

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **121445/2025**

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED: YES/~~NO~~

2025 ...05/02.....

In the matters between: -

ANELE MDA

APPLICANT

And

FIKILE MBALULA

RESPONDENT

RE:

FIKILE MBALULA

APPLICANT

And

ANELE MDA

RESPONDENT

JUDGMENT

BAQWA, J

Introduction

[1] Relying on s. 17(a) (i) and/or s.17 1(a) (ii) of the Superior Courts Act¹ Anele Mda (the applicant) seeks leave to appeal this court judgment and order handed down on 25 August 2025.

[2] The respondent opposes the application and seeks its dismissal with costs.

[3] An application in terms of s.17 (a) (i) will be granted if there is a reasonable prospect that another court would find differently whereas in terms of s.17 (a) (ii) is granted when there are other compelling reasons why leave to appeal should be granted.

[4] Having considered the applicant's grounds of appeal including the application to introduce new evidence on appeal as well as submissions by counsel for the parties, I am not persuaded that the applicant meets the test for leave to appeal on any of the two statutory provisions on which she relies.

[5] I therefore stand by the reasons and orders set out in the judgment.

The Test

[6] In the *MEC for Health, Eastern Cape v Mkitha and Another*² the Supreme Court of Appeal expressed the test for granting leave to appeal as follows:

"[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

¹ Act 10 of 2013.

² [2016] ZASCA 176 at paragraph 17.

success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there are some other compelling reasons why it should be heard.

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

[7] Lastly regarding the prospect of success the Supreme Court of Appeal elucidated the matter even further in *Ramakatsa and Others v African National Congress and Another*³ when the court again endorsed the sentiments expressed above.

Introduction of new evidence on appeal

[8] In this application the applicant seeks to seeks to introduce what she considers to be new evidence contained in a document annexure 'X' as follows:

"I'm saying that in as much as he was with Vusi Khekhe, currently Vusi Khekhe has been sentenced. do we have to tell him that you can't be the member of the ANC, you were travelling with someone who has been convicted and sentenced." Words to the above effect were allegedly uttered by one Brian Mogotsi.

[9] The requirements for the introduction of new evidence can be succinctly summarized as follows:

³ [2021] ZASCA 31 at para 10.

9.1 A sufficient reasonable explanation, based on allegations which may be true, why the evidence sought to be introduced was not led before the court *a quo*.

9.2 There ought to must be a *prima facie* likelihood of the truthfulness of the evidence, which must be materially relevant to the outcome of the trial. *Rail Commuters Action Group vs Transnet Ltd t/a Metrorail*⁴.

[10] The said allegation does not comply with the above stated requirements.

10.1 The article referred to by the applicant was not authored by Mr Brian Mogotsi, the person who is alleged to be the source of the new evidence. Mr Mogotsi has no connection with the current matter and there is no lis currently between Mr Mbalula and Mr Mogotsi.

10.2 The content of the article is a mere regurgitation of the same unsubstantiated report previously tendered before this court. The characterisation, therefore, of the alleged statement as, a "more serious utterance" or emanating from "other serious source of evidence" is plucked from the air in the sense that the credibility of such sources is untested and unknown. The "new evidence" seeks to tender defences which have already been advanced and/or rejected by this court. There are therefore no prospects of persuading another court on such flimsy hearsay evidence.

10.3 Moreover, the applicant, in the affidavit during the hearing of the matter, had no verified proof of the allegations made against Mr Mbalula other than the reference to a newspaper article. The so-called "new evidence" cannot possibly

⁴ 2006 (2) SA 359 (CC) at 338 C – 330 D.

add any probative value to the evidence already tendered. In any event, that cannot be achieved through hearsay evidence.

[11] The issue of new defence on appeal was dealt with in *Homi Lifestyle (Pty) Ltd and Another vs Unemployment Insurance Fund and Another*⁵ as follows:

"18 Leave to raise a new defence on appeal is not for the asking- It is given only in certain circumstances. The reason for this is obvious. An appeal court considers and must pronounce on the cogency of the judgement of the court a quo. Logically, it must, as a rule do so, in light of the case presented to that court. To consider a different case than that turns the appeal into a rehearing of the matter rather than an assessment of the court a quo."

[12] There is, accordingly, no merit in the attempt to link this "new evidence" application to the application for leave to appeal.

Grounds of Appeal

[13] In one of her grounds of appeal the applicant submits that this court misdirected itself in granting the order for an apology and retraction of the defamatory statement made by the applicant. This submission is clearly wrong.

[14] In *Du Toit vs Beckett and Another*⁶, Holderness J stated:

"[118] With regard to the nature of the relief sought, to the extent that the court in Heartland Lifestyle Estate (Pty) Ltd and Another vs APC Marketing (Pty) Ltd differed from this approach in refusing to order a retraction and an apology on

⁵ (13443/2023) [2025] ZAG PPC 630 (17 June 2025) para18.

⁶ (8687/2023) [2024] ZAWCHC 51 at para 118-119.

motion, on the basis of this decision of the SCA in Emmanuel. Respectfully, I differ.

[119] This matter is clearly distinguishable from Emmanuel, where the applicants sought an order for a retraction and apology in conjunction with a claim for damages. The SCA held that it was inappropriate to adjudicate a claim for damages in motion proceedings as oral evidence would need to be led to establish the damages, and the issue of a retraction and apology in that case was inextricably bound up with the question of damages.

[120] In this case, the applicant specifically disavowed himself of any intention to pursuing a claim for monetary damages and expressly contented himself with an apology and a retraction."

[15] Considering the prayers before this court regarding the retraction and apology, it's self-evident that the respondent wasn't seeking damages for defamation in an urgent application. The applicant's reference to Emmanuel is inappropriate and misplaced. This ground of appeal falls to be dismissed.

[16] The other ground of appeal is that applicant's reference to Mbalula as belonging in jail is an opinion. It is trite that for an opinion to be considered fair comment, it must withstand the test of fairness, in other words, it ought to be based on truth.

[17] The relevant paragraph in the judgement is paragraph 36, which reads:

"It is instructive to read what the respondent says in her answering affidavit. She makes an admission that the information obtained from the Citizen article was never verified by her when she says in paragraph 49:

'It is clear that I do not purport to have any factual knowledge as to whether he was liable for the murder of Mr Bozwana nor do I state that he was, an assertion Mr Mbalula incorrectly makes. I am however interested to know if he was, and undoubtedly, so does the public. Both my statements ask exactly that. Nothing more and nothing less.'"

[18] The refutation of the allegations against Mr Mbalula, which were made by Mr Mbalula in the same article referred to by the applicant, are skilfully and manipulatively omitted by the applicant in her comments and in her affidavit.

[19] The wrongfulness and unlawfulness which arise from the untruthfulness of the applicant's statements, as dealt with in the judgement speak to the absence of the defence of fair comment or public interest. The requirements are succinctly summarized in *EFF and Others vs Emmanuel*⁷ at paragraph 38.

"[38] (a).....

(b).....

(c) *the facts on which it is based must be true and must be clearly stated or clearly indicated or matters of public knowledge; and*

(d).....

If the comment is made maliciously, that is, with an improper motive, as opposed to being no more than an expression of an honestly held opinion on a matter of public interest it is wrongful and the defence is not available."

⁷ 2021 (3) SA425 SCA at para 38

[20] The falsity of the applicant's statements is apparent even from her own admission, and in my judgement, they need no elaboration.

[21] The issue of fair comment is also dealt with at paragraphs 33 and 34 of my judgement, and the falsehoods upon which she tried to base her case equally do not justify the defence of qualified privilege and public interest. If that would be accepted to be the case, public figures such as Mr Mbalula would be fair game to character assassination and defamation of the worst kind without an iota of evidence.

[22] The applicant in her widely repetitive grounds seems to have preferred the Court to deal with some binding authorities that have however been misconstrued in their understanding or interpretation. Inevitably no sound argument is proffered in support thereof. In effect, the argument advanced seems to be more like a fishing expedition.

[23] The above conduct is amply demonstrated in her submission that this court applied the judgement in *Ndlozi* to arrive in a hybrid decision similar to *Ndlozi*. Nothing could be further from the truth. Whilst *Ndlozi* is mentioned in paragraph 20 of the judgement, this court said the following:

"The facts in this case were different in that the applicant sought an order for an interdict and the quantum for damages be referred for oral evidence as a reasonable approach, taking into account the facts of the matter."

[24] The approach and application of the law is in line with the case of *EFF vs Emmanuel*, citing paragraph 111, where the SCA, having regard to the utilisation of urgent proceedings for granting interdictory relief, said:

"[111] There is, of course, no problem with a person seeking an interdict, interim or final, against the publication of a defamatory statement proceedings by way of motion

proceedings on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they obtain instant, though not necessarily complete, relief. There's a precedent for this in the well-known case of Buthelezii vs Poorter, where an interdict was granted urgently in relation to an egregious piece of character assassination."

[25] The order sought to be appealed against is no different.

[26] In light of the above, I conclude that there is no sound, rational basis to conclude that there are reasonable prospects of success on appeal.

Order

I make the following order:

[27] The application for leave to appeal is dismissed with costs



SELBY BAQWA
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 29 October 2025

Date of judgment: 5 February 2026 2026

Appearance

behalf of the Applicant

Adv D Mpofu SC

zondiwe@mabuzas.co.za

Instructed by

Mabuza Attorneys Inc

On behalf of the Respondents

Adv S Sethene

smanga@lawsethene.com

Instructed by

LS Mashifane Inc