REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2021/7425

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

04/03/2025 [redacted]
DATE SIGNATURE

In the matter between:

Tebogo Edwin Nooe **Plaintiff/Respondent**

And

The Minister of Police **1st Defendant/Applicant**
The DPP **2nd Defendant**

This Judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto the caselines system 04 March 2025

Thupaatlase AJ

Introduction

[1] The plaintiff instituted action against the first and second defendants for damages arising from alleged unlawful arrest, detention, and malicious prosecution.

[2] The plaintiff's summons was met with a special plea alleging that the plaintiff had failed to comply with the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act), which require Notice of the contemplated action to be served within a prescribed period of six (6) months from the date on which the debt became due.

[3] Initially, the special plea was raised by both the first and second defendant, however the second defendant subsequently abandoned the special plea, conceding that Notice was served within the prescribed period.

[4] The question for adjudication before was when did the debt became due in terms of Section 3(2) of the Act where the claim was one for unlawful arrest and detention. The first defendant contended that the debt had become due on the day the plaintiff was arrested, whereas the plaintiff argued that the debt only became due after the charges against him had been withdrawn.

[5] The court concluded that at the time of the arrest and detention, the plaintiff did not have all the facts giving rise to the debt. The arrest and detention constituted a continuous act and no personal injury had been done to the accused until the prosecution, which was determined by his discharge, therefore the debt arose at discharge. It is this finding that the plaintiff is seeking leave to appeal against.

Grounds of Appeal

[6] The first defendant/applicant is seeking leave to appeal to the Supreme Court of Appeal alternatively to the full court of the South Gauteng High Court against the whole my judgment and order.

[7] The first defendant/applicant submitted a comprehensive ground of appeal alleging that this court erred in fact and or law when it made the following rulings and order:

> 1.that the Plaintiff debt against the first defendant arose on the 26/08/2020 being the date in which the criminal case against the plaintiff was withdrawn.

2. that the notices in terms of section 3(1) of Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (the Act) sent to the provincial Commissioner of Police on 26/10/2020 and the Minister of Police on 26/10/2020 were sent within 6 months from date that the criminal case against the plaintiff was withdrawn and therefore that the Notice in terms of section 3(1) (a) was timeous and therefore no need for a condonation application despite the fact that the applicant had raised the special plea for non-compliance with section 3 of the Act.

3. It was submitted by the first defendant that the court should have held that, the debt against the first defendant arose on 16/03/2020 being the date in which the plaintiff was arrested and detained, therefore the Notices in terms of section 3(1) (a) that were sent respectively on 26/10/2020 and 10/11/2020 were not sent timeously.

4. It is the argument of the first defendant/applicant that the court should have concluded that the plaintiff was barred from bringing the legal proceedings against the first defendant/applicant as his action had prescribed.

5. the court erred in fact and or law when dismissing the first defendant's special and upheld the plaintiff's argument which was raised from the bar, that the debt against the first defendant arose on the day on which the criminal case against the plaintiff was withdrawn.

5. in terms of section 3(1) (a) of the Act reads as follows: ' a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as has having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of State wilfully prevented him or her of it from acquiring such knowledge.'

6.in terms of section 3 (3) (b) of the Act, a debt referred to in section 2 (2) (a) must be regarded as having become due on the fixed date.

[8] As can be discerned from the grounds above, the first defendant/applicant submitted comprehensive grounds showing how I erred in law and or fact in my finding. The grounds were subsequently followed by another lengthy grounds referred as supplementary grounds. In the main the grounds amounts to whether the court was correct in holding that the Notice as envisaged by Section 3 of the Act was served

within the prescribed period of six months which meant that there was no need for the plaintiff to apply for condonation.

The Law

[9] The approach that should guide this court in arriving at a decision whether to grant leave to appeal or not was stated succinctly in *Mount Chevaux Trust v Tina Goosen & Others* 2014 JDR 2325 LCC at para [6] that 'it is clear that the threshold for granting leave to appeal against 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 may 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 of certainty that another court will differ from the court whose judgment is sought to be appealed against'.

[17] There is a clear recognition of the heightened threshold in cases of application for leave in terms of the new statutory regime. In *Dexgroup (Pty) Ltd v Trusco Group Intl (Pty) Ltd* 2013 (6) SA 520 (SCA) at para [24] the court held 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 be deployed by refusing leave to appeal'.

[18] In the case of *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021] the SCA gave an imprimatur to that position by stating that: ' Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice... I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly mean that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave should be granted...The test of reasonable prospects 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist'.

[10] It is clear that the test whether the requirement of section 17(1) (a) of the Act is stringent. In the case of *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016) the court at para [16] that 'Once again it is necessary to say that leave, especially to this court, must not be granted unless there is truly a reasonable

prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 make it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or the there is some other compelling reason why it should be heard'.

[11] At para [17] of the judgment the court continued to set the test as follows: ' An applicant for leave to appeal must convince the court on proper grounds that there is reasonable or realistic chance of success on appeal. A mere possibility of success, an arguable case of one that is not hopeless, is not enough. There must be sound, rational basis to conclude reasonable prospect of success on appeal'.

Analysis

[12] The above legal principles emphasise that the requirement for a successful leave to appeal is more than a possibility that another court *might* come to a different conclusion. The test is whether there is reasonable prospect of success that another court *would* come to a different conclusion.

[13] The question before the court was when the debt became due in terms of Section 3(2) of the Act where the claim was one for unlawful arrest and detention. Was it at the time of the arrest or when the charges against the plaintiff were eventually withdrawn. The first defendant contended that the debt had become due on the day the plaintiff was arrested, whereas the plaintiff argued that the debt only became due after the charges against him had been withdrawn.

[14] The first defendant based her argument on an unreported judgment of this division (*Mataboge and Another v Minister of Police and Another* (16/17654) delivered on 25/08/2017) and urged the court to follow that decision. *Mataboge* refers to the judgment of Spilg J, in the case of *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) and contends that the conclusion supports the argument that the debt arises at the time of the arrest. I respectfully differed with this contention and held the view that a proper reading of the *Makhwelo* judgment did not support the conclusion reached in *Mataboge*.

[15] In distinguishing the two judgments and thereby answering the question as to when does the debt arise, the court had to differentiate and identify the plaintiff's claim. I classified a claim for wrongful deprivation of liberty and arrest as being claim based

on *Actio iniuriarum.* I found this distinction to be important in that it was under the *Aquilian* action that *Mataboge* appeared to have relied in order to conclude that the debt became due at the time of arrest, however in the *Actio iniuriarum*, the debt became due when the charges were withdrawn against the plaintiff.

[16] Also, precedent suggests that the objective knowledge of unlawfulness as a result of lack of reasonable suspicion on the part of the arresting officer, who arrests without a warrant of arrest, only manifests after acquittal or withdrawal of charges. This is so because during the trial, the arresting officer can still justify his or her action and show that he acted reasonably. This justification becomes relevant during trial.

[17] The court also held that the object and purpose of the Act was to alert the organ of State to a contemplated action against it and given its extensive activities, large staff and so forth, the rationale for the enactment would be nugatory if it were to be expected that whenever police effect an arrest, then immediately a notice must be given. The courts would also be overwhelmed with condonation applications. This will burden the already heavy court rolls.

[18] The court concluded that at the time of the arrest and detention, the plaintiff did not have all the facts giving rise to the debt. The arrest and detention constituted a continuous act and no personal injury had been done to the accused until the prosecution, which was determined by his discharge, therefore the debt arising at discharge. The court followed the decision of *Makhwelo.*

[19] I have considered the submissions by both parties, and I am satisfied that given the conflicting interpretation of the legal position and also taken into account the impact of the section 3 Notice in the overall litigation against Organs of State this is a compelling ground to grant the application for leave to appeal as envisaged by section 17(1)(b) of the Act.

[20] I am also persuaded that the issues raised by the first defendant/ applicant in its 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 reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The

appeal, therefore, in my view, does have a reasonable prospect of success as contemplated by section 17(1) (b) of the Act.

Order

In the circumstances, the following order is made:

(1) The first defendant/applicant's application for leave to appeal succeeds.

(2) The first defendant/ applicant is granted leave to appeal to the Full Court of this Division.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

THUPAATLASE AJ

ACTING JUDGE

GAUTENG LOCAL DIVISION JOHANNESBURG

Date of Hearing: 20 September 2024

Judgment Delivered: 04 March 2025.

For the Plaintiff/ Respondent: Adv. L Matsiela

Instructed by: Dudula Attorneys Incorporated

For the 1st Defendant/Applicant: Adv. L Liphoto

Instructed by: State Attorney: Johannesburg