CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 124/20

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT Applicant

and

PN ON BEHALF OF EN Respondent

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU-NATAL PROVINCIAL GOVERNMENT First Amicus Curiae

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE PROVINCIAL GOVERNMENT Second Amicus Curiae

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE PROVINCIAL GOVERNMENT Third Amicus Curiae

Neutral citation:	*Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC 6
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgment:	Madlanga J (unanimous)
Decided on:	1 April 2021

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. It is declared that the order granted by Moshidi J in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) on 24 April 2017 does not preclude the High Court from considering whether to develop the common law on whether the applicant, the Member of the Executive Council for Health, Gauteng, may compensate the respondent, PN, in a manner other than exclusively in an immediately due lump sum payment.
5. Each party is to pay her or his own costs in this Court and the Supreme Court of Appeal.

JUDGMENT

MADLANGA J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal. That Court upheld an appeal against a decision of the

High Court of South Africa, Gauteng Local Division, Johannesburg. At the centre of the application is the proper interpretation of an order given by Moshidi J in the High Court. The question is whether an order determining only the question of liability pursuant to a separation in terms of rule 33(4) of the Uniform Rules of Court and which is to the effect that the defendant must pay to the plaintiff 100% of the agreed or proven damages renders the manner of compensation *res judicata*[1] and means that payment or compensation can only be in one lump sum sounding in money.

Background

[2] The respondent, Ms PN, is the mother of a minor child who is afflicted with cerebral palsy as a result of injuries sustained at birth at a state healthcare facility in Johannesburg. The respondent instituted a claim for damages in excess of R32 million against the applicant, the Member of the Executive Council for Health, Gauteng.

[3] When the matter came before Moshidi J in the High Court, it proceeded as a stated case. The Court gave an order in accordance with a draft agreed to by the parties. The order separated the questions of liability and quantum, with the latter to be determined at a later stage. The order reads:

> "1. The issue of liability is separated from the issue of the determination of the quantum of the plaintiff's claim in accordance with the provisions of rule 33(4) of the Uniform Rules of Court.
> 2. The issue of the determination of the quantum of the plaintiff's claim is postponed *sine die*.
> 3. The defendant shall pay to the plaintiff 100% (one hundred percent) of her agreed or proven damages in her representative capacity for and on behalf of her minor child."

[1] The principle that a matter that has been adjudicated by a competent court may not be pursued further by the same parties.

[4] Subsequent to that, this Court handed down judgment in *DZ*.[2] In that matter this Court considered the need for the development of two common law rules, the "once and for all"[3] rule and the rule that damages for medical negligence must be paid in money. Such development would, first, allow compensation by the provision of physical items or medical services in the public healthcare sector instead of money (the so-called public healthcare defence), or, second, allow for the making of an undertaking "according to which medical services or supplies that cannot be provided in the public healthcare sector are paid for when they arise in the future" (the undertaking to pay defence).[4] Although in *DZ* a case was not made out for the development of the common law, this Court held that, where "[f]actual evidence to substantiate a carefully pleaded argument for the development of the common law" is properly adduced and "sufficiently cogent, it may well carry the day".[5]

[5] On the basis of that judgment, the applicant in the present matter amended his plea in the High Court and raised the public healthcare and undertaking to pay defences. In other words, he sought the development of the common law.

[6] The matter came before Van der Linde J in the High Court for the determination of quantum. The respondent argued that, since Moshidi J's order states that the applicant is obliged to "pay to" the respondent "100% . . . of her agreed or proven damages", the manner of compensation was *res judicata*. According to the respondent, this stipulated manner of compensation required payment in one lump sum sounding in money. It was thus not open to the Court to consider the development of the common law.

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[2] *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC).

[3] According to Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835C, "[e]xpressed in relation to delictual claims, the [once and for all] rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action".

[4] *DZ* above n 2 at para 6.

[5] Id at para 58.

[7] Van der Linde J held that the respondent was unduly fixated on the words "to pay", and that these words were simply language for an order to compensate the respondent; the purpose of this part of the order was not to deal with how the respondent was to be compensated, but rather whether the applicant was at all liable to compensate the respondent. Therefore, held Van der Linde J, the *res judicata* point was misconceived. On appeal, the Supreme Court of Appeal overturned this. It held that neither party, when agreeing to the draft order granted by Moshidi J, had anything else in mind other than that if the respondent proved her damages she would be entitled to be paid in the ordinary course in one lump sum payment. Similarly, the Court held, Moshidi J had nothing else in mind when granting the order. No plea for the development of the common law was before Moshidi J at the time, and neither was this Court's judgment in *DZ*.

[8] The Supreme Court of Appeal further held that the High Court erred in reading the word "pay" without regard to the context and purpose of the phrase in which it appears, and to the word's ordinary grammatical meaning. The same word was also used in the costs order, and clearly meant payment in money in that context. As a result, if anything else was envisaged by that word in the context of damages, this would have been expressly stipulated by the parties. The draft order was not a standard one; it had been carefully and consciously arrived at. According to the Supreme Court of Appeal, the applicant was acting opportunistically. As a result, held the Supreme Court of Appeal, the compensation contemplated by the parties and Moshidi J when the order was drafted and granted must be enforced.

[9] The Supreme Court of Appeal thus held that both the applicant's liability and manner of compensation had been finally adjudicated; compensation had to be in a lump sum payment. All that was left was the determination of quantum, i.e. how much that lump sum should be. The Court confirmed that when the quantum is being assessed, nothing prevents the applicant from proving that the necessary medical services of an

acceptable standard could be obtained at a lower cost in the public sphere.[6] But this could only serve to reduce the quantum. It could not be a basis for ordering that the medical services be rendered in the public sphere, instead of making a payment sounding in money.

[10] The Supreme Court of Appeal substituted the High Court's order with a declarator that Moshidi J's order precludes the Court from ordering the applicant to render services or provide medical and related items, instead of paying the respondent an amount of money, or to pay the amount of money in future as and when the need arises.

In this Court

[11] Before us the applicant argues that the Supreme Court of Appeal's interpretation of Moshidi J's order effectively precludes the Judge who is to determine the quantum of damages from developing the common law, something she or he is ordinarily entitled to do in terms of section 173 of the Constitution.[7] The applicant makes the point that the Supreme Court of Appeal's order has implications for his healthcare obligations under section 27 of the Constitution.[8] He argues that this Court's constitutional jurisdiction[9] is engaged on these bases. He adds that this Court's general jurisdiction is also engaged, as the correct interpretation of Moshidi J's order is an arguable point of law of general public importance which ought to be considered by this Court.[10]

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[6] *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (AD).

[7] Section 173 of the Constitution provides that "[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

[8] Section 27 of the Constitution provides:

> "(1) Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> . . .
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[9] Section 167(3)(b)(i) provides that "[t]he Constitutional Court may decide constitutional matters".

[10] Section 167(3)(b)(ii) of the Constitution provides that "[t]he Constitutional Court may decide any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of

[12] The applicant further argues that, when Moshidi J separated the questions of liability and quantum, he could not – when dealing with liability – legitimately deal with the manner of compensation. What was, and could properly be, before him was whether the applicant was liable at all and, if he was, the extent of liability. Correspondingly then, that is what the order is about: it intends to deal only with the question whether the applicant is liable to compensate the respondent, and to what extent; i.e. must it be 100% compensation or should there be an apportionment? The order did not purport to deal with the questions arising from the applicant's amended plea.

[13] The respondent argues that this Court's jurisdiction is not engaged. That is so because the Supreme Court of Appeal's decision was based on a factual and contextual assessment of the parties' intentions at the time Moshidi J's order was drafted. There is accordingly no constitutional issue, let alone one of public importance.

[14] Additionally, submits the respondent, this Court's judgment in *DZ* was academic. It did not consider the wording of an order of the nature of the one granted by Moshidi J. Also, the term "pay" in the context of delictual damages has always meant money in a lump sum.[11] This is what Moshidi J was aware of when he made the order. And this is true of the parties as well. When the order to "pay" "damages" was made, a lump sum sounding in money is what was intended. Thus Moshidi J's order disposed of both the issue of liability and the method of payment. The applicant remains entitled to lead evidence on quantum, but not on the method of compensation.

[15] This Court issued directions calling upon the parties to file written submissions. They have done so. We have elected to decide this matter without an oral hearing.

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general public importance which ought to be considered by that Court". The applicant's argument on general jurisdiction will be considered more fully below.

[11] This is in terms of the once and for all rule, touched on above, which was (and remains) in force at the time of the order.

[16] The Members of the Executive Councils for Health of Kwazulu-Natal, Northern Cape and Eastern Cape (collectively, the Health MECs) have applied for admission as amici curiae (friends of the court). Ordinarily an amicus may not seek to "bolster a sectarian or partisan interest against any of the parties in litigation".[12] As a result, a person with a direct or substantial interest should apply to intervene as a party.[13] Each Health MEC certainly does have a direct and substantial interest in the matter, and participation as an intervening party would have been preferable. However, this Court is entitled to regulate its own process,[14] and may act in accordance with whatever it considers to be in the interests of justice.

[17] The primary purpose of admitting amici, which is to promote and protect the public interest,[15] should inform this enquiry. This Court in *In re Certain Amicus Curiae Applications* further explained that "[t]he role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn".[16] In this matter, the Health MECs have sought to draw this Court's attention to the practical, widespread effects of the Supreme Court of Appeal's interpretation of Moshidi J's order. They also offer legal submissions that may assist this Court in the interpretative exercise. Importantly, they are not here for any individual's personal gain, but rather so that they may fulfil their constitutional obligations. In other words, their involvement is for the public interest and the promotion of the Constitution. Based on all this, they were admitted as amici curiae as it was in the interests of justice so to do.

[12] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 13.

[13] Id.

[14] Section 173 of the Constitution.

[15] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 26.

[16] *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 5.

[18] Before considering the application for leave to appeal, I wish to dispose of one argument. That is the suggestion by the third amicus, the Eastern Cape MEC, that this Court should itself develop the common law in this matter. As indicated, the role of an amicus is to "introduce additional, new and relevant *perspectives*"[17] on the issues before the Court. As such, it is generally "inappropriate for an amicus to try to introduce new contentions based on fresh evidence".[18] Considering the significant implications of the development of the common law rules at issue, which – in the context of a matter of this nature – may entail the leading of extensive evidentiary material and the presentation of legal arguments of some magnitude, it is simply not in the interests of justice for this Court to depart from this general principle. It is also undesirable for this Court to sit as a court of first and final instance on this complex issue of developing the common law.[19] As a result, this Court will limit its analysis to the case pleaded by the parties.

[19] The Supreme Court of Appeal's interpretation of Moshidi J's order has implications for the power of the High Court to develop the common law. Section 173 of the Constitution empowers the High Court to develop the common law. The Supreme Court of Appeal's interpretation also implicates the right to a fair hearing.[20] That is so because the applicant is precluded from leading evidence and presenting argument on alternative methods of compensation. Finally, this matter implicates the obligation of the applicant to take reasonable measures progressively to realise the right of access to healthcare services.[21] In *DZ* Froneman J explained:

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[17] *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at para 80.

[18] *In re Certain Amicus* above n 16 at para 5.

[19] In *S v Bequinot* [1996] ZACC 21; 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15 this Court explained that it "is placed at a grave disadvantage if it is required to deal with difficult questions of law, constitutional or otherwise . . . as a court of first instance".

[20] Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[21] Above n 8.

> "The development of the common law, and the potential impact of damages awards in medical negligence claims against public healthcare authorities on their ability to discharge their constitutional obligation to provide access to healthcare to everyone, raise constitutional issues that attract this Court's jurisdiction."[22]

This Court's constitutional jurisdiction is thus engaged.

[20] Also, for the reasons that follow, this Court's general jurisdiction is engaged. At the heart of this matter is the interpretation of a court order, and "interpretation is a matter of law and not of fact".[23] The points raised have merit, and are thus arguable. The public importance of the interpretation has been demonstrated by the Health MECs, who have all detailed multiple orders formulated in similar or identical wording, and were arrived at under similar circumstances. The widespread use of comparable orders means that the interpretation of Moshidi J's order transcends the narrow interests of the parties in the application before us.[24] It follows as a matter of course that the interpretation of the order ought to be considered by this Court.

[21] The applicant's contentions bear reasonable prospects of success. It is in the interests of justice that leave to appeal be granted.

Interpretation of Moshidi J's order

[22] This Court has accepted the following test for the interpretation of court orders:

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and

[22] *DZ* above n 2 at para 8.

[23] *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39.

[24] Compare *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 25-6.

> the court's reasons for giving it must be read as a whole in order to ascertain its intention."[25]

[23] In accordance with a contextual and purposive reading of the order as a whole, part of the context is what exactly is at issue when – after the questions of quantum and liability have been separated – a court determines the latter question. What is at issue is whether the defendant is liable to compensate the plaintiff and, if so, whether liability must be 100% or apportioned and, if it must be, to what extent. As a matter of legal experience, that is what an order of this nature seeks to achieve. That is the legal reality; that is part of "the material known to those responsible for [the document's] production".[26] As I say, all this is part of the context that is relevant to the interpretative exercise. The order need say nothing at all about payment. And yet the effect will be exactly the same. The order may well say something like: "The defendant is liable for 100% of the plaintiff's agreed or proved damages." And, indeed, some orders determining liability do use wording of this nature or words of similar purport. In context, there is nothing magical with the use of the word "pay". Thus contrary to what the Supreme Court of Appeal held, what I find opportunistic is the respondent's fixation with the word "pay". Van der Linde J was correct in holding that this fixation was at the expense of a contextual and purposive reading of the order. To hold that the order disposes of the *method* of compensation would, in my view, stretch the ordinary meaning of the words read in their proper context.

[24] In short, the order has nothing to do with "the how". The focus is on being liable to compensate.

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[25] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 13, cited with approval by this Court in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29.

[26] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[25] This interpretation commends itself because it better accords with constitutional values.[27] A viable interpretation of *any* document which promotes constitutional values must be preferred to one that does not. That principle applies to all documents – including court orders – because a viable interpretation that – by comparison – is more consonant with constitutional values better accords with the Constitution's supremacy clause. And the supremacy clause applies to court orders.[28]

[26] The interpretation preferred by the respondent has the effect that the applicant may not lead evidence to support an argument for the development of the common law, and the court determining quantum may not consider such a development. This Court in *DZ* has already confirmed that the common law may, with the support of "[f]actual evidence to substantiate a carefully pleaded argument", be developed by a court to allow for the public healthcare and undertaking to pay defences.[29] And the fact that the judgment in *DZ* had not yet been handed down at the time Moshidi J granted his order is irrelevant. This is because a development of the common law was always open to courts under sections 39(2) and 173 of the Constitution. Also, in terms of section 172(1)(b) of the Constitution courts deciding constitutional matters are afforded a wide discretion to grant any just and equitable remedy.[30] The issues relating to the mooted development are well-suited for consideration even under this section. Moshidi J's order should not be interpreted to limit these broad powers.

[27] Additionally, an interpretation precluding the applicant from leading evidence to support a development of the common law implicates his right of access to courts, which includes the right to have a dispute decided in a fair public hearing. In *Barkhuizen* this

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[27] Compare *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 89; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 26.

[28] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[29] *DZ* above n 2 at para 58.

[30] Section 172(1)(b) of the Constitution.

Court explained that the right to seek the assistance of the courts, and the orderly and fair resolution of disputes "is indeed vital to a society that, like ours, is founded on the rule of law".[31] It held that section 34 "not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy".[32] Considering the importance of this right in our legal system, an interpretation of Moshidi J's order that promotes the applicant's right to have his dispute regarding the development of the common law fairly resolved by the High Court should be preferred.

[28] It is also worth considering the possible implications on the right of "everyone" to have access to healthcare services[33] and of "every child" to "basic" healthcare services.[34] If the Supreme Court of Appeal's order is upheld, the applicant is at risk of being found liable to pay a lump sum of approximately R32 million, and possibly much more in similar cases. The third amicus points out that these types of claims are constantly on the increase. The result is that, instead of funding healthcare programmes and facilities, a large portion of her department's annual budget is allocated to medico-legal liabilities. Wessels argues that—

> "the most worrying consequence of the excessive medical malpractice litigation against the state is that it may potentially undermine the department of health's ability to provide public healthcare in future. . . . In other words, the problem is that an already overwhelmed and underfinanced public healthcare sector is exposed to the ever-increasing amount of malpractice claims."[35]

[29] In *DZ* Froneman J opined that the common law rule that damages must be paid in one lump sum may be reflective of a pre-constitutional era where individual loss-bearing was prioritised, and the right of access to healthcare services did not exist.[36]

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[31] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 31.

[32] Id at para 33.

[33] Section 27(1)(a) of the Constitution.

[34] Section 28(1)(c) of the Constitution.

[35] Wessels "The Expansion of the State's Liability for Harm Arising from Medical Malpractice: Underlying Reasons, Deleterious Consequences and Potential Reform" (2019) 1 *TSAR* 1 at 15.

[36] *DZ* above n 2 at para 45.

This does not mean the individual interest of the respondent and similarly placed individuals must be relegated to insignificance. Each must be afforded an appropriate remedy and compensated fairly for loss suffered. But in that process the applicant – who is well-placed to assist the High Court in balancing these competing interests – is entitled to lead evidence on the desirability and practical implications of a development of the affected common law rules. Since Moshidi J's order is reasonably capable of an interpretation that permits the applicant to lead this type of evidence in the High Court, that interpretation should be preferred.

[30] In sum, the respondent's interpretation of Moshidi J's order is at odds with the right of access to courts and potentially undermines the right of everyone to have access to healthcare services and of every child to basic healthcare services. It also has the effect of limiting the power of the court determining quantum to develop the common law in accordance with section 173 of the Constitution. On the other hand, the applicant's interpretation better accords with the context and purpose of the order and – instead of being inconsonant with these constitutional values – it promotes them. This interpretation is to be preferred. The order must thus be interpreted not to deal with the manner of payment.

[31] Of course, whether – when determining quantum – the High Court will, in fact, develop the common law is a matter for it to decide. All that I am deciding is that Moshidi J's order should not be read to preclude a consideration of the development.

Costs

[32] On the *Biowatch* principle, there is no basis for mulcting the respondent in costs even though she is the losing party.[37] Each party must pay her or his own costs in this Court and the Supreme Court of Appeal.

[37] See *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-4.

Order

[33] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. It is declared that the order granted by Moshidi J in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) on 24 April 2017 does not preclude the High Court from considering whether to develop the common law on whether the applicant, the Member of the Executive Council for Health, Gauteng, may compensate the respondent, PN, in a manner other than exclusively in an immediately due lump sum payment.
5. Each party is to pay her or his own costs in this Court and the Supreme Court of Appeal.

For the Applicant:	V Soni SC and L Mtukushe instructed by the State Attorney
For the Respondent:	N Van der Walt SC and P Uys instructed by Wim Krynauw Attorneys
For the First Amicus Curiae:	A Annandale SC instructed by Norton Rose Fulbright South Africa Incorporated
For the Second Amicus Curiae:	RT Williams SC and S Mahomed instructed by Robert Charles Attorneys & Conveyancers
For the Third Amicus Curiae:	A Dodson SC, A Bodlani and K Williams instructed by Norton Rose Fulbright South Africa Incorporated