

FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 046/2005

**WILDLIFE AND ENVIRONMENT SOCIETY
OF SOUTH AFRICA**

and

**MEC FOR ECONOMIC AFFAIRS,
ENVIRONMENT AND TOURISM,
EASTERN CAPE PROVINCIAL GOVERNMENT
DIRECTOR: ENVIRONMENTAL AFFAIRS IN
THE DEPARTMENT FOR ECONOMIC AFFAIRS,
ENVIRONMENT AND TOURISM,
EASTERN CAPE PROVINCIAL GOVERNMENT
CAPE PRODUCE CO (PTY) LTD
t/a PELTS PRODUCTS
C & M CONSULTING ENGINEERS**

REFERENCE NUMBERS:

Registrar: 178/2004

DATE HEARD: 24 March 2005

DATE DELIVERED: 28 April 2005

JUDGE(S): Pickering J

LEGAL REPRESENTATIVES:

Appearances:

State/Applicant(s)/Appellant(s): J Eksteen, M Euijin

Accused/Respondent(s): MG Swanepoel, RB Laher

Instructing attorneys:

Applicant(s)/Appellant(s): Legal Resources Centre

Respondent(s): N.N. Dullabh

Borman and Botha

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: 178/2004

In the matter between

**WILDLIFE AND ENVIRONMENT SOCIETY
OF SOUTH AFRICA**

Applicant

and

**MEC FOR ECONOMIC AFFAIRS,
ENVIRONMENT AND TOURISM,
EASTERN CAPE PROVINCIAL GOVERNMENT**

1st Respondent

**DIRECTOR: ENVIRONMENTAL AFFAIRS IN
THE DEPARTMENT FOR ECONOMIC AFFAIRS,
ENVIRONMENT AND TOURISM,
EASTERN CAPE PROVINCIAL GOVERNMENT**

2nd Respondent

**CAPE PRODUCE CO (PTY) LTD
t/a PELTS PRODUCTS**

3rd Respondent

C & M CONSULTING ENGINEERS

4th Respondent

JUDGMENT

PICKERING J:

The applicant is the Wildlife and Environment Society of South Africa, an association not for gain, incorporated in terms of s 21 of the Companies Act no 61 of 1973. The first respondent is the Member of the Executive Council for Economic Affairs, Environment and Tourism of the Eastern Cape Provincial Government. The second respondent is the Director: Environmental Affairs in the Department for Economic Affairs, Environment

and Tourism, Eastern Cape Provincial Government. The third respondent is Cape Produce Company (Pty) Ltd trading as Pelts Products. Third respondent operates a tannery in which it processes sheep skins and bovine hides from a raw state to a semi-processed condition. The fourth respondent is C & M Consulting Engineers CC.

On 26 November 2003 a so-called Record of Decision was issued whereby third respondent was granted permission by second respondent to proceed with the construction of a fluidised waste bed incinerator ("the incinerator"), in terms of s 22 of the Environment Conservation Act no 73 of 1989. Such authorisation was issued pursuant to a lengthy process of investigation, consultation and public participation which commenced during 2001. The fourth respondent was duly appointed as an independent consultant by third respondent in order to enforce compliance with the latter's obligations in terms of the regulations promulgated under the Environment Conservation Act. The managing member of fourth respondent, who was involved on behalf of third respondent with the monitoring work, was a professional engineer, Mr. Albertyn.

Applicant, who had been involved in the process from the outset, was aggrieved by the aforementioned Record of Decision and, accordingly, appealed to first respondent against second respondent's decision in terms of s 35 of the Environment Conservation Act. However, first and second respondents were of the opinion that the appeal could not be considered because it had not been lodged timeously with the first respondent and no application for an extension of time within which to lodge it had been made. This view of the first respondent was communicated to applicant's attorney, Legal Resources Centre, on 21 January 2004 by letter dated 19 January 2004.

Thereafter, on 20 February 2004, applicant launched the present application

for, *inter alia*, orders reviewing and setting aside the Record of Decision dated 26 November 2003; reviewing and setting aside the decision of first respondent not to consider applicant's appeal; and referring the matter back to second respondent, alternatively first respondent, for a consideration of certain issues, most particularly the levels of toxic hexavalent chromium alleged to be present in the waste to be incinerated in third respondent's waste bed incinerator.

On 8 June 2004 answering affidavits were filed on behalf of first and second respondents. These were followed on 14 July 2004 by answering affidavits filed on behalf of third and fourth respondents. Eventually on 11 November 2004 replying affidavits were filed on behalf of applicant. It appears that the lengthy delay in the filing of such affidavits was occasioned by settlement negotiations initiated by applicant, such proposals being that in order to save costs the application be withdrawn with each party paying their own costs. Insofar as first and second respondents were concerned these negotiations were unsuccessful.

In the replying affidavit attested to by Mr. Reeves of the applicant's Biodiversity Conservation Unit the following is stated:

"5 *The applicant concedes at the outset that the significance of one of its primary concerns, i.e. chromium emissions, at the time of launching the application has been somewhat reduced. It follows that one of the major reasons for launching this application, namely the concern about the emission of large quantities of hexavalent chromium from the incinerator has, in part, fallen away. For this and other reasons dealt with more fully below, the applicant has decided to withdraw this application and pursue its remaining concerns about the construction and operation of the incinerator at the third*

respondent's plant through other means."

Mr. Reeves states further that his replying affidavit is "*tendered purely for the purpose of supporting the applicant's contention that no order as to costs ought to be made by this Court in this matter.*" He then proceeds to deal in some detail with the merits of the application and to reiterate applicant's dissatisfaction and disagreement with the Record of Decision.

An affidavit by an expert in the field of chemical engineering, Dr. Cairncross, was also filed in reply. In this affidavit Dr. Cairncross deals in exhaustive detail with the merits of the application.

Thereafter, on 25 November 2004, applicant withdrew its application without tendering to pay the respondents' costs. First and second respondents then gave notice of their intention to apply in terms of Uniform Rule of Court 41(1) (c) for an order that applicant pay such costs. That application has been opposed by applicant and the matter was in due course argued before me on an opposed basis. In opposing the application for costs the applicant relied on a number of grounds and, in particular, with reference to the provisions of s 32(2) of the National Environmental Management Act no 107 of 1998 (hereinafter referred to as "NEMA"), averred that it had acted reasonably out of concern for the public interest and in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought. In this regard applicant made copious reference to averments contained in the various affidavits filed in the main application. Mr. Eksteen, who with Mr. Euijen appeared for applicant, stressed, however, that applicant's intention in so doing was not in any way to rely upon or to seek to argue the merits of the withdrawn application.

Mr. Swanepoel, who appeared for first and second respondents, submitted, however, that, because of the withdrawal of the application, there was no evidence whatsoever before the Court to enable the Court "*to exercise*

whatever discretion it might have in respect of costs.” He submitted that because of the withdrawal of the application there was no longer any *lis* between the parties and that the Court was therefore precluded from having regard to the affidavits filed in the main application. He referred in this regard to Kaplan v Dunell Ebdon and Co 1924 EDL 91 where at 93 van der Riet J stated that the effect of a withdrawal of a case by a plaintiff was that:

“... the case disappears from the Roll as though absolution from the instance had been given. In my view a plaintiff is not at any time debarred from withdrawing a case and if this is done by him even after set down the Court no longer has the action before it.” (The emphasis is that of Mr. Swanepoel).

That case dealt, however, with the issue as to whether or not a defendant who had set a matter down for trial could obtain a final judgment despite the plaintiff having thereafter withdrawn the action before the date of trial. It was in this context that van der Riet J stated that the case had “*disappeared from the roll*” and was no longer before the Court. The case is no authority for the proposition that a Court, faced with an application for costs in terms of Rule 41(1)(c), may have no regard whatsoever to the papers filed in the main application in order to resolve that issue.

Mr. Swanepoel referred further to Nel v O.V.S. Staalkonstruksie en Algemene Sweiswerke 1977 (3) SA 993 (O) as authority for his submissions in this regard and submitted that if the applicant wished to oppose the application for costs it should have filed an affidavit in opposition thereto setting out the basis of its opposition.

The respondent in that matter had instituted action against the applicant and another. An application for summary judgment was refused. Respondent duly delivered a declaration but, on the same day, notified applicant that it

was withdrawing the action. Applicant thereafter sought an order for costs against respondent in terms of Rule 41(1)(c). Respondent answered by way of an affidavit by his attorney alleging that it had instituted action against applicant by reason of the latter's misleading conduct. Applicant submitted that Rule 41(1)(c) did not contemplate that a party who had withdrawn his claim was entitled to oppose an application in terms of that sub-rule and asked that the affidavit be struck out. He contended further that a party wishing to avoid a possible adverse costs order should not withdraw his claim but should argue at the hearing of the application for such costs order as he considered to be appropriate.

These submissions were given short shrift by Smuts J who found, correctly with respect, that a party in the position of respondent was entitled to oppose a Rule 41(1)(c) application. With regard to the further procedure suggested by applicant, Smuts J stated at 997C:

“Ek kan nie aanvaar dat so ‘n onpraktiese prosedure deur die Hofreëls bedoel is nie. Dit kan alleenlik onnodige kosteverspilling tot gevolg hê.”

The learned Judge accordingly held that respondent was entitled to place its attorney's affidavit before the Court in opposition to applicant's application.

That case is clearly distinguishable from the present matter. The Court was not called upon to decide whether or not reference could be had to the papers filed in the main action. This was not surprising inasmuch as the action had been withdrawn immediately after the filing of the declaration. The basis of respondent's opposition to the application in terms of Rule 41(1)(c), namely, that respondent had been misled by applicant's conduct, did not therefore appear from the pleadings filed in the main action. In these circumstances the only means whereby the respondent could place the basis of its opposition to the application before the Court was by way of the affidavit of its attorney.

Nel's case, *supra*, does not therefore support the submissions made by Mr. Swanepoel.

Where, as in the present application, an applicant which has withdrawn its application wishes to make reference to averments contained in the affidavits filed in the main application, in substantiation of its contention that in bringing the application it acted reasonably, there is, in my view, no reason in law or in logic why it should not be permitted to do so. To require of such an applicant that it extract from the mass of papers filed of record the relevant factual averments pertaining to the reasonableness of its actions, and that it then file a further affidavit setting out yet again such averments, would lead to an unnecessary duplication of costs apart from being an exercise in empty formalism. Furthermore, it may be extremely difficult, if not impossible, in a particular case, for the Court to assess the reasonableness or otherwise of an applicant's conduct in launching an application where the evidence in that regard is taken out of the context of the application as a whole.

In my view therefore the Court is entitled to have regard to the affidavits filed in the main application in order to determine the issue of costs in terms of Rule 41(1)(c).

As stated above applicant opposes the application for costs on the ground that in launching the application it had acted reasonably. In this regard Mr. Eksteen referred to a number of authorities dealing with the issue of costs, to which authorities I shall refer hereunder. Mr. Swanepoel, however, submitted that the ordinary common law principles applicable to the determination of costs where an application had been withdrawn were applicable. He referred firstly to Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) the head note of which correctly reflects what was stated by Van Rhyn J at 300D–E namely:

“Where a litigant withdraws an action or in effect withdraws it, very sound reasons (baie gegronde redes) must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff’s or applicant’s institution of proceedings.” (sic).

With reference to this passage Van Reenen J stated as follows in Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others intervening) 2003 (3) SA 547 (C) at 550C–D:

“It is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby.”

See too: Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party) 2003 (2) SA 590 (W) where Lewis J stated at 597A:

“Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him.”

At 597F Lewis J referred also to the circumstances of the case as being “special”.

Mr. Swanepoel submitted that in the light of the above authorities the Court would only deprive first and second respondents of their costs if it were to find the existence of exceptional or special circumstances justifying a departure from the rule. If, however, by their respective references to “exceptional” and

“*special*” circumstances, Van Reenen J and Lewis J intended to apply a more stringent test than that referred to by Van Rhyen J then I would, for the reasons appearing hereunder, respectfully disagree.

It is clear that even where an action or application has been withdrawn the Court retains a discretion as to the award of costs. See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 786C.

In Ward v Sulzer 1973 (3) SA 701 (A) Holmes JA stated as follows at 706G:

“In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides.”

In Erasmus v Grunow en ‘n Ander 1980 (2) SA 793 (O) Flemming J, with whom Erasmus J concurred, referred to the general rule that a successful litigant was entitled to his costs and proceeded to set out certain considerations in regard to the award of costs. At 797H he stated the following:

“Die oorwegings wat sopas genoem is vir die toekenning of ontneming van koste, is nie grondslae vir die inroep van geykte beginsels wat sonder meer dogmaties toegepas moet word en aldus die basiese judisiële diskresie aan bande lê nie. Cronje v Pelser 1967 (2) SA 589 (A) te 593. Hoogstens is die aangewese billikheid soms so duidelik dat ‘n afwyking oortuig van verkeerde uitoefening van die diskresie. Dit kan aanvaar word dat die nie-toekenning van koste aan ‘n verweerder wat daarin slaag om te verhoed dat enige bevel teen hom verleen word, wel so ‘n geval is indien daar geen bykomende oorwegings is nie.”

The learned Judge then stated, at 797H–798A that the same considerations were applicable to a case where litigation had been withdrawn and continued, at 798C:

“As die kostebevel wat gemaak word wanneer litigasie teruggetrek word in sy aard ‘n diskresionêre kostebevel is, kan geen ander billikheidsbeginsels geld as die normale oorwegings...”

At 789E–H the following was stated:

“Wat verrigtinge betref wat nog nie tot finaliteit gebring is nie, kan vanweë die onnodigheid daarvan om daaromtrent te besin ten gunste van tweede verweerder veronderstel word eerstens dat as algemene reël ‘n litigant nie bloot omdat hy ‘n rede het waarom hy die litigasie wil beëindig, aanspreeklikheid vir sy teenparty se koste vryspring nie (vgl Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NK); Sing v Sing 1911 TPD 1034); dat ‘n hof die bevoegdheid het om te verhoed dat waar ‘n eis teruggetrek is of verval het, die volle meriete oopgevelek word ten einde die vraag na koste te beslis (vgl Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society 1946 WLD 15); en dat die beslissings te ver gaan wat aandui dat ‘n beslissing omtrent koste altyd ‘n beslissing met betrekking tot die meriete inhou. Vgl Cats v Cats 1959 (4) SA 375 (K) te 379. Tog staaf selfs daardie beslissings (vgl ook Roupell v Metal Art (Pty) Ltd and Another 1972 (4) SA 300 (W); Hugo v Hugo 1947 (1) SA 325 (O)) die moontlikheid wat in ooreenstemming met die normale billikhede van die situasie sou wees nl om in gepaste omstandighede in ag te neem of die party wat die litigasie terugtrek, geregverdig was om die litigasie te bring.”

See too: National Union of Mineworkers v East Rand Gold and Uranium Co

1992 (1) SA 700 (A) at 739A–B.

It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely, that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon a consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs.

In any event, Mr. Swanepoel's submission that the ordinary common law principles relating to the award of costs apply in a case such as the present loses sight of the public interest and constitutional nature of the litigation.

As submitted by Mr. Eksteen, with the enactment of the Constitution, the common law principles set out above are to be regarded only as the starting point of the enquiry in matters of this nature. See Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others (No. 2) 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3.

In Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) reference was made at para 43 to Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) where the following was stated at para 30:

“... one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or ‘chilling’ effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how

spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.”

In Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier, Province of the Free State, and Others 1998 (3) SA 692 (CC) an application for a costs order arising out of an application for leave to appeal which was withdrawn on the grounds that the issue had become moot was brought. Goldstone J stated at paragraph 4, *inter alia*, as follows:

“In my opinion, we should not make the order sought by the respondents. The applicants’ complaints were clearly not frivolous or vexatious and there can be no suggestion that they acted from improper motives. ... As this Court has made plain on a number of occasions, litigants should not be discouraged from enforcing their constitutional rights by having to run the risk of having to pay the costs of their governmental adversaries.”

At paragraph 5 Goldstone J continued:

“The merits of their case have not been argued before or considered by this Court. And it would obviously not be in the interests of justice for argument to be heard on issues which have now become moot and are no longer of any consequence to the parties or indeed anyone else. The costs of such a proceeding would greatly exceed those which the parties have incurred pursuant to the application for leave to appeal.”

See too Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning The Constitutionality Of Certain Provisions Of The Gauteng School Education

Bill Of 1995 1996 (3) SA 165 at 182, paragraph 36.

I would refer finally to Nzimande v Nzimande and Another [2005] 1 All SA 608 (W). In that matter the litigants had sought to test the validity of certain documents based on the implementation and application of a statute which had important socio-economic consequences. At 633e–f Jajbhay J stated as follows:

“Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the appellant. However, this does not mean that such litigant can be completely protected from that risk. The court may, in its discretion direct that they pay the costs of their adversaries if for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interests of justice to direct such costs should be paid by the losing party.”

Mr. Eksteen referred further to the provisions of s 32(2) of NEMA which provide as follows:

“A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.”

In Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others 2002 (1) SA 478 (C) the following was stated at 491I with regard to s 32(2):

“This section confers a discretion on the Court with regard to costs. Even without this section, costs would be in the Court’s discretion but the judicial exercise of the Court’s ordinary discretion of costs is now made subject to certain further guiding principles contained in the Legislation. Section 32(2) frees the Court from the fetter of ordinary principles on the basis of compliance with certain conditions.”

At 493D the learned Judge stated further as follows:

“... it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment.”

Mr. Eksteen submitted that the phrase *“fails to secure the relief sought”* was sufficiently widely worded as to include a case such as the present where the application was withdrawn. I am satisfied, despite the submissions of Mr. Swanepoel to the contrary, that Mr. Eksteen’s submission is correct. It is not difficult to envisage a situation where, for instance, an applicant which has acted reasonably in launching an application is driven to withdraw it in order to save costs because of facts emerging for the first time from a respondent’s answering affidavit or because the relief originally sought is no longer necessary or obtainable because of developments occurring after the application had already been launched. It would be neither fair nor logical, in my view, to exclude such an applicant from the protection afforded by s 32(2) and thereby to oblige an applicant, seeking to rely on the provisions of s 32(2), to continue with an application which it has now ascertained to be futile

merely in order to retain the protection of the section.

Bearing the above principles as to the award of costs in mind I turn to consider the issues remaining in dispute, namely, whether in launching the application applicant acted reasonably and whether it made due efforts to use other means available to obtain the relief sought. It is not in dispute that applicant brought the present application in the public interest and in the interest of protecting the environment.

It is also not in dispute in the present matter that applicant is South Africa's oldest and largest non-governmental membership-based environmental organisation. Its purpose and vision, as described by it, is to campaign for a South Africa that is wisely managed by all to ensure long-term environmental sustainability. To this end the applicant "*promotes public participation in caring for the Earth and the consequent well-being of its inhabitants*". According to applicant it thus seeks to give practical effect to the rights contained in s 24 of the Constitution Act no 108 of 1996 and in NEMA. Its opposition to the proposed construction of the incinerator was motivated solely by a concern that the incinerator had the potential to produce harmful toxic emissions that might impact negatively and severely on the environment and human health.

It is common cause that third respondent's tanning process does produce various toxic emissions and forms of waste. Indeed, during 2001, one of third respondent's neighbours launched an application in this Court seeking to force the Department of Economic Affairs and Tourism, Eastern Cape to take steps to curtail the emissions of hydrogen sulphide from third respondent's premises. An order was in due course granted by Leach J directing the Department to investigate, evaluate and assess the impact of gasses emitted from the tannery and to take such further steps as might be necessary in the light of such investigation, evaluation and assessment so as to ensure that

third respondent consistently complied, *inter alia*, with the provisions of NEMA. The judgment of Leach J, although delivered on 30 November 2001, was eventually only reported in 2004 as Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others 2004 (2) SA 393 (E).

According to the factory manager of third respondent, Mr. Howard, third respondent was at that stage already acutely aware of the need to curtail toxic emissions and had been in the process of changing its previous system to a new waste collection system. According to Howard the application for the installation and operation of the incinerator represented the culmination of this process which is aimed at drastically reducing the solid waste and emissions produced by the plant. The only emission which is relevant to the present application is that of hexavalent chromium and the dispute between the parties on the merits related to a large extent to the precise nature of the waste collection process used by third respondent and the amount of chromium which would be contained in the waste to be incinerated in the incinerator.

In order to place the events leading up to the launching of the application by applicant in perspective it is necessary to have regard to the nature of the tanning process conducted by third respondent; the previous waste collection system in operation and the new waste collection system which, as is now common cause, was in operation at the time the application was launched.

Third respondent has the capacity to process 700 000 salt-cured cattle hides and 2 million sheepskins per annum. The hides delivered to the tannery consist of two layers, namely, flesh, which is not part of the skin, and the derma which in turn consists of the top layer or epidermis and the corium, which consists primarily of collagen, a protein, in the form of interwoven fibres and fibre bundles. The objective of the tanning process is to cleanse the skin

of as much unwanted debris as possible and then to process the collagen fibre so as to render it strong, flexible and non-putrescible. The bovine hides are tanned with chromium sulphate ("mineral tanning") while the sheepskins are pickled. The process of tanning the wet-salted hides and skins consists of three stages: the liming stage, the physical fleshing stage and the pickling/tanning stage. The liming stage produces a liquid waste containing organic solids (fat, grit and hair). The physical fleshing stage produces fat as a waste product. The pickling/tanning stage starts with the hides and skins being pickled in a low pH liquor comprising salt and acid. The sheepskins are then sorted and sold as pickled pelts whereas the bovine hides proceed to the tanning process. In the course of the tanning process chromium is used for the first time. The hides are tanned with chromium sulphate in large wooden drums in the course of which they pick up a distinct blue colour. They are then removed from the drums and excess fluid is squeezed from them.

The process accordingly produces various waste streams being (1) organic solids from liming and fleshing; (2) high pH lime-sulphate liquors from the liming stage and; (3) low pH pickle and tan liquors from the pickling/tanning stage. The only waste stream that has a chrome content from added chromium compounds is the tanned liquor from the bovine hides at the end of the tanning process.

The waste collection system which was in operation until approximately February 2002 involved the removal of larger organic solids from the waste streams through the use of screens in order to reduce the waste streams to an effluent that contained smaller particles of organic waste. All the waste streams combined into a single effluent stream which was fed into two effluent ponds known as secondary aeration dams. The effluent was aerated in the dams by massive blowers, the purpose thereof being to prevent it from turning anaerobic and to allow aerobic bacteria present in the dams to digest the organic particles. Biomass created in the dams was removed from the effluent by means of a centrifuge. Because the effluent in the dam was a

combined effluent from all the waste streams including mineral tanning, the biomass taken out of the dams had a high chromium content and had to be taken off site as hazardous waste.

The new waste collection system came into operation during February 2002. As appears from the affidavit of Howard the new system differs significantly from the previous system. In particular, the waste streams have been separated out to ensure that the chromium effluent produced at the last stage of the bovine hide tanning process does not mix with the other waste streams produced by the earlier processes. All solid waste is removed from the waste effluent streams prior to chrome tanning. The liquid effluent is then passed through clarifiers which remove greater amounts of organic waste, leaving a liquid effluent that is largely free of organic matter. The effluent from the chrome tanning process is kept separate from this waste stream. It contains almost no organic matter. This effluent is treated separately and the chrome content is extracted and the chrome re-used. The result of the new process is that the solid waste extracted from the waste streams that is to be disposed of in the incinerator contains no chrome that has been added in the tanning process. The only chrome that exists in the waste stream entering the incinerator is chrome that occurs naturally in the hair and fat of the hides and skins.

It was in the light of the averments concerning the previous and the new waste collection systems that applicant conceded that the significance of its concern regarding chromium emissions had been "somewhat reduced" and that the application was withdrawn.

It is, however, applicant's contention that, because of a lack of clarity in the so-called Scoping Reports which were issued prior to the launching of the application and the alleged absence of any mention in the Final Scoping Report of the stage at which the chromium was added to or removed from the

waste stream, the significance of the new waste collection process in the Final Scoping Report escaped its attention. It was in fact, according to Reeves, only when sight was had of the detailed description of the new waste collection process set out in third respondent's answering affidavit that the true significance thereof became apparent. Reeves states accordingly that applicant does not concede "*that it is completely culpable in this regard*" and states that applicant "*did not launch this application vexatiously or without serious consideration.*"

The Scoping Reports to which I have referred above are an essential part of the process leading up to the issuing of the Record of Decision.

In terms of regulation 6 made under the authority of s 26 of the Environment Conservation Act third respondent was obliged, in its application to second respondent for permission to construct the incinerator, to submit a Scoping Report to second respondent. Such Scoping Report had to include (a) a brief project description; (b) a brief description of how the environment may be affected; (c) a description of environmental issues identified; (d) a description of all the alternatives identified; and (e) an appendix containing a description of the public participation process followed, including a list of interested parties and their comments.

It is common cause that three Scoping Reports were prepared before the Record of Decision was issued. The first Scoping Report, which is referred to as the Initial Scoping Report, was prepared at some time during late 2001. A public participation meeting was then held on 7 November 2001 with interested and affected parties to consider this Initial Scoping Report. Second respondent, in response to this initial Report indicated that an Environmental Impact Assessment (EIA) should be prepared. A consultant was appointed to prepare the EIA. A second Scoping Report was thereafter prepared, which Scoping Report was apparently received by applicant during May 2002. This

report, which was undated, as indeed were all three of the Scoping Reports, appeared, according to applicant, to be in all material respects identical to its predecessor save that it had an EIA attached to it as appendix D. The Final Scoping Report which was apparently issued during February 2003, had attached to it as Part E the record of a public participation meeting which was held on 31 January 2003. The Final Scoping Report forms part of the papers in the main application as Annexure WB to the affidavit of Reeves.

Reeves avers that applicant's attorneys, Legal Resources Centre, engaged an expert in the field, Dr. Chernaik, to evaluate the Final Scoping Report. Dr. Chernaik's written evaluation thereof is dated 21 June 2002 (annexure WG). It is immediately apparent from the date of his evaluation that the Scoping Report which he was requested to evaluate could not have been the Final Scoping Report as that report was only issued during March 2003. It appears from the answering affidavit of Howard that the scoping report upon which Dr. Chernaik was asked to comment may well have been the second Report.

In Dr. Chernaik's evaluation, he states that third respondent engages in chrome tanning of processed rawhide but does not employ chromium recovery and that it was therefore reasonable to expect that the mixed tannery sludge would contain between 5 000 – 20 000 ppm of chromium. He stated further:

"Implausibly, Table 2 of the Final Scoping Report indicates that the combined waste would contain only 34,6 ppm of chromium!! Interestingly, the Initial Scoping Report indicates that the combined waste would contain 660 ppm of chromium."

He states further that no explanation is provided by third respondent as to why the chromium content of the "combined waste" should be so much lower as indicated in the "Final Scoping Report."

His opinion was furnished to fourth respondent for the latter's comment. In a letter addressed to applicant's attorney (annexure WH) Albertyn replies as follows:

"Dr. Chernaik's comments about the chromium content would, no doubt, be accurate should waste collection be undertaken AFTER the addition of chromium chemicals, or extended aeration was carried out where a liquor that contains chromium salts is present. Section 3.1 of the Scoping Report describes the old waste collection process used by Pelts Products, a system which entailed extended aeration in an 'aeration basin' referred to by Dr. Chernaik. The process currently used by Pelts Products DOES NOT include extended aeration and the solid waste DOES NOT come into contact with chromium chemicals, hence the low chromium content.

Section 2.1 of the Scoping Report gives a brief description of the seven process steps involved in the tanning process. I am sure that even Dr. Chernaik would agree that solid waste is only produced in the first three of these steps. All wastes produced thereafter are in liquid form and chromium is only added to the tanning process in step seven.

Section 3.2 describes the waste collection procedure currently being followed by Pelts Products. Six steps are described.

Section 3.3. describes the benefits of the new waste collection procedure. One of the advantages is stated quite clearly as 'Of further importance is the fact that effective solids removal is achieved before the introduction of chromium chemicals to the tanning process. This results in a very low chromium content, as can be seen from table 2, which is associated with the inherent chromium content of the hides and skins.'"

In response hereto (annexure WI) Dr. Chernaik states as follows:

“I stand by my assertion that the waste that Pelts Products proposes to incinerate would have very high chromium content. Chris Albertyn asserts that the waste would have very low chromium content. To explain his assertion, Mr. Albertyn states that:

‘the process currently used by Pelts Products DOES NOT include extended aeration and the solid waste DOES NOT come into contact with chromium chemicals hence the low chromium content.’

I am not persuaded by this explanation.”

Of particular relevance to the present issue is the following statement by Dr. Chernaik:

“In the tanning process, more than half of the chromium in the bath does not bind with the collagen in the animal skin. After so many uses Pelts Products must discard the spent liquid in the chromium bath, which contains substantial amounts of dissolved chromium (that did not bind to collagen). Pelts Products discards this spent liquid (from the chromium bath) into a mixed ‘effluent’ that contains waste water from other steps of the overall process that Pelts Products uses to make leather. That is, the dissolved chromium unites with suspended solids in waste water from other steps of the overall tannery process in the mixed effluent stream that exits the factory into the drain channel (see figure 1 in section 3.2).”

The concerns raised by Dr. Chernaik were dealt with by Albertyn at the public participation meeting held on 31 January 2003, the record of which is annexed to the founding papers as annexure WJ and which is annexed to the

Final Scoping Report as Part E. The following appears therein:

“Mr. Albertyn drew a concept diagram on the flip chart of the Pelt’s process showing how tannery waste for incineration was removed from the process, prior to the treatment of hides with chrome. In view of this method, the tannery waste for incineration would only contain innate chromium in the hides, as they were received, and would not contain excess chromium as the waste would be removed prior to the introduction of chromium chemicals for the treatment process. In view of this, Dr. Chernaik’s comments that the reported chromium content of the waste is implausibly low, is not relevant as in the new process the chromium content, as reported in the Scoping Report would be very low.” (My emphasis)

It is common cause that both Reeves and a member of applicant’s attorneys were present at the meeting. Neither of them, however, addressed any query to Albertyn as to the process whereby the waste would be removed prior to the introduction of chromium chemicals.

Reeves refers further to an affidavit by another expert in the field, Dr. Cairncross, which affidavit is annexed to the founding affidavit as annexure WQ. The evidence of Dr. Cairncross, so Reeves states, is the evidence which applicant’s attorneys wished to present to first and second respondents prior to them making the decision complained of in the main application. Reeves states that because applicant had been deprived of an opportunity of placing the evidence of Dr. Cairncross before the respondents they in turn had been deprived of important expert evidence which would have assisted them in the rendering of an informed decision in the matter.

In his affidavit Dr. Cairncross states that he has had regard, *inter alia*, to section 3 of the Initial Scoping Report as well as to the final Scoping Report.

He refers to the abovementioned views of Dr. Chernaik stating in this regard as follows:

“Dr. Chernaik argued that the figure of 660 ppm of chromium given in table 2 (p 8 of the FSR) is implausibly low, given that the waste treatment process shown in figure 1 of the Scoping Report treats a single combined waste stream from the factory, and that the hide pre-treatment and tanning process uses chromium. About 50 – 70 % of the chromium is taken up by the hide to form leather, thus the remaining 30 – 50 % must be discharged in the waste product stream as a mixture of solids and liquid. This stream is discharged via the drain channel from the factory (figure 1, Initial Scoping Report).

Dr. Chernaik referred to international data for mixed tannery sludges that show that the chrome content of the sludge is expected to be between 5 000 and 20 000 mg per kilogram of sludge, compared with the figure of 34,6mg per kilogram given in the Initial Scoping Report or 660mg/kg in the FSR.”

Dr. Cairncross states further that Albertyn’s response to Chernaik’s opinion does not satisfactorily address the discrepancy between the expected chromium content of the solid waste and that given in the Final Scoping Report. He then states:

“The treatment processes within the factory include a chromium salt addition process but only 50% to 70% of the added chromium is recovered in the leather. The remaining 30% - 50% of chromium added is thus discharged in the effluent unless recycling is practised. The effluents from all the process steps are combined and discharged via a single drain channel therefore the remaining chromium must be in the combined effluent stream.” (My emphasis).

Dr. Cairncross then refers to *“the implication of figure 1 of the FSR: process without separating chrome and non-chrome containing effluents”* and reproduces figure 1 of the Initial Scoping Report from which figure it is apparent that effluent without chromium and effluent containing chromium did indeed combine in a single waste stream in the process then in use.

In the founding affidavit Reeves, with reference to what is set out above, states that serious questions are raised by both Dr. Chernaik and Dr. Cairncross in regard to the estimates of chromium residue present in the solid waste to be incinerated and points out that they both challenge the estimates made in the Final Scoping Report in this regard. He avers further, as follows:

“The fourth respondent is dismissive in his response to Dr. Chernaik, stating that because chromium is only added to the process after the solid waste is collected it has no bearing on the chromium content thereof. As pointed out by both Drs. Chernaik and Cairncross, the chromium, whenever added, is discharged into the same drain channel as all the other effluent and is consequently incinerated together.”

In his answering affidavit Howard states that it is clear that the references by Reeves to the Final Scoping Report could not in fact be references to that Report inasmuch as most such references as are made by him do not relate to corresponding paragraphs in the Final Scoping Report. I do not intend to set out each and every such instance. A few examples will suffice. In paragraph 31 of the founding affidavit Reeves states as follows:

“The Scoping Report (paragraph 3.4) acknowledges that the chromium content of the ash produced by the incinerator will be sufficiently hazardous to require disposal at the H:H landfill site in Cape Town.”

As pointed out by Howard, however, paragraph 3.4 of the Final Scoping Report does not deal with the chromium content of ash but rather with “odour reduction”. Paragraph 5.7 of the Final Scoping Report in fact deals with ash but makes no mention of the need for the ash to be disposed of at a hazardous (H:H) Landfill site.

In paragraph 32 Reeves refers to certain averments contained in paragraph 2.1 of appendix C of the Final Scoping Report. There is, however, no paragraph 2.1 contained in appendix C thereof. In paragraphs 35, 36 and 37 of the founding affidavit Reeves refers, *inter alia*, to an acknowledgment contained in paragraph 4.3 of the Final Scoping Report to the effect that the conditions and chemicals present in the incinerator are conducive to the formation of dioxins. Paragraph 4.3 of the Final Scoping Report does not in fact make such an acknowledgment nor is there any mention in that paragraph of dioxins. Reeves refers further to paragraphs 3.4, 5 and 10 of the Final Scoping Report in which, so he states, the issue of carcinogenic compounds is dealt with. These paragraphs, however, make no mention of carcinogenic compounds. The further paragraph of the Final Scoping Report referred to by Reeves namely 7.2.2, does not appear at all in the Final Scoping Report.

In paragraph 67 of the founding affidavit Reeves states that:

“As pointed out by both Drs. Chernaik and Cairncross, the chromium, whenever added, is discharged into the same drain channel as all the other effluent and is consequently incinerated together with it.”

Such a statement is in fact not contained in the Final Scoping Report which, after setting out the various steps employed to remove solid matter from the liquid effluent streams, states as follows at paragraph 3.3 thereof:

“Of further importance is the fact that effective solids removal is achieved before the introduction of chromium chemicals to the tanning process. This results in a very low chromium content as can be seen from table 2, which is associated with the inherent chromium content of the hides and skins.”

In these circumstances Howard is correct in his assertion that Reeves must have prepared his affidavit with the use of a Scoping Report other than the Final Scoping Report, inexplicable as this may appear to be. What makes the matter more inexplicable is that, despite referring to the incorrect Report, Reeves attached the correct Final Scoping Report to his affidavit as annexure WB.

Howard states further that the averments made by Dr. Cairncross concerning the possible chromium content of the combined waste streams are based upon his understanding that *“the waste treatment process treats a single combined waste stream from the factory.”* Howard points out further that the reference to 660 ppm in the affidavit of Dr. Cairncross as well as the *“figure 1”* diagram are in fact taken from the Initial Scoping Report and are a clear indication that Dr. Cairncross was provided with the incorrect documentation when asked by applicant to comment. He avers that Dr. Cairncross appears to be entirely unaware of the actual waste management system in operation at the site. I should mention that the reference by Dr. Chernaik in annexure WI to *“figure 1”* is clearly also a reference to the waste disposal process described in the Initial Scoping Report.

That applicant and Cairncross were indeed unaware of the new process appears from the replying affidavits filed by Reeves and Dr. Cairncross. In his replying affidavit Reeves deals with the averments made on behalf of the respondents to the effect that applicant was in fact unaware of the change to its waste management process that took place during February 2002. He

states in this regard as follows:

“The third respondent’s central contention is that because the applicant was unaware of the changes to its waste management stream that apparently took place during February 2002, its entire application is misconceived and, for this reason alone, ought to be penalised with a costs order. Although the applicant has conceded at the outset that one of its primary concerns had fallen away, it does not concede that this completely negates its opposition to the construction of the incinerator nor that it is completely culpable in this regard.”

He is, however, silent on the issue raised by Howard to the effect that his founding affidavit was based upon a Scoping Report other than the Final Scoping Report.

In his replying affidavit Dr. Cairncross states, perhaps not surprisingly in the light of what is set out above:

“I accept that my previous description of the wastes streams, including the streams containing chromium salts, was in error because it was based on my reading and analysis of a previous version of the Scoping Report. At the time I did not have access to the current version of the Scoping Report. (It should be noted that all three versions of the Scoping Report are undated, that the cover pages are identical and that none of the documents include a version reference.) However I do not accept that the current version of the Scoping Report, even when read in conjunction with Mr. Howard’s affidavit, adequately clarifies and describes the important matter of the chromium content of the various streams in the process.”

It is against this background that the reasonableness of applicant’s conduct in

launching the application must be considered.

It must be remembered that, according to the papers, Dr. Chernaik fell out of the picture after July 2002 at a stage when this application still lay some 18 months in the future. It is not alleged that he ever had sight of the Final Scoping Report. His opinions were apparently based entirely on the first two reports. He was still of the view, based on those reports, that the chromium was discharged into the same drain channel as all the other effluent and was incinerated together with it. In bringing the application, applicant relied heavily on his opinion. It relied chiefly, however, on the evidence of Dr. Cairncross. The evidence of Dr. Cairncross, however, was, in my view, fatally flawed by reason of his reliance on the incorrect Scoping Reports. Not only was Dr. Cairncross not briefed with the Final Scoping Report prior to the application being launched but it would appear that he became confused between the two Scoping Reports with which he was briefed and, apparently, also did not properly read Dr. Chernaik's opinion. He states in his affidavit that "*Dr. Chernaik argued that the figure of 660 ppm of chromium given in table 2 (p 8 of the FSR) is implausibly low*" and that "*between 5 000 and 20 000 mg per kg of sludge was to be expected compared with the figure of 34.6 mg per kg given in the Initial Scoping Report or 660 mg/kg in the FSR.*" (My emphasis)

As set out above, however, Dr. Chernaik's opinion is quite explicitly to the effect that the figure of 34.6 was contained in what he called the FSR whilst that of 660 ppm was mentioned in the Initial Scoping Report.

In his replying affidavit Reeves states, as set out above, that there is a "*complete absence of any mention whatsoever in the Final Scoping Report of the stages at which the chromium was added to and removed from the waste stream.*" He adds:

"Hence the reason why the significance of the new waste collection

process in the Final Scoping Report escaped the attention of both the applicant and Dr. Cairncross.”

In my view, however, this reason does not withstand close scrutiny. Firstly, section 3.3 read with section 3.2 of the Final Scoping Report does make it clear at which stage the chromium enters the waste stream, namely, after effective solids removal has been achieved. Secondly, it is clear that Dr. Cairncross never saw the Final Scoping Report prior to the application being launched. If he never saw it then it is difficult to understand on what basis it is now alleged that the significance of the new waste collection process described therein escaped his attention.

No proper explanation has been placed before the Court as to how it came about that Dr. Cairncross never saw the Final Scoping Report and, in particular, as to how he came to be briefed with a Scoping Report that was two years out of date and which referred to a waste collection system that was no longer in place. In his replying affidavit Reeves makes some attempt to exculpate applicant for the situation and, somehow, to apportion the blame with the respondents. He states that not one of the Scoping Reports is dated and that not one has a version reference; the first two pages of all three Scoping Reports that he has had sight of are all identical. He states that “*it is not possible to tell the difference between the May 2002 report and the final report of February 2003 from the covering page or the content page.*” (My emphasis).

He then proceeds immediately thereafter, however, to contradict this assertion by stating that “*the only difference is that the May 2002 content page ends with appendix E and the February 2003 content page follows appendix E with Addendum and Recommendations.*” He states that although both applicant and its attorneys “*finally came to be in possession of all three Scoping Reports, because of the factors set out above, we were never absolutely*

certain that the February 2003 Scoping Report was in fact the Final Scoping Report.”

This latter statement is startling to say the least. It is, in my view, a matter of some surprise that applicant could have proceeded to launch what it knew would be a hotly contested application without first having ascertained the true facts and having established which of the three reports was in fact the Final Scoping Report. It appears from applicant's affidavits that there was a considerable degree of confusion prior to the launching of the application as to which of the three reports was indeed the Final Scoping Report. Applicant and its attorneys must therefore have been alive to the very real possibility of error. In such circumstances one would have expected that every care would have been taken to ensure that no such error occurred. Reeves states in this regard that applicant's attorney contacted Albertyn in order to obtain electronic versions of all three Scoping Reports in an attempt to ascertain which one was the final one but was, in impolite terms, refused assistance. Whether or not Albertyn refused to assist (which is denied by him) the fact remains that the onus obviously lay on applicant to place itself in possession of all relevant information prior to the institution of proceedings. The blame for the failure to furnish Dr. Cairncross with the Final Report cannot be laid at the door of respondents.

Reeves continues by stating that *“even now that we are thoroughly familiar with all of the Scoping Reports both my attorney, myself and a team of four other experts find them very difficult to deal with as the only way to tell them apart is by referring to the final content page.”*

This latter comment is, in my view, somewhat disingenuous. The Initial Scoping Report dealt with the previous waste collection system and did not have attached to it the EIA. The second Scoping Report had the EIA attached to it. It did not, for obvious reasons, contain part E of the final Scoping

Report, in view of the fact that the meeting of 31 January 2003 still lay in the future at the time that the second report was prepared. The final Scoping Report, containing part E, the record of the public participation meeting of 31 January 2003, would, by reason of the presence of part E, be readily identifiable. It would have been a very simple matter for applicant, its attorneys and its experts to have marked each of the Reports accordingly. In any event, the first two Scoping Reports are largely only of historical reference: practically speaking, the only Report that applicant was required to work with for purposes of the application was the Final Report.

It is clear in the light of the above, in my view, that the long road leading to litigation was lined with alarm bells, to which, unfortunately, no proper heed was paid by applicant. Apart from the increasingly vociferous statements by Albertyn reiterating that effective solids removal was achieved before the introduction of chromium chemicals to the tanning process, there is the important fact of the public participation meeting of 31 January 2003 at which Albertyn drew a *“concept diagram on the flip chart of the Pelts Process showing how tannery waste for incineration was removed from the process, prior to the treatment of hides with chrome”* and where he stated that the waste for incineration *“would not contain excess chromium as the waste would be removed prior to the introduction of chromium chemicals to the treatment process.”*

Reeves and applicant's attorney were both present at this meeting and what occurred there must surely have given them pause for thought. Prudence would surely have dictated that Albertyn's diagrammatic explanation be conveyed to Dr. Cairncross even if Reeves and the attorney did not fully understand its import. It would appear, however, that because of the confusion of Dr. Cairncross in respect of the Scoping Reports and his belief that the waste process described in Figure 1 of the Initial Scoping Report was still of application, every explanation to the contrary was ignored by applicant.

Had Dr. Cairncross been disabused of his notion that Figure 1 of the Initial Scoping Report correctly described the waste disposal process in operation at third respondent's tannery and had he been properly briefed with the Final Scoping Report then the significance of the description of the new waste disposal process described therein and of Albertyn's explanations could not but have become apparent. In that event, applicant would obviously never have launched the application because, as Reeves himself in effect conceded, its concerns in respect of the emission of chromium waste would to a large extent have been met.

Mr. Eksteen submitted, however, that, even if it were to be found that applicant had been to any degree remiss in its conduct of the litigation, the conduct of first and second respondents themselves had been such as to disentitle them to any costs. In this regard he referred in particular to the abortive appeal launched against the second respondent's decision in terms of s 35 of the Environment Conservation Act. He advanced cogent criticisms of the manner in which first and second respondents had dealt with this appeal. It is clear, in my view, that the respondents, in initially refusing to hear the appeal, adopted an overly formalistic and technical approach to the matter. Furthermore, it is apparent from the letter written by first respondent to applicant's attorneys concerning the appeal notice, that first respondent had in any event prejudged the matter. In that letter (annexure WD) first respondent stated as follows:

"The ROD is deemed to be a well thought out approval for the proposed development, setting clear conditions. In setting out the ROD conditions and attempts to mitigate against any negative environmental impacts that may rise from the proposed development, without stifling such development has been taken care of." (Sic)

Mr. Eksteen referred further to the fact that applicant had never been afforded an opportunity to place *"the evidence of Dr. Cairncross"* before the first and

second respondents prior to the Record of Decision being issued.

The fact remains, however, that, because of applicant's misunderstanding of the waste disposal process then in operation, the appeal had no prospects of success and the evidence of Dr. Cairncross was irrelevant to a proper decision in the matter.

In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly because it is quite clear that in bringing the application applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining at the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been aware, its concerns had already been met and the application was therefore unnecessary. I am acutely aware of the above-mentioned authorities as to the chilling effect of adverse costs orders in matters of this nature as well as of the pertinent remarks of Davis J in the Silvermine case, *supra*. In my view, however, it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception.

Accordingly the following order will issue:

Applicant is ordered to pay the costs of first and second respondents in the main application, such costs to include the costs of the application in terms of Rule 41(1)(c) of the Uniform Rules of Court.

J.D. PICKERING
JUDGE OF THE HIGH COURT