



**HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION,
JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED/NO

21.01.2025

DATE

SIGNATURE

Case No.: 50725/2021

In the matter between:

DLAMINI AFRICA PHUMLANI

First Plaintiff/First Applicant

DLAMINI KHULEKANI

Second Plaintiff/Second Applicant

NGWENYA MIKE

Third Plaintiff/Third Applicant

and

MINISTER OF POLICE

Defendant / Respondent

**JUDGMENT
APPLICATION FOR LEAVE TO APPEAL**

NHARMURAVATE AJ:

Leave to appeal – applicants have an onus to satisfy the test-application refused

INTRODUCTION

- [1] The Applicants which are the Plaintiffs in the main action seek leave to appeal the entire judgement as delivered citing various grounds as set out in their notice of leave to appeal.
- [2] The Respondent which is the Defendant in the main application has opposed the leave sought in that the Applicants have not demonstrated good prospects of success in line with the provisions of section 17 of the Superior Courts Act 10 of 2013 as amended (the Act).
- [3] The parties herein shall remain as cited in main application for the ease of reference.

GROUND FOR LEAVE TO APPEAL

- [4] The Plaintiffs have set their grounds for leave to appeal and argue that the judgement was in error because no sufficient consideration was made on the lawfulness of the arrest and the resultant detention. The charges were withdrawn therefore there was no case for the Plaintiffs to answer. Alternatively the judgement failed to take into account the provisions of section 50 (1)(c)(i) of the Criminal Procedure Act 51 of 1977 in the resultant the detention after the charges were withdrawn by the complainant was not lawful. The Plaintiff further raised a ground and argued that the court erred in accepting the evidence on the charges of kidnapping and intimidation in the absence of any documentary proof in the docket. Therefore by detaining the Plaintiffs the Defendants official Warrant Officer Dlamini exercised his discretion to arrest the Plaintiffs irrationally.
- [5] The Defendants are opposed to the application simply because the application sought has no merit and it does not meet the standard set by section 17 of the Act as amended. The Defendants argue that even if the complainant withdrew the charges under the circumstances, the Plaintiffs bail could not be granted by

Warrant Officer Dlamini the discretion in that regard was vested with prosecution. Further crucial evidence was led which the Plaintiffs could not rebut therefore another court will not come to a different finding simply because the Plaintiffs did assault, kidnap and intimidate the complainant as per the testimony of the Defendants witnesses. The charges laid on the Plaintiffs precluded the police from granting bail or releasing them.

[6] In terms of section 6 of the Criminal Procedure Act powers to withdraw charges under the charge/s laid to the Plaintiffs are bestowed to an Attorney General or any person conducting a prosecution at the instance of the State or any person conducting a prosecution under the terms of Section 8. bestows power to withdraw a charge. This is the operative law in this regard and Warrant Officer Dlamini did give an explanation that once he had detained the Plaintiffs he could not decide upon himself to release them in light of the charges. He even went further to make a telephone call to the prosecutor involved in that district to find out if indeed he could proceed in releasing the Plaintiffs under such circumstances which he did by reading the contents of the docket which included the complainant's statement to the prosecutor. This was corroborated and could not be refuted by the Plaintiffs. It is the prosecutor who advised him that there was no police bail under such circumstances and he could not release the Plaintiffs except for presenting before the court despite the withdrawal made.

[7] It is my view that another court will not come to a different finding, simply because, police bail alternatively a release could not be granted to the Plaintiffs who were charged with assault GBH. It also does not assist the Plaintiffs that they could make out a case for not assaulting the complainant. Section 17 of the Superior Courts Act 10 of 2013 has raised the threshold for the granting of leave to appeal, leave may now only be granted if there is/are reasonable prospects that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. The party applying for leave to

appeal must demonstrate a sound, rational basis that there are prospects of success on appeal¹.

- [8] In *MEC Health, Eastern Cape v Mkhitha*, the Supreme Court of Appeal held: *"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes 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 there is some other compelling reason why it should be heard.*
- [9] *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*
- [10] I am not convinced that another court will come to a different finding.

Conclusion

- [11] Therefore the following order is made as follows:

1. The Plaintiffs application for leave to appeal is refused with costs on scale "B".

¹ In *Four Wheel Drive v Rattan N.O.* 2019 (3) SA 451 (SCA), the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring): *"[34] There is a further principle that the court a quo seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'...*



**NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

For the Plaintiff: Adv. Muller

Instructed by : Jean Keyser Attorneys Inc.

For the Defendant : Adv. SF Sibisi

Instructed by: State Attorney Johannesburg

Date of Judgment: 21 January 2025