



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 433/2019

In the matter between:

TSHIDISO PAUL TOLAONE

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

LEAVE TO APPEAL JUDGMENT

HEARD ON:

THE PAPERS AS PER THE HEADS OF ARGUMENT, FILED
ON 17 MARCH 2023 AND 29 MARCH 2023 RESPECTIVELY.

BEFORE:

CHESIWE, J

DELIVERED ON:

This judgment was handed electronically by circulation to
the parties' representatives by email. The date and time for
hand-down is deemed to be at 13h00 on 21 July 2023.

- [1] The Applicant seeks leave to appeal in terms of section 16(1)(a)(i), read with section 17(2)(a) of the Superior Court Act 10 of 2013 (the Superior Courts Act), wherein the Applicant applied for leave to appeal to the full bench of this Division alternatively to the Supreme Court of appeal, against the whole order of the judgment granted on 13 January 2023.
- [2] Grounds of the application for leave to appeal are listed in the Notice for leave to appeal and will therefore not be repeated herein.
- [3] The Respondent, (Defendant in the main action) filed a notice for application for leave to cross-appeal. The Respondent's contention is that there is reasonable prospects of success in the cross-appeal. The Respondent further filed an application for the late filing of the leave to cross-appeal that same be condoned.
- [4] In terms of the provisions of section 17(1) of the Superior Courts Act, leave to appeal may only be granted if the judge concerned is of the opinion that:
- The appeal would have reasonable prospect of success or if there is some compelling reasons why leave should not be granted;
- The decision sought on appeal does not fall within the ambit of section 16(2)(a) of the Act;
- Where the decisions sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [5] In an unreported decisions of **Mont Chevaux Trust v Tina Goosen**¹, Bertelsmann J said the following:

"It is clear that the threshold for granting leave to appeal against judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion...The use of the word "would" in the new statute

¹ LCC 14R/2014 3 November 2014.

indicates a measure of certainty that another court would differ from the court whose judgment is sought to be appeal against.”

- [6] The **Mont Chevaux** decision was cited with approval in the matter of **Mototo v Free State Gambling and Liquour Authority** ², where Daffue J at paragraph 5 said:

“There cannot be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word only emphasised supra is a further indication of a more stringent test.”

- [7] The Court in **Smith v State** ³, dealt with the question of what constitutes reasonable prospects of success and stated as follows:

“What the test of reasonable prospect of success postulates is a dispassionate decision based on the facts of the law that a Court of appeal would 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 a mere probability of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. These must, in other words, be a sound rational basis for the conclusion that there are reasonable prospects of success on appeal”

- [8] The Applicant’s contention that the court erred in accepting the complainant’s identification of the Respondent (Plaintiff), which identification was not reliable nor satisfactory as it was based only on the sneakers, the height and built of the Plaintiff. The Respondent contends that the court ought to have dismissed the claim with costs as the court had found in favour of the Respondent (Defendant) that the arrest was lawful.

- [9] Having considered the submissions made by the Applicant, in my view there is reasonable prospects and that another court may come to a different conclusion.

² (4629/2015) [2017] ZA FSHC 8 June 2017

³ 2012 (1) SACR 567 (SCA) at para [7]

[10] In considering the condonation application, the court has a discretion to be exercised judicially upon a consideration of all the facts and in essence, it is a question of fairness for both parties. In the unreported judgment of **MD Marais v The Minister of Safety and Security and MEC of Roads and Transport**, Case (1521/2010), Jordaan J held that:

“Any explanation is not ordinarily regarded as acceptable only because it is full explanation. That full explanation must be acceptable as well.”

[11] The Applicant’s Legal Representative in founding affidavit gave a full explanation of the delay and such full explanation and in my view is acceptable. Thus the late filing of the cross-appeal is condoned.

[12] Having accepted and granted the late filing of the cross-appeal as well as Respondent being granted his leave to appeal, it therefore follows that the Applicant be granted leave to cross-appeal as another court may come to a different conclusion.

[13] Accordingly, both applications ought to be granted.

Order

1. Leave to appeal the judgment and order granted on 13 January 2023 is granted to the full bench of this Division;
2. Leave for an application to cross-appeal the judgment and order granted on 13 January 2023 is granted to the full bench of this Division;
3. That the late filing of the leave to cross-appeal condonation is granted;
4. Costs in both applications will be costs in the appeal.

S. CHESIWE, J

On behalf of the Applicant: Adv. L R Bomela
Instructed by: State Attorney
BLOEMFONTEIN

On behalf of the Defendant: Adv. M S Mazibuko
Instructed by: Mokhomo Attorneys
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