



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 6317/2021**

|                       |                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------|
| (1)                   | REPORTABLE: NO                                                                                  |
| (2)                   | OF INTEREST TO OTHER JUDGES: NO                                                                 |
| (3)                   | REVISED: YES                                                                                    |
| 31 March 2025<br>Date | <br>Signature |

In the matter between:

**NORIA MAGARETH MASHABANE**

**1<sup>ST</sup> Applicant**

**and**

**MINISTER OF DEFENCE AND**

**1<sup>ST</sup> Respondent**

**MILITARY VETERANS**

**THE CHIEF OF NATIONAL DEFENCE**

**2<sup>ND</sup> Respondent**

**SOUTH AFRICAN MILITARY OMBUD**

**3<sup>RD</sup> Respondent**

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**JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL**

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**INTRODUCTION**

[1] This is an application for leave to appeal against the judgment and order handed down on the 06<sup>th</sup> of July 2023.

[2] The application for leave to appeal was accompanied by an application for condonation.

[3] The respondent opposed both applications for leave to appeal and condonation and argued that the applications should be dismissed with punitive costs on the basis that they were frivolous.

[4] The court granted the application for condonation with costs in the cause.

[5] The applicant's grounds of appeal are set out in the application dated 13 August 2024.

[6] The application for leave to appeal was remanded few times amongst others to enable the respondent to comply with delivery and uploading on case line of heads of argument and on 9 January 2025, respondent was ordered to pay costs for the postponement.

[7] The application for leave to appeal and condonation were heard on the 18<sup>th</sup> of March 2025.

## **RELEVANT LEGAL PROVISIONS AND AUTHORITIES**

[8] Section 17 (1) (a) of the superior court Act reads as follows; "Leave to appeal"

17. (i) 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.

[9] See also *The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC) paragraph [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 and others* 1985 (2) SA 342 (T)

at 343 (H). 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”.

[10] The stringent test to be applied in the leave to appeal under the Superior Courts Act was reaffirmed by the supreme court of appeal in *S v Smith* 2012 (1) SACR 567 (SCA), paragraph 7;

“In order to be succeed, therefore the appellant must convince this court on proper grounds that he has prospect of success on appeal and those prospects are not remote but have a realistic chance of succeeding. More is required than to establish that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless as hopeless. There must in other words be sound, rational basis for conclusion that there are prospects of success on appeal”

[11] See also *MEC for Health Eastern Cape v Makhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016), paragraph [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 clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success there is some or the compelling why it should be heard”

[12] The grounds of appeal are summarised by the applicant in paragraph 2.13 of their heads of argument for leave to appeal as follows.

“2.13. Applicant sternly avers that the honourable court erred in its interpretation of the words “recommend” ad consider” as appears in the military ombud final recommendation to the minister for consideration.

2.14. The honourable court had a preconceived conclusion before it could hear the applicant’s case on facts and evidence adduced during the hearing of the application.

2.15. The honourable court never considered legal implication of the minister of defence's directive to the chief of defence to implement the recommendation of the military ombud following applicant lodgement of her unbearable working condition complaint;

2.15.1. The first and second respondents withheld the minister of defence's directive to the chief of defence force referred to in the answering affidavit but not attached despite numerous requests by applicant's current attorneys of record to avail same thus hampering proper preparations of the replying affidavit until same was availed during hearing of this matter on the 23<sup>rd</sup> of May 2023, but concealed during first hearing on the 2<sup>nd</sup> of May 2023.

2.16. The honourable court misconstrued applicant's application on facts and evidence.

2.17. The honourable court condoned first and second respondent's defective affidavit, which in form was not deposed to and commissioned before the commissioner of oath, after said point in limine was argued on the 2<sup>nd</sup> of May 2023 whereafter the court reserved judgement until 23 May 2023. On the same date the honourable court varied its earlier judgment dismissing the first and second respondent's application for condonation".

[13] The applicant contend that should the respondent wish to oppose this application the court should order the respondent to pay costs.

[14] The first and second respondent's counsel contends that this application for leave to appeal should be dismissed with punitive because the application constitutes an abuse of legal process.

## Discussion

### Point in limine-Answering Affidavit

[15] Point in limine raised by the Applicant in which the court admitted the answering affidavit at which at first the last two pages were missing ,which contain the commissioner of oath 's signature ,stamp and other details that go with it, I find it not to have been fatal in admitting it .In my view that is a procedural and technical point which do not address the substantive issue on the merits. The missing two pages

were eventually produced before the commencement of the main hearing in the presents of the applicant. I am of the view that the applicant is being opportunistic by relying on this point as a ground of appeal. The court is clothed with a discretion and considered that there was substantive compliance.

#### Main application-Leave to Appeal

[16] I have read the papers filed and heard both parties having considered arguments advanced, I do not see it necessary to deal with each alleged misdirection on its own or in any great detail.

[17] In my judgment I dealt with each item raised by the applicant in the notice of motion.

[18] The applicant failed to specifically engage the provisions of section 17(1) (i) and (ii) of the superior Court Act 10 of 2013. Having an arguable case is not enough, there must be a measure of certainty that another court would come to a different conclusion.

[19] The Applicant brief notice of motion does not deal with the chain of command of the defence force as provided by section 202 of the constitution.

[20] A S Moosa AJ (as he was then) pointed out in re: Lembede v Minister of Defence and Military Veterans and Others, GD 9642/2020 (15 December 2021) The Military ombud is not a member of military command. As such the military ombud is not part of the chain of command.

[21] I am mindful of Davids v Minister of Defence and Military Veterans 854/2023 SCA (13/11/2024) paragraph 25.

“Paragraph 25 in my view, this is significant and lends support to the interpretation that the recommendations of the Military Ombud are not binding on the Minister. The Military cannot have more than one chain of command. There is only one chain of command with the President as the commander in chief at the top”.

[22] In the present case there was no authority or directive that was given by the President to the Minister. The Minister on his own is not part of the chain of command.

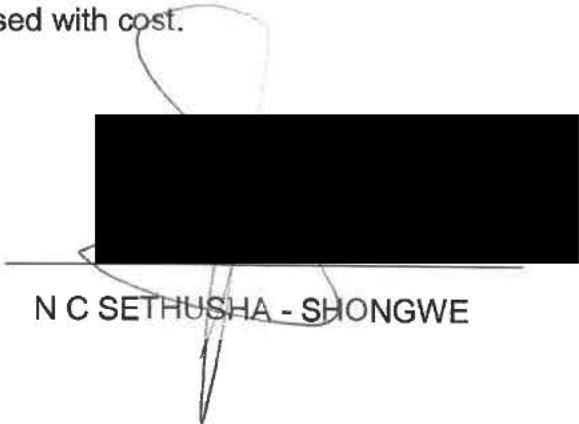
[23] Upon considering my judgment on the merits and ruling on procedural aspect, In light of the grounds of appeal raised by the applicant, I am convinced that the applicant has failed to show real prospect of success on appeal and no other compelling reason why leave to appeal should be granted.

[24] In so far as costs are concerned, I see no reason why costs should not follow the result.

### **ORDER**

[25] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed with cost.



N C SETHUSHA - SHONGWE

### **Appearances**

Counsel for the Appellant:

Advocate K J Maleka

Instructed by

Leshilo Inc. Attorneys

Pretoria

Counsel for the Respondent:

Advocate Marius Oosthuizen SC

Instructed by

State Attorneys, Pretoria

Date of hearing:

18 March 2025

Date of Judgment:

31 March 2025

Judgment transmitted electronically