

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2023-055949

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

31 January 2024

Judge Dippenaar

In the matter between:

MERRIAM MAKWENA MANAMELA

APPLICANT

AND

GRACE MAITE

RESPONDENT

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 31st of JANUARY 2024.

DIPPENAAR J:

[1] The applicant sought leave to appeal to the Full Court, pursuant to a judgment and order granted on 6 September 2023, in terms of which I dismissed the applicant's contempt application and granted certain punitive *de bonis propriis* costs orders against the applicant's attorney of record, Mr Seloane. The costs orders granted were:

(i) The costs of the application in [1] above, including the reserved costs in the Urgent Court on 1 August 2023 are to be borne by the applicant's attorney of record, Mr. Vincent Seloane, de bonis propriis on the scale as between attorney and client;

(ii) The applicant's attorney of record, Mr Seloane, is directed not to present a bill, nor to recover any fees or disbursements from the applicant in respect of any work performed in respect of the contempt application dated 20 July 2023."

[2] Leave to appeal was not sought against the dismissal of the contempt application, but only against the two costs orders.

[3] In her application for leave to appeal, the applicant raised various grounds for leave to appeal. Those grounds are based on apparent misdirections in certain findings and the reasoning supporting the exercise of the discretion pertaining to an appropriate costs order in the judgment.

[4] It was contended that there are reasonable prospects of success that another court would grant a different costs order as envisaged by s 17(1)(a)(i) of the Superior Courts Act¹. (“the Act”).

[5] The central premise of the applicant is that through the second contempt application, she sought leave to reinstate the first urgent contempt application and to supplement her grounds based on new facts with a view to having the pending contempt application determined on an urgent basis, which she was entitled to do.

[6] In the heads of argument, it is contended that the applicant “*is unhappy with the costs orders, which have the effect of deterring her legal representative from representing her, pro bono, and from discharging his duties without fear*”. It was argued that the decision to saddle the legal practitioner with costs is not grounded on facts and is a sequel to a disregard of certain principles, hence that an appeal court would be free to intervene.

[7] The respondent opposed the application and sought a *de bonis propriis* costs order against Mr Seloane on the basis that the application is vexatious and a dilatory abuse of process. It was argued that the applicant was not prejudiced by the costs orders granted and the application was initiated by Mr Seloane to serve his own interests. It was argued that, despite being afforded an opportunity to make representations on why he should not be directed to pay the costs on a *de bonis propriis* basis, Mr Seloane failed to put forward any basis to avoid such costs order and that the costs orders granted were justified.

[8] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote². An applicant for leave to appeal faces a higher threshold³ than under the repealed Supreme

¹ 10 of 2013

² Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) para [10]

³ S v Notshokovu Unreported SCA case no 157/15 dated 7 September 2016, para [2]

Court Act.⁴ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁵. A reasonable prospect of success requires that:

*“The appellant must convince a court on proper grounds that that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”*⁶

[9] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties’ extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in the heads of argument of the parties and the authorities referred to.

[10] My judgment is comprehensive and I stand by the reasons set out therein.

[11] It is trite that an appeal lies against a judgment and not against the reasons for the judgment or the expression of an opinion⁷. The findings which the applicant contends were erroneous, primarily underpin the order dismissing the contempt application, an order which is not being appealed against.

[12] It was contended I erred in finding that the applicant launched a further contempt application, rather than seeking to supplement the first contempt application, which had been struck from the urgent court’s roll by Motha J for lack of urgency.

[13] Even if that proposition were to have been accepted, that does not avail the applicant. At the time the 20 July 2023 application was launched and again enrolled for

⁴ 59 of 1959

⁵ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

⁶ S v Smith 2012 (1) SACR 567 (SCA) para [7]

⁷ Pretoria Garrison Institutes v Danish Variety Products(Pty) Ltd 1949 (1) SA 839 (A) at 864; Western Johannesburg Rent Borad v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355; Manana v King Sabata Dalinyebo Municipality [2011] 3 All SA 140 (SCA) par [3]; Tecmed Africa (Pty) Ltd v Minister of Health and Another [2012] 4 All SA 149 (SCA) par [17]

hearing on 8 August 2023, the first contempt application remained pending and was due to be determined in due course, together with the respondent's counter applications for a stay and rescission of the *ex parte* order granted by Shepstone AJ. The argument that Mr Seloane held the genuine view that the application was urgent for which he may not be punished, given the cautions by Opperman J on 1 August 2023, lacks merit.

[14] It is trite that the award of costs is a discretionary matter and an appellate court will only interfere with the exercise of a true discretion, such as costs orders, in circumscribed circumstances⁸. The circumstances in which such interference will be justified are cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably could have made the order in question⁹. The principles applicable to the granting of a *de bonis propriis* costs order are trite¹⁰.

[15] In sum, the circumstances of this matter are exceptional and the conduct of Mr Seloane was egregious. Given the totality of that conduct referred to in my judgment, exacerbated by the failure to effect proper service of the reenrollment of the application for 8 August 2023 on the respondent, his conduct deviated substantially and materially from the standard expected of a legal practitioner. Such conduct falls within the ambit of the relevant principles already referred to and justified the granting of the punitive costs orders against him.

[16] In applying the relevant principles to the grounds for leave to appeal when measured against the facts, I conclude that the appeal would not have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act. The applicant did not rely

⁸ Public Protector v Commissioner for the South African Revenue Service and Others [2020] ZACC 28 paras [31]-[33]; Biowatch Trust v Registrar Genetic Resources & Others 2009 (6) SA 232 (CC) paras [29]-[30] with reference to the principle in Attorney- General, Eastern Cape v Blom & Others 1988 (4) SA 645 A at 670D-F

⁹ Biowatch Trust v Registrar Genetic Resources & Others 2009 (6) SA 232 (CC) paras [29]-[30] with reference to the principle in Attorney- General, Eastern Cape v Blom & Others 1988 (4) SA 645 A at 670D-F

¹⁰ SA Liquor Traders Association and others v Chairperson, Gauteng Liquor Board and Others 2009 (1) SA 565 (CC) para [54]; Adendorffs Boerderye v Shabalala & Others (997/15) [2017] ZASCA 37 (29 March 2017) para [45]-[46]

on any compelling reasons as envisaged in s 17(1)(a)(ii) of the Act. It follows that the application must fail. There is no basis to deviate from the normal principle that costs follow the result.

[17] The respondent sought a costs order against the applicant's attorney, Mr Seloane on a *de bonis propriis* basis. Mr Dlamini, who appeared for the applicant, however assured me that it was the applicant who was unhappy with the order and that the application was launched at her instance. In those circumstances, I am not persuaded that a *de bonis propriis* costs order is warranted.

[18] I grant the following order:

The application for leave to appeal is dismissed with costs.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 26 January 2024
DATE OF JUDGMENT	: 31 January 2024
APPLICANT'S COUNSEL	: Adv S Dlamini
APPLICANT'S ATTORNEYS	: Seloane Vincent Attorneys
RESPONDENT'S COUNSEL	: Adv S Lindazwe
RESPONDENT'S ATTORNEYS	: Joubert Scholtz Inc