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[3] **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

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[5] **JUDGMENT**

[6] Case No 411/09

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[8] In the matter between:

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[10] **ETHEKWINI MUNCIPALITY**
Appellant

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[12] and

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[14] **R E BROOKS**

First Respondent

[15] **L A MINDRY and 14 OTHERS**
Second to Fifteenth Respondents

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[18] **Neutral citation:** *Ethekwini Municipality v Brooks* (411/09) [2010] ZASCA 74 (27 May 2010)

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[20] **Coram:** MPATI P, NAVSA, VAN HEERDEN and MHLANTLA JJA and GRIESEL AJA

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[22] **Heard:** 14 May 2010

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[24] **Delivered:** 27 May 2010

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[26] **Summary:** Servitude of right of way – whether such a ‘public street’, as contemplated in s 1 of Ordinance 25 of 1974 (Natal).

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[30] **ORDER**

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[33] **On appeal from:** KwaZulu-Natal High Court (Durban) (Choudree AJ sitting as court of first instance):

The appeal is dismissed with costs.

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[35] **JUDGMENT**

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[37] GRIESEL AJA (MPATI P, NAVSA, VAN HEERDEN and MHLANTLA JJA concurring):

[38] The issue for determination in this appeal is whether a servitude of right of way over the first respondent's land is to be classified as a 'public street' as defined in s 1 of the Local Authorities (Natal) Ordinance 25 of 1974 ('the Ordinance'). (For convenience I refer to the appellant as 'the municipality' and to the first respondent as 'Mrs Brooks'.)[1]

[39] Mrs Brooks launched an application in the KZN High Court, Durban against the municipality (as first respondent in the court below), seeking, *inter alia*, an order declaring that the servitude of right of way over her

[1] The second to fifteenth respondents, who are the owners of neighbouring properties, abided the decision of the high court and took no part in the appeal to this court.

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property does not create a public street as defined in the Ordinance. In addition, she also sought certain interdictory relief, prohibiting the municipality from treating, in any manner or form, that portion of her property which is subject to the servitude as a public road; and prohibiting and interdicting the municipality from undertaking or continuing any road works on that portion of her property which is subject to the servitude, 'without first complying with the provisions relating to private streets in the Local Authorities Ordinance, No. 25 of 1974 and/or the Durban Extended Powers Consolidated Ordinance, No. 18 of 1976 or taking steps in terms of those laws to declare Nyala Drive a public road'.

[40] The municipality opposed the application and, in its answering affidavit, adopted the attitude that Nyala Drive is a public street as defined in the Ordinance. In the result, so it contended, the municipality is 'obliged to fulfil the obligations contemplated by s 209 of the Ordinance for the public benefit and, in particular, to ensure that the road is kept in good order and repair'.

[41] The high court rejected the municipality's contentions and granted an order in favour of Mrs Brooks, hence this appeal, which is before us with leave granted by the court below.

[42] <u>A public street</u>

[43] The answer to the dispute between the parties must be sought in the

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definition of ‘public street’ as defined in s 1 of the Ordinance, namely, as ‘any street which –

[44] (*a*) has been established by a local authority or other competent authority as a public street;

[45] (*b*) has been taken over by or vested in a local authority as a public street in terms of any law;

[46] (*c*) the public has acquired the right to use; or

[47] (*d*) which is shown on a general plan or diagram of any private township situate in the area of a local authority filed in the Deeds Registry or the Surveyor-General’s Office and to which the owners of erven or lots in such township have a common right of use.’

[48] A ‘private street’, on the other hand, is defined, in the same section, as ‘any street which is not a public street’.

[49] In support of its contention that Nyala Drive is a public street, the municipality relied mainly on para (c); alternatively paras (b) and (d) of the definition. These requirements will accordingly be considered consecutively in the sequence adopted by the municipality, after a brief examination of the relevant factual background.

[50] Factual background

[51] In 1993 Mrs Brooks took transfer of the property described as:

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[52] ‘Remainder of Lot 183 Drummond, situate in the Drummond Health Committee Area and in the Port Natal-Ebhodwe Joint Services Board Area, Administrative District of Natal; in extent 3,7497 (Three Comma Seven Four Nine Seven) Hectares.’

[53] The property originally formed part of subdivision B of what was then infelicitously called ‘Farm Kafirdrift No 906’ (later renamed as ‘Farm Drift No 906’). It is situated in a rural area, near the Valley of a Thousand Hills. Certain further subdivisions, numbered 2 to 10 (subsequently renumbered as erven 175 to 183), were surveyed over subdivision B in 1947. At the same time, a servitude of right of way 30 feet (9,14 metres) wide was surveyed over the farm. The servitude was created in order to provide access by means of a road to the newly created land-locked subdivisions, which would otherwise have no road access. Suitable endorsements reflecting the servitude were entered upon the title deeds of the relevant subdivisions. A similar endorsement also appears in Mrs Brooks’ title deed, recording that her property is subject to a servitude of right of way as indicated on a Surveyor-General’s diagram ‘in favour of the Remainder of B of the Farm Kafirdrift’; in other words, in favour of the other subdivisions lying to the north and the west of her property, which subdivisions later came to be described as erven 175 to 182.[2]

[2] Mrs Brooks’ property is, in addition, also subject to a road servitude in favour of the Drummond Health Committee which cuts across the south-eastern corner of the property. This servitude, however, is unrelated to the present dispute and does not concern us in this appeal.

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[54] The first subdivision to be registered (in 1960) was subdivision 10, later described as Lot 183, of which Mrs Brooks' property forms the remainder. Later, a road known as Nyala Drive was created within the area of the servitude. The road is untarred and extends over a distance of just over one kilometre, allowing access to the various subdivisions. A sign indicating that the road is a cul-de-sac has been placed at the entrance of Nyala Drive and was still there when these proceedings commenced, as appears from one of the photographs on record. The road commences off Thousand Hills Drive, runs in a northerly direction across Mrs Brooks' property for a short distance, before turning in a westerly direction at a ninety degree bend on the north-eastern corner of her property and continuing from there in a straight line to the end of the cul-de-sac.

[55] A dispute arose between the municipality, on the one hand, and the owners of several of the properties abutting upon Nyala Drive, on the other hand, as to the party or parties liable to maintain that road. Maintenance was originally undertaken by the Drummond Health Committee, the predecessor in title of the municipality. Thus, on 24 July 2003 Mr Hobson, Executive Director: Engineering Services of the Outer West area of the municipality told a meeting of owners of certain properties serviced by Nyala Drive that he considered the road to be a right of way servitude and not a public road. He informed the meeting that the municipality proposed to undertake certain modifications to the recently

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installed drains and that it would thereafter arrange for the road to be graded. The maintenance of the road would thereafter be the obligation of the various landowners.

[56] In a similar vein, Mr D B Thomas, Deputy Head: Roads Provision, wrote to one of the other owners in Nyala Drive on 27 September 2004:

[57] 'Nyala Road, as it stands, is a right-of-way servitude in favour of the property owners and not a public road. In view of the afore-mentioned the maintenance of the road will remain the responsibility of residents.'

[58] On 5 October 2004, in a letter addressed to Mrs Brooks, Mr S Chetty, Manager: Engineering Services in the Roads Provision Department of the municipality, reiterated that Nyala Drive was 'a right-of-way servitude in favour of the property owners and not a public road'. In the result, so it was stated, 'the maintenance of the road will remain the responsibility of the residents'.

[59] However, after receiving a petition, dated 18 October 2004, signed by 14 of the 16 owners of properties abutting Nyala Drive, however, the municipality reconsidered the matter and appears to have changed its stance. During April 2005 it accordingly informed Mrs Brooks that, on the advice of the Surveyor-General and its own legal department, it would henceforth be treating Nyala Drive as a public road and would assume responsibility for its maintenance.

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[60] Matters came to a head a few months later, during November 2005, when the municipality commenced extensive road and construction works on Nyala Drive on a portion of the property of Mrs Brooks. This conduct precipitated the urgent application that forms the basis of the present appeal.

[61] Against this background, I now to turn to deal with the individual requirements on which the municipality relied in support of its contention that Nyala Drive is a public street.

[62] <u>The right of the public to use the road</u>

[63] In considering whether or not the public had acquired a right to use Nyala Drive, it may be noted that, at common law, there were two kinds of roads which members of the public were entitled to use: the one was the *via publica*, coming into existence by proclamation as a public road by the competent authority. This category, which coincides with para (a) of the definition of 'public street', does not concern us as it is common cause that there has been no proclamation in respect of Nyala Drive. The other category of public road is a so-called *via vicinalis* or 'neighbours' road' (Afrikaans: *buurweg*). In *Malherbe v Van Rensburg & 'n ander*[3] the court (Van Winsen J, Corbett J concurring) dealt with the nature and origin of a 'buurweg' and held as follows:

[3] 1970 (4) SA 78 (C).

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[64] ‘’n Saaklike reg van weg kan, onder andere, deur verjaring bekom word mits die aanspraakmaker op so ’n reg bewyse kan lewer dat hy en sy voorgangers-in-titel ten opsigte van *praedium* in wie se guns die reg opgeëis word, gebruik gemaak het vir ’n tydperk van 30 jaar van ’n bepaalde weg, en dat die gebruik openlik, vreedsaam en sonder instemming van die eienaar van die grond waaroor die weg loop, geskied het. In teenstelling hiermee kan die publiek geen regte tot ’n weg by wyse van verjaring verwerf nie. Sodanige verwerwing kan slegs uit hoofde van gebruik sedert ’n onheuglike tyd geskied. Deur sodanige gebruik word ’n buurweg geskep. Daar rus op die persoon wat beweer dat so ’n buurweg bestaan die bewyslas om aan te toon dat *die publiek in die algemeen*, sonder beletsel van die eienaar van die grond waaroor die weg loop, vir so ’n geruime tydperk van die weg gebruik gemaak het dat die oorsprong van die gebruik nie bepaal kan word nie. Die reg deur so ’n gebruik geskep het sy oorsprong in “ancient custom” of *vetustas.* Weens die verswarende aard van regte op hierdie wyse deur die publiek oor ’n ander se grond verkry word duidelike bewyse van sodanige gebruik geverg.’[4]
(My emphasis).

[65] When it comes to a servitude of right of way, it is important to bear in mind that it enures not only to the servitude holder but, as it was put by Voet,[5] also to ‘the members of his household, his guests, his table companions, hirelings and medical attendants along with him.’ This passage in Voet does not purport to create a watertight *numerus clausus* of parties entitled to make use of a servitude road. Thus, Maasdorp[6] paraphrased the above passage as follows:

[4] At 80A–F (other case references omitted).

[5] *Commentarius* 8 3 1.

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[66] ‘(S)ervitudes . . . may be made use of, not only by the owner of the dominant tenement, but by *anyone who has a legal right to be upon the dominant tenement*, such as servants, guests, visitors, labourers, etc.’
(My emphasis.)

[67] This brings me to the evidence adduced on behalf of the municipality in support of its contention that the public has acquired the right to use Nyala Drive:

(a) Mr Alan Neil Mitchell, a practising land surveyor, has been employed by the municipality (and its predecessor) since 1985 and he is presently Manager: Land Surveying in the Surveying and Land Information Department of the Engineering Unit of the municipality. He said *inter alia* the following with regard to Nyala Road:

[68] ‘Access to members of the public was not at any stage, as far as I am aware and as far as the records of the respondent reveal, ever barred.
[69] Members of the public were always allowed to use the road which was created in the area of the servitude which ultimately acquired the status of a public street.’

(b) Ms Dorothy Grace Canny, who was a secretary at the Drummond Health Committee between the years 1971 and 1979, stated:

[6] A F S Maasdorp *Institutes of Cape Law* Vol II (1918) p 202.

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[70] ‘Nyala Drive was already in existence when I joined the Drummond Health Committee. As far as I am aware, it was always regarded as a road to which members of the public had access and which the public utilised.’

(c) Ms Frith Myers joined the Drummond Health Committee as Town Secretary on 3 February 1993 and remained in that position until the Drummond Health Committee was eventually incorporated into the Outer West area of the municipality, where she is presently still employed. She said:

[71] ‘As far as I am aware, Nyala Drive was always regarded as a public road to which the public had access and which they utilised.’

(d) Mr Richard William Birkett, the Deputy Surveyor General, Pietermaritzburg, stated that ‘. . . our offices share the views expressed in the affidavit of Mitchell to the effect that Nyala Drive has acquired the status of a public street’. He added:

[72] ‘Nyala Drive was accessible to the public ever since the creation of the first subdivisions serviced by it; members of the public were never barred access to it; . . . certain of the owners of such subdivisions appear to be engaging in commercial enterprises such as nurseries which will attract members of the public.’

[73] In the circumstances, according to Mr Birkett, it is ‘inconceivable that Nyala Drive could still be classified as a private road’.

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[74] Mrs Brooks, in her replying affidavit, denied that Nyala Drive had been regarded by the municipality and its predecessor as a public street. Her attitude is summarised as follows:

[75] 'I remain the owner of my property and the only people who may legitimately use it are those in whose favour the right of way servitude was created and this is a finite and limited class of people.'

[76] She added that, when she purchased her property (in 1992), there was a sign at the entrance from Thousand Hills Drive to the following effect: 'Residents' Access Only'. Her evidence in this regard is supported by affidavits from two current owners and one former owner in the area, who similarly recall that members of the public did not enjoy unrestricted access to Nyala Drive, nor did they routinely use it as a public road. Indeed, as pointed out by one of these witnesses, '. . . members of the public, unless they were visiting property owners in the area, had no need and could not access any public place if they travelled down the road'.

[77] It is significant to note that, although Mr Mitchell filed a supplementary affidavit in response to some of the allegations contained in the replying affidavit of Mrs Brooks, he did not deal with these aspects of her evidence, which are thus uncontradicted.

[78] Apart from the above views expressed in vague and general terms on

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behalf of the municipality regarding the public nature of Nyala Drive, there had, of course, also been the contrary views expressed by senior employees of the municipality, as mentioned earlier.[7] Those views only changed after the petition of 18 October 2004, in which the various owners urged the municipality to regard Nyala Drive as a public street. (This seems to confirm that all owners of properties in Nyala Drive at that stage still regarded it as a private street.) Thus, far from being generally regarded as a public street, exactly the opposite seems to have been the position – at least until 2005, when the municipality had a change of heart.

[79] Having regard to the legal test as outlined above and bearing in mind the requirement for clear proof ('duidelike bewyse') in support of the right relied on, I am of the view that the evidence adduced on behalf of the municipality falls far short of establishing a right on the part of the general public to use the road in question. At best for the municipality, the evidence establishes that some members of the public, or persons other than the owners of subdivisions, may, over the years, have used the road from time to time without let or hindrance. However, the evidence fails to establish whether or not those members of the public who used Nyala Drive over the years fell into the extended category of lawful users of the servitude of right of way described by Voet in the passage referred to above. It follows, therefore, that the municipality has failed to

[7] Paras 11–13 above.

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prove that the public has acquired a right to use the portion of Nyala Drive that forms part of the property of Mrs Brooks.

[80] Has the road been taken over by or vested in the municipality?

[81] The first alternative argument advanced by the municipality relies on para (b) of the definition, based on an allegation that Nyala Drive has been taken over by or vests in the municipality. Section 220 of the Ordinance deals with this situation and reads as follows:

[82] '(1) Whenever any private street referred to in section 218 or section 219 has been formed, hardened, paved, kerbed and guttered to the satisfaction of the council, then on the application in writing of the owner of the land, or, as the case may be, of the owners representing more than one-half of the value of houses and land abutting upon such street, the council shall take over such street as a public street.

[83] (2) Notwithstanding anything hereinbefore contained, the council may also with the consent in writing of the owners representing more than one-half of the value of houses and land abutting upon any private street, take over such street as a public street.'

[84] In support of this leg of the argument, the municipality relied on the petition referred to above,[8] which set out the history of the road and proposed that Nyala Drive be recognised as a 'public road' for purposes

[8] Para 14 above.

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of maintenance. (Mrs Brooks refused to sign the letter, while another owner could not be located.) The municipality regarded the petition as an application by owners representing more than one-half of the value of houses and land abutting the private street in question to take over such street as a public street. It therefore claims to have acceded to the application and to have 'taken over' Nyala Drive as a public street.

[85] Leaving aside the question whether or not Nyala Drive is the kind of private street referred to in sections 218 and 219 (which is open to considerable doubt), there is simply no evidence of any decision having been taken by the council to take over that street. Had such a decision legitimately been taken, one would have expected a clear recordal thereof. Thereafter, the next step would have been to regularise the position in the offices where transactions of this nature are recorded, namely the Registrar of Deeds and the Surveyor-General. In this regard, s 221 of the Ordinance provides as follows:

[86] 'Whenever the council shall take over any private street as a public street as hereinbefore provided, such street shall vest in the council, but it shall not be necessary for such street to be transferred to the council, the Registrar of Deeds and the Surveyor-General being hereby authorised to make such entries in the records of their respective offices as may be necessary to give effect to the provisions of this section; provided that they or either of them may require the production of such proof or other information as they or he may deem necessary, including any plan or plans; and provided further that the title deeds of any property concerned shall be

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produced to the Registrar of Deeds whenever they are available, for endorsement in terms of such vesting aforesaid.'

[87] No evidence has been adduced of any entries made in the records of either of those offices to give effect to the purported taking over, nor have the title deeds of the properties concerned been produced to the Registrar of Deeds for endorsement.

[88] Bearing in mind that ownership in public streets vests in the municipality in terms of s 208 of the Ordinance, the municipality's argument that it had 'taken over' Nyala Drive as a public street implies that it had somehow, informally and unilaterally, acquired ownership of a portion of Mrs Brooks' property – in the process depriving her of ownership of that portion – without any formal decision or recordal to that effect and without any steps having been taken in respect of expropriation as contemplated by s 190 of the Ordinance. This proposition only has to be stated for it to be rejected.

[89] Faced with these formidable obstacles, counsel for the municipality – without expressly abandoning the point – rightly did not press it with much vigour. In my view the municipality's contentions regarding a 'takeover' of Nyala Drive as a public street are simply untenable.

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[90] The Surveyor-General's diagrams

[91] The final leg of the municipality's argument received scant attention in the papers filed on its behalf. It is based on para (d) of the definition which, to repeat, refers to a street 'which is shown on a general plan or diagram of any private township situate in the area of a local authority filed in the Deeds Registry or the Surveyor-General's Office and to which the owners of erven or lots in such township have a common right of use'.

[92] In support of this point, Mr Mitchell attached an extract from a drawing (No FT8A–4B) compiled and drawn in the office of the Surveyor-General, which was completed on 8 May 1963 and kept up to date with information relating to subdivisions and servitudes. It shows the individual properties and roads in the general area of Drummond. Where Nyala Drive is situated, the diagram clearly indicates 'right of way servitude SG 200/48'.

[93] Mr Birkett, in his supporting affidavit, briefly deals with this aspect as follows:

[94] 'I confirm also that as far as our offices are concerned, Nyala Drive is reflected on diagrams of the private townships created in the area serviced by the road, filed in our offices, as being one to which the owners of erven in such townships have a common right of use.'

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[95] I shall accept for present purposes, without deciding the point, that the properties and their subdivisions shown on the general plan or diagram relied on fall in 'a private township situate in the area of a local authority'. The further requirement is more problematic: the diagram must depict a street 'to which the owners of erven or lots in such township have a common right of use'. This is the aspect in the definition on which the municipality strongly relies. In my view, the reliance is misplaced. It is clear beyond doubt, and confirmed by the general diagram, that the owners of properties in Nyala Drive enjoy their common right of use of the street by virtue of the servitude of right of way. (The rights derived from the servitude are, of course, also enjoyed by the owners of new subdivisions, the general principle being that '[i]f the dominant land is physically subdivided between different co-owners, the servitude continues to be attached to each subdivided portion of the land in so far as it can benefit from the servitude, provided that it does not increase the burden on the servient land.')[9] Can the mere fact that the street is shown on the Surveyor-General's diagram now convert what manifestly is a private street into a public street? This would clearly be an absurd result, which could not have been intended by the legislature. For para (d) of the definition to make any sense, one would therefore have to interpret it so as to exclude from its ambit of application streets in respect of which owners enjoy their common right of use by virtue of a servitude of right of way.

[9] 24 *Lawsa* (2 ed) para 399 and the authorities referred to therein.

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[96] I am accordingly of the view that para (d) of the definition likewise does not assist the municipality in establishing that Nyala Drive is a public street.

[97] Costs

[98] It follows from the foregoing analysis that the appeal falls to be dismissed with costs. It remains to deal briefly with one aspect relating to costs. The court below, when granting leave to appeal to this court, ordered the municipality to bear the costs of Mrs Brooks, not only with regard to the application for leave to appeal (which included an application by the municipality for condonation for late noting of its appeal), but also 'the costs of the appeal incurred by [Mrs Brooks] in prosecuting her defence to the appeal'. The municipality subsequently obtained the leave of the court below to appeal against that portion of the order as well.

[99] The learned judge, in granting leave to appeal, did not refer to any authority to justify his order regarding the costs of appeal. He reasoned as follows:

[100] 'I am of the view that we all function in a new constitutional environment where citizens ought not to be deprived of their rights to go forward and ventilate them simply because of lack of funds. We are in a constitutional environment where every citizen now has a right to challenge any act of authority on reasonable grounds

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and in a case of this kind I am satisfied that an appropriate order for costs should be that the municipality bear the costs of appeal and if I am proved to be wrong certainly those costs will be reflected in an appropriate order made in due course by the Supreme Court of Appeal. The judgment in favour of the applicant would be otherwise nugatory if her lack of funds prevented her from defending the judgment.'

[101] Counsel for the municipality urged us, as a matter of principle, to disapprove of the precedent set by the court below, submitting that such order was 'grossly irregular and without precedent and that the grant thereof constitutes a gross misdirection'.

[102] In view of the conclusion to which I have come with regard to the merits of the appeal, the order of the court below regarding the costs of appeal makes no difference in this instance; the municipality will in any event have to pay those costs. Any comments that we may make in that regard will therefore be nothing more than *obiter dicta*. Suffice to say that, by ordering an appellant *in anticipando* to pay the costs of the appeal, a lower court in effect fetters the discretion of a court of appeal, which is undesirable.

[103] Order

[104] The appeal is dismissed with costs.

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[106] B M GRIESEL
Acting Judge of Appeal

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[108] APPEARANCES

[109] FOR APPELLANT: V I Gajoo SC

[110] Instructed by: Ngidi & Company Inc, Durban

[111]
Symington & De Kok, Bloemfontein

[112]

[113]

[114] FOR RESPONDENT:
A A Gabriel

[115]

[116] Instructed by:
Calitz Crockart & Associates, Durban

[117]
Matsepes Inc, Bloemfontein

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