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

CASE NO: A2023-02482 A2023-02482
RANDBURG MAGISTRATES' COURT
CASE NUMBER 25273/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
DATE	SIGNATURE

In the matter between:

FHP ZIMBALI RESIDENCE NO. 5B SHAREBLOCK COMPANY (PTY) LTD **Appellant**

and

STUDIO 521 INVESTMENTS CC **Respondent**

JUDGMENT

MOORCROFT AJ [DU PLESSIS AJ CONCURRING]:

Summary

Appeal from Magistrates' Court – section 83(b) of Magistrates' Courts Act, 32 of 1944 – Appeal against the cost order only

Section 16(2) of Superior Courts Act,10 of 2013 - Appeal will have no practical effect or result – no exceptional circumstances justifying interference on appeal

No reason for finding that the decision was capricious, was based on a wrong principle, was not reached by unbiased judgment, or was not based on substantial reasons

Appeal dismissed

Order

[1] In this matter I make the following order:

1. *The appeal is dismissed;*
2. *The appellant is ordered to pay the costs on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] The appellant lodged an appeal against a cost order granted by the Learned Magistrate Jansen sitting in the Randburg Magistrates' Court at the hearing of six interlocutory applications in the litigation that subsequently became settled.

[4] The decision now sought on appeal will have no practical effect or result, except perhaps in respect of the costs. It was argued on behalf of the appellant that

exceptional circumstances merit the hearing of the appeal on costs because of a gross misdirection by the presiding Magistrate.

Section 16(2) of the Superior Courts Act, 10 of 2013

[5] Section 16(2) of the Superior Courts Act reads as follows:

> *"(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*
>
> *(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.*
>
> *(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph (a), he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.*
>
> *(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.*
>
> *(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph (a) be argued before them at a place and time appointed, and may, whether or not they have so ordered—*
>
> *(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or*
>
> *(ii) order that the appeal proceed in the ordinary course."*

[6] The predecessor of the subsection was section 21A of the Supreme Court Act, 59 of 1959. Section 21A was analysed by Cloete J in *Universal Storage Systems (Pty) Ltd v Crafford and Others.*[1] He held that the power conferred in subsections (1) and (3) of the old Act (corresponding with what is now subsection (2) (a) in the new Act) may be exercised independently of the power envisaged in subsection (2) of the old Act, corresponding with what is now subsection (2) (b), (c), and (d) of the new Act.

[7] I conclude that we are at liberty to proceed with the appeal and to give a judgment.

The appealability of a discretionary ruling on costs

[8] It is instructive to refer to the judgment by Stegmann J in *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another*[2] where the learned judge summarised the applicable principles in his usual imitable style:

> *"1 There is no rule of law to the effect that in every appeal against the exercise of any discretionary power vested in the court of first instance the Court of appeal has no jurisdiction to interfere with the decision appealed against unless such decision is shown to have been unjudicial in one of the respects mentioned in Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335D - E.*
>
> *2 In an appeal against the exercise of a discretionary power by a court of first instance, the first task of the Court of appeal is to examine the nature of the discretionary power, and to decide whether it belongs to the category of discretionary powers contemplated by the decision in Ex parte Neethling and Others.*

1 *Universal Storage Systems (Pty) Ltd v Crafford and Others* 2001 (4) SA 249 (W).

2 *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T)

3 If the power is found to belong to such category, the Court of appeal has no jurisdiction to interfere with the exercise of the power decided on by the court of first instance unless such decision is shown to have been unjudicial

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in one of the respects mentioned in Ex parte Neethling and Others, ie that such decision was capricious, that it was based on a wrong principle, that it was not reached by unbiased judgment, or that it was not based on substantial reasons.

4 If the discretionary power is not found to belong to such category, the Court of appeal must decide to what category it does belong. One possibility is that it may be found to belong to the same category as the discretionary power in Mahomed v Kazi's Agencies (Pty) Ltd and Others 1949 (1) SA 1162 (N).

5 If the power is found to belong to the last-mentioned category, the function of the Court of appeal is to hear all such arguments as may be addressed on the basis of the record before it, and to give due consideration to the decision of the court of first instance.

6 In some cases it may be possible to conclude that the exercise of the discretionary power by the court below was 'wrong' in some sense other than the sense of 'unjudicial' contemplated by Ex parte Neethling and Others. However, discretionary powers being what they are, there is usually no objective criterion according to which the exercise of such power can be judged to be 'right' or 'wrong'. The criteria according to which it may be judged to be 'judicial' or 'unjudicial' are dealt with in Ex parte Neethling and Others. However, there are always criteria according to which the exercise of a discretionary power may be judged to be 'appropriate' or 'inappropriate'. Such criteria depend upon the circumstances of the particular case. In the very nature of things, therefore, when the subject-matter of an appeal is the exercise of a discretionary power of the kind referred to in para 5 above, the Court of appeal is not bound to uphold the decision of the court below unless satisfied that such decision was 'wrong'.

7 In an appeal against the exercise of such a discretionary power, the function of the Court of appeal is to consider whether, in the light of all

relevant factors, the exercise of the power by the court of first instance was appropriate to the circumstances of the particular case. If it was, the appeal must fail. If it was not, the Court of appeal must exercise the discretion anew, and must substitute its own discretion for the discretion of the court below."

[9] An appeal against a cost order resorts under paragraph 3 of the judgment by Stegmann J quoted above and the principles in *Ex parte Neethling and Others*[3] apply. A court of appeal should therefore be reluctant to intervene in a cost order made by a lower court unless the decision was capricious, was based on a wrong principle, was not reached by unbiased judgment, or was not based on substantial reasons.

[10] In *Public Protector v South African Reserve Bank*[4] Khampepe J and Theron J said:

"[144] An important principle in this appeal is that courts exercise a true discretion in relation to costs orders. A true discretion exists where the lower court has a number of equally permissible options available to it. An appeal court will not lightly interfere with the exercise of a true discretion. Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong."

[145] An appeal court should be slow to substitute its own decision simply because it does not agree with the permissible option chosen by the lower court. The reason for this was explained by Moseneke DCJ in Florence:[5]

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3 *Ex parte Neethling and Others 1951 (4) SA 331 (A).*

4 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras 144 to 145. [5] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 113.

> *'Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It*
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> *fosters certainty in the application of the law and favours finality in judicial decision making.' "*

[footnotes in text of judgment omitted]

The facts

[11] The six interlocutory applications were enrolled before the Learned Magistrate on 29 November 2022. Five of these applications were already enrolled for hearing on that day. The 6th application was a condemnation application brought by the respondent on 8 November 2022. The appellant delivered a notice of intention to oppose the condemnation application on 15 November 2022 and delivered its answering affidavit 10 days later on 29 November 2022, the day of the hearing before the Magistrate. The respondent filed a replying affidavit on 30 November 2022, the day after.

[12] When the six interlocutory applications came before the Magistrate on 29 November 2022, he was not willing to hear the matters piecemeal and insisted that the condonation application be heard with the other five. He ruled that the applications be postponed and that the appellant be ordered to pay the costs.

[13] Rule 55 of the rules of the Magistrates' Court differentiates between interlocutory applications and other applications in Rule 55(1)(d). The so-called long form known as Form 1A of Annexure 1 to the Rules provides for the filing of an answering affidavit within 10 days after giving notice of an intention to oppose the application. The long form is typically used to initiate application proceedings between parties.

[14] Rule 55(4)(a) provides that interlocutory and other applications incidental to pending proceedings must be brought on notice corresponding substantially with Form 1C, the so-called short form. The short form is used when the parties are already involved in litigation and differs from the long form in that no provision is made for filing of the answering affidavit ten days after giving notice of intention to oppose.

[15] The difference between the two forms is not a coincidence. When the short form is used in interlocutory proceedings greater flexibility is required and a reasonable time, rather than a set number of days, must be allowed. What a reasonable time is depends on the specific circumstances of the case. In many instances ten days might be a reasonable time but in other instances a shorter period might be reasonable.

[16] When there are five interlocutory applications on the roll for 29 November and a sixth is launched on 8th November to be heard on the same date there would appear to be no justification for the respondent to merely assume that ten days would be available after the 15th when notice of intention to oppose is given, and that it would file its answering affidavit on the 29th and postpone the application for the filing of a replying affidavit and for argument to a subsequent date.

[17] The reasonable litigant in the position of the respondent in such a case would have a choice of filing its answering affidavit timeously so that a replying affidavit can then be filed and the matter can proceed with the other applications on 29 November, or at least raise the alarm and tell the opponent that there was insufficient time and that the date of 29 November will have to be reconsidered. A litigant who ignored such an approach to an opponent would do so at its peril and run the risk of an adverse cost order on the 29th. As it turned out it was the appellant who kept quiet and merely filed its answering affidavit on the 29th thus causing a delay.

[18] It was therefore the appellant who ran the risk of an adverse cost order on 29 November 2022. The matter came before the Magistrate who decided in the exercise of his discretion that it would be preferable to the conduct of the litigation to hear all six interlocutory applications on the same day, and decided that all six applications would be postponed. He also decided in the exercise of his discretion that the appellant should pay the costs.

[19] It was argued on behalf of the appellant that the Magistrate was informed incorrectly that the notice to oppose the condemnation application was given on the 14th of November 2022 and not on the 15th. To my mind nothing turns on this. Both parties were represented before court and if the respondent's counsel made an error it was surely the function of the appellant's legal representative to correct the error in argument. The Magistrate cannot be blamed for a failure to do so and did not act capriciously.

Secondly, and as I have indicated above the ten- day period was not applicable.

Conclusion

[20] The appeal must therefore fail for two reasons:

20.1 The exercise of the Magistrate's discretion was closely connected with conduct of the business of the court and it was properly exercised. The discretion was not exercised capriciously or upon a wrong principle.

20.2 There are no exceptional circumstances that would merit having regard to considerations of costs in deciding whether the Magistrate's order would have any practical effect or result.

[21] It was argued on behalf of the respondent that a punitive cost order is justified. The appellant persisted with an appeal that had no merit. I agree that a punitive cost order is justified.

[22] For the reasons set out above I make the order in paragraph 1.

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J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

I agree and it is so ordered

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WJ DU PLESSIS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judges whose names are reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **21 AUGUST 2023**.

COUNSEL FOR APPELLANT:	M NIEUWOUDT (heads by C VAN DER LINDE)
INSTRUCTED BY:	LOMAS-WALKER ATTORNEYS
COUNSEL FOR RESPONDENT:	G COHEN (heads by R G COHEN)
INSTRUCTED BY:	GLYNNIS COHEN ATTORNEYS
DATE OF THE APPEAL:	8 AUGUST 2023
DATE OF JUDGMENT:	21 AUGUST 2023