

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 253/20

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES ☒ NO ☒
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒
(3)	REVISED.
03 April 2023 DATE	 SIGNATURE

In the matter between:

CASILLI, DIEGO

Applicant

and

FACEBOOK SOUTH AFRICA (PTY) LTD

First Respondent

ZAMBIAN WATCHDOG

Second Respondent

FACEBOOK, INC

Third Respondent

JUDGMENT ON LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

- [1] The Applicant seeks leave to appeal against the judgment and order of this Court handed down on 27 October 2022. The Court had dismissed the applicant's claims for various costs orders against the third respondent.
- [2] The background to the applicant's claims for costs, the contentions for and against the claims, are all set out in detail in the main judgment, and I do not intent to repeat same in this judgment. What can be restated however in order

to give context to this leave to appeal is that the applicant initially sought a final interdict ordering and directing the first respondent ('Facebook SA') to remove offending and defamatory content posted by the second respondent, ('*Zambian Watchdog*') on the Facebook Service Page as provided to users in South Africa by the third respondent ('Facebook Inc').

- [3] Following the removal of the offending post on the Facebook platform, the main claim was no longer pursued and what remained for determination before the court was whether the third respondent, which was subsequently joined to the proceedings, was liable for the applicant's costs in respect of the main application. The applicant persisted in seeking a costs order against the third respondent on the basis that it was compelled to bring the main application in the first place, in order to have the offending post removed from the Facebook platform. Further costs sought related to the third respondent's institution and withdrawal of an interlocutory application in the main application.
- [4] The approach to leave to appeal needs no introduction. It however ought to be restated that under section 17(1) (a)(i) and (ii) of the Superior Courts Act¹ (SAC), leave to appeal may only be granted where the Court is of the opinion that the appeal would have a reasonable prospect of success; or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Thus, an applicant in such cases is required to must meet the threshold set out in section 17(1) of the SCA², in the sense that there exist more than just a mere possibility that another court would find differently on both the facts and the law³, and further that such prospects are not too remote⁴.

¹ 10 of 2013 (Superior Courts Act).

² *Chithi and Others; In re: Luhlwinini Mchunu Community v Hancock and Others* [2021] ZASCA 123 (23 September 2021) Para 10:

³ See *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7, where it was held that; "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

⁴ *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

[5] Given that the principal consideration in this appeal is whether costs ought to have been granted in favour of the applicant, this implies that the application ought to be considered within the provisions of section 16(2)(a)(i) of the SCA⁵. The parties are in agreement with reference to various authorities, that this Court rarely grants leave to appeal in respect of cost orders only. This is so in that such appeals ordinarily involve the exercise of a judicial discretion, which ought not be lightly interfered with, unless the appeal court would reasonably find that exceptional circumstances exists⁶.

[6] It is thus accepted that a failure by a Court to exercise its judicial discretion when considering costs will fall within the category of exceptional circumstances⁷, more particularly if the costs in question are substantial⁸. The

⁵Which provides;

‘(2) (a) (i) 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.

(ii) 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.’

⁶ See *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at para 5; *Mukanda v South African Legal Practice* 2021 (4) SA 292 (GP) at para 9; *Manyike v S* (527/17) [2017] ZASCA 96 (15 June 2017) at para 3, where it was held;

“What constitutes exceptional circumstances depends on the facts of each case. (See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Scheitkat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77). Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H remarked that:

- ‘1. What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different”
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.’

In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.”

⁷ See *Merber v Merber* 1948 (1) SA 446 (A) at 452

⁸ *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* (245/2017) [2018] ZASCA 12; 2018 (4) SA 433 (SCA) at para 8 where it was held;

question that arises in this leave to appeal is whether the applicant has demonstrated that a court of appeal would find grounds to interfere with that discretion, i.e. whether there are exceptional circumstances to do so. This means that the court of appeal will have to determine whether this court in refusing to award the applicant costs, exercised its discretion judicially; or whether its decision was influenced by wrong principles or affected by a misdirection of facts; and/or whether there was a misdirection of the relevant facts and applicable principles⁹. Where such exceptional circumstances are absent, it follows that there would be no reasonable prospect of success, and as such, the application for leave to appeal should fail.

- [7] The third respondent's primary contention in this application is that no such exceptional circumstances have been demonstrated by the applicant. The applicant in seeking leave to appeal relied on no less than eleven grounds, the essence of which was to attack the Court's findings on the facts as presented before it. In summary, the applicant contends that the Court failed to properly consider which party was successful in the matter, and that in the circumstances, costs ought to have followed the cause. It is not clear what the basis of this contention was in the light of the common cause fact that the main application was not pursued after the alleged offending post was removed from the third respondent's platform. One cannot speak of successful litigation in the absence of the merits of the main claim being fully ventilated, and resulting with a favourable order.
- [8] Other than the above contention, the all other grounds relied upon relate to alleged errors by the Court in making certain findings on the facts as to why the

"Counsel for JWP conceded that the only practical effect which an appeal order would have was in relation to costs. In terms of s16(2)(a)(ii) of the Superior Courts Act 10 of 2013, the question whether a decision would have practical effect or result is, save under exceptional circumstances, to be determined without reference to any consideration of costs. The costs referred to in this provision are the costs incurred in the court against whose decision the appellant or would-be appellant is seeking to appeal, not the costs in the appellate court. The section is concerned with the decision of the court a quo and the circumstances in which an appeal against the decision of that court can be dismissed without an enquiry into the merits. If the costs incurred in the court a quo court were very substantial, this might constitute an exceptional circumstance leading to the conclusion that a reversal of that court's decision would have practical effect."

⁹ *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) at para 144 - 145

applicant was not entitled to costs. It would not be necessary to restate all of these grounds in full. Just to reiterate however, the applicant's principal complaints in the main application were that upon noticing the offending post on Facebook, the third respondent was made aware of it and a demand was made for its immediate removal. The applicant persisted with his contentions that the third respondent had refused to remove the post prior to the application being launched. Of course all of these issues had to be considered and determined within the context of the facts which invariably related to the merits of the claim.

[9] The mere fact that the third respondent opposed an order of costs and in so doing made reference to the merits of the claim that was abandoned, cannot in my view imply that it had expressly entered the arena and opposed the merits. Equally so, the mere fact that the Court took regard of all the factors giving rise to the claim in the course of determining an ancillary claim does not imply that the merits were adjudicated. It is not clear how the third respondent could have simply opposed the costs order without giving context, whilst the applicant on the other hand pursued such costs by relying on the very same merits of the abandoned claim. In any event, once the main claim was abandoned, its merits could only have been relevant for the purposes of determining costs.

[10] In the main judgment, reasons were proffered at length as to why the third respondent had not removed the post at the time that the applicant made the demand. It was concluded that the third respondent had always evinced an intention to have the offending post removed upon certain steps having been taken by the applicant, which included securing a court order. In the end however there was no basis upon which this Court having applied its mind to the facts and circumstances of the case, could have found that the third respondent upon being made aware of the offending posts, acted unreasonably, or should have been found liable *qua* publisher for the offending post.

[11] Equally dealt with in full in the main judgment are the issues related to costs in respect of the third respondent's request for an extension of time to file an answering affidavit in the main application, which affidavit was filed and

subsequently withdrawn. Full reasons were proffered as to why the Court deemed it appropriate not to award the applicant costs in that regard

[12] In the end however, the refusal by this Court to grant the applicant costs as sought in the main claim which was abandoned, entailed an exercise of judicial discretion, after a consideration of a number of equally permissible options to refuse such an order. Irrespective of the applicant's contentions, there could be no practical effect in ruling otherwise, especially in circumstances where the main claim was not fully adjudicated and thus having been rendered moot. Equally so any award of costs in favour of the applicant would not have been served the interests of justice¹⁰.

[13] As correctly indicated on behalf of the third respondent, all that the applicant sought in the main application was to recoup his litigation costs. Such a claim on its own cannot by any stretch of imagination, constitute an exceptional circumstance. In conclusion, having reflected on my judgment, and having had regard to the submissions made for and against the leave to appeal, and further in the absence of exceptional circumstances having been demonstrated by the applicant, it follows that the application for leave to appeal would have no reasonable prospect of success, and as such, it ought to fail.

[14] In the light of all the above conclusions, the following order is made;

Order:

1. The application for leave to appeal is dismissed with costs.


Edwin Tlhotlhalenmaje

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

¹⁰ See *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 03 April 2023.

Heard on : 17 March 2023 (Via Microsoft Teams)

Delivered: 03 April 2023

Appearances:

For the Applicant:

C Acker SC with R Bhima,
instructed by Swanepoel van Zyl
Attorneys

For the Third Respondent:

G Kairinos SC with R Pottas,
instructed by Adams & Adams