



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

Reportable/Not Reportable

Case no: 1436/2022

In the matter between:

FAKO PHILLIP CHETANE

Applicant

and

THE MINISTER OF POLICE

1st Respondent

THE NATIONAL DIRECTOR: PUBLIC PROSECUTIONS

2nd Respondent

Coram: Opperman J

Heard: 1 November 2024

Delivered: 28 March 2025. This judgment was handed down in court and electronically by circulation to the parties' representatives by email and release to SAFLII on 28 March 2025. The date and time for hand-down is deemed to be 15H00 on 28 March 2025.

Summary: Application for leave to appeal – claims unlawful arrest, detention and prosecution – domestic violence.

ORDER

1. Leave to appeal is granted to the Supreme Court of Appeal on the whole of the judgment and order.
 2. Costs to be in the appeal.
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JUDGMENT

Opperman J

[1] This is an application for leave to appeal. The judgment of an application for leave to appeal 'is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate court.'¹

[2] Meritless appeals may not be allowed. The test in an application for leave to appeal is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success. The Supreme Court of Appeal (SCA) has in the past criticized the regularity with which leave to appeal is granted in matters not deserving its attention. Marais AJ stated that: '... The inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not.'²

[3] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may

¹ *S v Shinga (Society of Advocates (Pietermaritzburg)) as Amicus Curiae*, *S v O'Connell and Others* (CCT56/06, CCT80/06) [2007] ZACC 3; 2007 (5) BCLR 474 (CC); 2007 (2) SACR 28 (CC); 2007 (4) SA 611 (CC) (8 March 2007) para 53.

² *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* (231/2002) [2003] ZASCA 57; [2003] 3 All SA 123 (SCA); 2003 (5) SA 354 (SCA) (30 May 2003) para 6.

never become an obstacle to justice in the post-constitutional era. Section 17 of the Superior Courts Act 10 of 2013 is the law.³

[4] The prevailing law was clarified in *H.B (Nee D.J) v R.J.B (Leave to Appeal)*⁴ in that a court may not grant leave to appeal where the threshold which warrants such leave has not been cleared by the applicant. It simply is that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] With regard to the meaning of reasonable prospects of success, it was held in *S v Smith*⁵ as follows:

‘... More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[6] The dilemma in this case is that the facts that were found by the court to exist demanded that the plaintiff be arrested. There prevailed a serious situation of domestic violence. These are the facts ruled *a quo*:

‘FACTS COMMON CAUSE, UNDISPUTED AND PROVEN

[10] The Plaintiff was first arrested on 1 April 2021 and released the same day. He was not detained at all (he was never placed in a police cell or detention facility); it was just the formality of arrest that happened and the process was then immediately followed by a release on warning on a so-called SAPS 496 form.

[11] The plaintiff was warned on 1 April 2021 to stay away from the complainant, that she does not want to have any contact with him and not to interfere with the investigation of the

³ ‘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 a reasonable prospect of success; or

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

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(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 *H.B (Nee D.J) v R.J.B (Leave to Appeal)* (21480/2014) [2024] ZAGPPHC 401 (2 April 2024).

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

case. The law pertaining to domestic violence in South Africa was explained to him. He is a Lesotho citizen.

[12] It is undisputed and proven beyond any doubt that the complainant feared for her life and that of her family as result of the threats and conduct of the plaintiff alleged.

[13] The plaintiff admitted unequivocally that he got arrested the second time because; as he put it, he went to the brother of the complainant to explain to him that the complainant is not sleeping at home anymore. The brother of the complainant and the plaintiff had a conversation, and it was decided between them that the plaintiff must go to the manager of Shoprite where the complainant was employed: "Because the brother informed me to request the manager to bring us together."

[14] The above shows a disrespect for the right of the complainant to decide her fate and her privacy. Two men took a decision as if she does not have any recognition under the Constitution of the Republic of South Africa, 1996 as a human being in her own right.

[15] The plaintiff also disregarded the verbal warning of Sergeant Mkhwanazi not to interfere with the investigations and stay away from the complainant. It will be shown later that he admitted this in court and apologized for this.

[16] The plaintiff was again arrested on 3 April 2021 and detained until 6 April 2021, when the plaintiff first appeared in court. He was arrested because the manager of the shop where the complainant was employed reported to the police: "a male that was fighting a lady". It was proven beyond doubt that the manager reported to Captain Mokoena that the plaintiff was "chasing" the complainant in the shop and she had to be locked into a room for her safety.

[17] The plaintiff was brought before a court within 48 hours, considering the public holidays at the time. This was on 6 April 2021. He was not released nor was an application for bail entertained.

[18] The plaintiff was at all times from the first appearance on 6 April 2021 represented by a legal representative appointed by Legal Aid: South Africa. He did not initiate a bail application on 6 April 2021 as was his right to do.

[19] As indicated; the plaintiff is a Lesotho citizen and also went by the name of Thobi Phillip Mokoena. This complicated his release.

[20] The matter was remanded to 9 April 2021 to verify the passport of the plaintiff and then to 12 April 2021 for the address referred to hereunder to be confirmed. The facts show that the postponement of the hearing of the application for the release of the plaintiff at this stage was under section 50(6) of the CPA. The presiding officer, on reading of the transcribed record, also wanted more information in terms of sections 60(2) and (3) of the CPA in order to apply his mind to the release of the plaintiff.

[21] The plaintiff was residing with the complainant at the place that she rented. She was so fearful of him that she was willing to move out of the place and reside where he could not find her. She made it clear to the police that the plaintiff may not know her whereabouts and where she took up residence after the 1st of April 2021.

[22] During the court proceedings and according to the transcribed records of said proceedings a so-called "alternative address" whereto the plaintiff could be traced should he be released was, lawfully so, demanded. The plaintiff was not certain of the address and the investigating officer had to search for the place (the home of the sister of the plaintiff) and confirm the address for purposes of the bail application. The investigating officer brought the sister to court on 13 April 2021 and he was immediately released on bail when she confirmed the address.

[23] It is crucial to take cognizance of the transcribed record of the proceedings as a whole wherein the magistrate among others remarked that:

Court: Okay are there any other reasons why you did not want to grant him bail? Is he a threat to the witness?

Mr. Mkhwanazi: Actually, we issued to him a form 6 (sic) before and seemingly he went back to the complainant, before the appearance.

Court: So, you will be kind to him?

Mr. Mkhwanazi: So, the other people who, who, the complainant complained to, I mean to the other police officers and then we cancelled the SAPS 4 and 6 (sic) and helping him in ... (indistinct)

Court: Okay, so he is, he is to blame for that one. No, it is fine, let me, I will just, if we can confirm the address then and the sister then we can take it from, but you must understand Mr Fako, Mr Phillip that this type of offence is very serious. If the investigating officers want me to keep you there, I will keep you in custody. You understand?

Accused: Yes

Court: Because they have said to me, he has been kind to you by issuing out 496, which means you were out. And then the complainant complains which means there is a real threat

that you do not want to listen or to adhere to what, does she have a protection order against him?

Accused: Ja, I am very, very sorry My Lord. I am very sorry.

Court: You must not be sorry for me, you must do the right thing at home, you understand. You get out and we give you bail. you killed that lady then. then we have made a mistake here.

You understand? (Accentuation added)

Accused: Yes

Court: Because gender-based violence is very serious here.

Accused: Okay

Court: You are a bit reluctant that we because I, what there actually is no need for me to get Sergeant Mkhwanazi here to because I could have made a decision in my own...

(intervenes)

Accused: Okay

Court: And keep you in custody. But I want to give you a second chance to see if you are going to resolve that because you guys make the work difficult for the police in this way. Because we have to be careful about what we are doing from the bench, and from the investigating officers.

Further:

Court: Sorry man, you must not do that. You are putting us under pressure here because the courts are bound to look serious into gender - based violence cases. Understood? I am not even supposed to entertain this, I am just supposed to postpone it until the investigation officers is here. But I am trying to be lenient to you.

CASE POSTPONED UNTIL 13 APRIL 2021.

[24] On 13 April 2021 the plaintiff was released on R300-00 bail. The matter was remanded to 14 May 2021. On 14 May 2021 the matter was remanded to 31 May 2021 for further investigation.

[25] On 31 May 2021 the matter was struck off the roll by the court because the docket was not at court.

[26] The plaintiff was again summoned for court but the matter was mediated between the parties and the charges withdrawn on that basis. The docket depicts that the decision to withdraw the case was due to successful mediation in January 2023; not due to a lack of evidence or evidence to support prosecution.

[27] The plaintiff was subpoenaed to appear on 3 November 2022 in Phuthaditjhaba Court A on a charge of "assault by threat". This is correct given the allegations and no malice or fault can be ruled to have occurred.

[28] To conclude for completeness; the Plaintiff was detained for a period of 10 (ten) days and prosecuted for approximately 2 (two) months. The detention and the prosecution were explained by the facts above. This brings the law to the fore. I will first depict the claims and the defence for perspective.'

[7] The applicant here claims that another court would come to a different conclusion. The court handed down a judgment and order, dismissing the applicant's claims, with costs. The appeal lies against the whole of the judgment and the order. The respondent opposes the application.

[8] Although I align with the point of view in the heads of argument for the respondent⁶ another court would, reasonably so, come to another finding on the issues of the legislation applied, the case pleaded and failure to cross examine as proposed by the applicant. These aspects are intertwined with others and I am compelled to grant leave to appeal against the whole of the judgment and the order. The subject of domestic violence is of public interest and the matter is therefor referred to the Supreme Court of Appeal.

Order

[9] In the result, the following order is made:

1. Leave to appeal is granted to the Supreme Court of Appeal on the whole of the judgment and order.
2. Costs to be in the appeal.

 **OPPERMAN J**

⁶ Dated 30 October 2024.

Appearances:

For applicant

C Zietsman

Pretoria

Loubser van Wyk Attorneys Inc.

Pretoria

c/o Jacobs Fourie Attorneys Inc.

Bloemfontein

For respondents:

GJM WRIGHT

Bloemfontein

Office of the State Attorney:

Free State

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