



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

4/5/17
DATE

[Signature]
SIGNATURE

CASE NO: 45224/2014

29/3/2017

In the matter between:

KATLEGO SANAH RAMATLO

Plaintiff

and

MPHELA & ASSOCIATES

First Defendant

TSHEPO MATLALA

Second Defendant

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

Baqwa J

[1] This is an application in terms of section 17 (1) of the Superior Courts Act No. 10 of 2013 which states that:

"17 (1) Leave to appeal may only be given when the judge or judges concerned are of the opinion that (a)(i) the appeal would have a reasonable prospect of success;"

[2] I have been presented with heads of argument by both counsel herein who have also made oral submissions in line with those heads.

[3] I have considered the findings of fact and law in my judgment together with counsels' submissions. In his heads of argument counsel for the applicant makes reference to the case of **Crown Chicken (Pty) Ltd ta/ Rocklands Poultry v Rieck** 2007 (2) SA 118 SCA at paras 13 and 14, in which Nugent stated *inter alia* as follows:

"(13) Thus, whatever the correct jurisprudential approach, a person who causes bodily injury by a positive act will avoid liability for the harm that he caused, on either approach, only if the reasonable person in the position in which he found himself would have acted in the same way. Considerations that are to be brought into account in determining whether the conduct was reasonable are described by Van der Walt and Midgley as follows:

"A person may inflict harm in situation of necessity only if the danger existed or was imminent. The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case. The nature of the threat, the extent of the harm, the likelihood of serious injury to persons, and the value of the interest threatened must, for example, be taken into consideration. It must have been the only reasonable possible means of averting the danger. Similarly, although any interest may be protected, the interest infringed or harm inflicted should not be greater than the interests protected or the harm prevented."

(14) Essentially, what is called for is weighing against one another of the gravity of the risk that it was created by the defendant, and the utility of this conduct. As it is expressed by Boberg: the proportionality in the sense of preponderance of avoided over inflicted harm, is a traditional postulate of necessity. In short, the greater the harm that was threatened, and the fewer options available to prevent it, the greater the risk of reasonable person would be justified in taking and vice versa."

- [4] As can be seen from the facts are summarized in my judgment the means used by the police were stun grenades and rubber bullets some of which struck and injured the respondent herein. There is no evidence that the respondent herself presented any imminent danger to the police or the property in the vicinity.
- [5] Counsel for the respondent, making reference to the same judgment argues and I agree that the means used by the police in the circumstances were excessive in that there was no evidence of any water cannons or tear gas presented and that the means used were therefore not the only reasonable means of averting the danger.
- [6] Counsel for the applicants in supporting the submission that the police acted out of necessity refers to paragraph 3.2.1.2 of the first and second defendants' amended plea which reads as follows:

"The protesting students threw stones at the University premises damaging the University's property which prompted the members of the SAPS to fire rubber bullets in order to disperse the violent students and protect the University's property from further malicious damage by the protesting students."

In my judgment, I have not referred to any other means other than the stun grenades and rubber bullets because there was indeed no evidence of any other means used by the police.

- [7] I have also considered that the defendants did not even testify in the trial. Counsel for the applicants has submitted that it was not necessary for them to do so which I consider to be strange in light of the fact that there is no link between the failure to prosecute the plaintiffs claim, which they admit was negligent, and the evidence given by the police. They could have been expected to testify that they consulted with the police and having considered whatever evidence they would have obtained from the police, they formed the view that the probabilities of the plaintiff succeeding in an action against the police did not exist. There was simply no such evidence leaving a lacuna in the defendant's evidence. If the plaintiff had been timeously advised of their adverse opinion regarding her claim, she could have consulted other attorneys who would have prosecuted her claim. There was no evidence to excuse the defendants' negligence in their failure to prosecute the claim.
- [8] In my view, the Court cannot step in and fill in the lacuna by providing the basis for the attorneys' conclusion or inaction. Put differently, the chain of evidence on the defendants' part was incomplete.
- [9] In the circumstances, having listened to counsel and having considered the matter and for the reasons stated in my judgment, I am not persuaded that the appeal would have any reasonable prospects of success.
- [10] In the result, the application for leave to appeal is dismissed with costs.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of Hearing:
Date of Judgment:

29 March 2017
29 March 2017

For the Plaintiff:
Instructed by:

Advocate M. Demeyer
Sekati Monyane Attorneys Incorporated

For the Defendants:
Instructed by:

Advocate V. D. Motsweni
Gildenhuys Malatji Incorporated