IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16/06499

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: Yes

Date: 17/04/ 2019

Signature:

In the matter between:

PAKAMA TSHIKILA	First Plaintiff
ZODWA MALINGA	Second Plaintiff
FLOYD MALINGA	Third Plaintiff
IDA MALINGA	Fourth Plaintiff
CEKISO GEMIKILE	Fifth Plaintiff

and

THE MINISTER OF POLICE Defendant

J U D G M E N T (LEAVE TO APPEAL)

MAIER-FRAWLEY AJ

1. The first-to-fifth plaintiffs apply for leave to appeal against the whole of the judgment and order delivered by the trial court on 20 December 2017. The application for leave to appeal is opposed by the defendant.

2. The judgment found that the arrest and detention that followed thereupon was lawful, thereby dismissing the plaintiff's claims with costs.

3. The judgment is criticized on grounds that the trial court erred in accepting the evidence of Constable Makaleng as credible and sustainable in concluding that objectively, he had reasonable grounds for suspecting that the plaintiffs had committed a schedule 1 offence prior to effecting the arrests.

4. When deciding whether to grant leave to appeal, the Court must determine whether there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words the appeal would have a reasonable prospect of success.[1]

The use of the word 'would' in section 17 (1)(a)(i) of the Superior Courts Act has been held to denote *'a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*[2] Such approach has been held to be correct in this division in *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others.*[3] To this may be added, further cautionary notes sounded by the Supreme Court of Appeal in dealing with

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[1] See Section 17(1)(a) of the Superior Courts Act 10 of 2013.
[2] *The Mont Chevaux Trust (IT 2012/28) and Tina Goosen and 18 Others* Case No. LCC 14R/2004, at para [6]
[3] (19577/09) [2016) ZAGPPHC 489 (24 June 2016) para [25], a decision of the Full Court, which is binding upon me.

appeals: In *S v Smith*,[4] it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be 'a sound, rational basis for the conclusion that there are prospects of success on appeal.' In *Dexgroup (Pty) Ltd v Trusco Group*,[5] the SCA cautioned 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. ...' Later, in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*[6] the Court applied the concept of 'reasonable prospects of success' as follows:

> '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.
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> 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.'

5. The grounds upon which the applicants seek leave to appeal are set out in the application for leave to appeal and will not be repeated herein. I do not intend to deal with the grounds *ad seriatim*, because there is a measure of overlapping between some of the grounds, but shall briefly deal with those grounds which underpin the essential complaints against the judgment. These can be summarised as follows:

   5.1. The trial court erred in concluding that the objective evidence relied on by Const. Makaleng supported a reasonable suspicion that the plaintiff's acted in common purpose in the suspected commission of the crime of kidnapping;

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[4] 2012 (1) SACR 567 (SCA) para 7.
[5] [2013] ZASCA 120 (20 September 2013).
[6] [2016] JOL 36940 (SCA) at paras 16 – 17.

5.2. To the extent that the trial court 'drew inferences' from the statements under oath of the complainant and other witnesses in assessing whether or not the individual arrests were founded on a reasonable suspicion that all the plaintiffs had been implicated in the crime of kidnapping, as viewed objectively, it erred, in that it resulted in the court taking into account inadmissible hearsay evidence ('hearsay point');

5.3. The trial court erred in employing the general approach to the award of costs, namely, that costs follow the result, in circumstances where the plaintiffs ought to have been absolved from paying costs, seeing as the case involved a challenge to the legality of the exercise of state power.

6. The hearsay point was abandoned by counsel appearing on behalf of the plaintiffs during the course of oral argument. Paradoxically, counsel for the plaintiffs himself argued that in these type of matters, the court is tasked with assessing whether the police officer could himself objectively have formed a reasonable suspicion that a schedule 1 offence had been committed, and the only way to gage how the police officer did so, is by reference to the affidavits obtained from the complainant and other witnesses – that is, from information at his disposal prior to the arrests.

Common purpose argument

7. The complaint is directed against the statement in paragraph 39 of the judgment where the trial court *inter alia,* stated that '...those who did not themselves physically participate in the assaults or the locking of the gate in order to prevent the complainant and her ensemble from leaving must have been aware of the commission thereof, since they were alleged to have been present at the scene of the altercation...'

8. Counsel for the plaintiffs submitted that the doctrine of common purpose does not extend to persons by reason of their mere presence in the vicinity of the commission

of the crime. Invocation of the doctrine requires evidence that demonstrates that each of the persons had an intent to commit the crime, even though they did not physically perform the act themselves, and intention *per se* could never be imputed to them under the doctrine of common purpose.

9. The above quoted statement in the judgment appears to have been scrutinised in isolation – it must, however, be read contextually with the remaining contents of para 39 of the judgment, including footnote 14 thereto and the judgment as a whole.

10. The prerequisites for liability in a case based on the doctrine of common purpose are set out in *S v Mgedezi* 1989 (1) SA 687 (A) (referred to in fn 14 of the judgment) in the following terms:

' (i) The accused must have been present at the scene where violence was committed.

(ii) He or she must have been aware of the crime committed.

(iii) He or she must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others.'

11. The essence of the doctrine of common purpose is described by Snyman[7] in the following terms:

"... if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others."

12. As was succinctly put by Molahlehi J in *Sithole and Another v S* (A777/15) [2017] ZAGPPHC 169 (20 February 2017), para [24][8], 'It is apparent from the authorities that liability in terms of the doctrine of common purpose arises where the participants agree or associate together with others to commit a particular crime with the requisite *mens rea.* The

[7] Snyman *Criminal Law*, 4th edition, 261.
[8] Ranchod J concurring.

basis of common purpose can thus be by way of prior agreement which may be express or implied. It may also be by way association between the co-perpetrators. In general, active association may be evidenced by conduct of the co-perpetrators. It is not necessary to show that the participation of the co-perpetrators was causally connected to the consequent crimes.[9] The other principle governing common purpose is that it is not necessary for the prosecutor to prove beyond reasonable doubt that each of the co-perpetrators directly and/ or actively participated in the unlawful conduct. Once the element of fault has been satisfied, then the conduct of the co-perpetrator of the crime is attributed to the other participants. In other words what the prosecutor needs to establish is that one of the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants.[10]'

13. In *S v Thebus* 2003 (2) SACR319 (CC) the Constitutional Court in dealing with the doctrine of common purpose held that:

"If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she had intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue."

14. In para 39 of the judgment, the court assessed the salient aspects of the evidence at Const. Makaleng's disposal preceding the arrest. To that may be added, that on the totality of the evidence considered by the court, the *prima facie* facts at Const.

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[9] See *S v Setatso* 1998 (1) SA 868 at 895. This judgment confined those decisions that overruled the cases that had held that the doctrine of common purpose required causal connection between the act of the accused and the consequent death to be shown.

[10] See: *S v Leroux and Others* 2010 (2) SARC 11 (SCA) where the court found on the authority of S v Mgedezi 1989 (1) SA 687 that the conduct of 'the individual accused should be individually considered with the view to determining whether there is sufficient basis for holding a particular accused person is liable on the ground of active participation in the achievement of a common purpose that developed at the scene."

Makaleng's disposal revealed that the whilst the third plaintiff had physically seized the keys from the person in control thereof at the premises and had thereafter locked the basement gate at the one and only exit point in the basement garage, and the first and third plaintiffs had made the further threats in relation to the complainant and her ensemble (who had been locked in and thereby forcibly detained against their will in the basement) to the effect that they would not be able to leave the basement alive unless the electricity was restored, the evidence also pointed to the other plaintiffs (who were present and who had acquiesced in the forced detention and deprivation of freedom of movement) performing their own act of association therewith, as discussed in para 39 of the judgment. All the plaintiffs were, on the evidence of the complainant and other witnesses, aggressively confronting and questioning the complainant and her ensemble whist being forcibly held captive, with their freedom of movement curtailed, against their will. They did nothing to prevent this from happening or continuing, including the infliction of further physical attacks upon the complainant and her ensemble by one or the other of the plaintiffs, this under the threat that no-one (in reference to the complainant and her ensemble) would leave the locked garage unless the demand for re-instatement of the electricity was adhered to. It was reasonable for Const. Makaleng to suspect that they were all involved in one or other respect in the commission of the offence. Whether each of the plaintiffs in fact subjectively foresaw the possibility of the criminal result ensuing in relation to the crime of kidnapping, whilst nonetheless associating him or herself therewith, reckless as to whether the result was to ensue, was something that had to be proven at a trial in due course beyond a reasonable doubt.

15. Given that each of the plaintiffs were (i) present at the scene where the alleged crime was committed; (ii) aware of the forced locking up and deprivation of freedom of movement of the victims of the alleged crime, which was, in the context and circumstances of the matter, unlawful; (iii) present when the threat was levied that the complainant and her ensemble would not leave the garage and (iv) that each plaintiff

manifested his or her sharing of a common purpose by himself or herself performing some act of association with the conduct of the others in allowing the forced lock-up, it would have been reasonable for Constable Makaleng to form a suspicion that each such plaintiff must have foreseen the possibility of the criminal result (unlawful deprivation of freedom against the will of the victims) and nonetheless actively associated him/herself therewith, reckless as to whether the result was to ensue.

16. I am accordingly not persuaded with any measure of certainty that another court would find merit in the arguments advanced by the applicants in this regard.

Costs argument

17. Counsel for the plaintiffs argued that where parties challenge the lawfulness of their arrest and detention, the general approach that costs follow the result ought to be departed from, for it not, it would have 'a chilling effect on persons who hold the State to account for an unlawful arrest' to have to be burdened with a costs order.

18. The argument is fallacious and unsustainable. The argument presupposes that all civil claims pursued against the Minister of Police for unlawful arrest and detention are valid or meritorious. It also advocates an approach whereby plaintiffs are absolved from payment of all costs associated with the litigation, irrespective of whether or not the plaintiffs succeed in establishing their claim, merely by reason of the fact that a legal challenge is brought. The argument further seeks to override and denigrate the court's discretion in relation to costs, which ultimately turns on a question of fairness to *both* sides, taking into account the basic principle that the successful party who was put to the expense of opposition, which was successful, ought generally to be recompensed therefore, that is, in the absence of recognised exceptions to the general rule, of which none were found to be present in the matter under consideration.

19. No circumstances were either proffered at the trial or found to exist, such as would warrant a departure from the general rule that costs should follow the result.

20. I am accordingly not persuaded that I erred in determining the matter on the basis set out in the main judgment, much less am I persuaded that a different court would find merit in the plaintiffs' submissions.

21. I accordingly make the following order:

ORDER:

21.1. The application for leave to appeal by the applicants is dismissed with costs.

Frawley

MAIER-FRAWLEY AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing:	26 March 2019
Judgment delivered	23 April 2019

APPEARANCES:

Counsel for Plaintiffs:	Adv. M. Courtenay
Attorneys for Plaintiffs:	Dudula Incorporated .
Counsel for Defendant:	Adv. NM Mtsweni
Attorneys for Defendant:	State Attorney.