OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 3473/2022

In the matter between:

PETER BECKER	**Applicant**
vs	
MINISTER OF MINERAL RESOURCES & ENERGY	**First Respondent**
NATIONAL NUCLEAR REGULATOR	**Second Respondent**
CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE NATIONAL NUCLEAR REGULATOR	**Third Respondent**

JUDGMENT DELIVERED ON 26 MAY 2023

MANTAMEJ

[1] The first to third respondents *("the respondents")* seek leave to appeal to the Supreme Court of Appeal against the judgment of this Court handed down on 19 January 2023. Numerous grounds of appeal are set out in their respective applications for leave to appeal and as such, it would not be necessary to regurgitate them in this judgment.

[2] The respondents alleged that there are reasonable prospects of success as

contemplated in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 *("the SC* Act") and that there are compelling reasons why the appeal should be heard as contemplated in section 17(1)(a)(ii) of the SC Act as this Court's findings have radiating consequences beyond the facts of the current case.

[3] In summary, *first,* amongst the grounds relied upon heavily by the first respondent was that it was not for this Court *"to decide whether there are valid grounds to sustain* a *conclusion of misconduct by the Minister,* ... " It was not for the first respondent to show that his decision could be sustained on valid grounds, but for the applicant, Mr Becker. The first respondent is statutorily entrusted with the power to make the determination of whether a director's conduct justifies their removal. This Court's thinking slipped from the review thinking to that of an appeal. As a result thereof, it misconceived the reference to misconduct in section 9(1) as imposing a jurisdictional requirement, and that it was thus free to establish for itself whether the Minister's conclusion was correct as a matter of fact.

[4] *Second,* it was not open for this Court to find that Mr Becker's *"conduct should have been dealt with better"* by the Second respondent. This Court should have confined itself to determine whether the Minister's conclusion could be substantively impugned as irrational and / or unreasonable, and whether the process followed could be impugned as being procedurally unfair and/ or procedurally irrational and so on.

[5] The applicant, in tum, filed a notice of conditional application for leave to appeal against the failure of this Court to grant the relief sought by the applicant in prayer 3 of his amended notice of motion dated 23 May 2022. This application will be dealt with further at the end of this judgment.

[6] As the respondents put it, despite this Court having acknowledged that it was undesirable for the applicant to wear two hats after his appointment, however, this Court "rows away" from this finding and finds that *"Mr Becker's conduct should have been*

dealt with better and in a *more constructive manner."*

[7] It appears that the respondents decided on reading the judgment of this Court selectively. It analysed the comments made by the Court and elevated them into findings. In making these submissions, the respondents deliberately elected not to appreciate that the Impugned decision is the discharge of the applicant on the ground of "misconduct." For this Court to find whether the decision of the Minister is unreasonable, procedurally unfair and / or procedurally irrational, this Court could not have glanced at the misconduct as a sanction. Most importantly, it was crucial for it to analyse "misconduct" as referred to in section 9(1)(c).

[8] This Court was further criticised that it *"strays into the irrelevant"* when it considered that the Board should have considered themselves fortunate as the applicant brought a different perspective to their discussions other than the government policy that was referred to by the Minister. It was argued that the applicant was not sanctioned for holding his political or organisational views. The respondents neglected to have an insight into their rushed recommendations (by the Board} and irrational decision (the Minister). Judging from the public statements before and after the applicant was discharged, their submissions are inconceivable. This Court made reference to the relevant public statement that was made by the Minister at the Newsroom interview on 3 February 2022 and that was later on validated by his statement at the ANC conference on 7 May 2022. It would be naïve of this Court not to be convinced that the Minister pre• judged the conduct of the applicant.

[9] This Court analysed and reached a conclusion on this matter. The ultimate finding is not borne out by their submissions that this Court was motivated by thinking on appeal. The respondents cannot substitute the Court's analysis with their own convenient censure. For instance, in their submissions, the respondent over-exaggerated the duties of a statutorily appointed director. In fact, they somehow equated the duties of "non-executive directors" with the fiduciary duties of a director appointed In terms of the

Companies Act. That is absurd, to say the least. This argument was ably dealt with in this Court's judgment, and it does not assist the respondents to rehash these arguments. Markedly so, the fact that the Minister's reasons for the discharge of the applicant contained in the letter of discharge of 22 February 2022 were not consistent with the Minister's answering affidavit in these proceedings is a clear reflection that the decision by the Minister was irrational.

[10] The question of whether the decision by the Minister is an "executive" or "an administrative power" was exhaustively dealt with in this Court's judgment. The respondents contended that this is a complex issue and has to be dealt with by an appeal court. This issue has been previously dealt with on numerous judgments in the Supreme Court of Appeal and Constitutional Court. In my view, there is no complexity as alleged.

[11] The reasonableness, irrationality and fairness of the Minister's decision is attendant upon whether there was any misconduct committed by the applicant. On the evidence that was put by the second respondent before the Minister, no actionable misconduct could be deduced. In such circumstances, a discharge on the grounds of misconduct was found to be unreasonable, unfair and irrational.

[12] To the extent that there was a misunderstanding on the part of this Court in so far as not dealing with prayer three (3) of the amended notice of motion, that is regrettable. This Court unconditionally apologise for this error.

[13] The test applied in an application for leave to appeal amongst others, suggests that there must be a sound and rational basis for the conclusion that there are prospects of success on appeal. The respondents have not taken this Court into its confidence and Identified the compelling reasons why this matter should be heard by an appeal court, other than to give this Court's judgment their own meaning. The fact that they preferred their own interpretation to the comments and findings of the Court could not be said to be a justifiable reason/s for the matter to

be heard by an appeal court.

[14] In *Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at [34],* the SCA state that:

> *"There is a further principle that the court a quo seems to have overlooked – leave to appeal should be granted only when there is* 'a *sound, rational basis for the conclusion that there are prospects of success on appeal.' In light of its findings that the plaintiff failed to prove focus standi* or *the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit."* See also *Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 para [18](29 January 2021; Nwafor v The Minister of Home Affairs and Others [2021] ZASCA 58 at para [25] (12 May 2021); Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 at para [10] (23 September 2021).*

[15] Similarly, in this matter, in light of the finding that there was no evidence of misconduct on the part of the applicant, it then follows that there is no rational or sound basis for his discharge. In the circumstances, the conclusion that there are prospects of success on appeal or that there are compelling reasons for the appeal to be heard is without merit. The submissions that this Court superimposed itself and made findings that were not under the applicant's challenge are most unfortunately unfounded.

[16] In conclusion, this Court is satisfied that the respondents have failed to meet the threshold that is required by Section 17 of the SC Act, and stands by its judgment.

[17] In the result, the application for leave to appeal against the first, second and third respondents is refused. Given this finding, it then follows that the conditional application

for leave to appeal cannot be proceeded with. The respondents are ordered to pay the costs of this application.

MANTAME J

WESTERN CAPE HIGH COURT