



IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Case No: 2889/2016

In the matter between:

MINISTER OF POLICE

Applicant

and

THANDEKILE SABISA

First Respondent

LAWRENCE NZIMENI MAMBILA

Second

Respondent

JUDGMENT (Application for leave to appeal)

NHLANGULELA DJP

[1] The applicant applies for leave to appeal pursuant to the judgment that the police had unlawfully arrested, detained and assaulted the respondents in violation of the provisions of ss 44 and 50 (1) (a) of the CPA and their

constitutional rights in terms of ss 10 and 12 (1) of the Constitution which are: not to be deprived of their freedom arbitrarily or without just cause, to be free from all forms of violence and not to be tortured.

[2] There is no appeal against the *quantum* of damages that was fixed in the sum of R510 000 for payment to each of the respondents. However, it was submitted on behalf of the applicant that since the payment of such damages depends on the appeal court's decision on the liability issue, the judgment on *quantum* will not stand. These submissions are reasonable in my view. I did not hear counsel for the respondent to be suggesting otherwise.

[3] There is also no appeal against the factual findings made by the trial court. The appeal is predicated on legal grounds. Therefore, the crisp issue for decision is whether, or not, the trial court misapplied the provisions of ss 44 and 51 (1) (a) of the CPA. Counsel for the respondent submitted that the judgment of the trial court based on the application of these subsections cannot be faulted. Put differently, since the outcome of these proceedings is limited to a decision in terms of s 17 (1) of the Superior Courts Act 10 of 2013 (prospect of success and /or compelling reason), this court must only confine its decision on the application of ss 44 and 51(1) (a) of the CPA.

[4] On the consideration of the approach that I adopted, the provisions of s 44 envisage the use of a warrant of arrest that would have been authorised on a prescribed form. In this case, I found that in completing the form the magistrate did not indicate the place where the respondents had to be taken to upon arrest. In light of that omission, I held the view that the police were obliged to arrest and take the respondents directly to the police station, and as soon as possible as is envisaged in s 50 (1) (a) of the CPA. I rejected the submission that the section permits deviating to the Butterworth office where interrogations, assault, and torture were done. It also concerned me a great deal that the police might not have obtained a valid warrant of arrest from the magistrate, which is the issue that, although not debated, is relevant to the inquiry of lawfulness or otherwise of the arrest and detention. On this score, I have formed the opinion that the Court of Appeal will provide guidance on the issue of lawfulness of arrest and detention. The issue of whether the police should have exercised discretion to effect the arrest, or not to do so, is also germane to the arrest inquiry. But counsel for the applicant submitted that the discretion issue does not arise by reason that the execution of the warrants of arrest was all that the police were entitled to do.

[5] I would not have granted leave on the grounds that the applicant was saddled with *onus* erroneously; and that the pleadings of the respondents were bad in law. I need not repeat here the reasons for which I dismissed counsel's

submissions in that regard. Since the appeal is not based on factual findings, the ground that assault was not proved by the evidence cannot be sustainable.

[6] That said, I incline towards granting leave to appeal to the Supreme Court of Appeal for the reasons that I have stated. The costs should be in the cause of the appeal.

1. The application for leave to appeal to the Supreme Court of Appeal is granted. 2. The costs of this application shall be in the cause of the appeal.

ZM NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT.

Appearing for the appellant: Advocate Notshe SC

With: Advocate Magadla

Instructed by: The State Attorney
Mthatha.

Appearing for the respondents: Advocate Mullins SC

With: Advocates Kroon and Makiwane

Instructed by: Notyesi Attorneys

Mthatha.

Heard on: 06 July 2023

Date of delivery: 11 July 2023