



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:32440/18

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
19 February 2024	 
DATE	SIGNATURE

In the matter between:

KHUMBELO MULEYA

Applicant

And

MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

JUDGMENT

NOKO J*Introduction*

[1] The applicant launched an application for leave to appeal the whole judgment and order I granted on 18 December 2023 in terms of which the civil claim against the respondents for damages predicated on unlawful arrest, unlawful detention and malicious prosecution was dismissed with costs. .

Background

[2] The factual background has been set out *in extenso* in my judgment and same will not be repeated in this judgment. I have decided that the facts/evidence presented by the respondents justified the invocation of the provisions of section 40(1)(b) of the Criminal Procedure Act (*the CPA*). The investigating officer had a suspicion that the complainant suffered a dangerous wound which suspicions formed the basis for proceedings with the arrest without a warrant. The suspicion was based on the observation of the fresh stitches on the complainant's hand and the fact that he was hospitalised for two days.

[3] I have also decided that the applicant failed to demonstrate that there was malice in the institution of the prosecution by the second respondent who enrolled the case pursuant to the prosecution's realisation that the complainant was injured, and the applicant made a statement that indeed he assaulted the complainant. The contention by the applicant that the withdrawal of charges is indicative of malice and the case against the applicant was at all times weak lacks proper legal foundation and unsustainable.

[4] As set out above the applicant is aggrieved by my judgment and order and seek leave to appeal same.

Legal principles

[5] In the application for leave to appeal the applicant relies on section 17 of the Superior Court Act which provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and further that the adjudication of the application to stay would be precedent setting.

[6] It has been held by several courts¹ (and therefore trite) that the provisions section 17 of the Superior Court Act have introduced a higher threshold to be met in application for leave to appeal and the usage of the word ‘*would*’ require the applicant to demonstrate that another court would certainly come to a different conclusion.

[7] The mere possibility of success, an arguable case or one that is not hopeless is not enough.² There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal³.

Parties submissions analysis

[8] The fulcrum of the applicant’s application for leave to appeal is still (just like in the action proceedings) predicated on the contention that the investigating officer did not

¹ *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance; In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.

² *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17

³ *S v Smith* 2012 (1) SACR 527.

make proper investigation of the wounds to conclude that it was dangerous to justify the arrest without warrant. This contention could not subvert the judgment in *Mananga*⁴ as quoted by the respondent's counsel when she submitted that *'it is not necessary to establish as a fact that the inflicted wound was dangerous. Suspicion implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a prima facie case against the arrestee'*.⁵

[9] There was no persuasive arguments advanced to persuade me that the decision to enrol the matter by the second respondent is assailable. There is also no legal justification for the applicant to contend that the second respondent did not hold *'... an honest belief in the guilt of the plaintiff, but its belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'* The record in the docket presented before the prosecution included an indication that the complainant was assaulted by a mob, the applicant was at the scene, and he acknowledged that he is the first person to hit the complainant with an open hand. This was good enough to have a *prima facie* conclusion that there was triable offence was committed by the applicant. Nothing has been presented to gainsay this conclusion at trial and during argument for leave to appeal.

Conclusion

[10] The applicant has failed to meet the threshold and I am not persuaded that the appeal has reasonable prospects of success and further that another court would come to a different conclusion. To this end the application for leave to appeal is bound to fail.

⁴ *Mananga and Others v Minister of Police* (324/20200[2021] ZASCA 71 at para 8.

⁵ See para 22 of Respondents' Heads of Argument on page 8

Costs

[11] There are no reasons presented to unsettle or upset the general principle that the costs should follow the results.

Order

[12] In the premises I grant the following order:

That the application for leave to appeal is dismissed with costs.



Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be **19 February 2024.**

Date of hearing:

15 February 2024

Date of judgment:

19 February 2024

For the Applicant:

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For the Respondent:

Advocate NM Mtshweni

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