

**REFLECTIONS ON THE BIOWATCH DISPUTE – REVIEWING THE
FUNDAMENTAL RULES ON COSTS IN THE LIGHT OF THE NEEDS OF
CONSTITUTIONAL AND/OR PUBLIC INTEREST LITIGATION**

T Humby*

Abstract

Using as a case study the recent decision on costs in the *Biowatch* matter, this article critically examines the traditional fundamental rules on costs in the light of the needs of constitutional and *a fortiori* public interest litigation. The fundamental rules on costs are taken to include the two traditional principles (that costs are a matter of judicial discretion and that to a successful party should be awarded his costs), the requirement that the discretion be exercised judicially, the test for interference in costs orders in a court of appeal, and the characterisation of costs orders as requiring the exercise of only a narrow discretion on appeal. In the light of the decisions in the *Biowatch* matter it is argued that the current rules do not meet the new needs of constitutional and/or public interest litigation as regards access to justice, equal protection and benefit of the law, proportionality, and the accountability of the judiciary. Suggestions are made for possible reform.

* Senior Lecturer, School of Law, University of the Witwatersrand, South Africa. Email: Tracy-Lynn-Field@wits.ac.za.