

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

CASE NO: A5012/19

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

.....*[Signature]*.....

SIGNATURE

.....12/04/2021.....

DATE

In the matter between:

PURPLE PRIMULA 80 CC

Appellant

and

VODACOM (PTY) LTD

Respondent

Appeal has become moot. Costs in issue.

JUDGMENT

DE VILLIERS, AJ:

- [1] This is an appeal against the refusal of a rescission application of a default judgment. Shirilele AJ ordered the eviction of the appellant from a business premises on 10 November 2017. The appellant was thereafter evicted on about 14 November 2017. Nkosi-Thomas AJ on 20 August 2018 dismissed the appellant's application for rescission of the order for the eviction. The appeal against this refusal serves before this court with leave from the Supreme Court of Appeal having been obtained on 15 March 2019. In the interim the appellant's application for interim relief was struck from the roll on 24 October 2018 as Mashile J found the matter not urgent. On 13 October 2020 Molahlehi J dismissed a Rule 30 application, brought by the respondent due to the late provision of security for costs, for lack of prejudice. The appeal in the application for rescission of the order for the eviction came before this court on 1 March 2021.
- [2] In addressing the "*good cause*" requirement in a rescission application, it is common cause that the application for eviction, although properly served, never came to the appellant's notice. An accountant at its registered address received it, but did not inform the member of the appellant that he had received the application. The appellant's defence on the merits of the application for eviction, is that it, as a franchisee, was in occupation of the premises in terms of an agreement. That agreement is in dispute, but it is common cause that it would have terminated on 31 May 2020, had it existed. The appeal is thus moot on both versions, no matter what its merits once were. The appeal stands to be dismissed.
- [3] The remaining matter is one of costs. When only costs remain for decision, the matter is determined in broad general lines, and not by full judgment on the merits of, as in this case, the appeal. In this division, see *Jenkins v SA Boilermakers, Iron and Steel Workers & Ship Builders Society* 1946 WLD 15 at 17-18,¹ and *Roupell v Metal Art (Pty) Ltd and Another* 1972 (4) SA 300

¹ "... When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires Courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake.

(W) at 302D-H. Although these judgments did not expressly address the issue of a moot appeal, the principle is the same on how the matter is to be approached. Regarding the treatment of costs in a looming moot matter, see further: *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T) at 159B-C (underlining added):

*"Such an order at this stage will, however, be of no real practical value because the restraint relied upon by the appellant will in any event expire in a few weeks at the end of October 1992. No action instituted now can sensibly be determined before that date. The trial would therefore at best become relevant simply to determine the proper liability for costs. A costly trial, simply to determine who shall pay the costs of proceedings which have been rendered academic when the trial is set down, must be avoided. The Court must simply make a proper allocation of costs on the material at its disposal. (See *Jenkins v South African Boilermakers, Iron & Steel Workers' & Ship Builders' Society* 1946 WLD 15; *Gans v Society for the Prevention of Cruelty to Animals* 1962 (4) SA 543 (W).)"*

- [4] A matter where the costs of a moot appeal had to be decided, is *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* 2018 (4) SA 433 (SCA). The Supreme Court of Appeal held as follows in para 10 (underlining added):

"[10] The remaining question is what to do about the costs of the application in this court. Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was stillborn from the outset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would-be appellant may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to the date on which the appeal became moot. The other party may hold a different view. As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants should take into account, among other factors, the extent of the costs already incurred; the additional costs that will be incurred if the appellate proceedings are not promptly terminated; the size of the appeal record; and the likely time it would take an

In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled." (underlining added)

appellate court to form a view on the merits of the moot appeal. There must be a proper sense of proportion when incurring costs and calling upon judicial resources."

- [5] Accordingly, the duty to have brought this matter to an end, with sensible costs proposals rested on both parties. In the end this court raised the issue, after all the costs of an appeal were incurred.
- [6] Ultimately in *John Walker Pools*, the appellant was ordered to pay the costs of the appeal. It had bleak prospects of success, and seemed² to have acted deplorably in pursuing an appeal with no merit, whilst remaining in occupation of the premises without paying rent. The facts of this matter are different.
- [7] Our courts do not easily close the door to the courts on litigants at the rescission stage if the requirements for rescission are met. They have always enjoyed a wide discretion to ensure that justice is done. See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042G-10143A. In general terms the appellant had to show good cause for the rescission, which usually consists of three elements: (a) A reasonable explanation for the default, (b) showing that the application is made *bona fide*, and (c) showing a *bona fide* defence which *prima facie* has some prospect of success. See *Colyn v Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.
- [8] In my view, the appeal *prima facie* carried prospects of success. The appellant proffered a reasonable explanation for the default. On the merits of the defence, the appellant was in occupation of the business premises, seemingly trading as a franchisee of the respondent. At certain stages, it so traded in terms of a formal agreement and thereafter occupied the premises in circumstances where a renewal of a formal agreement was at least pursued in part and in fact, on its version, on the respondent's terms agreed to by the appellant. Under those circumstances, the appellant has demonstrated that it was *bona fide* in pursuing its defence. Further, under the circumstances a court should be slow to decide a rescission application in making findings on the existence (or not) of a formal, signed agreement. With

² Although this matter was not finally determined;

respect, another court, with the full facts available, should make the finding on the existence of an agreement, or not. It would have weighed heavily with me that *audi alteram partem* principle had failed, through no fault of the sole member of the appellant.

- [9] My overall view would point to the appellant being awarded the costs of the appeal at least until the matter became moot. However, that is not the only matter to consider in a costs decision. The appeal record was in such a poor state, that an order striking the matter from the roll would have been appropriate. Costs would have followed that result in the normal course. On the other hand, in terms of *John Walker Pools*, the respondent (no matter its own submissions about the appeal having become moot at an earlier date, as it had given occupation of the premises to a third party)³ too should have alerted the appellant and the court that the matter has become moot on all versions. Instead, three judges were unnecessarily called upon to prepare for an appeal.
- [10] Further, none of this would have happened had the person on whom the respondent properly served the original application (an accountant at the registered address) informed the appellant of the application. A judgment by default would not have followed, and the first decision would have been on the merits of the application for eviction after due compliance with the *audi* principle. In that sense both the appellant and the respondent are victims of consequences not under their control.
- [11] Fairness to both parties is the test to apply in the exercise of this court's discretion on costs.⁴ After reflection, the fairest order in this matter is for each party to pay its own costs.
- [12] Accordingly, I propose that the following order be made:
1. The appeal is dismissed;
 2. Each party is to pay its own costs, including all reserved costs.

³ I make no finding on the validity of the defence.

⁴ The principle is trite, see *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694A.



DP de Villiers AJ

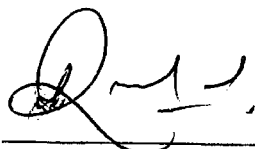
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
JOHANNESBURG

I agree and it is so ordered.



A Maier-Frawley J

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
JOHANNESBURG



AK Ramlal AJ

ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
JOHANNESBURG

Heard on: 1 March 2021

Delivered on: 12 April 2021 by uploading on CaseLines

On behalf of the Appellant:

Adv T Seroto

Instructed by:

Nwaila Attorneys Inc

On behalf of the Respondent:

Adv K Tsatsawane SC

Adv Ri Ramatselela

Instructed by:

Farah and Parker Attorneys