SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 221/2011
Reportable

In the matter between:

ANDREW LIONEL PHILLIPS **APPELLANT**

and

SOUTH AFRICAN RESERVE BANK **1ST RESPONDENT**
MINISTER OF FINANCE **2ND RESPONDENT**
PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA **3RD RESPONDENT**

Neutral citation: *Andrew Lionel Phillips v South African Reserve Bank & Others* (221/11) [2012] ZASCA 38 (29 March 2012).

Coram: Mthiyane DP, Farlam, Majiedt JJA et Petse, Ndita AJJA

Heard: **02 March 2012**
Delivered: **29 March 2012**

Summary: **Costs – Uniform Rules of Court – Interpretation of Rule 16A – Whether the findings and order for the appellant to pay the respondents' wasted costs are appealable – whether presumption of regularity applies**

where no evidence that Rule 16A notice was dealt with by registrar under Rule 16(A)(1)(*c*) and (*d*) - practice to be followed where Rule 16A applies – whether general rule as to costs in constitutional matters applies to ancillary orders in such cases.

ORDER

On appeal from: Gauteng North High Court, Pretoria (Makgoba J, sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The costs order of the court below is set aside.

JUDGMENT

FARLAM JA (MTHIYANE DP concurring)

Introduction

[1] The appellant in this matter instituted proceedings in the North Gauteng High Court, Pretoria, against the first respondent, the South African Reserve Bank, the second respondent, the Minister of Finance, and the third respondent, the President of the Republic in January 2009. The relief he sought was:

(a) an order reviewing and setting aside a decision by the first respondent, the South African Reserve Bank, not to return certain foreign currency seized from him at Oliver Tambo International Airport on 10 February 2008; and

(b) orders declaring that the Exchange Control Regulations promulgated in Government Notice R 1111 of 1 December 1961, as amended, alternatively certain provisions in the Regulations are inconsistent with the Constitution and invalid.

[2] The third respondent, from whom no relief was sought, did not

participate in the proceedings.

Judgment of the court a quo

[3] On 1 June 2010, the date on which the application was set down for hearing, it was postponed sine die by Makgoba J, who ordered the appellant to pay the first and second respondents' wasted costs (including in the case of both respondents, those occasioned by the employment of two counsel). The learned judge made this order because in his view, the appellant had not complied with rule 16A of the Uniform Rules of Court.

[4] Rule 16A(1) reads as follows:

'*(a)* Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.'

[5] The court a quo found that there was no indication that the rule 16A notice which the appellant's attorney had prepared when the application was instituted was filed or, if it was filed with the registrar, that it was put on the notice board as required by the rule.

[6] The learned judge also found that it was the responsibility of the

appellant to satisfy himself that the registrar had caused the notice to be put on the notice board and that the notice which the appellant's attorney had prepared did not adequately set out the basis on which the constitutionality of the Exchange Control Regulations was challenged.

[7] He motivated this part of his judgment as follows:

'If one were to look at the purported notice which does not in itself comply with the rule in that as Mr. Lüderitz [one of the counsel for the first respondent] correctly said or argued no particularities of the constitutional challenge had been set out fully. Much as in a notice of appeal a litigant is expected to set out the grounds of appeal both on facts and on law it is likewise in this particular matter that the grounds of constitutional challenge should be succinctly set out for the interested party to know what the case is all about.'

[8] He had earlier referred to what Ackermann J said in *Shaik v Minister of Justice and Constitutional Development & others* 2004 (3) SA 599 (CC) at 610H–I (para 24) about the purpose of rule 16A. The passage to which he referred reads as follows:

'The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests.'

He proceeded:

'I underline the particularity of the constitutional challenge.'

[9] He proceeded to hold that non-compliance with rule 16(A)(1) cannot be condoned and that if the appellant wished to proceed with the constitutional challenge the matter would have to be postponed for the rule to be complied with and that the appellant would have to bear the wasted costs occasioned by the postponement.

[10] The conclusion that the costs of the postponement had to be borne by the appellant was based on a finding that the postponement had been brought about 'by the conduct of the [appellant] and nobody else and it is only fair that [he] should bear the costs thereof'.

[11] During the proceedings in the court a quo a notice in terms of rule 16A, which bore the registrar's stamp but did not have the case number written on it, was handed in from the bar. The registrar's stamp indicated that it was filed with the registrar on 28 January 2009.

Facts

[12] The notice reads as follows:

> '**BE PLEASED TAKE NOTICE** that the Applicant herein has raised a constitutional issue in the application filed under the above case number.
>
> **TAKE NOTICE FURTHER** that the Applicant seeks an order:
>
> 1 Declaring that paragraphs (a), (c) and (d) of Regulation 3(1) of the Exchange Control Regulations as promulgated by Government Notice R1111 of 1 December 1962 and as amended ("the Exchange Control Regulations") are inconsistent with the Constitution and are invalid.
>
> 2 Declaring that all of the provisions of Regulation 3(3) of the Exchange Control Regulations, following the semi colon at the end of paragraph (b) of that sub-regulation, are inconsistent with the Constitution and invalid.
>
> 3 Declaring that Regulation 3(5) of the Exchange Control Regulations is inconsistent with the Constitution and are invalid.
>
> 4 In the alternative to prayers 1 to 3 above, declaring that the Exchange Control Regulations in their entirety are inconsistent with the Constitution and are invalid.

> **AND TAKE NOTICE FURTHER** that any interested party in any of the aforementioned constitutional issues may, with the written consent of all the parties to the proceedings, given by no later than 20 days after filing of the Plaintiff's Affidavit, be admitted therein as *amicus curiae*, upon such terms and conditions as may be agreed upon in writing by the parties.
>
> **KINDLY** forthwith place this notice on the notice board designated for this purpose and ensure that same remains on such notice board for a period of 20 days, whereafter you shall endorse the notice to state on which day the notice was placed on the notice board and, on expiry of the 20 day period, place such endorsed notice in the court file.'

[13] At no stage prior to 17 May 2010 did either the first or the second respondent raise the contention that rule 16A had not been complied with.

[14] On 17 May 2010 the second respondent filed his heads of argument, in which the following was said:

'We submit that both the content and the context of the challenge address a constitutional issue. In the circumstances the applicant ought to have issued the required Rule 16A notice, putting all participating parties, and any prospective parties with an interest in the legislation that is challenged herein, on terms regarding the orders that it seeks. Its failure to do so has compromised its ability to proceed with the constitutional challenge to the legislation.'

[15] By this time it was, of course, too late for the appellant to comply with the rule before the date on which the application was set down for hearing.

[16] At some stage after 8 April 2010 when the appellant's attorney met with the first respondent's attorney to reach agreement on the index and record for

the high court hearing the court file was misplaced in the registrar's office. The appellant's attorney has reconstructed the record in the main application but he had not retained a copy of the bundle of additional non-contentious documents, which included the original rule 16A notice, and so was only able to produce the copy of the notice to which I have referred.

[17] When the case was called before the court a quo both the first and the second respondents argued that rule 16A had not been complied with and that the appellant was left, as counsel for the first respondent put it, 'with a choice of either abandoning [his] constitutional challenge or seeking a postponement of the hearing of the application'. Counsel for the first respondent went on to submit that whatever course he adopted the appellant should 'be held responsible for the wasted costs occasioned by his failure to comply with the rules of Court'. Counsel for the second respondent did not go so far as regards costs because it was only in the event of the appellant's choosing to ask for a postponement that they submitted that the appellant should tender the respondents' costs.

Application for leave to appeal

[18] The appellant applied for leave to appeal against the costs order to the full bench of the North Gauteng High Court. Because he was seeking leave to appeal against a costs order he set out in the founding affidavit filed on his behalf the exceptional circumstances which indicated why, in his submission, it was in the interests of justice for leave to appeal to be granted against the costs order: cf s 21A(3) of the Supreme Court Act 59 of 1959, as amended.

[19] Makgoba J refused the application for leave to appeal with costs, including those occasioned by the employment of two counsel by both first and second respondent.

[20] In his judgment refusing leave, Makgoba J held that his decision that rule 16A had not been complied with was a ruling which was not a final order, that his costs order had not been given in what he called 'proceedings…wholly of a constitutional nature' (so that the general rule that adverse costs orders should not be made against parties seeking to assert constitutional rights unless there are exceptional circumstances did not apply) and that the appellant had been 'rather lackadaisical in conducting the proceedings'. In his main judgment the judge had justified this finding on the basis that the appellant's attorney, who was aware of the requirements of rule 16A(1) and that they had to be complied with before the matter could properly be before the court, had only gone 'as far as just filing the notice' and had 'never satisfied himself that the registrar [had] duly publicised the…notice and endorsed [it]'.

[21] The judge appears to have been of the view that exceptional circumstances as referred to in s 21A(3) were not present because he said:

'In the circumstances I am not persuaded that another court will come to a different finding, especially if I also have to regard to the provisions of section [21A] of the Supreme Court Act, as [counsel for the second respondent] has presented that the appeal in this matter will not take this matter any further whatsoever.'

[22] On petition this court granted the appellant leave to appeal to it against the whole of the order made by the court a quo on 1 June 2010. Its order also contained the following:

'The affidavits that were filed by the parties in the application for leave to appeal to this court are admitted as evidence in the appeal and must be included in the record.'

Issues

[23] The following issues were debated during the hearing of the appeal:

(a) whether Makgoba J's findings and order are appealable;

(b) whether the notice compiled by the appellant's attorney complied with rule 16A(1);

(c) whether the appellant or the registrar bore the duty to ensure that a rule 16A notice is placed on the notice board for a period of 20 days;

(d) whether it is appropriate for an organ of state to raise any alleged non-compliance with rule 16A at a time and in a manner that prevents the defect being corrected and then to require an applicant either to pay the costs of a postponement to have his or her matter proceed on the merits or to abandon his or her constitutional challenge in order to allow the matter to proceed immediately;

(e) whether the appellant could have avoided the problem by moving for a separation of issues under rule 33(4) and proceeding only with the review, leaving the constitutional challenge to be decided later if the review did not succeed; and

(f) whether the general rule in constitutional litigation that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs applies also to costs orders relating to what were called ancillary matters, such as the question which arose in the present matter.

Discussion

(a) Is the order appealable?

[24] Counsel for both respondents contended that the order was not appealable because it is not definitive of the rights of the parties and not dispositive of at least a substantial portion of the relief claimed in the main

proceedings. In this regard reliance was placed on what was said by this court in, inter alia, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B-C.

[25] It must be remembered, however, that, as Hefer JA said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F, the passage in *Zweni*:
'does not purport to be exhaustive or to cast the relevant principles in stone.'

[26] The question of appealability in a case such as this, where a party seeks to attack on appeal an order made in judicial proceedings which have not yet terminated, was discussed by Nugent JA in a judgment with which the other members of the court concurred in *NDPP v King* 2010 (2) SACR 146 (SCA) at 166e–167c (paras 50–51), where he said the following:
'There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Association of Africa Ltd v Niselow* (in another court), which was cited with approval by this court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.

In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its proper classification does not seem to me to be material. I pointed out in *Liberty Life* that while the

classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle. Even the features that were said in *Zweni v Minister of Law and Order* to be characteristic, in general, of orders that are appealable was later said by this court in *Moch v Nedtravel (Pty) Ltd* not to be exhaustive nor to cast the relevant principles in stone. As appears from the decision in *Moch*, the fact that the order is not 'definitive of the rights about which the parties are contending in the main proceedings' and does not 'dispose of any relief claimed in respect thereof', which was one of the features that was said in *Zweni* to generally identify an appealable order, is far from decisive.'

[27] The matter was further discussed in two recent decisions of this court *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at 473C – 475E (paras 14 – 19) and *Government of the RSA v Von Abo* 2011 (5) SA 262 (SCA) at 270B - D (para 17), where Snyders JA (with whom the rest of the court concurred) said:
'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'

[28] In the present case the order made by Makgoba J will stand, unless upset on appeal in these proceedings, until at the earliest the main case is dealt with on appeal. If it was wrongly made (as I believe it was, for reasons set out later in this judgment) it may well give rise to considerable inconvenience and prejudice and impede the attainment of justice in cases involving constitutional

issues where arguments arise as to whether rule 16A(1) has been complied with. In my view that in itself affords sufficient reason to allow an appeal at this stage.

[29] A further aspect which was argued in the context of appealability was whether exceptional circumstances within the meaning of s 21A(3) of the Supreme Court Act 59 of 1959 are present so as to permit an appeal to be brought solely against a costs order. In my view the obtaining of a decision by this court on the interpretation of rule 16A(1)(*b*) as well as the other issues relating to the question as to whether the rule was complied with satisfies this requirement.

(b) Did the notice comply with the rule?

[30] The Constitutional Court and this court have repeatedly in recent years stressed the need to interpret the Constitution and other statutory provisions purposively (see, eg, *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) at 217F – 218A (para 51) and *Standard Bank Investment Corporation v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 (2) SA 797 (SCA) at 810D – 812E (paras 16 to 22)).

[31] Rule 16A(1)(l) has accordingly to be interpreted in the light of the purpose for which it was enacted, viz. to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases so that they may take steps to protect their interests by seeking to be admitted as amici curiae with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn (*Shaik v Minister of Justice and Constitutional Development*, supra, at 610H–I (para 24) and *In re Certain Amicus curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713

(CC) at 715F – G (para 5)).

[32] In the *Shaik* case, as appears from the passage quoted above in para 8 of this judgment, Ackermann J said that the purpose of the rule was to bring to the attention of the persons affected 'the particularity of the constitutional challenge'. This passage was stressed by the judge in his judgment and he relied on it in coming to his conclusion that the appellant's notice did not comply with the rule. But Ackermann J's reference to particularity related to the desirability of specifically identifying any statutory provision being attacked on the ground of its constitutional invalidity. In the *Shaik* case, although the notice said that the applicant contended that s 28(6) of the National Prosecuting Authority Act 32 of 1998 was unconstitutional and invalid because it violated the rights entrenched in certain sections of the Bill of Rights, the constitutional attack in the High Court and the Constitutional Court focused on the alleged constitutional inadequacy of s 28(8) of the Act. In the present case the notice correctly and specifically identifies the constitutional provisions under attack.

[33] The question arising in this case is thus different from the question in the *Shaik* case. It is this: does a notice which correctly specifies the statutory provisions being attacked comply with the rule if it simply states that the attack is based on inconsistency with the Constitution without specifying the grounds of the alleged inconsistency?

[34] What is an 'issue'? Among the definitions of the word 'issue' in the *Shorter Oxford English Dictionary* are 'a point on the decision of which something depends or is made to rest' and 'a point or matter in contention'.

[35] What is the point on the decision of which the appellant's case depends, and which is in contention in this case? The answer is clear: the constitutional invalidity of the Exchange Control Regulations. Is it necessary for the point to

be elaborated by specifying, as the judge held, the grounds of the challenge? I think not. When one bears in mind the purpose of the Rule as stated above it is clear that while the wording in the Rule might in another context be interpreted so as to require the grounds of the constitutional challenge to be stated this is not the case here because the role of the prospective amici to whom the notice is directed is 'to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn...[He or she] must raise new contentions' (*In re Certain Amicus curiae Applications*, supra at 715F - G (para 5).)

[36] All a prospective amicus needs to know in a case such as this is what provision is being attacked. He or she can then examine the court file to see whether the matters of law and fact he or she considers relevant are contained in the applicant's papers. If not, he or she may wish to raise such matters to assist the court correctly to decide the issue before it.

[37] Indeed it is difficult to conceive of a case where the perusal of the founding affidavit (or where appropriate the answering affidavit in which a constitutional issue is raised) would not be required. After all an amicus curiae may only be admitted if his or her participation would draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn, i.e. if he or she raised new contentions.

[38] Counsel for the second respondent contended that it should not be necessary and would in fact be unduly burdensome for a prospective amicus to have to peruse the court file to ascertain whether to apply to be admitted as an amicus. I cannot agree. It is difficult to see how a description of the issue can be 'succinct' if it is not such as to require an examination of the file. Furthermore it should be apparent after a relatively brief perusal of the founding affidavit in such a case what contentions are being relied on by the applicant. But such a perusal will in almost all cases be required by a prospective amicus

who wants to see if there is something new to be put before the court.

[39] Support for this approach in the matter may in my opinion be found in the decision of the Constitutional Court in *Nyathi v MEC, Department of Health, Gauteng* 2008 (5) SA 94 (CC).

[40] In that case, as appears from the judgment of the court a quo reported at [2007] JOL 19612 (T), the rule 16A notice before the court read as follows:
'Be pleased to take note that the above Applicant has lodged an application with this Honourable Court for, inter alia, an order declaring s 3 of the State Liability Act, no. 20 of 1957 unconstitutional. In terms of the aforesaid section no execution, attachment or like process shall be issued against the Defendant or Respondent in any action or proceedings or against any property of the state. Applicant contends that the provisions of the aforesaid sections [are] inconsistent with the Constitution of South Africa and should be declared unconstitutional.'

[41] The court a quo (Davis AJ) held that that notice complied with the rule. When the case came before the Constitutional Court the court clearly agreed because it allowed the appeal to proceed without more. As the purpose of the rule is to alert prospective amici the Constitutional Court was under a duty to satisfy itself that the Rule had been complied with. It was obviously aware of Davis AJ's finding regarding rule 16A. The only inference one can draw is that it also was satisfied that the rule had been complied with. The fact that the respondents did not raise the point is of no moment because as I have said the Constitutional Court was obliged to satisfy itself on the point.

[42] In the course of argument reference was also made to a case before the Constitutional Court in which the present appellant featured as one of the appellants, viz *Phillips v National Director of Public Prosecutions* 2006 (1) SA

505 (CC). The appellant and his co-applicants unsuccessfully sought leave from the Constitutional Court to appeal against a judgment of this court dealing with the powers of the High Court to rescind orders made in terms of s 26(1) of the Prevention of Organized Crime Act 121 of 1998. This court's interpretation of s 26(10) of that Act was sought to be attacked by the appellant on the ground that it did not advance the values enshrined in the Bill of Rights and was inconsistent with the Constitution. The constitutional complaints raised by the appellant in the Constitutional Court had not been argued in this court and no notice had been give to interested parties of the intention to argue them. In para 43 of the judgment of the Constitutional Court (at 520A–C) Skweyiya J said:

'It is not ordinarily permissible to attack statutes collaterally. The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led and that the requirements of the separation of powers are respected.'

[43] The passage does not support the arguments of the respondents in this case. The constitutional challenge here was explicit and the screening of the notice on the notice board (a topic I deal with below) constitutes due notice to all affected.

[44] In all the circumstances I am satisfied that the notice drawn up by the appellant's attorney complied with the rule.

(c) Did the appellant or the registrar bear the duty to ensure that the rule 16A notice was placed on the notice board for a period of 20 days and was it so placed?

[45] It is clear from rule 16A(1)(*c*) that it is the duty of the registrar to see to it

that the notice is put on the notice board designated for that purpose and I think it must follow that it is his or her duty to see to it that it stays there for the required period.

[46] In his replying affidavit, which neither respondent sought to challenge, the appellant's attorney, correcting to some extent what he had said in his founding affidavit, described what happened when the papers in this application were issued as follows:
'I handed several copies of the notice of motion, the founding affidavit and the Rule 16A notice to an official in the Registrar's office to be issued with a case number and stamped with the court stamp.
The official returned the originals of all the documents to me. I then passed the original Rule 16A notice back to her, explained that it was a notice in terms of Rule 16A and asked her to exchange it for a copy because her office needed the original version of the Rule 16A notice.

I do not recall the precise wording of her response, but she took back the original, handed me the copy and verbally acknowledged that she knew what a Rule 16A notice was and that her office was required to keep the original.'

[47] In the circumstances he was, in my view, perfectly entitled to assume that the registrar's staff would do what the rule enjoined them to do with the notice. The court a quo's finding that he was 'lackadaisical' is entirely unfounded.

[48] I am satisfied that it can be accepted that the notice was datestamped by the registrar's representative and placed on the notice board designated for the purpose and that it remained there for 20 days. The maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* (all [official acts] are presumed to have been duly performed until the contrary is proved), on which the appellant's counsel relied, applies, as it did, for example, in *Cape Coast*

Exploration Ltd v Scholtz 1933 AD 56. In that case one of the issues was whether the defendant had been sent a letter from the Civil Commissioner for Namaqualand notifying him that his diamond prospecting certificate had been withdrawn. A copy of the letter had been found in the commissioner's office but no evidence was led to the effect that the original had been posted. Wessels CJ said (at 76):

'Absolute proof is well nigh impossible where the frail recollection of men is a factor, and especially is this the case when we have to deal with the recollection of officials who almost automatically do much of their routine work. Hence the importance of the maxim *omnia praesumuntur rite esse acta*. See *Byers v Chinn and Another* 1928 A.D. at p. 332. We must presume that an official will carry out the ordinary routine work of his office, for in our experience this is what usually occurs. Hence we must presume that it an official letter is written and a copy filed, that the former is dispatched in the ordinary course of business to the person concerned and that he has received it.'

[49] The placing of the notice on the notice board and seeing to it that it remained there for 20 days was part of the ordinary work of the registrar's office: it must be presumed, until the contrary is proved, that that work was done.

[50] It follows from what I have said thus far that the point taken by the first and second respondents was incorrect and should not have been upheld by the court a quo. It follows further that the appeal should be allowed and that the order of the court a quo relating to costs should be set aside and replaced with an order directing the first and second respondents jointly and severally to pay the wasted costs occasioned by the postponement, including those resulting from the employment of two counsel. The remaining issues argued by counsel accordingly fall away. But in view of the importance of two of them in future constitutional litigation and the fact that they were fully argued I propose setting out my views in order to provide guidance in future cases.

(d) Did respondents act inappropriately by raising the Rule 16A point at a late stage?

[51] The first of these issues was whether the first and second respondents, by raising the rule 16A(1) point at a stage when it was not possible to remedy it and by seeking to put the appellant to the choice of either abandoning his constitutional challenge or paying the costs of the necessary postponement (which it was common cause before us exceeded the amount which the appellant was seeking to recover from the first respondent), had acted inappropriately.

[52] In the founding affidavit in the application to this court for leave to appeal, the appellant's attorney referred to three previous cases where the first respondent had taken the same rule 16A point, and put the applicant concerned to the same election as in this case and at the same stage of the proceedings. In one of these cases the applicant abandoned his constitutional challenge in order to avoid the threat of a large costs order. This was not denied on behalf of the first respondent, whose attorney in his reply merely denied that the point had been taken belatedly.

[53] In the appellant's attorney's founding affidavit to which I have referred, reference was made to other cases in which the rule 16A(1) point had been taken by other organs of state 'with a view', so contended the appellant's attorney, 'to having the relevant constitutional challenge postponed, dismissed or abandoned.' He concluded this part of his affidavit as follows:

> '49. It is clear that various organs of state have adopted a strategy of complaining of non-compliance with Rule 16A in order to contend that an applicant in a constitutional challenge is non-suited and to dispose of the matter before the constitutional issue had been properly ventilated. I

respectfully submit that this practice is entirely inappropriate:

49.1 Organs of state (including the First and Second Respondents) have a duty to respect, protect and promote the rights and valued contained in the Constitution, and to assist the Courts. Their conduct in litigation – and the decision whether or not to take a particular point and how to do so – must be informed by the values of the Constitution and must take into account all relevant circumstances, with a view to promoting (rather than frustrating) the determination of constitutional issues.

49.2 This Court has found that it is improper for an organ of state to obstruct the ventilation of constitutional disputes:

> "when an organ or government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard." (*Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) at 1197D – E (para 15).)

49.3 I respectfully submit that a responsible organ of state involved in constitutional litigation should raise any concerns it has regarding Rule 16A as soon as a Rule 16A notice has been, or ought to have been, filed. It should not wait until the resolution of its concerns about Rule 16A will necessitate the postponement of a constitutional hearing; still less should it attempt to take advantage of this situation by using the threat of costs orders flowing from

the postponement to persuade an applicant to abandon his/her constitutional issues.

50. The award of costs against the Applicant in the present matter provides the Respondents with a perverse incentive to continue to invoke Rule 16A in a manner which is calculated to suppress constitutional litigation. They have made clear that they regard their practice of doing so as, not only defensible, but constitutionally appropriate.

51. The only way to prevent the Respondents and other organs of state from acting in the way the Respondents have acted in relation to Rule 16A in the present case (and other organs of state have acted in the cases referred to above) is to make clear that organs of state will have to bear their own wasted costs if they raise Rule 16A points belatedly.'

[54] I do not think that a finding can be made on the material before this court that the first respondent and/or other organs of state have adopted a practice of deliberately raising complaints of non-compliance with rule 16A(1), at a time when the defect cannot be remedied and a postponement or the abandonment of the constitutional challenge is inevitable.

(e) Suggested practice to be followed in the future

[55] Regard being had, however, to the fact that it appears that problems (real or imagined) relating to compliance with rule 16A appear to arise not infrequently in constitutional cases, it is advisable that those responsible for drafting (and settling) founding affidavits in constitutional cases (and, where appropriate opposing affidavits in which constitutional issues are raised which are not previously raised in the proceedings), should make it a practice of

inserting an allegation that a notice (a copy of which is annexed) has been prepared in terms of the rule, and is to be handed to the registrar for the necessary action when the founding (or opposing) affidavit is filed. It is also advisable that the notice, when removed from the notice board after the 20 day period has elapsed and put in the file, be included among the 'necessary' documents which go before the judge. The attorneys acting for departments or organs of state which are respondents in such cases should also follow the practice of checking as soon as the papers are received that the rule has been complied with and, if it appears not to have been, of bringing the omission to the attention of the applicant's attorney. Constitutional litigation should not be a game of forfeit and State respondents should take timeous steps to assist applicants to have constitutional issues raised with a minimum of obstruction.

(f) Applicability of general principle regarding costs in constitutional cases

[56] The other question with which I wish to deal is whether it would have been appropriate to order the appellant to pay the first and second respondents' wasted costs if there had not been compliance with the rule. In this regard it was argued by counsel that the general principle applicable in constitutional litigation that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs should have been applied.

[57] This principle is extensively considered in such cases as *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), especially at 296H–297H (para 138) and *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at 245C – 249E (paras 21 to 28). The rationale therefor was stated in the *Affordable Medicines* case as being the possible 'chilling effect' that an award of costs may have on litigants wishing to vindicate their constitutional rights, where the litigation in question is not frivolous or vexatious.

[58] It is clear in my view that this principle does not only apply to orders on

the merits in constitutional cases but also to what may be described as ancillary points. That that must be so follows, inter alia, from the fact that a litigant wishing to vindicate a constitutional right might well be discouraged from going to court by the fear that some technical or procedural slip on the part of his legal representatives might result in a costs order with financially ruinous consequences for him or her.

[59] Support for this approval may be found in the judgment of the Constitutional Court in the *Biowatch* case at 246E (para 23), where Sachs J in giving the judgment of the court said that:
'people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.'

[60] It follows in my view that even if the court a quo's finding that rule 16A(1) had not been complied with had been correct it would still have erred in ordering the appellant to pay the wasted costs of the postponement. What it should have done in the event was to make no order as to costs.

Proposed Order

[61] I propose that the following order be made:

1 The appeal is allowed with costs, including those occasioned by the employment of two counsel.

2 The costs order made in the court a quo is set aside and replaced with the following order:

‘The first and second respondents are ordered jointly and severally to pay the applicant’s wasted costs (including those resulting from the employment of two counsel) occasioned by the postponement.’

I G FARLAM
JUDGE OF APPEAL

MAJIEDT JA (PETSE AND NDITA AJJA concurring):

[62] I have read the judgment of my colleague, Farlam JA. I am in agreement with all aspects of his judgment, save for the question concerning the appellant’s compliance with rule 16A(1)(*b*), ie the requirement that a notice must contain a clear and succinct description of the constitutional issue concerned. In view of my conclusion on this aspect, a different order in respect of the costs in the high court to the one proposed by Farlam JA must inevitably follow.

[63] The factual matrix is sufficiently set out in the judgment of Farlam JA and does not need repetition. It bears emphasis at the outset that the appellant’s challenge to the exchange control regulations was in the main an attack on the constitutionality of the relevant regulations. The belated attempt by counsel for the first respondent during argument in this court to characterize the challenge as primarily an administrative review with the constitutional challenge as an alternative, was plainly a mere afterthought. The point was not raised at all in the high court or in the heads of argument in this court. That submission failed to get off the ground and the matter was further exacerbated by the fact that those portions of the papers dealing with the appellant’s administrative review

challenge were omitted from the record, I assume designedly so. The case clearly concerned a constitutional challenge and the requirements of rule 16A therefore had to be complied with.

[64] Farlam JA has already reproduced the rule. I think it is manifestly clear on a plain reading of rule 16A(1)(*b*) that it means what it says: a litigant raising a constitutional issue must furnish a brief description of the relevant constitutional issue. To simply give notice that the impugned regulations are 'inconsistent with the Constitution and invalid', begs the very question raised in rule 16A(1)(*b*). Such a description does not in my view provide an answer to the enquiry what the constitutional issue is.

[65] It is indeed correct, as Farlam JA states in paras 30 and 31, that a purposive approach is to be adopted in the interpretation of the Constitution and other statutes. I am also in agreement that the purpose for which rule 16A has been enacted is to bring constitutional issues to the attention of persons affected by them or with a legitimate interest in them. I, however, differ with my colleague that what in my view is a terse, uninformative description is compliant with the requirements contained in rule 16A(1)(*b*).

[66] In applying the purposive approach, as one is constrained to do, care must be taken not to violate the lawgiver's language employed in the statute. As Innes CJ put it in *Dadoo Ltd and others v Krugersdorp Municipal Council*:[1] 'A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be policy or object of the particular measure.'

[67] A second caveat is that the starting point in interpreting the statute ought, in my view, to be the language used in the statute. Harms JA put it thus

1 *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 543.

in *Abrahamse v East London Municipality and another; East London Municipality v Abrahamse*:[2]

'Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.'

The balance to be struck between the application of a purposive approach and the weight of the words employed in the statute is summarized as follows by Judge Learned Hand in *Borella et al v Borden Co*:[3]

'We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation – a method far more unreliable . . . . We do not indeed mean that here, or in any other interpretation of the language, the words used are not far and away the most reliable source for learning the purpose of a document; the notion that the "policy of a statute" does not inhere as much in its limitations as in its affirmations, is untenable.' (Emphasis added).

[68] The dictum of Ackermann J in *Shaik v Minister of Justice and Constitutional Development and others,*[4] referred to by Farlam JA at paras 31 to 33 above, must be understood in its context, namely a determination of whether the incorrect citing of impugned provisions of the particular statute renders the notice non-compliant or not. Ackermann J correctly says[5] that 'the minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of Uniform Rule 16A(1)' (emphasis supplied). In that matter the notice, although citing the incorrect statutory provision under challenge, contained a properly detailed description of the constitutional issue concerned. It read thus:

'Whether s 28(6) of the National Prosecuting Authority Act is unconstitutional and invalid as a result of violating the rights entrenched in ss 14 (privacy), 16 (freedom of

2 *Abrahamse v East London Municipality and another; East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) at 632G-H.
3 *Borella et al v Borden Co* 145 F 2d 63 (1944) at 64-5.
4 *Shaik v Minister of Justice and Constitutional Development and others* 2004 (3) SA 599 (CC).
5 At para 24.

expression), 33 (just administrative action), 34 (access to courts) and 35 (fair arrest, detention, trial) of the final Constitution.'[6]

The specificity required in the present matter concerns a brief description of the constitutional issue concerned. To the definition set out by Farlam JA in para 34 above can be added the following from the Concise Oxford English Dictionary 12 ed (2011): 'an important topic for debate or resolution'.

[69] A brief description of the constitutional issue concerned required, in the present matter, that the appellant had to set out the specific grounds on which the exchange control regulations were said to be constitutionally invalid, for example that they infringed the right to privacy (more particularly as contained in s 14(*c*) of the Constitution - the right not to have one's possessions seized), the right to freedom and security of the person and the right not to be arbitrarily deprived of property. The notice in the present matter is a mere recital of the order sought by the appellant. It does not provide any information on what the issues are which the appellant intends to raise in his constitutional challenge. Any affected and interested party and any prospective amicus curiae would be none the wiser upon a perusal of the notice as to what the constitutional issues are. To borrow from the example cited by the second respondent's counsel – a notice that an order would be sought to have the death penalty declared unconstitutional because it is constitutionally invalid, does not, without more, adequately describe the constitutional issue concerned and is thus not compliant with rule 16A(1)(*b*). A brief description of the basis upon which the order is sought is required, for example on the ground that it infringes the right to life. A prospective amicus curiae would then be in a position to advance new and further contentions,[7] for example that it also infringes the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. It is therefore not sufficient to merely identify the statutory provisions challenged. The rights under the Constitution which are the subject of the constitutional challenge must also be stipulated.

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6 *Shaik v Minister of Justice and Constitutional Development and others* (note 4) para 9

7 As an amicus curiae is required to do – *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) para 5.

[70] It is of some significance that the same attorneys who act for the appellant in the present matter had, in an unrelated matter (referred to by the appellant's attorney in his affidavit in the present proceedings in the high court), issued a notice some three months after the postponement before Makgoba J, which implicitly acknowledges the inadequacy of the notice in the present matter. That notice in the unrelated proceedings does not merely state that the relevant statutory provisions are inconsistent with the Constitution, but it goes further in clearly and succinctly describing the constitutional issue concerned. In that matter the constitutionality of s 310 of the Criminal Procedure Act 51 of 1977 (which provides that the State may appeal against the decision of a lower court on a point of law) was challenged. The original notice mirrored the brevity of the notice in this matter, namely 'declaring that s 310 of the Criminal Procedure Act 51 of 1977. . . . is inconsistent with the Constitution and invalid'. The subsequent notice was eminently more descriptive. Its relevant part read as follows:

'2. Whether, if s 310 . . . . does allow the State to appeal. . . ,

2.1 it is inconsistent with s 35(3)(*m*) of the Constitution which includes as part of the fundamental right to a fair trial, the right "not to be tried for an offence in respect of any act or omission for which that person has previously been either acquitted or convicted",

2.2 it irrationally distinguishes between accused persons who are acquitted on decisions of law (against whom the State would have a right of appeal) and accused persons who are acquitted on decisions of fact (against whom the State has no right of appeal and must accordingly content itself with the wrong decision by a court) and is, accordingly, inconsistent with the founding value of the rule of law in s 1(*c*) of the Constitution, alternatively, the guarantee of equality before the law in s 9(1) of the Constitution.'

[71] I respectfully disagree with my learned colleague in his observation in para 36 above that a prospective amicus needs only to know what legislative provision is being challenged and that, for the rest, he or she can then have regard to the court file to ascertain whether relevant matters of fact and law are contained in the applicant's papers. I do not think the Legislature intended to

burden affected and interested persons in this manner. To require of a prospective amicus to trawl through papers which are more often than not quite voluminous, is to defeat the very purpose of rule 16A(1)(*b*). The rule has, in my view, the objective of providing sufficient information to affected and interested persons of what the constitutional challenge is all about, thereby obviating the need of scouring through lengthy papers to obtain the relevant information.

[72] The use of the word 'succinct' in rule 16A(1)(*b*) is in my view deliberate – it signifies the requirement of a 'brief and clear expression' (as defined in the Concise Oxford English Dictionary 12 ed (2011)) of the constitutional issue concerned. A description can only be 'brief and clear' when it has some particularity – a terse regurgitation of the orders sought hardly leaves any room for such a brief and clear description. While I would not, unlike Makgoba J, elevate the required particularity to that contained in a notice of appeal, it certainly denotes more than a mere repetition of the orders sought.

[73] I also respectfully disagree with Farlam JA that the *Nyathi* decision[8] lends support to his approach. The matter was unopposed before Davis AJ in the high court and the learned judge therefore did not have the benefit of argument for and against the proposition that a notice in those terse terms would suffice for the purposes of rule 16A(1)(*b*). This aspect was evidently not raised as an issue in the Constitutional Court, which would explain why there is no dictum on the matter in that judgment. A court is therefore, with respect, not entitled to rely on that decision as authority for the abovementioned proposition. Moreover, as appears from para 39 above, the notice in *Nyathi* contained more particularity than the notice in the present matter.

[74] Rule 19(3)(*b*) of the Constitutional Court requires that an application for leave to appeal must contain 'a statement setting out clearly and succinctly the constitutional matter raised in the decision, and any other issues including issues that are alleged to be connected with a decision on the constitutional

8 *Nyathi v MEC Department of Health Gauteng* 2008 (5) SA 94 (CC).

matter'. That rule has a marked similarity to rule 16A(1)(*b)*. It is inconceivable that, in purported compliance with the requirements laid down in Constitutional Court rule 19(3)(*b*), a statement which, for example, merely declares the constitutional matter and issues to be that of constitutional invalidity would, without more, pass muster. A brief and clear description of the constitutional matter and ancillary issues is required in my view. If anything, since rule 16A(1) concerns a notice, the need for particularity and detail is in all probability even more acute than in the case of a statement in terms of Constitutional Court rule 19(3)(*b*), but I express no firm view on the matter.

[75] In summary therefore, I am of the view that the notice was inadequate and did not comply with rule 16A(1)(*b*). I concur with Farlam JA that, for the reasons enunciated by him, the high court erred in upholding in favour of the respondents the point that the appellant did not provide sufficient proof that the notice had been displayed on the notice board for the requisite 20 days. I agree, too, with his obiter remarks in para 59 above, that, even were a finding to be made against the appellant that there has been non-compliance with rule 16A(1), the high court should not have made an adverse costs order against the appellant. Farlam JA has fully motivated the reasons for that conclusion and I need not burden this judgment with anything further. Those obiter remarks of Farlam JA are of course apposite here, given my finding above. In the premises I would uphold the appeal on the costs aspect.

[76] The following order is made:

The appeal is upheld with costs, including the costs of two counsel. The costs order of the court below is set aside

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

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