FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO : 015/2004

PARTIES: ROGER HARRIS APPLICANT

AND

WHEELDON RUSHMERE AND COLE RESPONDENT

REFERENCE NUMBERS -

- Registrar: 463/99

DATE HEARD: 18 MARCH 2003

DATE DELIVERED: 12 JUNE 2003

JUDGE(S): Erasmus J

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): Applicant himself
- for the Accused/Defendant(s)/Respondent(s): SH Cole

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): Netteltons
- Defendant(s)/Respondent(s): Whitesides

CASE INFORMATION -

- *Nature of proceedings* : Application for leave to appeal
- *Topic*: Review of taxation
- Keywords: Costs. Judgment on review of taxation – appealability – analogous to appeal against costs' order – section 21A of Act 59 of 1959 – no practical effect or result – ulterior motive reason for refusal of leave

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: 376/98

REVIEW CASE NO: 463/99

In the application of:

ROGER GEORGE HARRIS **Applicant**

and

WHEELDON RUSHMERE & COLE **Respondent**

In the case of:

ROGER GEORGE HARRIS **Plaintiff**

vs

ELIZABETH WILD (RAIDL) **Defendant**

in re: REVIEW OF TAXATION

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

ERASMUS J:

INTRODUCTION

[1] The applicant would appeal to the Full Bench of this Division against the judgment delivered by a Judge in Chambers upon a review of taxation of a bill of costs; to which end he now seeks the leave of the Court.

[2] The standard test in such matters, is whether there are reasonable prospects of success on appeal. Appeal prospects involve the merits of the appeal as circumscribed by the question whether the court erred in its judgment or decision. Further considerations arise in appeals involving only costs' orders.

[3] I shall assume that a decision in terms of rule 48 by a Judge (as opposed to a Court) is appealable in terms of s 20(1) of the Supreme Court Act No. 59 of 1959. I am referred to no authority regarding the principles applicable to such appeals; nor could I find any. Clearly though, guidance can be derived from the principles that apply where, following action proceedings, leave is sought to appeal on a question of costs only. In such matters, the courts in general do not grant leave unless the amount in issue is substantial, **and** some principle is involved (*Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed. 887*). In *Michaels vs Welsh N.O 1967(1) SA 46 (C) 52A*-E, it was stated that in such cases 'special circumstances' must be present before leave to appeal will be granted. The question was considered by King AJ (as he then was) in *Tsosane and others vs Minister of Prisons and others*, *1982(3) SA 1075(C)*, *1076e- 1077b.* The

learned Judge referred to the then relevant provisions of the Supreme Court Act and found that it was clear that the legislature wished to discourage such appeals. He then stated (I leave out the references):

> ***'(i) Such leave is not lightly given, the Court's disinclination derives not only from the attitude of the legislature as expressed in the aforesaid section, but also from the fact that costs are ordinarily a matter of judicial discretion and also because it is desirable, in the interests of the parties and also in the overall interest of the administration of justice, that where the merits of a matter have been determined, finality should generally be regarded as having been reached. (No doubt these factors also motivated the legislature.)***
>
> ***(ii) Thus the Court will not ordinarily grant leave to appeal in respect of what has become a dead issue merely for the purpose of determining the appropriate order as to costs.***
>
> ***(iii) The Court will, however, more readily grant leave where a matter of principle is involved.***
>
> ***(iv) The amount of costs involved should not be insubstantial, lest the matter be regarded as altogether too trivial to engage the further attention of the Court.***
>
> ***(v) The applicant for leave to appeal should have a reasonable prospect of success on appeal in the sense that his case should be fairly arguable.'***

[4] The case was decided on the since substituted provisions of s 20(2)(b) of the Act. The comments of the learned Judge however come into point in virtue of the relatively recent substitution effected in s 21A. The relevant provisions thereof now provide:

> ***'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'***

and

> ***'(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'***

The legislature, with these provisions, unambiguously discourages appeals against costs' orders only.

[5] Clearly, general principles and statutory provisions dictate that in order to succeed in an application such as the present, the applicant needs to show the existence of exceptional circumstances.

[6] Such circumstances, if they exist, are not viewed in isolation, but in the full context of all of the facts and attendant circumstances that underlie the decision whether leave to appeal shall be granted. This exercise requires that the Court shall have regard to all relevant circumstances, exceptional or otherwise, that operate both for and against the granting of leave to appeal. In the present matter, this requires that the Court consider not only the objective merits of the appeal prospects, but also the subjective motivation of the applicant as reflected in his actions in the review proceedings as well as

his conduct in the presentation of the leave application. I deal first with the latter aspect.

APPLICANT'S REASONS FOR AND OBJECTIVES IN PROSECUTING AN APPEAL

[7] The respondent firm of attorneys acted for the applicant in a civil action. Mr. B.B. Brody was the partner that dealt with the matter. The case was settled on the fourth day of trial, substantially in favour of the applicant. Brody thereafter presented his bill as between attorney and client. The bill was drawn by a legal costs' consultant, Mr. Bowles. The document comprises 44 pages with 339 items. The fees amounted to R47 055.00 and disbursements to R70 928.00.

[8] The taxation thereof, so I gather, gave rise to considerable dispute. In the end, the taxing master taxed off R9 243.00 in fees and R63 594.00 in disbursements. Applicant, having been unsuccessful in his objections on a number of items, instituted a review of the taxation. He acted with vigour and tenacity. In the notice of review, objection was raised to no fewer than 44 items. Applicant's contentions together with annexures ran to 31 pages. His further contentions comprised 3 closely-typed pages. His reply to the attorneys' contentions was 5 closely-typed pages, with annexures of 16 pages. He subsequently filed a further 3 pages of contentions, with

annexures of 76 pages. He responded to the taxing master's supplementary stated case with yet further contentions of 3 pages, with still further documents attached. In the first decision on review (42 pages), the Judge called for further information from the taxing master in respect of certain items. Applicant responded to the taxing master's further report with a reply of 16 pages, to which he attached 69 pages of annexures. The Judge prepared a second and final decision (13 pages).

[9] The Judge disallowed certain items, and reduced the amounts allowed on taxation in a number of instances:

ITEM NUMBER	AMOUNT
1	R 50.00
2	90.00
201	620.00
202	32.00
203	4 820.00
297	2 000.00
TOTAL	**R7 612.00**

In the notice of appeal, the applicant indicates that should leave be granted, the following items will be taken on appeal:

1 –7, 12, 13, 31 – 42, 47 –49, 55, 56, 65, 59 – 62, 67 – 69, 102 –107, 111, 112, 127, 130, 135, 149, 183, 184, 204, 243, 244, 248, 297, 298, 299, 314 and 316. These items amount in total to R19 785.80, but applicant would contest only some portion thereof on appeal.

[10] Applicant's various contentions were prolix and repetitious. At the same time, he continuously introduced new matter in argument. Every possible aspect was visited and revisited, to the point of exhaustion and confusion. At the hearing of the application, he stated that his wife had spent many hours on the matter. This is reflected in the voluminous documentation.

[11] The applicant's written contentions contain allegations of misconduct on the part of Brody and Bowles. He called into question also the impartiality and integrity of the taxing master, Mr. Kroqwana.

[12] The applicant appeared in person at the application. His address lasted 4 hours. He repeatedly accused Brody and Bowles of misconduct, and Kroqwana of misdirection and bias. His parting shot was that Kroqwana had five weeks after the taxation joined the respondent firm of attorneys. The scurrilous implication of this 'comment' was all too clear.

[13] It became increasingly apparent that the applicant is using these proceedings as a platform from which to enveigh against Brody, and to a lesser extent Bowles and Kroqwana. The true objective of the appeal is clearly not to gain further reduction in the bill of costs, but rather to obtain public censure of Brody. That this is the case, was clearly illustrated by an exchange that occurred during the hearing of the application. While the

applicant was addressing the Court at some length on a particular item where he alleged that Brody had acted dishonestly, it was pointed out to him that he had been successful on review on that item. His response was that he was not happy with the basis upon which the Judge had ruled in his favour. Apparently, what he wanted was criticism of Brody rather than success on review. Applicant's attitude was further made clear when he intimated that money is not the object of the appeal, but rather principle (as he sees it). In his leave to appeal notice, he declares:

> ***'The applicant does not make this leave to appeal on the trumpery point of costs alone, neither is his cause frivilous*** *(sic)* ***or vexatious.***
>
> ***Indeed I submit that applicant's leave to appeal is based on a commitment to principles and on the contention that this is an important case that should be heard on Appeal. It is thus his contention that an Appeal of this judgment can never constitute prejudice to anyone who practices*** *(sic)* ***Law and this must include both respondents. In contrast I submit that the present Judgment prejudices the applicant and places his integrity in question, which could have far reaching consequences on Applicant's ability to have his word accepted as truth in any future matter. In the premises I submit that an appeal is essential in order to "clear an imputation of dishonesty". '***

[14] The desire to expose misconduct of officers of the Court, is undoubtedly laudable. The pursuit of that purpose is however out of place in a review of taxation; the use of appeal proceedings to such end could amount to abuse of the court process. Ordinarily, the motives of a litigant in taking or opposing legal action is irrelevant. However, "(w)hen …the Court finds an

attempt made to use for alternative purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse further. But it is a power which has to be exercised with great caution, and only in a clear case." *(per* De Villiers JA *in Hudson vs Hudson and another 1927 AD 268).* An ulterior motive can stigmatise legal proceedings as vexatious in the sense understood in law. There are two ways at least in which an action may be summarily dismissed for being vexatious: in accordance with the provisions of the Vexatious Proceedings Act 1956, and under the Courts' inherent jurisdiction (*Herbstein and Van Winsen op cit 546-7*. The refusal of an application for leave to appeal is however very different from summary dismissal of an action. Quite different considerations apply.

[15] Within the narrow ambit of an application for leave to appeal against a decision in a review of taxation, the fact that the applicant has an ulterior motive is to my mind a relevant consideration. The Court must consider whether there are real prospects that the higher Court will, in view of the provisions of s 21A(1) and (3), *supra*, decline to entertain the appeal. It follows that this Court is required to have regard to applicant's motivation as a factor militating against the granting of his application for leave to appeal. This consideration is however not in itself decisive.

THE OBJECTIVE MERITS OF THE APPEAL

[16] The grounds of appeal relied upon by the applicant are that the Judge erred in a number of respects: *viz* in failing to avail himself of certain options; in failing to have regard to the contents of the entire bill of costs from which it appeared that the attorneys were guilty of overreaching; in failing to take into account the fact that the taxing master had wrongfully allowed the costs' consultant to be present at the taxation; in accepting that the taxing master was entitled to act on the say-so of the respondent and/or his costs' consultant; in failing to interfere with the taxing master's discretion in making findings against the applicant; in failing to have any or proper regard to applicant's evidence and contentions; in making wrong findings of fact; in failing to make findings of fact in respect of item 297 where the credibility of the parties could have been tested (the Judge had disallowed this item); by failing to make findings on the balance of probability contained in the submissions and evidence placed before him; by arrogating powers to himself which he does not have in terms of rule 6(a); in holding that the respondent was entitled to charge fees in respect of the attorneys' own oversight; in denying the applicant his right to equality before the law and by not giving due regard to the spirit, purport and objects of the Constitution of the Republic of South Africa in interpreting, applying and developing the common law; in failing to deal with item 204; in failing to make a costs' award in favour of applicant. (The list is not exhaustive.)

[17] Those grounds advanced by applicant that purport to involve legal

principle, such as the reference to rule 6(a) and the Constitution, are patently spurious and without foundation. As for the grounds relating to factual aspects: despite their number and range, the applicant raises very little that was not fully canvassed on review, and considered by the Judge in his decisions. In my view, none of these grounds has any real merit.

[18] A further ground of appeal is that the Judge displayed bias in favour of the respondent. I doubt whether such averment can form the basis of an appeal in a civil matter. Be that as it may, the applicant establishes no basis for his accusation.

CONCLUSION

[19] I am unpersuaded that a court of appeal will come to a different finding on the merits. But even if I err in that regard, the applicant has in this appeal, involving costs only, failed to make out special circumstances for the granting of leave to appeal; there are, on the contrary, circumstances present that operate against the applicant.

[20] In the result, the application is dismissed with costs.

A.R. ERASMUS
JUDGE OF THE HIGH COURT