REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no 2022-036684

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

2023/11/15
DATE

[redacted]
SIGNATURE

In the matter between:

AMALGAMATED LAWYERS ASSOCIATION	**First Applicant**
TEBEILA INSTITUTE	**Second Applicant**
and	
JUDICIAL SERVICE COMMISSION	**First Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
MAAKE FRANCIS KGANYAGO	**Third Respondent**
ARNOLD MAURITIUS LEGODI PHATUDI	**Fourth Respondent**
MOELETJE GEORGE PHATUDI	**Fifth Respondent**
As Amici Curiae:	
BLACK LAWYERS ASSOCIATION	**First Amicus**

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery was 15 November at 10h00.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Sutherland DJP:

Introduction

[1] This is an application for leave to appeal by first and second applicants against a judgment given by me on 30 August 2023 in favour of the 5th respondent. The extempore judgment has been transcribed and I do not regurgitate it. Naturally, that judgment must be read with this judgment.

[2] Both applicants filed extensive notices of appeal. Several grievances about the judgment have been articulated. I heard extensive argument from counsel for the first and second applicants and from counsel for the 5th respondent. It is unnecessary to traverse all that was presented to me. The so–called grounds of appeal mentioned in paragraphs 9, 10 and 11 of the first applicants notice were not addressed when counsel argued and in reply, it was stated that they were 'left out'. These are ad hominin grievances which

are irrelevant to the application for leave to appeal proper. For that reason, for record purposes, to the extent necessary I deal with them discretely, but they do not address the merits or demerits of the judgment per se.

The issues

[3] The critical issue relevant to the application for leave to appeal is whether or not the orders given by me in the judgment are susceptible to the court of appeal taking a different view as contemplated by section 17(1) (a) of the Superior Courts Act 10 of 2013 (SCrt Act); i.e. is there a reasonable prospect of success or some other compelling reason that an appeal be heard.

[4] Of the orders issued, the order upholding the point taken by the respondents that section 47(1) of the SCrt Act was not complied with is foundational to the fate of the application. As a fact, neither of the applicants for leave to appeal have complied with that section. I held, on the basis of binding authority, that the point was good and the result was that the proceedings as a whole are invalid. The second application in its heads of argument suggested that the decision in *FUL v Motata 2021 JDR 0077 (GP)* supported the proposition that section 47 consent was not necessary. The allusion is to order no. 2 in that decision. The applicants have misread and misunderstood the order and the judgment in *Motata*. The authority is dead against their proposition. In the *Motata* case, the initial review application against the JSC was commenced and thereafter leave to cite a judge was sought; at that stage the judge had not yet been cited. The leave to cite the judge was granted. In those fact-specific circumstances the court held that the initial review proceedings were not vitiated. No general principle as laid down. The decision, on the contrary, is direct authority to vitiate these proceedings. Its import is that if you cite a judge before consent is given, the act is *ipso facto* invalid.[1]

---

[1] This is not a controversial proposition. *See also: Engelbrecht v Khumalo 2016 (4) SA 564 (GP); Maluleke v NDPP 2016/2866 (L); Mthenjwa v Steyn 2017/9028 (WCC).*

[5] It is argued that it was illegitimate to address any point in the course of interlocutory proceedings that could have the outcome that the proceedings as a whole could be extinguished. The platform for this proposition is that the review, i.e. 'the main case' had not been set down on 30 August 2023 and only interlocutory applications were before the court. The contention is that the section 47 point could only be raised and argued when the main application was set down. This is incorrect in law and on the facts.

[6] The point in limine, as it was called, raising the section 47(1) point, was expressly raised in the affidavits of the 5th respondent and of the first applicant. Moreover, the 5th respondent had set down the section 47(1) issue for decision. Both parties addressed the question in their written heads of argument. No principle of law or procedure supports the notion that because a point which is lethal, not only to the interlocutory application, but also to the entire proceedings, cannot be raised at a juncture before the main case is set down. In the light of these considerations it is unlikely that a court of appeal might take the view that the matter was irregularly heard and decided.

[7] An additional grievance is advanced that the decision was made in the absence of the applicants. This is, in law, incorrect (See: *Zuma v Secretary of the Commission of Enquiry into State Capture 2012 (11) BCLR 1263 (CC)* at para [56] to [61]). The first applicant chose to walk out of the proceedings after being warned of the potential consequences. In law the first applicant was present. The second applicant, after having been joined also elected to leave the hearing despite having notice that the section 47(1) point had been set down for decision. Neither applicant has been denied the opportunity to argue against the sectiin47(10 point. An attempt was made to evade these consequences by stating that at the time that the second applicant got the notice of the section 47(1) point being set down it was not yet joined. This an absurd contention. No possible reasonable grasp of the situation could have

induced the delusion that were the section 47(1) decided against it, there was still a future for the review application.

[8] In the circumstances the contention that the hearing was unfair and transgressed section 34 of the Constitution is unsound.

[9] I deal succinctly with the ad hominem propositions.

[10] The circumstances of the walkout have been described in my judgment. It does not bear repetition. In consequence of such behaviour, I made an order referring the events to the LPC. The contention is now advanced that I was in error on the grounds that I afforded counsel no audi alterem partem, as required in clause 16(2) of the Judicial code of Conduct. In my view, the prescripts in the code were not transgressed in circumstances as described. I further am of the view that the court of appeal, upon a proper interpretation of the code would not hold otherwise.

[11] The attorney and client costs order is described as vindictive. The circumstances as described fully justified the order and I am of the view that a court of appeal is unlikely to take a different view.

[12] Gratuitously, in these proceedings I am accused of "concealing" the fact of a complaint against me having been made to the JSC by the applicants. The accusation is without foundation. My judgment alludes to me being informed by Mr Maluleke, during the hearing, of a complaint having been laid. I was ignorant, at that time, of a complaint having been and only when I received, days later, the application for leave to appeal, did I see a copy of a letter, dated 30 August 2023, purporting to come from the JSC acknowledging receipt of a complaint, attached to the application. For what is worth, I shall assume the letter is authentic but I, nevertheless, remain ignorant of a

complaint or its allegations. I have received, to date, no communication of such a complaint from either the applicants or from the JSC. In any event, this side-show is utterly irrelevant to the merits or demerits of the application for leave to appeal.

Conclusions

[13] As a result, the application is ill-founded with no prospects of success. It must fail with costs following the result.

The Order

(1) The application for leave to appeal is dismissed with costs.

Roland Sutherland

Deputy Judge President, Gauteng Division,

Johannesburg

Heard: 10 November 2023

Delivered: 15 November 2023

Appearances:

For the First Applicant Amalgamated Lawyers Association:
Adv TK Maluleke,
Instructed by Ntsako Phyllis Incorporated.

For the Second Applicant, Tebeila Institute
Adv Tebeila with Adv Makola

For the 1st Respondent Judicial Service Commission
Adv Machaba with Adv Lukashe
Instructed by the office of the State Attorney

For the third and fourth respondent
No representatives

For the fifth respondent
Adv L Meintjies
Instructed by Espag Magwai Attorneys