



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 121/20

In the matter between:

**KHOSIKHULU TONI PETER MPHEPHU-RAMABULANA** First Applicant

**MPHEPHU-RAMABULANA ROYAL FAMILY COUNCIL** Second Applicant

and

**MASINDI CLEMENTINE MPHEPHU** First Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS** Third Respondent

**PREMIER, LIMPOPO** Fourth Respondent

**NATIONAL HOUSE OF TRADITIONAL LEADERS** Fifth Respondent

**LIMPOPO HOUSE OF TRADITIONAL LEADERS** Sixth Respondent

**COMMISSION ON TRADITIONAL LEADERSHIP  
DISPUTES AND CLAIMS** Seventh Respondent

and

**RAVHURA ROYAL KINGSHIP COUNCIL** First Intervening Party

**AMOS TSHENUWANI MUKAPU RAVHURA** Second Intervening Party

**Neutral citation:** *Mphephu-Ramabulana and Another v Mphephu and Others* [2021]  
ZACC 43

**Coram:** Khampepe J, Jafta J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ, and Tshiqi J.

**Judgment:** Khampepe J (unanimous)

**Decided on:** 12 November 2021

**Summary:** Traditional affairs — Leadership of Royal Family — Presidential decision to recognise traditional leader

Traditional Leadership and Governance Framework Act —  
Promotion of Administrative Justice Act

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## ORDER

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On appeal from the Supreme Court of Appeal:

1. Condonation is refused in the main application.
2. The main application is dismissed.
3. Condonation is granted in the application for leave to cross-appeal.
4. Leave to cross-appeal is granted.
5. The cross-appeal is upheld to the extent set out in paragraphs 6 to 8 below.
6. Paragraph 1 of the order of the Supreme Court of Appeal is set aside and replaced with the order that:  
“The appeal is upheld, and the second respondent is ordered to pay the costs of the applicant.”
7. Paragraph 3(e) of the order of the Supreme Court of Appeal is set aside and replaced with the order that:  
“The second respondent is ordered to pay the costs of the applicants.”
8. Paragraph 3(f) of the order of the Supreme Court of Appeal is set aside.
9. The second respondent is ordered to pay the costs of the first respondent in this Court.

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## JUDGMENT

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KHAMPEPE J (Jafta J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaetsi AJ, and Tshiqi J concurring):

### *Introduction*

[1] It is said that “heavy is the head that wears the crown”, and indeed it is so. For the crown asks of one that his or her life, no matter how long or short it may be, be dedicated to the service of his or her people. And so this matter comes to this Court, presenting as an entanglement of applications, at the centre of which lies the question: on whose head should the Venda crown sit heavy? Who has the right to give his or her life in service of the VhaVenda people?

[2] This matter consists of three sets of applications. The first is an application for condonation and leave to appeal, in which the applicants seek leave to appeal against the judgment and order of the Supreme Court of Appeal (main application). The second consists of applications for condonation, leave to cross-appeal and direct access to this Court, in which the first respondent makes a number of counter-applications to the main application (counter-applications). The third is an application for leave to intervene in the main application (intervention application). I expand on these applications later.

### *Parties and factual background*

[3] At the core of this matter lies a royal family dispute over the leadership of the VhaVenda Community, in terms of the customary law and customs of the VhaVenda people. The primary parties to the dispute are descendants of the Mphephu-Ramabulana Royal Family (Royal Family), which is statutorily recognised as holding the sole claim to Venda Kingship or Queenship (Throne).

[4] The first applicant is Khosikhulu Mphephu-Ramabulana. In 2012, Mr Mphephu-Ramabulana was, by notice in the Government Gazette (Recognition Notice), recognised by the second respondent, the President of the Republic of South Africa, as the King of the VhaVenda Community (Recognition Decision). The Recognition Decision was made, and the Recognition Notice purportedly issued, in terms of the Traditional Leadership and Governance Framework Act<sup>1</sup> (Framework Act). I should mention here that the original version of the Framework Act was amended in 2009, under the same title, by the Traditional Leadership and Governance Framework Amendment Act<sup>2</sup> (Framework Amendment Act).

[5] The second applicant is the Royal Family Council. It was pursuant to the Royal Family Council's decision of 14 August 2010, to identify Mr Mphephu-Ramabulana as a suitable person to ascend to the Throne (Identification Decision), that the President made his Recognition Decision.

[6] The first respondent is Masindi Mphephu. She is a Princess of the Royal Family, and asserts that she should be seated on the Throne, as the sole Queen of the VhaVenda Community.

[7] The third and fourth respondents are the Minister of Cooperative Governance and Traditional Affairs and the Premier, Limpopo. The fifth and sixth respondents are the National House of Traditional Leaders and the Limpopo House of Traditional Leaders (collectively, the Houses of Traditional Leaders). The seventh respondent is the Commission on Traditional Leadership Disputes and Claims (Commission).

[8] In the intervention application, the applicants are the Ravhura Royal Kingship Council and Amos Tshenuwani Mukapu Ravhura (Mr Ravhura).

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<sup>1</sup> 41 of 2003.

<sup>2</sup> 23 of 2009.

*Litigation history**High Court*

[9] In December 2012, Ms Mphephu, together with her uncle, Mr Mbulaheni Mphephu, launched review proceedings in the High Court. She sought various orders, most of which are irrelevant to the current proceedings before this Court, and need not be set out in any detail. In essence, Ms Mphephu sought to have the Royal Family Council's Identification Decision, as well as the President's subsequent Recognition Decision, declared unlawful, unconstitutional and invalid, and consequently reviewed and set aside.

[10] Ms Mphephu also sought an order declaring that, in terms of customary law, she is the sole Queen of VhaVenda, alternatively that her uncle, Mr Mphephu, is the sole King.

[11] By agreement between the parties, the High Court was asked to determine separately 14 points *in limine* (preliminary points raised at the beginning of the hearing), which also need not be set out fully here. It is sufficient to say that the High Court decided many of the points *in limine* against Ms Mphephu, the result being that it dismissed her review application.<sup>3</sup>

[12] Aggrieved by the dismissal of her review application, Ms Mphephu brought an application for leave to appeal, but the High Court dismissed that application as well. Consequently, she approached the Supreme Court of Appeal, which granted her leave to appeal.

*Supreme Court of Appeal*

[13] While the Supreme Court of Appeal upheld some of the High Court's findings, it also overturned the judgment of the High Court on a number of the points *in limine*

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<sup>3</sup> *Mphephu v Mphephu-Ramabulana* [2017] ZALMP THC 1.

in substantial respects.<sup>4</sup> First, the Supreme Court of Appeal found that the High Court erred in holding that it lacked jurisdiction because the dispute ought to have been referred to the Commission in terms of the Framework Amendment Act. The Supreme Court of Appeal held that section 211 of the Constitution vests in the courts the authority to adjudicate customary law disputes, and to apply customary law in appropriate cases, which jurisdiction is not dependent on whether or not a person has lodged a claim with the Commission.

[14] Second, the Supreme Court of Appeal held that the decisions of the State respondents made in terms of the Framework Act were decisions of organs of State, reviewable in terms of the Promotion of Administrative Justice Act<sup>5</sup> (PAJA). It then held that the President's Recognition Decision was vitiated by a material error of law, and fell to be reviewed and set aside in terms of section 6(2)(d) of PAJA. This was so because, so held the Supreme Court of Appeal, in making the Recognition Decision and publishing the Recognition Notice, the President erroneously relied on the Framework Act, which did not require a ministerial recommendation for him to exercise his power. However, the law in force at the time of the Royal Family Council's Identification Decision was the Framework Amendment Act, which required the ministerial recommendation.

[15] Third, the Supreme Court of Appeal found that, while the Royal Family Council is not an organ of State, its decisions in terms of the Framework Amendment Act initiate a process of identification. This process then leads to an exercise of public power and the performance of the public function of recognition on the part of the President or the Premier, as the case may be, in terms of the Framework Amendment Act. The Royal Family Council's decisions are thus an initial part of administrative action, which become ripe for review after the relevant organ of State has taken its decision. The Supreme Court of Appeal went on to hold that the Royal Family Council's Identification

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<sup>4</sup> *Mphephu v Mphephu-Ramabulana* [2019] ZASCA 58; 2019 JDR 0753 (SCA).

<sup>5</sup> 1 of 2000.

Decision was taken by an improperly constituted forum; therefore, it was not in accordance with the law. This was so because certain persons who were present at the meeting in which the Council took the decision were neither part of nor related to the Royal Family and, in terms of the provisions of the Framework Amendment Act, were not entitled to be in attendance. The Identification Decision therefore fell to be set aside on a number of PAJA grounds, including that: the decision was taken under a delegation of power that was not authorised by the empowering provision (section 6(2)(a)(ii)); a mandatory material procedure prescribed by the empowering provision was not complied with (section 6(2)(b)); and the decision was taken because of the unauthorised dictates of another person (section 6(2)(e)(iv)).

[16] Fourth, the Supreme Court of Appeal held that the criteria applied by the Royal Family Council in making the Identification Decision, as set out in the minutes of the selection meeting, endorsed gender discrimination, in that it prescribed that “[i]n the Mphephu-Ramabulana family in particular the Chief or King must come or must be a man (sons)”. The Court declined to declare the criteria itself unconstitutional and invalid, or to review and set it aside, on the basis that this Court’s decision in *Shilubana* held that communities should be given an opportunity to develop their customs and traditions so as to promote gender equality.<sup>6</sup> It held, however, that the Identification Decision and the Recognition Decision fell to be reviewed and set aside, because they were made in terms of criteria which had the effect of impeding compliance with section 2A(4)(c) of the Framework Amendment Act, which imposes an obligation on the Royal Family to develop the criteria for the identification of a suitable person for the Throne and bring that criteria in line with the Bill of Rights. The Court found these to be relevant considerations which were not taken into account by the President, the Minister and the Royal Family Council, as is required by section 6(2)(e)(iii) of PAJA.

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<sup>6</sup> *Shilubana v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) at paras 73-4.

[17] The Supreme Court of Appeal was only seized with the points *in limine* appealed by Ms Mphephu, and not the entire review application. It, however, noted that there were factual disputes between the parties on the merits, which disputes required the application of customary law and customs, and the adjudication of the matter could not reach finality until they were resolved. The disputes included: first, the effect of Ms Mphephu's concession that she was born before her father ascended to the Throne, and was thus not born to an incumbent leader, as allegedly required by Venda customs; second, whether Ms Mphephu was born of a *Dzekiso* wife,<sup>7</sup> and the effect of this on her eligibility for Queenship; third, whether Ms Mphephu communicated her claim to the Royal Family Council before approaching a court; and, fourth, whether Mr Mphephu-Ramabulana was disqualified from ascending to the Throne on the basis of having been a *Ndumi*<sup>8</sup> to Ms Mphephu's father.

[18] Regarding the factual disputes on the merits, the Supreme Court of Appeal reviewed and set aside both the Recognition Decision and the Identification Decision on the bases set forth above, but then remitted the matter to the High Court for further adjudication on the merits before a different Judge. It also ordered the President and the Premier to refer certain issues of customary law and custom to the Houses of Traditional Leaders for their advice and opinion, which is to be submitted to the High Court in order to assist that Court in its adjudication of the merits.

[19] It should be noted at this juncture that, despite having reviewed and set aside both the Recognition Decision and the Identification Decision, the Supreme Court of Appeal held that it was premature to consider a just and equitable remedy before the entire review was finalised. This was because, so the Court held, the outstanding issues and points *in limine* remitted to the High Court had a direct bearing on any future

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<sup>7</sup> The *Dzekiso* wife is the wife of the traditional leader selected by the Royal Family to bear an heir to the throne.

<sup>8</sup> *Ndumi*, in terms of Venda custom, is a male person appointed by the Royal Family, along with the Chief, King or Queen, as a 'Regent apparent', in a manner of speaking. Should the Chief, King or Queen be incapacitated or pass on, or be unable to fulfil his or her duties for any reason, the *Ndumi* then becomes the *Khosi Pfareli* (Regent). The *Ndumi*'s duties also include protecting and assisting the Chief, King or Queen. The person appointed as the *Ndumi* is chosen from the family and is not permitted, in terms of custom, to become the ruler, when the ruler whom he served passes.

identification and recognition of a person to ascend to the Venda Throne, even in an acting capacity. Thus, the appointment of anyone to the Throne would require a prior determination of the very same issues which fell to be decided by the High Court. The Supreme Court of Appeal therefore ordered that the effect of the review and setting aside of Mr Mphephu-Ramabulana's recognition as the King of VhaVenda, and the withdrawal of his certificate of recognition as King, be stayed pending the final determination of these issues (stay order).

[20] It is also significant to note here that, although it upheld Ms Mphephu's appeal, the Supreme Court of Appeal made no order as to costs in the appeal, and ordered that costs in the High Court be costs in the cause (costs order).

*Main application in this Court*

[21] In the main application, the applicants request this Court to overturn the decision of the Supreme Court of Appeal. I briefly set out the parties' submissions made in the main application.

*Applicants' submissions*

[22] As a point of departure, it behoves me to mention that the main application was filed appreciably out of time. The Supreme Court of Appeal handed down its judgment on 12 April 2019, and the application for leave to appeal to this Court was only launched on 6 July 2020, that is more than a year after the date of filing in terms of this Court's Rules. The applicants were therefore compelled to apply for condonation, which they did – albeit on several grounds that are difficult to follow.

[23] In essence, the applicants say that they had to wait for the reports of the Houses of Traditional Leaders ordered by the Supreme Court of Appeal before deciding whether to appeal, and those reports were only filed on 6 November 2019. They also say that, thereafter, they were hamstrung because their legal representatives were

engaged in attempts to arrange suitable dates for a pre-trial conference ahead of the hearing on the merits in the High Court.

[24] The applicants further assert that the lockdown due to the Covid-19 pandemic, and their legal representatives' inability to access their Chambers from 23 March 2020, prevented them from launching the application timeously. The lateness of the application notwithstanding, the applicants aver that the issues which the application raises are of great constitutional importance, and there are good prospects of success, which should lead this Court to grant condonation.

[25] On the merits, the applicants take issue with the Supreme Court of Appeal's judgment on the basis that that Court erred in a number respects. The applicants claim that, firstly, having found that Ms Mphephu's claim in terms of the Framework Amendment Act and PAJA had prescribed, the Court erred in referring the matter back to the High Court for determination on the merits; secondly, that the Court dealt with issues that were not before it, and ordered relief not sought by the parties; thirdly, the Court erred in ordering the Houses of Traditional Leaders to furnish an opinion to the High Court, which is outside of their mandate and on issues which the High Court must itself determine; fourthly, the Court's remittal of the matter to the High Court is a futile exercise; and the Court erred in remitting the matter to the High Court in any event, because the identification of the heir to the Throne can only be done by the Royal Family and not by a court.

*Ms Mphephu's submissions*

[26] Because her applications are also out of time, Ms Mphephu seeks condonation for her late filing on a number of grounds. Firstly, she avers that her applications have been prompted by the applicants' delay and obstruction of the finalisation of her review application, of which their application to this Court is a clear instance. She states that, when the time for appealing the Supreme Court of Appeal's order had come and gone, she had trusted that the parties would finalise the review application in good faith, as expeditiously as possible and in the interests of the VhaVenda people and justice.

[27] Secondly, Ms Mphephu argues that, although she was aware of the Supreme Court of Appeal's errors at the time, she decided to use her limited resources, given that she is represented by Legal Aid, to finalise the review application. Ms Mphephu argues that she did not anticipate that the applicants would launch obstructive litigation to further frustrate the finalisation of the review application.

[28] Regarding the main application, Ms Mphephu opposes it on several grounds. In the first instance, she argues that condonation should be refused because the application comes almost 15 months out of time and on the eve of the set down of the matter for oral evidence on the merits in the High Court. Ms Mphephu submits that the application is an attempt to obstruct the set down of the matter and delay its final resolution, which has already been delayed by some eight years. She sets out a detailed chronology which she says shows extensive delays on the part of the applicants in their attempt to prejudice her and the VhaVenḡa Community in the finalisation of this matter. For these reasons, Ms Mphephu submits that this Court should make a punitive costs order against the applicants.

[29] Furthermore, Ms Mphephu disputes that the applicants were entitled to wait for the opinion of the Houses of Traditional Leaders. She submits that, if anything, what is clear is that this application is being launched only because, as it turns out, the reports of the Houses do not favour Mr Mphephu-Ramabulana, and not because of genuine concern about the correctness of the Supreme Court of Appeal's judgment and order. Ms Mphephu submits that, in any event, the applicants have known of the reports of the Houses of Traditional Leaders since November 2019, and no explanation for the delay since that date has been proffered.

[30] On the merits, Ms Mphephu points out that the Supreme Court of Appeal decided only the points *in limine* that were on appeal and not her ultimate claim to the Throne, which it rightly remitted to the High Court. She submits that the Supreme Court of Appeal's decision in this regard should be upheld. Ms Mphephu also submits that the

Supreme Court of Appeal was entitled to order the President and the Premier to refer questions of customary law to the Houses of Traditional Leaders, because the provisions of section 212(2) of the Constitution and sections 9(3)(a) and 11(3)(a) and Chapter 4 of the Framework Act make clear that the Houses are established as the bodies with expertise on matters of customary law and traditional leadership. She submits that nothing in those provisions precluded the Supreme Court of Appeal's order.

[31] This Court has decided to determine the main application on the pleadings, without any further submissions or oral argument. The decision on the main application follows.

*This Court's decision on the main application*

[32] It is necessary to begin by deciding the issue of condonation. After all, the main application can only be entertained by this Court if condonation is granted for its late filing.

[33] It is perspicuous that compliance with this Court's Rules and timelines is not optional, and that condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted.<sup>9</sup> Factors such as the extent and cause of the delay,<sup>10</sup> the reasonableness of the explanation for the delay,<sup>11</sup> the effect of the delay on the administration of justice and other litigants,<sup>12</sup> and the prospects of success on the merits if condonation is granted,<sup>13</sup> are relevant to determining what the interests of justice dictate in any given case.

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<sup>9</sup> *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 8.

<sup>10</sup> *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

<sup>11</sup> *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

<sup>12</sup> *Id* and *Brummer* above n 10 at para 3.

<sup>13</sup> *Mankayi* above n 9 at para 8.

[34] *In casu*, we are faced with a delay of over a year, which is evidently inordinate, and not justified by cogent reasons. I find myself compelled to take a dim view of the applicants' explanation that they had to wait for the reports of the Houses of Traditional Leaders in order to decide whether to appeal. It is not open to applicants simply to disregard this Court's Rules because they are mulling over whether or not to appeal. It is also plain from the grounds of appeal advanced that the Houses' reports bore little relevance to the applicants' decision to appeal. This was hardly surprising given that the part of the Supreme Court of Appeal's order relating to the Houses was made against the President and the Premier, and not the applicants. It is difficult, then, to discern of what relevance the contents of the reports are to the main application.

[35] Indeed, the only gripe the applicants have with the relief ordered by the Supreme Court of Appeal in relation to the Houses is that the order to provide an opinion falls outside of their mandate. But this ground of appeal was not contingent on the contents of the Houses' reports, and could have been advanced without first waiting to peruse the reports. In the absence of a plausible explanation, it appears to me that Ms Mphephu is correct in claiming that the applicants' waiting game was probably propelled by hope that the Houses' reports would favour the applicants, and a belated decision to appeal was taken when this did not materialise. Far from being a reasonable explanation for the delay, this purported explanation by the applicants borders on abuse of court processes.

[36] Moreover, as Ms Mphephu points out, the applicants have known of the Houses' reports since November 2019. No reasonable explanation has been provided as to why the applicants failed to launch proceedings immediately thereafter. The best excuse the applicants could provide was that their legal representatives were hamstrung by the apparently taxing logistics of arranging suitable dates for a pre-trial conference ahead of the hearing on the merits in the High Court. Does sending a collection of correspondence for a pre-trial conference constitute so heavy a burden as to prevent the

launching of an allegedly important application for leave to appeal to the country's apex court? The flimsiness of this excuse need only be stated to be seen.

[37] There was, as a last-ditch effort to rescue the applicants' plea for condonation, an attempt to rely on the Covid-19 pandemic and the ensuing lockdown from late March 2020. While the pandemic, together with its attendant lockdowns, has no doubt been responsible for legitimate delays in many contexts, this Court will still closely scrutinise any purported reliance on the pandemic to justify failure to comply with its rules. It is for this Court to determine for itself whether or not the pandemic offers a reasonable explanation for the delay in a given case. I am afraid that in this case, it does not. As the applicants themselves acknowledge, it is only the period from late March 2020 until July 2020, when they launched their application, which could have been affected by the pandemic. The pandemic, therefore, cannot justify the delay since the Supreme Court of Appeal handed down its judgment in April 2019. In truth, it seems to me that the applicants' use of the pandemic as an opportunistic crutch to explain their delay was really the final flogging of an otherwise dead horse. No reasonable explanation has been put forward for the excessive delay, and this is a strong indicator that the application for condonation must fail.

[38] While I am of the view that the extremity of the delay, coupled with the paucity of the explanation provided, justify the immediate refusal of condonation, I am mindful that this Court has said that lateness and inadequacy of the explanation provided are not necessarily dispositive of the question of condonation.<sup>14</sup> This is because the other factors relevant to condonation may favour its granting and tilt the interests of justice to the other side of the scale. If anything, however, the other factors in this case bring the scale flat to the ground on the side of refusing condonation. Entertaining the main application at this stage, when the review application is due to be finalised in the

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<sup>14</sup> *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at paras 13-4. See also *S v Ndlovu* [2017] ZACC 19; 2017 (2) SACR 305 (CC); 2017 (10) BCLR 1286 (CC) at para 32.

High Court, would be highly prejudicial to the finalisation of the dispute between the parties, and would be a fundamental hindrance to the administration of justice.

[39] Moreover, and in any event, the main application lacks prospects of success. The bedrock of the applicants' case is that the Supreme Court of Appeal ought not to have upheld the appeal after finding that Ms Mphephu's claim had prescribed. But this is a fundamental and seemingly opportunistic misreading of the Supreme Court of Appeal's judgment. The Supreme Court of Appeal only found that Ms Mphephu's claim in terms of certain sections of the Framework Amendment Act had prescribed. But this was not dispositive of Ms Mphephu's claims in terms of other provisions, and certainly did not prevent a review in terms of PAJA. To put it bluntly, the grounds of appeal advanced are in many ways flimsy and unconvincing, and do not even attempt to unseat the PAJA grounds of review on which the Supreme Court of Appeal reviewed and set aside the Identification Decision and the Recognition Decision. The result is that those grounds of review remain unchallenged, and the appeal would have no prospects of succeeding if entertained. Ergo, when all the relevant factors are considered, there can be no question about where the interests of justice lie in this case: condonation must be refused.

[40] Having refused condonation, the main application is not before this Court for determination and is dismissed on that basis.

*This Court's decision on the intervention application*

[41] Given the decision that this Court has reached on the main application, it is unnecessary to delve into the merits of the intervention application. This is so because the intervening applicants applied specifically to make submissions in the main application. Their main contention was that they have a direct and substantial interest in this matter because, so they claim, neither Mr Mphephu-Ramabulana nor Ms Mphephu are entitled to ascend to the Throne. This is apparently because the second intervening applicant, Mr Ravhura, is in fact the rightful heir to the Throne.

[42] The submissions which the intervening applicants sought to make were contingent on this Court adjudicating the merits of the main application and finally deciding the rightful heir to the Throne. These are not issues we reach and, as a result, the intervention application does not arise for determination.

*Ms Mphephu's counter-applications*

[43] I mentioned earlier that Ms Mphephu launched several counter-applications in response to the main application, including an application for condonation, for leave to cross-appeal, and for direct access to this Court.

[44] Once again, it is necessary to begin by disposing of the application for condonation. Cognisant of the fact that Ms Mphephu's applications are, like the applicants', considerably late, I wondered at length whether her applications should not similarly be dismissed given the lengthy delay. However, this Court has, on a number of occasions, said that the length of the period of the delay is not the only consideration in determining whether condonation should be granted. As I have already explained, the central question in a condonation enquiry is whether it is in the interests of justice to grant condonation.<sup>15</sup>

[45] In the case of Ms Mphephu, the aspects of her applications which are conditional on the Court granting leave to appeal in the main application fall away because leave in the main application is refused. However, those aspects of her applications that are unconditional are more complex and provide much food for thought, both on condonation and leave to appeal.

[46] There are some prospects of success apropos to Ms Mphephu's two unconditional applications. It strikes me that the Supreme Court of Appeal applied rules

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<sup>15</sup> See the discussion at [33] which is supported by a number of this Court's decisions, including: *Mankayi* above n 9 at para 8; *Van Wyk* above n 11 at para 20; *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School* [2003] ZACC 15; 2005 JDR 1227 (CC); 2003 (11) BCLR 1212 (CC) at para 11; and *Brummer* above n 10 at para 3.

of costs that ordinarily apply to regular litigants on appeal despite having conducted a PAJA review of the administrative action of organs of State. This is especially so since Ms Mphephu argues that the Supreme Court of Appeal's attention was drawn to the *Biowatch* principle,<sup>16</sup> which was ignored. Given that Ms Mphephu's challenge was in vindication of her constitutional rights, that she enjoyed substantial success in vindicating them, and in the light of the silence of the Supreme Court of Appeal's judgment on the applicability of *Biowatch*, there are strong prospects of success on these particular points. As a result, condonation is granted to Ms Mphephu.

[47] As regards the substance of the cross-appeal, the first set of Ms Mphephu's applications were conditional applications for direct access and leave to cross-appeal against various aspects of the judgment and order of the Supreme Court of Appeal. The condition in these applications was that they were brought only if this Court was inclined to set down the main application for oral hearing, or otherwise to grant the relief sought in that application.

[48] The second was an unconditional application for leave to cross-appeal the Supreme Court of Appeal's costs orders. The third set consisted of what Ms Mphephu referred to as an application for a discharge of the Supreme Court of Appeal's stay order, on the strength of what was alleged to be this Court's wide remedial powers in terms of sections 172 and 173 of the Constitution to discharge interlocutory orders.

[49] On 24 February 2021, this Court issued directions calling on the parties to file written submissions on: the Supreme Court of Appeal's stay order; the Supreme Court of Appeal's costs order; and Ms Mphephu's request for punitive costs against the applicants in this Court. I briefly set out the submissions filed by the parties on each of these issues in what follows.

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<sup>16</sup> The *Biowatch* principle provides that where individuals litigate against the State in order to vindicate constitutional rights and are successful, they are entitled to a costs award. See *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

*Parties' submissions on the Supreme Court of Appeal's stay order**Ms Mphephu*

[50] Ms Mphephu submits that the Supreme Court of Appeal's stay order must be discharged or set aside on two related grounds. In the first instance, Ms Mphephu says that the stay order is not just and equitable. Additionally, she argues that the stay order was granted unfairly and without affording her, as the person who is prejudiced by the order, an opportunity to be heard on its appropriateness. She says that the stay order was not sought by either of the parties and was thus not properly considered by the Supreme Court of Appeal.

[51] Ms Mphephu submits that the stay order is prejudicing her and the Venda nation in the ongoing review proceedings because it provides an incentive for Mr Mphephu-Ramabulana to delay the finalisation of the matter while enjoying the benefits of the Throne. Additionally, it subjects the Venda nation to the indefinite rule of an unlawfully appointed and publicly compromised King. For as long as his application to this Court (and any other litigation he may launch in the future) is pending, Mr Mphephu-Ramabulana is protected in his unlawful Kingship. She says that it is unjust that the stay order keeps Mr Mphephu-Ramabulana's Kingship intact and enables him to enjoy access to considerable resources which, in turn, enable him to engage in protracted litigation, despite the Supreme Court of Appeal having found his appointment to be unlawful. The injustice is exacerbated by the Supreme Court of Appeal's finding that rendered him without any legal entitlement to these resources. Ms Mphephu submits that she is unable to counter this litigation because she has no funds and is represented by Legal Aid.

[52] According to Ms Mphephu, it is not clear whether, in making the stay order, the Supreme Court of Appeal purported to exercise its remedial discretion in terms of section 172(1)(b) of the Constitution, or its power to regulate its own processes under section 173. She submits that, either way, she ought to have been granted a hearing before the order was issued, and the failure to do so was a procedural irregularity which

impaired her right to just administrative action in terms of section 33 of the Constitution and PAJA, and of access to courts under section 34 of the Constitution. She avers that at the core of both sections 172(1)(b) and 173 is the principle of fairness, which prohibits courts from granting orders that are prejudicial, and without hearing the prejudiced party. Ms Mphephu submits that this Court has the power to set aside or discharge the stay order in terms of its broad remedial power outlined in sections 172(1)(b) or 173 of the Constitution.

*The applicants*

[53] Instead of limiting their written submissions to the issues directed by this Court, the applicants dedicated half of their submissions to arguments on why the main application should succeed. In essence, it was argued that the Supreme Court of Appeal should have dismissed Ms Mphephu's appeal when upholding the High Court's finding that, insofar as lodging a claim or declaring a dispute with the Commission in terms of the Framework Amendment Act is concerned, Ms Mphephu's claim had prescribed.

[54] In relation to the stay order, the applicants withdraw the averment made in their pleadings that the order was in the interests of justice. They now maintain that they agree with Ms Mphephu that the Supreme Court of Appeal erred in making the stay order, and in doing so without hearing the parties on the order. They argue that, having found the judgment of the High Court to be correct on the prescription point, the withdrawal of Mr Mphephu-Ramabulana's recognition certificate was not an issue on appeal. The applicants assert that this is a ground to overturn the entire judgment of the Supreme Court of Appeal.

*The State respondents*

[55] The State respondents, being the President, the Minister and the Commission, filed written submissions in which they indicate that they abide by the decision of this Court, and filed the submissions only in compliance with this Court's directives. On the stay order, the State respondents argue that it is plain from the Court's statement

that it was premature to consider the question of a just and equitable remedy before the entire review application was finalised. And, that the Supreme Court of Appeal refrained from exercising its powers in terms of section 172(1)(b) of the Constitution, and instead exercised its powers in terms of section 173. This being the case, the State respondents submit that it was not necessary for the Supreme Court of Appeal to hear the parties on the stay order. Their position is that the Supreme Court of Appeal was well aware that, because there were outstanding issues which required adjudication by the High Court, it could not grant final relief in the matter.

[56] Furthermore, the State respondents assert that the stay order does not prejudice Ms Mphephu, as it does not follow from the Supreme Court of Appeal's invalidation of Mr Mphephu-Ramabulana's recognition and appointment that Ms Mphephu would automatically be recognised as Queen of VhaVenda. While the State respondents admit that it is concerning that Mr Mphephu-Ramabulana continues to act as King of VhaVenda despite his appointment having been declared unlawful, unconstitutional and invalid, they aver that the stay order appears not unlike a declaration of invalidity that is suspended by this Court from time to time in terms of section 172(1)(b)(ii) of the Constitution.

*Parties' submissions on costs*

*Ms Mphephu*

[57] On the Supreme Court of Appeal's costs order, Ms Mphephu argues that the Court erred, because she was entitled to costs in both the High Court and the Supreme Court of Appeal in view of her substantial and final success on the points *in limine*. She relies on this Court's decision in *Baloyi*,<sup>17</sup> which shows, so she submits, that even where the balance of issues is remitted to the court a quo, an appellant's success entitles them to costs. Ms Mphephu also submits that since her review application against the State seeks to enforce and vindicate constitutional rights, the

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<sup>17</sup> *Baloyi v Public Protector* [2020] ZACC 27; (2021) 42 ILJ 961 (CC); 2021 (2) BCLR 101 (CC).

*Biowatch* principle dictates that she ought to have been awarded costs in both the High Court and in the Supreme Court of Appeal.<sup>18</sup>

[58] Ms Mphephu also seeks punitive costs against the applicants in this Court on the basis that they obstructed the administration of justice by significantly and purposefully delaying the final resolution of the matter. Ms Mphephu alleges that Mr Mphephu-Ramabulana's conduct is worthy of this Court's rebuke through punitive costs, for he lied on oath in his opposing affidavit to the applicant's counter-applications in this Court about the current criminal proceedings he faces as a result of alleged involvement in unlawful VBS Mutual Bank activities.

*The applicants*

[59] The applicants' submissions on the Supreme Court of Appeal's costs order depend, to a great extent, on their submission that that Court erred in upholding the appeal. On costs in the High Court, the applicants maintain that this issue was entirely within that Court's discretion. They further assert that the High Court's exercise of its discretion not to award costs should not be interfered with, given that the issues in this matter affect the VhaVenḡa people rather than the parties. Finally, on Ms Mphephu's request for punitive costs in the proceedings before this Court, the applicants aver that their application raises genuine constitutional issues of great importance to the VhaVenḡa people, and that there is nothing in the way they have conducted themselves in this Court which justifies its opprobrium through a punitive costs order.

*The State respondents*

[60] The State respondents submit that, given their decision to abide by the decision of this Court, the question of costs in the appeal is a matter between the applicants and Ms Mphephu. Accordingly, they make no submissions on the issue of punitive costs, save to state that there is no basis for any costs order against them in view of their decision to abide.

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<sup>18</sup> *Biowatch* above n 16.

*This Court's decisions on Ms Mphephu's counter-applications*

[61] This Court has decided to determine Ms Mphephu's counter-applications on the basis of the pleadings and the written submissions filed in response to its directions, without an oral hearing. Our decisions on each of the counter-applications are set out in what follows.

[62] In view of our decision to refuse condonation and dismiss the main application, Ms Mphephu's conditional applications fall away and do not arise for determination. These applications were conditional on this Court setting down that application for hearing, or being inclined to grant the relief sought therein.

[63] What remains is the class of unconditional counter-applications relating to the Supreme Court of Appeal's stay and costs orders. It is trite that for this Court to entertain these applications they must engage this Court's jurisdiction, and it must be in the interests of justice to entertain them. In my view, there is no doubt that these pre-conditions are met. None of the parties argue that the unconditional counter-applications do not engage this Court's jurisdiction. Rightly so. At the core of the dispute between the parties in relation to the stay order lies the question of whether the order constitutes just and equitable relief, pursuant to the Supreme Court of Appeal's review of the Identification Decision and the Recognition Decision. It is trite that the review and exercise of public power by courts always raises a constitutional issue, and therefore engages this Court's jurisdiction.<sup>19</sup> Moreover, this matter calls upon this Court to evaluate the Supreme Court of Appeal's approach to the consequences of unconstitutional and invalid administrative action and implicates the power in section 172(1) of the Constitution. These are constitutional issues falling squarely within this Court's jurisdiction.

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<sup>19</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 22.

[64] The challenge to the costs order of the Supreme Court of Appeal similarly engages this Court’s jurisdiction, it being settled that “[t]he award of costs in a constitutional matter itself raises a constitutional issue and therefore this Court has jurisdiction to hear it”.<sup>20</sup> As will be clear from my exposition below, Ms Mphephu’s unconditional counter-applications also bear prospects of success, and it is in the interests of justice to entertain them. In what follows, I set out each of this Court’s decisions on the merits of the unconditional counter-applications in turn.

*The challenge to the Supreme Court of Appeal’s stay order*

[65] My point of departure on this issue is the Constitution. The consequences of a court finding that an administrative act is unlawful and unconstitutional, as the Supreme Court of Appeal did in respect of the Identification Decision and the Recognition Decision, are dictated by the Constitution itself. Section 172(1)(a) of the Constitution prescribes that such an administrative act must be declared invalid. As this Court noted in *Doctors for Life International*, albeit in the context of unconstitutional legislation, a court which has found conduct to be unconstitutional enjoys no discretion, and must declare it invalid.<sup>21</sup> This stringent injunction “gives expression to the supremacy of the Constitution and the rule of law”,<sup>22</sup> which are entrenched in the Constitution.<sup>23</sup> It is for this reason that I must, at this earliest available opportunity, reject the contention by the State respondents that, in making the stay order, the Supreme Court of Appeal exercised not the remedial power in section 172(1) of the Constitution, but the power to regulate its own processes in section 173.

[66] Let me make this clear: section 172(1) is the primary constitutional memorial of a court’s remedial powers in constitutional matters. The section fully sets out the parameters of what a court can and should do pursuant to a declaration that law or

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<sup>20</sup> *Biowatch* above n 16 at para 10.

<sup>21</sup> *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 201.

<sup>22</sup> *Id.*

<sup>23</sup> The supremacy of the Constitution is entrenched in section 2, while the rule of law is a foundational value set out in section 1(c).

conduct, which includes administrative action, is unconstitutional. It is not an option available to a court to evade the consequences of a finding of unconstitutionality by purporting to exercise the power to regulate its own processes in section 173. That construction is untenable, and would allow courts to use the seemingly cosmic facility of section 173 to relieve themselves of that which the Constitution prescribes. The section 173 power is not boundless in the sense of what the Supreme Court of Appeal would have it be in this instance.

[67] The principle of legality, which is an incident of the rule of law,<sup>24</sup> is central to a court's power when dealing with unconstitutional, and therefore invalid, administrative action. It is now settled that, as a default position, "[t]he principle of legality [requires] that an invalid administrative decision be set aside".<sup>25</sup> This is to honour the constitutional command that the Constitution must reign supreme and the law must rule. While the Constitution recognises that the full might of setting aside unconstitutional conduct may sometimes produce unjust and inequitable results, section 172(1)(b) affords a court the discretion to make any order that is just and equitable. This may include an order limiting the retrospective effect of the declaration of invalidity,<sup>26</sup> and/or suspending the declaration of invalidity.<sup>27</sup>

[68] I pause here to note that, notwithstanding the broad nature of the remedial discretion in section 172(1)(b), a court is not at large, on the strength of its own peculiar sensibilities and untrammelled notions of justice, to evade the constitutional imperative that unconstitutional conduct must be invalidated and thus be of no force or effect. That would be inimical to the principle of legality, and the supremacy of the Constitution. As this Court said in *Bengwenyama*:

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<sup>24</sup> *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 17.

<sup>25</sup> *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8; 2009 (4) SA 628 (SCA) at para 9.

<sup>26</sup> Section 172(1)(b)(i) of the Constitution.

<sup>27</sup> Section 172(1)(b)(ii) of the Constitution.

“It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. *The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it.* Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the ‘desirability of certainty’ needs to be justified against the fundamental importance of the principle of legality.”<sup>28</sup> (Emphasis added.)

[69] It is therefore perspicuous that, as a default position, a court must give full effect to its finding of invalidity and, where it exercises its remedial discretion not to do so in terms of section 172(1)(b), must carefully consider whether this is justified in the particular circumstances of the case. This is firmly in line with this Court’s approach to orders limiting the retrospective effect of declarations of invalidity in the context of legislation, where the default position is the full might of retrospectivity.<sup>29</sup> Similarly, the default position in relation to the suspension of orders declaring invalidity is that the declaration of invalidity is immediate, unless a proper case for suspension has been made out,<sup>30</sup> and/or the suspension has a clear purpose.<sup>31</sup>

[70] In my view, it is unsurprising that the Constitution places so high a price on ensuring that, as a general rule, declarations of invalidity are given full effect where conduct is unconstitutional. Quite apart from giving expression to the principle of legality, and the supremacy of the Constitution, giving full effect to the consequences

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<sup>28</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at para 84.

<sup>29</sup> *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 20.

<sup>30</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 89.

<sup>31</sup> *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) at para 89.

of invalidity is often closely linked to the vindication of the rights of those affected by the unconstitutional conduct. In the context of administrative action, this must be seen in the light of the right to lawful, reasonable and procedurally fair administrative action, as enunciated in section 33 of the Constitution, and the need to afford appropriate relief to those whose administrative justice rights have been breached.<sup>32</sup> In *Steenkamp N.O.*, this Court expressed the purpose of remedies in this context to be—

“[t]o afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”<sup>33</sup>

[71] It seems to me that the Supreme Court of Appeal’s stay order serves neither of these purposes, and is not a just and equitable order as contemplated in section 172(1)(b). In fact, it is not immediately clear what the purpose of the stay order is, as the order seems to be completely out of sync and incompatible with the rest of the orders made by the Court. It appears highly paradoxical for the Court to say that the Identification Decision and the Recognition Decision are “unlawful, unconstitutional and invalid” and are “reviewed and set aside”, on the one hand, but then to go on and say that the effect of the review and setting aside, and the withdrawal of Mr Mphephu-Ramabulana’s recognition certificate, are “stayed”, on the other hand. In administrative law terms, “setting aside” generally implies the complete quashing of the administrative act in question, and suggests that the full consequences of the declaration of invalidity are in motion. Yet, this is the precise result that the stay order appears designed to prevent.

[72] The stay order is all the more puzzling because it is hard to imagine any consequence but a setting aside in this case. In the light of the Supreme Court of Appeal’s emphatic orders declaring the Identification Decision and the Recognition Decision “unlawful, unconstitutional and invalid”, very weighty reasons would have

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<sup>32</sup> *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

<sup>33</sup> *Id.*

had to be advanced to avert the default remedy of setting aside. Yet, no such reasons were provided. All the Court said was that it would be premature to consider a just and equitable remedy in view of the pending issues to be decided by the High Court, and the fact that the appointment of anyone to the Throne required those issues to be finally resolved first. I must say that I have difficulty following this reasoning.

[73] Determining a just and equitable remedy did not necessarily bear any relationship to the appointment of anyone to the Throne, or the determination by the High Court of the outstanding issues. The findings and orders of the Supreme Court of Appeal declaring the Identification Decision and the Recognition Decision invalid are final and binding, and nothing the High Court will say can change that. The appropriateness of appointing anyone to the Throne or the final determination of the outstanding issues could perhaps have been relevant if the Supreme Court of Appeal had been minded to order the remedy of substitution, and to appoint Ms Mphephu to the Throne. It was irrelevant to the full range of remedies available to the Court, some of which are set out in section 8 of PAJA. For example, applying the remedy of setting aside the impugned administrative action did not hinge on the appropriateness of appointing anyone to the Throne, or the determination by the High Court of the outstanding issues. The reasons given by the Court, therefore, bear no relationship to the remedy ordered, and this signals that the stay order cannot be sustained.

[74] Furthermore, the stay order neither affords Ms Mphephu administrative justice nor does it vindicate the rule of law. The stay granted by the Supreme Court of Appeal is operative until the completion of the review proceedings, including any appeal which may arise therefrom. It could be years before the review proceedings are finally settled, in addition to the period of more than eight years which has already passed since Ms Mphephu first approached the courts. This is evidently prejudicial to Ms Mphephu. It also means that Mr Mphephu-Ramabulana will continue to unlawfully occupy the Throne in circumstances where his appointment has been found to have been unconstitutional and invalid. This categorically offends the rule of law and the supremacy of the Constitution.

[75] The peculiar aspect of this matter is that the applicants also agree that the stay order is to be set aside, and have proffered no reasons why it is a just and equitable remedy. Given my finding that the reasons provided by the Supreme Court of Appeal also do not hold, I am left with an order in respect of which no one can advance reasons as to why it is a just and equitable remedy. To uphold the order without reasons would be contrary to the constitutional imperative to give full effect to orders of constitutional invalidity unless there are reasons that dictate otherwise. Accordingly, I can find no reason why this Court should not set aside the stay order, and that is the order I am compelled to make.

*The Supreme Court of Appeal's costs order*

[76] Costs in constitutional matters are governed by the principles elucidated in this Court's decision in *Biowatch*. In that case, this Court held that:

“In litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines* established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.

...

If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good.”<sup>34</sup>

[77] A private litigant need not succeed in each and every aspect of their case in order for the *Affordable Medicines*<sup>35</sup> principle, reiterated in *Biowatch*, to apply. What is required is substantial success. As this Court explained, “particularly powerful reasons

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<sup>34</sup> *Biowatch* above n 16 at paras 22-3.

<sup>35</sup> *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*).

must exist for a court not to award costs against the [S]tate in favour of a private litigant who achieves substantial success in proceedings brought against it”.<sup>36</sup>

[78] This matter, being one in which Ms Mphephu sought to vindicate her constitutional rights, falls squarely within the contours of *Biowatch*. It is plain from the judgment of the Supreme Court of Appeal that it decided the majority of the points in favour of Ms Mphephu, which led to the Court upholding the appeal. In view of this substantial success, Ms Mphephu should have been awarded her costs in the appeal. Consequently, the Supreme Court of Appeal’s costs order should be set aside.

[79] Similarly, the order by the Supreme Court of Appeal that costs in the High Court should be “costs in the cause” must be overturned. It is not clear why, having reviewed and set aside both the Identification Decision and the Recognition Decision, the Supreme Court of Appeal did not award costs to Ms Mphephu. While the balance of the review application is still to be finally determined by the High Court, the orders of invalidity made by the Supreme Court of Appeal are final in effect, and Ms Mphephu ought to have been awarded her costs because of her success in the determination of these issues.

[80] The only State respondent against whom the orders of invalidity made by the Supreme Court of Appeal operate is the President. It is accordingly he who must pay Ms Mphephu’s costs in the Supreme Court of Appeal and the High Court.

#### *Costs in this Court*

[81] What remains is the question of costs in this Court. I am mindful that this dispute has been ventilated through the cases made out by private parties, and that the State respondents elected to abide by the decision of this Court. However, it is trite that, in determining which parties ought to bear the costs in litigation, “it is not correct to begin

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<sup>36</sup> *Biowatch* above n 16 at para 24.

the enquiry by a characterisation of the parties”,<sup>37</sup> for “the starting point should be the nature of the issues”.<sup>38</sup>

[82] As I have already explained, the issues raised in this matter are of a constitutional nature. Although the applicants effectively opposed part of the relief that is being granted to Ms Mphephu, this does not change the fact that she sought this relief in pursuit of the vindication of her constitutional rights, and that she had to do so on account of a decision made by the President. After all, it was the unlawfulness of the Recognition Decision that created the need for the courts’ involvement. Furthermore, although the proceedings in this Court have comprised a multitude of applications from private parties, the genesis of this flurry of litigation is State conduct. Moreover, this matter is one which “involve[s] litigation between a private party and the State, with radiating impact on other private parties”.<sup>39</sup>

[83] In these circumstances, *Biowatch* dictates that the costs must be borne by the State, even though the State respondents did not oppose these proceedings. This approach safeguards the “over-arching principle of not discouraging the pursuit of constitutional claims”<sup>40</sup> and accords with this Court’s jurisprudence.<sup>41</sup> However, this does not lay down an inflexible rule that the State should always foot the bill in constitutional litigation between private parties. For example, *Biowatch* tells us that if a private party litigates to uphold unlawful State conduct in a frivolous and vexation manner, it “cannot expect that the worthiness of its cause will immunise it against an adverse costs award”.<sup>42</sup> In such a case, it may not be just and equitable for the State to

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<sup>37</sup> Id at para 16.

<sup>38</sup> Id.

<sup>39</sup> Id at para 28.

<sup>40</sup> Id, where this Court held that this principle applies “irrespective of the number of private parties seeking to support or oppose the State’s posture in the litigation”.

<sup>41</sup> See, for example, *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 74; *MEC for Education, Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 118; and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 89.

<sup>42</sup> *Biowatch* above n 16 at para 24.

carry the cost of the litigation. In this case, the applicants have not litigated in a vexatious manner. Since it is the impugned decision of the President that lies at the heart of this matter, it once again falls to him to bear Ms Mphephu's costs.

[84] There was a request for punitive costs by Ms Mphephu. This was, however, on the basis that costs were sought against the applicants. Punitive costs would self-evidently be inapposite in the light of the order that I make. I am therefore compelled to decline the request, and to make an order for costs on the ordinary party and party scale.

### *Order*

[85] The following order is made:

1. Condonation is refused in the main application.
2. The main application is dismissed.
3. Condonation is granted in the application for leave to cross-appeal.
4. Leave to cross-appeal is granted.
5. The cross-appeal is upheld to the extent set out in paragraphs 6 to 8 below.
6. Paragraph 1 of the order of the Supreme Court of Appeal is set aside and replaced with the order that:  
“The appeal is upheld, and the second respondent is ordered to pay the costs of the applicant.”
7. Paragraph 3(e) of the order of the Supreme Court of Appeal is set aside and replaced with the order that:  
“The second respondent is ordered to pay the costs of the applicants.”
8. Paragraph 3(f) of the order of the Supreme Court of Appeal is set aside.
9. The second respondent is ordered to pay the costs of the first respondent in this Court.

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