



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 70/2016

In the matter between:

NDIVHUWO CATHRINE PHASHA	FIRST APPLICANT
ZONDEKA ROSELETA MATHEBULA	SECOND APPLICANT
NKHUMELENI CALVIN NEDOMBELONI	THIRD APPLICANT
SAMUEL M MUKOSI	FOURTH APPLICANT
PFULANI JOEL MASHAVA	FIFTH APPLICANT
NYELISANI ALBERT RAMAKUELA	SIXTH APPLICANT
AVHAPFANI JOSEPH MUNYAI	SEVENTH APPLICANT
MAGEZI JOSEPH KUBAYI	EIGHTH APPLICANT
ELIAS VALOYI	NINTH APPLICANT
ROBERT H CHAUKE	TENTH APPLICANT
RESIMATI SAMUEL HLONGWANE	ELEVENTH APPLICANT
ABEL MALULEKE	TWELFTH APPLICANT
MMBONENI RAMAKAVHI	THIRTEENTH APPLICANT
TSHILIDZI GODFREY MUDAU	FOURTEENTH APPLICANT
MOLOKO ELVIS TLOU	FIFTEENTH APPLICANT
MAROPENG SATHEKGE	SIXTEENTH APPLICANT

and

MINISTER OF POLICE

RESPONDENT

Neutral citation: *Phasha v Minister of Police* (70/2016) [2017] ZASCA 006
(10 March 2017)

Coram: Ponnan, Theron, Petse, Zondi and Van der Merwe JJA

Heard: 21 February 2017

Delivered: 10 March 2017

Summary: Appeal: special leave to appeal in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013: intended appeal raises only factual issues in respect of which the prospects of success are poor: no special circumstances to merit further appeal: special leave refused.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Baqwa J and Strijdom AJ sitting as court of appeal):

The application for special leave to appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Ponnan, Theron, Petse and Zondi JJA concurring):

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. The sixteen applicants in this matter sued the respondent, the Minister of Police, in the magistrate's court for the district of Soutpansberg for damages arising from their alleged unlawful arrest and detention. The second, eleventh and thirteenth applicants also sued for damages for alleged assault. At the conclusion of the trial, the magistrate found for the respondent and dismissed all the claims of the applicants with costs. The applicants unsuccessfully appealed against this order to the Gauteng Division of the High Court, Pretoria (Baqwa J and Strijdom AJ). Consequently, they applied to this court for special leave to appeal to it in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013. The judges who considered the petition referred the application to the court for consideration and argument in terms of the provisions of s 17(2)(d) of the Superior Courts Act.

[2] The background of the matter is as follows. All the applicants were employed by the Makhado Municipality and were members of the South African Municipal Worker's Union (SAMWU). On 15 August 2011 SAMWU embarked on a national protected strike. It appears from the evidence that an agreement as envisaged by s 69(4) of the Labour Relations Act 66 of 1995, was reached between the Makhado Municipality and the local SAMWU branch. The fifteenth applicant, Mr Moloko Elvis Tlou, was the chairperson of

the branch. In terms of this agreement rules applicable to any picket in relation to the strike were put in place. These rules provided that the striking workers would gather at the municipal workshop, some distance from the civic centre, where the municipal offices were located. The municipal management would, on a daily basis, furnish the workers and the South African Police Service (SAPS) with a route to be followed by the workers when marching to the civic centre for purposes of picketing.

[3] On 23 August 2011 the municipal management delayed in announcing an authorised route to the workers who had gathered at the workshop. As a result, the workers – who were approximately 400 in number – decided to walk to the civic centre. On the way to the centre, however, the workers were blocked by a public order police unit of SAPS under the command of Captain Frederik Jacobus Kroucamp. The police unit formed a line in accordance with its standard crowd management techniques and forced the workers back to the workshop. The workers entered the premises of the workshop and closed the gate. The police lined up outside the premises. At this point, an incident ensued which led to the arrest of the eleventh applicant, Mr Resimati Samuel Hlongwane, by Captain Kroucamp. I will allude to the particulars of this incident shortly. As a result of the incident, stones were thrown at the police by some of the workers. Nevertheless, calm was restored. The police commanders and the leaders of the workers reached an agreement in terms of which the march was to be called off for the day and the workers were to disperse to their respective homes.

[4] The facts outlined above were common cause. The principal dispute at the trial concerned the events that occurred after the workers had left the workshop. Captain Kroucamp testified in this regard, as did two members of his unit, namely Warrant Officer Rofhing John Mashandule and Constable Divhamabele Mabirimisa. Warrant Officer Mashandule testified that at about 13h00, whilst on routine patrol, he noticed that a group of approximately 30 workers had proceeded to the main gate of the civic centre, where they were littering and starting fires. According to this evidence, several fires were started and chaos reigned. As a result, Captain Kroucamp ordered the arrest

of the persons that participated in this conduct. When the police approached, the group scattered and the police followed in pursuit. The police witnesses testified that fourteen of the applicants were thereafter arrested on account of their participation in the unlawful events at the civic centre. As mentioned above, Mr Hlongwane had already been arrested at the workshop. Notably, the second applicant, Ms Zondeka Roseleta Mathebula, was not arrested in respect of these events.

[5] Constable Mabirimisa said that he saw the first applicant, Ms Ndivhuwo Cathrine Phasha, burning substances at the civic centre and therefore arrested her at the scene. He further testified that Ms Phasha held a piece of burning paper and was in the process of setting a plastic bag filled with papers alight. Both Captain Kroucamp and Warrant Officer Mashandule testified that Mr Tlou was present at the civic centre. The latter said that he saw Mr Tlou singing, uttering vulgar words and participating in making a fire. He also said that he identified the other applicants at the scene, excluding Ms Mathebula and Mr Hlongwane.

[6] Only three of the applicants testified in respect of the events that transpired after the workers had left the workshop. These witnesses were Mr Tlou, the thirteenth applicant, Mr Mmboneni Ramakavhi, and the sixteenth applicant, Ms Maropeng Sathekge. These witnesses vehemently denied the evidence in respect of the unrest at the civic centre. They said that nothing of the sort took place. On their evidence there was no justification for any of the admitted arrests.

[7] Ms Sathekge was a shop steward of SAMWU at the Makhado Municipality. Her testimony was that after the workers had left the workshop, she went to consult a doctor. She then received a telephone call from Mr Tlou who requested her to go to the police station. She went to the police station and upon her arrival she was arrested. In evidence, Mr Tlou said that he was the last worker to leave the workshop. He called the SAMWU provincial office in respect of legal representation for Mr Hlongwane and then proceeded to the police station to assist him. Whilst standing outside the police station, he

and others were arrested on the ground that they were the leaders of 'those people'.

[8] Mr Ramakavhi testified that after he left the workshop, he went to the bus rank. Whilst waiting for the bus, four police officers came running towards him, saying 'here is one of them'. He said that once they caught up with him, they brutally assaulted and then arrested him. His version was that he was kicked on several parts of his body, including his ribs and legs, and that he was hit on the head with a baton which caused an open wound. According to his testimony, he received treatment at the hospital for this wound.

[9] Ms Mathebula testified that she was assaulted by a police officer at the place where the police blocked the procession of the workers. The police officer hit her on her back with a baton. As a result, she was bruised and went to the hospital where she received treatment. Although Ms Mathebula's evidence was corroborated by Ms Sathekge, Mr Tlou and Mr Ramakavhi, on the evidence of the respondent, no such incident took place,

[10] Mr Hlongwane's testimony related to an event that took place before the workers' dispersal. In his testimony he said that he suffered from diabetes. Whilst at the workshop, he felt dizzy and obtained permission from a Captain Jordaan to leave the workshop to buy something to eat. His version was that after he left the premises of the workshop, he was accosted by another police officer. On his evidence this must have been Captain Kroucamp. He informed Captain Kroucamp that he had requested permission to leave the workshop from Captain Jordaan. According to his evidence, Captain Kroucamp nevertheless assaulted him by hitting him with a baton several times. He said that he was then attacked and assaulted by several other policemen, arrested and placed in a police van. Of the other applicants who testified, only Mr Ramakavhi testified about an assault on Mr Hlongwane, but he did so in vague and materially different terms.

[11] Captain Kroucamp testified that Captain Jordaan came to him with Mr Hlongwane. Captain Jordaan said that he knew Mr Hlongwane and that the

latter requested permission to leave the area because of a heart condition. Captain Kroucamp agreed to the request and said that Mr Hlongwane should move past the police cordon. Whilst passing, Mr Hlongwane threatened Captain Kroucamp and grabbed the latter by the front of his shirt with his right hand. Captain Kroucamp then hit Mr Hlongwane's hand with his baton in order for him to release the grip on his shirt. He called for assistance and after a struggle to release Mr Hlongwane's grip on him, the latter was arrested and placed in the police vehicle. This evidence was materially corroborated by Warrant Officer Mashandule and Constable Mabirimisa.

[12] The magistrate rejected the evidence of the applicants and accepted that of the respondent. The court a quo found that there was no basis for interference with these findings. It is trite that a court of appeal is bound by the factual findings of the trial court, unless they were affected by material misdirection or the court of appeal is convinced that they were wrong.

[13] It is trite that different considerations come into play when considering an application for leave to appeal compared to adjudicating the appeal itself (*S v Boesak* 2000 (3) SA 389 (SCA) para 11). What presently has to be determined, is whether the applicants have shown special circumstances which merit a further appeal to this court, as explained in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E. Such special circumstances would generally be present where the intended appeal raises a substantial point of law; where the matter is of great importance to the parties or of great public importance; or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.

[14] On the evidence for the respondent, no worker was assaulted and Mr Hlongwane was arrested for assault committed in the presence of the arresting officer, in terms of s 40(1)(a) of the Criminal Procedure Act 51 of 1977. On this evidence, some 30 persons acting in concert disturbed the public peace and tranquillity by littering and starting several fires at the main entrance to the municipal offices. This took place at about 13h00 and in windy

conditions. It could hardly be disputed that these circumstances would give rise to at least a reasonable suspicion that the participants had committed the offence of public violence, and that this would justify arrest without a warrant in terms of s 40(1)(b) of the Criminal Procedure Act. Thus, the only question is whether this evidence was wrongly accepted by the trial court. This question does not raise a substantial point of law or any matter of great importance. And, for the reasons that follow, the applicants' prospects of success on this question are not good.

[15] On the case for the applicants, the police witnesses must have fabricated the evidence of the unrest at the civic centre and the applicants' participation therein. This is highly improbable. In this regard Ms Sathekge contradicted herself in respect of whether she actually got to the doctor or not and what reason had been given to her by the police for her arrest. On his own evidence, Mr Ramakavhi was not wearing a SAMWU T-shirt at the time and his version to the effect that he was randomly selected as a participant in unrest that did not take place, appears improbable. The same applies to the versions of Ms Mathebula, Mr Hlongwane and Mr Ramakavhi that they were brutally assaulted for no reason whatsoever. Although, according to them, at least Ms Mathebula and Mr Ramakavhi received treatment in hospital for injuries sustained during the alleged assault, none of them produced any medical evidence. In addition, Ms Mathebula and Mr Hlongwane materially contradicted allegations that had been made in their letters of demand and particulars of claim as to the extent of the alleged assault and the identities of the alleged perpetrators. No acceptable explanation was given for these contradictions.

[16] In the result, the applicants have not shown any special circumstances which would merit a further appeal to this court. The application for special leave to appeal must therefore fail. Costs should follow the result.

[17] The application for special leave to appeal is dismissed with costs.

C H G van der Merwe
Judge of Appeal

APPEARANCES:

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