REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 79398/2018

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

Date: 21 December 2020

In the matter between:

SIMON PIERRE TSHIMPAKA MUKANDA APPLICANT

and

SOUTH AFRICAN LEGAL PRACTICE COUNCIL FIRST RESPONDENT

THE PRETORIA SOCIETY OF ADVOCATES INTERVENING PARTY

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for leave to appeal against the costs order made when the applicant's application to be admitted as a legal practitioner and enrolled as an advocate of the High Court was dismissed by this court. The respondents oppose the application. The facts and history of the matter are extensively set out in the judgment dated 9 November 2020 and need not be repeated herein.

Issues to be determined

[2] The appeal raises the questions as to whether the fact that the order on the merits is not the subject of the appeal precludes the adjudication of an application for leave to appeal in relation to the costs order; and if not, what criteria should be used in determining whether to grant the application for leave to appeal.

[3] Section 16(2)(a)(i) of the Superior Courts Act, 10 of 2013 ('the Act') determines that an appeal may be dismissed, if, at the hearing of the appeal the issues are of such a nature that the decision sought will have no practical effect or result. Section 16(2)(a)(ii) prescribes that, save under exceptional circumstances, the question as to whether the decision would have any practical effect or result is to be determined without reference to any consideration as to costs. The Constitutional Court confirmed in *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC) ('*Teibelia*') at par [13] that 'few appellate courts countenance appeals on costs alone' and that the practical impact of s 16(2)(a) of the Act is that 'appeals on costs alone are allowed very rarely indeed.' – see also *Justice Alliance of South Africa v Minister for Safety and Security and Others* 2013 (7) BCLR 785 (CC).

[4] Section 17(1)(b) of the Act, however, determines that leave to appeal may only be granted where the Judge or judges concerned are of the opinion that the decision sought on appeal does not fall within the ambit of s 16(2)(a) of the Act. Therefore, the first issue to be determined in this application is whether this court is empowered to grant leave to appeal at all, in light of s 17(1)(b). In *Teibelia (supra*), the Constitutional Court grappled with the question as to whether it should deal with a direct appeal against a costs order, or send the applicant back to the High

Court in order to seek its leave to appeal the costs order. The court stated in par [14]:

> 'But, as shown above, that course may fail on the very point that appeals against costs orders alone are not countenanced.'

[5] Section 16(2)(a) of the Act corresponds with the amended section 21A of the Supreme Court Act 59 of 1959, the Superior Courts Act's predecessor. In the result the court should be guided by the principles set out in case law dealing with the pertinent issue even if the case law precedes the Act.

[6] in *Logistic Technologies (Pty) Ltd v Coetzee and Others* [1998] JOL 1854 (W), Cloete J gave an overview of the development of the position relating to appeals sought against costs orders only. He referred to *Delmas Koöperasie Bpk v Koen* 1952 (1) SA 509 (T) at 510E-F and stated that the legislature wanted to discourage appeals brought against costs orders alone without the judgment on the merits being attacked. He found that the result of the amendment of s 21A was that unless an applicant for leave to appeal against a costs order only can satisfy the court *a quo*, that an appeal court may reasonably find that exceptional circumstances exist, leave to appeal should be refused. The Appellate Division's approach in *Cronjé v Pelser* 1967 (2) SA 589 (A) at 592H-593A remained relevant in that a failure to exercise a judicial discretion would constitute exceptional circumstances, however, the mere fact that an appeal court might or even would give a different order, would not.

[7] The Supreme Court of Appeal ('the SCA') held in *Khumalo v Twin City Developers* (328/2017) [2017] ZASCA 143 (2 October 2017) in par [14], that the fact that an order in respect of the merits is not being attacked, does not preclude a court from considering an appeal directed only at costs. Section 16(2)(a) of the Superior Courts Act grants the court of appeal a discretion to decide whether there are exceptional circumstances that warrant the hearing of such an appeal.

[8] More recently, the SCA held in *Jacob G Zuma v The Office of the Public Protector and Others* (1447/18) [2020] ZASCA 138 (30 October 2020) that in granting a costs order, a lower court exercises a true discretion, which involves a choice between a number of equally permissible options - 'Interference is only warranted where the discretion was not exercised judicially'.

[9] In light of sections 16(2), 17(1)(a) and 17(1)(b) of the Act and the case-law referred to hereinbefore, it can thus be stated that a court will not grant an application for leave to appeal against a costs order only, unless the applicant can satisfy the court that an appeal court would reasonably find that exceptional circumstances exist that warrant such leave. In the absence of exceptional circumstances, the appeal would not have any reasonable prospect of success, and the application for leave to appeal will consequently have to be dismissed.

[10] In the current matter, the applicant has advanced no basis whatsoever to persuade us that an appeal court would find that exceptional circumstances are present, either because we did not exercise our discretion judicially or for any other reason. In particular, the applicant's submission that this court erred in granting a costs order against him when he was exercising his constitutional right to choose his profession is without merit. That was not the issue before us, nor is it a relevant consideration. The central issue at stake in the admission application is not a genuine and substantive constitutional issue. It is not the applicant's right to choose his occupation which was at issue in the admission application, but the question as to whether he met the statutory requirements to be admitted as a legal practitioner and enrolled as an advocate of the High Court.

[11] The applicant's contention that the issues that led to the dismissal of his application were novel, and that he should not have to bear any costs even if the application was dismissed, likewise, has no merit. The application was instituted before the Legal Practice Act, 28 of 2014 ('the LPA') commenced. The principle that an application cannot be governed by legislation that commences after it is initiated unless the legislation applies retroactively is not novel or unique. In any event, the SCA confirmed in *The South African Legal Practice Council v Alves and Others* (Case no 1255/2019) [2020] ZASCA 170 (14 December 2020) that s 115

of the LPA preserves the right of any person who qualified for admission as, *inter alia,* an advocate prior to the commencement of the Act to be so admitted thereafter. The applicant did not meet the admission criteria of the LPA, or its predecessor, the Admission of Advocates Act, 74 of 1964, and he does not qualify to be admitted.

[12] As far as an appropriate order as to costs in the application for leave to appeal is concerned, the applicant seeks an order to the effect that each party pays its own costs. The intervening party argued that an order that the applicant pays costs on a scale as between attorney and client is appropriate, not because the proceedings are vexatious but because they have the effect of being vexatious. The intervening party relied on Gardiner JP's view in *In re Alluvial Creek Ltd* 1929 CPD 532 at 535 referred to in *De Winter-De Lange v Moonsamy and Another* (7634/2003) [2004] ZAWCHC 22 (1 October 2004) where the court held:

> 'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious.'

[13] In considering an appropriate order as to costs, a court must exercise its discretion judicially to bring about a fair result. Punitive costs serve as a mark of a court's displeasure with one or more facets of the unsuccessful litigant's conduct. In *Geerdts v Multichoice Africa (Pty) Ltd* (JA88/97) [1998] ZALAC 10 (29 June 1998) at par [48], Myburgh JP held that:

> 'Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs'.

The SCA held in *Du Toit NO v Thomas NO and Others* (635/15) [2016] ZASCA 94 (1 June 2016) that a punitive costs order is also justified where an applicant

displayed an 'unconscionable stance'. I am not convinced that the applicant instituted the application for leave to appeal merely to annoy the defendant, or that the application for leave to appeal is a deliberate abuse of process. A court must be mindful not to curtail access to justice. My view is that whilst the applicant was misguided in launching this application, that in itself does not suffice to mulct him with a punitive costs order. In the circumstances, a punitive costs order will not be appropriate. However, I am of the view that it will likewise not be appropriate or fair towards the respondents if it is ordered that each party must carry its own costs. I can find no reason why the general principle that costs follow the event, should not apply.

ORDER

In the result, I propose that the following order be made:

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

E van der Schyff

Judge of the High Court

I agree, and it is so ordered.

D MLAMBO

Judge President of the High Court, Gauteng Division

Delivered: This judgement was prepared and authored by the Judges whose names are 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 21 December 2020.

The applicant:	In person
For the first respondent:	L Groome
Instructed by:	ROODT &WESSELS INC
Counsel for the intervening party:	Adv C A C Korf
Instructed by:	BERNHARD VAN DER HOVEN ATTORNEYS
Date heard:	10 December 2020
Date of judgment:	21 December 2020