



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

CASE NUMBER: 2023-013753

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

DATE: 31 October 2025

SIGNATURE: 
LINDEQUE AJ

In the matter between:

SIFISO TWALA

First Applicant

S. TWALA ATTORNEYS INC

Second Applicant

and

MUTLANENG, MOSEDI BONOLO

Respondent

In re:

MUTLANENG, MOSEDI BONOLO

Applicant

and

<u>MUTLANENG, TSHEPO EDWIN</u>	First Respondent
<u>SIFISO TWALA</u>	Second Respondent
<u>S. TWALA ATTORNEYS</u>	Third Respondent
<u>MINISTER OF POLICE</u>	Fourth Respondent
<u>MINISTER OF JUSTICE & CORRECTIONAL SERVICES</u>	Fifth Respondent

JUDGMENT

LINDEQUE AJ

1. This is an application by the first and second applicants seeking a costs order against the respondent in respect of the first hearing of the application in the urgent court, where costs were reserved on 28 February 2023. The respondent brought an urgent application on the said date in an effort to hold the applicants in contempt of court. Furthermore, the applicants seek that the respondent makes payment of the costs of the present application, which includes an occasion when costs were reserved by agreement in the unopposed motion court on 18 September 2024.

BACKGROUND

2. The respondent launched an urgent application in this court on 14 February 2023 for *inter alia* an order to hold the applicants in contempt of an order granted by Regional Court Magistrate Alberts in Randburg Regional Court and an order that the first applicant as director of the second applicant be directed to report to the authorities for incarceration for a period of six months.
3. The urgent application was opposed by the present applicants in this application as well as the first respondent in the urgent application. Answering and replying affidavits, heads of argument and supplementary heads of argument were filed in the urgent application.
4. The urgent application was heard by Wepener, J on 28 February 2023 and it is common cause between the parties that he expressed the view that the matter was not urgent and afforded the respondent an opportunity to remove the matter from the urgent roll with costs reserved, which was then done as per his court order.

5. The respondent took no steps to place the matter on the normal opposed roll after it was removed from the urgent roll, whereupon the applicants set the application down on the opposed roll, which was heard by Crutchfield J on 15 May 2023, reserving judgment after the hearing.
6. It is common cause between the parties that no one involved in the argument before Crutchfield, J drew her attention to the order of Wepener, J, where costs were reserved in respect of the urgent application heard on 28 February 2023.
7. On 16 May 2023, the day after the hearing before Crutchfield J, the first applicant addressed an email ostensibly to Crutchfield J, wherein he requested that the costs order, if she was inclined to make same, should include the reserved costs for 28 February 2023. The said email was addressed to Lesego Molose and Tsakani Maluleke, whom I presume were the secretaries of Crutchfield J. It is common cause that no response was received as a result of the said email and there is no evidence that it came to the attention of Crutchfield J.
8. Crutchfield J delivered judgment on 14 February 2024, postponing the application against the first respondent in the main application, granting

him and the applicant (respondent in this application) leave to supplement their papers, both parties to pay their own costs. In respect of the current applicants in this application, Crutchfield J dismissed the current respondent's application with costs on the party and party scale. Her judgment had no reference to the reserved costs of the urgent application.

9. The applicants contend that such costs remain reserved and should be dealt with in this application, whilst the respondent contends that the court is *functus officio* with its jurisdiction having been fully and finally exercised and that its authority over the subject matter has seized.
10. Before the respondent brought the urgent application in this court, it launched an application in the same vein in the Magistrate's Court, Randburg, which application she withdrew tendering the applicants' wasted costs, whereafter she reinstituted the application on the same day, namely 22 June 2022 in the Regional Court, Randburg, where the matter was dismissed on 7 February 2023 on an attorney and client scale. In both instances (in the District and Regional Court) the

applications were enrolled on the normal opposed motion roll and not in the urgent court.

11. The applicants contend that in the circumstances the respondent was aware or must have been aware that the application for contempt of court against the applicants was not urgent and did not have any merit. The applicants ask the court to order that the respondent pays the reserved costs in the urgent court as well as the costs of the present application. The applicants do not seek attorney and client costs in their notice of motion or in their founding affidavit.
12. The respondent's current attorney of record deposed to the answering affidavit in this application on behalf of the respondent. He contends that the respondent relied solely upon the legal advice from her previous attorneys and that she should not be penalised, even in being misguided to bring a hopeless case as there is no evidence before court that there is an absence of *bona fides* on her part.
13. The respondent's attorney further contends that there are *mala fides* on the part of the applicants in that in the answering affidavit to the urgent application, they only sought an order for costs against the respondent's

previous attorneys *de bonis propriis*. I do not agree that this contention is a true reflection of the answering affidavit in the urgent application. In dealing with urgency in the urgent application's answering affidavit, it was contended that the urgent application should be dismissed with punitive costs on an attorney and client scale, *de bonis propriis*. However, the said affidavit concluded with a general statement that a punitive costs order in favour of the current applicants was warranted.

14. In any event and as I have already mentioned, the notice of motion in the present application does not seek payment of the costs of the urgent application on a punitive scale.
15. In the applicants' heads of argument and in their contentions as contained in the joint practice note, the applicants also seek the costs for the occasion when this application was on the unopposed roll on 18 September 2024 and subsequently removed as a result of the late filing of the respondent's answering affidavit. The applicants contend that the application was removed from the unopposed roll by agreement and that it was agreed that costs in respect thereof would be reserved. I will deal with these costs hereunder.

FUNCTUS OFFICIO ARGUMENT

16. The respondent contends that the court is *functus officio* and that the applicants have no right to seek to re-open a closed case.
17. As in Goldsworthy (born Marshall) v Goldsworthy [2009] JOL 23468 (ECG) at paragraph [13], it is common cause that the aspect of the reserved costs constituted a *bona fide* omission of all concerned and was overlooked by the legal representatives of both parties and as a result thereof the issue of the reserved costs was not brought to the attention of Crutchfield J. Sandi J, in Goldsworthy (supra) did not accept the respondent's submission that the court was *functus officio*.
18. In Lynmar Investments (Pty) Ltd v South African Railways and Harbours 1975 (4) SA 445 (D), the plaintiff approached the court, after judgment had been handed down with the request that the judge allowed the costs of two expert witnesses in respect of whom no provision had been made for their costs. The application was opposed on the ground, *inter alia*, that the court was *functus officio*. In the course of his judgment on page 446, Miller J referred to the matter of **West Rand Estates Ltd v New**

Zealand Insurance Co Ltd 1926 AD 173 at 176 where it was pointed out that:

“... although the main judgment could not be altered it might be timeously supplemented in respect of consequential matters, such as the award of costs, for which no provision has been made.”

19. I therefore find that the court is not *functus officio* as no provision and reference was made to the reserved costs order of 28 February 2023 in the judgement and order of Crutchfield J as a result of an omission by the legal representatives to draw her attention to same.

GENERAL PRINCIPLES OF COSTS

20. In **Fripp v Gibbon & Co (1913 AD 354)**, Lord de Villiers, CJ said at **pages 357-356**:

“In appeals upon questions of costs two general principles should be observed. The first is that the Court of 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 judgments have contravened the general principle that to the successful party should be awarded his costs.”

21. It follows that in the event where the general rule, namely that a successful party must be awarded his costs, is departed from, there have to be grounds for departing from the general rule. This approach was adopted in *Merber v Merber* 1948 (1) SA 446 (A) at pages 452-453 where Greenberg JA remarked as follows:

“In Ritter v Godfrey (1920, 2.K.B. 47) the Master of the Rolls said: '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.'

I presume that 'any grounds' mean any grounds on which a reasonable person could come to the conclusion arrived at. This passage was cited with approval by the House of Lords in Donald Campbell and Company v

Pollak (1927, A.C. 732) by the LORD CHANCELLOR (at pp. 809 and 811) and by LORD ATKINSON (at p. 814). In Penny v Walker (supra) this Court, in laying down what was meant by a judicial discretion referred to p. 60 of the report of Ritter v Godfrey (supra). What ATKIN, L.J., there said was:

'In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.' “

22. Costs are generally reserved because there is no ready view about the liability for them and they will not necessarily follow result of the case. In the urgent court costs are often reserved to save time in order to enable the presiding judge to get through the urgent roll on the merits of the applications.

23. Reserved costs are separate from the costs of the action or application. If a judgment is given for a party with costs, an award to it of costs for an interlocutory proceeding which were reserved does not thereby become attached to or part of the judgment in favour of that party, even though in granting it the trial judge did have regard to some of the evidence adduced at the trial. It remains separate from and independent from that judgment and it does not necessarily follow the result of the action between the parties.¹

APPLICATION OF THE LEGAL PRINCIPLES

24. In the application before me the merits of the application in the urgent court and the subsequent hearing thereof before Crutchfield J were the same as both applications relied on the same set of papers and for the same relief. The only difference was that the hearing before Crutchfield J was not heard on an urgent basis and the respondent does not even endeavour to contend that the original application was urgent in this application.

¹ AA Mutual Mutal Insurance Association v Gcanga 1980 (1) SA 858 (A) at 869A; Martin N.O. v Road Accident Fund 2000 (2) SA 1023 (W) at 1026J-1027B.

25. I therefore approach the matter on the basis that the applicants, as the successful party, having succeeded to have the respondent's application for contempt of court against them dismissed with costs before Crutchfield J, should also be entitled to their costs in the urgent application, unless there are good reasons to exercise my discretion and refuse a costs order against the respondent. I am of the view that there are no good reasons to exercise my discretion to deprive the applicants of their costs as the successful party in the application.
26. In as far as the applicants are seeking the costs of this application, including the reserved costs of 18 September 2024, when this application was removed from the unopposed roll, the situation is different.
27. In this instance, I am of the view that there are grounds to depart from the general rule in respect of awarding costs for this application and the reserved costs of 18 September 2024 in that the omission of the legal representatives of both parties to have drawn the attention of Crutchfield J to the issue of the reserved costs for 28 February 2023 is the root cause for the origin of this application, which occasioned unnecessary litigation and expense and the use of judicial resources, which should

have been avoided by drawing the attention of Crutchfield J to the outstanding reserved costs issue.

28. I am therefore of the view that the parties should pay their own costs in respect of this application as well as the costs reserved on 18 September 2024 in respect of the unopposed motion court.

WHEREFORE I make the following order:

1. The respondent is ordered to pay the applicants' reserved costs of 28 February 2023 on the party and party scale;
2. The applicants and the respondent are responsible for payment of their own respective costs incurred in this application and the reserved costs for 18 September 2024.



I M LINDEQUE AJ

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

COUNSEL FOR THE APPLICANT: MR S TWALA

INSTRUCTED BY: S TWALA ATTORNEY INC

COUNSEL FOR THE RESPONDENT: MR I MURERIWA

INSTRUCTED BY: WARFFEMIUS VAN DER MERWE INC

DATE OF HEARING: 1 AUGUST 2025

DATE OF JUDGMENT: 31 OCTOBER 2025