

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

Case No: 32820/2013

In the matter between:

BAREND JACOBUS VAN DEN BERG

Applicant PLAINTIFF

and

THE MINISTER OF DEFENCE

1ST RESPONDENT

THE SECRETARY FOR DEFENCE

2ND RESPONDENT

THE CHIEF OF THE SANDF

3RD RESPONDENT

THE CHIEF OF THE S.A. ARMY

4TH RESPONDENT

**GENERAL OFFICER COMMANDING, SOUTH
AFRICAN ARMY SUPPORT FORMATION**

5TH RESPONDENT

**GENERAL OFFICER COMMANDING, SOUTH
AFRICAN ARMY SUPPORT BASE, BLOEMFONTEIN
COLONEL J.S. MALEPE**

6TH RESPONDENT

7TH RESPONDENT

DATE HEARD 17TH SEPTEMBER 2013

DATE JUDGMENT HANDED DOWN: 17TH OCTOBER 2013

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL AND APPLICANT'S
RULE 49(11) APPLICATION**

EBERSOHN AJ

[1] After this Court granted the interim interdict to the applicant, the respondents applied for leave to appeal and will be referred to herein as “the respondents”. The applicant on the other hand applied for an order in terms of Rule 49(11). The applicant will be referred to as such in this judgment.

[2] It is clear that the relief granted is only interim in nature.

[3] About the only merit in the application for leave to appeal is the correctness of the reference to the typing error in the judgment where “section 49” was typed instead of “section 50”.

[4] As the Court only granted an interim order, cases such as **Airoadexpress (Pty) Ltd v Chairman, Local Transportation Board, Durban and Others** 1986 (2) SA 6 AD and **South African National Defence Union & Others v Minister of Defence (T)** case 15790/2003 dated 14 July 2003 as referred to in **South African National Defence Union & Others v Minister of Defence & Others** 2007 (5) SA 400 (CC) at p. 415A, apply.

[5] At the hearing of the application for leave to appeal the Court questioned counsel for the respondents as to when the grievance procedure will be finalised and counsel, obviously expecting the question, immediately shrugged his shoulders and responded by answering to the effect of “Don’t ask me”. At the initial hearing of the matter the Court got the clear impression that the respondents were not candid with the Court, lies were told to the Court in the affidavits, perjury was committed and now the Court is faced with some respondents being obstructive of the applicant’s rights to have his grievance being dealt with.

[6] The respondents, instead of putting a logically phrased application for leave to appeal before this Court, put an *argumentatio* before this Court and the Court had to screen the

document to try and figure out what exactly the alleged grounds were.

[7] The first is that the Court erred with regard to the provisions of section 50(5)(b) of the Defence Act to be tested against the provisions of section 33 of the Constitution and the “Interim Procedure Instruction” issued by Gen. Nyanda. With regard to the latter it was blandly stated that as the present Defence Act came into effect on 23 May 2003, i.e. after the Interim Procedure Instruction of Gen. Nyanda, the latter was no longer of effect. Just like that. No motivation and no authority quoted. It shows a poor knowledge of the military by those who instructed counsel. A perusal of the Defence Act will in any case show that the Defence Act did not repeal the Interim Procedure Instruction.

[8] The second is that the Court erred in extending the lifespan of the interim interdict further than which the applicant originally asked for. When the Court deliberated about the initial order to be made the Court was acutely aware of the reluctance of the respondents to deal with the applicant’s grievance for some undisclosed reason and to prevent the respondents from sidestepping the issue by some or other ploy or delay the Court in terms of its discretion and under alternative relief as claimed in prayer 7 of the notice of motion the Court decided to pin the respondents down and make the order it did and extended the period.

[9] The third ground, namely that the transfer of the applicant from Bloemfontein to Limpopo would not have devastating consequences for the applicant, clearly shows that the author of the application for leave to appeal did not read the papers or was just being mischievous.

[10] The fourth ground was that the applicant did not lodge the grievance timeously. The papers were not closely read by the drafter of the application for leave to appeal and this ground is also incorrect and not applicable..

[11] The fifth ground is that this Court erred with regard to General Marumo not being a truthful witness. This Court ordered that the matter of his perjury be referred to the Director of Public Prosecutions. His perjury was clearly demonstrated in the judgment. It is noted that his perjury is now admitted but is referred to as “unintentional”. How such clear perjury could be described as “unintentionally” boggles the mind. The fact that he had no knowledge of the Interim Procedure Instruction was demonstrated by himself.

[12] The sixth ground is that the Court erred in holding that the respondents and the leadership of the Defence Force have a “peculiar malicious attitude” – was also demonstrated by their conduct and utterings which were recorded, transcribed and quoted in the judgment.

[13] The seventh ground is that the Court erred in finding that other candidates were interviewed for the transfer but not the applicant. This is not a ground of appeal at all. When the matter eventually goes on trial and/or a hearing this aspect can be resolved by the calling of witnesses and cross-examination.

[14] The interim order is not appealable and in any case this Court is not prepared to exercise any discretion in favour of the respondents .

[15] Before the Court is also a Rule 49(11) application by the applicant.

[16] The respondents have since March 2013 endeavoured to evade their responsibilities towards the applicant and it can be expected that they may also attempt to obtain leave to appeal from another Court and so stall the matter. If that happens the applicant will have no alternative but to succumb to his uprooting. This Court therefore will grant an order in terms of Rule 49(11).

[17] The following order is made:

1. The application for leave of the respondents to appeal is refused.
2. The applicant's application in terms of Rule 49(11) is granted and it is ordered that the operation and execution of this Court's order shall not be suspended, pending the decision of any appeal or application for leave to appeal to any court.
3. The First respondent is ordered to pay the costs of the application for leave to appeal and also the costs of the applicant's Rule 49(11) application which costs will include the costs of a senior counsel.

P.Z. ~~EBER~~SOHN

ACTING JUDGE OF THE HIGH COURT

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