

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG, PRETORIA)**

Case No: 1552/05

Date heard: 18/03/2009

Date of judgment: 19/03/2009

NOT REPORTABLE

**In the matter between:**

MINISTER OF SAFETY AND SECURITY

APPLICANT

and

JACO SCOTT

1<sup>ST</sup> RESPONDENT

SCOTTCO (PTY) LTD

2<sup>ND</sup> RESPONDENT

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**JUDGMENT**

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**DU PLESSIS J:**

I gave judgment in this matter on 15 June 2007. Some eighteen months later, in December 2008 the defendant filed an application for leave to appeal. That application and an application to condone the late filing of the leave to appeal application are now before me.

Senior Superintendent Mudau deposed to the founding affidavit of the condonation application. She is a member of the SAPS attached to the provincial legal office. In the course of her employment she handled this matter on behalf of the defendant. In summary, her explanation for the delay in bringing the application for leave to appeal is that consecutive attorneys attached to the office of the State Attorney did not carry out instructions to pursue the application for leave to appeal. In addition, while she was on maternity leave, a senior officer of the SAPS had to deal with the matter in her absence. He too did not do his work. In cases involving government departments, one must bear in mind that one is dealing with huge organisations and that it is not always possible for them to adhere to time limits. An explanation that a delay of about 17 months was due to civil servants not doing their work is, however, not to be accepted lightly as an excuse. But the question whether condonation should be granted is one that must be answered after due consideration of the explanation for the delay and of the merit of the application for leave to appeal itself. I turn to consider the merit of the application for leave to appeal.

In the principal case the plaintiffs claimed damages arising from the alleged unlawful arrest of the first plaintiff. It was not in issue that Sergeant Rhamaphakela of the SAPS arrested the first plaintiff. The sergeant testified that he arrested the first plaintiff for being in possession of a firearm while under the influence of liquor. At the time of the arrest, however, that was not an offence.

The relevant offence was handling a firearm while under the influence of liquor. On Rhamaphakela's evidence, that this court accepted, the first plaintiff did not handle the firearm in his presence. It followed, this court held, that the defendant did not prove that the arrest was lawful.

This court rejected the first plaintiff's evidence. It nevertheless held that even if one has regard to the first plaintiff's rejected version, the arrest was still unlawful. On his version the first plaintiff also did not handle the firearm.

In the notice of application for leave to appeal the defendant contends that this court misdirected itself by basing its finding as to the lawfulness of the arrest on the plaintiff's rejected evidence. The contention is, with respect, based on an incorrect reading of the judgment. In the judgment, as I have pointed out above, the primary finding was based on the evidence presented by the defendant. It was then pointed out that even on the rejected version, the arrest was unlawful.

Mr Shakoane for the defendant argued that the arrest was lawful as there were sufficient grounds for Rhamaphakela reasonably to suspect that the first plaintiff had handled a firearm while under the influence of alcohol. The difficulty with the argument is that Rhamaphakela did not say that he had such a reasonable suspicion nor did he say that that is why he arrested the first plaintiff. Counsel's argument therefore raises the following question: Can an arrest be lawful if the arresting officer states that he arrested on an invalid ground, but

there are objective facts to show that another ground for arrest existed. That question was not debated before me during the trial. It is a question that, I believe should be debated and decided. There is in my view a reasonable prospect that a court of appeal may at least on that question find in favour of the defendant.

Having due regard to the inter-relationship between the defendants explanation for the delay to bring this application and the prospects on appeal, I do not think that this is a case where the doors of the court should be closed on the defendant's right to appeal.

The following order is made:

1. The defendant's late filing of the application for leave to appeal is condoned.
2. The defendant is ordered to pay the costs of the application for condonation.
3. Leave to appeal to the full bench of this division of the High Court is granted.
4. The costs of the application for leave to appeal shall be costs in the appeal.

B.R. du Plessis

Judge of the High Court

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