(Inlexso Innovative Legal Services) avs

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32608/2021

DATE: 2021.11.12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED .....
SIGNATURE
.....
DATE: 12/11/'21

In the matter between

CA ANDERSON — Applicant

and

SI BARBAGLIA — First Respondent

MS BOVE — Second Respondent

JUDGMENT
Ex-Tempore

KEIGHTLEY J: This is an application for leave to appeal against a judgment and order handed down by me in urgent court on the 26 July 2021. Briefly, the litigation arose from an application that was made by the executor of the deceased estate of Mr Barbaglia, the executor being Mr Anderson N.O. He sought final interdictory relief against Mrs Barbaglia, and

he included Mrs Barbaglia's legal representative, Ms Bove, as the second respondent in the matter.

As the applicant when the matter was heard before me remains the applicant for leave to appeal, I will simply refer to the parties as "applicant" and "respondent

The relief that was sought is dealt with in paragraphs 6 to 10 of my judgment. It will be evident from those paragraphs that the relief that was sought was wide ranging and broad. It was also intended to be of final effect, and it was sought on a very urgent basis.

First, one must bear in mind what the test for leave to appeal under section 17(1)(a) of the Superior Courts Act, Act 10 of 2013 entails. In terms of that section, leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success (sub-para (i)), or there are some other compelling reasons why it should be heard, including conflicting judgments on the matter under consideration (sub-para (ii)).

It is settled law too that the question is not whether the case is arguable or whether another court may come to a different conclusion, that is a principle from the common law going back to *R v Nxumalo* 1939 AD 580 at 588.

In more recent authorities courts have spoken of the effect of the change in wording in section 17(1)(a)(i), that is the use of the word "would". In that regard it has been held that this imposes a more stringent test than previously was the case.

There are a number of authorities for this principle: *Mont Chevaux Trust v Goosen* is the first, [2014] ZALCC 20, that is a judgment of Judge Bertelsmann dated the 3 November 2014. It was endorsed by a full court of this division in *Zuma & Others v The DA*; that was the leave to appeal judgment, unreported case number 19577/2019, and the judgment is dated the 24 June 2016. Then there is also Supreme Court of Appeal authority for the principle that a more stringent test is required under the Superior Courts Act, and that authority is *Notshokovu v S*; [2016] ZASCA 112, dated the 7 September 2016, and that judgment also makes reference to other SCA authority for the point.

In *Mont Chevaux* what Judge Bertelsmann pointed out is that the use of the word indicates a measure of certainty that another court will differ from the court *a quo,* and that is what was endorsed in the *Zuma v DA* matter. That then deals with the principles that are applicable.

The grounds of appeal are to be found at CaseLines reference 012, starting at 012-01. Although there are some 10 grounds of appeal, Mr Peter for the applicant categorised these into three groups, due to the fact that there is some overlap between the different grounds of appeal. It is pragmatic to follow Mr Peter's example and to refer to them in categories.

The first two grounds of appeal deal with the undertakings that the applicant relied upon to in seeking the interdict against Mrs Barbaglia. The undertakings are dealt with in the first ground of appeal in the application for leave to appeal, coupled with grounds 3 to 8. The undertakings go to the question of *locus standi*, and the clear right for the relief sought, which were issues which had to be determined. Mr Peter essentially submitted that insofar as these issues rested on an interpretation of the undertakings that were given by the respondent, I erred in my interpretation of them, and that I failed to give sufficient weight to the circumstances in which each of those undertakings were given.

The submission is that there are reasonable prospects that another court would interpret the undertakings differently if proper weight is given to the context within which each of those undertakings relied upon was made.

There were three undertakings that were at issue when the matter was heard before me. I have dealt with the undertakings extensively in my judgment, particularly at paragraphs 61 to 84. I undertook a detailed legal and factual analysis of the undertakings that were given, and I rejected the interpretation placed on them by Mr Peter. Mr Peter did not essentially depart in any specific way from the submissions that were made by him when I first heard the matter.

His point today, is that he simply has to satisfy me or persuade me that there is a reasonable prospect that another court would interpret the undertakings differently, and that it would interpret them to mean that what Mrs Barbaglia had undertaken was to absolutely take no steps at all as regards foreign assets.

What is important, I think, to bear in mind on this issue is that in order to accept the applicant's interpretation, that another court would have to accept that on a proper interpretation of the undertakings they were unqualified, firstly; and secondly, that they amounted to a waiver of her right to seek legal advice from foreign lawyers in the jurisdictions in which those assets were situate.

For the reasons fully set out in my judgment, I do not believe that that interpretation is correct. That is not the test in an application for leave to appeal, I accept that, but for the reasons fully set out in my judgment, in my view there is no reasonable prospect that another court would find that Mrs Barbaglia gave, firstly, unqualified undertakings, and secondly, that her undertakings were such as to amount to a waiver of her legal rights to seek legal advice from attorneys in foreign jurisdictions, which is in effect, on the papers, what she was going to Italy to do. Mr Anderson, as the executor, was well aware of that, as she had told him that she was going to seek legal advice.

So, I am not persuaded that there is a reasonable prospect that another court would find that she waived her rights and that she gave an unqualified undertaking that she will do nothing to protect her position as regards foreign assets. As I say, I refer for further reasons to what I have already set out in my judgment in the main application, which I need not cite again here in any detail.

The second ground of appeal that Mr Peter referred to is encapsulated in ground 2 of the application for leave to appeal. This is the submission that the duties imposed on the executor under the Estate Duty Act, and the fact that the

deceased was resident and *domiciled* in South Africa, gave the applicant *locus standi* and a clear right to the interdict sought in the application.

In my judgment, I dealt with the legal aspects of the executor's rights and duties as regards foreign assets. I deal with the issue under the heading *"Locus Standi"*, and then following from that, the issue of the clear right. I refer to various authorities from paragraph 49 to paragraph 54 of the judgment, and Mr Peter again referred me to those authorities.

It seems to be common cause that they are the authorities in question, those authorities being the *Segal* matter, which is referred to in my judgment. In addition, Mr Peter referred me to further passages in *Segal*, and to *Dicey & Morris.* The point Mr Peter made in his submissions to me today was that from the authorities it is clear, or at least it seems to be the position in South Africa law, that an executor does have a duty when it comes to foreign assets.

The executor has a duty, and this was common cause before me, under the Administration of Estates Act to record in the estate documents the existence of foreign assets because they are important from an estate duties' point of view and its calculation. Mr Peter submitted that the duty goes further, and

that in fact the executor does have a duty to take appropriate steps to guard foreign assets, and not to sit supine. He said that the Executor can take steps to extend his authority over foreign assets. This can be done in a variety of ways.

Mr Peter submitted that this being the case, it follows from that in the interim an executor does have *locus standi* to apply for appropriate relief to protect those assets until such time as the Executor has had his legal authority extended to cover the foreign assets.

As appears from my judgment, it was common cause when the matter was argued before me that an executor may seek to have powers extended, or his appointment recognised in a foreign jurisdiction. I have no quarrel with this basic legal submission.

However, the question really is whether the executor in this case had *locus standi* to seek the relief set out in the Notice of Motion. To put it another way, because it was an application for an interdict, did the executor have a clear right to seek the relief that was sought in the Notice of Motion in the absence of an extension of his powers? It is here in my view that the applicant falls short of persuading me that there are reasonable prospects another court would find differently.

I have already referred to the fact that the relief sought was very broad-ranging, it was extremely broad-ranging, and I refer, in particular, to paragraphs, 8 and 9 of my judgment in that regard, where I set out the extent of the relief sought in the Notice of Motion. The question really is whether the executor established a clear right to seek this particularly broad relief on a final and urgent basis, that is the question.

It seems that the executor sought the interdict in order to prevent Mrs Barbaglia from having free reign that he alleged she otherwise enjoyed over the foreign assets. I deal with this particularly in paragraphs 58 to 60 of my judgment.

I point out that the effect of the relief that was sought by the executor would be to interdict institutions in foreign countries from dealing with the assets, in respect of which in terms of their own laws they have jurisdiction. That gives some sense as to the very wide-ranging relief that was sought by the executor.

Despite the fact that as a matter of law, the executor would be able to take steps to give effect to his duty in respect of foreign assets, what is unexplained is that Mr Anderson did not take any steps to have the powers extended. Although he knew for many months about the existence of foreign assets,

and although it was common cause that he had appointed lawyers in foreign jurisdictions, he did not take any further steps to extend his powers in respect of the assets in foreign jurisdictions. Instead, he sought wide-ranging relief that would in effect perhaps create further problems for lawyers in foreign jurisdictions. Furthermore, he sought to do that on an urgent basis.

It is clear from the facts of this case that Mr Anderson, as the executor, despite having a basis on which he could seek a proper channel to exercise his duties in foreign jurisdictions, did not follow those channels, and he gave no explanation for not following them. Instead, he sought an extremely urgent and wide-ranging interdict against Mrs Barbaglia.

Bearing that in mind, the mere fact that in law he has obligations to take steps did not give him a clear right to seek the relief that he sought in this case. For those reasons I do not believe that there are reasonable prospects that another court would find that in this case Mr Anderson had a clear right to seek the relief set out in the Notice of Motion.

The last basis for the appeal is the question of costs. I dealt with the question of costs in the closing paragraphs of my judgment. To preface the issue of costs for purposes of the

application for leave to appeal, it is perhaps worth noting that both parties sought punitive costs against each other. Consequently, the fact that punitive costs were awarded cannot come as a surprise to the applicant. In fairness to Mr Peter, what he submitted to me was that the real issue with the punitive costs order was that the costs were made against Mr Anderson in his personal capacity rather than that the estate should pay the costs.

In my main judgment, in paragraph 97, I point out that the applicant acted with undue haste in instituting the urgent application. I say that I have already dealt with the shortcomings of the application from the point of view of urgency, and in fact there is a heading in my judgment dealing with urgency, where I particularly point out that, despite knowing for months that Mrs Barbaglia intended travelling overseas for purposes of getting legal advice in respect of foreign assets, the applicant did not do anything until the eve of Mrs Barbaglia's intended departure.

In doing so, he did not take up the tender of a meeting with Mrs Barbaglia and her attorney, as was suggested by them, and instead launched an urgent application. He did so in circumstances where the papers were served on Mrs Barbaglia on the evening of the Thursday, the papers were filed at the

High Court on Friday, and Mrs Barbaglia was expected to file answering papers by the Monday to be in court on the Tuesday. Thus, it was with great haste that the urgent application was sought.

I made the point in my judgment that there would have been grounds for refusing to enrol the matter, or rather to strike it for want of urgency. Nonetheless I proceeded to hear the matter. But the fact that the urgent application could have been struck for want of urgency gives an indication of the extent to which I viewed the applicant's action and conduct in this regard to be worthy of some rebuke, and that is reflected in the punitive costs order.

Adding to this is the extensive and overly broad relief that was sought by the applicant, and again I go into that in some detail in the body of my judgment. When this was pointed out to Mr Peter at the hearing, he submitted that an amendment could be made because of the over-breadth of the relief that was sought in the first place. That too was another reason why Mr Anderson's application justified some censure on the part of the court.

I also made a point in my judgment that very serious allegations were made by the applicant about what

Mrs Barbaglia was going to possibly do with foreign assets, and I found that those were not properly established on the facts. They were very serious allegations and accusations. This was despite Mrs Barbaglia having made it clear through her attorney for some time that she was seeking advice from attorneys in foreign jurisdictions. In fact, she had offered to share the opinions of the foreign lawyers with the executor in recent correspondence between the parties. I took that too as a reason to disparage the applicant's conduct.

As far as punitive costs are concerned, the Constitutional Court recently dealt with this matter, in *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC). In paragraph 20 of that judgment the Constitutional Court makes the point that:

> "The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that she or he should not have had to endure. Indeed, this Court has recognised that costs orders often do not even achieve this objective, and fall short of assisting the successful litigant in fully recovering her or his expenses. It follows that, at times, it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in

recouping their often substantial expenses."

The Constitutional Court goes on in paragraph 21 to say:

> "Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted."

And they point out that:

> "Attorney and client costs are extraordinary and should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner."

Then it refers to a more recent decision of the Constitutional Court in *Tijiroze*, the citation of which can be found in paragraph 22 of the Constitutional Court's judgment *Mkhatshwa*. From these authorities it is plain that there are a number of principles that apply in making costs awards. The first is the obvious one that costs are always a matter of discretion for the court that heard the matter.

The second is that, as the Constitutional Court says in paragraph 20 of *Mkhatshwa*, at times it may be just and equitable to award costs on a punitive scale not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses.

Thirdly, the Constitutional Court also notes in *Mkhatshwa*, that in *Tijiroze* the Court found that the cumulative effect of conduct may warrant a punitive costs order. In this case it is quite clear from my judgment that there was an accumulation of conduct on the part of the applicant that I regarded as worthy of some censure. I refer here to the three aspects I discuss above. In addition is the fact that the respondent, Mrs Barbaglia, is the residual heir in Mr Barbaglia's estate, and so if the estate were to be ordered to pay punitive costs (rather than the Executor) this effectively would mean that Mrs Barbaglia would be bearing the costs of successfully opposing the litigation. For this reason, an order of *de bonis propriis* or personal costs against the Executor is justified.

For these reasons, in my view there is no reasonable prospect that another court would find differently on the question of costs.

Finally, although Mr Peter did not address me on this, a remaining ground for leave to appeal is the question of whether I erred in finding that the Executor was not without an alternative remedy. I think my judgment makes it clear that there was at least one alternative remedy available to the executor, that being to take steps to protect whatever duties

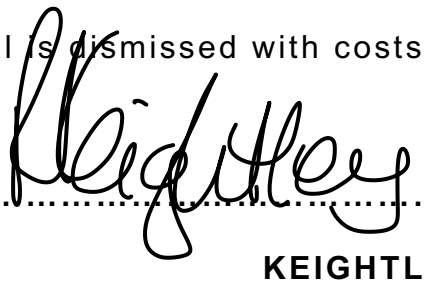
he may have had in respect of foreign assets, and no steps were taken to do that.

And might I add to that surely there were any number of other alternatives that could have been sought by the executor rather than the drastic and wide-ranging relief that was actually sought in the Notice of Motion. The executor could have sought more refined relief, which he never did.

There can be no warrant for the conclusion that there are reasonable prospects that another court would find that the executor had no alternative but to seek the drastic and wide-ranging final relief that was sought in the Notice of Motion. For these reasons I am not persuaded that there is merit in the application for leave to appeal.

ORDER

The application for leave to appeal is dismissed with costs.



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KEIGHTLEY J

JUDGE OF THE HIGH COURT

DATE: ……