

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, HELD AT PRETORIA**

CASE NO:31418/2022

DOH:19 March 2025

- 1) REPORTABLE: NO
- 2) OF INTEREST TO OTHER JUDGES: NO
- 3) REVISED.

SIGNATURE

**11 APRIL 2025
DATE**

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

AFRICAN NATIONAL CONGRESS

First Respondent

**AFRICAN NATIONAL CONGRESS
DEPLOYMENT COMMITTEE**

Second Respondent

**THE DEPUTY PRESIDENT OF THE
AFRICAN NATIONAL CONGRESS**

Third Respondent

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Fourth Respondent

**THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA**

Fifth Respondent

**THE MINISTER FOR PUBLIC SERVICE
AND ADMINISTRATION**

Sixth Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 11 April 2025.

ORDER

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the respondents' costs, such costs to include the costs of five counsel in respect of the first to the third respondents.

JUDGMENT

THE COURT

Introduction

1. This is an application for leave to appeal the judgment and order of this court of 21 February 2024. That order dismissed the Democratic Alliance's (DA's) application to declare, amongst others, the African National Congress' Cadre Deployment Policy (the policy) inconsistent with the Constitution of the Republic of South Africa, 1996, and various consequential orders. In its Notice of Application for Leave to Appeal (notice), the DA contends that this court misdirected itself at the level of fact and law. It submits that there are reasonable prospects that the Supreme Court of Appeal will come to a different conclusion. As further basis to grant leave to appeal, the DA submits that there are compelling reasons.
2. The respondents oppose the application. In sum, the respondents' opposition centers on three issues. Firstly, they say that the grounds of appeal posited by the DA misrepresent the judgment. Secondly, they submit that there is a single *ratio* underpinning the judgment, which says that the DA had failed to plead a cause of action. The respondents say that none of the grounds posited by the DA engage or even disturb that conclusion. Thirdly, the respondents submit that it is plain from its grounds that the DA takes issue with some of the reasons set out in the judgment. This, they say is a fundamental error on the part of the DA because an appeal lies only against the order and not the reasons. On these bases, the respondents submit that the DA has failed to meet the threshold for granting leave to appeal. They urge the court to refuse leave and dismiss the application with costs.

Legal principles governing applications for leave to appeal

3. Applications for leave to appeal are governed by section 17 of the Superior Courts Act¹. The relevant parts of the provision read:

‘17 (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;’

4. It is trite that an applicant for leave to appeal ‘must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.’²

5. An applicant 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

¹ Act 10 of 2013.

² *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (982/18) [2020] ZASCA 17; 2020 (5) SA 35 (SCA) (25 March 2020).

enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’³

An appeal lies against the substantive order and not the reasons

6. It is trite that an appeal lies against the order and not the reasons⁴. Thus, even where an applicant for leave to appeal were to successfully persuade a court that it had erred on the facts or the law, it must show that the misdirection or error is material to the order⁵. It does not assist an applicant for leave to appeal to snipe at the reasons in the judgment or level criticism without demonstrating the material impact to the order granted.

Principle of appellate restraint

7. On the DA’s complaint regarding costs, it is settled law that the instances in which an appellate court will interfere with a lower court’s exercise of its discretion are limited⁶. The court in *Giddey NO v JC Barnard and Partners*, informs that an appellate court will not consider,

‘whether the decision reached by the court of first instance was correct but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an

³ *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016), paragraph 17.

⁴ *Neotel (Pty) Ltd v Telkom SOC & Others* (605/2016) [2017] ZASCA 47 (31 March 2017), paragraph 23; *Zurich Insurance Company South Africa Ltd v Gauteng Provincial Government* (734/2021) [2022] ZASCA 127; [2023] 1 All SA 368 (SCA); 2023 (1) SA 447 (SCA) (28 September 2022), paragraph 4.

⁵ *Celliers and Others v Kleinfontein Aandeleblok (Edms) Bpk and Others* (Leave to Appeal) (4755/2022) [2024] ZAGPPHC 1060 (31 October 2024), paragraph 15.

⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22, paragraphs 82-91

appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.¹⁷

Applicant's grounds

(i) *The DA's failure to plead a valid constitutional attack*

8. Against the reasoning and the finding that the DA had failed to plead a valid constitutional attack, the DA now contends, contrary to all the authorities set out in the judgment, that it was not necessary for it to impugn a specific clause or clauses of the policy. This is despite the judgement's reasoning that on the DA's own version, there are aspects of the policy, against which the DA raises no objection. Now the DA contends that any policy that seeks to infuse political considerations into appointments in the public service, and has, as its core, the objective of politically influencing appointments in the public service, will always be unlawful. The DA submits that this court misdirected itself by not having regard to the purpose of the policy and its terms.
9. Firstly, the judgment of this court concluded, citing the Constitutional Court case of *Ramakatsa*, that policies and rules of a voluntary association, such as the ANC, form part and parcel of the terms of a contract between the members of that voluntary association on the one hand, and on the other, the voluntary association and its members. That the DA has now decided to appropriate unto itself the role of identifying what is and is not core in a contract to which it is not a party, does not disturb that finding.

¹⁷(CCT65/05) [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (1 September 2006), paragraph 19.

10. Secondly, this court rejected the DA's purported evidence of corruption, brought about by the policy. See in this regard this court's findings under the Commission Pillar. This court further rejected the DA's evidence of how the policy is applied, including the role of the Cadre Deployment Committee of the ANC. See in this regard this court's conclusions on the Minutes Pillar.

11. This court concluded that the DA had failed to plead a cause of action.

12. The DA avoids dealing with the finding that the policy is not government policy; that neither the Minister nor any member of the public service had either applied or threatened to apply the policy or held themselves as bound by the policy when making appointments to public administration.

13. Finally, this court rejected the DA's curation of Messrs Brian Molefe, Montana and others, whose appointments to various public entities it sought to link to the policy. There is no merit to this ground and no prospect that another court will come to a different conclusion.

(ii) *The DA's failure to set out the basis upon which the policy is unconstitutional*

14. The DA contends that this court erred in concluding that it had not set out the basis upon which the policy violates the Constitution, the rule of law, and the right to equality. It says it had explained that the policy violates the right to equality because 'it is manifestly unfair and unequal and it affords advantages to politically connected deployees over other candidates based on merit.' The DA further contends it had explained why the policy is inconsistent with

sections 197 (3) of the Constitution. The court according to the DA neither considered nor interpreted section 197(3) of the Constitution.

15. The DA avoids this court's findings regarding its failure to plead a valid constitutional attack, so that the respondents were aware of the case they had to answer. It ignores this court's conclusions regarding the principle of subsidiarity. I refer to the findings in the judgment. No purpose will be served by regurgitating the reasoning in the judgment. There is no merit to this ground and no prospect that another court will come to a different conclusion.

(iii) *The DA's failure to plead its case as to why a policy of a political party must comply with the PSA*

16. The DA submits that this court misdirected itself on this issue. Firstly, it says as a matter of law all statutes create obligations on both public and private entities. It says that a private association may not seek to undermine the objectives of a statute through conduct, simply because it is a private association. Secondly, the DA submits that the court failed to consider whether the ANC acts as an organ of state when it determines appointments in the public service.

17. The judgment of this court makes plain that the DA had failed to plead a cause of action. I need not repeat the reasoning set out in the judgment. There is simply no prospect that another court will come to a different conclusion on this issue.

(iv) *The DA's failure to establish a basis for declaring Chapter IV, sections 9, 10, and 11 of the PSA Unconstitutional*

18. In furtherance of this ground, the DA submits that the PSA must give effect to sections 195 and 197 of the Constitution. It says it had demonstrated that the policy undermines various constitutional obligations and, because the PSA does not adequately insulate the public service from political interference, it fails to adequately give effect to sections 195 and 197 of the Constitution. The DA says the SCA will be required to consider the policy and determine whether the ANC controls appointments in the public service through punitive measures.

19. The DA does not explain how the SCA will be able to do all of this in circumstances where, according to the finding in the judgment, no valid constitutional attack had been pleaded. There is no need to repeat what is set out in the judgment. There is no prospect that another court will reach a different conclusion on this ground.

(v) *Costs*

20. The DA submits that it had set out a clearly defined constitutional case regarding sections 195 and 197 of the Constitution. There was thus no need to conclude that the *Biowatch* principle did not apply.

21. The judgment carefully considered the question of applicability of the *Biowatch* principle. Having done so, it exercised its discretion to award costs

in the manner it did. There is no merit to this ground and no prospect that another court will come to a different conclusion.

Compelling reasons to grant leave

22. The DA submits that there are two broad compelling reasons to grant leave to appeal. The first is that this application raises important questions of constitutional law that are of considerable public importance. This court, according to the DA is the first to conclude that influence in public service appointments is permissible. Secondly, this court's judgment is inconsistent with the approach in *Mlokoti v Amathole District Municipality and Another*⁸, where it was held that it was unlawful for political considerations to influence an appointment in the civil service.

23. On compelling reason number 1, this case, far from the DA's contentions, does not raise questions of constitutional law that are of considerable public importance. The judgment adequately substantiates this conclusion. On the question of influence by political parties, this court placed reliance on the *ratio* of the Constitutional Court's judgment in *Public Protector and Others v President of the Republic of South Africa and Others*. It did not break new ground in reaching its conclusions.

24. On compelling reason number 2, this court clearly distinguished the circumstances of this case from those in *Mlokoti*. There is no need to regurgitate the basis upon which the two cases are distinguishable. The

⁸ 2009 (6) SA 354 ECD.

upshot is that the DA has failed to demonstrate compelling reasons for granting leave. Assuming in the DA's favour that either of these two amounted to some compelling reason/s, which, as already indicated, is not the case, in our view, the DA's application would still fail as the merits of its application for leave to appeal are poor.

Conclusion

25. For all the reasons set out in this ruling, the application for leave to appeal must fail.

Order

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the respondents' costs, such costs to include the costs of five counsel in respect of the first to the third respondents.



**A.P LEDWABA D/P
DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT, GAUTENG
DIVISION, PRETORIA**


N.N BAM J (Ms)
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA


M.M MOJAPPELO AJ
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA

Date of Hearing: 19 March 2025
Date of Judgment: 11 April 2025

Appearances:

Counsel for the Applicants: Adv A Katz SC with Adv K Perumalsamy
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Counsel for the First to Third

Respondents: Adv L.M Morison SC, Adv A Cajee, Adv
A Ayayee, Adv M Salukazana and Adv
S Mamoepa

Instructed by: Krish Naidoo Attorneys
c/o Prebashnie Moonsamie Attorneys
Centurion, Pretoria

Counsel for the Fourth and Fifth

Respondents: Adv N Nyembe

Instructed by: State Attorney
Pretoria

Counsel for Sixth the Respondent: Adv M.D Sekwakweng

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