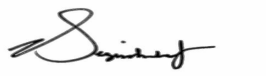
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 40039/2017

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

DATE: 10/08/21



In the matter between: -

XOLANI SIPHIKA Plaintiff

and

THE MINISTER OF POLICE Defendant

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 10 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This is an application for leave to appeal against my judgment of 1 January 2021. For convenience I refer to the applicant for leave as the plaintiff and to the respondent as the defendant.

[2] The application for leave to appeal ("*the application*") is dated the 5th of March 2021. Both the plaintiff and the defendant submitted written heads of argument prior to the oral virtual hearing of the application on 17 March 2021.

[3] The application was filed out of time and the first prayer to the application is for an order condoning the late filing. There was no substantive application for condonation, however, the defendant indicated that although it did not formally oppose the application for condonation, the ordinary principles applicable to condonation applications, that an applicant must show reasonable prospects of success in the main dispute, should apply.

[4] Although not a model of clarity by any measure, the application essentially contains eight grounds of appeal, and I summarize them as follows: -

First ground

[a] The court was not faced with two mutually destructive versions from the parties in that the "*version led by the [plaintiff] as a witness should have been preferred at this instance as he was a* ***credible and competent witness*** *whose version was supported by statements and testimony from the [defendant's] witnesses… and the*

unavailability of crucial evidence which could support his case."[1] (emphasis added)

Second ground

[b] The court erred in common cause facts by stating at paragraph 9(p) of the judgment that: -

> *"The crowd was angry and violent and demanded the release of the suspect so that they could kill him. They started attacking the vehicle."*[2]

Third ground

[c] I misdirected myself in my findings *"and erred in placing value, weight and relevance on irrelevant or immaterial information from the plaintiff and yet neglected to do the same on crucial evidence from the defendant"*.[3]

Fourth ground

[d] The court correctly pointed to the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others in her analysis of the evidence *"however, the court incorrectly applied the case to the facts*".[4]

---

1 Application for leave to appeal, paragraph 3, CaseLines pp 075-2 and 075-3.
2 Application for leave to appeal, paragraph 6, CaseLines p 075-4.
3 Application for leave to appeal, paragraph 7, CaseLines p 075-4.
4 Application for leave to appeal, paragraph 9, CaseLines p 075-7.

Fifth ground

[e] I erred in not considering the fact that pleadings *"must be read as a whole and not in isolation. The fact that there may be inconsistency, or the fact that pleadings were drafted a certain way does not make the [plaintiff's] particulars and/or version defective".*[5]

Sixth ground

[f] I did not exercise my discretion rationally and objectively in that I conflated the issues and therefore the requirements for a legal duty and the duty of care.[6]

Seventh ground

[g] The court erred in its assessment of the defences put up by the defendant in that there was no imminent or commenced act of attack on either of the members of the South African Police Service (*"SAPS")*. I further failed in my analysis of the Act to take into consideration the requirements of a private self-defence.[7]

Eighth ground

[h] In both the defences raised by the defendant the court failed to analyse the excessiveness of the force used by the member of the defendant vis-à-vis the circumstances the defendant was allegedly

---

5 Application for leave to appeal, paragraph 11, CaseLines pp 075-8 and 075-9.
6 Application for leave to appeal, paragraphs 12 to 17, CaseLines pp 075-9 to 075-11.
7 Application for leave to appeal, paragraphs 18, 18.1 and 18.2, CaseLines pp 075-11 and 075-12.

faced with. In this regard the court erred in not assessing the proportionality of the degree of force used in relation to the proportionality or the seriousness of the offence in respect of which it is alleged that the member of the SAPS shot the plaintiff.[8]

PRINCIPLES GOVERNING APPLICATIONS FOR LEAVE TO APPEAL

[5] Before dealing with the grounds of appeal, it is necessary to have regard to the basic principles governing applications for leave to appeal.

[6] In terms of the provisions of section 17(1) of the Superior Courts Act, 2013, leave to appeal will only be granted if the court is 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) whether 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."*

[7] What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the word *"only"* used in the section. In Mont

---

8 Application for leave to appeal, paragraphs 19 and 20, CaseLines p 075-12.

Chevaux Trust v Tina Goosen and 18 Others[9] Bertelsman J held as follows: -

> *"It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure or certainty that another court will differ from the court whose judgment is sought to be appealed against."*

[8] It has been repeatedly held in the analysis of the test that it involves considerations as to whether *"there is a reasonable prospect that another court could come to a different conclusion"*[10] and not whether there is a possibility that another court could come to a different conclusion.

[9] The test therefore is whether there is a reasonable prospect that another court could come to a different conclusion. In Westinghouse Brake and Equipment (Pty) Ltd v Builder Engineering (Pty) Ltd[11] the Appeal Court (as it then was) reiterated the general principle that in order for an applicant for leave to appeal to succeed, the applicant must demonstrate that it has a reasonable prospect of success on appeal. It was also stated that an appeal would be allowed where the matter is of great importance or where the matter is of public importance whether the court is of the view the decision might affect other questions.

[10] The procedural and substantive importance of applying for leave to appeal

---

9 2014 JDR 2325 (LCC) paragraph [6].
10 Woolworths Ltd v Matthews 1999 [3] BLLR 288 (LC).
11 1986 (2) SA 555 (A).

cannot be overstated. The Supreme Court of Appeal held in Dexgroup (Pty) Ltd v Trustco Group[12] that: -

> *"The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should, in this case, have been deployed by refusing leave to appeal."*

[11] It is against this legal backdrop that I consider the plaintiff's application for leave.

THE MAIN ARGUMENTS

[12] I am grateful to both counsel for the written heads of argument. They have been of great assistance in crystalising the main grounds of appeal.

Preliminary

[13] The defendant submitted that the application is fatally defective. It was submitted that an applicant in an application for leave must clearly and succinctly set out his grounds of appeal in unambiguous terms so as to enable the court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposition. In support of this submission I was referred to Songono v Minister of Law and Order[13] where Leach J (as he then was) held as follows: -

> *"In attempted compliance … the applicant filed a document headed*

---

12 2013 (6) SA 520 (SCA) paragraph [24].
13 1996 (4) SA 384 (E)

> *'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so-called 'grounds' constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal was sought in clear and unambiguous terms…"*[14]
>
> *"Accordingly, insofar as rule 49(3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvas every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the court or to the respondent…"*[15]

[14] It is apposite that the court in Songono stated that: -

> *"The point is that the notice must clearly set out the grounds and it is not for the court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed."*[16]

[15] I agree with the defendant that the application falls short of the requirements of rule 49(3). A consideration of the plaintiff's heads of argument filed in support of the application for leave illustrates the deficiencies of the application. Whilst the application does not contain a ground for leave premises on the existence of conflicting judgments in the

---

14 At p 385C - E.
15 At p 385E – H.
16 At p 386A.

application itself, Mr Moloi appearing for the plaintiff included in his heads of argument such a ground which he submitted, if found to be correct, would justify the granting of leave to appeal.

[16] In any event, even if I am incorrect in reaching the conclusion that the application is fatally defective, for reasons that will be dealt with later in this judgment, there does not seem to me to be a reasonable prospect of another court finding that the plaintiff is entitled to damages on his claim for reasons that will be dealt with later in this judgment.

Plaintiff's argument

[17] Mr Moloi, appearing for the plaintiff, limited his argument to two main points, which was a very sensible approach in my view.

[18] The first point argued by Mr Moloi is that my judgment is in conflict with the decision by the Supreme Court of Appeal in Govender v Minister of Safety and Security.[17] It was argued that the facts in Govender where the unarmed plaintiff was shot in the back from behind by members of the SAPS, were not too dissimilar to the present matter. The Supreme Court of Appeal dealt with the question of how the interest of the state and the rights of the fleeing suspect can be brought into balance and ultimately concluded that the answer lies in applying the constitutional test, namely when a statutory provision allowing the wounding of a fleeing suspect under certain circumstances would be reasonable and justifiable in an open and

---

17 2001 (4) SA 273 (SCA).

democratic society based on freedom and equality.

[19] Moreover, the Supreme Court of Appeal considered the proportionality between the degree of force used and the seriousness of the crime.[18]

[20] Secondly, Mr Moloi argued the point of causation and in this regard relied on Lee v Minister of Correctional Services.[19] Mr Moloi argued that according to Lee, the enquiry to determine a causal link is whether *"one fact follows from another"*. I might add that the Supreme Court of Appeal in Lee also pointed out that the test is not without problems, especially when determining whether a specific omission caused a certain consequence, which in my view is an acritical consideration in this matter.[20]

[21] The Supreme Court of Appeal went on to explain the application of the test in the case of a positive act and in the case of an omission: -

> *"[41] In the case of 'positive' conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but for rest requires that a hypothetical positive act be inserted in the particular set of* ***facts****, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later the law regarding the application of the test in positive acts and omission* ***cases is not inflexible****. There are cases in which the strict application of the rule would result in an injustice, hence a* ***requirement for flexibility****. The other reason is because it is not*

---

18 Govender (*supra*) at paragraph [16].
19 2013 (2) SA 144 (CC).
20 Lee (*supra*) at paragraph [40].

> *always easy to draw the line between a positive act and an omission. Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the* ***facts*** *of a particular case."* (emphasis added)

[22] Notably, the Supreme Court of Appeal held that the application of the test is dependent on a "particular set of facts" and that the test ought not to be applied inflexibly.

[23] In applying the test to the matter at hand, Mr Moloi argued that once the positive conduct or commission on the part of the defendant is removed, the question is whether the relevant consequence would still have resulted. That, Mr Moloi argued, would be the end of the enquiry and it would not be necessary to consider whether the plaintiff caused the harm to befall him or not.

[24] Mr Moloi touched on the issue of legal duty and the duty of care and placed emphasis on the foreseeability formula for the determination of a duty. In this regard two separate but related enquiries would ensue, namely: -

[a] Would a reasonable person in the same circumstances have foreseen the possibility of harm occurring to the plaintiff and, if the answer is in the affirmative,

[b] Would a reasonable person have taken measures to guard against the occurrence of such foreseeable harm.

Defendant's argument

[25] Mr Mbatha, in addition to the preliminary point already mentioned, argued that Govender does not apply to this matter. In fact, so the argument went, the two cases dealt with completely different and particular sets of facts.

[26] Moreover, Mr Mbatha argued that the plaintiff lost sight of two critical issues, namely that in this matter two grounds justifying the shots were raised, namely self-defence and necessity, whereas in Govender no such defences were raised because the SAPS was faced with a fleeing suspect who was shot by a member of the SAPS while in pursuit. In Govender members of the SAPS were not accosted or threatened by a crowd and there was also no struggle over the possession and control of a police officer's firearm.

[27] On the issue of causation, the defendant's argument was as follows: in stark contrast with Govender, the two police officers in this matter were defending themselves against a crowd consisting of 100 members and Detective Rapoone was confronted with a scenario that if he was to merely relinquish possession over the firearm, his action could have caused serious injury or even death to a number of crowd members, considering the close proximity. Mr Mbatha therefore argued that the proportionality and the degree of force that was used in the circumstances was reasonable and justifiable.

[28] Mr Mbatha dealt with various of the additional grounds of appeal contained in the application. I summarize them here: -

[a] The plaintiff asserts that he was a *"credible and competent witness"*. It was submitted on behalf of the defendant that a distinction must be drawn between a competent and a reliable witness. Whereas the plaintiff was a competent witness in that he was able to understand and appreciate the nature and obligation of an oath and the proceedings, he was not a reliable witness as his testimony cannot be believed.

[b] The court was faced with two conflicting versions, namely the version by the plaintiff vis-à-vis the versions by the defendant's two witnesses and in a situation like that the court is bound to make findings on the credibility of various factual witnesses.

[c] The plaintiff states that the court erred in common cause facts by stating that the crowd was angry and violent and that this was not the evidence of witnesses, especially the plaintiff. The defendant submitted that the judgment is replete with evidence by the plaintiff as well as Constable Segage regarding the angry crowd who wanted to take the law into their own hands. The defendant confirmed that the plaintiff himself used the word *"kill"* to explain the motive of the crowd. Therefore, the only logical conclusion could be, so the defendant argued, was that the motive of the crowd was to kill the suspect and that they could not have been anything but angry and volatile at the time

[d] It is one of the plaintiff's grounds of appeal that I placed unnecessary weight on the pleadings. However, the defendant submitted that

during cross-examination the plaintiff even disputed those facts that were in fact pleaded in the particulars of claim which demonstrates the stark contrast between the plaintiff's oral evidence at trial and the facts advanced in the particulars of claim, also bearing in mind that the particulars of claim had been amended shortly before trial.

[29] Regarding plaintiff's ground that I incorrectly applied the principles enunciated in Stellenbosch Farmers, the defendant submitted that the plaintiff has failed to indicate how exactly I incorrectly applied these principles.

DELIBERATION

Interference with factual findings

[30] It is trite that where there has been no misdirection on fact by the trial judge, the presumption is that her conclusion is correct and the appeal court will not interfere. In such instance the appeal court will only reverse the judgment or order where it is convinced that the trial judge was wrong. So, for instance, in Santam Bpk v Biddulph[21] Zulman JA expressed the approach as being that while an appeal court *"is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong"*.

[31] However, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

---

21 2004 (5) SA 586 (SCA) at paragraph [5].

[32] The highest courts have held before that an appeal court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge as no judgment can ever be perfect and all-embracing. It also does not necessarily follow that, because something had not been mentioned by the trial judge, that it has not been considered.[22]

[33] In this regard the Supreme Court of Appeal found as follows in Fourie v FirstRand Bank Ltd and Another N.O.:[23] -

> *"The time honoured approach by this court is, in sum, that, absent any misdirections on the part of the trial court, a court of appeal is not permitted to interfere with findings of fact (see, for example, R v Dhlumayo at 705-706)."*

[34] There can therefore be no doubt that it is a well-known principle of our law that the facts or findings of the trial court are presumed to be correct, unless a misdirection on the part of the trial judge can be pointed to in order to justify interference with those findings on appeal.

[35] When reading my judgment against the backdrop of the application and both the written and oral submissions submitted by counsel, I am of the view that it cannot confidently be argued by the plaintiff that I committed a misdirection on the facts. In my analysis of the evidence I found various improbabilities in the version of the plaintiff and although I do not intend to repeat them in this judgment, a few are deserving of emphasis: -

---

22 R v Dhlumayo and Another 1948 (2) SA 667 (A) at 706.
23 2013 (1) SA 204 (SCA) at paragraph [14], p 210.

[a] The plaintiff testified that there was no blood on or around the deceased who was stabbed, while two witnesses for the defendant testified that the deceased was lying in a pool of blood;

[b] The plaintiff gave evidence that approximately 100 community members were angry at the death of the deceased and demanded the handing over of the suspect for vigilante justice, however, the plaintiff, a cousin of the deceased, was neither angry nor revengeful;

[c] The plaintiff gave evidence that the murder scene was unsecured but could not explain the presence of two police officers at the murder scene, namely Thibela and Malatjie;

[d] The plaintiff on his version did not remain at the scene where he was unlawfully shot by a police officer in the presence of various eye witnesses who could support his version, and instead chose to leave the scene where he was assaulted and walked home – behaviour that is at odds with an innocent victim and bystander who alleges that he was unlawfully assaulted by the police.

[36] On the issue of causation and proportionality, Govender, in my view, does not assist the plaintiff. As already pointed out, the facts in Govender are completely dissimilar to the facts in this matter. In this regard a critical distinguishing fact is that in Govender the police officer deliberately shot at the fleeing suspect, whereas the uncontested evidence of the police officers in this matter is that the shot was fired during a struggle over the possession of Detective Rapoone's firearm. Here the evidence of the plaintiff is critical.

He alleges that he heard people saying: *"He is going to shoot you"*, whereafter the plaintiff heard only one shot fired but did not see it being fired. Moreover, Detective Rapoone's evidence that he was engaged in a struggle over the possession of the firearm, was never challenged under cross-examination.

CONCLUSION

[37] I am therefore of the view that not only is the application for leave to appeal fatally defective, but that there is no prospect of success on any of the points which Mr Moloi felt could be gleaned from the notice.

[38] The application is therefore dismissed with costs.

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: **17 March 2021**

Date of Judgment: **10 August 2021**

APPEARANCES:

On behalf of plaintiff:	Adv T Moloi Cell: 076-318-4344 moloi@rsabar.com
Instructed by:	T Matubatuba Attorneys Incorporated Tel: (011) 825-1161 tsepiso@matubatubaattorneys.co.za
On behalf of defendant:	Adv H M Mbatha Cell: 082-422-4086 hmbatha01@gmail.com
Instructed by:	The State Attorney Tel: (011) 330-7674 tmpulo@justice.gov.za