CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 95/19

In the matter between:

A M Applicant

and

H M Respondent

Neutral citation: *A M v H M* [2020] ZACC 9

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Mhlantla J (unanimous)

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 May 2020.

Summary: Matrimonial Property Act 88 of 1984 — section 21 — postnuptial agreement — without sanction of a court — leave to appeal — interests of justice

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The application for leave to appeal is dismissed.
2. Each party must pay his or her own costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal.[1] The matter is about the contractual freedom of married persons. More particularly, the central question is whether a contract concluded between married persons, which departs from the terms of their antenuptial contract, should be considered valid and enforceable? The question raised concerns the validity and enforceability of a postnuptial agreement entered into by the parties during their marriage, without court supervision, which the applicant requested in order to "allay her fears of insecurity in the event of a divorce".[2] Another question is whether a proper interpretation of section 21(1) of the Matrimonial Property Act[3] (MPA),

[1] *HM v AM* [2019] ZASCA 12; 2019 JDR 0501 (SCA) (Supreme Court of Appeal judgment).

[2] Id at para 11.

[3] 88 of 1984. Section 21(1) provides:

> "A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—

which prohibits spouses from changing their matrimonial property regime without the sanction of the court, proscribes the enforceability of agreements entered into by spouses (who are married out of community of property) that were not entered into in contemplation of a divorce.

Background facts

[2] Mrs A M (the applicant) and Mr H M (the respondent), employed as an accountant and chartered accountant respectively, were married to each other out of community of property with the exclusion of accrual on 28 August 1993.[4] The antenuptial contract was duly registered in terms of the MPA.

[3] The applicant drafted a document that purported to be a postnuptial agreement (agreement). The terms thereof were that the respondent would set aside the antenuptial contract; the applicant would be entitled to half of his estate; and that the respondent would pay her maintenance.[5] On two different occasions, that is, in April and May 2014, the applicant presented the agreement to the respondent but he refused to sign it since he was of the view that the content thereof was ridiculous because she had her own separate estate.

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."

[4] The parties have two children, a son and daughter. The daughter was a minor at the start of the litigation.

[5] The original Afrikaans version of the relevant clauses of the agreement are:

"Hiermee bevestig ek, H M, ID nommer . . . Dat ek my huwelikskontrak tersyde stel en dat A M, ID nommer . . . geregtig is op die volle helfte van my boedel. Ek bevestig dat ek haar sal onderhou soos my finansies dit toelaat in dieselde hoedanigheid as wat sy tans gewoond is en elke maand 50% van my nette inkomste / dividend en pension aan haar sal oorbetaal."

The English translation reads:

"I, H M, ID number . . . herewith confirm that I set aside my antenuptial contract and that A M, ID number . . . is entitled to the full half of my estate. I confirm that I will maintain her as my finances allow in the same way as she is currently used to and will pay 50% of my net income / dividends and pension to her every month."

[4] There is a dispute between the parties about the circumstances that resulted in the signing of the agreement. According to the respondent, before the day of signature, he was met with alleged threats by the applicant. The respondent alleges that on the evening of 10 November 2014 the applicant approached him with the document and she allegedly escalated into aggression upon his refusal to sign it. Thereafter, the respondent signed it to maintain peace in the house for the sake of their minor daughter. The respondent further alleges that the signatures of the applicant and witnesses were appended in his absence.

[5] On the contrary, the applicant's version, which was corroborated by their minor daughter, was that the document was signed on the morning of 10 November 2014 without any hesitation or objection from the respondent. The applicant further states that she explained the reasonableness of the document to the respondent.

[6] Nevertheless, the parties thereafter continued to stay together as husband and wife.[6] On 29 November 2014, after gaining access to the respondent's mobile phone, the applicant discovered that the respondent had continued with an extra-marital affair.[7] She also uncovered an email from his attorney with a draft settlement agreement attached thereto, which indicated a potential divorce action. On 30 November 2014, the applicant confronted the respondent about the persistence of the extra-marital affair; it was then that the respondent indicated that he wanted a divorce. However, according to the applicant, this was the first time that either of them had mentioned a divorce.

[6] It was common cause at the trial that the parties resumed a normal marital relationship after 10 November 2014 until 30 November 2014. See Supreme Court of Appeal judgment above n 1 at 11.

[7] Supreme Court of Appeal judgment above n 1 at para 12. This affair is alleged to have commenced in October or November 2012.

Litigation history

Regional Court

[7] The respondent issued a summons for divorce, in which he also sought ancillary orders concerning the parental rights and responsibilities of the parties over their minor daughter in the Regional Court for the Regional Division of Mpumalanga, held at Mbombela (Regional Court).[8] The applicant filed a counter-claim seeking a decree of divorce; claims for certain orders in respect of parental rights and responsibilities regarding the minor daughter; and a declaratory order that the agreement was valid and binding on the parties, and that it was signed in settlement of all claims or disputes that might emanate from the divorce action.[9] Flowing from the divorce action, the applicant claimed that she was entitled to 50% of the net asset value of the respondent's estate.[10] In the alternative, she sought maintenance on behalf of their minor daughter as well as maintenance for herself.[11]

[8] At the commencement of the trial, the parties agreed to separate the issues relating to the grounds for the breakdown of the marriage from the disputes relating to the maintenance of their minor child and that of the applicant.[12] With regard to the contested agreement of 10 November 2014, the Regional Court had to determine whether the document was a binding agreement between the parties or alternatively whether it was a settlement of all the claims and disputes flowing from the divorce proceedings.[13] The respondent, on the one hand, contended that the document was signed under duress and / or undue influence, and was thus not binding.[14] On the other hand, the applicant argued that the document was signed in contemplation of a divorce.

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[8] *H M v A M*, unreported judgment of the Regional Court for the Regional Division of Mpumalanga, Case No MRCD33/15 (27 July 2016) (Regional Court judgment) at para 1.

[9] Id at para 2.

[10] Id at para 6.

[11] Id at para 2.

[12] Id at para 3.

[13] Id at para 5.

[14] Id at paras 6 and 11.

[9] The Regional Court noted that parts of the agreement could never be enforceable,[15] and that it would be an absurdity for the following reasons:

> "This could lead to situations where a person could easily write out an affidavit or a declaration that his or her marriage is of a particular regime the person feels is convenient at whatever given time. This is not only against the unambiguous position of the law, but is clearly against public policy. Section 21 of the [MPA] provides a mechanism for the change of the matrimonial property system to apply in their marriage. This could only be achieved through an application made jointly by the husband and the wife. The first paragraph is not only against the legal position but it is also repugnant to public policy".[16]

[10] The Regional Court further noted that not all agreements constitute contracts that are binding and enforceable, including those contrary to the law and public policy.[17] It held that to enforce the agreement in the manner requested by the applicant would be contrary to section 21(1) of the MPA.[18]

[11] The Regional Court granted a decree of divorce. Insofar as the agreement was concerned, the Regional Court held that at the stage when the document was signed, there was no divorce action pending.[19] No negotiations towards the conclusion of the agreement had been conducted by the parties.[20] The Regional Court held that the agreement was not binding and unenforceable as it was against public policy and dismissed the applicant's counter-claim.[21]

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[15] Id at para 8.

[16] Id.

[17] Id at para 9.

[18] Id at para 8.

[19] Id at para 13.

[20] Id.

[21] Id at para 15.

High Court

[12] Aggrieved by the decision of the Regional Court, the applicant applied to the High Court of South Africa, Gauteng Division, Pretoria (High Court) for leave to appeal.

[13] Upholding the appeal, the High Court held that the agreement was signed in contemplation of a divorce, with the object of reaching a binding settlement.[22] The High Court also held that it was immaterial and irrelevant when the agreement was signed, or whether the divorce was instituted or contemplated at the time of signing.[23] While the High Court held that the agreement was valid and enforceable, it found that the parties could not by "mutual consent" revoke or amend their antenuptial contract.[24] The High Court nonetheless noted that the applicant had abandoned this argument.[25] It overturned the Regional Court's finding and held that the agreement was enforceable as it was concluded in contemplation of a divorce with its purpose being to constitute a settlement agreement.[26]

Supreme Court of Appeal

[14] The respondent was granted special leave to appeal the decision of the High Court. The Supreme Court of Appeal[27] accepted that the parties had concluded an agreement. That Court noted that while the agreement appeared to be a waiver of matrimonial property rights by the respondent, it was not necessary to decide this point.[28] The Supreme Court of Appeal held that, since the parties had not approached a court in terms of section 21(1) of the MPA to sanction the change, the central issue

[22] *A M v H M*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No A773/2016 (29 August 2017) per Mudau J at para 17.

[23] Id at para 11.

[24] Id at para 15.

[25] Id.

[26] Id at para 17.

[27] Per Majiedt JA with Cachalia JA, Schippers JA, Mokgohloa AJA and Matojane AJA concurring.

[28] Supreme Court of Appeal judgment above n 1 at para 9.

that had to be determined was whether the agreement was made in contemplation of a divorce.[29]

[15] The Supreme Court of Appeal held that "it is settled law that a court may only make an agreement between parties an order of court if it is competent and proper to do so"; which means that "the agreement must, either directly or indirectly, relate to a legal issue or *lis* [lawsuit] between the parties" as well as "bear some relation to litigation".[30] It held that for the agreement to be valid, the parties must have contemplated a divorce at the time of entering into the agreement as required in terms of section 7(1) of the Divorce Act.[31]

[16] The Supreme Court of Appeal held that the applicant had failed to prove that the agreement was an agreement concluded by the parties in contemplation of the divorce proceedings.[32] That Court accepted the applicant's version that "it was only on 30 November 2014 that the divorce was contemplated for the very first time by the parties".[33] The Supreme Court of Appeal thus upheld the appeal and set aside the order of the High Court.[34]

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[29] Id at paras 4 and 9.

[30] Id at para 10. For this proposition, the Supreme Court of Appeal relied on this Court's judgment in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC), where Madlanga J states at para 25:

> "This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place 'relate directly or indirectly to an issue or *lis* between the parties'."

[31] 70 of 1979. Section 7(1) provides:

> "A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other."

[32] Supreme Court of Appeal judgment above n 1 at para 10.

[33] Id at para 14.

[34] Id at para 15.

In this Court

[17] The applicant thereafter approached this Court for leave to appeal the judgment and order of the Supreme Court of Appeal. On 2 August 2019, the Chief Justice issued directions calling on the parties to file written submissions on: the jurisdiction of this Court; the interests of justice; and whether a registered antenuptial agreement could be overridden by a subsequent unregistered agreement.[35]

[18] The parties filed written submissions and the matter is determined without oral argument.

Issues

[19] The following issues must be determined:

(a) Whether this matter engages this Court's jurisdiction?; and

(b) Whether it is it in the interests of justice to grant leave to appeal?

Jurisdiction

Applicant's submissions

[20] The applicant submits that the matter raises constitutional issues and an arguable point of law of general public importance that falls squarely within the ambit of section 167(3)(b)(i) and (ii) of the Constitution. The applicant further contends that the appeal is not against the factual findings of the Supreme Court of Appeal. However, she is adamant that the agreement did not amount to an amendment of the parties' matrimonial regime. She also does not challenge the constitutionality of

[35] The Chief Justice issued the following directions calling for written submissions on the following issues:

> "(a) Given the factual findings by the Supreme Court of Appeal that the agreement in question was not concluded in contemplation of divorce, does this Court have jurisdiction?
>
> (b) If it does, can a registered agreement regarding dispossession of marital property be overridden by a later unregistered agreement?
>
> (c) Given that the applicant's constitutional challenge is raised for the first time in this Court, is it in the interests of justice to entertain this point bearing in mind *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd*?"

section 21(1) of the MPA. Rather, she contends that the agreement was not prohibited by that section.

[21] The applicant submits that this matter pertains to the question of whether there is any legal rule or principle that prohibits spouses who elect to retain their independent estate after marriage from concluding agreements (other than those in contemplation of a divorce). She submits that if this is the case, then the issue is whether this position infringes one's dignity, in particular one's freedom to contract. The applicant further argues that if these infringements are established, it amounts to discrimination on the basis of the elected marital regime, and that these infringements are not reasonable and justifiable limitations in terms of section 36 of the Constitution.

Respondent's submissions

[22] The respondent submits that since the applicant accepts the finding of the Supreme Court of Appeal that the contested agreement is not an agreement in contemplation of a divorce, this, on its own, should be the end to the matter. In other words, the whole basis for the application falls away upon the applicant accepting the correctness of the factual finding by the Supreme Court of Appeal. The respondent submits further that the pleadings before the High Court and Supreme Court of Appeal are different to those in this Court. This is because the Supreme Court of Appeal essentially made a finding on a slightly different basis than that presented by the applicant and the applicant now wishes to challenge the unconstitutionality of that finding, which means that this Court lacks jurisdiction to entertain the matter.

Analysis on jurisdiction

[23] For leave to appeal to be granted, an applicant must show that the matter falls within the jurisdiction of this Court and that the interests of justice warrant the granting of leave to appeal.[36] For this Court's jurisdiction to be engaged, the matter

[36] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) (*Jiba*) at para 35.

must either raise a constitutional issue or an arguable point of law of general public importance that ought to be considered by this Court.[37]

[24] The applicant submits that her argument implicates the vindication of constitutional rights. The applicant frames the problem in terms of contractual freedom, dignity and unfair discrimination (on the basis of marital regime). Thus, according to the applicant, constitutional issues are triggered as the effect of the Supreme Court of Appeal judgment is that all contracts concluded between spouses who retain their independent estates after marriage are void unless that contract is concluded in contemplation of a divorce.

[25] Since the applicant is challenging the finding of the Supreme Court of Appeal, which revived the Regional Court's decision, the applicant is in essence challenging its effect – that all agreements concluded between spouses who are married out of community of property are against public policy, invalid and unenforceable unless they are concluded in contemplation of a divorce. A constitutional issue can also be ushered in through the avenue of whether the agreement is in line with public policy as infused with our constitutional values. In *Barkhuizen*,[38] this Court said:

> "[W]hether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."[39]

[26] The applicant also challenges the Supreme Court of Appeal's interpretation of section 21(1) of the MPA, which she contends was done in a manner that prohibits those agreements. She submits that the interpretation militates against married couples' contractual freedom and allegedly infringes upon their constitutional rights to

[37] Section 167(3)(b)(i) and (ii) of the Constitution.

[38] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[39] Id at para 29.

freedom, dignity and non-discrimination. As such, this Court's jurisdiction is also engaged by the applicant's request for an interpretation of section 21(1) of the MPA that is constitutionally compliant.

[27] For these reasons, constitutional issues are raised in this matter. Thus, jurisdiction is found on the basis of pleadings.[40]

Interests of justice

[28] For the interests of justice to warrant the granting of leave to appeal, this Court is required to weigh up a variety of factors.[41]

Applicant's submissions

[29] The applicant contends that it is in the interests of justice to grant leave to appeal and distinguishes this matter from this Court's decision in *Tiekiedraai*[42] in three respects: (a) this matter raises various constitutional issues; (b) this matter will affect every person in South Africa who is married out of community of property; and (c) the constitutional issues only arose after the Supreme Court of Appeal handed down its judgment in which it overturned the High Court order, consequently there was no other opportunity for the applicant to raise the constitutional challenges.

[30] The applicant explains that it is common for parties married out of community of property to conclude various agreements and that the judgment of the Supreme Court of Appeal will affect these agreements. She argues that it is probable that unscrupulous litigants will approach the courts in an attempt to escape their contractual obligations. Therefore, it is in the interests of justice for this Court to intervene and correct the judgment of the Supreme Court of Appeal.

[40] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75 and *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 169.

[41] *Jiba* above n 36 at para 36.

[42] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) (*Tiekiedraai*).

Respondent's submissions

[31] The respondent submits that the constitutional issues are raised for the first time before this Court. It is therefore not in the interests of justice to grant leave to appeal. The applicant's argument before this Court differs substantially from what was argued previously, and it raises points that the applicant did not consider before. This renders this Court as a court of first and last instance on these issues where no exceptional circumstances have been raised.[43] He contends that there is no merit in the argument that this matter will have far-reaching consequences; this matter is similar to *Tiekiedraai* in that "[i]t is a desperate attempt to get another bite at the cherry". The respondent claims that hearing issues raised for the first time in this Court will be prejudicial to him, since he did not have an opportunity to properly present his case, and that it may also prejudice third parties.

Analysis on interests of justice

[32] In my view, the applicant's attack on the judgment of the Supreme Court of Appeal is misplaced. A proper interpretation and analysis of the judgment reveals that the Supreme Court of Appeal did not prescribe a bar on all agreements between spouses married out of community of property.[44] The finding only relates to this agreement, whose terms appeared to have the effect of changing the parties' matrimonial regime without being sanctioned by a court order. It did not affect the parties' capacity to contract in respect of other agreements.

[33] The Supreme Court of Appeal accepted that the parties had concluded an agreement and that the only issue to be determined was whether the agreement was made in contemplation of a divorce. The Supreme Court of Appeal held that "[i]t is settled law that a court may only make an agreement between parties an order of court

[43] Id at paras 17-26 and 33-4; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 26; and *Lane and Fey N.N.O. v Dabelstein* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5.

[44] See [16].

if it is competent and proper to do so".[45] Relying on *Eke*, it held that the agreement must relate to a legal issue between the parties and must bear some relation to litigation.[46] On this basis, the Supreme Court of Appeal reasoned that, while it was not necessary for divorce proceedings to have been instituted at the time of signing the agreement, a divorce must have been contemplated by the parties at the time the agreement was signed. It was only on 30 November 2014 that the divorce was contemplated.

[34] In this regard, the Supreme Court of Appeal considered that the marital relationship between the applicant and respondent was normal after the agreement had been signed. The agreement was her "'insurance policy', to allay her fears of insecurity in the event of a divorce".[47] The applicant had done nothing with the agreement save to leave it for safekeeping with her friends. She had also only found out about the potential divorce action after the agreement had been signed. This led to her confronting her husband on 30 November 2014, at which point he stated that he wanted a divorce. In her evidence, the applicant admitted that this was the first time that either of them had mentioned a divorce. The Supreme Court of Appeal thus held that, as it was only on 30 November 2014 that the divorce was contemplated, no divorce was contemplated at the time when the agreement was signed.

[35] In addition, when applying to this Court, the applicant changed tack and introduced a new issue. She framed the constitutional issues in terms of contractual freedom, dignity and unfair discrimination and also sought a proper interpretation of section 21(1) of the MPA. These issues have not been ventilated in the High Court and Supreme Court of Appeal.

[36] In *Tiekiedraai*, it was held that "this Court's appellate powers exist not to determine novel issues raised for the first time before it, but to intervene in and correct

[45] Supreme Court of Appeal judgment above n 1 at para 10.

[46] Id which cites *Eke* above n 30.

[47] Id at para 11.

determinations by lower courts".[48] There are cogent reasons why this Court is often reluctant to be the Court of first and last instance.[49] There is no possibility of appealing against a given decision and—

> "[e]xperience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in light of such judgment".[50]

[37] It is accepted that this Court is better positioned when it is assisted by well-reasoned judgments from other courts on a particular issue.[51] It has been established that a court will not entertain a novel argument where it causes prejudice or unfairness to the other party.[52]

[38] It is clear that the applicant seeks to advance a new case on a totally different basis and on issues not advanced in the High Court and Supreme Court of Appeal. The respondent has not had an opportunity to present his case, in respect of these new issues, in the other courts and will be prejudiced by the applicant's stance. Furthermore, there are no exceptional circumstances to warrant this Court to hear these issues as a court of first and last instance.[53] As noted in *Mkontwana*,[54] "the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court

[48] *Tiekiedraai* above n 42 at para 24.

[49] *Holomisa v Holomisa* [2018] ZACC 40; [2018] JDR 1808; 2019 (2) BCLR 247 (CC) at para 25.

[50] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

[51] *Tiekiedraai* above n 42 at para 20.

[52] See further *Everfresh* above n 43 at para 50; *Barkhuizen* above n 38 at para 39; and *Naude v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558A-C.

[53] *Holomisa* above n 49.

[54] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

being a court of first and last instance".[55] Since the constitutional issues are raised for the first time in this Court, it is not in the interests of justice to grant leave to appeal. It follows that the application for leave to appeal must be dismissed.

Costs

[39] The last aspect is the question of costs. Ordinarily, costs follow the result. However, the context and circumstances of this case militate against the granting of costs against the applicant. It seems to me that a costs award that is just and equitable will be one where each party pays his or her own costs.

Order

[40] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. Each party must pay his or her own costs.

[55] Id at para 11.