



CONSTITUTIONAL COURT OF SOUTH AFRICA

Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others

CCT 66/21

Date of judgment: 14 November 2022

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 Monday, 14 November 2022 at 10h00, the Constitutional Court handed down judgement in two applications for leave to appeal against the judgement and order of the High Court of South Africa, Western Cape Division (High Court). The main proceedings in the High Court concern the alleged defamation of two mining companies and their office bearers, by a group of environmental activists and lawyers. The mining companies are Mineral Sands Resources (Pty) Limited and Mineral Commodities Limited, joined in these proceedings by two of their office bearers, Mr Zamble Qunya and Mr Mark Victor Caruso. In the interests of brevity, these parties are collectively referred to as “the Mining Companies”. The environmental activists are Ms Christine Reddell, Ms Tracey Davies, Ms Davine Cloete, Mr Mzamo Dlamini, Mr Cormac Cullinan and Mr John Gerard Ingram Clarke. In the interests of brevity again, these parties are collectively referred to as “the Activists”.

Both matters before this Court arose from three consolidated actions in the High Court, in terms of which the Mining Companies issued summons against the Activists for defamation. The claims were based on the Activists’ critique of the Mining Companies’ operations and activities in the Tormin and Xolobeni Minerals Sands Projects, on various mediums and platforms. The Mining Companies sought several awards from the High Court against the Activists, for general damages, in the sum of R14 million.

In the High Court, the Activists raised two special pleas. The first is the Strategic Litigation Against Public Participation (SLAPP) suit special plea and the second is the corporate defamation special plea. The Mining Companies raised exceptions to both special pleas on the ground that they do not disclose a proper defence in law. This matter, being case CCT 66/21, was an appeal against the High Court’s dismissal of the Mining Companies’ exception raised against the Activists’ SLAPP suit defence special plea, where it upheld that special plea as disclosing a proper defence to a claim for defamation. Case CCT 67/21 concerned an appeal against the High Court’s upholding of the Mining Companies’ exception raised against the Activists’ corporate defamation special plea, where it was held that such a defence was not competent. These appeals arose from the same proceedings in the High Court, and concerned much the same factual background, and so were consolidated for the purposes of hearing in this Court. However, because they raise separate legal

issues and debates and they have been dealt with in separate judgments, this Media Summary relates only to the SLAPP suit defence special plea under CCT 66/21.

Before the Constitutional Court, the Mining Companies' and the Activists' main submissions addressed the following issues: whether the order of the High Court dismissing the exceptions was appealable; whether it was appropriate to grant leave to appeal directly to the Constitutional Court; whether the SLAPP special plea as contended for by the Activists – wherein a finding of an ulterior motive on the part of the plaintiff suffices, on its own without more, to constitute an abuse of process – is part of our common law of abuse of process; and, in the event that it was not, whether our law ought to be developed to accommodate such a defence. There was little to no dispute on the first two issues. The parties, however, differed on the last two, that is, the merits.

On the merits, the Mining Companies submitted that the SLAPP special pleas, as pleaded by the Activists, in effect meant that a litigant could raise an abuse of process as a stand-alone defence to a substantive claim and that ulterior motive alone, to the exclusion of the merits of a claim, could give rise to an abuse of process. The Mining Companies argued that such a position was inconsistent with the Supreme Court of Appeal's decision in *MEC, Department of Co-operative Governance and Traditional Affairs v Maphanga* [2019] ZASCA 147; 2021 (4) SA 131 (SCA) (*Maphanga*). According to the Mining Companies, that case, and similar cases, places clear (if not exclusive) emphasis on the merits of a claim in the determination of abuse of process. In the event that the Court agreed with their exposition of the existing common law abuse of process, the Mining Companies resisted the development of the law to accommodate the defence as contended for by the Activists. The Mining Companies did so on the primary basis that the Activists had not demonstrated, per the principles laid down in *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 12 BCLR 1528 (CC) (*DZ*), that a development was warranted in the circumstances. Furthermore, the Mining Companies submitted that the common law principles of abuse of process are not, as the Activists submit, inconsistent with section 16 or section 34 of the Constitution nor the constitutional value system. In closing, the Mining Companies submitted that the Activists' SLAPP special pleas lacked the necessary averments to sustain the defence which they desired to raise. This was because the Activists sought to have the merits of a claim excluded from the abuse of process analysis, contrary to that doctrine. The Mining Companies, thus, submitted that their exceptions in relation to the SLAPP special pleas stood to be upheld.

The main thrust of the Activists' argument was that the existing doctrine of abuse of process encompassed a SLAPP suit defence and that the existing common law allows and requires courts to consider ulterior motive when assessing whether a litigant has abused court proceedings. The Activists, relying on, amongst others, *Lawyers for Human Rights v Minister in the Presidency* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC), submitted that the common law allows for ulterior motive, on its own, to be determinative of abuse of process in certain circumstances. In addition, the Activists made extensive submissions as to why the Mining Companies' strong reliance on *Maphanga* was misplaced. According to the Activists, the question of improper motive does not appear to have been at issue in *Maphanga*. And if *Maphanga* did indeed purport to hold that the motive or purpose of the litigation was irrelevant to the assessment of abuse of process, the Activists submitted that it would be inconsistent with a series of decisions, including those of the Constitutional Court and the Supreme Court of Appeal. In the event that the Constitutional Court differed with the Activists on the position of the existing common law, the Activists argued that the existing common law stood to be developed. The Activists submitted, contrary to the submission made by the Mining Companies that this case fell squarely within the principles laid down in *DZ*. As regards the SLAPP special pleas that they raised in the High Court, the Activists submitted that the said special pleas were good in law, as litigation brought for an ulterior purpose is patently impermissible and constitutes an abuse of process.

In a unanimous judgment penned by Majiedt J, the Constitutional Court held that the main issue in the matter – that is, whether the common law doctrine of abuse of process currently provides for a SLAPP suit defence and, if not, whether the law ought to be developed – fell within the extended and constitutional jurisdiction of the Court in terms of section 167(3)(b) of the Constitution. Notwithstanding, the Court had to determine: first, the appealability of the order of the High Court dismissing the exceptions raised by the Mining Companies; second, whether the said decision was “a decision on a constitutional matter” as required by rule 19 of the Rules of the Constitutional Court; and third, whether it was in the interests of justice to grant leave to appeal directly to the Court.

Based, in the main, on the interests of justice criterion, the Constitutional Court held that the order of the High Court was appealable. The Court, in light of the issues that were before the High Court, held that the High Court’s order dismissing the said exceptions constituted a decision on a constitutional matter for the purposes of rule 19. And as regards the all-important question of the interests of justice, the Court held that the issues in the matter were of manifest importance and they transcended the narrow interests of the parties. And, as the issues were of general public importance, and the matter was inextricably linked to the application brought under CCT 67/21 – which had to by-pass the Supreme Court of Appeal on account of that Court’s decision in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) – the Court held that it was in the interests of justice to grant leave to appeal directly to the Court.

Before getting into the merits, the Court provided a brief discussion on the origin, nature and development of SLAPP suits. In sum, the Court observed that SLAPP suits were generally described as cases without merit brought to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party, until they abandon their defence. The Court observed further that the hallmark features of SLAPP suits are that they are suits that often, but not necessarily always, lack merit and are brought with the goal of obtaining an economic or other advantage over a party by increasing the cost of litigation to the point that the opposition’s case is weakened or abandoned. On the basis of the authorities discussed, the Court concluded that both merit and motive played a role in the assessment of a SLAPP suit defence.

The case before the Constitutional Court required the Court to grapple with the place of the SLAPP suit defence under the South African abuse of process doctrine and to make a finding on the SLAPP special pleas raised by the Activists. The defence raised by the Activists was that the Mining Companies’ conduct in bring the defamation action was (a) an abuse of process, (b) tantamount to the use of court processes to achieve an improper end – to use litigation to cause the defendants financial and/or other prejudice in order to silence them, and/or (c) violated the right to freedom of expression entrenched in section 16 of the Constitution. The Court held that, distilled to its essence, the defence was really one of abuse of process. The Constitutional Court adopted the definition of abuse of process set out in *Phillips v Botha* [1998] ZASCA 105; 1999 (2) SA 555 (SCA), to the effect that “[t]he term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose.” The Constitutional Court then observed that there were a number of different categories of abuse of process in our law. The first type encompassed a situation where there is gross abuse of the procedure employed by a litigant, to the extent that the court, as a rare instance, will dismiss the claim without any regard to the merits. The second type concerns frivolous and vexatious litigation. In those cases the merits of the cases, both past and present, are germane in order to determine whether the court is being assailed by a further frivolous claim or something with arguable merits. The third type concern criminal proceedings, public and private. The Court held that the issue that arises in those cases is different. There the enquiry is whether the prosecution is being brought in the public interest and not to pursue some private objective. That, the Court held, is a question of the legality of the proceedings and the permissible statutory purpose for which

a prosecution may be instituted. In the light of this finding, the Court framed the question before it thus: whether there may be a further species of abuse case of the kind set out in the Activists' special plea that falls within the inherent jurisdiction of a court to ensure that the court's processes are not abused.

After considering the position in foreign jurisdictions, such as the United States of America and Canada, the Constitutional Court held that a determination of what constitutes abuse of process will always be fact-specific and there can be no all-encompassing definition of it; a close examination of all the relevant circumstances must be made. The Court held that, in addition to the various types of abuse of process discussed, there seemed to be another species of abuse, one not previously explicitly recognised, that deserved the nomenclature "abuse of process". And that species was what was before the Court in the matter. The Constitutional Court held that, hypothetically, a plaintiff could sue for defamation in circumstances where there are very little, if any, prospects of establishing a case for defamation. The defendant, in that case, would be in a position to show that the defamation action is being brought not to vindicate the plaintiff's right to a good name and reputation, but to silence the defendant or to burden the defendant in a manner that causes grave harm to the defendant's right of expression and the public interest that is being served by that expression, with the likelihood that pursuing the action will have that negative effect. The Court held that in that instance, court processes were clearly not being used to resolve a genuine dispute, but were rather employed to achieve a result that undermines the rights in the Constitution. The Court held that such conduct could be labelled, for the purposes of the case, "abusive litigation". The Court held that, generally, it would not be easy to establish a case of abusive litigation, but if one were able to do so, abusive litigation would have nothing to do with the right to access to courts in section 34 of the Constitution. Instead, it would simply be about the use of court process and resultant legal costs as a means to an impermissible end, likely to cause appreciable damage to fundamental rights. It would thus be about motive and consequence. The Court held that, framed in the aforesaid manner, abusive litigation would fall within the common law doctrine of abuse of process and it would consist of a consideration of both the merits of and the motive for bringing the case, with its likely consequences. The Court held that courts, at common law and under section 173 of the Constitution, have the power to prevent this type of abuse.

The Court held that the approach that it adopted was consonant with the doctrine of abuse of process. Moreover, the Court held that the approach could conceivably accommodate the SLAPP type of defence pleaded by the Activists. Thus, in the present matter, the Activists would have to prove that the defamation action brought by the Mining Companies: (a) was an abuse of process of court; (b) was not brought to vindicate a right; (c) amounted to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and (d) violated, or was likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.

Having set out the essential elements of the SLAPP suit defence under South African law, the Constitutional Court then considered the Activists' special pleas. The Court held that the Activists' SLAPP special pleas, as pleaded, were predicated upon the proposition that the actions were brought for an ulterior purpose. This was based on the view held by the Activists that improper motive alone was sufficient to warrant dismissal of the actions. The Court, based *inter alia* on its conclusion on the position of SLAPP defences under South African law, held that the Activists' position was not sustainable. The Court held that the merits of the case also bear consideration when such defences are raised. In the light of that finding, the Court held that the special pleas lacked the averments necessary to satisfy the requirements of the SLAPP suit defence. To this extent, the exceptions taken by the Mining Companies held good and had to be upheld, with the consequence that the appeal had to be upheld. The Court, however, held that the Activists were to be afforded an opportunity to amend their special pleas, if they so desired. As to costs, the Court held that the Mining Companies have enjoyed success in that the special pleas have been found to be excipiable. But they have prevailed for reasons not relied upon in their exception. The Activists have secured the recognition of the SLAPP suit defence, albeit not on the basis that they pleaded the defence, or

supported the defence in their submissions. The Court held that their success is, nonetheless, substantial and that they deserve part of their costs.

In conclusion, the Constitutional Court held that the SLAPP suit defence forms part of South African law and the defence requires more than what the Activists pleaded. The Court also held that the Mining Companies' exceptions held good, as the Activists' special pleas lacked the necessary averments to make out the SLAPP suit defence. As the SLAPP suit defence is accommodated under our law, the Court held that there was no need to get into questions about the development of the law. The Court held that it was for Parliament to consider whether a more comprehensive, specific SLAPP suit defence, of the kind developed in Canada and the United States of America, ought to be legislated.

In light of all of the above, the Constitutional Court upheld the appeal, set aside the order of the High Court, and made an order upholding the Mining Companies' exceptions to the SLAPP special pleas raised by the Activists on the basis that they lacked the averments necessary to establish a defence. The Court ordered the Mining Companies to pay 60% of the Activists' costs in the Constitutional Court, including the costs of two counsel. Each party was ordered to pay their own costs in the High Court.