



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2012 - 33658

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

5/3/2025

DATE

SIGNATURE

In the matter between -

ADV DEXTER LEE – JAY REYNEVELDT *NOMINE OFFICIO* on behalf of THABISO KHETHABAHLE

Applicant

And

First Respondent

MINISTER OF SAFETY AND SECURITY, *NOMINE OFFICIO*

EKURHULENI METROPOLITAN MUNICIPALITY

Second Respondent

In re the matter between -

ADV DEXTER LEE – JAY REYNEVELDT *NOMINE OFFICIO* on behalf of THABISO KHETHABAHLE

Plaintiff

And

First Defendant

MINISTER OF SAFETY AND SECURITY, *NOMINE OFFICIO*

EKURHULENI METROPOLITAN MUNICIPALITY

Second Defendant

JUDGMENT

MOORCROFT AJ:

Summary

*Application for leave to appeal – section 17(1)(a)(i) and (ii) of the Superior Courts Act -
reasonable prospect of success or some other compelling reason why the appeal should
be heard*

Application dismissed

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The plaintiff is ordered to pay the costs of the second defendant, including the
cost of counsel, on scale C.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal to the Full Court against a decision¹ handed down by me on 25 April 2025. In this judgement I refer to the parties as they were referred to at trial.

[4] The application is opposed by the second defendant. The first defendant abides the decision of the Court and did not present argument.

The principles

[5] Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that

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5.1 the appeal would have a reasonable prospect of success or

5.2 there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[6] Compelling reasons for an appeal to be heard cannot be divorced from the merits on the appeal.²

[7] The requirement that leave must be obtained serves the purpose of a gatekeeper

¹ *Khethabahle v Minister of Safety and Security and another* 2024 JDR 1717 (GJ), also reported as *Reyneveldt obo Khethabahle v Minister of Safety and Security and Another* [2024] ZAGPJHC 411, [2024] JOL 64282 (GJ)

² *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) paras 23 and 24. See also *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2.

and ensures that valuable resources are not wasted.³

[8] Once such an opinion is formed leave may not be refused. Importantly, a judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[9] An appeal lies against the decision⁴ of the court and not against the reason for the decision.⁵

[10] There is a wealth of authority⁶ on the subject. In *Ramakatsa and others v African National Congress and another*⁷ Dlodlo JA summarised the law as follows:

“[10] .. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

³ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 SCA para 24.

⁴ Section 16 (1) (a) of the Superior Courts Act 10 of 2013.

⁵ *Medox v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) para 10 and *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] All SA 149 (SCA) para 17.

⁶ See *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC), *S v Smith* 2012 (1) SACR 567 (SCA) para 7, *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC); [2014] ZALCC 20 para 6, *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2, *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16, *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489; JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5, *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29, *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5, *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA); 2021 JDR 0948 (SCA) paras 25 and 26, *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para 4, *Mphahlele v Scheepers NO* 2023 JDR 2899 (GP), and Van Loggerenberg Erasmus: Superior Court Practice A2-55.

⁷ *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31.

The grounds of appeal

First ground: The Judge concluded that further factual witnesses would have exposed facts detrimental to the plaintiff

[11] No such finding was made. I dealt with the plaintiff's failure to call relevant factual witnesses in paragraphs 67 to 71 of the judgement. I concluded that an adverse inference is justified because the plaintiff failed to call witnesses who were available to testify to the facts on a disputed issue, namely where, when and how the plaintiff sustained injuries.

Second ground: the Court did not take cognizance of the fact that it was common cause that injuries sustained by the plaintiff were caused by ammunition used by the defendants

[12] It was never common cause between the parties that injuries to the plaintiff were caused by ammunition used by the defendants. To the contrary the inference was specifically challenged when Mr Pieterse, the plaintiff's forensic expert, testified.

[13] I dealt with his evidence in paragraphs 38 to 48 of the judgement. The witness made it clear that his conclusion that the injuries were probably caused by a shot gun round was based not on his own knowledge but on documentation read by him as part of his brief. The documentation was properly before the court but the truth of the contents was not common cause and the plaintiff elected not to lead any medical evidence dealing with the nature of the plaintiff's injuries.

Third ground: the court erred by considering the contents of a sworn statement by the mother of the plaintiff when the mother was not called as a witness

[14] The affidavit by the mother of the plaintiff formed part of the discovered documents and correctly so. It was agreed at a pre-trial conference that the documents were what they purported to be but without admitting the truth of the contents. The affidavit formed the basis of cross examination by the second defendant's counsel. The second defendant

relied on this affidavit not to prove the contents of the affidavit but to demonstrate that there was a further witness available with a conflicting version of the facts: According to the affidavit the plaintiff was found in a shack and not on the ground outside the house as testified by the plaintiff's sister, Ms Khethabahle.

Fourth ground: The Court implied that the Plaintiff was among the protesters at the main road even though no witness placed the plaintiff at the main road where protest action took place

[15] No such finding was made. In paragraph 76 of the judgement I referred to photographs depicting the plaintiff's witness in the company of the plaintiff and the plaintiff's brother on a street where rocks and other obstacles had been placed, which was not consistent with the evidence that the protest action took place a kilometre away from where the plaintiff was, but the witnesses for the plaintiff were not cross-examined on this aspect and I therefore did not make any inferences to find that the plaintiff was injured where the protest action took place on the main road.

[16] It was not possible to reconcile these obstacles with the street where the plaintiff lived when on the evidence obstacles were placed on the main road where the protest action took place. The presence of these obstacles therefore remain a mystery and an unanswered question.

Fifth ground: The Court wrongly concluded that the plaintiff's injuries could have been caused by something other than a gunshot when it was the evidence of Mr Pieterse that the plaintiff had indeed been shot

[17] Mr Pieterse disavowed any medical knowledge and testified that his inference that a gunshot wound was to blame for the plaintiff's injuries was based on medical documents read by him and not on his own expertise. I dealt with the nature of the documents in paragraphs 20 and 21 of the judgement. It was agreed between the parties that affidavit evidence not be submitted nor was any such application made by the plaintiff

at any point during the trial.

[18] On the evidence placed before me I was unable to find that the plaintiff was injured by a rubber cartridge fired by a police officer,⁸ and the question whether a police officer was acting negligently or intentionally in injuring the plaintiff therefore did not arise. The question whether the police officers were negligent or acted with intent to injure the plaintiff would have arisen, had I been able to find that it was a shot fired by police officers that injured the plaintiff. I therefore do not deal at length with this question of an academic nature but I do point out that, on the evidence before me by the second defendant that dealt in some detail with the conduct of the police officers on the day in question, there was nothing to merit the inference that the officers were conducting themselves in a negligent or reckless manner, or that they set out to intentionally hurt any member of the public.⁹

Sixth ground: Mr Mojatladi was not cross examined on obstacles on the road

[19] Mr Mojatladi was indeed not cross examined on the obstacles on the road and I could not infer from the presence of these obstacles where exactly the plaintiff was injured. The presence of these obstacles on the photographs therefore also do not merit the inference that he was indeed shot, and that the shooting occurred at the main road where the protest action took place.

[20] I therefore stopped short of making any finding as to the locality where the plaintiff might have suffered an injury.

[21] It is indeed so that Chief Superintendent Bheki Nhlapho with reference to one of the photographs where the plaintiff is visible being carried by his brother and Mr Mojatladi identified the scene shown as one at the main road where the protest action took place, but I did not attach weight to this evidence as it was in my view not specific enough to

⁸ See also paragraph 66 of the judgement.

⁹ I refer also to paragraph 61 of the judgement.

stand as satisfactory evidence that the plaintiff was at the scene of the protest action.

Seventh ground: the defendants lead no evidence to show that the plaintiff was not shot in the yard of the house where he lived

[22] This is not correct. The evidence of the police officers,¹⁰ which evidence I accept, was that police officers operated as a group and were active only where the protest action took place on the main road. For obvious reasons police officers dealing with protest action where there is violence and the potential of violence should never become isolated from their colleagues. There is strength in numbers for the police officers.

[23] On the day of the protest action the police officers did not operate in the area where the plaintiff's house was situated.

Eighth ground: The Court should have ordered absolution from the instance instead of dismissing the claim

[24] The practical effect of a dismissal and an order of absolution would be the same under circumstances where any possible claim would have prescribed already. The plaintiff's claim arose in 2009 and the curator was appointed in or before 2014.

[25] I found at trial that the evidence justified the dismissal of the action

Conclusion

[26] I am of the view that the plaintiff has not established grounds meriting the

¹⁰ I dealt with their evidence in paragraphs 53 to 62 of the judgement.

conclusion that the appeal would have a reasonable prospect of success, nor are there any compelling reasons why the appeal should be heard.

[27] I am also of the view that the second defendant is entitled to its costs, including the cost of counsel on scale C as the matter is one of sufficient complexity both factually and with reference to the law involved to justify costs on the higher scale, namely scale C.

[28] For all the reasons as set out above I make the order in paragraph 1.


J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **5 MARCH 2025**

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DATE OF JUDGMENT:	5 MARCH 2025