CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 124/15

In the matter between:

MINISTER OF HOME AFFAIRS	Applicant
and	
ABDUL RAHIM	First Respondent
HOSSAIN KAMAL	Second Respondent
ZAKIR HOSSAIN	Third Respondent
HARUM MOHAMMED	Fourth Respondent
MOHAMMED SALLA UDDIN	Fifth Respondent
ABDUL SHAMOL	Sixth Respondent
MUHBUB ALOM	Seventh Respondent
TOYOBUR RAHMAN	Eighth Respondent
SUMAN CHUDHURY	Ninth Respondent
MUSTAFI GURRAMAN	Tenth Respondent
EUNICE HAYFORD	Eleventh Respondent
ZAIUR RAHMAN	Twelfth Respondent
MD ALAP	Thirteenth Respondent
NORUL ALOM	Fourteenth Respondent

MAHE MINTU Fifteenth Respondent

and

PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY Amicus Curiae

Neutral citation:	*Minister of Home Affairs v Rahim and Others* [2016] ZACC 3
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J
Judgment:	Nugent AJ
Heard on:	26 November 2015
Decided on:	18 February 2016
Summary:	Immigration Act 13 of 2002 — section 34(1) — illegal foreigners — determination of places of detention — damages for wrongful detention

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth):

1. Leave to appeal is granted.
2. Leave to cross-appeal is granted.
3. The appeal is dismissed with costs.
4. The cross-appeal is dismissed.

JUDGMENT

NUGENT AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] The respondents are all Bangladeshi nationals, save for the eleventh who is from Ghana. They arrived in this country and applied for asylum under section 21 of the Refugees Act.[1] They were granted asylum-seeker permits under section 22(1), which permitted them to be and to remain in the country temporarily pending the outcome of their applications. Their permits were extended from time to time, but ultimately their applications for asylum were rejected and internal appeals against the rejection failed.

[2] Having failed to depart the country, the respondents were arrested and detained, pending deportation, purportedly under the authority conferred upon immigration officers by section 34(1) of the Immigration Act (the Act).[2] That section permits an immigration officer to arrest an "illegal foreigner" and, subject to various conditions, to detain him or her or cause him or her to be detained, pending deportation—

> "in a manner and at the place … determined by the Director-General [of the Department of Home Affairs]."

[3] Following their arrest, the respondents were all detained for various periods, ranging from 4 to 35 days, in various facilities, and were later released. In all cases the respondents were detained in prison or at a police station, either for the full period

[1] 130 of 1998.

[2] 13 of 2002.

of detention or for part of the time in prison and part of the time at a police station. In four cases the respondents were also detained for short periods in the Lindela Repatriation Centre, but the application for leave to appeal made nothing before us of that distinction.

[4] Alleging they had been unlawfully arrested and detained, the respondents sued the applicant for damages in the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth (High Court). The arrests and detentions were said to be unlawful for various reasons but it is not necessary to deal with them all. Before us only one reason was pursued, which was that the places at which they were detained were not places determined for detention by the Director-General.

[5] It was not disputed before us, nor in the Supreme Court of Appeal, that at the relevant time the places at which the respondents were detained had not been determined by the Director-General as places for the detention of illegal foreigners. Indeed, the Director-General had not determined any places at all for their detention.

[6] The respondents' claims were consolidated in the High Court and all were dismissed by Chetty J. Their appeal to the Supreme Court of Appeal succeeded. The Supreme Court of Appeal declared the detention of the respondents to have been unlawful, and awarded damages to each in varying amounts, dependent in each case upon the period for which each respondent was detained. The applicant now applies for leave to appeal to this Court against the orders of the Supreme Court of Appeal. The respondents apply for leave to cross-appeal the amount of damages awarded in each case.

In the High Court

[7] The High Court found, upon a construction of section 34 of the Act,[3] that prisons, and by implication police cells and lock-ups, had indeed been determined by

[3] Section 34 provides in relevant part:

the Director-General as places at which illegal foreigners may be detained pending deportation. To reach that conclusion the High Court said:

> "There is a clear indication in subsection (7), which refers to the detention of an illegal foreigner in a prison that it is the place which the Director-General had determined that an illegal foreigner be detained pending his or her deportation."[4]

In the Supreme Court of Appeal

[8] That construction of the section was correctly not accepted by the Supreme Court of Appeal.[5] The construction given to subsection (7) by the High Court

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"(1) Without need for a warrant, an immigration officer may arrest an *illegal foreigner* or cause him or her to be arrested, and shall, irrespective of whether such *foreigner* is arrested, deport him or her or cause him or her to be deported and may, pending his or her *deportation*, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the *Department* determined by the *Director-General*, provided that the *foreigner* concerned—

(a) shall be notified in writing of the decision to *deport* him or her and of his or her right to appeal such decision in terms of *this Act*;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of *deportation* be confirmed by warrant of a *Court*, which, if not issued within 48 hours of such request, shall cause the immediate release of such *foreigner*;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a *Court* which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum *prescribed* standards protecting his or her dignity and relevant human rights.

. . .

(6) Any *illegal foreigner* convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

(7) On the basis of a warrant for the removal or release of a detained *illegal foreigner*, the person in charge of the prison concerned shall deliver such *foreigner* to that immigration officer or police officer bearing such warrant, and if such *foreigner* is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant."

[4] *Rahim and Others v Minister of Home Affairs* [2013] ZAECPEHC 34 at para 14.

[5] *Rahim and Others v Minister of Home Affairs* [2015] ZASCA 92; 2015 (4) SA 433 (SCA) (Supreme Court of Appeal judgment).

overlooks the preceding subsection.[6] When seen in the context of subsection (6) it becomes apparent that subsection (7) refers to illegal foreigners who have been convicted and sentenced for an offence under the Act and are liable to deportation before the expiry of their sentence, who may thus be handed over by the prison authorities under subsection (7) for that purpose.

[9] Navsa ADP, writing for the Court, considered the purpose for which section 34(1) of the Act requires the Director-General to determine places at which illegal foreigners may be detained.[7] He observed that it is an international norm that refugees and others caught up in migratory regulation have a peculiar status that differentiates them from those who are imprisoned by the criminal justice system. There is no need to repeat in full the contents of the instruments he relied upon. I extract only their core principles.

[10] Navsa ADP drew attention to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which provides:

> "Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial."[8]

He pointed out that the *Inter-American Commission on Human Rights* has resolved that:

[6] See above n 3 for the text of subsections (6) and (7).

[7] Supreme Court of Appeal judgment above n 5 at para 20.

[8] Article 17(3) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990).

> "The holding of asylum-seekers and persons charged with civil immigration violations in a prison environment is incompatible with basic human rights guarantees."[9]

He also observed that the Special Rapporteur of the Human Rights Council of the United Nations, reporting in 2012 on the human rights of migrants, said:

> "The Standard Minimum Rules for the Treatment of Prisoners provide that persons imprisoned under a non-criminal process shall be kept separate from persons imprisoned for a criminal offence. Additionally, the Working Group on Arbitrary Detention stated in its deliberation No. 5 that custody must be effected in a public establishment specifically intended for this purpose or, when for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law. At the regional level, the Principles and Best Practices on the protection of Persons Deprived of Liberty in the Americas provide that asylum or refugee-status-seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges."[10]

[11] Against that background, the Supreme Court of Appeal concluded that the Director-General was required, by section 34(1) of the Act, pertinently to determine the place or places for the detention of illegal foreigners pending deportation. Absent evidence that any determination had been made, it found the detention of the respondents to have been unlawful, and further, that they were entitled to damages.

In this Court

[12] This Court admitted People Against Suffering, Oppression and Poverty (PASSOP) as amicus curiae. PASSOP is a community-based, non-profit organisation and grassroots movement that works to protect and promote the rights of all refugees, asylum-seekers and immigrants in South Africa.

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[9] Human Rights of Migrants, International Standards and the Return Directive of the EU, recommended by the Inter-American Commission on Human Rights Resolution 03/08, 25 July 2008.

[10] François Crépeau, "*Report of the Special Rapporteur on the human rights of migrants*" (2 April 2012).

[13] Much was made before us by the applicant of the fact that the international instruments to which I have referred do not purport to be binding law in this country. Moreover, so it was submitted, those instruments do not purport to require migrants who have fallen foul of migratory regulations to be kept out of prisons and police cells, but only require them to be separated from convicted criminals. It was pointed out that the respondents were not held together with convicted criminals, and it was submitted that their detention thus accorded with those instruments.

[14] Those submissions seem to me to read more into the findings of the Supreme Court of Appeal than is justified. The Supreme Court of Appeal did not purport to make findings upon whether the respondents were detained in conflict with international norms, nor are we called to do so. Those norms were referred to only to illustrate why it is that the Legislature required the Director-General to apply his or her mind to where illegal foreigners may be detained.[11]

[15] With regard to the text of the section, it was submitted for the applicant that section 34(1) does not require the Director-General pertinently to designate any one or more places for the detention of illegal foreigners. Illegal foreigners may be detained anywhere, so the submission went, provided only that the place of detention was under the authority and control of the State. For that submission reliance was placed on the decision of this Court in *Lawyers for Human Rights*, in which Yacoob J, writing for the majority, said:

> "Section 34(1) [of the Immigration Act] is designed to cater for the situations in which illegal foreigners are detained in a facility over which the government has control and which is serviced or frequented by State officers."[12]

[11] Supreme Court of Appeal judgment above n 5 at para 20.

[12] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (*Lawyers for Human Rights*) at para 39.

[16] That submission was similarly advanced before the Supreme Court of Appeal and correctly rejected. It needs to be borne in mind that when *Lawyers for Human Rights* was decided, section 34(1) read differently, in that it authorised detention at "the place under the control or administration of the Department determined by the Director-General".[13] In the extract of *Lawyers for Human Rights,* this Court did not purport to construe the section. As the Supreme Court of Appeal pointed out in the present case, section 34(1) was merely contrasted with section 34(8), which concerns the detention of an illegal foreigner on a ship that brought him or her to the shores of this country. Hence, unlike under section 34(1), his or her detention is not under the control of the State.[14]

[17] The purpose for which the relevant provision was inserted into section 34(1), as held by the Supreme Court of Appeal, was to ensure the Director-General applies his or her mind to what places are appropriate for the detention of illegal foreigners, having regard to international norms for the detention of those who fall foul of migration regulation, and determines appropriate places for their detention. Both the text and purpose of the section make it clear that, having so applied his or her mind, the Director-General must pertinently determine the place or places appropriate for that purpose. Absent a determination having been made, which is not disputed, I agree with the Supreme Court of Appeal that the respondents were detained in conflict with the section.

[18] The principal case advanced on behalf of the applicant, however, was that if we were to find that the detention of the respondents at places not determined was a breach of the section by the immigration officials, it would constitute a failure to fulfil a public duty, but would not translate into a private action for damages. That submission was made on the premise that proper and lawful grounds existed for the

[13] The section was amended by section 35 of the Immigration Amendment Act 19 of 2004 with effect from 1 July 2005.

[14] Supreme Court of Appeal judgment above n 5 at para 21.

arrest and detention of the respondents, the unlawfulness lying only in detaining them at places not authorised.

[19] It is well-established that breach of a public duty is not, by itself, necessarily actionable in damages. As it was expressed by Langa CJ in *Zealand*,[15] and recently affirmed in *Mashongwa*:[16]

> "In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*, this Court considered the relationship between violations of constitutional rights in public law and delictual claims against the State in private law. This Court unanimously held, on the one hand, that 'private law damages claims are not always the most appropriate method to enforce constitutional rights.' It held also that '[i]t should also be emphasised that a public law obligation does not automatically give rise to a legal duty for the purposes of the law of delict'. On the other hand, the Court also held that—
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> > '[we] should not be understood to suggest that delictual relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate'."[17] (Footnotes omitted.)

[20] In *Country Cloud*,[18] this Court referred, with approval, to a line of cases in which the Supreme Court of Appeal considered in what circumstances conduct will be held to be delictually actionable.[19] Those cases concerned conduct that was alleged to

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[15] *Zealand v Minister for Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) (*Zealand*).

[16] *Mashongwa v Passenger Rail Agency of SA* [2015] ZACC 36 (*Mashongwa*).

[17] *Zealand* above n 15 at para 50.

[18] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*).

[19] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) at para 12; *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) at para 10; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 13; *Gouda Boerdery BK v Transnet Ltd* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) at para 12; and *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 12.

be negligent, but *Mashongwa* affirms that the principles apply as much to conduct in breach of a public duty.

[21] Even if the arrest and detention of the respondents was unassailable, the unlawfulness lying only in the places at which they were detained, as submitted on behalf of the applicant, I do not think the applicant can escape liability for damages.

[22] The cases referred to earlier establish that whether conduct gives rise to a delictual action (in the language that is used for that analysis, whether the conduct is "wrongful") is a question of legal policy. That question is not fact-bound to the particular case. It will necessarily apply to all illegal foreigners who find themselves caught up in the same situation. So far as their individual circumstances, and the consequences for each, might differ, that will determine what particular harm, or absence of harm, each might have suffered, which is relevant to the enquiry into damages. The proper enquiry is whether conduct of the kind in issue attracts civil liability for any harm that might have been caused. As Khampepe J said in *Country Cloud*:

> "The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability'."[20]

And again in *Mashongwa*, in relation to omissions to perform public duties, Mogoeng CJ held:

> "[I]n addressing wrongfulness the question is whether omissions of that type, in breach of PRASA's public law obligations, are to be treated as wrongful for the

[20] *Country Cloud* above n 18 at para 21.

> purposes not only of public law remedies, but also for the purpose of attracting delictual liability sounding in damages."[21]

[23] People who might find themselves in the position of the respondents are men, women and children who are in this country illegally, and liable to summary deportation. Although they are foreigners, and in this country illegally, persons in that category nonetheless enjoy the protection of the Constitution, at least so far as the principle of legality, and their right to respect for their dignity, is concerned. Yet they are amongst the most vulnerable in our society, with no political or social influence over the laws that govern them, often living on the margins of society, without communal support, assistance or influence to ensure compliance with the law by public officials. Counsel for the applicant submitted that people in the position of the respondents are able to vindicate their right to be dealt with lawfully by seeking interdictory or similar relief should they find themselves detained in conflict with section 34(1), but that seems to me to be cold comfort to people who are unlikely to have access to the courts during the time they are awaiting expulsion from the country.

[24] I see no basis upon which the vulnerable and marginalised are able to vindicate their rights other than through a delictual claim, and no other was suggested by counsel. There are also no reasons of principle or public policy or practicality that militate against recognising a delictual action. This is not a case in which fulfilment of the duty cast upon the Director-General impinges upon matters of government policy, or, apart from damages awards, calls for allowance to be made for the appropriate allocation of resources. It calls only for the Director-General to do what the Legislature has required.

[21] *Mashongwa* above n 16 at para 21.

[25] In *S v Bhulwana; S v Gwadiso* this Court remarked upon the need for successful litigants to be afforded effective relief:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants."[22]

Langa CJ reiterated this in *Zealand:*

> "I accordingly hold that the breach of section 12(1)(a) is sufficient, in the circumstances of this case, to render the applicant's detention unlawful for the purposes of a delictual claim for damages. *That will be the most effective way to vindicate the applicant's constitutional right*." [23] (Emphasis added.)

[26] But I think the submission on behalf of the applicant is in any event incorrectly founded. I do not think the detention, and the place of detention, can be separated, as suggested for the applicant, the one part being lawful, and the other not lawful. The two are inextricably linked and go hand-in-hand. For so long as a person is confined in a place not permitted by law his or her confinement is unlawful. That was the approach adopted by the Supreme Court of Appeal, although not expressly so stated, and I agree.

[27] The protection of personal liberty has a long history in the common law both of this country and abroad. It is now entrenched in our law by the guaranteed right of everyone in section 12(1) of the Constitution to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. That the deprivation of personal liberty is prima facie unlawful, calling for justification to avoid liability for damages, was reaffirmed by this Court in *Zealand*, which concerned a claim for delictual damages:

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[22] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[23] *Zealand* above n 15 at para 53.

> "This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. . . . [It] must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."[24] (Footnotes omitted.)

[28] The premium our Constitution places on liberty is reinforced by what O'Regan J said in *Bernstein*, although in a different context:

> "Freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable."[25] (Footnotes omitted.)

O'Regan J, in her minority judgment, further held in *S v Coetzee*:

> "[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in [*Bernstein*], our Constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of

[24] Id at para 25.

[25] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*) at para 145. See also the remarks of Leeuw AJ in *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21.

> his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair."[26]

[29] The detention of the respondents was indeed unlawful, entitling them to damages, as found by the Supreme Court of Appeal. While the application for leave to appeal should be granted, the appeal by the applicant must be dismissed.

Application for leave to cross-appeal

[30] The damages the Supreme Court of Appeal awarded varied from R3 000 to R25 000. The applicant did not challenge the amounts awarded, but these were challenged by the respondents, who applied for leave to cross-appeal the awards.

[31] The amount to be awarded as general damages lies quintessentially within the discretion of the court making the award. An appeal court will not interfere in the absence of misdirection, or unless there is a "substantial variation" or a "striking disparity" between the award made and the award the appeal court considers ought to have been made.[27] Here, the trial court having dismissed the actions, the Supreme Court of Appeal, on reversing that outcome, itself determined the damages awarded to each respondent.

[32] That was explained more fully by Khampepe J in *Trencon*,[28] in which it was said that when a court has exercised a "true" discretion (which includes a discretion to determine an award of general damages):

> "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

[26] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 159.

[27] See, for example, *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809B-C.

[28] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC).

> directing itself to all the relevant facts and principles. . . . An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court'."[29] (Footnotes omitted.)

[33] I find no misdirection by the Supreme Court of Appeal, nor was any contended for on behalf of the respondents. Nor could the respondents say that the award was one that the Court could not reasonably have made. The respondents contented themselves with an assertion the awards were strikingly disparate from the awards ought to have been made, but I disagree. It has been said before that while "[m]oney can never be more than a crude *solatium* for the deprivation of [liberty] . . . and there is no empirical measure for the loss" nonetheless "our courts are not extravagant in compensating the loss".[30]

[34] There were sufficient grounds to grant leave to appeal and to cross-appeal, but both must fail. There remains the question of costs.

Costs

[35] The principal issues in this case arose in the appeal, in which the respondents have succeeded, the cross-appeal raising less prominent issues. In *Biowatch*,[31] this Court pointed out that *Affordable Medicines Trust*[32] held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs. The general rule established in *Affordable Medicines Trust* was cited with approval in *Biowatch*:

> "[W]here the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected . . . the state should bear the costs of litigants who have been successful against it, and ordinarily there should

[29] Id at para 88.

[30] *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006 (6) SA 320 (SCA) at para 20.

[31] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[32] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines Trust*) at para 139.

> be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct."[33]

I see no reason to depart from that general rule in this case.

Order

[36] The following order is made:

1. Leave to appeal is granted.
2. Leave to cross-appeal is granted.
3. The appeal is dismissed with costs.
4. The cross-appeal is dismissed.

[33] *Biowatch* above n 31 at para 56.

For the Applicant:	W Mokhare SC, M Bofilatos SC and T Ngcukaitobi instructed by the State Attorney
For the First to Fifteenth Respondents:	A Beyleveld SC, A C Moorhouse and D Bands instructed by McWilliams & Elliott Inc
For the Amicus Curiae:	J Brickhill and L Siyo instructed by the Legal Resources Centre