

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

Reportable: No

Of interest to other judges: No

Revised: Yes



Signature

28/3/2025

Date

Case Number: 46769/2020

In the matter between:

SOUTH AFRICAN NATIONAL DEFENCE UNION

First Applicant

KS SETLOGELO PLUS 33 OTHERS

Second to Thirty Fifth Applicants

and

**CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE
FORCE**

First Respondent

MINISTER OF DEFENCE AND MILITARY VETERANS

Second Respondent

CHIEF OF THE SOUTH AFRICAN ARMY

Third Respondent

SECRETARY OF DEFENCE

Fourth Respondent

JUDGMENT – LEAVE TO APPEAL

This Judgment was handed down electronically by circulation to the parties / their legal representatives by e-mail and by uploading to the electronic file on Case Lines. The date of hand-down is deemed to be 28 March 2025.

TERBLANCHE AJ

INTRODUCTION:

- [1] The eighteen applicants who were employed under the Core System Service (CSS) contracts apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court, against the judgment and order delivered by me on 3 September 2024.

TEST FOR LEAVE TO APPEAL:

- [2] In order to succeed with leave to appeal, the applicants must meet the standard set in section 17(1) of the Superior Courts Act, 10 of 2013 (*"Superior Act"*). It reads thus:

“(1) 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 prospect of success; or

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

(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[3] It has been held in **Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others** at para 6¹ that this provision has raised the bar for granting leave to appeal. In that case, Bertelsmann J held as follows:

“[6] It is clear that the threshold for granting leave to appeal against the judgment 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 Cronwright & 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 judgment is sought to be appealed against...”

[4] The Supreme Court of Appeal (“SCA”) said the following in **MEC for Health, Eastern Cape v Mkhita**:²

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act, 10 of 2013, makes it clear that leave to

¹ Unreported judgment of the Land Claims Court under case no: LCC14R/2014 (3 November 2014); See also **Acting National Director of Public Prosecutions v Democratic Alliance In Re: Democratic Alliance v Acting Director of Public Prosecutions and Others**, [2016] ZAGPPHC 489 at para 25.

² [2016] ZASCA 176

appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[5] In **Ramakatsa and Others v African National Congress and Another**,³ the SCA explained that:

“[10]... the test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of a trial court. In other words, the appellants in this matter must convince the Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

³ (724/2019) [2021] ZASCA 31

- [6] The judgment by Meiring AJ in **Smartpurse Solutions (Pty) Ltd v Firststrand Bank Ltd**, 2025 1 All SA 552 (GJ) is, in my respectful view, clearly wrong, for the reasons convincingly stated by Van Loggerenberg and Vivian in a very instructive article in "TYDSKRIF VIR DIE SUID-AFRIKAANSE REG / JOURNAL FOR THE SOUTH AFRICAN LAW" 2025-2, p 349. The views expressed by the Learned Acting Judge are, in any event clearly obiter. I am accordingly not bound by the judgment and decline to follow it.
- [7] In my view it is by now trite that the threshold has indeed been raised.
- [8] I must accordingly be satisfied that the appeal would have a reasonable prospect of success.

THE GROUNDS FOR APPEAL:

- [9] The applicants, in their application for leave to appeal as well as in their heads of argument, relied on a plethora of grounds of appeal. Mr McConnachie, who appeared for the applicants, made it clear during argument that the central issue was whether the CSS fixed-term contracts were automatically extended by virtue of the reinstatement order granted by Raulinga J, coupled with their commanding officer's failure to apply for the non-renewal of their contracts under the policy of the Defence Force.
- [10] Mr McConnachie argued that the consequences of the Defence Force's policy for the fixed term contracts were that unless and until there is a

formal application for non-renewal and a final decision not to renew, the members' fixed term contracts are automatically extended.

- [11] Mr McConnachie further argued that the combined effect of the order granted by Raulinga J, together with the Defence Force policy, is that the applicants' fixed term contracts were automatically extended. He argued that there is no dispute that the applicants' commanding officers did not make any formal application for the non-renewal of the agreements, nor has there been any decision on non-renewal.
- [12] That the commanding officers did not make any formal application for the non-renewal of their agreements, is not at all surprising. The applicants now applying for leave to appeal, were dismissed in 2015 and all their contracts expired prior to the judgment granted by Raulinga J. It is thus not surprising that the commanding officers did not deem it necessary to apply for the non-renewal of the contracts in question.
- [13] Mr McConnachie nevertheless argued that I erred in not applying the *dictum* of Wallis JA in paragraph [36] of the judgment in **Xulu**,⁴ where the Learned Judge of Appeal stated:

"The SANDF repeatedly described the policy as involving the taking of administrative steps. These followed a clear bureaucratic course. The starting point was that unless the members' commanding officer made a request that the contract not be renewed it would be renewed automatically. That reflected the policy choice, as section 59(1)(d) of

⁴ **Minister of Defence and Another v Xulu**, 2018 (6) SA 460 (SCA) at p 474

the Act provides for the automatic termination of the contract on expiry of its fixed term."

[14] In my view, the statement by the Learned Judge of Appeal in paragraph [36] did not form part of the *ratio decidendi* of the judgment and was no more than a recordal of the bureaucratic course adopted by the SANDF. It is not a finding by the court.

[15] Of much more importance is the *dictum* by the Learned Judge of Appeal in paragraph [41] of the judgment, where it is stated:

"Irrespective of the precise nature of the contract, the decision not to renew it did not involve an exercise of contractual power, because no such exercise was required in the situation. If nothing had been done the contract would have come to an end by operation of law. If Mr Xulu had found more lucrative employment elsewhere, perhaps in the security industry, he was perfectly entitled to walk away and there was nothing the SANDF could do to stop him. His obligation to serve until discharged in terms of section 52(3)(d) of the Act would have terminated on the termination date of his fixed-term contract, entitling him to his discharge in the absence of either the special circumstances referred to in section 59(5) of the Act."

This statement by the Learned Judge of Appeal puts the issue beyond doubt. Contrary to the argument in support of the automatic renewal of the contracts, they came to an end by operation of law.

- [16] I am accordingly of the view that there is no tension between my judgment and the judgment of the Supreme Court of Appeal in **Xulu**. The position is made quite clear in paragraph 41 of the **Xulu** judgment.
- [17] I am accordingly of the view that it cannot be said that the appeal would have a reasonable prospect of success.
- [18] Mr McConnachie in addition urged me to find that there are compelling reasons why leave to appeal should be granted and if so, to the Supreme Court of Appeal. In this regard, he argued that there is conflict between my judgment and the Supreme Court of Appeal's judgment in **Xulu** and that this, by itself, provides compelling reasons for granting leave to appeal. I disagree. In the case of conflict between my judgment and the Supreme Court of Appeal's judgment in **Xulu**, there would have been very good prospects for success on appeal on the simple basis that my judgment would then be wrong. I, however, believe my judgment to be in accordance with the judgment of the Supreme Court of Appeal in **Xulu** and do not believe that another court would come to a different conclusion in this regard.
- [19] Mr McConnachie further argued that this matter raises discreet legal questions of broadening importance regarding the consequences of non-renewal of fixed term Defence Force contracts, which require clarification. I disagree. The issue of the failure by the commanding officer to apply for the non-renewal of a fixed term contract, constitutes administrative action, which is subject to review by the courts. That is the remedy available to a

member disgruntled with any unfair administrative action which resulted in the termination of his contract.

CONCLUSION:

[20] In my view therefor, there is no reasonable prospect of another court coming to a different conclusion and there are no compelling reasons which justify the granting of leave to appeal.

COSTS:

[21] Mr McConnachie argued that in the event of leave to appeal not being granted, the **Biowatch** principle⁵ should find application and that no order for costs should be made. I disagree. The application did not amount to a genuine constitutional challenge. It might have been different had the applicants not misconceived their remedy and applied for the review of the decision, or rather the failure to take a decision by the SANDF. There is no reason why the normal costs order should not be made.

[22] Both parties, at all stages but for the oral argument addressed to me, availed themselves of the services of two counsel and I am of the view that it was reasonable to do so.

THE ORDER:

[23] I accordingly make the following order:

⁵

Biowatch Trust v Registrar Genetic Resources and Others, (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009)

1. The application for leave to appeal is dismissed with costs, such costs to include the costs of the employment of two counsel and such scale of costs to be determined in accordance with Scale C contemplated in rule 67A(3) in respect of senior counsel and Scale B in respect of junior counsel.


TERBLANCHE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Heard: 17 March 2025
Delivered: 28 March 2025

APPEARANCES:

Applicants' counsel:	C McConnachie
Applicants' attorneys:	Griesel Breytenbach Attorneys
Respondents' counsel:	G Avvakoumides S.C.; M Rantho
Respondents' attorneys:	State Attorney, Pretoria