



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 no: A159/2023

In the matter between:

PARKER BEUSEKOM PARTNERSHIP

APPELLANT

and

SHAUN SMITH

RESPONDENT

Neutral citation:

Coram: MUSI JP *et* OPPERMAN and DANISO JJ

Heard: 02 AUGUST 2024

Delivered: 30 AUGUST 2024

Summary: Application to adduce further evidence on appeal – requirements restated. Security for costs from a South African resident – may not be demanded only because person resides in the jurisdiction other than the one in which proceedings instituted. Mootness – requirements restated.

ORDER

1. The application to adduce evidence on appeal is granted with no order as to costs.
 2. The appeal is dismissed with costs.
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JUDGMENT

Musi JP (Opperman and Daniso JJ concurring)

[1] This is an appeal against an order of a single judge of this Division, in which he dismissed an application brought by the appellant (Parker Beusekom Partnership (partnership)) against the respondent, Mr Shaun Smith (Smith). The partnership sought an order that Smith be ordered to pay security for its costs. The application was dismissed on 23 January 2023. The appeal is with the leave of the court *a quo*.¹

[2] Smith sued the partnership after it cancelled a sale agreement regarding the sale of an Apollo Aircraft (Aircraft). It is common cause that Smith first emigrated to the United States of America and thereafter to Israel. The partnership delivered a Rule 47 notice, on 23 February 2022, seeking R500 000 as security for its costs (the first notice).² Smith refused to furnish the security as demanded and nothing came of this

¹ Leave to appeal was granted on 6 October 2023.

² (1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

demand. On 19 September 2022 the partnership delivered a second demand for security for costs in the same amount as in the previous notice (second notice). Smith, once again, refused to furnish security.

[3] On 29 September 2022 the partnership launched an application seeking security for costs in the amount of R500 000 and that the action proceedings instituted by Smith be stayed until such security had been furnished. The application was opposed. It was common cause that at the time when security was sought, Smith was not residing in South Africa and was, therefore, a *peregrinus* (foreigner).

[4] The partnership alleged that Smith, being a *peregrinus*, did not have immovable property in this country; the object of their contract was in a state of disrepair and was in any event being disassembled. The partnership further stated that a certain Mr Bellingham had offered to purchase the Aircraft for R1 500 000 as Smith previously stated that the Aircraft is airworthy with a value ranging between R4 200 000 and R5 200 000.

[5] In dismissing the application, the court *a quo* found that the partnership was not candid in its founding affidavit since it failed to disclose that it had served the first notice. It also did not disclose why it failed to pursue that notice. It further found that the second notice was not delivered as soon as practicable after the commencement of the proceedings. Additionally, it found that the offer of R1 500 000 for the Aircraft exceeded the amount demanded as security for costs.

[6] Aggrieved by the court *a quo*'s order, the partnership successfully applied for leave to appeal. Before us, Smith brought an application to adduce evidence on appeal. The new evidence related to the fact that Smith is residing at St Francis Bay since 3 September 2023 with his wife in a house that she purchased during May 2023. The transfer of the house was registered on 13 July 2023. On 31 October 2023 he gave notice of his intention to amend his particulars of claim to reflect his current

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.

address. The partnership did not object and on 15 November 2023 the amendment was effected, in terms of Rule 28(5).³

[7] The partnership opposed the application to adduce evidence on appeal, primarily on the ground that Smith remains a *peregrinus* of this Court since he resides in the Eastern Cape and not in the Free State. It further states that he was not candid as he did not mention that he was deported from the USA.

[8] In terms of s 19(b) of the Superior Courts Act⁴ (Act) this Court is empowered to receive further evidence on appeal. In *Pepkor Holdings v AJVH*⁵ the legal position was succinctly set out as follows:

‘... an appellate court does not decide an appeal according to new circumstances that came into existence after the judgment appealed against. There may be exceptional circumstances where an appellate court might be able to take cognizance of subsequent events. The power to admit evidence on appeal should be exercised sparingly. There must be a reasonably sufficient explanation why the evidence was not tendered earlier in the proceedings. The evidence “must be weighty and material and presumably to be believed.”⁶

[9] The evidence that Smith wants to adduce obviously relates to a time after judgment was given in the court *a quo*. It could not be adduced at any other time because its relevance only arose after the judgment was delivered. The evidence sought to be adduced might render the matter moot. This is a weighty and material consideration. The evidence is not disputed and has a ring of truth to it.

[10] The opposition to the evidence is based on an incorrect legal basis. The fact that he currently resides in South Africa since May 2023 is not disputed. Section 25 of the Act provides:

‘If a plaintiff in civil proceedings in a Division resides within the Republic, but outside the area of jurisdiction of that Division, he or she shall not by reason only of that fact be required to give security for costs in those proceedings’

³ (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

⁴ Act 10 of 2013.

⁵ *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others* [2020] ZASCA 134; 2021 (5) SA 115 (SCA).

⁶ *Ibid* para 49. Footnotes omitted.

[11] It is clear that Smith is residing outside the area of jurisdiction of this court but within the Republic. We decided to admit the evidence with no order as to costs, notwithstanding the opposition. It will definitely assist this Court with the inquiry into the mootness of this appeal. I now turn to the issue of mootness.

[12] Section 16(2)(a)(i) and (ii) of the Act state:

- '(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (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 consideration of costs.'

[13] Courts are loath to determine appeals that would have no practical effect or result. Judicial resources must be used sparingly. Impractical orders on appeal obviously lead to inefficient utilization of already overstretched judicial resources.

[14] This principle was underscored by the Constitutional Court in *Normandien Farms v South African Agency for Promotion of Petroleum Exportation and Exploitation*⁷ when it pronounced that:

'Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical."⁸

[15] An appellate court may, however, entertain appeals even when there are no live controversies to settle, if it is in the interests of justice to do so. The factors to consider in order to determine whether it is in the interests of justice to hear a moot matter, include:

- '(a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;

⁷ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exploration and Exploration SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC).

⁸ *Ibid* para 47.

- (c) the importance of the issues;
- (d) the complexity of the issues;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.⁹

[16] The order sought in this case would not have any practical effect. The entire basis for the application was to order Smith to furnish security for costs because he is a *peregrinus*. When he moved back to South Africa and decided to reside here permanently, the foundation of the application crumbled. There is therefore no basis upon which this court can order him to furnish security for the partnership's costs.

[17] The partnership argued that should the appeal succeed, Smith may subsequently apply for the security to be released. He would then have to prove that he had become a resident or *incola*.¹⁰ The mere stating of this preposition indicates the unnecessary time, effort and expense that Smith will be put through just to achieve what is presently known and accepted. It cannot be in the interest of justice to put a litigant through such a process.

[18] It can also not be in the interest of justice to require a resident of the Republic to furnish security for costs based on the fact that at some stage in the past he resided in another country. That would be the effect if this appeal were to succeed. The partnership would achieve, by dint of judicial decree, that which is proscribed by s 25 of the Act. The application was predicated solely on Smith being a *peregrinus*.

[19] I am convinced that there are no live controversies to settle in this matter and the interest of justice militate against determining this appeal. I now consider the issue of costs.

[20] The partnership was alerted by the amendment that Smith resides in the Republic and his full address at St Francis Bay was disclosed. Smith also wrote a 'with prejudice letter' to the partnership during February 2024, informing it that the appeal is rendered moot by his return. He offered to pay the costs of the appeal up to that

⁹ Ibid para 50.

¹⁰ *Alexander v Jokl and Others* 1948 (2) SA 269 (WLD) at 274.

stage but refused to jettison the costs order made in his favour by the court a quo. His offer was rejected after a long delay.

[21] There are no exceptional circumstances present in this case to consider costs. In fact, the partnership was forewarned. It, however, persisted with this appeal on spurious grounds. There is no reason why it should not be mulcted in costs. Smith was successful and the costs should follow the result.

ORDER

[22] I therefore make the following order:

1. The application to adduce evidence on appeal is granted with no order as to costs.
2. The appeal is dismissed with costs.



C.J. MUSI JP

I concur.



M. OPPERMAN J

I concur.



N.S. DANISO J

Appearances

For Plaintiff:

Adv D.H. Wijnbeek

Instructed by:

McIntyre & Van Der Post Attorneys

Bloemfontein

For Defendant:

Adv C.D. Pienaar

Instructed by:

Hendre Conradie Inc

Bloemfontein