



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 5554/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 16 November 2015

Judgment delivered: 8 December 2015

In the matter between:

ECONOMIC FREEDOM FIGHTERS

AND 60 OTHERS

Applicants

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

and

10 OTHERS

Third to Eleventh Respondents

JUDGMENT

BINNS-WARD J:

[1] Economic Freedom Fighters, which is a political party represented in the national and provincial legislatures, and the 60 of its members who have seats in those legislatures have applied for an order declaring that the provisions of the

Parliamentary and Provincial Medical Aid Scheme Act 28 of 1975, as amended, (hereafter referred to as ‘the PARMED Act’) that –

- i. make membership of the Parmed Medical Aid Scheme (‘PARMED’) compulsory for certain office bearers, including judges of certain of the superior courts and members of the national and certain provincial legislatures, and
- ii. provide for deductions to be made from their monthly salaries in respect of their contributions to the scheme

are inconsistent with the Constitution. The applicants have alleged that the impugned provisions give rise to infringements of the freedom of association and property clauses in the Bill of Rights. They have sought consequential relief in the form of an order directing Parliament to adopt amending legislation within 12 months to make membership of PARMED voluntary, as well as an order directing that, pending the contemplated amendment, the current legislation should be read in a way that would render membership of the scheme as voluntary with immediate effect.

[2] This judgment is concerned only with some preliminary matters in the pending constitutional challenge proceedings.

[3] The Speaker of the National Assembly and the Chairperson of the National Council of Provinces have been joined as the first and second respondents, respectively, in the application. The Speakers of eight of the provincial legislatures were also joined as respondents, as was PARMED itself. The Speakers of the Gauteng, Limpopo and KwaZulu-Natal Provincial Legislatures have delivered notices of intention to abide the court’s judgment.

[4] The joinder of the first and second respondents is stated in the founding papers to have been in terms of s 23(2)(a) of the Powers, Privileges and Immunities of Parliament Act 4 of 2004, read with s 2 of the State Liability Act 20 of 1957. The deponent to the founding affidavit averred that they had been cited ‘*as nominal respondent[s] on behalf of*’ the respective houses of the national legislature. The joinder of the speakers of the provincial legislatures is described as having been in terms of s 29 of the Act 4 of 2004 read with s 2 of Act 20 of 1957 and also because they have ‘*a direct interest in the subject matter of [the] application*’. The joinder of PARMED is not expressly explained in the founding papers, but was clearly indicated

on account of its readily identifiable direct and substantial interest in the orders sought.

[5] I have set out the allegations concerning the basis for the joinder of the first and second respondents in some detail because, as will be described presently, the preliminary points to be determined in this judgment arise from a plea non-joinder. The first and second respondents have contended in their answering papers that the President, the Chief Justice and the Minister of Finance are necessary parties to the proceedings. They maintain that the applicants' challenge cannot competently be entertained until those persons have been joined.

[6] The non-joinder points came up for separate determination together with certain other interlocutory issues in the circumstances described below. A separation of issues for the purpose of hearing is exceptional in motion proceedings; even more so, I would venture, when it happens before the papers are complete. How that exceptional course appears to have been taken in the current matter suggests that it might be useful to rehearse some relevant general principles because the circumstances in which the court was called upon to separately determine the non-joinder point were less than ideal, and a repetition should be discouraged.

[7] The application was served on the first and second respondents (to whom I shall for convenience hereafter refer simply as 'the respondents') on 24 April 2015. In terms of rule 6(5) of the Uniform Rules of Court, the respondents were required, if they intended to oppose the application, to give notice of their intention by 19 May 2015. Having initially indicated an intention to abide the judgment, they gave notice on 15 May 2015 of their intention to oppose the application. In terms of the rules their answering affidavits therefore fell to be delivered by 4 June 2015.

[8] PARMED also indicated its intention to oppose the application. PARMED's attorneys contended in correspondence with the applicants' attorneys at the outset that the applicants were obliged, in terms of rule 10A of the Uniform Rules, to have joined certain other parties (i.e. the Minister of Finance and the Speaker of the Provincial Legislature of the Western Cape) as respondents in the proceedings.

[9] The applicants responded to PARMED's complaint by bringing an application for the joinder of the Minister and the Western Cape Speaker as respondents. The applicants' attorneys agreed with PARMED's attorneys at the time that PARMED

could defer delivering its answering papers in the principal application until after the joinder of the additional parties had been effected. An agreement of that nature is permitted in terms of rule 27(1). On becoming aware of the pending joinder application and the related arrangement with PARMED's attorneys, the State Attorney, who represents the respondents, made arrangements with the applicants' attorneys for the delivery of the respondents' answering affidavits to be similarly deferred. It appears that one of the considerations informing those arrangements was the reported unavailability of the respondents' counsel during the July court recess.

[10] It subsequently transpired that the applicants withdrew their application to join the two proposed additional respondents. The withdrawal followed on the objection by the National Treasury to the proposed joinder of the Minister of Finance and the discovery that the Western Cape legislature had not resolved, as contemplated by s 1(e) of the PARMED Act, that the Act should apply to its members. PARMED thereafter purported to invoke rule 30A to apply for an order compelling the applicants to effect the joinder of the Minister. It contended that the joinder of the Minister was necessary despite the Treasury's objection. PARMED's rule 30A application has also since been withdrawn.

[11] After the applicants' joinder application had been withdrawn, their attorneys advised the State Attorney that the respondents' answering papers had to be delivered by 17 July 2015. The State Attorney demurred, claiming the benefit of the previously concluded extension agreement and reiterating that the respondents' counsel would not be available before 20 July 2015. The applicants' attorney thereupon made an application to a judge in chambers in accordance with the relevant practice in this Division for an order compelling the respondents to deliver their answering papers within five days, failing which, according to the terms of the order that was subsequently granted, they would be barred from filing papers in the application. The order was served on the respondents on 28 August 2015, after they had failed to comply with an undertaking to deliver answering papers by 21 August 2015. Accordingly, if they were not to be barred, the respondents had to deliver their answering papers by 4 September 2015.

[12] The respondents duly delivered an answering affidavit on 4 September 2015. It described itself as the 'first and second respondents' provisional answering affidavit'. The only points taken in the affidavit were ones of non-joinder. They

contended that the President, the Chief Justice and the Minister of Finance were necessary parties to the proceedings.

[13] At the same time, the respondents also delivered an application, purportedly in terms of rule 6(5)(e) and rule 27(1) of the Uniform Rules of Court, in which they sought orders granting them leave to supplement their answering papers within 30 days after the later of - (i) 'the final determination' of the points *in limine* taken in their aforementioned provisional answering affidavit and (ii) 'the final determination' of PARMED's application in terms of rule 30A.¹ The application was allocated for hearing before me on 16 November 2015.

[14] The applicants opposed the respondents' interlocutory application. They contended that the respondents were not permitted to advance their answer to the main application on a piecemeal basis. They asserted that the respondents had been obliged, in addition to the dilatory defence of non-joinder, also to have set forth their substantive grounds of opposition in a single set of answering papers. They sought the dismissal of the respondents' application, together with a punitive costs order. The applicants also delivered a replying affidavit in the main application, in which they responded, to the extent considered necessary, to the respondents' allegations in support of the non-joinder points.

[15] When the matter was called I was informed that the parties had come to an agreement in respect of the disposal of the respondents' application for leave to supplement its answering papers. I made an order giving effect to their agreement by directing the respondents to deliver an answering affidavit in the main application within 15 days and standing the costs over for determination in the main application.

[16] The parties then sought to argue the non-joinder points. When I cavilled at that, my attention was drawn to an order that had been obtained from the vacation duty judge during the spring recess. The order provided for the set down of the first and second respondents' non-joinder points in the main application for hearing together with the aforementioned application in terms of rule 6(5)(e) and 27(1), as well as the then still pending application by PARMED in terms of rule 30A. According to its tenor, it had been taken '[b]y agreement between the parties'. I had

¹ The reference in the notice of application to PARMED's rule 30A application had obviously been overtaken by events, as described above (in para [10]) by the time the matter came before me on 16 November 2015.

been unaware until then of the existence of the order; and counsel, who had not been involved in taking it, were unable to inform me of the circumstances in which it had been obtained. I had also not been provided with a set of the papers in PARMED's application in terms of rule 30A, which it will be recalled had by then been withdrawn.²

[17] It is not evident on what basis the vacation duty judge was persuaded to make an order directing the separate hearing of one of the issues in the principal proceedings. The papers in the main application were not complete at that stage. Indeed, the applicants only delivered their reply to the respondents' limited answering affidavit a month after the order was taken. Moreover, the issue of whether the respondents would be permitted to deliver additional answering papers and, by implication, the applicants a further reply, was contentious and, at that stage, undetermined. It is difficult to conceive in that context how it could have been considered that it would be convenient for a court at a single hearing to entertain and determine both the respondents' interlocutory application and the non-joinder points in the main proceedings.

[18] It also was not apparent how it could have been thought to be clear that the respondents' non-joinder points might conveniently fall to be determined together with PARMED's application in terms of rule 30A. I do not have to determine the question, but it strikes me as far from certain that bringing an application in terms of rule 30A, as distinct from raising a non-joinder point *in limine* in its answering affidavit, is the appropriate manner in which a respondent should deal with an alleged non-compliance with rule 10A. Rule 10A is in a sense peculiar because it gives expression to a principle of mixed substantive and procedural legal character, rather than providing the purely procedural regulation of proceedings at which most of the other Uniform Rules are directed. As I seek to explain below, it would often be inconvenient to deal separately with questions of non-joinder in motion proceedings before the papers are complete. Allowing rule 30A to be used to raise non-compliance with rule 10A - which is nothing but a non-joinder point - would tend to conduce to such inconvenience.

² A copy of the papers in the rule 30A application was handed in from the bar when I enquired as to their whereabouts.

[19] No consideration appears to have been given when the order was taken to the incidence of the general rule that piecemeal litigation is discouraged and that it is well-established that in motion matters, even when a special defence is raised, a respondent should ordinarily deal in a single set of answering papers with all of the grounds upon which it intends to rely in opposition to the application. The principle was expounded by Corbett J in *Bader and Another v Weston and Another* 1967 (1) SA 134 (C), at 136E-137C, in a passage that has been endorsed in a number of subsequently reported judgments.³ Moreover, in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA), at para 49, it was observed in the context of litigation in motion proceedings that ‘[c]ourts should be circumspect when suggestions are made about the procedure to be followed on the basis that it might shorten rather than lengthen litigation’.

[20] As noted, the separation of issues is unusual in motion proceedings, but if it is to be done, it should be informed by the same principles that apply in terms of rule 33(4) in respect of actions. A court that is asked to make a separation order should not accede to the application unless it is able to form a clear view that it would indeed be convenient for the issues to be separated; cf. *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA), at para 3, where Nugent JA remarked that ‘*even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately*’.

[21] It goes without saying that legal practitioners who seek separation orders by agreement, especially from overburdened duty judges,⁴ should do so only after equally careful thought. In my view they are under a duty to alert the judge that the order they propose is of an exceptional nature and to draw attention to the

³ Exceptions to the general rule are permitted depending on the circumstances. Applications brought on an urgent basis are a typical example. In such matters, respondents are frequently permitted to take preliminary or limited points separately because of a lack of sufficient time to prepare full answering papers.

⁴ The papers which it would have been necessary for the judge to consider for the purposes of determining the appropriateness of making the separation order ran to 555 pages at the time the order was taken; and the matter appears to have been number 66 on the motion court roll for that day. By reason of the volume of the other work that would have been demanding attention, the duty judge would unavoidably have been heavily reliant on the parties’ legal representatives for guidance.

jurisprudence that emphasises that a judge should make such an order only after forming a clear view in favour of its supposed advantages.

[22] In the current case, not only was there the difficulty inherent in a court being called upon to decide in a single hearing whether there should be further affidavits in the principal case, and also an issue in that inchoate case, but there was the further consideration that the additional evidence that the respondents might at that hearing be permitted to adduce in affidavits to be delivered subsequently in support of their substantive opposition to the application could conceivably be of assistance in assessing and determining the contested non-joinder issue. Indeed, it appears from the affidavit in support of the respondents' interlocutory application that the further evidence they would seek to adduce will, in part, relate to how the impugned provisions work in the context of a broader legislative framework. It could conceivably have assisted in elucidating the incidence or absence of the allegedly direct and substantial interest in the relief sought in the principal case of the parties the respondents maintain must be joined as necessary parties.

[23] It is not unprecedented for non-joinder points that are not at first apparent to reveal themselves later in the context of the playing out of the case; see, for example, *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A), where the necessity to join a further party became evident only when a party relied for first time in argument in an appeal on the effect of a statutory provision that had not been called in aid before the court of first instance.⁵ Thus, any supposition that a non-joinder point self-evidently lends itself to separate determination *in initio* in motion proceedings before the papers are complete is not well founded. It might not always be possible, but considerations of convenience militate in favour of the determination of non-joinder questions in a single hearing as a general rule, as opposed to in a series of hearings as a case develops, which is a risk that will be more inherent if they are dealt with before the papers are complete.

[24] Fortuitously, the first of the aforementioned difficulties has since been addressed by the parties' settlement of the interlocutory application at the doors of the

⁵ Other examples in which non-joinder points became evident only later in the development of the case are afforded in the judgments in *Schroeder v Vakansieburo (Edms) Bpk* 1970 (3) SA 240 (T) and *Toekies Butchery (Edms) Bpk en Andere v Stassen* 1974 (4) SA 771 (T)

court and the withdrawal of PARMED's rule 30A application. The second disadvantage inherent in the exceptional course adopted remains.⁶

[25] Despite my reservations about the convenience or appropriateness of doing so, I nevertheless entertained the non-joinder points. I did this in less than ideal circumstances because of the deference that I considered was indicated to the terms of the order made earlier by a colleague; because I had read the voluminous papers; and because the parties (the applicants being represented by out of town counsel) appeared anxious that it should be heard. If in the circumstances I appear to have laboured the point about the less than satisfactory consequences of the separation order, it has been in the hope that the exposition might encourage the practitioners involved, and any others to whose notice this judgment might come, to be more circumspect about adopting a similar course in future matters of this sort.

[26] I turn now to deal with the separated issues.

[27] Any consideration of necessary joinder must obviously occur with regard to the context of the case; more particularly, the nature and effect of the relief that is sought or may be granted. In the current matter, which it will be recalled, concerns a challenge to the constitutionality of the compulsory medical aid scheme membership requirements of the PARMED Act, it is convenient to begin by looking at the impugned provisions.

[28] Section 1 of the PARMED Act provides:

Compulsory membership of Parmed Medical Aid Scheme of certain persons

Every person who is or becomes-

- (a) while not being a member of either the National Assembly or the Senate, an Executive Deputy President or a Minister;
- (b) a judge of the Constitutional Court;
- (c) a judge of the Supreme Court of South Africa in a permanent capacity;
- (d) a member of the National Assembly or of the Senate;
- (e) a member of a provincial legislature in a case where the provincial legislature concerned has resolved that this Act shall apply to its members;
- (f) any other office-bearer in the service of the Republic approved by the President for the purposes of this Act and made known by proclamation in the *Gazette*,

shall, for as long as he or she holds that office or post, be a member of the Parmed Medical Aid Scheme, subject to the rules of that medical aid scheme as registered in accordance with the provisions of the Medical Schemes Act, 1967 (Act 72 of 1967): Provided that...

⁶ I have not even mentioned the further inconvenience that would have followed if it had been found that PARMED's resort to rule 30A had been inappropriate; and PARMED consequently afforded an opportunity to raise its non-joinder point in the answering papers it had still to deliver.

The statute is an ‘old order’ enactment and its subsequent amendment has resulted in s 1 containing an awkward mixture of old order and new order terminology. So, when the provision refers to ‘the Senate’, it must be read as referring to the National Council of the Provinces; and when it refers to ‘a judge of the Supreme Court of South Africa’, that is a reference to a judge of the Supreme Court of Appeal or of the High Court. It is common ground that the President has not published notice in terms of s 1(f) concerning the application of the Act to any other office-bearers. It therefore follows that the categories of office-bearer affected by the compulsory membership provisions are (i) the Deputy President and any member of the Cabinet who is not a member of Parliament; (ii) all the judges of the Constitutional Court, the Supreme Court of Appeal and the High Court; (iii) all the members of Parliament in both houses; and (iv) all the members of those provincial legislatures which have decided that the provisions of the Act should apply to its members. (It is not apparent on the papers which, if any, of the provincial legislatures has resolved to adopt the Act.)

[29] In terms of their notice of motion, the applicants have sought declaratory relief only in respect of s 1 of the PARMED Act. However, as pointed out by Mr *Breitenbach* SC, who (together with Mr *Magardie*) appeared for the respondents, the effect of the relief sought necessarily implicates s 2 as well. Section 2 provides for the deduction at source from the monthly salary of every office-bearer who is compulsorily a member of PARMED of an amount equal to the sum that is payable by such person in respect of contributions in terms of the rules of the Parmed Medical Aid Scheme, and for the payment of the amount so deducted to the manager of the Scheme. The effect of granting the applicants the relief sought in terms of paragraph 3 of the notice of motion, in respect of what they would wish the wording of the Act to be deemed to be pending its required amendment if their constitutional challenge were to be successful, would entail that the relevant accounting officers would not make any such deductions in respect of those office-bearers who chose no longer to remain as members of PARMED, or who, upon appointment, elected not to become members.

[30] It is a fundamental principle of law that a court should not at the instance of any party grant an order whereby any other party’s interests may be directly affected without formal judicial notice of the proceedings having first been given to such other party. This is so that all substantially and directly interested parties may be heard

before the order is given, which is a matter of fairness. And also so that the order may be binding on all parties whose interests its terms should affect, and not just some of them, which is a matter of sound judicial policy. The excursus in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) is the locus classicus on the subject in our jurisprudence.⁷ It is thus mandatory for a party that institutes proceedings to join every other party that has what is called ‘a direct and substantial interest’ in the relief sought. If the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so *mero motu*.

[31] Furthermore, in a matter like the present, in which the constitutionality of legislation is impugned, rule 10A of the Uniform Rules of Court prescribes that ‘*the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings*’. Rule 5 of the Constitutional Court’s rules is to the same effect. The rationale for these rules has been explained in a number of judgments of the Constitutional Court.⁸ It was summarized in *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para 7 and 8, as follows:

... when the constitutional validity of an Act of Parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity.

... It is indeed trite that the contentions and evidence, if any, advanced by the State functionary charged with the administration of legislation under scrutiny are vital, if not indispensable, for proper ventilation and ultimate adjudication of the constitutional challenge to the validity of legislation.

⁷ A more recent and equally helpful disquisition by Cilliers AJ is to be found in the full court’s judgment in *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W), at para 9- 41.

⁸ See e.g. *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC), at para 12-13; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), at para [27]; and *Jooste v Score Supermarket Trading (Pty) Limited* 1999 (2) SA 1 (CC), at para 7-8.

Rule 10A of the Uniform Rules was introduced after the Constitutional Court had remarked in *Parbhoo v Getz NO and Another* 1997 (4) SA 1095 (CC), at para [5], that -

Despite the fact that an order of constitutional invalidity has no force unless it is confirmed by this Court, it appears undesirable for any court to make an order under s 172(2)(a) concerning the invalidity of an Act of Parliament or a provincial Act, where a relevant organ of State is not a party to the proceedings, unless that organ has had an opportunity to interfere in such proceedings. It might be necessary for the court first seized of the matter to hear evidence for purposes of deciding the issue of invalidity. That is the appropriate stage for the relevant organ of State to be afforded an opportunity of adducing such evidence, otherwise the issue might only arise when the order of invalidity is before this Court for confirmation. This would cause unnecessary delay and inconvenience.

[32] Mr *Breitenbach* submitted that in matters such as this, in which constitutional rights are sought to be enforced by way of proceedings for orders *in rem*,⁹ the interests of justice afforded a further basis for directing the joinder of a party. He called the judgments of the Constitutional Court in *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC), at para 12-13, *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC), at para 41, and *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC), at para 35-40, in aid in support of that contention. Reference to these judgments has been of assistance, but they are distinguishable. They concerned standing to institute or intervene in constitutional litigation. None of them dealt with the situation that arises in the current case, where a party that has been joined as a respondent contends that it is necessary for other persons to be joined as respondents before the matter can be competently adjudicated. *Giant Concerts* was concerned with the ambit of standing conferred in terms of s 38 of the Constitution. The question in *Mukaddam* was about who might qualify to institute a class action of a sort to which standing in terms of s 38 of the Constitution does not apply, and the peculiar requirements that anyone seeking to do so should have to satisfy. I shall come back to *Gory* later. It concerned an application for leave to intervene in an application in which the constitutionality of certain legislation was being impugned. While some of the

⁹ That is, in the current context, orders directed at a state of affairs, or a legal position, rather than at a particular person or persons.

considerations applicable to necessary joinder apply also to applications to intervene, there is a material difference between the concepts.¹⁰

[33] The respondents contend that the joinder of the President and the Chief Justice as necessary parties is required because *‘they are the proper representatives of two classes of persons with a direct and substantial interest in the relief sought’*, namely:

1. in the case of the President, as the representative of the other members of the Cabinet or at least any of its members who are not members of Parliament;
- and
2. in the case of the Chief Justice, as the representative of the judges of the Constitutional Court, the Supreme Court of Appeal and the High Court.

It was submitted that the President and the Chief Justice are necessary parties, being ‘the constitutionally-identified heads’ of two of the ‘classes’ in paragraphs (a) to (e) of s 1 of the PARMED Act. The argument proceeded that as the respondents had been joined as ‘heads’ of the ‘classes’ identified in paragraphs (d) and (e) of s 1 of the Act, so too should the President and the Chief Justice as ‘heads’, respectively, of the ‘classes’ identified in paragraph (a) and paragraphs (b) and (c).

[34] Quite what inheres in the notions of the ‘head of the judiciary’ or the ‘heads’ of the houses of Parliament raises interesting questions. But even if one were for the moment to accept the basis of characterisation propounded by the respondents’ counsel, one would not reach the issue of whether the President and the Chief Justice should be joined as representative parties without first deciding whether the individual members of the categories of office-bearers that they would represent have a direct and substantial interest in the relief sought by the applicants. For if the interests of the individual members are not implicated in a sufficiently direct sense to require their joinder, no point is served by considering in what manner they should be joined, whether personally, or through a ‘class’ representative.

[35] It is not altogether easy to define precisely what constitutes a direct and substantial interest in the relevant sense. In *Amalgamated Engineering Union* supra, at p. 657, it was held that the question of joinder should not depend on the nature of the subject matter of the suit, but on the manner in which, and the extent to which, the

¹⁰ See the discussion s.v. Rule 12 in Van Loggerenberg, *Erasmus, Superior Court Practice* 2nd ed. vol 2 at D1-137 [Original Service, 2015], and the authorities there referred to.

court's order *may* affect the interests of third parties.¹¹ The criterion is the realistic possibility, not the certainty, that the interests of third parties might be substantially and directly affected; hence the stress placed in the Appellate Division's judgment on the effect of the word 'may' in the relevant context. Mr *Breitenbach* acknowledged, correctly I think, that the phrase 'the *interests* of third parties' denoted the rights of such parties. This much seems to be illustrated by the two examples given by Fagan AJA at pp. 657 - 659 of the judgment with reference to *Collin v Toffie* 1944 AD 456 and *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A), and by the basis of distinction often made between a mere interest in the outcome and a direct and substantial interest by describing the latter as 'a legal interest'.¹²

[36] At p. 661 of the judgment in *Amalgamated Engineering Union*, Fagan AJA gave two tests as being useful to determine whether a direct and substantial interest exists. The learned judge did, however, emphasise that he was not dealing with cases involving judgments *in rem*.¹³ The first was the equal *locus standi* test. By that test if another party had equal standing in its own right to have instituted the proceedings, that would, of itself, vouch for the existence of its direct and substantial interest in the relief sought. That that test would, however, not necessarily be determinant in the context of proceedings for an order *in rem* is illustrated in the reasoning by which a non-joinder point was adversely disposed of by the Appellate Division in *Ngcwase and Others v Terblanche, NO and Others* 1977 (3) SA 796 (A), at 806H-807A. The second test was what might be called the *res judicata* test. That entails asking whether the order sought would not be binding on a party that had not been joined, in the sense that that party could not be barred in subsequent proceedings from obtaining a potentially conflicting judgment on the same matter. The second test is also not workable when the case involves an order *in rem*.

[37] That some degree of flexibility in the application of the principle of joinder of necessity may be permissible on pragmatic grounds finds support in the full court judgment of Mohamed J in *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T), at p. 158, where the future Chief Justice remarked that '*the rule which seeks to avoid orders which might affect third parties in*

¹¹ Cf. also *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA), at para 44, and the other authority cited there.

¹² See, for example, *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC), at para 56, and *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA), at para 9.

¹³ At p. 651 of the judgment.

proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case’. Compare also *Mukaddam* supra, at para 39.

[38] In the context of the principles that may be distilled from the jurisprudence to which I have had reference, I think it is clear that the respondents are entitled to require the joinder of the other members of PARMED (or, as Mr *Breitenbach* argued, their representatives) only if it is evident that those members have a sufficiently direct and substantial interest in the litigation in the sense that any order made in it may prejudicially affect their rights. In litigation of the nature involved in the current case, considerations of practicality will also play a role.

[39] The relief sought by the applicants would not, were it to be granted, have the effect of depriving any other members of the categories of office-bearer referred to in s 1 of the PARMED Act of the *right* to be members of the PARMED Medical Aid Scheme; on the contrary, it might appear, in fact, to have the effect rather of relieving them of an *obligation* to belong to it. That might in turn appear to be sufficient to dispose of the contention that the interests of the other members of the Scheme would be prejudicially affected by the order sought by the applicants and, adopting the approach in cases such as *Tshandu v Swan and Another* 1946 AD 10 and *Aaron v Johannesburg Municipality* 1904 TS 696 (both of which are discussed in *Amalgamated Engineering Union*), support a conclusion they are therefore not necessary parties. In my view, however, a more nuanced and contextual assessment is indicated to determine whether the interests of the other members might nevertheless be prejudicially affected. It is only upon such an assessment that the manner in which, and the extent to which, the court’s order *may* affect the interests of third parties can properly be established; cf. *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W), at para 37.

[40] In *Rosebank Mall* the dispute involved concerned the breach of ‘a co-operation agreement’ related to the development of a shopping precinct in Johannesburg’s northern suburbs. Insofar as currently relevant, the relief sought entailed a mandatory interdict sought by the respondents in the appeal for the demolition by the appellants of certain structures erected in breach of the agreement and an interdict restraining the appellants from using a certain area for any purposes other than an unimpeded pedestrian thoroughfare and right of way of the general

public. It was held that notwithstanding that the tenants occupying the areas to be affected by the proposed demolition order and restraining interdict (which included a restaurant known as the Clockwise Restaurant) were not parties to the co-operation agreement and were in occupation only in terms of rights obtained *aliunde* the rights that were the subject matter of the litigation, the direct and prejudicial effect of a demolition order on their rights of possession would be such that they had to be regarded as necessary parties to the litigation on the basis of having a sufficiently direct and substantial interest in the orders that could be made.

[41] Cilliers AJ, writing for a full court, distinguished the nature of the interest of the tenants in the *Rosebank Mall* case from those of parties whose rights are merely derivative from the rights in contention in the proceedings, when the resultant interest is generally characterised as being of an indirect nature despite its often significant financial or commercial importance to the affected parties. In this respect the learned acting judge, having quoted the *dicta* of Corbett J concerning the purely derivative nature of the interest of a sub-tenant in a dispute concerning the principal lease in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 417A-C, proceeded as follows (at para 37):

There is a distinction between the case of a party whose rights are derived purely from 'the right which is the subject-matter of the litigation' and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired *aliunde* the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in the litigation to which he was not a party were carried into effect.

and concluded (at para 41)

The relief sought in prayers 2 and 3 of the amended notice of motion involves the demolition of the steel and glass structure at the entrance of the Rosebank Mall Shopping Centre and the exterior walls and windows of the area occupied by the Clockwise Restaurant as well as the canopy on the exterior of those premises. These orders directly affect, in addition to the appellants, the competing rights of the lessee of the Clockwise Restaurant. The relief sought and obtained under prayer 5 of the amended notice of motion is to the effect that the appellants are interdicted from using and permitting the use of any sections of the road portion indicated as pedestrian areas on the plan otherwise than as a right of way in favour of the general public. This would in effect interdict the appellants from affording the lessees of those areas the use of such areas for purposes conflicting with such right of way. Such interdict would thus directly (and substantially) affect the competing rights of such lessees. It follows that the lessee of the premises referred to as the Clockwise Restaurant should have been

joined as necessary parties in respect of the relief sought under prayers 2 and 3 of the amended notice of motion.

[42] Mr *Breitenbach* stressed in his argument that the medical aid benefits conferred by membership of the PARMED Medical Aid Scheme by virtue of the PARMED Act constituted an inherent component of the remuneration and benefits to which the office-bearers to which the Act applies are currently entitled in terms of their conditions of appointment. He submitted that the PARMED Act fell to be seen as ‘part of the fabric’ of the statutory framework that governs the remuneration of the affected office-bearers.

[43] In this regard the respondents’ counsel referred, amongst other provisions, to s 9 of the Remuneration of Public Office Bearers Act 20 of 1998. According to its long title the Act provides a framework for determining the salaries and allowances of various categories of public office-bearers. These include those referred to in paragraphs (a) and (d) of s 1 of the PARMED Act. Section 9 of the Act provides that an office-bearer falling under the auspices of the Act is entitled to belong to a duly registered medical aid scheme and provides further that in respect of the office-bearers falling under paragraphs (a) and (d) of the PARMED Act the State shall make a payment in an amount to be determined annually by the Minister of Finance towards the office-bearer’s medical aid scheme membership contributions. The provision makes no reference to PARMED or the PARMED Act, however. It also applies indiscriminately to some categories of office-bearer that are not subject to the PARMED Act. I am not persuaded in the circumstances that the operation of s 9 of Act 20 of 1998 would in any way be affected by the relief sought by the applicants. The determination of the amount of the State’s payment towards the office-bearers’ medical aid contributions in terms of the provision does not seem to me to bear any relationship to the identity of the medical aid scheme to which they might belong. It is merely a fixed sum of money. The only requirement is that the scheme must be duly established and registered in terms of a law.

[44] The infelicitously titled Judges’ Remuneration and Conditions of Employment Act 47 of 2001¹⁴ which, amongst other matters, regulates the remuneration of the office-bearers referred to in paragraphs (b) and (c) of s 1 of the PARMED Act

¹⁴ Judges are no more ‘employees’ than are the other public office-bearers whose remuneration is regulated by Remuneration of Public Office Bearers Act.

contains no equivalent provision to s 9 of the Remuneration of Public Office Bearers Act. The respondents, however, annexed a copy of the Government Gazette in which the most recent determination of judicial remuneration determined by the President in terms of s 2(a)(i) of the Act provides that ‘the total remuneration package shall include the following elements: (1) A cash annual salary component of 72,24%, and (2) A non-cash component of 27,76% (which includes motor allowance and *employer* (sic) *medical contribution* (sic)’. I am similarly unpersuaded that the determination bears any demonstrable relationship to involuntary membership by judges of the PARMED medical aid scheme, as distinct from any other registered medical aid scheme to which judges might belong if they had freedom of choice.

[45] What does appear clear, however, is that the medical aid benefits that accrue to the affected office-bearers by virtue of their compulsory membership of the restricted membership PARMED medical aid scheme¹⁵ do indeed constitute part of the benefits they enjoy in terms of their current conditions of tenure. Whether the value of those benefits could be replicated or bettered at no greater cost to the office-bearers were they to join one of the other open registered medical aid schemes is not clear. The applicants have put in an affidavit by an actuary, which seems to suggest that they could be, but for all one knows a sufficiently interested party might be in a position to adduce controverting evidence. It is also clear enough, I think, as averred by the respondents, and indeed acknowledged by the applicants in their founding papers, that the viability of a restricted membership scheme could be imperilled if an applicable system of compulsory membership were changed to one of voluntary membership; cf. s 24(2)¹⁶ read with 27(1) of the Medical Schemes Act 131 of

¹⁵ The PARMED Medical Aid Scheme is a ‘*restricted membership scheme*’ as defined in s 1 of the Medical Schemes Act 131 of 1998.

¹⁶ Section 24(2) of the Medical Schemes Act provides, insofar as relevant:

No medical scheme shall be registered under this section unless the Council is satisfied that-

- (a) ...
- (b) ...;
- (c) *the medical scheme is or will be financially sound;*
- (d) *the medical scheme has a sufficient number of members who contribute or are likely to contribute to the medical scheme;*
- (e) ...; and

1998.¹⁷ The potential effect of the relief sought by the applicants, both in respect of declaration of unconstitutionality and the consequential remedies, is such that the other members' interests may be directly and substantially adversely affected. The interest of the other members is more than a mere financial interest; it is an interest in the maintenance to their common advantage of a restricted membership scheme supported by compulsory membership provisions. Thus, assuming that the applicants establish that the impugned provisions infringe their constitutional rights, it seems to me that it would be inappropriate for an order of unconstitutionality to follow without an opportunity having been afforded to the other members of the scheme to be heard on whether their infringing effect is objectively justifiable.

[46] The respondents appear to regard themselves to have been properly joined as the representatives of all members of their respective houses of the legislature and, as mentioned, have proposed that the President and the Chief Justice also be joined as representatives of members of the executive who are not members of Parliament and of the affected judges, respectively. Mr *Breitenbach* sought to support the notion of joining a representative for each 'class' of membership of the PARMED scheme rather than all of the members individually on grounds of convenience. He supported his argument in this respect with a reference to *Gory v Kolver NO* supra, loc. cit.

[47] As mentioned earlier, *Gory* concerned an application for leave to intervene as respondents in proceedings before the Constitutional Court for the confirmation of an order made by the High Court declaring a statutory provision to be unconstitutional. The provision was contained in a law of general application and liable to affect an indeterminable number of people whom it would have been quite impossible to identify individually. The Court granted the intervention application, but acknowledged that considerations of practicality meant that 'in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or

¹⁷ Section 27(1) of the Medical Schemes Act provides, insofar as relevant:

The Registrar may, with the concurrence of the Council, after investigation and after having afforded the medical scheme, or its legal representative an opportunity of being heard, cancel the registration of a medical scheme-

- (a) ...;
- (b) ...;
- (c) *if the medical scheme is unable to maintain a financially sound condition as contemplated by this Act;*
- (d) *if the medical scheme is unable to enrol within the period determined by the Council, or to maintain the minimum number of members required for the registration of a medical scheme;*
and
- (e) ...

invalidity of the statute in question will ordinarily be a *necessary* requirement to be met by an applicant for intervention, it will not always be *sufficient* for the granting of leave to intervene'. This was because in many such cases the court '*would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity*'. The implication of those observations for the notion of necessary joinder in such applications seems to be that where the interests of a very large, and effectively indeterminable, number of persons might be affected by the order sought, it would be impracticable to require that they should all be joined. A pragmatic approach has to be adopted in such cases in identifying who needs to be joined as a necessary party. A material consideration is that the constitutional invalidity of legislation – certainly laws of general application – falls to be determined objectively, and not with reference to its subjective effect on particular individuals.¹⁸

[48] It seems to me that rule 16A of the Uniform Rules was introduced recognising that in matters where the constitutional validity of legislation is impugned it will often be impractical for an applicant to join everyone whose interests might be affected. Rule 16A serves in effect to provide for a surrogate joinder by means of a legislatively ordained form of judicial notice of proceedings to affected parties. It gives them notice of the opportunity to ask for a hearing. It will be a question of degree and practicality as to when actual or substituted service in terms of rules 4 and 5 is required and when notice in terms of rule 16A will be sufficient. When notice in terms of rule 16A is sufficient it will be for the party in receipt of such notice to show why they should be admitted to the proceedings, either as a party or an *amicus*. Practical considerations might require that they will have to show more than that they have a direct and substantial interest in the outcome of the litigation.

[49] The PARMED Act is not a law of general application; it pertains only to a limited number of officers of state. I am not persuaded that considerations of practicality stand in the way of the joinder of each of the other individual members of the PARMED scheme. They are all certainly identifiable, and although their number is not small, it is far from infinite. A range of means whereby effective notice might

¹⁸ Cf. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), at para 25-26.

be given to each of them directly is readily conceivable. It might not be necessary, and may indeed be impractical, to cite them individually, rather than by category as described in s 1 of the PARMED Act, but that would not be any reason for the applicants not to name them individually in supplemented founding papers¹⁹ and to effect service on them. It will be for the applicants to decide how service should be effected, and, if appropriate, to obtain directions for that purpose from the court. I would venture that in matters in which large numbers of respondents are involved and service on each of them individually is impractical, service could be addressed by means of an order in terms of rule 4(2)²⁰ for some form of effective substituted service; alternatively by means of the issue of a rule *nisi*.²¹ Having regard to the closed and interactive environments in which all of the office-bearers in the categories affected by s 1(a)-(e) of the PARMED Act discharge their functions, it is unlikely that the court will be overwhelmed by a deluge of affidavits by affected individuals who might wish to take an active part in the proceedings. They would be more likely to club together and express their views through a few of *their* chosen representatives.

[50] The respondents' counsel referred to a number of provisions in the elaborate statutory framework regulating the remuneration of office-bearers, as well as ss 91 and 165(6) of the Constitution, in support of their contention that the President and the Chief Justice would suffice as representative respondents in respect of the classes of office-bearer referred to in paragraphs (a)-(c) of s 1 of the PARMED Act. I do not find it necessary to go through them all. Suffice it to say that I have not found anything in the provisions to which I was referred that would justify holding that their import was to invest in either the President or the Chief Justice the power or responsibility to represent the personal interests of the Deputy President, ministers of the Cabinet, or the judges in their membership of a medical aid scheme.

[51] As mentioned earlier,²² the respondents were joined as parties purportedly in terms of s 23(2)(a) of the Powers, Privileges and Immunities of Parliament Act 4 of

¹⁹ As indeed, they listed themselves as applicants in an annexure to the notice of motion.

²⁰ In my view the word '*impossible*' in rule 4(2) does not denote absolute impossibility. It would cover a situation in which service in terms of rule 4(1) was practicably impossible.

²¹ Compare the discussion, with reference to the other cases cited therein, in *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) about service in matters in which a large number of necessary parties are involved.

²² In paragraph [3], above.

2004,²³ read with s 2 of the State Liability Act 20 of 1957.²⁴ Those provisions are not applicable to proceedings of the nature of the current application. They apply in civil proceedings *against* the Parliament, qua institution, or any House or committee of Parliament. The State Liability Act is concerned with proceedings against the State in proceedings based on contract or delict. No relief of any sort whatsoever is sought against Parliament in the current application. The stated basis for the citation of the respondents in these proceedings is misconceived. The joinder of the members of Parliament is required because the orders *in rem* that are being sought may affect their *personal* interests in a sufficiently direct and material way. As in the cases of the offices of the President and the Chief Justice, I have found nothing in the Constitution, or the regulatory framework canvassed in the argument of the respondents' counsel that would afford a proper basis to regard the respondents as effective representatives in the cause for the possibly quite disparate viewpoints of the members of the respective Houses. (Quite incidentally, the respondents have been properly joined as individuals, however, by virtue of their being members, respectively, of the categories of office-bearer referred to in paragraphs (d) and (e) of s 1 of the PARMED Act.)

[52] In my judgment therefore, the proceedings will have to be stayed pending the joinder of the other office-bearers who are compulsorily members of PARMED. It is up to the applicants to determine how precisely to achieve this. Insofar as the joinder of the judges is concerned, the applicants will have to consider whether s 47 of the Superior Courts Act 10 of 2013 is applicable. I refrain from expressing any opinion in that regard. The stay of proceedings will not derogate from the effect of the agreed

²³ Section 23 of Act 4 of 2004 provides:

Civil proceedings against Parliament

- (1) *In any civil proceedings against Parliament or a House or committee, the State Liability Act, 1957 (Act 20 of 1957), applies, with the necessary changes.*
- (2) *For the purposes of subsection (1), where appropriate, a reference in the State Liability Act, 1957, to the Minister of a department must, where the proceedings are against-*
 - (a) *Parliament or a House, be construed as a reference to the Speaker or the Chairperson, or to both the Speaker and the Chairperson, as the case requires;*
 - (b) *a committee, be construed as a reference to the chairperson of the committee.*

²⁴ Section 2 of Act 20 of 1957 provides:

Proceedings to be taken against executive authority of department concerned

- (1) *In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.*
- (2) *The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.*

order in terms of which the respondents were required to deliver their supplemented answering papers within 15 days.

[53] I proceed now to the part of the respondents' non-joinder objection that is founded on the requirements of rule 10A(1) of the Uniform Rules.²⁵ The point raised by the respondents begs the question as to who, if anyone, might be the 'national executive authority responsible for the administration of the [PARMED Act]'.

[54] Differing from the position in most statutes, the PARMED Act does not give any indication of a minister in the Cabinet or statutory body as being responsible for its administration. That is not surprising because, as the respondents' counsel in fact conceded, it does not require administration. Its provisions are 'self-executing', as Mr *Breitenbach* put it.²⁶ The Act's provisions are twofold in effect: firstly, they impose an obligation of all members of the categories of office-bearer described in s 1 to become and remain members of the PARMED Medical Aid Scheme for as long as they hold office; and secondly, they impose an obligation on the relevant accounting officers responsible for the payment of the office-bearers' salaries to make deductions at source in respect of the office-bearers' monthly membership contributions to the Scheme. The carrying out by a functionary of a prescribed function in terms of a statute entails complying with the instrument; not administering it. It follows that there is no need for, nor is there, an executive authority responsible for the administration of the Act. The applicants' counsel contended that rule 10A(1) therefore finds no basis to apply in the circumstances.

[55] The fact that rule 10A(1) cannot be complied with according to the letter of its provisions in the peculiar circumstances of this case does not mean, however, that it is

²⁵ Rule 10A(1) of the Uniform Rules provides:

Joinder of provincial or national executive authorities and service on Rules Board for Courts of Law

(1) If in any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings.

²⁶ The contention by the applicants' counsel in their heads of argument that 'it is clear that the first and second respondents, acting jointly as the Executive Authority of Parliament, are responsible for the administration of the Parmed Act' is unsubstantiated and, in my view, unfounded. That the respondents might have an influential role in the governance of PARMED is an incidence of the rules of the Scheme, and nothing to do with the administration of the Act. Nothing in the Financial Management of Parliament and Provincial Legislatures Act 10 of 2009, cited by the applicants' counsel, bears on the administration of the PARMED Act. The provision in the parliamentary budget for the payment to PARMED of the medical aid contributions contemplated in terms of s 9 of the Remuneration of Public Office Bearers Act 20 of 1998 read with the PARMED Act is incidental to the obligation imposed on Parliament's accounting officer in terms of s 2 of the PARMED Act.

not necessary for a national executive authority to be joined.²⁷ The rationale for rule 10A, discussed in paragraph [31], above, remains pertinent. The national government introduced the legislation and it will be responsible for effecting the required legislative amendments should the relief sought by the applicants be granted. It is therefore only right that the national government be heard both on the substance of the challenge and, should the case get that far, the formulation of any remedial relief.

[56] The PARMED Act was introduced by the national government in 1975, and it has been amended in the post-Constitutional era at the instance of the national government by means of the Parliamentary and Provincial Medical Aid Scheme Amendment Act 8 of 1996. Mr *Breitenbach* argued, again on the basis of various statutory provisions concerning the remuneration of the relevant office-bearers and the fact that their remuneration is a direct charge on the Consolidated Revenue Fund, that the Minister of Finance is the national executive authority that should be joined. In correspondence with the applicant's attorneys in connection with the aforementioned application to join the Minister that was launched in response to PARMED's threat of proceedings in terms of rule 30A, the Director: Litigation and Law in the National Treasury disowned any responsibility by the Minister of Finance for the PARMED Act. It is not necessary to treat of the reasons given in support of the Director's contentions. One of them was that no significance should be attached to the fact that the Act had originally been introduced by the Minister of Finance in 1975 because 'that... predate[d] the [current] constitutional dispensation'.

[57] The most recent amendments to the PARMED Act were effected in terms of the Parliamentary and Provincial Medical Aid Scheme Amendment Act 8 of 1996. The amendment Bill was tabled by the Minister of Trade and Industry, but it appears from *Hansard* that the sponsor of the Bill at the second reading debate was the Leader of the House (a position that currently carries the title 'leader of government business in the National Assembly'). The President is required in terms of s 91(4) of the Constitution to appoint a member of the Cabinet as leader of government business. In terms of the rule 150(a) of the Joint Rules of Parliament, the leader of government business is responsible for the affairs of the national executive in Parliament. In the absence of a Cabinet minister who is specifically responsible for the administration of the PARMED Act, it seems to me that the leader of government business in the

²⁷ Cf. *Mukaddam* supra, at para 26.

National Assembly is the most appropriate representative of the national executive – or, as it was put in *Parbhoo* supra, loc.cit., ‘*the relevant organ of State*’ - to join for the purposes discussed in paragraph [55], above.

[58] In all the circumstances, and having regard to the fact that the determination of the separated issues has not followed entirely on all the arguments of either of the protagonists in the current round of proceedings, I consider that it would be appropriate to direct that the costs, including the costs of two counsel, should be costs in the cause. Whether the costs in the cause should be determined applying the *Biowatch* principle,²⁸ as submitted by Mr *Ngalwana* SC, who (together with Ms *Muvangua*) appeared for the applicants, is a matter to be decided in the main application.

[59] The following orders are made:

- a) Without derogation from the order made on 16 November 2015 directing the first and second respondents to deliver their answering papers within 15 days, further proceedings in the application are hereby stayed until the applicants have effected the joinder of –
 - i. every person (other than the applicants) referred to in paragraphs (a)-(e) of section 1 of the Parliamentary and Provincial Medical Aid Scheme Act 28 of 1975, as amended; and
 - ii. the Leader of Government Business in the National Assembly in his official capacity
 as respondents in the application.
- b) The costs of the proceedings concerning the non-joinder issues raised by the first and second respondents shall, as between the applicants and the first and second respondents, be costs in the cause; and shall include the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

²⁸ *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014.

Before:	Binns-Ward J
Applicants' counsel	V. Ngalwana S.C. N. Muvangua (The applicants' heads of argument having been drafted by T.N. Ngcukaitobi and N. Muvangua.)
Applicants' attorneys	Webber Wentzel Johannesburg and Cape Town
First and second respondents' counsel	A.M. Breitenbach S.C. S. Magardie
First and second respondents' attorneys	State Attorney Cape Town