THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1060/16

In the matter between:

V N MGWENYA NO	**FIRST APPELLANT**
S P SMIT NO	**SECOND APPELLANT**
G J AUGUST NO	**THIRD APPELLANT**
AFM CHURCH OF SOUTH AFRICA	**FOURTH APPELLANT**

and

VERNON XAVIER KRUGER	**FIRST RESPONDENT**
GOVERNING BODY OF THE DANVILLE ASSEMBLY OF THE AFM OF SA	**SECOND RESPONDENT**

Neutral Citation:	*Mgwenya v Kruger* (1060/16) [2017] ZASCA102 (6 September 2017).
Coram:	Shongwe AP, Bosielo and Majiedt JJA and Mokgohloa and Fourie AJJA
Heard:	24 August 2017
Delivered:	6 September 2017

Summary: Section 16(2)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 – judgment or order sought on appeal would have no practical effect or result – no exceptional circumstances justifying a consideration of the matter with reference to the issue of costs – appeal dismissed.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Gura and Kgoele JJ, Hendricks J dissenting, sitting as court of appeal):
The appeal is dismissed with costs.

JUDGMENT

Fourie AJA (Shongwe AP, Bosielo and Majiedt JJA and Mokgohloa AJA concurring):

[1] In this appeal counsel were, at the outset of the hearing on 24 August 2017, required to address argument on the preliminary question whether the appeal and any order made thereon would, within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the SC Act), have any practical effect or result. After hearing argument on this issue, the appeal was dismissed with costs and it was indicated that reasons for the order would follow. The following are those reasons.

[2] In order to understand the context in which the order was made, it is necessary to briefly summarise the history of the litigation between the parties: The first respondent, Vernon Xavier Kruger, was previously a duly ordained pastor in the service of the fourth appellant, the Apostolic Faith Mission Church of South Africa (the church) at its Danville Assembly, Mahikeng. However, during 2012, the church instituted disciplinary proceedings against the first respondent and found him guilty of misconduct on four charges, resulting in the termination of his pastoral status with immediate effect from 23 January 2013. The first respondent then launched an application in the North West Division of the High Court, Mahikeng (the NWHC) for the review and setting aside of the ruling of the disciplinary committee of the church.

[3] On 11 June 2015, Gutta J dismissed the application with costs, but the first respondent was granted leave to appeal to the full court of the NWHC (the Full Court). On 9 June 2016, the full court upheld the first respondent's appeal and reviewed and set aside the ruling of the disciplinary committee. The church and the three members of the disciplinary committee (the latter being the first to the third appellants), with the special leave of this court, then noted the current appeal.

[4] However, on 27 January 2017 before the hearing of the appeal, the first respondent passed away. This resulted in the parties being requested on 21 June 2017, to file supplementary heads of argument on the preliminary question referred to in paragraph one above. The parties duly filed supplementary heads of argument and, for completeness, I should add that, at the commencement of the hearing of the appeal, an application was granted pursuant to Uniform Rule 15(2), in terms of which the first respondent's son, Warren Vernon Kruger in his official capacity as the executor of his late father's estate, was substituted for the first respondent in this appeal.

[5] Turning to the preliminary question as to whether this appeal will have any practical effect or result, the starting point is s 16(2)*(a)*(i) of the SC Act, which reads as follows:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[6] Counsel for the appellants were constrained to concede that the appeal and any order made thereon would have no practical effect or result. This concession was rightly made as, in view of the demise of the first respondent, there are simply no live issues remaining between the parties. Therefore a decision on appeal will have no practical effect or result as between the parties to the appeal. On this basis alone the appeal ought to be dismissed.

[7] Counsel for the appellants, however, had a second string to their bow. They submitted that, if the appeal were not to be heard on its merits, the church would be saddled with the costs orders made in favour of the first respondent and this would be most 'unfair' to the church. In this regard counsel for the appellants stressed that

the costs incurred to date were substantial. However, in so arguing, the appellants were confronted with a significant obstacle in the form of s 16(2)*(a)*(ii) of the SC Act which reads as follows:

'Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

It follows that it is incumbent upon the appellants to show that exceptional circumstances exist justifying this court, in deciding whether its judgment or order would have a practical effect or result, to have regard only to considerations of costs.

[8] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C), Thring J conducted a comprehensive inquiry as to the meaning of 'exceptional circumstances' in our case law. The conclusion reached at 156H-J, with which I am in agreement, is that '[w]hat is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . .'. Further, the approach to the construction of the phrase 'exceptional circumstances' in legislation was stated as follows by this court in *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399:

'Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.'

[9] In essence the submissions made on behalf of the appellants in this regard constituted a plea *ad misericordiam*. The appellants also sought to rely on the judgment in *Oudebaaskraal (Edms) Bpk en andere v Jansen van Vuuren en andere* 2001 (2) SA 806 (SCA). In my view, *Oudebaaskraal* is clearly distinguishable. In that matter the appeal became academic as a result of the repeal of the Water Act 54 of 1956 at the time when the appeal was ripe for hearing. By that stage a trial of seven days in the Water Court had taken place rendering a record of 2 379 pages. This included the evidence of several expert witnesses. The appeal record consisted of 35 volumes. This court held that these circumstances were exceptional, justifying the conclusion that in the event of a successful appeal, the judgment or order of the

court would have had a practical effect or result. I should mention that *Oudebaaskraal* was decided in terms of s 21A(3) of the Supreme Court Act 59 of 1959 which, for all practical purposes, is similarly worded to s 16(2)*(a)*(ii) of the SC Act. See also *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA) at 55G-56F.

[10] In the present matter the appeal related to an order granted in Motion Court which was set aside by the full court. No *viva voce* evidence was tendered and the appeal record constituted only three volumes running to 437 pages. *Oudebaaskraal* and the present appeal are simply not comparable. It follows that, although the appeal was rendered moot by the death of the first respondent, the circumstances relied upon by the appellants cannot, for purposes of s 16(2)*(a)*(ii) of the SC Act, by any stretch of the imagination be regarded as exceptional in the sense of something out of the ordinary, or of an unusual nature, uncommon, rare or different to the extent that the general rule as embodied in s 16(2)*(a)*(i) should not apply.

[11] In the result the appeal fell to be dismissed. With regard to the costs of appeal, there is no reason why the appellants, as the unsuccessful parties, should not bear those costs. In this regard, the appellants were the authors of their own misfortune. As recorded above, they were notified as early as 21 June 2017 of this court's concern that the hearing of the appeal may not render a judgment or order which would have any practical effect or result. Notwithstanding this, they persisted with the appeal, resulting in the estate of the first respondent incurring costs in opposing same.

[12] These were the considerations on which the dismissal of the appeal with costs was based.

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P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	M C Erasmus SC; L W De Beer Instructed by: Meintjies Petzer Attorneys, Mahikeng c/o Symington De Kok, Bloemfontein
For the Respondent:	J H F Pistor SC Instructed by: Herman Scholtz Attorneys, Mahikeng c/o Rossouws Attorneys, Bloemfontein