

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO: 2811/2020
Date heard: 17 March 2022
Date delivered: 12 April 2022

In the matter between

PHUMZILE SONGO
in

**Applicant (Respondent
the Leave to Appeal**

And

THE COUNCIL OF LOVEDALE TVET COLLEGE

First Respondent

PAULINE SEEMISE
(The Chairperson of the Lovedale College Council)

Second Respondent

WISTON PLAATJIES
(The Deputy Chairperson of the Lovedale College Council)

Third Respondent

JUANITA VERSTER
(The Acting Principal of the Lovedale College)

Fourth Respondent

WANDILE NTUSANA
(Member of the Lovedale College Council)

Fifth Respondent

BONGI PAYANA
(Member of the Lovedale College Council)

Sixth Respondent

THEMBALETHU BHEKA
(Member of the Lovedale College Council)

Seventh Respondent

LUYOLO NGQONGWA
(Member of the Lovedale College Council)

Eight Respondent

CIKIZWA GANTO
(Member of the Lovedale College Council)

Ninth Respondent

MIHLALI PETSHE
(Member of the Lovedale College Council)

Tenth Respondent

XOLISA TYALI
(Member of the Lovedale College Council)

Eleventh Respondent

THE MINISTER OF HIGHER EDUCATION

Twelfth Respondent
(First, Second, Fifth and
Seventh

Respondent in
Leave to Appeal)

the

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

LOWE J:

INTRODUCTION

1. In this matter, I originally heard extensive argument from the parties followed by a full judgment in which the application was essentially successful but each party to pay their own costs.
2. In due course, first, second, fifth and seventh respondents as applicants, sought leave to appeal the entire judgment to the Full Bench of the Eastern Cape Division alternatively the Supreme Court of Appeal.
3. There were no fewer than fourteen paragraphs in the grounds advanced in respect of the application for leave to appeal most of which surrounded the manner in which it was alleged that I had erred.
4. The application for leave to appeal was subsequently argued by counsel who had not represented the various respondents (applicants in the application for

leave to appeal), and in respect of which careful and well-articulated argument was addressed relevant to the application for leave to appeal.

5. Indeed, counsel laid considerable weight upon a matter which had not been referred to me during the original argument being **Miller v Natmed Defence (Pty) Ltd and others**¹. I will return hereto in due course.

THE APPROACH TO APPLICATIONS FOR LEAVE TO APPEAL

6. I have given careful consideration to the principles, which are applied by our courts in respect of applications for leave to appeal and particularly in terms of Section 17(1) of the Superior Courts Act 10 of 2013 and the sometimes suggested slightly changed onus or level that has to be applied thereto as has been suggested in a number of cases particularly in the Labour Court.²
7. I wish to make it clear however, that I have applied the present test hereto and that is whether there is a reasonable prospect that another court would come to a different conclusion than did I.
8. I have also had careful regard to the decision of the Supreme Court of Appeal, **Minister of Justice and Constitutional Development and Others v Southern**

¹ 2022 (2) SA 554 GJ.

² **The Mont Chevaux Trust (IT 2012/28) v Goosen and 18 others** LCC14R/2014; **Fair Trade Tobacco Association v President of the Republic of South Africa and Others** (21688/2020) [2020] ZAGPPHC 311.

Africa Litigation Centre and Others³, a judgment given on the 15 March 2016 in which Wallis JA dealt with an application for leave to appeal, commenting on appeals in which there is a particularly important matter to be decided that is a matter of public importance. At paragraph [23] he outlined the basis underlying what he said in paragraph [24], which I intend to quote selectively, and it was against this background that it was suggested that in that matter jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view in that matter as to the prospects of success, leave to appeal should have been granted, having regard to the importance of the matter to various parties and the public.

9. His Lordship said as follows at paragraph [24]:

“That is not so say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.”

10. In any event, it is clear that if there is a reasonable prospect that another court may differ on the issues raised, leave to appeal must be given.

THE ARGUMENT IN THIS MATTER

11. The fundamental basis of the argument in this application is effectively that I erred having set out the statutory background applicable to the application, in thereafter failing to find that along the lines suggested in **Miller** (*supra*)

³ 2016 (3) SA 317 (SCA).

essentially that even where statutory requirements have not been complied with, such as in this matter, if this did not serve to prejudice the parties, the failure to comply with those statutory requirements was by no means fatal to the consequences which followed.

12. In the application for leave to appeal, it is urged upon me that there was no prejudice in this regard whatsoever, and that accordingly on the authority of **Miller**, there was a reasonable prospect that another court would come to a different conclusion.
13. It was further argued that if this was the case, then it became necessary to consider whether the appointment originally of Professor Plaatjies as chair for the following three years had to be dealt with and could not be ignored as I had done.
14. I have given the matter considerable thought, but I am unpersuaded that there is on the basis advanced in argument, and I have considered all the arguments advanced, that there is a prospect of success on appeal not being persuaded that another court might reasonably come to a decision different to that which I did.
15. I consider that the **Miller** decision (*supra*) is entirely distinguishable in this regard which matter relates to the removal of directors of a company and the requirement that reasons be given for their removal or their intended removal

relevant to section 71(2) of the Companies Act 71 of 2008. In that matter as I understood the argument and relying on paragraphs 42 and 43 of the judgment, in respect of which the failure to give notice was said not to have prejudiced applicant and thus did not render his removal unlawful is of application in this matter. In my view this is not applicable to this matter and does not assist the argument.

16. The remainder of the reasons set out in my judgment are clear and it would serve no reasons to restate same and certainly impermissible to further bolster these reasons.
17. It should be noted, that the respondents in this matter did not enter into the application for leave to appeal, and accordingly it is unnecessary to make any costs order in respect of the application, respondents having left the matter in the hands of the court.

ORDER

18. In the circumstances the application for leave to appeal is refused.
19. It is ordered that:
 1. The application for leave to appeal is refused.
 2. There shall be no order as to costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant:

Adv. Nxumalo, instructed by: Netteltons
Attorneys, Ms. Pienaar.

Date heard:

14 October 2022.

Date delivered:

8 November 2022.