THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 328/2017

In the matter between:

GWEJE KHUMALO	**FIRST APPELLANT**
JULY JOSEPH MAGUBANE	**SECOND APPELLANT**

and

TWIN CITY DEVELOPERS (PTY) LTD	**FIRST RESPONDENT**
WETLANDS COUNTRY RETREAT (PTY) LTD	**SECOND RESPONDENT**
THE DIRECTOR: ANIMAL HEALTH IN THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**THIRD RESPONDENT**
THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**FOURTH RESPONDENT**

Neutral citation: *Khumalo v Twin City Developers* (328/2017) [2017] ZASCA 143 (2 October 2017)

Coram: Tshiqi, Saldulker, Swain and Mathopo JJA and Molemela AJA

Heard: 28 August 2017

Delivered: 2 October 2017

Summary: Appeal against costs – s 16(2)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 – whether there are exceptional circumstances justifying a consideration of the matter with reference to the issue of costs – whether the Land Claims Court properly exercised its discretion in relation to the award of costs – appeal dismissed with costs.

ORDER

On appeal from: Land Claims Court, Randburg (Mpshe AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Molemela AJA (Saldulker JA concurring):

Introduction

[1] This is an appeal directed against a costs order made by the Land Claims Court (court a quo) when it dismissed an urgent application initiated by the appellants. The appellants in this matter are occupiers of land as contemplated in the Extension of Security of Tenure Act 62 of 1997[1] (ESTA). They reside on a farm owned by the first respondent. The second respondent conducts farming activities on the first respondent's farm. (The first and second respondents are hereinafter referred to as 'the respondents'.) The third respondent is the Director: Animal Health in the Department of Agriculture, Forestry and Fisheries and the fourth respondent is the Minister of Agriculture, Forestry and Fisheries. The third and fourth respondents opposed the application in the court a quo and pointed out that they were only doing

[1] In terms of s 1 of ESTA, an occupier is a person residing on land which belongs to another and who has on or before 1997 had consent or another right in law that entitles him or her to occupy the property. The status of the appellants as occupiers is undisputed.

so due to a cumbersome order sought against them. The third and fourth respondents filed a notice to abide by the decision of this Court and did not participate in this appeal.

Background facts

[2] It is necessary to go into some detail in regard to the facts giving rise to this appeal. The appellants have been resident on the farm Damascus in Mpumalanga since 1975 and 1980 respectively. Both of them were previously employed as farm labourers by the former owner of the farm. In terms of their arrangement with the previous farm owner each one of them was allowed to keep forty head of cattle, two horses and a few goats. They were allocated 120 hectares of land for grazing purposes. The farm was subsequently sold to the first respondent, who owns a number of farms in the area with licences for the hunting, capturing and selling of game. It is common cause that at the time of the launching of the application which is the subject of this appeal, there were pending eviction proceedings in relation to the appellants' continued occupation of the farm. It is not clear from the record as to when such proceedings were instituted. It is necessary to mention that in terms of s 24(1) of ESTA, the rights of an occupier shall, subject to the other provisions of that Act, be binding on a successor in title of an owner or person in charge of the land concerned. Furthermore, consent given by the owner or person in charge of the land concerned is binding on his or her successor in title as if he or she or it had given such consent.

[3] During March 2015, the respondents were granted a permit to keep buffaloes on the farm on which the appellants resided. The respondents had complied with the relevant legislation by erecting a 2.4 metre electric fence so as to make the area in which the buffaloes were kept game-proof. It is evident from the papers that at some point after the arrival of the buffaloes on the farm, the respondents indicated that they wanted to designate a particular piece of land on the farm as a grazing camp for the appellants' livestock. According to the appellants, their reluctance towards the fencing off of the designated area was on account of the fact that the area in question was smaller than the 120 hectare that they were previously allowed to utilise. It is not disputed that in August 2015, buffaloes were sighted by the appellants close to their

homesteads and were seen grazing among their cattle. This was something that had not happened before.

[4] Concerned by the presence of the buffaloes and believing that the buffaloes were a danger to their families and their livestock, the appellants' attorneys sent a letter to the respondents' attorneys complaining about the matter. The letter inter alia stated as follows: 'the introduction of buffalo in violation of legislation in the area of our clients' dwellings is a danger to clients and their families and their livestock. This prevents our clients from accessing and exiting their premises. Most importantly, the buffalo poses a high level of danger to the children of our clients. This is considered to be tantamount to constructive eviction.' The appellants considered the presence of the buffalo as 'constructive eviction' that was aimed at forcing them off the farm pending the finalisation of the eviction proceedings. They also regarded the presence of buffalo among their cattle in contravention of legislation as a denigration of their rights to the use of the land in question.

Litigation History

[5] Dissatisfied with the respondents' response to their letter, the appellants brought an urgent application in the court a quo seeking an order that inter alia interdicted the respondents from unlawfully evicting them without a court order. They further sought an order compelling the respondents to remove their buffaloes from the farm pending an investigation to be conducted by the third respondent. A pre-trial conference was held at the instance of the Judge President of the court a quo and an inspection in loco was subsequently held. In their answering affidavit the respondents denied having constructively evicted the appellants and contended that the presence of the buffaloes close to the respondents' homestead was as a result of the buffaloes' agitation resulting from running away from a veld fire. The respondents contended that the court a quo did not have the jurisdiction to entertain the application as the relief sought was based on the provisions of the Animal Diseases Act 35 of 1984 (the Animal Diseases Act) and revealed no cause of action based on eviction.

[6] The third respondent's answering affidavit provided some insight which, in my view, gives proper context to the appellants' application. It is undisputed that

legislation enjoins the owner of the farm on which buffaloes are kept to fence the buffaloes off with 'game-proof fencing' and requires such owner to bear the costs for maintaining the fencing. According to a report filed by the appellants, an inspection in loco held at the farm revealed that although the appellants' homesteads were fenced off, the fence in question was inadequate as it was not game-proof.

[7] The third respondent stated that since the respondents' permit was only issued in March 2015, the keeping of buffaloes on the farm before that date would have been in contravention of the Animal Diseases Act and Animal Diseases Regulations[2]. The third respondent further denied the respondents' averment that its officials had regularly inspected the farm and found the fencing to be adequate. According to the third respondent, the application submitted by the respondents when applying for a permit to keep the buffaloes on the farm did not disclose that there were cattle on the same farm and this non-disclosure constituted a contravention of the applicable legislation. According to the third respondent, had the presence of cattle been disclosed, the respondents would have been required to submit a certificate of adequate enclosure of the land designated for the buffalo so as to ensure that they would not graze with the cattle in contravention of the Animal Diseases Regulations, which provides that 'no buffalo may be moved onto the same land where cattle are being kept, and no cattle may be moved onto the same land where buffalo are being kept'[3].

[8] The court a quo held that although the adjudication of the relief sought in prayer 3 (constructive eviction) would fall within its power as contemplated in s 20 of ESTA, no case had been made out to substantiate such relief as 'there was no evidence tendered in either founding affidavit or submissions by Counsel in support of prayer 3' [constructive eviction]'. It, inter alia, found that the inclusion of the prayer relating to constructive eviction was 'opportunistic' and 'mischievous'. The court a quo further found that it did not have incidental jurisdiction to adjudicate the other relief sought by the appellants, as it was based on the Animal Diseases Act. It dismissed the application with costs. The order of the court a quo relating to costs

[2] Animal Diseases Regulations: Amendment GN R865, GG 38159, 7 November 2014.
[3] Ibid regulation 20(8).

was couched as follows: ‘Applicants [appellants] to pay costs, the one paying the other to be absolved. Costs to include costs of two Counsel.’

[9] Aggrieved by the court a quo’s costs order, the appellants approached the same court and applied for leave to appeal against its adverse costs order, but they were unsuccessful. Dissatisfied with the refusal of leave to appeal, the appellants then approached this Court on petition as contemplated in s17(2)*(b)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) on the basis that the court a quo had erred in granting costs in favour of the respondents. The appeal is with special leave of this Court.

In this Court

The appellants’ submissions

[10] The appellants contended that the court a quo had erred in making an adverse costs order contrary to the practice of the Land Claims Court in relation to costs orders, as there were no circumstances that warranted the making of such an adverse order. They submitted that the court a quo’s conclusion that the appellants were ‘opportunistic’ and ‘mischievous’ in bringing the application was not borne out by the supporting facts. They also averred that even though the appellants’ legal representation in the proceedings was state-funded, the burden of the adverse costs order would pose a financial burden to the appellants as they risked losing their capital assets which consisted of meagre livestock.

The respondents’ submissions

[11] The respondents argued that the appeal should be dismissed on the following grounds: that the issues are of such a nature that the decision on appeal on costs only, will have no practical effect or result in terms of s 16(2)*(a)* of the Superior Courts Act; that there are no exceptional circumstances that warrant the adjudication of this appeal. The respondents acknowledged that the pursuance of litigation in the court a quo was based on statutes intended to address the protection of rights in land and thus constituted social interest litigation. They further conceded the existence of the Land Claims Court’s practice of not awarding costs save in exceptional circumstances. They, however, contended that the Land Claims Court’s general

practice of not making cost awards 'was not a right of any litigating party in that court to no adverse costs order'. They reasoned that the appellants' frivolous and vexatious litigation constituted exceptional circumstances that justified the court a quo's deviation from that established practice.

[12] The respondents further argued that since the nature of the litigation brought by the appellants did not fall within the jurisdiction of the Land Claims Court, the general costs principle that 'costs follow the result', applicable in the ordinary courts, should have been applied. They further averred that the fact that the court a quo made an adverse costs award, despite the existence of the aforesaid practice did not amount to exceptional circumstances that warranted the adjudication of this appeal, as the court a quo's discretion was exercised judicially. Counsel for the respondents also urged us to be mindful of the fact that it is not open for this Court to go against the findings of the court a quo on the merits because the appeal is directed only at the costs order.

Issues

[13] This appeal raises the following issues:

(a) Whether the fact that the order on the merits is not the subject of the appeal precludes the adjudication of the appeal in relation to the costs order.

(b) Whether there are exceptional circumstances warranting the hearing of the appeal in terms of s 16(2)*(a)* of the Superior Courts Act.

(c) Whether the court a quo's discretion in relation to the award of costs was judicially exercised.

Does the fact that the order in respect of the merits has not been attacked on appeal preclude this Court from considering an appeal directed only at costs?

[14] The short answer to that question is 'no'. From the definition, it appears that s 16(2)*(a)* of the Superior Courts Act does not oblige this Court to dismiss an appeal directed solely at costs. Rather, it grants this Court a discretion to decide whether

there are exceptional circumstances that warrant the hearing of such an appeal. Significantly, this Court in *De Vos v Cooper & Ferreira*[4] stated as follows:

'Hoe so 'n appel teen die kostebevel benader word waar die landdros se *bevel ten opsigte van die meriete nie appellerbaar is nie*, blyk uit die meerderheidsbesslising op hierdie aspek in die *Pretoria Garrison*[5] saak op 863, naamlik

'…the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not. In deciding whether or not the Court below made the correct order as to costs the reasons which prompted that Court to make its order must be examined and those reasons must be the actual reasons and no others.

If the actual reasons were in fact a mistaken view of the law or a mistaken view of the facts and a wrong order as to costs was made because of those wrong views, then a Court of Appeal must correct the order as to costs if that order is appealable.'' (My emphasis).

[15] I am of the view that by parity of reason, the fact that the order relating to the merits has not been attacked in this appeal cannot preclude this Court from considering those facts of the case that have a bearing on the award of costs by the court of first instance.

Are there exceptional circumstances for the adjudication of this appeal as contemplated in s 16(2)*(a)* of the Superior Courts Act?

[16] This appeal is directed only against the adverse costs order made by the court a quo As to whether this appeal should be heard or not requires a consideration of the provisions of s 16(2)*(a)* of the Superior Courts Section 16(2)*(a)* provides as follows:

'16 (2) *(a)* (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

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[4] *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1302A.
[5] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A) at 863-864.

Identical provisions to the aforesaid section were embodied in s 21A(1) and (3)[6] of the Supreme Court Act 59 of 1959 (the Supreme Court Act), which is the predecessor to the Superior Courts Act.

[17] It is a trite principle of our law that a court considering an order of costs exercises a discretion.[7] Equally trite is the principle that where the costs order sought includes the costs for the employment of two counsel, here too, the court exercises a discretion. The court's discretion must be exercised judicially[8]. It is well-established that in the ordinary courts, the general rule is that 'costs follow the result'. It is settled law that the general practice in the Land Claims Court is not to make award of costs unless exceptional circumstances justify an adverse costs order. It bears emphasising that notwithstanding the aforestated practice, all courts have an unfettered discretion in relation to the award of costs. I will return to this aspect in due course.

[18] It is trite that a court has a discretion whether to allow the fees for the employment of more than one counsel. In *Motaung*[9] the court quoted the following passage with approval:

'The enquiry in any specific case is whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary for the proper attainment of justice or for defending the rights of the parties," and were not incurred through "over-caution, negligence or mistake". If it was a wise and reasonable precaution to employ more than one counsel, the costs incurred in doing so are allowable as between party and party. But they are not allowable if such employment was merely luxurious.'[10]

[19] Factors that are taken into account when considering whether costs consequent upon the employment of two counsel are justified includes the

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[6] Section 21A of the Supreme Court Act stipulated as follows:
'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.' '(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to considerations of costs.'

[7] *Ferreira v Levin NO & others*; *Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441; [1996] ZACC 27.

[8] *Motaung v Mukubela & another, NNO*; *Motaung v Mothiba, NO* 1975 (1) SA 618 (O) at 631A.

[9] Supra at 631A.

[10] *Koekemoer v Parity Insurance Company Ltd & another* 1964 (4) SA 138 (T) at 144F-145.

consideration of the 'complexity of the facts and the difficult points of law involved'[11] in the case, the volume of the evidence dealt with by counsel, the presence or absence of scientific or technical problems, any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case.[12] The respondents maintained that the issue raised did not fall within the court a quo's jurisdiction. In their answering affidavit the respondents contended that 'the concept 'constructive eviction' does not exist in South African law and any reference thereto is of no value.' In my view, the issues raised in this matter were not complex at all and no technical aspects were raised. I am therefore unable to find any justification for the adverse costs order and the order of costs for the employment of two counsel.

[20] It is significant to bear in mind what this Court stated in relation to the determination of the existence of exceptional circumstances as contemplated in s 21A(1) and (3) of the Supreme Court Act in *Naylor & another v Jansen*[13]. Cloete JA said:

'I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee & others* [1998 1 ALL SA 377 (SCA) at 1075J – 1076A] to express the view that *a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance.* I still adhere to that view — for, if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of the section.' (Emphasis added).

[21] It must be stated from the outset that a disconcerting fact in this matter is that the court a quo did not, in its judgment, specifically address itself to the award of costs consequent upon the employment of two counsel before mulcting the appellants with costs. The court a quo's only reference to the issue of costs was in the order itself. In the absence of the court a quo's reasons for including the costs consequent upon the employment of two counsel, it is difficult to conclude that the court a quo exercised its discretion judicially on the award of costs.

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[11] *Law & others v Kin & another* 1966 (3) SA 480 (W) at 483F-G.
[12] Supra *Koekemoer at 144H.*
[13] *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) (31 August 2006) para 10.

[22] Where the exercise of a discretion in relation to the award of cost was not apparent at all, this Court set the attorney-and-client costs order aside[14]. I am of the view that there is no reason why the same approach should not be followed in respect of a failure to justify an order for the employment of two counsel. The costs order made against the appellants equates to exceptional circumstances justifying the hearing of the appeal. The costs order will have a practical effect on the lives of the appellants, if allowed to stand. It follows that I would, for the reasons referred to above, find that there are exceptional circumstances that warrant the adjudication of the appeal directed at the costs order.

[23] There are, however, other reasons why I conclude that exceptional circumstances that warrant the hearing of this appeal have been established. These are set out below. This Court, in *Jazz Spirit 12 (Pty) Limited v Regional Land Claims Commissioner: Western Cape*[15] had occasion to consider the provisions of s 21A(1) and (3) of the Supreme Court Act. The appeal that served before that court was directed only at the fact that the court a quo had not made any costs order. On appeal, the question that occupied the court's mind was whether the facts or circumstances of the case constituted 'exceptional circumstances' for purposes of s 21A(3). In answering that question, this Court cited the following passage from the judgment of Thring J[16] with approval:-

'I think that, for the purposes of s 5(5)(*a*)(iv) the phrase 'exceptional circumstances' must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in *Norwich Union Life Insurance Society v Dobbs*, *(supra loc cit)*, be given a narrow rather than a wide interpretation. I conclude to use the phraseology of Comrie J in *S v Mohammed (supra, loc cit)*, that, to be exceptional within the meaning of the subparagraph, the circumstances must be "markedly unusual or specially different"; and that, in applying that test, the circumstances must be carefully examined.'

[24] Having accepted the aforesaid test as the proper one against which the facts or circumstances raised by the appellants had to be measured, the court proceeded

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[14] *Motowest Bikes & ATVS v Clavern Financial Services 2013 JDR 2734 (SCA)*; (138/13) [2013] ZASCA 196 (2 December 2013) para 13.
[15] *Jazz Spirit 12 (Pty) Limited v Regional Land Claims Commissioner: Western Cape* 2014 JDR 1897 (SCA); (704/2013) [2014] ZASCA 127 (22 September 2014) para 27.
[16] MV *AIS MAMAS Seatrans Maritime v Owners,* MV *AIS MAMAS, & another* 2002 (6) SA 150 (C) at 157E-F.

to examine the facts and circumstances of that case. The court remarked that the 'exceptional circumstances' which the appellants sought to rely on, had to do with the allegedly unacceptable manner in which the respondents conducted the litigation which, they submitted, contributed to its length and costs. The court stated that 'the mere fact that the costs are considerable in the present case and other factors called in aid do not in themselves constitute exceptional circumstances justifying the hearing of the appeal.'[17] This Court therefore dismissed the appeal.

[25] Even though I support the test that was endorsed in *Jazz Spirit,* which was recently confirmed by this Court in *Mgwenya NO & others v Kruger & another,*[18] the facts and circumstances of the present case are distinguishable from those in *Jazz Spirit.* This is evident from a passage in the same judgment, where Bosielo JA aptly remarked as follows:-

'It is crucial for the promotion and maintenance of the rule of law that parties who approach the courts to resolve their land disputes *should not be mulcted with costs*, particularly where there are no allegations of wilfulness or vexatiousness as is in this case. Undoubtedly s 6 of the Restitution Act places an onerous duty on the office of the Land Claims Commission to take all reasonable steps to ensure that claims that are lodged are well investigated and properly prepared . . . *In addition, it has as its rationale the fact that many of the people dispossessed of land have also been systematically disadvantaged in many other ways and may well be unlikely to be in a position to fund any adverse costs order. Such people might be dissuaded from pursuing the very rights provided for in the Restitution Act if costs orders were made in the ordinary course.* If this was their response, it would defeat the very object of the Restitution Act. This is, perhaps, an additional reason for the exceptional circumstances envisaged in s 21A (3) to be required to meet an even higher standard in matters concerning costs arising from the Restitution Act.'[19] (Emphasis added).

These remarks are equally apposite in relation to ESTA.

[26] What is clear from the afore-going passage is that Bosielo JA was acutely aware of the practice of the Land Claims Court in terms of which that court does not make costs orders 'in the ordinary course'. He was also alive to the rationale for that practice. In that matter the appeal was directed at the fact that the Land Claims Court

[17] *Jazz Spirit* fn 16 para 24.
[18] *Mgwenya NO & others v Kruger & another* (1060/16) [2017] ZASCA 102 (6 September 2017).
[19] *Jazz Spirit* fn 16 para 27.

had made no order as to costs. The Land Claims Court's practice of not making costs orders 'in the ordinary course' was not in dispute. That is the background against which this Court's finding that there were no exceptional circumstances warranting the hearing of the appeal was made. In the present case, the appeal is directed at an adverse order of costs which includes the costs for the employment of two counsel without any demonstrable consideration of whether such an order was appropriate in the circumstances.

[27] The practice of not making an order for costs 'in the ordinary course' in the Land Claims Court has been extant for a number of years. The rationale for such a practice was explained by Dodson J in the following terms:-

'The Act [ESTA] was passed specifically to deal with the legitimate demands for remedial action to deal with past, large-scale breaches of the human rights of a class of rural, black people. In my view, that places this matter squarely in the sphere of public interest litigation, notwithstanding that the parties to litigation under the Act will usually be private persons.'[20]

[28] The established practice of the Land Claims Court in relation to costs orders was acknowledged by Harms JA in *Haakdoornbult Boerdery CC & others v Mphela & others* in the following terms:-[21]

'The LCC [Land Claims Court] ordered the participating owners to pay the costs of the proceedings. For this the LCC relied on what it perceived to be a new principle laid down by the Constitutional Court in *Richtersveld [2004 (5) SA 460 CC] and it decided to disregard its own practice of not ordering costs in land claim cases in the absence of special circumstances.*' (Emphasis added).

[29] Another reason why this case is distinguishable from *Jazz Spirit* is the nature of the litigation and the 'chilling effect' that an adverse costs order could have in the future if same w not to be set aside. In *Hotz & others v University of Cape Town*[22] the Constitutional Court stated that the starting point when determining an award of costs is to have regard to the nature of the issues. To this end the court emphasised that what is to be taken into account is the 'nature of the issues' rather than the

[20] *Hlatshwayo & others v Hein* 1999 (2) SA 834 (LCC) para 24; 1998 (1) BCLR 123 (LCC).
[21] *Haakdoornbult Boerdery CC v Mphela & others* 2007 (5) SA 596 (SCA) para 75.
[22] *Hotz & others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC) para 29.

'characterisation of the parties'. It is thus important for issues to be seen in their proper context.

[30] In *Biowatch Trust v Registrar, Genetic Resources, & others*[23], the court, per Sachs J, set out three reasons for the departure from the general principle that costs follow the result:

'In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse'

Secondly, constitutional litigation, *whatever the outcome,* might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those *in* similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. 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 are constitutional is placed at the correct door.'[24] (My emphasis).

[31] ESTA is an Act of Parliament envisaged in s 25(6)[25] of the Constitution to improve security of tenure for those whose tenure of land is insecure. ESTA was also enacted to give effect to s 26(3)[26] of the Constitution. The vulnerability of the persons that ESTA is intended to protect is expressly acknowledged in the preamble of that

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[23] *Biowatch Trust v Registrar, Genetic Resources, & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 10 BCLR 1014 (CC).
[24] Supra para 23.
[25] Section 25(6) of the Constitution provides: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'
[26] Section 26(3) of the Constitution provides that: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

statute. It states that 'many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction'. In the present matter, the appellants approached the Land Claims Court to vindicate a right envisaged in ESTA. Section 6(1) of ESTA is intended to address the tenuous position in which ESTA occupiers often find themselves. It provides that an occupier shall have the right to reside on and use the land on which he or she resides and which he or she uses.

[32] The conduct of the appellants, as heads of their households, in seeking to protect the families who included women and children against what they deemed to be constructive eviction must be considered in the light of s 5 of ESTA, which guarantees farm dwellers the right to freedom and security of the person with due regard to the objects of ESTA. The following remarks made by Sachs J in *Port Elizabeth Municipality v Various Occupiers*,[27] in relation to s 26(3) of the Constitution are apposite:

'… a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world'.[28]

[33] While acknowledging that all courts have an unfettered discretion in relation to the award of costs, I am of the view that the practice of the Land Claims Court regarding cost awards is one of the factors that must be taken into account in assessing whether the court a quo's discretion was judicially exercised. The rationale for that practice is a very relevant factor. It is undisputable that farm-dwellers are among the poorest South Africans.

[34] As far back as in 2001, the Land Claims Court in *Nkuzi Development Association v Government of the Republic of South Africa & another*[29] recognised their plight by declaring, inter alia, that persons who have a right of security of tenure in terms of ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 have a right to legal representation or legal aid at state expense if substantial injustice would

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[27] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[28] Supra para 17.
[29] *Nkuzi Development Association v Government of the Republic of South Africa & another* (LCC10/01) [2001] ZALCC 31 (6 July 2001).

otherwise result, provided that such state-funded representation need not be granted where there is no reasonable or probable cause. The following remarks still ring true today:

'However, a very large number of the people for whose benefit the Labour Tenants Act and ESTA were enacted, do not enjoy that entitlement when their rights are infringed or threatened with infringement. This is so because they are overwhelmingly poor and vulnerable people with little or no formal education. When their tenure security is threatened or infringed, they do not understand the documents initiating action or the processes to follow in order to defend their rights. On the other hand they cannot afford the fees for a lawyer to represent them because of their poverty. As a result they are quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA.'[30]

[35] Given the sentiments expressed above, which I align myself with, it seems to me to be a contradiction to grant farm-dwellers state-funded legal representation in consideration of the aforementioned principles, only to mulct them with costs later when they are unsuccessful in such litigation.

[36] Of significance is the fact that the Land Claims Court was established in terms of s 22 of the Restitution of Land Rights Act 22 of 1994 (Land Restitution Act). Section 33 of that Act enjoins the court to have regard to 'the requirements of equity and justice' in considering its decisions. The importance of the phrase 'just and equitable' was considered in the decision of the Constitutional Court in *Port Elizabeth Municipality,* albeit in relation to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The court stated that the phrase makes it plain that the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law. Sachs J aptly remarked that:

'The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. . . .

[30] Supra para 4.

The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.'[31] (Emphasis added.)

[37] It was stated in *Lawyers for Human Rights v Minister in the Presidency & others* [32] that the well-established test when considering whether to award a costs order against a private party in a constitutional litigation is whether the litigation in question was frivolous, vexatious or manifestly inappropriate. The court stated that 'to be subject to an adverse costs order, the litigant's conduct must be worthy of censure.' In this matter, it is of significance that the appellants had tried to avoid litigating by sending a letter to the respondents' attorneys and also to the third respondent. That letter was sent before the main eviction application was enrolled. The letter was evidently sent soon after the buffaloes were sighted close to the appellants' homesteads, which is undisputed. Litigation was initiated soon thereafter. Unlike in the case of *Lawyers for Human Rights,* in this matter it cannot be reasonably concluded that there was an unreasonable delay in launching the application. In my view, the appellants' characterisation of their dispute as constructive eviction was clearly in the genuine belief that the presence of buffaloes near their homesteads posed danger to them and their livestock. Even though the appellants might have been mistaken in that belief, it cannot be said that their litigation was 'frivolous' or 'vexatious'. I strongly doubt that the Judge President of the Land Claims Court would have allowed the adjournment of the pre-trial for purposes of an inspection in loco, for litigation that was clearly 'frivolous' or 'vexatious'.

[38] Of some significance is also the fact that the court a quo, in its consideration of whether the requirement of irreparable harm had been met, that the requirement might have been met if the buffalo had actually entered the appellants' home. That statement suggests to me that that even though the court a quo eventually found that the requirements of an interdict had not been met, the litigation could not be characterised as 'manifestly inappropriate'. It is also clear from the appellants' affidavits that they consistently averred that they had been constructively evicted on

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[31] In *Molusi & others v Voges NO & others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 31 - the court referred to this extract and found Sachs J's remarks to be equally apposite in relation to the provisions of ESTA.

[32] *Lawyers for Human Rights v Minister in the Presidency & others* 2017 (1) SA 645 CC para 7.

account of the recent sighting of the buffaloes near their homesteads. Their counsel also argued that the threat posed by the buffaloes was the motivation for the appellants' conclusion that the introduction of the buffaloes into the area of the appellants' homesteads constituted an attempted constructive eviction. The court a quo's conclusion that the appellants had not provided any evidence or arguments in support of constructive eviction is not borne out by the record.

[39] Although an award of costs should not be determined on the basis of the financial resources of the litigants,[33] the well-documented vulnerability[34] of the farmworkers to arbitrary evictions, their express protection in terms of ESTA and the chilling effect that an adverse costs order might have are some of the circumstances that the court a quo ought to have taken into account, but these were evidently not sufficiently interrogated when mulcting the appellants with costs coupled with an order of costs for the employment of two counsel. Mulcting vulnerable litigants who invoke ESTA with costs for vindicating their rights by seeking relief for what they considered to be constructive eviction[35] flies in the face of the values expressed in the aforementioned authorities. The court a quo's glaring failure to address itself squarely to principles of equity and justice[36] alluded to in the aforementioned authorities before mulcting the appellants with costs is an egregious injustice that cannot be countenanced. In my view, a refusal to entertain this appeal on the grounds set out in s 16(2)*(a)* of the Superior Courts Act in the present circumstances will amount to a perpetuation of a grave injustice and will be tantamount to paying lip service to the spirit and purport of our Constitution.[37]

[40] For all the reasons alluded to above, I would find that the circumstances of this case fall within the meaning of 'markedly unusual or specially different' circumstances

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[33] *Hotz* fn 23 para 29.
[34] See para 31 at 15 and the preamble to ESTA that 'unfair evictions lead to great hardship, conflict and social instability'.
[35] 'Constructive eviction' in relation to ESTA seems to be a phrase used to describe a situation where a farm owner deliberately makes the conditions intolerable for continued occupation or use of his or her farmland with a view to inducing the occupier to vacate the said farmland. It is noted in fn 12 of *Molusi* that the applicants in that matter had previously 'successfully approached the Land Claims Court . . . on an urgent basis as a result of allegations of constructive eviction of the applicants when the respondents removed corrugated iron roofs from the rooms occupied by them.'
[36] *Hotz fn 23* para 40.
[37] Constitution of the Republic of South Africa Act 108 of 1996.

and constitute exceptional circumstances that justify the adjudication of this appeal on costs.

Was the court a quo's discretion in relation to the award of costs judicially exercised?

[41] The question is whether the court a quo judicially exercised its discretion in awarding cost, bearing in mind the Land Claims Court's approach to costs awards. In *Norwich Union Fire Insurance Society Ltd v Tutt*,[38] Holmes AJA said in relation to the determination of an award of costs:-

'. . . [T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides.'

[42] A consideration as to whether the court a quo's discretion was judicially exercised warrants a cautious approach. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another*,[39] the Constitutional Court, per Khampepe, J stated as follows:-

'When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

"judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles"'.

[43] It follows that if a court of appeal is satisfied, after considering all the facts and circumstances that have a bearing on the award of costs, that the lower court did not exercise its discretion judicially, it is at large to interfere with the costs award. This would be so if the court has exercised the discretionary power 'capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts . . . .'[40]

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[38] *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854D.

[39] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

[40] *Ferris & another v First Rand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) paras 28 and 29.

[44] The Constitutional Court has consistently sketched out the factors to be taken into account when determining an award of costs. The applicable principles to a cost award have already been discussed earlier in the judgment and need not be repeated here. A further consideration is the approach followed by the Land Claims Court in respect of cost awards. As stated before, the practice of the Land Claims Court of not ordering costs is not disputed. It is of significance that in *Hlatshwayo & others v Hein*[41] the Land Claims Court made no order of costs despite having found that that court did not have jurisdiction to entertain the appeal.

[45] I pause to mention that the concept of constructive eviction is not foreign in the Land Claims Court, especially when regard is paid to the definition of eviction in the Land Reform (Labour Tenants) and the ESTA. The appellants in *Molusi* had, under slightly different circumstances, successfully brought an urgent application relying on allegations of constructive eviction on the basis that the respondents had removed corrugated iron roofing from the rooms occupied by them. The Land Claims Court apparently ordered the respondents to rebuild the demolished structures with immediate effect.

[46] Although the appellants were unsuccessful with their claim in relation to constructive eviction, among others, (and did not appeal against that court's findings), that does not detract from the nature of the issues that were raised and debated in the court a quo. Therefore it does not preclude this Court from considering the nature of the litigation brought to the Land Claims Court. Eviction' includes the deprivation of a right of occupation or use of land'.[42] There is no basis for concluding that the issue raised by the appellants pertaining to the constructive eviction was not of genuine constitutional import. The court a quo's conclusion that the appellants were 'opportunistic' and 'mischievous' is not supported by the evidence and therefore has no basis. The contention that the appellants' reliance on constructive eviction was frivolous or vexatious has no merit.

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[41] *Hlatshwayo* fn 21 para 24.
[42] Section 1 of ESTA.

[47] In *Biowatch*[43] the court pointed out the dangers of making adverse costs orders in constitutional litigation in the following terms: '…[m]eritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences.' The appellants are unemployed persons who have lived on the farm for the better part of their lives. They are seemingly dependent on subsistence farming based on the paltry amount of livestock they are allowed to keep on the farm. They are the male heads of large families and are unlikely to obtain employment on account of their relatively advanced age. They are laypersons who probably do not know anything about the jurisdiction of courts. They obviously depended on legal advice for the initiation of litigation and the choice of forum. If the respondents are indeed correct that the dispute raised by the appellants ought to be raised in the ordinary courts and not in the Land Claims Court, the question that comes to mind is whether the appellants were effectively represented[44] in those proceedings. In the event that the answer is in the negative, the logical question is why the vulnerable appellants should be penalised for the fact that their application was launched in the wrong court.

[48] There are many other vulnerable farm-dwellers who are in the same position as the appellants. I have no doubt in my mind that seeing the appellants lose their livestock in satisfaction of the award of costs granted by the court a quo will definitely have a chilling effect on vulnerable people whom ESTA is intended to protect. They could indeed be discouraged from pursuing meritorious claims for fear of detrimental cost awards. This would fly in the face of the very purpose for which ESTA was enacted, as espoused in its preamble.

[49] Considering all the aforesaid provisions, I am left with the impression that the court a quo did not take into consideration that the Land Claims Court is a court determining social interests, as a result of which adverse costs orders are made only in exceptional circumstances. An adverse order of costs made against the appellants who are unemployed and who are unlikely to find employment because of their relatively advanced ages. The financial ruin to them and their families as such costs

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[43] *Biowatch* fn 24 para 23.
[44] It is noteworthy that s 4*(6)* of ESTA enjoins the court to take this aspect into consideration, albeit in different circumstances.

can only be satisfied from their paltry and meagre assets, which are their livestock. Considering all the circumstances, the impact of an adverse order of costs with inclusion of costs of employment of two counsel can only be disastrous for the appellants. For all the aforementioned reasons, I am of the view that the court a quo did err in not pertinently considering all the relevant factors which require consideration when an award of costs is made. I therefore conclude that the adverse costs order made could not reasonably have been made by a court properly directing itself to all the aforesaid relevant facts and principles and does not evince a judicial exercise of the discretion in respect of costs. It follows that the appeal must succeed.

[50] With regards to the costs of appeal, I align myself with the remarks of Harms DP in *Haakdoornbult*[45] where he said: 'I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances.' I am of the view that the requirements of equity and justice as envisaged in the Land Restitution Act dictate that no order should be made as to costs on appeal.

[51] I would therefore uphold the appeal.

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M B Molemela

Acting Judge of Appeal

Tshiqi JA (Swain and Mathopo JJA concurring):

[52] This appeal arises from an order of the Land Claims Court (LCC) in terms of which it dismissed an urgent application brought by the appellants against the respondents, with costs of two counsel. It found that it lacked urgency and that it had

[45] *Haakdoornbult* fn 12 para 76.

no jurisdiction to determine the matter. There is no appeal against the order on the merits. Consequently the LCC's factual findings and its basis for finding that it had no jurisdiction to determine the application cannot be adjudicated in this appeal. The appeal is confined to the costs order. The first appellant (Mr Gweje Khumalo) aged 57, and the second appellant (Mr July Magubane) aged 60, hereinafter referred to as the appellants, are unemployed males who are residents at a farm known as Damascus 125, Registration Division HT, Mpumalanga (the farm) together with their families. It is common cause that the appellants are occupiers in the farm as contemplated in the Extension of Security of Tenure Act 62 of 1997 (ESTA). The farm was operated and managed by the second respondent, Wetlands Country Retreat (Pty) Ltd, which together with the first respondent, Twin City Developers (Pty) Ltd, were licenced to keep various species of game on the farm, including buffalo. The appellants kept their own livestock on the farm in terms of an agreement concluded between them and the previous owner of the farm. The third and fourth respondents elected to abide the decision of this court.

[53] On 14 August 2015 the appellants, through their attorneys, wrote a letter to the respondents' attorneys complaining about the presence of the buffalo in the farm and stating, amongst others, that they considered the presence of the buffalo to be tantamount to 'constructive eviction'. They also threatened to initiate legal proceedings against the respondents if the buffalo were not removed from the farm by a certain date. In response, the respondents' attorneys denied the allegations concerning constructive eviction and said the following concerning the threatened legal action:

'Our client has instructed us to inform your offices that you can proceed to initiate legal proceedings but we will reserve our rights in the matter as your clients are funded by the Department of Rural Development and Land Reform and our client is the one who is paying all of his legal costs out of his own pocket.

. . . .

This matter is going to Court shortly for the main application to be heard and you are welcome to combine the two matters on the same day at Court as there will be no delay of the main application in this matter.'

[54] It is common cause that the main application referred to was an eviction application by the respondents against the appellants that was already pending at the LCC. On 10 November 2015 the appellants, launched an urgent application in the LCC for an order interdicting the respondents from unlawfully evicting them and their family members from the farm without a court order; that the respondents be ordered to remove the buffalo from the farm; and for the third respondent – the director of animal health in the Department of Agriculture, Forestry and Fisheries – to be ordered to investigate whether the respondents had a permit to keep the buffalo on the farm and if so whether there was compliance with it. The appellants alleged that the court had jurisdiction to entertain the matter in terms of s 20 of ESTA.

[55] The matter came before Mpshe AJ who found that the urgent application had been launched 'almost three months after establishing [the] danger on the farm'. On this basis he concluded that the application lacked urgency. He said:

'There is no fibre of evidence that disease has since been found to be spreading, nor possible spread thereof, neither is there any tissue of evidence that either the Applicants [appellants] and/or children were at a certain stage challenged or attacked by the buffalo . . .'

He then said that it was 'opportunistic' for the appellants to include this prayer 'knowing fully well that their eviction was pending' before the court and that this was 'mischievous' and 'frowned upon'. The judge stated further that '[i]t is not the mere naming of the issue . . . that will cloth[e] the court with jurisdiction' and concluded that the LCC, as a specialist court, was limited to its enabling statute and did not have jurisdiction to deal with the application. In the result, he dismissed the appeal with costs of two counsel.

[56] As stated above, the appellants are not challenging any of the findings and conclusions of the court that the application was opportunistic and mischievous. There is also no challenge to the court's finding that the LCC did not have jurisdiction to entertain the application. The appeal is confined to a consideration of the costs order.

[57] It is trite that a court of first instance has discretion to determine the costs to be awarded and that a court of appeal can only interfere with the exercise of that discretion if it has not been exercised judiciously or was influenced by wrong

principles or a misdirection on the facts.[46] The jurisdiction of this court is guided by amongst others s 16(2)*(a)* of the Superior Courts Act 10 of 2013 which reads:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined *without reference to any consideration of costs*.' (My emphasis.)

[58] In *Mgwenya NO & others v Kruger & another*,[47] the first respondent, an ordained pastor in the services of the Apostolic Faith Mission Church of South Africa, whose pastoral status was terminated by the Church passed away before the hearing of the appeal. In view of the demise of the first respondent, the appellants conceded that there were no live issues remaining between the parties and that the appeal and any order made thereon would have no practical effect or result. The appellants however contended that the church would be saddled with the costs orders made in favour of the first respondent and this would be most 'unfair' to the church. Not persuaded that these were exceptional circumstances, the court said the following in para 8:

'In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C), Thring J conducted a comprehensive inquiry as to the meaning of "exceptional circumstances" in our case law. The conclusion reached at 156H-J, with which I am in agreement, is that "[w]hat is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."

"Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon."'

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[46] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

[47] *Mgwenya NO & others v Kruger & another* ZASCA 102 unreported case no 1060/16 of 6 September 2017.

[59] In this matter Counsel for the appellant conceded that the appeal and any order concerning costs will have no practical effect. However he submitted that the following factors constitute exceptional circumstances which justify the consideration of costs only:

a) The fact that the LCC deviated from the established practice in the LCC of not ordering costs in land claim cases in the absence of special circumstances.
b) That the costs order did not take into account the fact that the appellants are rural persons who have not accumulated any wealth, and face the risk of losing any capital assets they may possess if burdened with a cots order.

[60] As to the first submission, it is common practice that the LCC has consistently refrained from awarding costs in appropriate matters, unless special circumstances exist.[48] This is a salutary practice which has been endorsed by this court.[49] The practice adopted at the LCC is influenced primarily by the fact that matters that fall within the jurisdiction of that court stem from social interest litigation. This matter is however different from the other matters in that although the appellants claimed that the court had jurisdiction to entertain it in terms of ESTA, the court found that the application was 'opportunistic', 'mischievous' and that it did not fall within its jurisdiction. It also said that the mere allegation that it had jurisdiction was insufficient to qualify the matter as such. There was no appeal against the court's finding on this issue. There was also no appeal against the factual findings of the court that there was no merit to allegations of the threat of diseases to the appellant's livestock, and the alleged danger posed by the buffalo to the appellants and their families. It concluded that the application was not urgent and that no case was made for constructive eviction. In the absence of an appeal against all these findings, it is impermissible for the appellant to rely on these allegations to justify its appeal on a consideration of costs only. Put differently, in instances where an appellant has elected not to appeal against the merits and the factual findings of a lower court, an appeal court is not at liberty to interrogate the correctness thereof.

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[48] *Pannar Research Farms (Pty) Ltd & another v Kebatladitse Cornelius Magome & another* (LCC) unreported case no 17/02 of 17 July 2002 para 5.
[49] See *Haakdoornbult Boedery CC and others v Mphela and others* 2007 (5) SA 596 (SCA) at 618A-D).

[61] This then takes me to the second submission: that the award of costs should be set aside simply on the basis that the appellants are indigent and that they were acting in the best interests of their families. This ground also lacks merit. As stated above, the court was not persuaded that the appellants were acting in the interests of their families. Instead the court said that there was no substance to the allegations concerning the spread of disease[s] and that the buffalo posed any danger to the families. Regarding their socio-economic status, it is trite that an award of costs is not based solely on the socio-economic status of a particular litigant but rather on the nature of the matter.[50] To illustrate the fallacy in the appellant's argument, if the application had been brought in a court with competent jurisdiction, the general rule that costs follow the result would probably have been applied and the appellants would probably not raise the issues being raised before us. Moreover, s 18*(b)* of ESTA provides that '[a] court may, in addition to other powers set out in this Act . . . make such orders for costs as it deems just.' Nothing therefore prevents the LCC, in the event of an abuse of the court's process, as it held was the case in this matter, from expressing its displeasure through an award of costs against the offending litigant. It thus cannot be said that the court was influenced by wrong principles or a misdirection on the facts, nor that it did not exercise its discretion judicially.[51]

[62] For all those reasons there are no exceptional circumstances justifying this court to have regard only to the consideration of costs. The appeal must therefore fail. With regard to the costs of the appeal, there is no basis for deviating from the general rule that the appellants, as the unsuccessful parties, should bear the costs of the appeal. The appellants were aware of the provisions of s 16(2)*(a)* of the Superior Courts Act and the sentiments expressed by the LCC concerning what it perceived to be an abuse of that court's process. They nevertheless persisted with the appeal.

[63] The conclusion by this court should not be construed to mean that this court does not endorse the salutary practice of not awarding costs in appropriate matters. As stated above, this matter is different because the LCC found the application to be an abuse of the court's process and these findings were no appealed against. The

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[50] See *Hotz & others v University of Cape Town* 2017 (7) BCLR 815 (CC) para 35.
[51] *National Coalition for Gay and Lesbian Equality* supra fn 1 para 11. See also *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 14 and the authorities referred to therein.

conclusion should also not be construed to mean that this court has closed its eyes to the fact that the appellants are part of a disadvantaged group of society, for which the Land Reform legislation was promulgated; and the reality that litigation such as this one is mainly funded by the public purse. But, as Counsel for the respondent correctly submitted, the respondents have been dragged to court, at their own expense, to face what the LCC held was an application that had to be frowned upon.

[64] I make the following order:

The appeal is dismissed with costs.

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Z L L Tshiqi

Judge of Appeal

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