

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**APPEAL CASE NUMBER: A5002/2022**

15 DECEMBER 2022

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

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In the matter between:

**CHHITA, ASHA**

Appellant

And

**RANCHOD, ROOPESH RAHUL**

Respondent

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## JUDGMENT

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 December 2022.

**OLIVIER AJ (MATOJANE et DIPPENAAR JJ concurring):**

[1] This is an appeal against an order of Van der Merwe AJ consolidating actions for repayment of a loan and donations (“the loan action”) and an action for divorce (“the divorce action”), made in terms of Rule 11 of the Uniform Rules of Court (“the Rules”). The appeal is with the leave of the court a quo.

[2] The Appellant and the Respondent are the Plaintiff and Defendant respectively in each of the actions. They were married to each other in May 2014. It is common cause that they are married out of community of property without accrual and that the marriage has broken down irretrievably.

[3] The Appellant (Plaintiff in both actions) claims the repayment of loans totalling an amount of R 3 118 897.73 (after deduction of payment of R 140 000) made to the Respondent by her between October 2014 and September 2017. She further claims R 999 275.00 for alleged donations made to the Respondent between August 2014 and July 2017. The Respondent launched a counterclaim, alleging the existence of a partnership and seeking its dissolution, the appointment of a liquidator and the distribution of the partnership assets.

[4] Twins (a boy and a girl) were born of the marriage on 2 December 2017. They are now five years old.

[5] There are three issues before the court: first, condonation for the delay in prosecuting the appeal; second, whether an order for consolidation in terms of Rule 11 is appealable; and third, whether the court erred in law and/or in fact in granting the consolidation order. The last aspect requires a consideration of the merits of the consolidation application.

### **CONDONATION**

[6] The Appellant seeks condonation for making late application for an appeal hearing date as required by Rule 49(6); the late filing of the record as required by Rule 49(7); the late giving of security for the Respondent's costs of the appeal as required by Rule 49(13); the late filing of the power of attorney as required by Rule 7(2); and the late filing of her heads of argument and practice note as required by Chapter 7, paragraph 2 of the Practice Manual of the Gauteng Division of the High Court.

[7] The Appellant also seeks an order reinstating the appeal, as the appeal is deemed to have lapsed due to the late application for a hearing date.

[8] It is trite that condonation is not merely for the taking. It is an indulgence. An applicant must satisfy a court that there is good cause to excuse him from complying with the Rules.<sup>1</sup> A court has discretion in this regard which should be

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<sup>1</sup> *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E.

exercised judicially. Guidelines exist which assist a court in exercising its discretion.<sup>2</sup>

[9] An applicant must give a satisfactory explanation for the delay and default, which is sufficiently full to enable the court to understand how the delay and non-compliance came about and to assess the applicant's conduct and motives.<sup>3</sup> Other factors include the degree of non-compliance (and lateness), the importance of the case, the respondent's interest in the judgment's finality, the court's convenience, and avoidance of delays in the administration of justice.<sup>4</sup> All these factors should not be considered individually but as part of an objective assessment of all the facts.

[10] The prospects of success are of pivotal importance. If there are no prospects of success, there would be no point in granting condonation. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay.

[11] The delay in court days in respect of the various steps not complied with is 22 court days. This is not a short delay, but it does not necessarily disqualify the application. It depends on whether the reasons advanced by the Appellant show good cause.

[12] According to the Appellant, the late filing of the appeal record lies at the heart of the delay. The reason for the delay is that the parties had agreed to and embarked upon mediation with a view to settling the divorce action and the loan action, from which several delays resulted. The preparation of the appeal record was complex, and there was the additional complication of preparing a further

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<sup>2</sup> See eg *United Plant Hire supra*; *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) at 532 B—E; and *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para [6].

<sup>3</sup> *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) at 93E—F.

<sup>4</sup> *United Plant Hire supra* at 720E—720G.

appeal record in respect of the *lis pendens* appeal. The Respondent submits that the last point is irrelevant.

[13] The Respondent denies that the Appellant has shown good cause. He alleges that the Appellant has misrepresented facts (by categorising the mediation as formal and not informal and by implying that the Respondent's attorneys had acquiesced in not complying with the time periods stipulated by the Rules) and dragged her feet in prosecuting the appeal. Issue is taken with the instruction to stop preparation of the appeal record, considering that there was an agreement that mediation would not suspend the time periods for prosecuting the appeal.

[14] The mediation was agreed to in principle on or about 24 February 2022, formally convened on 24 and 25 March 2022, and terminated on 30 March 2022. The mediation was not conducted in terms of Rule 41A, meaning that the time periods to prosecute the appeal were not automatically suspended. The Appellant contends that this does not mean that there was an agreement or an understanding that the time periods would not be suspended.

[15] Until the parties in principle agreed to proceed with mediation on 25 February 2022, the Appellant's attorneys were proceeding with preparing both appeal records (*lis pendens* and consolidation). The Appellant contends that her attorneys' view that the mediation ought to suspend the time periods was not unreasonable. The Appellant concedes that the instruction to cease preparation of the appeal records was unilateral but that it was not unreasonable under the circumstances. It was only on 18 March 2022 that the draft index was sent to the Respondent's attorneys for comment. They replied only on 31 March 2022, after the mediation had terminated on 30 March 2022. According to the Appellant, it is reasonable to infer that the Respondent and his attorneys did not comment on the draft index at the time of its receipt because of the preparations involved in the run-up to the mediation, and the view that doing so, might turn out to be moot in the event of the

mediation being successful. I do not necessarily agree with this inference as it is speculative.

[16] Overall, in my assessment, the Appellant has been frank with the court in disclosing the reasons for the delay. Her reasons are cogent and do not exhibit any malice or gross and wilful disregard for the Rules. I accept the reasonableness of the explanation regarding the termination of the transcription of the record. Although not by agreement, it was not unreasonable to do so under the circumstances. The detailed chronology shows that the matter had not come to a standstill after judgment in the consolidation matter was handed down. There was always the intention to file an appeal, and there was continuous correspondence between the parties' attorneys on this point.

[17] The prospects of success in the appeal are not decisive, but it remains an important consideration.<sup>5</sup> A court must assess the prospects of success unless the other facts, considered cumulatively, are such that it makes the application for condonation "obviously unworthy of consideration".<sup>6</sup> That is not the case here. The appeal has sufficient merit and prospects of success to clear the bar for condonation.

[18] I do not consider the respondent's objections to be sufficiently strong to show an absence of good cause. In the context of the case, any possible prejudice to the Respondent is not sufficient to deny the application for condonation. The Respondent was aware that the appellant intended to appeal. The Appellant had offered to pay the wasted costs of the condonation application should it not be opposed.

[19] Considering what is at stake in this protracted litigation, it is in the interests of justice to grant condonation and to reinstate the appeal.

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<sup>5</sup> *Uitenhage Transitional Council supra* at para [19].

<sup>6</sup> *Ibid.*

## IS THE CONSOLIDATION ORDER APPEALABLE?

[20] An application to consolidate actions is of an interlocutory kind brought on notice of motion.<sup>7</sup> Is it competent for an order issued in terms of rule 11 to be appealed?

[21] Several considerations apply when assessing whether a particular judgment or order is appealable. Traditionally, in terms of the common law, an appeal would be permitted where the relief granted was final in effect, definitive of the rights of the parties, or disposed of substantial portions of the relief claimed.<sup>8</sup> Other factors to consider would be aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.<sup>9</sup>

[22] The Constitutional Court in *City of Tswane Metropolitan Municipality v Afriforum* considered the traditional common law test.<sup>10</sup> Although that matter was decided in the context of a temporary restraining order, it seems to me that the judgment applies equally to the appealability of all interim orders. In short, the court rejected the rigidity of the common law test in favour of a more general, Constitution-based test of interests of justice:

[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not

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<sup>7</sup> *International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd* 1953 (1) SA 241 (W) at 243.

<sup>8</sup> *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA) at para [17].

<sup>9</sup> *Ibid.*

<sup>10</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC).

on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:

“This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is ‘the interests of justice’. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

[41] What the role of interests of justice is in this kind of application, again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. This is especially so where, as in this case, the interim order should not have been granted in the first place by reason of a failure to meet the requirements. The Constitution and our law are all about real justice, not mere formalities. ...

[42] Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application are not irrelevant to the determination of appealability and the grant of leave, they are



in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave. ...

(Footnotes omitted.)

[23] In *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others*, the Constitutional Court enumerated factors to consider in determining the appealability of a particular interim order.<sup>11</sup> Although the context is different, again the factors identified by the court are of relevance and, to my mind, of general application:

[20] The question whether a particular interim order is appealable is not novel. This Court has considered the appealability of interim orders. What was different, in each case, was the factual setting. The applicable test is whether hearing the appeal serves the interests of justice. In making this determination, the Court must have regard to and weigh carefully all relevant circumstances. The factors that are relevant, or decisive in a particular instance, will vary from case to case. Even so, this Court has developed a collection of factors that help it decide whether to hear an appeal against an interlocutory decision of another court. These include:

- (a) the kind and importance of the constitutional issue raised;
- (b) whether irreparable harm would result if leave to appeal is not granted;
- (c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;
- (d) whether there are prospects of success in the pending review;
- (e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;

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<sup>11</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC).

(f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds; and

(g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to wasteful use of judicial resources or legal costs.

(Footnotes omitted.)

[24] Not all the above considerations apply in the present case. Counsel for the Appellant emphasised the importance of the factual setting. Every case is different and no doubt needs to be assessed on its own facts. As the court said in *Afriforum*, form should never trump an approach that advances the interests of justice. And if appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should proceed no matter what the common law impediments might suggest.

[25] Of significance in the present case is that one of the actions is a divorce. The parties have two minor children. It is contended that only maintenance is in dispute, but care and contact are not finalised until the divorce decree has been granted. The consolidation of the two actions has already impacted on them. Whether the court below paid due consideration to this aspect is a matter of importance, which probably on its own justifies consideration of the appeal.

[26] A determination of appealability also requires a peek at the relative merits of the appeal. I have stated above in the condonation application that the appeal has sufficient merit and prospects of success to clear the bar for condonation. I consider the merits of the appeal to be sufficiently worthy of consideration to justify allowing the appeal to be heard.

[27] The overall question is clear: would it be in the interests of justice to allow the appeal? The answer is yes.

## **MERITS OF THE APPEAL**

### **Relevant legal principles**

[28] Rule 11 of the Uniform Rules of Court provides for the consolidation of actions:

Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon

- (a) the said actions shall proceed as one action;
- (b) the provisions of rule 10 shall mutatis mutandis apply with regard to the action so consolidated; and
- (c) the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.

[29] The object of the rule is to prevent multiple actions or applications based on the same facts proceeding independently of each other.<sup>12</sup> The rule does not make provision for the consolidation of issues.<sup>13</sup>

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<sup>12</sup> *Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A) at 801.

<sup>13</sup> *Jacobs v Deetlefs Transport BK* 1994 (2) SA 313 (O) at 317.

[30] A court has a wide discretion to grant or refuse the application.<sup>14</sup> Convenience and absence of substantial prejudice to the other party are the two main considerations.

[31] Convenience “broadly and widely connotes not only facility or expedience or ease, but also appropriateness in the sense that procedure would be convenient if in all the circumstances of the case it appears to be fitting and fair to the parties concerned...”.<sup>15</sup>

[32] The applicant in the consolidation application bears the onus of proving convenience.<sup>16</sup> Once this onus has been discharged successfully, the second leg of the inquiry is the question of prejudice, more particularly whether there is a possibility that consolidation might substantially prejudice the other party. The applicant bears the onus of proving the absence of substantial prejudice.<sup>17</sup> A court may refuse the application even though the balance of convenience would favour it, if the prejudice to the other party is “substantial”.<sup>18</sup>

[33] A court must consider and assess whether a real and substantial concern of a multiplicity of actions exists between the two actions. If not, an important consideration in favour of consolidation is absent.

[34] Consolidation has been refused where it would involve considerable delay.<sup>19</sup>

[35] Consideration may be given to whether there are issues common to both actions that may be decided by an order in terms of Rule 33(4).<sup>20</sup>

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<sup>14</sup> *Beier v Thornycraft Cartridge Company; Beier v Boere Saamwerk Bpk* 1961 (4) SA 187 (N) at 191.

<sup>15</sup> *Placecol Cosmetics (Pty) Ltd v ABSA Bank Limited* 2012 JDR 1993 (GSJ) at para [7].

<sup>16</sup> *New Zealand Insurance Co Ltd v Stone and Others* 1963 (3) SA 63 (C) at 69; *Mpotsha v Road Accident Fund and Another* 2000 (4) SA 696 (C) at 699E; *Forsyth v Botha* 2019 JDR 0338 (WCC) at para [27].

<sup>17</sup> *New Zealand Insurance Co Ltd supra* at 69; *Belford v Belford* 1980 (2) SA 843 (C) at 846.

<sup>18</sup> *New Zealand Insurance Co Ltd supra* at 69.

<sup>19</sup> *Id* at 69H–70A.

<sup>20</sup> *Jacobs v Deetlefs Transport BK supra* at 317.

[36] Consolidation applications are not adjudicated with reference to the merits of the actions sought to be consolidated. They are adjudicated with reference to the pleadings in the two actions, the issues arising therefrom and the evidence which will be required to be led at trial in relation to matters in dispute on the pleadings.

[37] The impact on costs is also relevant.<sup>21</sup>

[38] Simply put, the aim of rule 11 is to avoid a multiplicity of actions and to have substantially similar issues tried at single hearing so as to prevent two separate courts coming to separate decisions on the same issues.

### **Submissions by Appellant**

[39] The court a quo found against the Appellant in respect of almost all the relevant factors, including most significantly the general interrelatedness and overlap between the two claims, convenience and prejudice.

[40] The main grounds raised by the Appellant are that the Respondent failed to make out a case for consolidation of the two actions; that in the circumstances of the two actions, consolidation is not convenient; that consolidation results in substantial prejudice to the Appellant and the parties' minor children; the Respondent is not substantially prejudiced if consolidation is not ordered; the Respondent failed to discharge his onus of proving convenience as well as absence of substantial prejudice; the Respondent unreasonably delayed bringing the consolidation application; and the consolidation of the actions is contrary to the public interest and/or the interests of justice.

[41] The Appellant submits that the court a quo applied the wrong legal test and principles. The court found that the two sets of pleadings are interrelated and for

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<sup>21</sup> *Mpotsha supra* at 699E–F.

that reason convenience was shown to exist. According to the Appellant, the court should have found that whatever interrelatedness there was between the two sets of pleadings, the reasons for the breakdown of the marriage, including the respondent's alleged indebtedness to the Appellant, were moot and of no further relevance in the divorce action.

[42] The court ought to have found that there was no possibility of a multiplicity of actions, considering the limited issues in dispute in the divorce action and the evidence relevant to such issues, as compared to the several issues in dispute in the loan action and the evidence relevant to such issues.

[43] The Respondent should have made submissions on what evidence would need to be led, what witnesses would be called to testify, and how their evidence would be the same if the actions were consolidated, but did not.

[44] Convenience was compromised by the delay in bringing the application, and the resulting delay in the finalisation of the divorce trial. The effect of consolidating the two actions was to nullify the divorce action's trial-readiness certification and effectively reverse all progress made towards the divorce action's finalisation.

[45] Entirely different factual, legal and policy considerations apply to each action; the issues are not the same, different laws apply to each, and it is not in the interests of justice or public policy for the two distinct actions to be heard as one.

[46] The court ignored the best interests of the children in ordering consolidation. The court erred in finding that because there was a Rule 43 interim order in place, there would be no substantial prejudice if the divorce action was delayed.

[47] The court order failed to address and provide a mechanism for the further conduct of the actions so as to ensure that the Appellant's right to employ two sets of legal representatives in each action is given effect to, and to ensure the smooth and unhindered conduct of the actions in the future.

[48] The Respondent disputes the grounds of appeal and submits that he had discharged the required onus and that the court a quo was correct to grant the application.

### **Evaluation**

[49] It is unnecessary to deal with each of the grounds individually. In my view the issues of prejudice, best interests of the children, and delay in finalisation of the divorce proceedings, are the most important grounds to consider.

[50] The Respondent submitted that the Appellant would suffer no serious prejudice due to the consolidation. In fact, it may even be argued that the Appellant would benefit from consolidation, as it would result in one trial only, not two, which may reduce the Appellant's overall costs, considering that she has opted to employ two sets of legal representatives. The Appellant's answer to this is that consolidation will not reduce the overall length of the trial and that, in this sense, the consolidation would have no effect on costs. To my mind, what prejudice there may be to the Applicant personally cannot be said to be substantial. Of greater significance and importance is the impact of the consolidation on the children.

[51] The best interests of the child should always be uppermost in the mind of a court when adjudicating any matter involving children. In this case, the impact of consolidation on the two minor children is not trivial.

[52] It appears to me that in Rule 11 proceedings, where the outcome of the application may have an effect, whether direct or indirect, on minor children, prejudice should be given a broad interpretation. This would mean that in a case

like the present, the question of prejudice to the children and what would be in their best interests should be considered as part of the main enquiry. It is not only prejudice against the parents personally that are of relevance. The child's best interests should be a primary consideration and not relegated to a mere afterthought.

[53] As the upper guardian of minor children, a court has a duty to ensure that in matters involving children, their best interests are determined and considered. Section 28 of the Constitution of the Republic of South Africa, 1996, guarantees the rights of children. Section 9 of the Children's Act 38 of 2005 stipulates definitively that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied." Section 2 provides further that "all proceedings, actions or decisions in a matter concerning a child must- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation; (b) respect the child's inherent dignity; (c) treat the child fairly and equitably."

[54] Public interest and the interests of justice demand that matters relating to children be dealt with expeditiously and that finalisation of minor children's care and contact arrangements ought not to be delayed. Section 6(4) of the Children's Act provides that a delay in any action or decision involving a child should be avoided. Section 7 of the Children's Act places emphasis on the need to avoid or minimise further legal action (this is in the context of the best interests of the child).

[55] The consolidation application was brought shortly after the divorce action was certified ready for trial. The timing of the application was unfortunate. It is not necessarily the duration of the delay in bringing the application but the combined effect of the delay and its timing that is important. The court a quo, with respect,



did not attach sufficient weight to the impact of the delay on the conclusion of the divorce proceedings. The effect of the consolidation order was essentially to suspend the trial readiness of the divorce action and to put it on ice until a time in the future when the loan action would be ready to go to trial. This was prejudicial to the Appellant – but more importantly, it was undoubtedly even more prejudicial to the children and certainly not in their best interests. The date of the plea and counterclaim was 10 November 2018. It is now three years later, and there has been little movement towards finality. It is only a soothsayer who can predict when the loan action will be ready to go to trial. Any suggestion by the Respondent that the loan action will soon be trial ready rings hollow.

[56] The court a quo overemphasised the effect of the Rule 43 order. There are sound public policy reasons why divorce and other matters involving minor children should be prioritised and dealt with expeditiously by our courts. An interim order is, by its nature, temporary. It should remain in place only as long as it is necessary. Care and maintenance cannot be finalised until the divorce trial proceeds, evidence is heard, submissions are made, or the parties reach a settlement agreement that is incorporated into the decree of divorce. It would be highly prejudicial to the children, not in their best interests, and certainly not in the interests of justice to delay the conclusion of the divorce trial. I take the view that the court erred by not attaching sufficient weight to the children's best interests. Finality is of critical importance. The two children are young and require certainty in terms of their relationship with their respective parents. Part of this is a fixed arrangement in respect of contact and care.

[57] Furthermore, there is insufficient overlap between the divorce and loan actions to justify consolidation. As argued by counsel, there is a fundamental difference in the nature of the proceedings, the applicable law, and the evidence to be led. Even should the loan not have been given had it not been for the marriage, and even should it be one of the reasons for the breakdown of the marriage, the fact remains that it is common cause that there has been an irretrievable breakdown and that the

only outstanding issue is maintenance. The loan proceedings should have no impact on the divorce – at most, it could be relevant to the parties’ respective financial positions to determine maintenance. But on its own, this is not sufficient justification for consolidation. There are statutory and other means available to revisit aspects of maintenance should circumstances change.

[58] The evidence to be led at the divorce trial is also limited and focused. Several expert reports relating to the children were commissioned, and none made mention of financial matters.

[59] For these reasons, the appeal must succeed.

## **COSTS**

[60] It is trite that a court exercises a discretion when awarding costs. This discretion is wide but not unlimited; it must be exercised judicially upon consideration of all the facts. There are established principles which guide a court, but they are not hard and fast rules. As a rule of thumb, successful parties are entitled to their costs.<sup>22</sup>

[61] This appeal is not the final chapter in this saga. The trials must still take place. There comes a time in ongoing litigation when costs can no longer simply be in the cause. There has been a litany of litigation, some of which could arguably have been avoided.

[62] In the present case it would be unfair to the Appellant to deprive her of the costs of this appeal. However, a complicating factor is that the Appellant had opted to employ two counsel, one of whom is a senior counsel. I do not necessarily think the appeal justified the use of two counsel. It would not be fair to order that the

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<sup>22</sup> *Fripp v Gibbon & Co* 1913 AD 354, and more recently *Griessel NO v De Kock* 2019 (5) SA 396 (SCA) at para [24].

Respondent must pay the costs of both counsel. The Appellant is entitled to costs, but only the costs of junior counsel.

[63] In respect of the consolidation application, the court a quo had ordered costs to be in the cause of the consolidated action. This is no longer appropriate, considering that there are now two causes. The Appellant has prayed for costs on a punitive scale but I do not consider it justified. The Appellant is entitled to costs but on a party and party scale.

**I MAKE THE FOLLOWING ORDER:**

1. The non-compliance with the Uniform Rules of Court and Practice Manual of the Gauteng Division of the High Court, in respect of the late application for a date of the appeal hearing, the late filing of the record, the late giving of security for the Respondent's costs of appeal, the late filing of a power of attorney, and the late filing of the heads of argument and practice note, are condoned.
2. The appeal is reinstated.
3. The appeal is upheld.
4. The order of the court a quo is set aside and replaced with the following order:

“The application is dismissed with costs.”

5. The Respondent is ordered to pay the Appellant's costs of this appeal, including the costs of the condonation application, but excluding the costs of senior counsel.

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**M Olivier**  
**Acting Judge of the High Court**  
**Gauteng Division, Johannesburg**

Date of hearing: 12 October 2022

Date of judgment: 15 December 2022

*On behalf of Appellant:* A. De Wet SC (Ms) (divorce action)

T. Lope (loan action)

*Instructed by:* Clarks Attorneys, Johannesburg

*On behalf of Respondent:* T. Govender (Ms)

*Instructed by:* David C Feldman Attorneys