Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO.: CIV APP RC04/22

In the matter between:

FRIEDAH GOMOLEMO ANDREA **Appellant**

and

MORWESI SETLHABO **First Respondent**

TIISETSO SETLABO AND ALL OCCUPANTS
OF NO.50 METSI STREET HUHUDI, VRYBURG **Second Respondent**

CORAM: PETERSEN J & MALOWA AJ

ORDER

1. The appeal is upheld with costs.

2. The orders of the court *a quo* dated 15 October 2021 and 09 December 2021 in respect of costs, is replaced with the following order:

   '*No order as to costs*'

JUDGMENT

THE COURT

INTRODUCTION

[1] The appellant approaches this Court on appeal, challenging the awarding of costs against her, which costs emanate from an eviction application launched on 15 October 2021 in the Regional Court, Vryburg.

[2] The appeal lies only in respect of costs awarded against the appellant on 15 October 2021 in refusing an application for postponement; and costs awarded against her in a later application for rescission of the order of 15 October 2021, made on 9 December 2021.

CONDONATION

[3] The appellant sought condonation for the late lodging and filing of the appeal, as 20 days had already lapsed at the time of lodging the appeal. The application for condonation was opposed. Good cause was shown for the late filing of the appeal and condonation was granted at the hearing of the appeal.

FACTS

[4] The appellant, on 30 August 2021, filed an application for eviction of the first and second respondents in the Regional Court, Vryburg in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"). The date of 15 October 2021 was allocated by the Assistant Registrar on behalf of the Acting Regional Magistrate. The date was inserted on Notice of Motion. The appellant asserts that the date was considered by her to be solely for the exchange of documents between parties and not for hearing of the application.

[5] It is common cause that the appellant inserted the date of 15 October 2021 in Parts A and B of the application. The matter was then set down

on the opposed roll of 15 October 2021. The application was served on the respondents on 10 September 2021. On 21 September 2021, the respondents served and filed a Notice to Oppose the application. The respondents thereafter filed an answering affidavit, which served on 07 October 2021.

[6] On 15 October 2021, the appellant sought a postponement of the application, which was not ripe for hearing, which application the respondents opposed. The respondents moved a counter application to have the application struck from the roll. The appellant in particular, sought a postponement to allow her to file her replying affidavit on points *in limine* raised by the respondents in their answering affidavit and to address non-compliance with the PIE Act as alleged by the respondents in their answering affidavit. The respondents on the other hand alleged, amongst others, that the applicant failed to comply with the provisions of section 4(2) of the PIE Act. The application for postponement was refused and the application was struck from the roll with costs.

[7] The appellant requested written reasons for judgment and when that failed, she brought an application for rescission of judgment only in respect of the cost order. The application for rescission followed a similar cause when it was dismissed with costs on 9 December 2021.

GROUNDS OF APPEAL

[8] The appellant submits that she is entitled to an order setting aside the cost orders granted against her on 15 October 2021 and 9 December 2021. The main reason being that the awarding of costs was based on a predicament brought about by the incorrect date being allocated on the opposed motion roll by the Assistant Registrar at the behest of the Acting Regional Magistrate, with no fault on the part of her legal representatives. The date of 15 October 2021 was solely to secure an order in terms of section 4(2) of the PIE Act for service of the eviction application.

[9] The respondents submitted that the appellant was correctly mulcted with the costs orders as the appellant caused their appearance on 15 October 2021 to answer to the application for eviction contrary to the provisions of section 4(2) of the PIE Act. The respondents further contend that it was the appellant who sought the indulgence of a postponement and even if the matter was not struck off the roll, the respondents incurred the costs not out of their own making but because of the appellant.

DISCUSSION

[10] In the ordinary course, the application will be brought in two parts (Part A and Part B). In Part A of the application, an application would be made for directions as to service of the main eviction application, on the respondents. The Acting Regional Magistrate was fully within her

powers to have removed the application from the roll, alternatively to postpone same to the opposed roll, since the respondents in fact appeared on 15 October 2021. The issue of costs of 15 October 2021 could safely have been argued with the main application, for eviction.

[11] A court of appeal will generally be very loathe to interfere with an order as to the award of costs. Appeal against cost orders are therefore an exception rather than a norm. In *Hotz and Others v University of Cape Town* (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) at paragraphs 25 and 28, the Constitutional Court stated as follows in this regard:

> *"[25] In Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) *this Court dealt with the power of an appellate court to interfere with the High Court's order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense or whether it was a discretion in the loose sense. The distinction in either type of discretion, the Court held, "will create the standard of the interference that an appellate court must apply". This Court remarked, per Khampepe J, that "[a] discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it". In such instances, the ordinary approach on appeal is that the "the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially …". This type of discretion has been found by this Court in many instances, including matters of costs …". The question remains whether the High Court, in considering the*

relevant circumstances and available options, judicially exercised its discretion in mulcting the applicants with costs.

...

[28] It is established that a court of first instance has discretion to determine the costs to be awarded in light of the particular circumstances of the case. Indeed, where the discretion is one in the true sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion.

[12] Although the issue of costs remains the discretion of the court, the discretion cannot be exercised arbitrarily, but judicially on grounds upon which a reasonable person could have come to the conclusion arrived at. The approach to awarding costs is succinctly set out in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) at paragraph 3:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on

circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation…"

[13] For an appeal to succeed on costs, the appellant must demonstrate exceptional circumstances warranting interference with the order as to costs. In *Naylor and Another v Jansen* (508/05) [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) at paragraph 10, the Supreme Court of Appeal stated as follows in this regard:

"[10] … I had occasion in Logistic Technologies (Pty) Ltd v Coetzee to express the view that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance. I still adhere to that view for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs; and that obviously cannot be the effect of the section…"

[14] In *R v Zackey* 1945 AD 505 with reference to *Fripp v Gibbon & Co* 1913 AD 354 at 363, the Appellate Division said the following in respect of the exercise of the discretion on costs:

"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."

[15] As to punitive costs orders, it was held in *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* (309/97) [1999] ZASCA 82 at paragraph 20:

"[20] To sum up, in considering a punitive costs order a court should warn itself against using hindsight in assessing the conduct of a party..."

[16] Having regard to the aforesaid authorities, whilst the appellant's Notice of Motion in the Regional Court called on the respondents to appear on 15 October 2021 to show good cause why the relief sought should not be granted, the Acting Regional Magistrate should not have granted a cost order against the appellant.

[17] The argument that the appellant should have familiarized herself with the practice of the Regional Court in respect of opposed motions when a date was sought for allocation of the application, does not behove the respondent. The appellant's legal representative moved from the premise that the date allocated was solely for the application in terms of section 4(2) of the PIE Act.

[18] The appellant was within her rights to seek a postponement of the application to the opposed roll or for the Acting Regional Magistrate to remove the application from the roll, with an order that costs either be costs in the cause or no order as to costs.

CONCLUSION

[19] The manner in which the costs order against the appellant was granted, was not exercised judicially and merits interference by this Court as an exceptional circumstance. The cost orders of 15 October 2021 and 09 December accordingly stand to be set aside with an appropriate order as to costs.

COSTS OF APPEAL

[20] Whilst the award of costs in the Regional Court was at the behest of the respondents and acceded to by the Acting Regional Magistrate, we are of the view that none of the parties should be mulcted with the costs of this appeal.

ORDER

[21] In the result, it is ordered:

1. The appeal is upheld with no order as to costs.

2. The orders of the court *a quo* dated 15 October 2021 and 09 December 2021 in respect of costs, is replaced with the following order:

'*No order as to costs*'

[redacted]

A H PETERSEN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

[redacted]

M L MALOWA
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

For the Appellant	:	MR M. P. MASEKO
Instructed by:	:	MP Maseko Attorneys Inc. c/o Tau Matsimela Attorneys Inc. 1206 Barolong Street Unit 7 MMABATHO
For the Respondent	:	ADV O. I. MONNAHELA
Instructed by	:	Shuping Attorneys c/o DC Kruger Attorneys 29 North Street Golf View MAHIKENG
Date of Hearing	:	25 November 2022
Date of Judgment	:	21 February 2023