



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **A274/2022**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE: 17.7.2024	
SIGNATURE: [Redacted]	

In the matter between

MINISTER OF THE SOUTH AFRICAN POLICE SERVICES

First Appellant

CORNELIUS ROELOFSE MARITZ

Second Appellant

THE DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA

Third Appellant

and

WILLIAH JOSEPH MUDOLO

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

[1] This appeal lies against an order granted by the court *a quo* on 27 May 2022 in the following terms:

- “1. This matter was called in the Urgent Court on 18 May 2022. Having heard counsel for the parties, the Court reserved judgment.
2. On 25 May 2022, an erroneous order was issued in which it was stated that “the matter is struck off the roll with costs due to a lack of urgency.”
3. Having, scrutinised the said order on 27 May 2022 and realising that there is an error, the Court decided to *mero motu* rescind it, in terms of Rule 42(1) and replace it with the following:

3.1 The application is granted with costs.”

- [2] The appellants initially appealed the relief granted in paragraph 3 of the order, rescinding the erroneous order issued on 25 May 2022, on the basis that they were not heard prior to the order being granted. To their credit the appellants did not persist with this ground of appeal. The rescission was clearly necessary to correct an administrative error, and nothing turns on the rescission of the erroneous order.
- [3] It needs mentioning that in terms of the judgment delivered by the court *a quo* on 2 August 2022, costs were granted on an attorney-client scale, whereas only party and party costs were granted in terms of the court order dated 27 May 2022. It is trite that an appeal lies against an order and not the judgment. [See, *inter alia*, *Tavakoli and Another v Banty Hills (Pty) (Ltd)* 2019 (3) SA 163 (SCA) at para [3]
- [4] This judgment, therefore, proceeds on the basis that a party and party cost order was granted.

BACKGROUND

- [5] On 17 October 2020 the respondent, a businessman who was on a business trip to Nigeria, was arrested at OR Tambo International Airport on a charge of fraud. The respondent was charged with fraud and remained in custody until he was released on bail on 17 June 2021. In terms of the bail conditions the respondent had to remain in Gauteng and was not allowed to be within 500 metres from any port of entry. The respondent was, furthermore, required to report to the nearest police station every Monday and Friday.

- [6] On 8 March 2022 the respondent's bail conditions were amended by the Magistrates Court to allow the respondent to travel outside Gauteng and abroad. The respondent arranged a trip abroad and on 22 March 2022, his attorney requested his passport from the second appellant, Colonel Marais ("Marais"). According to the respondent, Marais refused to hand over the passport and informed his attorney that the National Prosecuting Authority (NPA) had filed a notice of appeal on 18 March 2022. The refusal to hand over the respondent's passport culminated in the urgent application in which the respondent claimed the following relief:

" 2. *Compelling the respondents to release the applicant's passport number ZP028394 to allow him to undertake travel, both local and overseas, in compliance with the order of the Pretoria Magistrates Court dated 8 March 2022.*

3. *In the event of the respondents filing a notice of appeal, it is directed that such appeal shall not suspend the order granted by the Honourable Magistrate on 8 March 2022 and the order shall continue to be operational and enforceable until the final determination of the appeal."*

- [7] As set out *supra*, the relief was granted with costs by the court *a quo* on 27 May 2022.

MOOTNESS

- [8] At the hearing of the appeal, the parties were *ad idem* that the appeal has become moot in the following circumstances:

8.1 the order granted by the Magistrate on 8 March 2022 was set aside on appeal on 13 September 2022;

8.2 the respondent proceeded to file an application for special leave to appeal to the Supreme Court of Appeal, which application was dismissed on 16 November 2022;

8.3 thereafter, the respondent brought an application for leave to appeal to the Constitutional Court, which application was dismissed on 6 March 2023.

- [9] Notwithstanding the fact that the appeal has become moot, the appellants maintained that the appeal should proceed in respect of the cost order granted by the court *a quo*.

[10] In the heads of argument filed on behalf of the appellants, the appellants relied on the provisions of section 16(2)(a)(i) of the Superior Courts Act, 10 of 2013, which reads as follows:

*“16(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no effect or result, the appeal **may** be dismissed on this ground alone.” (own emphasis)*

[11] Relying on the aforesaid discretion, the appellants submitted that the court should hear the appeal in circumstances where an unconscionable result would ensue if the appeal is dismissed and the appellants remain liable for the costs of the application. The order sought in the heads of argument was accordingly for the appeal to be upheld, the order of the court *a quo* to be set aside and that the application be dismissed with costs.

[12] During the hearing of the appeal, Mr Bester SC, counsel for the appellants, did, however, not insist that the appeal being heard on the merits as envisaged in section 16(2)(a)(i). Mr Bester submitted that an order in terms of section 16(2)(a), save for the issue of costs, should be granted. A draft order in the following terms was accordingly submitted:

- “1. It is ruled that for purposes of section 16(2)(a) of the Superior Courts Act 10 of 2013, save for the issue of costs, the decision sought on appeal will have no practical effect or result;*
- 2. The cost order granted by the court a quo is set aside;*
- 3. No order as to costs in the appeal (including the costs of the application for leave to appeal);*
- 4. The order contained in paragraphs 1 – 3 disposes of the issues on appeal.”*

[13] In the result, the cost order granted by the court *a quo* stands to be considered in terms of section 16(2)(a)(ii), which reads as follows:

“16(2)(a)(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any considerations of costs”

- [14] In *John Walker Pools v Consolidated Aone Trade and Invest 6 (Pty) Ltd (in liquidation) and Another* 2018 (4) SA 433 (SCA) the court summarised the position under section 16(2)(a)(ii) as follows:

"[15] Counsel for JWP conceded that the only practical effect which an appeal order would have was in relation to costs. In terms of s 16(2)(a)(ii) of the Superior Courts Act 10 of 2013, the question whether a decision would have practical effect or result is, save under exceptional circumstances, to be determined without reference to any consideration of costs. The costs referred to in this provision are the costs incurred in the court against whose decision the appellant or would-be appellant is seeking to appeal, not the costs in the appellate court. The section is concerned with the decision of the court a quo and the circumstances in which an appeal against the decision of that court can be dismissed without an enquiry into the merits. If the costs incurred in the court a quo were very substantial, this might constitute an exceptional circumstance leading to the conclusion that a reversal of that court's decision would have practical effect." (footnote excluded)

- [15] In *Mgwenya NO and Others v Kruger* (1060/16) [2017] ZASCA 102 (16 September 2017), the appeal became moot because the first respondent passed away before the hearing of the appeal. The appellants similarly conceded that the appeal and any order made thereon would have no practical effect or result. Having made the aforesaid concession, the appellants also relied on the provisions of section 16(2)(a)(ii) and requested that the appeal be heard. The court dealt with the request and the principles, involved in considering such a request as follows:

[7] Counsel for the appellants, however, had a second string to their bow. They submitted that, if the appeal were not to be heard on its merits, the church would be saddled with the costs orders made in favour of the first respondent and this would be most 'unfair' to the church. In this regard counsel for the appellants stressed that the costs incurred to date were substantial. However, in so arguing, the appellants were confronted with a significant obstacle in the form of s 16(2)(a)(ii) of the SC Act which reads as follows:

'Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

It follows that it is incumbent upon the appellants to show that exceptional circumstances exist justifying this court, in deciding whether its judgment or

order would have a practical effect or result, to have regard only to considerations of costs.

[8] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C), Thring J conducted a comprehensive inquiry as to the meaning of 'exceptional circumstances' in our case law. The conclusion reached at 156H-J, with which I am in agreement, is that '[w]hat is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . .'. Further, the approach to the construction of the phrase 'exceptional circumstances' in legislation was stated as follows by this court in *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399:

'Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.'

[9] In essence the submissions made on behalf of the appellants in this regard constituted a plea ad misericordiam. The appellants also sought to rely on the judgment in *Oudebaaskraal (Edms) Bpk en andere v Jansen van Vuuren en andere* 2001 (2) SA 806 (SCA). In my view, *Oudebaaskraal* is clearly distinguishable. In that matter the appeal became academic as a result of the repeal of the Water Act 54 of 1956 at the time when the appeal was ripe for hearing. By that stage a trial of seven days in the Water Court had taken place rendering a record of 2 379 pages. This included the evidence of several expert witnesses. The appeal record consisted of 35 volumes. This court held that these circumstances were exceptional, justifying the conclusion that in the event of a successful appeal, the judgment or order of the court would have had a practical effect or result. I should mention that *Oudebaaskraal* was decided in terms of s 21A(3) of the Supreme Court Act 59 of 1959 which, for all practical purposes, is similarly worded to s 16(2)(a)(ii) of the SC Act. See also *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA) at 55G-56F.

[10] In the present matter the appeal related to an order granted in Motion Court which was set aside by the full court. No viva voce evidence was tendered and the appeal record constituted only three volumes running to 437 pages. *Oudebaaskraal* and the present appeal are simply not comparable. It follows that, although the appeal was rendered moot by the death of the first respondent, the circumstances relied upon by the appellants cannot, for purposes of s 16(2)(a)(ii) of

the SC Act, by any stretch of the imagination be regarded as exceptional in the sense of something out of the ordinary, or of an unusual nature, uncommon, rare or different to the extent that the general rule as embodied in s 16(2)(a)(i) should not apply.”

- [16] In *casu* the appellants relied, in their heads of argument, on the merits of the appeal in support of their submission that “*an unconscionable result*” will ensue if the cost order granted by the court *a quo* against the appellants would be allowed to stand.
- [17] Having read the record of appeal, I appreciate the appellants’ stance that to allow the cost order granted by the court *a quo* to stand would be hugely unfair to the appellants. This is, however, not the test to apply in terms of section 16(2)(a)(ii).
- [18] “*Exceptional circumstances*” must exist, insofar as only a cost order must, in the circumstances, be determined without having regard to the merits of the appeal. This much is clear from reasoning of the Supreme Court of Appeal in the *Mgwenya* matter.
- [19] Having failed to establish exceptional circumstances as envisaged in section 16(2)(a)(ii), the appeal stands to be dismissed in terms of section 16(2)(a).

COSTS

- [20] The question of costs in an appeal that has become moot is determined with reference to the time when it became apparent that the appeal became moot. In *casu*:

20.1 leave to appeal was granted by the court *a quo* on 5 October 2022;

20.2 the notice of appeal was delivered on 2 November 2022;

20.3 the date for the hearing of the appeal was allocated by the registrar on 27 January 2023;

20.4 the date on which the appeal became moot was the date on which the respondent's application for leave to appeal to the Constitutional court was dismissed on 6 March 2023.

[21] The duty of the parties after 6 March 2023 was set out in the *John Walker Pools* matter *supra* at 437 H as follows:

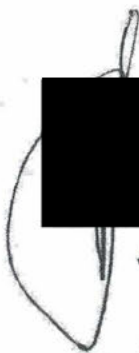
"As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that appellate court's intervention is not needed."

[22] Neither the appellants nor the respondent complied with their respective duties in terms of the general rule. In the result, I am of the view that the parties should bear their own costs.

Order:

I propose the following order:

1. The appeal is dismissed.
2. No order as to costs.



JANSE VAN NIEUWENHUIZEN, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

I agree.



KUBUSHI, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

I agree.



COLLIS, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

It is so ordered.

DATES HEARD:

08 May 2024

DATE DELIVERED

17 ~~08~~ July 2024

APPEARANCES

For the Appellant's:

Advocate G Bester SC

Instructed by:

The State Attorney, Pretoria

For the Respondent:

Advocate J Mnisi

Instructed by:

Matojane Malungana Inc