



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date of hearing: 01 February 2022

CASE NO: 47599/2016

In the matter between:

**FRANKLIN D PENNINGTON
GAIL JACKSON PENNINGTON**

**First Plaintiff
Second Plaintiff**

And

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT
OF THE REPUBLIC OF SOUTH AFRICA**

First Defendant

**THE MINISTER OF POLICE OF
THE REPUBLIC OF SOUTH AFRICA**

Second Defendant

**THE MINISTER OF HOME AFFAIRS OF
THE REPUBLIC OF SOUTH AFRICA**

Third Defendant

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

NYATHI J

A. INTRODUCTION

[1] Having considered the reasons and supplementary reasons for the orders dismissing the Applicants' (Defendants') special plea which were handed down on 24 January 2022 and on the 26 January 2022 respectively, Applicants are seeking leave to appeal the said orders to the Supreme Court of Appeal rather than the full bench of this division.

[2] The Applicants are aggrieved at the dismissal of their special pleas of prescription. They contend that said pleas should have prevailed, resulting in a substantial portion of Plaintiffs action falling away.

[3] Applicants contend in the first instance that the court erred by not distinguishing between First and Second Plaintiffs. They submit that the alleged

unlawful arrest of the First Plaintiff occurred on or before 6 September 1994 when First Plaintiff was allegedly arrested for the third time. This then terminated on 2 June 1997 when judgment was handed down. This accordingly did not impact upon the Second Plaintiff who therefore cannot have a claim in respect of these actions.

[4] Applicants state further that Second Plaintiff seem to base her claim on a sort of a maintenance claim which is not supported in law. A claim is only available where a breadwinner is unlawfully killed.

[5] The second basis of the application is premised on alleged misjoinder. Applicants allege that Plaintiffs rely on the actions of the National Prosecution Authority which had undertaken to make the reconstructed court record available. Their non-joinder is thus crucial for the survival of the cause of action or otherwise.

[6] Applicants' third basis for assailing the court's findings are that the court erred in accepting the Plaintiff's reliance on cumulative liability which is akin to different causes of action. Each of the delicts has a lifespan of its own and action ought to have been instituted before its period of prescription ran out.

[7] It was thus submitted on behalf of the Applicants that they have prospects of success on appeal in that the SCA may come to a different conclusion to this court's findings.

[8] On behalf of the Respondents, reference was again made to Section 179(6) of the Constitution of the Republic of South Africa which provides as follows:

“The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.”

[9] Further reference was made to Section 33(1) of the National Prosecuting Authority Act 33 of 1998, which provides as follows:

“The Minister shall, for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act.”

[10] The Respondents accordingly opposed the application for leave to appeal. It was submitted on their behalf that there are no prospects of success on appeal.

[11] The Respondents made a conditional notice to be granted leave to cross-appeal on the issue of costs only. The matter of costs is inextricably tied up with the outcome of the envisaged appeal if leave to pursue same is granted. The general rule regarding matters of costs is applicable, namely, the successful party is entitled to their costs.

[12] In considering whether to grant or refuse leave to appeal its judgment or order, courts are guided by section 17 of the Superior Courts Act 10 of 2013. The section provides as follows:

“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 prospect of success; or

(ii) There are some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) ...”

[13] In *S v Smith 2012 (1) SACR 567 (SCA)* Plaskett AJA stated that the test of reasonable prospects of success postulates 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.

[14] Having considered the submissions made on behalf of the parties and having regard to the involved factual issues raised, I am of the view that the appeal is arguable and has reasonable prospects of success.

[15] I am further of the view that this matter should enjoy the attention of the Supreme Court of Appeal.

[16] I therefore make the following order:

16.1 The Applicants (Defendants) are granted leave to appeal to the Supreme Court of Appeal.

16.2 The costs of this application, including the hearing on the application for leave to appeal, shall be costs in the appeal.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of judgment on leave to appeal application: 03 February 2022

On behalf of the Applicants / Defendants: Adv M.M.W. Van Zyl SC
With : Adv C.G.V.O. Sevenster

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