IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **2551/2022**

In the matter between:

HLONELWA NKOMO Applicant

and

CENTLEC (SOC) LIMITED Respondent

JUDGMENT BY: C REINDERS, ADJP

RESERVED ON: 9 SEPTEMBER 2022

DELIVERED ON: 11 OCTOBER 2022

This judgment was handed electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 15:45 on 11 October 2022.

APPLICATION FOR LEAVE TO APPEAL

---

[1] On 2 June 2022 the applicant, Ms Hlonelwa Nkomo, issued an urgent application under case number 2551/2022 praying for an order that a Settlement Agreement (signed on 18 October 2022 – the "Settlement Agreement") between herself and the respondent, Centlec (SOC) Limited, be set aside and/or declared null and void. For ease of clarity I will refer to the parties as "Ms Nkomo" and "Centlec".

[2] The application was set down on extremely truncated time periods for 10 June 2022. Ms Nkomo appeared in person and Centlec was represented by Adv LT Sibeko SC. Having heard arguments by the parties, I declined to take the matter on my court role as Ms Nkomo had not made out a case for condonation in terms of Uniform Rule of Court 6(12). I must state at this stage already that the papers were not only neatly drafted, but it was evident that the draftsperson of the papers clearly had the required knowledge of legal proceedings.

[3] As Ms Nkomo appeared in person I deemed it apposite to explained the legal requirements for urgency to her, indicating a lack... any of the required averments (with reference to the facts of the matter) in her founding (and even replying) affidavit. In fact, it was pointed out to her (as was evident from her affidavits) that on her own version, she had known since February 2022 that she was dissatisfied with the Settlement Agreement, yet did not approach this court until five months later. The Settlement Agreement was concluded pursuant to Ms Nkomo's initial appointment (and subsequent suspension) as the Chief Financial Officer of Centlec.

[4] Mr Sibeko SC, apart from opposing the application on urgency, argued that the application was vexatious and an abuse of court process as it was in fact the subject matter of an application (in respect of the very same Settlement Agreement and on the same facts) brought by Centlec against Ms Nkomo under case number 724/2022 which was pending before my sister Daniso J. The urgent application was issued on the exact day that Daniso J had reserved judgment. Having heard the submissions of Mr Sibeko SC, and once again requesting Ms Nkomo to indicate her response to the issues raised by Mr

Sibeko SC, I made the order that the application be struck from the roll with costs due to a lack of urgency.

[5] According to the official stamp of the Registrar, Ms Nkomo on 20 July 2022 filed an application for leave to appeal my order as follows:

> **"TAKE NOTICE THAT** the Applicant intends to appeal against **part of** (own emphasis) the judgment handed down on 10 June 2022 in the above Honourable Court on a date to be arranged with the Registrar.
>
> The grounds of appear (*sic*) are set out hereunder.
> **The learned judge erred in**
> 1. **Striking the matter from the roll with costs against the Applicant with no counsel and was representing themselves in favour of the Respondent with legal counsel which included two senior advocates and a junior advocate."** (own emphasis)

[6] The parties filed their heads of argument on 2 and 7 September 2022 respectively (with leave to the applicant to reply to Centlec's heads of argument on 9 September 2022) for adjudication of the application in chambers in terms of the Free State Rule 16.5 as a cost saving measure to the parties. I am indebted to both parties for their comprehensive and able heads of argument. It needs mentioning that Ms Nkomo was provided with Centlec's heads of argument as is evident from tracing electronic communication (emails) indicating that Centlec's simultaneously with filing its heads of argument at court, furnished a copy thereof to Ms Nkomo electronically. For sake of completeness, an electronic copy of Centlec's heads of argument will be resend to Ms Nkomo.

[7] Ms Nkomo was required to apply for leave to appeal within 15 court days of the granting of the order, in terms of Rule 49(1)(b) of the Superior Court Rules. On a calculation the said days expired on 4 July 2022. The application was filed 11 court days late. Accordingly, Ms Nkomo's right to seek the required leave had lapsed, and a properly motivated application for condonation for the late filing should have accompanied the application before me. Same was not done. This

should be the end of the application for leave to appeal with an order that it be dismissed with costs. However, I deem it necessary to condone this non-compliance with the Rules and deal with the merits of the application for leave to appeal as Ms Nkomo, amongst others, submitted in para [11] of her heads that she *"approached the court exercising her constitutional right to access the court as stated under section 34 of the Bill of Rights"*. Moreover, as will be illustrated below Ms Nkomo deals with the truth rather economically, not only in her application for leave to appeal, but also in her heads of argument.

[8] Centlec, for sake of completeness, made submission on the application for leave to appeal against the whole of the order. However, Ms Nkomo in her heads of arguments in paragraph [6] states unequivocally that "…**This appeal is sole** *(sic)* **on cost granted against the applicant**." (own emphasis). I will accordingly deal with leave to appeal against the cost order only.

[9] It is trite that the legislative framework for considering an application for leave to appeal is set out in section 17 of the Superior Courts Act 10 of 2013 ("the Act") which provides:

> "17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> …" (own emphasis).

9.1 In considering an application for leave to appeal the test to be applied by a court was set out in ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*** *2014 JDR 2325 (LCC)*. Bertelsmann J held as follow in para [6]:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985

(2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." (own emphasis)

9.2 In respect of the granting of a cost order, it is trite that the default principle is that costs ordinarily follows the event. In ***Attorney-General, Eastern Cape v Blom and Others 1988(4) SA 645 (A)*** at 670D-F it was held:

> "In awarding costs the Court of first instance, exercises a judicial discretion and a Court of appeal will not readily interfere with the exercise of that discretion. The power to interfere on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a Court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order."

9.3 The Constitutional Court placed its stamp of approval on the aforementioned principal in holding that *"few appellate courts countenance appeals on costs alone and that the practical impact of section 16(2)(a) of the Superior Courts Act is that appeals on costs alone are allowed very rarely indeed*".

See: ***Mkhatshwa and Others v Mkhatshwa and Others*** 2021 (5) SA 447 (CC)

9.4 In considering whether an application for leave to appeal should be granted, the interest of justice should always be taken into account.

See: ***Philani-Ma-Afrika and others v Mailula and others*** 2010 (2) SA 573 (SCA) at para [20]

9.5 In order not to discourage litigants from vindicating their **constitutional rights**, the Constitutional Court in ***Biowatch Trust v Registrar, Genetic Resources and Others*** *2009 (6) SA 232 (CC)* enunciated the principle of permitting an unsuccessful litigant to be exempted from paying costs as unsuccessful litigant

(the "Biowatch-principle"). It was held that the issues in the matter must however genuinely and substantively be of a constitutional nature (at para [25]).

[10] Ms Nkomo challenges the costs order on the grounds that she represented herself whilst the Respondent "engaged the services of two senior counsel and one junior counsel", and furthermore places reliance on the Biowatch-principle.

[11] In Centlec's heads of argument it was, correctly so, stressed by Centlec that the court record would bear out that the Respondent was represented by one senior counsel only, not a total of three counsel. Centlec submits that these incorrect facts (as even placed on record in Ms Nkomo's application for leave to appeal) is an attempt to deliberately mislead this court. Relying on section 16(2)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Act"), it was submitted that save for the aforementioned alleged deliberate attempt of deception, the application for leave to appeal does not disclose any exceptional circumstances to justify the reconsideration of the award of costs by another court as envisaged in 16(2)(a) of the Act. I am in agreement with these submissions.

[12] Centlec submitted that the relief claimed by Ms Nkomo was not premised on the enforcement of constitutional rights as Ms Nkomo sought to challenge the Settlement Agreement based on an alleged lack of authority. Indeed, reliance on the Biowatch-principle is misplaced. Ms Nkomo exercised her right to approach this court by bringing an urgent application. In doing so Centlec was forced to oppose the application on truncated time periods.

[13] In her heads of argument Ms Nkomo made the following averments:

> "13. Judge Reidners (*sic)* did not review the merits and/or grounds of the above mentioned application...
>
> 14. Judge Reidners (*sic)* did not give a full judgment with reasoning behind the lack of urgency, the Judge just provided a court order. Therefore, the *(sic)* was no transcript to be obtained."

The content of para [13] hereinabove indicate the factual position and I need not say more in this regard.

[14] Centlec submitted that it would not be in the interest of justice "to permit or encourage an applicant in the position of Nkomo to continue their current path of misguided litigation, which was nothing more than an abusive imposition on the Court's resources and the rights of the respondent". Moreover, it was stressed by Centlec that, despite the fact that Ms Nkomo was not legally represented, Centlec is a public entity funded by public funds to perform functions for the public benefit. In any event, Centlec would not be able to recover the costs of opposing an application that did not only lack grounds for urgency, but was also vexatious and an abuse of the Court process given the fact that this court had reserved judgment under case number 724/2022 on the same issues raised by Ms Nkomo in the dismissed urgent application.

[15] On 29 August 2022 Daniso J upheld the validity of the Settlement Agreement as prayed for by Centlec in case number 724/2022. Centlec in its heads of argument indicate that this confirms the vexatious nature of the urgent application.

[16] I have duly considered the facts of this matter, the applicable case law governing applications for leave to appeal against cost orders, heads of argument filed by the applicant and the respondent and all papers filed. Having done so I am not of the view that there are any prospects of success that another court would come to a different conclusion in respect of the order of costs that I have granted, nor that there are compelling reasons for me to grant leave to the applicant.

[17] In my view there is no reason why Ms Nkomo should not be ordered to pay the costs that Centlec had incurred in the drafting of its heads of argument in this application for leave to appeal. Centlec, as a public entity, was forced to oppose the relief claimed and the public should not, given the facts of the urgent application and this application for leave to appeal, have to indirectly pay the costs of an applicant who abuses the process of court.

[8] Accordingly I make the following order:

The application for leave to appeal against the cost order granted on 10 June 2022 is dismissed with costs.

C. REINDERS, ADJP

Heads of Argument filed
on behalf of the applicant: Ms H Nkomo (Applicant)

Heads of Argument filed
on behalf of the respondent: Adv. N Moloto
Instructed by:
Tshangana & Associates Inc.
Bloemfontein