THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 220/2021

In the matter between:

SIMON SONGO **APPELLANT**

and

MINISTER OF POLICE **FIRST RESPONDENT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**
MINISTER OF JUSTICE & CORRECTIONAL SERVICES **THIRD RESPONDENT**

Neutral citation: *Songo v Minister of Police and Others* (Case No. 220/2021) [2022] ZASCA 43 (5 April 2022)

Coram: SALDULKER, MOLEMELA, DLODLO JJA and MAKAULA and MOLEFE JJA

Heard: 15 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 April 2022.

Summary: Whether the court a quo was correct in holding that the fourth and fifth special pleas of no cause of action had to be adjudicated separately – was it correct to uphold the sixth special plea of misjoinder – whether the court a quo failed to discharge its primary function of determining the disputes that were properly before it – whether this court could determine the issues that the court a quo declined to determine as the court of first instance or remit the matter to the court a quo.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Sardiwalla J sitting as court of first instance):

1 The appeal is upheld with costs.

2 Paragraphs 3 and 4 of the order of the court a quo are set aside and replaced with the following:

'The Sixth special plea is dismissed with costs.'

3 The matter is remitted to the high court for the determination of the fourth and fifth special pleas.

JUDGMENT

Dlodlo JA: (Saldulker and Molemela JJA, Makaula and Molefe AJJA concurring):

[1] On 19 November 2009, the appellant, Mr Simon Songo was convicted on two counts of murder by the North-West Division of the High Court (the high court) and sentenced to eighteen (18) years' imprisonment. On 15 October 2015, he successfully appealed against his conviction to the Full Bench of the high court, and he was immediately released.

[2] The appellant instituted an action against the respondents, the Minister of Police, the National Director of Public Prosecutions and the Minister of Justice and Correctional Services in the Gauteng Division of the High Court, Pretoria for damages. The respondents resisting the claim, raised six (6) special pleas, namely : (i) the first and second special pleas referred to the failure to comply with ss (18)(1) and 18(10) of the Uniform Rules of Courts in that the combined summons were fatally defective; (ii) the third

special plea referred to the non-compliance with the provisions of s 3(1) and 3(2)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, which were peremptory and no condonation was obtained thereto; (iii) the fourth and fifth special pleas raised the issue of no cause of action against the first and second respondents; (iv) the sixth special plea raised the issue of misjoinder of the third respondent.

[3] However, the first and the second special pleas were abandoned. The gist of the fourth and fifth special pleas was that the appellant's imprisonment was based upon the conviction and sentence during criminal proceedings and as a result his imprisonment was not unlawful. It is contended that the appellant failed to set out and aver any grounds by which a causal nexus could be established between any of the facts pleaded, a cogent cause of action or the alleged damages suffered. As to the sixth special plea, the respondent averred that the particulars of claim were fatally flawed because of the lack of averments which are necessary to sustain the action, alternatively, because no cause of action against the Minister of Justice and Correctional Services was disclosed. Again, the appellant is said to have failed to set out and aver any grounds upon which a causal nexus can be established between the facts pleaded, a cogent cause of action or the alleged damages suffered.

[4] The matter came before Sardiwalla J in the Gauteng Division of the High Court, Pretoria (the court a quo), where the remaining special pleas were argued. Sardiwalla J delivered a judgment on the third special plea, the alleged non-compliance with the provisions of Act 40 of 2002, and after discussion of the facts and the law, he concluded that the appellant's claim had not prescribed. However, he failed to deal with the remaining special pleas, the absence of a cause of action against the respondents, including the alleged misjoinder of the third respondent.

[5] It is common cause that both parties' attorneys complained to the court about its failure to deal with the remaining issues that were argued. The parties then submitted further written submissions to Sardiwalla J, after being requested to do so, and thereafter, on 6 November 2020, the court a quo handed down judgment, and again did not

determine the issues in respect of the fourth and fifth special pleas. Sardiwalla J made the following order:

'(1) The applicant's alleged failure to serve the notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002, within the period laid down in s 3(2)(a) of the Act is hereby condoned.

(2) The third special plea of non-compliance is dismissed;

(3) The fourth and fifth special plea of no cause of action must be adjudicated separately;

(4) The sixth special plea of misjoinder is upheld; and

(5) The respondents are ordered to pay applicant's costs of the application on an opposed basis.

[6] It appears from the aforegoing order of Sardiwalla J that he proceeded to uphold the sixth special plea of misjoinder. It is strange, though, that he did not decide the fourth and fifth special pleas (of no cause of action) and ordered that the fourth and fifth special pleas must be adjudicated separately. It is not known which court was to decide the latter two pleas separately. It is apparent that the determination of the fourth and the fifth special pleas was effectively postponed by the high court. In paragraph 7 of its judgment, the high court stated the following concerning the fourth and fifth special pleas:

'This Court is of the opinion that there may be a need to present further evidence on this aspect as this raises an important constitutional issue which may require the law to be developed. This Court finds that there is insufficient evidence before it to determine that particular issue in light of the severe lack of jurisprudence on the subject matter. It is my view that a preliminary ruling on that issue could result in a gross irregularity being committed. Therefore, this judgment will not deal with that aspect but rather will deal with the remainder of the special pleas only.'

[7] Aggrieved by the decision of the court a quo, the appellant applied for leave to appeal against paragraphs 3 and 4 of court a quo's order. The court a quo gave leave to appeal to this Court. This appeal is with leave of the court a quo.

[8] It is apparent from the order of Sardiwalla J, that despite being provided with additional heads of argument by both the parties, he did not determine the fourth and fifth special pleas. In the circumstances, the appellant applied for leave to appeal in respect

of undetermined proceedings, which were in effect postponed to be 'adjudicated separately'. The court a quo furthermore erred in granting leave to appeal to the Supreme Court of Appeal, in respect of undetermined, and therefore, pending proceedings. This Court is not a court of first instance and cannot deal with a matter clearly pending before the high court. It is trite that the essential function of a court of appeal is to determine whether the court a quo came to the correct conclusion[1]. Where the high court has made no decision at all and has in fact postponed the determination of an issue before itself, what essential function is this Court called upon to perform? A definitive decision of the matter by the high court ordinarily clothes this Court with jurisdiction to deal with the matter so decided. Even Mr Krüger, counsel for the appellant, on being referred to the relevant order made by the court a quo, conceded that it effectively postponed the determination of the fourth and fifth special pleas. Importantly, the court gave no judgment on the fourth and fifth special pleas.

[9] Different important rationale distinguishing non-appealable rulings and appealable orders were canvassed by this Court in *Zweni v Minister of Law and Order.*[2] What is of importance is that one must look not merely at the form of the judicial pronouncement but also at its effect.[3] In *Zweni,* Harmse JA mentioned three attributes that an appealable judgment must have:

'[F]irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'[4]

[10] It is the primary function of a court to bring finality to the dispute with which such court is seized. The court does this by making an order which is clear, exact in compliance, and is capable of being enforced in the event of non-compliance.[5] In *Solidarity and Another v Black First Land First and Others*[6], a reference was made to

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[1] See *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-273.
[2] *Zweni v Minister of Law and Order of the Republic of South Africa* ZASCA 197; 1993 (1) SA 523 (A).
[3] *South African Motor Industry Employers Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) 96 H.
[4] See fn 2 at 532I-533A.
[5] *Solidarity and Another v Black First Land First and Others* [2021] ZASCA 26 para 10.
[6] Ibid.

Makhanya v University of Zululand[7] where Nugent JA talks to the power of a court as follows:

'The power of a court to entertain a claim derives from the power that all organised states assume to themselves to bring to an end disputes amongst their inhabitants that are capable of being resolved by resort to law. Disputes of that kind are brought to an end either by upholding a claim that is brought before it by a claimant or by dismissing the claim. By so doing the order either permits or denies to the claimant the right to call into play the apparatus of the state to enforce the claim.'[8]

This, the high court in this matter omitted to do. It resorted to postponing the determination of the fourth and fifth special pleas. It wrongly granted leave to appeal to this Court instead of first exhausting that which was its duty to perform.

[11] The real issue in this matter is, seemingly, whether the appellant had a cause of action, and if not, whether the common law should be developed to accord him a cause of action to claim for damages for being convicted and incarcerated when he was innocent of the charges preferred against him. The nature of the claim instituted by the appellant is such that it is pre-mature to absolve the third respondent at this stage. It is, of course, not yet known as to how a trial court will decide the real issue set out above. It may be contrary to the dictates of justice to decide at special plea level that the third respondent was wrongly cited. However, it is necessary to deal also with the sixth special plea, despite this Court's reluctance to deal with one and the same matter on a piecemeal basis.

[12] The following order is made:

1 The appeal is upheld with costs.

2 Paragraphs 3 and 4 of the order of the court a quo are set aside and replaced with the following:

'The Sixth special plea is dismissed with costs.'

3 The matter is remitted to the high court for the determination of the fourth and fifth special pleas.

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[7] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA).
[8] Ibid para 22.

DV DLODLO

JUDGE OF APPEAL

APPEARANCES:

For the appellant:	TP Krüger SC
Instructed by:	Mike Potgieter Attorneys, Pretoria
	EG Cooper Majiedt Inc, Bloemfontein
For the respondents:	M Vimbi
Instructed by:	State Attorney, Bloemfontein