

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 19020/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
7.10.2024	
DATE	SIGNATURE

In the matter between:

SIMPHIWE ISAAC JWILI

APPLICANT

And

MINISTER POLICE

FIRST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

SECOND RESPONDENT

JUDGMENT: LEAVE TO APPEAL

KEKANA AJ

INTRODUCTION

[1] This is an application for leave to appeal judgment delivered by this court on the 29th January 2024. This court delivered judgment in which it dismissed the applicant's claim(s) for unlawful arrest and detention, malicious and / or negligent prosecution against the first and second respondent. The application is opposed.

CONDONATION

[2] The respondents brought an application for condonation for the late filing of the answering affidavit which was granted. The applicant also brought an application for the late filing of the leave to appeal which was initially opposed but the respondents withdrew their opposition. After considering the application, I granted the condonation.

GROUND OF APPEAL

[3] The applicant raised numerous grounds of appeal which I do not intend to list. The gist of the applicant's contention is that having found that the arrest of the applicant was unlawful and that the prosecutors had no probable cause, I ought to have found in favour of the applicant.

THE CLAIM BASED ON THE UNLAWFUL DETENTION AGAINST THE FIRST RESPONDENT

[4] According to the applicant I erred on the facts and on the law when I failed to find that the only claim that has prescribed was the claim for unlawful arrest. The applicant contends that having found that the arrest was unlawful I ought to have found that the detention was unlawful.

[5] The applicant was arrested on the 1st April 2014 and taken to court on the 4th April 2014 beyond the expiry of the requisite 48 hours. The summons was issued on the 17th July 2017 after the initial detention prescribed in April 2017.

THE CLAIM BASED ON THE UNLAWFUL FURTHER DETENTION AGAINST THE FIRST RESPONDENT

[6] The applicant contends that I erred in finding that the first respondent was not liable for the further detention of the applicant especially seeing that I have found the arrest and initial detention unlawful. Reliance is based on numerous grounds which will not be dealt with in detail. The applicant reasons that the police investigation never improved after his arrest and that the police failed to advise the prosecutors of the charge(s) to be leveled against the applicant. Further, my finding that the evidence showed that the police did no more than their obligation was wrong.

THE CLAIM BASED ON THE UNLAWFUL FURTHER DETENTION AGAINST THE FIRST RESPONDENT

[7] The applicant contends that I erred in finding that the 'missteps of the police persons engaged in this prosecution were too remote to attract liability for the unlawful detention of the plaintiff'.

THE CLAIM BASED ON THE UNLAWFUL FURTHER DETENTION AGAINST THE SECOND RESPONDENT

[8] The applicant further contends that I erred by failing to consider that the failure to secure the necessary evidence for a lawful arrest was causally connected to the failure to secure the necessary evidence for every subsequent decision made by the police and the prosecution which made the second respondent liable for the entire period of detention of the applicant.

[5] The applicant was arrested on the 1st April 2014 and taken to court on the 4th April 2014 beyond the expiry of the requisite 48 hours. The summons was issued on the 17th July 2017 after the initial detention prescribed in April 2017.

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THE LAW

[9] The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the Superior Court Act 10 of 2013 (the act). The act provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospects of success, or there is some other compelling reason why the appeal should be heard.

[10] It then follows that leave to appeal must not be granted unless there are prospects of success or there is some compelling reason why the appeal should be heard. A mere possibility of success is insufficient, there must be a reason to conclude that there is a reasonable prospect of success on appeal. See also MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 (25 November 2016)

ANALYSIS

[11] The respondent also presented their arguments in opposition to the applicant's application. In this judgment I intend to deal with the two grounds which in my view have a possibility of success. However, a mere possibility of success is not enough, I need to determine whether there is reason to conclude that there are reasonable prospects of success.

[12] Firstly, I deal with the contention that the second respondent ought to have been held liable for further detention and / or malicious prosecution. The applicant contends amongst others that failure to call Ms Erasmus, one of the prosecutors in the Applicant's criminal trial, ought to have attracted a negative inference. The applicant further contends that this ought to have been considered together with the insufficient evidence the prosecution had at their disposal.

[13] Having found that the prosecutors acted without reasonable cause when they decided to prosecute the applicant for armed robbery and attempted murder, the applicant contends that I ought to have found that the prosecutors were liable for further detention and / or malicious prosecution. Taking cognisance of the fact that a person should not be prosecuted in the absence of evidence upon which he might be convicted, I am of the view that the applicant has reasonable prospects of success on appeal.

[14] There is a reasonable prospect that a court of appeal may find that the respondents are liable for further detention. This is so considering my finding that the prosecution had unsatisfactory

evidence against the applicant. There is a reasonable prospect that the court of appeal may conclude that the prosecution should have been stopped or should not have been initiated.

[15] Secondly, I will deal with the applicant's contention that I ought to have found that the first respondent is liable for the applicant's further detention. In this regard the Constitutional Court's finding in *JE Mahlangu and another v Minister of Police* [2021] ZACC 10 where the court reiterated the right not to be arbitrarily deprived of one's freedom and found the police to be liable for further detention is significant. Although I have concluded that the first respondent is not liable, I am persuaded that there are reasonable prospects that the appeal court may decide differently.

CONCLUSION

[16] After careful consideration of the Applicant's grounds for leave to appeal and the submissions from both parties, I am persuaded that this appeal would have a reasonable prospect of success based on the abovementioned reasons. I will therefore grant the order in favour of the applicant for leave to appeal the entire judgment.

COSTS

[17] The applicant prayed the costs of this application. The practice is that costs of the leave to appeal is costs in the appeal, unless the applicant does not proceed with the appeal in which case the applicant will pay the costs of the application.

ORDER

I therefore make the following order:

1. Condonation for the late filing of the answering affidavit is granted.
2. Condonation for the late filing of the application for leave to appeal is granted.

3. Leave to appeal to the Full Court of this division against the judgment of the 29th January 2024 is granted.

4. The cost of the application for leave to appeal is to be costs in the appeal, unless the applicant does not proceed with the appeal, in which case the cost of the application for leave to appeal is to be paid by the applicant.


P D KEKANA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant

G E Kerr-Phillips
Instructed by Wits Law Clinic

For the respondents

NG Mhlanga
Instructed by State Attorney -
Johannesburg

DATE HEARD: 23 September 2024

DATE DELIVERED: 07 October 2024