1**IN THE HIGH COURT OF SOUTH AFRICA**

(GAUTENG DIVISION: PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

15 MARCH 2024 .....
DATE SIGNATURE

Date: 15 March 2024

Case number: 121487-2023

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL **APPLICANT**

And

GODFREY MALUMANE **RESPONDENT**

(ID number: […])

JUDGMENT

MINNAAR AJ,

[1] On 22 December 2023, I delivered judgment in terms of which the respondent was suspended from practising as an attorney of this

Court. The suspension was ordered to be in place until the applicant satisfies the Court that he is a fit and proper person to resume practise as an attorney. Further ancillary relief was also included in my order dealing with the practise of the applicant and what was expected of him to comply with the order of suspension.

[2] The applicant, through his attorneys, Maesela Incorporated, launched an application for leave to appeal on 9 January 2024.

[3] On 29 January 2024, the applicant delivered an application in which, in essence, an amended application for leave to appeal was delivered. This application was delivered by Zehir Omar Attorneys.

[4] On 4 March 2024, Maesela Incorporated delivered a notice of withdrawal of attorneys of record.

[5] No formal notice of substitution as attorneys of record was delivered by Zehir Omar Attorneys. On the day of hearing the application for leave to appeal, Mr Zehir Omar appeared and confirmed that Zehir Omar Attorneys has the mandate to appear on behalf of the applicant. This submission by Mr Omar was accepted and an undertaking was provided that a formal notice of substitution as attorney of record be uploaded. Despite this undertaking by Mr Omar, such formal notice of substitution as attorney of record has not, as of the date of this

judgment, been uploaded. For all purposes of the application for leave to appeal, it is accepted that Zehir Omar Attorneys is duly mandated to represent the applicant herein.

[6] On the date of hearing of the application for leave to appeal, Mr Omar confirmed that the applicant is relying on the amended notice of application for leave to appeal and that the application for leave to appeal, delivered on 9 January 2024 should be disregarded.

[7] The application for leave to appeal is mainly premised thereon that the provisions of the Promotion of Administrative Justice Act 3 of 2000 find application to the striking or suspension of attorneys and that this court erred in not considering and applying same. It was further submitted that, in terms of section 33(3) of the Constitution of the Republic of South Africa, the applicant has the right to review the respondent's decision to approach the Court to apply for the suspension of the applicant. It is further the case of the applicant that an inquiry had to be conducted into the financial position of the applicant to determine whether the applicant had at his disposal a liquid fund large enough to enable him to pay, if necessary, the money which he supposed to have accrued to the benefit of the applicant's trust clients. It is further alleged that the Court erred in not taking into account that the suspension of the applicant would materially and adversely affect members of the public, and more specifically so, the more than one hundred clients that the applicant was doing work for on the date of suspension. An attack

on the jurisdiction of the Court, to entertain the respondent's application was also levied. It was further alleged that the Court misdirected itself by over-emphasizing the seriousness of the applicant's alleged misconduct.

[8] Applications for leave to appeal are dealt with in terms of the provisions of Rule 49 of the Uniform Rules of Court read with sections 16 and 17 of the Superiors Courts Act 10 of 2013 ("the Superior Courts Act").

[9] Section 17(1) of the Superior Courts Act provides the test applicable to applications for leave to appeal. Section 17(1) reads 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."

[10] Section 17(1)(a)(i) of the Superior Courts Act was dealt with in the decision of the Land Claim Court in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 (JDR 2325 (LCC); 2014 JDR 2325 in which Bertelsmann J held that the use of the word *"would"* (as opposed to could) in the provisions is an indication that the threshold for leave to appeal has been raised. It was further held that the word *"would"* indicates a measure of certainty that another court will differ from the judgment appealed against.[1]

[11] On the rigidity of the threshold, Plaskett AJA (as he then was) in which Cloete JA and Maya JA (as she then was) concurred, wrote the following *S v Smith 2012* (1) SACR 567 (SCA) ([2011] ZASCA 15) at paragraph 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. 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

[1] *Mont Chevaux Trust at* par 6. See further *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (1957/09) [2016] ZAGPPHC 489 (24 June 2016) par 25

must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[12] Under section 17(1)(a)(ii) of the Superior Courts Act the Court determining an application for leave to appeal ought to enquire whether there is a compelling reason for the appeal to be heard.[2] The enquiry is factual and, therefore, each application ought to be decided on its own facts.

[13] Other considerations beyond the abovementioned statutory provisions would include where the material case is of substantial importance to the appellant and where the decision sought to be appealed against involves an important question of law[3] or where required by the interests of justice.[4]

[14] If regard is had to my judgment, read with the application for leave to appeal, then it is my conclusion that, although subjectively to the applicant the case might be of substantial importance, the application lacks any semblance of prospect of success, let alone reasonable prospect of success.

[15] No other compelling reason is advanced as to why the appeal

[2] Erasmus, Superior Court Practice (2021) A2-56 to 57
[3] Erasmus, Superior Court Practice (2021) A2-56 to 57
[4] *City of Tshwane v Afriforum* 2016 (6) SA 279 (CC) par 40

should be heard and the interest of justice is not implicated. Neither is a valid important question of law raised.

[16] As the provisions of section 17(1)(a) of the Superior Courts Act clearly demand, the application must be dismissed, as leave to appeal may only be given when the Court believes that the intended appeal "would have" a reasonable prospect of success. The applicant has failed to make out a case that another Court would reach a different conclusion or outcome to the judgment *in casu*.

[17] On the approach as to costs, it was held in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others* 1996 (2) SA 621 (CC) at paragraph 3:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the

nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation."

[18] I can see no basis upon which another Court would differ from the costs order made in my judgment.

[19] There is no basis upon which the respondent should be out of pocket in opposing this application for leave to appeal and as such the respondent is entitled to the costs of this application on the scale as between attorney and client.

[20] Consequently, I make the following order:

1. The application for leave to appeal is dismissed with costs on the scale as between attorney and client.

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Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on	: 8 March 2024 (virtually)
For the Applicant	: Mr Z Omar
Instructed by	: Zehir Omar Attorneys
For the Defendant	: Adv. Z Muhamed
Instructed by	: Mothle Jooma Sabdia Inc.
Date of Judgment	: 15 March 2024