



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED	
<u>16/3/2026</u>	<u>[REDACTED]</u>
DATE	SIGNATURE

CASE NO.: B40284/2022

In the matter between:-

ECKEM WILLIAM SITHOLE

Applicant

v

CONSTANTIA METERING SERVICES (PTY) LTD

First Respondent

THE HONOURABLE M KHOELE N.O.

Second Respondent

Heard on: 23 February 2026**Delivered:** 16 March 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 16 March 2026.

ORDER

It is ordered:-

1. The review application is dismissed.
2. The applicant is ordered to pay the costs of this application on an attorney and client scale.

JUDGMENT

KOOVERJIE J

THE REVIEW APPLICATION

- [1] This review application has been instituted in terms of Rule 53 of the Uniform Rules of Court. Mr. Sithole seeks to review and set aside the decision of the magistrate (the second respondent), who granted absolution from the instance in respect of his defamation claim.
- [2] For the purposes of the judgment the applicant will be referred to as “Mr Sithole”, the respondent as “Constantia”, and the National Credit Regulator as “the Regulator”. The National Credit Act 34 of 2005, will be referred to as “the National Credit Act”.
- [3] Section 21(1)(b) of the Superior Courts Act (the Act) clothes a High Court with jurisdiction to hear review applications from the Magistrate’s Court. This review application is premised on Section 22 of the Superior Court’s Act which makes provision for the review of the proceedings of the Magistrate’s Court on the following grounds:
- (a) absence of jurisdiction of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[4] This review finds its genesis in action proceedings instituted by Mr. Sithole against Constantia. The first respondent, Constantia is known to conduct business as an electricity reseller in terms of various agreements it enters into with the City of Tshwane together with property owners and/or body corporates. In this case Constantia terminated the electricity supply due to Mr. Sithole failing to pay his electricity bill.

[5] The trial proceedings proceeded before the Magistrate. After Mr. Sithole's evidence, and his evidence under cross-examination was led, the Magistrate granted absolution from the instance, upon the request of Constantia.

ISSUES FOR DETERMINATION

[6] Since review grounds are confined to Section 22 of the Act, this review is limited.¹ In my view, the main issue for determination is whether the irregularities relied upon by Mr. Sithole are proven on a balance of probabilities.

[7] Mr. Sithole's main contentions on review related firstly to the Magistrate finding that the Regulator declined to hear his complaint, when in fact there was no such decision, secondly, the Magistrate erred in granting absolution from the instance. As a result, Mr Sithole was unable to cross-examine Constantia, and thirdly, the Magistrate was required to make a finding on whether the charges imposed by Constantia were unlawful in terms of the National Credit Act.

¹ *Hira v Booysen* 1992 (4) SA 69 (A) at p85G-p86B.

ANALYSIS

(i) Appropriate proceedings

[8] Appeal and review are processes whereby decisions can be reconsidered by another court. However, they are different processes. An appeal is appropriate where it is thought that a decision maker came to the wrong conclusion on the facts or the law. It is concerned with the merits of the case, meaning that on appeal the second decision maker can declare the first decision wrong. A review focusses on the way/manner in which the decision maker came to the challenged conclusion. Hence a court of review concerns itself with issues such as impartiality of the decision maker and the admissibility of the evidence taken into account.²

[9] It appears that one of Mr Sithole's contentions relate to the manner in which the Magistrate arrived at his findings. Notably a criticism against a Magistrate for granting absolution from the instance may constitute a ground for review.³ However it is evident that the rest of his contentions should have been challenged on appeal. In particular that the Magistrate failed to consider the applicability of the National Credit Act and apply same in his determination as well as the Magistrate's findings, and that the Regulator declined to hear his complaint. It was Mr Sithole's contention that the Magistrates findings were wrong.

(ii) The Record

² *Rustenburg Platinum Mines Ltd v Commissioner for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 37.

³ *G.C (Nee O) v D.S.C and Another* (84382/2017) [2018] ZAGPPHC 946 (11 December 2018) at para 4.4.

- [10] During his address, Mr. Sithole advised that he was comfortable in excluding the transcript of the court proceedings before the Magistrate. He held the view that the issue on review could be determined simply from the judgment, the review application and the record. I am mindful that an applicant can waive his right to have the transcript excluded from the record. He is entitled to that election. In doing so he must, however, bear the consequences.
- [11] It is trite that on review, a court should be appraised with the full record which includes the transcript of the proceedings (transcription). In my view, the record should *inter alia* have included evidence that was presented to the Magistrate at the trial proceedings, the pleadings, as well as the deliberations in court, which would be contained in the transcript. The purpose of the record is to enable the court to fully and properly assess the lawfulness of the decision-making process.
- [12] Both the Constitutional Court and the Supreme Court of Appeal emphasized the importance of a full record in review proceedings. The Supreme Court of Appeal in the ***Democratic Alliance***,⁴ expressed that —

“...It can hardly be argued that, in an era of great transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of Section 34 of the Constitution to have a justiciable dispute

⁴ *Democratic Alliance and Others v Acting Director of National Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at para 37.

decided in a fair public hearing before a court with all the issues being ventilated, would be infringed..."

[13] The Constitutional Court in the **Helen Suzman Foundation**,⁵ stated that—

"[13] The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review."

[14] It has been echoed by our highest court that the Rule 53 record has to include all information relevant to the impugned decision or proceedings. It is an invaluable tool in the review process and helps to shed light on what "happened and why". In **Mamadi**,⁶ the Constitutional Court emphasized:

"[36] The rule 53 record contains "all information relevant to the impugned decision or proceedings" which includes "every scrap of paper throwing light, however indirectly, on what the proceedings were" and the record of the deliberations of

⁵ *Helen Suzman Foundation v Judicial Service Commission and Others* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018) at para 13.

⁶ *Mamadi and Another v Premier Limpopo Province and Others* (CCT 176/21) [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) (6 July 2022) at para 36.

the relevant decision maker. The fundamental importance of the rule 53 record was explained by this Court in *Turnbull-Jackson*:

“Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker’s stance; and in the performance of the reviewing court’s function.”

[15] Having regard to the principles enunciated by our higher courts, I find myself in difficult circumstances where I am required to consider the review, without the transcript.

[16] At the end of the day, a court on review is required to fully assess the lawfulness of another court’s findings, particularly in light of the grounds raised in this review.

(iii) **Previous Proceedings**

[17] I find it appropriate at this stage to outline the previous applications instituted by Mr Sithole in this court, before I deliberate on the substantive issues.

[18] When the interlocutory matter (the Rule 30 application) came before Millar J, he became aware that Mr. Sithole instituted various interlocutory applications including this review application. In one such application, the Rule 30A application, Mr Sithole sought that Constantia pay for the transcription of the record of the proceedings. In the application before Millar J, Mr Sithole sought constitutional damages in an

amount of R1 million from Constantia. These applications all arose due to Constantia terminating his electricity supply.

- [19] Millar J assisted the parties to prioritize the disputes. Mr Sithole was advised to institute appropriate proceedings in respect of the damages claim by way of a summons instead of the Rule 30 process. Consequently Millar J crafted the agreement between the parties in the form of an order to assist them going forward. Notably in prayer 2 of such order, Millar J recorded the importance of the transcript of the record of the proceedings. Mr. Sithole understood the potential consequences of his decision and that he confirmed that he made a considered decision to waive his right to file the transcript of the record of the proceedings.

(iv) The applicant's case on review

- [20] Based on Mr Sithole's persistence to proceed without the transcript, I then proceeded to hear both parties. It is common cause that on 10 July 2019 Constantia issued a payment reminder and added the sum of R190.64 to the applicant's account. Mr Sithole *inter alia*, not satisfied with this charge and other charges, then lodged a Section 136 complaint with the Regulator on 21 July 2019 where he alleged that Constantia was in breach of Section 5(2) of the National Credit Act.
- [21] On 19 September 2019, Constantia terminated the electricity supply to Mr. Sithole, on the basis that he failed to settle his arrears account. This led him to institute summons in the Magistrate's Court seeking damages based on defamation due to

the said termination. He further claimed that the charges imposed by Constantia were unlawful in terms of the National Credit Act.

[22] On 16 November 2022, the Magistrate granted absolution from the instance after the closure of the plaintiff's case (Mr. Sithole). His main contentions remain that the Magistrate erred in finding that a "non-referral letter" was issued by the Regulator. Moreover, Constantia terminated the electricity services, despite being aware of the complaint before the Regulator. Constantia's conduct was clearly unlawful.

[23] In his first founding affidavit Mr. Sithole at paragraph 5.1, alleged:

"5.1 On 12 June 2019 I was presented with a bill for the payment of electricity I have consumed with a due date of 30 June 2019. I failed to settle the bill before 30 June 2019. On 10 July 2019 the first respondent sent me a payment reminder. I was aggrieved by the addition of the sum R190.64 as I was convinced that such payment was default administration charge, governed by the provisions of Section 6(2) of the National Credit Act. In terms of the section, the first respondent could only acquire the legal right to charge such default administration charge after the expiry of 20 business days, following the first day I fell into arrears, the 20 business day therefore expired on 26 July 2019. This is the date the full cause of action arose in relation to the June 2019 bill."

[24] His particular grievance was that Constantia imposed both a service fee as well as a cash handling fee. In his view, this constituted double dipping which was contrary

to the National Credit Act (particularly Regulation 44). Constantia acted unlawfully by charging default administration charges for the months of August and September 2019 alleging that the total debt was R661.51 by 11 September 2019, knowing that he lodged a complaint on this very issue before the Regulator.

[25] According to him, Constantia's conduct was an "act of self-help which was both wrongful and unlawful". On this basis, he sought defamatory damages as well as the wrongful deprivation of the use and enjoyment of electricity supplies.

[26] He further contended that he never received a "notice of non-referral" from the Regulator and neither was such a letter ever sent to him on 19 August 2019 as the Magistrate found.

[27] At this juncture, it must be pointed out that the Magistrate did not express that the Regulator issued a non-referral letter. Instead, the Magistrate's words were "*on 19 August 2019, the Office of the National Credit Regulator declined to assist with the complaint on the basis that the National Credit Regulator does not entertain such complaints*".

[28] My understanding of Mr. Sithole's argument is that since a notice of non-referral had not been issued by the Regulator, Constantia could not have terminated the electricity and the Magistrate could not have made a finding that the Regulator declined Mr. Sithole's complaint. The Regulator has not made a final decision. If it had done so, it would have issued a non-referral letter. He persists with the view that his complaint falls under the National Credit Act. In his heads of argument, he expressed:

"The 2nd respondent made it clear that in his mind that there was no dispute pending before that office of the National Credit Regulator that could have precluded the 1st respondent from terminating electricity supplies".

(v) Constantia's case on review

[29] In its plea (at trial stage before the Magistrate), Constantia denied that the metering and billing was subject to the National Credit Act. It alleged that it acted in terms of the agreement and the City of Tshwane's By-laws. It also denied that it was a credit provider.

[30] In this review application, Ms. Schoonraad deposed to the answering affidavit in her position as the accounts manager of Constantia as well as her role in the termination of the electricity supply. She specifically alleged that she was responsible for termination of the electricity supply. She confirmed that she was present in court when Mr. Sithole presented his evidence in chief and when he had been cross-examined, Constantia's version was put to him. She alleged the following in her answering affidavit:

30.1 Mr Sithole signed the relevant agreement for the provision of electricity supply with Constantia and confirmed that Constantia had complied with all the terms of that agreement;

30.2 he explained how he fell into arrears and how his account was accordingly debited;

- 30.3 he acknowledged under cross-examination that all the charges levied on his account were properly done in terms of the relevant City of Tshwane debt collection by-laws and procedures;
- 30.4 he confirmed that he was aggrieved with Constantia and therefore did not respond to Constantia's invitations to arrange for the payment of arrears in instalments;
- 30.5 he further confirmed that the charges he now disputed in respect of the arrears had previously been levied on him without any protest from his side;
- 30.6 he also testified that he elected to rather approach the Gauteng Housing Tribunal rather than engaging with Constantia Metering;
- 30.7 he refused to make payment in respect of the disputed entries and line items on his accounts on the basis that such charges were not permissible in terms of Section 5(2) and Section 136 of the National Credit Act;
- 30.8 he conceded that the charges imposed on him were all in accordance with the prevailing tariffs and confirmed that Constantia had acted in terms of the regulatory prescripts which in accordance with those of the City of Tshwane;
- 30.9 he also confirmed that he received various warning texts and letters between the period February 2019 to December 2019 from Constantia and that Constantia was entitled to debit penalty fees in respect of those warnings.

(vi) **The Magistrate's Judgment**

[31] On the reading of the judgment, the Magistrate had in fact outlined the relief sought by Mr. Sithole namely that:

31.1 Constantia acted unlawfully in charging him for cash handling fees. Constantia contravened Section 5(2) of the National Credit Act when it issued an invoice within 7 days for the default administration charge of R190.64. Constantia was not entitled to recover this amount;

31.2 the termination of the electricity was wrongful, unlawful, and defamatory; and

31.3 Constantia should be ordered to pay damages in an amount of R100,000.00 and special damages in an amount of R5,000.00 per day beginning 18 September 2019 up to 2 October 2019.

[32] In paragraph 4, he recorded Constantia's defences to be that:

32.1 Mr Sithole's claim was flawed in law and he failed to plead a legally cognizable claim;

32.2 he was not unlawfully deprived of electricity usage and enjoyment;

32.3 the act of terminating his electricity supply was not defamatory;

32.4 there was no publication of any defamatory statements nor did Constantia make any publication that was defamatory in nature; and

32.5 the claim for special damages has not been proven.

[33] In paragraphs 5.1 to 5.6 he then set out Mr Sithole's evidence. The Magistrate noted that Mr Sithole referred his complaint to the Regulator, on the basis that Constantia's conduct contravened Section 5(2) and Section 136 of the National Credit Act. On 19 August 2019 the Regulator declined to consider the complaint on the basis that it does not entertain such complaints. Subsequent thereto he withdrew the complaint on 11 November 2019.

[34] The Magistrate also recorded that Mr. Sithole expressed that although the National Credit Act is not applicable to all transactions, it was incorrect to conclude that his complaint did not fall within the purview of the National Credit Act.

MY FINDINGS

[35] In respect of the contention relating to the Regulator's response, it must be pointed out that I had perused the voluminous records in order to locate the relevant correspondence.⁷ I have noted that there were several exchanges between Mr. Sithole and the Regulator whereby Mr Sithole persisted with the point that the Regulator has jurisdiction to consider the complaint.

35.1 Of relevance is an email from the Regulator dated 30 July 2019, wherein Mr Sithole was informed "*you failed to allege any fact which would constitute*

⁷ Two "records" had been uploaded onto caselines

grounds for a remedy under the NCA". Regulation 46 of the NCA refers to a credit provider;

35.2 In another e-mail the Regulator informed him "*Kindly note that your complaint would not fall within the mandate of the Regulator, it relates to a service agreement*";

35.3 On 11 November 2019, Mr. Sithole withdrew his complaint and he expressed:

"Kindly be advised that I hereby withdraw the complaint I filed with your offices due to your failure (refusal) on your part to finalize the same. I will be issuing summons against Constatia Metering in the magistrates' court to secure the finalization of my complaint and to seek attendant relief".

[36] It appears that the latter communication was dated and/or sent to the Regulator on 11 November 2019 and the proceedings in the Magistrate Court were initiated a day later, on 12 November 2019. It can however not be refuted that by this time Mr Sithole had already withdrawn his complaint before the Regulator.

[37] There can be no doubt that even if the Magistrate referred to an incorrect date, the evidence supported his finding that the Regulator declined Mr. Sithole's complaint.

[38] Furthermore I find Mr Sithole's understanding of a "non-referral letter" to be misconceived. On the reading of Section 139 of the National Credit Act, it is clear that the Regulator would consider a complaint if it fell within the ambit of the National Credit Act. It is only then the Regulator may issue a notice of non-referral to the

complainant in the prescribed form if it finds that the complaint appears to be frivolous or vexatious or that the complaint did not allege any facts which if true, would constitute grounds for a remedy under the Act.

[39] Moreover Section 4 stipulates that the National Credit Act applies to credit agreements between parties and further identifies the nature of such credit agreements. The Regulator had in fact advised Mr Sithole that the agreement between him and Constantia constituted a service agreement, thus implying it was not a credit agreement.

[40] In this case, clearly the Regulator simply declined to consider the complaint on the premises the agreement was not a credit agreement.

[41] Clearly if Mr Sithole wished to persist with the point that the complaint fell within the ambit of the National Credit Act, the question that begs an answer is: why did he withdraw the complaint. Amongst various recourses available to him, he could have instituted proceedings against the Regulator on this very jurisdictional issue.

[42] With regard to the contentions *inter alia* that the charges levied by customers were unlawful, the Magistrate found that Mr Sithole failed to prove same. He specifically recorded that during cross-examination Mr. Sithole testified that he was bound by the clauses of the Constantia Metering House Rules which provided as follows:

“Clause 2.1:

"It remains the responsibility of the account holder to ensure that the account is up to date at all times";

Clause 3.1:

"Failure to pay the account by the due date may result in a payment reminder being delivered and the relevant penalty fee debited to the next invoice (Fees charged as subscribed by the local authorities)."

Clause 3.2:

"Disconnections will take place 7 days after the payment reminder was issued and the relevant penalty fees debited to the next invoice."

Clause 6.1:

"Constantia Metering have the right to disconnect services for unpaid rent or levies where instructed by the letting agency, body corporate or owner."

At paragraph 5.7.3 he expressed:

"Testified that his electricity account for June 2019 was short paid and a further payment of R250.00 followed on 19 July 2019 to make up for the short payment. He concedes that his account was in arrears with an amount of R291.20 as on 30 June 2019 and further that he had received a warning letter on 19 June 2019 for which the charge of R41.20 was levied. He testified with reference to page 8 of the discovered document bundles that

he had received from the defendant the warning text messages and letters for the period between February 2019 and December 2019 and further that the defendant was entitled to debit penalty fees in respect thereof”.

[43] Then in paragraph 5.7.4 he recorded that Constantia’s version was put to him:

“it was put to him that the Defendant witness will testify that the termination of the electricity was done following a standard procedure followed in any other case similar to his and it was not intended to punish him in any manner or form. In response he testified that it is likely when apples are compared with apples. However, he further did not comment when he was advised that Constantia’s evidence would be that the termination as per the standard procedure is to stick a notice under the door of a particular resident”.

[44] In paragraph 12, the Magistrate concluded that the levying of collection fees was not unlawful and not supported by evidence. Mr Sithole failed to establish a *prima facie* case to sustain his claims and no court reasonably applying its mind to the evidence above could find for the plaintiff on this claim.

[45] On the defamation claim, at paragraph 13, the Magistrate expressed that no evidence had been presented to suggest that the dignity or reputation of Mr. Sithole was impaired in any manner. He took cognisance of the fact that Mr. Sithole confirmed that the steps undertaken by Constantia in terminating the provision of electricity on 18 September 2019 were in accordance with the agreement for the provision of electricity.

- [46] Consequently he found that Mr. Sithole failed to establish a *prima facie* case for defamation and no court reasonably applying its mind to the evidence, as set out above, would find in Mr Sithole's favour.
- [47] From my reading of the judgment there was no evidence led in the applicant's favour that the termination of the electricity was defamatory. The termination was merely a consequence of the debt collection procedures implemented due to non-payment.
- [48] It appears that he correctly appreciated the principles on "absolution from the instance" and granted the relief in terms of Section 48(c) of the Magistrate's Court Act. He was aware of the test to be applied: whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. It is trite that the plaintiff has to make out a *prima facie* case, in that evidence exists relating to all the elements of the claim in order to survive absolution.
- [49] At paragraph 8 he expressed that the onus to adduce evidence is on the plaintiff and, if the defendant is of the opinion, when the plaintiff closes his case that the plaintiff may apply for absolution from the instance. It is trite that absolution from the instance may be granted at the conclusion of the plaintiff's case if the plaintiff failed to adduce sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff.⁸

⁸ See also *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

[50] The Magistrate found that Mr. Sithole failed to prove firstly that the charge was unlawful and secondly that a case of defamation was proven. It is noted that Mr. Sithole did not dispute the fact that Constantia adhered to the City of Tshwane debt collection procedures and he confirmed that he was bound by contractual rules of Constatia.

[51] In order to prove a claim for defamation, the jurisdictional requirements that have to be met, are that there was the act of publication, which was defamatory in nature and constituted an injury to his personality and further it was wrongful.

[52] Constantia further submitted that in determining whether the act of terminating the electricity supply was intentional and defamatory the court should be reminded that the right to receive electricity is qualified by the constitutional and statutory obligations of the City to provide public services in a financially sustainable manner. There can be no doubt that consumers who contravene the prevailing conditions of payment would be subjected to the termination of the electricity supply. Such conduct has been considered lawful by the Constitutional Court.⁹

CONCLUSION

[53] I once again, reiterate that my findings are premised on the record availed to me, in particular the pleadings, the judgment, written and oral submissions of both parties, as well as the records uploaded onto caselines. In the circumstances and for the reasons

⁹ *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) at para 88.

aforesaid, this review must fail. Mr Sithole has failed to prove irregularities on the part of the Magistrate in terms of Section 22 of the Superior Court Act.

COSTS

- [54] Mr. Sithole is unsuccessful in this review application. I had taken the opportunity to explain to Mr. Sithole that the general proposition in law is that the costs should follow the result. Mr Sithole during his address, took no issue therewith. He accepted that the losing party should be liable for costs. He, however, argued that he should not be subjected to a punitive costs order in the event he is unsuccessful.
- [55] Constantia, on the other hand, persisted with its argument that punitive costs are warranted, particularly having regard to the manner in which this review application was instituted.
- [56] It was pointed out that Mr Sithole persisted with the review despite being advised that he had not complied with Rule 53 by not filing the transcript of the proceedings. Notably this issue was not only raised by me, but by Millar J as well. However, Mr Sithole insisted that the court should adjudicate the review application without the transcript of the proceedings. As alluded to above, the Constitutional Court in **Mamadi** emphasized that the record should contain "all information relevant to the impugned decision which includes every scrap of paper, throwing light, however indirectly, on what the proceedings were as well as the record of the deliberators of the relevant decision maker".¹⁰ The record remains an invaluable tool that it sheds light on "what happened

¹⁰ *Mamadi* above n 7 at para 36.

and why”, particularly on the decision maker’s stance. More significantly it assists a court to perform its reviewing function.

- [57] Ultimately the issue of costs is within the discretion of this court. Such discretion has to be exercised judicially upon the consideration of all the facts. I am required to carefully weigh the issues, consider the conduct of the parties and any other circumstances which would have a bearing on the matter and finally make an order that is fair and just.
- [58] It is a known fact that attorney and client costs are usually imposed when a court disapproves of the conduct of the losing party. Such an order is also not lightly granted. Courts are usually hesitant to penalize a person who exercises his right to obtain a judicial decision. Therefore, special grounds must be prevalent, particularly if a court finds a party’s conduct to be vexatious, frivolous, reckless, malicious or that if a party acts unreasonably in the litigation.¹¹
- [59] Constantia in its papers and heads of argument motivated why punitive costs are justified in the circumstances. I have noted that Mr Sithole had not dealt with this issue in his replying affidavit. He was simply silent on this issue. I nevertheless, elicited a response from him during his address. His argument was that these costs were not justified.
- [60] Constantia alleged that it has been severely prejudiced by the “endless torment of frivolous and vexatious litigation” instituted by Mr Sithole which constitutes an abuse of

¹¹ Erasmus Superior Court Practice, third edition D5-21-22.

the process of this court. It also contended that the "scurrilous" contentions raised against the Magistrate and legal representative, were inappropriate.

[61] Constantia reminded this court that to date Mr Sithole had failed to settle the costs orders in the other proceedings where he was unsuccessful. He should therefore be ordered not to pursue any further legal proceedings until the costs orders are settled. I reminded both parties that since I had only been seized with the review application, it would be inappropriate to delve into costs arguments relating to the other applications. I advised Constantia that it is at liberty to pursue the relief it seeks in appropriate proceedings, where it fully outlines the facts and the relief that it anticipates.

[62] There are no closed list of factors highlighting when punitive costs are appropriate. Over a period of time, our courts have expressed their disapproval in various circumstances which included: when reckless allegations of another party's incompetence were alleged; if there was an unwarranted and unpleasant attack on a professional in respect of his/her profession; when a party persists in a defence which is spurious and he/she is well aware of this fact, or where his/her conduct was found to be a deliberate flouting of the law in the face of lawful attempts made by the other party to perform its statutory duty. Punitive costs have also been awarded in instances where there is a failure to disclose material facts to the court.¹²

[63] In these circumstances, I find that punitive costs are warranted. This court must express its disapproval of the manner in which these proceedings ensued and in light of the unsubstantiated allegations made against the Magistrate and Ms Schoonraad, namely:

¹² Erasmus Superior Court Practice, third edition D5 22-25.

- 63.1 Mr Sithole requested this court to make findings against Ms Schoonraad for lying under oath, claiming she perjured herself;
- 63.2 the Magistrate breached his oath of office which necessitated an investigation of the breach by the Magistrate's Commission;
- 63.3 there was gross irregularity in the proceedings which affected his rights to a fair hearing before an impartial and independent court;
- 63.4 the Magistrate was biased and favoured Constantia. In fact he goes so far as to allege that there was collusion between Constantia and the Magistrate;
- 63.5 more concerning was the allegation that the Magistrate was not the author of the judgment. He launches this spurious attack without a shred of evidence.
- 63.6 undisputedly he was alive to the issue that the transcript was material and would equip this court to fully and fairly determine if there was unlawfulness and/or irregularity on the part of the Magistrate in the proceedings before him. Clearly the transcript of the proceedings would have assisted this court in noting the evidence presented and particularly the evidence the Magistrate had relied upon to arrive at his findings.

CONCLUSION

- [64] At this point I deem it necessary to further express that this matter was presented in a very disorganized manner. In my preparation for the hearing, it had taken me an extensive amount of time to discern which record, which heads of argument and which practice notes should be relied upon. Furthermore, I was only placed in possession of

the respondent's' heads pertaining to this review application at the hearing. I was informed that same was removed from case lines at some point.

- [65] I further attempted to make sense of Mr Sithole's case with reference to the pleadings, the record as well as the judgment. At least two versions of the record were uploaded and I spent a considerable amount of time perusing the records.
- [66] This uncertainty resulted in me spending at least 30 minutes with Mr Sithole at the hearing where he was requested to identify the relevant documents pertaining to this application and identity his main contentions. The time taken to do this was clearly unnecessary and could have been prevented, particularly if Mr. Sithole had legal representation. It must be appreciated that the court's time and its resources are scarce and litigants are expected to make their matters accessible to courts in a comprehensible manner. Mr Sithole as *dominus litis* should have ensured that the matter was properly before the court.
- [67] The duty of this court in terms of Section 173 of the Constitution is to exercise its inherent power to uphold, protect and fulfill its judicial function in an orderly, and effective manner which aims to prevent any possible abuse of the process and to enable the courts to act efficiently within its jurisdiction.¹³
- [68] In the circumstances, I dismiss the review application with costs on an attorney client scale. The applicant is ordered to pay such costs.

¹³ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC); 2007 (1) SACR 408 (CC) (21 September 2006) at para 39-40.



H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:

Mr. EW Sithole (in person)

Counsel for the first respondent:

Adv. S.W. Davies

Instructed by:

JW Wessels and Partners Inc

Date heard:

24 February 2026

Date of Judgment:

16 March 2026