IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 3489/2016

In the matter between:-

THE KWAZULU-NATAL LAW SOCIETY	Applicant
and	
MRS SIMRITHI SHARMA	First Respondent
THE STANDANRD BANK OF SOUTH AFRICA	Second Respondent

JUDGMENT

VAN ZÿL, J:- (MADONDO, DJP and OLSEN, J concurring)

[1] The applicant law society sought by way of application proceedings to have the name of the first respondent struck from the roll of attorneys. The second respondent, although initially cited, was not served with the application papers and took no part in the matter. For convenience the first respondent is therefore herein referred to simply as 'the respondent'.

[2] In a written judgment the respondent was held to have acted dishonourably but, whilst deserving of censure, her conduct was held not to have rendered her unfit to continue in practice. The application to strike her name from the roll of attorneys

was accordingly refused, but she was nevertheless sentenced to pay a fine of R20 000-00, conditionally suspended for three (3) years. The court made no order as to costs.

[3] The applicant delivered a substantive application for leave to appeal, but only 'in respect of the costs Order…'. The application was opposed by the respondent and it was then enrolled for argument. Counsel for the respondent, without having had sight of the applicant's heads of argument, delivered their written heads of argument on 22 March 2017.

[4] During the course of the same day Counsel for the applicant, whom I hasten to add had not appeared in the main application before us, also delivered written argument in anticipation of the hearing of the application for leave to appeal. The opening paragraph thereof read as follows:-

> 'At the hearing of this matter the applicant will seek leave to amend its notice of application for leave to appeal to seek leave to appeal also in respect of the sanction imposed by this Court in its judgment delivered on 14 February 2017.'

[5] In the result counsel for the respondent delivered additional written argument dated 23 March 2017 in order to deal pertinently with the belated attempt to broaden the appeal. In this regard counsel firstly drew attention to the provisions of Rule 49(1)(b) of the Uniform Rules of Court which provide for an application for leave to appeal to be made within fifteen (15) days and pointed out that whilst the application for leave to appeal against the costs order had been lodged on the last day permitted

therefor, leave to appeal against the sanction imposed upon the respondent and as contained in counsel's heads of argument, was well out of time.

[6] In developing their argument counsel for the respondent submitted that the applicant, by giving notice of intention to seek leave to appeal against the costs order only, had thereby made a conscious election to abide by the remainder of the judgment, including the sanction imposed. Accordingly and relying upon *Natal Rugby Union v Gould 1999 (1) SA 432 (SCA)* counsel submitted that the applicant was precluded, by virtue of the doctrine of peremption, from bringing a late application for leave to appeal against the sanction imposed. In *Gould* (supra) at page 443G the Court cited as authority the decision of *Dabner v South African Railways and Harbours* 1920 AD 583 where at page 594 Innes CJ held that –

> 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

[7] The difficulty I have with the application of the doctrine of peremption is that it was raised by the respondent in the written argument delivered by her counsel shortly before the hearing of this matter, so that the applicant has not had an opportunity of dealing with the factual situation underlying the attempted application of the doctrine. The fault in this regad of course lies with the applicant, not the respondent. If a proper application to amend the application for leave to appeal, or

for condonation of the late attempt to seek leave to appeal on the merits of the case, had been made, the issue of peremption would inevitably have been aired. (Counsel for the applicant did not ask for a postponement in order to deliver such an application.) The difficulty is exacerbated also by the doubt surrounding the circumstances and extent of the applicant's authority relating to the application for leave to appeal itself. This topic is addressed more fully later in this judgment and relevant to the issue of the costs of the application for leave to appeal. For present purposes it is sufficient merely to state that I prefer in the circumstances not to base the decision whether to grant or refuse the application to amend the notice of application for leave to appeal, upon the application of the doctrine of peremption.

[8] Secondly and in any event counsel for the respondent contended that it was impermissible for the applicant to informally bring a late application to amend its notice of leave to appeal to include leave also against the sanction without a substantive and timeous application for condonation. Counsel for the respondent submitted that in the circumstances she was unfairly hampered in opposing the application.

[9] In developing their argument in this regard counsel submitted that no explanation or justification for the applicant's belated change of mind had been provided and suggested that this was in fact brought about by the approach, dealt with extensively in the respondent's initial heads of argument, that leave to appeal the costs order only was impermissible. Counsel suggested that the belated attempt at appealing the sanction was in reality an attempt to bolster the application for leave

to appeal an otherwise unappealable costs order. Counsel also expressed doubt whether, in the circumstances, the applicant's attorney even had proper authority from the applicant's Council additionally to seek leave to appeal against the sanction.

[10] Finally and in opposing any leave to appeal against the sanction counsel for the respondent submitted that the approach on the issue of sanction was inappropriate since the court of appeal would not readily interfere with the discretion of the court *a quo* in exercising discipline over an attorney, unless there were some irregularity in the exercise of the discretion. In this regard counsel relied upon the authority of *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at page 51F.

[11] In *Jasat* (supra) Scott, JA in para 10 dealt with the so-called three staged inquiry relevant to the conduct of an errand practitioner. The first related to the factual establishment, on a preponderance of probabilities, of the alleged misconduct. The second, relevant to whether the offending practitioner remained a fit and proper person to continue in practice, was held to amount to a value judgment involving the exercise of a discretion by the Court of first instance with which a Court of appeal had limited power to interfere. The third and final inquiry related to sanction and was whether, in all the circumstances, the practitioner should be removed from the roll, or suspended from practice. This was similarly held to be a matter for the discretion of the court of first instance.

[12] In the present matter the applicant belatedly seeks leave to appeal against the sanction, which relates to the third leg of the inquiry referred to above. Counsel for

the applicant informed the Court that it accepts the Court's determination with regard to the first and second inquiries, with the latter being that the respondent despite her misconduct remains a fit and proper person to continue in practice. Having at the outset contended for the name of the respondent to be struck from the roll of attorneys, it is unclear what sanction the applicant would seek upon appeal, if leave were to be granted to it. Counsel for the applicant faintly suggested the possibility of an increased fine.

[13] The test for condonation was formulated by Majiedt JA in *Meyer v The State (46/12) [2013] ZASCA 208 (28 November 2013)* at para 3, as follows:-

> 'The test for condonation entails, broadly speaking, an evaluation in the main of the degree of non-compliance and the explanation therefor as well as the prospects of success (See *S v Senkhane 2011 (2) SACR 493 (SCA) at paras 28 and 29*).'

[14] In the present instance and in the absence of a substantive application for condonation there is no explanation for the delay before us, nor are we able without a clear indication of what sanction the applicant would contend for, adequately to assess its prospects of success if condonation and leave were to be granted to it.

[15] In any event, no grounds have been identified upon which a Court of Appeal would be justified in interfering with the sanction, as imposed. In the course of his argument counsel for the applicant sought to infer that the misconduct of the respondent was more serious than she admitted to in her answering affidavit. The difficulty I have with this approach is that the respondent declared herself willing to

enter the witness box to be cross examined, but that offer was declined by counsel then appearing on behalf of the applicant.

[16] Having in its replying affidavit not disputed the version of events deposed to by the respondent, it is not now open to the applicant to suggest a different factual scenario. In *Botha v Law Society, Northern Provinces 2009 (1) SA 227 (SCA),* Cloete, JA explained in para 4 at 231D that-

> 'If the attorney is not cross-examined then, unless the allegations and denials made in the answering affidavit are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers, the case must be decided on the common cause facts and, where there is a conflict, on the attorney's version. Speculation as to what might really have happened is not permissible.'

[17] In my view the form of the application for leave to amend the application for leave to appeal, so as to include leave to appeal against the sanction imposed upon the respondent as well, was wrong. The application should have been brought upon adequate notice by way of a substantive application, including an application for condonation for the late noting of an application for leave to appeal against the sanction imposed. In its informal form, motivated from the Bar, the application does not establish good cause for condonation, either by way of explaining the initial default, nor on the merits and, in addition, prejudices the respondent by limiting her ability to meaningfully oppose the relief sought. The attitude expressed by the Court of Appeal with regard to submissions from the Bar in an attempt to justify additional grounds for an appeal in *South African Police Service Medical Scheme and Another*

v Lamana and Others 2011 (4) SA 456 (SCA) resonates with the present matter. In para 13 at page 460G the Court remarked that –

> 'It would be quite improper for this court to act upon information tendered informally from the bar, which should have been contained in an affidavit when leave to appeal was sought, which is still not in that form, and where the respondents have not had an opportunity of challenging it.'

[18] Broadly speaking and peremption excluded, I find myself in agreement with the grounds of opposition to the application for leave to include sanction and as formulated by counsel for the respondent. In the circumstances it follows that the application for leave to amend the notice of application for leave to appeal, so as to include leave to appeal the sanction, must fail and the only ground upon which leave to appeal is sought is therefore limited to the order in relation to costs, as contemplated in the applicant's original notice of application for leave to appeal dated 6 March 2017.

[19] With regard to the issue of costs counsel for the applicant submitted that it was compelled, as *custos morum* of the profession, to bring the application for the striking off of the respondent and to place the matter before the court for decision. It was not, so the submission ran, the task of the applicant to determine the appropriate sanction, but that of the court and that the applicant merely facilitated the matter being placed before the court for that purpose.

[20] It was further submitted that it was only the delivery of the respondent's answering affidavit which resulted in her "*coming clean*", to use the words employed by the deponent to the applicant's founding affidavit in the application for leave to appeal. Counsel for the respondent however pointed out that the new matter disclosed in the respondent's replying affidavit related to the personal domestic and marital pressures brought to bear upon on her at the time and that there was no material departure from the substance of her conduct, as placed before the disciplinary committee during the course of the inquiry. Had there been, then I would have expected that the applicant would have required the respondent to submit to cross examination thereon. That was not the case, as already discussed above.

[21] Counsel for the applicant further urged upon us that the decision to deprive the applicant of a costs order in its favour involved a matter of principle which required the attention of the court of appeal. Taken at face value the submission amounted to the proposition that in all matters involving dishonesty the applicant was obliged to place them before the court for decision and that the applicant, as *custos porum* was then entitled, as a matter of course, to a costs order in its favour. The principle involved was expressed in counsel's written argument, as follows:-

> 'The principle is namely whether or not a law society should ever run the risk of having to pay its own costs when it refers a dishonest practitioner to this Court for consideration.'

[22] No doubt in by far the majority of applications to strike the names of offending practitioners from the roll of attorneys the applicant law society, as *custos morum* of the attorneys' profession, would be awarded its costs. But I am not persuaded that

any principle, in the form as contended for by the applicant is correct, or has ever been recognised as such.

[23] In *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) in para 21 Cloete JA referred to the paucity of matters where the sanction imposed by the court *a quo* had been reduced on appeal from striking-off to one of suspension. Of the three matters identified, in two the relevant law societies were ordered to pay the appellants' costs (*Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 641H; *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at 623D) and in the third (*A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A), at 853A - F) no order as to costs was made. In *Botha* (supra) likewise no order as to costs was made.

[24] The circumstances in which a law society may be ordered to pay the costs of unsuccessful proceedings brought by it were considered in *Incorporated Law Society v Taute* 1931 TPD 12 and where Tindall, J (Solomon, J concurring) at page 17 formulated the correct approach, as follows-

> 'I think that the Court should now lay down that the mere failure of the Law Society to prove the charges made will not entitle the respondent to costs against the Society, that the liability of the Society for the respondent's costs in unsuccessful proceedings must depend upon the circumstances of each case and that the Society will not be ordered to pay such costs where there are no special circumstances calling for such an order, such, for example, as the failure of the Society to investigate the charge adequately before proceeding with it or the unreasonable pressing of a charge which is without foundation.

> Applying this test to the present proceedings, there is no doubt that the correct order is no order as to costs. The Society's conduct in the matter is not open to the least criticism.'

[25] With reference to the approach in *Taute* set out above, Cloete JA held in *Botha* (supra) in para 22 at page 237 E-F that where a law society failed to prove its charges against an attorney and the society's conduct is not open to criticism, then the correct order is to make no order as to costs. Where, however, a law society's conduct is open to criticism the principle, as formulated and contended for by counsel for the applicant in the present matter, is therefore clearly not supported. The correct principle is rather that the decision regarding costs in such circumstances would depend upon the particular facts of the matter, would fall within the discretion of the court of first instance and that a court on appeal would be reluctant to intervene in this regard, unless the lower court failed to exercise a judicial discretion.

[26] Counsel for the respondent submitted that the order sought to be appealed, namely that there would be no order as to costs, was in all the circumstances of the present matter not in law appealable at all. In this regard counsel drew attention to the provisions of section 16 (2) (a) of the Superior Courts Act, 10 of 2013, which it was submitted were similar to section 21A of the Supreme Court Act 59 of 1959 (as amended by sec 22 of Act 129 of 1993), to the effect that where the decision at the hearing of an appeal would have no practical effect or result, then the appeal may be dismissed upon that ground alone and that save under exceptional circumstances the determination of a practical effect or result should be determined without

reference to any consideration of costs. In this regard reliance was placed upon *Logistic Technologies (Pty) Ltd v Coetzee 1998 (3) SA 1071* where Cloete J (as he then was) dismissed an application for leave to appeal against costs and at 1074 I said that –

> '…, an investigation as to who ought to have succeeded on the merits is relevant only as to costs and it is precisely that sort of investigation which the Courts and the legislature have discouraged'.

[27] Counsel for the respondent submitted that in any event a court of appeal would only interfere with the discretion of the lower court regarding costs where the latter had failed to exercise a judicial discretion. It was submitted with reference to paragraphs 68 to 74 of the judgment sought to be appealed that this Court gave reasons for the exercise of its discretion in favour of making no order as to costs. Counsel further submitted that such exercise was not based upon any wrong principle and it followed that the Court exercised a judicial discretion in arriving at the disputed costs order with which interference upon appeal would not be justified. Reliance in this regard was placed upon *Logistic Technologies* (supra) at 1074 A-C. But see also *Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 (CC)* in para 23 at page 653 A-B.

[28] The requirements for leave to appeal are intended to protect the Court of appeal against the burden of having to deal with matters where there are no reasonable prospects of success and in addition to ensure that the rolls of the Court of Appeal are not clogged with meritless appeals. That much was stated by Cloete JA in *S v Maputle and Another* 2003 (2) SACR 15 (SCA) at paragraph 3 and

although this was a criminal matter, the principle likewise applies to a civil matters, such as the present.

[29] In terms of s17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the Court is of the opinion that the appeal would have a reasonable prospect of success, or failing that, where there is some other compelling reason justifying the matter receiving the attention of the Court of Appeal.

[30] In *S v Smith 2012 (1) SACR 567 (SCA)* the Court of appeal restated the test for reasonable prospects of success on appeal. That test remains valid also in terms of the new Act which has since come into operation. In regard to the applicable test the Court of Appeal in *Smith* (supra) in particular remarked at paragraph 7 that:

> "More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[31] In the light of the aforegoing I am of the view the application for leave to appeal against the costs order does not meet the threshold set for the grant of such relief. Again I find myself in broad agreement with the submissions made by counsel for the respondent and I consider the principle contended for by counsel for the appellant to be unsustainable. It follows that there are neither reasonable prospects of success on appeal, nor is there any other compelling reason justifying the matter receiving the attention of the Court of Appeal.

[32] In addressing the issue of the costs occasioned by the application for leave to appeal, including the abortive attempt at expanding the ambit of the application also to include the sanction imposed, counsel for the respondent submitted that the applicant's conduct in proceeding against the respondent was open to criticism. In this regard attention was drawn to the long period which had elapsed from the time the original complaint was made to the applicant and before the matter was eventually argued on the merits before this Court, the unsuccessful attempt at the outset to suspend the respondent from practice and for the appointment of a *curator bonis*, which were subsequently abandoned, resulting in unnecessary delay and costs being incurred, the fact that the applicant was substantially unsuccessful in its attempt to have the respondent's name struck from the roll of attorneys and the criticism adverse to the applicant, as expressed in the judgment of the Court when it determined that no order as to costs in the main application should be made.

[33] In developing their argument counsel for the respondent submitted that the entire application for leave to appeal was incompetent, an exercise in futility and that the costs thus incurred amounted to a wilful waste. In the circumstances counsel sought an order directing the applicant to pay the costs occasioned by the application for leave to appeal, including the costs of two counsel, where employed.

[34] Counsel for the applicant opposed such an adverse costs order and submitted that to grant such an order would mean that unless a law society was successful in a striking of application, it would be deprived of its costs. I do not agree. In my view

counsel misunderstood the principle involved, as more fully discussed in paragraph 25 above.

[35] In the main judgment sought to be appealed I commented (in para 72) upon the inflexible attitude adopted by the applicant as being relevant to the decision on costs and I drew attention (in para 74) to the serious consideration given to making a costs order adverse to the applicant society. The warnings implicit in these remarks were clearly not heeded by the applicant's representatives in bringing the present application for leave to appeal, as well as the manner in which it was presented. In this regard I do not, however, wish to be understood as being critical of the conduct of Mr De Wet, who was merely instructed to argue the application on behalf of the applicant, but who had not previously been involved in the matter.

[36] It is also unclear whether the Council of the applicant had formally resolved to authorise and instruct the applicant's legal representatives to pursue the application for leave to appeal, or indeed to bring the application to amend the application for leave in order to appeal the sanction as well. Counsel for the respondent, in para 2 of their written argument dated 23 March 2017, doubted that this was the case. It is also noteworthy that Ms N Harripersad, the applicant's Deputy Manager: Regulatory Affairs and the deponent to the applicant's founding affidavit in the application for leave, makes no mention of having been specifically authorised in this regard.

[37] Be that as it may, the authority of the applicant's representatives to bring the application for leave was not formally challenged before us, nor were the provisions

of Rule 7 invoked (see: *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19). In any event, the applicant's attorneys were clothed in apparent authority or, as it was put by Cachalia JA in *MEC for Economic Affairs, Environment & Tourism, EC v Kruizenga* 2010 (4) SA 122 (SCA) in para 20 at page 132D, in an '*aura of authority*', so that we are entitled to assume that the attorneys had the necessary authority to do what attorneys usually do in representing their clients.

[38] Should the applicant's representatives have acted beyond their actual authority in launching and pursuing the application for leave to appeal, then that dispute is a matter to be internally resolved as between the applicant, its relevant officials and/or its attorneys. The issue cannot, peremption apart, affect our decision regarding the appropriate costs order to be made relevant to the application for leave.

[39] In the final analysis and considering all the circumstances of the matter, including its background, the lack of merit in the application for leave itself, the criticism levied at the conduct of the applicant as contained in the main judgment, as well as in relation to the application for leave and the failure of the applicant's representatives to heed the warning extended in the judgment sought to be appealed regarding the risk relevant to costs, I am of the view that the present application calls for an order of costs against the applicant.

[40] At the hearing before us both parties were represented by senior counsel. Neither party suggested that the employment of senior counsel was inappropriate in

the circumstances. In my view, given the nature and importance to the parties of the issues involved, the length of the record and the nature of the issues forming the subject matter of debate, the employment in particular of senior and junior counsel by the respondent, was justified and cannot be faulted.

[41] In the result I would propose an order in the following terms, namely that:-

(a) The belated informal application to amend the notice of application for leave to appeal to include leave to appeal the sanction imposed upon the first respondent, is dismissed.

(b) The Application for leave to appeal the costs order contained in the written judgment of this Court and as delivered on 14 February 2017, is likewise dismissed.

(c) The applicant is to pay the first respondent's costs of the applications, including the costs of two counsel, where actually employed.

_____ _____ _____

VAN ZÿL, J. **MADONDO, DJP.** **OLSEN, J.**

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For the Second Respondent: No Appearance.

Matter argued: 24 March 2017.

Judgment delivered: 28 April 2017