IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2017/ 29163

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

.....
KHAN AJ **15 JULY 2022**

In the matter between:

GEORGE HLAUDI MOTSOENENG **Applicant**

And

SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED **First Respondent**

SPECIAL INVESTIGATING UNIT **Second Respondent**

SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND **Third Respondent**

Delivered: *This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been the 15 July 2022.*

JUDGMENT

KHAN AJ

[1] The Applicant, Mr George Hlaudi Motsoeneng ("Motsoeneng") seeks leave to appeal the Judgement and Order of this Court handed down on the 15 December 2021. Leave is sought to the Supreme Court of Appeal ("the SCA") on the grounds set out in the Notice of application for leave to appeal, dated 21 December 2021.

[2] Leave to appeal is sought in terms of section 16(1)(a)(i) read together with section 17(2)(a) of the Superior Courts Act[1] and Rule 49 of the Uniform Rules of Court. The First and Second Respondent ("the Respondents' ") oppose the relief sought.

[3] Section 17(1) of the Superior Courts Act provides that, "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 prospects of success; or*

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration."

[1] 10 of 2013

[4] The Applicant submits that there are reasonable prospects that the SCA will reach a different conclusion on the merits, the remedy and the cost. The Applicant relies on a number of grounds of appeal, to which I will refer to later.

[5] The test in terms of section 17(1)(a)(i) is set out in **Mont Chevaux Trust (IT 20128) V Tina Goosen And 18 Others**[2], where, Bertelsmann J, stated,

> *"It is clear that the threshold for granting leave to appeal against a judgement of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion, see Van Heerden v Cronwrite and Others 1985 (2) SA 342 (T) at 343H. The use of the word would in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against."* [Reiterated in Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others.[3]]

[6] This Court must accordingly, in considering this application remain cognisant of the higher standard that needs to be met before leave to appeal may be

---

[2] 2014 JDR 2325 LCC at para 6
[3] (2016) ZAGPPHC 489 at para 25

granted. The Applicant's relies on 4 grounds of Appeal- Merits, Remedy, Costs and Other Compelling Reasons.

Merits

[7] The argument here is twofold, firstly, that this Court erred in finding that the GNC did not have the powers to make a policy on success fee and to pay the Applicant in accordance therewith. This ground is duplicated under Other Compelling Reasons and here the complaint is that this matter involves the interpretation of the Terms of Reference of the GNC, a committee of the Board of the SABC and whether the Court was correct in the interpretation of the Terms of reference.

[8] The second argument is that the Court erred in finding that the Applicant was dishonest and ought to have found that it was lawful for the GNC to make a policy on success fee, to pay the Applicant in accordance therewith and that there was no dishonesty on the part of the Applicant.

[9] Both arguments were advanced previously and considered at length by the Court. In deciding whether the GNC had the authority to pay the Applicant a success fee this Court dealt with the powers of the GNC extensively in its judgement[4] and concluded that *"the GNC's decision to award Motsoeneng a*

[4] CaseLines para 49 to 93, 076-20 to 076-32; para 147 to 148; 076-50 to 076-51

success fee was therefore unauthorised, unlawful and beyond the prescripts of its mandate." In dealing with the issue of dishonesty[5] the Court found that the Applicant's conduct was dishonest and that the requirements of section 37D(1)(b)(ii)(bb) have been met.

[10] Most, if not all of the arguments made by the Applicant in his heads of arguments are a rehash of arguments made previously, which arguments and the reasons why they cannot succeed have already been dealt with by this Court in its judgement and will not be repeated here. In **T & M Canteen Cc V Charlotte Maxeke Academic Hospital And Another[6],** Adams J stated, *"for starters, these are all issues which have already been decided in the main application. It does not behove the respondents to rehash the same defences, which this court has already found to be without merit."*

[11] In his Heads of argument, the Applicant submits, "*at the heart of this Application is whether the South African Broadcasting Corporation (SABC) supported by the Special Investigative Unit have a lawful basis to set aside an agreement to pay Mr Motsoeneng a fee for successfully bringing private sector financial investment into SABC projects."*[7] .... *"Put differently the question is whether the SABC should be allowed to have the agreement reached between itself and Motsoeneng to pay him a success fee reviewed*

---

[5] CaseLines para 100 to 147; 076-35 to 076-62
[6] 2021 ZAGPJHC 519 at para 8
[7] Applicants Heads of Argument, CaseLines 015-68

and set aside, on the grounds that the SABC did not have a policy to pay a success fee or that the GNC did not have the powers to award him a success fee"[8].

[12] It was never the Applicant's case that this was an application in terms of which the Court was required to interpret, ***the terms of reference of the GNC***, (my emphasis). The Applicant, impermissibly raises arguments that were not raised previously, i.e. the argument that the GNC had powers to make a policy on a success fee and to pay the Applicant in accordance therewith.[9] The court dealt with the powers of the GNC[10] extensively with reference to the SABC Delegation of Authority Framework, the Board Charter and the Terms of Reference. Apart from rehashing arguments made before the Applicant has not shown that another court will come to a different conclusion and alter this Courts finding.

[13] The Applicant makes the submission that the SABC did not accuse the Applicant of dishonesty in its Founding Affidavit, referring to Part A of this application. This is incorrect, the Affidavit filed by the Respondents', dated 24 July 2020 sets out the investigations conducted by the SIU and the dishonesty on the part of the Applicant.[11] The Applicant deals extensively with the reasoning in this Courts' Judgement which he alleges favour his

---

[8] CaseLines para 4.1, 015-69
[9] CaseLines, para 9- 079-8
[10] CaseLines para 50 to 72, 076-20 to 076-26
[11] CaseLines para 14-32, 012-11 to 012-19

case, whilst ignoring those for which he has no answer[12]. **In South African Reserve Bank v Khumalo and Another[13]** the Court held "*that an appeal lies against an order that is made by a court and not against its reasons for making the order.* The Applicant has failed to show that certainty exists that another Court would alter this Courts order.

Remedy

[14] That the learned Judge improperly exercised her remedial discretion in terms of section 172(1)(b) of the Constitution by crafting a just and equitable remedy. The Court dealt extensively with this aspect,[14] and will seek that the reasoning and the deluge of authority relied upon be repeated here. The Court found that the only reasonable inference to be drawn is that the Applicant received payment of the success fee in circumstances that he knew, or ought to have known, that he was not entitled to such success fee and that same should be repaid. This Court does not believe that another Court will come to a different conclusion.

[15] The Applicant argues that the interest rate of 15,5% calculated from 13 September 2016 imposed by this Court should not have been imposed as the Respondents' acknowledged that they delayed to bring the matter to

---

[12] CaseLines para 145, 076-49
[13] (235/09) [2010] ZASCA 53; 2010 (5) SA 449 (SCA) ; [2011] 1 All SA 26 (SCA) (31 March 2010)
[14] CaseLines para 152 to 167; 076-51 to 076-62

court and even applied for condonation, their delay should not be condoned at the expense of the Applicant. Further that the interest rate was not 15,5% all the way from the 13 September 2016 to date of payment and is in fact currently far below 15,5%.

[16] The Respondents' delay and condonation has been dealt with by this Court[15] which found that the interest of justice permit that condonation be granted.

[17] The Court concedes that the prescribed legal rate should have been ordered as opposed to a constant rate of 15,5%. A court is allowed to correct a clerical, arithmetical or other error in its judgement in order to give effect to its true intention. The Court will accordingly amend the existing order by deleting the words 15.5% and replacing same with *interest a temporae mora from 13 September 2016 to date of payment.*

[18] The power of a court to amend or supplement its findings was dealt with in the matter of **Thompson v South African Broadcasting Corporation**,[16] where the court held:

---

[15] CaseLines para 15 to 25 076-7 to 076-10
[16] 2001 (3) SA 746 (SCA)

"In this regard there appears to be a misunderstanding about the power of a Court to amend or supplement its findings in contradistinction to its orders. The correct position was spelt out in Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 307C-G: 'The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention.... This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. Kotze JA made this distinction manifestly clear in [West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 186-7], when, with reference to the old authorities, he said: 'The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced..."

Cost

[19] The argument in this regard is twofold, firstly that the Court erred in ordering the Applicant to pay the cost of the review application which cost are to include the reserved costs in respect of Part A and cost of two counsel where employed. Secondly that this was a self-review application made by

the Respondents' in terms of the principle of legality, an incident of the rule of law. This was therefore constitutional litigation. The Respondents' are State parties while the Applicant is a private party. The court ought to have applied the Constitutional Court judgement of **Biowatch Trust v Registrar Genetic Resources and Others**[17]("Biowatch") in determining the issue of cost.

[20] It is a basic rule of our law that an award of cost is in the discretion of the Court and such discretion must be exercised judicially.[18] In **Kruger Bros and Wasserman v Ruskin**[19] Innes CJ held that,

" *the rule of our law is that all costs-unless expressly otherwise enacted-are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.*"

[21] It is trite that in the Ordinary Courts, the general rule is that, cost follow the result.[20] Equally trite is the principle that a court has a discretion whether to allow the fees for the employment of more than one counsel. **In Motaung v Makibela and another NNO; Motaung v Mothiba NO**[21], the Court quoted

---

[17] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)
[18] Ferreira v Levin and Others, Vryenhoek & others V Powell NO & Others 1996(2) SA 621 (CC) and Motaung v Mukubela & Another NNO; Motaung v Mothiba NO 1975 (1) SA 618 at 631A
[19] 1918 AD 63 at 69
[20] Khumalo and Another v Twin City Developers (Pty) Ltd and Others (2017) ZASCA 143.
[21] 1975(1) SA 618 (0) at 631 A

the following passage from Koekemoer v Parity Insurance Company Ltd and Another[22] with approval,

"The enquiry in any specific case is whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary for the proper attainment of justice or for defending the rights of the parties" and were not incurred through "over-caution, negligence or mistake". If it was a wise and reasonable precaution to employ more than one counsel, the cost incurred in doing so are allowable as between party and party. But they are not allowable if such employment was merely luxurious."

[22] The Constitutional Court, considering the discretion of the High Court on the issue of cost, stated in **Hotz and Others v University of Cape Town,**[23]

"A cautious approach is, therefore, required. A court of Appeal may have a different view on whether the cost award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion."

[23] In Biowatch, Sachs J held that,

"Equal protection under the law required that costs awards not be dependent on whether the parties are acting in their own interests or in the

---

[22] 1964 (4) SA 138 (T) at 144
[23] 2018(1) SA 369 (CC) at para 28

public interest. Nor should they be determined by whether the parties were financially well-endowed or indigent…. The primary consideration in regard to costs in constitutional litigation had to be the way in which a costs order would hinder or promote the advancement of constitutional justice." Thus in Affordable Medicines this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court."[24]

[24] In Affordable Medicines[25] this Court laid down exceptions to the rule, Ngcobo J said:

---

[24] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), at para 16 to 18.
[25]Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138

"there may be circumstances to justify departure from this rules such as whether litigation is frivolous or vexatious. They may be conduct on the part of the litigant that deserve censure by the court which may influence the court order and unsuccessful litigant to pay costs".

[25] In **Harrielall v University of KwaZulu Natal**[26], the Constitutional Court per Jafta J, restated the principles underlying the Biowatch rule:

"In Biowatch this court laid down a general rule relating to costs in constitutional matters. That rule applies in every constitutional matter involving organs of State. The rule seeks to shield unsuccessful litigants from the obligation of paying cost to the State. The underlying principle is to prevent the chilling effect that adverse cost orders might have on litigants seeking to assert constitutional rights. However, the rule is not a license for litigants to institute frivolous or vexatious proceedings against the State. ***The operation of its shield is restricted to genuine constitutional matters****.(my emphasis) Even then, if a litigant is guilty of unacceptable behaviour in relation to how litigation is conducted, it may be ordered to pay costs. This means that there are exceptions to the rule which justify a departure from it".*

---

[26] 2018 (1) BCLR 12 (CC)

[26] This Court did not find that this matter was "a genuine constitutional matter" and accordingly the Biowatch principle does not apply. The Respondents' approached this Court with a self-review application in terms of the principle of legality, the Applicant did not argue or approach this matter as a constitutional matter, there is no indication that the Applicant was acting in the public interest and did not even refer to Biowatch in its Heads of Argument.[27]

[27] The Applicant in Biowatch was acting in the public interest and in so doing sought to vindicate a constitutional right. This matter was not argued as one in the public interest, the only interest being advanced was that of the Applicant.

[28] In **Lawyers for Human Rights and Another v Minister of Home Affairs and Another**[28], the Court in dealing with public interest stated, "*Having regard to the nature of public interest litigation, litigants bringing an application in terms of Section 38(d) of the Constitution should not have as much of a substantive and financial interest in the outcome of the mater as the Applicant has in this matter. A vested interest in the matter, both financially and otherwise- clearly taints the legitimacy of the claim that the matter is in fact being brought solely in the public's interest. "Even if the*

[27] CaseLines 015-58-015-102
[28] 2004 (7) BCLR 775 (CC).

..... as a private litigant is litigating to ventilate issues of public importance, this is not enough to shield it from an averse costs order as noted by Sachs J in Biowatch. A constitutionally discernible right must be sought to be vindicated against the State in order for the Biowatch principle to apply".[29]

[29] Having regard to the aforesaid, I am not persuaded that another court will find that this Court erred in ordering costs against the Applicant. This Court was acting within the boundaries of its discretion when it did so.

Other Compelling Reasons

[30] The Applicant relies on Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd[30] ("Caratco"), in support of its contention that the Court cannot refuse the Applicant for leave to appeal merely on the grounds that it is of the view that the Applicant has not made out a case that he would have reasonable prospects of success on appeal.[31] The Court is bound to go further and answer the second question of whether there are other compelling reason or reasons for leave to appeal to be granted.

---

[29] Fair-Trade independent Tabaco Association/ President of the Republic of South Africa and others (21688/2020) [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) (26 June 2020)

[30] (982/18) [2020] ZASCA 17; 2020 (5) SA 35 (SCA) (25 March 2020)

31 *"In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive."*

[31] The Applicant contends that this matter concerns:-

31.1 the payment of a success fee for an innovation through which a person who was an employee of an organ of state raised money from the private sector. It is important for the Appeal court to set the correct approach in dealing with an application for the review of such a decision in circumstances where the organ of state has benefited from the innovation and continues to do so;

31.2 It involves the interpretation of the Terms of Reference of the GNC;

32.3 It involves the question whether it was appropriate to order that the monies paid for the innovation be paid back, and if so, from the pension fund proceeds of the Applicant;

[32] In Caratco, the issue was whether a business rescue practitioner may earn a success fee outside the strictures of s 143 of the Companies Act[32] it was submitted that this involved important questions of public policy and constituted a 'compelling reason' for the appeal to be entertained as contemplated in s17(1)(a)(ii) of the Superior Courts Act. The Court at para 26 stated," *These submissions were not only extraordinary but utterly*

[32] 71 of 2008

without any merit. It is trite that it is for the party seeking to impugn an agreement on public policy grounds to plead and prove the facts upon which it is founded, Caratco has done neither."

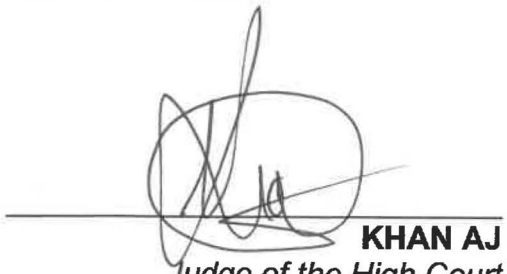
[33] The Applicant has unsuccessfully attempted to bring this application within the ambit of Constitutional law in its argument on the Biowatch principle, it now attempts to cloak this in the mantle of public policy. It has never been the Applicant's case that public policy demands that he be paid a success fee. This was not raised in the papers filed of record or in argument . In order to succeed on the grounds of public policy, the Applicant would have to *plead and prove the facts upon which it is founded*, this the Applicant has not done. I do not find that the Applicant has succeeded in proving compelling reasons for the granting of the Appeal. Nothing argued has persuaded me that another court would find differently or that another could would be entitled to disturb the discretion I exercised based on recognised legal principles.

ORDER

In the circumstances, I make an order in the following terms:

1. The Applicant is ordered to repay to the SABC an amount of R11,508,549.12 paid to him as a success fee with interest, a *tempore morae* calculated from 13 September 2016 to date of payment.

2. The Application for leave to Appeal is dismissed with costs.



KHAN AJ
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 5 April 2022

Judgment: 15 July 2022

Applicant's Counsel: J A Motepe SC, with him, TE Netshiozwi

Instructed by: Mr Khosi Mabaso of Werksmans

Respondent's Counsel: T Masuku SC with him, MK Mathipa

Instructed by: Bokwa Law Incorporated