

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 07/12835

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
<u>29/11/2019</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL
EDUCATION DEPARTMENT GAUTENG**

First Applicant

MINISTER OF SAFETY AND SECURITY

Second Applicant

and

DAPHNEY NKOSI

First Respondent

THEMBINKOSI MAJOLA

Second Respondent

In re:

DAPHNEY NKOSI

First Plaintiff

THEMBINKOSI MAJOLA

Second Plaintiff

and

JUSTICE MOKONYAMA

First Defendant

HELEN T MOKONYAMA

Second Defendant

**MEMBER OF THE EXECUTIVE COUNCIL
EDUCATION DEPARTMENT GAUTENG**

Third Defendant

MINISTER OF SAFETY AND SECURITY

Fourth Defendant

J U D G M E N T ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

- [1] This is an application for leave to appeal my judgment delivered on the 2nd February 2017.
- [2] At the commencement of the trial on the 7th May 2010 I granted an order in terms of Rule 33(4) separating the merits from quantum.
- [3] At the close of Plaintiff's case during June 2010 the first and second Applicants in this application who were the third and fourth Defendants applied for absolution. I granted absolution only in respect of the second Applicant (fourth Defendant) and dismissed the application in respect of the MEC of Education.
- [4] The Plaintiffs appealed that judgment and were successful at a hearing by the full bench of this Division.
- [5] There was thereafter a long delay before the matter could resume before me for continuation which delay was caused amongst others the

unavailability of counsel for the Applicants who at that time had become involved in a major criminal trial. Then there was a period when the first and second Defendants had no legal representation until finally the Johannesburg Bar Council provided pro-bono representation for the first and second Defendants.

- [6] As indicated above I finally handed my judgment on the 2nd February 2017 and found in favour of the Plaintiffs against all four Defendants. The matter then stood down to enable the parties to prepare for the second part namely quantum.
- [7] On the 3rd June 2019 before my brother Matojane J an order was granted detailing amounts awarded to the Plaintiffs. There was no written judgment.
- [8] The Application for leave to appeal is against both merits and quantum. Seeing that I was not involved in the determination of quantum I enquired from the parties whether it will be appropriate for me to hear them on quantum. After submissions were made to me I ruled that I can only make an order concerning merits. This judgment is accordingly only in respect of merits.
- [9] It was argued by counsel for the Respondent Adv Shakoane SC that my judgment having been delivered on the 2nd February 2017 the Applicants were out of time in that they only filed this application for

leave to appeal during June 2019 and that they should have brought a substantive application for condonation.

[10] Counsel referred this court to two decisions namely:

a) David Hirsch Organisation (Pty) Ltd and Another v ABSA Insurance Brokers (Pty) Ltd 1998 (4) SA 782 TPD.

and

b) Tolstrup N.O. vs Kwapa N.O. 2002 (5) SA 73 WLD

[11] Both decisions deal with applications for amendment of pleadings after a ruling on merits wherein there had been a Rule 33(4) separation. The decision has nothing to do with an application for leave to appeal brought long after a ruling on merits in a separated trial.

[12] In my view the Applicants acted correctly in awaiting a final outcome on all the issues before filing an application for leave to appeal so that the separated issues which have now been merged into one should be dealt with at once in one sitting.

[13] Application for leave to appeal is determined in accordance with Section 17 of the Superior Court Act No 10 of 2013 which reads as follows:

17. 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 prospects of success; or

(ii) there is some other compelling reasons 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 issue between the parties.

[14] In this matter there are four issues which in my view deserve consideration of the Supreme Court of Appeal. They are:

a) Whether the school was negligent in not conducting daily searches on scholars entering the premises.

- b) Whether the second Plaintiff and the Defendant were involved in a “School activity” at the time of the tragic shooting incident inside the school toilets during school hours.
- c) If it is so that the commissioner of police was negligent in granting a licence to possess a firearm to Mrs Mokonyane without having ensured that she was able to handle a firearm can it be said conclusively said that it was therefore foreseeable that the firearm would at some point in the future be used in the unlawful manner that it was.
- d) It has become an issue of factual vs legal causation

[15] The Applicant has in my view raised fairly noble issues that deserve the attention of the Supreme Court of Appeal particularly in view of the fact that the school Act does not define “School Activity”

[16] I have considered all submissions by both counsel and have come to the conclusion that leave to appeal my judgment on the merits be granted to both the Applicants (third and fourth Defendants).

ORDER

1. Leave to appeal the merits of the judgment is granted to both Applicants.
2. Costs of this application shall be costs in the appeal.

DATED at JOHANNESBURG this the 26 day of NOVEMBER 2019



M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing : 20 NOVEMBER 2019
Date of Judgment : 26th NOVEMBER 2019

For First and Second Applicants : Adv D J Joubert SC

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