IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 23993/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

11 APRIL 2023

SIGNATURE **DATE**

In the matter between:

OOSTHUIZEN ANDRE APPLICANT (PLAINTIFF)

And

THE MINISTER OF POLICE RESPONDENT (DEFENDANT)

JUDGMENT (LEAVE TO APPEAL)

NDLOKOVANE AJ

INTRODUCTION

[1.] The applicant/plaintiff in the main application applies for leave to appeal to the Supreme Court of Appeal, against the whole judgment and order I handed down on

06 October 2022.[1] The application for leave to appeal is opposed by the respondent/defendant.

[2.] For the sake of convenience, I will refer to the parties as they are cited in the main judgment. After delivery of the judgment on 06 October 2022, the plaintiff filed a detailed notice of application for leave to appeal dated 26 October 2022,which contained the grounds of appeal.

[3.] In paragraph 20 thereof, the plaintiff submits that the application is based on the contention that the appeal has reasonable prospects of success as envisaged in section 17 of the Superior Courts Act 10 of 2023('the Act').

[4.] The defendant on the other hand contends that the application for leave to appeal has no prospects of success and submits as follows in paragraphs 28 and 29 of their main heads of arguments:

> "28. *The Applicant does not meet any of the statutorily imposed threshold for the granting of leave to appeal. There is absolutely no basis offered in this application to satisfy this court that there are prospects of success.*
> *29. Based on the above, we submit that there is no reasonable prospect of success and submit that the application must be dismissed with costs."*

[5.] The essence of my order that the plaintiff seeks to appeal against is situated in the main judgement at paragraph 50(a)and can be summed up as follows:

> "1. *The plaintiff's claim is dismissed with costs".*

The test in an application for leave to appeal

[6.] Applications for leave to appeal are governed by sections 16 and 17 of the Act. Section 17(1) of the Act provides:

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[1] Preamble to the Notice of Application for Leave to Appeal at para 1, First Respondent's Heads of Argument (Application for Leave to Appeal) at para 2, Founding Affidavit to the Applicant's Urgent Application at para 10.

"*(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."

[7.] With the enactment of section 17 of the Act, the test has now obtained statutory force and is to be applied using the word "*would"* in deciding whether to grant leave. In other words, the test is would another court come to a different decision. In the unreported decision of the ***Mont Chevaux Trust v Goosen & 18 others,***[2] the Land Claims Court held, *albeit obiter*, that the wording of the subsection raised the bar for the test that now must be applied to any application for leave to appeal. In ***S v Notshokovu,***[3] it was held that an appellant faces a higher and stringent threshold in terms of the Act comparted to the repealed Supreme Court Act 59 of 1969.

[8.] It is noteworthy that the phrase "*reasonable prospects of success*" in section 17(1) of the Act presupposes a measure of certainty that the court of appeal would reach a different outcome. What the test- reasonable prospects of success postulates is 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.[4] In order to succeed, the appellant must convince the court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.[5]

Summary of the grounds of appeal

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[2] 2014 JDR 2325 (LCC) para 6.
[3] [2016] ZASCA 112 para 7.
[4] *S v Smith* 2012 (1) SACR 567, 570 para 7.
[5] Supra.

[9.] I deal with the grounds of appeal under the main theme as postulated by the plaintiff. However, I do not endeavour to deal with each, and every argument raised therein but only those arguments which are central to the respective themes.

Whether the defendant discharged onus placed on it as a result of its admission of arrest?

[10.] The plaintiff contends in his heads of arguments that objectively seen:

> *"4.3 All the evidence confirms that only one 54-crate load of copper left Wade Walker/Exxaro Grootgeluk mine on the day in question.*
> *4.4 The only evidence of the existence of an additional 92-crate load of copper is the say so of Capt. Baloyi.*
> *4.5 The glaring omissions in the Defendant's case are as follows:*
> > *4.5.1 The Defendant failed to call Etienne Koekemoer to testify at trial or to give an explanation why he is not available to testify at trial in order to confirm the correctness of the averments in his Affidavit, deposed to, to Capt. Baloyi."*

[11.] To support its contention, the plaintiff referred me to various authorities and case law, I will recite some of the authorities relevant to the question before me as follow:

> "*Principles of Evidence, Second Edition, PJ Schwikkard et al (2002) at page 513:*
> > *"A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The extent to which such an inference can be drawn will depend on the circumstances of the case. The Court should, inter alia, consider the following: Was the party concerned perhaps under erroneous but bona fide impression that he had proved his case and that there was therefore no need to have called the witness? Is there a possibility that the party concerned believed that the potential witness was biased, hostile or unreliable?"*

[12.] I was also referred to the case of ***Shishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC) at paragraph 112***, which provides that:

> *"[112] The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify."*

[13.] The plaintiff further avers that Capt. Baloyi could not and did not produce the averred register in which it was allegedly recorded that on the said day, two loads of copper respectively 54-crates and 92-crates were delivered to Ellisras Scrap Metal because of that the plaintiff submitted that it is clear that, objectively seen, all the documentation and the evidence adduced on behalf of the Plaintiff confirms that only one 54 crate load of copper left Ellisras Scrap Metal on the day in question

[14.] The plaintiff submits that I erred in not finding that the conclusions reached by the arresting officer, Capt. Baloyi, were based on speculation, assumption, and conjecture and therefore, unreasonable under the circumstances. As a result of this error that I made, the plaintiff submitted that another Court will find that the arresting officer, Capt. Baloyi, had not reasonable come to the conclusion that the crime of defeating the ends of justice had been committed in his presence having regard to the facts of this case and having applied the case law thereto as referred to in paragraph 6 of the plaintiff's heads of arguments:

[15.] Relying on the authorities in LAWSA Second Edition Volume 6 paragraph 205 and 206 on page 202 to 203 and Criminal Law CR Snyman Third Edition Butterworths paragraph 3 page 319 to 320,the plaintiff submitted that another Court

would, on application of the law to the facts, come to the conclusion that the Defendant failed to prove its defence on a balance of probabilities, namely that the admitted arrest and detention is lawful, having regard to the provisions of Section 40(1)(a) of the Criminal Procedure Act, Act 51 of 1977 (as amended).

Summary of opposition to the application for leave to appeal

[16.] In the main the defendant contends that the grounds for leave to appeal advanced by the first respondent do not meet the stringent test set out in section 17(1) of the Act.[6]

[17.] The defendant contends that the matter before the court *a quo* was not whether the State in particular the defendant has proved beyond reasonable doubt that Plaintiff in the court *a quo* committed an offence of defeating the ends of justice. In support of its contention the defendant refers me to case authorities as well as shall be seen hereunder. The defendant contends that the proceedings in the court *a quo* were not of a criminal nature but a civil case that required the defendant to prove on a balance of probabilities that the arrest of the Plaintiff was lawful in terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977 ("CPA"). In so doing, the defendant had to prove the three jurisdictional factors for arrest in terms of section 40(1)(a) of the CPA. The jurisdictional factors for section 40(1)(a) are: the arrestor must be a peace officer; an offence must have been committed or there must have been an attempt to commit an offence; and the offence or attempted offence must be committed in his or her presence.

[18.] Therefore there is no requirement to prove that the officer acted reasonably in arresting the Plaintiff, all that needed to be proven was whether Captain Baloyi had reasonable suspicion that the Plaintiff committed the offence of defeating the ends of justice as a Schedule 1 offence. Reasonable suspicion would be appropriate in case of a plea of section 40(1)(b) of the CPA requiring an officer to arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. An arrest in terms of section 40(1)(b) is only permissible where the peace officer entertains

[6] Applicant's Heads of Argument (Opposition to Application for Leave to Appeal) at para 10.

reasonable suspicion that the person he is arresting has committed an offence listed in Schedule 1. The jurisdictional factors for section 40(1)(b) being the arrestor must entertain a suspicion; suspicion must be that the suspect committed a Schedule 1 offence and that the suspicion must rest on reasonable grounds.

[19.] Further it is evident that plaintiff's case is that the defendant failed to prove some of the above jurisdictional factors. Having regard to the defendant's plea and case presented in the court *a quo*, the above requirements are irrelevant and any reasonable suspicion of defendant's employees having failed the test of reasonableness for suspicion must be rejected and submits that the Defendant's case in terms of section 40(1)(a) has been discharged.

[20.] In support of its contention, I was referred to the case of ***Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG),*** in this case the court laid the principle regarding section 40(1)(a) by holding that the assessment of determination of the legality of an arrest in terms of section 40(1)(a) requires a determination whether facts observed by the arresting officer "as a matter of law *prima facie* establish the commission of an offence in question". His honest and reasonable conclusion from the facts observed by him is not of any significance to the determination of the lawfulness of his conduct, but may, within the context of section 40(1)(a) be relevant for determination of the *quantum* of damages.

[21] The above by ADJP Van Zyl rejected the AD decision in Tsotse's arrest made in terms of the predecessor of section 40(1)(a) would be lawful if the arrester, as a result of his observations, entertained the honest and reasonable belief that a crime was committed, so the plaintiff's submission goes.

[22.] Relating to the facts of the present case and evidence presented in the court *a quo*, the defendant avers, the facts observed in line with Scheepers's principle supporting justification of arrest in terms of section 40(1)(a) are:

> "*22.1 The Plaintiff was asked during a meeting at Lephalale about his last load delivered which he responded to be 54 crates and he made a statement in that regard and During the meeting it was revealed that Mr Ettiene Koekemoer was the one tasked to cut the off-cuts;*

22.2 Mr Koekemoer was called into the meeting, in the presence of the Plaintiff, asked a question about the last load on the date in question, which he responded that it was 92 crates, which were loaded and the Plaintiff confirmed the loads, the Plaintiff did not dispute the allegations, Mr Koekemoer was requested to make a statement which was deposed and relied on with other information by arresting officer to arrest;

22.3 Further investigations by the arresting officer at Ellisras Scrap Metal revealed two different invoices for the two loads with two huge different amounts reflecting the two loads;

22.4 Documents submitted by the Plaintiff in particular the two weighing tickets supported the invoices relied on by the arresting officer that they are in sequence and different;

22.5 The Plaintiff when confronted during arrest was apologetic and said he was working for his family and furthermore did not make any exculpatory statement presenting his version or defence and exercised his right to remain silent.

22.6 The above justified the arrest and refute any contention that the officer failed to investigate before arrests as facts observed and investigation justified arrest. The Plaintiff was arrested and brought to justice/court within the prescribed time limits."

[23.] Based on the above, no case has been made for leave to appeal and the application must be dismissed with costs, so the defendant submits.

Conclusion

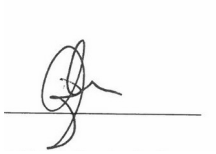
[24.] Having considered the arguments presented by the plaintiff and the defendant with regard to whether the defendant discharged its onus and the authorities they referred me to , I am of the view that there is no reasonable prospect that another court would come to a different decision. It is so especially considering the findings I made in the main judgement from paragraphs 43-50.As it is trite that for a peace officer ,in the present case Baloyi to be placed in a position to rely upon s40(1)(a),it

is not necessary that the crime in fact be committed or that the arrestee(the plaintiff in the present case) be later charged and convicted of the suspected offence.[7]

ORDER:

[25] In the result the following order is made:

(a) The application for leave to appeal to the Supreme Court of Appeal is refused with costs.



N NDLOKOVANE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties and their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 11 April 2023

APPEARANCES :

FOR THE PLAINTIFF: ADV. T DE KLERK

FOR THE DEFENDANT: ADV. W MOTHIBE

DATE OF HEARING: 25 NOVEMBER 2022

DATE OF JUDGMENT: 11 April 2023

[7] 2011(1) SACR 63 (WCC).