**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 34/2014
Reportable

In the matter between:

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| **DEUTSCHES ALTERSHEIM ZU PRETORIA** | **APPELLANT** |
| and | |
| **ROLAND HEINRICH DOHMEN** | **FIRST RESPONDENT** |
| **DANIëL HEINRICH DOHMEN** | **SECOND RESPONDENT** |
| **MARGRETHA ANNA BOTHA** | **THIRD RESPONDENT** |
| **THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY** | **FOURTH RESPONDENT** |

**Neutral citation:** *Deutsches Altersheim Zu Pretoria v Roland Heinrich Dohmen* (34/14) [2015] ZASCA 3 (5 March 2015)

**Bench:** Ponnan, Mhlantla, Leach and Zondi JJA and Mayat AJA

**Heard:** **19 February 2015**

**Delivered:** **5 March 2015**

**Summary**: Costs – death of respondent rendering appeal academic – liability for costs.

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**ORDER**

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**On appeal from**: North Gauteng High Court, Pretoria (Maumela J (Jordaan J concurring) sitting as court of appeal):

Save for ordering the appellant to pay two thirds of the respondents' costs, the matter is struck off the roll.

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**JUDGMENT**

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**Ponnan JA (Mhlantla, Leach and Zondi JJA and Mayat AJA concurring):**

[1] On 5 March 2007 the appellant, the Deutsches Altersheim Zu Pretoria, a home for the aged, concluded a written agreement with Mr Roland Heinrich Dohmen, in terms whereof it undertook to provide him with 'board and lodging' and 'care in its frail care section' against a monthly payment of R3 420. The preamble to the agreement recorded:

'The parties to this agreement concur that in principle the care for the elderly is the responsibility of their next-of-kin and/or relatives, who for that reason act as Guarantor for the due fulfilment of the financial obligations towards the HOME, who offers its services to the LESSEE and on behalf of the LESSEE's relatives, as hereinafter set out in detail'.

Accordingly, Mr Dohmen's son, Daniël Heinrich Dohmen, and daughter, Magretha Anna Botha, signed the agreement as 'guarantors'.

[2] On 21 September 2009 the management committee of the appellant wrote to Mr Dohmen: 'Considering the events of these last months, various correspondence and discussions, we have no other option than to give you Notice, effective 31 October 2009, in terms of the provisions of paragraph 9 of the lease agreement.

This decision was not taken easily and we had discussed it in detail with our legal advisor'.

The written notice notwithstanding, Mr Dohmen refused to vacate his room and as a consequence on 5 March 2010 and in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the appellant commenced proceedings in the Pretoria Magistrates' Court for his eviction. In his answering affidavit Mr Dohmen stated:

'3.2 *Ex facie* the document attached to the Applicant's founding affidavit it was entered into between various parties including the Applicant, myself as well as Mrs M A Botha and Mr D H Dohmen (the latter being my daughter and son respectively).

3.3 As such all parties to the alleged written agreement have an interest in the relief sought by the Applicant'.

In the event, Mr Dohmen's son and daughter came to be joined to the proceedings as the second and third respondents (the respondents). On 18 March 2011 the magistrates' court issued an eviction order to take effect on or before 30 April 2011. Mr Dohmen was also ordered to pay costs on the attorney and own client scale. Aggrieved, Mr Dohmen appealed to the North Gauteng High Court, Pretoria. His appeal succeeded with costs. The further appeal by the appellant is with the leave of this court.

[3] The appeal was set down for hearing before this court on 19 February 2015. On 27 January 2015 a supplementary practice note was filed on behalf of the respondents with the registrar of this court. That practice note purported to take issue with certain omissions from the appeal record filed by the appellant and recorded in passing that Mr Dohmen had died on 12 January 2015. In the light of that disclosure and by notice emanating from the registrar of this court on 2 February 2015 the Appellant was required as a matter of urgency to intimate whether it still persists with the appeal. If so, so the notice continued:

'the parties will be required at the hearing of the matter to address full argument on whether the judgment sought on appeal will have any practical effect or result as contemplated by s16(2)(a) of the Superior Courts Act 10 of 2013 (formerly s 21A of the Supreme Court Act).'

[4] In response to the registrar's notice, the appellant's attorney wrote on 2 February 2015:

'2. We kindly request that the appeal – set-down for 19/02/2015 – should proceed.

. . .

4. The judgment, handed down by two Judges in the North Gauteng High Court (against which this appeal has been noted) lent an interpretation to the written agreement concluded between the parties, as well as the circumstances governing the relationship between the parties. This interpretation, unfortunately, has an adverse effect on all the existing and future agreements concluded with residents of the Appellant which is, with respect, to the detriment of the Appellant. As matters stand, the Appellant is bound by this North Gauteng High Court decision. The Appellant is further of the humble view that it shall also be in the public interest that the appeal be heard, keeping the following in mind:

4.1.1. The judgment of the High Court has far reaching consequences, not only for the Appellant, but also for other owners of similar establishments;

4.1.2. The judgment also deals with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and the Older Persons Act;

4.1.3. Both the cannons of legislation and its proper interpretation is of considerable importance for the broader public and legal community;

4.1.4. The judgment of the High Court therefor has consequences, not only for the Appellant, but also for other owners, extending beyond this case.'

But that was to fundamentally misconceive the position, for, as Innes CJ observed as long ago as *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441:

'Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'[1]

That principle has been emphasised in a long line of cases of this court. (See *Legal-Aid South Africa v Magidiwana and others* [2014] 4 All SA 570 (SCA) and the cases there cited.)

[5] Indeed, as Wallis JA pointed out in *Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others* 2013 (3) SA 315 (SCA) para 5:

'The Court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the Court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the

[1]In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) 2000 (1) para 21 fn 18 the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said: 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'

future and on which the adjudication of this Court was required, whilst in the latter no such issue arose.' [2]

This matter plainly falls into the latter of the two categories alluded to by Wallis JA. To once again borrow from Innes CJ, practitioners do not seem to make themselves acquainted with important decisions of this court (*Stevenson v MacIver* 1922 AD 413 at 414).

[6] The respondents' attorney, on the other hand, took the view 'that the relief sought by the appellant has become moot'. His letter written on 4 February 2015 in response to the registrar's notice added:

'2. On behalf of the respondents in the appeal we confirm that none of them intend to pursue the matter.

3. In our view (and this will be respectfully conveyed to the Honourable Supreme Court of Appeal in heads of argument to be filed in due course, if necessary) the appeal, if persisted with by the appellant, should be struck from the roll with costs.'

After an exchange of correspondence between the parties it ultimately came to be accepted by the appellant that the appeal had indeed become academic. What thereafter occupied the attention of the parties were debates about costs. In due course the appellant filed supplementary heads of argument with this court. It read:

'7. It is common cause between the Old Age Home and the attorney acting for the Second and Third Respondents that the appeal has become moot.

8. Section 16(2)(a)(i) of the Superior Court's Act, provides that an appeal may be dismissed on the ground that the decision in the appeal will have no practical effect or result. As a result thereof the Old Age Home, as indicated to the Registrar of the above Honourable Court and the attorney for Second and Third Respondents, that the Old Age Home does not intend to argue the appeal, but will remove the matter from the roll. The Second and Third Respondents however persist that unless their costs are tendered, the matter must proceed.

. . .

13. The Old Age Home would of course preferred to proceed with the appeal, but keep in mind the salutary principle why the above Honourable Court should not be detained with issues relating to costs only, decided to remove the matter from the roll. It is through no fault of the Old Age Home that the appeal has become academic, and having regard to the discretion

[2]See also *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444I-445B; *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 SCA para 4; *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) paras 5-7; *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd and others* [2012] 1 All SA 135; 2012 (1) SA 453 (SCA) paras 43-46.

a Court has regarding the award of costs, the correct approach should be that no costs should have been awarded.

14. It is therefore respectfully submitted, that should Second and Third Respondents persist that the matter should proceed on 19 February 2015 only for the issue of cost, that the following order should be made:

"1. The appeal is removed from the roll;

2. Each party pays its own costs up and until 6 February 2015;

3. Second and Third Respondents are ordered to pay the Appellants costs from 7 February 2015 on the scale as between attorney and client."'

[7] The respondents also availed themselves of the opportunity to file supplementary heads of argument, which read:

'1. These supplementary heads are filed in direct response to the appellant's failure and/or refusal to withdraw the appeal and the appellant's supplementary heads of argument of 13 February 2014.

2. The second and third respondents have been appointed as executors of the estate of the first respondent and all parties are duly represented.

3. It is common cause between the parties that the appeal is moot.

4. Contrary to the appellant's allegation the respondents are not of the view that the matter should proceed on 19 February 2015. It is the respondents' view, as stated in the correspondence with the appellant, that the appellant, being *dominus litis*, should withdraw the matter with a tender of costs. The appellant has refused and/or failed to withdraw the matter.'

[8] And so, fresh battle lines having been drawn between parties, it came to pass that this court had to be convened on 19 February 2015. Given the conceptual confusion that permeated some of the submissions from the bar in this court, it may be as well to identify precisely what still remains for determination in the matter. Clause 9 of the agreement provided:

'This agreement may be terminated by either party giving the other party one calendar month notice, in writing, terminating this agreement. The agreement will terminate automatically on the day of the LESSEE'S death without prejudice in either case to any accrued liability of the LESSEE or the GUARANTOR to the home'.

The practical effect of clause 9 was therefore that the agreement would terminate automatically upon the death of Mr Dohmen. That being so, there can certainly no longer be any dispute or *lis* between the parties on the issue initially raised by them for

determination in the appeal. In those circumstances there can hardly be an appeal on the merits that this court has any power to deal with (*Legal-Aid South Africa v Magidiwana* (above)). *Legal-Aid South Africa v Magidiwana* held (para 20-22) that once the parties settled, the litigation between them terminated and there were thereafter no disputes between them upon which this court could exercise its appellate jurisdiction. That principle, no doubt, applies with equal force to a situation such as the present where the death of a party brings to an end the underlying *lis*. In those circumstances this court can hardly enter into the merits of the appeal (*Nxaba v Nxaba* 1926 AD 392 at 394). It must therefore follow that the appeal falls to be struck off the roll (*Kett v Afro Ventures (Pty) Ltd* [1997] 1 All SA 1 (A)).

[9] It still remains nonetheless to consider the ancillary issue - the question of costs - that continued to occupy the parties in debate and the attention of this court in argument from the bar. There can be no dispute that much of the costs of the appeal would necessarily have been incurred by the parties prior to the death of Mr Dohmen. For it is clear, I think, that an attorney in the position of either party's attorney would have been entitled to charge his clients for his services in respect of the contemplated appeal. And by then, one suspects, counsel would have been briefed and would necessarily have had to be prepared to argue the merits of the appeal.

[10] Ordinarily where an appeal is withdrawn the appellant is liable for the costs incurred up until the time of the withdrawal (*Eisenstadt v Barone* 1931 AD 486). The appellant ultimately having accepted that the appeal had been rendered moot by the death of Mr Dohmen, the respondents, relying on the 'usual order' (*Kett v Afro Ventures* at 3), claimed costs. The appellant, in contradistinction, contended that this was the kind of matter where it would be appropriate for no order as to costs to issue. It is indeed so that there are cases where this court has made no order as to costs.[3] But those were cases where both parties, to a greater or lesser extent, co-operated or acquiesced in pursuing an incorrect procedure. On the other hand where a point was successfully raised by the court itself on appeal, the usual order has been that the appellant pays the costs, particularly where the appellant did not concede the non-

[3] *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50 at 52; *Nxaba v Nxaba* 1926 AD 392 at 394; *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339 (A) at 345A-346C; *Clear Enterprises* (*Pty*) *Ltd v Commissioner*, *SARS and others* [2011] ZASCA 164; [2011] JOL 27974 (SCA).

appealability of the orders appealed against and the respondent was compelled to come to court to have the decision set aside.[4]

[11] However, as Centlivres CJ observed in *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339 (A) at 346A:

'None of the cases purport to lay down a hard and fast rule in a matter such as this nor can they be said to deprive the Court of its inherent discretion to make such an order as to costs as may be just in the circumstances of any particular case.'[5]

In exercising that discretion the following factors are relevant: First, the appellant was *dominus litis* - it initiated and prosecuted the appeal. The respondents were thus not brought before this court as willing parties. And, even when it ought to have been clear to the appellant that the relief originally sought, namely an eviction order, had been rendered moot, it initially, in response to the notice from the registrar of this court, persisted in its contention that the appeal be adjudicated on its merits. What is worse – and this is the second factor – is that it sought punitive costs against the respondents from this court when there was plainly no warrant for such an order. Thus, whatever the merits of the respondents' other contentions, they were wholly justified in instructing counsel to appear before this court to resist the grant of that order. On the other hand (this is the third factor) – we are not dealing here with an abortive appeal on the merits on account of any fault on the part of the appellant or because the matter was prematurely or wrongly brought to this court. The appellant had sought and obtained the leave of this court for the further prosecution of the

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[4] *Stevenson v MacIver* 1922 AD 413 at 414; *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *Desai v Engar and Engar* 1966 (4) SA 647 (A) at 655; *Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A) at 764G-H; *SA Motor Industry Employers' Assoc v SA Bank of Athens* 1980 (3) SA (A) 91 at 98F-H; *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 at 929A; *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 835; *Coin Security Group* (*Pty*) *Ltd v SA National Union for Security Officers and others* 2001 (2) SA 872) (SCA) para 12; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) paras 6,7 and 12; *Rand Water Board v Rotek Industries* (*Pty*) *Ltd* 2003 (4) SA 58 (SCA) paras 1 and 27; *Radio Pretoria v Chairman*, *Independent Communications Authority of SA* 2005 (1) SA 47; [2004] 4 All SA 16 (SCA) para 46; *South African Police Service Medical Scheme v Lamana* 2011 (4) SA 456 (SCA) para 14; *Kenmont School and another v DM and others* [2013] ZASCA 79; [2013] JOL 31055 (SCA) para 14; *Ethekwini Municipality v SAMWU* [2013] ZASCA 135 para 20; *Qoboshiyane NO and others v Avusa Publishing Eastern Cape* (*Pty*) *Ltd and others* 2013 (3) SA 315 (SCA) paras 14-15.

[5] See for example *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012] 4 All SA 149 (SCA) para 22 where the respondent raised the point for the first time at an advanced stage of the appeal, until then neither was an unwilling participant, each party was ordered to bear its own costs until the date when the point was raised and the appellant was ordered to pay the costs of appeal beyond that date.

appeal. Without in any way delving into the merits of the matter, it must nonetheless be accepted that leave to appeal was granted because it was thought that the appeal had reasonable prospects of succeeding. Thus, one must suppose that but for the untimely death of Mr Dohmen, the appellant would have had every intention of prosecuting the appeal to its conclusion. One is not dealing here with an appellant who chooses of its own volition to abandon an appeal because it, on reconsideration, has misgivings about the merits of the appeal. Nor, is one dealing with an appellant whose attention is drawn by either this court or its opponent to the fact that the appeal has been wrongly brought to this court. The appellant in this instance was forced to reconsider its position because of the death of an opponent - an event beyond its control. Fourth, in filing a supplementary practice note with this court after the death of Mr Dohmen, it was patent that the respondents were minded to persist with the appeal. To that extent they were equally remiss in not appreciating and bringing to the attention of the appellant and this court that it would be futile for any further steps to be taken in the prosecution of the appeal as the matter had become academic. Accordingly, the point had to be raised by this court. Even then there was no real pause for reflection on the part of the appellant. Undaunted, it filed additional heads of argument, in which it sought punitive costs from the respondents. Nor, even after further time for reflection, was there any modification of that stance in argument before us.

[12] Finally, that the parties chose, when the writing was clearly on the wall, to forego pragmatism for obdurateness is to be decried. The intransigence on the part of both, no doubt, must have further inflated the considerable costs already incurred, leaving one to wonder whether the game was indeed worth the candle. In that regard the following dictum by Harcourt J in *Mashaoane v Mashaoane* 1962 (2) SA 684 (D) at 687G is apposite:

‘However, . . . when a case has to all intents and purposes been settled, apart from the question of costs, it is undesirable to permit the question of such costs to become an occasion for incurring a great many further costs and, incidentally, to occupy the time of the Court which could perhaps have been better spent in the disposal of other litigation. I naturally accept that the interests of the litigating public are superior to those of the Court in this but the true interests of the public and the Court probably coincide in this regard and may best be indicated by repeating the latin phrase: *interest rei publicae ut sit finis litium*.’

[13] Thus to the extent that the respondents are also to blame, it seems to me only but fair that they should bear a portion of their own costs, which I assess to be one third. In the result, save for ordering the appellant to pay two thirds of the respondents' costs, the matter is struck off the roll.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

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| For Appellant: | M C Erasmus SC |
| | Instructed by:<br>A B Löwe Attorneys, Pretoria<br>Honey Attorneys, Bloemfontein |
| For Respondents: | J Coetzer |
| | Instructed by:<br>Serfontein Viljoen & Swart, Pretoria<br>Claude Reid, Bloemfontein |