Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1629/2020
Heard: 09 May 2022
Judgment delivered: 29 July 2022

In the matter between:-

JOHANNES ABRAHAM LOUW
APPLICANT

and

ENGIREX (PTY) LTD **FIRST RESPONDENT**

BERTUS KILIAN **SECOND RESPONDENT**

NEXUS (PTY) LTD **THIRD RESPONDENT**

JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION:-

[1] At the hearing of the main application, the parties agreed that the rule *nisi,* which was sought and granted in favour of the applicant, should be discharged. The primary relief moved for and the determination of the main application had thus become moot and I was seized with only the issue of costs.

[2] On 30 July 2021, I granted an order that the applicant was to pay the first and second respondents' costs.

[3] The applicant now seeks leave to appeal the cost order.

[4] I will refer to the parties as they were in the main application.

GROUNDS OF APPEAL:-

[5] In essence, the grounds of appeal can be summarised as that I misdirected myself in finding that:-

5.1 the dispute revolved around the question of whether the applicant was still an agent of the first respondent on 25 September 2020 rather than whether the applicant was still an agent of the first respondent when he was prompted to lodge the urgent application; and

5.2 the marketing agreement between the applicant and the third respondent was relevant and that the applicant could have contracted directly with the third respondent.

LEAVE TO APPEAL:-

[6] The test of what needs to be established in order to be granted the necessary leave to appeal is set out in section 17(1) of the Superior Courts Act, Act 10 of 2013 ("the Superior Courts Act"), the relevant provisions of which read as follows:-

> "*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;*
>
> *(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."*

[7] Section 16(2)(a) of the Superior Courts Act provides that:-

> "*(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".*

APPLICABLE LEGAL PRINCIPLES:-

[8] In ***S v Smith***[1] Plasket AJA emphasized that:-

> "*[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and*

[1] 2012 (1) SACR 567 (SCA).

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

[9] Mr Olivier, on behalf of the applicant, submitted that this application should be determined only with reference to the question of whether the applicant has reasonable prospects of success on appeal.

[10] In the matter of ***Gelb v Hawkins***,[2] the Appeal Court confirmed that awarding of costs in any matter is in the exclusive discretion of the Court, which discretion should be exercised judicially upon a consideration of all of the facts of each case.

[11] According to the applicant, I failed to exercise my discretion judicially as I did note take cognisance of all the relevant facts. Mr Olivier argued that the applicant was justified in lodging the main application at the time that he did and, by virtue of the fact that the first respondent accepted orders placed by the applicant with the third respondent subsequent to the granting of the rule *nisi*, it should be accepted that the applicant was substantially successful in the main application.

[12] It is trite that a court, sitting as a court of appeal, will not lightly interfere with any judgment (specifically with a judgment as to costs) where the court *a quo* exercised a discretion when deciding on the issue, on condition that the discretion was judicially exercised.[3] In essence, whether I exercised my discretion judicially, entails an investigation on whether the decision is based on grounds upon

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[2] [1960] 3 All SA 371 (A) at 376.

[3] Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69. See also Cronje v Pelser [1967] 1 All SA 265 (A) at 267.

which a reasonable person would have reached the same conclusion.[4]

[13] In ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another***,[5] the Constitutional Court confirmed, with reference to ***National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others***,[6] that:-

"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:

> *". . . judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."*

[14] Mr Olivier contended that the judgment, which forms the subject of this application for leave to appeal, does not fall within the ambit of Section 16(2)(a) of the Superior Courts Act. Mr D van Reenen, on behalf of the first and second respondents, countered that this application does fall within the ambit of section 16(2)(a) as the issue is of such a nature that the decision sought will have no practical effect or result and that no exceptional circumstances exists. He submitted that the appeal may be dismissed on this ground alone.

[15] The Constitutional Court in the matter of ***Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another***[7] held that *"few appellate courts countenance appeals on costs alone" and that the practical impact*

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[4] Merber v Merber [1948] 1 All SA 446 (A) at 453 with reference to Ritter v Godfrey (1920, 2.K.B. 47).
[5] [2016] JOL 33413 (CC) at paragraph [88].
[6] National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others [2000] JOL 5877 (CC) at paragraph [11].
[7] 2015 (4) BCLR 39 (CC) at paragraph [13]. See also Justice Alliance of South Africa v Minister for Safety and Security and Others 2013 (7) BCLR 785 (CC).

of s 16(2)(a) of the Act is that "appeals on costs alone are allowed very rarely indeed."

[16] In ***Khumalo v Twin City Developers***[8] the Supreme Court of Appeal, with regard to what would constitute "exceptional circumstances", held that:-

> *"[23] There are, however, other reasons why I conclude that exceptional circumstances that warrant the hearing of his appeal have been established. These are set out below. This Court, in Jazz Spirit 12(Pty) Limited v Regional Land Claims Commissioner: Western Cape had occasion to consider the provisions of s 21A(1) and (3) of the Supreme Court Act. The appeal that served before that court was directed only at the fact that the court a quo had not made any costs order. On appeal, the question that occupied the court's mind was whether the facts of circumstances of the case constituted 'exceptional circumstances' for purposes of s 21A(1). In answering that question, this Court cited the following passage from the judgment of Thring J with approval:-*
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> > *'I think that, for the purpose of s 5(5)(a)(iv) the phrase 'exceptional circumstances' must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in Norwich Union Life Insurance Society v Dobbs, (supra loc cit), be given a narrow rather than a wide interpretation. I conclude to use the phraseology of Comrie J in S v Mohammed (supra, loc cit) that, to be exceptional within the meaning of the subparagraph, the circumstances must be "markedly unusual or specially different": and that, in applying that test, the circumstances must be carefully examined."*

[17] In my view, my decision had no practical effect or result as it dealt with the issue of costs alone.

[18] Mr Olivier confirmed that the exceptional circumstances the applicant relies on are limited to the grounds of appeal. In my view,

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[8] (328/2017) [2017] ZASCA 143 (02 October 2017).

the applicant has made no attempt to list any circumstances that are markedly unusual of specially different. The application for leave to appeal stands to be dismissed for this reason alone.

[19] After dispassionately assessing the *rationale* for my decision in the main application, I am persuaded that a reasonable person would have found that the agency agreement between the applicant and the first respondent had been terminated prior to the launching of the urgent application and that the relief sought by the applicant was not necessary as he could have contracted directly with the third respondent to deliver products to his clients. The basis for my factual findings, set out in paragraphs [5] to [17] of my judgment does not support the contention that I did not exercise my discretion judicially. There are simply no reasonable prospects of success on appeal.

COSTS:-

[20] Mr van Reenen argued that a punitive cost order should be granted in favour of the first and second respondents in view of the fact that the main application was ill-advised, alternatively that costs should be awarded on a party and party scale.

[21] The cost order on a punitive scale was, however, not vigorously pursued. I am not convinced that the application was objectively vexatious or an abuse of legal process that will warrant a punitive cost order.

WHEREFORE I MAKE THE FOLLOWING ORDER:-

The application for leave to appeal is dismissed, with costs.

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STANTON, A

ACTING JUDGE

On behalf of the applicant:	Adv. AD Olivier
On behalf of repondents:	Adv. D van Reenen