



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 290/24

In the matter between:

**SHAYNAZ PRITHILAL**

Applicant

and

**AKANI EGOLI (PTY) LIMITED**

First Respondent

**TSOGO SUN GAMING LIMITED**

Second Respondent

**Neutral citation:** *Prithilal v Akani Egoli (Pty) Ltd and Another* [2025] ZACC 5

**Coram:** Maya CJ, Madlanga ADCJ, Dambuza AJ, Goosen AJ, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

**Judgment:** Rogers J (unanimous)

**Decided on:** 24 April 2025

**Summary:** Attorney and client costs — Court's duty to give reasons — sections 1(c) and 34 of the Constitution

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**ORDER**

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On application for leave to appeal from the High Court, Gauteng Division, Johannesburg:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. Leave to file a replying affidavit is refused.
3. Leave to appeal is granted.
4. The appeal succeeds.
5. The words “on the attorney and client scale” are struck out of paragraph 2 of the High Court’s order.
6. The applicant must bear her own costs in respect of her application for leave to file a replying affidavit.
7. Save as set out in paragraph 6 of this order, the first respondent must pay the applicant’s costs in this Court and the costs of her applications for leave to appeal in the High Court and Supreme Court of Appeal.

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## JUDGMENT

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ROGERS J (Maya CJ, Madlanga ADCJ, Dambuza AJ, Goosen AJ, Majiedt J, Mhlantla J, Opperman AJ, Theron J and Tshiqi J):

[1] This case, which we are deciding without a hearing, is about a punitive costs order which the High Court, Gauteng Division, Johannesburg, (High Court) granted in favour of the first respondent, Akani Egoli (Pty) Limited (Akani), against the applicant, Ms Shaynaz Prithilal.

[2] In September 2021 Ms Prithilal instituted a delictual action against the second respondent, Tsogo Sun Gaming Limited (Tsogo), alleging that she had suffered substantial damages when she slipped and fell at the Gold Reef City Casino in September 2018. She pleaded that Tsogo owned and operated the casino. In its plea, delivered in December 2021, Tsogo alleged that Akani owned and operated the casino.

In February 2023 Ms Prithilal served an application to join Akani as a second defendant. Akani opposed the application on the basis that her claim against it was prescribed.

[3] The application was argued on 20 February 2024. On the same date the High Court delivered an *ex tempore* (off-the-cuff) oral judgment granting the joinder and ordering Ms Prithilal to pay Akani's costs on the attorney and client scale. Her applications for leave to appeal the punitive costs order having failed in the High Court and Supreme Court of Appeal, she now seeks leave to appeal to this Court.

[4] In her founding affidavit Ms Prithilal invokes our constitutional jurisdiction,<sup>1</sup> contending that the High Court's unexplained imposition of punitive costs violated her rights under section 34 of the Constitution.<sup>2</sup> She also invokes our general jurisdiction,<sup>3</sup> identifying, as a point of law of general public importance, the question whether a Judge can mulct a litigant in punitive costs without giving reasons. Akani, which opposes the application, denies that our jurisdiction is engaged and disputes that there is any basis for interfering in the High Court's exercise of its costs discretion.

[5] At the instance of the Chief Justice, directions were issued calling on the parties to file written submissions on whether the dispute about the punitive costs order engaged our jurisdiction and, if so, whether the Court should interfere. The submissions followed the lines of the affidavits, save that Ms Prithilal added a further basis for jurisdiction, namely that the punitive costs order was an arbitrary deprivation of property in violation of section 25(1) of the Constitution.<sup>4</sup>

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<sup>1</sup> Section 167(3)(b)(i) of the Constitution provides that the Constitutional Court may decide "constitutional matters".

<sup>2</sup> Section 34 provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

<sup>3</sup> Section 167(3)(b)(ii) provides that the Constitutional Court may decide "any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

<sup>4</sup> Section 25(1) states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[6] On the merits of the joinder application, the High Court considered that there were factual disputes as to when Ms Prithilal could reasonably have learnt that Akani was the owner and operator of the casino.<sup>5</sup> For this reason, the High Court declined to uphold Akani's basis for opposing the joinder, stating that Akani should raise prescription in a special plea. The High Court thus granted the joinder order. It gave no reasons for its costs order, punitive or otherwise.

[7] Since Ms Prithilal was successful in the joinder application, one would have expected the High Court to explain why she, rather than Akani, was to pay the costs. Ms Prithilal touches on this in passing in her founding affidavit, criticising the High Court for failing to consider whether Akani's opposition to the joinder application was reasonable. However, the focus of her application is the unexplained punitive costs order, and it is this feature that she says engages our jurisdiction.

[8] Save where a costs order follows the general rule applicable in a particular situation, a court must give reasons for its costs order.<sup>6</sup> This is particularly so in the

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<sup>5</sup> In terms of the Prescription Act 68 of 1969, the applicable prescription period is three years. In terms of section 12(1), and subject to the further subsections in section 12, prescription begins to run "as soon as the debt is due". Section 12(3) states:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

<sup>6</sup> Compare *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605; [2002] 3 All ER 385 (CA), the leading case in England on a court's duty to give reasons, where Lord Phillips MR said the following at para 14:

"It is an unhappy fact that awards of costs often have greater financial significance for the parties than the decision on the substance of the dispute. Decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment. Often no reasons are given. Such a practice can, we believe, only comply with Article 6 if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. This was almost always the case before the introduction of the new Civil Procedure Rules, where the usual order was that costs 'followed the event'. The new rules encourage costs orders that more nicely reflect the extent to which each party has acted reasonably in the conduct of the litigation. Where the reason for an order as to costs is not obvious, the Judge should explain why he or she has made the order. The explanation can usually be brief. The manner in which the Strasbourg Court itself deals with applications for costs provides a model of all that is normally required."

The reference to Article 6 in the above passage is to Article 6(1) of the European Convention on Human Rights, which is broadly the equivalent of section 34 of our Bill of Rights. Article 6(1) provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and

case of an award of attorney and client costs, which is – unless based on an agreement between the parties – punitive in nature.<sup>7</sup> The judicial power to order costs requires the court to exercise a discretion. Unless a judicial officer gives reasons, it is impossible to know whether the discretion was exercised at all or, if it was, whether it was exercised properly.

[9] In *Mphahlele*<sup>8</sup> this Court said that the Judiciary was bound by the rule of law, a founding value proclaimed in section 1 of the Constitution. The Court continued:

“The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to make an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”<sup>9</sup>

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public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

<sup>7</sup> In *Swartbooi v Brink* [2003] ZACC 25; 2003 (5) BCLR 502 (CC); 2006 (1) SA 203 (CC) this Court at para 27 quoted with approval the following passage from *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607:

“The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

<sup>8</sup> *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

<sup>9</sup> Id at para 12. See also *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; [2009] 9 BLLR 847 (CC); 2009 (10) BCLR 1046 (CC); (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC) at paras 16-18 and *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); 2021 (2) SA 54 (CC); [2021] 2 BLLR 123 (CC);

[10] In my view, therefore, the High Court’s unreasoned award of punitive costs against Ms Prithilal is a constitutional matter. It is in the interests of justice to entertain the application, because in the absence of a reasoned award such an order is ordinarily not sustainable and the matter can be disposed of without any significant diversion of the Court’s resources.

[11] Akani has argued that there are no grounds to interfere in the High Court’s exercise of its discretion.<sup>10</sup> However, in the absence of reasons it is impossible to know that the High Court exercised a discretion at all, and it is certainly not possible to say that it made the order by acting on correct principles and considering all relevant factors.<sup>11</sup> Even when this failure was pertinently raised in Ms Prithilal’s application for leave to appeal, the High Court did not, when dismissing her application, explain its decision. One of the consequences of the absence of reasons is that Ms Prithilal was deprived of the opportunity of demonstrating to the Supreme Court of Appeal that the High Court went astray on a basis justifying appellate interference.

[12] Akani has submitted that we should have regard to the transcript of the oral argument in the High Court in order to understand why punitive costs were awarded. I shall assume in Akani’s favour that there may be circumstances where oral argument

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(2021) 42 ILJ 269 (CC) at para 17: “It is important to stress that the High Court ordinarily bears a constitutional duty to provide reasons for its decisions. Failure to do so is an abdication of this constitutional duty.”

<sup>10</sup> The awarding of costs involves the exercise of true discretion, of the kind described by this Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88:

“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’.”

<sup>11</sup> See *Motowest Bikes and ATVS v Calvern Financial Services* [2013] ZASCA 196 at para 13, where Majiedt JA said:

“The court below did not furnish any reasons at all for its punitive costs order. Absent such reasons this court is left in the dark as to the basis for such an order. It is thus difficult to conclude that there was a proper judicial exercise by the trial court of its discretion on costs. The punitive costs order must therefore be set aside.”

and engagement with the bench are such as to leave a litigant in no doubt as to why it was mulcted in punitive costs, and that in those circumstances the absence of reasons in the judgment might be overlooked. On that assumption, the transcript falls far short of showing any reasons for a punitive costs order.

[13] In the oral argument Akani's counsel criticised Ms Prithilal for (a) having issued summons just two weeks before the lapse of three years from the date of her fall; and (b) then taking 15 months, from the delivery of Tsogo's plea, to bring the joinder application. Those submissions, however, were part of Akani's counsel's attempt to persuade the High Court that the claim against Akani had prescribed. The High Court was not prepared to find, at the stage of joinder, that the three-year period of prescription in respect of Akani began to run before the delivery of Tsogo's plea in December 2021. The order for Akani's joinder was made on the basis that Ms Prithilal's claim against Akani might not have prescribed and that prescription was something to be raised in a special plea.

[14] In those circumstances, it is impossible to say that the timing of the joinder application was indicative of any impropriety by Ms Prithilal in the conduct of the litigation or that the High Court considered that there was any such impropriety. The application was not brought on the eve of a trial. No inconvenience or prejudice to Akani or Tsogo was apparent. It may yet emerge, pursuant to the adjudication of a special plea, that Ms Prithilal's claim against Akani was brought in time. Why then should she be punished for having taken the time that the law allowed her?

[15] The transcript reveals that at no stage was the question of a punitive costs order against Ms Prithilal ventilated. However, at the end of Ms Prithilal's counsel's brief replying argument an exchange took place between counsel and the Judge to which I must refer. Regrettably, the Judge had throughout displayed impatience with counsel on both sides. In her replying argument, Ms Prithilal's counsel was dealing with the question of prescription and the complex corporate structure of which Akani formed part. This exchange with the Judge then ensued:

“Court: I am concerned and the only reason why I leave this slither of hope open to your client is that at some point she might actually sue her attorneys for their possible negligence of doing nothing, almost nothing, and I do not want her to pay the price for that. I would rather a trial judge hear what she has to say and make a decision, but I have serious misgivings about your attorney’s handling of this matter, and I am not sure that the applicant should pay the price for what her attorney has or has not done, and I am going to reflect that in the cost order.

Ms Bedhesi: M’Lord, then just on the issue of costs. If it is accepted that the applicant did only find out, because she is the creditor . . . [Intervenues]

Court: I am not going to make that decision of when she found out. The trial judge is going to make that decision. I am simply going to reflect my displeasure with your attorney’s conduct in my cost order. Is there anything further?

Ms Bedhesi: I have nothing further to add.”

[16] In relation to costs, the reason for the Judge’s displeasure with Ms Prithilal’s attorney is hard to grasp. The attorney’s conduct had not caused costs to be run up. If the attorney was guilty of delay, and if it were found in due course that this caused Ms Prithilal’s claim against Akani to become prescribed, Ms Prithilal might have a legitimate complaint against her attorney, but this was irrelevant to the joinder application, because the Judge made no finding that her claim had prescribed. In any event, the Judge’s remarks, while they might have explained an order that Ms Prithilal’s attorney pay the costs *de bonis propriis* (out of his own pocket), could not possibly explain why Ms Prithilal herself was burdened with an order for attorney and client costs. The actual costs order was entirely antithetical to the Judge’s remarks which I have quoted.

[17] Ms Prithilal has sought condonation for the late filing of her application in this Court. The application should have been filed by 11 September 2024. It was served on the respondents two court days late and filed in this Court shortly afterwards.

Ms Prithilal has explained that she was in hospital when the Supreme Court of Appeal dismissed her application in that Court, and that due to strong pain medication she was not able to give the case her attention until 5 September 2024. The application, she says, could only be finalised on 16 September 2024. The explanation is acceptable, the delay is modest, and there has been no prejudice. Condonation should be granted.

[18] Ms Prithilal has applied for leave to file a replying affidavit. Replying affidavits are not ordinarily permitted in this Court in applications for leave to appeal. There are no special circumstances justifying one in this case.

[19] As to costs, Akani opposed Ms Prithilal's attempts in the High Court, the Supreme Court of Appeal and this Court to appeal the punitive costs order. Akani could simply have abandoned the benefit of the attorney and client component. There is no reason why it should not pay Ms Prithilal's costs in this Court and the costs of her unsuccessful applications for leave to appeal in the High Court and Supreme Court of Appeal, save that Ms Prithilal must bear her own costs of her unsuccessful application to file a replying affidavit.

[20] I make the following order:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. Leave to file a replying affidavit is refused.
3. Leave to appeal is granted.
4. The appeal succeeds.
5. The words "on the attorney and client scale" are struck out of paragraph 2 of the High Court's order.
6. The applicant must bear her own costs in respect of her application for leave to file a replying affidavit.
7. Save as set out in paragraph 6 of this order, the first respondent must pay the applicant's costs in this Court and the costs of her applications for leave to appeal in the High Court and Supreme Court of Appeal.

For the Applicant:

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For the First Respondent:

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