

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT  
LOCAL DIVISION, JOHANNESBURG

CASE NO: A5032/2013

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED

6 JUNE 2014

  
EHD VAN OOSTEN

In the matter between

ANDREW TREVOR NORDENGEN

FIRST APPELLANT

OUTSOURCE INDUSTRIAL  
LOGISTICS (PTY) LTD

SECOND APPELLANT

and

VANGUARD RIGGING (PTY) LTD

RESPONDENT

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J U D G M E N T

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VAN OOSTEN J:

[1] This is an appeal against the judgment and order granted in the court a quo on 30 November 2012, in terms of which an interdict was issued effective for a period of 18 months from the date of the order, restraining the appellants from approaching the respondent's clients, making use of the respondent's confidential information in order to solicit business from the respondent's customers and competing with the respondent's business arising out of the appellants' use of the respondent's customers. The appellants were further ordered to pay the costs of the application jointly and severally, on the scale as between attorney and client.

[2] Counsel for the respondent has raised by way of a point *in limine* in his heads of argument, which were served and filed on 4 April 2014, that the appeal is moot in view of the expiry of the effective period of the interdict of 18 months, on 30 May 2014, being 3 days after the hearing of the appeal and in any event before delivery of this judgment. In this regard s 21A of the Supreme Court Act, 59 of 1959, applies. Its equivalent in the new Act is s 16(2)(a) of the Superior Courts Act, 10 of 2013. Section 21A provided for the dismissal of an appeal on the sole ground that the 'issues are of such a nature that the judgment or order sought will have no practical effect or result'. A judgment or order in this appeal will clearly not impact on the rights or obligations of the parties and therefore will have no practical effect or result *inter partes*. Counsel for the appellant submitted that the appeal should be heard as the court a quo's judgment remains binding on the principles of *stare decisis* and further that the judgment of this court on the merits would assist in creating certainty on the applicable legal principles. I am unable to agree. The primary consideration is whether the judgment will have any practical effect to the parties who, after all, are the litigants whose interests are at stake. The answer is clearly that it will not. Authority for the finding is to be found in the judgment of the Full Court of this Division in *Universal Storage Systems (Pty) Ltd v Crafford and others* 2001 (4) SA 249 (W) where it was held that it would not serve any purpose in granting any order on appeal in respect of a restraint where the one year period thereof had lapsed by the time the appeal was heard. In *Radio Pretoria v Chairman, ICASA and another* 2005 (1) SA 47 (SCA) para [41] the Supreme Court of Appeal, with reference to s 21A, reaffirmed that an appeal ought only to be submitted for determination if the judgment of the court of appeal will have a real, practical effect or result, which as a fundamental principle, ought not to be relaxed or diluted. The only exceptional circumstances warranting a departure from the principle may be considerations of costs. Nothing exceptional as for the costs of this appeal has been referred to by either counsel nor was I able to find such. The appeal record consists of 3 volumes extending into 172 pages, compared to 8 volumes in *Radio Pretoria* (which was considered not to be exceptional) and juxtaposed to an appeal record of 2 379 pages in *Oudebaaskraal (Edms) Bpk en andere v Jansen van Vuuren en andere* 2001 (1) SA 806 (SCA) 47 which, together with substantial trial costs, were held to constitute exceptional circumstances for permitting the hearing of the appeal.

[3] As for the possible binding effect of a judgment by this court in this matter, the challenge to add to the already wealth of authorities on these issues, attractive as it may be, quickly loses its allure, as the judgment will in any event concern the question of costs and may therefore, as far as findings on the merits are concerned, well be *obiter*.

[4] In the absence of any special considerations concerning costs I conclude that the appeal ought to be dismissed on the ground provided for in s 21A.

[5] The issue remaining concerns the costs of the application in the court a quo as well as the costs of the appeal. This court, in terms of the provisions of s 21A(2)(c) (i) may 'order that the appeal be dismissed, with or without an order as to costs incurred in any of the courts below or in respect of the costs of appeal..'. In *Universal Storage Systems* it was held that the powers conferred by s 21A(1) read with s 21A(3) may be exercised independently of the procedure envisaged in s 21A(2). It stands to reason that the orders provided for in s 21A(c)(i) and (ii) apply in regard to both such procedures.


[6] First, the costs order made by the court a quo, which it will be remembered was for the appellants to pay the costs of the application on the scale as between attorney and client. The court a quo, on 21 June 2013, granted leave to appeal against the whole of the judgment and the orders made. Regrettably we do not have the benefit of the reasons, if any, for granting leave to appeal. It must however be assumed that the learned Judge a quo, in granting leave to appeal, considered that reasonable prospects of a successful appeal existed. The mootness of the appeal cannot be attributed to the appellants. All steps in the prosecution of the appeal were timeously taken. Delays however occurred for which there are no explanations. In these circumstances it would in my view, be unjust and unfair not to set aside the costs order of the court a quo.

[7] Finally, I turn to consider the liability for the costs of the appeal which falls within the discretion of this court. Some background facts are relevant. Almost 4 years have by now elapsed since the first appellant left the respondent's employment. The judgment of the court a quo was delivered some 17 months after termination of his employment and 6 months after the hearing of the application. Leave to appeal was

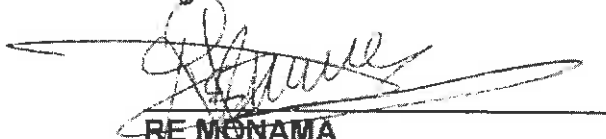
granted only on 21 June 2013. On 25 November 2013 the appeal was enrolled for hearing on 28 May 2014. The respondent did not resort to obtaining urgent relief. The appellants were made aware of the respondent's point *in limine*, on 4 April 2014, some 7 weeks prior to the hearing of the appeal. Counsel for the respondent submitted that the appellants, having been informed of the incontestable mootness of the appeal, should consequently have withdrawn the appeal and tendered all costs. The appellants' failure to do so, counsel further submitted, resulted in an unnecessary waste of costs, which the appellants should be held liable for. I am unable to agree. The contention overlooks the second leg of the appeal which concerns the costs both in the court below and of the appeal. As will become apparent the respondent's insistence on a tender for payment of all costs runs contrary to this court's findings and orders concerning costs. The appellants accordingly, were entitled to proceed with the appeal in the face of its mootness. Having carefully considered and weighed all relevant circumstances, a fair and just order concerning the costs of both the application and the appeal, in my view, is for each party to pay its own costs.

[8] In the result the following order is made:

1. The appeal is dismissed.
2. Paragraph (e) of the order of the court a quo is set aside.
3. Each party is to pay its own costs in relation to both the application and the appeal.

  
 FHD VAN OOSTEN  
 JUDGE OF THE HIGH COURT

I agree.

  
 RE MONAMA  
 JUDGE OF THE HIGH COURT

I agree.

  
Z BUTHELEZI  
ACTING JUDGE OF THE HIGH COURT

**COUNSEL FOR APPELLANTS**

**ATTORNEYS FOR APPELLANTS**

**COUNSEL FOR RESPONDENT**

**ATTORNEYS FOR RESPONDENT**

**ADV I MILTZ SC**

**FLUXMANS INC**

**ADV SL JOSEPH SC**

**MERVYN SMITH**

**DATE OF HEARING**  
**DATE OF JUDGMENT**

**28 MAY 2014**  
**6 JUNE 2014**