THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 657/2013

In the matter between:

THE MINISTER OF POLICE **Appellant**

and

VONGANI SHARON MBOWENI **First Respondent**

RUDZANI LOLLA MAKATU **Second Respondent**

Neutral citation: *Minister of Police v Mboweni* (657/2013) [2014] ZASCA 107 (5 September 2014)

Coram: MPATI P, BOSIELO, WALLIS and MBHA JJA and SCHOEMAN AJA

Heard: 25 August 2014

Delivered: 5 September 2014

Summary: Special case – requirements for – facts must be agreed and fully set out – section 28(1)*(b)* of the Constitution – deprivation of parental support – constitutional damages.

ORDER

On appeal from: North Gauteng High Court, on circuit in Polokwane (Mothle J sitting as court of first instance):

1 The appeal is upheld and the action is referred back to the high court for trial in accordance with the provisions of this judgment.

2 All parties will bear their own costs of the appeal.

JUDGMENT

Wallis JA (Mpati P, Bosielo and Mbha JJA and Schoeman AJA concurring)

[1] On 15 March 2009 the police arrested Mr Wisani Mahlati and detained him at the Ritavi police station. During his detention two other prisoners in his cell assaulted him. The noise of the assault was apparently disguised by other inmates of the cell singing loudly. The police did not detect the assault or do anything to prevent it or protect Mr Mahlati. The following morning, satisfied that they had no grounds for Mr Mahlati's arrest and detention, the police released him. He was at that time visibly in pain, sweating excessively and had vomited. He was taken to a doctor and, later that day, hospitalised. His condition deteriorated and he died five days later.

[2] The first respondent was married to Mr Mahlati and is the mother of his daughter born on 13 January 2009, a few months prior to his death. The second respondent is the mother of another daughter born some years

earlier on 27 November 2000. On behalf of their daughters the respondents pursued claims against the Minister of Police (the Minister) for substantial damages based on an allegation that their daughters' 'right to parental care as provided for in Section 28(1)*(b)* [of the Constitution] was impaired upon' when their father died as a result of 'the unconstitutional conduct' of the members of the force for whom the Minister was in law liable. It was specifically pleaded that the damages were 'general in nature' and that it was 'neither possible nor practical to particularise the amount in any further detail'. Notwithstanding that allegation it appears that the parties were able to agree the amounts payable in respect of loss of support of Mr Mahlati's two daughters and on 16 April 2013, at the trial before Mothle J, sitting in the North Gauteng High Court on circuit in Polokwane, judgment was given for the agreed amounts, now described as delictual damages.

[3] The order granted by Mothle J provided that 'the claim for constitutional damages' be separated from that in respect of delictual damages, in disregard of the fact that they had never been separate claims. The parties then prepared a document headed 'Statement of Facts in terms of Rule 33(1) and (2)' and according to the judgment proceeded to argue 'whether a child whose parent/s has died as a result of the unlawful conduct of a third party has a right to sue for constitutional damages arising from an infringement of the constitutional right to parental care as provided in section 28(1)*(b)* of the Constitution'. Mothle J answered this question in the affirmative and granted an order in the following terms:

'[1] The Plaintiffs' right to claim for constitutional damages lodged on behalf of the minor children of the deceased, succeeds;

[2] The Defendant is liable to compensate the minor children of the deceased for proven constitutional damages arising out of the unlawful deprivation of their father's parental care …'

He then referred the quantum of those damages to trial.[1] The present appeal is with his leave.

[4] The issues raised in this case are of considerable difficulty and importance with far-reaching ramifications if the judgment of the court below is sustained. Although the Constitutional Court in *Fose*[2] accepted that there may be circumstances in which in terms of s 172(1)*(b)* of the Constitution damages are a just and equitable remedy for the breach of a constitutional right, the only subsequent cases in which damages have been awarded as a remedy for the breach of a constitutional right are the *Modderfontein Squatters* case[3] and *Kate*,[4] both of which differed entirely from the present matter. To uphold the judgment of the court below would accordingly break new ground. That requires careful consideration of the legal basis for the claim and the reasons for holding that constitutional damages are the appropriate remedy to be afforded to the claimants. But first it is necessary to examine the procedural circumstances in which the court below was asked to address these important issues.

[5] The parties and the court below approached the matter as if there was a clear-cut issue of law capable of resolution with the barest minimum of factual matter being placed before the court. That was an error. In *Modderfontein Squatters* and *Kate* the court was concerned with

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[1] The judgment is reported as *M and Another v Minister of Police* 2013 (5) SA 622 (GNP).
[2] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[3] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre,* Amici Curiae*); President of the RSA v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA).
[4] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

whether damages were on the facts of those cases an appropriate remedy for breaches of the claimants' constitutional rights. The facts and those rights had been determined and all that remained was for the court to determine an appropriate remedy. While *Fose* was decided on exception, the background to the claim was a series of assaults allegedly perpetrated on the claimant, details of which were fully pleaded. It was accordingly possible for the court, against the pleaded factual backdrop, to determine whether the consequence of the breaches of his constitutional rights warranted an award of constitutional damages that included a punitive element, in addition to the damages to which he was in any event entitled in consequence of the assaults. It held that they did not. In all three cases the court was apprised of the facts on which the claim was based. Here there were no facts dealing with the question of the loss of parental care.

[6] Those three cases demonstrate that the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. To start with the appropriateness of the remedy is to invert the enquiry. But that is what occurred in the present case. This came about because of a flawed understanding of the provisions of rules 33(1) and (2) dealing with special cases. To understand why this is so it is necessary to look at the rules themselves, which read as follows:

'(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)*(a)* Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions …'

The statement of facts prepared by the parties did not comply with the requirements of rule 33(2)*(a)* in that it did not set out the facts upon which the proposed legal argument was to rest, nor did it define the question of law that the court was being asked to determine or set out the parties' contentions in relation to that question. Had that been done the litigation would probably have taken a different course. As it is, it is apparent that the exercise upon which the litigants embarked was fatally flawed.

[7] This court, whilst still the Appellate Division, dealt with the requirements of a special case.[5] That occurred in a matter where what purported to be a special case was stated for the consideration of this court in terms of the Labour Relations Act 28 of 1956. The aim was to secure the ruling of this court on a number of questions arising from the unfair labour practice jurisdiction of the then industrial court. Giving the judgment of the Court, which held that the document presented to it did not constitute a special case, Nicholas AJA said:

'Provision is made in Rules of Court and in a number of statutes for the submission to a Court of questions of law "in the form of a special case"… In none of them is "special case" defined, presumably because the expression has an accepted meaning. Mozley and Whiteley's *Law Dictionary* 7th ed says *sv* "special case" that it is:

"1. A statement of facts agreed to on behalf of two or more litigant parties, and submitted for the opinion of a court of justice as to the law bearing upon the facts so stated."

Stroud's *Judicial Dictionary* 4th ed states that:

"A special case is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law... It is also known as a case stated."

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[5] *National Union of Mineworkers and Others v Hartebeestfontein Gold Mining Co Ltd* 1986 (3) SA 53 (A) at 56G-57E.

This meaning is reflected in Rule 33 of the Uniform Rules of Court. It provides in subrule (1) that the parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the Court, and in subrule (2)*(a)* that

"such statement shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon".

It is, therefore, implicit in the expression "in the form of a special case" that there should be a statement of the facts agreed by the parties … The industrial court has power to reserve for the decision of the Appellate Division a question of law which arises in proceedings before it. It is only such a question which can properly be reserved - this Court does not answer whatever questions the industrial court may choose to put to it. The question must not be an abstract or academic question. Courts of law exist for

"the settlement of concrete controversies, ... not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

(*Per* INNES CJ in *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441.)

Consequently, in order to enable this Court to determine whether the questions of law reserved do or do not arise in the proceedings, the industrial court should set out in the special case something which shows what has arisen, and how it has arisen.'

[8] It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane v D'Ambrosi*,[6] where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. The proceedings in *Bane v D'Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the judge's ruling should be led, with the result that the record was complete

[6] *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) para 7.

and this court could then rectify the consequences of the error in deciding the special case.

[9] The statement of facts in this case described in some detail the circumstances of Mr Mahlati's detention and death. In regard to the children's claims, however, it provided virtually no detail. They were identified and it was said that their father had been under a legal duty to support them and had supported them. Then followed a bald statement that the deceased provided parental care to his two daughters. On that basis it was said that they were entitled to constitutional damages because they had been deprived of their biological father and guardian and thus deprived of their constitutional right in terms of s 28(1)*(b)* of the Constitution. Nothing more was placed before the judge in respect of this claim.

[10] It appears that the parties thought that the statement that Mr Mahlati provided parental care to his daughters was a statement of fact that sufficiently raised the point of legal principle of whether a claim for constitutional damages was legally tenable. In that they erred. The statement was a conclusion that a constitutionally protected right had been infringed, which is a mixed matter of fact and law. A brief look at s 28(1)*(b)* of the Constitution reveals why that is so. The section reads as follows:

'Every child has the right … to family care or parental care or to appropriate alternative care when removed from the family environment.'

The right is couched in the alternative, not as three separate and distinct rights. Children have the right to family care *or* parental care *or* appropriate alternative care. The third of these, which presupposes the absence of the first two, demonstrates that there are alternative ways of

ensuring the fulfilment of the right generally embodied in the section. The right is thus a right that the child will be cared for, that can be fulfilled in different ways. That at least raises the possibility that the right is satisfied if any one of those alternatives exists as a matter of fact. The language of the section suggests a progression from an ideal of being raised and cared for in a family, bearing in mind that concepts of family differ among different communities in this country and that the notion of what constitutes a family is subject to evolution over time, to parental care by one or both of a child's parents,[7] to appropriate alternative care, which may mean foster care or care in an appropriate home or institution.[8] The latter is probably seen as the least desirable situation, but may be necessary in the best interests of the child, which are paramount in terms of s 28(2) of the Constitution.

[11] The fact that section 28(1)*(b)* expresses the right that it embodies in three alternatives, demanded that in the first instance there be a proper analysis of the different elements of the right and, in particular, the relationship between the right to family care and the right to parental care. In *Grootboom*,[9] Yacoob J said that ss 28(1)*(b)* and *(c)* must be read together and that the former defines those responsible for giving care, while the latter lists various aspects of the care entitlement. His approach to the three alternatives was that:

'They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care.'

[7] The word 'parent' may encompass a biological, adoptive or foster parent or a parent who has become such by virtue of a surrogacy agreement.
[8] These were described as three contingencies in *Jooste v Botha* 2000 (2) SA 199 (T) at 208D-F. The conclusion that parental care necessarily means care by a custodian parent may be unduly restrictive.
[9] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 76. See also *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) paras 74-76 (hereafter *TAC (No 2)*).

At least superficially that appears to support an interpretation that the rights guaranteed by the section are fulfilled if the child is cared for by any one of those responsible for giving that care, or at least that one of those responsible for that care provides it. The primary obligation clearly rests on family and parents, but, as the second TAC case shows, where they are for reasons of poverty or otherwise unable to provide necessary care the State may be obliged to step in.[10]

[12] The court below simply elided the concepts of family care and parental care[11] by reference to the definition of 'care' in the Children's Act 38 of 2005. Appropriate though reference to that definition might be in certain circumstances, it was not directed at the problem facing the court below of a claim for damages arising from an alleged breach of the constitutional right embodied in s 28(1)*(b)* of the Constitution. An important question in that analysis, where a family unit is disrupted by the death of one parent, is whether the fact that the child is thereafter cared for by the surviving parent means that there was no infringement of the right, because it is being fulfilled in a different way. An alternative approach would be that the right is in part infringed because there is an element of deprivation in the change from a situation where both parents participate in the child's life to that where one parent shoulders the entire burden of care. If the parents were separated and the one parent provided the child's day to day care, another question would be whether the death of the other parent deprived the child of parental care in terms of s 28(1)*(b)*. The separation of father and mother might already have done so.

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[10] *TAC (No 2)* para 77.

[11] As do the authors of the section on 'Children's Rights' in *Constitutional Law of South Africa*, 2nd ed (loose-leaf) section 47.3 (Revision service 07-09).

[13] These two questions could easily have arisen in this case, the first in relation to Mr Mahlati's wife and his newly born child and the second in relation to the older child from whose mother he appeared to be separated. As they illustrate, it was essential for the court to be told or to determine the facts in order to have a full picture of what Mr Mahlati did in relation to his daughters that was said to constitute parental care, the loss of which would warrant an award of constitutional damages. In every case whether the parent who has died provided parental care in terms of the Constitution would depend on the relationship between the parent who has died and the children in respect of whom the claim is being made.

[14] The central issue in this case was whether, and if so in what way, the two girls had been deprived of parental care in the sense in which that expression is used in the Constitution. Their mothers represented them in this litigation. Presumably they were and are receiving parental care from their mothers. In the case of the younger of the two girls she was but a babe in arms when her father died. She will never really have known him even though he was at the time married to her mother and I assume, although like much else this does not appear from the record, had established a family home with her. If he was, then one would have thought her claim would be one for loss of family care rather than loss of parental care, which she clearly still enjoys. In the case of the older girl she was living with her mother at a different address from her half-sister. Although both homes are in the same town we do not know if they were sufficiently close for Mr Mahlati to visit both on a daily basis or whether he tried to do so. We do not even know whether, like so many South Africans, commercial necessity forced him to live away from home most of the time. All we know from the pleadings is that he was detained at a

police station over 100 kilometres away from the town where his children were living. Without knowing what role Mr Mahlati played in the lives of his children it was impossible for the court below to determine that a loss had been suffered, much less the nature of that loss.

[15] The court below recognised the relevance of these facts, because in para 51 of the judgment the following was said:

'In the case of loss of parental nurturing the most important factors to be alleged and proved will be the ages of the children at the time of death of the parent, [the] nature of the relationship between the child and the parent, the role which the parent played in the child's development, time spent together and the general financial contribution by the deceased in the upbringing of the child. Some cases also distinguish between the instances where one parent survives the other, in which case the award would be substantially less than in the instance where both parents perish. Further arguments have also been raised in some cases, concerning the prospects of re-marriage, with a view to bring in a partner who would otherwise replace the lost parental services.'

It is unclear why, in the light of this, the learned judge proceeded to make an order holding the Minister liable to the respondents for proven constitutional damages arising out of the unlawful deprivation of Mr Mahlati's parental care. None of the facts he identified as important to the determination of whether there had been a loss of parental care had been alleged or admitted. As a result he was not in a position to assess whether there had in fact been any loss of parental care.

[16] The judge's approach was to leave these questions to a later stage of the trial where the issue of quantum would be considered. That was not appropriate, because the first issue he had to determine was whether there had been any deprivation of parental care at all. Until he had determined the nature of parental care for the purposes of s 28(1)*(b)* and, on the basis of evidence or admissions of fact, decided that there had been a

deprivation of parental care, no question of quantum could arise. An enquiry into damages cannot take place in the air. It must be an enquiry into the damages arising from an identified wrong.

[17] The difficulties to which this gave rise emerge from the judgment itself. In para 54 the judge held that the plaintiffs have a right to claim constitutional damages on behalf of their children for unlawful deprivation of their father's care. Immediately thereafter in para 55 he said that this finding was for the purpose of determining whether the plaintiffs had the 'right to sue' on behalf of their children and recorded that liability was not conceded. It appears that he was of the view that liability was still in issue because of the absence of evidence on the issues he had identified. In other words the issue was determined as if on exception. But that was incompatible with the declaration of liability that he proceeded to make against the Minister.

[18] A second area of concern with the approach adopted in the court below is that, even if the facts showed that the children had been deprived of parental care within the meaning of s 28(1)*(b)*, that did not necessarily establish their right to claim damages. A further issue was whether the actions, or more accurately inaction, of the police in failing to safeguard and care for Mr Mahlati while in police custody, constituted a wrongful act in relation to the children. It was clearly wrongful in relation to Mr Mahlati himself, but whether it constituted a wrongful breach of the children's constitutional right is a different matter. The court needed first to decide whether the right operates horizontally in terms of s 8(2) of the Constitution so as to extend to the policemen in the present situation or whether, if it does not, the position of state employees is different, by virtue of s 8(1) of the Constitution. It also required the court to decide

whether the police owed a legal duty to the children to avoid or prevent them from suffering a loss of parental care. Not every breach of constitutional duty is equivalent to unlawfulness in the delictual sense and therefore not every breach of a constitutional obligation constitutes unlawful conduct in relation to everyone affected by it.[12]

[19] Insofar as Mr Mahlati was concerned the police were in breach of his constitutional rights to human dignity, life and freedom and security of the person in terms of ss 10, 11 and 12 of the Constitution. But their obligation to protect Mr Mahlati while in their custody does not necessarily mean that they were at the same time under a legal duty to his children to secure their rights in terms of s 28(1)*(b)*. That raised and demanded an assessment of policy considerations similar to those that operate in relation to the existence of a legal duty in delictual claims. In *Steenkamp*[13] Moseneke DCJ summarised the position as being that 'whether or not a legal duty to prevent loss occurring exists calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in the view of the court, consistent with the common convictions of society'. The court below did not undertake this enquiry and it is apparent from the heads of argument in this court that counsel had not appreciated its relevance.

[20] Even if those issues could be and had been determined in favour of the respondents there remained the further issue of whether constitutional damages were the appropriate constitutional remedy for that breach. The heads of argument in this court framed the debate as being one between constitutional damages as a remedy and a development of the common

[12] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 37.
[13] Para 39 and the further discussion in paras 40-42.

law relating to the assessment of damages to permit recovery of an amount in respect of general damages under the head of deprivation of parental support, but that was not the primary issue. The first issue was whether the existing remedy by way of damages for loss of support was inadequate to compensate the children for any breach of their right to parental care from their father. In that regard, a curious feature of the court below's judgment is that the judge said that:

'The claim for loss of parental care goes further than that of the loss of support. However, in my view, the child cannot claim for both loss of support and deprivation of parental care separately as the former is part of the latter. Such claim would amount to duplication and undue enrichment.'

If that was indeed his view then it is entirely unclear why he even addressed the issue of a claim for constitutional damages for breach of the children's s 28(1)*(b)* rights, because he had already granted judgment in their favour for damages for loss of support.

[21] The proper starting point for the enquiry was to consider whether the existing remedy by way of damages for loss of support was an appropriate remedy for any breach of the children's constitutional rights. As Moseneke DCJ pointed out in *Law Society of South Africa and Others v Minister of Transport and Another*:[14]

'It seems clear that in an appropriate case a private-law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking "appropriate relief" to which it is entitled, may properly resort to a common-law remedy in order to vindicate a constitutional right.'

In another case[15] Moseneke DCJ said:

'There appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within the

[14] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 74.
[15] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 91.

reach of s 38. If anything, the Constitution is explicit that, subject to its supremacy, it does not deny the existence of any other rights that are recognised and conferred by the common law.'

[22] The court below did not consider whether a remedy by way of a claim for damages for loss of support was an appropriate remedy for any breach of the children's rights in this case. Its approach was that the Constitutional Court in *Fose*[16] had recognised the possibility of a claim for constitutional damages as an appropriate remedy for a breach of a constitutional right and the only issue was whether such damages should be awarded for a breach of the right in s 28(1)*(b)* of the Constitution. That approach was incorrect. The court should first have considered the adequacy of the existing remedy. If it was inadequate then it should have considered whether the deficiency could be remedied by a development of the common law to accommodate a claim more extensive than one for pecuniary loss. Ackermann J pointed out in *Fose*[17] that the common law of delict is flexible and falls to be developed with due regard to the spirit, purport and objects of the Bill of Rights. Another consideration is that the infringement of constitutional rights may often be appropriately vindicated by resort to public law remedies.[18]

[23] I am also concerned that there may be a misunderstanding of the ambit of the dictum in *Fose* on which the claim for constitutional damages was advanced and a lack of appreciation of what that case decided. It is as well therefore to remind ourselves of what Ackermann J said in para 60 of his judgment. The passage reads as follows:

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[16] *Fose* para 60.
[17] *Fose* para 58(b).
[18] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para 81.

'it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.'

[24] In the first place Ackermann J said that where a delictual claim arising from a breach of statutory duty is made, the award is made to compensate the injured party for loss that they have suffered. In other words the claim is for pecuniary loss of the type ordinarily recoverable by way of the Aquilian action. It is not a claim for a *solatium* or for general damages. The latter are recognised in claims arising from personal injuries, but that is an exception to the general rule that the Aquilian action is an action to recovery pecuniary loss. It was in the context of the fact that damages to compensate for pecuniary loss are recoverable in an Aquilian action, where the legal duty that has been breached arose from a statutory provision, that Ackermann J remarked that it would be strange if a similar claim could not be brought arising out of a breach of a constitutional right. It is so that he added the rider 'at least' before his reference to 'loss' but that does not mean that he endorsed a general proposition that constitutional damages will encompass a *solatium* or general damages. Whether our law should develop in that direction in some instances remains an open question. The awards in both *Modderfontein Squatters* and *Kate* were based on quantifiable financial harm and the rejection in *Fose* of claims for punitive damages points in

the opposite direction. It would be a curious result indeed were the legal position to be that Mr Mahlati could not have obtained an award of constitutional damages for the assaults perpetrated on him, because of the rejection of such awards in *Fose*, but, because he died, his daughters can obtain an award of constitutional damages beyond their claim for damages for loss of support on the basis of the same decision.

[25] The final point that should have been born in mind in the consideration of these claims was the broader implications of a judgment in favour of the respondents. The most obvious instance in South Africa of a child losing a parent as a result of the unlawful actions of a third party would be where the parent was killed in a motor accident and the target of the claim was the Road Accident Fund. The members of this court are well aware that the Fund is under considerable financial pressure dealing with the claims that it faces at present. Recognising claims of the type now suggested would add to its existing burden. That necessitates our approaching the matter aware that any decision will have an effect going beyond the facts of the present case. In those circumstances, before the court below arrived at a decision with potentially far-reaching consequences it should have ensured that any parties, and especially those organs of state that discharge their responsibilities from public funds, had the opportunity to appear and make submissions that would enable the court to arrive at a just conclusion. As Jafta J pointed out in *Mvumvu*:[19]

'… in determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government. These competing interests need to be carefully weighed.'

[19] *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) para 49.

The competing interest in that case was that a retrospective declaration of invalidity would increase the Road Accident Fund's liabilities by R3 billion. In the present case the Road Accident Fund and the Ministers of Transport and Finance would appear to have had a significant interest in the decision that the court below was called upon to make and would have been able to make a contribution to its determination. In those circumstances they should have been afforded the opportunity to intervene in order to make that contribution.

[26] In the result the court below failed to address issues of a factual and a legal character that were central to the decision that it was called upon to make. For those reasons the judgment of the court below cannot stand. It was but faintly suggested on behalf of the Minister that the claim should be dismissed, but as the Minister was a party to the inappropriate procedure adopted in the court below that would not be justified. As to costs the parties are jointly responsible for the situation that has arisen. As this was an endeavour on the part of the respondents to vindicate constitutional rights it is appropriate that the parties bear their own costs of the appeal.

[27] The following order is accordingly made:

1 The appeal is upheld and the action is referred back to the high court for trial in accordance with the provisions of this judgment.

2 All parties will bear their own costs of the appeal.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	P J J de Jager SC (with him A Granova) Instructed by: State Attorney Pretoria and Bloemfontein
For respondent:	G J Diamond Instructed by: Diamond Hamman & Associates, Polokwane; Van Pletzen Lambrechts Attorneys, Bloemfontein.