

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 18144/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

SIGNATURE:

DATE: 13 November 2023

In the matter between:

THABO GERALD KOMANE

Applicant

and

THE MINISTER OF POLICE

Respondent/Defendant

JUDGMENT

MLOTSHWA AJ

INTRODUCTION

[1] On 26 May 2023, I granted an order dismissing the Applicant's claim against the Minister of Police for unlawful arrest with costs.

[2] The Applicant who was the Plaintiff in the action now seeks leave to appeal against that order and or judgment on the ground set out in the Application for Leave to Appeal.

[3] It is argued that leave to appeal should be granted because:

- 3.1 The Court erred and/or misdirected itself in reaching the conclusion that the defendant discharged the onus cast upon it, to prove on balance of probabilities that the plaintiff's arrest was lawful.
 - 3.2 The Honorable Court erred and/or misdirected itself in finding that Sergeant Masoga was the arresting officer.
 - 3.3 The honorable Court erred and/or misdirected itself in not finding that the station commander was in actual fact the arresting officer.
- [4] The Honorable Court erred and/or misdirected itself in not making a finding that the Defendant's case is premised on hearsay evidence, particularly if regard is had to the following;
- 4.1 Sergeant Masoga did not read the complainant's statement;
 - 4.2 Did not see the docket;
 - 4.3 Did not do his investigation and relied solely on Inspector Semanya's say so.
- [5] The Court erred and or misdirected itself in not coming to the conclusion that hearsay evidence can only be used against the Plaintiff if it meets the requirement of Section 3 of Law of Evidence Amendment Act 45 of 1988.
- [6] The Court erred and/or misdirected itself on finding that the police officer's conduct would be wrong if they arrested Maringa and Khazamula and let go of the plaintiff.
- [7] I accept that in his Heads of Argument, the applicant, who will hereafter be referred to as the plaintiff, has correctly set out the test to be applied in considering an application for leave to appeal. The applicant has however, averred without substantiating that there are also compelling reasons why the appeal should be heard.

THE LAW AND PRICIPLES REGARDING AN APPLICATION FOR LEAVE TO APPEAL

[8] It is tried Law that application for leave to appeal should be considered within the perimeter of what is set out in Section 17(1)(a) of the Superior Court Act 10 of 2013 which reads as follows:

“leave to appeal may only be considered where the Judge or Judges concerned are of the opinion that-

- (I) The appeal would have a reasonable prospects of success or
- (II) There is some other compelling reason why the appeal should be heard including conflicting judgements on the matter under consideration.

[9] **In Nwafor v The Minister of Home Affairs and Others [2021] ZASCA 58 (12 May 2021)** at para 21 the court stated that;

“Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success”. See also **Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021)**

[10] **In Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021)** at paragraph 18 it was stated that:

“Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss17(1)(a)(i) and 17(1)(a) (ii) must

satisfy in order for leave to appeal to be granted. The applicable principles have over time crystallized and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted 'where the judge or judges concerned are of the opinion that the appeal would have reasonable prospect of success.

It is manifest from the text of s17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have reasonable prospect of success or alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discreet requirements is met, there would be no basis to grant leave to appeal".

[11] In **Khathide v S [2022] ZASCA 17 (14 February 2022)** it was held that in considering an application for leave to appeal, a court must be alive to the provisions of section 17 (1) of the Act.

[12] In **Smith v S 2012 (1) SACR 567 (SCA)** the court stated the test to grant leave to appeal as follows:

"What the test of reasonable success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonable 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 categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal".

[13] In order to grant the leave to appeal which is sought under section 17(1) (a) (i) of the Act, being where it is not a case where there is some other compelling reason why an appeal should be heard as contemplated in section 17(1)(a)(ii);

[13.1] I must be of the opinion that the appeal would have reasonable prospect of success;

[13.2] I must find that there is a sound, rational basis for such a finding of reasonable prospects of success of a court on appeal interfering with my judgment;

[13.3] I must find that my judgment reflects material misdirection.

THE FACTS AND MERITS OF THE APPLICATION

[14] The issue in this matter is whether the applicant was lawfully arrested and if so, was the arresting officer Sergeant Masoga or Inspector Semenya. Both Masoga and Semenya are employees of the Respondent, the Minister of Police.

[15] On 26 April 2020 the Plaintiff and the complainant, Maringa and one Khazamula confronted each other on a section of a road in Mehlareng. The confrontation resulted in a physical fight between the parties. They thereafter all went to Mametlhake Police Station to lay charges against each other. One docket was opened by Inspector Semenya against the Plaintiff on the basis of the complaint by Maringa against the Plaintiff. Another docket was opened by Sergeant Masoga against Maringa on the strength of the complaint by the Plaintiff against him (Maringa).

[16] Masoga testified that the parties, that is, the Plaintiff, Maringa and one Khazamula, who was with Maringa when the incident leading to the charges occurred, were at the instructions of the Station commander, Captain Selwane, taken to a boardroom to discuss and to try and resolve the issues between them. The parties were accusing each other in his, Masoga's presence. In other words, Maringa accused the Plaintiff of damaging their motor vehicle, and the Plaintiff in turn accused Maringa and Khazamula of

damaging his motor vehicle. The parties failed to resolve the issues between them.

- [17] As inspector Semenya was knocking off duty, he requested Sergeant Masoga to the arrest of the Plaintiff as per the docket that he opened against the Plaintiff. Sergeant Masoga complied and duly arrested the Plaintiff. He also arrested Maringa and Khazamula. All were charged and appeared in court where they were all granted bail.
- [18] The Plaintiff is suing the Minister of Police resulting from this arrest and subsequent detention.
- [19] The fact of the matter is that there were charges opened against the plaintiff by Mr Maringa of, amongst others, malicious injury to property. This charges were opened before the Plaintiff opened similar charges against Meress Maringa and Khazamula.
- [20] The Plaintiff's argument is inter alia that this court relied on hearsay evidence to justify the arrest of the Plaintiff. This argument is misplaced as there was no evidence before the court that Inspector Semenya narrated to Sergeant Masoga what the contents of the docket opened by Maringa against the Plaintiff is. The evidence before the court was that Inspector Semenya requested/instructed Masoga to arrest the Plaintiff for the complaint laid against him by Maringa. In any event the issue of hearsay evidence never arose during the hearing of the matter nor was it ever argued by either party. And in any event the parties continued to accuse each other in Masoga's presence. Masoga therefore knew what the allegations against the Plaintiff were when he arrested him.
- [21] It should be noted that the action instituted by the Plaintiff is against the Minister of Police and not against Sergeant Masoga, Captain Selwane or Inspector Semenya in their personal capacities.

- [22] It is common cause that Maringa laid the charges of malicious injury to property against the Plaintiff and on the basis of those charges the Plaintiff was arrested and detained. It is therefore difficult to understand as to on what basis it is said that the arrest was unlawful and that Masoga was not the arresting officer. The Station Commander only gave a directive that if the parties do not resolve their issues they then all were to be arrested and charged for the charges laid by them against each other. The facts of the cases mentioned in the Plaintiff's Heads of Argument are distinguishable from the facts of the matter in casu.
- [23] Masoga was present as the parties were accusing each other of the malicious injury to each other's vehicles. What was then there for him to investigate. He was the arresting officer and not the investigating officer. It would be absurd and a waste of time and resources to expect each arresting officer to delve into an assessment and investigate complains laid at the police by parties especially those that are physically accusing each other at the police station.
- [24] I fail to understand as to in what manner this court misdirected itself. I fail to understand as to what more Masoga as a peace officer in terms of section 40 (1)(b) of Act 51 of 1977 should have done to justify the arrest of the Plaintiff who was accused in his face that he committed a schedule 1 offence. The Plaintiff's accusers were with him at the police station at the same time. He was told in his face what the allegations against him were. At the time of his arrest he knew what the allegations against him were, he knew his accusers. He appeared in court on the same charges that were laid against him. The matter was placed on the court roll. He was admitted to bail and for a reason unknown the charges against him were withdrawn. It is not clear to this court whether the charges were withdrawn because of lack of evidence or for further investigations or some other reasons.
- [25] As was stated in **Van Zyl, Jacobus Petrus v Steyn Marianne Desiree [2022] ZAGPPHC 302**,

“The easy decision is to grant leave to appeal. It is a comfort someone else may fix an error made in adjudicating a matter. We all err. Taking the decision comes at a cost when it is a wrong decision. Granting leave to appeal in an unmeritorious matter, chokes the roll and thus prevents access to justice, and comes at a cost to the respondent (both financial and in delaying the completion of the matter).”

CONCLUSION

[26] I am, under the circumstances, of the view that the Applicant has failed to persuade me that he has a reasonable prospect that the appeal would succeed and/or that there are compelling reasons why the appeal should be heard.

In the result I make the following order;

(a) The application for leave to appeal is dismissed

(b) The applicant is ordered to pay the respondent's party and party
+costs

DATED AT PRETORIA ON THIS THE 13TH DAY OF NOVEMBER 2023

J J MLOTHSWA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

DATE OF HEARING : 25 AUGUST 2023
DATE OF JUDGEMENT : 13 NOVEMBER 2023

Appearances

FOR APPLICANT: ADV. DM KEKANA
WITH : ADV. KC MOKGOPE
FOR THE RESPONDENT: ADV. M MUSETHA