

SOUTH AFRICA / JUDGMENT

Mdlangu and Others v Mayime Primary Agricultural Co-Operative (CA 48/2020) [2021] ZAECGHC 71 (3 August 2021)

[2021] ZAECGHC 71

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N Gqamana, S M Mbenenge

CASE / FILE NUMBER

CA 48/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. CA 48/2020

In

the matter between:

STEVEN

MDLANGU

1ST

Appellant

THEMBA

MNYAKA

2ND

Appellant

SAKHUMZI

BLEKIWE

3RD

Appellant

DUMISANI

KOFI

4TH

Appellant

MALIBONGWE

XHELISILO

5TH

Appellant

NZALISEKO

JACK
6TH
Appellant
and
MAYIME PRIMARY
AGRICUTURAL
CO-OPERATIVE
Respondent

JUDGMENT

GQAMANA J:

- [1] This is an appeal against a costs order issued by the District Magistrate, Whittlesea (“the court a quo”) in an application that involved the present parties as the respondents and applicant, respectively.
- [2] The application was prompted by an invasion and erection of structures on the respondent’s land commonly described as Grazing Camp 1(A), Corner Katberg and Fort Beaufort Road, Whittlesea, Eastern Cape Province (the property). The respondent is a non-profit and community-based organisation and derives income for its members from various projects such as, inter alia, a dairy scheme. As such, it had preserved the property for grazing of its dairy cows. The appellants are all community members from Whittlesea township and were allegedly amongst the people that invaded and erected structures on the property. The relief sought by the respondent as framed in the notice of motion was for the grant of an interdict.[1] The application was moved on an ex parte urgent basis. On 16 November 2018, an interim order was granted in favour of the respondent.[2]
- [3] Subsequent to service of the aforementioned order on the appellants, a notice to oppose was delivered on their behalf.[3] Thereafter, the appellants delivered their opposing and confirmatory affidavits, raising numerous points in limine namely, lack of power of attorney; [4] lack of resolution by the board; [5] that the founding affidavit was not properly attested; [6] lack of locus standi on the part of the applicant to bring the application; [7] lack of urgency; [8] and lack of territorial jurisdiction on the part of the court a quo to entertain the application.[9]
- [4] The application was opposed on the merits, as well. At the commencement of the hearing, the appellants’ counsel moved for an order in accordance with the provisions of rule 29 (4) of the Magistrates’ Court Rules of Court (the Rules).[10] Such order was granted and, accordingly, only the points in limine were argued.
- [5] Having heard the argument, the court a quo upheld the points in limine, and directed that each party pay its own costs. Disenchanted with the costs order, the appellants lodged this appeal. The respondent has not participated in the appeal.

[6] The grounds of appeal as framed in the notice of appeal[11] are that the magistrate -

6.1 erred in attaching no or inadequate weight to the submissions advanced by appellants' counsel on the complexity of the matter which justified the costs order in their favour at the scale as prayed for;

6.2 misdirected himself by affording little or no weight to the general principle that the costs follow the result;

6.3 erred in not finding that there were no special circumstances justifying a departure from the general rule on costs;

6.4 erred in finding that, because both parties are not the owners of the piece of land in issue, therefore each party must pay its own costs, although the appellants were successful; and

6.5 erred in not finding that the respondent handled the application in a 'slovenly and hastily' manner and accordingly ought to have been ordered to pay the costs.[12]

[7] In his heads of argument and at the hearing of this appeal, Mr Botha, counsel for the appellants, submitted that the court a quo it exercised its discretion arbitrarily on the costs issue in that no special circumstances justifying a departure from the general rule that costs follow the results existed, and the fact that neither of the parties was the owner of the land in question was not an acceptable ground for depriving the appellants as the successful party their costs. The notice of appeal does not refer to the fact that the court a quo exercised its discretion acted arbitrarily.

[8] The notice is bereft of what it should contain when the costs order is attacked on appeal. Mr Botha conceded this point, but sought to persuade this court that, although it was not expressly mentioned in the notice of appeal that the court a quo acted arbitrarily, the underlying gravamen and attack on the costs order can be gleaned from paragraph 4 of the notice of appeal. The relevant paragraph reads as follows:

"(4) The Honourable Magistrate erred by finding that because both parties are not owners of the piece of land in issue, therefore each party must pay its own costs, despite the fact that the Court ruled in favour of the appellants and dismissed the [the respondent's]

application".

[9] In terms of rule 51(7)(b) of the Rules, a notice of appeal must contain the grounds of appeal, specifying the findings of fact or rulings of law appealed against. The purpose of this sub-rule is to enable the magistrate to frame his reasons for judgment, to inform the respondent of the case it has to meet and to notify the appeal court of the points to be raised.[13] The requirements of this sub-rule are peremptory and non-compliance therewith renders the notice invalid.[14]

[10] In *Songono v Minister of Law and Order*,^[15] Leach J held that the notice of application for leave to appeal must clearly set out the grounds therefor, failing which the court may dismiss the application on that basis alone. Although these sentiments were expressed in the context of an application for leave to appeal, by parity of reasoning, they apply equally to a notice of appeal. Fortified by the above authorities, the court could have dismissed this appeal on the basis that the notice of appeal was bereft of what it should contain when the issue of costs is attacked. This procedural irregularity will, however, be overlooked and the appeal disposed of on the merits.

[11] As a point of departure, it is trite that the award of costs is a matter wholly within the discretion of the court of first instance. In *Beinash v Wixley*^[16] it was held:

“The issue of as to what order of costs would be appropriate in the circumstances of any particular case falls primarily within the

discretion of the Court of first instance. It is trite law that this Court on appeal will not interfere with a cost order made by such a Court, unless it had failed to exercise a proper and judicial discretion.”

[12] However, the discretion of the court of first instance is not an unfettered one. It has to be exercised judicially upon consideration of the facts of each case.^[17] Therefore, the court of appeal should not lightly and readily interfere with such discretion.^[18]

[13] The above principles have been applied and followed for over decades in a long line of decided cases. In *Attorney-General, Eastern Cape v Blom*,^[19] Corbett JA said:

*“In awarding costs the Court of first instance, exercises a discretion and a Court of appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order. (See *Protea Assurance Co. Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons & Another v Jongilanga* 1985 (3) A 117 (A) at 124B and the authorities cited in these two cases)”*.

[14] Mr Botha argued that the court a quo exercised its discretion arbitrarily because the costs should have been awarded in the appellants' favour as the successful party and there was no justification for departing from the general rule that the costs follow the result. In advancing this argument, it was submitted that the fact that neither of the parties is the owner of the piece of the property was not an acceptable ground to justify the deviation from the general rule in regards to costs. Counsel was, however, pointed to the judgment and the findings by the court a quo namely, that the property was allocated to the respondent for grazing purposes and as such the latter had control over same. The purpose for which the property was allocated was central to the application. It was the appellants' stance that the property was “not part of the farming land and thus not grazing land as stated by the deponent to the founding affidavit.” Evidently astounded by the above findings, and fully appreciating the

consequences flowing therefrom, Mr Botha sought to persuade the court that such findings were wrong. The difficulty one has with such submission is that the findings are not challenged in this appeal, with the result that the appellants are bound by them. In our view, the issue of ownership, control and purpose for which the property was allocated, was central to the application before the court a quo and as such, it was a relevant factor for the court to consider in exercising its discretion on costs.

- [15] The cause of action that prompted the application from the onset was the invasion of land allocated to the respondent for grazing purposes. Given all these facts, the court is not persuaded that the court a quo exercised its discretion arbitrarily. It was alive to the fact that neither of the parties was the owner of the property, but that the property was allocated to the respondent for grazing purposes. In the view of this court, there is nothing to suggest that the court a quo did not exercise its discretion properly and judicially.
- [16] Therefore, on the evidence and facts, which were at the disposal of the court a quo, the appellants' submission that the latter acted arbitrarily cannot be sustained. This court is accordingly unable to agree with the appellants that there was no justification for the departure from the general rule that costs follow the result. In the absence of misdirection or irregularity in the manner in which the court a quo exercised its discretion, interference with its decision is not justified. The appeal must accordingly fail.
- [17] In the result, I would dismiss the appeal with no order as to costs.

N GQAMANA

JUDGE OF THE HIGH COURT

MBENENGE JP:

I agree. It is so ordered.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES:

Counsel for the appellants : M F T Botha

Instructed by

: Mbambo Attorneys Inc

Queenstown

C/o Mili Attorneys

Grahamstown

Counsel for the respondent : No Appearance

Date heard

: 23 July 2021

Date judgment delivered : 03 August 2021

[1] Vol 1, pp 1 – 2 prayers 1 and 2 of the notice of motion.

[2] Vol 1, pp 17–18.

[3] Vol 1, pp 27/9.

[4] Vol 1 p 36, para B1.1.

[5] Vol 1 para B1.2.

[6] Vol 1, para B1.3.

[7] Vol 1, p 39, para B2.

[8] Vol 1, p 39, paras 25–27.

[9] Vol 1, p 40, para 28 and 29.

[10] Rule 29 (4) reads: “If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such a manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall at the request of any party make such order unless it appears that the question cannot conveniently be decided separately.”

[10] Rule 29 (4) reads:

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[11] Vol 1, pp 108–109.

[12] Vol 1, pp 107–109.

[13] *Leeuw v First National Bank Ltd* 2010

(3) SA 410 (SCA) at 413 D–E.

[14] *Tzouras v SA Wimpy (Pty) Ltd* 1978 (3) SA 204 (W) at 205 E–F and *Leeuw* (supra) para [2].

[15] 1996

(4) SA 384 (E) at 385 E–J.

[16]

[1997] ZASCA 32; 1997

(3) SA 721 (SCA) at 739 G–H.

[17] Norwich Union Fire Insurance Society Ltd v Tutt

[1960] 4 ALL SA 388 (A).

[18] Kilian v Geregsbode, Uitenhage 1980

(1) SA 808 (A) at 815H.

[19] 1988

(4) SA 645 (A) at 670 D–F.

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