CONSTITUTIONAL COURT OF SOUTH AFRICA

J T PUBLISHING (PROPRIETARY) LIMITED — First Applicant
EUGENE MARAIS — Second Applicant

versus

MINISTER OF SAFETY AND SECURITY — First Respondent
MINISTER OF HOME AFFAIRS — Second Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — Third Respondent

Heard on 14 May 1996
Decided on 21 November 1996 — Case CCT 49/95

J U D G M E N T

DIDCOTT J:

[1] The present matter is the second one concerning the statutory censorship of obscenity and the like with which we have had to deal this year. The first was *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*, [1] where we struck down a subsection of the Indecent or Obscene Photographic Matter Act (37 of 1967) that lay at its heart, holding the provision to be incompatible with the interim Constitution (Act 200 of 1993). Some equally crucial parts of the Publications Act (42 of 1974) have now been impugned in turn. They too are said in these proceedings to be constitutionally defective.

---

1 1996(3)SA 617(CC); 1996(5) BCLR 609(CC).

[2] In neither case did any of the counsel who argued it before us contend or suggest that such censorship was always and in principle repugnant to the Constitution, no matter how vile, depraved and bereft of redeeming features the material thus suppressed might happen ever to be. They all accepted, on the contrary, that the production of material so egregious, its dissemination and sometimes even its possession could justifiably be prohibited or restricted in the public interest whenever those activities were shown to have a truly pernicious effect. That so much might well be constitutionally tolerable was furthermore acknowledged, with varying degrees of force and emphasis, in three of the separate judgments delivered when we decided the previous case.[2] I mention all that because the decision given then appears to have been misunderstood in some circles as a green light shone for the peddling of pornography. It therefore seems necessary to stress that the target under attack was on the earlier occasion, and is again on this one, not censorship in general but the particular scheme of the statute in question, the nature and range of its dictates and the capacity attributed to them for hitting, indiscriminately and unseverably, both obnoxious and innocuous material.

[3] Whether those details of the Publications Act are indeed open to challenge in the present case is by no means common cause, however, but an issue in dispute and the first one that we have to consider. The background to that question and the circumstances from which it arises must therefore be described straight away.

---

2 See paras 93, 99 and 105 to 107.

[4] The first applicant publishes a magazine called *Hustler*, a name belonging to it on the strength of a trademark that it holds. It also produces other publications and material recorded on videotape. The second applicant is a member of a close corporation which has procured from the first applicant a franchise allowing it to trade under the name and requiring it to sell the first applicant's products. Both businesses ran into trouble when they were believed to be contravening the Publications Act. Issues of the magazine were banned. The police raided the premises of the close corporation and seized its stocks of merchandise supplied by the first applicant. The same happened to a second franchisee. That all occurred despite a concession by the Minister of Home Affairs that some parts of the statute were constitutionally flawed and the consequent preparation, on which his department was already at work, of a bill proposing its repeal and replacement by a fresh scheme. An undertaking that such incidents would not recur while the legislation remained under review was requested from the authorities. But they refused to promise that, insisting on the enforcement in the meantime of the law as it stood.

[5] The sequel was a series of recourses that the applicants had to litigation where they sought protection for their trading against a repetition of the experiences undergone by them, which were said to have interfered with it drastically. Their earlier efforts to achieve that object all went awry for various reasons, none of which matters now. In the end they applied to the Transvaal Provincial Division of the Supreme Court for an order

referring to us, for our ruling on them, the questions whether the Publications Act and the Indecent or Obscene Photographic Matter Act,[3] or alternatively some individual sections of each, were constitutionally valid or invalid. No additional relief was claimed in that forum as either an interim or a lasting measure. The Minister of Safety and Security, the Minister of Home Affairs and the Government were joined in the proceedings and cited respectively as the first, second and third respondents. The first respondent took no part in the debate that followed, abiding instead by the decision of the Court. The other two respondents both opposed the application. It came before Daniels J, who dismissed it with costs. His refusal of the referral was appealable to this Court under section 102(17) of the Constitution. So the applicants obtained from him the preliminary certificate required for such purposes by our rule 18. They then applied to us for leave to appeal against the decision in terms of that rule, as read with section 102(11) of the Constitution. In accordance with directions issued here for the disposal of the matter, oral argument on the application for leave to appeal was heard in due course by the whole Court, together with the appeal itself in case the application succeeded.

[6] The referral was sought under section 102(1) of the Constitution, the salient part of which stipulates that:

> "If, in any matter before a provincial or local division of the Supreme Court, there is

---

[3] At that time we had not yet passed judgment on the second statute mentioned. The applicants had been threatened with it too.

an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court ..., the provincial or local division concerned shall, if it

considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

Daniels J took the view that those provisions did not apply to the sort of case at hand, a case raising no issue but the ones on which a ruling was wanted from us. His reasons for thinking so were furnished in a judgment that he delivered at the time, when he said:

"The validity of the Acts, in the context of their enforceability regard being had to the Constitution, is not in issue.[4] The procedure adopted and sought to be employed by the applicants is simply not catered for by the section. There is no case before this Court involving the question of the validity of the two Acts. The applicants have merely expressed a desire to have that issue determined by the Constitutional Court, and to that end ask for a referral not of the case or matter or issue before the Court, but of an issue unrelated to the matter under consideration.[5] This Court also finds itself in a position where it cannot consider whether evidence is necessary for the purposes of deciding the issue, since it is not required to determine the issue but is asked to refer that very issue to the Constitutional Court, and it is precluded from giving effect to the requirements of the section. However one interprets the section, one is constrained to find that a referral, such as is contemplated, prerequires an issue arising within the context of an existing or pending *lis*. Since the issues sought to be referred are not issues in the case or matter before me, a determination of those issues cannot be decisive for any case, least of all the matter before me. In my view the referral sought is incompetent, and to grant the order prayed would be irregular and beyond the scope of the section."

---

4 That sentence should be read no doubt as if some such word as "here" or "now" had been added to the end of it.

5 I construe the mention made of an issue "unrelated to the matter under consideration" as an allusion to one on which a decision was hoped to be obtained elsewhere.

[7] The field for the enquiry into the construction thus placed on section 102(1) is best entered, as I see it, through section 7(4) of the Constitution, a convenient portal to that area of investigation. Paragraph (a) of the subsection, which appears at the beginning of Chapter 3, decrees that:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

The list then provided by paragraph (b) of the people who are qualified to claim such relief mentions in subparagraph (i) "a person acting in his or her own interest", and in subparagraph (iv) "a person acting as a member of or in the interest of a group or class of persons". Each applicant fell within a category so specified, subparagraph (i) covering the first applicant while subparagraph (iv) accommodated the second. They both complained that the statutes in question infringed or threatened a number of rights which Chapter 3 protected against "all law in force", as section 7(2) put it, "during the period of operation of this Constitution". Their ultimate aim was to gain an order which upheld the rights invoked by declaring the alleged infringements or threats to be unconstitutional. Their sights were set, in other words, on obtaining eventually a declaration of the very kind for which section 7(4)(a) entitled them to apply. No such order could be granted by the Transvaal Provincial Division, however, because it did not rank as a "competent court" for those purposes. For it lacked the requisite consents to its adjudication on the constitutionality of the statutes or parts of them that the applicants planned to assail in asserting the rights to which they laid

claim. That issue lay instead within the exclusive jurisdiction entrusted to this Court by section 98(3) of the Constitution, as read with sections 98(2)(c), 101(3)(c) and 101(6). So the applicants had to approach us for the declaratory order that they wanted.

[8] No more than two methods of doing that are ever available to litigants in cases like the present matter. They may follow the ordinary course, the one taken here, by asking the Supreme Court for the referral to us of the questions on which decisions are sought. Or they may request us to allow them direct access to our Court on those issues through the channel of its rule 17(1), as read with section 100(2) of the Constitution. But the alternative is a special route open, according to the rule, in -

> "... exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government".

I doubt that the present case would have passed the test thus set, had the applicants chosen that second path initially and in the circumstances which prevailed then.[6] In argument their counsel urged us nevertheless to let them fall back on it at this stage if we confirmed the decision of Daniels J. The best reason for our acceding in that event to the belated request would have been the fresh factor which had entered the reckoning

---

[6] See para 18 of the judgment, not yet reported, which this Court delivered on 18 November 1996 in *Transvaal Agricultural Union v Minister of Land Affairs and Another.*

in the meantime when the door was closed to a referral. We might have felt persuaded

that, once the prospect of a prejudicial delay in the outcome of a referral amounted to an exceptional circumstance contemplated by the rule in a matter of public importance, the certainty of no such outcome when there was nothing to produce one must *a fortiori* do so too. Otherwise an impasse would have ensued in which the applicants had no way of capturing our attention and, since that alone sufficed, the procedural right which they derived from section 7 (4) (a) was frustrated. Those possibilities need detain us, however, no further. For the occasion to explore them does not arise now.

[9] I say that because, in my opinion, Daniels J misconstrued section 102(1) and erred in holding the referral to be incompetent. In the light of section 7(4) it seems hardly imaginable that the framers of the Constitution intended, when they provided for referrals, to differentiate between cases in which the questions calling for our consideration were the sole ones raised and those where others that did not concern us accompanied them, excluding the former from the process and confining it to the latter. No sound reason for such a distinction occurs to me in principle or in pursuit of some policy. Nor does the wording of section 102(1) show, to my mind, that it was meant to be drawn. The subsection deals with "any matter" coming before a provincial or local division which contains an issue that falls within the exclusive jurisdiction of this Court and may be decisive of the case. The division must then refer the issue to us,[7]

---

[7] We have already ruled that the word "matter", where it appears for the second time in s 102(1), must be interpreted as if "issue" had appeared there instead. That was decided in para 10 of the judgment delivered in *S v Vermaas; S v du Plessis* 1995(3) SA 292 (CC) at 296H; 1995(7) BCLR

once it believes that a referral would serve the interests of justice. And that is surely so on the

851(CC) at 856G.

wording, whether the issue stands alone or additional ones emerge as well which do not have to be determined here. The second and third subsections of section 102 lend some support to my reading of subsection (1). They go thus:

> "(2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.[8]
>
> (3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction."

The conditional conjunction used at the start of both subsections indicates that the situations which they envisage for referrals encompass indeed, but are not necessarily restricted to, those where more issues have arisen than any susceptible to the process. The interpretation that I put on subsection (1) is then reinforced with greater strength by subsection (17), which ordains that:

> "If, in any matter before a provincial or local division, the only issue raised is a constitutional issue within the exclusive jurisdiction of the Constitutional Court ..., a refusal to refer such issue to the Constitutional Court shall be appealable to the Constitutional Court."

---

[8] In *S v Vermaas; S v du Plessis* we held that ss (2) "does not in itself provide for any referrals ... (but) merely supplements ss (1) by regulating the procedure which the provincial or local division must follow in ordering a referral under that subsection". See footnote 7 above: para 12 at 297 E-F in the first report cited there and 857 D-E in the second one.

That, in my view, dispels any doubt that may linger about the import of subsection (1), demonstrating quite clearly the competence of a referral when the issue to which it relates is the only one in the case.

[10] So much has already been decided by this Court, as it happens, not in a matter which raised precisely the same point but during a general discussion of referrals that took place. The occasion was *Brink v Kitshoff NO*,[9] when Chaskalson P had this to say:

> "The Constitution contemplates that constitutional disputes will ordinarily be dealt with by the provincial or local division before the Constitutional Court is engaged; and this is so even if the only issue in the case is a constitutional issue within the exclusive jurisdiction of the Constitutional Court. This follows from the language of section 102 (1) and (2) which necessarily implies that section 102 (1) is applicable to cases in which the only issue is the one to be referred to the Constitutional Court, and section 102 (17) which makes provision for appeals to the Constitutional Court against a decision of the Supreme Court refusing a referral where 'the only issue raised is a constitutional issue within the exclusive jurisdiction of the Constitutional Court'."

That judgment had not been delivered when Daniels J dismissed the application for a referral, or even by the time when we heard argument on the refusal. But the direction in which we must go is now confirmed by the passage that I have quoted.

[11] In coming to the opposite conclusion Daniels J was influenced by a couple of considerations which call next for some comment. He could not see, in the first

---

9 See para 6: 1996 (4) SA 197 (CC) at 206 C-E; 1996 (6) BCLR 752 (CC) at 757 H-J.

place,

how the issues on which a referral was requested might prove to be decisive of the case before him. But they would surely have had that effect. The case raised those issues squarely, and them alone. They were therefore ones decisive of the case, of the whole case as distinct from the part containing the preliminary application for a referral. Their decisiveness would have become obvious had a declaratory order resolving them been obtainable and sought from Daniels J himself. The same could scarcely have been gainsaid, what is more, if the applicants had claimed from him such an order in their favour, presenting the claim with tongues in cheeks when they knew full well that he was precluded from adjudicating on it and would inevitably have to send the matter here once the issues turned out to be transmissible. By any token those would then have arisen, to quote from his judgment, "within the context of an existing or pending *lis*" of which he was truly seized. Yet the difference between that step which the applicants might have taken and the course actually followed by them was one of mere form and no substance. So futile an exercise, such a veritable charade, would have contributed nothing real to the proceedings. The second difficulty that Daniels J thought he faced and took into account had to do with the proviso to section 102(1), which required evidence to be adduced in an application for a referral whenever that was necessary for the determination of any issue thus posed. The form and thrust of the application on his agenda prevented him, he believed, from considering the need for evidence on that occasion, and therefore from giving effect to the requirement. I do not understand why he felt obstructed there. Some remarks about such evidence were passed in *Luitingh*

v Minister of Defence,[10] when the judgment delivered by us expressed uncertainty about -

> "... the scope of the evidence which the proviso encompasses, whether it envisages testimony pertaining to the issue that is about to be referred, testimony relating to other issues which furnish the setting for the enquiry into that one, or both categories".

The question was left open then, and it will stay undecided for the time being since the answer is now neither here nor there. For nothing would have barred Daniels J from hearing evidence on either subject, had any that might count sprung to mind. Counsel who represented the second and third respondents in the Court below maintained there that some was required. But no scrap of it was tendered by either side, as far as we can tell from the record. None happened to be needed anyhow. The second topic broached in the passage which I have just quoted was by the way in the absence of the additional issues that it mentioned. And the first topic amounted to a general one, the treatment of which neither depended on nor could be affected by any particular set of facts that somebody or other had to prove.

[12] All that must still be said under the heading of competent referrals is this. Counsel who appeared for the second and third respondents reminded us of two previous *dicta* that we had voiced and relied on them in his argument supporting the line taken by Daniels J. The first was an excerpt from the judgment written in *S*

---

[10] See para 8: 1996(2)SA 909 (CC) at 916 A-B; 1996(4) BCLR 581 (CC) at 586 I-J.

v Vermaas; S v du Plessis[11] which concerned section 102(1) and went as follows:

> "What we have to decide on a referral ordered under the subsection is a specific 'issue' falling within our exclusive jurisdiction which has arisen in the 'matter' so referred, and not the 'matter' in its entirety."

That observation furnished authority, counsel contended, for the proposition that the referral of an issue could never be countenanced once it was the sole one raised by the case, since "the 'matter' in its entirety" would then be improperly referred. The second passage by which counsel set store came from the judgment passed by us in *Luitingh v Minister of Defence*,[12] where we had noted that:

> "The purpose which section 102(1) was designed to serve is obvious. It enables provincial and local divisions to seek rulings on issues of the kind encompassed which they need for, and on obtaining must apply to, the matters handled by them."

Counsel pointed out that no such purpose could be accomplished unless a residue of issues remained before the provincial or local division, awaiting determination there. His reliance on those *dicta* of ours was, however, misplaced. It ignored altogether the

context in which the words had been uttered. Neither case had contained a single issue alone, the one sent here. Multiple issues had arisen in each, the rest of which were left behind and had yet to be resolved there. On both occasions our attention was therefore focussed on, and our minds were accordingly attuned to, cases of that sort and no other

---

11 See footnote 7 above: para 10 at 296 F in the first report cited there and 856 E in the second one.

12 See footnote 10 above: para 5 at 914 D-E in the first report cited there and 585 C-D in the second one.

kind. That concentration on them formed the setting in which we spoke as we did. So each of the extracts quoted must be read in relation to no cases but those. The upshot is nothing derived from either to buttress the decision of Daniels J.

[13] Once the referral was competent it should, in my view, have been ordered. Daniels J did not consider where the interests of justice lay in that regard. The conclusion to which he came made it unnecessary for him to apply his mind to the question. The answer, when required, is the responsibility in the first instance of the provincial or local division dealing with the matter. The last word on it rests always, however, with this Court.[13] Here, I believe, the interests of justice told in favour of a referral, given the circumstances that prevailed at the time of the application for such and their accentuation by the attitude which the Minister and his department had adopted.

[14] It follows that, in my judgment, we should grant the application for leave to appeal, allow the appeal in turn, and substitute the requested referral for its refusal.

[15] The reversal of the decision reached in the Court below brings duly before us the claim for a declaratory order which the applicants wish us to grant on the constitutional issues presented by them. That does not necessarily mean, however, that we are now bound to resolve those issues. Whether we should say anything at all about them must

---

[13] That was decided in *Luitingh v Minister of Defence*. See footnote 10 above: para 12 at 918E in the first report cited there and 589 D-E in the second one.

be settled first. I interpose that enquiry because a declaratory order is a discretionary remedy,[14] in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.[15] I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here. Perhaps, what is more, a declaratory order on an issue quite unsuitable for one does not even amount to "appropriate relief ", the type which section 7(4)(a) empowers us to grant. The description may well encompass not only the form of the relief but also the setting for it. We do not need to consider that suggestion, however, once our adoption of the rule appears to be wise in any event. We should no doubt regard it, like most general rules, as one that is subject in special circumstances

---

[14] See s 19 (1) (a) (iii) of the Supreme Court Act (59 of 1959); *Ex parte Nell* 1963 (1) SA 754 (A) at 760 B; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93 H; *South African Mutual Life Assurance Society v Anglo - Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658 H.

[15] See *Herbert Porter and Co Ltd and Another v Johannesburg Stock Exchange* 1974 (4) SA 781 (W) at 796 G - H; *Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society* 1977 (3) SA 631 (T) at 635 F-G; *Erasmus v Protea Assuransiemaatskappy Bpk* 1982 (2) SA 64 (N) at 66 H; *Compagnie Interafricaine de Travaux v South African Transport Services and Others* 1991 (4) SA 217 (A) at 230 I-J; *Muller v The Master and Others* 1992 (4) SA 277 (T) at 281 J - 282 A; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another* ; *Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 14 F; *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) at 125 E-F.

to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication. But, for reasons that will emerge in a moment, nothing warrants a departure from the policy this time. A further word or two had better be said on the topic before I leave it. Section 98 (5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract,[16] academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.

[16] The current state of affairs differs significantly from the situation that existed at the time when Daniels J heard the application for a referral. No staunch effort was made before us to defend the parts of the Publications Act that had come under fire, and by the time when the argument ended it seemed to have become common cause that, in some important respects at least, the statute could not survive constitutional scrutiny. The only question then remaining in dispute on those features of it was whether their consequent invalidation should ensue immediately or be suspended for a limited period in order to afford Parliament the opportunity of repairing the defects in them. The occasion for that opportunity which was thought to have arisen has

---

16 In our directions which are issued for hearings before this Court we often indicate that the questions put to us will be treated as "abstract" ones. What we mean by saying so is that we shall deal with them in principle, and as general questions on which no evidence is required because the answers do not depend on any particular set of facts. We never imply that they will be considered in a vacuum.

disappeared, however, since we reserved our judgment in the case. For Parliament has now achieved the purpose that the suspension was meant to serve by passing in the meantime the Films and Publications Act (65 of 1996), which repeals entirely both the Publications Act and the Indecent or Obscene Photographic Matter Act, replacing the pair with a substantially different scheme. The new statute was enacted very recently, and it has not yet been

brought into operation. But that will no doubt happen soon, in all probability sooner than the time when the suggested suspension would have expired. The old statutes, which are already obsolete, will both then terminate. Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under their rapidly waning authority.

[17] In all those circumstances there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.

[18] The costs of the litigation in its consecutive phases remain to be considered. Once the view is taken that the application for a referral ought to have succeeded in the Court below, it must follow that the applicants should not have been saddled with the entire costs of those proceedings. They were liable for the ones that would have been incurred had their application encountered no resistance, since they could not have avoided going to Court for the referral in any event. But those occasioned by the

opposition which eventuated should be made payable, now that it has failed, by the second and third respondents. The applicants had to come here on appeal in order to obtain that reversal of the adverse order for costs. So they deserve, I believe, to be awarded the costs of both the appeal and the application for leave to appeal.

[19] In the result an order is made in the terms that follow.

(a) The application for leave to appeal is granted.

(b) The appeal is allowed and the order of the Court below dismissing with costs the application for a referral is replaced by one:

(i) granting the application and referring to this Court the two issues that were sought to be referred;

(ii) directing the second and third respondents to pay the costs occasioned by their opposition to the application.

(c) No ruling on either of those issues will be given by this Court in the situation that prevails now and in the light of the material differences between it and the one that existed when the Court below heard the application for a referral.

(d) The second and third respondents are directed to pay the costs of the appeal and of the application for leave to appeal.

(e) The costs awarded in subparagraph (b) (ii) and in paragraph (d) of this order will include at each stage those which the applicants and appellants incurred for its purposes in employing the services of two counsel.

Chaskalson P, Mahomed DP, Ackermann J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J all concur in the judgment of Didcott J.

For the applicants and appellants: JJ Gauntlett SC and GJ Marcus, instructed by Michael B Snoyman and Associates.

For the second and third respondents: GL Grobler SC, DE van Loggerenberg and NJ Louw, instructed by PRT Rudman Attorneys.

No appearance for the first respondent.