REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***8th June 2023*** Signature: _____

CASE NO: 30278/2018

DATE: 8TH JUNE 2023

In the matter between:

NDLOVU, TRUST	First Plaintiff
BHEBHE, THANDAZANI	Second Plaintiff
and	
THE MINISTER OF POLICE	First Defendant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant
NDZUKE, VINCENT	Third Defendant
NTJANA, ANDRIES	Fourth Defendant

Neutral Citation: *Ndlovu and Another v Minister of Police and Others (30278/2018)* **[2023] ZAGPJHC 670** (8 June 2023)

Coram: Adams J

Heard: 8 June 2023

Delivered: 8 June 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 08 June 2023.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

ORDER

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(1) The first and second plaintiffs' application for leave to appeal is dismissed with costs.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the main action in which the first and second plaintiffs claim delictual damages from the defendants on the basis of alleged unlawful arrest and detention and malicious prosecution. The first and second plaintiffs are the first and second applicants in this application for leave to appeal and the first, second, third and fourth respondents herein are the first, second, third and fourth defendants in the said action. The first and second plaintiffs ('the plaintiffs') apply for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 9 November 2022, in terms of which I had dismissed, with costs, the plaintiffs' claims.

[2]. The application for leave to appeal is mainly against my factual findings and my legal conclusion that the arrest of the plaintiffs and their subsequent detention and prosecution were lawful. The court erred, so it was submitted on behalf of the plaintiffs, by finding, for example, that the police encountered a so-called informer upon arrival at the scene of the crime, who then directed them to where the suspects had headed. The plaintiffs also contended that I over emphasised the short period which had lapsed from the time that the

housebreaking was reported to the call centre of the SAPS to the time when the plaintiffs were apprehended, thus making their explanation for their possession of the stolen item highly improbable. It was also contended on behalf of the plaintiffs that the court ought to have had regard to discrepancies in the case of the defendants, such as contradictions between versions in previous statements and their evidence in court. As regards the costs order against the plaintiffs, it was contended by Mr Sibisi, Counsel for the plaintiffs, that I should have applied the so-called *Biowatch* principle and I should not have ordered costs against the plaintiffs.

[3]. Nothing new has been raised by the first and second plaintiffs in this application for leave to appeal. In my original judgment, I have dealt with most, if not all of the issues raised by the plaintiffs in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I said in my judgment, namely that, the arresting officers manifestly harboured a suspicion that the plaintiffs had committed at least the offence of being in possession of suspected stolen property. The police officers would also have been justified in suspecting that the plaintiffs had committed the offence of housebreaking and such suspicion was reasonable.

[4]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[5]. In *Ramakatsa and Others v African National Congress and Another*[1], the SCA held that the test of reasonable prospects of success postulates 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. These

[1] *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[6]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the 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.'

[7]. In *Mont Chevaux Trust v Tina Goosen*[2], the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[3]. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*[4].

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[2] *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported).

[3] *Notshokovu v S,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

[4] *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[8]. I am not persuaded that the issues raised by the first and second plaintiffs in their application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. As for the costs argument and the submission that the *Biowatch* principle finds application, there is no merit in such contention. The point is simply that the plaintiffs' claims were dismissed on the basis of the facts in the matter. The applicable legal principles relating to unlawful arrest and detention and malicious prosecution are settled.

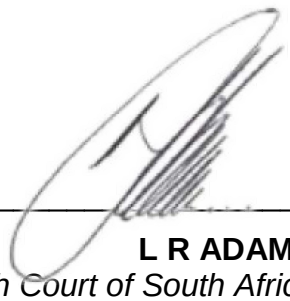
[9]. The appeal therefore, in my view, does not have a reasonable prospect of success.

[10]. Leave to appeal should therefore be refused.

Order

[11]. In the circumstances, the following order is made:

(1) The first and second plaintiffs' application for leave to appeal is dismissed with costs.



L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	8th June 2023
JUDGMENT DATE:	8th June 2023 – judgment handed down electronically
FOR THE FIRST AND SECOND PLAINTIFFS:	Advocate S F Sibisi
INSTRUCTED BY:	Dike Attorneys, Johannesburg
FOR THE FIRST TO FOURTH DEFENDANTS:	Advocate James Magodi
INSTRUCTED BY:	The State Attorney, Johannesburg