FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A114/2012

In the appeal between:-

THABO MOFUTSANYANA DISTRICT MUNICIPALITY Appellant

and

F H BADENHORST Respondent

CORAM: EBRAHIM, J *et* LEKALE, J

HEARD ON: 29 APRIL 2013

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 8 AUGUST 2013

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[1] This appeal has its genesis in a number of actions, approximately 3000, instituted in the magistrates' courts in various districts in the Free State during 2008, in which appellant claimed, *inter alia*, the submission of proper statements of account and the debatement thereof alternatively payment of an estimate of levies from registered regional services levy payers. The respondent is one of such payers, being a private person who carries on the business of farming at his farm "Farm At Last" in Harrismith.

[2] The appellant's particulars of claim claimed the following relief from the respondent:

“**2.**

The Regional Services Council for the Eastern Free State Region, established in terms of the provisions of section 3 of the Regional Services Councils Act, no 109 of 1985 (the **‘RSC Act’**) by Administrator’s Notice no 78 promulgated in provincial Gazette (Free State Province) no 70 of **25 May 1989**, was dissolved and substituted for by the Eastern Free State District Council in terms of Provincial Proclamation no 124 promulgated in Provincial Gazette no 78 of **22 November 1996**, which was in turn disestablished with effect from **15 December 2000** in terms of section 21F of Part 1 of the Schedule, promulgated in Provincial Notice no 184 of 2000 in Provincial Gazette (Free State Province) no 112 of **28 September 2000** (**‘the Schedule’**), and substituted for by the Thabo Mofutsanyana District Municipality (the plaintiff) in terms of section 16(1) read with 20 of Part 20 of the said Schedule.

4.

The defendant is, as contemplated in section 12 of the RSC Act:

(a) an employer who employs or who is deemed to employ employees within the region: and/or

(b) a person or entity carrying-on or deemed to be carrying-on a business or enterprise within the region;

and is legally obliged to register with the Plaintiff as a levypayer in terms of the RSC-act.

5.

In terms of the provisions of section 7 of the Eastern Free State District Council Establishment Proclamation, 1996:

(a) the assets, liabilities, rights and obligations of the Regional Services Council devolved upon the District Council;

(b) the regional services levies and regional establishment levies claimed and payable by virtue of the provisions of section 12(1)(a) of the RSC-Act and other monies payable to or recoverable by the Regional Services Council, are payable to or recoverable by the District Council.

6.

In terms of sections 5 and 6 of Part 1 of the Schedule, the Thabo Mofutsanyana Municipality (the plaintiff) became the successor-in-law and has succeeded to the rights and obligations of the disestablished Eastern Free State District Council with effect from **15 December 2000**.

7.

In terms of section 59(2) of the Small Business Tax Amnesty and Amendment of Taxation Laws Act no 9 of 2006, any regional services levy or any regional establishment levy for which liability arose in terms of the RSC Act before or on **30 June 2006**, may be collected by a municipal council in accordance with the provisions of the RSC Act.

8.

In the premises, the plaintiff being such a municipality as contemplated in section 59(2) of the said Act, at all times material hereto, and in terms of the laws of the Republic of South Africa, the statutory entitlement to recover the regional services levies and the regional establishment levies (**'the regional levies'**), as defined in section 1 of the RSC Act, from those who are not exempt from paying them, vested in the plaintiff, <u>alternatively</u> in the plaintiff's predecessors-in-law, whose rights and obligations have devolved upon the plaintiff by operation of law.

11.

In terms of paragraph 9(4) read with 9(1), 9(3) and 10 of the regulations promulgated in terms of section 12(1)(b) read with section 12(1A) of the RSC Act, in government notice R340 of **17 February 1987** (**'the RSC-Regulations'**), the defendant was obliged to register as a levypayer of regional levies and to submit to plaintiff, until **30 June 2006**, within a period of twenty (20) days after the end of each succeeding month, payment of the regional levies together with a monthly return in which it disclosed:

(i) the remuneration figure paid to or payable by the defendant to its employees during the preceeding month; and the amount of his/her drawings in relation to its enterprise or partnership during the preceeding month;

and

(ii) the turnover figure of the sale of goods, fixed property, rental, trade, earnings, services or the like in its business or enterprise.

12.

The defendant failed to so register and to render returns for the period 1 July 1996 to 30 June 2006 (**'the relevant period'**).

13.

Pursuant to the defendant's failure to submit returns, the plaintiff, acting in accordance with the provisions of paragraph 11 of the RSC-Regulations, assessed the defendant to be liable to it in respect of regional levies probably payable in respect of the relevant period, in the estimated amount of **R100 000.00**, and which amount is presently due, owing, payable and recoverable in terms of the provisions of paragraph 11(4) of the RSC-Regulations.

14.

Notwithstanding demand, the defendant fails and/or refuses and/or neglects to make payment of the aforesaid amount.

WHEREFORE PLAINTIFF CLAIMS FOR JUDGMENT AGAINST DEFENDANT AS FOLLOWS:

1. Payment of the amount of **R100 000.00**;
2. Payment of interest on the aforesaid amount at a rate of 15,5% per annum *a tempore morae*, from date of summons till date of payment;
3. Costs of suit;
4. Further and/or alternative relief."

[3] The respondent, who was sued in the magistrates' court Harrismith, delivered notice of his intention to defend the action on 24 June 2008. He also requested further particulars to the summons, which were furnished on 28 July 2008. Due to the insufficiency thereof an application to compel further and better particulars was brought by the respondent, which was granted with costs on 31 July 2008.

[4] The appellant thereafter gave notice of its intention to amend its particulars of claim in terms of Rule 55A of the Magistrates Court Rules. On 17 October 2008 the respondent notified his intention to oppose the amendment. The appellant consequently delivered an application for the grant of the proposed amendment, which although initially opposed by the respondent, was granted by consent on 11 March 2009 with costs being costs in the cause. The appellant delivered amended particulars of claim in accordance with the amendment granted on 17 March 2009. On 19 March 2009, despite its earlier consent to the amendment, the respondent noted an exception thereto on, *inter alia*, the following grounds:

(a) the appellant's lack of *locus standi* to institute proceedings for the submission of accounts and for the recovery of service levies;

(b) that the appellant was not authorised to embark on a process of estimating levies;

(c) there was no basis in law for appellant's demand for a delivery of a statement of account and for the debatement thereof.

[5] It was at this stage that the parties reached an agreement that the appellant would not proceed with the multitude of summonses it had issued against all the other levy payers against whom it had instituted action and that all these actions would be held in abeyance, pending the outcome of an appeal in the Supreme Court of Appeal by the appellant against three registered regional service levy payers in which the issue to be decided was whether the appellant's demand for the submission of accounts and for the debatements thereof, had any basis in law. On 29 September 2011 that court dismissed that appeal with costs, upholding the exception, which the respondents had taken to the appellant's particulars of claim that it disclosed no cause of action, on the grounds that it is only the Regional Services Council established in terms of the Regional Services Council Act 109 of 1985, which is empowered to estimate levies payable for municipal services rendered. The court confirmed that in terms of section 12 of that Act and paragraph 1 of the Regulations promulgated thereunder by virtue of Government Notice R340 dated 17 February 1987, that power has been delegated to and resides with the Commissioner of the South African Revenue Services. See **Thabo Mofutsanyana District Municipality v Steyn-Enslin**

& Vennote, Rudnat (Pty) Ltd, Afgri (Pty) Ltd (639/2010) [2011] ZASCA 168 (29 September 2011).

[6] Pursuant to this judgment the chief magistrate Harrismith on 27 February 2012 granted an order in the respondent's favour upholding his exception to the appellant's particulars of claim, with costs. In addition the appellant was afforded 30 days within which to amend its particulars of claim. The magistrate further ordered the appellant to pay all costs awarded to the respondent since the inception of the action, such costs to be taxed and paid prior to appellant recommencing the proceedings, after amending its particulars of claim.

[7] It is against this latter part of the order pertaining to costs that the present appeal lies. Mr Ploos van Amstel SC for the appellant asked us to bear in mind that this is a novel issue, there being no definitive judgment in point and that any order on appeal will impact directly on the approximately 3000 actions instituted by the appellant against levy payers throughout a significant area of the Free State, at least 673 of which were instituted in Reitz and Harrismith alone. He argued that the magistrates' courts would be inundated with applicants seeking immediate taxation and payment of interim costs orders and lead to an uncontrolled outbreak of such taxations. He argued that multiple costs orders in each case would have to be taxed and that such a course of conduct in proceedings such as the present was not envisaged by the legislator, hence the reason for Rule 33(3)

of the Magistrates' Court which provides that, as a general rule

> "unless the Court shall <u>for good cause</u> otherwise order. Costs of interim orders shall not be taxed until the conclusion of the action…" (the underlining is my own)

He has urged us not to overlook the fact that in granting the order, the learned magistrate in the court *a quo* heard no evidence and consequently was unable to and did not make any factual findings to serve as a basis for the prerequisite of "good cause". This, he argues is fatal to the decision of the court *a quo*. As authority for this proposition, he relies on an earlier decision of this court in **<u>Thabo Mofutsanyana District Municipality v Van Zyl Staalwerke</u>** FSHC A168/2009, a judgment delivered on March 8, 2010.

[8] This appeal accordingly turns on the question as to whether the respondent has shown good cause or just cause, entitling him to immediate taxation and payment of his costs thus far in the litigation process. It is clear to me that the court *a quo* based its decision to grant an order favouring immediate taxation and payment of the respondent's costs on the English decision of **<u>In re Romer & Haslam</u>** [1893] 2 Q.B. 286 at 301 where it was held

> "A solicitor who is retained to conduct a simple legal proceeding is not entitled, in the absence of a special agreement, to send in a Bill of Costs and ask for payment until the conclusion of the business or the termination of his retainer. Where, however, the proceedings are of a long and protracted character the solicitor

> may, at any reasonable break in the proceedings, deliver a Bill of Costs for work done up to such a break and ask for payment."

The learned magistrate considered the lull in proceedings, as agreed to by both parties, pending the outcome of the decision of the SCA in the matter referred to, as a reasonable break in the proceedings, such as to justify the drafting of an interim Bill of Costs for taxation and payment.

[9] As further justification for the grant of the order, the court *a quo* found that the matter was not a simple matter, in its infancy. I quote from the learned magistrate's reasons for judgment at page 114 of the record:

> "Ek is oortuig daarvan dat daar nie meer gesê kan word dat die saak nog in sy kinderskoene is nie, gesien (in) die lig van al die aansoeke asook die eksepsie wat al 'n draai in die Appèlhof gaan draai het. Daar het al baie tyd verloop soos reeds hierbo aangedui en kan ek nie sien dat die sage binnekort tot 'n einde gaan kom nie. Eiser het onder andere self te kenne gegee dat die saak waarskynlik in die Grondwethof sal eindig. Afgesien daarvan en sonder om te veel klem daarop te lê is dit egter duidelik dat die saak reeds vir baie lank aan die gang is.
>
> Eiser het ook te kenne gegee dat dit glad nie 'n ingewikkelde saak is nie en dat dit net 'n kwessie is van om oor die eerste hekkie te kom. Ek kan nie hiermee saamstem nie. Hoekom het die aangeleentheid dan al 'n draai in die Appèlhof gaan maak en hoekom voorsien die Eiser dat dit nog in die Grondwethof gaan eindig? Hoekom sukkel ons na meer as drie jaar nog om dit afgehandel te kry? Dit, na my mening, dui nie op 'n eenvoudige saak nie. Eiser sukkel nou al hoe lank om oor die eerste hekkie te kom, om sy woorde te gebruik. Dit dui vir my net op een ding

en dit is dat dit ‘n besondere hoë hekkie is, wat daarop dui dat dit inderwaarheid ‘n ingewikkelde saak is.”

[10] He stressed the point in his judgment that as at the date of his order (27/2/2012), a period of three years and eight months had elapsed since the issue of summons against the respondent in June 2008.

The learned magistrate, correctly, in my view, considered that the fact that the issue between the parties on the substance of the dispute was deserving of adjudication by the Supreme Court of Appeal was indicative of its complexity and I did not understand Mr Ploos van Amstel to challenge this. He concluded, on the basis that there had been a reasonable break in the proceedings, that the matter was long, protracted and complicated and would take a while to finalise, “most probably” ending up in the Constitutional Court as factors indicative of the respondent having discharged the onus he carried of showing “good cause” to justify a departure from the stringent application of the provisions of Rule 33(3). As further justification, he considered it improper and unfair to expect the respondent to wait any longer to recoup costs accumulated and expended thus far in defending litigation, which was through no fault or default of his own, fatally flawed.

[11] 11.1 Mr Danzfuss SC, on behalf of the respondent, supported the judgment of the court *a quo* in its entirety. He contended that the court *a quo* in deciding on the respondent’s application for the grant of an

order of taxation of an interim Bill of Costs and payment thereof, was called upon to exercise a discretion, which it had exercised judicially and correctly in respondent's favour. He submitted that the concept of "good cause" embodied a wide discretion and relied for support on the dictum in **Du Plooy v Anwes Motors (Edms) Bpk** 1983 (4) SA 212 (O) at 216H.

11.2 He submitted that in deciding whether respondent had shown good cause, it was permissible for the court *a quo* to have had regard to the pleadings and affidavits, the sequence of the proceedings and the time it took for various sequences to reach completion. He also stressed that common sense should play a significant role in deciding whether good cause has been shown. To illustrate this submission, he referred repeatedly to the fact that none of the orders given against the appellant were of the respondent's making and on that account alone, respondent should not be left to his own devices as regards the funding of the further conduct of his defence. He has urged this court to keep in mind that respondent has had to meet the costs of his own legal team; which he informed us has not been inconsiderable and that respondent has been frustrated in his right to finalise the litigation instituted against him by appellant, because the appellant's tardiness in pleading, has protracted the litigation process. He contends strongly that this is in fact the strength of the respondent's case, because he cannot be expected to carry on his defence in the knowledge that the appellant is nowhere nearer to the finalisation of its case than it was three years and eight months before the order appealed against was granted, i.e. when summons was first issued. Mr Danzfuss has asked the rhetorical question “How can this not be good cause?.”

11.3 He has also urged us to dismiss this appeal on the basis that the litigation between his client and the appellant, which he describes as “senseless”, must come to an end and the taxation allowed to proceed so that the public can be informed of the costs of this litigation to tax and rate payers. He also takes issue with Mr Ploos van Amstel’s argument that to allow an interim taxation would result in chaos, because of the thousands of bills which would have to be taxed. He submits that at this stage, due to the fact that agreement exists that the other actions ought to, for the moment, be dormant, there would only be a maximum of eight (8) bills of costs which would have to be taxed and paid immediately given the various legal steps and procedures which unfolded in the present matter. However were the taxations all to be held over until the conclusion of the litigation, chaos would certainly reign once the bills of costs in all 3000 odd cases are presented for taxation. He has reminded this court that ultimately the question is whether the learned magistrate failed to exercise his discretion judiciously in light of the prerequisite of “good cause”. He argues that, on the facts of this case, the magistrate cannot be faulted and accordingly the appeal must be dismissed with costs.

[12] Mr Ploos van Amstel has taken issue with this approach. His contention is that there can be no room for the question of the exercise of a judicial discretion when it comes to deciding the narrow issue we are faced with in this appeal *viz* whether the court *a quo* was correct in making an order for immediate taxation and payment of an interim Bill of Costs. He argues that such an order is in the nature of a punitive order and not an indulgence. Consequently the question of the exercise of a judicial discretion does not arise. I do not agree. The fact that the respondent is seeking an order of court, the effect of which is to enable him to act in a manner contrary to that sanctioned by the prescribed rule of court (Rule 33(3)) that in any litigation, only one Bill of Costs is to be taxed at the conclusion of such litigation, amounts, in my view, to the seeking of an indulgence from the court for the granting of which that court needs to be satisfied "on good cause" shown that facts and circumstances exist in the particular case justifying it. So, without elevating it to a necessary prerequisite in such matters, I shall assume, without deciding, for the purpose of this judgment, that in the court *a quo* the learned magistrate was requested to indulge the respondent, on good cause shown, with an order for the immediate taxation and payment of an interim Bill of Costs and that he did so by the exercise of a discretion vested in him for that purpose. This discretion is a wide one, essentially because a judge is not just a referee to see to it

that the rules of the game are being observed. He/She is an administrator of justice and must see to it that justice is done.

[13] In **Fripp v Gibbon and Co** 1913 AD 354 Lord De Villiers CJ at 357 said:

> "In appeals upon questions of costs two general principles should be observed. The first is that the Court of the first instance has a judicial discretion as to costs; and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgements have contravened the general principle that the successful party should be awarded his costs"

It has repeatedly been stated by our courts that an appeal tribunal will not readily interfere with an exercise of discretion by the court *a quo* in awarding costs, merely because it would have taken a different view of the facts. (**Penny v Walker** 1936 AD 241 at 260.)

In **Ritter v Godfrey** [1920] 2 KB 47, the following was said in regard to the nature and extent of the discretion exercised and what is meant by "judicial discretion".

> "The discretion must be judicially exercised and therefore there must be some grounds for its exercise for a discretion exercised on no grounds cannot be judicial. If however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court cannot interfere with his discretion."

It is only where it is shown that the court *a quo* acted arbitrarily that a court of appeal would be at large to interfere and exercise its own discretion. But having said that, the mere fact that the appeal court would have given more weight to the grounds/facts of the case does not mean that the trial court acted arbitrarily and not with judicial discretion. (**Merber v Merber** 1948 (1) SA 446 (A) and **Beimash v Wixley** 1997 (3) SA 721 SCA.)

[14] I turn now to the tricky question of the definition of the concept of "good cause". It is a tricky issue because the concept is not a definitive one, there being no "numerous clauses" of good reasons sufficing to constitute "good cause". Each case must be decided according to the facts peculiar to it. In any event, to attempt to define "good cause" is undesirable and hardly possible. It is something which is only capable of a contextualised meaning in the light of the circumstances relevant to the case. According to the learned authors Jones & Buckle in their work: **The Civil Practice of the Magistrate Courts in SA** 10th edition, volume 2 at p 33 – 35, good cause embraces:

> "… the length of the proceedings taken as a whole, i.e. the whole action, including the interim proceedings. If the case is long and complicated, the attorney should be allowed to send in his bill at some reasonable break in the proceedings and be allowed taxation thereof."

They rely for support of this stance on the English decision of **Romer**, *supra*.

[15] Mr Ploos van Amstel has submitted that in approximately 673 actions sued out of the magistrates' courts in Harrismith and Reitz, all of the defendants have approached these courts with interim Bills of Costs, demanding taxation and immediate payment of their interim costs as at the date of the dismissal of the appellant's appeal in the SCA. Mr Ploos van Amstel has urged us to consider this as the gravamen of the appeal *viz* that any order granted by this court dismissing this appeal necessarily means that the same order will be applied to all of those 673 cases held in abeyance in the magistrates' courts of Harrismith and Reitz and that the appellant will have to pay costs orders worth thousands of rands notwithstanding that those actions are still pending and not finalised. I have considered this argument as best I can and fail to understand on what basis this court can be persuaded to dismiss the appeal on that ground alone, that a multiplicity of taxations of interim Bills of Costs would eventuate and create administrative chaos in those courts and cause a significant depletion of public funds. There is no evidence on record relating to any of the other actions instituted by the appellant, the extent to which the litigation in each of them has proceeded and the rationale for the submission that each defendant would be entitled to demand taxation of an interim Bill of Costs, prior to the conclusion of the litigation in each case. That being so this court is not at large to have regard to any submissions concerning those actions.

[16] But even if, however, there has been some agreement to the contrary with the appellant, which I doubt very firmly to be the case, I still fail to see how such a factor can be brought to

bear upon the decision making process we are called upon to undertake in this appeal for it was this very argument which caused this court in the **Van Zyl Staalwerke** case, *supra*, to find for the appellant in that appeal. In the **Van Zyl Staalwerke** case, *supra*, this court had occasion to deal, on appeal, with a similar issue and held, as follows (at page 3 of the typed judgment):

> "… the learned magistrate allowed irrelevant consideration to cloud his judgment in coming to the decision that he did… I say so because he erred in ascribing to the appellant the difficulties experienced by himself as the only judicial official dealing… with the copious load of civil litigation which he said would be generated by the appellants institution of the multiplicity of actions based on the same cause of action as the present case… such a reason cannot satisfy the test of… good cause… No evidence… qualifying the requirement of good cause was placed before the learned magistrate and consequently no such evidence could be taken into account by him in coming to a decision…".

That decision makes light work of Mr Ploos van Amstel's submissions in this regard and, I do not hesitate to say, it is indicative of the appellant shooting himself in the foot. For on the one hand, he has urged this Court to regard that decision as the alpha and omega of this appeal and find that the respondent has produced no evidentiary basis for showing good cause and in the next breath would have this court do precisely the opposite and accept the lack of an evidentiary basis as support for its case that a multitude of taxations of interim Bills of Costs is evidence militating against the finding of the requisite “good cause” in respondent’s favour.

[17] Mr Ploos van Amstel has also challenged the learned magistrate’s application of certain principles relating to the taxation of Bills of Costs enunciated in the **Romer** case as a basis for his finding that respondent had discharged the *onus* of showing good cause, as a material misdirection. This was primarily because, as I understood the argument, of his insistence that the principle of a “reasonable break in proceedings” dealt with a “recognised break” or a “natural break” and not a break randomly plucked out of the air as was done, he submitted by the learned magistrate. He also placed strong reliance on the fact that the **Romer** case had dealt with arbitration proceedings which had been completed before the issue of taxation arose and that the taxation related to attorney and own client costs and not party and party costs, as is the issue in the present appeal. What difference the nature and type of costs makes to the question whether the discretion to grant the order was judicially exercised, is not clear to me in the context of the provisions of Rule 33(3) and have assumed, for the purposes of the adjudication of this appeal, that the learned magistrate in the court *a quo* also did not regard the distinction as relevant to the debate.

[18] Whilst it is correct that the **Romer** decision did not deal with the interpretation of a provision such as Rule 33(3), it did deal with the situation where money had to be collected from a client by his solicitor and the court in that case listed certain

factors which had to inform any judicial decision taken to grant those costs. I agree with Mr Danzfuss that there is no conceivable reason why those factors should not have been taken into account by the learned magistrate when called upon to decide whether the respondent ought to be allowed to tax a bill of his interim costs, especially in view of the fact that the learned magistrate was guided in his election to do so by the sanction of the authors Jones & Buckle, *supra*, of those very factors as valid and worthy of consideration by a court when called upon to exercise a judicial discretion. These factors, *inter alia*, are the length of the litigation, the fact that a reasonable break in the proceedings had occurred and the relative complexity of the litigation, all of which the court *a quo* had regard to in its deliberations. I fail to see how an agreement between the parties to suspend the further progress of the litigation between them for the specific purpose of obtaining a definitive judgment from the Supreme Court of Appeal on a matter intrinsic to the litigation between them, can be termed a break "randomly plucked out of the air". This was no arbitrary situation, of the learned magistrate's own making. I am of the view and make the finding that in these circumstances, the learned magistrate was correct in regarding the suspension in the proceedings as a "reasonable" and/or a "natural" and/or a "recognised" break.

[19] It is a *fait accompli* that the litigation between the parties has been long and protracted, summons having been issued in June 2008, 5 years prior to the date of the grant of the order appealed against. Now is not the time to apportion blame

and, quite rightly, the learned magistrate did not apply his mind to that inconsequence. What was important to the debate was inordinate delay in the finalisation of litigation and the court *a quo*, correctly in my view took this factor into account. However, it considered that, notwithstanding a number of amendments, the appellant was unable since June 2008 right up to when proceedings were suspended, to get its house in order and to plead a proper case as a further ground for finding that good cause had been proved by the respondent and that it would be unfair ("onbillik") for the respondent not to be paid the costs he had incurred before continuing with the litigation. I cannot fault this approach and it would seem to me to be pre-eminently in accordance with the principles of equity that a man, who through no fault of his own is dragged to court to answer a charge bad in law, ought to be paid the costs he has incurred over a period of 5 years during the subsistence of the earlier litigation before being made to incur any further costs in the pursuit of that litigation. This is not a case of a matter which has sustained for a couple of months on an incorrect legal premise. I think given the manner in which the litigation between the parties has progressed, it would not be remiss of this court to find the financial expense to which the respondent has unnecessarily been put by the appellant in defending an action brought on the basis of an invalid legal premise, as not inconsiderable, given the period of the delays of 3 years and 8 months, <u>alternatively</u> 5 years since the issue of summons. The appellant was ordered to pay the respondent's costs for the first time in respect of its failure to furnish proper particulars to the summons on 31 July 2008. I find that the learned magistrate was quite correct in accepting the long delay and the protracted litigation between the parties as a factor justifying his finding of good cause.

[20] Although not considered by the court *a quo* as a factor influencing the exercise of its discretion, the legal effect of a successful exception on litigation definitely has a bearing thereon especially in the present matter. The respondent's exception was successful and that in effect means that the appellant's particulars of claim as initially pleaded and thereafter amended has been set aside. Consequently the effect for the respondent is that, after approximately 5 years, the litigation through which he was put and for which he paid out of his own pocket is non-existent and was an exercise in futility from the onset. That litigation did not disclose any claim against the respondent and it has taken approximately 5 years for the appellant to be made to accept that. Despite repeated objections to its summons and particulars of claim as disclosing no cause of action, the appellant steadfastly and adamantly refused to accept that it had no basis in law for the relief it had claimed against the respondent and so it persisted with fruitless litigation against the respondent, in the vain hope, no doubt, of being vindicated by the Supreme Court of Appeal. The exception taken by the respondent to the appellant's particulars of claim went to the root and the heart of the appellant's case. The appellant's persistence with a fatally flawed action in the face of what was clearly and self-evidently an exception of legal substance, spoke of its reckless disregard for the respondent as a lay litigant who, unlike the appellant, did not have the endless financial

resources to embark on protracted litigation in circumstances where same was unwarranted and could not be justified. On all accounts therefore, I find that the approach of the learned magistrate in the court *a quo* cannot be faulted.

ORDER

[21] The appeal is dismissed with costs.

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S. EBRAHIM, J

I concur.

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L. J. LEKALE, J

On behalf of applicant:	Adv C. Ploos van Amstel SC With him: Adv C. Coetzer Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv F.W.A. Danzfuss SC Instructed by: Phatshoane Henney BLOEMFONTEIN

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