

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 52325/2012

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

2024

26/06

In the matters between: -

FIDELITY SECURITY SERVICES

APPLICANT

And

SIBUSISO MOTAUNG

RESPONDENT

RE:

SIBUSISO MOTAUNG

APPLICANT

And

FIDELITY SECURITY SERVICES

RESPONDENT

JUDGMENT

BAQWA J.

Introduction

[1] This is an application for leave to appeal against an order of this court granted on 2 February 2024.

[2] The applicant's plea specifically denies that the plaintiff's injury was caused by a "rubber bullet" as set out in the particulars of claim.

[3] In order to prove the aforesaid the applicant submits that the respondent should have presented evidence from an expert to support the averment in the particulars of claim. Since no expert was called, this forms the essence of the grounds of appeal. The applicant avers that the respondent did not succeed to establish a link between the shots that were heard and the injuries sustained by the respondent. This application therefore erroneously places emphasis on the nature of the projectile that injured the respondent and not the shooting of the respondent by the applicant's employees.

The Law

[4] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 (the Act) provides that leave to appeal may be granted where the judge concerned is of the opinion that:

4.1 The appeal would have a reasonable prospect of success (Sec 17(1) (a) (i))

4.2 There is some other compelling reason why the appeal should be heard (Sec 17 (1) (a) (ii)).

The test

[5] In the matter of *MEC for Health, Eastern Cape v Mkhitha and Others*¹ the Supreme Court of Appeal expressed the test for granting leave to appeal as follows:

“[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 a 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.”

[6] In *Lee v Minister for Correctional Services*² Nkabinde J said:

“The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a

¹ [2016] ZASCA 176.

² 2013 (2) SA 144 (CC) Nkabinde J.

juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.”

[7] Both legs of the enquiry suggested in the above quotation are answered positively when reference to paragraphs [14] to [20] of the judgment sought to be appeal against. Put differently, the negligent act of the security guards caused the harm resulting in the liability of the applicant.

[8] Plaintiff's evidence is that he heard a gunshot, and then fell to the ground when he realised that he was injured.

[9] His witness, Wanda, testified that whilst he did not see who specifically shot the respondent, he saw the applicant's security officers shooting towards the place where the plaintiff was standing. There was no other shooting heard or observed. The only inescapable inference is that it was the applicant's security officers who not only did the shooting but also caused plaintiff's injury. It would defy logic to conclude otherwise.

[10] The test applied in establishing liability was on a balance of probabilities. The conclusion reached was based on the available facts and relevant probabilities.

[11] Put differently, what the respondent did not see was clarified in the testimony of Wanda. Moreover, as stated in paragraph [27] of my judgment, this action was brought on the basis of vicarious liability, and the common cause fact that the security officers who caused the respondent's injury were the applicant's employees.

Costs

[12] The respondent seeks costs on the scale as between attorney and client including costs of senior counsel.

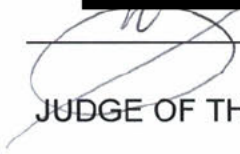
[13] I am not persuaded that costs on a punitive scale are justified.

Conclusion

[14] In the premises and in light of the above I hold the firm view that an appeal would not have a reasonable prospect of success and that there is no other compelling reason why an appeal should be heard.

[15] In the result, I make the following order.

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



SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of judgment: 26 June 2024

Appearance

On behalf of the Applicants

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