

SOUTH AFRICA / JUDGMENT

Dlamini v Ntuli and Others (Leave to Appeal) (D4845/2015) [2024]

ZAKZDHC 66 (2 October 2024)

[2024] ZAKZDHC 66

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D4845/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D4845/2015

In

the matter between:

PHIKISILE
ALVINA DLAMINI
PLAINTIFF
and
DETECTIVE
INSPECTOR NTULI
FIRST DEFENDANT
MINISTER
OF POLICE
SECOND DEFENDANT
E
M NXUMALO
THIRD DEFENDANT
DIRECTOR
OF PUBLIC PROSECUTIONS
FOURTH DEFENDANT
MINISTER
OF JUSTICE
FIFTH DEFENDANT

Coram: Mossop J

Heard: 18 September 2024

Delivered: 2 October 2024

ORDER

The

following order is granted: The application for leave to appeal is refused, with costs to be taxed on scale C.

JUDGMENT

MOSSOP J:

[1] This is an application for leave to appeal against my judgment of 19 July 2024. The party that brings this application is the fourth

defendant in the action, the Director of Public Prosecutions. I shall refer to the parties in this judgment as they were cited in the plaintiff's summons.

[2] At trial, I was only required to consider the issue of liability and, after hearing evidence, I upheld the plaintiff's claims against the second defendant for wrongful arrest and detention and I upheld her claim against the fourth defendant for malicious

prosecution. The second defendant has not sought leave to appeal the judgment that was delivered against it.

[3] Unlike at the trial, Mr Epstein SC and Mr Mabuda now appear for the fourth defendant. Mr Pretorius SC continues to appear for the plaintiff.

[4] I do not intend reciting the facts of the matter in this brief judgment. It is unnecessary to do so as they were dealt with in some detail in my judgment and have been mentioned in extenso in Mr Epstein's heads of argument. It would serve no useful purpose to repeat them for a third time.

[5] Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) regulates the appeal procedure from the high court and reads as follows:

Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’
- [6] From the heads of argument delivered on behalf of the fourth defendant, it appears that it acknowledges that the test for leave to appeal has been elevated since the introduction of the Act, as explained in the seminal decision of Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen and others*.^[1] As mentioned by Mr Epstein in those heads of argument, in that matter it was found that the use of the word ‘would’ in s 17(1)(a)(i) of the Act indicated a measure of certainty that another court would come to a different decision in respect of the decision sought to be appealed.^[2]
- [7] Mr Epstein commenced his argument by highlighting a factor relevant to the conduct of the trial. This centred on the transcript of proceedings (the transcript) of the criminal trial in the Eshowe Regional Court (the criminal trial) in which the plaintiff was initially convicted of murder and sentenced to 20 years’ imprisonment. Mr Epstein highlighted the fact that the transcript was handed in as an exhibit at the trial before me (the civil trial) and was accepted by me as an exhibit.^[3] However, not all of the persons who testified at the criminal trial were called to testify at the civil trial: in fact, only one witness, excluding the plaintiff, testified at both trials. Mr Epstein correctly drew attention to paragraph 3 of my judgment, in which I noted my reservation at proceeding in this fashion. My disquiet was based on the fact that I did not get to see or hear the evidence of all the witnesses who testified at the criminal trial, but instead had to accept the recorded evidence of those witnesses who did. One of the difficulties that I anticipated was the weight to be attached to the evidence that was not given before me.
- [8] It was argued by Mr Epstein that the transcript was hearsay evidence and ought to have been excluded by me and that my failure to order this may be viewed by another court as a misdirection on my part. My attention was drawn to the full court decision of this division in *Griffiths v S*,^[4] and to the decision of the Supreme Court of Appeal in *Technology Corporate Management (Pty) Ltd and others v De Sousa and others*.^[5] Griffiths affirmed the principle that hearsay evidence is not admissible, and Technology Corporate Management dealt, *inter alia*, with the application of the well-known matter of *Hollington v F Hewthorn & Co Ltd*.^[6]
- [9] In my view, the facts and circumstances of the civil trial are distinguishable from the principles extracted from all three cases

just mentioned. In Griffiths:^[7]

‘The State presented evidence to show that the appellant masterminded the killing and robbery of the deceased for monetary and property gain. In order to secure conviction on the charges of murder and robbery with aggravating circumstances, the State relied on the narration of hearsay evidence by certain witnesses relating to the statements the deceased allegedly made to them as well as the fact that subsequent to the hijacking incident the appellant allegedly pointed out the body of the deceased to the police in terms of s 218(2) of the Act as the intermediate facts supporting the inference that the appellant was responsible for the death of the deceased.’

The trial court in Griffiths accepted the hearsay evidence presented in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

[10] In Technology Corporate Management, the dispute before the court related to a dispute amongst shareholders of a company. One of the parties attempted to lead evidence of a finding made against the defendant by a commissioner of the Commission for Conciliation, Mediation and Arbitration and the rule in Hollington was invoked to prevent its admissibility. The judgment of Wallis JA explained the rule in Hollington to be the following:

‘Evidence that a party has been convicted of a criminal offence is not evidence, not even prima facie evidence, in a subsequent contested civil suit; it is the irrelevant opinion of another court. In uncontested civil proceedings the fact of the conviction constitutes prima facie proof. The finding of a court in civil proceedings is inadmissible in subsequent criminal proceedings and a conviction is not evidence in subsequent criminal proceedings against someone else.’[8]

[11] The rule in Hollington is not without its critics.[9] Wallis JA, however, stated further in Technology Corporate Management that:[10]

‘The rule in Hollington v Hewthorn should not be extended beyond the circumstances to which it expressly applied. In other instances where it is sought to use findings in a previous case to prove facts in a subsequent case, the test for admissibility should be relevance and the court must pay careful

attention to the weight to be attached to the evidence thus tendered. It should be excluded if, like the Land Securities case, it diverts the case into a collateral enquiry.’

[12] In the authorities referred to by Mr Epstein, one party attempted to use evidence of statements or what had been found at legal proceedings against the other without the other party’s consent. The differentiating factor between the facts of those matters and the facts of this matter is that in this matter, all the parties consented to the handing up of the transcript. This included senior counsel who then acted for the fourth defendant. I was advised that there was agreement between the parties that I was to treat what was recorded in the transcript as if it was evidence that had been led before me. It consequently hardly lies in the mouth of the fourth defendant to now say that I should have ignored what its own counsel, amongst others, urged me to do.

[13] While hearsay evidence is usually not accepted in legal proceedings it is perfectly permissible to agree to the admission of hearsay evidence. In terms of section 3(1)(a) of the Law of Evidence Amendment Act 45 of 1988 evidence can be admitted by consent (as was done in this case). It reads as follows:

‘(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings...’

That is precisely what occurred in this instance.

[14] I am, furthermore, not sure what relevance Hollington has to the facts of this matter. The rule in Hollington only relates to findings of guilt by another court.[11] It is so that the plaintiff was twice convicted by the regional court, but she was ultimately acquitted on appeal by the high court.

That acquittal was with the concurrence of Mr Epstein's client, who conceded the plaintiff's appeal when faced with the facts. The convictions of the plaintiff and her ultimate acquittal were accordingly not an issue in dispute. Indeed, it was the very basis of the civil action and was conceded by the fourth defendant in its combined plea.[12] On the issue of the parties agreeing to hand up the transcript, Mr Pretorius drew my attention to *Fischer v Ramahlele*[13] in which Theron and Wallis JJA stated that:

'... it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues.' (Footnotes omitted.)

[15] That, it would seem to me, also means that the parties are at liberty to agree upon what evidence will be accepted as being common cause and how certain evidence will be presented to the court. This is routinely agreed to in civil trials at Uniform rule 37 conferences. In this instance, the transcript was handed in consensually. In any event, there was nothing prohibiting the fourth defendant from calling any person that it wished to call to testify in the civil trial. The handing up of the transcript did not preclude witnesses who appeared at the criminal trial from being called to give evidence in the civil trial. I can see no other court concluding that the transcript ought not to have been handed up as an exhibit, or that the parties were not at liberty to agree on its status, and this ground of appeal consequently holds no attraction to me.

[16] It was next submitted on behalf of the fourth defendant that the plaintiff had not established an absence of reasonable and probable

cause when deciding to prosecute the plaintiff and that I had erred in finding that it had. In *Majaesa v Minister of Police and others*,[14] Keightley J stated as follows:

'Absence of reasonable or probable cause means either that subjectively a defendant did not have an honest belief that the plaintiff had committed the offence, or that objectively, on the facts and law as known to the defendant at the time, a reasonable person could not have concluded that the plaintiff had committed the offence. It is sufficient for the plaintiff to prove either of these two elements.' (Footnotes omitted.)

[17] In *S v Lubaxa*,[15] the court remarked as follows:

'Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and

probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated ... and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.’

[18] In coming to the conclusion that there was no reasonable or probable cause, it was submitted that I apparently failed to attach sufficient weight to the evidence of Mr Hlonipheni Ntanzi (Mr Ntanzi). This argument is ironic in that Mr Ntanzi did not testify before me and his evidence was presented as part of the transcript, which Mr Epstein earlier argued should not have been permitted to be handed up. That notwithstanding, Mr Epstein submitted in his heads of argument that:

- (a) The plaintiff was the only other person in the dwelling apart from Mr Ntanzi when the deceased met his fate;
- (b) Mr Ntanzi heard two shots and two spent cartridge cases were subsequently found;
- (c) Mr Ntanzi observed the plaintiff placing a firearm on the ground;
- (d) Although he had earlier received information that the deceased was threatening to shoot himself, Mr Ntanzi did not find a firearm on the deceased when he searched him; and
- (e) The firearm that caused the death of the deceased belonged to the plaintiff.

[19] Not all these points are accurate. The point raised in sub-paragraph (a) is not. There was no evidence that the plaintiff was in the house immediately prior to the death of the deceased. Mr Ntanzi testified that the plaintiff and the deceased met at the doorway to the dwelling. He testified that he observed the plaintiff through a window as she approached the dwelling. His further evidence made it clear that she was outside when she met the deceased.

[20] The point mentioned in sub-paragraph (c) is also inaccurate. It was apparent that Mr Ntanzi did not actually see the plaintiff place the firearm on the ground. His evidence on this point was mentioned in my judgment and was the following:

‘Okay. Now, let’s analyse this putting. How was the accused putting this firearm down? He (sic) was putting slowly, not throwing it down? --- Well, I cannot explain that, whether she was putting it down slowly or whether she was throwing it on the floor, I did not see, but she did put it on the floor.’

This was the critical point of Mr Ntanzi’s evidence. Without this, there was nothing that could conceivably have linked the plaintiff to the death of her husband. In context, it followed upon Mr Ntanzi stating, on at least two occasions, that the deceased had, indeed, committed suicide. His answer described above casts serious doubt, in my view, on his alleged observations. What he testified to was a conclusion but the basis for that conclusion was unsound. I do not believe that another court would come to a different conclusion.

- [21] As regards the point raised in sub-paragraph (d), it is so that Mr Ntanzi testified at the criminal trial that he had searched the deceased but did not find a firearm. But he testified that he only searched the upper torso of the deceased and never mentioned searching any other part of his body or any part of the house.
- [22] A further point taken by the fourth defendant in its application for leave to appeal is that too much reliance was placed by me on the affidavit of the deceased's sister, Ms Maureen Gumede (Ms Gumede). I do not believe that I did so. Her evidence formed part of the transcript and it was not impugned by any of the defendants at the civil trial. It is suggested that I attached more probative value to Ms Gumede's evidence than to Mr Ntanzi's evidence. Both were considered. I specifically considered that Ms Gumede actually said nothing factual about how the deceased met his fate. Her evidence related to events that occurred primarily before the death of the deceased. She did not say that the deceased had killed himself or that anyone else had killed him. On the other hand, Mr Ntanzi did say that the deceased had killed himself. He said it on two different occasions to two different people. And then he changed his version. I think the point taken is misconceived.
- [23] It was further submitted that the medical report that the deceased was shot at close range did not constitute conclusive proof of suicide. Of course, it did not have to conclusively establish that fact at the criminal trial. It was sufficient if that evidence raised a reasonable doubt about the accuracy of the State's version. The fourth defendant's heads of argument went on to reinforce the submission that it was not conclusive proof by stating the following:
- ‘... especially without hearing the expert evidence of the expert at trial.’
- [24] That submission, in my view, is unsound. The doctor who performed the post mortem on the deceased, Dr Ngcobo (Dr Ngcobo), did testify at the criminal trial. And he was asked about the likelihood of the deceased having committed suicide. His response to a question from the plaintiff's legal representative was the following:
- ‘... If you are saying there was this absence of a tattoo, does this mean that there is no possibility of the deceased to have killed himself? --- Actually that question had never been posed to me before, whether the deceased had killed himself or not, but anyway. The absence of a muzzle imprint, as I said, suggest that it was not a hard contact. It means that the gun was not in direct contact with the skin which does not necessarily exclude the possibility that he may have killed himself, if there is such a question.’
- [25] There most certainly was such a question. But the prosecution had apparently not even canvassed the possibility with Dr Ngcobo of the deceased's death being attributable to him committing suicide. It knew that this was what the plaintiff and, at least initially, what Mr Ntanzi said had happened and that this was likely to be the plaintiff's defence. Dr Ngcobo responded to another question put to him by the plaintiff's legal representative as follows:
- ‘But as you have said, you don't deny the possibility of that the deceased had killed himself? --- I'm not in a position to.’

The expert accordingly did testify and the point has no merit.

[26] An important point raised by Mr Epstein is the issue of the gunshot residue (GSR) specimens and tests. It was submitted that the test results were not available when the decision to prosecute was taken and that, even if introduced before the trial concluded, those test results would not have been conclusive proof of suicide. The same point about conclusiveness not being the required standard is worth mentioning again.

[27] Extensive reference was made in the fourth defendant's heads of argument to the judgment of the regional magistrate where he referred to a statement delivered by the scientist who performed the tests on the GSR specimens harvested from the deceased, the plaintiff, and Mr Ntanzi. That statement was ostensibly prepared in terms of the provisions of s 212(4)(a) and s 212(8)(a) of the Criminal Procedure Act 51 of 1977 and was received and considered by the regional magistrate without demur. The deponent stated its purpose to be the following:

'On 2015-10-28 I was requested to give information about primer residue in the case Nkandla CAS 101/01/2008.'

[28] That is what the statement dealt with. The phenomenon of primer residue. Not specifically with regard to the facts of the case for which the plaintiff stood trial, but generally. Neither of the sections referenced by the scientist who made the statement permit such general opinion evidence to be established by way of an affidavit. Section 212(4)(a) deals, essentially, with proof of facts by way of a number of identified sciences and s 212(8)(a) deals generally with the receipt, delivery, and custody of specimens. There was no basis in law for the receipt of this affidavit, which expressed the opinion of the scientist in the abstract as to why GSR may, or may not, be present on the hands of a person tested for it.

[29] Of particular relevance to the issue of GSR is the evidence of the third defendant, who was the public prosecutor involved in the plaintiff's criminal trial. His conduct impacts upon the issue of animus iniuriandi, an aspect thoroughly dealt with by Mr Epstein in the fourth defendant's heads of argument.

[30] It was submitted that there was no reference to GSR tests in the docket or in the SAP13 before the conclusion of the criminal trial of the plaintiff. Accepting that the proposition is correct, that did not necessarily mean that the third defendant did not know of the existence of the specimens harvested or that there were no results then in existence. The third defendant knew of the specimens because a copy of the letter accompanying the specimens to the Forensic Science Laboratory in Pretoria was in the photographic album that the third defendant received prior to the criminal trial commencing. That album was uplifted from Insp Ngobese on 6 March 2008, a month and a half before the plaintiff's criminal trial commenced and the third defendant thus had knowledge

of the existence of the specimens for a considerable period before the trial commenced. If that was not enough, on the first day of the trial, Insp Ngobese told him of the harvesting of specimens. Such knowledge appeared, ultimately, to have been ignored by the third defendant.

[31] Mr Epstein, correctly in my view, took the position that the third defendant's conduct was 'not exemplary' but that it was not evidence of an intention to injure. The third defendant may have been negligent, or even grossly negligent, but even such conduct fell short of establishing animus iniuriandi, so the argument went. In my view, the third defendant's conduct went way beyond being 'not exemplary'.

[32] At the civil trial, I found the interaction between the third defendant and the regional magistrate at the criminal trial shortly before the State closed its case to be disturbing and significant. In that exchange, quoted in full in my judgment, the third defendant responded as follows to a question from the regional magistrate:

'COURT So, there were no tests made?

PROSECUTOR No.'

[33] That was factually untrue. There is a distinct difference between the taking of a sample and the testing of that sample. A test had been conducted on the deceased's right hand in order to test for the presence of GSR. That test was positive. Mr Epstein in his heads of argument stated the following and I quote it in full:

'37.1 At the time of the exchange between the Prosecutor and the Regional Magistrate, it was common cause from the evidence of Insp Ngobese that GSR tests had been conducted;

37.2 If the Magistrate and the Plaintiff's representatives understood that the Prosecutor meant anything other than that the tests had been carried out but that the results had not been received, either party would have raised the issue with the Prosecutor, as it contradicts the evidence of Insp Ngobese; and

37.3 The plaintiff's counsel who prepared the heads of argument for the appeal acknowledged that the Prosecutor meant that the tests had been carried out but that the results had not been received.'

[34] There are several inaccuracies in that lengthy submission. Firstly, it was not common cause from the evidence of Insp Ngobese that GSR tests had been conducted. Insp Ngobese had, on his own version, last had any involvement with the GSR samples that he collected once he dispatched them to the Forensic Science Laboratory. He did not know whether any tests had actually been carried out and he did not, and ordinarily would not, know of the results once the tests had been carried out. Secondly, the interaction between the regional magistrate and the third defendant did not suggest that the test had been conducted but that the results were not yet to hand. The question posed by the magistrate was clear, as was the third defendant's response: no tests had been done.

There was, thus, nothing for the plaintiff's legal representative to raise with the third defendant for he would have heard that no test had been conducted, notwithstanding that specimens had been collected.

[35] As to whether animus iniuriandi had been established, as was stated in Minister for Justice and Constitutional Development and others v Moleko:[16]

‘The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.’ (Footnotes omitted.)

[36] I was satisfied that on the proven facts, dolus eventualis had been established. After reflection, I am not persuaded that another court would come to a different conclusion other than the one to which I came. Costs must follow the result. In my judgment, I assessed the costs to be taxable on scale C. I see no reason to deviate from that scale in this application.

[37] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the fourth defendant: Mr H Epstein SC and Mr T Mabuda Instructed by: The State Attorney 6th Floor Metropolitan Life Building 391 Anton Lembede Street Durban Counsel for the plaintiff: Mr C Pretorius SC Instructed by: Ndwandwe Attorneys Suite 505, 5th Floor Metropolitan Life Building 391 Anton Lembede Street Durban

[1] The Mont Chevaux Trust v Tina Goosen and others 2014 JDR 2335 (LCC) para 6.

[2] Ibid.

[3] It was marked as ‘Exhibit C’.

[4] Griffiths v S [2017] ZAKZPHC 13 para 107 (‘Griffiths’).

[5] Technology Corporate Management (Pty) Ltd and others v De Sousa and others [2024] ZASCA 29; 2024 (5) SA 57 (SCA) (‘Technology Corporate Management’).

[6] Hollington v F Hewthorn & Co Ltd 2 [1943] 2 All ER 35 (CA); 1943 KB 587 (CA) (‘Hollington’).

[7] Griffiths para 9.

[8] Technology Corporate Management para 161, citing with approval 18 Lawsa 3 ed (2015) para 141.

[9] B T Njoko ‘The admissibility of criminal findings in civil matters: re-evaluating the Hollington judgment’

(2021) De Jure Law Journal 160.

[10] Technology Corporate Management para 165.

[11] Institute for Accountability in Southern Africa v Public Protector and others

[2020] ZAGPPHC 64; 2020 (5) SA 179 (GP); [2020] 2 All SA 469 (GP) para 19.

[12] Paragraph 44A of the plaintiff's amended particulars of claim reads: 'On the 25th May 2017, the Plaintiff successfully appealed against her conviction and sentence at the Pietermaritzburg High Court.' To this, the second and fourth defendants pleaded: 'The second and fourth defendants admit these paragraphs.'

[13] Fischer and another v Ramahlele and others [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.

[14] Majaesa v Minister of Police and others (GJ) unreported case no 43046/2020 (14 June 2024) para 8.

[15] S v Lubaxa 2001

(2) SACR 703 (SCA); [2002] 2 All SA 107 (A) para 19.

[16] Minister for Justice and Constitutional Development and others v Moleko

[2008] ZASCA 43; 2009 (2) SACR 585 (SCA) para 64.

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