

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 21/50612

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

DATE 4 March 2024 SIGNATURE

In the matter between:

UNATHI PAKATI

Plaintiff/Respondent

and

HOUSING DEVELOPMENT AGENCY

Defendant/Excipient

JUDGMENT

KORF, AJ

Introduction

- [1] This matter concerns an exception by the defendant/excipient to the plaintiff/respondent's amended particulars of claim dated 24 April 2022 because it fails to disclose a cause of action.
- [2] The parties shall be referred to as they have been cited in the summons, to wit, the excipient as the defendant and the respondent as the plaintiff.
- [3] On or shortly after 22 October 2021, the plaintiff, UNATHI PAKATI, an adult female employee of the defendant, instituted an action against the defendant, the HOUSING DEVELOPMENT AGENCY, cited as an entity duly established under the Housing Development Act, 23 of 2008.
- [4] As will be alluded to more fully below, the plaintiff's action comprised two claims. As pleaded, Claim A is pleaded as a claim for delictual damages caused by the defendant's breach of a common law legal duty. Claim B is for constitutional damages sustained due to the defendant's infringement of certain constitutional rights of the plaintiff.
- [5] The defendant's first exception is essentially that the plaintiff's claim is precluded by section 35(1) of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ("COIDA"). The second exception is that the plaintiff's claim for constitutional damages is wrong in law because the applicant has a common law remedy.

Relief sought

- [6] In its exception, the defendant prayed for an order that:
- a) The exception be upheld;
 - b) The Plaintiff pays the costs of the exception;
 - c) Further and/or alternative relief."
- [7] According to the defendant's heads of argument, it seeks its exception to be upheld with costs.
- [8] During the oral argument, I asked the defendant's representative whether the upholding of the exception (without granting either a dismissal of the claim or an opportunity to amend) would not leave the case in limbo and that there may then be uncertainty as to the status of the plaintiff's claims.

[9] The defendant's counsel accordingly contended that the following relief would be appropriate:

1. In respect of Claim A, that the exception be upheld inasmuch as the allegations relate to negligence, alternatively, if the court finds that this exception cannot be upheld at the exception state, that the excipiability of Claim B be reserved for determination at the end of the trial.
2. Regarding Claim B, the exception should be upheld, and Claim B should be dismissed with costs.

[10] The plaintiff prayed that both objections be dismissed with costs. If upheld concerning Claim B, the plaintiff should be afforded time to amend its pleading and not be penalised with costs.

Overview of the facts pleaded in the Particulars of Claim

[11] Under the heading "**CONDUCT**", the plaintiff pleads that: [1]

"Jobs for Sex and Rape

4. *In December 2018 and February 2019, the defendant [through its employee [RI] acting in the course and scope of her employment or as an agent of the defendant] presented [MM]... and [LM] with ... charge sheets, inter alia [for]:*

4.1. *sexually harassing the plaintiff;*

...

4.5 *sexual favours pertaining to the secondment of the plaintiff to the Strategic Support Department;*

4.6 *gang raping the plaintiff;*

...

4.8 *...bringing the good name of the employer [the defendant] into disrepute in that in the assembly party held in September 2017, [LM] was identified as one of the men who took "advantage" of [the plaintiff] who appeared extremely intoxicated as he is alleged to have been seen in sexual acts with [the plaintiff] in full view of others passing by, as the doors and windows were left open and the lights on....*

Board Meeting:

5. *On or about 23 October 2018...the defendant [through its employee [RI] acting in the course and scope of her employment*

1 The quoted section excludes parts that do not refer to the plaintiff.

or as an agent of the defendant]...reported to the Board of Directors of the ... defendant, inter alia [that]:

- 5.1 *the plaintiff had been sexually harassed;*
 - 5.2 *the plaintiff had sexual intercourse with senior executives employed by the defendant in return for job promotion;*
 - 5.3 *the plaintiff would not admit that she was either gang raped; or*
 - 5.4 *sexually harassed.”* ^[2]
- (hereinafter referred to as the “Conduct”)

[12] Under the heading “**CONSEQUENCES**”, the plaintiff pleads the following:

- “11. *As a result of the aforesaid conduct of the defendant and its employee mentioned above in paragraphs 4 to 5.4, the plaintiff:*
 - 11.1 *suffered emotional shock and trauma;*
 - 11.2 *suffered and still suffers impaired mental health, for which she requires medical treatment;*
 - 11.3 *suffered financial loss;*
 - 11.4 *suffered constitutional damages.*
 - 12. *The defendant and its employee’s aforesaid conduct, as mentioned above, was the sole and/or the main cause of the above-mentioned consequences.”* ^[3]
- (hereinafter referred to as the “Consequences”)

[13] The portions quoted above, read in the context of the Particulars of Claim, show that both plaintiff’s claims stem from the same set of facts. In the plaintiff’s heads of argument, counsel for the plaintiff agreed with this assessment.

[14] The plaintiff’s pleading is by no measure a textbook example of clarity. It has various unnecessary allegations and mistakes, and it is incomplete. However, as will appear from what is stated below, the defendant’s exception is not that the pleading is vague and embarrassing.

[15] In the following section, I shall further consider Claim A and the defendant’s exception based on the provisions of COIDA. After that, Claim B and the exception (that the claim for constitutional damages is wrong in law) will be considered.

Claim A

2 Grammatical errors have been corrected.

3 Grammatical errors have been corrected.

- [16] Claim A is essentially founded on the defendant's alleged failure to act in accordance with a common law duty to maintain a safe working environment, including taking necessary steps to ensure that the plaintiff is not abused or harassed emotionally or psychologically. Apart from the Consequences referred to above, the plaintiff pleads that the Conduct caused her to "...suffer emotional shock, trauma and damages...". [4] The plaintiff consequently claims general damages of R 5 million, interest and costs.
- [17] In the defendant's exception to Claim A, it pleads essentially that in terms of section 35(1) of COIDA, an employee who is covered by COIDA has no claim against an employer for damages suffered following an occupational injury arising out of or within the scope of the employee's employment. Under section 35(2), as the defendant pleads, occupational injuries sustained due to negligence by certain employees are deemed attributable to the employer. The defendant pleads that the employee whom the plaintiff alleges to have engaged in conduct resulting in vicarious liability is deemed under the provisions of section 35(2)(b) to be an employer. The defendant concludes that the emotional shock, trauma and mental impairment that she suffered constitutes an occupational injury, and the plaintiff is precluded under COIDA from claiming such damages from the employer.
- [18] For the defendant's exception to be upheld, it would require this court, at the exception stage of the proceedings and based on the plaintiff's pleading, to find that all the jurisdictional requirements for a claim under COIDA are satisfied and that the defendant is not liable under the provisions of the said act. This notion is tainted with difficulties.
- [19] By way of example, a jurisdictional requirement for the applicability of COIDA is that a claimant (such as the plaintiff) must have sustained injury (*in casu*, emotional shock, trauma and impaired mental health as a result of the Conduct) while acting in the course of his/her (the plaintiff's) employment. [5]

4 Particulars of Claim, paragraph 19

5 COIDA, section 1- "accident" is defined as an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee...".

- [20] In *Churchill v Premier of Mpumalanga and Another* [6], the Supreme Court of Appeal emphasised the following: “[34] ...[B]ut the nature and severity of the assault and the extent of the incursion upon the dignity and bodily integrity of the victim, cannot be the factors that determine whether it arose out of their employment. As held in MEC v DN it is difficult to see on what basis, as a general proposition, attacks on a person's dignity and bodily integrity are incidental to their employment. In simple language, they are not things that 'go with the job'.” [Emphasis added]
- [21] In *Member of the Executive Council for the Department of Health, Free State* [7], the SCA concluded that: “[33] Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African Society, I have difficulty contemplating that employees would be assisted if their common law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interests of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.” [Emphasis added]
- [22] The above cases make it plain that the applicability of COIDA to injuries sustained by an employee is i) intricate, ii) requires careful interpretation of the provisions of COIDA and, for example, the Constitution (1996), and iii) demands a considered finding on the facts of the case. These considerations render the exception state of proceedings inappropriate to make any findings that the plaintiff's claim falls under COIDA.
- [23] I believe it would be incumbent upon the defendant to plead COIDA as a defence. As such, the defendant would bear the onus to demonstrate that all the disputed elements for a claim under COIDA are present and, therefore, that the defendant is exonerated under COIDA from any liability stemming from the Conduct.

6 *Churchill v Premier of Mpumalanga and Another* 2021 (4) SA 422.

7 *Member of the Executive Council For the Department of Health, Free State Province v EJNI* [2015] 1 All SA 20 (SCA).

[24] Counsel for the defendant argued that if the COIDA objection cannot be decided at the exception state, this question should be reserved for determination at the end of the trial.

[25] It must be borne in mind that the trial court will ultimately adjudicate the applicability of COIDA based on the pleadings and the evidence before it and not on the plaintiff's Particulars of Claim. Consequently, it would serve no purpose to reserve the determination of the COIDA exception at the end of the trial.

[26] For these reasons, the defendant's exception to Claim A cannot be upheld.

Claim B

[27] Under Claim B, the plaintiff claimed R 2 million (plus interest and costs) as constitutional damages. According to the plaintiff's pleading, Claim B arose because the defendant breached its constitutional duty to the defendant not to infringe upon and failed to protect the plaintiff from infringement of her constitutional rights. The plaintiff further pleaded that through the Conduct, the defendant violated her rights afforded by the Constitution, i.e., the rights to dignity under section 10 [8], to be free from all forms of violence, and not to be treated or punished in a cruel, inhumane or degrading way under section 12 [9]. Consequently, the plaintiff avers that she suffered constitutional damages.

[28] The defendant excepts against Claim B because the plaintiff failed to disclose a cause of action for constitutional damages. The defendant pleads that: i) the plaintiff has available to it and, in fact, concurrently claims common law

8 Section 10:

"Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected."

9 Section 12:

"12

Freedom and security of the person.

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) ...

(b) ...

(c) to be free from all forms of violence from either public or private sources;

(d) ...

(e) not to be treated or punished in a cruel, inhuman or degrading way."

general damages and constitutional damages; ii) that a claim for constitutional damages is inappropriate, unavailable and not recognised in law; and iii) with the availability of common law damages, a claim for constitutional damage is not available to the plaintiff.

[29] Counsel for the defendant relied strongly on the matter of *Fose*, in which it was held that, on the facts in that matter, there was no place for punitive constitutional damages. Accordingly, the defendant's exception was upheld. The plaintiff further relied on the cases of *Komape* and *Industry House* in support of the latter contentions. It was submitted that the cases of *Modderklip* and *Kate* were distinguishable from the plaintiff's case. I shall deal more fully with *Fose*, *Komape*, *Industry House*, *Modderklip* and *Kate* below. Counsel for the defendant highlighted that the judgement in *Kate* was criticised by Jafta J in *Industry House*, stating that the SCA departed from its own previous decisions, including *Modderklip*, and was at variance with the principles previously espoused by both the Constitutional Court as well as the SCA.

[30] Counsel for the plaintiff argued that a party's right to claim constitutional damages where it has a claim in delict is not precluded in absolute terms. In support of this contention, counsel relied on *Thubakgale*, in which it was stated that "*Courts are under an obligation in terms of section 38 of the Constitution to grant "appropriate relief" when approached by someone who seeks to enforce a right in the Bill of Rights that has been infringed or threatened, and this may include constitutional damages*". Further, it was highlighted in *Fose* [¹⁰] that courts have a particular responsibility to "forge the tools" and shape innovative remedies to vindicate the Constitution. Counsel contended that the defendant's proposition was inconsistent with the constitution because courts must be innovative in fashioning new remedies to meet constitutional obligations, and courts enjoy wide discretion to decide on what remedy would be effective, suitable or, just and equitable. During his address, the plaintiff's counsel emphasised the degree of seriousness of the references in the charge sheet and the report to the Board of Directors concerning the plaintiff. Consequently, the claim for constitutional damages in addition to delictual damages was justified. As pleaded by the plaintiff, Claim

¹⁰ *Fose* at [69].

B is premised on infringing her constitutional rights, whereas the common law claim is premised on the duty to create a safe work environment. Counsel contended that the facts of *Komape* were distinguishable from the instant matter.

Case Law

- [31] In *Fose v Minister of Safety and Security* [11] (“*Fose*”), the plaintiff sued the defendant for damages arising out of a series of assaults by members of the South African Police Force. The plaintiff alleged that these incidents constituted an infringement of the plaintiff’s fundamental rights as enshrined in chapter 3 of the interim Constitution, more particularly, the right to human dignity, freedom and security of the person, privacy, and to be arrested and detained lawfully.
- [32] The Constitutional Court was not required to answer the question, in broad terms, whether an action for damages in the nature of constitutional damages exists in law and whether an order for payment of damages qualifies as appropriate relief for purposes of section 7(4)(a) of the interim Constitution in respect of a threat to or infringement of any of the rights in Chapter 3. That court was concerned with the much narrower task of answering these questions concerning the rights allegedly infringed in the case before it and only for the separate claim for constitutional damages formulated in the claimant’s particulars of claim. [12]
- [33] In paragraph [70] of the *Fose* judgment, Ackerman J states, “...*I have come to the conclusion that we ought not, in the present case, to hold that there is any place for punitive constitutional damages....*”. This conclusion is fortified by two considerations: *first*, the notion that granting punitive damages against the government will serve as a deterrent against further infringements of rights is an illusion, and *second*, awarding punitive damages will place undue economic pressure on the already scarce resources of the fiscus. In the concurring judgment of Kriegler J, he expressed more robust views that

11 *Fose v Minister of Safety and Security* 1997 (1) SA 786 (CC), in particular paragraphs [58], [60], [67], [69], [70] and [71].

12 *Fose* at [20].

punitive damages are inappropriate to vindicate the Constitution and deter its further violation. In paragraph [91], he states, "*On one point, I respectfully suggest, Ackermann J is uncharacteristically ambivalent. As I understand the reasoning in paragraphs 69 to 73 of his judgment, my learned colleague in principle condemns punitive damages as a potential remedy for infringements of constitutional rights but at the same time seeks to found the current rejection on the particular facts of this case. For reasons that I hope to make plain shortly, I agree that we should unequivocally reject punitive damages as a remedy in this case. I do believe, however, that we should refrain from any broad rejection of any particular remedies in other circumstances.*"

[34] *Minister of Police v Mboweni* [13] ("*Mboweni*") concerned the case of assault of the plaintiff by fellow inmates detained at a local police station, as a result of which the plaintiff died five days after his release from custody. The High Court awarded delictual damages for loss of support and constitutional damages. The Minister appealed the award of constitutional damages. Wallis JA held that the proper starting point was to consider whether the delictual remedy for damages for loss of support was appropriate for compensating the children for a breach of their constitutional rights. If the common law remedy was inadequate, the court should have considered whether the development of the common law could remedy this.

[35] The case of *Komape and Others v Minister of Basic Education and Others* [14] ("*Komape*") stemmed from the tragic circumstances of a little boy who fell into a pit latrine and succumbed by drowning in faeces. The court recognised no other cases in which damages had been awarded for physical or psychiatric injuries. The court held that additional damages would be equivalent to punishment because the parties had received compensation for general damages. As such, the parties have already been compensated for the breach of the right in question. [15] Leach JA held that in South Africa, there was a "*chronic shortage of what would in foreign jurisdictions be regarded as basic infrastructure...*" and that circumstances in this state had not changed so much as to regard the approach followed in *Fose* as no longer applicable.

13 *Minister of Police v Mboweni* 2014 six SA 256 (SCA)

14 *Komape and Others v Minister of Basic Education and Others* [2019] ZASCA 192

15 *Ibid* at [59].

Despite the tragic facts before it, the court found that there was no reason why the deceased child's family should be the beneficiaries of an additional award for constitutional damages and that there was no room for an award of constitutional damages. [16]

[36] In *Residence of Industry House et al. v Minister of Police and Others* [("Industry House"), the claimants comprised a group of approximately 3000 people who lived in 11 buildings situated in the inner city of Johannesburg. Over the period of a year, they had been subjected to "cruel, invasive and degrading raids" by the police without warrants. [17] The claimants claimed, *inter alia*, an amount of R 1000 each as constitutional damages for the infringement of their constitutional rights to dignity and privacy. [18] The High Court dismissed the claim for constitutional damages, partly because there was no evidence that every room had been searched, and the court held that it was not appropriate to grant a blanket order for constitutional damages. [19] The claimants approached the Constitutional Court claiming leave to appeal against the High Court's dismissal of their claims for constitutional damages, which application was dismissed. The following is germane:

1. Based on an analysis of the relevant case law, Mhlantla J (for the majority) formulated general principles concerning claims for constitutional damages. The learner judge referred, *inter alia*, to *Fose*, holding that the law of delict would, in most cases, be broad enough to provide appropriate relief for the infringement of constitutional rights. [20] Where a delictual remedy would be available, constitutional damages would seldom be available in addition to a common law remedy. [21]
2. The majority further held that the availability of an alternative common law or statutory law remedy was "*not an absolute bar to the granting of constitutional damages, but a weighty consideration against the award*

16 Ibid at [63].

17 Ibid at [6] – [18].

18 Ibid at [19].

19 Ibid at [27].

20 Ibid at [96].

21 Ibid at [97].

for such damages.” [22] Sometimes, a delictual remedy would be available, but it would not be effective. The damage-causing conduct could be an inherent barrier to the remedy because wrongful conduct itself created a complete barrier to providing one of the elements of delict. [23] In these instances, a court might consider an award of constitutional damages even though there was an alternative remedy. [24]

3. The court enunciated the legal position in the following terms: “... *The uncertainty and unpredictability would be at variance with the rule of law, a linchpin of the Constitution. Therefore, constitutional damages must be the most appropriate remedy available to vindicate constitutional rights with due weight attached to other alternative remedies available within the common law and statutes...*” [25] The court further found that once an appropriate remedy has been identified, it becomes unnecessary to award constitutional damages in addition to damages awarded in terms of the delictual remedy, stating further that “...[I]t is not fair to burden the public purse with financial liability where there are alternative remedies that can sufficiently achieve that purpose, because that would effectively amount to punishing the taxpayers for conduct for which they bear no responsibility.” [26]
4. Jafta J concurred with the majority. In paragraph [157], Jafta J stated the following: “...*The other alternative remedy available to the applicants was a delictual claim. The delictual claim did not cease to be an alternative remedy only because it may be onerous to prove it. The principle is not that the alternative remedy must be easy to prove. Nor should it be convenient for the claimant to pursue it. It will be recalled that in Fose and Dikoko, this Court stressed the fact that constitutional damages may be allowed where it is necessary. It*

22 Ibid at [104].

23 Ibid at [104] and [105].

24 Ibid at [104].

25 Ibid at [118].

26 Ibis at [120].

cannot be necessary to award them where there is an adequate alternative remedy that is not easy to prove...

- [37] In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [27] (“*Modderklip*”). In that case, the landowner exercised its remedies, proverbially, according to the book, to have some 80,000 unlawful occupiers on its land evicted. It succeeded in being granted an eviction order, only to find that the organs of state were either unwilling or unable to assist in enforcing it. The court found that although the landowner had a claim in delict, constitutional damages would be a more effective remedy.
- [38] *Member of the Executive Council: Welfare v Kate* [28] (“*Kate*”) concerned the failure on the part of the Department of Welfare to process the plaintiff’s application for a disability grant timely. Discussing *Fose*, the court noted that “*in principle, monetary damages are capable of being awarded for a constitutional breach.*” [29] The court held that “... *in this case we are not called upon to answer those questions broadly and in the abstract – and I do not do so – but only to decide whether the particular breach that is now in issue is deserving of relief in the form of the monetary damages that are now claimed. Whether relief in that form is appropriate in a particular case must necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned...*”. [30]
- [39] *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [31] (“*Thubakgale*”) does not deal with the availability of constitutional damages where delictual damages are available. That matter dealt with constitutional damages as a means to enforce socio-economic rights. The Constitutional Court held that constitutional damages were not open to the claimants because of the availability of remedies in terms of legislation. [32]

27 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

28 *Member of the Executive Council: Welfare v Kate* 2006 4 SA 478 (SCA).

29 *Ibid* at [23]

30 *Ibid* at [25]

31 *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (2021) ZACC 25.

32 *Ibid* at [145] and further; [171] and [178].

Analysis

- [40] In my view, the legal principles expressed in the above cases concerning constitutional damages where a party has a common law remedy established may be summarised as follows:
1. Courts generally followed *Fose*.
 2. Courts followed a casuistic approach.
 3. The purpose of constitutional damages is not to penalise a party.
 4. Courts will not grant constitutional damages in addition to common law damages arising from the same set of facts.
 5. It is accepted that there was no reason why “appropriate relief”, as envisaged by section 38 of the Constitution [³³], could not include an award for damages.
 6. Constitutional damages will only be awarded if a common law remedy is ineffective.
 7. Constitutional damages will only be available where they are demonstrated to be the most effective and appropriate remedy.
 8. Most courts held that constitutional damages should not be awarded when delictual damages were available.
- [41] On a plain reading of the Particulars of Claim, the plaintiff claims constitutional and common law damages. Both claims stem from the same set of facts. The defendant’s exception to Claim B asks whether the plaintiff is entitled to claim concurrently common law damages and constitutional damages.
- [42] The plaintiff does not describe its claim for constitutional damages as “*punitive constitutional damages*”. However, concurrently with common law damages, the plaintiff’s claim for constitutional damages renders Claim B squarely as punitive constitutional damages.
- [43] Based on the case law referred to above, constitutional damages, in addition to common law damages, as the plaintiff seeks to claim, have no legal basis.

³³ “38 *Enforcement of rights*

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights...”.

In addition, the plaintiff failed to plead facts that may be relevant to determine what appropriate relief would be. The exception to Claim B should accordingly be upheld.

- [44] The next inquiry is whether the plaintiff's Claim B should be dismissed or whether the plaintiff should be allowed to amend its Particulars of Claim inasmuch as it concerns Claim B.
- [45] Counsel for the defendant submitted that the dismissal of Claim B at the exception stage would align with *Fose* and that there is no possibility that an amendment will cure the plaintiff's defective claim. In any event, the plaintiff has had ample opportunity to amend its case.
- [46] I appreciate that the circumstances under which constitutional damages will be awarded are limited. However, in my view, it would not serve the interest of justice at this junction to dismiss the plaintiff's Claim B without allowing it to amend its claim. A dismissal of Claim B would finally shut the court's doors to the plaintiff. The plaintiff's right to access the courts warranted under section 34 of the Constitution is accordingly at stake.
- [47] The objection to Claim B, on the basis of the punitive effect of the plaintiff's concurrent claims, may be resolved (albeit in part) by an amendment to plead these claims in the alternative. For clarity, I do not find it will or ought to remove the defendant's cause of complaint.
- [48] In *Mboweni*, Wallis JA held that the court *a quo* had not addressed the factual and legal issues important to the decision it had to make. Consequently, the award of constitutional damages was overturned. Referring to *Fose*, *Modderklip* and *Kate*, the court found that in those cases, the court was apprised of the facts on which the claim was based. The SCA, however, found that the parties did not plead the facts necessary to determine an appropriate remedy and concluded that the issue (of an appropriate remedy) could arise only once the relevant facts had been identified and pleaded and it had been shown that the rights in question had been infringed. ^[34]
- [49] *Mboweni*, in my view, is authority for the proposition that a court must ensure that all the facts necessary to determine an appropriate remedy have been pleaded. I am not convinced that this is the case in the matter at hand.

³⁴ Ibid at [6] – [7].

[50] Accordingly, I believe that Claim B should not be dismissed and that the plaintiff should be allowed to reconsider its pleading, given this judgment and the authorities to which I have referred.

Costs

[51] Although the issue of costs remains the discretion of the court, the discretion cannot be exercised arbitrarily but judicially on grounds upon which a reasonable person could have arrived. The approach to awarding costs is succinctly set out in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* [³⁵] in paragraph 3:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation..."

[52] Recently, in *Dhlamini v Schumann, Van den Heever and Slabbert Inc and Others* [³⁶], the Supreme Court of Appeal dealt with a matter in which both parties were partially successful. In that matter, the court ordered each party to pay its own costs.

[53] It is true that the plaintiff enjoyed partial success in defeating the challenge to Claim A.

[54] It was argued that the plaintiff is an individual litigating against a state-owned agency and that the court should pay due consideration to this factor.

³⁵ *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC).

³⁶ *Dhlamini v Schumann, Van den Heever and Slabbert Inc and Others* (505/2021) [2023] ZASCA 79 (29 May 2023).

[55] It is to be noted that the exception to Claim B was caused by the plaintiff's failure to plead her case for constitutional damages adequately. There is no reason why the public purse should pay for the defendant's costs while the defendant was successful in its exception to Claim B.

Order

- [1] The defendant's exception to Claim A is dismissed.
- [2] The defendant's exception to Claim B is upheld.
- [3] The plaintiff is afforded 20 days from the date of this order to deliver a notice in terms of Rule 28(1) of the Uniform Rules of Court to amend its Particulars of Claim (as amended), should it wish to do so.
- [4] The plaintiff shall be liable for the defendant's costs, which excludes costs incurred by the defendant regarding its exception to Claim A.

C. A. C. KORF
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Excipient/Defendant:

Y Peer instructed by ENS Africa

For the Respondent/Plaintiff:

MW Maweshe