(Inlexso Innovative Legal Services)fvs

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54573/2018

DATE: 26/11/2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED

In the matter between

K E MAHLANGU

AN BUSHULA

and

THE MINISTER OF DEFENCE AND

MILITARY VETERANS

LEAVE TO APPEAL J U D G M E N T

VAN DER WESTHUIZEN, J:

[1] In this matter, the applicants who were the applicants in the main application, applied for leave to appeal against my

judgment granted on 5 September 2019 in respect of an application which the applicants brought against the Minister of Defence and Military Veterans and the Chief Director Liaison and Stakeholder Management Ministry of Defence. I dismissed that application on the grounds that were dealt with in the main application and which were relevant to deciding whether the relief sought could and should be granted.

[2] The applicants have cited a number of issues in their application for leave to appeal in terms whereof I had erred. Those grounds were expanded upon in oral argument when this application for leave to appeal was called. I have carefully considered the submissions in the application for leave to appeal and the submissions made by both of the applicants in oral argument today. I have reconsidered my judgment in this regard and I shall deal with some of the issues raised.

[3] The principles applicable when considering an application for leave to appeal was succinctly set out in *MEC for Health Eastern Cape v Mkhitha* 2016 JDR 2214 SCA. I quote from that judgment:

> "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 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. An applicant for leave to appeal must convince the Court, on proper grounds that there is a reasonable prospect of realistic chance of success or a 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 and rational basis to conclude that there is a reasonable prospect of success on appeal."

[4] The first ground upon which the applicants rely in their application for leave to appeal relates to paragraph 5 of my judgment. I quote that paragraph:

"5. In respect of the defence of the premature institution of this application, it is submitted on behalf of the respondents, that section 61 of the Defence Act 42 of 2002, the Act read with regulation 17 of the Individual Grievances Regulation to the Act applies. That section provides that all internal remedies are to be exhausted,

prior to the seeking of external remedies."

[5] The point that is made on behalf of the applicants is that I made a finding that they have not completed all the internal remedies and have, so to speak, jumped the gun and approached the High Court. It is clear from the quote that I made no such finding. It is merely stating what the defence was in respect of the premature institution of this application. I did not find as a fact that there was premature institution and that the applicants were nonsuited in respect of non-compliance with all internal remedies. There is no merit and basis in that attack.

[6] The submission is further made by the applicants that, in view that I found and made such finding, the logical and appropriate approach would have been to strike the application from the roll and direct the applicants to first proceed with, and comply with all the internal remedies. As already recorded, I have made no such finding and hence that approach or that criticism is of no consequence.

[7] A further ground upon which the judgment is attacked, is that I had erred in non-suiting the applicants on the basis that the applicants sought relief prior to exhausting the internal remedies available. The exhaustion of internal remedies is

applicable in instance of applicants' application for judicial relief made in the context of administrative law. I have made no finding that they are nonsuited because of non-compliance or non-exhaustion of the internal remedies.

[8] That criticism is directed at paragraph 27 of my judgment. Which reads as follows:

> "27. It follows from the foregoing that the applicants are not employed on a full-time basis during the whole period of the five-year contract period nor are they remunerated for a period of non-utilisation."

[9] It is clear that paragraph 27 is a conclusion drawn from what has gone before. What has gone before was dealing with specific sections in the Superior Courts Act. The position under the common law and the requirements for granting declaratory orders postulating with the issues that are to be determined. I then dealt with the aforesaid regulations in a reverse order in terms of the content sought. There is no merit in that criticism and that ground does not assist.

[10] Further reliance is placed on the contents of paragraph 6 of my judgment where it is stated:

> "6. It is further submitted on behalf of the respondents that the claim to non-payment of salaries is an aspect which falls within the definition of a grievance. Hence it is submitted that the seeking of a declaratory prior to the exhausting internal grievance procedures nonsuits the applicants. In the present instance it is not required to deal with it. That issue unveils the approach to be taken in this judgment."

[11] I made no finding of nonsuiting in that paragraph. That again is a restating of what the respondents' view was and it is clearly stated in the last sentence that I, in fact, did not deal with the issue of non-exhaustion of procedures.

[12] The other submissions that were made by the applicants in oral argument, centred around the structure of the Reserve Force, the procedures applicable there and the manner of employment in that regard. I dealt with all those issues in my judgment and I do not intend to deal with them further.

[13] Having regard to the principles, quoted earlier, that are to be considered in an application for leave to appeal, there is clearly non-compliance with any of those principles and I am not persuaded that another Court would come to a different conclusion than I have come.

I grant the following order:

The application for leave to appeal is dismissed with costs.

10 **……**

VAN DER WESTHUIZEN, J

JUDGE OF THE HIGH COURT

DATE: ……

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