

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

Case number: 2548/2016

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

WARREN POPE

1st Applicant

MARLENE POPE

2nd Applicant

and

JOHANNES FRANCIOS HATTINGH

1st Respondent

ROZELLE SALLY HATTINGH

2nd Respondent

CORAM:

MHLAMBI J,

HEARD ON: Matter disposed of without oral hearing in terms of section 19(a) of the Superior Court Act 10 of 2013.

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down is deemed to have been on 05 May 2022 at 09h00.

MHLAMBI, J

[1] This is an application for leave to appeal against my judgment and order granted on 31 August 2021 in terms of which it was declared that both defendants were liable to the plaintiffs for the damages suffered by the plaintiffs as a result of the wrongful conduct of Mr Pharaoh Mhone (Mhone) in the early hours of 20 April 2014. Both first and second defendants were ordered to pay the plaintiffs' costs jointly and severally, the one paying, the other to be absolved.

[2] Leave to appeal is sought on the following three main grounds:

2.1 The court erred in finding that the defendants' evidence that Mhone was solely in the employ of the second defendant was false and in finding that Mhone was indeed in the employ of both the defendants. The court did not, in making such findings, give due regard:

2.1.1 to the objective evidence, particularly the evidence of Dlamini, which supported the evidence of the defendants;

2.1.2 to the contents of paragraph 2 of the first defendant's affidavit deposed to on 21 April 2014, a day after the incident occurred, in which he stated that the guesthouse was conducted by the second defendant who employed Mhone as caretaker of the guesthouse;

2.1.3 to the evidence and explanation by the defendants regarding the allegations contained in the affidavits submitted to the South African Police shortly after the event, and the explanation given in respect of their initial plea on the advice of their attorney, one Mr Rossouw.

2.2 The court erred in finding that there were serious contradictions in the evidence of both the defendants and that they wanted to evade liability by denying that Mhone was in both their employment;

2.3 The court erred in finding that the defendants were vicariously liable for Mhone's wrongful acts.

[3] The crux of the applicants' argument is that there was a reasonable prospect of success that another court would find that Mhone was in the employment of the second defendant and that a sufficiently close link did not exist between the wrongful acts of Mhone and the first defendant, or between the defendants and the business of the guesthouse. It was submitted that neither the second nor both the defendants were vicariously liable for the wrongful acts committed by Mhone. The plaintiffs had therefore failed to prove the merits of their case and their claim should have been dismissed with costs.

[4] This application is predicated upon section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 which provides 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. This section has not only raised the bar for such applications but fettered the judge's discretion when considering such applications.¹ Considerations that the applicant may have an arguable case or that there is a possibility of success on appeal are irrelevant.² In *Notshokovu v S*,³ it was held that an appellant faces a higher and more stringent threshold in terms of the current Act compared to the provisions of the repealed Supreme Court Act 59 of 1959.

[5] The first and second grounds of the application for leave to appeal will be considered together as they impact the credibility and factual findings made. The defendants' case is based on the second defendant being the proprietor

¹ School Governing Body Grey College, Bloemfontein v Scheepers and Others (South African Teachers Union Intervening) (2612/2018) [2019] ZAFSHC 25 (17 January 2019); *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others LCC 14R/2014*.

² S v Smith 2012 (1) SACR 567 (SCA).

³ (157/15) [2016] ZASCA 112 (7 September 2016) para 2.

of the guest house and Mhone being her employee as a general labourer from 2011 until 2014⁴. The defendants denied the contents of paragraphs 22, 25, 28 and 29 of the judgment.

- [6] The defendants contended that the evidence and explanation contained in the defendants' respective affidavits submitted to the South African Police shortly after the incident, as well as the explanation given in respect of the advice received from Rossouw in respect of the initial plea, should be conceded and evaluated against the aforesaid objective facts and that, based on such facts, another court would find that the defendants' version is not false.⁵
- [7] Both the first and second defendants do not deny, and their evidence is clear, that Mhone was a caretaker of the guest house and the farm⁶ and that he was left to manage the guest house and the farm on that weekend as the first defendant had given leave of absence to the rest of his workers for that period.
- [8] The defendants contended that their evidence was supported by Dlamini's evidence which was objective. It is indeed so that Dlamini's evidence confirmed that Mhone was left all by himself over the weekend in question and that he, Mhone, occasionally worked with goats but not the horses and the cattle. The second defendant testified that Mhone's duties were, amongst others, to feed the animals and the horses. She testified that the horses belonged to the defendants' trust. The first defendant never paid a salary to Mhone. She knew this because she worked with the salaries of the farm, Bagshot, as it was previously known. On a consideration of this testimony, it was therefore strange that she testified that the first defendant paid the amount of R 15 000.00 (fifteen thousand rands) which she transmitted onwards to Mhone.

⁴ Para 9: The defendants' heads of argument.

⁵ Para 13.9: Defendants' heads of argument.

⁶ Exhibit "B", on page 66.

- [9] The contents of paragraph 2 of the first defendant's affidavit deposed to on 21 April 2014 confirm that Mhone was a caretaker of the guest house. The allegation that due regard was not given to the defendants' evidence and explanations to the South African Police and the pleadings is incorrect. This aspect is covered in paragraphs 20, 21 and 22 of the judgment. It is clear from the judgment that a credibility finding was made as the defendants' testimony was fraught with inconsistencies and contradictions.⁷
- [10] As regards the third ground of application for leave to appeal, it is evident that the defendants entrusted both the farm and the guest house to Mhone with the responsibility to care for the Pope family.⁸ It is common cause that Mhone was left all alone with his family on the farm when all the other workers were granted leave of absence that weekend. He was to care for the Pope family that had booked the guest house for the weekend. He conveyed their requests to the defendants whenever the need arose. He also watched over the animals on the farm during that weekend.
- [11] In their replying heads of argument, the applicants contended that it was undisputed that Mhone, in addition to his responsibilities in respect of the guest house, had to attend to the horses and the ducks during that weekend. However, it was submitted, such facts and the fact that he and his wife and child were the only people on the farm during the weekend, did not prove that he was in the employment of the first defendant.
- [12] Relying on *Midway 2 Engineering and Construction Services v Transnet Bpk*,⁹ the applicants contended that the so-called control test is not the only consideration but that in addition to such test, all relevant factors which can play a role to determine whether the person to be held vicariously liable, was involved, or connected to the act of the business that leads to the wrongful act, should be considered.

⁷ Paragraph 26 of the judgment.

⁸ Paragraph 28 of the judgment.

⁹ 1988 (3) SA 17 (A) at P 23 H.

- [13] It was submitted further that the question of whether the first defendant, being the owner of the farm, is also vicariously liable for the wrongful acts of Mhone, must be evaluated and determined in the context of the pleaded case which was premised on the booking reservation for the utilisation of the guest house facilities on the farm for the particular weekend.¹⁰
- [14] The grounds contained in 2.1 and 2.2 are aimed at the credibility findings of the court whereas those in 2.3 are a consequence of the findings in 2.1 and 2.2.
- [15] The applicants submitted that their insurance claim was rejected on 21 September 2016 because they did not give timeous notice as provided for in the insurance policy. The claim was repudiated by the insurer before the initial plea was filed and that did not mean that the explanations given by the defendants were untrue or unreliable. Consequently, a reasonable prospect existed that the court's factual findings regarding the employment of Mhone by both the defendants would be disturbed on appeal.
- [16] In the initial plea, the defendants pleaded that Mr Mhone was employed by the first defendant as a general farm worker and labourer. This plea was filed and served on 7 October 2016 whereas the insurance claim was repudiated in September 2016 as confirmed by the first defendant in his joinder application. Despite disputing that Mhone was in his employ, the first defendant stated in his affidavit on 3 March 2017 that both defendants conducted farming activities on Tweevlei as well as a guest house and that Mhone was in his employment at the time of the incident.¹¹ Both defendants in oral testimony failed to explain the inconsistencies and contradictions in their evidence.
- [17] The court's powers to interfere on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.¹² (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f). Bearing in mind

¹⁰ Paragraph 7 and 8 of the head of argument in reply.

¹¹ See Paragraph 19 of the judgment.

¹² *S v Hadebe and Others* 1997(2) SACR 641 (SCA) at 645e-f;

the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony.¹³ In *S vs. Pistorius*¹⁴ the following was stated:

“[30] It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong.”

[18] I am of the opinion that the applicants did not make out a proper case in their papers for the relief sought and leave to appeal should be refused.

[19] Consequently, I make the following order:

ORDER:

The application for leave to appeal is dismissed with costs.

MHLAMBI, J

On behalf of the Plaintiff:

Instructed by:

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On behalf of the respondent:

Instructed by:

Adv. CD Pienaar

Phatshoane Henny INC.

¹³ *S v Monyane 2008(1) SACR 543 SCA; S v Francis 1991 (1) SACR 198 (A) at 204e*.

¹⁴ 2014 (2) SACR 315 (SCA)

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