Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division, Kimberley)

Saakno / Case number: **1486/2016**
Datum verhoor/Date heard: **12 / 06 / 2017**
Datum gelewer/Date delivered: **19 / 06 / 2017**

In the application of:

THE MINISTER OF POLICE Applicant

and

KGOSIMANG JACOB JANUARY Respondent

Coram: **ERASMUS, AJ**

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JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

ERASMUS, AJ

[1] The applicant approached this Court for leave to appeal against a cost order of Matlapeng AJ in an application for condonation for the non-compliance with the provisions

of s3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002 ('the Act').

[2] The applicant is the defendant in an action under case number 1486/2016 ('the action') and was the respondent in the application for condonation ('the main application'). The respondent herein is the plaintiff in the action and was the applicant in the main application. I shall refer to the parties as in the application for leave to appeal.

[3] Matlapeng AJ had ordered the applicant to pay the costs of the main application on a scale as between party and party, which costs would exclude the costs of preparing, perusing and lodging of pages 25 to 82 of the record.

[4] S17 of the Superior Courts Act, Act 10 of 2013 regulates applications for leave to appeal and provides as follows:

"(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;

(b) …the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[5] S16(2)(a) of the same Act provides as follows:

"(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[6] As submitted by Adv Botha, on behalf of the respondent, a proper reading of s17 of Act 10 of 2013, leads one to conclude that either of the two requirements referred to in s17(1)(a), but both requirements contained in s17(1)(b) and (c), need to be established for leave to appeal to be granted.

[7] The test to be applied when adjudicating an application for leave to appeal is now, under Act 10 of 2013, whether there is a reasonable prospect that another court **would** come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use

of the word "would" in s17(1)(a)(i)[1] is indicative of a raising of the threshold since previously, all that the applicant was required to demonstrate was that there was a reasonable prospect that another court could come to a different conclusion.[2] The object of s17 thus appears to be to limit circumstances in which a High Court may grant leave to appeal.

[8] It is within the legislative framework, set out above, and the specific facts of this matter that this Court must adjudicate the application for leave to appeal.

[9] Mr Botha further submitted that the Court *a quo* had not misdirected itself in any material way, that this application for leave to appeal does not pass the threshold laid down in s17 read with s16 of Act 10 of 2013 and that no exceptional circumstances exist why the appeal should be heard.

[10] The grounds of appeal were set out in the NOTICE OF APPLICATION FOR LEAVE TO APPEAL, dated 6 December 2016. In short, the application is based thereupon that the Court *a quo* had incorrectly exercised its discretion in

[1] Superior Courts Act, No 10 of 2013

[2] *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC); See also *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening* 1996(4) SA 331(CC)

relation to the cost order granted against the applicant. As the applicant had only opposed the main application as a result of the punitive cost order sought, the respondent should have been held liable for the applicant's costs.

[11] In his judgment Matlapeng AJ set out the background and facts pertaining to the main application. I do not deem it necessary to repeat it. I cannot find that he had misdirected himself on the facts.

[12] From the evidence and correspondence it appears, as Matlapeng AJ had found, that the applicant was under the mistaken impression that the respondent had to approach the Court for condonation.

[13] The applicant did not provide any other acceptable reason why he had not consented to the institution of legal proceedings. Throughout the period leading up to the application, in the opposing affidavit as well as at the time of the hearing of the application, it was the position of the applicant that it could not grant condonation/ concede to the action proceeding without proper notice and that only the court could do so. As a result of the applicant’s refusal the respondent had to apply for

condonation and sought a punitive cost order against the applicant.

[14] Adv Sieberhagen, on behalf of the applicant, submitted that the application was opposed because a punitive cost order had been sought in the Notice of Motion. Although this was stated in the applicant's answering affidavit, it is not borne out by the correspondence between the parties. The applicant had indicated that the relief pertaining to the condonation would not be opposed, but that the application would be opposed 'solely on the basis of costs' and that they were of the opinion that the respondent is not entitled to the costs of their application. The applicant had not referred to the punitive cost order sought by the respondent.

[15] In terms of s3(1)(b) of the Act an organ of state may consent in writing to the institution of legal proceedings and thus has a discretion to consent to the institution of proceedings. Matlapeng AJ, in line with the decision of *Minister of Safety and Security v De Witt*[3], found that the decision by a debtor whether to apply for condonation for non-compliance with the Act depended on the attitude of the organ of state. In my view he had not misdirected himself in this regard.

[3] 2009(1) SA 457 (SCA) at 461G-H and 462A

[16] It was submitted on behalf of the applicant that the Court *a quo* had incorrectly relied on the case of *Premier Western Cape v Lakay* 2012 (2) SA 1 (SCA) at 15 A-C, in which it had been found that where applications for condonation in terms of the Act are opposed, costs should follow the result. The relevant portion of that judgment reads as follows:

> "*[25] … Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of state relies on a creditor's failure to serve a notice.*[13] *In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result…*"

[17] The applicant did not explain why the reliance on the Lakay judgment was misplaced. Proper reading of the paragraph quoted above leads me to conclude that where an organ of state relies on the creditor's failure to serve the notice and refused to consent to the institution of legal proceedings and it, as a result thereof becomes necessary for the creditor to launch an application for condonation, the costs should follow the result. If the

creditor is granted condonation, he/she was successful and should be awarded costs.

[18] In my view the Court *a quo* correctly found that in cases such as the main application, the applicant was not requesting an indulgence and that the approach to the granting of costs of such an application is different to that in respect of an application for condonation for non-compliance with court rules. Matlapeng AJ found, correctly so, that the applicant's refusal to consent to the institution of legal proceedings had been unreasonable as it was solely based on the wrong impression that the applicant could not consent to the institution of legal proceeding and thereby condoning non-compliance with the provisions of s3(2)(a) of the Act. The costs incurred by having to lodge an application for condonation would not have been necessary, had the applicant understood the legal position correctly and consented to the institution of legal proceedings timeously. The respondent was successful with the application and was therefore entitled to his costs.

[19] It was further submitted on behalf of the applicant that the appeal against the cost order would have a reasonable prospect of success and further the appeal should be heard, because there appears to be conflicting

judgments on the matter under consideration. In this regard the applicant referred to the decision of Olivier J in the matter of *White v Kheis Municipality*[4].

[20] The judgment of Olivier J is distinguishable from the matter in *casu.* In that case it had specifically been found that the applicant had provided much more information in the founding affidavit than he did in the letter in terms of which he had requested the respondent to consent to the institution of the legal proceedings. It had been this further information that had convinced the respondent not to oppose the application for condonation on the merits and which had led to the order directing the applicant to pay the respondent's costs of the application. In the present matter all the facts had been presented to the applicant in the correspondence and it had never been the case for the applicant that something surfaced in the founding affidavit or annexures that had convinced the applicant not to oppose on the merits.

[21] I am satisfied that in this instance there is not any prospect that a court of appeal would interfere with the exercise of the discretion of Matlapeng AJ in respect of the cost order. There is no compelling reason why the appeal should be heard. The application for leave to

[4] 1828/2016 [2016] ZANCHC 38 (9 December 2016)

appeal therefore stands to be dismissed. No reasons were advanced why costs should not be awarded to the successful party.

I therefore make the following order:

THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS.

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SL ERASMUS

ACTING JUDGE

On behalf of the Applicant:	**Adv. A.S Sieberhagen (oio The State Attorney)**
On behalf of the Respondents:	**Adv. C.H. Botha (oio Elliott, Maris, Wilmans & Hay)**