

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

5/7/13.

CASE NO: A58/2012

(1) REPORTABLE: YES / ~~NO~~
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED.

05/07/2013

In the matter between:

MORNE JANSE VAN RENSBURG

Appellant

and

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Respondent

JUDGMENT

MURPHY J

1. This is an appeal against the decision of the court *a quo* discharging a rule *nisi* and refusing the appellant an interdict prohibiting the respondent, the City of Tshwane Metropolitan Municipality, from cutting off his electricity pending

the finalisation of a dispute pertaining to his municipal account. On 6 October 2010, the appellant brought an application on an urgent basis in terms of rule 6(12) for an order compelling the respondent to restore the electricity and water supply to his property. The notice of motion did not seek a rule *nisi*, but an order with immediate effect, pending finalisation of a dispute about an amount of R21 324.97 charged to the appellant's municipal account.

2. The application was served on the respondent at 11h37 on 6 October 2010. In terms of the notice of motion the respondent was required to give written notice of intention to defend before 10h00 on 6 October 2010 and to file its opposing affidavit before 12h00 on the same day. The appellant enrolled the application for hearing at 12h00, also on that day. The time frames thus set by the appellant made no provision for the filing of a replying affidavit.
3. The application arose out of a dispute between the parties regarding the appellant's water bill. During July 2009 the respondent replaced the existing water meter on the property with a new one. Subsequent to the change of meters, the appellant's water consumption increased dramatically. In the months following the change of meters, the charges for water supply increased to an average of about R2500 per month whereas it had been approximately R250 per month prior to the installation of the new meter. The respondent made no averment contradicting this allegation, but explained that the original meter on the property was recording usage on another property belonging to the appellant.
4. The appellant complained to the respondent, but to no avail. Eventually in April 2010 the appellant received an account including an amount of R21 324, 97 as finance charges.
5. On 7 May 2010 the appellant's attorney addressed a letter to the respondent requesting a formal and proper explanation as to what the amount of R21 324.97 was for and how it was calculated. He indicated that the appellant disputed the correctness of the water meter's measurement of his consumption. The attorney also requested confirmation from the respondent

that the electricity supply would not be cut off until the dispute was finalised and gave an undertaking that the appellant would continue paying the account for normal water and electricity supply.

6. No formal reply was received from the respondent, though an official of the respondent did confirm with the attorney telephonically that the water and electricity supply would not be cut off until the dispute was finalised and agreed to send relevant documentation.
7. A dispute then arose between the parties about whether there was a water leak on the property.
8. On 28 May 2010, the appellant's attorney served a notice in terms of section 5(2) of the Promotion of Administrative Justice Act 3 of 2000 requesting adequate reasons from the respondent for debiting the appellant's account with the disputed amount. No meaningful or effective response was forthcoming. The respondent claims it had 90 days within which to respond, and hence the response was only due on 28 October 2010. Yet, on 20 September 2010 the appellant received a text message stating that his account was in arrears in the amount of R18 139.90 and should it not be paid within 7 days "credit control action" would be taken.
9. On 4 October 2010, in response to the text message, the appellant's attorney addressed a letter to the respondent reminding it of its undertaking not to cut off the supply until the dispute was finalised. The next day, 5 October 2010, contractors of the respondent arrived at the property and disconnected the electricity supply. This then led to the application for an urgent interdict on 6 October 2010.
10. The urgent application was enrolled on 6 October 2010 and the court handed down an order drafted by the parties and agreed to by them. The order reads:

"IT IS ORDERED

1. That the respondent restore the electricity and water supply to the applicant's property, described as stand number 540, Faerie Glen X 1, Unit Number 50001, situated at 394 Colorado Rd, Faerie Glen X 1, with immediate effect, pending finalisation of this application.
 2. That the respondent show cause if any, on 7 February 2011 (in the opposed motion court) why this order should not be confirmed and made final.
 3. Costs are reserved for determination on 7 February 2011."
11. What is notable about both the notice of motion and the order granted by consent is their failure to set out a timeframe beyond 6 October 2010 in which opposing and replying affidavits would be filed. As is well known, rule 6(5) governs the timeframes applicable in the filing of papers in motion proceedings. The rule ensures an orderly flow of applications and fairness in the process of adjudication. Rule 6(12)(a) permits a court to dispense with the ordinary rules and times for service. It allows an applicant who requires relief urgently to have the case decided without the delays necessitated by the ordinary procedure. The degree of abridgement and deviation from rule 6(5) must be commensurate with the case. Where a rule *nisi* is sought, the applicant departing from the ordinary *dies* provided in rule 6(5) should substitute alternative timeframes for the two stage process in the notice of motion or the draft order. In the notice of motion in this case the appellant seemingly waived his right to deliver a replying affidavit and did not set out timeframes for the second stage of the process; and in the order by consent the parties neglected to specify any timeframe for the filing of an opposing affidavit or a reply. Their failure to have done so resulted in unexpected and unsatisfactory consequences.
12. The respondent only served its opposing affidavit on Friday 4 February 2011. The matter was enrolled in the opposed motion court on the return day, Monday 7 February 2011. The applicant argued that the court should regard the application as an unopposed application on the grounds that the opposing affidavit was filed late and should have been accompanied by an application in terms of rule 27 for condonation. It was indicated to the court that in the

event that it should allow the opposing affidavit, the application should be postponed by agreement between the parties to a future date to afford the appellant an opportunity to file a replying affidavit. The argument was limited to this issue and no argument was addressed by either party to the judge on the merits of the application. The respondent handed in brief heads of argument on the merits. The appellant had not prepared heads of argument because counsel had not seen the opposing affidavit.

13. After hearing argument on the question of whether the opposing affidavit should be accepted, the court reserved judgment and extended the rule *nisi* until 18 February 2011, the date agreed by the parties. The judge handed down judgment on 25 February 2011. In his written judgment, he stated that he had extended the rule *nisi* to the date of judgment. It is not clear whether he did that on notice to the parties, in court or in chambers.
14. The judge decided to accept the opposing affidavit and in his discretion chose to override the agreement of the parties for a postponement for the purpose of filing a replying affidavit and heads of argument. He said:

“When the parties agreed to the rule *nisi* being granted, nothing stopped the appellant in restructuring time frames within which the respondent should file its opposing affidavit. The order called upon the respondent to show cause on 7 February 2011 why the order should not be made final. The respondent indeed abided by this court order and filed its opposing affidavit that very morning. In my view the applicant cannot then want to cry foul when he should have foreseen that once respondent filed its opposing affidavit there might be a need to reply thereto but failed to make allowance therefor. I am of the view that, in the exercise of my discretion, I should accept the opposing affidavit and reject with costs the applicant’s opposition to the filing thereof.”
15. Despite not having heard argument on the merits, and without the benefit of a replying affidavit, the judge then turned to the merits. He found that the appellant had not established the primary requirement for an interdict, namely a clear right or even a *prima facie* right open to some doubt. He held that the

appellant did not have any “possessory right” entitling him to electricity supply. As he saw it, the relation between the appellant and the respondent was contractual. He concluded as follows:

“Confirming the rule *nisi* would be tantamount to compelling the respondent with specific performance of a contractual nature in order to resolve a contractual dispute regarding payment of the arrears.”

He accordingly discharged the rule *nisi* and ordered the appellant to pay the respondent's costs.

16. For reasons that will be apparent presently, there is no need to examine the correctness or otherwise of the reasoning of the court *a quo*. However, it deserves mention that the judge's failure to entertain, hear and consider argument probably accounted for his evident misconception of the right the appellant sought to protect. The appellant did not assert a right of contractual entitlement. He asserted a right to just administrative action, being action which is lawful, reasonable and procedurally fair. It is beyond doubt that the respondent is an organ of state which is obliged to observe the prerequisites of just administrative action when taking a decision which adversely affects the rights or legitimate expectations of any person. There are strong *prima facie* indications that the respondent had acted unreasonably and unfairly towards the appellant. The appellant had at the very least a legitimate expectation that the respondent would heed his request for a debatement of account. He sought an interdict to protect his right to fair and reasonable consideration before a decision was taken to cut off the supply of electricity to his property.
17. The appellant filed an application for leave to appeal on 7 March 2011. In the course of argument before us, when the question of whether the appeal had become “academic” was raised, which I discuss later, counsel for the appellant handed in a letter addressed by the appellant's attorney to the respondent's attorney also dated 7 March 2011. The letter is of some importance. It reads:

- "1. We refer to the above and our client's leave to appeal that was served on your office earlier today.
 2. We specifically draw your attention to the irregularities and the grounds for the appeal as set out therein.
 3. We accordingly require that you abandon the court order as far as costs is concerned. Alternatively agree that the applicant may file a reply that the matter can be placed on the roll again for argument.
 4. We also confirm that the notice of appeal effectively suspends the court order and require your written confirmation that your client will not proceed to cut the water and electricity supply of our client until the court of appeal has decided the issue."
18. The letter exhibits a measure of confidence on the part of the appellant that he had good grounds for appeal. The appellant persisted with two grounds of appeal in argument before us. Firstly, he contended that the judge *a quo* erred in refusing to allow a postponement as agreed between the parties for the purpose of filing a replying affidavit, and presumably heads of argument; and secondly, he submitted that the judge erred in dealing with the merits of the application without having afforded the appellant the opportunity to make submissions in respect of them, taking account of the opposing affidavit. He sought leave also to appeal against the costs order.
19. The court *a quo* dismissed the application for leave to appeal with costs on 26 July 2011. No reasons for this decision have been filed of record. On 15 November 2011, the Supreme Court of Appeal (the SCA) reversed the order and granted leave to appeal to the Full Court of this division. It also set aside the costs order of the court *a quo* in dismissing the application for leave to appeal and ordered that the costs of the application for leave to appeal in the SCA and in the court *a quo* are to be costs in the appeal.
20. We were informed from the bar that the respondent declined to agree to the proposal made in paragraph 3 of the letter of the appellant's attorney dated 7

March 2011 that the respondent abandon the costs order or agree to the filing of a reply and the re-enrolment of the matter. It is doubtful that the latter course could have been pursued without the judgment being set aside on appeal in view of the matter being *res judicata*. But the respondent certainly could have abandoned the costs order in respect of the application. Without that agreement, the appellant opted to prosecute the appeal.

21. Counsel for the respondent has submitted that the appellant was the author of his own misfortune by failing to set proper time frames when making the application in terms of rule 6(12). She submitted further that a postponement cannot be claimed as of right. The submission is well made. The High Court has inherent power to protect and regulate its own process, which means a party cannot claim a postponement as of right, flowing from an agreement between the parties. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted unless the court is satisfied that it is in the interest of justice to grant one.

22. In *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) 1112, the Constitutional Court pronounced that whether a postponement will be granted is in the discretion of the court and cannot be secured by mere agreement between the parties. Mokgoro J stated:

“In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the court to determine whether it is in the interests of justice to grant the postponement.

What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.”

23. In *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17 and in *Shilubana and others*

v Nwamitwa 2007 (5) SA 620 (CC) para 11, the Constitutional Court added to the factors to be considered in granting a postponement. They include: the broader public interest; the prospects of success on the merits; the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequence of not granting a postponement; and the scope of the issues that ultimately must be decided.

24. Thus, while it is correct that the court has a discretion whether or not to grant a postponement, which certainly cannot be fettered by an agreement between the parties, the decisions of the Constitutional Court intimate unequivocally that the discretion is one which must be judicially exercised by having regard to a range of relevant factors and considerations.

25. It is well established law that where a lower court has given a decision on a matter within its discretion, an appeal court is permitted to interfere if it is persuaded that the court *a quo* has not exercised the discretion judicially. The question normally asked is whether it can be said that the court *a quo* has exercised its discretion capriciously or upon wrong principle, has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons - *Ex parte Neethling and Others* 1951 (4) SA 331 (A) 335E. This test applies particularly in relation to decisions on the question of costs, on a postponement and on amendment of pleadings in the lower court - *R v Zackey* 1945 AD 505. These are matters of discretion in the wider sense, as opposed to a truly strict discretionary power where the room for intervention is more circumscribed. In the latter instance an appeal court is not permitted to interfere merely because it would have preferred a different course of action. But that is not equally so in relation to the exercise of a wide discretion, where, in addition to the traditional grounds, the appeal court may depart from the lower court's order on any grounds which it feels render this necessary - *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) 124; and *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) 466-467.

26. I am persuaded that the judge *a quo* did not exercise his discretion judicially in this case. While it is true that the appellant waived his right to a reply in the timeframe set in the notice of motion, both parties were evenly to blame in neglecting to set timeframes for further pleadings in the consent order handed down on 6 October 2010. The respondent had four months within which to file an opposing affidavit, yet chose to do so effectively on the day of the hearing. The appellant was ambushed and had no opportunity either to deal with the evidence in the opposing affidavit in a replying affidavit or to present argument in relation to that evidence.
27. Added to that, the judge *a quo* gave no indication to the parties that in the event of his accepting the opposing affidavit he would proceed to determine the merits. Both parties were under the impression that if the opposing affidavit was accepted, the matter would be postponed for the purpose of filing a replying affidavit and heads of argument; and that the rule *nisi* would be extended to a fresh return day where the merits would be argued. Such arrangements are commonplace in the practice of the High Court to the extent that few advocates, or for that matter judges, would have expected anything different to transpire. By not communicating that he intended to do otherwise, the judge left the parties believing that the merits would be argued later on a fuller set of papers. In view of that, counsel understandably opted not to argue the merits. As a result, the unfavourable exercise of discretion by the judge prevented the appellant from having his case fully and fairly determined.
28. Counsel for the respondent has suggested that the judge had sufficient evidence and submissions before him to make the determination and that it was thus within his discretion to dispense with argument. In my estimation, it will hardly ever be permissible for a judge to dispense with argument. In arbitration proceedings not hearing argument would constitute a gross irregularity, allowing without more for the setting aside of the award - *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) para 268. By the same token, the refusal or neglect of a judge to hear argument for insubstantial reasons, except perhaps in extraordinary circumstances, will be capricious or wrong in principle and in consequence a

failure to exercise discretion judicially. The opportunity to present evidence in support of a party's case, to controvert opposing evidence and to present argument is the essence of due process and the principle of natural justice. These incidents of a fair trial should be denied rarely, if ever, and then only for substantial and compelling reasons.

29. The judge *a quo* gives as his only reason for refusing the postponement the fact that the appellant did not adequately provide for timeframes in the notice of motion. Such reasoning is formalistic. No prejudice would have been occasioned to either party by granting a postponement. The judge in any event postponed the matter by reserving judgment on the preliminary issue for insubstantial reasons. He appeared also not to appreciate that the respondent had acted unfairly in delaying for four months before filing its opposing affidavit, and lost sight of the fact that the application for a postponement was unopposed in the event of the affidavit being accepted.
30. In these circumstances, the refusal of a postponement and the denial of an opportunity to present argument can be characterised as capricious and wrong in principle. The error is perhaps most starkly revealed in the judge's misconception of the right the appellant sought to protect. The appellant sought an interdict to protect his right to just administrative justice. The court *a quo* did not fairly determine whether he had such a right, whether the respondent had infringed that right and whether an interdict was the only adequate remedy.
31. In the result, the appeal on the merits should succeed on these grounds. However, it may be that the order sought by the appellant will have no practical result or effect.
32. Ordinarily, where the record of evidence is deficient, as in this appeal, the court of appeal would be required, in terms of section 22(a) of the Supreme Court Act 59 of 1959, to remit the case to the lower court for further hearing after the filing of a replying affidavit. The incomplete record of evidence and no prior argument on the merits make it impossible for this court to pronounce

on the merits. When that outcome was canvassed with counsel in argument before us, it became evident that both parties were keen to avoid another round of litigation before a lower court. Both readily conceded that the merits by now have become “academic”. We were informed from the bar that the appellant has sold the property and paid the arrears on the account, presumably under protest, in order to obtain a rates clearance certificate for the purposes of transfer. Consequently, an order remitting the matter to the lower court will have no practical effect or result. Counsel for the respondent submitted that the appeal should be dismissed for that reason. Counsel for the appellant argued that justice required the appellant to be awarded the costs of the application or at least that the costs order of the court *a quo* be set aside.

33. Section 21A of the Supreme Court Act 59 of 1959 governs a situation like this. The relevant subsections provide:

- “(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to considerations of costs.”

The purpose of section 21A was explained in *Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) 1143 by Oliver JA as follows:

“Die bedoeling van art 21A is klaarblyklik om die drukkende werkklas van Howe van appel te verlig. Appelle behoort slegs vir beregting voorgelê te word as daar 'n werklike, praktiese uitwerking of gevolg van 'n uitspraak van die Hof van appel sal wees.”

Nonetheless, an appeal court is not obliged to dismiss an appeal in all cases where the judgment sought will have no practical effect or result. The word

“may” in section 21A(1) confers a discretion - *Logistic Technologies (Pty) Ltd v Coetzee and Others* 1998 (3) SA 1071 (WLD) 1075E.

35. Moreover, section 21A(3) allows the question whether a judgment or order by a court of appeal would have a practical effect or result to be decided with reference to considerations of costs in exceptional cases - *Radio Pretoria v Chairman Independent Communications Authority of South Africa and Another* 2005 (1) SA 47 (SCA) 56B.

36. Appeals against cost orders should not be prosecuted too readily, but are permitted in certain circumstances. The approach of our courts where an appeal is directed only against the costs order is spelt out in *Cronje v Pelser* 1967 (2) SA 589 (A) 592H-593A where it was held:

“Hierdie Hof sal nie ingryp in die Hof *a quo* se beslissing oor koste nie tensy dit geskied het sonder 'n judisiële uitoefening van diskresie. Die toets is of die beslissing gebaseer is op gronde waarop 'n redelike mens tot so 'n besluit kon geraak het. 'n Beslissing oor koste is 'n kwessie van diskresie in elke besondere geval.”

37. In *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) 22D-F Cloete JA made the following observation in relation to section 21A(3):

“I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee and Others* to express the view that a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance. I still adhere to that view - for, if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of the section.

38. In the present case, as I have found, the court *a quo* failed to exercise its discretion judicially and the consequent costs order was coloured by that error; the award seemingly having been made in line with the principle that costs follow success. Such constitutes an exceptional circumstance. Thus, even though a judgment setting aside the order of the court *a quo* would have no practical result or effect, it would be unfair to dismiss the appeal and to

saddle the appellant with the costs consequences of the court's misdirection. Even more so if we keep in mind the attempt by the appellant to find a solution to avoid an appeal in the proposal made on his behalf by his attorney in the letter of 7 March 2011. I accordingly prefer to exercise the discretion bestowed by section 21A in favour of the appellant and not to dismiss the appeal.

39. Both parties bear blame for the procedural problems that arose in the application. A just decision on the question of the costs of the application would be for each to bear his or its own; or that no order be made as to costs. That result can be achieved simply by upholding the appeal and setting aside the orders of the court *a quo* without reviving the rule *nisi*. There is no reason why the appellant should be denied his costs on appeal.

40. In the result, the following orders are made:

1. The appeal is upheld with costs, such to include the costs of the application for leave to appeal in the Supreme Court of Appeal and in the court *a quo*.
2. The orders of the court *a quo* are set aside.

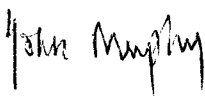
JR MURPHY
JUDGE OF THE HIGH COURT

I agree

EM KUBUSHI
JUDGE OF THE HIGH COURT

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JR MURPHY

JUDGE OF THE HIGH COURT

I agree



EM KUBUSHI

JUDGE OF THE HIGH COURT

I agree



N KHUMALO

ACTING JUDGE OF THE HIGH COURT

P.P.

Date Heard:	12 June 2013
For the Applicant:	Adv J Roux
Instructed By:	Lombard Muller & Ass
For the Respondent:	Adv N. Erasmus
Instructed By:	Matabane Inc.