(Inlexso Innovative Legal Services) / le

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 30665/2016

DATE: 30665/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED

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SIGNATURE

DATE: 28.V.19

In the matter between

JUSTICE PROJECT SOUTH AFRICA Applicant

and

THE REGISTRAR OF THE ROAD TRAFFIC

AND OTHERS Respondents

J U D G M E N T

UNTERHALTER, J: The applicant brings an application for leave to appeal against the judgment that I rendered.

The applicant indicates that it was not well served by its legal representatives and Mr Dembovsky ably chose to represent the applicant as I have already indicated.

The burden of his submission was to suggest that the

abuses that occurred in this matter, which are now candidly admitted by Mr Dembovsky, were perpetrated by the legal representatives of the applicant and that this should be taken into account for the purposes of the application for leave to appeal.

The factual basis for what is said on this score is not before me on affidavit, but even taking the submissions made from the bar it is clear to me that the failures that are alleged to have occurred cannot avail the applicant for the purposes of an application for leave to appeal. They would at best have some relevance to the question of costs, which I decided on the basis of the abuses that had occurred and which, at least at the time the costs orders were made, were not abuses the applicant sought then to blame on its legal representatives.

This means that on the facts that I had available to me at the time that I made the costs order I was in no position to differentiate the conduct of the applicant's legal representatives from those of the applicant. And therefore, to the extent there is any relevance to what Mr Dembovsky has pointed out about his legal representation, it is unavailing for the purposes of revisiting the question of costs or inclining an appeal court to do so.

At the heart of my judgment is the question whether the secure mail that was utilized for the purposes of effecting

service under the Act was a species of registered mail. As I have already pointed out in my judgment, the factual foundation for reaching any conclusion on this score is to be found in the answering affidavit of the first respondent. Upon an application of the principle in Plascon Evans, which I do not consider that I wrongly applied in this case, the differences between secure mail and registered mail for individual letters does not appear to me to undo the conclusion that the secure mail, as I found, was indeed a form of registered mail.

As I explained in my judgment, the principal difference is simply as to how notification to collect is given in respect of bulk mail. This is entirely consistent with the concept of registered mail which as the Constitutional Court has recognized,has as it's signal feature, the tracking of mail through the post. That is what Parliament required and secure mail achieves that objective, as I found in my judgment.

I am unpersuaded by the arguments now made to me again by Mr Dembovsky that I erred or that another court will reasonably find differently.

Mr Dembovsky emphasized in his submissions to me that the consequences of the use of secure mail could be significant for those to whom such mail was directed and he emphasized that the processes envisaged under the Act entailed time periods within which persons had to make elections that were of

consequence to their rights.

That may well be so, but the legal question is different. It is whether Parliament when it stipulated for the use of registered mail could not have envisaged the system of secure mail that the Post Office uses for the purposes of rendering the service for the bulk delivery of mail.

The fact that secure mail, as applied by the Post Office, may have certain imperfections and that these imperfections may have been cured during the course of this litigation does not establish that even in its original form secure mail was not registered mail in its essential features, and, in particular that it tracks mail through the system.

None of this suggests to me that an appeal court would be likely to take a different view of the matter to the one that I found in my judgment.

Nor do I find that an appeal court would consider that I erred by reference to further authorities relied upon by Mr Dembovsky. The first is the Sebolo judgment in the Constitutional Court, where on very different facts, the Court emphasized how the use of registered mail could be utilized for the purposes of service and indeed emphasized the very feature that I have attached significance to, which is, the tracking of the

mail through the system, which secure mail does, and thus achieves the purpose that Parliament had in mind.

Reference was also made in heads of argument filed on behalf of the applicant to the case of Fines4U, a judgment that I do not believe was referred to me in the course of the proceedings. But nevertheless on distinct facts, I find nothing in that judgment that suggests that there was an interpretation given to the concept of registered mail which suggests another court has differed from the approach that I adopted on the facts before me. That too is therefore unavailing for the purposes of persuading me to grant leave to appeal.

I am therefore of the view that, on the central question that I had to consider, an appeal court would not differ from the view that I came to.

Mr Dembovsky also addressed me on the question of relief. But again here too I find no answer to the proposition that the compliance relief that I found to be wanting would be relief that an appeal court would be more inclined to give. First because there is no foundation for the interpretation as to what registered mail is. But secondly because relief by way of mandamus, as I pointed out in my judgment, must seek to cure an ongoing harm. That harm is confessedly cured as the applicant indicated and thus there would be no competence to grant that relief. I heard no argument from Mr Dembovsky which

would persuade me that I was wrong in reaching that judgment in respect of the relief.

As to the other relief,that is to say the cancellation relief, Mr Dembovsky explained in his replying submissions that it was not simply those notices served between April 2010 and 2012 but notices that had issued from the outset of the pilot project in 2008 and thus no mootness question arose. But mootness is but one of the issues that stood in the way of any cancellation relief being granted. I indicated that there were a number of reasons why cancellation relief was not competent, not least because of the delays that had occurred in seeking the relief. I am equally unpersuaded that the relief failed to distinguish those who had indeed been served and indeed may well have paid their fines from those that had not. This relief was a species of review and there was no warrant to grant this kind of relief given the considerable time that had gone by, a delay for which the applicant is entirely responsible whether through its legal representatives or otherwise.

I therefore must conclude that there is little basis to suppose that an appeal court would take a different view to the one that I have taken in my judgment in respect of the cancellation relief. Accordingly I cannot find on this ground either that there is a basis for allowing the application for leave to appeal.

I turn finally again to the question of costs. Mr

Dembovsky, apart from referring to the difficulties that he had with the legal representation that the applicant received was unable to point to an error that I made in the exercise of my discretion concerning whether Biowatch should be applied as a form of qualified immunity from costs.

The central thrust of the point that was made in the written heads was to suggest that I made no finding of abuse. That is not the position that emerges from the judgment. I was unwilling to dismiss the application solely on the grounds of abuse and that was in the exercise of my discretion and for the reasons that are reflected in the judgment. But it does not mean, nor entail, that I did not find that abuse had occurred on the part of the applicant in the manner in which the litigation had been conducted. Mr Dembovsky to his credit now recognizes that there was such abuse and says that it is attributed to the quality of his legal representation. In coming to the decision I did as to costs I permissibly considered the abuse and chose to make a costs order that was reflective of what I thought was some recognition of that abuse. But a costs order that equally did not tax the applicant as might have been the case were it an ordinary commercial litigant.

I can find no reason to suppose that an appeal court would consider that the discretion I have in respect of costs was not judicially exercised.

ORDER

The result is that this application cannot succeed and it is dismissed with costs.

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UNTERHALTER, J

JUDGE OF THE HIGH COURT

DATE: .....