

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Before His Lordship Mr Justice Labuschagne AJ on 9 April 2024

Case No: 2023/121964

In the matter between:

MICHAEL MUTOMBO

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL OF HOME AFFAIRS

Second Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

[1] This is an application for leave to appeal against an order of 28 November 2023 dismissing the applicant's application with costs, due to a lack of urgency.

[2] The lack of urgency was made apparent when the respondents pointed out that the applicant had launched an application in the urgent court on 24

October 2023 under case number 105994/23 against the Minister of Home Affairs, the Director General of Home Affairs, the Minister of Police, the Minister of Justice and Correctional Services and the Director General: Justice and Constitutional Development. As far as the passport was concerned, the relief sought was almost identical to the application before me.

[3] In the prior application the applicant sought the following urgent relief:

- “3. *That the first and second respondents (the Minister of Home Affairs and the DG of Home Affairs) be compelled to release the applicant’s passport with passport number [...] which the unlawfully seized and spoliated from him, alternatively to issue the applicant with a new passport with an instruction to the relevant Embassies to reissue the applicant with the VISAs and/or Permits which were in the unlawfully seized and spoliated passport, within 30 days of the first and second respondent receiving this court order.*

4. *That the first and second respondents be compelled to release the applicant’s permanent residence permit within 30 days of the first and second respondents receiving this court order.*

5. *That the third respondent provide the applicant with a Police Clearance Report (PCR) within 10 days of receipt of this court order.*

6. *That the fourth and fifth respondents issue a certificate of expungement directing that the convictions and sentences have been expunged for the applicant within 15 days of receipt of this court order.*
7. *That the third respondent inform the applicant in writing that his convictions and sentences have been expunged within 20 days of receipt of this court order.*
8. *That should the respondents intend to oppose, they must file their opposing papers and give 48 hours' notice before the return date ..."*

[4] In the matter that served before me, the applicant sought the following urgent relief:

- “3. *That the first and second respondents (the Minister of Home Affairs and the DG of Home Affairs) be compelled to release the applicant's passport with passport number OPO708392 which they unlawfully seize and spoliated from him, alternatively to issue the applicant with a new passport with an instruction to the relevant Embassies to reissue the applicant with the VISAs and/or Permits which were in the unlawfully seized and spoliated passport, within 24 hours of the first and second respondents receiving this court order.*
4. *That the first and second respondents pay the costs of this application, only if it is opposed.”*

[5] As the prior application had not been withdrawn, and as Prayer 3 of both applications are (save for the time period in the last two lines) identical, the Department of Home Affairs raised a special plea of *lis pendens*.

[6] The applicant had not disclosed at all in the founding affidavit that there was a prior application for the same relief which, when it was heard before Subbiah Fraser J, was struck for lack of urgency.

[7] The arguments advanced in this application for leave to appeal included the following on the issue of *lis pendens*:

7.1 That the requirement of prior litigation between the same parties was not established, because, submits counsel for the applicant, there were more respondents in the prior application than in the current application.

7.2 The respondents in the prior application who were called upon to produce the confiscated passport or to supply an alternative, are the Minister of Home Affairs and the DG of Home Affairs. As they have raised a plea of *lis pendens* in these proceedings, the requirement of pending litigation between the same parties has been established. It matters not that there are other respondents in the prior application against whom other relief was being sought.

7.3 A further argument raised was that the issue of *lis pendens* could only arise if the prior application had also been set down for hearing. This is a misconceived argument as the whole basis of the special plea of *lis pendens* is that prior litigation between the same parties on the same cause of action and in the same forum is pending.

7.4 The third argument advanced was to the effect that the cause of action for the prior application differs.

7.5 In both these applications the applicant seeks the return of the same passport, contending that he wishes to travel, and that the passport is required for the exercise of his right of freedom of movement. Characterised in this manner, the causes of action are the same. All that changed were the circumstances why the passport was required for travel. In the application before me the passport was required for purposes of a proposed trip to Russia. The changed reason for requiring the passport does not constitute a separate cause of action. While it might form a basis for rendering the prior application urgent (if properly motivated), it does not translate into a new cause of action.

[8] There are no prospects of another court coming to a different conclusion on these propositions.

[9] Although the notice of leave to appeal refers to a cost order as a ground for leave to appeal, this was not pursued during argument. It suffices to state

that no exceptional circumstances exist which would justify a cost argument forming the basis of an application for leave to appeal. As the application, in that sense, would fall within section 17(1)(b), read with section 16(2) of the Superior Courts Act 10 of 2013, leave to appeal falls to be refused.

[10] In the premises I make the following order:

1. The application for leave to appeal is dismissed with costs.

LABUSCHAGNE, AJ