THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 423/2020

In the matter between:

MLULEKI MARTIN CHITHI	**FIRST APPELLANT**
ERNEST SANDILE CELE	**SECOND APPELLANT**
SINAMA AND ASSOCIATES INC	**THIRD APPELLANT**

In re:

LUHLWINI MCHUNU COMMUNITY	**CLAIMANT**

and

LAWRENCE HANCOCK	**FIRST RESPONDENT**
PETER GOBLE	**SECOND RESPONDENT**
BUCKSTONE CC	**THIRD RESPONDENT**
MICHAEL ROBERTS	**FOURTH RESPONDENT**
HALLIWEL PROPERTY TRUST	**FIFTH RESPONDENT**
ARTHER JAMES ARATHOON	**SIXTH RESPONDENT**
AMANDA JANE CAMPBELL	**SEVENTH REPONDENT**
JOHN NORMAN CAMPBELL	**EIGHT RESPONDENT**

WILLEM JAN SCHORTEMEIJER	**NINTH RESPONDENT**
BETH SUSAN SHAW	**TENTH RESPONDENT**
BRETT DAVID SHAW	**ELEVENTH REPONDENT**
QONDISA CECIL NGWENYA	**TWELFTH RESPONDENT**
GLR PROPS 005 CC	**THIRTEENTH RESPONDENT**
NEWINVEST 136 (PTY) LTD	**FOURTEENTH RESPONDENT**
MICHAEL BENSON	**FIFTEENTH RESPONDENT**
VENGARITE (PTY) LTD	**SIXTEENTH RESPONDENT**
ELPIS TRUST	**SEVENTEENTH RESPONDENT**
MACKENZIE TRUST	**EIGHTEENTH RESPONDENT**
SAPPI MANUFACTURING (PTY) LTD	**NINETEEN RESPONDENT**
MONDI (PTY) LTD	**TWENTIETH RESPONDENT**
CHURCH OF THE PROVINCE OF SOUTHERN AFRICA	**TWENTY-FIRST RESPONDENT**
REGIONAL LAND CLAIMS COMMISSIONER FOR KWAZULU-NATAL	**TWENTY-SECOND RESPONDENT**
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**TWENTY-THIRD RESPONDENT**

Neutral citation: *Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others* (Case No. 423/2020) [2021] ZASCA 123 (23 September 2021)

Coram: PETSE AP, MOLEMELA, CARELSE and MOTHLE JJA and MOLEFE AJA

Heard: 17 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal

and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on ## September 2021.

Summary: Civil procedure – application for leave to appeal referred for oral argument in terms of s 17(2)(f) of Superior Courts Act 10 of 2013 – costs order – whether the Land Claims Court's order depriving the applicants of their fees was warranted – leave granted and appeal upheld.

ORDER

On application for Leave to appeal from: The Land Claims Court, Randburg, (Meer AJP sitting as court of first instance):

1 The application for leave to appeal is granted.

2 The appeal is upheld.

3 Paragraph 5 of the order of the Land Claims Court is deleted.

4 There is no order as to the costs of the appeal.

JUDGMENT

Mothle JA: (Petse AP, Molemela, Carelse JJA and Molefe AJA concurring):

[1] On 25 June 2020 two advocates and an attorney, in their personal capacities as applicants, approached this Court with an application for leave to appeal a punitive costs order. The costs order in issue deprived them of their fees as legal representatives of the plaintiffs. On 6 August 2020, this Court, acting in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act), referred the application for oral argument, and directed that the parties must be prepared, if called upon to do so, to also address the Court on the merits. The attorney, cited as the third applicant, withdrew from the application a few days before its hearing. No reason was furnished for the withdrawal.

[2] The impugned costs order was made on 16 March 2020 by Meer AJP sitting in the Land Claims Court (the LCC). In dismissing the plaintiffs' claim for restitution of land rights with costs, the learned Acting Judge President also disallowed in full, the applicants' fees in the entire matter.

[3] The facts are briefly that on 17 April 1998, Mr Jabulani Mchunu lodged a claim on behalf of the Luhlwini Mchunu Community (the community) in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The Regional Land Claims Commissioner, after investigating the claim, could not resolve the disputes with the landowners through mediation or arbitration. On 5 May 2017, he referred the claim to the LCC in terms of s 14(2) of the Restitution Act. Thereafter the majority of landowners issued notices to defend the action, some disputing the allegation that the plaintiffs were a community within the meaning of s 2(1) (*d*) of the Restitution Act.

[4] Prior to the commencement of the trial on 25 November 2019, a pre-trial conference, presided over by the learned Acting Judge President, was held on 17 September 2019. During the pre-trial conference, the learned Acting Judge President requested the parties to reflect on their stance, with reference to the standard of proof set by the Constitutional Court, on whether what the plaintiffs sought to pursue was indeed a community claim. She cautioned the parties that should the allegation that the plaintiffs were a community not pass muster, there would be costs implications.

[5] On the first day of the trial, the first applicant informed the LCC that the claimants intended to amend their pleadings. The purpose of the proposed amendment was, in the main, to introduce an alternative claim as labour tenants. The application to amend was however deferred to the end of the plaintiffs' case. After hearing oral evidence from the plaintiffs' eight witnesses, the parties addressed the court on the amendment application. In a written judgment dated 20 February 2020, the plaintiffs' application to amend was dismissed, the LCC having found it to be '*bad in law, prejudicial to the Defendants, vague, embarrassing and excipiable.'*

[6] Thereafter the learned Acting Judge President of her own accord ordered a separate hearing on an issue of law in terms of Rule 57(1).[1] The issue of law raised was

[1] Rule 57(1)*(c)* of the Land Claims Court allows the court, on its own accord, to order that a separate hearing be held on an issue of law which may conveniently be decided separately from any other issue.

whether the plaintiffs were a community as defined in the Act. After hearing the parties, the LCC ruled that the plaintiffs were not successful in proving that they were a community. Their action was thus dismissed with costs. The order included a punitive costs order – in para 5 thereof - against their legal team, the applicants, couched in the following terms:

'The fees of the Plaintiff's legal team, Attorney Sinama and Advocates Chithi and Cele, for this entire matter are disallowed in full. They are ordered to repay to the relevant entity that funded them on behalf of the State, whatever fees that may have already been paid to them.'

[7] On 27 May 2020, the LCC dismissed the applicants' application for leave to appeal. The applicants then turned to this Court with the present application. The plaintiffs and defendants do not feature in this application. In particular, the defendants delivered notices to abide the decision of this Court. I turn to the Land Court's reasons for imposing the punitive costs order against the applicants.

[8] In the main judgment and under the heading *'Were the proceedings vexatious, frivolous and an abuse of the Court and should Plaintiff's legal teams' fees be disallowed?'* the LCC, in providing reasons for the punitive costs order, stated as follows (paras 24-26):

'At the hearing I *mero motu* asked Mr Chithi [first applicant] for submissions as to whether the fees of the Plaintiff's legal team comprising an attorney and 2 advocates, wholly funded by the State, ought to be disallowed in the event of my finding against the Plaintiff as I have. I raised this, given the persistence and pursuit on behalf of the Plaintiff with a community claim when there was no shred of evidence to prove the legally established acid test post-*Goedgelegen* that the Plaintiff derived its use and possession of the land from common rules.

I raised this especially given that Mr Chithi, leader of the plaintiff's legal team, had appeared for the Plaintiff in *Elambini*[2] *supra* which, as aforementioned, involved a community claim for restitution, as in the instant matter. In *Elambini*, Mr Chithi and the plaintiff's legal team unsuccessfully argued, contrary to *Goedgelegen*[3], that persons who were at best labour tenants

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[2] *Elambini Community v Minister of Rural Development and Land Reform and Others* [2018] ZALCC 11.
[3] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

or farm workers on privately owned land constituted a community as defined in the Act. In *Elambin*i at paragraph 149 it was stated:

"it is disquieting that the plaintiff, who was legally represented, and significantly at the state's expense, throughout these proceedings, could have pursued and persisted with a community claim without adducing a shred of evidence to prove the legally established acid test post *Goedgelegen*, that they derived their possession and use of the land from common rules"

Post-*Elambini* at the very least Mr Chithi was thus well-versed with the requirements for instituting and succeeding with a community claim. This notwithstanding, he persisted with this claim as a community claim.

I raised the fees of the Plaintiff's legal team also, given that during a telephonic pre-trial conference I specifically cautioned the Plaintiff's legal team to consider whether in light of the established case law, the claim as a community on the part of the Plaintiff could pass muster, and cautioned them that there could be cost implications if it did not.' (Own footnotes.)

[9] The applicants contend, first, in regard to the application for leave to appeal, that it should be granted, in that there are reasonable prospects of success. Second, in respect of the envisaged appeal, that the order of the LCC should be set aside on procedural grounds. Third, on substantive grounds, that the conduct of the applicants in the trial was not vexatious, frivolous and an abuse of court processes. I proceed to deal with these grounds in that order.

[10] The threshold for an application for leave to appeal is set out in s 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success.[4] The applicants contend that this application concerned an order directed only against them and not the plaintiffs in the action. Consequently, they asserted that the application is capable of adjudication, independently of the merits of the action.

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[4] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA).

[11] In support of their application, the applicants relied, amongst others, on procedural grounds, that the LCC in adjudicating the matter, breached the principles of procedural fairness that are fundamental to the rule of law. As it turns out, and for the reasons that follow, this contention has merit. I am thus of the view that the application for leave to appeal should be granted and the appeal itself determined.

[12] It will be recalled that the learned Acting Judge President raised the question of the costs with the first applicant during the debate in relation to the Rule 57 issue of law. She summarily raised the issue of the punitive costs while the first applicant was addressing the court. The first applicant was directed to show cause why he, the second and third applicants, as plaintiffs' legal team, should not be deprived of their fees. The exchange between the first applicant and the learned Acting Judge President at that point, demonstrates that the issue was raised in a manner that the first applicant felt somewhat obligated to respond there and then. Thus, neither the applicants nor the other parties participating in the trial were afforded adequate opportunity to make meaningful, or any submissions on the subject.

[13] As for the second applicant and the attorney, they were not afforded an opportunity to have their say in relation to the looming deprivation of their fees that the LCC had threatened. In its judgment refusing leave to appeal, the LCC summarily dismissed their complaint in this regard, on the basis that they were present in court and that had they requested to address the court – which they did not do – they would readily have been allowed to do so. This, however, manifests a misconception of the essence of their complaint. When the LCC was minded to issue an order in the terms encapsulated in para 5 of its order it had a duty to invite and then afford the second and erstwhile third applicants a reasonable opportunity, as of right, to dissuade it from making the sort of order it had contemplated. But it did not. Therein lies the rub.

[14] The principle that the courts should not grant adverse court orders, without providing the affected parties an opportunity to be heard, is trite and sacrosanct. In this regard what the Constitutional Court said in *De Beer NO v North-Central Local Council*

and South-Central Local Council 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) is instructive. The Court said (para 11):

'The right to a fair hearing before a court lies in the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.'

[15] It therefore goes without saying that the courts must do more to avoid summarily inquiring into the conduct of a legal practitioner and thereafter imposing a sanction. In *Singh and Others v North Central and South Central Local Councils and Others,* [1999] 1 All SA 350 (LCC), the LCC stated as follows (para 128):

'That however is not necessarily the end of the matter in relation to the conduct of the applicants' attorneys and counsel and its impact on the costs order. The applicants and their attorneys allege that an agreement has been reached with the Chief Land Claims Commissioner to provide legal aid for these proceedings in terms of section 29(4) of the [Restitution] Act. This is disputed by the third respondent. *It would appear that that dispute may have to be resolved in separate legal proceedings. It certainly does not fall to be determined here*. For purposes of the costs order in this matter, I will assume, without in any way seeking to decide the issue, that there is an agreement or decision to provide legal aid for these proceedings. Where a litigant is funded by State legal aid, a court may none the less order that an attorney may not recover costs from the State's legal aid system. Section 29(4) represents part of the State's legal aid system. This may be a case where such an order should be made. *However the applicants, their attorneys and counsel have not had an opportunity of being heard in this respect and no such order was sought at the hearing. I will therefore provide in the order that such an opportunity be afforded before this aspect is finally dealt with.'* (Emphasis added.)

[16] Further, in holding that the conduct of the applicants was vexatious, frivolous and an abuse of court processes, the LCC made reference to the provisions of the Vexatious Proceedings Act 3 of 1956 (the Act). The right to be heard prior to an order being made in vexatious proceedings is entrenched in the Act itself. The relevant provision is s 2(1) (b), which provides:

‘2(1)(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may*, after hearing that other person or giving him an opportunity of being heard,* order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is a *prima facie* ground for the proceedings.’ (Emphasis added.)

[17] Accordingly, I conclude that the learned Acting Judge President erred in not paying due regard to these statutory prescripts. She failed to separate the inquiry concerning costs against the applicants from the trial, and to provide an opportunity for the applicants to be heard. This breach of procedure, on its own, and for reasons enunciated above, vitiates the LCC’s punitive costs order against the applicants. On this ground alone, the punitive costs order falls to be set aside.

[18] Having so concluded, there is thus no need to deal in detail with the substantive grounds of appeal, save to mention two issues. First, the LCC characterised the first applicant’s conduct in the trial as being persistently in pursuit of a vexatious claim. This view is expressed in paragraph 29 of its judgment as follows:

‘The Vexatious Proceedings Act 3 of 1956 authorises a court to prohibit legal proceedings by any person who *has persistently and without any reasonable ground instituted legal proceedings.* For the purposes of this Act, the element of persistency is a necessary one. *Heugh and others v Gubb* 1980 (1) SA 699 (C) at 702F. The litigation in the present case fits the persistency criteria, given *Mr Chithi’s persistence* with a community claim notwithstanding his lack of success with the same nature of evidence in *Elambini*.’ (Emphasis added.)

[19] On a proper reading of the record placed before this Court, there is no evidence that supports the conclusion reached by the LCC that the litigation in the present case fits

'the persistency' criteria. The first applicant disputed the LCC's finding that he initiated the proceedings in *Elambini*. He contended that he had joined the proceedings in *Elambini* as a junior member of the plaintiff's substitute legal team, after the plaintiffs' case had been prosecuted. Therefore, having joined the proceedings at that stage, it cannot be said that he instituted the plaintiffs' case in *Elambini*. Similarly, included in the LCC's documents of the present case and filed as Bundle A, is the plaintiffs' statement of claim dated 28 February 2018, signed by T Kadungure as plaintiff's counsel. A statement of claim initiates proceedings for the claimants in the LCC, and not the referral in terms of s 14 of the Restitution Act. The first applicant appears to have joined the proceedings after the statement of claim was filed in 2018 and sometime before the pre-trial conference. Thus, neither he nor the second applicant, could have initiated the proceedings in this case.

[20] The second issue concerns the caution the learned Acting Judge President made to the parties during the pre-trial conference. She cautioned that there could be costs implications. Although paragraph 4 of the minutes of the pre-trial conference[5] does not reflect the learned Acting Judge President having cautioned the applicants, the first applicant nevertheless confirms, in paragraph 12 of the founding affidavit before this Court, that such a warning was made. However, it is apparent from the record that the learned Acting Judge President cautioned the applicants even before the LCC heard oral evidence from the plaintiffs' witnesses at the trial. This is borne out by what is contained in paragraph 7 of the minutes that, at that stage, the plaintiffs were yet to file their expert's report.

[21] Curiously, the learned Acting Judge President did not indicate the reasons that moved her to issue the caution even before the plaintiffs presented oral evidence, in particular that of the expert witnesses. The Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President*

[5] The minutes of the pre-trial conference were signed by the learned Acting Judge President.

of the Republic of South Africa and Others [2014] ZACC 32; 2015 (1) BCLR 1 (CC), cautioned, in paragraph 36, as follows:

'The Court should ordinarily be very loath to grant a punitive cost order in a case like this. This is constitutional litigation and parties should never be forced to be too careful to assert their constitutional rights through a court process, for fear of a cost order.'[6]

Although these remarks were made in a different context, they are equally apposite in this case as the plaintiffs were asserting their constitutional right to land restitution.

[22] The first applicant avers that in a consultation with the plaintiffs, held after the caution, the plaintiffs instructed the legal team to present oral evidence in court, including the expert evidence of Dr V Khumalo and Mr Xolani Xaba, the land surveyor to establish their entitlement to the relief sought. Both experts appeared to support the plaintiffs' contention that they were a community. There is no evidence to suggest that the applicants acted recklessly in presenting the plaintiffs' case in the manner they did. In *Multi Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA (GP), the court remarked (para 34):

'. . . [A]ttorneys and counsel are expected to pursue their clients' rights and interest fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated by their opponent or even, I may add, by the Court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them. ... '

[23] In the result I make the following order:

1 The application for leave to appeal is granted.
2 The appeal is upheld.
3 Paragraph 5 of the order of the Land Claims Court is deleted.
4 There is no order as to the costs of the appeal.

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[6] This view is reiterated by the same court in *Lawyers for Human Rights v Minister in the Presidency and others* [2016] ZACC 45; 2017 (1) SA 645 (CC) para 17.

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SP MOTHLE

JUDGE OF APPEAL

APPEARANCES:

For appellants:	T V Norman SC (with her C M Nqala and K Shazi)
Instructed by:	Gordon Zungu Attorneys, Durban
	Maduba Attorneys, Bloemfontein
For the 1st to 23rd Respondents:	No appearance