THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1447/2018

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	**APPELLANT**

and

THE OFFICE OF THE PUBLIC PROTECTOR	**FIRST RESPONDENT**
THE PUBLIC PROTECTOR	**SECOND RESPONDENT**
ECONOMIC FREEDOM FIGHTERS	**THIRD RESPONDENT**
THE UNITED DEMOCRATIC MOVEMENT	**FOURTH RESPONDENT**
THE CONGRESS OF THE PEOPLE	**FIFTH RESPONDENT**
THE DEMOCRATIC ALLIANCE	**SIXTH RESPONDENT**
MABEL PETRONELLA MENTOR	**SEVENTH RESPONDENT**
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	**EIGHTH RESPONDENT**

Neutral citation: *Jacob G Zuma v The Office of the Public Protector and Others* (1447/18) [2020] ZASCA 138 (30 October 2020)

Coram: MAYA P, ZONDI, DAMBUZA and SCHIPPERS JJA and UNTERHALTER AJA

Heard: 28 August 2020

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Summary: Application for leave to appeal to Supreme Court of Appeal – against high court's refusal to grant leave to appeal costs order – awarded against public functionary on punitive scale – high court exercises true discretion in granting costs order – interference by appellate court only in case of material misdirection – not shown – application dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mlambo JP and Boruchowitz and Hughes JJ):

The application for leave to appeal is dismissed with costs, including the costs of two counsel on the scale as between attorney and client.

JUDGMENT

Schippers JA (Maya P, Zondi and Dambuza JJA and Unterhalter AJA concurring):

[1] The United Nations 2004 Convention against Corruption, to which South Africa is a signatory, describes corruption in graphic and unequivocal language:

'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.'[1]

[1] The United Nations Convention Against Corruption (2004), adopted by the UN General Assembly on 31 October 2003, which came into force on 14 December 2005. It was signed by South Africa on 9 December 2003 and ratified on 22 November 2004.

[2] This application has its genesis in grave allegations of corruption at the highest levels of government, contained in the 'State of Capture Report' by the former Public Protector, Ms Thuli Madonsela, published in 2016 (the Report).[2] The issue is whether the applicant, Mr Jacob Gedleyihlekisa Zuma, the former President of the Republic of South Africa, should be granted leave to appeal against an order by a full bench of the Gauteng Division of the High Court, Pretoria (Mlambo JP and Boruchowitz and Hughes JJ) (the high court), directing Mr Zuma to pay, in his personal capacity and on a punitive scale, the costs of a failed application to review and set aside a decision by the Public Protector. In terms of that decision, Mr Zuma was required to appoint a commission to conduct an enquiry into allegations of corruption involving Mr Zuma as the Head of State, and senior officials in government.

Facts

[3] The Report contains troubling allegations of improper relationships between Mr Zuma, Cabinet Ministers and senior government officials on the one hand, and the Gupta family on the other. It states the following. Mr Zuma did nothing to investigate claims that some six weeks before he removed Mr Nhlanhla Nene, the former Minister of Finance, in December 2015, members of the Gupta family had offered Mr Mcebisi Jonas, then the Deputy Minister of Finance, R600 million and the position of Minister of Finance in exchange for favours. This allegedly happened in the presence of Mr Duduzane Zuma, the former President's son, at the Gupta family residence in Saxonwold, Johannesburg, to which Mr Jonas had been taken. A similar corrupt offer of a cabinet post was allegedly made to the seventh respondent, Ms Mabel Mentor, then a member of Parliament, in

[2] State of Capture Report: No 6 of 2016/2017 entitled, 'Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of the State-Owned Enterprises resulting in improper and possibly corrupt award of State contracts and benefits to the Gupta family's businesses'.

return for cancelling the South African Airways route to India. She too, was taken to the Gupta's residence where the offer was made, and where Mr Zuma was present.

[4] The Report also states that Mr Zuma's appointment of Mr Des van Rooyen as the Minister of Finance on 9 December 2015, which had a severe negative impact on the South African economy in the following days, was allegedly known to the Gupta family beforehand. Cellphone evidence showed that Mr Van Rooyen was in Saxonwold on the night before that appointment. The Report also contains evidence that Mr Brian Molefe, then the Chief Executive Officer of Eskom, was a regular visitor to the Gupta residence in Saxonwold, and it is alleged that Eskom (and other state-owned entities) awarded state contracts in corrupt circumstances, totalling billions of Rands to Gupta-owned companies and business associates, including Mr Duduzane Zuma. It is also alleged in the Report that the Cabinet had become involved in attempts to hold commercial banks accountable for withdrawing banking facilities from Gupta-owned companies; and that Mr Mosebenzi Zwane, the former Minister of Mineral Resources, illegally secured the award of numerous government contracts to the Gupta family.

[5] On 13 October 2016, the day before the Report was due to be released, Mr Zuma, Mr Van Rooyen and Mr Zwane launched an urgent application in the high court to stop its publication, pending a review of the Public Protector's decision. However, they withdrew that application on 1 November 2016, the day it was to be heard, and tendered the costs thereof. Consequently, the Report was released on 2 November 2016.

[6] In the Report the Public Protector stated that she was unable to fully investigate the allegations of state capture, due to the extent of the issues and the inadequacy of funds allocated to her office by government. As President, Mr

Zuma was directly implicated in the improper conduct referred to in the Report. The Public Protector's remedial action therefore required the President to appoint a judge selected by the Chief Justice to head a commission of inquiry into the allegations of state capture, using the Report as a starting point. The commission had to be set up within 30 days, and present its report with findings and recommendations to the President within 180 days. Thereafter, within 14 days the President was required to submit the report to Parliament, together with 'an indication of his implementation of the commission's recommendations'.

[7] Mr Zuma however did not appoint the commission within 30 days. Instead, on 2 December 2016 and in his capacity as President, Mr Zuma launched an application in the high court, in which he sought an order reviewing and setting aside the remedial action required by the Public Protector; and that the matter be remitted to her for further investigation (the review application).

[8] The review grounds, in sum, were these. Mr Zuma alleged that the remedial action was unconstitutional because it directed him to establish a commission of enquiry, contrary to the provisions of s 84(2)*(f)* of the Constitution, which reserved that power to the President.[3] He said that he could not be instructed by anyone as to when and how he should appoint a commission of inquiry, and if he were to implement the remedial action, the commission 'would be invalid and a nullity', and would amount to the 'exercise of an executive power under dictation'. The appointment of a judge by the Chief Justice to head the enquiry, Mr Zuma said, was unconstitutional and a breach of the doctrine of separation of powers, because the Chief Justice has no such power under the Constitution. The

[3] Section 84(2)*(f)* of the Constitution provides:
84 Powers and functions of President
. . .
(2) The President is responsible for-
. . .
(f) appointing commissions of inquiry.

decision to 'outsource' the remedial action was irrational. The remedial action was inconsistent with the Executive Members' Ethics Act 82 of 1998 (the Ethics Act), which required complaints of the kind in question to be investigated by the Public Protector.

[9] On 26 May 2017 the Office of the Presidency issued a media statement that none of the review grounds suggested in any way that Mr Zuma was opposed to the establishment of a judicial commission of inquiry in terms of the Public Protector's remedial action. On 22 June 2017 Mr Zuma informed Parliament that a decision had been taken to establish the commission and that the date of its commencement would be announced.

[10] On 24 July 2017 Mr Zuma filed a supplementary affidavit in the review application, setting out further grounds for the review of the remedial action. They were these. The Public Protector had not made any findings that Mr Zuma had acted improperly or that his conduct had caused any prejudice. It was irrational to remove the investigation from the newly appointed Public Protector. The Public Protector does not have the power under the Constitution and the law to direct that the allegations of state capture be investigated by a commission of enquiry.

[11] A few days later, on 4 August 2017, the African National Congress issued a press release stating that the appointment of the commission was 'of extreme urgency'. Despite the public announcements that a commission of enquiry into state capture would be established in accordance with the Public Protector's remedial action, Mr Zuma did not inform the reviewing court of his decision to establish the commission.

[12] On 13 December 2017 the high court dismissed the review application on the following grounds. The Public Protector has the power in appropriate circumstances to direct the President to appoint a commission of enquiry, in order to fulfil her constitutional mandate. There is nothing in the Public Protector Act 23 of 1994 or the Ethics Act, that prohibits the Public Protector from instructing another organ of state to conduct a further investigation. Although the Report does not contain firm findings concerning wrongdoing by the President, prima facie there was serious misconduct or impropriety on the part of the President, the Gupta family and the functionaries, persons and entities referred to in the Report. Consequently, the Public Protector was entitled to take remedial action, which was appropriate, as a commission of enquiry is transparent, independent, conducts proceedings in public, and is able to subpoena witnesses and documentation. The appointment of a judge by the Chief Justice to head the commission was fitting, since the President was personally implicated in the allegations of state capture and the award of state contracts to Gupta-owned entities, which allegedly also involved his son. The high court ordered Mr Zuma to pay the costs of the review application in his personal capacity, on the scale as between attorney and client (the costs order).

[13] On 22 December 2017 Mr Zuma lodged an application for leave to appeal the whole of the judgment and order of the high court in the review application. On 9 January 2018 Mr Zuma publicly announced that he would comply with the high court's order and establish the commission. That commission, chaired by Deputy Chief Justice Zondo, has since been established and is ongoing.

[14] On 14 February 2018 Mr Zuma resigned as President of the Republic of South Africa. He was succeeded by President Cyril Ramaphosa, who on 6 April 2018 withdrew the application for leave to appeal against the dismissal of the review application (enrolled for hearing on 12 April 2018). The withdrawal was

made an order of court on 18 April 2018. The application to appeal the costs order was not withdrawn as it affected Mr Zuma personally.

[15] On 4 June 2018 Mr Zuma launched an application to intervene in the high court proceedings in his personal capacity; to condone the late filing of his application for leave to appeal; and for leave to appeal the costs order. The intervention application was granted. The applications for condonation and leave to appeal the costs order were dismissed. Mr Zuma then applied for special leave to this Court, which referred the application for leave to appeal the costs order for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

[16] The application for leave to appeal to this Court was opposed by the Economic Freedom Fighters, the Democratic Alliance and the Council for the Advancement of the South African Constitution (the respondents). They and others, including Ms Mentor, opposed the review application.

Prospects of success

[17] Before us, it was contended that the costs order should not have been made because the remedial action was unprecedented and its effect was to 'amend the Constitution'. The challenge to the remedial action, so it was contended, was legitimate and not reckless because it raised important issues concerning the exercise of executive power, and did so on the basis of legal advice, and hence the high court's order as to costs failed to give this consideration the decisive weight it warranted in the determination of costs.

[18] There is however no appeal against the high court's order dismissing the review application. An applicant for leave to appeal cannot accept the lower court's judgment on the merits on the one hand, but challenge the correctness of

those findings to dispute the correctness of its order on costs, on the other. This is untenable. In short, it is impermissible to seek to relitigate the merits of a review in an appeal purely on costs. In *Khumalo v Twin City Developers*,[4] Tshiqi JA stated this principle as follows:

'In the absence of an appeal against all these findings, it is impermissible for the appellant to rely on these allegations to justify its appeal on a consideration of costs only. Put differently, in instances where an appellant has elected not to appeal against the merits and the factual findings of a lower court, an appeal court is not at liberty to interrogate the correctness thereof.'

[19] Since there is no appeal against the order dismissing the review, the only question is whether the appeal against the costs order has a reasonable prospect of success.[5] In this regard Mr Zuma faces a formidable hurdle: in granting a costs order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion, unless there was a material misdirection by the lower court.

[20] Recently, in *Public Protector v SARB*,[6] the Constitutional Court affirmed the principle that an appellate court will not lightly interfere with the exercise of a true discretion, which involves a choice between a number of equally permissible options. This principle applies both to an award of costs *de bonis propriis* and costs on a punitive scale.[7] Interference is warranted only where the discretion was not exercised judicially; the decision was influenced by wrong principles; the decision was affected by a misdirection on the facts; or the decision could not reasonably have been reached by a court properly directing itself to the

[4] *Khumalo and Another v Twin City Developers (Pty) Ltd and Others* [2017] ZASCA 143 para 60.
[5] In terms of s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may be granted only where the court is of the opinion that the appeal has a reasonable prospect of success.
[6] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) para 144.
[7] *Public Protector v SARB* fn 6 para 226.

relevant facts and principles.[8] It is not sufficient on appeal against a costs order simply to show that the lower court's order was wrong.[9]

[21] The Constitutional Court has said that an appeal court 'should be slow to substitute its own decision simply because it does not agree with the permissible option chosen by the lower court'.[10] The reason for this was explained by Moseneke DCJ in *Florence v Government of the RSA*,[11] as follows:

'This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'

[22] This approach is fortified by s 16(2)*(a)* of the Superior Courts Act 10 of 2013, which provides:

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

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

This Court has held that when interpreting the concept 'exceptional circumstances' courts 'will best give effect to the intention of the legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon'.[12]

[23] It was argued on behalf of Mr Zuma that the review application fell squarely within the principles relating to costs in constitutional litigation laid down in *Biowatch Trust v Registrar Genetic Resources*,[13] since the question whether the remedial action was consistent with the Constitution applies not only

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[8] Ibid para 107.
[9] Ibid para 144.
[10] Ibid 8 para 145.
[11] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 113.
[12] *Mgwenya NO and Others v Kruger and Another* [2017] ZASCA 102 para 8.
[13] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

to this case but also to future cases. This, so it was argued, constituted exceptional circumstances justifying intervention by this Court, and rendered an appeal against only the costs order permissible.

[24] The argument however is unsound. *Biowatch* was an exceptional case that challenged the correct legal position for the award of costs in constitutional litigation. In this case the applicant does not suggest that the existing law is wrong in any way. His case is that the law concerning the issuance of personal costs orders against public officials was misapplied on the facts. *Biowatch* therefore does not aid him.

[25] The high court's reasons for the costs order may be summarised as follows. The overarching basis for the Public Protector's remedial action was that Mr Zuma was personally implicated in the allegations of state capture. Thus, Mr Zuma could not have been in any doubt that his own powers were not untrammelled, and that he could not appoint a commission of enquiry to investigate evidence of his own involvement in malfeasance. The review application was barred by peremption when Mr Zuma publicly announced his unequivocal intention to establish the commission. Aside from this, Mr Zuma was perempted from challenging the remedial action – he had established the State Capture Commission, presided over by a judge selected by the Chief Justice, in accordance with its terms.

[26] The Report had uncovered worrying levels of corruption in government departments and state-owned entities, involving large amounts of taxpayer funds and state resources. The Public Protector's remedial action presented Mr Zuma with an opportunity to confront and address the problem. Instead of doing so, he launched the review application which further delayed the resolution of the state capture allegations. This conduct, the high court held, was reckless and

unreasonable, and taxpayers should not foot the bill for the actions of wayward officials who disregard constitutional norms.

[27] At the hearing of the review application Mr Zuma abandoned the relief that the matter be remitted to the Public Protector for further investigation. The high court endorsed the submission that this last-minute change of course established that the review application had been brought for an improper or unconstitutional purpose – to ensure that the serious issues raised in the Report which implicated Mr Zuma, his friends and his family, were not investigated at all – unless he got to choose the person to do the investigating and decide the terms of reference of the investigation. The court held that on this basis alone, the costs of the application should not be paid out of the public purse.

[28] Counsel for Mr Zuma submitted that the high court failed to exercise the discretion to impose the costs order judicially. The order has no legal basis and is unjustifiable on the facts before the court. It was also submitted that the challenge by Mr Zuma as the Head of State to the constitutionality of the remedial action, was well-founded. It was based on legal advice and was necessary to obtain guidance and certainty from the court.

[29] The basis for a punitive costs order was laid down more than a century ago in *Orr v Solomon*[14] – to mark the court's displeasure at the conduct of a litigant. This was approved by the Constitutional Court in *Public Protector v SARB,*[15] in which it was held that a personal costs order on a punitive scale is 'justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke'.[16]

[14] *Orr v Solomon* 1907 TS 281.
[15] Footnote 6 para 223.
[16] *Public Protector v SARB* fn 6 para 226.

[30] Regarding personal costs awards against public officials, Navsa JA, in *Gauteng Gambling Board v MEC for Economic Development*,[17] said:

'It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant office bearers.'

This dictum was affirmed by the Constitutional Court in *Public Protector v SARB*,[18] in which it was stated that the power to mulct public officials with personal liability for costs is sourced in the Constitution. Khampepe and Theron JJ said:

'[T]he Constitution endows courts with the responsibility to uphold and enforce the Constitution, and the imposition of personal liability for costs on public officials who act contrary to their constitutional obligations is an important tool to be used for this purpose.'[19]

[31] The Court went on to say that public officials, and not the taxpayer, should pay the costs of litigation brought against them when their 'defiance of their constitutional obligations is egregious'.[20] The result is that '[a] higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights'.[21] This higher duty, the Constitutional Court held, requires that public officials, 'observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court'.[22]

[32] Applied to the present case, the high court was not merely entitled, but obliged to consider whether Mr Zuma acted consistently with his constitutional

[17] *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) para 54.
[18] *Public Protector v SARB* fn 6 para 148.
[19] *Public Protector v SARB* fn 6 para 148 per Khampepe and Theron JJ.
[20] *Public Protector v SARB* fn 6 para 153.
[21] *Public Protector v SARB* fn 6 para 155.
[22] *Public Protector v SARB* fn 6 para 152.

obligations as President. In *Economic Freedom Fighters v Speaker of the National Assembly*,[23] the Constitutional Court said that the President must 'ensure that our constitutional democracy thrives', must support all institutions or measures designed to strengthen that democracy, and must 'fulfil all obligations imposed on him, however unpleasant'. Likewise, the Constitutional Court has held that the powers and responsibilities of public servants – which include those of the President – must be exercised for the public benefit, and not for personal advancement.[24] The high court was thus correct in assessing Mr Zuma's conduct in bringing the review application, also against the standards for public administration contained in s 195 of the Constitution.[25]

[33] It is beyond question that the high court applied the correct legal principles concerning the award of personal and punitive costs. It had regard to this Court's decision in *Gauteng Gambling Board*. It rightly found that the President could not litigate for the purpose of protecting his own personal interests. This finding is underscored by the President's initial attempt to suppress the publication of the Report, which application was withdrawn at the eleventh hour, and his abandonment of the relief sought in the review application that the matter be remitted to the Public Protector. The effect of renouncing remittal, as the high court correctly observed, was that if the review succeeded, neither the Public

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[23] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11; 2016 (3) SA 580 (CC) para 26.
[24] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (5) SA 300 (CC) para 7.
[25] Section 195 of the Constitution inter alia provides:
'Basic values and principles governing public administration
195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
. . .
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(2) The above principles apply to—
(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises. . . .'

Protector nor an independent commission would have investigated Mr Zuma's conduct.

[34] Mr Zuma can point to no factual error that influenced the costs order. The high court clearly gave considerable thought to the question as to whether the review application was launched recklessly. The implementation of the remedial action presented an opportunity for the President to suppress his own personal interests and serve the national interest as the Constitution required. Mr Zuma chose the former, which directed attention away from the serious allegations of corruption in which he was fingered. This resulted in a delay of the investigation into those allegations for more than a year. In May and June 2017, Mr Zuma himself stated that he would appoint a commission but did not notify the high court of this. He thereafter filed a supplementary affidavit containing even further grounds of review, wholly unrelated to the supposed high constitutional point that he now advances to justify the review. What is more, he relied on the pending review to justify his delay in appointing the commission. The high court's finding that it was not open to the former President to contend that there was merit in bringing the review or that he had a reasonable basis to pursue it, thus cannot be faulted.

[35] That Mr Zuma was motivated by personal interests in reviewing the Public Protector's decision, is buttressed by the following facts. He challenged the remedial action on every conceivable ground. He could have appointed the commission immediately and still sought declaratory relief as to the lawfulness of the remedial action. Mr Zuma's own conduct demonstrates that this route was both available and feasible. On 22 December 2017, while still President, he lodged an appeal against the high court's order and stated publicly on 9 January 2018 that the appointment of a commission could not wait any longer whilst his appeal was pending. And at no stage before, or during the review proceedings,

did Mr Zuma even suggest – as he now contends – that the Constitution permits the Deputy President to perform the functions of the President, where the latter is unable to do so. That, of course, would have undercut his argument that only the President had the power to appoint a commission of enquiry, and rendered the review application pointless.

[36] In conclusion, there is no reasonable prospect that the applicant will establish any of the grounds upon which leave to appeal is sought, to the requisite high degree. The application must therefore be dismissed.

Costs

[37] In this application Mr Zuma is acting in a personal and not a representative capacity, and the remaining question is whether he should be ordered to pay costs on an attorney and client scale.[26] The respondents seek an order that Mr Zuma pay the costs of the application on a punitive scale.

[38] In *Johannesburg City Council v Television & Electrical Distributors*,[27] this Court endorsed the extended meaning placed on the term 'vexatious' in the context of a punitive costs award, namely that proceedings may he regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear. The Constitutional Court has affirmed this approach in *Public Protector v SARB*,[28] in which it held that a punitive costs order is appropriate 'in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation'.[29]

[26] *Public Protector v SARB* fn 6 para 39. The Constitutional Court has said that while the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order.
[27] *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another* 1997 (1) SA 157 (A) at 177D-E, approving *In Re Alluvial Creek, Ltd* 1929 CPD 532 at 535.
[28] *Public Protector v* SARB fn 6.
[29] *Public Protector v SARB* fn 6 para 221.

[39] Like any other litigant, Mr Zuma was entitled to exercise his right of appeal in relation to the costs order. But in doing so, he put the respondents to unnecessary trouble and expense, which in the particular circumstances of this case, they ought not to bear. A punitive costs order is appropriate to mark the court's displeasure at a litigant's conduct, which includes vexatious conduct and 'conduct that amounts to an abuse of the process of court'.[30]

[40] The respondents submitted that Mr Zuma's conduct in proceeding with this application and his attempt to relitigate the merits of the review, constitute an abuse of process. There is force in this submission, given that in both the review application and these proceedings, Mr Zuma sought to justify the impermissible, rather than accept the error of his challenge. And it cannot conceivably be in the interests of justice to permit Mr Zuma to pursue an appeal against the costs order, in circumstances where the launch of the review application was reckless and motivated by personal interests. His delay in establishing the commission of enquiry into serious allegations of state capture was prejudicial both to the public and national interest, and subversive of our democratic ethos.

[41] For all these reasons, a punitive costs order in this application is justified. The applicant has not established a reasonable prospect of success on appeal. It is therefore unnecessary to consider the high court's refusal to condone the late filing of the application for leave to intervene.

[42] The following order is issued:
The application for leave to appeal is dismissed with costs, including the costs of two counsel on the scale as between attorney and client.

[30] *Public Protector v SARB* fn 6 para 223.

A Schippers
Judge of Appeal

APPEARANCES

For Appellant:	M Sikhakhane SC
	T Masuku SC
	Mpilo Sikhakhane
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