



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 220/20

In the matter between:

**SIPHIWE HAPPY MKHATSHWA** First Applicant

**ISAAC NYOMO NTIWANE** Second Applicant

**JUDY MKHATSHWA** Third Applicant

**MAWEWE COMMUNAL PROPERTY ASSOCIATION** Fourth Applicant

and

**EVAH SIMANGELE MKHATSHWA** First Respondent

**MAWEWE TRIBAL AUTHORITY** Second Respondent

**CANDY ZIDWE MKHATSHWA** Third Respondent

**DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM** Fourth Respondent

**MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT** Fifth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL, AGRICULTURE, RURAL DEVELOPMENT, LAND ADMINISTRATION AND ENVIRONMENTAL AFFAIRS, MPUMALANGA** Sixth Respondent

**FIRST NATIONAL BANK** Seventh Respondent

**Neutral citation:** *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Khampepe J (unanimous)

**Decided on:** 18 June 2021

**Summary:** Costs — punitive costs — vexatious litigation and scurrilous remarks about judges may warrant punitive costs

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## ORDER

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On appeal from the Supreme Court of Appeal dismissing an appeal from the High Court of South Africa, Mpumalanga Division, Mbombela:

1. Leave to appeal is refused.
2. The applicants must pay the costs of the first and second respondents in this Court on an attorney and client scale.

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## JUDGMENT

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KHAMPEPE J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

*Introduction*

[1] This application arose from the orders and judgment of the High Court of South Africa, Mpumalanga Division, Mbombela, in terms of which an Anton Piller order<sup>1</sup> and a temporary interdict in favour of the first and second respondents were granted in March 2020.<sup>2</sup> This relief was sought from and granted by the High Court on the basis of an application predicated on allegations of corruption, theft and fraud in the Mawewe Communal Property Association (MCPA), as well as the failure of the Executive Committee of the MCPA to register and restore certain farms to the Mawewe Tribe. The purpose of the application before the High Court was to vindicate the integrity of the MCPA by wresting control away from its alleged hijackers.

[2] The first applicant is Mr Sipiwe Happy Mkhathshwa, the Chairperson and one of the beneficiaries of the fourth applicant. The fourth applicant is the MCPA, established in terms of the Communal Property Associations Act (the Act).<sup>3</sup> The second and third applicants are members of the Executive Committee of the MCPA (Committee).

[3] The first respondent is Ms Evah Simangele Mkhathshwa, the mother of Ms Khulile Nomvula Mkhathshwa, the Chieftainess of the Mawewe Tribe. The first respondent was appointed as the Acting Chieftainess of the Mawewe Tribe while her daughter was a minor. The first respondent is also a member of the Mawewe Traditional Council and one of the beneficiaries of the MCPA. The second respondent is the Mawewe Tribal Authority, recognised in terms of the Traditional Leadership and Governance Framework Act.<sup>4</sup> The remaining respondents have played no role in these

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<sup>1</sup> An Anton Piller order is a form of injunctive relief, akin to a private search warrant. It allows for the search of premises for crucial documentation or material for purposes of preserving important evidence for litigation, so that the documentation or material may be removed and safely kept, pending the ordinary discovery process and trial.

<sup>2</sup> *Eva Simangele Mkhathshwa v Candy Zidwe Mkhathshwa*, unreported judgment of the High Court of South Africa, Mpumalanga Division, Mbombela, Case No 391/2020 (11 March 2020 and 24 March 2020).

<sup>3</sup> 28 of 1996.

<sup>4</sup> 41 of 2003.

proceedings that requires any mention in this judgment, and it follows that any reference to “respondents” refers only to the first and second respondents.

*Litigation history*

[4] In February 2020, the respondents approached the High Court on an urgent basis, seeking an Anton Piller order and an interim interdict. The purposes of this double-pronged relief were: firstly, to preserve evidence pertaining to the operations of the MCPA and secondly, to limit the management and running of the MCPA to certain appointees. The applications were heard *in camera* as directed by the Judge President, and the orders were granted.<sup>5</sup> Consequently, the Committee was temporarily dissolved and three persons were appointed to take control of and investigate the affairs of the MCPA, and to report back to the High Court as to the allegations in question.<sup>6</sup>

[5] In response to the orders granted against them, the applicants filed a reconsideration application, which ended up being heard on the return day of the *rule nisi*.<sup>7</sup> It is unnecessary to traverse the details and process that followed, and it suffices to say that the process concluded with the High Court confirming its first order subject to minor amendments.<sup>8</sup>

[6] Aggrieved, the applicants sought leave to appeal against the decision of the High Court. This application was dismissed. The applicants then approached the Supreme Court of Appeal, which dismissed the application for leave to appeal on the basis that it bore no reasonable prospects of success.

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<sup>5</sup> See High Court judgment above n 2 at para 4.

<sup>6</sup> Id at paras 5-6.

<sup>7</sup> Id at paras 8-9.

<sup>8</sup> Id at para 10.

*Before this Court**Leave to appeal*

[7] The parties have placed a plethora of submissions before this Court, none of which need to be discussed in any great detail. In short, the applicants submit that the orders granted by the High Court were sought for illicit purposes and were improperly and unlawfully granted. They argue that certain provisions of the Act, as well as section 25(1) of the Constitution,<sup>9</sup> are implicated by the allegedly unlawful orders, which were granted as a result of a material misdirection by the High Court.

[8] The respondents dispute the applicants' submissions and argue that the application is defective on several technical grounds, including that the orders granted by the High Court are not final in nature and are accordingly not appealable.

[9] This Court has considered the merits of this application for leave to appeal on the papers alone, and is satisfied that it must be dismissed on the basis that it bears no reasonable prospects of success. Ordinarily, the matter would end there, and an order would be issued to that effect. However, in pursuit of their cause, the applicants repeatedly made certain troubling submissions which have driven me to pen this judgment, setting out an explanation for the costs order that follows.

*Costs of the application*

[10] A recurring theme throughout the applicants' submissions is that the presiding officer in the High Court, Roelofse AJ, conducted himself in an improper and biased manner. In particular, the applicants have repeatedly taken issue with the fact that, as expressed by Roelofse AJ in his judgment, the matter was heard "*in camera* in accordance with the Judge President's directive".<sup>10</sup> To this end, the applicants have effectively accused Roelofse AJ, together with the Judge President, of serious and grave

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<sup>9</sup> Section 25 of the Constitution enshrines the right to property, and the right to not be arbitrarily deprived of property.

<sup>10</sup> See High Court judgment above n 2 at para 42.

misconduct. By way of example, the following submission appeared in the applicants' founding affidavit:

“There is evidently no doubt that the interim interdict was heard *in camera* as a result of the directive of the Judge President. We submit . . . that this was inappropriate. We submit that Roelofse AJ has failed to act independently and impartially.”

This extract is but one of several damning statements made by the applicants against Roelofse AJ and the Judge President. As it clearly illustrates, the crux of the applicants' objection is that the Judge President allegedly exercised undue and improper influence over Roelofse AJ, who consequently failed to act independently, impartially and without fear or favour in the course of hearing and deciding the matter.

[11] Particularly troubling is the fact that the applicants have made these submissions, not as mere passing remarks, but as a basis for their appeal. They submit that the impugned orders were granted as a “result of this improper influence” and are accordingly a nullity, and stand to be set aside on appeal.

[12] The respondents reacted to these accusations by submitting that they are “unacceptable, scurrilous and vexatious” and “constitute a basis for ordering costs on a punitive scale in respect of this application”. In amplification of this submission, the respondents annexed a letter from the Judge President addressed to the applicants' legal representative. In the letter, the Judge President clearly and unequivocally addressed and disposed of the accusations levelled against him and Roelofse AJ, and invited the applicants' representatives to retract statements that they had made in correspondence addressed to Roelofse AJ. It is unnecessary to mention any further details on this profoundly unfortunate exchange of niceties between the applicants' legal team, Roelofse AJ, and the Judge President, save to note that it is confusing and difficult to understand why, against this backdrop, the applicants not only persisted with their accusations against the two Judges, but went as far as to submit them as a legitimate ground of appeal in this Court.

[13] Perplexed, and with all of this in mind, this Court called for written submissions in relation to the issue of costs. The submissions by the parties are briefly summarised below.

*Submissions pursuant to this Court's directions dated 1 February 2021*

[14] The applicants submit that costs should follow the result, but that the *Biowatch* principle<sup>11</sup> ought to apply in the event that the application does not succeed. This argument is made on the basis that the applicants seek to assert their constitutional rights as contemplated by sections 25 and 34 of the Constitution, because the matter involves land restitution and section 13 of the Act.

[15] In response to the respondents' prayer for punitive costs, the applicants refer again to Roelofse AJ's statement that "the application was heard *in camera* in accordance with the Judge President's directive". They further assert that the allegations made against the Judge President and Roelofse AJ in their founding affidavit are in no way vexatious or unacceptable, because they are merely based on Roelofse AJ's "factual statements". They accordingly argue that the application was based on cogent grounds, and that there is no basis on which a punitive costs order is warranted.

[16] The respondents, on the other hand, argue that the *Biowatch* principle does not apply to this matter because the application has no impact on the public interest and is clearly not of a constitutional nature, in line with previous cases wherein this principle has applied. The respondents also emphasise that the *Biowatch* principle does not ordinarily apply between private parties, and that the applicants' reprehensible conduct

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<sup>11</sup> *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at paras 22-3, where this Court affirmed that, in matters of litigation between the state and private parties—

"If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."

towards the Judge President and Roelofse AJ vitiates any mercy towards them in relation to costs. On the matter of punitive costs, the respondents submit that such an order is appropriate as a result of the “deplorable and unacceptable attitude of the applicants towards the courts”.

*The appropriate costs order*

[17] It is trite that the issue of costs is truly within this Court’s discretion,<sup>12</sup> and that the default practice in litigation is that costs ordinarily follow the result. So let me begin by immediately disposing of the applicants’ submission that they ought to be shielded from costs by the *Biowatch* principle.

[18] Although the interpretation of section 13 of the Act may invoke constitutional issues, the genesis of this application is a dispute about the validity of an Anton Piller order. And I am thus inclined to agree with the respondents’ submission that this “constitutes an attempt to bring the matter under a broad blanket of constitutional rights, so as to enable the applicants to then rely on the *Biowatch* principle”. Further, it is trite that the principle does not apply to frivolous and vexatious litigation, which is plainly what has spurred this application. This is revealed by the papers, and the judgment of the High Court, considered together with the aspersions cast upon the Judiciary in the process. The final nail in the coffin is that the applicants do not seek to assert their constitutional rights against an organ of State. It follows that there is no basis upon which the *Biowatch* principle can operate in the applicants’ favour in this application.

[19] Absent the application of the *Biowatch* principle, or any other cogent reason to deviate from the ordinary approach to costs, the applicants, as unsuccessful litigants, must bear the costs of this application. The question then becomes whether the exceptional award of punitive costs, as sought by the respondents, is warranted in these circumstances.

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<sup>12</sup> *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (*SARB*) at paras 224 and 227 and *Limpopo Legal Solutions v Eskom Holdings (Soc) Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) (*Eskom*) at para 20.



[20] The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that she or he should not have had to endure.<sup>13</sup> Indeed, this Court has recognised that costs orders often do not even achieve this objective, and fall short of assisting the successful litigant in fully recovering her or his expenses.<sup>14</sup> It follows that, at times, it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses.<sup>15</sup>

[21] Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted. In *SARB*, this Court affirmed the following guiding principles in relation to punitive costs, elucidated by the Labour Appeal Court in *Plastic Converters Association of SA*:<sup>16</sup>

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”<sup>17</sup>

[22] Although they are not a common form of costs, this Court’s recent decision in *Tjiroze*<sup>18</sup> is particularly instructive on the subject of punitive costs. This matter involved

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<sup>13</sup> *Eskom* id at para 35, where this Court referred to the Appellate Division’s decision in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607 which held that:

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

<sup>14</sup> *Eskom* id at para 37.

<sup>15</sup> Id at para 36.

<sup>16</sup> *Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) (*Plastic Converters Association of SA*).

<sup>17</sup> *SARB* above n 12 at para 225, citing, with approval, *Plastic Converters Association of SA* id at para 46.

<sup>18</sup> *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18; 2020 JDR 1413 (CC); 2021 (1) BCLR 59 (CC).

an applicant, Mr Tjiroze, who frivolously abused court processes and defamed a member of the Judiciary.<sup>19</sup> This Court observed that Mr Tjiroze, as a legal professional, ought to have understood the impact and weight of his defamatory remarks against a Judicial Officer,<sup>20</sup> and it was the cumulative effect of these considerations that called for the award of punitive costs in that matter.<sup>21</sup>

[23] Notwithstanding the factual differences between *Tjiroze* and this matter, like Mr Tjiroze, the applicants have not approached this Court with clean hands. They have stubbornly persisted with serious and unmeritorious allegations against Roelofse AJ and the Judge President, despite the fact that these allegations were categorically and formally addressed by the Judge President in a letter, and have no factual basis. As alluded to earlier, the fact that these allegations form a major basis of the application for leave to appeal to this Court renders this approach all the more reprehensible. I shall explain why. The applicants, in full knowledge of the Supreme Court of Appeal's dismissal of their application, as well as the letter sent by the Judge President, chose to sail a sinking ship into deeper litigious waters, and in the process relied heavily on these unsubstantiated and scandalous accusations as the rudder. This conduct is, at a minimum, vexatious and prejudicial to the respondents who find themselves, once again, having to foot the bill for necessitated legal responses on issues that, quite frankly, have no place in this Court.

[24] At this point, I must also confess my disappointment in the applicants' failure to make any reference to the letter that the Judge President provided in response to their accusations. As a starting point, there is absolutely nothing controversial about the impugned part of Roelofse AJ's judgment. And when it is considered in conjunction with the letter, there is little room for any genuine or logical belief that any untoward and improper conduct was perpetrated by the learned Judges in the High Court. For good reason, the common practice is to grant Anton Piller orders *in camera*. If given

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<sup>19</sup> Id at para 24.

<sup>20</sup> Id at para 28.

<sup>21</sup> Id at para 29.

notice, the party against whom the order is sought may very well defeat the object of the order by causing the required documentation or other material to disappear. The only possible conclusion that follows is that, in persisting with their accusations, the applicants are either being wilfully ignorant of this practice and its objects, or they are attempting to turn a sow's ear into a silk purse. Even in their written submissions, the applicants unapologetically persisted with these accusations in flagrant disregard of the facts. Aside from the prejudice caused to the respondents by this frivolous exercise, this is tantamount to an attempt to mislead this Court by omitting relevant facts and tailoring others to fit an argument that simply cannot pass muster. On numerous occasions this Court has considered it appropriate to punish attempts at misleading the court with a punitive costs order.<sup>22</sup>

[25] What is particularly troublesome is the ease with which the applicants approached this Court, callously defaming other members of the Judiciary to justify their cause. Of course, courts and their members are by no means immune from public criticism and accountability to those they serve.<sup>23</sup> However, that does not mean that it is open to a litigant to level unfounded and scurrilous attacks against Judicial Officers to further their own ends.

[26] This Court enjoys a sacrosanct power and privilege to uphold the law in furtherance of the constitutional project. Thus, the importance of this Court's work, and the limited judicial resources that it expends in the process, ought not to be taken for granted, and it is incumbent upon a litigant to approach this Court with a bona fide, genuine case. It will not do for litigants to resort to unscrupulous tactics to succeed in this Court, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon Judicial Officers. This is because the Judiciary, unlike other branches of government, must rely solely on the trust and support of the public in order

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<sup>22</sup> Id at para 24 and *SARB* above n 12 at para 224.

<sup>23</sup> *S v Mamabolo (E TV Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at paras 29-30.

to fulfil its functions.<sup>24</sup> Consequently, any conduct that undermines and erodes the authority and integrity of the Judiciary must be prevented.<sup>25</sup> Litigants who resort to the kind of tactics displayed in this matter must beware that they are unlikely to enjoy this Court's sympathies or be shown mercy in relation to costs. The only reasonable conclusion in the circumstances is that a punitive costs order is apposite.

[27] As a final remark, I note that this series of unfortunate events did not take place at the hands of a self-represented, desperate litigant. The applicants benefitted from the representation of an impressive legal team, which included experienced senior counsel. They ought to have known better. After all, when a party "lowers its ethical and professional standards in pursuit of a cause", it is natural that punitive costs must follow.<sup>26</sup>

### *Order*

[28] The following order is made:

1. Leave to appeal is refused.
2. The applicants must pay the costs of the first and second respondents in this Court on an attorney and client scale.

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<sup>24</sup> Id at para 19, where this Court held that:

"In the final analysis it is the people who have to believe in the integrity of their Judges. Without such trust, the Judiciary cannot function properly; and where the Judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the Judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the Judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute."

<sup>25</sup> Id at para 33.

<sup>26</sup> *Eskom* above n 12 at para 36.

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