

SOUTH AFRICA / JUDGMENT

Molefe v Eskom Pension and Provident Fund and Others (93895/2019) [2025] ZAGPPHC 721 (11 July 2025)

[2025] ZAGPPHC 721

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, M J Teffo, R Francis-Subbiah

CASE / FILE NUMBER

93895/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

APPEAL

CASE NO: A202/2023

CASE

NUMBER: 93895/2019

(1)

REPORTABLE: Yes

(2)

OF INTEREST TO OTHER JUDGES: Yes

(3)

REVISED: Yes

In

the matter between:

BRIAN
MOLEFE
Appellant
and
ESKOM
PENSION AND PROVIDENT FUND
First Respondent
ESKOM
HOLDINGS SOC LIMITED
Second Respondent
THE
COMMISSIONER
FOR
THE
SOUTH
AFRICAN
Third Respondent
REVENUE
SERVICES
In

re:

ESKOM
PENSION AND PROVIDENT FUND
Applicant
BRIAN
MOLEFE
First Respondent
ESKOM
HOLDINGS SOC LIMITED
Second Respondent
THE
COMMISSIONER FOR THE SOUTH AFRICAN
Third Respondent
This

judgment is handed down electronically by circulation to the parties/their legal representatives by email and through uploading same on the electronic file of this matter on Caselines. The date of delivery of this judgment is deemed to be the of July 2025.

ORDER:

1.
The appeal is upheld with costs to be paid by the First Respondent of both the Appellant and the Third Respondent, the costs will include the costs of two counsel where so employed on scale C.
2.
The order of the court a quo in relation to paragraphs 2,3,4,5

and 6 are set aside and substituted with the following order:

- a) The matter is referred to oral evidence to determine the amount payable by the Appellant to the First Respondent, before a different Judge.
- b) The First Respondent must discover all documents relating to the calculation and flow of money as well as all documents it intends to use during the leading of evidence within 15 days of this order.
- c) The Appellant must discover all documents relating to the calculation and flow of money and all documents he intends using during the leading of evidence within 15 days of the filing of the documents referred to in the previous paragraph.
- d) The actuaries may file supplementary reports after receiving the documents referred to above and must do so at least 45 days prior to the matter being heard.
- e) The costs of the application will be costs in the referral to evidence.

JUDGEMENT

TOLMAY, J (TEFFO, J and FRANCIS-SUBBIAH, J CONCURRING)

Introduction

1. This matter deals with a further chapter in a long-standing dispute between the appellant (“Mr Molefe”) and the respondents. This time the dispute between Mr Molefe and the first respondent (the Fund) is about the amount that he must repay the Fund. The court a quo ordered the Fund to repay certain amounts to the second respondent (Eskom). Eskom in turn was directed to pay the post-tax value of certain amounts to Mr Molefe and Mr Molefe was ordered to repay certain amounts to the Fund.
2. The Supreme Court of Appeal (“SCA”) granted leave to appeal to the Full Court against the entire judgment and order(s) (including the order as to costs) of the court a quo[1]. Eskom filed a notice to abide. The cross-appeal, by the Fund was not proceeded with, and correctly so, as leave to appeal was not granted by the court a quo, nor sought before the SCA.

3. The litigation to recover the amounts paid in relation to Mr Molefe's employment at Eskom has a long history. During the first round of litigation the Full Court of the Gauteng Division, Pretoria, dealt with three separate but consolidated applications in which Mr Molefe was involved, namely the Democratic Alliance v Minister of Public Enterprises and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others.

[2] The questions before that Full Court were:

- a) Whether Mr Molefe's admission as a member of the Eskom Fund was lawful.
- b) Whether the lump-sum transfer from the Transnet Retirement Fund to the Eskom Fund was lawful.
- c) Whether the monthly contributions (including performance bonus contributions) made by Eskom to the Fund on behalf of Mr Molefe were lawful.
- d) Whether payment by the Fund of a statutory lump sum pension to Mr Molefe was lawful.
- e) Whether payment of a monthly pension by the Fund to Mr. Molefe was lawful.

4. The court held in Solidarity as far as repayment by Mr Molefe is concerned, as follows:

"It is declared that any payment or sum of money received by Mr Molefe under any purported pension agreement between him and Eskom is invalid and Mr. Molefe is ordered to repay such amounts within ten days of this order."[3]

5. The court in Solidarity mentioned the amount of R10 327 074.53 as being the amount that Mr Molefe had received from the Fund but did not, as the order reflects, order repayment of that amount.[4] The Fund was a party to that application and in a counterapplication sought repayment of the amounts paid to Mr Molefe. Despite the counterapplication not being granted, the Fund did not appeal that judgment. The SCA and the Constitutional Court refused Mr Molefe's application for leave to appeal and the Fund abided by the decision.
6. In the application that preceded the appeal before us, the Fund said it was seeking the implementation of the order granted in the Solidarity judgment. The Fund however claimed, in the amended notice of motion, R7 981 727.94 and R2 003 812.90 respectively from Mr Molefe. This amount does not resemble the amount stated in Solidarity as having been paid to Mr Molefe.
7. At the heart of the dispute between Mr Molefe and the Fund in this matter is the amount that he must repay. The Fund and Mr Molefe

both appointed actuaries to resolve this dispute. After a meeting between them, supplementary affidavits were filed. The transcript of the meeting between the actuaries, their reports and the supplementary affidavits filed reflect that the actuaries and the parties could not reach an agreement about the flow of money, or the method that should be followed to calculate the amounts that must be repaid by Mr Molefe. According to Mr Molefe's appointed actuary he must repay an amount of R 1 490 920,88. This is in stark contrast to the amount claimed by the Fund.

8. Despite the disputes between the actuaries, the court a quo was satisfied that the joint minutes by the actuaries disposed of any factual dispute and concluded that a mere mathematical calculation

was required to determine the amount that was payable. The court a quo, concluded that an amount of R 7 981 727.94 was paid to Mr Molefe.[5] The court a quo applied a table to determine the amount of tax plus interest up to 31 October 2019 and concluded that the total amount of tax plus interest due is an amount of R2 417 144.39.[6] The Fund argued that an amount of R2 003 812,70 was repayable by SARS to it.[7] The court a quo however found that Mr Molefe should repay the amount to the Fund and not SARS.[8]

Grounds of appeal

9. Despite raising other defences in the papers, only four grounds of appeal were raised on behalf of Mr Molefe before us. I therefore limit the discussion to these points:
 - a) The matter was capable of resolution through mediation and the court was implored to direct the parties in terms of Rule 41A(3)(b) of the Uniform Rules of Court to mediation.
 - b) The application that was before the Court raised material disputes of fact known to the first respondent at the time of launching it. For that reason, the application ought to have been dismissed with costs as the dispute should have been dealt with by way of action proceedings.
 - c) The issues before the Court were determined by the Full Court and confirmed by the SCA and Constitutional Court and could not be revisited by the court.
 - d) Judicial deference requires the Court not to resolve the actuarial disputes.

Mediation

10. As far as mediation is concerned it was argued on behalf of Mr Molefe that the Court should have exercised its discretion and referred the dispute to mediation in terms of Rule 41A(3)(b) which reads as follows:

"A Judge, or a Case Management Judge referred to in rule 37A or a court may at any stage before judgment direct the parties to consider

referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation"

11. It was correctly conceded during argument, that a court sitting on appeal could not refer a matter to mediation as the language of Rule 41A(3)(b) states that a direction to mediation should occur before judgment. We were, however, implored to still consider the appropriateness of mediation in order to provide the courts with guidance in this regard. I do not deem it appropriate to, within the context of this case, come to any general conclusions regarding mediation.
12. Suffice it to say that the court a quo correctly recognised that the dispute between Mr Molefe and the Fund simply contemplates a determination of the “correct calculation” of the amount to be paid by Mr Molefe.[9] The court a quo concluded correctly that aspects that could have been mediated were already addressed through the appointment and interactions of the actuaries and the filing of the joint minute.[10]
13. The only people that could have assisted in the determination of the disputed amount were the two actuaries and a perusal of the

transcript of their meeting, their reports and the joint minutes filed by them make it clear that they were not able to come to a mutually acceptable solution. To have referred the matter to mediation would have been an exercise in futility.

Referral to evidence and deference to experts

14. The second ground of appeal relates to the alleged misdirection by the court a quo in concluding that the factual disputes raised by Mr Molefe could be resolved on the papers. [11] This ground is closely connected to the ground of appeal that the court a quo should have deferred to the actuaries and should not have calculated the amount itself. I therefore deal with these two grounds simultaneously.
15. The court a quo held that there were no factual disputes that could not be determined on the papers. The issues involved a mere mathematical calculation and the actuaries confirmed in their joint minutes that apart from the differences mentioned there, they were in agreement. [12]
16. In the judgment in the application for leave to appeal the court a quo went further and explained that the dispute between the actuaries was purely based on legal arguments and not on actuarial principles. The court a quo held that the facts were simply those already established by the Full Court in Solidarity. The court a quo held that there was no dispute regarding the payment received, or what has been paid to SARS. And that the remainder of the disputes

were legal arguments that did not fall within the purview of the experts.[13] It was merely a determination as to who should make the repayments and to whom.[14]The actuaries brought out a joint minute and as a matter of principle the parties are bound by the agreement and may not deviate from the agreement without proper explanation and the consideration of prejudice. [15]

17. In my view the court a quo over-simplified the dispute. The respective reports, of the actuaries, the supplementary affidavits and the transcript of the meeting between them reveal that there were substantial disputes between the parties, not only factual, but also inter alia about the method to be applied to calculate the amount as well as the flow of money.
18. The Fund's actuary, Ms Ryan, applied the amounts provided to her by the Fund's attorneys and did not independently establish the correctness of the amounts from source documents. Mr Mathopa, the actuary employed by Mr Molefe, raised this as an issue. The Fund is of the view that nothing turns on this and explained that the amounts were provided by it, and the attorneys in turn provided the actuary with them.
19. However, the amount claimed by the Fund did not remain constant and kept on changing throughout. In the counter application that led to the Solidarity[16] judgment, the Fund indicated that Mr Molefe was paid an amount of R10 327 074.53. Initially, in this application, the Fund claimed an amount of R4 315 874. This amount escalated to R7 796 566 in the amended notice of motion filed during August 2021. In a letter to its members, the Fund indicated that an amount of R7.9 000 000.00 was paid to Mr Molefe after tax. In a letter dated 19 May 2017, the Fund's attorneys were instructed that R9 767 743.68 was the gross amount paid to Mr Molefe.
20. The Fund explained in its replying affidavit that the amounts previously claimed were rectified by the actuarial calculation attached to that affidavit. Significantly, however, it persisted in this affidavit with the view that the issue regarding the calculation

of the amount should be referred to oral evidence. The Fund explained that it would not be in the interest of justice to dismiss the application. It is undisputed that Mr Molefe is indebted to the Fund even on his own version and this narrow point could be determined by referring it to oral evidence.

21. The Fund, in the papers, indicated that the actuaries should be subjected to cross-examination due to their divergent views and conclusions. The Fund requested the court a quo to refer the matter to evidence. In its argument before us the Fund disavowed this stance and insisted that there was no dispute of fact that could not be determined on the papers and that the court a quo was correct in resorting to a mathematical calculation of the amount based on the information before it. The view of counsel on behalf of the Fund, during argument before us, cannot be understood to be a concession that the Fund has abandoned the case made out in the papers.

22. It was argued on behalf of Mr Molefe that the matter should not be referred to evidence, but that the application should be dismissed.

The argument was that the factual dispute was foreseeable, and therefore the Fund should have instituted action proceedings relying

on Carrara and Lecuona (Pty) Ltd v Van Den Heever Investments Ltd and Others.[17]

23. When considering whether a referral to evidence is appropriate, the starting point is Rule 6(5)(g) which provides:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

24. In Mamadi and Another v Premier of Limpopo Province and Another,[18] the Constitutional Court explained:

“The purpose of the court's discretion under this rule to dismiss an application is to discourage a litigant from using motion proceedings when the court will not be able to decide the dispute on the papers. This is a waste of scarce judicial resources and prejudicial to the respondent. An applicant should not be able to use motion proceedings when the worst outcome is confined to a referral to oral evidence or

trial. Rule 6(5)(g) thus vests a power in courts, where motion proceedings have been inappropriately used in this way, to penalise a litigant through dismissal without rendering a final decision. In short, therefore, a dismissal in terms of rule 6(5)(g) serves to punish litigants for the improper use of motion proceedings.”

...

This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of Plascon-Evans. Likewise, where an applicant relies on Plascon-Evans, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53 application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of Plascon-Evans, only for the respondent to later show that this is not so. In these

circumstances, provided the dispute of fact which emerges is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or

trial, as the case may be, will generally be appropriate.”[19]

25. The question to ask when considering whether to refer an application to oral evidence is:

“On the basis of the Wallach test, it would appear that the critical question in this regard is: Is there material which could be placed before the Court which could inform an evaluation of these contentions, the resolution of which is critical to the determination of the main application?”[20]

26. The Court has a discretion to refer a matter to oral evidence. This is a discretion in the true sense, and should not be easily interfered with[21], but if the discretion was not properly exercised, a court on appeal may interfere. In this instance, the court a quo resorted to its own calculation and ignored the different experts’ views, the disputes reflected in their reports and the fact that the amount claimed did not remain consistent. All these factors point to the fact that oral evidence and cross-examination are required to properly determine the dispute.

27. It is trite that experts may not usurp the adjudicative functions of the courts, but it is also acknowledged that courts routinely rely on expert evidence in a variety of fields.[22] We were referred to Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another,[23] where the importance of judicial deference was stressed. This was confirmed by the Constitutional Court in Bato Star Fishing v Minister of Environmental Affairs and Tourism.[24] Although these matters dealt with review applications and the deference to the decision-maker’s decision was made in another

context, we were implored to apply the same principle here. In this matter, a referral to evidence will in any event not lead to the usurpation of the powers of the court. Evidence will assist the court in establishing the disputed amount.

28. The amount determined by the court a quo did not reflect the calculations of the actuaries. The amount ultimately awarded by the court a quo is at odds with the calculations of the actuaries and the amount claimed by the Fund.

29. To determine whether the court a quo should have resorted to its own calculation, a closer look is required at the views of the actuaries. The joint minutes set out the aspects that they disagree on. To interpret the disagreements, one must refer to their respective reports. In the report dated 19 November 2019 compiled by Ms Ryan, it is recorded that she was requested to comment on the correctness of the calculations made by the Fund. It would seem then that she did not independently determine the actual payments made to Mr Molefe from the source documents. This issue was raised by Mr Mothapo, during the meeting of the actuaries as confirmed by the transcript of the meeting.

30. Ms Ryan continues to identify three issues that her opinion deals with. They are the following:

- a) The calculation of the special contribution required to fund the additional retirement benefit.
 - b) The calculation of the Fund benefits; and
 - c) The calculations of the accrual of interest.
31. She then proceeds to clarify that her opinion is confined to the specific issues mentioned and is not a comprehensive analysis nor should it be construed as confirmation of any matter not specifically confirmed. She confirmed the correctness of the calculation and the correct application of actuarial factors. What is significant is the exclusion from her opinion of, inter alia, the correctness of the data and personal information applicable to Mr Molefe and used in the calculations. The inference that can be drawn from this is that she did not independently form an opinion from the data provided to her. This concern was raised by Mr Mothapo during their meeting.
32. Mr Mothapo concluded in his report that Mr Molefe owes the Fund R1 490 920.88. The actuaries came to vastly different conclusions. The amount ultimately awarded by the court a quo is at odds with the calculations of the actuaries and the amount claimed by the Fund.
33. For all the above reasons I conclude that the court a quo erred when it proceeded to do the calculation, able as a judge may be, judges should proceed with caution when experts disagree

especially when the supporting evidence indicates that there are facts that need clarification. In such instances evidence is required

to determine the issue. Only if this is done will the court be able to execute its function as arbiter of the dispute properly.

34. It was argued on behalf of Mr Molefe that the application should be dismissed as the dispute was foreseeable. I do not agree, it was only when the experts failed to agree, and the supplementary affidavits were filed that it became clear that this limited dispute could not be resolved on paper. Because the court a quo already expressed a view on the amount payable, it will be in the interest of justice that the evidence be heard by another judge.

The court could not revisit the dispute between the parties

35. The argument that the dispute has already been determined and could not be revisited by this Court has no merit. The liability was

determined, but the amount payable remained in dispute as is abundantly clear from the papers. It is this amount that needs to be established. Solidarity[25] did not establish the amount payable, and it is this amount that the Fund requires of this Court to determine.

SARS's continued involvement in the matter

36. It was argued that South African Revenue Service's ("SARS") attendance at the hearing was not required and that it should not be awarded costs. The appeal was, however, against the whole of the judgment and orders granted. The heads of argument filed on behalf of Mr Molefe also took issue with whether the portion of tax that was withheld and paid over to SARS is refundable.
37. Only belatedly in the submissions filed for purposes of the hearing, it became clear that this issue was laid to rest. SARS is concerned with the interpretation of the Income Tax Act and in so far as the computation by Mr Molefe and the Fund seek to circumvent the provisions of inter alia, section 190 of the Tax Administration Act, which deals with refunding taxes. SARS has an interest in the litigation. It was correctly argued that SARS cannot sit idly by when it has obtained a judgment that clarifies the pertinent legal position on fundamental legal principles pertaining to refunds and implementation of tax legislation. SARS is therefore entitled to its costs and the costs should follow the result of the appeal.

The failure to provide security

38. There is one remaining aspect and that is even though the Fund and SARS requested security for costs in terms of Rule 49(13) of the Uniform Rules of Court, no security was provided for by Mr Molefe. The Court requested the parties to file submissions in this regard. Only counsel on behalf of Mr Molefe complied even as he did so rather belatedly. The proverbial horse has bolted. None of the respondents brought an application to compel security, neither did they file any submissions despite the invitation to do so. The respondents did not apply to the SCA in terms of section 17(5) of the Superior Courts Act that security for costs be provided, they did not object to lodgement of the record of appeal and the Fund set the matter down for hearing. These facts justify the conclusion that respondent's acquiescence to the prosecution of the appeal and nothing further needs to be said in this regard.

Costs

39. The costs should follow the result and the Fund should pay the costs of the appeal.

The following order is made:

1. The appeal is upheld with costs to be paid by the First Respondent of both the Appellant and the Third Respondent, the costs will include the costs of two counsel where so employed on scale C.
2. The order of the court a quo in relation to paragraphs 2,3,4,5 and 6 are set aside and substituted with the following order:
 - c) The Appellant must discover all documents relating to the calculation and flow of money and all documents he intends to use during the leading of evidence within 15 days of the filing of the documents referred to in the previous paragraph.

R G TOLMAY

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M J TEFFO

R FRANCIS-SUBBIAH

Appearances:

For Appellant: Adv Ngalwana SC with Adv S Nelani

Instructed by: Molaba Attorneys

For 1st Respondent: Adv T Motau SC with Adv R Tshetlo

Instructed by: Norton Rose Fullbright.

For 3rd Respondent: Adv L Sigogo SC with Adv L Kalipa

Instructed by: Ledwaba Mazwai Attorneys.

Date of hearing: 12 February 2025.

Date of judgment: 11 July 2025.

[1] The order of the court a quo, per Davis J, that is sought to be impugned reads as follows: “1. The Eskom Pension and Provident Fund (the Fund) is directed to repay to Eskom Holdings Soc Ltd (Eskom) the following amounts: 1.1. The amount of R 30 103 915,62 being the amount found by the full court on 25 January 2018 to have been unlawfully paid to the

Fund, together with interest at the prescribed mora rate from date of the unlawful payment to date of repayment thereof. 1.2. The amount of R 1 345 461,79, constituting Eskom’s employer contributions on behalf of Mr Molefe (inclusive of Fund interest less applicable administration fees) together with further mora interest from 31 October 2019 to date of repayment thereof. 1.3. The amount of R 727 547,64, constituting the total of Mr Molefe’s own monthly pension contributions (inclusive of Fund interest less administration fees) together with further mora interest from 31 October 2019 to date of payment thereof. 1.4. The amount of R 123 332,98, constituting Mr Molefe’s performance bonus pension contributions (inclusive of Fund interest less administration costs) together with further mora interest from 31 October 2019 to date of payment thereof. 2. Eskom is directed to pay Mr Molefe the post-tax value of the amounts referred to in paragraphs 1.3 and 1.4 above. 3. Mr Molefe is ordered to repay the Fund the amounts of R 7 981 727,94 and R 2 003 812,70 together with mora interest thereon from

31 October 2019 to date of repayment The Fund is entitled to set-off against the above amount due by Mr Molefe, the net balance of the Transnet Retirement Fund lumpsum received from or on behalf of Mr Molefe, upon receipt of a tax directive from the South African Revenue Service in respect of the Tax payable on such amount, inclusive of accruals thereto subsequent to 31 October 2019. 4. The payment referred to in paragraph 3 above shall be made within 10 days after

the set-off contemplated in paragraph 4 has occurred. 5. Mr Molefe is ordered to pay the costs of the Fund and of SARS, such costs to include the costs of two counsel where employed.”

[1] The order of the court a quo, per Davis J, that is sought to be impugned reads as follows:

“1. The Eskom Pension and Provident Fund (the Fund) is directed to repay to Eskom Holdings Soc Ltd (Eskom) the following amounts:

1.1. The amount of R 30 103 915,62 being the amount found by the full court on 25 January 2018 to have been unlawfully paid to the

Fund, together with interest at the prescribed mora rate from date of the unlawful payment to date of repayment thereof.

1.2. The amount of R 1 345 461,79, constituting Eskom’s employer contributions on behalf of Mr Molefe (inclusive of Fund interest less applicable administration fees) together with further mora interest from 31 October 2019 to date of repayment thereof.

1.3. The amount of R 727 547,64, constituting the total of Mr Molefe’s own monthly pension contributions (inclusive of Fund interest less administration fees) together with further mora interest from 31 October 2019 to date of payment thereof.

1.4. The amount of R 123 332,98, constituting Mr Molefe’s performance bonus pension contributions (inclusive of Fund interest less administration costs) together with further mora interest from 31 October 2019 to date of payment thereof.

2. Eskom is directed to pay Mr Molefe the post-tax value of the amounts referred to in paragraphs 1.3 and 1.4 above.

3. Mr Molefe is ordered to repay the Fund the amounts of R 7 981 727,94 and R 2 003 812,70 together with mora interest thereon from

31 October 2019 to date of repayment The Fund is entitled to set-off against the above amount due by Mr Molefe, the net balance of the Transnet Retirement Fund lumpsum received from or on behalf of Mr Molefe, upon receipt of a tax directive from the South African Revenue Service in respect of the Tax payable on such amount, inclusive of accruals thereto subsequent to 31 October 2019.

4. The payment referred to in paragraph 3 above shall be made within 10 days after the set-off contemplated in paragraph 4 has occurred.

5. Mr Molefe is ordered to pay the costs of the Fund and of SARS, such costs to include the costs of two counsel where employed.”

[2]

[2018] ZAGPPHC1. (Solidarity)

[3] Id at para 82(c).

- [4] Id at para 6.
- [5] Id. Paras.3.1-3.13.
- [6] Id. Par.3.14.
- [7] Id. Par.3.16.
- [8] Id. Par.4.7.
- [9] Judgment, court a quo par.5.1.3.
- [10] Id. Par.5.1.8.
- [11] Id. Par.13.
- [12] Id. Par.5.2.1.
- [13] Judgment, application for leave to appeal para 17.
- [14] Id. Par.18.
- [15] HAL obo MML v MEC for Health, Free State [2022]1 ALL SA 28(SCA).
- [16] Supra, fn 2.
- [17] 1973(3) SA 716 (T) p.720.
- [18]
- [2022] JOL 54408(CC) at para 42 and 44.
- [19] Id. Par.44.
- [20] Shoprite Holdings Ltd v Oblowitz and others [2006] 3 All SA 491 (C).

[21]Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another [2016] JOL 33413 (CC) para 88 ‘When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised: ". . . judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles"(footnote omitted). An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.’

[21]Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another [2016] JOL 33413 (CC) para 88 ‘When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:

". . . judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles"(footnote omitted).

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.'

[22] South African Human Rights Commission Obo Jewish Board of Deputies v Masuku and Another (South African Holocaust and Genocide Foundation and others as amici curiae) [2021] JOL 52146 (CC) para.145. Gentiruco Ag v Firestone Sa (Pty) Ltd 1972 (1) Sa 589 (A) At 616. Salem Party Club and Others v Salem Community and Others 2018 (3) SA 1 (CC) par.63.

[23] Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another (32/2003, 40/2003) [2003] ZASCA 46

[24] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 290 (CC) par.48.

[25] Supra, at fn 2.

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