

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 49965/16

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

Date:

Signature:

In the matter between:

ZIXOLISILE FENI

Applicant

and

THE PAN SOUTH AFRICAN LANGUAGE BOARD

1st Respondent

MPHO REGINALD MONARENG

2nd Respondent

JUDGEMENT

VAN DER SCHYFF, AJ

Introduction

- [1] This is an application for leave to appeal against the order and judgment handed down on 16 November 2018.
- [2] The applicant contends that the court erred in dismissing the matter and holding that because of the dismissal of case number 25170/2016 and 51782/2016, the application has become moot. The argument is that this matter had 'a life of its own' and should not have been dismissed on the basis that the two applications that were launched earlier by the same applicant was dismissed.
- [3] Cognisance should be taken of the fact that prayer 9 of the amended notice of motion dated 6 July 2016 specifically categorises the relief sought as interim relief in that the prayer reads: "That orders 2, 3, 4, 5 and 6 above shall operate as interim orders pending the final determination of the matter under case number 51782/2016".
- [4] This court dismissed the application under case number 51782/2016 and as a result the application brought under case number 49965/16 became moot.
- [5] The applicant additionally contends that the court erred in not taking into consideration that it is stated in the joint (unstamped) practice note that the applicant "does not persist with any interim relief as the matters are consolidated, i.e. case number 51782/16 and 49965/16." As stated in the judgment the applicant is seeking leave to appeal against, the respondents' contention that the application brought under case number 49965/16 became moot, was not refuted by the applicant's counsel during argument. In addition it is common cause that the matters under case number 51782/16 and 49965/16 were not consolidated.

- [6] Cognisance should also be taken that it is stated in the said joint practice note that as far as case number 49965/16 is concerned, it is only necessary to read the amended notice of motion since the allegations in the founding affidavit are identical to the allegations made under case number 51782/16. The prayers sought in terms of the amended notice of motion under case number 49965/16 are, with the exception of prayer 9 referred to above, incorporated in the prayers under case number 51782/16. Except for the interim relief sought under case number 49965/16 the amended notice of motion is basically replicated, and extended, in the notice of motion under case number 51782/16.
- [7] The applicant took issue with the punitive cost order granted by this court when the motion was dismissed. After reconsidering this issue I am still of the view that the reason for granting a punitive cost order as set out in the written judgment is valid.
- [8] In light of the above I am not of the view that the applicant met the requirements set out in section 17(1) of the Superior Courts Act, No 10 of 2013.
- [9] The final aspect that needs to be considered is the issue of wasted costs. It is common cause that the applicant enrolled the application for leave to appeal to be heard on 1 March 2019 at 8:30. This time was agreed on since the court had to commence with a criminal trial at 9:30. The matter was removed from the roll and costs reserved just before 9:00 when it became apparent that applicant's counsel was under the impression that the application was to be heard at 9:30, after the respondents' counsel inquired telephonically when neither counsel, nor the applicant's attorney, or a representative of the firm were present in court.
- [10] After hearing the application for leave to appeal, I requested the applicant's legal representatives to provide me with written argument as to why they should not be held liable for the wasted costs occasioned by the removal of the application *de bonis propriis*. In the written heads of argument it is contended that "an honest error of judgment on the part of the applicant's legal team occurred in the form of lack of Communication and a serious misunderstanding regarding the exact time of the hearing" occurred as the "issue of the time of the hearing was never revisited

but the date of the Hearing was.” It is further contended that “With all things considered, it can never be said that an error of judgment of this nature should be construed as serious negligence or recklessness on the part of the attorney of record particularly when one considered his role in the entire matter and further as a notice of set down with specific time was emailed to counsel”.

[11] The application for leave to appeal was removed because of the late arrival of the applicant’s counsel. None of the applicant’s legal team was present in court at that time. There is no doubt that justice requires that the respondents must be indemnified from carrying any wasted costs or expenditure caused by the fact that the application for leave to appeal had to be removed from the roll due to the late arrival of the applicant’s counsel. The question is whether it would be just to require that those costs be carried by the applicant. I am of the view that it would not be fair and just to order that these costs be paid by the applicant since it is clearly a lack of communication between his legal representatives that gave rise to this conundrum.

ORDER

As a result, the following order is made

1. The application for leave to appeal is dismissed with costs.
2. The wasted costs associated with the removal of the application for leave to appeal from the roll on 1 March 2019, on an attorney and own client scale, are to be paid jointly and severally by Makhafola & Verster Inc and Mr S Makhafola *de bonis propriis*, the one to pay the other to be absolved.

E VAN DER SCHYFF

Acting Judge of the Gauteng Division, Pretoria

Heard on:

22 March 2019

For the Applicant:

Adv Z Kela

Instructed by:

MAKHAFOLA & VERSTER INC

For the Respondents:

Adv G Fourie SC

Instructed by:

BOWMAN GILFILLAN INC

Delivered on:

25 April 2019