#### REPUBLIC OF SOUTH AFRICA



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 034689/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
5/1-	424
DATE	SIGNATURE
1	

In the matter between:

ROBERT KINGSCOTT

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS

Second Respondent

Summary: Application for leave to appeal – the heightened test in section 17 of the Superior Courts Act not met. Held: (1) The application for leave to appeal is refused. Held: (2) The applicant is to pay the costs of the application taxable at scale B.

JUDGMENT- LEAVE TO APPEAL

# MOSHOANA, J

### Introduction

- This Court finds it apt to commence this judgment with a statement that there is definitely a growing tendency that an unfavourable judgment to a party is prone to an application for leave to appeal. Felicitously put, launching an application for leave to appeal has become a second nature after almost every judgment of a single judge. Inasmuch as this Court accepts that, in line with section 34 of the Constitution, every litigant has a right to have disputes resolved by application of the law, such does not licence unmeritorious applications for leave to appeal. The higher Courts has lamented the fact that judges too readily grant leave to appeal even where the strict test has not been met.
- [2] Generally, unlike a Court of appeal, a Court of review, operates in a constrained space. It does not axiomatically follow that if a Court does not like an impugned decision such a decision is reviewable in law. The impugned judgment dealt with a review application. Thus, in my view, when an opinion is formed as to whether another Court would reach a different conclusion, regard must be had to the fact that the Court of appeal would still operate in that constrained space, much the same way as this Court did.
- [3] That said, the present is an application for leave to appeal against the judgment of this Court, where this Court refused to interfere with the administrative decision of the Minister.

## Evaluation

[4] Having expressed views at the dawn of this judgment regarding the growing tendency, this Court finds itself in a fortunate position because, the legislature, conscious of the fact that every unfavourable judgment would axiomatically cause some disquiet to a losing party, legislated a test to be applied when faced with an application of this nature. The test is a very simple one, would the appeal have a reasonable prospects of success? A plethora of authorities emanating from the High Court; the Supreme Court of Appeals; and the Constitutional Court has confirmed that

the legislated test is heightened. In other words, the bar has been raised much higher. Absent meeting of the legislated test, a judge(s) should not readily grant leave to appeal. Counsel for the applicant conceded that the legislated test is indeed a heightened one.

- [5] The high watermark of the applicant's case is that this Court in its judgment quoted and interpreted the provisions of section 19(4) of the Immigration Act, which is non-existent. The provisions from which this Court extracted the contested text appear in GG No. 23478 Vol 443 dated 31 May 2002. The submission from counsel, ever so boldly made, was that such extracted provisions never existed in the statute books. Mildly put, this Court was on a figment of its own imagination. Counsel did not remotely suggest that the provisions from which the text was extracted was repealed and or amended. This Court takes a view that it remains the duty of counsel to not mislead a Court and or make a submission that is not substantiated. If the Government Gazette that this Court relied on was for some other reasons amended or repealed, it remained the duty of counsel to advise the Court accordingly. It is inappropriate, in my view, for counsel to boldly submit that a Court has misinterpreted the law, in the circumstances where the text extracted by a Court existed or once existed in the statute books. It remains a duty of counsel to verify the veracity of every submission he or she makes to a Court. Where counsel is uncertain about the veracity of a submission, counsel must say so to a Court, instead of making a submission that may turn out to be unsupported. Similarly, such amounts to counsel misleading a Court, a conduct that is unconscionable, which may attract punitive costs de bonis propriis order.
- [6] Howbeit, even if this Court quoted a repealed or an amended provision of a statute, such extraction is inconsequential. Firstly, it is trite law that an appeal does not lie against the reasons of the Court, but the order of a Court. The relevant case of the applicant was that the Minister's decision was influenced by an error of law. Regard being had to the letter penned by the Minister, which contained the impugned decision and its reasons, other than referencing section 19(4) of the Immigration Act, the Minister did not quote the text of the section. Thus, it cannot be said that the Minister relied on the similar text that this Court quoted in its impugned judgment. For that reason alone, another Court would not come to a conclusion that the decision of the

Minister was materially influenced by an error of law. It is incorrect, as submitted by counsel for the applicant that the Minister, like this Court, misinterpreted the provisions of section 19(4). Such an alleged misinterpretation is not apparent anywhere in the letter of the Minister. It is one thing to commit an error of law, it is yet another thing to be materially influenced by an error of law. Ordinarily, a wrong or mistaken interpretation of a legislative provision is commonly referred to as an error of law. In casu, what the Minister did was to predicate or support his decision with the provisions of section 19(4) as opposed to any mistaken interpretation.

[7] Counsel for the applicant repeated his argument that the regulation does not differentiate between a candidate engineer and a professional engineer. What is clear from the wording of the regulation, as they stood at the time of the decision, the word candidate engineer does not appear at all. As such, in not considering a non-listed skill, the Minister was not influenced materially by any error of law. In *Premier of Western Cape v Overberg District Municipality (Overberg)*<sup>1</sup>, the erudite Brand JA, dealing with an error of law had the following to say: -

"... the principle of legality requires the holder of executive power not to misconstrue that power. As I see it, it follows that in the circumstances the impugned decision offended the principle of legality, because it directly resulted from the cabinet misconstruing its powers under section 139(4) of the Constitution. Stated slightly differently; by deciding to dissolve the council without considering a more appropriate remedy, the cabinet, in my view, offended the provisions of s 41(1) ..."

[8] It is important to observe that the Minister, in this particular instance, was not necessarily exercising executive powers. The Minister took a decision of an administrative nature. Accordingly, it is not the Court's function to say whether an administrator's decision is right or wrong, but merely whether it was arrived at in an acceptable manner. According to Hoexter, this function of a Court, makes it difficult to explain why a Court should be able to review the substantive correctness of an administrator's interpretation of legal (or indeed factual) questions<sup>2</sup>. This Court

<sup>1 [2011] 3</sup> All SA 385 (SCA).

<sup>&</sup>lt;sup>2</sup> Cora Hoexter Administrative Law in South Africa 2<sup>nd</sup> Edition 2012 Juta at 288 para (c).

plentifully agrees with Hoexter, in a review, correctness of a decision does not arise. This view resonates well with what Corbett CJ stated in *Hira v Booysen* (*Hira*)<sup>3</sup> about an error of law by an administrator.

[9] With regard to the remaining two pleaded grounds of review, another Court would not reach a different conclusion. With regard to costs, it was contended that since the applicant argued that the *Biowatch* principle finds application, this Court was in error in not accepting such a submission. The *Biowatch* principle is being abused. Recently, the Supreme Court of Appeal in *Masiteng v Minister of Police (Masiteng)*<sup>4</sup>, confirmed that absent constitutional issue or any right asserted against an organ of the State, the principle does not find application. It cannot be correct, in my view, that in every PAJA or legality review, the principle of *Biowatch* must be applied without fail<sup>5</sup>. Nevertheless, when it comes to costs, a Court possesses a very wide discretion. A Court of appeal is loath to interfere with an exercise of discretion unless wrong principles, *mala fides* and capriciousness are apparent.

[10] In summary, this Court is not of an opinion that a reasonable prospect exists that another Court would come to a different decision. Thus, the applicant has failed to meet the legislated test. Accordingly, leave to appeal ought to be refused with an appropriate order as to costs.

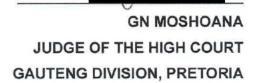
#### Order

- [11] For all the above reasons, I make the following order:
- The application for leave to appeal is refused.
- 2. The applicant is to pay the costs of this application on a party and party scale taxable or to be settled at scale B.

<sup>3 1992 (4)</sup> SA 69 (A).

<sup>4 (944/2023) [2024]</sup> ZASCA 165 (4 December 2024)

<sup>&</sup>lt;sup>5</sup> See *Independent Community Pharmacy Association v Clicks Group Ltd* [2023] ZACC 10 (28 March 2023) where the Court held: "The fact that a PAJA review is constitutional litigation does not mean that **the applicant will always be insulated from costs**, because *Biowatch* is subject to exceptions, such as where the litigant is 'frivolous and vexatious, or in any other way manifestly inappropriate'."



Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 05 December 2024.

APPEARANCES:

For the Applicant:

Instructed by:

For the Respondent:

Instructed by:

Date of the hearing:

Date of judgment:

Mr V Mabuza

McMenamin Van Huyssteen, Pretoria

Mr T Segage

State Attorney, Pretoria

04 December 2024

05 December 2024