



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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **1552 / 2014**
Datum aangehoor / Date Heard: **06 / 03 / 2017**
Datum gelewer/Date delivered: **21 / 04 / 2017**

In the application of:

THE ROAD ACCIDENT FUND

Applicant

and

JACQUELINE ISAACS

Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

[1] The respondent had instituted action against the applicant in this Court after which the merits and quantum were settled in terms of two separate court orders. No evidence had been led. By agreement between the parties the costs were argued before me on 8 November 2016. The only issue was whether the

applicant (defendant in the action) should pay costs on the scale applicable in High Court or that in the lower courts, and if lower court, on what scale.

- [2] During argument on the costs, Adv Sieberhagen, on behalf of the plaintiff, handed up a bundle of documents. This was done by agreement between the parties. Ms Sieberhagen based her arguments on this bundle and the pleadings. No evidence had been presented on behalf of the defendant and Adv Stanton proceeded to argue the issues pertaining to the scale of the costs.
- [3] On 18 November 2016 I ordered the applicant to pay the respondent's taxed or agreed party and party costs of the action on the scale applicable in the High Court. My reasons for awarding costs to the plaintiff on the High Court scale appear from my judgment.
- [4] The applicant thereafter applied for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of the Northern Cape Division of the High Court against the whole of my judgment delivered on 18 November 2016. The respondent did not oppose the application for leave to appeal. I shall hereinafter refer to the parties as in the action.

- [5] The grounds of appeal appear from the notice of application for leave to appeal dated 7 December 2016. I do not deem it necessary to repeat these grounds herein. In essence these grounds are based on certain of the findings made in respect of the conduct of the attorneys of the defendant, without having invited them to address me on these issues. The other grounds are based thereupon that I had exercised my discretion to award costs on the scale applicable in the High Court, based on a misinterpretation of the facts and law relevant to the issue of costs and that I had not exercised my discretion judicially.
- [6] During argument in the application for leave to appeal, Adv Salie SC, on behalf of the defendant, handed up the transcribed record of the arguments which had been presented before me on 8 November 2016. He pointed out that from this record it appears that I had raised several issues with counsel of the plaintiff and that I had done so to a much lesser extent in respect of counsel for the defendant.
- [7] Mr Salie submitted, *inter alia*, that the issues on which I had based my findings against the defendant had not specifically been raised and canvassed with counsel of the defendant. He submitted that I had misdirected myself and erred in finding the conduct of the

defendant's attorneys unacceptable and difficult to comprehend, without evidence to that effect and without having considered the consequences of such a finding on the said attorneys.

- [8] In terms of s 21A(3) of the Supreme Court Act, No. 59 of 1959, an applicant for leave to appeal against a costs order had to satisfy the court from which leave was sought that exceptional circumstances existed that would justify interference with its costs order. The mere fact that a Court of appeal might give a different order did not constitute exceptional circumstances.¹
- [9] The Supreme Court Act has been repealed and replaced by the Superior Courts Act, No. 10 of 2013. In terms of section 17(1) of this act, leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. It does not contain a section similar to section 21A(3) of the Supreme Court Act.

¹ *LOGISTIC TECHNOLOGIES (PTY) LTD v COETZEE AND OTHERS* 1998 (3) SA 1071 (W) at 1075I-J

[10] In *Erasmus: Superior Court Practice*² the learned author submitted that, where the only issue remaining was one of costs, the principles set out in *Tsosane v Minister of Prisons*³ continue to apply in the context of the question whether compelling reasons why the appeal should be heard, do exist. These relevant principles entail that leave should not lightly be given, because costs are ordinarily a matter of judicial discretion and also because it is desirable that finality should be reached where the merits of a matter have been determined. Where a matter of principle is involved though, leave would more readily be granted. The final requirement remains that an applicant for leave to appeal should have a reasonable prospect of success on appeal. I agree with the opinion expressed above.

[11] In *Motswai v Road Accident Fund*⁴ the court *a quo* had made an adverse cost order and a finding of fraud against the attorney of the plaintiff, based on the court papers and informal discussions in chambers which had taken place in the absence of the said attorney. The cost order entailed, *inter alia*, that the plaintiff's attorney be prohibited from recovering any fee or disbursement from the plaintiff or the Fund (defendant) and further, that the costs of the experts had to be met by the plaintiff's

² JUTA 2016, RS 3 2016, A2-56-57

³ 1982 (3) SA 1075 (C) at 1076E-1077B

⁴ 2014(6) SA 104

attorneys *de bonis propriis*. In the appeal against the cost order (and the finding of fraud) it was held that the circumstances of the case had required the presiding judge to hold a public hearing to afford the interested parties an opportunity to deal with the issues. In not doing so, the learned judge had not exercised the discretion bestowed on the court *a quo* judicially and within the parameters prescribed by law. The cost order was set aside and replaced by an appropriate cost order.

[12] Although it is trite that an award of costs lies in the discretion of the court, such discretion must be exercised judicially upon a consideration of the facts of each case, and that, in essence, it is a matter of fairness to both sides.

[13] It appears from a proper reading of paragraph 31 of my judgment that I have found the conduct of the legal representatives of both the plaintiff and defendant 'unacceptable and difficult to comprehend'. I disapproved of the practice of instituting action in the High Court where a lower court would also have jurisdiction in the matter and the case could have been dealt with in that court at less expense to the litigants. I have expressed criticism, not only against the defendant and its legal representatives, but also the plaintiff's legal representatives. I had not only taken into account the

conduct of the parties, but also the circumstances of the plaintiff in an attempt to balance the interests of both parties in deciding the issue of costs. It was not only the conduct of the defendant and its legal representatives, but also that of the plaintiff that had contributed to my conclusion that the best interest of the minor had not been served and that this had led me to awarding costs on the scale applicable in the High Court.

[14] The facts of this matter differ substantially from those in the *Motswai* matter. I have neither made any finding of dishonesty in respect of any of the legal representatives, nor have I made an adverse cost order affecting the legal representatives. I have made certain findings though pertaining to the defendant and the legal representatives of both parties that, as was submitted by Mr Salie, could adversely affect the defendant's current legal representatives. The matter is further not only of importance to the defendant and its attorneys, but finds wider application in matters of similar nature in this Division.

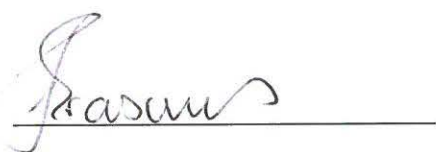
[15] Given further my findings contained in paragraph [32] of my judgment, namely that the plaintiff had not shown why the action could not have been instituted in the lower court, I am satisfied that another court could come

to a different conclusion in respect of the awarding of costs on the scale applicable in the High Court. This being so, it follows that there is a reasonable prospect of success on appeal and therefore, leave to appeal should be granted in this instance.

[16] During argument before me, Mr Salie indicated that, should I grant leave to appeal, it should be to the Full Court of this Division. I agree that this would be the appropriate forum.

Wherefore I make the following order:

THE APPLICANT IS GRANTED LEAVE TO APPEAL TO THE FULL COURT OF THE NORTHERN CAPE DIVISION OF THE HIGH COURT AGAINST THE JUDGMENT AND COST ORDER MADE ON 18 NOVEMBER 2016.



ERASMUS, SL

ACTING JUDGE

On behalf of the Applicant:	Adv. Salie SC (oio Robert Charles Attorneys)
On behalf of Respondent:	No appearance