REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.7802/09
and 71 other cases

In the matter between

MAXWELL XOXA THUSI Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent
THE DIRECTOR GENERAL:
HOME AFFAIRS Second Respondent

and

71 other cases.

J U D G M E N T

Del. 23 December 2010

WALLIS J.

INTRODUCTION

[1] The operations of the Department of Home Affairs in relation to the issue of identify documents – at least in KwaZulu-Natal – are beset by problems. These flow from a variety of causes. An affidavit delivered on behalf of the Department identifies these as lack of capacity; inadequate systems; changes in procedures relating to applications for the issue of identify documents; the volume of applications and the need to conduct proper investigations in respect of many applications, particularly those

involving a late registration of birth. Lack of capacity is explained as encompassing insufficient staff, fraud and corruption. I would add, because this was not disputed, that it includes incompetence and inefficiency on the part of existing staff. In order to minimise fraud and corruption access to the Department's database has been restricted, but this occasions bottlenecks. In addition, prior to April 2009, no systems were in place to keep track of applications, whether for the late registration of births, the first issue of an identify document or the issue of an amended or replacement identity document.

[2] These bureaucratic problems occasion considerable frustration to people seeking the issue of identity documents whose applications are not dealt with within the target period of two months identified on the Department's website. Judging by the cases before me those who are particularly affected are people who are relatively unsophisticated; those who lack underlying documents because their parents did not register their births; and generally those who lack the resources in terms of time, money and knowledge to deal with bureaucratic incompetence and delay and to secure the resolution of the problems they occasion.

[3] It is people such as these who are the applicants in the steady stream of cases that have come before the High Court in this province in the past two years. Their ability to bring legal proceedings has been facilitated by firms of attorneys who apparently undertake cases on behalf of such people on a speculative or contingency basis. They do not charge fees or seek to recover disbursements from their clients but take advantage of costs orders obtained in favour of the clients to tax bills of costs and recover the amounts so taxed from the Department.

[4] In February 2009 I dealt with a number of such cases whilst sitting in Pietermaritzburg and the resulting judgment is reported as *Sibiya v Director General: Home Affairs and Others and 55 Related Cases.*[1] After that judgment was delivered the flow of such cases diminished for a while, apparently because the attorneys who practise in this area were considering the implications of that judgment, but in the latter part of 2009 it resumed.

[5] During the recess in January 2010 home affairs cases were again appearing on the motion roll on a daily basis in similar numbers to that which had previously been the case. Notwithstanding what was said in *Sibiya*[2] about the difficulties inherent in using standard form affidavits it was apparent that this practice continued, the form of the standard affidavit having been varied somewhat to deal with certain of the points raised in *Sibiya.* In most cases it was apparent that the representatives of the State Attorney were not able to obtain proper instructions from their clients and the pattern resumed of adjournments or other orders being taken by consent subject to orders for costs being made against the respondents.

[6] The three duty judges sitting in Durban at the time decided that all home affairs cases be adjourned to 19 January 2010 when 40 such cases came before me. All emanated from two firms of attorneys in Durban. Prior to the hearing a lengthy report was filed by the State Attorney explaining the Department's difficulties in dealing with the applications for identity documents and the difficulties confronting his office in dealing with this constant stream of review applications. To some extent

1 2009 (5) SA 145 (KZP). Cases of this type are commonly referred to as home affairs cases and I will refer to them as such.
2 In para [25]

this traversed ground that had been covered in *Sibiya*.

[7] On 19 January 2010 one attorney indicated that he was in a position to resolve matters with the State Attorney and would seek leave to withdraw all the applications emanating from his firm. In the other cases I was informed that time was needed to take instructions to deal with the contents of opposing affidavits and accordingly the cases would need to be adjourned. On the directions of the judge president the cases were adjourned to 9 March 2010 and I was allocated to deal with them. As it was anticipated that the judgment flowing from the proceedings on that date would apply to all pending cases both firms of attorneys undertook that they would remove from the rolls in both Durban and Pietermaritzburg all similar cases and place them on hold pending the outcome of the hearing on 9 March 2010. It was agreed that if any issue not encompassed by the existing cases arose in another case that case would also be enrolled for hearing on 9 March 2010. This was a sensible arrangement because at that stage no other attorney was bringing home affairs cases and it was thought that a judgment on the existing matters would give guidance for the future to all concerned.

[8] On 9 March 2010, as anticipated, all of the applications involving the one firm of attorneys were withdrawn with no order for costs. I was told that these were to be dealt with so as to render it unnecessary to engage in litigation. During argument on the cases handled by the other firm, Goodway & Buck, the matters stood down and ultimately a consent order was taken in each of those cases.

[9] In addition the parties discussed the fate of the pending applications that had been commenced through Goodway & Buck. They agreed that a

list of applicants would be furnished to the State Attorney; their cases would be investigated and a process put in place to resolve issues arising out of them. In the meantime further applications would not be set down. It was hoped that this would provide a better way of dealing with home affairs cases in the interests of all parties and would obviate the need for such matters to come before the court in the future. It was so reported to the Judge President and the other judges in this division.

[10] Further meetings to put these arrangements in place were unsuccessful. Goodway & Buck had furnished a list of cases in accordance with the initial arrangements and on 7 July 2010 the State Attorney's office furnished them and the court with a schedule dealing with each of the 252 applications in that list. The schedule reflected the fate, as ascertained at that date, of the applications lodged with the Department. They fell, broadly speaking, into four categories, namely cases where an ID document had been issued; cases where there had been a late registration of birth but an application for the issue of an ID document was required; cases where the department could not trace any application and cases where various queries had arisen and required resolution. A further attempt to resolve these cases outside the framework of litigation failed and in August Goodway & Buck made it clear that their instructions were to have the cases set down for hearing. The only question was whether they should be dealt with in a single hearing or by resuming the previous practice of setting down a few cases each day on the rolls in Durban and Pietermaritzburg. On 25 August the Judge President directed that all the applications, whether lodged in the Pietermaritzburg or the Durban High Court, would be heard together by me on 15 September 2010.

[11] The following directions were given for the hearing of the application:

'1. All cases referred to in the schedule of cases prepared by the office of the State Attorney and annexed to its letter to Judge Wallis dated 7 June 2010 are set down for hearing on 15 September 2010 at 09h30. A separate court will be convened for that purpose distinct from the ordinary Motion Court.

2. The applicants' attorneys are to deliver to the Registrar's office a single notice of set-down to which is annexed a list of the cases and case numbers of the matters covered by these directions. That notice is to be delivered by no later than Friday, 27 August.

3. The Respondent is to file its opposing affidavit or affidavits by no later than noon on 7 September 2010. To avoid prolixity a single affidavit dealing with all matters of general application shall be filed together with such confirmatory affidavits as are needed and will serve as the opposing affidavit in all cases save any specially excluded. Additional affidavits shall only be filed where essential.

4. Matters specific to individual applicants shall so far as possible be dealt with by the Respondent in a single affidavit to which a schedule is annexed generally following the format of the schedule annexed to the State Attorney's letter dated 7 July 2010, but containing such information as the Respondent seeks to have taken into consideration in relation to each applicant.

5. Replying affidavits are to be delivered by 13 September 2010. To the extent that this can be done in a single consolidated affidavit that should be done. In respect of cases where it is accepted by the Respondent that an application was made but the documents have gone astray it will be unnecessary to file replies by the applicants and the general affidavit must deal with the manner in which all such cases should be disposed of.

6. Heads of argument need not be delivered in advance of the hearing but may be handed in from the Bar. Those heads must deal with the following issues:

(a) whether the individual cases should be consolidated;

(b) whether there are general issues common to a number of applications such as missing applications or cases where identity documents have been issued and collected and if so how such matters should be disposed of;

(c) whether the court can, and if so whether it should, treat these cases as a class action and grant a general order applicable to all such cases. If it is submitted that such an order should be granted the basis for and terms of such order should be canvassed.

(d) the proper approach to costs in these applications. In order properly to inform the court on this issue the applicants' attorneys are directed to provide indicative bills of costs drawn from previous cases and duly taxed indicating the quantum of costs and the items including disbursements that are included in bills in cases of this type. It should also indicate in general terms the time involved in taking instructions in cases of this type, who on behalf of the firm undertakes that task and on what basis the applications are prepared ie by whom and what time is involved. '

[12] Argument could not be completed on 15 September 2010 and it accordingly continued on 27 and 29 September 2010, when judgment was reserved. The present judgment deals with the cases emanating from the High Court in Pietermaritzburg and will deal with the principles applicable to these applications and the outcome of the Pietermaritzburg applications. A separate judgment will be prepared to deal with the cases emanating from the Durban High Court. Late in November 2010, when a large part of this judgment was complete and I was awaiting further information from the applicants' attorneys, an application was brought for my recusal in one of the Durban cases.[3] It was agreed between the parties that this would serve as a test case the result of which would affect all cases heard by me. That application was heard on 6 December and in a separate judgment is dismissed. Thereafter this judgment was completed.

ISSUES

[13] Subject to minor variations the orders sought in the notices of motion in these applications are identical. They are framed on the basis

3 Durban Case No 16425/2009, the application of Mbuso Eric Ndlovu.

that these are review proceedings under PAJA. I quote a typical order:

'(1) That the applicant's failure to bring this application within the 180 days stipulated in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") be and is hereby condoned in terms of section 9 of PAJA.

(2) That the second respondent's failure to take decisions on:

(a) the applicant's application for the late registration of birth made in terms of section 9(3)(A) of the Births and Deaths Registration Act 51 of 1992 ["the Births Act"];

(b) the applicant's application for an Identity Document, made in terms of section 15 of the Identification Act 68 of 1997 ("the Identification Act);

be reviewed, in terms of section 6(3)(a) of PAJA and declared unlawful.

(3) That the second respondent be ordered in terms of section 8(2) of PAJA to:

(a) register the applicant's birth; and

(b) issue an identity document to the applicant within 10 (ten) days of date of this Order.

(4) That the respondents be ordered to furnish written proof of the registration of the applicant's birth and issue of the identity document and written details as to when and where such may be collected to the applicant's Attorney within 10 days of the issue thereof.

(5) That the applicant should be granted further, other or alternative relief.

(6) That the respondents should be ordered to pay the costs of this Application.'

[14] The only major variation that I have been able to detect is that in those instances where the applicant's documents reflect an identity number there is no prayer in relation to the late registration of their birth. As far as minor variations are concerned in a few instances the order refers to the issue of a duplicate, replacement or amended identity document. Apart from these differences the relief claimed in all the applications, bar one, is the same. The one exception I discovered was a case where the relief sought related to an application for a change of surname simultaneously with an application for an identity document.[4]

4 Matter 23 on the roll, Case No 8152/2009. The application papers included a printout from the department's website that showed that the application for an identity document was at stage 2. It was

This exception did not make any significant difference to the contents of the application papers

[15] This outward uniformity fractured in the light of the information embodied in the schedules furnished on behalf of the respondents. No fewer than fifteen different draft orders were attached to the heads of argument on behalf of the applicants. Of these five continued to ask for condonation under s 9 of PAJA and for a review of the second respondent's failure to take decisions on the applications for late registration of birth and the issue of identity documents. Three of those five ordered the applicants, by way of consequential relief, to attend at identified offices of the first respondent for the purpose of making further applications or undergoing interviews. Five of the other draft orders asked for no relief by way of review, but provided for the applicants to be ordered to attend at identified offices of the first respondent, either for the purpose of making fresh applications of various types or for the purpose of providing documents or submitting to interviews, in order to finalise existing applications. One required the respondents to make a corrected identity document available for collection. One recorded that the applicant's birth had been registered and authorised the applicant to make a fresh application for the issue of a bar-coded identity document. Three provided for the applications to be adjourned *sine die*, two on the basis that the respondents would be directed to pay the costs jointly and severally and one on the basis that the respondents be directed to pay the costs of contempt applications on an attorney and own client scale. In formulating these different orders reliance was placed on various orders that have over time been taken by consent in applications such as these.

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unclear from this whether the application to alter the applicant's surname had been approved. The department's records reflect the application as a duplicate requiring a fresh application to be made.

[16] Arising from these disparate claims for relief the following issues seem to emerge:

(a) Where condonation is necessarily sought in terms of s 9 of PAJA for the failure to commence proceedings within the time period prescribed in s 8 of PAJA, should it be granted?

(b) In those cases where a review is sought of the failure to take decisions on either an LRB application together with one for the issue of an identity document, or an application for the issue of an identity document (whether initial, duplicate, replacement or amended) alone:-

  (i) has there been such a failure;

  (ii) should such failure be reviewed and declared unlawful; and

  (iii) what consequential relief, if any, should be granted to the applicants?

(c) In those cases where the relief sought is that the applicant attend at the first respondent's offices for various purposes:-

  (i) is that relief competent;

  (ii) should such relief, with the ancillary consequential relief provided in those orders, be granted?

d) In those cases where orders are sought adjourning the application *sine die,* should such orders be granted?

e) What is to happen with the contempt applications?

f) Is it appropriate in some cases to grant declaratory relief?

(f) What order should be made in respect of the costs of the various applications?

[17] Fortunately it is unnecessary in order to determine these issues to analyse each of the separate cases in detail. The reason is that the answers largely emerge from a consideration of issues of general principles. In the

light of those answers it is possible to address each of the individual cases fairly briefly. It is first necessary to deal with the evidence. Before I turn to that it should be recorded that the parties were agreed that it was not appropriate to consolidate the different applications as each one depended on its own facts. They also agreed that it was not appropriate to treat the cases as a class action with a view to formulating a structured interdict to address not only these applications but also any similar cases that may arise in the future.

THE EVIDENCE

[18] The affidavits in support of these applications are in a standard form. The applicant identifies herself or himself and says:

'I make this affidavit pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000, ("PAJA") to compel the respondents to issue and deliver an Identity Document to me.'

Then follows a statement of when and where the applicant was born and an allegation that they are deemed to be a South African citizen by birth. There is then a short paragraph stating whether the applicant's birth has been registered. If it has their identity number is given and a submission is made that their name is recorded in the Population Register.[5] If their birth was not registered there is a terse explanation such as 'I am unsure as to the reason why my birth was not registered' and this is followed by reference to the statutory provisions that oblige the second respondent to register births and include the person's details in the population register.[6] (These cases, where relief is sought in relation to the late registration of the applicant's birth, are referred to as LRB applications.)

5 Under s 5 of the Identification Act 68 of 1997.
6 Under the Births and Deaths Registration Act 51 of 1992

[19] The applicants record that they were obliged to apply for an identity document within 30 days of attaining the age of 16. Almost invariably they were older than that when they applied and they explain their failure to apply then by saying that they were not advised or instructed to do so earlier. They identify the second respondent as the functionary responsible for issuing identity documents. Where the case deals with an LRB application four standard paragraphs follow setting out the legal requirements that must be satisfied for a late registration of birth. In all cases it is said that the applicant applied for an identity document. Where their birth had not been registered they say that this was together with an LRB application or not. The date on which and place at which application was made is stated. The applicants either state that they completed a form or forms, or that they were assisted by an official to complete a form or forms. A receipt is annexed to the affidavit. In some cases there are several receipts in respect of several separate applications[7] and in some others the applicant says that they have previously applied but do not have the receipt.[8]

[20] As noted in *Sibiya* these receipts are less than satisfactory and frequently do not tie in with the factual allegations made in the affidavit. The most common problem is that they do not clearly identify whether what is applied for is an identity document or a late registration of the applicant's birth or both of these. In many instances the receipt does not say what application has been made. In others, although the applicant has an identity number, so that presumably their birth was registered, the receipt reflects that it is an application for late registration of birth. In

7 No 55, Case No 10040/09, is such a case where there were 5 receipts. It was unclear which of these applications was the subject of the review proceedings.
8No 18, Case No 10767/2009, is an example of this where the applicant says that she applied in each of the years from 2003 to 2007 but lost the receipts. There is no indication in the papers whether this might itself have been a cause of delay.

others, although the applicant says it was a first application for an identity document the receipt reflects the payment of a fee in respect of the re-issue of an identity document. From this one infers that they applied for either a replacement or a duplicate identity document. It is rare for the receipt to reflect that the application is for the re-issue of an identity document although some of the cases are of this nature. In the case of LRB applications the receipt usually does not indicate what documents accompanied the application and whether such documents satisfied the requirements of the relevant regulations.

[21] Whatever information is given in the affidavit or reflected in the receipt the applicant invariably goes on to say that he or she has returned on a number of occasions to the appropriate office on dates that they do not recall and on each occasion were told that their identity documents was not yet ready. The affidavits then proceed as follows:

'I have at no stage been informed as to whether the respondents require any further details from me or as to what I can do to accelerate the process'

and

'I am still not in receipt of my identity document. I respectfully submit that the second respondent has had a reasonable time within which to issue me with an identity document and that the delay can only be attributed to his failure to make a decision as to whether or not to issue me with such identity document.'

[22] The affidavits refer to PAJA and allege that because of the applicant's residence within the area of jurisdiction of the court it has jurisdiction to hear the application. Then follow allegations in regard to prejudice. In some instances the applicant provides a few details of difficulties experienced as a result of not having an identification document, such as inability to obtain a child support grant or to provide proof of identity to a potential employer. In most instances, however, the

allegations of prejudice are relatively standard referring generally to the need to have an identity document to secure employment, open a bank account, vote in the next elections, take out insurance policies and register a marriage or the birth of children.

[23] The provisions of PAJA, more particularly s 6(2)(g) thereof and the related sections namely, ss 6(3)(a), 7(2)(a) and 7(1)(b) are summarised. Section 7(1)(b) provides that proceedings for judicial review be instituted not later than 180 days after the date on which the applicant might reasonably have been expected to have become aware of the failure to make the relevant decisions that are the subject of the proceedings. Then follows in every case this curious paragraph:

'I respectfully submit that, as I have received no communication from the Respondents as to why no decision has been made on my application for the issue of an identity document, I accordingly could not possibly have become aware of any such failure to make a decision or the reasons for such failure by a fixed or ascertainable date.'

There is no endeavour by any of the applicants to state when they regarded the delay as having become unreasonable. Be that as it may in every case, irrespective of what period of time has elapsed (and in a number of cases the period is clearly less than the 180 days provided in s 7(1)(b) of PAJA) an application for condonation is made. The allegations in support of that application are virtually identical in every case.

[24] Lastly the applicant refers to letters of demand sent by their attorney. These letters are in standard form stating only the name and date of birth of the applicant, the date of the application for an identity document and providing a copy of the receipt. Where the applicant has made more than one application and has more than one receipt only one is referred to in

the letter. This appears to be the earliest one even when the latest one is relatively recent.[9] In some cases the assertion is made that the application for an identity document was accompanied by an LRB application. In others, with less confidence, it is said that the application for an identity document was 'probably accompanied' by such an application. In these latter cases the attorney's diffidence is not mirrored in the founding affidavit, which positively avers that both applications were made. However, for reasons dealt with below, it is debatable whether this allegation is always correct.

[25] In most instances the Department does not respond to these letters. In a few there is a response pointing out the need for applicants who have applied for the late registration of their birth to apply separately for an identity document. In some cases the Department of Home Affairs website has been accessed by the attorneys, usually on the day that the affidavit is sworn, and a copy of the printout is attached to the affidavit. However, it matters not what that printout says. In most instances in the cases before me it says that the application has been 'captured at our office (step 1 of 4)' or 'is at Head Office Pretoria for processing (step 2 of 4)'. There is no attempt to explain what this means. No enquiry follows upon this information. In some instances the information on the website is inconsistent in that on an earlier date it shows that the application has reached stage 2 and then on a later date it reverts to showing that it is only at stage 1. On the other hand in a few cases it shows that the application is at stage 3, which is the printing of the identity document.[10] Whatever stage the website reflects in relation to the application this makes no

9 In matter 41,Case No 9086/2009, the letter of demand is dated 10 September 2009 and refers to an application made in 2007, notwithstanding the fact that the applicant had been advised by an official to make a fresh application and had done so on 5 August 2009. Her LRB application was approved and an identity document issued presumably pursuant to this latter application. It was collected on 17 May 2010.

10 Matters 53 and 72, Cases No 9117/09 and 10580/09 are examples of this.

difference as it does not generate further enquiries on behalf of the applicant nor does it result in the review being delayed. Indeed in almost all cases where there is a reference to the website the relevant status report was accessed on the day that the founding affidavit was sworn.

[26] The application is always accompanied by a short confirmatory affidavit by an attorney from Goodway & Buck. In a number of cases an affidavit by another attorney, a Ms Oodit, is filed in which she says:

'I confirm the correctness of the Founding Affidavit insofar as same relates to me with regard to the legal advice offered to the Applicant at the initial consultation.'

As there is never a reference in the founding affidavit to an initial consultation with Ms Oodit the relevance of these affidavits is not apparent and could not be explained in argument.

[27] In summary the only information relating to the applicants is in the paragraphs giving their name, address, date of birth, the date and place of the application and, where it was an LRB application, some description of the information that accompanied the application and possibly, although not in most instances, some personal information regarding prejudice. Otherwise the affidavits are entirely standard and in large measure consist of prolix and unnecessary summaries of the relevant legal provisions and submissions in regard to them.

[28] The respondent delivered an affidavit by Mr Norman Ramashia, the Chief Director: Back Office Status Services in the Department. Annexed to that affidavit in accordance with the directions to the parties were schedules dealing with the cases that came before me on 9 March 2010 as well as the 252 cases that were dealt with in the present proceedings. Those reflect the Department's information regarding the status and

outcome of the various applications and divided the applications into the four groups I have already mentioned.

[29] Mr Ramashia says that the Department processes approximately 3 million identity document applications per year. In the three years from August 2007 to the date upon which his affidavit was sworn 12 631 applications similar to those under consideration in this judgment were served upon the State Attorney, KwaZulu-Natal.[11] This gives an indication of the scale of the challenge in dealing with these cases, whilst also indicating that in the overall picture the Department is reasonably successful in fulfilling its obligations in regard to the issue of identity documents. He also described the procedures for applications and problems experienced by the Department.

[30] Prior to 25 April 2008 applicants were entitled to apply simultaneously for the late registration of their birth and the issue of an identity document. This occasioned problems and facilitated fraud resulting in the procedure being amended. Under the new system the intention is that an identity document cannot be applied for or issued immediately or simultaneously with the registration of a person's birth. A two-stage process must be followed in which the person first makes an LRB application and, once their birth has been registered, applies for an identity document. It is helpful to interpose at this point that a number of applications for identity documents in the cases before me were made prior to the change in the system. In addition I was informed from the Bar in the course of argument that the introduction of the new system has not been entirely uniform, with its introduction being more effective in major

11 With this number of cases it is inevitable, even if they are all unopposed, that a backlog will develop as there is insufficient capacity on the motion court rolls to deal with these cases if other matters are also to be heard.

centres than in outlying areas.

[31] Overall the position is not as clear-cut as it should be. In the case of applications made prior to 25 April 2008 the two applications should have been made simultaneously, although this may well not be reflected on the receipts. After that date the position is unclear. In some cases both applications may have been made simulataneously and in others it seems likely that only an LRB application was made.[12] There are nine Pietermaritzburg cases where the departmental response is that an LRB application has been successful and the applicant must now apply for the issue of an identity document. Eight of those applications were made after the introduction of the new system. In some cases the receipts were unclear and in some they clearly related only to an LRB application. Six of the letters of demand asserted that both applications had been made and two said that an application for an identity document was 'probably' accompanied by an LRB application. Nonetheless all of the founding affidavits asserted that both types of application had been made. It seems probable in the light of the department's changed procedure that this was not correct, at least in some cases. One cannot blame the applicants for this confusion, as they are unlikely to have been familiar with the niceties of the two different types of application and probably set out to obtain an identity document without being aware of the need for an LRB application. The situation may well not have been clarified when they applied. The attorneys very often ignored the terms of the receipts and simply produced affidavits making the standard allegations.

12 Matter 4, Case No 8848/09, is a case in point where the application was made on 25 August 2008 and the receipt clearly reflected that it was an LRB application. The department's records show that the applicant's birth had been registered and that she was required to apply for an identity document. This she appears to have done because information made available since the hearing is that an identity document has been issued to her.

[32] It is apparent from Mr Ramashia's affidavit that an LRB application is more difficult to deal with than one for the issue of an identity document. The fingerprints of the applicant and of any person who attests to the facts of their birth are checked on the Department's system in Pretoria. Whilst this ought to take 14 days he concedes that, due to the limited number of staff and the volume of applications, in practice it frequently takes longer. Provided that this generates no queries, the applicant is called for an interview. This involves the verification of the information provided. For reasons that were not explained one of the members of the interviewing committee must hold a post at the level of a deputy director in the Department. This must cause delays, possibly for a significant period, in convening an interviewing committee. Once the date for the interview has been set this has to be conveyed to the applicant by way of an SMS message and many such applicants, particularly those in rural areas may have difficulty in presenting themselves for interviews on the specified day. Thus the potential for delay is inherent in the system.

[33] Once the LRB process has been completed and an application for an identity document is considered the issue of the latter ought to be relatively straightforward because the person's birth has been registered and they have been allocated an identity number. It is difficult to see what further problems can arise as any problems should have been picked up earlier. LRB applications are thus more likely to generate problems. The magnitude of the problem emerges from the following paragraph in Mr Ramashia's affidavit:

'Apart from processing applications before the court in the nine provinces, respondents have had to deal with the backlog in respect of LRB applications. As at 30 April 2010, the KwaZulu-Natal provincial offices was dealing with 14 420 LRB

applications. These included LRB applications which formed part of the backlog. Head Office has allocated 6394 identity numbers and 998 applications have been rejected. As at 1 August 2010 there were 9428 LRB applications. During the course of August 2010 202 of the applications have been rejected and 2530 approved. As at 30 August 2010 8860 still have to be dealt with.'

In the light of this it was no surprise to discover that of the sixteen Pietermaritzburg cases where applications were unresolved because of various forms of query eight involved LRB applications. Most of the remainder were cases of duplicate applications, duplicate fingerprints, cases where the applicant had two identity numbers or cases where the applicant shared an identity number with some other person. All of these require investigation and resolution before an identity document can be issued.

[34] Mr Ramashia's affidavit was prepared in accordance with paragraph 3 of the directives for the hearing of these cases. It was delivered late, only being tendered (and then unsigned) on 15 September 2010, which afforded the applicants no opportunity before the commencement of the hearing to deliver a reply. The applicants consequently objected to its admission. There were, however, two factors that militated against a refusal to rule it inadmissible at that stage. The first was that insofar as it dealt with general matters much of the ground traversed had already been traversed in the affidavits and the judgment in *Sibiya*. Second, insofar as the bulk of the affidavit consisted of the schedules annexed thereto, almost all of the material in those schedules had been available to the applicants since 7 July 2010 when the State Attorney furnished Goodway & Buck with the original schedule, itself prepared from the list of cases made available by Goodway & Buck in April 2010. In addition the schedules, as made available to me at the

hearing, had been updated by Goodway & Buck themselves by the insertion of further information in regard to certain of the applicants. The orders they sought were also based on these schedules. There was no suggestion that the schedules were inaccurate in any respect. In those circumstances I allowed the argument to commence on the basis that the affidavit was provisionally before the court and a decision as to its status could be made when the argument was completed.

[35] As it happened it became apparent at a very early stage that there was no prospect of the argument being completed in one day and I heard argument on two further days during the recess. I was handed lengthy written submissions on behalf of both the applicants and the respondents. At the end of the argument the applicants asked for and were afforded the opportunity to deliver an updated schedule and replying submissions. These were eventually delivered at the end of November 2010, over two months after the completion of argument. The revised schedule ran to 76 pages and the replying submissions to some 300 pages. There has been no objection on behalf of the respondents to my referring to the information contained in this updated schedule, which contains a status report on the applications for identity documents as at the first week of November 2010. In those circumstances there is no purpose in excluding Mr Ramashia's affidavit and it is admitted, as is the further schedule. I will refer to this further schedule from the applicants as 'the final schedule'

[36] The applicants have not sought to reply to the material in Mr Ramashia's affidavit save to the extent that the final schedule contains additional information. Mr Ramashia deposed to the fact that the information was the best information available to the Department regarding the status of the applications. The parties accepted this as is

apparent from the manner in which the argument has progressed and it is the basis upon which this judgment has been prepared, subject only tot the additional information provided in the final schedule.

[37] The written submissions on behalf of the respondents included information and documents that were not otherwise before me. Whilst I have no reason to doubt the accuracy of this information and it was provided in order to assist the court the applicants did not have an opportunity to deal with it and proffer any response. They justifiably complain of this in the replying submissions and say that as it stands this material constitutes inadmissible hearsay. They also complain, again with justification, that a nit-picking approach has been adopted where there is a search for technical non-compliance with the *Sibiya* judgment and a failure to address the core of the problem where ordinary people have made what they understand to be an application for an identity document and have received no adequate response from the Department charged with dealing with that application. They draw attention to attempts to place question marks over the attestation of affidavits and the authenticity of signatures. In some instances enquiries reveal that there were other proceedings brought by these applicants, either through the offices of Goodway & Buck or through other attorneys, which are still pending before either the Durban or Pietermaritzburg court. Ms Sridutt correctly submitted that there may be explanations for this, such as that fresh applications were prepared in the light of *Sibiya* and the need to withdraw the earlier application has been overlooked. To delay proceedings further to enable explanations to be given and further enquiries to be made is contrary to the need for finality in litigation. I have accordingly disregarded this material.

[38] In a number of instances the contents of the schedules prepared on behalf of the Department and updated by the Applicants' attorneys conflict with the factual allegations contained in the application papers. That is not surprising bearing in mind that the applications have been prepared in accordance with a standard template and frequently contain internal contradictions. In my view the proper approach to any such conflicts must be the ordinary approach in opposed motion proceedings, namely that the applications fall to be determined on the basis of those facts in the application papers that are not disputed read together with the allegations on behalf of the respondents.[13] As an illustration of this, where it is unclear from the papers what type of application was made, for example, because the terms of the receipt proffered in support of the allegations in the founding affidavit are inconsistent with the allegations made by the applicant, then unless the information emanating from the Department indicates clearly what type of application was made, it cannot be accepted that both an LRB application and an application for an identity document were made. Where it is admitted that an LRB application was made, but not that an application for an identity document accompanied it, then unless there is proof that the Department is in error in its stance the matter will fall to be dealt with on the footing that only an LRB application was made. Against that factual background I turn to deal with the legal issues raised by these applications.

THE LEGAL BASIS FOR THE APPLICATIONS

[39] The nature of applications such as these was dealt with in *Sibiya*. They are review applications brought under the provisions of s 6(2)(g) of PAJA. Their foundation is the proposition that the second respondent was

13 *Plascon-Evans Paints Limited v van Riebeek Paints Limited* 1984 (#) SA 623 (A) at 634E-635C.

under a legal duty to take a decision on the LRB applications and the applications for the issue of an identity document, or both where they were made simultaneously, and that there has been unreasonable delay in taking the decision.[14] In terms of s 7(1) of PAJA the proceedings for judicial review must themselves be instituted without unreasonable delay and in any event not later than 180 days after the date upon which the applicant became aware of the administrative action or might reasonably have been expected to have become aware of the administrative action. As pointed out in *Sibiya* where the administrative action consists of a failure to take a decision the determination of the date from which the period of 180 days commences to run is a matter of some nicety.[15]

[40] These principles are not disputed by the parties. They have important consequences for the proper determination of a number of the applications. The reason for this flows from the nature of a review based upon s 6(2)(g) of PAJA.

[41] PAJA is the statutory embodiment of the constitutional right to just administrative action, that is, administrative action that is lawful, reasonable and procedurally fair.[16] Administrative law as developed by our courts prior to the constitutional era is now subsumed under the constitutional right to just administrative action and does not exist as a separate body of law alongside the constitutional dispensation.[17] However that does not mean that the administrative law developed by our courts prior to the Constitution and the enactment of PAJA is to be disregarded. It may provide a helpful source to inform and illuminate the particular

14 *Sibiya, supra*, para [18].
15 *Sibiya, supra,* para [16]
16 S 33 of the Constitution. *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), para [22].
17 *Pharmaceutical Manufacturers Association of South Africa: in re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras [33] and [44]

provisions of PAJA.

[42] Without saying that the two overlap entirely, s 6(2)(g) deals with a situation that under the common law would have attracted the remedy known as a *mandamus.* This was an order requiring a public authority to comply with a statutory duty imposed on it or to perform some act to remedy a state of affairs brought about as a result of its own unlawful administrative action.[18] As with the common law *mandamus*, s 6(2)(g) of PAJA deals with the failure by an administrator to take a decision that the administrator is under a legal obligation to take.[19]

[43] Where s 6(2)(g) is invoked and a mandatory order is claimed by way of consequential relief the applicant must demonstrate that the administrator concerned is under a duty to perform the act in question and has failed to do so. This was also the case with a common law *mandamus*. In *Moll v Civil Commissioner of Paarl*[20] De Villiers CJ said about this form of relief:

'The wide power possessed by the Court under our law of interdicting illegal acts implies the power, as pointed out in *New Gordon Co. v Du Toitspan Mining Board* (9 Juta, 154), of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of "mandament." It also implies the power of correcting an illegality committed by such public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality. But it is obvious that relief will not be given where such rights are of a doubtful nature, or where the public officer has acted in the exercise of a discretion left to him, but only where the existence and continued infringement of an absolute legal right have been clearly established.'

When dealing with the appropriate consequential relief in such a case

18 Baxter, *Administrative Law*, 687. At 690 the author gives a number of examples of situations where a *mandamus* was issued to compel a public authority to perform a specific statutory duty.
19 *Offit Enterprises (Pty) Limited and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) para [43] p.259B. Baxter, *supra*, 691, fn 105.
20 (1897) 14 SC 463 at 468.

Greenberg J (as he then was) said:

'… *prima facie*, as the proceedings are based on a complaint that the statutory body has withheld from the aggrieved party the right given to him by statute, it would seem that the more appropriate remedy is to order that he be given that to which he was entitled and which has been withheld; in the present case the applicant's cause of action is not that they were entitled to a certificate but to a proper hearing and exercise of discretion – and *prima facie* the court should grant them what has been withheld.'[21]

I think that these statements of principle are equally applicable to a review under s 6(2)(g) of PAJA.

[44] This has two consequences for the cases under consideration. The first and obvious one is that each applicant was obliged to establish on a balance of probabilities that he or she made either an LRB application or an application for the issue of an identity document or both such applications and that there has been unreasonable delay in responding to those applications. That must at least have been the situation when the application was launched. Otherwise they will have commenced prematurely and without establishing any ground for review at all. It follows that where it emerges that the decision, the failure to take which is the subject of the review, was taken before the commencement of proceedings the application is without foundation and must be dismissed. This is illustrated by the case where the papers show that the identity document was at the stage of being printed when the proceedings were launched.

[45] The second consequence, recognised in those cases where the applicant seeks an adjournment of the application together with an order for costs, is that once it is apparent on the papers that a decision has been made on the relevant application, be it an LRB application or an

21 *Norman Anstey & Co v Johannesburg Municipality* 1928 WLD 235 at 241 – 242.

application for the issue of an identity document, there is no longer a failure to take a decision capable of being reviewed. As De Villiers CJ pointed out relief can only be granted where there is a 'continued infringement' of the applicant's rights. After a decision has been taken on an application for the issue of an identity document, whether the application is successful or unsuccessful, it is no longer possible to review and have declared unlawful the failure to take that decision. That being so no basis for consequential relief to be granted still exists as the grounds of review, upon the basis of which the claim for consequential relief is founded, have fallen away. The whole point of consequential relief in review proceedings is that it is relief that is dependent on the review succeeding. Where the review is based on a failure to take a decision, if the right to that relief falls away because the decision has been taken then there is no longer a legal basis for other relief to be granted. There is certainly no basis for relief to be granted on a footing wholly different from the grounds set out in the application.

THE RELIEF CLAIMED AND OTHER POSSIBLE REMEDIES

[46] Problems arise from these legal principles in those cases where the applicants no longer seek relief by way of a review of the failure to consider their applications of whatever type but claim relief directed at expediting consideration of those applications or consideration of fresh applications. In these instances the proposed order commences with a direction addressed to the applicant rather than the respondents. I take by way of example the order embodied in Annexure 'A15' to the heads of argument on behalf of the applicants, which is an order sought in respect of cases where, according to the schedules, the application has been rejected for one or other reason. Leaving aside the problem that the fact

of rejection reveals that the decision that the applicant wanted made has in fact been made, the suggested order reads as follows:

'1 That the Applicant is required to report to _____ at the Respondents' _____ office [KwaZulu-Natal] for purposes of making an application for late registration of the Applicants' birth, the costs of such application to be borne by the Respondents.'

[47] There is a basic misconception underlying this order. Its aim is to commence a fresh process and to expedite it. It is accordingly no longer based on a review of the failure to consider the original application of whatever type but is aimed at the administrative processing of a new application. In order to get the new process underway an order is given for the applicant to report to one of the Department's offices. That is an order against the applicant not the respondents and, what is more, one sought by the applicant. To sue oneself is an oddity. To ask for and obtain relief against oneself is unprecedented. To do so because the relief originally sought is no longer appropriate illustrates a misunderstanding of the nature of the proceedings from which I have drawn this example. They are not general proceedings directed at securing the presence of the State Attorney and trying to work out a solution to a problem that is then embodied in a court order. They are reviews of the alleged failure of the respondents to take a decision in respect of an LRB application (and possibly an application for an identity document as well). The claim is that the relevant decision should be made. When it transpires that a decision has been made and it is unfavourable to the applicant the order is amended to one ordering *the applicant* to attend at the respondents' offices for the purpose of making a fresh application, which they are perfectly entitled to do without the intervention of the court. The result is an order in which the applicant seeks relief against him or herself. Its

novelty can only be explained on the basis that it has never hitherto been considered to be a proper approach to litigation.

[48] The purpose in seeking such an order is clear. It is to commence a fresh process and then to expedite it by imposing obligations on the respondents. Thus the order I have used as an example proceeds as follows:

'2 That it is recorded that the Respondents shall prioritise the application referred to in paragraph 1 *supra.*

3 That the Respondents will provide the Applicant's attorneys …with written notification … of the issue of the identity number and/or birth certificate in favour of the Applicant.

4 That the Applicant is hereby authorised to make a fresh application for the issue of a bar coded identity document, the costs of the application to be borne by the Respondents.

5 That it is recorded that the respondents shall prioritise the application referred to in paragraph 4 *supra.*'

[49] In other instances where the response of the department is that it is engaged in dealing with an application but requires an interview to be conducted or further information to be obtained the order is adapted to suit the revised situation. Sometimes the applicants persist in seeking a review of the failure to take the decision[22] and in others not.[23] It is not wholly clear on what basis a distinction is drawn between cases where the original relief continues to be sought and those where it is not. In the cases referred to in Schedules 'A4' and 'A8' to the Applicants' heads of argument the Department indicates that it requires the applicants to report for an interview in order to continue to process their applications. The only difference between the two schedules is that 'A4' deals with LRB

22 As in Schedule 'A4'.
23 As in Schedule 'A8'.

and identity document applications and 'A8' deals with applications for duplicate identity documents. I can discern nothing in that distinction for the difference between them in the amended relief. Nor is it clear on what basis in the 'A4' cases the court can be asked to declare a failure to take a decision unlawful and then grant relief directed at the applicant co-operating to enable the decision to be taken. If the Department's requirement of an interview is accepted as necessary, then its failure to take a decision until an interview has been held would not ordinarily involve unreasonable delay.

[50] As a matter of legal principle therefore the applications for amended relief, insofar as they now seek orders against the applicants themselves, are seeking relief that it is not competent for the court to grant. I am aware that such relief has been granted by consent in other cases[24] but that was without any consideration of the relevant legal principles. It is necessary then to consider in greater detail what relief if any is properly available to the applicants and should be granted by the court.

[51] The problem in dealing with these applications is the conviction that many, if not all, of the applicants have been the victims of bureaucratic inefficiency, incompetence and indifference. No other conclusion can be drawn from the fact that in 106 of the 272 cases the response by the Department is that they have no application on record, notwithstanding the fact that in each instance the applicant has put up a receipt emanating from the Department that indicates, at the very least, that either an LRB application or an application for an identity document, was indeed made.[25] No explanation has been proffered for the fact that the

24 On at least one occasion I have done it myself.
25 In some of these cases the final schedule shows that an identity document has been issued but it is not always clear whether this may be pursuant to a fresh application.

Department has no trace of these applications. Nor do I doubt that the applicants have returned to the service points where they made their applications and by and large received no helpful information or response to their enquiries. The criticisms by Ms Chetty, the partner at Goodway & Buck who principally deals with these cases, of the quality of service provided by counter staff at these service points seems entirely justified. The court is naturally sympathetic towards people who find themselves in this situation and would like, if possible, to afford them a remedy that will address the difficulties they have encountered.

[52] However, sympathy alone is not a proper basis for a court to grant orders. The judicial system is, and judges are, subject to constraints. Central to this is that a court is only entitled to grant relief to a litigant if the litigant can show by way of proof on balance of probabilities facts that, when seen in conjunction with applicable legal principles, entitle the litigant to that relief. That is not to say that the court operates in a straitjacket. Where it is clear that a litigant has a legal right and that right has been infringed the court may have to craft a remedy, novel in character, addressed to the litigants' particular situation. In general terms that is what the Constitutional Court was referring to when it said in *Steenkamp NO v Provincial Tender Board, Eastern Cape*[26] that:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper

26 2007 (3) SA 121 (CC) para [29] *per* Moseneke DCJ.

administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for any adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

Broadly stated this encapsulates the notion underlying the Latin maxim *ubi ius, ibi remedium.*

[53] In many instances of deficient administrative action it is relatively straightforward to identify the appropriate remedy. In others it is not. Very often the passage of time and events subsequent to the impugned administrative decision create substantial practical obstacles to providing an effective remedy.[27] The difficulty confronting the applicants in these cases is that with the benefit of further information in a number of instances they no longer require, if they ever did, the relief that they originally sought, nor are they entitled, if they ever were, to such relief. They sought conventional relief by way of a review of the failure to take decisions on LRB applications and applications for the issue of identity documents, with appropriate consequential relief in the form of order directing the second respondent to register their births or issue them with identity documents as the case might be. The facts as they have emerged have rendered that relief inappropriate and there is only one group of cases where it is largely persisted in.[28] They have accordingly changed tack.

27 See in this regard the cases and the discussion in *Moseme Road Construction cc and others v King Civil Engineering Contractors (Pty) Limited and Another* 2010 (4) SA 359 (SCA) paras [9] to [21].
28 That instance was the eight cases referred to in Annexure A6 to the applicants' heads of argument where it was suggested that an appropriate order would be one requiring the second respondent to register the births of the applicants and thereafter facilitate the making of applications for the issue of identity documents.

[54] The formulation of the revised orders is directed at remedying problems and blockages in the administrative process in dealing with these applications. The nature of these has emerged from the information furnished by the Department. However these orders suffer from a number of weaknesses. Many of them involve orders being granted against the applicants themselves. They do not address what is to happen if the applicants do not comply with those orders. The ordinary remedy of contempt of court for non-compliance with an order in *ad factum prastandum* would clearly be inappropriate. The duration of the obligations on the Department is uncertain. How long must they wait for the applicant to arrive for the purpose of an interview, providing information or making a fresh application? In one of these cases the Department called the applicant to an interview in January 2010 and the final schedule reflects that personal circumstances have prevented him from responding to that request. It is not clear what will constitute compliance with an obligation to 'prioritize' an application. In some cases orders were made along these lines and the attorneys contended that compliance therewith was insufficiently expeditious and commenced contempt proceedings. That is an unsatisfactory way of ensuring compliance with a court order.

[55] Is the court then helpless in the face of the bureaucratic inefficiency, incompetence and indifference that I have mentioned? One would hope not but, as I had cause to remark on a previous occasion in relation to a different government department, the court's powers are limited. With the best will in the world it cannot force the employees of the Department of Home Affairs to do their jobs properly.[29] The court cannot direct the department to employ more staff or to get rid of the dead wood in its

29 *Cele v South African Social Security Agency and 22 Related Cases* 2009 (5) SA 105 (D) para [26].

ranks. It cannot require the department to install more efficient tracking systems or devise more effective means of communicating with those who require its services. What remedy then is available to it?

[56] In an illuminating description of the problem Justice Harms said:

'The ideal remedy for an infringement of a social right is the structural interdict (injuction) or *mandamus*. However, these orders have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the State. Then there is the problem of sensible enforcement: the State must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements and all this impacts on enforcement.

These problems justify the use of declaratory orders. Declaratory relief declares what the constitutional standards are and what conduct would meet them. The remedy aims to clarify and not alter. Although the declaration does not regulate the future conduct of parties or clarify their legal position, it is supposed to have the psychological and symbolic effect that a mere finding in the course of a judgment does not.

This means that declaratory orders tend to make a statement but make no real difference to the parties. It is convenient to declare that something done or not done by government was unconstitutional especially if it is impossible to find an answer or if the court order is likely to cross the boundary between the judicial field and the legislative or administrative. The fact that courts have to resort to such orders indicates the limits of judicial authority.'[30]

[57] Ordinarily a declaratory order is a precursor to the grant of consequential relief. Assuming that unlawful and unconstitutional conduct, in the sense of conduct inconsistent with the constitutional right to just administrative action, is established is the court obliged at least to

30 In a paper entitled 'Fashioning Remedies' delivered at the Middle Temple and South African Conference on 'The Rule of Law under a Written and Unwritten Constitution' at the University of Cape Town on 26 September 2010. The paper is available at http://www.middletemple.org.uk/news_& notices/april_2009/Legal_Conference_in_South_Africa.htm.

issue a declaratory order even if no consequential relief is sought or can be granted? This is a question that has recently been considered by the Supreme Court of Appeal and a negative answer was given.[31] The court concluded that declaratory relief is not there for the asking and there must be good and proper reason to grant such relief where it can have no practical purpose.

[58] The appropriateness of granting at least a declaratory order in some of these cases where it is plain that the respondents have breached their obligations in regard to just administrative action needs to be considered against the backdrop of alternative courses available to the applicants. It cannot be said that the applicants were faced with no choice but to bring their applications on that basis as they had no knowledge of the cause of the delays in dealing with the applications they had made to the Department of Home Affairs and were left none the wiser by the lack of response to the letters of demand addressed to the Department on their behalf by their attorneys. The information concerning the applications constitutes a 'record' to which the applicants were entitled to have access in accordance with the provisions of s 11 of the Promotion of Access to Information Act 2 of 2000. That route could have been followed to obtain clear information and formulate a claim accordingly. However it was for the applicants' legal advisers to inform them of this possibility and assist them in following it.

[59] There is justification for the complaint that the applicants are simple people who were left in the dark by the department. In addition the failure by the Department to respond to letters of demand is unacceptable. However that does not warrant an approach to litigation that focuses on

31 *Van der Merwe v NDPP* [2010] ZASCA 129 paras [27] to [34].

getting the opponent's lawyer to court in order to obtain some form of consent order, whether or not justified by the facts. The correct approach is to formulate the client's case properly in advance of the proceedings. It seems to me that declaratory relief should only be granted in those cases where it is possible for the court to grant an order along the lines of a structured interdict[32] that addresses the applicant's problem specifically and is aimed at procuring registration of their birth and ultimately the issue of an identity document. It is unfortunate that the court is limited in this regard but it is a consequence of the constraints under which courts operate and the need to recognise the separation of powers between courts, the executive and the legislature that is fundamental to our Constitution. I am painfully aware that in some instances where the defects in the papers preclude the grant of relief the applicants have probably been badly treated by the Department's officials. However their inability to obtain relief on the papers at present before the court must then be laid at the door of those who prepared and presented their cases.

THE APPLICATIONS

[60] When the final schedule was delivered at the end of November 2010 I was informed that two of the applicants[33] had died and that no relief is sought in their applications. Seven other cases have been settled[34]

32 In *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para [129] it was said: 'The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council* this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary.'

33 Ntombikhona Zulu, Case No 8151/2009, and Delisile Shezi, Case No 10110/09, Nos 30 and 61 on the roll.

34 Matters 2, 23, 24, 25, 27, 28 and 55 the matters of Zoleka Khumalo, Case No 10880/09; Phobeni Letlolo, Case No 8152/09; Akhona Nyawusa, Case No 8153/09; Portia Msomi; Case No 6972/09; Princess Vilakazi, Case No 9110/09;Manthabiseng Mofokeng, Case No 9106/09 and Simphiwe Mgenge, Case No 10040/09.

although the basis for the settlement is not disclosed. Leave was sought to withdraw these cases and there is no reason why that should not be granted as the settlement means that they have been finally disposed of. That leaves the remaining cases to be dealt with in convenient groups.

[61] The first group consists of cases where, irrespective of the form of the application, it is now accepted that the applicant has been issued with an identity document. When the case was argued there were 17 such cases on the roll of Pietermaritzburg cases. Seven more were added in the final schedule. In twenty cases the order sought is that the application be adjourned *sine die* and the respondents be ordered, jointly and severally, to pay the applicant's costs. In four orders had previously been obtained by consent authorising the applicants to make a fresh application for the appropriate identity document and directing the respondents to provide the name of an individual at the relevant office to whom such application should be made. In those four cases it was contended that the respondents had failed timeously to comply with that latter portion of the order. This resulted in contempt proceedings being brought requiring them to appear before the court both to explain their non-compliance and to explain how they intended to comply with the order. In those four cases an order for the payment of costs of the contempt application on an attorney and client scale is sought.

[62] In argument it was submitted that the order for costs should 'follow the result'. In other words it was submitted that because the applicants had obtained their identity documents they were entitled to orders for the costs of the applications. In the case of the contempt applications it was submitted that the orders should be on a punitive scale because of the respondents' contempt.

[63] The difficulty with this approach is that it is not apparent from the evidence that the issue of identity documents to these applicants was causally connected to the bringing of the applications. There was no evidence before me in relation to any application that the effect of bringing the application had been to jolt the Department into action and cause it to issue an identity document. In those cases where an identity document was issued that seems to have occurred in consequence of the Department finally completing the processing of the relevant application or possibly even as a result of a fresh application being made notwithstanding the litigation. This is particularly so with the seven additional cases that emerged with the final schedule. Three of those were cases where the application was under investigation as a possible duplicate. It seems that the problem has been resolved and the identity document issued as a result. In three the Department said that a fresh application had to be made. It is therefore possible that the issue of identity documents to these three people is as a result of their having made fresh applications. As regards the seventh application this concerned an LRB application that had been granted long before the proceedings were commenced. It is probable that the issue of an identity document occurred as a result of a fresh application.

[64] That does not, however, mean that an order for costs should not be granted. If the applicants commenced proceedings in consequence of the unlawful failure of the Department to process their applications the fact that the ultimate issue of an identity document to them was unrelated to the applications cannot mean that they are disentitled from recovering the costs incurred in bringing the applications. As Watermeyer CJ said in

Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd[35]:

'A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of discretion, in an appeal against an order for costs, the Court of Appeal does not judge a party's right to his costs in the Court *a quo* by asking the question *was he the successful party* in that Court. It asks *ought he to have been* the successful party in the Court and decides the question of costs accordingly.'

In accordance with that principle where a decision on the merits of an application is no longer necessary or permissible, for whatever reason, the question of costs is not determined in isolation from the merits.[36] In order to assess the claims for costs orders in these applications it is accordingly necessary to consider whether the applicants were justified in commencing the proceedings.

[65] In all these cases it can be taken that the applicant was entitled to an identity document. Accordingly where they had made an application and what seems on the face of it to be an unduly lengthy time had expired without an identity document being issued to them, my *prima facie* view is that there was an unreasonable delay in dealing with the application. In the absence of any explanation for that delay, in the form of an indication that there were special difficulties attendant upon its consideration that precluded it being dealt with reasonably quickly, the result is that the commencement of proceedings was legitimate. Where it is clear that there has not been an undue delay or where the application is defective for

35 1948 (1) SA 839 (A) at 863.
36 *Erasmus v Grunow* 1980 (2) SA 793 (O) at 798 C-H.

other reasons it was not legitimate to commence those applications.[37] In cases where the commencement of proceedings was legitimate there is a *prima facie* entitlement on the part of the applicants to a favourable order for costs. I will deal with that in the section of the judgment dealing with costs. No other order is necessary in those applications. In cases where the commencement of proceedings was not legitimate the proper order to make is one dismissing the applications.

[66] Four of the cases where an identity document has been furnished to the applicant are cases that had previously come before the court and in which consent orders had been made. All of those consent orders provided for the applicants to make a fresh application. They required the respondents to designate a person at the relevant office to deal with the fresh application. In each it was contended that the respondents had failed timeously to identify such a person and inform Goodway & Buck of that person's identity. It was this failure that grounded the application for contempt. In each application the prior court order has already dealt with the costs of the application and it is not within my remit, even if I were minded to do so, to interfere with those orders. Nor were the respondents entitled to disregard those orders.[38] The only issue before me is whether it was appropriate to bring the contempt applications.

[67] In one application[39] the answer is clearly in the negative. The reason is that by the time the contempt application was commenced the applicant's birth had been registered and an identity document issued. The review application was commenced on 9 October 2009 and only came before the court on 17 November 2009. The LRB application had

37 C/f *Teasdale v HSBC Bank plc and other applications* [2010] 4 All ER 630 (QBD) at para [3].
38 *Els v Weideman* [2010] ZASCA 155.
39 That of Noxolo Ngcobo, Case No 8833/09, no 56 on the Pietermaritzburg roll.

been granted and the identity document issued by 19 October 2009, although the applicant apparently only collected it on 26 February 2010. It is not clear in those circumstances on what basis the contempt application was brought as it was supported only by an affidavit by the attorney. Perhaps the attorney was unaware of the client's situation. This is not dealt with in the final schedule.

[68] The other three contempt applications[40] stand on a different footing. The identity documents in those cases were issued respectively on 9 April 2010, 20 July 2010 and in August 2010. That was several months after the court orders and the commencement of the contempt proceedings. That raises the question whether such an application is permissible. In *Jayiya v MEC for Welfare, Eastern Cape and Another*[41] the court considered an application to commit the Permanent Secretary: Welfare of the Eastern Cape Provincial Government for contempt of court for failing to comply with an order relating to the payment of a social grant. The problem considered by the court was whether contempt proceedings could be used to enforce a money judgment against the State or a provincial government.[42] The court held that it could not. Its reasoning was two-fold. First it held that an obligation to pay a social grant is an order for the payment of money (*ad pecuniam solvendam*) to which the prohibition on 'execution, attachment or like process' being issued against the nominal respondent (the second respondent) contained in s 3 of the State Liability Act 20 of 1957 applied. It is not a permissible extension of the common law to try and circumvent that by characterising the order as one for the performance of an act (*ad factum praestandum*).

40 Matters 64, 69 and 65 the cases of Samekeliswe Chili, Case No 9088/2009; Mthokozisi Ntshangase, Case No 9085/2009 and Thandazile Mdluli, Case No 9084/2009.
41 2004 (2) SA 611 (SCA).
42 Para [14]

Second contempt of court, even civil contempt, is a criminal offence[43] and the effect of treating such an order as one *ad factum prastandum* is to create criminal liability retrospectively, which is impermissible in terms of the Constitution.

[69] The problem raised in *Jayiya* has since been resolved by permitting, subject to limited conditions and pending legislation, execution against the State on monetary judgments.[44] The issue raised in these cases is of a failure to perform an act in terms of an order *ad factum prastandum*. To that extent they are plainly distinguishable. The reasoning in *Jayiya* was subject to consideration in a lengthy *obiter dictum* by Froneman J in *Kate v MEC for the Department of Welfare, Eastern Cape*.[45] The learned judge came to the conclusion that it did not preclude 'an adapted common-law rule of civil contempt, shorn of its criminal elements of punishment, in the form of a declaratory order that a State functionary is in contempt of a court order'.[46] Froneman J also held that it is permissible for a court to call upon State functionaries to explain why they have not complied with court orders and to require them to explain how they intend complying with those orders in the future. On appeal, the SCA expressly declined to reconsider *Jayiya* or the comments by Froneman J because:

'To add to the non-binding statements that were made in that case and in the Court below will only add to any uncertainty.'[47]

The question whether one can have purely civil proceedings for contempt of court and whether the approach suggested in *Kate* is permissible therefore remains unresolved.[48] It was not addressed by the Constitutional

43 *S v Beyers* 1968 (3) SA 70 (A).
44 *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) as read with *Minister for Justice and Constitutional Development v Nyathi and Others* 2010 (4) SA 567 (CC).
45 2005 (1) SA 141 (SECLD) paras [15] – [27].
46 Para [21], p.156 F-G.
47 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para [19].
48 The decision was dissented from in *Matiso and Others v Minister of Defence* 2005 (6) SA 267 (TkD) at paras [12] and [13].

Court in *Nyathi.*[49]

[70] The contempt applications before me had some support in the authorities even though there was no decisive ruling on the issue. The question is one of considerable difficulty in which it would be helpful to explore the approach in other jurisdictions.[50] I think it undesirable to determine these questions when the issue of contempt has become moot. I prefer to adopt the approach that there was non-compliance with the court order and support could be found for bringing contempt proceedings in the judgment in *Kate*. The applicants should not be penalised for taking this step. The question of what order for costs should be granted in these cases will then be dealt with in the section of the judgment dealing with costs. There is one other contempt application[51] where an order has already been granted authorising the applicant to re-apply for an identity document. The applicant seeks the same order from me but it would be otiose to grant it. That leaves only the question of costs to be dealt with together with the other cases of this type. I turn then to deal with the remaining applications in this category.

[71] In one application[52] an order was granted on 6 April 2010 directing the respondents to pay the costs of the application jointly and severally the one paying the other to be absolved. Annexure D to the applicants' heads of argument indicates that certain costs were reserved on 25 November 2009 when the matter first came before the court. Whilst

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49 Although in para [43] Madala J, who gave the judgment of the court, quoted with seeming approval the two decisions in lower courts that had been disapproved in *Jayiya*.
50 In *Kate*, Froneman J pointed out that in one of the earlier decisions Jafta J had made reference to the speech of Lord Woolf in *M v Home Office* [1993] 3 All ER 537 (HL) at 567 a-h. However our law of contempt of court is not the same as that of England (*S v Beyers*, *supra,* 76 G-H) and even in that jurisdiction the distinction between civil contempt and criminal contempt has been described as unhelpful or largely meaningless. *A-G v Times Newspapers Ltd* [1991] 2 All ER 398 at 414-415.
51 No 70, Zamantusi Ncube, Case No 8843/2009.
52 That of Tholani Bhengu, Case No.8848/2009, No.4 on the Roll.

that is correct the order granted on 6 April 2010 encompasses those costs because it requires the respondents to pay all the costs of the application. There is accordingly no further room for any order to be made in that case.

[72] Of the remaining cases in this group there are seven[53] where the commencement of proceedings was justified on the facts before me. In three cases where I was originally told that identity documents had been issued the application for an identity document had been made more than a year prior to the approach to the attorneys and long before identity documents were issued. That is an unreasonable delay. Three involved queries that the applications were duplicates and an inordinate amount of time appears to have elapsed in dealing with the queries. Two were cases where the Department simply said that they had no trace of an application and the applicant should re-apply. In one an order was taken and contempt proceedings were commenced. In the other it is possible that a fresh application was made but that is no excuse for the Department having lost the original application. In all cases there was no adequate response to the attorney's letters and the identity documents were only issued some months after the commencement of the litigation. Whilst each application can be criticised for inaccuracies and deficiencies and in none of them was there an endeavour to obtain the requisite information by the available statutory means, my view is that the length of the delays and the unhelpful response received from officials of the Department when queries were made, means that there was on the face of it a justification for commencing review proceedings on the basis that there was an unreasonable delay in determining the applications. In those seven

53 Nos 10, 15, 18, 40, 43, 62 and 67 being those of Nlonnipho Ngcobo, Case No 7582/2009; Thobani Ncube, Case No 8839/2009; Zanele Sithole, Case No.10767/09, Bongani Ndlovu, Case No 9118/2009; Selani Mthethwa, Case No.10180/09; Allenridge Makhoba, Case No 8903/2009 and Philani Ndlovu, Case No.8902/09, No.67 on the roll.

applications therefore the only question that remains is the question of costs to be dealt with in the section of the judgment devoted to that topic.

[73] That leaves the remaining twelve cases. In my view each of the applications was from the outset fatally defective. I will, as briefly as possible, indicate why.

(a) Patheni Mthembu, Case No.7512/09, No 6 on the roll

The applicant sought a re-issue of her identity document on two separate occasions. The first was on 3 June 2008 and the second on 9 June 2009, after she had been advised by an official of the Department to make a fresh application. The attorney's letter of demand is dated 10 July 2009 and is based solely on the earlier application. There was an unhelpful response from the Department dealing with LRB applications (of which this was not one) that prompted the following, equally unhelpful, reply:

'We respectfully place on record that annexure A to our letter dated 10 July 2009, is a clear indication that our client's application for an Identity Document was accepted by your Tongaat offices. Accordingly, your designated official is deemed to have adequately dealt with the requisite documentation at that point in time.'

The application was launched on 31 August 2009. The Department's website at that time showed that the application – presumably the second application – was being processed in Pretoria. It is unclear from the application papers whether the review relates to the first application for an identity document or the second. In the light of the letter of demand it was presumably the first application, but that had been supplanted by the second. Where an applicant makes more than one application for an identity document, the ordinary inference will be that the Department is dealing with the most recent application and the earlier ones have been abandoned. Because the application appeared to relate to the first application which had been abandoned, not the second, and because in

relation to the latter an unreasonable period of time had not elapsed from the date on which it was made the application was not justified. I mention that when the application came to court on 12 November 2009 and was adjourned for opposing affidavits to be filed the applicant had received her identity document the previous day although the court was not told that. According to the final schedule the reason is that the applicant only informed the attorneys of that fact after the hearing. They in turn notified the State Attorney on 10 December and sought an undertaking to pay the costs of the application.

(b) Cebile Luthuli, Case No.8846/09, No 7 on the roll

In this case the applicant's identity document was issued on 7 October 2009. The application was brought two days later on 9 October 2009. It was accordingly without foundation from its inception because the decisions that were alleged not to have been taken and were the subject of the review had in fact been taken.

(c) Zakhe Zondi, Case No.8840/09, No.13 on the roll.

This was clearly an LRB application, although the receipt reflected an application for an identity document and the letter of demand treats it as such saying only that:

'Accompanying the above application was in all probability an application for the late registration of the applicant's birth.'

The difficulty is that the applicant's birth was registered on 7 November 2008, long before the commencement of review proceedings on 12 October 2009. According to the affidavit of the respondents the applicant would have been informed of that fact by SMS and requested to make an application for the issue of an identity document. It was not open to him in those circumstances to seek a review of the failure to deal with his LRB application. The subsequent issue of an identity document is almost certainly the result of a fresh application.

d) Nosikhumbule Nqabeni, Case No 9115/2009, No 17 on the roll.

This was an LRB application made on 28 January 2009 according to the receipt but it was treated as also being an application for the issue of an identity document. The letter of demand is dated 26 August 2009 and demands the issue of an identity document even though no such application had been made and this was perfectly clear. An identity document was issued and collected in July 2010 but the attorneys only ascertained this on 7 October 2010. It seems probable that this was pursuant to a fresh application. In my view it cannot be said that there was justification in bringing the application.

(e) Khulekani Cebekhulu, Case No.10768/2009, No 20 on the roll.

The applicant's identity document was issued on 7 October 2009 and the application was commenced on 9 December 2009. Like a previous case it was therefore unfounded from its inception. Although the applicant collected his identity document on 18 December 2009, the application was set down for hearing on 21 January 2010 without that information being placed before the court.

(f) Hloniphile Mabasa, Case No.582/10, No 35 on the roll.

The applicant made an LRB application on 4 September 2009. The receipt annexed to the founding affidavit is clearly marked as an LRB application and not an application for an identity document. Nonetheless on 27 November 2009 the attorneys addressed a letter of demand to the Department saying that an application for an identity document had been made in March 2009. There was a reply to that letter received by Goodway & Buck on 20 January 2010 saying that the Department was investigating and would revert. The reply was attached to the founding affidavit, which nonetheless claimed that the applicant had not received any response to the demand from the attorneys. The application was launched on 22 January 2010 and five days later the applicant's birth was

registered. The Department says that on 23 August 2010 an identity document was issued, but that must have been pursuant to a separate application, and there is a dispute arising from the absence of an entry on the Department's website. Plainly there was no foundation for the complaint that there had been an unreasonable delay in dealing with the LRB application and the application was unfounded.

(g) Mtokozo Zondi, Case No.10325/09, No 37 on the roll.

This application involved a duplication of the applicant's identity number. A letter of demand was sent on 15 October 2009 and proceedings were commenced on 24 November 2009. The identity document was issued on 25 March 2010, but that was done pursuant to an application made on 15 March 2010, not to the earlier applications. Clearly the applicant was operating independently of her attorneys in making this further application. As by doing so she abandoned the earlier applications it seems to me that she also abandoned the proceedings.

(h) Thabile Dimba, Case No.9086/09, No 41 on the roll

The applicant originally made an application in 2007 but was advised by an official of the Department in August 2009, prior to her consulting with her attorneys, to make a fresh application, which she did. The receipt in respect of that application is dated 5 August 2009. Nonetheless the letter of demand dated 10 September 2009, a mere five weeks later, relates to the earlier application and in the founding affidavit the following is said:

'I do not believe that this fresh application is the one that the Department ought to finalise as my early application was in 2007, the Department has had more than sufficient time to process and finalise that application especially due to the fact that I had submitted all the necessary information and documentation relating to such an application.'

Fortunately for the applicant the Department disregarded this statement and processed the later LRB application and an application for an identity

document, which was collected on 17 May 2010. Clearly it was impermissible to commence proceedings on the grounds of unreasonable delay on 19 October 2009 in relation to an application made a little over two months earlier. The attempt to base the application on the earlier 2007 application for an identity document founders because it had been supplanted by the August 2009 application.

(i) Samkelisiwe Ncube, Case No.9458/09, No 47 on the roll

The applicant applied for the re-issue of an identity document on 17 May 2008. Thereafter she was told that there had been a duplication of identity numbers and was advised to make a fresh application which she did on 12 May 2009. The letter of demand is dated 17 September 2009, only four months later and the review proceedings were commenced on 26 October 2009. The applicant's identity document was issued on 19 November 2009, but when the matter came before the court on 14 December 2009, a consent order was taken providing for the filing of opposing affidavits, without that information being placed before the court. Where a mere six months elapsed from the date of making the fresh application until the issue of the identity document in a case involving a duplicate identity number, there was no unreasonable delay.

(j) Luckyboy Mtshali, Case No.9117/09, No 53 on the roll

It is unnecessary to traverse the history of this application as one of the annexures to the founding affidavit is an extract from the Department's website stating that:

'Your ID book is being printed at head office, Pretoria (step 3 of 4).'

Clearly therefore a decision had been taken in relation to the application and there were no grounds for seeking to review the non-existent failure to take that decision. The application was fatally defective from the outset.

(k) Zakhele Madlala, Case No.8429/09, No 59 on the roll

The applicant made an LRB application on 13 March 2009. That is clearly recorded on the receipt. Nonetheless in a letter of demand dated 31 July 2009 it was stated that he had applied for an identity document and;

'Accompanying the above application was in all probability an application for the late registration of the applicant's birth.'

That was not supported by the receipt. The applicant applied separately for an identity document on 4 September 2009. This was issued on 16 September 2009 and collected on 4 November 2009. No doubt this second application was made in accordance with the two-stage procedure reflected in the affidavit of Mr Ramashia. Notwithstanding those fact the founding affidavit was sworn on 28 September 2009 and the application was lodged the following day. It came before the court on 2 November 2009, by which stage the applicant must have been aware that his identity document was available for collection, but this was not disclosed to the court and an order was taken, including an order to pay wasted costs, providing for the adjournment of the case and the filing of further affidavits. On any basis there was no undue delay in dealing with either the LRB application or the application for the issue of an identity document. (In the final schedule I was informed that the matter is not proceeding and should be removed from the roll but I was not told the basis for this. In the light of my conclusion it is safer to dismiss the application.)

(l) Nomathemba Mthembu, Case No.10580/09, No.72 on the roll.

Again there is no need to canvass the details of this application as annexed to the founding affidavit was an extract from the Department's website dated on the day the founding affidavit was sworn and the application commenced saying that the applicant's ID book was being printed in Pretoria. The application was fatally defective from the outset.

[74] These applications were defective from the outset. Other than the information concerning the dates when LRB applications were approved or identity documents issued the information on the basis of which I find that they were defective was contained in the founding affidavit. Although they have become academic in view of the fact that the applicants have received their identity documents they should formally be dismissed in the light of the conclusions set out above and an order to that effect will be made. The next group of applications is cases where an LRB application has been granted and it is accepted (although the applications were all brought on the footing that both an LRB application and an application for an identity document had been made) that the applicants must now apply for the issue of an identity document. There are six such cases.

[75] In one case[54] no order is necessary or permissible. Two consent orders have already been granted that deal with all the costs. The receipt reflects that the only application made was an LRB application and that has been granted. No further order can be made as the issues between the parties have been finally resolved. It is for the applicant, if she has not already done so, to apply for the issue of an identity document.

[76] In three cases[55] there was an unreasonable delay in dealing with the applicants' LRB applications. In two of them over a year elapsed between the making of the LRB application and the commencement of proceedings and in the third case the period was eight months. The registration of the applicants' births appears to have taken place some

54 No 26, Nonkosi Hlengwa, Case No.9108/09.
55 Nos 8, 9 and 34. being those of Sizwe Cele, Case No.8844/09; Sibongile Mkhize, Case No.8830/09 and Zodwa Mthimkhulu, Case No.10111/09.

time after the commencement of proceedings. There is no indication that there were special difficulties in dealing with the applications. They accordingly fall to be treated as cases where the commencement of proceedings was *prima facie* justified leaving only the question of costs to be dealt with later in this judgment.

[77] In the other two cases the commencement of proceedings was not justified for the reasons that follow and they should be dismissed:

(a) Zama Mjilo, Case No.8424/09, No.31 on the roll.

The applicant made his application on 2 February 2009 after the introduction of the bifurcated system of applications. The receipt tendered is blank and does not indicate what kind of application was made. The letter of demand was written a little over five months later on 31 July 2009 and the LRB application was approved on 28 September 2009. Although the application was commenced two weeks before that on 15 September 2009 I am not satisfied that there was undue delay in dealing with the LRB application as the period that had elapsed was considerably shorter than the period in the other cases before me. I am accordingly not satisfied that the commencement of proceedings was justified.

(b) Mbali Mchunu, Case No.8422/09, No.60 on the roll.

In this case the application made on 5 February 2009 was an LRB application. Notwithstanding that, the letter of demand dated 7 July 2009 described it as an application for an identity document together with an LRB application. The response to the letter of demand dated 31 July 2009 dealt with the system in respect of LRB applications and the fact that it was separate from applications for identity documents. It justifiably complained, bearing in mind the discrepancy between the letter of demand and the receipt, that the information in the letter of demand was

vague. This provoked the retort that the letter of demand 'clearly indicates that there was an application for the late registration of birth' and that 'it is clear that you do not intend on assisting our client with the application/s at hand'. There was no justification for the attorneys adopting that stance and commencing proceedings on 26 October 2009.

[78] The next group of cases consists of eleven matters where, for one or other reason, there are problems with the applicants' applications. In two instances[56] the Department's records show that the screening committee rejected the LRB application. In both cases there is an indication that the applicant is to be interviewed, which suggests that this was a preliminary, not a final, decision. In the case of Mr Majola his application was made on 26 February 2009 and the receipt is unhelpful. There is no indication of the date on which his application was rejected or what was done to communicate this decision to him. The usual method of communication, according to the affidavits, is by way of cellphone messages but nothing has been placed before me in this regard. I am told that there was no communication with the attorneys. The review proceedings commenced in January 2010. It is unclear from material in the parties' submissions whether he made a fresh application thereafter but they appear to agree that his birth was registered on 6 August 2010.[57] It is unclear whether he has subsequently applied for an identity document. The situation is so beset by confusion that I am not satisfied that the commencement of proceedings was justified.

[79] Ms Zuma's application confronts the court with a clear dispute of fact. The Department say that the LRB application was rejected on

56 Nos 36 and 38. Mazwi Majola, Case NO 581/2010 and Buyeliwe Zuma, Case No 10326/2009.
57 The replying submissions object to this information as contained in the respondent's submissions but proceed to accept that the applicant's birth was registered. I accordingly take account only of the latter fact on the basis that it is common cause.

17 April 2009, prior to the commencement of the review proceedings. They say that the applicant was called to, but did not attend, an interview. The applicant disputes this. As with the previous case the order now sought is one ordering the applicant to attend to make a fresh LRB application and authorising her thereafter to make an application for an identity document. For the reasons I have given that cannot be granted. Again I am unable to say that the commencement of proceedings was justified. It seems to me that both applications must fail.

[80] Five other cases in this group fall to be dismissed. In one[58] the Department says that she needs to be interviewed arising out of her application. According to the final schedule she is not contactable by the attorneys on the given telephone number. In those circumstances it is not possible to conclude that the delay is occasioned by any failure on the part of the Department. In the second[59] the applicant also needed to be interviewed. According to the final schedule he was told of this in January 2010 but had been unable to attend an interview in the 10 months since then because of his mother's work commitments. Whilst I understand the problems that this may occasion it is difficult in those circumstances to say that the delay is occasioned by the Department's administrative failings. Number 22 on the roll[60] involved an application made in 2003 and proceedings commenced six years later. The Department's response is that the identity document was destroyed in 2004 because of a problem with photographs and that no response was received from the applicant. Other than saying that the client has been told to re-apply nothing more is said on his behalf. On the face of it the application is misconceived. The fourth and fifth cases[61] relate to

58 No 54, Hloniphani Gumede, Case No 8847/2009.
59 No 68, Innocent Gumede, Case No 9121/2009.
60 Skholiwe Mzila, Case No 7752/2009.
61No 39, Kwangaphandle Zondo, Case No 9087/2009 and No 58, Jabu Mbele, case No 9119/2009..

applications made in 2002 and 2003 respectively, where the proceedings were brought in 2009 and the applicants are no longer in contact with the attorneys. It is plain that the applicants did not pursue their applications timeously and in the light of the passage of time the Department cannot be blamed if it can no longer trace the applications, which may well have been disposed of on perfectly legitimate grounds. These are cases where condonation is clearly necessary and it should not be granted.

[81] The sixth case[62] is one where hopeless confusion reigns. The application was an LRB application as the receipt clearly shows. The receipt is in the form BI-25, which is a form used solely in respect of LRB applications. Nonetheless the letter of demand and the founding affidavit say that the application was for an identity document, accompanied by an LRB application. This cannot have been an oversight but involves a deliberate disregard of the contents of the receipt. There was no response to the letter and when the matter came before court on 26 November 2009 an order was taken by consent authorising the applicant to make a fresh application for a duplicate identity document. As he had never had an identity document nor made an application for one this was a *brutum fulmen.* Thereafter a contempt application was brought on the grounds that there had been undue delay in advising the attorneys of the name of the person who would attend to this fresh (and both pointless and impermissible) application. This is the application before me. To conclude this sorry tale I was told that the applicant had gone for an interview in March 2010, although it was unclear whether in respect of the original application or a fresh one. The order sought was that he report to the Department's offices for the purpose of making a fresh LRB application. Responsibility for this state of affairs must in

62 No 50, Maxwell Nkala, case No 8877/2009.

large measure be placed at the door of the applicant's legal representatives who appear to have given no thought to the documents actually in their possession or to what relief would be appropriate. It leaves me confronted with a contempt application arising from an order that should not have been sought or granted. The application must be dismissed.

[82] In each of the other four cases the applicants are in my view entitled to some relief although precisely what that should be is not clear. Mr Thusi[63] made an application on 5 June 2008. Although he says that this was an application for an identity document as well as the late registration of his birth it seems probable from the annexures to his affidavit that this was only an LRB application. Contrary to all the indications the letter of demand said only that 'in all probability' his application for an identity document was accompanied by an LRB application. When this received the response that Mr Thusi needed to make an LRB application the unhelpful reply was that 'our letter clearly stated that in all probability' he had made such an application. Proceedings were commenced on 24 August 2009. His attorneys received a letter requesting him to make a fresh LRB application and in addition an order was granted on 1 April 2010 authorising him to make a fresh LRB application (to be followed by a fresh application for an identity document). Such an application was made on 9 April 2010. He has not yet received any response to that application. Properly analysed this is not a case of a completely fresh application but of a continuous process to which the Department was a party in consequence of its request. No excuse is proffered for the failure to deal with the initial application nor for the time it has taken to deal with the application made on 9 April 2010. In those circumstances a case

63 Maxwell Thusi, Case No 7208/2009, No 1 on the roll.

is made for relief. What that should be is addressed in the next paragraph.

[83] I do not think that Mr Thusi requires condonation, although if he did I would grant it. He is entitled to an order reviewing and declaring unlawful the failure by the respondents to take a decision in relation to his original LRB application as replaced by the application on 9 April 2010. The main difficulty lies with determining the appropriate consequential relief to address and resolve his complaint. I do not think that I should order the Department to register his birth as there may be difficulties that I am unaware of that must be resolved before that can be done. As regards the remaining suggested relief that he be authorised to make a fresh application for an identity document and that this be prioritised it is impermissible for the simple reason that he does not appear ever to have made such an application, although he may be under the genuine impression that he has. It is also desirable that further attempts to force the Department to act by way of contempt applications should be avoided, both because it is debatable whether that is permissible and because it is wasteful of costs and court time and distracts from the real issue in dispute. That may be avoided by requiring the respondents to report directly to the court in regard to the application. That can be done by requiring it to deliver an affidavit dealing with the outcome of the application; the reasons for the delay if the application has not yet been determined and, in that event, the steps being taken by the Department to resolve any queries and take a decision on the application. The application can then be adjourned for a period to enable such affidavit to be delivered. If by the date of the adjournment the application has been finally resolved and both Mr Thusi and his attorneys have been advised on the outcome it will be unnecessary to file the contemplated affidavit. As to the costs they will be dealt with in the section of the judgment

dealing with costs.

[84] Mr Samora Sibisi's application[64] stands on much the same footing and follows the same pattern. An LRB application made on 9 January 2009 is said to be an application for an identity document 'in all probability' accompanied by an LRB application. The Department responds by saying that an LRB application is necessary and receives the same unhelpful reply. Proceedings were commenced on 9 October 2009 and on 12 December 2009 the application was sent to Pretoria for the allocation of an identity number. Nothing more has happened since. That is an unacceptable delay to add to the 11 months he had already been waiting. A similar order should be made. No condonation is necessary as the application was clearly brought within the required period of 180 days.

[85] Mr Sibusiso Mthabela[65] applied for an identity document on 11 May 2009. He says that he had applied on a number of previous occasions without success. The receipt in his possession is marked 'duplicate case' This requires that he be interviewed but by the time he commenced his application on 4 November 2009 no contact had apparently been made with him in this regard. The Department says that his attorneys were informed of the duplication on 16 February 2010 with follow-up letter on 26 March and 22 April 2010. I have not been shown a copy of the letters but I am told that the Department's Ladysmith office informed Mr Mthabela that they would contact the attorneys to set up an interview but this has not been done. The Department's website simply reflects that his application has been sent to Pretoria for processing. Again it seems to me that the delay has been unreasonable and that he is

64 No 11, Case No 8831/2009.
65 No 44, Case No 9739/2009.

entitled to some relief. No condonation is necessary as the application was brought timeously. An order similar to those in the two previous cases is in my view appropriate.

[86] In the last case, that of Ms Nhlanhla Ndlovu,[66] there is a dispute of fact that cannot be resolved at this stage. On 3 November 2008 she made what must have been, from her description of it, an LRB application, although as in the other cases the letter of demand says that it was an application for an identity document accompanied 'in all probability' by an LRB application. The department says that she has been called several times for an interview and has not responded. She denies that she has received any message asking her to attend an interview and claims that her enquiries at the Department's offices have simply resulted in her being told that her identity document is not ready. If she is correct in this then there has been unreasonable delay in dealing with her application. If the fault lies in her failure to respond to messages requesting her to attend an interview then her complaint is not well-founded. Whilst neither side asked for a reference to oral evidence that is the only fair way of resolving this dispute. In order to further define and narrow the issues the respondents will be ordered to deliver a further affidavit setting out when and in what manner Ms Ndlovu was requested to attend an interview. The order referring the matter to evidence will be made conditional on the furnishing of the affidavit and that containing an allegation that the relevant messages were sent before the commencement of these proceedings. If that condition is not satisfied an appropriate order granting relief will be made.

[87] That brings me to the last group where, irrespective of the type of

66 No 48, Case No 9459/2009.

application, the Departmental response is that there is no trace of the application and the applicant must re-apply. The subsequent research embodied in the final schedule provided a little more information. In two cases the applicants[67] have received their identity numbers and in one of those it is recorded that the applicant has been advised to apply for an identity document. The Department's website contains no record of such an application. In the one case[68] all questions of costs have already been disposed of by court orders so that there is no need for a further order and the other falls to be dealt with together with the case in paragraph [76]. In another case[69] the applicant's birth has been registered, but there is an error in her first name that requires correction and she will thereafter apply for an identity document. That may well have occurred by now. Like the previous case this one should be dealt with together with the other cases in paragraph [76]. In one instance[70] the applicant has made a fresh application (probably in terms of the existing court order). The costs of the application are dealt with in the existing order. A contempt application was brought and has become academic other than in respect of the costs of that application. These will be dealt with in the costs section of the judgment. The one applicant[71] applied in 2003, has an identity number and on his own admission has been told several times to re-apply but refuses to do so. The case is one where condonation is clearly necessary. In view of the lapse of time it should be refused and the application dismissed.

[88] In the remaining 16 cases[72] it is recorded that the Department has no trace of any application and that the applicant must re-apply. Bar one

67 No 5, Sihle Sithole, Case No 8845/2009 and No 32, Hlengiwe Mnomiya, case No 10251/2009.
68 No 5.
69 No 57. Nkosinatha Shinga, Case No 8427/2009.
70 No 63. Mthobisi Mkhize, Case No 8834/2009
71 Skholowe Mzila, Case No 7752/2009, No 22.
72 Numbers 3, 12, 14, 16, 19, 21, 29, 33, 42, 45, 46, 49, 51, 52, 66 and 71.

case,[73] where it is said that the application is to replace a lost identity document, all the others are cases where an LRB application was necessary. Although the claim is made in all of the letters of demand that this application actually or probably accompanied an application for an identity document and in the founding affidavit in all cases this is stated quite definitely to be the case it seems unlikely to be correct in all instances. It is more probable that the applicants went to the Department's offices to obtain an identity document and when it was ascertained that their births had not been registered made an LRB application, which involved greater complexity and the completion of more forms, but not necessarily an application for an identity document. If they were not properly informed of the new system that had been put in place, where two separate applications needed to be made, it is readily understandable that they might believe that they had applied both for the registration of their birth and the issue of an identity document. In two instances I was informed that the applicant is experiencing substantial personal difficulties as a result of not having received an identity document. In the one case the applicant has threatened to commit suicide and in the other the applicant is caring for an elderly and sickly mother and cannot readily attend at the Department's offices in order to make a fresh application.

[89] It is accepted on behalf of these applicants that in the absence of an appropriately competed application form it is not possible to require the Department either to register the births of the applicants or to issue them with identity documents. To require registration without having that information on file in the records of the Department would be disruptive of the entire system of registration in the Population Register. Accordingly it is accepted that these applicants will have to make fresh

73 No 14, Howard Mkhize, Case No 10457/2009.

applications and that in all bar the one case these will be LRB applications. In one case[74] the applicant made two applications and commenced review proceedings on the basis of the first very shortly after she had made the second (to which there has been no response). The review proceedings were clearly premature and must be dismissed. In the other matters the applicants are entitled to an order reviewing the Department's failure to take a decision on their applications and to have that failure declared unlawful. In any case where the review proceedings have been brought outside the 180 day period prescribed in PAJA, the fact that the Department fobbed off their enquiries; their lack of knowledge of options available to them and the absence of opposition justifies the grant of condonation. The key issue is however consequential relief.

[90] The order prayed proffered in argument requires the applicants to report to various offices of the Department for the purpose of making fresh LRB applications and an order that the Department 'prioritize the application'. It requires the Department to inform Goodway & Buck of the issue of each applicant's 'identity number and/or birth certificate'. Then follows an order authorising the applicants to make a 'fresh application' for an identity document at the cost of the Department. This application is also to be prioritized. As discussed earlier this suffers from major difficulties. First it is dependent upon an order against the applicant himself or herself. Second it is incurably vague in requiring the Department to 'prioritize' the contemplated applications. Third it authorises the applicants to do something they are perfectly entitled to do without any authority from the court. Fourth this authority relates to a 'fresh' application when they have not hitherto made an application of

74 No 52, Lindiwe Jiyane, Case No 8421/2009.

that type. Fifth compliance with the order cannot be enforced and raises the spectre of further contempt applications being made as the applicants' attorneys seek to impose their view of what constitutes giving priority to an application. None of that is satisfactory. However, to grant no consequential relief will not alleviate the plight of these applicants.

[91] In my view it is appropriate, especially in the light of complaints on behalf of the applicants that court orders in these matters are disregarded, to grant relief in a form akin to a structured interdict. The respondents will be ordered to inform this group of applicants that it is necessary for them to make fresh LRB applications (or in the one instance an application for an identity document). They will also be required to inform them of how, where and to which named official they should make their applications. In the two cases I have mentioned they will be required to approach the applicants directly to make special arrangements if they so request for officials to visit the applicants at their homes in order to enable the fresh applications to be made. Lastly they will be required to file a report with the Court in the form of an affidavit from an appropriate official setting out precisely what they have done in this regard. The precise form of order is formulated at the end of this judgment.

[92] That serves to dispose of each of the applications apart from the question of costs. It is to that question that I now turn in relation to those cases where the applicants have shown either that the commencement of review proceedings by them was justified, although they no longer require any other relief from the Court, or that they have an entitlement to substantive relief. In those cases where the applications fall to be dismissed the respondents quite properly do not seek costs against the

unsuccessful applicants.

COSTS

[93] The applicants all seek an order that the respondents pay the costs of the applications. Where contempt applications have been brought they seek an order that the costs of the contempt application be paid on the attorney and client scale. Where such orders are obtained it is apparent from sample bills of costs that were furnished to me under cover of a memorandum concerning costs that the bills are prepared on the basis of the maximum amount payable under the tariff in terms of Rule 70 together with disbursements and taxed accordingly. All amounts recovered are paid directly to Goodway & Buck and retained by them as fees.

[94] However appropriate this approach might be in other cases, in these cases it presents a number of difficulties arising from the arrangements between Goodway & Buck and the applicants in regard to fees and disbursements. Regrettably the applicants' legal representatives either do not recognise the nature of these difficulties or seek to have them disregarded. In the result although I have throughout the course of these matters sought assistance and submissions from them in regard to the proper approach to costs this has not been forthcoming and I have had to grapple with the issue without the assistance that I would have appreciated receiving.

[95] The arrangements between Goodway & Buck and their clients is described in the costs memorandum in the following terms:

'The bringing by such an Applicant of an application against the Respondents in the High Court is only made possible by the fact that Goodway & Buck are prepared,

entirely at their own risk to:

17.2.1 without the expectation or requirement of payment by the indigent applicant, prepare and bring the application;

17.2.2 accept the fact that if the application is unsuccessful, not only will they forfeit any costs, but will also forfeit any and/or all disbursements incurred by them in pursuance of the unsuccessful matter;

17.2.3 accept as their payment for the bringing of such applications, only those fees which are recovered by way of taxation or agreement which fees … bears no resemblance whatsoever to the substantially increased fees which would in normal circumstances be charged by Goodway & Buck … for the rendering of such services;'

[96] In an advertisement that Goodway & Buck publish with a view to attracting clients in this type of case it is said 'You do not have to pay.' When asked to confirm that this advertisement[75] was theirs I was told that this statement related to the initial consultation and the following was added:

''It was never understood to mean nor been understood to mean … that Goodway & Buck waives its rights to receive payment for the services rendered in pursuance of an Applicant's claim but as is explained to potential Applicants should the application not be successful and no award for costs be made, Goodway & Buck will not hold the Applicant liable for payment of their costs.'

[97] It is plain from this that the applicants in these cases are not obliged to pay Goodway & Buck for their services and the disbursements attendant upon the litigation will be borne by the attorneys. This gives rise to the obvious concern that, if the litigants are not in fact incurring any liability in respect of costs, there are no costs in relation to which an order for costs as claimed by the applicants can operate. In this regard it was said by Innes CJ in *Texas Co (SA) Ltd v Cape Town Municipality*,[76]

75 The full text is set out in the judgment in *Sibiya,* para 56.

76 1926 AD 467 at 488-489. See also *Jonker v Schultz* 2002 (2) SA 360 (O) at 363 G-J.

in regard to a claim by the municipality to recover qualifying fees in respect of two engineers in its employ:

'Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based. Speaking generally, only amounts which the suitor has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs. But there are exceptions. It has been held by the English Courts that a solicitor who personally and successfully conducts his own case is entitled to be paid the same costs as if he had employed another solicitor, save costs which under the circumstances are unnecessary. … And that view has been approved by South African Courts … So that an attorney successfully litigating in person may recover costs which represent not an expenditure or a liability but an earning. And a party to a suit is entitled to claim his own witness expenses, provided he is duly declared to have been a necessary witness. Whether the qualifying expenses of a suitor-witness would be covered by the same rule need not now be discussed. It does not arise in this case. The items at issue here are the qualifying expenses, not of a litigant, but of professional witnesses in the employ of the litigant. And the general principle must be applied, for I am aware of no exception governing the matter. Against what expense is the Council seeking an idemnity?'

[98] The same indemnity principle was applied by Satchwell J in *Payen Components South Africa Ltd v Bovic Gaskets CC and others*[77], where five respondents had been cited and the case against the third, fourth and fifth respondents was abandoned on appeal. Those respondents were awarded their costs, while the unsuccessful first and second respondents were ordered to pay the applicant's costs. All the respondents used the same counsel and the same attorney and the contribution to the litigation by the successful ones was minimal – a two and a half page affidavit by the third respondent dealing with a peripheral issue. On taxation however

77 1999 (2) SA 409 (W) at 415I – 418F.

it was contended that they should recover 60% of the costs incurred by all five respondents in defending the application. Satchwell J rejected this and said:

'I can see no justification in the claim of these three respondents, the third to fifth respondents, receiving from the applicant three-fifths or 60% of the fees charged by the one firm of attorneys for consultations, drafting affidavits, instructions to counsel or for fees charged by counsel for consultations, settling affidavits, preparing heads of argument and on the application and the appeal.

Regard must be had to the nature of the case and to the nature of the defences raised to the claims. It is quite clear that the main contest was between the applicant and the second respondent. The actions complained of were laid at the feet of the second respondent and through him to the first respondent. The third to fifth respondents did not themselves raise, in detail or at all, the matters raised by the second respondent in his defence. Yet if the claim of the successful respondents (the third to fifth respondents) is allowed on taxation they will be each entitled to 20% of the fees for attorneys and counsel though they patently did not consult or depose to affidavits or brief counsel on the very matters argued and even though the applicant succeeded on those matters against the first and second respondents who did so consult, depose and brief counsel.

This cannot be right. In my view this would result in injustice against the applicant.

The third to fifth respondents would effectively receive moneys from the applicant to cover services not rendered to them by their legal representatives. These respondents would not be indemnified for expenses to which they have been put - rather they would be making a profit on expenses never incurred.

The respondents submitted to the Taxing Master that the applicant, by joining the third to fifth respondents, exposed them each to the risk of having an interdict order granted against them as well as an order for costs and that, having been so exposed, the successful respondents are therefore each entitled to a proportionate or equal share of the joint costs. That submission is, in my view, misplaced. A costs order is not intended to be compensation for a risk to which one has been exposed but a refund of expenses actually incurred.'

In the result the learned judge ruled that the successful respondents were entitled to recover only those additional expenses incurred as a result of

their joinder in the litigation.

[99] The indemnity principle is of general application in the field of costs.[78] It has not become outdated. In *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa*[79] Howie JA said:

'A costs order – it is trite to say – is intended to indemnify the winner (subject to the limitation of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show – and the Taxing Master has to be satisfied about – is that the items in the bill are costs in the true sense, that is to say expenses that actually leave the winner out of pocket.'

If the applicants are not out of pocket or at risk of being out of pocket as a consequence of bringing these applications it would appear that, unless the indemnity principle can be circumvented, it operates to preclude them from obtaining a costs order in their favour.

[100] These problems were put to the attorneys and information and submissions were sought on the following questions:

'1. Are there any circumstances in which Goodway & Buck's clients incur any personal liability for the payment of costs (including disbursements) to their attorneys? If so what are the precise circumstances in which that liability arises and what steps do Goodway & Buck take to enforce that liability?
2. Are there any written agreements between Goodway & Buck and their clients concerning the question of costs? If there are a copy of a typical agreement (assuming they are in standard form) must be furnished. Otherwise details of such agreements must be furnished.
3. In the light of the basic purpose of an order for costs (*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Jonker v Schultz* 2002 (2) SA 360 (O) at 363 G-J) to what costs actually incurred by the applicants do the costs orders that are sought in these applications relate?

78 *Taylor v Mackay Bros and McMahon Ltd* 1947 (1) SA 423 (N) at 431.
79 2003 (3) SA 54 (SCA) para [18].

4. In those instances where an order for attorney and client costs is sought to what additional costs actually incurred by the applicants does that order relate?
5. Insofar as applicants do not incur any personal liability to Goodway & Buck, either in respect of costs or disbursements, does any legal basis exist for making an order for costs in favour of any of the applicants herein?'

[101] Regrettably, as I have said, I received no helpful response to these questions. Instead I was told that:

'All of the Home Affairs clients incur personal liability for the payment of costs including disbursements. The circumstances in which that liability arises is that the client furnishes Goodway & Buck authority to act on its behalf which is as set out in our previous memoranda on costs. Goodway & Buck enforce the liability against successful costs order. If there is no successful costs order and the client is still indigent Goodway & Buck do not take any further steps to enforce the liability against the client.'

I was told that the agreements between Goodway & Buck and its clients is an oral one and it was said that the questions arising from the judgment of Innes CJ proceeded on the basis of an incorrect assumption. In regard to attorney and client costs the following was said:

'Attorney and client costs are sought to be granted as a mark of the displeasure of this Honourable Court at the conduct of the respondent. In those exceptional circumstances if the costs were awarded and recovered, Goodway & Buck would be entitled to retain the additional amount as an additional recompense of their fees. This amount would nevertheless still be less than their usual fees the amount of which is not calculated according to the High Court tariff.'

[102] Goodway & Buck said from the outset[80] that the vast majority of applicants in Home Affairs cases 'are indigent or impecunious and clearly not in a position to contribute towards the legal costs incurred in their application (and are thus not required to do so by us)'. They reaffirmed this in their subsequent memorandum of 15 September 2010. In those

80 Para 6.2 of memorandum dated 4 March 2010.

circumstances where their clients know that they will not be asked to pay any costs in relation to these applications it is impossible to see on what basis they now say that their clients incur personal liability for costs. Their clients were told that in view of their indigent circumstances they would not have to pay costs, and that the attorneys would at their own risk pay the disbursements consequent upon litigation. It is factually incorrect to claim that the client incurs personal liability for the attorneys' fees and disbursements when that arrangement gives rise to a possible problem. There can be no liability when there is no obligation to pay.

[103] It is perfectly clear that Goodway & Buck undertook this work in the hope (and the reasonable expectation) that costs orders would be obtained in sufficient cases to make the venture worthwhile. In that sense they are acting on a speculative or contingency basis although it is not one sanctioned by the Contingency Fees Act.[81] Applying the general rule in regard to the purpose of a costs order set out in the cases I have cited the fact that the applicants incur no liability for costs disentitles them to orders for costs. As they have incurred no expenses in relation to the litigation and no liability for costs, there is no need for an indemnity and nothing to which a costs order could apply. The critical issue in these cases is whether nonetheless a costs order can be obtained on the basis of an exception to the general rule. Innes CJ said that there are exceptions to the rule. Is this one of them?

[104] I have found no authority dealing with this point. There have been

81 Act 66 of 1997. It may be that an arrangement similar to this would be permissible in terms of s 2(1)(a) of that Act, but in the recusal application (see para [12]) Mr Harpur SC argued that sections 2(1)(a) and (b) must be read conjunctively which would then exclude this type of arrangement. As the applicants and Goodway & Buck do not suggest that their arrangement is sanctioned by the Act it is preferable not to enter upon this terrain. However the submission appears to be incorrect. *Price Waterhouse Coopers Inc v National Potato Board Co-op Ltd* 2004 6) SA 66 (SCA) at para [41]. This is immaterial as their agreements with the applicants do not comply with the provisions of the Contingency Fees Act. However, see *Rogers v Hendricks* [2007] 2 All SA 386 (C).

substantial changes in our legal system since 1926 and practices in regard to attorneys' and counsel's fees have changed markedly since then. Foremost among these changes is that the right of access to courts is now enshrined in s 34 of the Constitution. In order to render that right a reality and not a mere chimera it is essential that creative means be adopted to make legal services available to those who could not otherwise afford them, for it is a truism that without legal assistance from qualified lawyers few in any society are able to represent themselves adequately in the complex arena of forensic combat. Didcott J said some years ago[82] that if a person such as one of the applicants in these cases ventured into a court, he would find himself 'entangled in the workings of a legal machinery that bewilders him' and he went on to remark generally that:

'… those members of the community who can least afford legal representation are also those who need it most.'

Whilst said in the context of a criminal case those words are apposite to the situation in which the applicants find themselves. Without some form of legal assistance they will not be able to exercise their constitutional rights. As noted by the United Nations Human Rights Committee:

'The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.'[83]

It is therefore important that the legal community should develop and accept methods of financing legal proceedings that will enable the constitutional right to be fully realised and courts must not be astute to create obstacles to them doing so.

[105] In recent years, here and in other jurisdictions with which we share the adversarial legal system, there has been an increasing acceptance of

82 *S v Khanyile and another* 1988 (3) SA 795 (N) at 813A-B

83 Human Rights Committee, United Nations, *General Comment 32, Article 14: Right to equality before Courts and Tribunals and to a Fair Trial*, 10 UN Doc CCPR/ C/GC/32 (2007).

forms of speculative and contingency fees that would have been regarded as contrary to public policy in times past. The primary vehicle for this in South Africa is the Contingency Fees Act, which is designed to encourage legal practitioners to undertake speculative litigation on behalf of clients, but that is not the only form of contingent arrangement that has been sanctioned. In *Price Waterhouse Coopers Inc v National Potato Board Co-op Ltd* an agreement in terms of which a stranger to the lawsuit agreed to finance the litigation in return for a share of the proceeds (a *pactum de quota litis*) was held not to offend against public policy. The Court also endorsed[84] the long-standing recognition by our courts of the Roman Dutch principle that it is acceptable for anyone, in good faith, to give financial assistance to a poor suitor and thereby help him or her to prosecute an action in return for a reasonable recompense or interest in the suit. Such an agreement is not unlawful or void.

[106] What these instances of contingent fees have in common is that they are peculiarly suited to cases where the claim advanced in the litigation is a monetary one. As Jackson LJ pointed out in his recent Review of Civil Litigation Costs in the United Kingdom, third party funding such as that in the *Price Waterhouse* case is not usually feasible where non-monetary relief is sought.[85] The 'no win, no fee' agreement, to which Southwood AJA referred in giving judgment in *Price Waterhouse* is an arrangement that prevails in litigation where monetary claims are advanced. In such an arrangement the lawyer agrees to forego or reduce the fees that would otherwise be charged in the event of the action failing and may be paid something extra – an uplift or enhanced fee or percentage of the award – if successful.[86] Whilst the Contingency Fees

84 In para [27].
85 Chapter 1, para 1.5, p 118.
86 Jackson Report, Chapter 10, para 1.8, p 96. The report only discusses contingency fees in the context of monetary claims. Chapter 12, para 1.1. p 125.

Act contemplates non-monetary litigation its provisions are directed at the arrangements between the legal practitioner and the litigant rather than recovery from the other party. They deal with 'no win, no fee' arrangements and the recovery of success fees. The underlying assumption is that when success is achieved a liability to pay fees attaches to the litigant. That is not the case here.

[107] I have not discovered in any other jurisdiction a comparable situation to that which prevails in these cases. At most there is a general recognition that this type of case justifies the recovery of costs from the unsuccessful party. In the United Kingdom a legally aided litigant may recover costs, but I have not ascertained whether this is due to the terms of the statutory scheme under which legal aid is provided, as is the case in South Africa.[87] There is one instance where the provision of legal services at no cost has run foul of the indemnity principle and that is in our neighbour Namibia. The case is *Hameva and another v Minister of Home Affairs*.[88] It involved the Legal Assistance Trust in that country, which had been established for the purpose of providing legal assistance in the public interest and without charge to persons requiring such assistance. It had successfully pursued an action for damages and reached a settlement for payment of an agreed sum and the Trust's disbursements. On taxation the fees of counsel and stamp duty were disallowed and this was taken on appeal. The court held that the Trust was bound by the trust deed to provide the necessary finance, with the result that the assisted person would incur no liability for legal expenses whatsoever. The legal assistance given was free. The Court[89] held that the bill of costs is the client's bill, not that of the attorney,[90] and as the client incurred no costs

87 Section 8A of the Legal Aid Act 22 of 1969.
88 1997 (2) SA 756 (NmSC)
89 Consisting of Mahomed CJ, Dumbutshena AJA and Hannah AJA.
90 Relying on *City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd* 1973 (1) SA 93 (N) at

the disbursements by the attorney were not recoverable. The decision is certainly against the applicants, but it may be distinguishable because it was not argued on the basis of any principle of access to justice giving rise to an exception to the indemnity principle, but on the basis of the terms of the trust deed.

[108] There are three exceptions to the indemnity principle, one in the High Court rules and two in statutes. Where an applicant is indigent and qualifies for assistance *in forma pauperis* then on successfully concluding the litigation the attorney is entitled in terms of Rule 40(7) to tax a bill of costs on the basis of the fees they would ordinarily have been entitled to. Then there are the provisions of the Legal Aid Act, already referred to, which entitle the Legal Aid Board to recover costs. Lastly there are the provisions of s 79A of the Attorneys Act,[91] introduced in 2000, that entitle a litigant who is represented by a law clinic as defined in s 1 of the Act to obtain an order for costs and deems it to be ceded to the law clinic.[92] What is notable about these is that they recognise that in the area of assisting the indigent to obtain access to justice there is no public policy reason precluding the attorney from recovering costs on an order in favour of the client. The Contingency Fees Act and the judgment in *Price Waterhouse* reflect that public policy and the right of access to justice requires a relaxation of other restrictions that previously limited the range of fee arrangements that could be concluded between clients and legal practitioners.

97A where Harcourt J said: 'The attorney must look solely to his client for remuneration and is not directly concerned in, nor adversely affected by failure attending upon, the recovery of the costs from te litigant ordered to pay costs on any scale whatsoever', and *Costello v Registrar of the High Court, Salisbury and another* 1974 (3) SA 289 (R) at 290F.

91 Act 53 of 1979.

92 The previous director of the Legal Resources Centre informs me that prior to that statutory change they did not seek or obtain orders for costs save in respect of disbursements for which the client assumed liability.

[109] I have found no authority on whether the indemnity principle is subject to an exception that enables an attorney to provide legal assistance to an indigent litigant on the basis that an order for costs will be sought and if obtained will provide the source from which the attorney will be remunerated. Nor is there any decisive authority against such an exception. Cautious though I am as a single judge in a lower court in recognising a new exception to the indemnity principle in my view there is much to be said in favour of it where the litigant would otherwise have no means of securing access to the legal assistance necessary to pursue a claim. To permit it would not be unduly prejudicial to the respondents. Litigants bringing similar proceedings who have the means to pay their legal representatives are entitled to obtain orders for costs and to tax them against the Department. Such litigants could agree with their attorney that the latter would wait for the outcome of the case before rendering a bill. Essentially that is what the applicants seek. To deny them the benefit of an exception to the general principle would deny justice to some who are amongst the poorest in our society and least able, as I said at the outset, to deal with an inefficient and heartless bureaucracy. It would place them at a disadvantage in relation to people of means. It would also provide those who are at fault with a fortuitous benefit because of the willingness of the attorneys to undertake these cases at their own risk. In my view that is contrary to the spirit, purport and objects of the Bill of Rights.

[110] The constitutional right of access to courts favours the recognition of an exception. Allowing an exception does not appear to give rise to any greater scope for abuse than exists in other instances where attorneys are permitted to act on a speculative or contingency basis and the courts and professional bodies will be alert to prevent abuse. I have pondered whether such an exception should rather be formulated in legislation and

accept that a revision of the Contingency Fees Act, long called for by the organised legal profession, would be desirable. However the exception I contemplate is narrow and consistent with other exceptions in allowing an order for costs even though there is no underlying liability by the litigant to the legal representative. It is subject to constraints both by the court and possibly through the mechanism of taxation, although as I will show that poses difficulties. Lastly I have borne in mind the following *dictum* by Southwood AJA in *Price Waterhouse*[93]:

'The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal.'

The arrangement between Goodway & Buck and the applicants is not one that would be prohibited by the common law. It is simply one that in the absence of an exception to the indemnity principle would result in the client being unable to obtain an order for costs and the attorney not recovering any payment. This *dictum* therefore does not affect the situation.

[111] In those circumstances I am satisfied that the type of arrangement that Goodway & Buck have entered into with their clients constitutes an exception to the strict application of the indemnity principle. I hold that an order for costs may be granted in favour of a successful applicant

a) where the litigant is indigent and is seeking to enforce constitutional rights against an organ of state; and
b) the legal representative acts on their behalf for no fee and accepts liability for all disbursements; and
c) the litigant agrees that the legal representative will be entitled to the benefit of any costs order made by the court or tribunal in his

93 Para [41].

or her favour.[94]

I stress that for present purposes the exception is confined to cases in this category. It is unnecessary for me to explore whether and to what extent the basic principle may be further relaxed and I refrain from doing so.

[112] The last issue that arises from this conclusion is the appropriate terms of any order for costs. One proposition can be disposed of immediately. It is the proposition that in cases undertaken on this footing an order for attorney and client costs can be granted. Such an order is impermissible because there is no bill of costs with a party and party and an attorney and client component. Whilst the reason for a court granting such an order is usually as a mark of its displeasure at the conduct of a litigant that is closely linked to the indemnity principle and the fact that an ordinary order for costs will in the circumstances of the case leave the innocent litigant out of pocket. The order is more than an expression of displeasure by the court. It is directed at ensuring that the other party is not out of pocket as a result of the misconduct of its opponent. In cases that are conducted on the same basis as these that purpose cannot be fulfilled because the litigant is not out of pocket. No doubt that is why it is described in response to my enquiry as an additional recompense to the attorneys, but orders for attorney and client costs are not made for that reason.

[113] A conventional order for costs is also problematic. The reason is that there is no underlying agreement for the payment of fees and charges by the applicants. Accordingly the bills that are prepared and submitted for taxation in these matters are entirely artificial. The purpose of taxing a

94 Steenkamp J in *Zeman v Quickelberge* [2010] ZALC 122 held that costs were recoverable in similar circumstances but for some reason the learned judge's attention was not drawn to the judgment of Innes CJ and the cases following it, so that it approaches the question form a different perspective to that adopted in this judgment.

bill of costs is to ensure that the fees and disbursements recovered from the losing party are confined within reasonable limits. It is irrelevant to the process of taxation whether the attorney formulated the bill rendered to the client in accordance with the tariff and it would be an unusual case in practice if the attorney did so. In almost all instances nowadays attorneys charge for their services at an hourly rate plus disbursements. Unlike other jurisdictions such as the United Kingdom, where the costs judges assess whether the hourly rate and the hours claimed are reasonable, our system of taxation under Rule 70 operates in terms of an itemised tariff of maximum charges that serve as a guide to and limit upon the taxing master in assessing the reasonableness of the fees actually charged by the attorney. In that sense a bill of costs contains two representations. They are that each item in the bill represents an item actually undertaken and that the costs claimed are equal to or less than the actual fees that the legal practitioner has charged its client. In the unusual situation where the client has been charged less than could be derived from an application of the tariff the bill cannot be taxed in an amount greater than the actual fee.[95]

[114] Merely preparing a bill of costs in accordance with the tariff does not render it taxable where the attorney has not charged fees. Some special provision needs to be in place, as in the statutory exceptions I have mentioned, to entitle the attorney to do this. Otherwise the indemnity principle would operate to require the taxing master to disallow the bill in its entirety. For that reason the conventional costs order that has been sought in these cases would be of no assistance to the applicants or their attorneys in securing payment of fees. A different approach is necessary. The starting point is that the attorney is entitled to

95 An example is postulated in the judgment in *Costello v Registrar of the High Court, Salisbury and another* 1974 (3) SA 289 (R) at 290.

a reasonable fee. As the grant of an order involves an exception to the indemnity principle the basis for determining a reasonable fee must be contained in the court order. In some instances a bill of costs prepared in accordance with the maximum amounts reflected under the tariff might be a proper indication of what is a reasonable fee but that is not necessarily so in all cases. In these cases the information furnished to me shows that it is not a proper basis for determining a reasonable fee.

[115] Although I asked for information that would enable some assessment of a reasonable fee to be made, such as the time involved in taking instructions; who dealt with matters in the firm; who prepared the applications and what time was spent in doing so, the response was relatively unhelpful. I was given no information on the normal basis on which this firm charges its clients or the basis of what they would regard as reasonable. They simply nailed their colours to the mast of the tariff and the practice that has grown up between them and the State Attorney in agreeing the amount payable under bills of costs.

[116] The following information was provided about the work involved in these cases. A preliminary interview of approximately half an hour is held before sending the standard letter of demand. Thereafter if there is no response a longer interview of approximately an hour and a half is conducted to prepare the application papers. The interviews take longer than would ordinarily be the case to assemble the limited information in the application because of the need to make use of an interpreter. The information thus obtained is inserted in the standard template prepared for the firm by counsel. This is said to require the attorney to ‘dictate, type, edit and finalise the founding affidavit’. It is also said that the notice of motion must be drafted as well as confirmatory affidavits, although these

are entirely standard. The papers are then compiled, issued and served, very often in batches. Thereafter each matter takes its course which usually involves it being set down after no notice of opposition is received and a hearing involving junior counsel taking an order by consent agreed with a representative of the State Attorney's office who has almost invariably neither sought nor obtained instructions from the Department.

[117] Much is made in the memoranda of the careful preparation that goes into these applications. It is said that 'a high degree of care and attention must be applied to the preparation and finalisation of such papers'. Having now read the files in 72 cases in the course of preparing this judgment as well as a number of the Durban files in the course of argument I am in a position to express a view on this. In my view whilst it may be correct from an administrative perspective it is not otherwise justified. There is little evidence of a careful consideration of each case in either the letters of demand or the application papers. This will be apparent from my earlier consideration of the different applications but I highlight a few points. It appears to make no difference when the client's application was made to the Department. There are demands where the application was made two months prior to the letter as well as demands where it was six years earlier. There is no apparent attempt to assess whether the client may have been dilatory in following up an application. In every case it is alleged in the letter of demand and the founding affidavit that the application was one for an identity document even where the receipt states in the clearest possible terms that it is a receipt for an LRB application. In cases where the receipt reflects no identity number it is frequently said in the letter that the application was for an identity document and was 'in all probability' accompanied by an LRB

application. The affidavit then says that it was an LRB application in conjunction with an application for an identity document. The basis for doing this is unclear and the facts given usually indicate that it was an LRB application alone and not an application for an identity document. That the letters and affidavits are thus misleading is ignored.

[118] Whilst dealing with lack of care in preparing the application papers there are the numerous cases where Ms Oodit, without explanation, deposes to a confirmatory affidavit although in none is there any evidence that she had any involvement in the case. If she did the nature of her involvement has not been disclosed to me. In many cases it is clear that information has been given to a clerk to complete the template. Names and other information have obviously been inserted in brackets on an existing precedent, because the brackets are reproduced in the final affidavit without this being detected. In all cases there is an application for condonation even though it is patently unnecessary in many instances. There is little or no attempt to individualise the allegations of prejudice and none to include in the affidavits the 'tales of how clients have been treated abominably by the Department Officials' that are said in the memorandum to result in clients being reduced to tears in the course of consultation.[96] Where the applicant has made a number of separate applications the implications of this are not explored and the matter proceeds on the basis of the earliest application ignoring the later ones. In the most extreme instances the attorneys are in possession of information that the identity document is being printed and yet the application is brought on the basis of a claim that the Department has failed to take a decision on the application for an identity document.

96 Para 2.2 of memorandum dated 4 March 2010.

[119] A perturbing feature that emerged from this is that in many instances the attorneys are not in communication with their clients in regard to the ongoing conduct of their cases. This is most evident in those cases where the applicant received an identity document or had their birth registered and the application nonetheless proceeded without this vital information being conveyed to the court. Sometimes this resulted in quite inappropriate relief being sought and obtained. In many instances it has resulted in unnecessary costs being incurred. In the final schedule there are several cases in which it is said that attempts to contact clients have been unsuccessful. Until that schedule was prepared the firm was apparently unaware that two of its clients had died. (I was not told when they died.) All of the contempt applications are brought on the basis of affidavits by a member of the firm of Goodway & Buck and there is no indication that the client is aware of the application.

[120] This has implications insofar as costs and the reasonableness of the charges claimed by the attorneys, because all the bills of costs furnished to me contain copious references to 'taking instructions' to take various steps in the proceedings. For example there are claims for taking instructions to draw a notice of set down, to prepare an index to the papers and to prepare briefs to counsel. Yet it seems certain that the attorneys did this of their own volition. Other problems arise in considering the bills of costs placed before me as examples of typical bills. As every judge in this Division is aware a number of matters are set down in the two courts in Pietermaritzburg and Durban on virtually a daily basis. The notices of set down indicate – as one would expect – that whoever attends to this will on the same day set down a number of cases. Similarly the indexing and pagination of the court file will be done on one day in respect of a number of matters. Yet the bills of costs do not

seem to make any allowance for this. In four furnished to me claims are made for spending 45 minutes, 1½ hours, 1¼ hours and 1 hour and 20 minutes respectively on this latter task. I drew the file in the case where it is said to have taken 1½ hours and there were only 20 pages of documents. These were the application papers, two returns of service and a notice of set down. By no stretch of the imagination could that have taken 1½ hours to index and paginate. What is more when another 20 pages were added as a result of a contempt application being brought a further 1¼ hours was allegedly spent on updating the index and pagination. R1599.45 was claimed for these tasks. Over and above that R1179.60 was claimed for indexing and paginating the papers in the attorneys' file and the papers in counsel's brief. Simple multiplication will indicate the profitability of attending to say five cases a day at these charges.

[121] In the same case a fee was claimed on the day of the hearing (separate from the charge for travelling) for three hours of attendance at court. The bill says that negotiations took place; thereafter the matter was called and an order granted. In fact the order in the court file was typed in advance of the hearing and only needed to have the date and case number inserted in manuscript. On that day there were 43 home affairs cases on the roll in Pietermaritzburg and, according to the judge who presided, it is probable that he completed his roll before the short adjournment at 11.15 am. It would be rare for that not to be the case with the Pietermaritzburg motion roll. In any event the three hours claimed must relate not only to this case but to all other cases that the firm had on the Pietermaritzburg roll on the day in question. However the full period is claimed in this case and there is no apportionment of time to other matters. In the absence of an apportionment this is an excessive claim. It is apparent that there is a

considerable risk of duplication of charges as bills are prepared in different cases. This will be difficult for the State Attorney, and impossible for the Taxing Master, to detect.

[122] All of this is indicative of the fact that preparation of a bill of costs in terms of the tariff in Rule 70 is not a safe basis for determining a reasonable fee. I mention only one other matter, which relates to the costs that are claimed in respect of taking instructions and preparing the application papers. I was given only one bill in respect of an application commenced in 2009 after the judgment in *Sibiya*. The total claim up to the stage of commencing proceedings was slightly over R5000. The bulk of that related to the costs of the consultation to take instructions of R1064.70 and the costs of preparing the founding affidavit at R2662.50. This is an unreasonable amount for ascertaining a limited amount of personal information from a client (most of which would have been available from the initial consultation to prepare the letter of demand) and having it inserted into a standard template of an affidavit. I have set out in detail earlier in this judgment the contents of these founding affidavits. Mostly they consist of a detailed repetition of the statutory material concerning the issue of identity documents and the making of LRB applications and a summary of the applicable provisions of PAJA. Assuming it is necessary to place this material before the court I see no reason why it cannot be incorporated in a two or three page annexure prepared by the attorneys and attached to the founding affidavit. If that material is excluded most of the founding affidavit is redundant. So are the supporting affidavits. This unnecessary prolixity serves to increase the claim for costs without advancing the applicant's case or being of any assistance to the Court.[97]

97 Unlike the social security cases where there was some confusion as to the applicable legislation there is no such confusion in regard to identity documents nor does the curt need to be informed in

[121] It is accepted by Goodway & Buck that they are not entitled to claim more than a reasonable fee for their services. Such a fee must be determined without duplication or unnecessary padding. Disbursements properly incurred should be recoverable. In the case of counsel's fees for appearance the taxing master has been allowing R450 on taxation and that is in my view more than reasonable if one has regard to the general level of junior counsel's charges for unopposed applications as I have done. If counsel appears in 4 or 5 of these cases in a day, as is usually the case, this generates substantial remuneration for what is ordinarily little more than an hour to an hour and a half's work. The degree of preparation is minimal and consists mainly of preparing consent orders.

[122] According to the two memoranda on costs three partners of Goodway & Buck, an interpreter and four secretarial staff are dedicated fulltime and three articled clerks are dedicated most of the time to Home Affairs work.[98] On average bills of costs are agreed at R7500 although when prepared in accordance with the tariff they range between R10 000 and R15 000 inclusive of disbursements. That may now increase as a result of the increase in the tariff that came into effect in June 2009 and July 2010. In order to sustain the staff working in this area on a full-time basis the average fee must generate a significant return to the firm. Otherwise they would not be willing to undertake this work and certainly not on the scale that they do. It must be borne in mind that they solicit this work by way of strategically placed advertisements.

[123] For the reasons I have given the preparation *post hoc* of a bill of

detail of the contents of PAJA. What I said in *Sibiya* was that there needed to be a recognition of the applicability of PAJA and an attempt to address the issues that it raises, not that there needed to be a repetition of matters well-known to the Court.

98 Para 9.2 of memorandum of 4 March 2010.

costs according to the tariff is not a satisfactory basis for determining a reasonable fee. In addition, as Goodway & Buck themselves point out the preparation of a bill involves additional work and expense and places all concerned under additional pressure. They indicate in the one memorandum[99] that they attempted to agree a scale of fees with the State Attorney in respect of such cases. That seems to me to provide the basis for a sensible solution to the problem. I would go further and say that the proper approach to establishing a reasonable fee is to treat these cases as being sufficiently similar that a fixed fee applicable to all of them is the fairest way in which to determine what costs order should be made. That is after all the basis upon which the application papers are prepared and the litigation conducted. There is necessarily an element of 'swings and roundabouts' in such an approach but overall it will be fair to all concerned. It removes the risk of duplication of charges and eliminates the costs of preparing and attending to the taxation or agreement of bills of costs. It provides a disincentive to prolixity and an incentive to take care in the preparation of papers. I propose, in the exercise of my discretion in regard to costs, to make such an order. In addition to such lump sum amount, to which must be added VAT, the order must also cover disbursements in respect of court charges, sheriff's fees and counsel, the latter limited to R450 per appearance.

[124] That leaves only the assessment of the amount of the lump sum fee. This must necessarily be a robust exercise. In undertaking it I have had regard to the manner in which the application papers have been prepared and both the routine nature of the work and the deficiencies that I have already mentioned. I have had regard to the bills of costs provided to me and examined them against the tariff. I have also had regard to the

99 That of 4 March 2010 t para 11.2.

amount of time that would be taken in the reasonably efficient preparation of these cases. Some items such as the initial consultation leading up to the writing of the letter of demand are not recoverable as being incurred prior to litigation and no allowance should be made for this. Overall taking instructions, giving a clerk the information necessary to complete the standard template and checking it once typed should take no longer than two hours of a partner's time and could easily be done by a senior articled clerk. From there on all aspects of the case can be dealt with by an articled clerk at a considerably lower rate than a partner in the firm. The issue of papers at court, taking them to the sheriff for service, lodging notice of set down and indexing and paginating papers is a purely clerical function. The preparation of counsel's brief is also largely formal and in the absence of opposition it is at most necessary for a clerk to attend at court. (Many attorneys in this and similar lines of work undertake their own appearances.) Taking all that into account and with the tariff as background my conclusion is that an amount of R5000 is reasonable and fair. If one allows for the fact that attorneys usually charge at an hourly rate for partners in the firm that is higher than the hourly rate in the tariff, much the same figure would be arrived at on a conventional charge out basis, bearing in mind the proportion of work that can and should be undertaken either by an articled clerk or by an administrative clerk. Where there has been non-compliance with an order and a contempt application has been brought an additional fee of R1500 should be allowed.

[125] In the result in those cases where the applicant is entitled to an order for costs the order will be that the respondents are ordered, jointly and severally, to pay the applicant's costs in a lump sum of R5000 plus VAT as well as the disbursements actually incurred in respect of court

charges, sheriff's fees and counsel's fees, the latter being limited to an amount of R450 per appearance. In any case where there is an entitlement to an order in respect of the costs of a contempt application the order will be for payment of costs in a lump sum of R1500 plus VAT as well as disbursements as set out above.

[126] There is one further aspect in respect of costs and that is the costs of the hearing before me over three court days. It is not possible to divide this among the 252 cases and it seems appropriate to make a single order that will cover all cases. In my view the applicants have enjoyed significant success albeit that in a number of instances the claims fail. The respondents should accordingly be ordered to pay the costs of and incidental to the hearing on 15, 27 and 29 September 2010.

[127] I accordingly make the following orders:

(a) Matters 30 and 61, where the applicants have died, are removed from the roll.

(b) In matters 2, 23, 24, 25, 27, 28 and 55, where the applications have been settled, leave is granted to withdraw the applications.

(c) The contempt application in No.56 is dismissed with no order for costs.

(d) The applications in matters 6, 7, 13, 17, 20, 31, 35, 36, 37, 38, 41, 47, 50, 52, 53, 54, 59 60, 68 and 72 are dismissed with no order for costs.

(e) In matters 22, 39 and 58 the applications for condonation are refused and the applications are dismissed with no order as to costs.

(f) In matters 4, 5 and 26 final orders have already been granted and they are removed from the roll.

(g) In each of matters 63, 64, 65, 69 and 70 the respondents are ordered to pay the costs of the contempt applications brought by the applicants,

such costs to be in the sum of R1500.00 plus VAT in each case.

(h) In each of matters 8, 9, 10, 15, 18, 32, 34, 40, 43, 57, 62 and 67 the respondents are ordered to pay the applicant's costs of the application, such costs to be in an amount of R5000.00 plus VAT plus all necessary disbursements in respect of court fees, sheriff's charges and the appearances of counsel, subject to the fee for each such appearance being limited to an amount of R450.00.

(i) In each of matters 1, 11 and 44 the following order is granted:

(aa) The Second Respondent's failure to take a decision within a reasonable time on the Applicant's application for the late registration of his birth in terms of section 9(3A) of the Births and Deaths Registration Act 51 of 1992 is reviewed and declared to be unlawful.

(bb) The Respondents are directed to deliver an affidavit by an authorised official in which is set out the outcome of the applicant's application for the late registration of his birth; the causes of the delay in processing the application; in the event of the application not yet having been finalised the requirements of the Department (if any) by way of further information, attendance at interviews or otherwise that are necessary to finalise the application and the steps being taken by the Department to finalise the application.

(cc) The application is adjourned to the 26 January 2011.

(dd) The respondents are ordered to pay the applicant's costs of the application, such costs to be in an amount of R5000.00 plus VAT plus all necessary disbursements in respect of court fees, sheriff's charges and the appearances of counsel, subject to the fee for each such appearance being limited to an amount of R450.00.

(j) In matter 48 the following order is made:

(aa) The application is adjourned for the hearing of oral evidence on a date to be arranged with the Registrar on the issue of whether the applicant was requested by the Department of Home Affairs prior to 29 October 2010 to attend an interview in connection with her application for the late registration of her birth and failed to do so.

(bb) The costs of the application are reserved for decision by the court hearing such oral evidence.

(cc) The orders in paragraphs (aa) and (bb) are conditional upon the respondents delivering, by no later than 17 January 2011 an affidavit setting out the date upon which any such request was communicated to the applicant; the manner in which such request was communicated to her and the terms of the communication and further conditional upon such request having been communicated to the applicant prior to 29 October 2010.

(dd) If the condition in paragraph (cc) is not fulfilled then the order in the following paragraphs is made and becomes effective on 18 January 2011.

(ee) The Second Respondent's failure to take a decision within a reasonable time on the Applicant's application for the late registration of his birth in terms of section 9(3A) of the Births and Deaths Registration Act 51 of 1992 is reviewed and declared to be unlawful.

(ff) The Respondents are directed to deliver an affidavit by an authorised official in which is set out the outcome of the applicant's application for the late registration of his birth; the causes of the delay in processing the application; in the event of the application not yet having been finalised the requirements of

the Department (if any) by way of further information, attendance at interviews or otherwise that are necessary to finalise the application and the steps being taken by the Department to finalise the application.

(gg) The application is adjourned to the 26 January 2011.

(hh) The respondents are ordered to pay the applicant's costs of the application, such costs to be in an amount of R5000.00 plus VAT plus all necessary disbursements in respect of court fees, sheriff's charges and the appearances of counsel, subject to the fee for each such appearance being limited to an amount of R450.00.

(k) In each of matters 3, 12, 16, 19, 21, 29, 33, 42, 45, 46, 49, 51, 66 and 71 the following order is granted:

(aa) The Second Respondent's failure to take a decision within a reasonable time on the Applicant's application for the late registration of his birth in terms of section 9(3A) of the Births and Deaths Registration Act 51 of 1992 is reviewed and declared to be unlawful.

(bb) The respondents are ordered to inform the applicant forthwith in writing of the fact that their application has been lost and it is necessary for them to make a fresh application for the late registration of their birth after which they will be entitled to apply for the issue of an identity document.

(cc) The respondents are ordered to inform the applicant in that communication of the manner in which a fresh application should be made; the offices at which such an application can be made and the name of the officials stationed at those offices that will be available to deal with their applications.

(dd) Copies of the communications to the applicant are to be

furnished to the applicant's attorneys, Goodway & Buck.

(ee) The respondents are ordered to pay the applicant's costs of the application, such costs to be in an amount of R5000.00 plus VAT plus all necessary disbursements in respect of court fees, sheriff's charges and the appearances of counsel, subject to the fee for each such appearance being limited to an amount of R450.00.

(l) In cases 45 and 71, the respondents are ordered in addition to the order in paragraph (k) forthwith to contact the applicants to ascertain whether they require assistance in making a fresh application by sending an official to visit their homes to assist them in completing the fresh applications and if so requested are ordered to send an official to their homes for that purpose.

(m) In case 14 an order is granted as set out in sub-paragraph (aa) to (ee) of paragraph (k) of this order save that the words 'late registration of his birth in terms of section 9(3A) of the Births and Deaths Registration Act 51 of 1992' in sub-paragraph (aa) shall be replaced by "issue of an identity document in terms of section 15 of the Identification Act 68 of 1997' and the words 'for the late registration of their birth after which they will be entitled to apply' shall be deleted in sub-paragraph (bb).

(n) The respondents are directed to furnish a report to the court as constituted for the hearing of these cases in the form of an affidavit by an authorised official setting out what has been done in fulfilment of paragraphs (k), (l) and (m) of this order, such affidavit to be furnished by no later than 17 January 2011. On receipt of that report any further necessary directions will be made.

(o) The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicants' costs of and incidental to

the hearing on 15, 27 and 29 September 2010.

DATES OF HEARING	15, 27 and 29 SEPTEMBER 2010
DATE OF JUDGMENT	23 DECEMBER 2010
APPLICANTS' COUNSEL	MS D SRIDUTT (heads of argument prepared by G D Harpur SC and Ms D Sridutt)
APPLICANTS' ATTORNEYS	GOODWAY & BUCK
RESPONDENTS' ATTORNEY	THE STATE ATTORNEY
DEFENDANT'S ATTORNEYS	MR R B G CHOUDREE SC and MS J HENRIQUES