

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO.: 342/2017

In the matter between:

KOKELA SIVUYISE YANGA SIGONYA

Applicant

And

MINISTER OF POLICE

Respondent

JUDGMENT

JOLWANA J

[1] On 22 May 2019 I dismissed plaintiff's claim for damages claimed in respect of an alleged unlawful arrest and detention. The applicant now applies for leave to appeal against the whole of my judgment.

[2] In the main there are two grounds for the application for leave to appeal. The first one is that I erred in accepting the evidence of the defendant's witness, sergeant Baca because in her evidence, so the submission goes, she had contradicted her own statement which she had made shortly after the arrest. I do not intend to deal with any of the alleged contradictions in her evidence. I am of the view that doing so would serve no purpose as I would be regurgitating the reasons for my judgment. I must point out

that despite the alleged contradictions, perceived or real, there was a rational basis for the arrest and detention.

[3] As I understand the legal position a witness is not expected to give evidence that is beyond reproach. In *S v Sauls* 1981(3) SA 172 (AD) at 180 E-F Diemot JA made the following salutary remarks with which I respectfully agree:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are short comings or defects or contradictions in the testimony he is satisfied that the truth has been told.”

[4] The second ground of the application for leave to appeal is that the defendant’s plea was a bare denial and as such defendant’s evidence should have been rejected as it was not pleaded. The relevant portion of the defendant’s plea is couched as follows:

“

2

Ad paragraphs 3, 4 and 5:

Save admitting the arrest and detention for possession and/or dealing in dagga, the remainder of the contents of these paragraphs is denied as if specifically traversed the plaintiff is put to proof thereof”.

[5] This ground of appeal is amplified in the applicant’s heads of argument in which it is submitted that section 40(1)(h) of the Criminal Procedure Act 51 of 1977 should have been specifically pleaded. Besides the fact that no authority is referred to by the applicant in his heads of argument for the submission that the law which, in this case, is section 40(1)(h) of the Criminal Procedure Act should have been pleaded, I have two other fundamental difficulties. The first one is that I understand Rule 22 to be requiring facts, not law, to be pleaded. While the inelegance of the drafting of the plea is evident,

it cannot be denied that the facts on which the plaintiff was arrested as would enable the plaintiff to know what the defendant's defence is, are pleaded. Those facts are that the plaintiff was arrested for possession and/or dealing in dagga. The second difficulty is that Rule 22(5) of the Uniform Rules of Court provides that:

“If the defendant fails to comply with any of the provisions of subrules (2) and (3), such plea shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.”

[6] It is so that the plaintiff did not take any action envisaged in Rule 30 of the Uniform Rules of Court during pleading stage. His counsel also never raised any issue even during the opening address about the difficulty the plaintiff had with the defendant's plea.

[7] Despite the inelegance of the plea as it is currently formulated, on the facts of this case, I do not think that it should have led to the defendant not being allowed to give the evidence that the defendant did. I cannot see how the plaintiff was or could have been prejudiced during trial. In fact no objection was raised on behalf of the plaintiff when sergeant Baca testified during trial. She testified and was cross-examined in the normal way.

[8] The test for an application for leave to appeal is trite and was recently restated in by the full court in *Nceba Tyhulu v The State* (1173) [2019] ZASCA 51 (1 April 2019) as follows:

“[5] The issue to be determined at this stage is whether the appeal should have been granted by the High Court and not the appeal itself. As a result, the test to be applied is whether there is a reasonable prospect of success in the envisaged appeal rather than whether the appeal ought to succeed. 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.”

[9] During argument I was referred to the case of *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 CC para 83 in which the Constitutional Court said:

“It is by now settled law that the operative standard for determining whether leave to appeal should be granted is “the interests of justice”. That the order is temporary is not in itself determinative of whether the interests of justice call for leave to appeal to be granted. A number of cases in this Court have enumerated a collection of non-exclusive factors that need to be considered when determining the interests of justice.”

[10] In *City of Tshwane Metropolitan Municipality v Afriforum* the Constitutional Court was not changing and did not change the legal position of determining whether leave to appeal in general should be granted from what we know as aptly articulated in *MEC for Health Eastern Cape v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016) in which Scheepers AJA summarized the threshold for the granting of a leave to appeal. The learned Acting Judge of Appeal said in *Mkhitha*:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[11] The above test and standard remains the legal position on an application for leave to appeal. In order to determine what is in the interests of justice in each case the same

standard and criteria as articulated in *MEC for Health v Mkhitha* is applied. To the extent that it was submitted on behalf of the applicant, that there is a new standard based on *City of Tshwane v Afriforum*, I do not think so. The interests of justice will always and has always been paramount, in general. What the Constitutional Court did was to clarify that it can no longer be the determining factor whether the order is temporary or final. The interests of justice will be and are the operative standard even if the order appealed against is temporary.

[12] On the facts of this matter I am not convinced that the applicant has realistic prospects of success on appeal. Therefore the application for leave to appeal must fail.

[13] In the result the following order will issue:

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

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: S.M. LUZIPO

Instructed by: M.K. MAJAVU & ASSOCIATES

MTHATHA

Counsel for Respondent: J.J. BEMBE

Instructed by: STATE ATTORNEY

MTHATHA

HEARD ON: 10 JULY 2019

DELIVERED ON: 11 JULY 2019