CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 4/98

HAFIZA ISMAIL AMOD (born PEER) Applicant

versus

MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND Respondent

Heard on : 21 May 1998

Decided on : 27 August 1998

JUDGMENT

CHASKALSON P:

[1] The applicant has applied for leave to appeal directly to this Court against a judgment delivered by Meskin J in the Durban and Coast High Court.[1] The applicant claimed damages in the High Court for loss of support arising out of the death of her husband in a motor vehicle collision in 1993. The matter was dealt with there as a special case in terms of Uniform Rule of Court 33(1).[2]

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1 Reported as *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D).

2 Uniform Rule of Court 33(1) provides as follows:

"The parties to any dispute may, after institution of proceedings, agree upon a written

statement of facts in the form of a special case for the adjudication of the court."

Proceedings in the High Court:

[2] The applicant's action was based on the provisions of the Multilateral Motor Vehicle Accidents Fund Act ("the MVA Act").[3] For the purposes of the special case the parties agreed inter alia that:

a. The applicant and the deceased were married in accordance with Islamic law on 18 April 1987.

b. This union was not registered as a civil marriage in terms of the provisions of the Marriage Act.[4]

c. In terms of the Islamic marriage, which is a contract, the deceased, as husband, was obliged to maintain and support the applicant during the course of the marriage and until termination thereof by death or divorce; and in fact did so.

d. The deceased died in a motor vehicle accident on 25 July 1993.

e. The deceased's death was caused by the negligence of the driver of

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3 Act 93 of 1989. This act has subsequently been repealed by the Road Accidents Fund Act 56 of 1996.

4 Act 25 of 1961.

the other vehicle involved in the collision.

[3] The question which the High Court was asked to decide was whether the defendant was legally liable on the basis of these facts to compensate the applicant for the loss of support which she had suffered as a consequence of her husband's death. The respondent would be liable only if the driver whose negligence caused the death of her husband would have been liable for such damages at common law if the MVA Act had not been passed.[5]

[4] The Appellate Division[6] held in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*[7] that a claim for damages for loss of support caused by the death of a spouse was allowed by the common law only in cases where the union in question constituted a lawful marriage in terms of the common law. Unions which were polygamous or potentially polygamous were not lawful at common law. It followed that a spouse married according to African customary law (which permitted polygamous marriages) was not entitled to claim damages for the loss of support which she suffered as

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5 *Mlisane v South African Eagle Insurance Co Ltd* 1996 (3) SA 36 (C) at 39B-41D.

6 Now the Supreme Court of Appeal in terms of item 16(3)(a) of schedule 6 of the 1996 Constitution.

7 1960 (2) SA 467 (A).

a result of the death of her husband. The Court held further that the fact that the deceased spouse had been under a statutory duty to maintain his wife during the subsistence of their customary marriage was not in itself sufficient to found a claim for such damages.

[5] The rule in *Fondo* was applied in *Nkabinde v SA Motor & General Insurance Co Ltd*[8] to a claim by a wife married according to African customary law. The wife sought unsuccessfully to avoid the consequences of that decision by relying on an agreement which she and her deceased husband had concluded prior to their marriage, that the husband would be liable to maintain and support her in consideration for her marrying him. The court declined to extend the Aquilian action (which forms the basis of the common law claim) to include claims for damages based solely on contract.[9]

[6] In *Ismail v Ismail*[10] the Appellate Division reaffirmed the rule by holding that marriages contracted in accordance with Islamic law are not lawful marriages in terms of

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8 1961 (1) SA 302 (D).

9 The right of a spouse married according to African customary law to claim damages for loss of support has since been provided for, subject to certain conditions, in section 31 of the Black Laws Amendment Act 76 of 1963. No equivalent statutory provision exists however in respect of a spouse married according to Islamic law.

10 1983 (1) SA 1006 (A).

the common law, because such marriages are potentially polygamous.

[7] The applicant contended in the High Court that this line of authority was no longer good law since public policy had evolved sufficiently in subsequent years for the court to depart from these decisions. In particular it was submitted that the common law should now be developed in accordance with section 35(3) of the interim Constitution,[11] or section 39(2) read with section 8(3) of the 1996 Constitution,[12] to recognise that a duty of

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11 Section 35(3) of the Constitution of the Republic of South Africa Act 200 of 1993 provides as follows:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

12 Section 39(2) of the Constitution of the Republic of South Africa, 1996, provides as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Section 8 of the 1996 Constitution provides as follows:

> "(1) . . . .
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to

support which flowed from an Islamic marriage was sufficient to found the liability for which the applicant contended. It was submitted further that the effect of this recognition should be retroactive in the sense that it should grant the applicant relief in spite of the fact that her cause of action arose prior to the commencement of the interim Constitution on 27 April 1994.

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the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) . . . ."

[8] The events in the case spanned three constitutional orders. As indicated above the accident occurred before the interim Constitution was in force. The action was instituted in the High Court during the lifespan of the interim Constitution but was heard and decided after the 1996 Constitution had come into effect.[13] Since legal proceedings were pending before the High Court on 4 February 1997, this is a matter governed by item 17 of schedule 6 of the 1996 Constitution[14] which provides that, unless it is in the interests of justice, the matter shall be disposed of as if the 1996 Constitution had not been enacted. Meskin J came to the conclusion that it would be in the interests of justice to deal with the matter in terms of the 1996 Constitution.[15]

[9] Nonetheless Meskin J found that, on a proper construction of section 39(2) read with section 8(3) of the 1996 Constitution, courts were empowered merely to amplify existing legal principles in circumstances where the common law was silent in giving effect to a particular right and where legislation did not make good this deficiency. In his view the 1996 Constitution did not authorise courts to eliminate established rules from the common law; this, he held, was the responsibility of the legislature.[16] Hence Meskin J

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13 The application in the High Court was lodged in January 1997 and was heard on 20 November 1997. Judgment was delivered by Meskin J on 1 December 1997.

14 Item 17 of schedule 6 of the 1996 Constitution provides as follows:
"All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

15 *Amod* above n 1 at 1721I and 1722E-F.

16 Id 1723D-1725D.

held that the respondent was not liable to compensate the applicant for the loss of support which she had suffered as a consequence of the death of her husband because their union had not constituted "a lawful marriage".[17] In the light of this conclusion it is difficult to understand what "interest of justice" was served by dealing with the matter in terms of the 1996 Constitution.

The Application for Leave to Appeal:

[17] Id 1726F-G.

[10] The applicant initially applied to the High Court for leave to appeal to the Supreme Court of Appeal against that judgment. Due to the untimely death of Meskin J the application was heard by Combrinck J. Apparently as a result of questions posed by the learned judge during the course of the hearing as to whether the appeal should be noted to the Supreme Court of Appeal or to this Court, the applicant formulated a fresh application in which she sought a certificate in terms of Constitutional Court Rule 18.[18] The parties and Combrinck J were apparently of the view that if there was to be an appeal it should be brought to this Court and not the Supreme Court of Appeal. The application for a "positive" certificate was opposed, however, on the grounds that there were no reasonable prospects of success. Combrinck J, whilst noting that he had not had the benefit of detailed argument on the matter, endorsed the views which had been expressed by Meskin J and declined to furnish a "positive" certificate. It was not likely in his view that this Court would reverse or materially alter the decision that had been given.

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[18] The Constitutional Court rules promulgated under section 100(1) of the interim Constitution were still in force at the time of the application.

[11] Notwithstanding the "negative" certificate the applicant applied to this Court in terms of rule 18(f) for leave to appeal (as she was entitled to do).[19] The application raised a number of important and difficult issues concerning the jurisdiction of the Supreme Court of Appeal and the Constitutional Court. In the light of these difficulties the application for leave to appeal was set down for hearing before this Court and directions were given requiring the parties to consider and to address argument to the Court on two principal issues:

> "(a) Does the Constitutional Court have jurisdiction to hear an appeal in this matter? If so, does the Supreme Court of Appeal also have jurisdiction to hear the appeal?
>
> (b) If both the Constitutional Court and the Supreme Court of Appeal have jurisdiction, is this a matter in which the appeal should be noted directly to the Constitutional Court?"

[12] The directions also called upon the parties to deal with the following matters in their arguments:

> "(a) In view of the fact that the accident on which the applicant's cause of action is based occurred on 25 July 1993 is it contended that the Bill of Rights in either the interim Constitution or the 1996 Constitution is directly applicable to the applicant's claim, or does the claim depend entirely upon the development of the common law?

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19 *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others* 1998 (7) BCLR 855 (CC) at paras 16-22.

(b) In so far as the applicant's claim depends upon the development of the common law, is it to be dealt with in terms of the interim Constitution, the 1996 Constitution, or the common law jurisdiction of the courts which exists independently of the Constitution?

(c) If the applicant relies on the development of the common law under the interim Constitution:

i. Is the question whether reliance can be placed on that Constitution in respect of a cause of action which arose before the Constitution was in force a matter relating to the 'interpretation, protection and enforcement of the Constitution' within the meaning of section 98(2)?

ii. Is the question whether the common law should be developed in accordance with the requirements of section 35(3) in a manner which will give effect to the applicant's claim within the jurisdiction of the Constitutional Court or the Supreme Court of Appeal or both Courts?

In dealing with the issues raised in paragraphs (c)(i) and (ii) above, consideration should be given inter alia to the provisions of sections 98(2) and 101(5) of the interim Constitution.

(d) If the applicant relies on the development of the common law under the 1996 Constitution:

i. Is the question whether reliance can be placed on that Constitution in respect of a cause of action which arose before the Constitution was in force a constitutional matter within the meaning of section 167(3) of that Constitution?

ii. Is section 8(1) applicable to actions against the respondent? If so, can the applicant rely on section 8(2)?

iii. Is reliance placed on sections 8(2) and (3)? If so, is the question whether the common law should be developed in terms of section 8(3) to recognise a right of action for loss of support by a widow married according to Islamic law a constitutional matter within the meaning of section 167(3) of the Constitution?

iv. Is reliance placed on section 39(2)? If so, is the question whether the common law should be developed in terms of section 39(2) to recognise a claim for loss of support by a widow married according to Islamic law a constitutional matter within the meaning of section 167(3) of the Constitution?

(e) Any other matter considered by a party to be relevant to the question whether the Constitutional Court or the Supreme Court of Appeal or both Courts have jurisdiction to hear an appeal in the present case.

(f) If the Constitutional Court and the Supreme Court of Appeal both have jurisdiction to hear the appeal in the present matter should leave to appeal directly to the Constitutional Court be granted? In particular, and in so far as reliance is placed on the 1996 Constitution, is it in the interests of justice within the meaning of section 167(6) that an appeal in this matter, which concerns the development of the common law, should be brought directly to the Constitutional Court rather than to the Supreme Court of Appeal? In this regard the parties are required to address only the question of the proper forum, and are not required at this stage to address argument on the merits of the claim or the prospects of success."

[13] In addition the directions required the registrar of this Court to bring the application for leave to appeal to the attention of the South African Human Rights Commission and the Commission on Gender Equality. The Commission on Gender Equality applied for and was given leave to intervene as an amicus curiae. It was represented by counsel at the hearing. The Human Rights Commission did not seek leave to intervene in the proceedings.

[14] The issues raised in any appeal against the decision of Meskin J are, as I have already noted, difficult and important, and clearly warrant the attention of a higher court. It is my view, however, that the appeal in the present case should in the first instance be dealt with by the Supreme Court of Appeal and not by the Constitutional Court. For this reason leave to appeal directly to this Court should be refused. I will confine the remainder of my judgment to the reasons for this conclusion and say no more about the merits of the dispute and the issues raised in the directions than I consider to be necessary for this purpose.

Jurisdiction under the Interim Constitution:

[15] In terms of the interim Constitution the Supreme Court of Appeal has jurisdiction

to develop the common law in accordance with the provisions of section 35(3).[20]

[16] The Supreme Court of Appeal has jurisdiction to interpret item 17 of schedule 6 of the 1996 Constitution. If it decides that on a proper interpretation of that provision the interim Constitution is applicable to this case, a question which might arise is whether the Supreme Court of Appeal has jurisdiction to interpret that Constitution in order to decide whether section 35(3) is applicable to causes of action which arose prior to the coming into force of such Constitution.

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[20] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 59-64, 87, 137 and 138; *Gardener v Whitaker* 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 (CC) at paras 16 and 17.

[17] In *Premier of the Province of Mpumalanga and Another v Hoofbestuur van die Vereniging van Bestuursliggame van Staatsondersteunde Skole: Oos-Transvaal*[21] the Supreme Court of Appeal, following the decision in *Rudolph and Another v Commissioner for Inland Revenue and Others*,[22] held that it has no power to interpret the interim Constitution for the purpose of deciding the question whether its common law jurisdiction to decide administrative law matters was effectively taken away from it by the interim Constitution.[23] That question has been referred to this Court by the Supreme Court of Appeal in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg*

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21 As yet unreported judgment of the Supreme Court of Appeal, case no 101/96, delivered on 26 March 1998.

22 1996 (2) SA 886 (A).

23 *Mpumalanga* above n 21 at 15-21 of the judgment.

Transitional Metropolitan Council and Others.[24] Since that matter has not yet been decided, I will make no comment as to whether such jurisdiction still exists, and whether on a proper construction of the interim Constitution the Supreme Court of Appeal is precluded from resolving the issue itself.

[24] As yet unreported judgment of the Supreme Court of Appeal, case no 328/97, delivered on 23 March 1998.

[18] The present matter is clearly distinguishable from these two cases. This Court has already held that on a proper construction of the interim Constitution the Appellate Division had jurisdiction to develop the common law in accordance with the provisions of section 35(3).[25] In so far as it is necessary to interpret the interim Constitution to determine its "spirit, purport and objects" I am of the opinion that the jurisdiction to do so is clearly incidental to the jurisdiction vested in the Appellate Division to develop the common law.

[19] This seems to me to follow from earlier decisions of this Court.[26] Mahomed DP stated in *Du Plessis* that:

> "The interpretation which I have come to favour has the advantage of giving to the different Divisions of the Supreme Court, including its Appellate Division, a very clear and creative role in the active evolution of our constitutional jurisprudence by examining, and in suitable circumstances expanding, the traditional frontiers of the common law by infusing it with the spirit of chapter 3 of the Constitution and its purport and objects. Nothing contained in s 101(5), read with s 8, of the Constitution would in any way impede the untrammelled exercise of such powers, but it would leave also to the Constitutional Court the residual power to determine, in suitable circumstances, whether in the application of its jurisdiction in terms of section 35(3) the Supreme Court has in any particular case properly had regard to the spirit of chapter 3 of the Constitution and

25 Above n 20.

26 Id.

its purport and objects."[27]

[27] *Du Plessis* above n 20 at para 87. See also the comments of Kentridge AJ in para 63 of the judgment.

[20] This Court has decided that the interim Constitution does not ordinarily apply to causes of action which arose prior to the date on which it came into force.[28] It has expressly left open the question whether there might be exceptional circumstances in which this rule would not be applicable. These dicta dealt with the direct application of provisions of the Bill of Rights and not with its indirect application in terms of section 35(3) of the interim Constitution.

[21] The question whether section 35(3) can be relied upon by a litigant in respect of a common law claim which arose prior to the date on which the interim Constitution came into force was raised but not decided by Kentridge AJ in his judgment in *Du Plessis*, and the question whether an appeal against a judgment in such a matter would lie to the Appellate Division or the Constitutional Court was specifically left open.[29]

[22] The Supreme Court of Appeal has always had an inherent jurisdiction to develop the common law to meet the needs of a changing society. The circumstances in which it elects to do so and the manner in which it develops the law form part of this jurisdiction. With the coming into force of the interim Constitution, and later the 1996 Constitution, this power must now be exercised in accordance with the "spirit, purport and objects" of

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28 *Du Plessis* above n 20 at paras 20, 68 and 114, *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at paras 4-6, *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (4) SA 552 (CC); 1996 (7) BCLR 889 (CC) at para 15, and *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at para 6.

the Bill of Rights.[30]

[23] In my view the vesting of the power in the Supreme Court of Appeal under section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to develop the common law necessarily includes the jurisdiction to decide whether the power can be exercised in cases in which the cause of action arose before the Constitutions were in force, or whether it should be confined to causes of action arising after the coming into force of such Constitutions.

[24] Mr Omar, who appeared on behalf of the applicant, also contended that if the interim Constitution is applicable the applicant would be entitled to rely directly on the provisions of the Bill of Rights for the relief claimed by her notwithstanding the fact that the cause of action arose before that Constitution was in force. This, so it was contended,

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29 *Du Plessis* above n 20 at paras 65 and 66.

30 It is not necessary to decide whether the difference in wording between section 39(2) of the 1996 Constitution and section 35(3) of the interim Constitution has any material effect on the manner in which this power should be exercised.

was an exceptional case to which the rule stated in *Du Plessis* and *Tsotetsi* would not apply, and raises an issue under the interim Constitution in respect of which the Supreme Court of Appeal would not have jurisdiction.

[25] This Court has not decided that there are indeed cases which would not be covered by the rule in *Du Plessis* and *Tsotetsi*, and I do not consider it necessary or desirable to decide that question now. It is not clear how the direct application of the Bill of Rights under the interim Constitution would benefit the applicant. She does not seek to set aside the provisions of the MVA Act on which she relies for her cause of action. Because the MVA Act imposes liability on the respondent only when the driver of the vehicle would have been liable at common law, it is only if the common law is developed to give rise to such liability that the applicant could succeed. The applicant has not indicated how, if the Bill of Rights is applied directly to the MVA Act, the relevant provisions could be "read down" so as to give her a right of action if the common law is not developed in line with her main argument. Nor has she indicated how the Bill of Rights might otherwise be directly applicable to her claim.

[26] We did not hear argument on the merits of the dispute and thus no more need be said about this issue than the following. The question of the direct application of the Constitutions can arise only if the common law is not developed to allow her to claim damages. The anterior question of the development of the common law must be decided

first.

Jurisdiction under the 1996 Constitution:

[27] If the interests of justice require it to do so, the Supreme Court of Appeal has jurisdiction in terms of section 168(3) of the 1996 Constitution[31] to decide the appeal in accordance with the provisions of the 1996 Constitution.

[28] Mr Omar submitted that this Court's jurisdiction in the present matter is co-extensive with that of the Supreme Court of Appeal. Section 167(3) and (7) of the 1996 Constitution provides as follows:

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[31] Section 168(3) of the 1996 Constitution provides as follows:

> "The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only -
> (a) appeals;
> (b) issues connected with appeals; and
> (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament."

"(3) The Constitutional Court -

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

. . . .

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[29] Section 173 of the 1996 Constitution provides as follows:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[30] It is not necessary in the present matter to consider whether the development of the common law in accordance with the provisions of section 39(2) of the 1996 Constitution in a case such as this is a "constitutional matter"; nor is it necessary to consider the precise scope of the "inherent power" to develop the common law vested in this Court by section 173 and whether it is more extensive than the power under the interim Constitution recognised in *Du Plessis* and *Gardener*.[32]

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32 Above n 20.

[31] The factors referred to in paragraphs 65 and 66 of the judgment of Kentridge AJ in *Du Plessis* will no doubt be relevant to the way in which the common law is developed under section 39(2) of the 1996 Constitution. So too will be the provisions of section 8(2) and 8(3) of the 1996 Constitution.[33] Section 8(2) makes the Bill of Rights binding on natural and juristic persons "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Section 8(3) requires courts in giving effect to section 8(2) to "apply, or if necessary develop, the common law to the extent that legislation does not give affect to that right" and also empowers the courts to develop "rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)." The development of a coherent system of law may call for the development of the common law under section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to be done in a manner consistent with the way in which the law will be developed under sections 8(2) and 8(3) of the 1996 Constitution. Once again I prefer to make no comment on this issue other than to say that I consider it to be one which is within the jurisdiction of the Supreme Court of Appeal.

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[33] Above n 12.

[32] As the highest court in "constitutional matters" this Court has jurisdiction to hear appeals from decisions of the Supreme Court of Appeal in such matters.[34] It also has a discretion in terms of section 167(6) of the 1996 Constitution[35] to permit a litigant to appeal directly to it from the decision of the High Court in a constitutional matter. The considerations relevant to applications for leave to appeal directly to this Court from decisions of the High Court are discussed in the *Democratic Party* case.[36] Of particular relevance to the present matter is the following passage in that judgment:

> "What is of importance, however, and what must always be kept in mind in dealing with such matters is that the saving of costs and time are not the only factors that have to be taken into account in deciding what is in the interests of justice in any given case. There may be cases where the nature of the dispute is such that it would be appropriate for the SCA to consider the matter before it comes to this Court, and in the interests of justice for it to do so."[37]

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34 *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

35 Section 167(6) of the 1996 Constitution provides as follows:
> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
> (a) . . . ; or
> (b) to appeal directly to the Constitutional Court from any other court."

36 Above n 19 at paras 27-33.

37 Id para 31.

[33] When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a "constitutional matter" are of particular importance. Assuming, as Mr Omar contends, that this Court's jurisdiction to develop the common law in constitutional matters is no different to that of the Supreme Court of Appeal, it is a jurisdiction which ought not ordinarily to be exercised without the matter having first been dealt with by the Supreme Court of Appeal.

The Order:

[34] The crucial question in this case is whether the common law should be developed to allow the applicant to claim damages for loss of support. Whether the matter is dealt with under the 1996 Constitution or as if that Constitution had not been passed, the question is one within the jurisdiction of the Supreme Court of Appeal. For the reasons given the appeal ought to have been noted to that court and not to the Constitutional

Court.

[35] To avoid any doubt as to the implications of the order that is made, I wish to make it clear that the application for leave to appeal is dismissed because it is premature. It will be open to either party to approach this Court for leave to appeal after the matter has been dealt with by the Supreme Court of Appeal, or if leave to appeal to the Supreme Court of Appeal is not granted by the High Court or the Chief Justice.

[36] The circumstances in which the matter came before this Court have already been described.[38] It is not a case in which it would be appropriate to make any order for costs.

[37] The following order is made:

The application for leave to appeal directly to this Court from the decision given by Meskin J in the Durban and Coast High Court is refused.

Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Chaskalson P.

[38] Above paras 10-14.

CHASKALSON P

For the Applicant: Mr MS Omar of MS Omar & Associates

For the Respondent: Mr J Pammenter SC and Mr P Rowan instructed by Chapman Dyer Inc

For the Amicus Curiae: Mr M Chaskalson instructed by Mabuza Mabunda Inc