

SOUTH AFRICA / JUDGMENT

Koko v Tanton (2021/2212) [2021] ZAGPJHC 811 (14 December 2021) [2021] ZAGPJHC 811

COURT

South Gauteng High Court, Johannesburg

BEFORE

A. De Wet

CASE / FILE NUMBER

2021/2212

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE NUMBER: 2021/2212
REPORTABLE: NO
OF INTEREST TO OTHER
JUDGES: NO
REVISED: YES
14 DECEMBER 2021

In the matter between: MATSHELA
MOSES
KOKO
Applicant
and
BARBARA
TANTON
Respondent

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hand-down is deemed to be have been on 14 December 2021.

JUDGMENT

DE WET AJ:

1. This is an application for leave to appeal to the full bench of the Gauteng Local Division of the High Court, alternatively the Supreme Court of Appeal, against the two orders granted against the applicant by this Court on 7 September 2021, to wit:
 - 1.1. the applicant's application in terms of rule 6(15) of the Uniform Rules of Court (URC) to strike out is dismissed with costs; and
 - 1.2. the application is dismissed with costs, the costs until 3 February 2021 on a party and party scale and thereafter the costs on the attorney/client scale.
2. The appellant/applicant shall herein be referred to as the applicant.
3. The applicant brought an application against the respondent in this Court for the following relief:
 - 3.1. An order declaring that the statement/s or publications made and published by the respondent on Twitter are defamatory, demeaning, false and unlawful;
 - 3.2. in the event that the court finds that the statement/s or publications are defamatory, demeaning, false and unlawful; the respondent is directed to remove them from the media platforms and to publish an unconditional public retraction and apology for the defamatory publications about the applicant;
 - 3.3. the respondent be interdicted from publishing similar defamatory, demeaning, false and unlawful statement/s about the applicant in future;
 - 3.4. the respondent to be liable for damages in the amount of R500 000,00 as solatium for the injury caused to the applicant; and the determination of the quantum to be postponed sine die.
4. It is to be noted that the applicant sought no order for costs in the Notice of Motion. The applicant, however, now contends that the prayer for alternative relief includes an entitlement to include a prayer for costs.
5. The applicant, at the hearing of the application:
 - 5.1. brought an interlocutory application in terms of rule 6(15) of the Uniform Rules of Court ("URC") that certain matter in the respondent's answering affidavit be struck;
 - 5.2. abandoned all the relief in his Notice of Motion;
 - 5.3. sought a costs order against the respondent.
6. The Court's power to grant leave to appeal to a higher court is found in section 17(1) of the Superior Courts Act, 2017 ("the Act") that reads 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 judgements on a 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 Act provides:

“(2)

- (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.”
8. In determining whether an application for leave to appeal should be granted, the court should test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court would interfere in the decisions against which leave to appeal is sought.
 9. Leave to appeal should be granted only when there is a sound and rational basis for doing so. [1]
 10. The Act introduced a new test for granting leave to appeal and the threshold for such application to succeed has been raised.[2]
 11. Central to the application for leave to appeal is the applicant’s election not to proceed with the relief claimed in the Notice of Motion.

Application in terms of rule 6 (15) of the URC

12. The applicant, in his application for leave to appeal, raised as ground for appeal the court’s failure to properly apply its mind to the application to strike out, which he contends is a material error and which renders the judgement on the application to strike out appealable.
13. Mr Ndou, who appeared on behalf of the applicant in the application for leave to appeal, but not at the hearing of the application, submitted that:

13.1. the court made an error in law by dismissing the applicant’s application to strike out and in finding that there is no merit in the application brought in terms of rule 6(15);

13.2. the court ought to have thoroughly considered the application to strike out prior to going into the merits of the main application;

13.3. the respondent's evidence was based on hearsay evidence, which is irrelevant evidence;

13.4. the respondent ought to have brought an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 to have the hearsay evidence accepted into the record;

13.5. the court was under a duty to make a determination of the issues raised in the application to strike, particularly the inadmissible hearsay evidence;

13.6. the failure of the court to make a determination on the application to strike out was a material error of law, which ultimately had a negative bearing on the legal costs;

13.7. the court's refusal to hear and grant the application to strike out is a grave mistake, especially in light of the court's failure to apply its mind to the application brought in terms of section 6(15).

1cm; line-height: 200%">14. Mr Ndou referred to *Beinash v Wixley* [3] where it was held that:

“What is clear from the Rule is that two requirements must be satisfied before an application to strike out the matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced”.

15. Mr Ndou further referred to *Faartz v Law Society of Namibia* [4] where the requirements to succeed with an application to strike, namely that the matter should be scandalous, vexatious or irrelevant,

and the meaning ascribed to such words, were considered.

16. The respondent opposed the application for leave to appeal against the order in the striking out application. Mr Winks, on behalf of the respondent, submitted that the applicant ought not to have proceeded with the application to strike as it became moot upon the applicant abandoning the relief in the Notice of Motion.

17. The argument of the applicant, insofar as the application for leave to appeal against the dismissal of the application to strike, is not well founded as the Court, at the hearing of the application, heard and considered the merits of the application to strike out. The court considered the numerous portions of the answering affidavit, the many phrases contained in the answering affidavit and the annexures to the respondent's answering affidavit which the applicant sought to strike. Upon having considered this evidence in the context of the nature of the applicant's application, the contentions of the applicant in his founding affidavit, the relief that the applicant sought, not only in the Notice of Motion but also at the hearing of the application, held that the evidence which he sought to strike was not abusive, irrelevant, nor that the matter was included in the answering affidavit to harass or annoy the applicant, thus not vexatious.[5]

18. This court finds that in respect of the application for leave to appeal against the order in the striking out application, there is no reasonable prospect of success and neither is there any compelling reason why the application for leave to appeal against this order should be heard by a court of appeal. Further, on considering the provisions of section 16 (2) (c) of the Act it is clear that a hearing of an appeal on the striking out application will render the decision sought by the applicant of no practical effect or result, as the applicant did not seek any relief on the merits in having abandoned the relief claimed in the Notice of

Motion.

19. Accordingly, I conclude that the application for leave to appeal against the order in the striking out application has no reasonable prospect of success.

The costs order

20. The second part of the applicant's application for leave to appeal lies against the costs order awarded by this Court against him.
21. Mr Ndou relied on various grounds for appeal against this costs order, which grounds are set out in the applicant's application for leave to appeal as well as his heads of argument and which grounds are broadly encapsulated as:

21.1. The judgement is marred with incorrect conclusions of law in that:

21.1.1. the court relied on irrelevant case law in concluding that the application constituted an abuse of the process of court;

21.1.2. the court incorrectly found that defamation suits cannot be brought on motion;

21.1.3. an order for an interdict or a public apology may be brought on motion; [6]

21.1.4. the court relied on an incorrect interpretation of the Economic Freedom Fighters case;

21.2. The applicant was substantially successful in that the respondent removed the offending tweet;

21.3. There are compelling reasons why an appeal should be heard that include:

21.3.1. The complexity of the legal principles at issue;

21.3.2. The administration of justice will be advanced by an Appeal Court judgement giving certainty, particularly to the SLAPP strategy as raised by the respondent.

22. Mr Ndou amplified the above in both his heads of argument as well as in argument, which inter alia include:

22.1. The court misinterpreted the letter dated 3 February 2021 which was addressed by Digital Law, on behalf of the respondent, to the applicant, as an offer to settle;

22.2. The court made an error in law in finding that the applicant was under a duty to accept the respondent's foreshadowed tender;

22.3. The applicant submitted that the tender of 3 February had "no legal force or effect" as it was not addressed to the applicant by "a legal representative of the respondent", nor did it meet the requirements of a tender in terms of Rule 34 of the URC; and

22.4. it was not generous in that it did not contain a tender to pay the applicant's costs; [7]

22.5. The respondent removed the offending tweet only after the application had been launched. Therefore the applicant achieved partial success and was entitled to his costs.

22.6. Mr Ndou submitted that the court erred in concluding that the application constitutes an abuse of the process of court. The court further, he contended, incorrectly entertained a legal concept that has not been "tested in defamation of natural persons in South Africa" in that the defence of Strategic Litigation Against Public Participation ("SLAPP") does not form part of the South African Law;

22.7. The applicant in argument contended that the judgment contains gross misrepresentations of law and gross misstatements of fact in respect of SLAPP, which set, or may in future set a precedent in defamation litigation;

22.8. The applicant in his heads of argument and at the hearing contended that it is in the interest of justice that leave to appeal be granted as the matter has attracted negative public interest and the judgment has been widely circulated on social media;

22.9. Mr Ndou contended that it is in the interest of justice that the appeal be heard and granted so that clarity can be provided to the public on the correct legal position.

23. The applicant concluded by submitting that another court will come to a different conclusion based on the various legal issues raised by the parties in the application.

24. Mr Winks, on behalf of the respondent, in opposing the application for leave to appeal, relied on the following grounds:

24.1. The appeal would have no practical effect of result;

24.2. The appeal would have no reasonable prospect of success; and

24.3. There are no compelling reasons why an appeal should be heard.

25. Mr Winks, correctly pointed out that the applicant is in effect seeking to appeal nothing but a costs order.

26. Mr Winks referred to the provisions of section 17(1)(b) of the Act that inter alia provide that leave to appeal should only be granted if the decision sought to appeal does not fall within section 16(2)(a) of the Act. He submitted that the decision sought on the appeal, upon leave being granted, will have no practical effect or result in respect of the outcome of the application.
27. Mr Winks further argued that leave to appeal against a costs order alone should only be granted in exceptional circumstances and that there are no exceptional circumstances present as envisaged in *Ngwenya NO and Others v Kruger and Another*. [8]

“...what is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an

unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or

different...”

.....

‘Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by careful examining any special circumstances relief upon”.

28. The respondent submits that the applicant has failed to bring the application for leave to appeal within the ambit of the exception in section 16(2)(a)(ii).
29. Mr Winks submitted that there are no reasonable prospects of success and relied on the dictum of the Supreme Court of Appeal in *Smith supra* where it held that there must be “a sound, rational basis for the conclusion that there are prospects of success on appeal.”
30. It is trite that the court has a judicial discretion in awarding costs. Mr Winks submitted that an application for leave to appeal against a costs order should be granted only when the applicant demonstrates that the court of appeal would find grounds to interfere with the exercise of the discretion of the court, which grounds inter alia include that the court did not exercise the discretion judicially, meaning that the court exercised such discretion capriciously or upon a wrong principle or did not bring its unbiased judgement to bear on the question. [9] He argued that it was not the applicant’s case that the court failed to exercise its discretion judicially.
31. The respondent also submitted that the applicant was not substantially successful in the application in that it did not obtain any relief from the court. He further contended that once an application became moot, as in this case, the applicant is not entitled to proceed merely for an order for costs. [10]

32. Mr Winks submitted that there are no other compelling reasons to grant the applicant leave to appeal such as an important question of law or a discreet issue of public interest that will have an effect on future disputes.[11]

33. I now turn to consider the extensive submissions made by Mr Ndou on behalf of the applicant. I succinctly encapsulate it hereunder:

33.1. The letter dated 3 February 2021, notwithstanding the submissions by the applicant to the contrary, constitutes an offer by the respondent to settle the issues that had arisen between the parties upon the offending tweet having been published. It cannot be argued that the absence of a tender for costs renders such tender ineffective as at that stage the applicant had not claimed costs against the respondent. Whilst the applicant may well not be under any legal duty to accept a tender, the failure to accept a tender such as was contained in the foresaid letter puts the applicant at risk for costs.

33.2. The submission that the court erred in concluding that the application constitutes an abuse of the process of court in main is premised on the dicta in the *Economic Freedom Fighters* supra and *Buthlezi v Poorter* [12] matters where it was inter alia held that application proceedings are competent when an interdict against future or ongoing defamation or a public apology is sought.

33.3. In this application the applicant was cautioned not to proceed with the application inter alia due to the foreseeable dispute of fact as well as the illiquid claim for damages in the amount of R500 000, 00. Notwithstanding the caution, the applicant proceeded with his application.

33.4. The applicant abandoned its relief at the hearing of the application on the very grounds that the main disputes between the parties involve the balance between the applicant's right to dignity and a good name and the respondent's right to freedom of speech, and that such issues could not be determined by the court on the papers before it. As a consequence of the disputes of fact on the papers before the court, it could not determine whether the defences raised against the claim that the applicant was defamed were good.

33.5. The applicant in the application for leave to appeal contends that the applicant was substantially successful and accordingly he was entitled to the costs of the application. For such submission he relies on the fact that the respondent removed the offending tweet. At the hearing of the application for leave to appeal the applicant changed his position and contended that he had partial success but was still entitled to his costs.[13] The court made no order in favour of the applicant on the merits. The court found that the removal of the offending tweet by the respondent did not constitute substantial success such as to entitle the applicant to his costs.

33.6. Mr Ndou further contended that it is in the interest of justice that the appeal be heard and granted so that clarity can be provided to the public on the correct legal position. The applicant argued that another court will come to a different conclusion based on the various legal issues raised by the parties in the application. The only issue before the court at the hearing of the application was the issue of costs. As a consequence of the failure by the applicant to pursue the relief in the Notice of Motion none of the legal issues on the merits were determined.

33.7. During argument Mr Ndou contended that the applicant is entitled to approach the court to protect his constitutional right to dignity and good repute. The court made no finding that the applicant did not have a constitutional right to dignity, a right to his good name and reputation, neither did this court find that the applicant is not entitled to approach a court to protect these constitutional and common law rights. I cannot uphold the applicant's argument that the judgment and the reporting thereof on social media impacts on his reputation and good name and as such constitutes a ground upon which leave to appeal should be granted.

33.8. The applicant in his application for leave to appeal relies on numerous purported findings of fact and law which the court did not make. In particular, the court did not, as contended by the applicant, entertain "a legal concept that has not been tested in defamation of natural persons" being SLAPP. The court did not consider it necessary to make a finding on the defence of SLAPP raised by the respondent.

34. The court found, on considering inter alia the application, the relief claimed, the facts of the matter and the conduct of the parties herein, particularly the applicant abandoning all the relief claimed in the Notice of Motion, that the application constituted an abuse of the process of court. This much is clear from the judgement and to contend differently is disingenuous.
35. Accordingly, and in light of the fact that the court was called upon to determine the costs of the application only, no complex issue of law arose.
36. I have considered all the grounds in the application for leave to appeal as well as the very extensive argument before the court by both the applicant as well as the respondent at the hearing of the application.
37. I cannot, and for the reasons herein above, conclude that an appeal, be it in respect of the application to strike or the order of costs against the applicant has any reasonable prospect of success. I hold the view that another court would not find differently and or that another court would not be entitled to disturb the discretion that I exercised, taking into account the recognised legal principles above as well as those contained in the judgement. I further find no compelling reason, as intended in section 17(1) (a) (ii) of the Act, why the appeal should be heard.
38. Accordingly, I make the following order:

The application for leave to appeal is dismissed with costs.

A. DE WET

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard:

29 November 2021

Judgment:

14 December 2021

Applicant's Counsel: P. Ndou

Instructed by:

Ndou Inc

Respondent's Counsel: B. Winks

Instructed by:

Rupert Candy Attorneys Inc

[1] Smith v S 9475/10) [2011] ZASCA 15 or 2012 (1) SACR 567 (SCA) (15 March 2011)

[2] Independent Examinations Board v Umalusi & Others (8344/2019) [2021] ZAGPPHC 12 (7 January 2021).

[3]

[1997] ZASCA 32; 1997

(3) SA 721 (SCA) at 733A-B.

[4] 1991

(3) SA 563 (NMHC) at 566C-E

[5] See CaseLines 80-7 to 80-8 para19, 20 and 21.

[6] Economic Freedom Fighters and Other v Manuel 2021

(3) SA 425 (SCA)

[7] The applicant inter alia referred to Bloom v General Accident and Life Assurance Corporation Ltd and Another 1967 (2) SA 116 (D) and Syed v Metaf Limited t/a Metro Cash & Carry (CA356/2016)

[2018] ZAECGHC 80 (13 March 2018) when submitting that a party is at risk of an adverse costs order when refusing a generous offer to settle.

[8] [2017] ZASCA 102 (6 September 2017) par 8

[9] Naylor and Another v Jansen 2007 (1) SA 16 (SCA) at para14 and Smith supra at par 7

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- [10] Sepheka v Du Point Pioneer [2018] ZALCJHB 336 and Mahlangu and Another v Mahlangu and Others [2017] ZASCA 81 (2 June 2017) paras18-21
- [11] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA) par 5
- [12] 1974(4) SA 831 (W).
- [13] The applicant relied on Mathimba & Others v Nonxuba & Others (2946/2017) [2018] ZA ECGHC 85; 2019 (1) SA 550 (ECG) (18 September 2018) in support of his argument that he is entitled to costs upon being partially successful in this matter. This judgement is distinguishable from the present case as the contingency fee agreement in that matter expressly provided for recovery of fees in the event of partial success.
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