IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no 45779/2009

In the matter between:

23/5/2014

MZAMANE JIM CHAUKE **APPLICANT**

and

MINISTER OF SAFETY AND SECURITY **RESPONDENT**

Date of Ruling: 23 May 2014

RULING: APPLICATION FOR LEAVE TO APPEAL

A VAN NIEKERK AJ

[1] This is an application for leave to appeal against a judgment delivered by this court on 28 August 2013, when the court dismissed, with costs, three claims by the plaintiff against the defendants. The claims related respectively to the alleged unlawful arrest of the applicant, and the loss of income, stock and cash.

[2] The application for leave to appeal was filed five days late. The applicant has sought condonation by way of an application filed on 14 May 2014, the day before the application was scheduled to be heard (The application was set down

ultimately to be heard on 20 May 2104.) In response to the application, the defendants field a notice in terms of Rule 30 A, contending that the application for condonation was served on the respondent only on 19 May 2014 and that the application had not been set down for hearing. In so far as the merits of the application for condonation are concerned, the applicant's attorney avers that after receipt of the judgment, he sought instructions from the applicant who at that stage had not settled counsel's outstanding account. A letter to that effect was addressed to the applicant on 19 September 2013. Instructions were thereafter forthcoming, and the application for leave to appeal was filed on 27 September 2013, being five days late.

[3] I do not intend to deal at any length with the respondent's Rule 30 A notice. The history of this matter post the delivery of judgment appears to be unclear. It was apparently set down for hearing on 13 November 2013 before the Deputy Judge President. On that date, the application was postponed *sine die*, and thereafter enrolled, as I have indicated, on 20 May 2014. (I was advised of the existence of the application only during April 2014.) The applicant could proffer no explanation for the service of the application for condonation only on 19 May 2014. However, the merits of the application were fully canvassed during argument, and I do not intend to further delay this matter by upholding technical points, only for the sake of technicality. In my view, the period of the delay is not significant, and the explanation for the delay not unreasonable. On this basis, condonation for the late filing of the main application stands to be granted.

[4] The facts of the applicant's claim are set out in the judgment, and I do not intend to repeat them here. In essence, the applicant contends that in so far as the court found that the respondent had established a reasonable suspicion that the applicant was guilty of an offence, the court erred to the extent that Zulu testified that a member of the liquor board ought to have accompanied the police on a planned raid, and that the information to confirm the truthfulness of the suspicion was readily available. This submission overlooks the evidence of Nkahle, the arresting officer, who testified that both he and Baloyi, the officer who

accompanied him, had been appointed as inspectors in terms of the Liquor Act and had received training in that regard. It also overlooks the evidence to the effect that the basis of the suspicion formed by Baloyi was the applicant's inability to explain how he had acquired the permit, and the applicant's inexplicable failure to put the explanation that he says he gave to Nkahle in cross-examination.

[5] In so far as the applicant submits that the court erred by failing to establish that the arresting officer exercised a proper discretion in addition after forming a reasonable suspicion that the permit proffered by the applicant was false, this submission overlooks the specific finding made in paragraph 22 of the judgment that Nkahle has exercised his discretion rationally. Whether or not Nkahle had done so is a matter to be determined from the evidence – in essence, the court is not entitled to interfere unless the decision fell outside of the band of decisions to which a reasonable decision-maker could come on the available material. As *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) makes clear, the exercise of the discretion may not be *mala fide*, or from ulterior motives, or in circumstances where the decision maker has failed to apply his or her mind to the matter. The evidence presented on behalf of the respondent in the present instance clearly satisfied these requirements.

[6] I did not understand applicant's counsel to seek to extend this application to the court's findings regarding the applicant's claims for losses he alleges to have suffered consequent on his arrest. Submissions were made in the present instance without the benefit of a transcribed record. The record will confirm the poor quality of the applicant's evidence, which was vague and often riddled with contradictions. The applicant's failure to call his wife, who was present in court and a key witness to his version of events, is similarly inexplicable.

[7] For these reasons, I am not persuaded that another court might reasonably come to a different conclusion. The application stands to be dismissed.

I make the following order:

1. Leave to appeal is refused, with costs.

ANDRE VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT