



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

**Reportable / Not
reportable**

Case no: 1058/2021

In the matter between

THATO MOLETSANE

APPLICANT

and

MINISTER OF POLICE

FIRST RESPONDENT

DIRECTOR OF NATIONAL PROSECUTIONS

SECOND RESPONDENT

Neutral citation: Thato Moletsane v Minister of Police and Another

Coram: Chesiwe J

Heard: Heard on the papers as per the directive to file heads of argument on 12 July 2024 and 19 July 2024 respectively.

Delivered: This judgment was handed down in open court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 19 September 2024.

Summary: Application for leave to appeal – unlawful arrest, detention and prosecution - test to be applied – full court of the Free State Division of the High Court.

ORDER

1. The Applicant is granted leave to appeal to the Full Court of this Division against the whole judgment granted on 30 May 2024.
2. Costs shall be costs in the appeal.

JUDGMENT

Chesiwe J

[1] The applicant seeks to leave appeal to the Full Court of this division, alternatively, the Supreme Court of Appeal against the whole of the judgment and orders granted on the 30 May 2024. The application is opposed by the first and second respondents.

[2] The main ground for the application is premised in that the court erred in not finding that the applicant's arrest and detention was unlawful, and the subsequent prosecution was malicious. Furthermore, that the trial proceedings record was not made available to the applicant by the respondent's attorneys, nor to the court after the trial was concluded. However, such records were eventually made available.

[3] In terms of the provisions of s 17(1) of the Superior Court's Act 10 of 2013 leave to appeal may only be granted if the judge concerned is of the opinion that:

- a. The appeal would have reasonable prospects of success or if there are some compelling reasons why leave should be granted;
- b. The decision sought on appeal does not fall within the ambit of s 16(2)(a) of the Act;
- c. Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] This court in the unreported case of *Matoto v Free State Gambling and Liquor Authority and Others*¹ said the following:

'There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word "would" indicate a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'²

[5] In *MEC for Health, Eastern Cape v Mkhitha and Another*³ the court held 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 Court 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[6] In the main application, this court was called upon to adjudicate upon the unlawful arrest and detention of the applicant as well as the malicious prosecution. The applicant in the application for leave to appeal stated some of the erroneous findings which the court made.

[7] Indeed, in an application for leave to appeal, the court is called to consider its own judgment and considering all the facts of the applicable case, whether another court will come to a different conclusion. The invidious position the court find itself in is to consider granting or not to grant leave to appeal one of its own judgments.⁴

[8] The issues raised in these grounds, entail a revisit to the seriously contended issues in which the applicant contends that another court may deal with them differently. In an application for leave to appeal, the applicant is not precluded to revisit the issues provided that the court is satisfied that there is a reasonable prospect that the factual matrix would receive a different interpretation by another court. I am therefore of the

¹ *Matoto v Free State Gambling and Liquor Authority and Others* [2017] ZAFSHC 80.

² *Ibid* para 5.

³ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176.

⁴ *R v Balloi* 1949 (1) SA 523 (A) at 524-525.

considered view that the applicant would have reasonable prospects of success on appeal.

Order

[9] I accordingly make the following order:

1. The Applicant is granted leave to appeal to the Full Court of this Division against the whole judgment granted on 30 May 2024.
2. Costs shall be costs in the appeal.



S. CHESIWE, J

Appearances

For the Applicant:

Instructed by:

Adv. C Zietsman

Jacobs Fourie Inc.

Bloemfontein

For the First and Second Respondents:

Instructed by:

Adv. N Phakama

State Attorney

Bloemfontein