CONSTITUTIONAL COURT OF SOUTH AFRICA

Mkhatshwa and Others v Mkhatshwa and Others

CCT 220/20

Date of judgment: 18 June 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 18 June 2021 at 10h00, the Constitutional Court handed down judgment in an appeal against the order of the Supreme Court of Appeal, dismissing an application for leave to appeal against the judgment of the High Court of South Africa, Mpumalanga Division, Mbombela. The judgment of the High Court concerned an Anton Piller order, which was granted 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 dispute in this matter commenced when the respondents, aggrieved by the manner in which the Executive Committee of the MCPA was running the MCPA, approached the High Court on an urgent basis in February 2020. They did so seeking an Anton Piller order and an interim interdict to regulate the governance of the affairs of the MCPA. The applications were heard *in camera*, and the orders were granted by the High Court. 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. In response to these orders, the applicants filed a reconsideration application which was heard on the return day of the *rule nisi*. At these proceedings, the High Court essentially just confirmed its earlier orders.

Dissatisfied with this outcome, the applicants sought leave to appeal against the orders of the High Court from the Full Court and, subsequently, the Supreme Court of Appeal. Leave was refused by both Courts.

The applicants then approached the Constitutional Court and submitted that the orders granted by the High Court were sought for illicit purposes, and were improperly and unlawfully granted. They argued that the High Court misdirected itself in granting the orders, and that section 25 of the Constitution and certain provisions of the Communal Property Associations Act No 28 of 1996 were implicated by the allegedly unlawful orders

because the affairs of the MCPA affected property ownership. The respondents disputed these submissions and argued that the application was defective on several technical grounds, including that the orders granted by the High Court were not final in nature and were accordingly not appealable.

After considering the merits of the appeal on the papers, the Constitutional Court was satisfied that it bore no reasonable prospects of success, and accordingly falls to be dismissed. However, it considered it necessary to determine whether punitive costs were warranted in the instance, because the respondents sought punitive costs on the basis of certain allegations that the applicants repeated throughout their submissions. These allegations, in short, were that Roelofse AJ, the learned Judge in the High Court, had conducted himself improperly by failing to act independently. The applicants repeatedly made this submission with reference to Roelofse AJ's statement that the matter was heard "*in camera* in accordance with the Judge President's directive". These allegations were not made merely as passing remarks, but largely formed a basis for the applicants' application for leave to appeal to the Constitutional Court.

Before reaching a decision in this regard, the Constitutional Court called for written submissions on the issue of costs. The applicants submitted that, should the application fail, it ought to be shielded from costs by virtue of the *Biowatch* principle. Additionally, they argued that punitive costs are not warranted in the circumstances because the impugned submissions were made by them on the basis of factual statements. The respondents disagreed, and argued that the applicants had exhibited a scurrilous and reprehensible attitude towards Roelofse AJ and the courts, and accordingly deserved no mercy in relation to costs. The respondents also argued that it was this deplorable conduct that rendered a punitive costs award apposite in the circumstances.

The Constitutional Court, in a unanimous judgment penned by Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring) dismissed the application for leave to appeal, and granted a punitive costs award in favour of the respondents.

The Constitutional Court held that no genuine constitutional issue arose in this matter, which, in substance, concerned the validity of an Anton Piller order. In addition, the applicants were not seeking to assert a constitutional right against an organ of state, and the matter was plainly spurred by frivolous and vexatious litigation. For these reasons, the Constitutional Court held that the *Biowatch* principle could evidently not shield the applicants from costs. Thus, the Constitutional Court held that the applicants, as the unsuccessful litigants, were liable to bear the costs of the failed application. Having reached this conclusion, the only remaining question for the Constitutional Court to determine was whether a punitive costs award was appropriate.

The Constitutional Court held that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court's extreme opprobrium and disapproval of a party's conduct. Although punitive costs are rarely awarded, the Constitutional Court affirmed that existing jurisprudence indicates that they are appropriate when it is clear that a party has conducted itself in an indubitably vexatious and reprehensible manner. Moreover, it held that this matter was akin to the earlier matter of *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18, ; 2020 JDR 1413 (CC); 2021 (1) BCLR 59 (CC) where an applicant

frivolously abused court processes and defamed a member of the Judiciary, and was mulcted with a punitive costs award because he ought to have understood the impact and weight of his defamatory remarks against a Judicial Officer.

In applying the established principles on punitive costs to these facts, the Constitutional Court held that the applicants had, in effect, abused court processes by persisting with and basing its appeal on unmeritorious and scandalous allegations against Roelofse AJ and the Judge President. The Court held that this was particularly egregious in the light of a letter that was sent by the Judge President to the applicants, disposing of the baseless allegations and inviting the applicants to retract the allegations. The Court held that the applicants were being, at best, wilfully ignorant by persisting with their claims against Roelofse AJ despite the letter from the Judge President. In addition, their failure to mention the letter in their pleadings was regarded as tantamount to attempting to mislead the Court. Furthermore, the Constitutional Court held that it is incumbent upon a litigant to approach the Court with a bona fide, genuine case, and that it will not do for litigants to resort to unscrupulous tactics to succeed in the Constitutional Court, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon Judicial Officers.

The Constitutional Court accordingly held that litigants who resort to the kind of tactics displayed in this matter must beware that they are unlikely to enjoy the Court's sympathies or be shown mercy in relation to costs, and that the only reasonable conclusion in the circumstances is that a punitive costs order is apposite. It accordingly dismissed the application for leave to appeal with costs to be paid by the first and second respondents on an attorney and client scale.