IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number : 4254/2013

In the application between:-

STEPHANUS ABRAHAM CLOETE BEZUIDENHOUT N.O.	1st Applicant
ABEL JACOBUS DU PLESSIS BENADE N.O.	2nd Applicant
CHRISTIAAN HENDRIK EARLE N.O.	3rd Applicant
WYNAND JOHANNES FLEMMING N.O.	4th Applicant
DEIDRé MILTON N.O.	5th Applicant
BAREND JOHANNES STRAUSS N.O.	6th Applicant
JOHAN DANIëL SNYMAN N.O.	7th Applicant

[Cited herein in their representative capacity as Trustees of the Eco Home Development Trust]

and

MANGAUNG METROPOLITAN MUNICIPALITY	Respondent

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 25 AUGUST 2016

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[1] The applicants previously instituted an application again the respondent, which application served before me ("the main application"). This is an application for leave to appeal by the respondent against the order of costs which I issued in the main application when I dismissed the applicants' application, but ordered the respondent to pay the applicants' costs on a scale as between attorney and client. I will refer to the parties as in the main application.

[2] In terms of the respondents' application for leave to appeal, the application is based on the following grounds:

> "1. In that there are special circumstances and the reasonable prospect that another Court will come to a different conclusion regarding the exercise of the discretion by the Court in making the cost order;
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> 2. In that in granting the cost order the Court, with respect, failed to exercise the discretion judicially, alternatively the Court erred in exercising the discretion on one or more or all of the following grounds:
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> 2.1 In awarding costs against the respondent when it was successful;
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> 2.2 In the alternative, and on the basis of holding that the respondent did not disclose or raised the issue of illegality before the application was issued, the respondent was still duty bound to oppose the application on the basis of illegality and the cost order penalises the respondent for doing what it is in law compelled to do;
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> 2.3 In that, alternatively, the issue was pertinently raised in the

answering affidavit. The applicants elected, notwithstanding this, to persist with the application at own risk.

2.4 There are strong prospects of success that another Court will find that the Court erred in exercising its discretion by not considering that the applicants, at their own peril, elected to file a replying affidavit and to persist with arguing the matter on an opposed basis, thereby escalating the costs whilst the illegality and non-determinability of the prize was pertinently raised.

2.5 The Court, whilst referring to the lapse of time, did not give proper weight to the fact that the Applicants were also responsible for substantial delays in the process up and until 2013 and thus also responsible for any financial prejudice they may or may not suffer.

2.6 In that reasonable prospects of success exist that another Court will conclude that respondent's conduct does not, in any event, warrant a punitive cost order in light of the facts of the matter."

[3] The main application was instituted after the commencement of the Superior Courts Act, 10 of 2013, and the application for leave to appeal is therefore to be dealt with in terms of sections 16 and 17 of the said Act. The relevant extracts from the said sections read as follows:

"**16 APPEALS GENERALLY**

(1) Subject to section 15(1), the Constitution and any other law–

(a) an appeal against any decision of a Division as a Court of first instance lies, upon leave having been granted –

(i) if the Court consisted of a single judge, either to the Supreme Court of Appeal or to a full Court of that Division, depending on the direction issued in terms of Section 17(6)….

17 LEAVE TO APPEAL

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have 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 does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

(2) (a) …"

[4] In **Tsosane v Minister of Prisons** 1982 (3) SA 1075 (C) the Court dealt with the principles to be observed in dealing with an application for leave to appeal against an order as to costs. Despite a subsequent amendment to Section 20 of the Supreme Court Act, 59 of 1959, those principles were held still applicable in **W v S (2)** 1988 (1) SA 499 (N) at 501 F – 502 C:

> "In any application for leave to appeal where the only issue remaining therefore is one of costs, it seems to me that one should have regard to what was said by King AJ (as he then was) in *Tsosane and Others v Minister of Prisons and Others* 1982 (3) SA 1075 (C), particularly at 1076E - 1077B:
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> > 'It is clear from this provision that the Legislature wished to discourage appeals of this nature - see *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 488D; *Delmas Ko-operasie Bpk v Koen* 1952 (1) SA 509 (T) at 510E - F.

Bearing this in mind, the principles to be observed in arriving at a decision in an application of this nature may be stated as follows:

(i) Such leave is not lightly given, the Court's disinclination derives not only from the attitude of the Legislature as expressed in the aforesaid section, but also from the fact that costs are ordinarily a matter of judicial discretion - see *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69 - and also because it is desirable, in the interests of the parties and also in the overall interest of the administration of justice, that where the merits of a matter have been determined, finality should generally be regarded as having been reached. (No doubt these factors also motivated the Legislature.)

(ii) Thus the Court will not ordinarily grant leave to appeal in respect of what has become a dead issue merely for the purpose of determining the appropriate order as to costs - see *Read v SA Medical and Dental Council* 1949 (3) SA 997 (T) at 1026 - 7; *Jenkins v SA Boilermakers, Iron & Steel Workers and Ship Builders Society* 1946 WLD 15 at 18.

(iii) The Court will, however, more readily grant leave where a matter of principle is involved - see *Divine Gates & Co v Press & Co* 1931 CPD 143; *Lakofsky v O'Reilly* 1933 WLD 126; cf *Langverwacht Farming Co v Sedgwick & Co Ltd (2)* 1942 CPD 155 at 168; and see also *Kruger Bros & Wasserman v Ruskin (supra* at 69).

(iv) The amount of costs involved should not be insubstantial, lest the matter be regarded as altogether too trivial to engage the further attention of the Court.

(v) The applicant for leave to appeal should have a reasonable prospect of success on appeal in the sense that his case should be

> fairly arguable - see *Fouche v Erlanger & Co* 1920 CPD 76; *Holmes and Another v Lawrie* 1927 OPD 223; *Gray v Goodwood Municipality and Others* 1942 CPD 549; *Ex parte Registrateur van Aktes: In re Van den Berg NO v Registrateur van Aktes* 1975 (3) SA 321 (T).'
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> Admittedly *Tsosane's* case was decided before the amendment to s 20 of the Supreme Court Act 59 of 1959 by the Appeals Amendment Act 105 of 1982 and leave to appeal is required now in all civil matters, not merely those formerly dealt with by the previous provisions such as orders as to costs. Nevertheless, what is said in *Tsosane's* case seems to me to be appropriate in an enquiry such as the present (1982 *Annual Survey* at 429)."

The Supreme Court Act has now been repealed by the Superior Courts Act. In my view there is nothing in the Superior Courts Act which suggests or necessitates a stance different from the aforesaid.

[5] The following general principles are applicable to appeals on costs only, as summarised in **Erasmus: Superior Court Practice**, (Electronic Version), D.E. van Loggerenberg, Volume 1, Part A2, at RS 1, 2016, A2-86:

> "In awarding costs, a Court of first instance exercises a discretion and a Court of Appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a Court, acting reasonably, could have made the order in question. A Court of Appeal cannot interfere merely on the ground that itself have made a different order."

[6] The findings I made on the basis of which I, in the exercising of my discretion, deprived the respondent of its costs despite having being successful in its opposition of the main application are the following:

> "[39] It is evident from the totality of the papers before me, that the respondent at no stage before the filing of the answering affidavit raised the issue of the illegality of the deed of sale on any of the respective grounds raised in the answering affidavit. It was only once the applicants approached court that this issue was aired. The applicants have been involved in negotiations with the respondent which was followed by the eventual conclusion of the deed of sale for approximately thirteen years. After the conclusion of the written deed of sale, for so long as from 2006 till 2013, the respondent never raised the issue of the selling price that was to be revisited nor of the illegality of the deed of sale, full well knowing that the applicants are spending thousands or even millions of rand based upon the deed of sale and their intended township development.
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> [40] I seriously disapprove of the said conduct by the respondent. Although they had no other option but to oppose the current application, the detriment for the applicants could have been prevented if the relevant officials and employees who were involved herein on behalf of the respondent at the time had properly performed their respective duties.

[7] I still maintain that the aforesaid findings are factually correct. I also did not understand Mr Snellenburg, appearing on behalf of the respondent, to argue the contrary.

[8] The aforesaid conduct by the officials of the respondent

constituted a failure to comply with their constitutional obligations which was the fundamental cause of the litigation in this matter. See **Treatment Action Campaign v Minister of Health** 2005 (6) SA 363(T)**.**

[9] The fact that the respondent was duty bound to oppose the main application (like I duly found in paragraph 40 of my judgment), does not detract from the fact that it was the blameworthy conduct on behalf of the respondent which caused the circumstances that led to the litigation.

[10] Even if it is to be accepted that the applicants were also responsible for some of the delays in the process up and until 2013, one should be mindful of the fact that their persistence with the protracted process was based on their *bona fide* belief that they had concluded a valid written deed of sale with the respondent. The respondent, on the other hand, allowed the process to continue without ever during that period of time raising the issue of the selling price that was to be revisited and the illegality of the deed of sale. The respondent also failed to take any steps to have the deed of sale declared null and void.

[11] The applicants did indeed elect to file a replying affidavit and to persist with the arguing of the matter on an opposed basis even after the relevant issues were pertinently raised in the answering affidavit. However, the issue regarding the delegated authority of Me Abrahams which was also only raised in the answering affidavit for the first time, became crucial to the applicants' case. It necessitated the applicants to have served a notice in terms of

Rule 35(12) and (14) in order to properly respond to the said allegations in the answering affidavit. The applicants could obviously not have foreseen that this issue would be raised by the respondent and could therefore not have addressed it at any earlier stage than in the replying affidavit. This, in my view, was already enough justification for the applicants' decision to have filed a replying affidavit. In any event and in view of the totality of the particular facts and circumstances of this matter, the applicants were also not unreasonable in their decision to have persisted with the application in order to get certainty and finality in this matter; moreover so in the absence of any steps by the respondent to have the deed of sale declared null and void.

[12] Regarding the grounds upon which I ordered costs on a punitive scale, I stated as follows in paragraph 41 of my judgment:

> "[41] In the exercising of my discretion, I deem it necessary and appropriate to show my disapproval by means of a punitive costs order. In addition I deem it fair and just to ensure in the circumstances of this application that the applicants are properly recouped for their legal costs, despite them having been unsuccessful. See NEL v WATERBERG LANDBOUWERS KO-OPERATIEWE VEREENIGING 1946 AD 597 at 607".

Also see **Swartbooi and Others v Brink and Others** 2006 (1) SA 203 (CC) at par [27].

[13] In the circumstances and where the application was needlessly caused by the fault and conduct on the part of the respondent, I

considered the said order as appropriate in the circumstances of this matter. The following *dictum* stated in **the <u>Treatment Action Campaign</u>**-judgment**,** *supra*, at 372 C – D, is in my view directly relevant to this matter:

> "In the circumstances, both in terms of the constitutional principles of appropriate relief and just and equitable redress for unconstitutional conduct and in terms of the ordinary common-law principles of liability for costs, the respondent should be ordered to pay the applicant's costs, notwithstanding the fact that the applicant has withdrawn its prayers for the substantive relief originally sought in the application.
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> …
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> I accordingly make the following order:
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> The respondent is ordered to pay the applicant's costs of the application on the scale as between attorney and client."

[14] In the circumstances I cannot find that the respondent has a reasonable prospect of success on appeal. As was stated in **<u>W v S (2)</u>**, *supra*, at 502 I – 503 B:

> "Even taking all those circumstances into account and even if another Court may give lesser weight to the factors which have been said in the circumstances to have been overemphasised or given undue weight, the question of costs nevertheless remains a discretionary one and it seems to me that another Court would, in the light of the remaining considerations, be slow to interfere. I do not think that there is a sufficient basis for saying that there is a reasonable prospect that another Court, having regard to the above-mentioned factors in

Tsosane's case, and even weighing the favourable factors to which I have referred, will take a different view on the penal order as to costs.

It follows, and the conclusion to which I have come, is that in the circumstances the application for leave to appeal must be refused and I accordingly refuse it with costs."

[15] The respondent's application for leave to appeal against the order of costs, is dismissed with costs.

C. VAN ZYL, J

On behalf of the Applicants:	Adv PU Fischer SC Instructed by: Bezuidenhouts Inc. BLOEMFONTEIN
On behalf of the Respondent:	Adv N Snellenburg SC Instructed by: EG Cooper Majiedt Inc. BLOEMFONTEIN