

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: 2388/2017

Reportable	YES/NO
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In the matter between:

KINASE PHILASANDE

Applicant

and

MINISTER OF POLICE

First Respondent

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Respondent

JUDGMENT- APPLICATION FOR LEAVE TO APPEAL

Cengani-Mbakaza AJ

Introduction

[1] This is an application for leave to appeal to the Full Court against specific parts of my judgment and order dated 07 November 2023 (a judgment *a quo*). The order reads:

‘[78] In the result, the following order is made:

1. The plaintiff’s claim for unlawful arrest and detention against the 1st defendant from the period 12 to 15 November 2015 succeeds.

2. The 1st defendant is liable to compensate the plaintiff a sum of R175 000 (One hundred and seventy five thousand rand) for damages arising out of unlawful arrest and detention from the period 12 to 15 November 2015.

3. The defendant shall pay interest at the legal rate on the said amount from 14 days from the date of judgment to the date of payment.

4. The plaintiff's claim against the 1st and the 2nd defendants arising out of a detention from the period 16 November 2015 to 20 February 2016 is dismissed

5. The defendant is ordered to pay costs of this action.'

[2] For clarity and consistency, the parties will be referred to, as they were in the judgment *a quo*. A brief summary of facts leading to the application for leave to appeal is necessary. On 12 November 2015, the plaintiff was arrested and detained by the members of the South African Police Service on a charge of murder, classified under Schedule 1 and 6 offences in terms of the Criminal Procedure Act 51 of 1977 (CPA). He was brought to court as soon as it was reasonably possibly to do so. Subsequently, the Magistrate ordered his further detention from 16 November 2015 to 26 February 2016. On 26 February 2016, he was granted bail. Ultimately, the public prosecutor acting through the powers granted by the National Prosecuting Authority Act 32 of 1998, decided to withdraw the charges against him.

[3] It is common cause that a teacher at the Efata School for the Blind was tragically murdered. The plaintiff was implicated in the commission of the offence by the warning statements of his co-suspects namely Khimbili and Danti who were deaf and mute. Although an interpreter was utilised to obtain the warning statements, the accuracy of the information obtained was not verified through the interpreter. Notably, the arresting officer was not the same police officer who obtained the warning statements. Basically, the arrest of the plaintiff was predicated on a chain of hearsay evidence rendering the information unreliable.

[4] In the judgment *a quo*, I acknowledged that the standard of reasonableness that must be applied by police officers when arresting a suspect is very low. However, I found that this particular case stands as one where the arresting officer should have taken steps to verify the quality of the information before making the arrest. Essentially, they should have exercised their discretion objectively. Following extensive deliberation and careful consideration, I found that the first defendant was liable for the damages resulting in the plaintiff's arrest and detention from 12 to 15 November 2015.

[5] The present application for leave to appeal focuses solely on the detention period 16 November 2015 to 26 February 2016. The plaintiff still holds the second defendant (the NDPP) jointly liable with the first defendant for the unlawful detention implying that both defendants were equally legally responsible for the damages incurred.

The application for condonation

[6] On 02 April 2024, the plaintiff filed an application for condonation of the later launching of the application for leave to appeal. This was necessary because the application for leave to appeal issued on 5 March 2024, fell outside the 15-day period specified by the Uniform Rules of Court considering that the judgment was delivered on 7 November 2023. The application is opposed by the defendants.

[7] The plaintiff's case revolves around his claim of being unaware of the judgment due to his temporary relocation to the Western Cape Province, resulting in lost contact with his legal representatives and misplacement of his cellular phone. Essentially, the plaintiff asserts that these unforeseen circumstances led to his delayed knowledge of the judgment. He avers that upon learning of the judgment, he promptly instructed his legal representative to appeal. The plaintiff submits that these factors provide a reasonable explanation for the delay, accounting for the entire period.

[8] Mr Mhlawuli, the plaintiff's legal representative, argues that he has demonstrated reasonable prospects of success on appeal due to the controversial

issue at hand, which has been debated in various courts. Furthermore, two judgments from the same division based on identical facts, have reached conflicting conclusions on the same issue. He further argues that this judgment contradicts a Constitutional Court judgment on the same aspect.

[9] The requirements for the application for condonation are well settled.¹ In their set of the answering affidavits, the defendants have not refuted the plaintiff's claims regarding his lack of awareness of the judgment. This implies that the defendants are questioning the validity or credibility of the plaintiff's story, rather than addressing the core issue of whether the plaintiff was informed about the judgment in a timely manner. Having carefully considered the circumstances and the parties' submissions, I find that the explanation given by the plaintiff is reasonable to excuse the default. This decision is further motivated by the need to ensure that substantial justice is served.

The application for leave to appeal

[10] An application for leave to appeal is regulated by Section 17 of the Superior Court's Act² (the Superior Court's Act) which provides as follows:

'17. Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have reasonable prospects of success; or

¹ In *Uitenhage Traditional Local Council v South African Revenue Services* [2003] ZASCA 76, The court held, 'One would have hoped that many admonitions concerning what is required of an applicant in a condonation application would be the knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full detailed and accurate account of the causes of the delay and their effects must be furnished as to enable the Court to understand clearly the reasons and assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of obstacle on which reliance is placed must be spelled out'.

² Act 10 of 2013.

(ii) there is some compelling reason why the appeal should be heard, including conflicting judgments on the same matter under consideration.....’

[11] In opposing the application for leave to appeal, the defendants cited various authoritative precedents that elucidate the applicable test for granting leave to appeal. Following the Superior Court’s Act, the possibility of another court having a different view no longer forms part of the test. The precedent that authorisation for appeal should be based on the possibility of another court reaching a different conclusion is no longer tenable. There must be a sound, rational basis for the conclusion that there are reasonable prospects of success. *In Four Wheel Drive v Rattan N.O*³, the following was held by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA) concurring,

‘[34] There is a further principle that the court *a quo* seems to have overlooked- leave to appeal should be granted only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal’. In the light of its findings that the Plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding that there was a compelling reason to hear the appeal. In the result the parties were put through the inconvenience and expense of an appeal without a merit.’

[12] In the instant matter, the plaintiff filed a six- page document expressing the grounds of appeal. Rather than addressing each ground individually, I deem it sufficient to note that all the issues raised in the notice of appeal were thoroughly examined and adjudicated upon in the judgment *a quo*.⁴

[13] Moreover, the *conditio sine qua non* test and legal causation, as correctly articulated in the judgment *a quo*⁵, underpinned the dismissal of the plaintiff’s claim

³ 2019(3) SA 451 SCA.

⁴ The evaluation of the evidence on the issues at hand is found in the *judgment a quo* from pages 23-27.

⁵ At page 24 para 63, the court referenced to *De Klerk v Minister of Police* 2020 (1) SACR 1 CC and concluded that there was no evidence to establish a causal link between the actions of the defendants’ members and the consequences at issue.

regarding his detention subsequent to the court appearance. It is well established that there is no universally applicable criterion for legal causation, as its determination depends on the specific circumstances of each case.⁶

[14] It is acknowledged that the plaintiff was arrested with Mr Simphiwe Mabokela, who later instituted separate legal proceedings against the Minister of Police under case number 3587/2020. Although Mr Mhlawuli asserts that the *Mabokela* case is on all fours with the instant matter, a critical analysis discloses distinct differences rendering the two cases dissimilar. It is essential to recognise that courts exercise autonomy in evaluating the credibility of witnesses and assessing the probabilities and improbabilities of a case, guided by their independent judgment and discretion. Consequently, due to the distinguishing factors, identical outcomes cannot be anticipated. Therefore, the contention that the judgments are conflicting within the same division on the same issues, and that the law has been applied inconsistently, lacks substance.

[15] As previously noted, there is no cookie-cutter criterion for legal causation.⁷ In his heads of argument, Mr Mhlawuli acknowledges that the plaintiff's continuous detention was ordered by the court pursuant to the relevant legislation, which mandates detention until the plaintiff demonstrates exceptional circumstances which in the interest of justice permits his release. I agree with his concession in this regard.

[16] Conversely, he contends that there was no evidence presented as to why the Magistrate was never informed of the shortcomings in the state's case. With respect, Mr Mhlawuli has overlooked certain pivotal aspects of this case. During her testimony, the Public Prosecutor clarified that the plaintiff was implicated on a schedule 6 offence. She indisputably explained that a prima-facie case was established, meeting the lower threshold of likelihood rather than proof beyond reasonable doubt. As a result, further investigation was justified and a possibility of converting one of the suspects into a section 204 witness⁸ was warranted. Notably,

⁶ See *S v Mokgethi* 1990(1) SA 32 A

⁷ See Mokgethi's matter at footnote 4 above.

⁸ Section 204 of the CPA allows a witness who may be implicated in a crime to testify against other accused persons in exchange for indemnity from prosecution.

Mr Mhlawuli overlooks the plaintiff's significant concessions during vigorous cross-examination by Ms Nhantsi, counsel for the second defendant. These concessions reveal that: the postponement allowed the plaintiff and his co-accused to obtain legal aid attorney, a sign language interpreter was necessary (as he also exhibited himself as a mute person) and further the Magistrate's availability was a factor in the postponement.

[17] Consequently, through cross-examination the plaintiff effectively conceded that his post-appearance detention could not be attributed to the second defendant. The fact that the Department of Justice bears the responsibility for securing the services of a sign language interpreter remains uncontested. Given the plaintiff's self-description as a mute person, the availability of a sign language interpreter was indispensable for the bail hearing to proceed, as it was the only means to facilitate his effective communication and participation.

[18] Upon proper consideration of the facts presented, the remand orders by the Magistrate constituted a *novus actus intervenes*. Therefore, it is evident that there is no causal link between the plaintiff's initial arrest and detention by the first defendant and his subsequent detention following the court appearance. Furthermore, considering the plaintiff's concessions, as well as the lack of causal link, the second defendant cannot be held liable for the harm resulting from the plaintiff's continued detention following the court appearance. Upon careful consideration of the facts and the submissions from all the parties, I conclude that there are no reasonable prospects of success on appeal. Accordingly, the application for leave to appeal must fail.

Order

[19] The following order shall issue:

- 1. The application for leave to appeal is dismissed.**
- 2. The plaintiff shall pay costs in accordance with Scale 'A' as contemplated in terms of Rule 67A read with Rule 69 of the Uniform Rules of Court.**

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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Date Heard : 06 and 21 June 2024

Date Delivered : 01 October 2024