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**

Appealno: A92/2019

In the matter between

CENTRAL UNIVERSITY OF TECHNOLOGY **1st Appellant**
UNIVERSITY OF THE FREE STATE **2nd Appellant**

and

REALTY 1 CC BLOEMFONTEIN **1st Respondent**
CHRISTO DIPPENAAR INC. **2nd Respondent**
JOHANNA WILHELMINA DIPPENAAR **3rd Respondent**

HEARD ON: **4 NOVEMBER 2019**

CORAM: **NAIDOO J *et* MURRAY AJ**

JUDGMENT BY: **MURRAY AJ**

DELIVERED ON: **5 DECEMBER 2019**

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[1] This is an appeal against the decision of a Magistrate in the Bloemfontein District Court to dismiss the Appellants' application in terms of Rule 27[1] for costs on an Attorney and Client scale, which costs were to include increased Advocates' costs.

[2] The Respondents herein were the First, Second and Third Applicants in an urgent application ("the Main Application") in which they obtained a *rule nisi* on an *ex parte* basis against one Mr Pillay ("Pillay") and the Appellants. The Appellants were the Second and Third Respondents and Pillay the First Respondent in that application. The cause of action was the alleged breach of a rental agreement between the Respondents and Pillay to which the Appellants were not a party.

[3] The Appellants filed the Rule 27 application after the Respondents notified them, when they filed their opposing papers on the day before the return date of the *rule nisi,* that they intended to withdraw the main application without tendering costs, and only two-and-a-half months later, after the Respondents had already instructed Counsel to prepare and appear to argue the postponed costs application, filed a notice to withdraw the opposed costs application.

[4] The Respondents' Notice of Withdrawal incorporated a tender for party and party costs which the Appellants regarded as inadequate in view of the history of the matter. When the Respondents refused to accede to their written demand to tender costs on an Attorney and Client scale with higher Advocates' costs, the Appellants proceeded with the Rule 27 application.

[1] Jones & Buckle, RS 12, 2016 Rule-p27-4:

[5] The Rule 27 application was dismissed on 10 April 2019 as follows:

> "Application for costs on attorney and Client scale, which costs are to include higher Advocates costs, is dismissed with costs."

[6] The sole reason advanced for this order was that:

> "No case had been made out to justify increased fees as prayed."

[7] The Appellants aver that the order was made without the Court *a quo* having exercised her discretion judicially, *inter alia* by failing: to consider the circumstances of the case; to carefully weigh the various issues; to consider the conduct of the parties; to take into account that the Respondents' urgent *ex parte* application had been fatally defective; to consider all other circumstances which may have had a bearing upon the question of costs; and, as a consequence, failing to make a costs order that would have been fair and just between the parties.

[8] The Respondents, on the other hand, maintain that the Magistrate did consider all the circumstances since she had been in possession of the parties' heads of argument and had listened to their legal representatives' arguments. In their view the 'reasons' for the Magistrate's judgment confirm such judicial exercise of her discretion.

[9] To decide whether these allegations have any substance, one needs to consider the facts leading up to the Applicants' insistence on costs to be awarded on an Attorney and Client scale.

[10] The Respondents on 12 April 2018 instituted a patently defective urgent application on an *ex parte* basis. The court granted them an interim

interdict, operative with immediate effect, in the form of a *rule nisi* returnable on 17 May 2018, which:

10.1 Interdicted the Appellants from making any payments to Pillay, "and/or to Fountain View (Pty) Ltd or to any other third party or juristic entity"*;* and

10.2 Ordered the Appellants "to forthwith transfer the funds to Realty 1 CC Bloemfontein".

[11] In the Appellants' Opposing Affidavit, filed on 16 May 2018, they asked for a costs order on an Attorney and Client scale, based on the numerous grounds upon which the defective Main Application was opposed, namely:

11.1 The material non-joinder of Fountain View (Pty) Ltd against whom the order was made but which was not even cited as a party to the proceedings;

11.2 The order against the Appellants while the application was based on breach of a rental agreement between Pillay and the Respondents to which the Appellants were not a party.

11.3 The unenforceable orders in that the first was widely framed as to effectively prohibit the Appellants from paying their own employees' salaries or their creditors, and the second so vague as to refer to unspecified funds.

11.4 The Respondents' failure to establish a *prima facie* or clear right as against the Appellants in the absence of a legal nexus between them, dragging the Appellants into a dispute in which they had not been involved.

11.5 The Respondents' seeking payment of amounts that exceeded the monetary jurisdiction of the Magistrates' Court.

11.6 The Respondents' claiming that the Appellants had consented to the jurisdiction of the Magistrates' Court while the Appellants had not been a party to either the rental agreement on which the Respondents relied or any subsequent undertakings made by Pillay.

11.7 The Respondents' obtaining *ex parte* relief while providing no grounds or justification for an *ex parte* order against the Appellants.

[12] On 17 May 2018 the *rule nisi* was then discharged and the application was postponed to 24 August 2018 for the costs to be argued.

[13] Only two-and-a-half months later, on 3 August 2018, did the Respondents file a Notice of Withdrawal with a tender for party and party costs. That was after the Appellants had already instructed Counsel on 19 July 2018 to prepare and attend to the postponed proceedings on 24 August 2018.

[14] The Appellants felt aggrieved since their legal costs were unnecessarily incurred as a result of the Respondents' failure to take proper steps, which conduct they regarded as an abuse of the court process. They averred that, had the Respondents served the Main Application on them instead of obtaining the *rule nisi* on an *ex parte* basis, they would have been able to oppose the urgent application right away, which would have limited the amount of subsequent legal costs.

[15] They accordingly informed the Respondents that party and party costs would leave them out of pocket, and demanded costs on an Attorney and Client scale, failing which they would approach the Magistrates' court for such a costs order in terms of Rule 27. The Respondents withdrew the application on 20 August 2018, but refused to adjust the costs tender. The Appellants then instituted the Rule 27 Application which led to the order against which they now appeal.

[16] The basic rule regarding costs in litigation is that costs are in the discretion of the court.[2] The Appellate Division has laid down the principle that the court's decision must be exercised judicially, i.e. not arbitrarily, upon a consideration of all the facts of each case.[3] In **Muller v Erasmus**[4] the court determined, furthermore, that such discretion, although wide, is not unfettered.

[17] In **Fripp v Gibbon**[5], though, the Appellate Division warned that where the court *a quo* "brings his unbiased judgment to bear on the matter and does not

[2] Kruger Bros and Wasserman v Ruskin, 1915 AD 63 69
[3] A C Cilliers: The Law of Costs, 2nd Ed, at p.9
[4] 1959 (2) SA 465 (T) at 465
[5] 1913 AD 353 363

act capriciously or upon any wrong principle" a court of appeal may not interfere with the honest exercise of that discretion.

[18] The court's discretionary decision has to be a matter of fairness to both sides.[6] In coming to its decision the court needs to carefully weigh the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs, to enable it to make a costs order that would be fair and just between the parties.[7]

[19] A court of appeal may only interfere in a costs order, even if it would itself have exercised that discretion differently, if the court *a quo* failed to exercise its discretion judicially,[8] (a) in that it violated settled practice and principles upon which costs are awarded;[9] (b) in that the decision was made without any grounds upon which a reasonable person may have reached a similar decision;[10] (c) in that the decision is one to which no court could reasonably have come;[11] (d) in that the court *a quo* exercised its discretion capriciously or upon a wrong reason, or upon a wrong principle, or has not acted for substantial reasons;[12] or where the court *a quo* failed to consider the circumstances of the case and to carefully weigh the issues, the conduct of the parties and any other circumstances which may have a bearing upon the question of

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[6] McDonald t/a Sport Helicopter v Huey Extreme Club 2008 (4) SA 20 (C) at 22A – B. See also LP v PR 2018 (3) SA 507 (WCC) at 513D – 514C.

[7] Fripp v Gibbon & Co 1913 AD 354 at 363.

[8] SA Scottish Finance Corporation Ltd v Smit 1966 (3) SA 629 (T).

[9] Jonker v Schultz 2002 (2) SA 360 (D) at 364, with reference to Penny v Walker 1936 AD 241 at 260.

[10] Merber v Merber 1948 (1) SA 446 (A) at 453 in which the court held that "*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 to decide and this Court cannot interfere with his discretion. I presume that 'any grounds' mean any grounds on which a reasonable person would come to the conclusion arrived at."*

[11] S v G Kearney 1964 (2) SA 495 (AD) at 504 B – C.

[12] Jonker v Schultz, *supra,* with reference to Letsitele Stores (Pty) Ltd v Roets 1959 (4) SA 579 (T).

costs in order to make such order as to costs which would be fair and just between the parties.[13]

[20] In **R v Zackey**[14] the Supreme Court of Appeal held that:

> "Questions of costs are always important and sometimes difficult and complex to determine, and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a Court of appeal to interfere with the honest exercise of his discretion."

[21] The Constitutional Court, in turn, summarised the position regarding the setting aside of a decision of a lower court based on the exercise of a discretion in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**[15] as follows:

> "A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection of 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."

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[13] R v Zackey 1945 AD 505 with reference to Fripp v Gibbon & Co 1913 AD 354 at 363.
[14] *Supra.*
[15] 2000 (2) SA 1 (CC) at par [1]

[22] Bearing the above principles in mind, in order to determine whether it would be justified to interfere, this Court therefore has to investigate the merit or otherwise of the Appellants' submission that the Court *a quo* in the instant case failed to exercise its decision judicially.

[23] The purpose of an award of costs is to indemnify the successful party that has incurred expenses to bring or oppose an application.[16] Section 48(d) of the Magistrates' Court Act provides that the court has a discretion, to be judicially exercised upon a consideration of all the facts in each particular case, to grant such costs as it considers to be just, including costs on an attorney and client scale.

[24] Rule 33(8)(c) empowers a magistrate's court, in appropriate circumstances, in application proceedings[17], to award costs on any scale higher than that on which the costs of the proceedings would otherwise be taxable. This discretion should be exercised sparingly, however, and only where the circumstances justify it, such as where the unsuccessful party acted unreasonably in his conduct of the litigation,[18] or where the application was an abuse of the process of court even though that may not have been the intention of the applicant,[19] and also where the application suffered from grave defects and the disclosure of the patent flaws in the Answering Affidavit caused the applicant to withdraw its application[20].

[16] Jones & Buckle, RS 12, 2016 Rule 33-21
[17] Sybrand Smit Trust (Edms) Bpd v Fouche 1972 (2) SA 804 (C); and Waar v Louw 1977 (3) SA 297 (O).
[18] De Souza v Technology Corporate Management (Pty) Ltd 2017 (5) SA 577 (GJ) at 655C – 655J
[19] Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 339 E - J
[20] James v Jockey Club of SA 1954 (2) SA 44 (W). See also: Associated Musical Distributors v Big Time Cycle House 1982 (1) SA 616 (O).

[25] While the purpose of a party and party costs order is to fully compensate the successful party for costs and expenses reasonably incurred in litigation, for instance money due to the attorney for his fees and disbursements,[21] such party is entitled to burden his opponent only with such fees as are sanctioned by the Magistrate's Court rules,[22] i.e. those laid down in the tariff schedule or allowable as necessary expenses under Rule 33(5).[23]

[26] Attorney and client costs, on the other hand, are those which the attorney is entitled to recover from his client in respect of disbursements made on behalf of the client, *inter alia* to engage experts, to compensate witnesses and to brief counsel to draft the necessary papers, to draft heads of argument and to argue the matter in court. Such costs are intended to compensate the successful party for expenses reasonably incurred but not chargeable in the party and party bill of costs in order to ensure that such party is not left out of pocket in respect of the expenses caused to him by the litigation.[24]

[27] Costs on that scale are not awarded only to signify disapproval of the losing party's conduct, in other words as a form of punishment. Such costs are also awarded by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, or from the complexity of the matter.

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[21] Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd 2008 (6) SA 75 (NmHC) at 761-J.
[22] Reliable Motor and Cycle Works v Tocknell 1954 (2) SA 606 (T) at 608
[23] Mears v Jeffers 1964 (3) SA 32 (N).
[24] Jones & Buckle, SR 18.2018 Rule 33-24

[28] The Magistrate, in my view, erred in stating that the *"potential ramification that the order in the main action might have had on the operation of the respondent's"* was not the case argued before her and that *"the issue was only that of costs"*. From that remark it is evident that she did not weigh up the effect of such order upon the Respondents as against the effect on the Appellants to determine where the balance of convenience lies. That requirement for an interim interdict was therefore not met.

[29] In making the above statement, furthermore, she appears to have implied that the costs argument in the Rule 27 application should or could be decided independently of the consequences or the merits or demerits of the Main Application. In the circumstances of this case I cannot agree with that stance.

[30] The general rule is that a judgment for costs cannot stand alone, but that the merits of the matter in the court *a quo* must be investigated at least to some degree. Even where a decision concerning costs is divorced from the merits because a decision on the merits is not required, the decision on costs should not be reached in total isolation from considerations linked to the merits.[25]

[31] In the instant case the merits were adjudicated on an *ex parte* basis, i.e. solely on the Applicants' version. Before the merits could be finally determined, upon receipt of the Opposing Affidavit in which the numerous flaws were addressed, the Respondents withdrew the application.

[25] Erasmus v Grunow 1980 (2) SA 793 (O) at 798. See also: Cilliers, *supra,* par 2.21 at 20

[32] If a party proceeds *ex parte* instead of by application on notice to his opponent(s) in a matter in which notice is required, he will be liable for the costs unnecessarily incurred.[26] An *ex parte* application is used when the applicant is the only person who is interested in the relief which is being claimed,[27] or where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, or where immediate relief is sought in the form of a *rule nisi*, even temporarily, because harm is imminent.

[33] Good faith is a *sine qua non* in *ex parte* applications.[28] Therefore such application cannot be brought or granted unless the applicant provides the court with a proper motivation in its founding papers for the need for such an application. In the instant case there was no motivation or explanation for the need to file the application without proper notice to the Appellants.

[34] In **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd[29]** the majority held that where an order for costs is appealed against, the court of appeal does not judge a party's right to his costs in the court *a quo* by asking whether the appellant was the successful party in that court, but by asking "Ought he to have been the successful party in that court?"

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[26] In Office Automation Specialists CC v Lotter 1997 (3) SA 443 (E) at 448 the court held that while applications of the type referred to in rule 56(1) can be brought *ex parte*, an applicant bringing such application does so at his peril if he does not make out a good and proper case as to why an order should be granted without notice to the other party.

[27] Erasmus: Superior Court Practice, Vol 2, SR 7,2018 at D1-60

[28] Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC) at 115 A – E.

[29] 1948 (1) SA 839 (A) at

[35] Accordingly, the merits of the dispute in the Court below need to be considered to enable a decision as to whether the tender as to costs in that dispute was properly made or not, especially where the merits were not finally decided, as in the present case. After all, as Mr van Amstel correctly submitted, an applicant who withdraws his application is in the same position as an unsuccessful litigant because his claim is futile and the respondent is entitled to all costs associated with the withdrawing of the applicant's institution of the proceedings.

[36] In the present case the merits and the procedural flaws are inextricably intertwined and neither can be ignored in coming to a just decision regarding the appropriate scale of costs the Appellants would be entitled to. Therefore, although the matter was not finally adjudicated because of the withdrawal of the application, the numerous technical flaws in the main application which rendered the relief prayed for unenforceable against the Appellants, should have played a significant role in the scale on which costs were to be awarded.

[37] In **Germishuys v Douglas Besproeiingsraad**[30] the court held that very sound reasons for such withdrawal must exist before a respondent should not be entitled to its costs. In this case the Respondents averred that their reason for the withdrawal was a settlement agreement allegedly reached with Pillay which enabled them to discharge the *rule nisi.* That does not constitute the required *'very sound reason'* with reference to the Appellants, however, since they were, as they aptly put it in their Opposing Affidavit, *'dragged'* into a dispute between the Respondents and Pillay to which they were not a party notwithstanding the lack of a legal nexus between them and the Respondents.

[30] 1973 (3) SA 299 (NC) at 300D – E

[38] It does not automatically follow that where a matter is withdrawn, costs must be awarded on a party and party scale. As held in **Hugo v Hugo**[31] the question to be investigated would be whether the party that withdraws the litigation was justified in instituting the litigation in the first instance.

[39] In the present case, in my view, while the Respondents may have been justified in instituting the litigation against Pillay, they did not establish any justification for the relief obtained against the Appellants, much less by way of an *ex parte* application.

[40] From the papers it appears that Pillay was the party who rented the premises from the Third Respondent, and who in turn rented the premises to students. As such he is the party liable for payments to the Respondents. Yet the Appellants found themselves bound by court orders which the Respondents attempted to enforce against them in the absence of any legal *nexus* having been established between them.

[41] That the Main Application suffered from several fatal flaws, is clear from the Opposing Affidavit. I agree with Mr Johnson's submission that the Appellants had no other option than to oppose the matter. The submission on behalf of the Respondents that the Appellants opposed the matter only on legal grounds and hardly touched on the merits in the Opposing Affidavit does not change the fact that the application was fatally flawed from its inception and that the interim orders should never have been granted against the Appellants.

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[31] 1947 (1) SA 325 (O)

[42] In my view, therefore, the Appellants were indeed entitled to insist on being adequately compensated for their litigation costs and on not being left out of pocket by the Respondents' inadequate tender of costs.

[43] I find no evidence in the court *a quo's* 1½-page judgment that she indeed took into consideration all the facts of the case. She merely recorded in three brief paragraphs the Applicant's submissions in the Rule 27 application as follows:

1. That the Respondents acted unreasonably and hastily, and failed to establish a *prima facie* or clear right regarding the Appellants.

2. That the Respondents applied for a *rule nisi* and obtained an order which would have rendered the Appellants unable to function properly.

3. That the Respondents' conduct was *"tantamount to reckless litigation and abuse of process"* and that the Appellants therefore had no option to oppose the main application.

[44] Similarly, she merely summarised the Respondents arguments in three brief paragraphs as follows:

1. That they do not deny that they are liable for the Appellants' costs, including wasted costs on one occasion;

2. That the main application was justified and not vexatious in any way; that their application was necessary at the time due to the prevailing circumstances when the main application was instituted.

3. That the prejudice suffered by the Appellants could have been compensated by a reasonable payment of party and party costs as tendered.

[45] The sole extent of her reference to facts was that the *rule nisi* was set down for 17 May 2018; that the Respondents informed the Appellants on 16 May 2018 that they did not intend to proceed with the application; that the *rule nisi* was discharged in court on 17 May 2018; and that the matter was then postponed for argument on costs; and that no senior counsel appeared on behalf of the Respondents.

[46] Without any discussion or weighing up of the submissions made by the opposing parties, or any indication as to which submissions she accepted and which she rejected, the court *a quo* then averred that although she was mindful of the potential ramification that the order obtained in the main action might have had on the operations of the respondents, that was not the case argued before her, only one of costs.

[47] Whether she implied that the 'potential ramifications' was a factor which she considered of her own accord, or whether she implied that that played no role in the costs argument is impossible to determine. And whether she implied that the absence of Senior Counsel militated against costs on a scale as between attorney and client, or meant that only Senior Counsel was entitled to higher advocate's fees, is not discernible from the judgment.

[48] The next and final line of the judgment is the one that reads: "No case had been made out to justify increased fees as prayed by the applicants." Contrary to what the Respondents averred, therefore, no reasons for that conclusion appear from the judgment.

[49] With regard to her refusal to grant higher counsel fees, her only reference to counsel was the one line which read: "on this date no senior counsel appeared on behalf of the applicants". There is no requirement that only when a senior advocate appears, 'higher advocates' costs' can be awarded. The determining factors are the complexity of the matter and not only the appearance of counsel to argue the matter, but also the drafting of papers and Heads of Argument.

[50] Wright J in **Eerste Nasionale Bank van Suid-Afrika Beperk (handelend as Wesbank) v Mokotso**[32] stated that granting an order for higher counsel fees does not mean that such costs should be escalated to the next scale. It simply means that a higher than the normal fee prescribed for advocates in the Magistrate's Court Rules is awarded to the advocate in view of the particular circumstances and, especially, the complexity of the relevant case. The determination of a reasonable amount or percentage increase is still left in the hands of the taxing master.

[51] Item 26(1)(b) of Schedule 2 to the Magistrate's Courts Rules of Court stipulates that the court may on request allow a higher fee for counsel in regard to, *inter alia,* item 22 which provides for an allowance in lieu of the fee for first day for which the counsel was briefed where the matter was withdrawn on or before the date of the hearing, as well as for the drawing up of pleadings and heads of argument.

[52] In **The Road Accident Fund v Forbes**[33] it was held that an award of three times the amount specified in the tariff is specifically authorised by

[32] 2003 JDR 0655 (O) at p.7
[33] (CA 197/05) [2006] ZAECHC 47 (28 September 2006)

Note 26(1)(b) and that the award was neither incompetent nor arbitrary, and did not amount to an unjustified interference with the taxing master's discretion. That court confirmed that whether increased costs for counsel should be awarded depends on the circumstances of the matter as well as on the complexity of the case.[34]

[53] Mr Johnson did submit that he was briefed, right from the outset, to consult with the Appellants, to advise on the merits, to oppose the applications, to draft all the necessary papers, including heads of argument, and to appear to oppose the *rule nisi* as well as to argue the postponed costs application. Those are the matters regarding which item 26 of Schedule 2 to the Magistrate's Court Rules provides for higher costs.

[54] The matter was definitely not a trivial one, seeing that it involved so many legal issues and suffered from so many flaws of a legal nature rather than just factual errors despite the Second Applicant being an attorney, that the advocate's assistance by way of duly researched papers in my view was justified.

[55] The Respondents' refusal to admit their liability for attorney and client costs and higher advocates' fees in view of the circumstances of the case and the inadequately motivated urgent application with all its flaws, undoubtedly obliged the Appellants to reply. In **Jonker v Scultz**[35] the court stated that the costs awarded to a successful litigant because he was obliged to defend himself are seldom a total compensation because of taxation, but the award is intended to compensate that party for costs already incurred.

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[34] Eerste Nasionale Bank van Suid-Afrika (Handelend as Wesbank) v Mokotso 2003 JDR 0655 (O)

[35] 2002 (2) SA 360 (O) and

[56] As in that case, the Appellants were entitled to costs and the Respondents by first withholding that relief, then refusing to admit their liability for adequate compensation for the Appellant's costs and waiting until Counsel had already been briefed to argue the opposed costs issue, forced the Appellants to approach the court for relief and exposed the Appellants to the costs of not only that step, but the institution of a Rule 27 application for attorney and client costs.

[57] Besides all the other flaws regarding the court *a quo's* consideration of the issues or lack thereof, the Magistrate gave no indication that she took cognisance thereof that the lower court had had no jurisdiction to grant the orders since the amounts claimed far exceeded its monetary jurisdiction. She made no reference to the Appellants' denial of having consented to its jurisdiction on the basis that it was not a party to the agreement between the Respondents and Pillay or to any further agreements concerning jurisdiction either.

[58] She also failed to indicate that she had taken into consideration the fact that the Respondents had brought and obtained the application against the Appellants on an *ex parte* basis without any justification or explanation for such an approach.

[59] It is clear from the record, furthermore, that the Magistrate gave no indication of having taken into consideration the fact that the Main Application was materially flawed, as set out in the Opposing Affidavit thereto, and that the relief prayed for left the Appellants with no other option than to oppose the application.

[60] In my view, then, the Court *a quo* failed to apply her mind properly when she dismissed the application for higher advocate's costs and, similarly, failed to exercise her discretion judicially when she dismissed the application for costs on an attorney and client scale. Not only that, but in applying the wrong principles, she failed to make a costs order that would have been fair and just between the parties.

[61] This court therefore has the right to interfere in the court *a quo's* decision regarding costs.

WHEREFORE I make the following order:

1. The order by the court *a quo* to dismiss the application for costs on an attorney and client scale is set aside with costs.

2. It is substituted with the following order:

   "1. The application for costs on an attorney and client scale with higher advocate's fees succeeds with costs.

   2. The First, Second and Third Applicants in the main application are ordered to pay the costs of the Second and Third Respondents therein, jointly and severally, the one to pay, the other to be absolved, on an attorney and client scale, which costs are to include higher advocate's fees."

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MURRAY AJ

I concur and it is so ordered.

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NAIDOO J

For the Appellants:	Adv JMC Johnson Instructed by Mr LE Companie Appellants' Attorney Phatshoane Henney Attorneys 35 Markgraaff Street Westdene BLOEMFONTEIN
For the Respondents:	Adv PC Ploos van Amstel Instructed by: Mr C Dippenaar Attorney for Respondents Christo Dippenaar Attorneys 21 Reid Street, Reid Plaza 4 Westdene BLOEMFONTEIN