



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No.: AR483/24

In the matter between:

GABRIEL ZILUNGISELE HLONGWANE

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be on 05 June 2026 at 11:00

ORDER

On appeal from the Magistrate's Court, Durban:

The appeal is dismissed with costs on Scale A.

JUDGMENT

CHETTY et HARRISON JJ

[1] This is an appeal against the dismissal of an action in the court where the appellant, as plaintiff, sued the respondent on two causes of action, namely:

- (a) *contumelia* and deprivation of freedom due to unlawful arrest and detention; and
- (b) pain and suffering, and temporary loss of amenities of life.

[2] The second cause of action, whilst framed in the particulars as *pain and suffering*, is in effect a claim in respect of an alleged assault which occurred whilst the appellant was in police custody. The *contumelia* relates to an alleged instruction, at the instance of certain police officers, that the appellant *twerk*¹.

[3] The entirety of the events relates to the arrest of the appellant on Friday, 29 April 2016 and his subsequent detention until his release after having been held over a long weekend. It is common cause, as borne out by the appellant's own evidence-in-chief, that he was not arrested by the police on Friday, 29 April 2016, but rather that his arrest was effected by an employee of the security firm known as Black Dolphin Investigations (Black Dolphin).

[4] On 29 April 2016, a security officer Mr Jacob Machaka (Mr Machaka) of Black Dolphin was on duty at the Greyville branch in Durban of the First National Bank (FNB) keeping a watch over customers using their automated teller machines (ATMs) as there had been a number of thefts of bank cards and money, especially on Friday afternoons. Mr Machaka recognised the appellant, along with two accomplices, as being part of a syndicate targeting customers by swapping their bank cards while using the ATMs. The appellant was identified as being the driver of a Toyota Yaris in which two other known suspects were passengers.

[5] Although Mr Machaka was not called to testify in the court *a quo*, he deposed to a statement taken on 29 April 2016 at 19h00 which formed the basis of the appellant's detention by the police until his release following his first appearance in Court on 4 May 2016. Mr Machaka stated that the appellant and his cohorts were already on the bank's 'watch lists' when he recognised them arriving at the

¹ A sexually suggestive dance generally while squatting. *Merriam-Webster.com Dictionary*.

Greyville branch on 29 April 2016. He recalled that two of the occupants exited the vehicle and entered the banking lobby where the ATMs were located. They began 'interfering' with customers, typical of behaviour associated with the card swapping crimes at ATMs. The remainder of his statement is somewhat confusing as it is not clear whether the appellant was present in the bank lobby or remained waiting in the vehicle outside the bank. What is not in dispute is that the appellant and another individual were apprehended by Mr Machaka and his colleague, after which the members of the South African Police Service were summoned to the scene.

[6] When the police arrived on the scene, the appellant had already been arrested and detained in terms of s 42 of the Criminal Procedure Act 51 of 1977 (the Act) by a private individual. Section 42 of the Act provides that:

'(1) Any private person may without warrant arrest any person-

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.'

Having been detained and arrested, he was then handed over to the SAPS and transported to the Durban Central Police Station where, according to the appellant, he was later assaulted. He subsequently appeared in court and after which the charges against him were withdrawn and he was released. He thereafter instituted an action claiming damages for his unlawful arrest, detention and assault.

[7] During the course of the trial it was common cause that the appellant was arrested by Mr Machaka. The latter furnished a statement to the police indicating that the appellant and two other occupants of a motor vehicle had:

‘... [B]een seen by me at different FNB branches involved in various card swapping activities ... [T]hey were already on the bank watchlists. I therefore identified them by faces.’ (Sic.)

The police had before them a credible report as to why Mr Machaka had conducted himself and effected the arrest in terms of s 42 of the Act.

[8] During the trial and on appeal much was said of the police’s duty to properly investigate allegations levelled against individuals, to guard against unlawful arrests and arbitrary deprivation of one’s liberty. This, however, overlooks a more fundamental point which was specifically raised by the Magistrate in his judgment, namely, the failure to join Black Dolphin. It was common cause that the appellant was not detained nor arrested by the police. His arrest was carried out by a private security officer. This is borne out explicitly from the evidence of the appellant himself. His evidence under cross-examination is relevant:

‘Mr Xulu : You were arrested by two investigators who worked for Black Dolphin Investigators?

Plaintiff : I do not know, they did not introduce themselves to me. They were not employed by SAPS. They did not introduce themselves to me.

Mr Xulu : You were not arrested by the police?

Plaintiff : Yes, it is not okay.

Mr Xulu : You were not taken out of the car by the police?

Plaintiff : Yes, if you say so.

Mr Xulu : You were handcuffed and arrested by people of Black Dolphin.

Plaintiff : Okay.’

[9] The magistrate correctly identified that there was a non-joinder of Black Dolphin and, accordingly, the issue of the appellant’s arrest stands to be decided on whether there was a material non-joinder of Black Dolphin.

[10] It has long been established that a party with a direct and substantial interest must be joined as a party to any litigation for there to be an effective judgment.² In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*,³ the Constitutional Court held that:

‘The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences — including a penalty of committal — for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.’ (Footnote omitted.)

[11] *Khumalo v Wilkins and Another*⁴ held that:

‘the Court will not deal with those issues without such a joinder being effected, and no question of discretion nor of convenience arises ...’

The Constitutional Court in *De Klerk v Minister of Police*⁵ said the following in relation to the non-joinder of a concurrent wrongdoer:

‘[82] The applicant did have alternative avenues of recourse regarding his unlawful detention after the remand order beyond only pursuing a claim against the respondent. There appear to have been multiple, concurrent wrongdoers in this matter. They all contributed to a systemic failure that led to the applicant being unlawfully detained for seven days. These parties were not joined and are not before us, and we are thus unable to pronounce definitively on their liability.

[83] The Minister of Justice and Director of Public Prosecutions might be jointly and severally liable with the Minister of Police, but it is sufficient for one of them to be sued for their proven delict for the applicant to succeed. A plaintiff may elect to sue only one person whose delict caused her harm, even if another person’s independent delict also caused that same harm. It is not obligatory that *all* joint wrongdoers be sued in the same action. Where all joint wrongdoers have not been sued, a court is not barred from determining

² *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)* at 659 to 660.

³ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2018 (1) SA 1 (CC) para 92.

⁴ *Khumalo v Wilkins and Another* 1972 (4) SA 470 (N) at 475A.

⁵ *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC) 1.

the liability, if any, of the party or parties before it. This happened in *Carmichele* (and *K* and *F*), where the plaintiff sued only the state officials for their delict, and not the party who had actually assaulted her.

[84] This matter is similar. There are potential concurrent wrongdoers: the Minister of Justice, the Minister of Police and the relevant Director of Public Prosecutions. Each of these actors may have committed independent delicts resulting in harm to the applicant. This would render them jointly and severally liable. So, while Mr De Klerk may successfully sue only one wrongdoer, it does not follow that the others did not commit a delict.

[85] The Apportionment of Damages Act then provides that where a plaintiff successfully sues only one of the concurrent wrongdoers, then that wrongdoer can bring a claim of contribution against the other wrongdoers that were not sued by the plaintiff. It is open then to the Minister of Police to bring a claim of contribution against the Minister of Justice or Director of Public Prosecutions if the requirements for concurrent wrongdoing are met. These latter actors are absolved of liability as against the applicant, because the Minister of Police will foot the bill, but they may still be liable for contribution claims at the instance of the Minister.' (Footnotes omitted).

[12] The appellant, however, did not plead apportionment nor did he seek to amend his particulars after the respondent filed an amended plea specifically averring that the appellant had been arrested by Mr Machaka, an employee of a private security company. Bound by these authorities, the magistrate had no discretion to overlook the non-joinder of Black Dolphin and consequently dismissed the appellant's claim of unlawful arrest, as pleaded.

[13] We agree with the finding of the court *a quo* that the non-joinder of Black Dolphin was fatal and consequently dispositive of the appellant's claim of unlawful arrest. The appellant placed nothing before this Court on appeal pointing to a misdirection by the court *a quo* on the facts or the law. Accordingly, the appellant's appeal on this leg must be dismissed.

[14] We are obliged to record that at the hearing of the appeal, Ms Buthelezi who appeared for the appellant, informed the court that the appellant was not persisting with his claim based on the unlawful arrest, but intended to proceed with

the appeal based only on his unlawful detention. The abandonment of a significant part of the appeal was not communicated to the Court prior to the hearing. We were obliged to read the entire record, the heads of argument and all thirteen cases cited by the appellant's counsel relating to the issue of the unlawful arrest. Apart from a waste of the court's time and resources, the manner and lateness of the abandonment reflected a casual flippancy demonstrating a lack of respect for this Court. Counsel are first and foremost officers of the court and are expected to conduct themselves accordingly. We say no more in this regard.

[15] In respect of the claim for unlawful detention, the essence of the argument on behalf of the appellant was that the police had no reasonable grounds to justify the arrest and that they should have *applied their minds* before detaining him as the appellant was not identified by the complainant as being involved in the card swapping activity, and he was identified by Mr Machaka as merely the driver of the car. A further argument raised was that the police ought to have obtained the video surveillance evidence from the bank before deciding to detain the appellant.

[16] These arguments lose sight of the factual context of the arrest and the detention by the police. The arrest by Mr Machaka occurred late on a Friday afternoon, before a long weekend. There was no evidence to suggest that video surveillance footage could have been obtained after business hours from the bank. The appellant was taken from the scene of the alleged crime and transported to the police station. He was informed of his rights in terms of s 35 of the Constitution, including his right to remain silent and his right to be brought before a court as soon as reasonably possible but not later than 48 hours after his arrest, or before the end of the first court day after the expiry of the 48-hour period.

[17] The appellant confirmed in writing that his rights, referred to above, were conveyed to him at 17h50 on Friday, 29 April 2016. The witness statement from Mr Machaka was deposed to at 19h00. Within this timeline, counsel for the appellant was unable to indicate when the police should have obtained the video surveillance footage that was said to implicate the appellant. As stated earlier, the

appellant was arrested late on a Friday afternoon, and in circumstances where the first court day after the expiry of the 48-hour period would only occur after the long weekend, on Tuesday, 3 May 2016.

[18] Importantly, once the appellant abandoned the argument that the arrest was unlawful, the only issues which ordinarily remained was whether the police had a reasonable suspicion to detain the appellant and whether the appellant had proven on a balance of probabilities that he was assaulted while in detention.

[19] Regarding the contention that the police acted maliciously in refusing to grant the appellant bail on the day of his arrest, it is trite that bail recognises an awaiting-trial accused's right to liberty while he or she is presumed innocent. It is not a form of anticipatory punishment. Section 50 of the Act provides that:

'(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

- (i) no charge is to be brought against him or her; or
- (ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day.'

At the same time, a lawful arrest does not necessarily require that an arrested person remain detained until the first court appearance, especially in circumstances where the accused is charged with a minor offence. The Act permits release on bail by the police before a first court appearance. This is commonly referred to as *police bail*.

[20] In this appeal, it is a matter of record that the appellant was charged with theft and had three previous convictions for the same offence.⁶ In traversing his detention, the appellant conceded under cross-examination that he was informed that he was not eligible to obtain police bail in light of his previous convictions. Mr Xulu for the respondent submitted that the appellant's previous convictions as well as the evidence against him in the form of Mr Machaka's statement constituted a lawful basis that prevented him from being granted police bail in terms of s 59 of the Act, which provides that:

'(1) (a) An accused who is in custody in respect of any offence, other than an offence-

- (i) referred to in Part II or Part III of Schedule 2;
- (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or
- (iii) referred to in-
 - (aa) section 17 (1) (a) of the Domestic Violence Act, 1998;
 - (bb) section 18 (1) (a) of the Protection from Harassment Act, 2011 (Act 17 of 2011);

or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may, *before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official* charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official (My emphasis.)

[22] Section 59(1)(a)(i) provides that an accused may be released on police bail where he or she is charged with an offence other than that falling under Part II or Part III of Schedule 2. The appellant was arrested on a charge of theft, which does not fall under Part II or Part III of Schedule 2. However, the respondent contends that police bail could not be granted and the detention of the appellant until his appearance in court on 3 May 2016, being the next ordinary court day, was justified

⁶ The court *a quo* erroneously recorded in its judgment that the appellant had one (1) prior conviction for theft. The SAP 69 issued by the SAPS Criminal Record Centre reflects that the appellant had 3 previous convictions for theft.

by s 60(11)(b) of the Act which permitted his continued detention where he is charged for an offence under Schedule 5 of the Act, which refers to an offence under Schedule 1 of the Act, including theft, where the suspect has previous convictions. Section 60(11) provides that:

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence-

...

(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.’

[23] On this interpretation the contention that the police failed or refused to grant the appellant police bail does not arise, given his prior convictions for theft. In any event, as noted earlier, the alleged refusal of police bail was not properly pleaded as part of the appellant’s case with sufficient particularity, and was only obliquely raised during the hearing of the evidence. In *Kali v Incorporated General Insurances Ltd*,⁷ the court held that:

‘... [A] pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another ...’

[24] However, it bears noting that the magistrate did consider this aspect, and concluded:

‘Given the Plaintiff’s previous conviction for theft, it followed that the detention from 29 April 2016 to 3 May 2016 was justified and the members of the Defendant were not remiss in keeping Plaintiff in custody as they did.’

[25] In his grounds of appeal, the appellant contended that the court *a quo* erred ‘... [I]n finding that... [the] detention was justified because the appellant had a previous conviction for theft.’ It is noteworthy that no reference is made as a ground of appeal to the issue of a failure to consider the grant of police bail as an omission giving

⁷ *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 181H-182A.

rise to a claim for damages. Nor did the appellant advance this point with any conviction, either in the heads of argument or at the hearing of the matter. Neither counsel referred us to any case authority on this aspect. Even though this issue was not canvassed directly in the pleadings or in evidence, to the extent that it could fall to be considered as forming part of the claim for *unlawful detention* we consider it proper to deal with the issue of police bail, in light of the oblique reference to it in the record. In *Makofane William Mohlala v MEC for Transport, Limpopo and Others*⁸ the SCA found that once an accused person has been charged, the police are under an obligation to ascertain whether the detainee wishes to have the possibility of release on police bail considered. In *Mohala*, the Supreme Court of Appeal (the SCA) held that:

‘... [E]ven where an arrest is lawful, police officers must apply their minds to whether the detainee should remain in custody. This necessarily includes consideration of whether detention is required at all, and a failure to do so may render the ensuing detention unlawful.’ (Footnotes omitted.)

[26] The point of departure from this appeal and that in *Mohala* is that the appellant did not plead his case as one in which damages were claimed on the grounds of the failure of the police to consider and apply their minds to whether he ought to have been granted police bail. In *Imprefed (Pty) Ltd v National Transport Commission*,⁹ the Appellate Division held that:

“The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.”

[27] In *Mohala* the SCA held that:

‘[14] ... [T]he case he advanced, both on the pleadings and at trial, was that members of the SAPS acted unlawfully by keeping him detained in circumstances where they were entitled and permitted by the Act to release him on police bail ...’ (Footnote omitted.)

⁸ *Makofane William Mohlala v MEC for Transport, Limpopo and Others* [2026] ZASCA 55 (*Mohala*) para 12.

⁹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C.

[28] In addition, *Mohala* is distinguishable from the present appeal, particularly where the SCA held that:

[17] ... [M]r Mohlala's uncontested evidence was that he was never informed that he could apply for bail while in police custody following his arrest, with the result that he did not do so. It must be accepted that whatever rights were read to him by Mr Mbonani at the time of arrest did not include any mention of the possibility of bail ...' (Footnote omitted.)

[29] In the present matter, the appellant confirmed under cross-examination that he was given a copy of the rights in terms of s 35 of the Constitution which were explained to him, and for which he acknowledged in writing. This included his right to apply for bail. He testified that he enquired regarding police bail but was informed that he would have to wait until the next court day, being 3 May 2016. It was then put to him under cross-examination that the reason for police bail not being available to him was because of his previous convictions for theft. This accords with the argument referenced earlier as to why it was not open to grant the appellant police bail in terms of s 59 of the Act.

[30] For the reasons we have referred to earlier, the failure of the police to have consider the grant of police bail was neither pleaded in the particulars of claim nor traversed specifically in evidence as a basis for the appellant's claim. We are of the view that even if the point is good, it is distinguishable from the facts in *Mohala*. Moreover, the point cannot properly be raised for the first time on appeal. In *Robinson v Randfontein Estates GM Co Ltd*,¹⁰ the Appellate Division held that:

'... [Th]e trial Court been of opinion that the arrangements of December 1904 and July 1905 had not been fully investigated and that the absence of a plea raising the specific defence in question had prejudiced the appellant, an order directing the filing of an amended plea would indubitably have been made. No such order issued. And after carefully considering this very bulky record, I find myself in agreement with the views expressed by CURLEWIS, J.P., upon the point. (Volume 1, pp. 101-2.) The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and

¹⁰ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198

the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been. We are therefore bound to give full effect to the failure of the appellant to establish the genuineness of the contract upon which he relies ...'.

[31] Turning to the issue of the alleged assault, the clear evidence of the police officers who collected the appellant, namely, Sergeant (Sgt) Nzuza and Sgt Sithole, was that there was no assault of the appellant by them during the time they spent with him. He was subsequently transported to Durban Central Police Station where the matter was further investigated by Detective Mthembu who, likewise, testified that there was no such assault.

[32] During the course of the appellant's case, his version was that he was assaulted by an Indian officer. The respondent duly called Sgt Shaylin Naidoo who was the only Indian officer on duty on 29 April 2016. During the cross-examination of Sgt Naidoo it was put that it was not him, but another Indian officer who was responsible for the alleged assault. Faced with this version, the specific evidence was that there was no other Indian officer other than Sgt Naidoo on duty at the relevant time. Additionally, a new version was also put to Sgt Sithole in cross-examination that she also assaulted the appellant, a version which was neither led in evidence nor put to any of the other witnesses, a clear and unequivocal demonstration of a recent fabrication.

[33] The entire evidence of the assault and the twerking, which was equally denied, is predicated largely upon a medico-legal certificate (J88) which notes bruises on the wrists and numbness of the left thumb and index finger. The J88 also records that the left side of the appellant's jaw was tender. Unfortunately for the appellant, the J88 is supportive of injury to the wrist and hands, which is entirely consistent with him having been handcuffed by Mr Machaka from Black Dolphin, but the injuries are inconsistent with, and do not corroborate, the alleged assault. The tenderness to the jaw is not explained and, whilst the J88 was accepted into evidence, the nature and extent of the injury is undefined.

[34] Faced with the evidence of four police officers, all of whom disavowed any knowledge of an assault, and the appellant's version which shifted as the trial proceeded that it was perpetrated by another police officer and not those who had been called to give evidence, it is hardly surprising that the magistrate found that the appellant had failed to discharge his onus to prove the assault. In such circumstances, the magistrate's decision to dismiss the claim for the assault is equally justified on the nature of the evidence led and the clear contradictions in the appellant's version.

[35] It is trite that the powers of a court of appeal to interfere with the findings of a trial court are limited. In *Mavundla v MEC, Department of Co-Operative Government and Traditional Affairs, KwaZulu-Natal*,¹¹ the court held that:

'[87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —

"judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

[36] With the issue of the non-joinder being definitive of the question of the unlawful arrest, the detention of the appellant being a lawful consequence of the

¹¹ *Mavundla v MEC, Department of Co-Operative Government and Traditional Affairs, KwaZulu-Natal* 2025 (3) SA 534 (KZP) para 8.

arrest with the police having no discretion to grant him police bail in light of the charge of theft and his previous convictions for the same offence together with clear contradictions regarding the appellant's version of the assault and who assaulted him, the magistrate's decision to dismiss the action cannot be faulted. There was no misdirection by the magistrate and, accordingly, the appeal must fail.

[37] There is no reason why costs should not as per the general rule, follow the result, in *Septoo and Another v Road Accident Fund*,¹² where the SCA held that: '[22] The only question that remains for consideration is that of costs. The respondent as the successful party in this litigation is entitled to costs as a general rule. Though the general rule is that costs should follow the result, the issue of costs is an exercise of a judicial discretion. In the case where a party has been successful, there must be exceptional circumstances, to deprive the successful party of its costs. A court should take into consideration the circumstances of each case, . . . the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.' (Footnote omitted.)

Order

[38] The following order is made:

The appeal is dismissed with costs on Scale A.

CHETTY J

HARRISON J

¹² *Septoo and Another v Road Accident Fund* [2017] ZASCA 164.

Appearances

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