IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Not reportable
CASE NO. 1220/2019

In the matter between:

MALIBONGWE JEMSANA **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT

LAING J

[1] This is an application for leave to appeal against the judgment and order made on 15 May 2025. The matter pertains to an unsuccessful action for damages regarding the alleged unlawful arrest and detention of the applicant on 28 February 2018 in the district of Ngqeleni.

[2] The applicant set out numerous grounds upon which he based his application. These can be reduced to the following: (a) the court erred in its interpretation and application of section 13 (7) of the South African Police Act 68 of 1995; (b) the court erred in finding that the requirements of section 22 (*b*) of the Criminal Procedure Act 51 of 1977 (CPA) had been met; (c) the court erred in finding that the requirements of

section 40 (1) (*b*) and (*h*) of the CPA had been met; (d) the court erred in finding that the applicant was instructed by the police, after he had obtained bail, to place the dagga plants inside a bag and take them home; (e) regarding the alleged unlawful detention, the court erred in not applying the principles set out in *Zealand v Minister of Justice and Constitutional Development and Another*;[1] (f) the court erred in finding that Sgt Sisa Ntlatywa exercised his discretion correctly; and (g) the court erred in finding that the assault carried out on the applicant did not demonstrate the unlawfulness of his arrest.

[3] In terms of section 17 (1) of the Superior Courts Act 10 of 2013, a court may only give leave to appeal where the court is of the opinion that, inter alia, the appeal would have a reasonable prospect of success or there is some other reason why the appeal should be heard. The Supreme Court of Appeal remarked, in *MEC for Health, Eastern Cape v Mkhitha*,[2] that

'. . . 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.

. . . 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.'[3]

[4] Turning to the grounds of appeal in the present matter, it cannot be said that there was evidence of an intention on the part of the police to cordon off an area and to conduct searches without a warrant, as envisaged under section 13 (7) of the South African Police Act 68 of 1995. This is a drastic remedy. The testimonies of the witnesses provided no support for this, and the applicant's legal representative appeared to concede the point in argument.

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[1] 2008 (4) SA 458 (CC).
[2] 2016 JDR 2214 (SCA).
[3] At paragraphs [16] and [17].

[5] In relation to the requirements of section 22 (*b*) of the CPA, the applicant contended that Sgt Ntlatywa lacked reasonable grounds upon which to believe that a warrant would be issued and that any delay would defeat the object of the search. The applicant was, moreover, unaware of the impending search. The officer's uncontested evidence, however, was that he had received information from an informer that the applicant was dealing in dagga. The lateness of the hour and the distance between the applicant's residence and the nearest town would have allowed the applicant to have concealed or disposed of any evidence in the case of delay.

[6] Regarding section 40 (1) (*b*) and (*h*) of the CPA, the applicant referred to case law to argue that Sgt Ntlatywa's suspicion was flawed because he had relied solely on the information of the informer before proceeding to the applicant's residence. This ignores, however, the undisputed fact that the officer attempted to verify the information by questioning the applicant and then conducting a search, whereupon he discovered the dagga. It was abundantly clear that he did not carry out the arrest solely on the strength of what was communicated to him by the informer.

[7] The applicant mentioned, too, the decision in *Minister of Safety and Security v Zulu*,[4] saying that the decision in the present matter amounted to a conflicting judgment. In that matter, an informer told a police officer that he had seen the respondent with two other men in possession of suspected stolen property. The officer went to the respondent's address but did not carry out a search and did not recover any of the property in question. The respondent told the officer that he could point out the house where the property was being kept. The officer proceeded, however, to arrest the respondent on charges of housebreaking with intent to steal, and theft. The appeal court quoted, with approval, the judgment of the magistrate in the court a quo, which went as follows:

'It is quite clear to this court that [on] the facts of the evidence of Inspector Lambrechts when he attended the house of the plaintiff, no such goods were found on the plaintiff or his premises and this in itself should have alerted him to the reliability of the information which he was intent om acting upon.

[4] 2012 JDR 0097 (KZP).

Another important fact in my view is that when he arrested the plaintiff in this matter he himself did not search the plaintiff's premises and I found it strange in light of the fact that he ought or should have done so, bearing in mind that he was the arresting officer who was given the information on about the plaintiff's alleged involvement in the housebreaking or the possession of the stolen property.

By arresting the plaintiff before searching the house and before establishing a de facto reliance on the information he in fact placed the cart before the horse.'[5]

[8] The appeal court, per Steyn J, held that the officer had relied on someone else's suspicion, which he failed to test and verify. It was not a reasonable suspicion, considering what transpired at the respondent's address.[6]

[9] The facts in *Zulu* are not the same as those in the present matter. Sgt Ntlatywa tested and verified the information of the informer by questioning the applicant and searching the premises before discovering the dagga; the arrest was carried out on that basis. The case is distinguishable.

[10] Turning to when the applicant was instructed to place dagga plants inside a bag, the available record of the trial proceedings does not appear to indicate that this was done before the applicant obtained bail. The primary issues were, nevertheless, the applicant's credibility as a witness and whether the dagga was indeed found at his residence. Precisely when the applicant was instructed to accept possession of the plants and return home was a secondary issue; his testimony in this regard merely served to confirm that the evidence was discovered during the search.

[11] In relation to the alleged unlawful detention, it is correct that *Zealand* confirmed that an interference with physical liberty was prima facie unlawful; a plaintiff merely had to plead such interference for the defendant to be required to justify his or her detention.[7] This is what the respondent in the present matter did, however, when Sgt Ntlatywa testified that a written notice to appear would have been inadequate. The quantity of the dagga that was found at the applicant's residence implicated him in a

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[5] At paragraph [5].
[6] At paragraph [15].
[7] *Zealand*, at paragraph [25].

serious offence, necessitating his arrest and subsequent detention before he was brought before court.

[12] The applicant also referred to *Mvu v Minister of Safety and Security and Another*.[8] In that regard, Willis J held that, even where an arrest was lawful, a police officer was still required to apply his or her mind to the circumstances of such detention and whether it was necessary at all.[9] It was clear from Sgt Ntlatywa's testimony, however, that he had considered a combination of factors at the time: the crime prevention exercise was motivated by a high incidence of drug-related offences in the area; a substantial quantity of dagga was found; the applicant was unknown to the police; the discovery of the dagga was made late at night; and there was a considerable distance between the applicant's village of Nomadolo and the Ngqeleni police station. The applicant faced serious consequences if he was found guilty on a charge of possession or supplying of dagga. This was not a matter where a written notice to appear would have been appropriate.

[13] This leads to the question of Sgt Ntlatywa's exercise of his discretion. The applicant contended that his fixed address and lack of any indication that he was a flight risk ought to have been considered before the officer arrested him. The court found, however, that there was a rational basis for the officer's exercise of his discretion, as set out in the judgment.

[14] Regarding the assault on the applicant, he referred to *Mahlangu and Another v Minister of Police*,[10] where the Constitutional Court upheld an appeal against the refusal to award damages for the appellants' alleged unlawful detention. In doing so, the court found that the detention was premised on an inadmissible confession, extracted after the appellants were subjected to police torture and coercion.[11] As shocking as the conduct of Sgt Ntlatywa and his colleagues may have been in the present matter, it was simply never pleaded. The reason for this remains entirely unknown. The court was, in the circumstances, constrained to decide the case set out

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[8] 2009 (6) SA 82 (GSJ).
[9] At paragraphs [9] and [10].
[10] 2021 (2) SACR 595 (CC).
[11] At paragraphs [44] and [45].

in the pleadings, no more. The applicant did not pursue the point strenuously during argument.

[15] The court stands by its findings. It is, moreover, not persuaded that the applicant has met the requirements of section 17 (1) of the Superior Courts Act 10 of 2013. Leave cannot be given.

[16] Consequently, the following order is made:

(a) the application is dismissed; and

(b) the applicant is ordered to pay the respondent's costs.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE:

For the applicant:	Mr Pangwa
Instructed by:	Caps Pangwa and Associates No. 33 Callaway Street MTHATHA Tel: 047 532 3664 Email: caps@mweb.co.za
For the respondent:	Adv Sintwa
Instructed by:	The State Attorney Broadcast House 94 Session Street Fortgale MTHATHA Ref: 491/19 – A2M
Date heard:	25 July 2025.
Date delivered:	5 August 2025.