IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

10 / 10 / 2014
DATE

SIGNATURE

CASE NUMBER: 25137/10

10/10/2014

INA VAN DER MERWE	FIRST APPLICANT
BENJAMIN VAN DER MERWE	SECOND APPLICANT
AND	
MINISTER OF SAFETY AND SECURITY	RESPONDENT

JUDGMENT

MAVUNDLA J,

[1] This Court on the 30 October 2013 dismissed with costs the claims of the first and second applicants against the respondent.

[2] The applicant now seeks leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of this Division against the whole of the judgment and order referred to herein above.

[3] The application for leave to appeal was heard on the 14th July 2014. The reason for the delay in hearing the application was as a result of the unavailability of either one or the other counsel for the respective parties on the dates on which this court was available. This was compounded by the fact that the Court itself was doing some official duties outside Pretoria at one or other stage. When the matter was eventually heard, the aspect of the delay in bringing the application and condonation was not an issue.

[4] The action arose from the arrest of the first applicant in Kolonnade Shopping Centre mall in Pretoria on the Sunday of the 7th December 2008 and her subsequent incarceration for 27 hours when charges were withdrawn against her.

[5] The grounds upon which the application for leave to appeal is premised are, *inter alia*, that the court erred in fact and law by making incorrect factual findings, and adopting the incorrect approach to resolve the factual disputes between the parties, in that, whereas the arrest and detention of the first applicant was common cause, therefore the onus rested with the respondent to prove the lawfulness thereof. In resolving the dispute between respective parties' versions, the court erred in not adopting the test propounded in *Stellenbosch Framers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA (SCA) and finds that on the probabilities the applicant's version should be accepted, instead of accepting that of the arresting officer.

[6] It was further submitted on behalf of the applicants that, due to the prevalence of matters of this nature, that there is a need to have clarity with regard to the question of reasonable suspicion and the steps needed to be taken by the arresting officer before effecting an arrest.

[7] It is trite that the *onus* of proving that the arrest was lawful rested on the defendant *Mhaga v Minister of Safety and Security*[1]*; Lombo v African National Congress; Minister of Law and Order v Dempsey.*[2] *Lombo v African National Congress.*[3]

[8] During the trial the respondent called the arresting officer as its witness. The first applicant and her husband the second applicant testified. It is common cause that the second applicant was not present at the time of the arrest and therefore his evidence was not material to the critical question of the lawfulness or otherwise of the arrest. The court evaluated the evidence of both the arresting officer and the first applicant. This court found the first applicant, *inter alia*, not to be an impressive witness and on preponderance of probabilities rejected her version in regard to the circumstances that led to her arrest.

[9] The court accepted the version of the arresting officer and found that on preponderance of probabilities he had reasonable suspicion that a schedule I offence had been committed warranting the arrest of the first applicant. In doing so the Court had regard to, *inter alia*, the following authorities:

9.1 In the matter of R v Reabow[4] Plasket J held that: "[8]...In order for a suspicion to be reasonable, it must be objectively sustainable. The suspicion must be of such a nature that a reasonable person would entertain it; in forming such suspicion, a peace officer is required to act 'as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis' the suspicion 'must be based upon solid grounds' because if it is not 'it will be flighty or arbitrary, and not a reasonable suspicion'; and, in forming a reasonable suspicion, a peace officer must 'keep an open mind and take notice of every relevant circumstance pointing either to innocence or guilt.";[5]

9.2 In *Mhaga v Minister of Safety and Security (supra)* it was held that an arrest without a warrant is lawful if the arresting officer at the time of the arrest had a

[1] 2001 (2) ALL SA 534.
[2] *1988 (3) SA 19 (AD) at 36A-B.*
[3] 2002 (5) SA 668 (SCA) at 680G-H.
[4] 2007 (2) SACR 292 (E) at 297. See also *Nevhutalu and Others v Minister of Police and Another1986* (4) SA 822 (V) at 830I - 832B and *Farisani v Minister of Justice and Others*1987 (2) SA 321 (V) at 325D.
[5] [2001] 2 ALL SA 534 (Tk) at 535b-c.

reasonable belief that the plaintiff had committed a schedule 1 offence. The arrest remains lawful if circumstances exist demanding the arrest to bring the arrested person to court, even if his appearance at court could have been secured by means of a subpoena.

[10] This court found that the arresting officer had a reasonable suspicion that the first applicant had committed an offence of fraud which is a schedule 1 offence in terms of the provisions of the Criminal Procedure Act 51 of 1977.

[11] It is trite that in an application for leave to appeal the question to be asked is whether there are reasonable prospects that another court might arrive at a different conclusion.

[12] It needs mentioning that once the police officer has formed a reasonable suspicion for the arrest, it was held in *Ramakulukusha v Commander, Venda National Defence Force*[6] that it was settled law that the court would be unable to interfere with a due and honest exercise of discretion, even if it was considered inequitable or wrong.[7]

[13] It is trite that a court of appeal will not lightly interfere with credibility finding of a trial court because the latter court is stepped in the atmosphere of the court where the evidence is adduced and can see and observe the demeanour of the witnesses. The court found the first applicant to be an unimpressive witness and proceeded to reject her evidence in preference of the arresting officer, with regard to the events leading to her arrest.

[14] This court was urged on behalf of the applicants to grant leave to appeal to the Supreme Court of Appeal so that the issue of the exercise of the discretion by the arresting officer could be further clarified, in particular the need to do much more investigation before effecting an arrest. I am not persuaded by this submission

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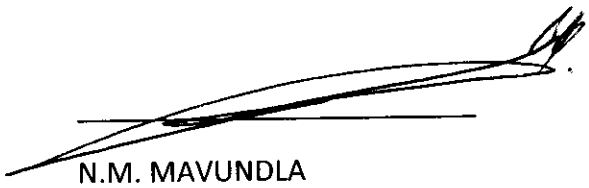
[6] 1989 (2) SA 813 (V).
[7] See also *Nevhutalu and Others v Minister of Police and Another1986* (4) SA 822 (V) at 830I - 832B and *Farisani v Minister of Justice and Others1987* (2) SA 321 (V) at 325D.

because the Supreme Court has in various matters unpacked the Constitution and the Bill of Rights as well as the issue of reasonable suspicion. Leave to appeal, in my view, should not be granted for mere academic purposes.

[15] Regard to the authorities cited herein above, I am of the view that there is no reasonable prospect that another court would conclude differently than this court has already done and therefore the application stands to be dismissed with costs.

[16] In the premise the application for leave to appeal is dismissed with costs.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 10 / 1 0 / 2013

APPLICANNTS' ATT : GERHARD BOTHA & PARTNERS INC.

PAPPLICANT' S ADV : ADV. A. VORSTER

RESPONDENT'S ATT : STATE ATTORNEYS (PRETORIA)

RESPONDENT'S : ADV. MTSHWENI