



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

REPORTABLE:

(1) OF INTEREST TO OTHER JUDGES:

(2) REVISED:

Date:

Signature:

Case No. 12697/2019 and 12698/2019

In the matter between:

NKOSINATHI MANDLAKAYISE HADEBE

First Plaintiff

MKHUMBULENI MKHIZE

Second Plaintiff

and

THE MINISTER OF POLICE

First Defendant

MEMBERS OF SOUTH AFRICAN POLICE SERVICES

Second Defendant

JUDGMENT

DU PLESSIS AJ:

1. The plaintiffs apply for leave to appeal against the judgment in terms whereof I dismissed their actions with costs. In the action they claimed damages for unlawful arrest and detention, as well as assault, contumelia, deprivation of freedom of movement and association and discomfort from the Minister of Police who is cited as the first defendant.

2. The application is, in summary, based on the following grounds:
 - 2.1. That the court erred when it accepted the evidence of Sergeant Phooko to the effect that the reason for him not making enquiries from the plaintiffs was that he expected them to deny the complainant's allegations;

 - 2.2. That the court erred in entertaining the evidence regarding the alleged assault on the plaintiffs, as the claim based thereon was withdrawn at the commencement of the trial;

 - 2.3. That the court erred in excluding relevant, material and admissible evidence of Warrant Officer Marakalala without drawing any inferences from this evidence but considered the evidence of the first plaintiff with a magnifying glass;

- 2.4. That the court took into consideration hearsay evidence that was given by the arresting officers;
 - 2.5. That the court adopted an incorrect approach when it rejected the evidence of the first plaintiff insofar as it contradicted the evidence of the arresting officers;
 - 2.6. That the court erred in referring to a single suspect that attempted to rob two young persons with a knife, when the evidence was that there were two suspects.
3. On the basis of these grounds the plaintiffs argued that there are reasonable prospects of success and that another court may come to a different conclusion.
 4. The test for an application for leave to appeal is set out in section 17 (1) of the Superior Courts Act, 10 of 2013 and is to the effect that leave may only be given if I am of the opinion that the appeal would have a reasonable prospect of success. The remaining grounds as set out in the relevant section are not applicable in this matter.
 5. I will deal briefly with the grounds set out above to show that I am not of the opinion that the appeal would have a reasonable prospect of success.

6. When the arrest was made, the arresting officers were in the presence of the complainant who informed them that there was an attempted armed robbery on him and who pointed the suspects out to them. On searching the plaintiffs, the officers also found a firearm in the possession of the first plaintiff.
7. Those facts, on their own, ensured that the officers discharged the onus to prove that the arrest was lawful and/or justified under the provisions of the Criminal Procedure Act. The main judgment contains the elements for such proof and I do not intend repeating same here.
8. The fact that the plaintiffs were not asked for an explanation on the scene of the arrest does not detract from the above. For these reasons the acceptance of the evidence of Sergeant Phooko does not make any difference to the outcome of the matter.
9. The second ground is baseless as the court was entitled to consider all the evidence in determining the credibility of the witnesses. The evidence regarding the alleged assault showed that the first plaintiff was not credible and for that reason there was nothing wrong in referring thereto.
10. The third ground was not elaborated upon in the notice nor in argument before me and I am still in the dark as to what evidence reference was made. In the main judgment the evidence of Warrant Officer Marakalala was

criticised as he did not make a good impression as a witness. However, it does not make any difference to the outcome of the matter as the claim for unlawful detention was dismissed on grounds that had nothing to do with his evidence.

11. The fourth ground relating to hearsay evidence was also not determinative of the matter. Those facts can be safely ignored in coming to the conclusion in the main judgment. Whether the arresting officers were informed that a cellphone was picked up by a third person or not would not have made a difference to the lawfulness of the arrest. In my view this ground can therefore also not sustain a successful appeal.
12. The fifth ground is unclear, as the evidence of the first plaintiff in fact corroborated that of the arresting officers in certain respects. Where they differed from each other an election had to be made on the basis of credibility and probabilities as to which version should be accepted. In that respect the evidence of the first plaintiff was rejected. It does not follow, as was stated in the notice of application for leave to appeal, that this means that “the case of the plaintiff must corroborate the case of the defendants for the Court to find in the plaintiffs favor (sic)”.
13. The conclusion drawn by the plaintiffs in the notice and in argument is therefore clearly wrong.

14. The last ground is that the court erred in referring to a single suspect that attempted to rob them whereas the evidence was that there were two black men. This is in fact correct and the reference to a single suspect was wrong. However, in the main judgment this was referred to in determining the probabilities in the first plaintiff's version. This was not the only factor that was taken into account as various others are referred to in the main judgment. The other factors are still relevant and would lead to the same conclusion.

15. For the reasons set out herein I am not of the opinion that there is a reasonable prospect of success on appeal.

16. I accordingly grant the following order:
 - 16.1. The application for leave to appeal is dismissed.

 - 16.2. The plaintiffs are, jointly and severally, ordered to pay the first defendant's costs.

D T v R DU PLESSIS
ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by Acting Judge du Plessis. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand down is deemed to be 7 July 2022.

HEARD ON: 30 June 2022

DECIDED ON: 7 July 2022

For the plaintiffs: Mr Mamathuntsha

Instructed by: Mamathuntsha Inc. Attorneys

For the first defendants: Adv M Makhubele

Instructed by: State Attorney, Johannesburg