



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

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

Case no: **2617/2021**

In the matter between:

TSHIDISO JACOB MAKHELE

Applicant

and

MINISTER OF POLICE

First Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Respondent

CORAM: PR CRONJÉ, AJ

HEARD ON: 8 SEPTEMBER 2023

DELIVERED ON: 04 DECEMBER 2023

JUDGMENT BY: P R CRONJÉ, AJ

- [1] The Applicant seeks leave to appeal against the Judgment of Mphama AJ, delivered on 13 February 2023. The Applicant's cause of action, in respect of the First Respondent only, was that the arrest of the Applicant by members of

the SAPS and the subsequent detention was unlawful. The Applicant's claim was dismissed, with costs.

- [2] It is common cause that the test for interference by a Court of Appeal is set out in Section 17 of the Superior Courts Act, which *inter alia* provides that leave to appeal may only be given where the Court is of the opinion that the appeal *would* have reasonable prospects of success or that there is some other compelling reason why the appeal should be heard, including conflicting decisions on the matter under consideration. Both these tests are not easily overcome. The Applicant concedes such.
- [3] One of the points of criticism is that the Court *a quo* did not make any credibility findings. It is trite that a Court does not have to deal with each fact or observation in the Judgment. The fact that the Court *a quo* did not make any credibility finding/s is not determinative of the success of an application for leave to appeal. The primary test that a Court has to apply is whether the party seeking relief has discharged its onus on a balance of probabilities. Although credibility may play a role in that finding, it in itself, does not imply that the onus is discharged.
- [4] What I understand from the Applicant's argument is that no version as to a second police vehicle was placed to the Applicant. However, one has to consider whether in the chain of events, such a vehicle - whether present or not - played a material part in the chain of events leading to the arrest and detention of the Applicant. To the extent that the Court *a quo* did not, or erroneously came to conclusions in respect of the version about the second vehicle, it cannot on itself be destructive of the First Respondent's version and evidence. Support for this can be found in Principles of Evidence, 2nd Edition, PJ Schwikkard et al (2002), page 513.
- [5] The Applicant argues that the question whether the Applicant ran away on the First Respondent's version, or whether he did not, in itself does not answer the critical question. The critical question, in my view, is whether the Police

received a complaint during the early hours of 2 December 2020 and whether it was an offence for which the Applicant could immediately be arrested without having obtained a statement by the Complainant.

- [6] The Applicant's submissions in respect of a timeline may, depending on the matter seen as a whole, be of relevance and in some instance also determinative. In this matter, it does not appear to me that this is one of those cases.
- [7] The Applicant's Replying Heads of Argument to the First Respondent's Heads of Argument addresses the point that it is important to determine whether witnesses of a party corroborate each other or others in all respects. In my view this too is not necessarily determinative of where the truth lies or what the central issue for determination is.
- [8] The Applicant relies on De Klerk v Minister of Police¹ where it was held:
- “[11] What is clear is that the arresting officer relied on the statement by the complainant and the J.88 only, when she made the decision to arrest. Clearly, seen objectively, that was insufficient. The arresting officer failed to investigate further the circumstances ...”
- [9] The facts in that case, however, vastly differed from the matter before the Court *a quo*. In the De Klerk matter the alleged offence was assault, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and the seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible. Rape, however, is listed in Schedule 1 and 5 of the CPA.

¹ 2018 JDR 0544 (SCA)

- [10] The De Klerk matter went to the Constitutional Court² and the appeal was upheld. However, the Constitutional Court dealt with legal causation and not with the lawfulness of the arrest itself. It constrained itself to De Klerk being held in custody for various remands whilst bail was not in issue.
- [11] The Court, in my view, approached the matter correctly in paragraph [24] of the Judgment. The Court applied the correct test in respect of arrest. Offences contained in Schedule 1 and 5 are serious offenses. I did not understand the Applicant's approach and argument in this application for leave, to the effect that the Court erred in respect of the summation provided for in paragraph [25] of the Judgment.
- [12] Having considered the Judgment of the Court *a quo*, the Heads of Argument and argument before me, I am of the view that there is no reasonable prospect that another Court would come to a different conclusion. I therefore make the following order:

ORDER:

1. The application for leave to appeal is dismissed with costs.


P R CRONJÉ, AJ

On behalf of the Applicant:

Adv C ZIETSMAN
Jacobs Fourie INC
Bloemfontein

² De Klerk v Minister of Police (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019) paras [11] [33] [63]

On behalf of the Respondents:

Adv K MOTSHABI
State Attorney
Bloemfontein