

SOUTH AFRICA / JUDGMENT

Age in Action North West v MEC for Social Development North West and Another (UM181/2022) [2023] ZANWHC 244 (9 November 2023) [2023] ZANWHC 244

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

UM181/2022

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: UM181/2022

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

9 November 2023

In the matter between:-

AGE IN ACTION: NORTH WEST Applicant

and

MEC FOR SOCIAL DEVELOPMENT, NORTH WEST 1st Respondent
HEAD OF DEPARTMENT:
DEPARTMENT OF SOCIAL DEVELOPMENT, NORTH WEST PROVINCIAL GOVERNMENT 2nd
Respondent

ORDER

The following order is made:

- i) The application for leave to appeal is dismissed.

ii) The applicant is to pay the costs of the application for leave to appeal.

LEAVE TO APPEAL JUDGMENT

FMM REID J

Introduction

- [1] This is an application for leave to appeal against the whole judgment and order made on 8 May 2023. That order dismissed with costs, an application to review and set aside the decisions of the Head of Department of Social Development, North West Provincial Government to refuse funding to the applicant for the 2021/2022 and 2022/2023 financial years.
- [2] By agreement between the parties and with the permission of the court, this application for leave to appeal was determined on the papers filed before court and no oral submissions were made.
- [3] The grounds for leave to appeal are the following:
- 3.1. That the court erred in finding that the documents submitted by the respondents in relation to the finding that the applicant was not tax compliant;
- 3.2. That the court erred in finding that there was no obligation on the Department to engage the applicant on its tax compliance status;
- 3.3. That the court erred in finding that the applicant acted in contradiction with the Public Finance Management Act 1 of 1999 (PMFA) and the terms of the Service Level Agreement (SLA) in transferring funds received by the respondent, to another bank account in the absence of such a specific clause in either the PMFA or the SLA specifically prohibiting the transfer of the funds;
- 3.4. That the court erred in holding that it could not condone an alleged non-compliance with the Service Level Agreement in relation to its conduct to transfer funds;
- 3.5. That the court erred in failing to recognise that the Department had failed to show that it had the capacity to provide the beneficiaries of the applicant with the social services they received from the applicant.
- 3.6. That the court erred in not acknowledging the constitutional duties fulfilled by the applicant with the funds from the Department.
- 3.7. That the court did not apply the principles of *Bioplus Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) in relation to costs.

Legal Position: Leave to appeal

- [4] The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that:

“(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;”

(own emphasis)

[5] This application is on the ground that the appeal has a reasonable prospect of success.

[6] In *MEC for Health, Eastern Cape v Mkhita* 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.”

[7] The above illustrates that the legislation and the Supreme Court of Appeal requires more than a mere possibility than that another Judge might come to a different conclusion. The test is whether another Judge would come to a different conclusion.

[8] The bar has been raised and a judge considering leave to appeal has a duty to ensure that the appeal has a strong prospect of success. Due to the ever increasing workload in the judiciary, the judge considering the application for leave to appeal has a duty to ensure that unmeritorious appeals do not become part of the workload of full courts or the Supreme Court of Appeal. Appeals without merits should not be granted leave to appeal.

Leave to appeal

[9] In the judgment a quo I dismissed the application mainly on two (2) grounds. I found the decision of the respondents to not grant funding to the applicant, to be administratively sound and this is due to the facts that the applicant did not comply with the SLA and the PMFA for the following two (2) reasons:

9.1. That the applicant was not tax compliant; and

9.2. That the applicant transferred money left over from the previous financial years to another account, contrary to the SLA.

[10] These two facts are not disputed by the applicant, but the applicant claims that their reasons for the above were not duly considered by the respondent, and subsequently not properly considered by this court in the application for review.

[11] The fact that the PFMA and the SLA does not specifically contain a clause to prohibit the transfer of money out of the allocated account for funding, cannot be a sound reason to argue that the transfer of money was not in contradiction with the PFMA and the SLA and therefore correct. Similarly, the fact that the applicant did not have a valid tax certificate for the periods specified, irrespective of the reason there-of, justifies the decision of the respondents to not allocate funding to the applicant.

[12] For the above reasons, I hold the view that no other court will come to a different conclusion than that reached in the judgment

dated 8 May 2023.

[13] In relation to costs, the applicant relies on *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) which determined, in paragraphs [57] and [58] as follows:

"[57] In the present case the High Court misdirected itself in respect of the factors it was obliged to consider when it held that the applicant should pay costs in favour of Monsanto. In its curt appraisal of costs, the High Court did not take appropriate account of the fact that the litigation was essentially constitutional in nature. Nor did it deal adequately with the fact that it was the State's conduct that had provoked the litigation in the first place. Nor did it take account of the fact that its order afforded Biowatch crucial information whose release Monsanto had resolutely opposed.

[58] This court is accordingly at large to review the costs award in favour of Monsanto and come to its own conclusion. In doing so I will give due acknowledgment to the fact that the High Court was extremely troubled by the lack of precision in the claims made by Biowatch. At the same time, it is necessary to bear in mind that this was fresh constitutional terrain for all. The litigation commenced before the PAIA came into force, and all the parties had to feel their way. In addition, all the factors which have already been referred to in the discussion on the failure of the High Court to order the State to pay Biowatch's costs, are relevant to the appraisal of the correctness of the order that Biowatch pay Monsanto's costs. Taking all these considerations into account, the costs award in favour of Monsanto is unsustainable. No order at all should have been made between the two private parties

involved in the matter.”

[14] The applicant’s argument on costs is misplaced. Firstly, the applicant does not have a constitutional duty to fulfil towards the care of the elderly. It is the respondent which bears such duty. Secondly, the facts in Biowatch differ substantively from the facts in casu. In Biowatch the private entity was not awarded costs, despite being successful in its application. In casu the application was unsuccessful and the court exercised its discretion to award costs against the applicant.

[15] The mere fact that a party is a non-profit organisation which litigates against a state organ, cannot indemnify itself from incurring costs in unsuccessful litigation.

[16] Consequently, the application for leave to appeal is bound to be dismissed.

Costs

[17] The normal rule is that the successful party is entitled to its costs.

[18] I find no reason to deviate from the normal rule.

Order

In the premise, the following order is made:

iii) The application for leave to appeal is dismissed.

iv) The applicant is to pay the costs of the application for leave to appeal.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

APPEARANCES: DATE OF HEARING: 8 SEPTEMBER 2023 (on papers) DATE OF DELIVERY OF JUDGMENT: 9 NOVEMBER 2023 COUNSEL FOR APPLICANT: ADV O BEN-ZEEV with ADV LETUKA COUNSEL FOR RESPONDENT: ADV T LOABILE - RANTAO ATTORNEYS FOR APPLICANT: VAN ROOYEN TLHAPI WESSELS INC 09 PROCTOR AVENUE MAHIKENG 2745 INSTRUCTED BY: WEBBER WENTZEL ATTORNEYS FOR RESPONDENT: THE STATE ATTORNEY EAST GALLERY, MEGA CITY CNR SEKAME RD & DR JAMES MOROKA DRIVE, MMABATHO

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