



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

CASE NO: 2022/17525

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

Date: 21 September 2022

H. Constantinos
SIGNATURE

In the matter between:

**THE SILVER BIRCH ESTATE HOMEOWNERS
ASSOCIATION NPR (RF)
(Registration Number: 2005/003035/08)**

First Applicant

MARY FISHER

Second Applicant

KELEBONGILE NTSANE

Third Applicant

AVRIL COUNTER

Fourth Applicant

and

JOHAN JOCHIMUS HEYNEKE

First Respondent

ROBERT JOHN CRAIG

Second Respondent

LIREN PILLAY

Third Respondent

COMMUNITY SCHEMES OMBUD SERVICE

"CSOS"

COMMUNITY SCHEMES OMBUD SERVICE

Fourth Respondent

"CSOS"

T S LEKOKOTLA

Fifth Respondent

Judgment of Application for Leave to Appeal

Reasons for judgment (handed down electronically by circulation to the parties' legal representatives by email) and by being uploaded to the Case Lines system of the Gauteng Division, Johannesburg.

The date and time for hand-down of judgment is deemed to be 10h00 on 21 September 2022

Matter heard on: Thursday, 15 September 2022

The matter was by consent between the parties, heard via electronic videoconference on Microsoft Teams.

CONSTANTINIDES AJ:

Background Facts:

1. This is an application for leave to appeal by the First to Fourth Applicants ("the Applicants") to the Full Bench of this Court, alternatively, to the Supreme Court of Appeal, against the Judgment granted by me in the Urgent Court which was handed down on the 6th June 2022. The following order was made:

*"1. The matter is struck off the roll due to self-created urgency;
2. The Applicants are to pay the costs on the attorney and client scale."*

2. For purposes of convenience the parties shall be referred to as in the Urgent Application.
3. The matter was set down and argued in the Urgent Court on the 24th May 2022. The Second, Third and Fourth Applicants were lay litigants and did not have legal representation. The First, Second and Third Respondents were represented by Counsel who opposed the urgent application. There is a pending application between the same parties in the Gauteng Division, Pretoria.
4. The reasons for judgment relating to the Urgent Application are detailed in my reasons for Judgment which will not be repeated herein and must be read as if incorporated herein.
5. The Applicants, have at the outset placed on record that the application for leave to appeal is **only sought in respect of the attorney client costs order**. (Emphasis added). They are not seeking leave to appeal in respect of the order striking the matter off the roll due to lack of urgency.
6. Both in the urgent application and in the present application the Second Respondent ("Ms Fisher") was the spokesperson for the Applicants who confirmed in person that that was in order.
7. Regrettably Ms Fisher failed to convince the court that the matter justified

an urgent hearing and therefore the court based on the reasons detailed in the reasons for judgement, struck the matter off the roll and awarded punitive costs against the applicants.

8. The urgent application papers were exceptionally voluminous for a matter of this nature and in the Applicant's Heads of Argument in this matter at paragraph 23.2, the following was stated :
9. “the volume of papers in the matter sought to be appealed totalled about 288 pages, which were mostly annexed evidence.”
10. It was argued that another Court may come to a different conclusion to the present Court in regard to costs. Ms Fischer cited and read various cases wherein she states there were similar facts to her matter and despite the fact that the Court struck the matter off the roll, the Court did not award punitive costs against the parties and instead made no order as to costs.
11. According to Ms Fischer on the 3rd November 2020, the First, Second and Third Respondents and Another launched an urgent application against the First Applicant and Another in the South Gauteng High Court under Case Number 2020/32119 to, *inter alia*, be declared Directors of the First Applicant.
12. The Court allegedly held that this matter was not ripe for hearing and lacked urgency. Furthermore, the Court did not award punitive costs against them, instead there was no order as to costs. The aforesaid is irrelevant to the instant case before the Court and reference to the

aforesaid cases are misguided.¹

13. According to the Applicants in this matter, it was argued that the punitive costs order which was awarded by this Court:

“22. ... has a serious practical effect in setting a legal precedent that effectively goes against the provisions of Section 77 of the Companies Act No. 71 of 2008 regarding when and under which circumstances company directors bear liabilities when dispensing their duties. Furthermore, the judgment being appealed will have the practical result of setting a legal precedent for punishing company directors seeking relief from any court in good faith; who acted rationally, with due care and skill, for proper purpose and in the best interest of the company.”²

14. The aforesaid argument is irrelevant to the Court’s finding that the matter was struck off the roll due to lack of urgency. The Court refused to hear an argument on the merits. The aforesaid argument in the Applicants’ Heads of Argument is an attempt by the Applicants to re-argue the merits in the urgent matter. They did not pass the hurdle of proving to the Court that the matter was urgent. Therefore, to argue the merits at the stage of the application for leave to appeal does not assist the Applicants in any way.

15. The Applicants’ further argument that despite the fact that a matter totalling

¹ Paragraphs 18, 19, 20 – 082-8 Case Lines ref, Applicants’ Heads of Argument

² Paragraph 22 – 082-9 Case Lines, Applicants’ Heads of Argument.

403 pages came before the Gauteng Division, Pretoria under Case No.: 5930/2022 and was merely struck off the roll with no order as to costs despite the fact that the present matter allegedly totalled approximately 288 pages which was allegedly mostly annexed evidence in fact is indicative of the Applicants' refusal to comply with the rules of court that require clear and concise applications which ensure that matters are dealt with expeditiously in cases of urgency.

16. During the hearing for the leave to appeal application, Ms Fischer persisted in attempting to argue the merits of the main application and the Court had to repeatedly caution her that the Court had not heard the merits in the Urgent Application and was not going to hear the merits in the application for leave to appeal. The merits of the main application had not been canvassed and this is evidenced by the facts that the matter was struck off the roll due to self-created urgency.
17. The Applicants furthermore attempted to side track the Court with arguments that they were not afforded an opportunity to argue the punitive costs order that was made and that the Judicial Officer stood up and left the Court not enabling them to argue the matter.
18. Ms Fischer was cautioned that to make allegations which are not candid purely for purposes of discrediting the Judicial Officer had serious repercussions, Ms Fischer then did not persist in regard to the aforesaid allegation.
19. The constant interruptions of the Applicant in the Urgent Application was to

stop the Applicants from presenting the merits of the case to the Court as they had not passed the hurdle of showing the Court that the matter was urgent.

20. The Applicants have stated that the Second to Third and Fourth Applicants have indicated in their Heads of Argument and in argument that they have not obtained legal aid as they do not qualify according to the means test as they earn more than the means test requires. Therefore, this in itself is an admission that they are not in financial dire straits as they have indicated to the Court in the Heads of Argument in the Application for Leave to Appeal.
21. The Second, Third and Fourth Applicants allege that they are merely trying to assist the non-profit organisation and they did not have funds to employ legal representation. The crux of the argument is that the parties are lay persons and therefore the impression created is due to the fact that "they are lay persons", they should not be held accountable for legal costs in this matter.
22. The Applicants filed a Supplementary Affidavit wherein they took issue with the fact that the Respondents were opposing this matter and requested that they not be heard in this matter. It is trite that a party need not file a Notice of Intention to Oppose an Application for Leave to Appeal.
23. The parties were given a directive to all file Heads of Argument and the Respondents filed their Heads of Argument to comply with the courts directive. Nevertheless, the Respondents indicated that they had no objection to the Supplementary Affidavit being entertained by the Court.

The Supplementary Affidavit once again is an abuse of the process of Court in that the Applicants again attempt to re-argue the merits of the Urgent Application at the Application for Leave to Appeal stage, which is untenable.

24. The reasons for granting a punitive costs order appears in my reasons for judgment in the urgent application and shall not be repeated in this Judgment.
25. According to the Respondents Counsel, in terms of Rule 49, there is no requirement to file a Notice of Intention to Oppose an Application for Leave to Appeal. It was argued that the Applicants had not specified the grounds of appeal and that the Applicants should stand or fall by what they have stated in their Application for Leave to Appeal.
26. It was placed on record that the main application is pending before the Pretoria High Court and that the Respondents are out of pocket due to the alleged vexatious litigation which the Second to Fourth Applicants have launched in this Court.
27. Furthermore, the Respondents have had to employ legal representation to oppose the present application for leave to appeal, thereby incurring further costs.
28. I am in agreement with the Respondents' argument that the Court Orders relating to other applications between these parties and others are irrelevant to the present application. According to the Respondents'

Counsel the facts for the relief sought are different to the facts of the present case. Nevertheless, as stated above, the merits of the case were not canvassed and are not relevant to the present matter. It was merely the fact that the matter was not urgent that was ruled upon and not the merits of the case.

29. The Applicants have stated that the Respondents had refused to accept service of the Urgent Application. However, the Respondents took issue with this and stated that the Applicants were not being candid with this Court and that in fact the Office of the Respondents' Attorneys had closed for the day when the Applicants had attempted to serve the papers on the Respondent's Attorneys of record. Nevertheless, the urgent application afforded the Respondents one Court day within which to give notice of intention to oppose and to file their papers two days thereafter.³
30. The Respondents' Counsel indicated that she was unaware of the Judicial Officer standing up and not allowing the Applicants to address the Court on costs. The court was adjourned in the proper manner and this is evidenced from the record of the proceedings.
31. The Applicants stated that irrespective of the fact that the Respondents were not afforded proper time limits within which to file their papers in the urgent application, they were aware of what the contents of the application were. This argument is not sustainable and does not absolve the Applicants conduct in not complying with the rules of court or the directives and is

³ Case Lines 001-1 to 001-3 and 001-4.

indicative of their lack of *bona fides*.

32. I have had regard to the cases referred to by the Applicants in terms of which no costs orders were granted. These cases do not support the Applicants' arguments and do not appear in line with the present arguments and issues raised in this application.

Applicants Grounds for leave to appeal

33. The Applicant's application for leave to appeal has stated that the Court erred and misdirected itself in the following respects, that the court:

"6. ... erred in concluding that the Applicants' urgent application for interim relief was an abuse of court processes, given that there was a pending application in the North Gauteng High Court, in respect of the same parties. (at para 6)."⁴ and :

"7. ... erred at paragraph 24, in concluding that the Applicants' application was ' a text book case of an abuse of the court process where the parties fail to comply with the uniform rules of court and launch unsustainable applications which basically amount to frivolous and vexatious litigation.'"⁵ and

34. Did not afford the Applicants:

⁴ Case Lines 075-7, paragraph 6 of the Application for Leave to Appeal.

⁵ Case Lines 075-9, paragraph 7 of the Application for Leave to Appeal.

“8. ... a fair opportunity to argue their matter ...”⁶

35. The parties submit that “... another Court could reasonably have come to a different conclusion.”⁷

36. The Applicants have made scurrilous and vexatious allegations against the judicial officer both in argument and in the papers and amongst those scurrilous allegations have argued that they were not afforded an opportunity to address the Court either in relation to the urgent application or in regard to the award of punitive costs on the Attorney and client scale at the hearing. The Applicants furthermore state that the Court’s finding in paragraphs 13 and 14 “.....regarding irreparable harm, and that the Applicants made unsubstantiated statements “both in argument and in the papers”, and allege the court’s decision in finding that the parties had not substantiated their statements was erroneous.”⁸

The Law

37. The Applicants who launch urgent applications must indicate to the Court why they cannot be afforded substantial redress at a hearing in due course. Where a Court finds that the application lacks the requisite degree of urgency, the Court can refuse to hear the matter and in those circumstances can strike the application from the roll.

Where a Court strikes off a matter from the roll due to lack of urgency, does this constitute a final judgment and is this order appealable?

⁶ Case Lines 075-10, paragraph of the Application for Leave to Appeal.

⁷ Case Lines Ref: - page 075-2, application for leave to appeal.

⁸ Case Lines 075-6, paragraph 5, application for leave to appeal.

38. It is trite when a matter is struck off the roll, it is not appealable. The urgent court did not entertain or rule on the merits of the matter.

39. Section 17(1) of the Superior Courts Act, 10 of 2013 ("the Act") states:
"Leave to appeal may only be given where a Judge or Judges concerned are of the opinion that –

(a) (i) The appeal would have a reasonable prospect of success;

or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of Section 16(2)(a); and

(c) Where the decision sought to be appealed against does not dispose of all of the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties;

40. The grounds upon which the Applicants seek leave to appeal are unclear and those grounds are not set out properly in terms of the rules. Once again the Applicants hide behind the fact that they are "lay persons". The parties were requested to file Heads of Argument and to address the Court as to why they have not approached the Legal Aid Board for legal aid. Based on the Heads of Argument, they state the following in regard to legal

aid:

*15. Having consideration for Legal Aid South Africa's qualifying criteria and means test, the First to Fourth Applicants did not and do not qualify for legal aid assistance. Specifically, that the First Applicant is a juristic person and not a natural person and its directors do not meet the means test requirements."*⁹

41. Based on the aforesaid it is evident that the Second to Fourth Applicants have "elected" not to seek legal representation and on their own papers it is evident that they can afford legal representation but choose to approach the Court in person. Despite the aforesaid the Second and Third Applicants indeed did address the court relating to the courts intention to grant punitive costs against them by stating that they could not afford to pay the costs yet, in the heads of argument and in argument in this matter Ms Fisher indicated that the parties did not qualify for legal aid as their earnings and assets were above the minimum threshold required by legal aid. From the aforesaid the parties misinformed the urgent court that they "could not afford" to pay the costs that the court was going to order against them. Furthermore, the court in the application for leave to appeal is once again mislead with the allegation that the parties were not afforded a proper hearing or an opportunity to address the court relating to the matter or the costs issue.

42. The courts order of punitive costs against the Applicants in which the

⁹ Case Lines 082-7, Applicant's Heads of Argument on Leave to Appeal.

Applicants seek leave to appeal would not have a prospect of success in another Court and there is no other compelling reason why the appeal should be heard and the decision sought to be appealed against does not dispose of all the issues in their case and an appeal would not result in the just and prompt resolution of the real issues between the parties as there is a pending case in the Pretoria High Court in this regard.

43. Regarding the question of leave to appeal, it has been held that if the judgment or order sought to be appealed against does not dispose of all the issues between the parties, the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words the test laid down was : *“whether the appeal – if leave were given – would lead to a just and reasonably prompt resolution of the real issue between the parties”*. Piecemeal consideration of a case was, therefore, allowed if an appeal necessarily led to a more expeditious and cost-effective final determination of the real issue between the parties, and, as such, contributed decisively to its final solution.¹⁰
44. In terms of Section 17(1)(a)(i) the criterion as to whether there would be a reasonable prospect of success in determining the conclusion to which the Judge or Judges must come before leave to appeal can be granted. There must be a sound rational basis for the conclusion that there are prospects of success on appeal.¹¹

¹⁰ Superior Court Practice Vol. 1, Service 11, 2019 A2 – 58.

¹¹ Four Wheel Drive Accessory Distributors CC v. Rattan N.O. 2019 (3) SA 451 (SCA) at 463 F Superior Court Practice, vol. 1 and A2 – 55, Service 12 [2020]

45. In the *Mont Chevaux Trust (IT 2012/28) v. Tina Goosen* the Land Claims Court held (in an obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.¹²
46. In *Notshokovu v. S*¹³ it was held at **paragraph 2** that an Appellant faces a higher and stringent threshold, in terms of the Act (i.e. this sub-section), compared to the provisions of the Repealed Supreme Court Act, 59 of 1959.
47. The court has to consider each application for leave to appeal on its own facts and the Applicant must demonstrate to the Court that there is a compelling reason why the appeal should be heard.
48. The facts in this case do not demonstrate that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. The decision in this matter which the applicants seek leave to appeal does not fall within the ambit of Section 16(2)(a) and the decision sought in the appeal does not dispose of all the issues in the case.
49. Given the history of this matter it has become evident that the Applicants have failed to accept the seriousness of their failure to comply with the uniform rules of court relating to affording their opponents sufficient time frames or the practice directive of this division relating to urgent

¹² Superior Court Practice, vol. 1 and A2 – 55, Service 12 [2020]

¹³ Unreported, SCA Case No.: 157/15 dated 7 September 2016

applications.

50. The general rule is that costs which have been unnecessarily incurred should be borne by the party responsible therefor hence the costs order granted against the Applicants in the urgent application.

51. In the leading case concerning attorney and client costs Tindall JA stated:

“The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”¹⁴

In essence this Court must try to achieve fairness to both sides.¹⁵

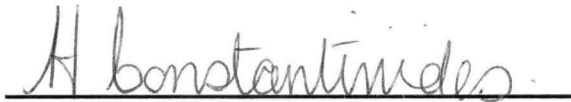
52. Despite the fact that the Applicants abandoned the application for leave to appeal in respect of the striking off of this matter due to lack of urgency at the commencement of the hearing of this matter they nevertheless continued to present argument in respect of the entire matter and repeatedly attempted to argue the merits of the urgent application before this court. The aforesaid is indicative of the total disregard for the time and scarce judicial resources, and once again is an abuse of the process. The fact that the parties are lay persons does not absolve them from complying with the rules and directives of the court and a failure and/or refusal to do so under the guise of ignorance of the law is untenable and vexatious.

¹⁴ *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597 at 607.

¹⁵ *Ward v Sulzer* 1973 (3) SA 701 (A) at 706G

The following order is made:

1. The application for leave to appeal is dismissed.
2. Each party is to pay their own costs.



H CONSTANTINIDES

Acting Judge of High Court
Gauteng Local Division
JOHANNESBURG

Date of Hearing: 15 September 2022

For the 1st, 2nd and 3rd and 4th Applicants ("the Appellants):

Applicants in person

Counsel for the 1st, 2nd and 3rd Respondents: Adv. N Breytenbach

**Attorneys for the 1st, 2nd and 3rd Respondents: Maybery Attorneys
Inc.**