



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE No: 12076/2017

In the matter between:

THOBANI KHOMO

APPLICANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

AYANDA MNTUNGWA

SECOND RESPONDENT

PHATHIZWE PHILIP MALULEKA

THIRD RESPONDENT

**THE NATIONAL PROSECUTING AUTHORITY
OF SOUTH AFRICA**

FOURTH RESPONDENT

ORDER

The plaintiff's application for leave to appeal is dismissed with costs.

JUDGMENT

Mathenjwa AJ

[1] The applicant, Thobani Khomo, seeks leave to appeal the judgment and order of this court handed down on 30 August 2022. Leave is sought to appeal to the full court of the KwaZulu-Natal Division of the High Court. For purposes of this judgment, the applicant is referred to as the plaintiff and the respondents are referred to as defendants, as they are cited in the main action.

[2] The plaintiff listed long grounds of appeal on the notice of leave to appeal. I do not intend dealing with each and every ground of leave to appeal, although each has been considered. The main grounds of leave to appeal are summarised as follows:

- (a) The court erred in finding that there was a prima facie case against the plaintiff at the time he was arrested, and in finding that there was no basis to conclude that the discretion to arrest him was wrongfully effected;
- (b) The court erred in finding that Ms Ndlela, who was the prosecutor at the magistrate's court when the plaintiff applied to be released on bail, was an honest witness;
- (c) That the court ought to have taken into consideration the fact that the statement of the deceased's wife, wherein she attested to the identification of the cell phone, was made after the bail application and Ms Ndlela, who opposed the bail application, could not have had such evidence before her at the bail hearing;
- (d) The court erred in stating that the obscurity was cleared by the investigating officer in his testimony that during the bail application, the deceased's cell phone was already positively identified by his wife;
- (e) That the court erred in finding that the evidence in possession of the investigating officer, including admissions by the plaintiff and statement by the eye witnesses, were reasonable grounds to detain and keep the plaintiff in custody;
- (f) This court erred in finding that the investigating officer was an impressive witness because he indicated that a Samsung Phone as well as Adidas takkies were taken from the deceased, however the witness on whose statement he relied

never mentioned Adidas takkies nor a Samsung phone, instead they mentioned White Nike Takkies and a Vodaphone;

(g) The court erred in relying on the evidence of the arresting officer when he stated that he was not told by the community to arrest the plaintiff; the court erred in accepting the arresting officer's evidence that the items in the bag belonged to the deceased, because the description of the items in the bag differed in its totality to the items that were allegedly missing from the deceased, and

(h) Finally, the plaintiff contends that this court erred in not accepting the plaintiff's evidence and in finding that he was a dishonest witness.

[3] The circumstances in which leave to appeal may be granted is set out in s 17(1) of the Superior Courts Act 10 of 2013 (the Act), which provides that:

'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] Leave to appeal is sought in terms of s 17(1)(a)(i) of the Act. The Supreme Court of Appeal had the opportunity to consider what constitutes a reasonable prospect of success in *S v Smith*,¹ where Plasket AJA held that:

'What the test of 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. In order to succeed, therefore, the appellant must convince this 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. 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.'

(Footnote omitted.)

¹ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

[5] With regard to lawfulness of the arrest, I pointed out in paragraph 13 of the judgment that when the arresting officer effected the arrest of the plaintiff he had first confirmed from the police station that indeed there was a case for murder of the deceased who was killed by knife; the plaintiff was found in possession of a bag which contains what looks like blood stains; the bag was found in a fridge in the plaintiff's house; a brother of the deceased had identified the bag as belonging to the deceased; the arresting officer had asked the plaintiff about the bag and he did not respond and that the evidence of the arresting officer was corroborated by the evidence of Sergeant Dladla who was present at the scene when the plaintiff was arrested. For these reasons, I am not convinced that another court may find that the arrest of the plaintiff was not based on reasonable suspicion and therefore unlawful.

[6] With regard to lawfulness of the detention, it is instructive to further point out that the bag that was found in the possession of the plaintiff had been positively identified as belonging to the deceased; the deceased's cell phone that was found in the possession of the plaintiff had been positively identified by the deceased's wife; an eyewitness had deposed to an affidavit attesting that he saw the plaintiff stabbing the deceased and the plaintiff had made a statement admitting that he killed the deceased by mistake. The plaintiff was charged for a Schedule 6 offence; he applied to be released on bail and the magistrate's court which heard his bail application refused his application to be released on bail. For these reasons, I am not convinced that another court may find that the detention was unlawful

[7] To my mind, the grounds based on dishonesty of witnesses and discrepancies in their evidence, have no substance. Ms Ndlela made a concession that she was misled by the investigating officer to believe that the cell phone was already identified by the deceased's wife at the time of the bail hearing. This concession was made after the plaintiff's attorney had suggested to Ms Ndlela that the deceased's cell phone could not have been identified at the time of the bail hearing because the deceased's wife had only deposed to the affidavit in which she attested to the identification of the cell phone after the date of the bail hearing. This submission does not hold water because in opposing bail, the prosecutor relied on the affidavit of the investigating officer who had stated that the deceased's cell phone found in the

possession of the plaintiff was positively identified by his wife. Furthermore, the investigating officer gave evidence before this court and confirmed that, at the time of the bail hearing, the deceased's cell phone had already been positively identified. Therefore, although Ms Ndlela made a concession that the cell phone was not yet positively identified at the time of the bail hearing, this obscurity was cleared by the evidence of the investigating officer. The fact that the deceased's wife had not yet deposed to the affidavit before the bail hearing does not negate the investigating officer's evidence at the bail hearing that the deceased's wife had positively identified the cell phone.

[8] With regard to the discrepancy about the items alleged to have been taken from the deceased and the items found in the bag in possession of the plaintiff, it should be pointed out that the bag was found inside the fridge in the house of the plaintiff; the plaintiff was in control of the bag, he alone could interfere with the contents of the bag. Although the deceased's brother stated in his statement that a Vodaphone was taken from the deceased, the investigating officer, in his affidavit opposing bail stated that a Samsung cell phone was taken from the deceased. Moreover, it is not in dispute that the Samsung cell phone found in the possession of the plaintiff belonged to the deceased.

[9] The crisp issue in this application is whether there is a reasonable prospect that the judges of appeal will take a different view. It is trite that the prospect of success should not be remote, but it must be realistic. I have considered the grounds of appeal as set out in the plaintiff's notice of leave to appeal as well as his submissions by his legal representative, and I am of the view that there is no reasonable prospect that another court will come to different conclusion.

[10] In my view, the test for leave to appeal has not been met and accordingly I make the following order:

The plaintiff's application for leave to appeal is dismissed with costs.

possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;'

To my mind nothing turns on the averment that the business rescue issue is a compelling reason for this court to grant leave to appeal. I am agreeable with the respondent's counsel that the sale of business facilitated rehabilitation of the company as per the objective of business rescue in terms of the Act.

[8] In my view, in an application where the business was sold for purposes of rehabilitating the business, and the business rescue plan does not explicitly provide for the sale nor prohibit the sale of business such as in this application, the chances of another court finding that the business was sold contrary to the business rescue plan and therefore contrary to the provision of the law are remote and not realistic.

[9] In my view, the test for leave to appeal has not been met and accordingly I make the following order:

The application for leave to appeal is dismissed with costs.


MATHENJWA AJ

Appearances:

For applicant: Mr Laing
Instructed by: Elaine Besesar &Co.
Durban

For respondent: Adv. Jaipal
Instructed by: The State Attorney
Durban

Date of hearing: 7 December 2022

Date of judgment: 27 January 2023