

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7633/21

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

.....
.....

DATE: 04/02/2025

SIGNATURE...  ...

In the matter between:

FLORANCE MATSHELANA SELOANA

Applicant

And

THE GOVERNMENT ADMINISTRATION AGENCY

First Respondent

GOVERNMENT EMPLOYEE'S PENSION FUND

Second Respondent

MINISTER OF FINANCE

Third Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Fourth Respondent

Delivered: This revised judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **04 February 2025**.

JUDGMENT

Makoti AJ

Introduction

- [1] The applicant condemns the judgment which it alleges to be riddled with errors in its findings and because its orders are unjustifiable. Sitting across the same table are the respondents who jovially exclaim, '*hail the judge and his judgment*'. This is the normal dichotomous relationship that opposing parties have with a judgment. For the victor, a judgment is the best instrument in hand while the opposite is true for the victim.
- [2] The applicant **Ms Florence Matshela Seloana** seeks leave to appeal my judgment of 06 March 2024. She impugns the judgment in its entirety, that is, the findings and orders that I made in it and on several grounds. In the application for leave to appeal the applicant asked that the appeal be heard by the full bench of the Limpopo Division. However, this position changed during the hearing of the application with the applicant now asking that the appeal be sent to the Supreme Court of Appeal (SCA).
- [3] As before, this application is opposed by only two of the four respondents, being the **Government Pensions Administration Agency (GPAA)** and the **Government Employees Pension Fund (GEPF)**, the first and second

respondents. Like the applicant's newly adopted posture, the respondents have submitted that the appeal and the issues involved in it, should I grant leave, are of such a nature that they should be referred for adjudication by the SCA.

- [4] I deal with the test for leave to appeal before answering whether the application should succeed or not.

Test for leave to appeal

- [5] Leave to appeal is granted where the court is satisfied that the application would have reasonable prospects of success.¹ In *S v Smith*² the court had the opportunity to consider what constitutes reasonable prospects of success and it came to the conclusion that:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal." (Emphasis added)

- [6] Our courts have further held that given the wording of section 17(1)(a)(i) of the Superior Courts Act,³ leave to appeal may only be granted where a court is of the view that the appeal would have reasonable prospects of success.

¹ S 17(1) of the Superior Courts Act No. 10 of 2013 (the Act).

² 2012 (1) SACR 567 (SCA) 570 at para [7].

³ Act 10 of 2013.

Numerous authorities have interpreted the section to mean that the phrase '*would have reasonable prospects of success*' serves to indicate some degree of certainty that the court of appeal would reach a different conclusion prior to granting an application for leave to appeal.

[7] In *MEC for Health, Eastern Cape v Mkhitha and Another*⁴ the court held *inter alia* that:

"An applicant for leave to appeal 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 enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[8] Apart from the question of reasonable prospects of success, the court may also grant leave to appeal if there exists a compelling reason for an appeal to be heard, and that includes instances where there are conflicting judgments over the subject under consideration.⁵

Whether leave should be granted to appeal the judgment

[9] The applicant has raised several grounds for appeal. I classify them into three categories. First, it is said that the court ought to have found the impugned pension rule unfairly discriminates against women who are in polygamous marriages, second, that there is no legitimate purpose for the rule, and, lastly, that the respondents did not discharge the onus which rested on them to show the existence of a legitimate purpose for the rule.

⁴ [2016] ZASCA 176, para 17.

⁵ Section 17(1)(a)(ii) of the Act.

The upshot of all of these is that I ought to have ordered that the impugned rule should be stricken out.

- [10] For the respondents it was contended that the judgment appropriately dealt with the issues and that, importantly, its orders are unassailable. They pointed out that the applicant has already benefitted millions of Rand since their spouse died, had no issue with the 25% that she was benefitting. The argument went further that the issue arose upon the death of one of the surviving spouses, it being the ostensible trigger of the demand for recalculation.
- [12] I am faced here with some kind of a *res nova* which carries constitutional implications. Indeed, in my judgment I found the existence of an indirect discrimination against women in polygamous marriages. This is significant. So too, is the fact that the case calls for clarification of the law on how pension benefits should be shared among surviving spouses. Could I have been wrong to suggest that the changes sought by the applicant depend on a new trigger, death of one of the surviving spouses to lead to a recalculation of pension benefits. I am not convinced.
- [13] Despite that I am not convinced that the findings in my judgment are assailable on appeal, the fact that this matter deals with important constitutional issues persuade me to grant leave to appeal in the interest of justice. I believe that a ruling at appeal level will help solidify the law, whatever the outcome will be.
- [14] I am also persuade that given the nature of the legal questions involved in this matter, the appeal should be heard by the Supreme Court of Appeal.

Order

[54] I make the following order:

- [a] Leave to appeal is granted to the Supreme Court of Appeal.
- [b] Costs are in the appeal.



MOKGERWA MAKOTI

ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

DATE OF HEARING : 16 AUGUST 2024
DATE OF JUDGMENT : 04 FEBRUARY 2025

APPEARANCES

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