



IN THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE.

CASE NO: 78/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: 15.11.2022	
SIGNATURE:	 LITHOLE AJ 

In the matter between:

JOHANN ALBERT MEYR

1ST APPLICANT

LEONORE ALENDRA LAAS

2ND APPLICANT

PETRUS HENDRIK DU BRUYN N.O

3RD APPLICANT

BARBARA DU BRUYN N.O

4TH APPLICANT

DANIEL CHRISTOFFEL STRYDOM

5TH APPLICANT

JOHN GAR ANNADALE

6TH APPLICANT

GERT JACOB WILHEMUS
VAN DER MERWE

7TH APPLICANT

LEON FERDINAND STEYN N.O

8TH APPLICANT

GERRIT VOORSTER N.O

9TH APPLICANT

And

SABLE HILLS ECO PARK HOME
OWNERS ASSOCIATION (NPC)

1ST RESPONDENT

BUNKER HILLS INVESTMENT 638
(PTY) LIMITED

2ND RESPONDENT

GERHADUS RUDOLPH VILJOEN

3RD RESPONDENT

WILLIAM STEPHEN WILLIAMS

4TH RESPONDENT

NADIA SMIT

5TH RESPONDENT

THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISION

6TH RESPONDENT

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for handing down shall be deemed to be the 15.11.2022 2022.

LITHOLE AJ:

INTRODUCTION

1. The applicants seek an order compelling the Sable Hills Eco Park Homeowners' Association's board of directors to adopt a resolution to amend its existing memorandum of incorporation (MOI). They contend that the amendment sought is to ensure that the developer, as the profit company with the sole director, no longer appoints the majority of the directors to the board of the Homeowner Association (HOA) as the (non-profit company) thereby preventing the developer exerting its wishes on the remainder of the homeowners who are members of the HoA.
2. The applicant asserts that the relief sought is in two fold first, the HoA memorandum of incorporation does not comply with the provision of the 2008 Companies Act. Secondly, because the developer controls the majority of the Board of directors and there is currently a deadlock between the directors concerning important financial decision of the HoA.
3. The second respondent (the respondent) is on opposing this application on the basis that the applicant has misconceived the legal basis of the relief they are seeking. They contend that section 66(4) of the Company Act 71 of 2008 is not applicable to the HoA as it is non-profit company and raised point in *limine* to that effect. He further contend that the first respondent article of association is an agreement as contemplated in section 15(7) of the Company Act 71 of 2008 and consequently item 3A of schedule 5 to the Act applies to the article of association, in that regard the MOI is not inconsistent with the Act.

FACTUAL MATRIX

4. The applicant approached this court seeking the court to excise it powers in terms of section 163 of the Company Act 71 of 2008. In essence the applicant are seeking the following relief:

"That the first respondent's board of directors are directed to forthwith adopt a resolution as contemplated in section 16(4)(a) of the Companies Act, 71 of 2008, to amend the first respondent's existing Memorandum of Incorporation (formerly known as its Articles of Association) in the following ways:

- (a) *By deleting the existing paragraph 6.1 and 6.3 of the Memorandum of Incorporation and replacing them with the following new paragraphs:*

"6.1 Subject the provisions of the Companies Act, 71 of 2008, the company's board of directors shall during the currency of the development period comprise of no less than four and no more than six directors. After expiry of the development period, the board shall consist of no less than three and no more than five directors.

6.3 During the development period, the developer shall have the right to appoint 50% of the company's board of directors on the expiry of the development period the directors so appointed shall immediately be deemed to have resigned from office. The remaining members of the board shall be elected to office by the members in general meeting, it being understood that the developer shall not be entitled to cast any vote on the election of such directors."

- (b) *By amending the existing paragraph 7.3 of the Memorandum of Incorporation by adding the following at the end of the paragraph:*

"It being understood that in the event that the vacancy involves a director nominated by the developer, the remaining director(s) nominated by the developer shall nominate the replacement director, and in the event that the vacancy involves a director elected by

members, the replacement director shall be elected by the remaining directors chosen by the members."

- (c) *By deleting the existing paragraphs 8.1 and 8.2 of the existing Memorandum of Incorporation and replacing them with the following new paragraphs:*

"8.1 The directors elected and appointed at a general meeting shall convene a first board meeting within 7-days after the general meeting and shall at such first meeting, as a first order of business, elect a chairman and a vice-chairman from their ranks.

8.2 The chairman and/or vice-chairman shall have no casting votes or special privileges.

8.3 The chairman shall preside over all board meeting and, when he/she is unavailable, this function will be fulfilled by the vice-chairman.

8.4 The office of chairman and vice-chairman shall during the currency of the development period rotate on an annual basis between the directors nominated by the developer, and between the directors elected by the company's members."

- (d) *By deleting the existing paragraph 11.2 of the memorandum of incorporation and replacing it with the following new paragraph:*

"11.2 Subject to the provisions of the Companies Act, 71 of 2008, the quorum for the holding of ant meeting of the directors shall be one-half of the total number of directors then in the office, plus one director."

- (e) *By inserting the following new paragraphs 11.6 to 11.11 into the memorandum of incorporation:*

"11.6 Unless the Companies Act, 71 of 2008, prescribed a higher percentage, a decision by the board of directors shall be adopted by an ordinary majority vote, whether taken at a board meeting or through a round-robin process.

11.7 In the event that the board is deadlocked on any decision, the disputed decision will be referred to an independent third party. In the event that the decision is of a financial nature, the independent party shall be an accountant of no less than 10-

years standing. Any other decision, or if the deadlocked directors cannot agree on the nature of the dispute on which the board is deadlocked, will be referred to a practicing attorney with experience in commercial law, of no less than 10-years standing.

11.8 The referral in 11.7 shall take place within 48-hours after the deadlock arises. In the event that the parties are unable to agree on the identity of the decision maker within 48-hours, such person shall be appointed on an urgent basis by the South African Institute of Professional Accountants (SAIPA), in the case of an accountant, and by the President of the Legal Practice Council, in the case of an attorney.

11.9 The deadlocked directors shall be entitled to make written representations to the appointed decision maker, which representations must reach the decision maker in electronic format within 48-hours after his/her appointment.

11.10 The decision maker shall publish his/her decision in electronic format within 4-days after his/her appointment and the decision so published shall be final and binding on the company and its board of directors and shall be forthwith implemented by the board of directors.

11.11 When making his/her decision, the decision maker shall act impartially, in good faith, and with the best interest of the company as his/her principal obligation.."

5. That the cost of this application be paid by the second respondent, and by any other respondents who opposes this application, jointly and severally with the second respondent".
6. The first and second applicants are members and directors of the first respondent being HoA incorporated as non-profit company. The third to the ninth applicants are the owners of the residential erven in the Sable Hills Eco Estate and are members of the first respondent.

7. The first respondent is Sable Hills Eco Park Homeowners' Association, being non-profit company in terms of section 8 of the Companies Act 71 of 2008 (the Act).
8. The first respondent was incorporated on 28 May 2011, approximately two years before Companies Act 71 of 2008 had come into operation. It is association that was incorporated under section 21 of the old Companies Act 61 of 1973. The statute which governs the association is the Article of Association. Before the commencement of the Act the first respondent's board of directors did not amend its article of association and memorandum of association when the new Act came into operation on ground that the article of association or MOI is not contrary to the Act.
9. The HoA received an advice from the association's attorney and the advice was accepted since it was consistent with item 4 of schedule 5 to the Act which provided that every pre-existing company incorporated in terms of section 21 of the previous act is deemed to have amended its memorandum of incorporation as of the general effect date to expressly state that it is non-profit company and to have changed its name in so far as required to comply with section 11(3).
10. The second respondent is the developer of the Sable Hills Eco Estate. The second respondent is the only respondent opposing this application though six respondent are cited.

11. The relation between the applicants and the respondent is that of the homeowners and the developer relationship. The relationship is based on an agreement. The agreement is as contemplated of section 15(7) of the Act.
12. The second respondent concluded the contract with third party purchaser of an erf in the estate including the applicants. The agreement is that all parties to it accept all the rules and regulations of the first responded as entrenched in the contract. Each buyer agreed to automatically becoming the member of the first respondent and to comply with all the rules of the HoA in clause 6 of the agreement.

The applicants

13. The applicant seeks a relief in terms of section 163 of the companies Act 71 of 2008 in that the HoA's board of directors be directed to adopt a resolution to amend the HoA's existing Memorandum of incorporation with the view to inter alia introduce a more equitable or democratic governance structure in the management of the Sable Hills Eco Park residential Estate.
14. The applicant seeks to amend the memorandum to ensure that the developer no longer appoints most of the directors to the board of the HoA with the intent to prevent the developer from exercising de facto control in respect of the remainder of the home owners for an undetermined future period to the prejudice of the homeowners. They contend that the present situation operates oppressive vis-a-vis the remainder of the residents in the HoA.

15. The applicant contend that they are not seeking to renegotiate the terms of the sale agreements concluded with the developer when they purchased stands but rather seeking to enforce the provision of the 2008 Companies Act.
16. The applicant conceded in the replying affidavit that the "the developer has a vested interest in the success of his development, that he may for this reason require a certain degree of control over the development." But they content that "however the legislature resolved to limit the control that a single party (like the developer) can excise over a company that is why section 66(4) was enacted."¹

The respondent

17. As alluded supra the second respondent is the only respondent resisting the relief sought by the applicant. The basis for its opposition is that the section 66(4) does not find application in this matter since the first respondent is the non-profit Company. It is accepted by the applicant that the first respondent is not profit company. The respondent raised point *in limine* that the "relief is mis conceived " in that the applicant ill-conceived the application of section 66(4)(b) of the Act that empowers the members of the 1st respondent to appoint at least 50 % of its board of directors .This section seems to be based upon the provision of section 10 (2) (b) of the Act which had not excluded the operation of the subsection 66(4)(b) as read with the provision of section 10(4) which provided

¹ Replying affidavit page 518 par 5.6

that any reference to "a shareholder" as it is the case in section 66)4) (b) must be construed as reference to "the voting members of the non-profit company".

18. The respondent further contended that the applicants when buying the property ,they signed the contract with the 1st respondent voluntarily ,and have contractual agreement which is binding between the parties . They agreed to be members of HoA and to comply with the rules and guidelines of the HoA.
19. Thirdly, the respondent contend that the conduct of the respondent in exercising its right to appoint three directors to the first respondent's board is not oppressive or prejudicial to the applicants or not unfairly disregarding the interest of the applicants.
20. The respondent further contend that there is dispute of fact on the papers as to whether the board that had been selected at the AGM of 12 October 2019 had in fact become deadlocked as alleged by the applicants in their founding affidavit.
21. The respondent filed an application for condonation for late filing of the heads of arguments which is not opposed by the applicant. The application is granted since there is no prejudice to any party to the proceedings.
22. As indicated the respondent raised a point *in limine* which clearly is intertwined to the merits .It will be dealt with below when dealing with that relevant point.
23. The issues to be determined:

- 23.1 whether the MOI does comply with the provision of the Companies Act 71 of 2008;
- 23.2 whether section 66(4) (b) apply to non-profit company; and
- 23.3 whether the court should excise its inherent power as envisaged in section 163 of the Companies Act 71 of 2008 to address the alleged power imbalance which constitute oppressive conduct if it find that section 66(4) does not find application.

Analysis

- 24. First, Whether the MOI comply with the provision of the 2008 Companies Act. It is common cause that the 1st respondent MOI was prepared in terms of the old Companies Act and that during the development period of the estate the respondent shall have the 20 votes in addition to the votes in respect of each unsold erf that vest in it .The article of association is an agreement as contemplated in section 15(7) of the Act consequently.
- 25. Clause 6.1 of the first respondent's MOI conflicts with the Act insofar as it provides for the appointment of a minimum of two directors (as opposed to the minimum of three directors dictated by section 66(2)(b)), the aforesaid provision only will be void to the extent that it contravenes or is inconsistent with the Act as envisaged in section 15(1)(c) of the Act. It is not the entire MOI that becomes void as the applicants seem to contend. In terms of item 4(1)(a) of Schedule 5 of the Act, every pre-existing company incorporated in terms of section 21 of the

previous Act was deemed to have amended its memorandum of incorporation as the general effective date of the Act.

26. Secondly, whether section 66(4) (b) apply to non-profit company.
27. The applicant counsel argued that the section 66 (4)(b) find application in this matter and that It empowers the members of the 1st respondent to appoint at least 50 % of its board of directors .This section is based upon the provision of section 10 (2) (b) of the Act which he argues that it had not excluded the operation of the subsection 66(4)(b) as read with the provision of section 10(4) which provided that any reference to "a shareholder as is in the case in section 66(4) (b) must be construed as reference to "the voting members of the non-profit company".
28. The respondent contends that because section 66(4) expressly refers to profit companies, it does not apply to non-profit Companies. The respondent's submission is that the provisions of section 66(4)(b) expressly exclude non-profit companies, is supported by the exclusion of the provisions of section 66(8) from application to non-profit companies. The latter section expressly refers to profit companies (as is the case with section 66(4)(b)) and provides that directors "must be elected by the persons entitled to exercise voting rights in such an election".
29. There is two destructive interpretation of the same section before the court, which then will require the court to look into case law in interpreting statute.

30. The interpretation of legislation involves more than analysing the particular provision in question. To interpret a text in its context includes the intra-textual context, that is the enactment as a whole, including its unique structure and legislative codes, as well as the extra-textual context (the rest of the existing law and other contextual considerations that may be applicable).

31. The interpreter has to study the legislation as a whole. In Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edms) Bpk², the court pointed out that:

"when interpreting certain provisions, statute must be studied in its entirety."

32. The interpretation of the Act requires a careful consideration of the scheme of the Act and its object and should be measured against the rights embodied in the Constitution.

33. In Cool Ideas 1186 Cc V Hubbard and Another the court held that:

"A fundamental tenet of statutory interpretation is that the word in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. there are three important interrelated riders this general principle, namely:

1. *that statutory provisions should always be interpreted purposively.*

² 1983 (4) SA 344 (A)

2. *the relevant statutory provisions must be properly contextualized; and*
3. *all statutes must be construed consistently with the constitution, that is, where reasonably possible, legislative provision ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)".³*

36. In Natal Joint Municipal Pension Fund, the Supreme Court of Appeal postulated a modern approach to interpretation. Wallis JA formulated it as follows:

"The general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:

"A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules'.⁴

37. In the circumstances, the background to the legislation, the context and the surrounding circumstances are important. The purpose of the legislation and the intention of the legislature. This exercise is not undertaken in a piece meal fashion, nor is it a step by step exercise. A wholistic approach should be adopted.
38. In looking in the section 66(8) it is clear that it was never the intention of the legislature to make the reading of the "profit company" to be synonymous to the phrase "non-profit company".

³ Cool Ideas v Hubbard 2014 4 SA 474 (CC) at paragraph 28

⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012)

39. If the legislature's intention was indeed that the phrase "profit company" should be synonymous to the phrase "non-profit company" and that the members holding voting powers in a non-profit company would be entitled to elect 50% of the directors of the board (read "persons entitled to exercise voting rights in such an election"), then it is completely illogical that the legislature would have excluded the operation of section 66(8) from non-profit companies. The exclusion of section 66(8) insofar as non-profit companies is concerned, leaves one with the conclusion that the election of the directors of such a company will be governed by the said non-profit company's MOI, which document may include the powers set out in sub-sections 66(4)(a)(i) - (iii).
40. The second respondent's rights to appoint three directors during the development period as per clause 6.3 of the MOI, is neither objectionable, nor contrary to the Act.
41. Thirdly, whether the court should excise its inherent power as envisaged in section 163 of the companies act to address the alleged power imbalance which constitute oppressive conduct if it finds that section 66(4) does not find application in this matter.
42. The applicants seeks to obtain an order in terms of section 163(2)(d) of the 2008 Companies Act directing the HoA to amend its MOI in accordance with section 66(4), in order to bring the MOI in line with the 2008 Companies Act and ensure it is no longer in conflict with Act.

43. The applicant in seeking the relief they do, they contend that they seek to give effect to section 7(h) and (j) of the 2008 Companies Act which states the Act's purpose is to "provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions and "encourage the efficient and responsible management of companies".
44. The respondents contend that section 163(2)(d) can only be granted to prevent oppressive or prejudicial conduct, none of which the second respondent, using, in the second respondent's own words: his 'superior voting power in the first respondent' has caused to the members/shareholders of the first respondent.
45. The next enquiry to be considered is whether the exercise by the second respondent of its rights to appoint three directors to the first respondent's board, has been oppressive or prejudicial to the applicants or whether it unfairly disregarded the interests of the applicants.
46. The applicants relies on *Geffen and others v Dominquez-Martin and Others* (4501/2014)[2017] ZAWCHC 118;[2018]1 All SA 21 (WCC) (17 October 2017) where Davis, J made reference to the analysis contained in *Henochsberg* on the Companies Act which states:

"Provided that the courts will adopt the same approach as under s 252, Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517(c) and authorities there referred to indicate a willingness on the part of the court to intervene where the circumstances show e.g. "that the majority shareholders are using their greater voting power unfairly in order to prejudice" a minority shareholder or "are acting

on a manner which does not enable ; such a shareholder "to enjoy a fair participation"

47. The applicants further relied *Grancy Property Ltd v Manala and others* (665/12) [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA) (10 May 2013) the application of section 163 was considered and applied where Petse JA considered the jurisprudence developed over the years insofar as section 252 of the Companies Act, 61 of 1973 (which is in all material respects, the previous equivalent of section 163 of the 2008 Companies Act). In considering such he cited the following extract at paragraph [22] of this judgment:

"Oppressive conduct has been defined as unjust or harsh or tyrannical ... or burdensome, hard and wrongful ... or which involves at least an element of lack of probity or fair dealing ... or a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. It will be readily appreciated that these various definitions represent widely the divergent concepts of oppressive conduct."

48. Petse, JA went on to agree with Prof Cassim et al and state:

"in the affairs of the company - (per Tebbutt AJ (as he then was) in the Aspek Pipe case supra at 527)' or where the shareholders have entered into an association upon the understanding that each Of them will participate in the management of the company, but the majority use their voting Dower to "exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms".

49. The applicant contend that they have suffered and will continue to suffer, prejudice due to the conduct of the second and third respondents.

50. The respondents submitted that apart from alleging that the third and fourth respondents had adopted a *"dictatorship-like approach over the HOA"* by assuming the positions of vice-chairman and chairman respectively (an allegation which does not even feature in the founding papers), the Applicants' counsel had not drawn the Court's attention to any single incident pointing to oppressive, prejudicial or unfair conduct.

51. Section 163 of the Act reads as follows:

"(1) A shareholder or a director of a company may apply to a court for relief if-

- (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;*
- (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or*
- (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.*

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-

- (a) an order restraining the conduct complained of;*
- (b) an order appointing a liquidator, if the company appears to be insolvent;*
- (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;*
- (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;*
- (e) ...;*

- (f) ...
 - (i) ...; or
 - (ii) ...;
- (g) ...;
- (h) ...;
- (i) ...;
- (j) ...;
- (k) ...; or
- (l) ...

(3) ...

- (a) ... and
- (b)"

52. From the facts submitted it is clear that the applicants are unhappy with the second 's respondent using his voting power which are contained in the MOI signed by HOA and its members. The applicants in essence attempt to subvert the rights that were created in favour of the Second Respondent in terms of its contractual arrangements with the members of the first respondent through the purported amendment of the latter's MOI.
53. Where the applicants and all other members of HoA voluntarily accepted the second respondent's greater voting powers and its ability to appoint directors on the board, there can hardly be any room for describing these provisions (or the exercise thereof) as oppressive, prejudicial or unfairly disregarding their interests. The applicants had failed to make out a case for any relief in terms of section 163 of the Act and that the application therefore falls to be dismissed.
54. The respondents had raised an issue about dispute of facts. The respondent contends that a clear dispute of fact on the papers exist. It arise on the issue on

whether the board that had elected at the AGM of 12 October 2019 had in fact become deadlocked as alleged by the applicants in their founding papers. The applicants had not disputed the second respondent's testimony that despite not being delegated by a properly constituted meeting of directors, the first and second applicants had in fact side-lined or shunned the other directors of the first respondent and purported to discharge all the functions of the first respondent's board of directors on their own, even going so far as to arrogate to themselves the titles managing directors despite the fact that the first respondent's MOI did not recognise any such office.

55. If the Court finds that there are disputes of fact, the Court retains the power to refer only those aspects that are in dispute and not capable of resolution on paper to oral evidence.
56. This principle that applicable if there is dispute of facts is called the "Plascon Evans Rule" which was developed in the matter of ***Stellenbosch Farmers Winery Ltd v Stellenbosch Winery (Pty) Ltd***⁵ and applied in the ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd***⁶.
57. The court held in the matter of ***Moosa Bro & Sons (Pty)Ltd v Rajah***⁷ "the presence of a dispute of fact in an opposed application, and the nature thereof, will often be the determining consideration in deciding whether viva voce evidence should be ordered".

⁵ 1957(4)SA234(C)

⁶ 1984(3)SA623(A) at 634

⁷ 1975(4) SA 87 (D) at 91D

58. In the matter of *Room Hire Co (Pty)Ltd v Jeppe Street Mansions (Pty)Ltd*⁸, it was held that the 'principle' ways in which a dispute of fact may arise are set out as follows:

- (i) When the respondent denies all the material allegations made by the various deponents on the applicant's behalf and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence viva voce if subpoenaed.
- (ii) When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes.
- (iii) When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are bias untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by the respondent directly contradicting the applicants' main allegations does not render the matter free of a real dispute of fact.

⁸ 1949(3) SA 115 (T) at 1163

59. There is dispute of facts in this matter, but it is not a dispute not capable of resolution on paper .

Costs

60. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.⁹ To the extent to which ethical considerations may enter the exercise of a presiding officer's discretion, this must also be determined by the facts of each case.¹⁰
61. The basic rule is that subject to express enactments to the contrary, all costs are in the discretion of the court. Even the general Rule, namely that costs follow the event is subject to the overriding principle. The discretion must be exercised judicially upon consideration of the facts of each case. In essence, it is a matter of fairness to both sides. *"judicially means not arbitrarily"*¹¹
62. In giving presiding officers a discretion, the law as contemplated is that they should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which has a bearing on the issue of costs and then make such an order as to costs as it would be fair and just between the parties.¹²

⁹ Raboniwitz v Van Graan 2013 (5) SA 315 (GSJ).

¹⁰ McDonalds Trading v Huey Extreme Club 2008 (4) SA (C).

¹¹ Gcanga v AA Mutual Insurance Association Ltd 1 979 3

SA 320 (E) 330.

¹² Fripp v Gibbon & Co 1913 (AD) 354 at 363.

63. In the exercise of the discretion as to costs, a presiding officer may also attach weight to the moral obligations, as opposed to the legal obligations, of the parties.¹³ Such conduct is deserving of censure, and it should attract the necessary cost order.

64. The applicant asked for costs on any respondent who opposes this application. The respondent as well asked for the dismissal of the application with costs.

I make the following order:

1.1 The application is dismissed with costs.


TC LITHOLE
ACTING JUDGE
LIMPOPO DIVISION OF THE HIGH COURT
POLOKWANE

APPEARANCES

On behalf of the applicant: Adv D Van Der Bogert

Instructed by: Looock Dupisane Incorporated Inc Attorneys

On behalf of the respondent: Mr Venter

Instructed by: BMV Attorneys

DATE OF HEARING : 18 AUGUST 2022

¹³ Berkowitz v Berkowitz 1956 (3) SA 522 (SR).

DATE OF JUDGMENT

15/4/2022