

SOUTH AFRICA / JUDGMENT

Mokhele v South African Legal Practice Council (2433/2023)

[2025] ZAFSHC 1 (8 January 2025)

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COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

2433/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable / Not

reportable

Case

no: 2433/2023

In

the matter between

LEBOHANG

MICHAEL MOKHELE

APPLICANT

And

THE

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

RESPONDENT

Coram:

Naidoo J

Heard:

30 May 2024

Delivered:

8 January 2025

Summary:

Application for security for costs – Attorney struck from roll of attorneys – applies for leave to appeal judgment for striking off – Legal Practice Council applies for security for costs in application for leave to appeal.

ORDER

1.

The applicant/respondent, Lebohang Michael Mokhele is ordered to furnish security to the respondent/applicant, the South African Legal Practice Council, in the sum of R300 000.00;

2.

The application for leave to appeal this court's judgment dated 8 January 2024 is stayed until this order is complied with;

3.

Should the applicant fail to furnish the respondent with security within thirty days of the date of this order, the respondent is given leave to apply on the same papers, duly amplified as may be necessary, for the dismissal of the application for leave to appeal;

4.

The applicant is ordered to pay the costs of this application on an attorney and client scale, such costs to include the costs occasioned by the employment of counsel.

JUDGMENT

Naidoo J

- [1] The South African Legal Practice Council (LPC) successfully applied for the striking of the applicant, Lebohang Michael Mokhele (Mr Mokhele) from the roll of legal practitioners. The judgment of Van Zyl J and Vele AJ in that matter (penned by Vele AJ, in which Van Zyl J concurred), was delivered on 8 January 2024 (the striking judgment). Mr Mokhele brought an application for leave to appeal the striking judgment, which was opposed by the LPC. The latter then brought this current interlocutory application for Mr Mokhele to pay security for costs in respect of the application for leave to appeal. I mention that the application for leave to appeal the striking judgment and the application for security for costs are preceded by numerous other applications which caused the matter to become rather protracted and acrimonious, largely from Mr Mokhele's side, where he even made statements accusing the LPC of fraud and impropriety in respect of the disciplinary hearings brought against him by the LPC, after complaints lodged with it by Mr Mokhele's clients at the time.

- [2] Save for one application brought by the LPC, the latter obtained judgment in its favour in all other applications, brought by it and Mr Mokhele. The result of this was that the LPC taxed bills of cost in each of those matters in which it was successful, numbering seven. The total of those costs amounted to R577 942.23. After Mr Mokhele paid an amount of R50 000.00, the amount owing was R527 942,23. A statement of account from LPC reflecting this amount, together with the taxing master's allocatur in each of those matters, substantiating the amount, were attached to the founding affidavit in this matter. The LPC issued a writ of execution in one of the matters and attempted to execute upon it. The sheriff of the court served the writ upon Mr Mokhele, who informed the sheriff that he could not immediately pay the amount demanded, or any amount in satisfaction of the debt. The sheriff also asserted that 'insufficient assets in full satisfaction of the writ' were pointed out to him. The sheriff, thereafter, attached the bank account of Mr Mokhele at Standard Bank, but found that there was no money in that account. The attachment was thereafter uplifted, due to non-availability of funds therein.
- [3] The LPC sought relief in the following terms:
- a. that Mr Mokhele be ordered to furnish security to the LPC for the sum of R300 000.00, alternatively such amount as determined by the court or taxing master;
 - b. That the proceedings, namely the application for leave to appeal, be stayed until such order is complied with;
 - c. Should the applicant fail to furnish the respondent with such security within 15 days of the order or determination by the taxing master, the respondent be given leave to apply on the same papers, duly amplified as necessary, for dismissal of the application for leave to appeal;
 - d. That Mr Mokhele be ordered to pay the costs occasioned by this application on an attorney and client scale, including costs occasioned by the employment of counsel.
- [4] The LPC alleged that the application for leave to appeal is frivolous, vexatious and an abuse of the court process. This assertion is based on Mr Mokhele's previous conduct, especially in respect of the numerous other applications that preceded the application for leave to appeal. The LPC argues that latter application was brought merely to delay the matter as there are insufficient or proper grounds, which fail to meet the requirements set out in section 17(1) (a) of the Superior Courts Act 10 of
2013. The grounds proffered by Mr Mokhele are a re-hash of the arguments and contentions put before the court in the striking application. Such arguments were dealt with in the striking judgment and were rejected by that court. Hence, those grounds, raised in the application for leave to appeal, are meritless and do not avail Mr Mokhele.

- [5] The LPC also argues that, based on the sheriff's returns of service, Mr Mokhele does not appear to own any unencumbered movable or immovable property which can be sold to satisfy the existing amounts, by virtue of the taxed costs, owed by Mr Mokhele to the LPC. Therefore, it seems unlikely that it would be able to recover the further costs that will be incurred in the appeal application. Hence, it is entitled to an order for security for costs of the application for leave to appeal and any appeal that may ensue thereafter.
- [6] Mr Mokhele argues that the LPC is not entitled to the relief it seeks as it has failed to provide sufficient reasons and good cause for such relief. In addition, he is a South African citizen and, therefore, an incola (for the purpose of this litigation). As such, he enjoys protection of his rights in terms of Chapter 2 of the Constitution of South Africa. He also alleges that the LPC has illegally and unlawfully stripped away his livelihood, a reference to the striking off order. Mr Mokhele continued to employ this kind of emotive language in his answering affidavit and proceeded to go into the merits of the striking off application, impermissibly so, in my view.
- [7] Mr Mokhele further argues that as an incola, the LPC would only succeed with an application of this nature if it can show that he is a vexatious litigant, which he is not. Mr Mokhele further appears to have misread or misunderstood the relief claimed by the LPC, as well as the content of its founding affidavit, and particularly its notice in terms of rule 47(1), as he embarks upon an argument that the LPC is not entitled to claim security for costs for matters that have been finalized, referring specifically to those matters where the taxing master's allocaturs have been annexed to the founding affidavit, where the amount still outstanding is R527 942.23. On any reading of the founding papers, this interpretation of the relief sought is not possible. It is clear that the LPC seeks security for costs only for the application for leave to appeal and any resultant appeal. In my view, it is unnecessary to deal any further with this argument that Mr Mokhele has put forward.
- [8] His answer to the LPC's contention that he does not appear to be in a position to pay the outstanding costs due by him, is that he paid the amount of R50 000, but this does not indicate his inability to pay costs once the matter has been finalized. The LPC has not proved in any way that he has no unencumbered property capable of being sold to satisfy the amount owed to it. This application is merely a knee-jerk reaction to his application for leave to appeal. I will deal further with the aspect of Mr Mokhele's inability to pay the amount owing, shortly.
- [9] The relevant provisions of Uniform Rule 47 reads as follows
- '(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.
- (2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

- (3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.
- (4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.'

It is well settled in our law that this rule does not set out grounds upon which a party may claim security for costs; it deals purely with the procedural aspect for such an application. Courts must resort to the common law and statutory provisions to determine the grounds upon which security for costs may be sought and granted. As a general rule, security for costs may not be demanded from an incola, but, as with most rules, there are exceptions. The court has a discretion in deciding whether to grant an order for security for

costs[1] and in exercising that discretion, the court must ensure that it considers all the relevant circumstances to achieve fairness and justice for both parties.[2] The court must also balance the interests of both parties, and consider the prejudice to the applicant and his ability to pursue his claim if such an order is granted, against that of the respondent, and whether he would have difficulties in recovering the costs of his being obliged to defend the matter, if the order is not granted.[3]

[10] The learned authors in Erasmus Superior Court Practice Vol 2 from RS 22, 2023, D1 Rule 47-5 set out the legal principles and precedents relevant to an application for security for costs. The following is an extraction of the salient principles relevant for this matter:

'As a general rule, the mere inability of a plaintiff or applicant as the case may be, who is an incola, to satisfy a potential costs order against him is insufficient in itself to justify an order that he furnish security for his

opponent's costs. Something more is required. The court must be satisfied that the main action is vexatious or reckless or amounted to an abuse of the process of the court... An action is vexatious if it is obviously unsustainable. While this must appear as a certainty in an application to dismiss or strike out a claim, in an application for the furnishing of security for costs the test is less stringent and other factors, which are irrelevant in an application for the dismissal of a claim, should also be taken into consideration. One such factor is the financial ability of the plaintiff to comply with an order to pay the defendant's costs of the action should it prove to be unsuccessful.'

[11] Erasmus referred to Boost Sports[4] where the Supreme Court of Appeal (SCA) said at para 18:

'African Farms and Townships was concerned with an application to strike out a claim. Since the common law is reluctant to limit access to court, an application for security for costs would seem to require a less stringent test than one for the stay of vexatious proceedings. The latter ends unsustainable litigation whereas the former contemplates the continuance of the proceedings with the safeguard of security for costs. Thus in *Fitchet v Fitchet* 1987

(1) SA 450 (E) at 454E – G Olivier J pointed out that:

"It may well be that, in applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account."

At para 19, the SCA continued thus:

"In Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet 2008

(3) SA 10 (C) para 26, Griesel J posited that the ordinary yardstick — a preponderance of probability — should find application in an enquiry such as the present. It is not envisaged, it seems to us, that a detailed investigation of the merits of the case should be undertaken. Nor is it contemplated that there should be a close investigation of the facts in issue in the action. As it was put by Streicher JA in *Zietsman v Electronic Media Network Ltd and Others* 2008

(4) SA 1 (SCA) para 21:

"I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case."

[12] In the present matter, I had the privilege of reading the striking judgment which dealt with the various points raised by Mr Mokhele as grounds of appeal in the notice of appeal. The court in the striking judgment rejected most of those points, in the exercise of its discretion. In striking off matters, the notion that such proceedings are sui generis is well established in our law and in legal practice in South Africa. The court exercises an inherent jurisdiction in regulating the conduct of legal practitioners, a power afforded to the court by the common law. In the exercise of its discretion in such matters, the court considers whether the interests of the public outweigh those of the practitioner to practice. An appeal court will not easily interfere with such judicial discretion, in the absence of a demonstration that the striking court exercised its discretion arbitrarily, or that it acted upon a wrong legal principle or applied a legal principle incorrectly, that it did not

bring a fair and impartial mind to bear in its adjudication of the matter or that no good reasons exist for its decision. The notice of appeal in this matter makes no such allegations. Mr Mokhele in his answering affidavit, alleged that he intends filing a supplementary

notice of appeal, amending his grounds of appeal. Even in those intended amendments, no allegations are made of grounds which would

be likely to trigger interference by an appeal court. On a balance of probabilities, it appears that the application for leave to appeal will not be sustainable.

- [13] Mr Mokhele is a qualified legal practitioner who practiced as an attorney for many years. Save for a few appearances in court, when he appeared in person, he was represented by counsel in the various applications pertinent to this matter, including the striking off application and in the application currently before me. He and those representing him ought to, and in fact are expected to, know legal procedures and the requirements of such in instituting and defending/opposing applications and actions. The papers in this matter are replete with irrelevant allegations and often impermissible arguments. Mr Mokhele did not deal meaningfully at all with the most important issue – that of the application for security for costs. The manner in which he presented his case required of this court to re-adjudicate the merits of the striking off application, and, in turn, also decide the application for leave to appeal. It is expected of a legal practitioner to know that it is impermissible for this court to do so. It is not the function of this court to closely investigate the merits of the matter nor to settle the disputes between the parties.
- [14] This court needs to balance the interests of both parties and consider all the relevant circumstances to determine if a security for costs order should or should not be granted. The LPC is a public interest body which regulates the manner in which legal practitioners ply their trade, so that public interest is not harmed by acts of malpractice and members of the public are not financially prejudiced as a result of malpractice or irregular conduct on the part of legal practitioners. Mr Mokhele's livelihood has been affected and his ability to earn an income limited as a result of his being struck from the roll of legal practitioners. In order to balance those competing interests, this court has undertaken the exercise of examining the conduct of Mr Mokhele, as has been comprehensively set out in the striking judgment, as well as the conduct of the LPC.
- [15] As indicated, the striking judgment dealt in detail with the various grounds raised by Mr Mokhele in opposition to the striking off application, and which I have dealt with earlier. He has not placed before this court and cogent answer to the LPC's contentions in support of its application for security. The LPC indicated that it appears from the sheriff's returns of service that it did not appear that Mr Mokhele is able to pay the amounts due by him to the LPC in respect of the taxed costs. Apart from alleging that the LPC did not prove that he has no unencumbered property and that he is unable to pay the amount due, Mr Mokhele gave no answer refuting the assertions of the LPC. He did not indicate if he, in fact, does have assets or resources, what such resources are and whether that would enable him to pay his

debts. The sheriff's returns are prima facie proof of the truth of their content and will be accepted by the court, unless challenged and proved otherwise. That was not done in this case, and I am inclined to accept that the LPC will have difficulty in recovering the costs it has had to incur in respect of the application for leave to appeal, should Mr Mokhele not be successful in that application.

- [16] The prejudice to the LPC, who acts in the public interest is substantial. It is currently out of pocket to the tune of over R500 000.00. It is obliged to oppose what appears to be an unsustainable application for leave to appeal. Even if the application were to be granted, it is clear that Mr Mokhele will then proceed to prosecute the appeal, causing the LPC to incur further costs, without much prospect of recovering same. The dictum of the court in the *African Farms and Townships*[5] is apposite, namely that an order for security for costs contemplates the continuance of proceedings with the safeguard of security for costs. The door will not be shut to Mr Mokhele, as he accuses the LPC of doing. He may continue with his application as soon as the LPC's costs are secured.
- [17] With regard to costs, the usual position is that the costs in a matter such as this will be borne by the unsuccessful party on an attorney and client scale. I see no reason to depart from this position
- [18] In the circumstances, the following order is made:

NAIDOO J

Appearances: For the Applicant/Respondent: Adv T Mhlanga with Adv (Ms) BH Mathlape
Instructed by: Ponoane Attorneys Suite 10 Library House 44 Westburger Street Bloemfontein
For the Respondent/Applicant: Adv MS Mazibuko Instructed by: Amade & Co Inc 56 Pres Steyn Ave
Westdene Bloemfontein

- [1] *Barker v Bishops Diocesan College* 2019
- (4) SA 1 (WCC) at 8B–C; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* [2023] ZASCA 54; 2023
- (4) SA 500 (SCA) para 7 (*Mystic River*).
- [2] *Magida v Minister of Police* 1987
- (1) SA 1 (A) at 14E and 15D; also *Mystic River*.
- [3] *Shepstone & Wylie and Others v Geyser* NO 1998
- (3) SA 1036 (SCA) at 1046B; *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 para 21 (*Boost Sports*). See also *Mystic River*.
- [4] Footnote 3.
- [5] As cited in *Boost Sports* para 18.

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