



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1295/2021

In the matter between:

SNOWY OWL PROPERTIES 284 (PTY) LTD

APPELLANT

and

NORMAN CELLIERS

FIRST RESPONDENT

MZIKI SHAREBLOCK LIMITED

SECOND RESPONDENT

Neutral citation: *Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another*
(1295/2021) [2023] ZASCA 37 (31 March 2023)

Coram: MOCUMIE and HUGHES JJA and NHLANGULELA, MALI and MASIPA
AJJA

Heard: 21 November 2022

Delivered: 31 March 2023

Summary: Contempt of court order – the principles of *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) re-affirmed – distinction between coercive and punitive orders – contempt of court established on a balance of probabilities.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mnguni J, sitting as court of first instance):

- 1 The appeal succeeds.
- 2 The order of the high court is set aside and replaced by the following:
 - ‘(a) The first and second respondents are found to be in contempt of the order granted by the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg on 24 May 2019.
 - (b) The first and second respondents shall, within 30 days of the date of this order:
 - (i) take such steps as may be necessary to introduce rules to prevent the second respondent and its members, and all persons who derive any right, privilege or title through the second respondent, from contravening the order above in paragraph (a).
 - (ii) take such steps as may be necessary to ensure compliance with the rules so made.
 - (c) The first and second respondents, together with the members of the second respondent and all persons who derive any right, privilege or title through the second respondent shall not engage in any conduct, which have the effect of non-compliance with the order in paragraph (a).
 - (d) The first and second respondents to pay the costs of the application in the high court, jointly and severally, the one paying the other to be absolved. Such costs to be paid on attorney and client scale.’
- 3 The first and second respondents to pay the costs of the appeal, including the application for leave to appeal in the high court, jointly and severally, the one paying the other to be absolved. Such costs to be paid on attorney and client scale.

JUDGMENT

Mali AJA (MocumieJA and Nhlangulela AJA concurring):

Introduction

[1] 'The corollary duty borne by all members of the South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally mandated function.'¹

[2] This appeal pertains to the contempt of the full court order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the full court). The appellant is Snowy Owl Properties 284 (Pty) Ltd, the registered owner of immovable properties described as the remainder of the Farm Fagolweni No 16156 (Farm Fagolweni), and the remaining extent of the Farm Ntabankosi No 14594, situated in the Province of KwaZulu-Natal.

[3] The first respondent is Mr Norman Celliers (Mr Celliers), the chairman of the second respondent. The second respondent is Mziki Shareblock Limited (Mziki), a public shareblock company, which is the registered owner of immovable property described as Portion 1 of Farm Fagolweni. For all intents and purposes in these proceedings and before the high court, Mr Celliers as the chairman of Mziki acted in his personal capacity and also acted for Mziki as duly authorised by the Board of Directors. Hereafter, the two will be collectively referred to as the respondents. In some instances, where necessary, they will be referred to in their individual capacity. The shareblocks of Mziki are owned by various entities and individuals, some of whom reside on the farm. Mr Celliers is also a member of Mziki and a resident on the farm. Farm Fagolweni and Portion 1 of Farm Fagolweni are contiguous pieces of land.

¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18, 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) para 1. (*Secretary of the JCI v Zuma*)

[4] In 1990, the appellant and Mziki (the parties) registered a notarial deed of servitude granting reciprocal servitudes to one another. On 27 November 1990, the deed was notarially executed under protocol No. 13 of 1990 and registered in the Pietermaritzburg Deeds Office under No K1287/90. In terms of clause 3 of the notarial deed, the objective of the reciprocal servitudes was to give and grant to one another and their successors in title, as owners of the land, reciprocal servitudes in perpetuity for the purpose of traversing the land to view wild game.

Litigation history

[5] During 2015, the appellant brought an application for an interdict in the high court, to restrain Mziki together with its members (including Mr Celliers) from traversing the appellant's farm, contrary to the terms of clause 4.2.8 of the notarial deed which provides:

' . . .[S]hould the right of traverse for the purpose of viewing wild game granted in terms of this agreement be desirous of being exercised by Mziki or a holder between the hours of sunset and sunrise, such rights shall only be capable of being exercised with the consent and under the supervision of the duly authorised representative of the registered owner of the land concerned upon such conditions as the registered owner of the land in his sole discretion may determine. . . '

The application served before Steyn J.

[6] On 10 February 2017, Steyn J dismissed the application on a point *in limine*, in that the matter should have been referred to arbitration in terms of clause 4.3 of the notarial deed². An application for leave to appeal to the full court was also dismissed. On petition to his Court, leave to appeal the judgment of Steyn J was granted by this Court, directing that the full court entertains the appeal. The full court (per Moodley, Chetty and Hadebe JJ) dealt with the merits of the application. Consequently, on 24 May 2019, an order was granted in favour of the appellant in the following terms:

- '1. The appeal is upheld.
2. The order of the court a quo is set aside and substituted wit[h] the following order:-
 "1 The respondent together with any and all persons who derive any right, privilege or title through the respondent are interdicted and restrained from traversing on the applicant's land, being the remainder of the Farm Fagolweni, No. 16151

² This means Steyn J did not deal with the merits of the application.

situate[d] in the Country of Zululand, Province of [KwaZulu-]Natal and the remaining extent of the Farm Ntabankosi No.14594, between the hours of sunset and sunrise unless in accordance with clause 4.2.8 of servitude K1287/1990, and more particularly unless:-

- 1.1 the prior written consent of the applicant has been obtained; and
- 1.2 under the supervision of a duly authorised representative of the applicant; and
- 1.3 in accordance with such conditions as the applicant may in its sole discretion determine; and
- 1.4 upon payment of the charges as are determined from time to time by the applicant in terms of the "current charge list".

2 The respondent is ordered to pay the applicant's costs, such cost to include the costs of two counsel."

3. The respondent is to bear the costs of appeal.'

[7] On 30 July 2019, an arbitration award, similar to the order of the full court, was granted in favour of the appellant. The arbitration proceedings were running parallel to the appeal proceedings before the full court. According to the appellant, the respondents failed to comply with the order of the full court. As a result, the appellant launched an application for contempt of court in the high court, which was dismissed. The high court also refused the application for leave to appeal. This matter now serves before this Court, consequent to leave being granted by this Court.

[8] The allegations pertaining to the non-compliance with the order of the full court are that on 30 May 2019, the appellant's attorneys addressed an email to Mziki's attorneys attaching the order of the full court. That correspondence requested confirmation that the judgment of the full court will be brought to the attention of any and all persons who derive any right, privilege or title through Mziki. The email was met with no response. Consequently, on 1 July 2019, the appellant's attorneys addressed a letter to the members of Mziki, which reads as follows:

'2. The purpose of this letter is to make you aware that our client recently succeeded before the Full Court sitting in the KwaZulu-Natal Division of the High Court, Pietermaritzburg ("the Appeal Court") to obtain a unanimous order against Mziki Shareblock Limited ("Mziki") in the following terms: . . . '

...

4. As a member of Mziki, you qualify as a person "who derive[s] [a] right, privilege or title

through [Mziki] as contemplated in the Appeal Court's order. It is therefore imperative that you familiarise yourself with the content of the judgment (which provides the reasons for the order) so as to ensure that you do not contravene it.

. . .

6. Although you should take the time to carefully read the entirety of the judgment, your attention is specifically drawn to the following paragraphs thereof:

6.1 The relief that was sought by Snowy Owl was protection from abuse by Mziki of its right of way under the servitude over Snowy Owl's land and an order compelling Mziki to comply with its obligations under clause 4.2.8 [of the servitude] should it wish to exercise its right of way (*paragraph 11*);

. . .

11. Should you wish to traverse on Snowy Owl's land before sunrise and after sunset, you are invited to contact Mr Anton Louw to obtain a copy of Snowy Owl's current charge list and to make the necessary arrangements with him to ensure that you traverse at all times legally on Snowy Owls' land.

12. To ensure that all who traverse Snowy Owl's land has an enjoyable experience and to avoid Snowy Owl having to become embroiled in legal proceedings with individual members, you are encouraged to adhere not only to the provisions of the servitude in general but to the terms of the order in particular.

13. You are requested to confirm by reply that you have received this letter, the judgment and order, and the servitude and that you confirm that you will abide by the terms of the order.'

[9] On the same day, Mr Celliers circulated a text message via WhatsApp to the members of Mziki. The message reads:

'Dear Shareholders. We noted the email circulated by Snowy Owl. Please refrain from responding until such time as the thorough update has been provided at the AGM. The e-mail is once again out of context and litigation regarding the time by which Mziki needs to be off the land has not been completed. Please do not be intimidated and await full feedback from the board. Kind regards. Norman.'

[10] On 8 July 2019, Mr Celliers responded to the appellant's letter of 1 July 2019. In response, he stated:

'3. As to . . . ("the KZN judgment"):

3.1 It addresses the interpretation of sub-clause 4.2.8 of the servitude. This sub-clause exists to address the arrangements to be made with your client when our client's members wish to embark upon night drives after sunset. Mziki and its members are, and have been,

willing to comply therewith;

. . .

3.4 Sub-clause 4.2.8, and hence the KZN judgment does not address our rights of traverse over your client's property for purposes of game viewing in terms of [sub-clause] 4.1. Such rights should be exercised civiliter modo, include the right to embark upon traverse shortly before sunrise and return shortly after sunset, as was understood between the parties back in 1990 and has been the practice for almost 30 years.'

The annual general meeting (the AGM) of Mziki

[11] On 13 July 2019, the members of Mziki held their annual general meeting (AGM), which was chaired by Mr Celliers. The minutes of the said AGM were annexed to the appellant's application for contempt of court before the high court. It was contended that the minutes proved that the respondents during the AGM had made disparaging remarks about the judges who presided in the full court.

Amongst others, Mr Celliers stated the following:

'...We got to KZN and Advocate Steyn, she was brilliant, brilliant, brilliant.' A person identified person 5 in the record said 'Judge Steyn.' Mr Celliers said 'Judge Steyn what did I say? She started that case, and within 30 minutes, she had it... She had Snowy on the ropes...We had a full day hearing where eventually she got him to the point where she said, but how can you rely on this table? No...we downloaded it from the internet which internet website? We cannot even access it, it is not even online and in the end they at the last minutes, 30 minutes before the hearing ended they said judge, you know what, we'll abandon the time table, let the time table go, let it go; all we want is 4,2,8, the order that 4,2,8 hold. She did not buy it she sent them their way and we went back and I called Fef in the car back and I say, look I think she really got it, it was very, very well done and she got it....

She gave judgment in our favour with costs and she said "Snowy came to court for an interdict knowing that there was a dispute in interpretation of the day drive times. This dispute must go to Arbitration and an arbitrator must interpret 4.1 and they used 4,2,8 in the wrong context because the real dispute is not night driving; the real dispute when must day driving end, ok. And she threw it out with costs'

They then applied for leave to appeal, she looked at it, she gave a second judgment: Denied the leave to appeal, okay... They then went to the Supreme Court of Appeal in Bloemfontein.

Now we are 2 years back. It took forever, forever, forever, but in some point in time the Supreme Court in Bloemfontein met. They opened the file, it was not a long hearing at all, nobody was there, closed the file and said Leave to Appeal granted but the case was then brought back to KZN and there was a full bench hearing in the morning opened up, guys it is not pretty what is going on in the courts in terms of Judges. It was shocking how the session opened up in KZN and the knowledge of the matter at hand was – we sat there and we thought this is going to be a strange day. I am not a lawyer and do not know how our legal position is.

But if you read the Kwazulu Natal award, you will read that even those Judges, I do not want to minute incompetent, but let us say even those judges, they could not even get themselves to, to say be on the farm by sunset.'

Before the high court

[12] In the high court amongst the submissions made by the appellant is that, the respondents made certain utterances, which were meant to scandalise the judiciary as the means to disobey the order of the full court in issue. The appellant, contended that the minutes proved that the respondents had during the AGM made disparaging remarks about the judges who presided in the full court.

[13] To bolster their case, the appellant relied upon, amongst other things, photographs taken on various occasions implicating the members of Mziki who were traversing the land in contravention of the full court order. The photographs, which were admitted without any objection by the respondents, depicted that, from August 2019, motor vehicles owned and/or operated by the members of Mziki traversed the land of the appellant after sunset. The motor vehicles were identified by the Mziki logo and the shareblock number. Again, on 14 September 2019, a motor vehicle bearing a Mziki 12 logo, owned by Mr Derick Meyers (Mr Meyers), a member and director of Mziki, also traversed the appellant's land. Regarding the allegations pertaining to Mr Meyers, the respondents undertook to investigate the matter. Further, in support of this evidence was the text message which Mr Celliers forwarded to the members as well as the minutes of the AGM.

[14] In their defence, the respondents, alleged, amongst other things, that the recording of the minutes of the AGM was done secretly and in breach of Mziki's

policies. Therefore, there was a violation of Mziki's constitutional right to privacy. Furthermore, that the recording was in any event incomplete and thus quoted out of context. The respondents applied for the striking out of the record in terms of rule 6(11) read with rule 6(5) of the Uniform Rules of Court.³ On this point, the high court stated: 'Snowy Owl's argument on admissibility under this ground was advanced on the footing that the transcript evidenced the factual correctness of the statements on which its case is predicated. What I consider to be the hurdle besetting the admission of the recording in this matter, is the common cause fact that the recording does not constitute the recording of the entire proceedings of the meeting in question. It is not Snowy Owl's case that the recording reflected what transpired in the meeting, but it sought to assert the factual correctness of the statements in regard to [the] agenda point 3.2.'

[15] The high court without rejecting these allegations by the appellants found as follows:

'[a]fter giving the matter careful thought, I am driven to conclude that that Mr Celliers is alleged to have said of and concerning the judges fell short of the criticism which tended to bring the administration of justice into contempt.'

[16] Furthermore, the high court found:

'The sufficiency or otherwise of the meagre and imprecise evidence adduced on behalf of Snowy Owl to this critical issue is a matter which was hotly debated during argument. What, in my view, cast a significant shadow across Snowy Owl's path with regard to this issue is the following. Firstly, the evidence does not show that the persons who are alleged to have breached the court order were persons who derived any right, privilege or title through Mziki.

³ Rule 6(11) provides:

'Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.'

Rule 6(5) provides:

'(a) Every application other than one brought *ex parte* must be brought on notice of motion as near as may be in accordance with Form 2 (a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

(b) In a notice of motion the applicant must –

- (i) appoint an address within 15 kilometres of the office of the registrar, at which applicant will accept notice and service of all documents in such proceedings;
- (ii) state the applicant's postal, facsimile or electronic mail addresses where available; and
- (iii) set forth a day, not less than 10 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.'

Secondly, the evidence does not show that the unidentified individuals involved were in any way influenced by what Mr Celliers had said when he addressed the AGM. Critically, even if it were shown that the alleged breaches were committed by Mziki's members, their conduct does not constitute conduct of Mziki, and no evidence was presented to show that they were acting for and on behalf of Mziki. The difficulty facing Snowy Owl is that, at best, the evidence shows that Mr Celliers had stated to Mziki's members that they could act contrary to the court order, and that certain unidentified individuals had breached the court order. In the circumstances, I am not persuaded that Snowy Owl has proven all the elements of the offence.'

[17] The high court further stated:

'I cannot ignore what the respondents have said of and concerning Mr Tony Ridl considering the role he played in sourcing the recording. In my view, it would be too dangerous for this court to rely on incomplete recording, due regard being had to the facts and circumstances of this case. It follows, therefore, that the transcript (annexure "FA 8") and its contents directly or indirectly referred to in the founding affidavits in paras...are struck out from these proceedings.'

Before this Court

[18] In this Court, the submissions made by the appellant pertaining to scandalising the judiciary were repeated. The allegations quoted above at para 11 made by Mr Celliers (which need not be repeated in this judgment, but are part of the record) are serious. These remarks deserve to be investigated and sanctioned by the relevant bodies including the Human Rights Commission and or the National Prosecuting Authority, if so advised.

[19] The respondents submitted that the non-admissibility of the evidence obtained in contravention of the constitution of Mziki was repeated. It was further submitted that the order of the full court is ambiguous. It was not denied that Mr Celliers acted on behalf of Mziki and its members, even though he did not traverse the land. The respondents' attitude was that the order of the full court is wrong. Counsel for the respondents contended that, the correct order was that of Steyn J. According to the respondents, legal opinion was sought to clarify the full court order. However, such legal opinion was not placed before this Court. In fact, the relevance of same is not significant, because the remedy provided in rule 42(1)(a) was available but not

invoked.⁴

[20] On the acceptance of the judgment of the high court with regard to the utterances made by Mr Celliers in the AGM, the utterances amounting to non-compliance with the order of the full court were indeed made. For the purposes of the determination of this appeal, there is no need to decide whether the record of the AGM proceedings was admissible or not.

[21] The issue to be determined is whether the respondents are in contempt of the order of the full court, dated 24 March 2019.

The law

[22] It is trite that an applicant who alleges contempt of court must establish that: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.

Contempt of court

[23] The thrust of s 165 of the Constitution was expounded by Nkabinde J in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*,⁵ in which it was stated that: 'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial

⁴ Rule 42(1)(a) provides:

'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

⁵ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) paras 1-2.

authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. . .’

[24] In *Fakie N O v CCII Systems (Pty) Ltd*,⁶ this Court held that in civil proceedings, to succeed, an applicant must prove the requisites beyond reasonable doubt. In *S v Mamabolo*,⁷ it was held that contempt of court consists in ‘unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’. Recently, in *Secretary of the JCI v Zuma*,⁸ the Constitutional Court explained comprehensively how the purpose of contempt of court proceedings should be understood, as follows:

‘[T]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.’⁹

[25] The case of *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*¹⁰ developed the law pertaining to the proper approach to the application of the tests

⁶ *Fakie N O v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42.

⁷ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 13.

⁸ Fnt 1 above.

⁹ Ibid para 26.

¹⁰ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC).

given the existing distinction between the committal and coercive remedies of contempt orders. The following was said in paragraph 67:

‘ . . . [O]n a reading of *Fakie*, *Pheko II*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies – for example, declaratory relief, *mandamus*, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.’

Discussion

[26] From the statements Mr Celliers made in the text message and communication to the members of Mziki, it is not difficult to conclude that the respondents were deliberate in undermining the order of the full court. In particular, Mr Celliers’s text message and the correspondence, which purported to discuss options relating to the legal opinion obtained, therefore characterised the order of the full court as the appellant’s intimidation tactics. The respondents refuse to see the court order for what it is. Furthermore, Mziki did not produce any evidence regarding the investigation, as they promised the appellant they would do. Disingenuously so, the respondents relied on the fact that the photos were not clear and/or the security guards stated that they were not sure whether Mr Meyers was the driver of the motor vehicle marked Mziki 12.

[27] On their own version on the application of the *Plascon-Evans* rule¹¹, they did not state that the occupants of the motor vehicles with logos reading Mziki 4 and Mziki 12 traversing the appellant’s land were not their members. The duty rested upon the respondents to take responsibility of ensuring that the members of Mziki exercise their

¹¹ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

rights properly. I am constrained to conclude that on the facts, the respondents should collectively be held liable for the conduct of the members of Mziki.

[28] It is unrefuted that the high court applied the criminal law test of contempt (instead of the civil one), placing the burden of proof upon the appellant. This is contrary to the trite principle that once the appellant had proven the existence of the order, service or notice, and non-compliance, the evidential burden to disprove wilfulness and *mala fides* rested upon the respondents. This principle was stated in *Fakie, Mamabolo* and recently restated in *Secretary of the JCI v Zuma*, 'affording the contemnor another opportunity to adhere to the original court order'. Apart from the bare denials which litter their affidavits, the respondents did nothing to disprove the allegations against them. In the result, this Court unequivocally accepts that Mziki members traversed the land in contempt of the order of the full court.

Conclusion

[29] In light of the foregoing, I find that the respondents have not discharged the evidentiary burden to establish a reasonable doubt, by disproving wilfulness and *mala fides*. The appellant has successfully proven the case of contempt of court. The appeal ought to succeed.

[30] Last, the issue of costs. It is evident that the conduct of the respondents as set out above ie wanton and in total disregard of a court order, clearly attracts a punitive costs order instead of the normal costs order. And as such costs on an attorney and client scale will be appropriate in these circumstances.

[31] In the result, I make the following order:

- 1 The appeal succeeds.
- 2 The order of the high court is set aside and replaced by the following:
 - '(a) The first and second respondents are found to be in contempt of the order granted by the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg on 24 May 2019.
 - (b) The first and second respondents shall, within 30 days of the date of this order:

(i) take such steps as may be necessary to introduce rules to prevent the second respondent and its members, and all persons who derive any right, privilege or title through the second respondent, from contravening the order above in paragraph (a).

(ii) take such steps as may be necessary to ensure compliance with the rules so made.

(c) The first and second respondents, together with the members of the second respondent and all persons who derive any right, privilege or title through the second respondent shall not engage in any conduct, which have the effect of non-compliance with the order in paragraph (a).

(d) The first and second respondents to pay the costs of the application in the high court, jointly and severally, the one paying the other to be absolved. Such costs to be paid on attorney and client scale.'

3 The first and second respondents to pay the costs of the appeal, including the application for leave to appeal in the high court, jointly and severally, the one paying the other to be absolved. Such costs to be paid on attorney and client scale.

N P MALI
ACTING JUDGE OF APPEAL

Hughes JA (Masipa AJ concurring):

[1] I have had the benefit of reading the majority judgment penned by my sister, Mali AJA, and agree with the order granted. My reasons for writing separately are set out in the succeeding paragraphs of this judgment.

[2] Whilst I agree with the reasoning and conclusion in respect of the issues pertaining to contempt of court, I diverge on the issue with regard to the alleged

submissions made by the appellant pertaining to scandalising the judiciary (See paras 11 and 18 above).

[3] Even if these allegations were made, this Court cannot make a conclusive finding on this in this judgment, as the allegations were found to be inadmissible by the high court. Thus, we cannot now put that which was inadmissible into our judgment, unless we make a finding that the high court erred in declaring the minutes of the AGM inadmissible. For us to include such evidence, we have to state why we now refer to it and admit the allegations in this Court, and thus same becomes admissible now in this Court.

[4] In *Fischer v Ramahlele*,¹² this Court stated that we are confined to that which was before the court below in adjudicating the issues. Only in an instance of a question of law which emerges fully from the evidence (admitted evidence) and which is necessary for the decision of the case, can we mero motu bring in this question of law, ie whether or not the disparaging allegations allegedly made by Mr Celliers are admissible.

[5] For these reasons, I disagree with the majority judgment's reasoning on the issue with regard to the alleged submissions made by the appellant pertaining to scandalising the judiciary.

W HUGHES
JUDGE OF APPEAL

¹² *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13-14.

Appearances

| | |
|----------------------|--|
| For the appellant: | R S Shepstone |
| Instructed by: | Errol Goss Attorneys, Johannesburg Eugene Attorneys, Bloemfontein |
| For the respondents: | A J Rall SC |
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