

SOUTH AFRICA / JUDGMENT

Buthelezi v Minister of Police (A3040/19; 9313/2017) [2019] ZAGPJHC 453; 2020 (2) SACR 21 (GJ) (20 October 2019) [2019] ZAGPJHC 453

COURT

South Gauteng High Court, Johannesburg

BEFORE

Unterhalter, Francis-Subbiah

CASE / FILE NUMBER

A3040/19; 9313/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NUMBER: A3040/19

CASE NUMBER: 9313/2017

In the matter between:

VUSI BUTHELEZI APPELLANT

and

MINISTER OF POLICE RESPONDENT

J U D G M E N T

THE COURT

INTRODUCTION

1. The Appellant, Mr Buthelezi, brought an action against the Respondent, the Minister of Police (“the Minister”) in the

Magistrates' Court, Johannesburg. Mr Buthelezi claimed that members of the South African Police Services ("SAPS") had unlawfully entered his home and conducted an illegal search, without a warrant. This was done in full view of members of the community who had gathered around Mr Buthelezi's house. Mr Buthelezi complained that his privacy was infringed and claimed damages of R 100 000.

2. The Minister pleaded that the search was conducted in various places to find a missing child. The plea states further that the search was justified, lawful and necessary. In particular, the Minister pleaded that to obtain a warrant would have defeated the object of the search. The Minister said that in any event Mr Buthelezi consented to the search. Further, it is said that there was an angry crowd who wanted to injure Mr Buthelezi and damage his property.
3. The Learned Magistrate dismissed the claim. She found that the search was lawful; that the interests of the child who had gone missing weighed more heavily than those of Mr Buthelezi's right to privacy; and finally that Mr Buthelezi was not a credible witness.
4. Mr Buthelezi now appeals to this court.

WAS THE SEARCH LAWFUL?

5. We consider first whether the search conducted by members of the SAPS was lawful, as the Learned Magistrate found.
6. It was common ground at the trial that the search of Mr Buthelezi's home was conducted without a search warrant.
7. On 15 September 2015, a mother reported to the police that her child had gone missing. The following day, members of the SAPS, headed by Lieutenant Colonel Matlaila, searched for the missing child in an area known as "the hostel" in Meadowlands. The police were accompanied by a group of some thirty people who were described by Lieutenant Colonel Matlaila as angry and violent. This group of people, from the community, pointed out places where the child was last seen, and the police proceeded to search these dwellings for the missing child. Some nine dwellings were searched. The members of the community who searched with the police were threatening to burn dwellings and attack anyone who did not allow their dwellings to be searched. These members identified the house of Mr Buthelezi, which also comprised a spaza shop and a liquor store, as a place where the child had been seen and demanded that the house be searched for the missing child. This the police proceeded to do, without a warrant. The child was not found in Mr Buthelezi's house. The child was happily found later unharmed.
8. The Minister's plea does not specify the basis on which the search of Mr Buthelezi's house by the police was lawful. Nor does the Learned Magistrate give her reasons for so finding. In submissions before this court, counsel for the Minister relied upon sections 25 and 26 of the Criminal Procedure Act 51 of 1977 ("the CPA").

9. But the circumstances under which the search took place do not meet the requirements of section 25. That section, in relevant part, requires that a police official has reasonable grounds to believe that a warrant will be issued but that delay would defeat the object of obtaining the warrant. True enough, the urgency that arises from the need to find a missing child may have justified the view that the time spent obtaining a warrant would hamper the search for the child. But there was simply no evidence known to the police officers who conducted the search of Mr Buthelezi's house that an offence had been or was being committed on the premises. The police officers had nothing more than a claim by unidentified members of the group from the community that accompanied the police that the missing child had been seen the previous day at the spaza shop that forms part of Mr Buthelezi's house. There was no basis to think that Mr Buthelezi was somehow implicated in the disappearance of the child, and hence no basis under section 25 lawfully to search the house without a warrant.
10. Nor does section 26 afford grounds upon which the warrantless search might be found to be lawful. The police officers who gave evidence at the trial did not testify that they were investigating a suspected kidnapping. Much less did they provide a basis to think that Mr Buthelezi may have provided them with information with reference to any offence. Nor, as we shall explain, was there proper consent given for the search to take place. The requirements of section 26 were simply not met.
11. It follows that the grounds advanced by the Minister as to why the search was lawful under sections 25 and 26 of the CPA cannot be accepted. To the extent that the Learned Magistrate relied upon these provisions as the basis for her finding that the search was lawful, she was in error. And we do so find.
12. This finding carries with it the necessary entailment that the police enjoyed no power under the CPA to conduct the search of Mr

Buthelezi's house, and the search was in this sense unlawful.

13. If the police had no power to search in terms of the CPA, could the search nevertheless be lawful? The Learned Magistrate thought so. She concluded that Mr Buthelezi had consented to the search. Recall that Mr Buthelezi's cause of action was based on the claim that he was humiliated and degraded by the public invasion of his privacy in virtue of which he suffered damages. Mr Buthelezi therefore complains of an *injuria* suffered by him as a result of the search of his house by the police. To establish an *injuria*, a plaintiff must in the first place show that the act complained of (here the search) was wrongful. This is tested against an objective standard of reasonableness informed by the prevailing norms of society, which include the overarching norms of the Constitution.[1]

14. If the CPA permits a search, then plainly the search is not wrongful because the CPA defines circumstances in which the detection and prevention of crime and the preservation of public order justify intrusions upon privacy. However, lawful searches under the CPA do not exhaust the circumstances in which we can say that a search is objectively reasonable. Accordingly, a search that is unlawful under the CPA, may yet not be wrongful if it is justifiable on other grounds.
15. One such ground is based upon consent. If my neighbour comes to my door and says that she fears that her cat may have strayed into my garden, and she asks whether she might look for the cat, and I agree, I can hardly be heard to complain that my privacy rights have been infringed if my neighbor then comes into my garden and searches for her cat. My right to privacy includes my right to give up some aspect of that privacy. Two conditions attach to the attenuation of privacy by consent. First, the consent must be informed consent and freely given. Second, the action taken must not exceed the bounds of the consent that is given.
16. A police officer seeking consent to infringe the privacy of a person is not in the same position as a private person seeking such consent. First, the police officer is a state functionary and it may well be that outside the statutory authority or other authority to search conferred upon a police officer, a functionary has no competence to seek the consent of a person to search, nor to search, even if consent is then given. . In other words, even if the consent is given, the search may nevertheless be wrongful because the functionary has no competence to seek consent or act on it, even if granted. For reasons that will become plain, we do not need to decide this point, as a matter of general principle, because we do find that the police had authority to request the search of Mr Buthelezi's house and to search for the missing child.
17. Second, and quite apart from the competence of a police officer to seek consent, the requirement of informed consent, freely given, requires very careful scrutiny when police officers are involved. The police are there to serve and protect the public. But to do so, the police are necessarily the coercive face of the state, with very great powers. Persons asked by the police to consent to a search would in many circumstances be fearful of the consequences should they refuse. Even assuming that police officers can seek consent to search and act on it if given, strict scrutiny is required to determine whether the consent was informed and freely given.
18. In this case, the actions of the police officers do not meet this standard. It is clear from the testimony of Lieutenant Colonel

Matlaila that in seeking to search Mr Buthelezi's house, he pointed out to Mr Buthelezi the angry crowd of persons outside his house. Warrant Officer Ngobane's evidence was to much the same effect. The crowd was angry that accompanied the police to search for the child. In essence, the police officers felt compelled to search the houses pointed out by members of the community and conveyed to Mr Buthelezi that he should consent to the search or suffer the anger of the crowd of community members that might otherwise threaten his property or person.

19. Although the Learned Magistrate considered Mr Buthelezi's testimony to have been inconsistent on the question of consent, she failed to consider whether consent, even if given, was informed and freely given. The evidence of the police officers shows that there was no such consent given by Mr Buthelezi. Mr Buthelezi was told by the police that he must consent or suffer the consequences of an angry crowd that demanded the police search his house. Mr Buthelezi had a right to be protected by the police from a crowd threatening violence against him. The police were required to exercise independent judgment as to how lawfully to proceed. Instead, Mr Buthelezi was told he must allow the search of his house so as to appease the anger of the members of the community assembled outside his house. Consent in these circumstances is not freely given. Accordingly, the consent that was given by Mr Buthelezi was coerced and does not render the search of his house by the police lawful.
20. There remains however a further justification for the search that took place that requires consideration. Section 28(2) of the Constitution states that the best interest of the child are of paramount importance. It is acknowledged as the guiding principle in all matters involving children. Justice Sachs in *S v M* [2] explained this concept as follows:-

"And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."

He further went on to hold that;

"A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word 'paramount' is

emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually

all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby

concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy

principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical

phrase of weak application, thereby defeating rather than promoting the objective of s 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests.”

21. When a child goes missing, the child is at risk, sometimes at grave risk. There is a duty that then arises upon every person, who can assist, to do so and thereby help to find the child and bring her to a place of safety. This duty gives practical effect to the constitutional paramountcy of the interests of the child. When Mr Buthelezi was informed that a child had gone missing and the police wished to search his house for the missing child, Mr Buthelezi came under a duty to assist to the extent he reasonably could to find the child. One way of doing this was to allow the police to see that the missing child was not in his house.
22. The matter may be tested in this way. If the mother of a child comes to my door and says that her child has gone missing and might perhaps have come into my house, could I simply refuse to assist on the grounds that that to permit any entry to my house infringes my right to privacy. We think not. There is ordinarily a duty to give some reasonable assistance to find the child. Quite what the scope of that duty will be depends upon who is asked to assist, how they are situated, what is asked of them and what is reasonable in the circumstances. Allowing the child’s mother to have a look is a modest contribution to the search for the child. We cannot honour the principle that the child’s interests are paramount, if we do not allow that a search should ordinarily be permitted that does very little harm to privacy rights but may contribute to the safety of a missing child. This, in our view, delineates the private actions that are expected of a person under the Constitution to protect the interests of children.
23. Does it make any difference that it is the police who ask to conduct the search for the missing child rather than the child’s mother? We think not. First, if, as we find in these circumstances, there is a duty to assist, it seems uncontroversial that the mother of the child may ask that a person who can assist takes reasonable steps to comply with their duty. The police to whom it has been reported that a child is missing also have a duty to assist. The police do so as a matter of public duty. Section 13 of the South African Police Service Act 68 of 1995 states that members of the service shall perform the duties and functions conferred by law, subject to the Constitution. Members have a duty to protect children in conformity with the paramountcy principle in section 28(2) of the Constitution. That duty includes searching for a missing child, which in turn may require looking for the child in a private dwelling, if there is reason to believe that the child may be there or may have been there. The person who is asked by the police to allow them to enter to look for the child also has a duty to assist, as we have found. The incidence of that duty will depend upon what it is reasonable to expect of a private person in the particular circumstances in which assistance is sought.
24. The police, in asking Mr Buthelezi to look for the missing child in his house, and then doing so, did not act wrongfully. First, as we have found, the police had a duty to look for the child. They were given information that the child had been seen the previous day at the spaza shop

that forms part of Mr Buthelezi's house. The police did not testify as to who precisely gave this information and its reliability. But in the circumstance of a search for a missing child, where time is of the essence, the information sufficed to warrant looking for the child in Mr Buthelezi's house. Second, Mr Buthelezi, when asked to permit the police to look for the child in his house, was required to lend his assistance by allowing the police to do so. True enough, his privacy is in some measure intruded upon. But provided that the police then conduct the search for the child in a careful and respectful way, the intrusion is modest and the potential gain is great in the interests of the child's safety.

25. We find that there is no objective unreasonableness. Mr Buthelezi cannot say that he is degraded and humiliated by the invasion of his privacy. The police did their duty in looking for the missing child and Mr Buthelezi complied with his duty to assist in helping to find the missing child. There is no *injuria*.
26. How then is this case different from the circumstance, described above, where the police seek the consent of a person to search their home, absent any basis to do so that is found in the CPA or elsewhere? First, we find here that the person from whom the consent is sought had a duty to assist the police and was not simply being asked to compromise their right of privacy, where the issue of informed consent, freely given assumes paramountcy. Second, we find that the police, in the circumstances of this case, did enjoy the competence to look for the missing child in Mr Buthelezi's house. The issue is not one of consent but of the complimentary duties of the police and Mr Buthelezi to assist to find the child.
27. We have found that the police sought consent to search the house of Mr Buthelezi at least in part to appease the angry crowd outside the house and do their bidding. That was an impermissible basis to seek consent and search the house. But this was not the only reason that the police sought permission to search the house. The police were looking for the child, responding to the report of the child's mother and her justifiable concern. After some confusion on the part of Mr Buthelezi that the missing child was not his child, Mr Buthelezi clearly understood that a child was missing and the police wanted to search for the child in his house. The police made no accusation against Mr Buthelezi concerning the child. In these circumstances, the duty to assist was triggered, and Mr Buthelezi was then obliged to allow the search for the child to take place. This duty was not negated because the police were also, quite impermissibly, doing the bidding of an angry crowd.
28. In virtue of Mr Buthelezi's duty to assist, the search of Mr Buthelezi's home to look for the child was not an *injuria*, and his claim on this score must fail.
29. There does however remain one further basis upon which Mr Buthelezi's complaint that he suffered an *injuria* rests. It is clear from the evidence of the policemen, and in particular the testimony of Warrant Officer Dintwe, that Warrant Officer Dintwe used the occasion of the search of Mr Buthelezi's house to enter the house and verify whether Mr Buthelezi had a license to sell liquor from the premises. As it turned out, Mr Buthelezi did have a liquor license.

30. The evidence shows that Warrant Officer Dintwe function on the force was to investigate whether vendors of liquor have the required license. On 16 September 2016, Warrant Officer Dintwe was called by Sergeant Nebe and informed that she was at Mr Buthelezi's house and that the owner was selling liquor and that she did not know whether Mr Buthelezi had a license to do so. Warrant Officer Dintwe made his way to Mr Buthelezi's house and joined the other police officers in the house who were searching for the missing child. His presence in the house is confirmed both by Lieutenant Colonel Matlaila and Warrant Officer Ngobane who conducted the search of Mr Buthelezi's house. Warrant Officer Dintwe proceeded to take up his enquiries with Mr Buthelezi concerning his liquor license and asked for its production. Mr Buthelezi then produced the license.
31. There was no basis for the search of Mr Buthelezi's house to be used so as to question Mr Buthelezi and seek verification that he held a valid liquor license. There is no suggestion that Mr Buthelezi ever consented to Warrant Officer Dintwe entering the premises for this purpose. It was a plain abuse. Where, as here, a person is honouring his duty to assist in the search for a missing child, the police may not abuse the access they secure for this purpose by interrogating Mr Buthelezi as to his compliance with the liquor laws and demanding the production of a valid liquor licence.
32. We do find that this abuse does amount to an unreasonable entry into Mr Buthelezi's home. It was wrongful. It was also done quite deliberately by Warrant Officer Dintwe who thought he would use the search to take up his own enquiries. Warrant Officer Dintwe entered Mr Buthelezi's house and there sought to pursue a criminal investigation. Warrant Officer Dintwe had no lawful basis to enter Mr Buthelezi house for this purpose and in doing so breached Mr Buthelezi's right to privacy. That Mr Buthelezi found this conduct to interfere with his dignity and right to privacy in his home is plainly established.
33. Accordingly, in respect of the conduct of Warrant Officer Dintwe we do find that Mr Buthelezi has a claim for injuria. The Learned Magistrate failed altogether to examine this aspect of the matter, and was in error as a result.

DAMAGES AND COSTS

34. Mr Buthelzi claimed damages in the sum of R 100 000. We have found that the search of his house was for the most part not wrongful because it was carried out to search for a missing child and Mr Buthelezi had a duty to assist in allowing such a search. In consequence he cannot complain that the search conducted for this reason was wrongful. However, the police nevertheless abused the occasion to enter the house to pursue a quite different enquiry for which there was neither consent, nor authority under the CPA.
35. Mr Buthelezi is entitled to compensation for this abuse. We find that he should be compensated in an amount of R30 000.
36. Mr Buthelezi has also been partially successful in his appeal. We find that he is entitled to a portion of his costs: being 50 % of his costs

In the result we make the following order:

- a) The appeal is upheld.
- b) The orders of Additional Magistrate Johannesburg, Ms R Lerm are set aside
- c) The following order is made in substitution thereof:

The defendant shall pay R30 000 in damages to the plaintiff, together with costs as to 50% of the plaintiff's costs on the party and party scale.

- d) The Respondent shall pay the costs of the appeal on a party and party scale

Unterhalter J

Judge of the High Court

Francis-Subbiah AJ

Acting Judge of the High Court

Appearances:

Appellant: Thulani Nkosi briefed by Pale Attorneys

Respondent: Advocate J Cordier briefed by the State Attorney

Date Heard : 27 August 2019

Date Judgment Delivered : 29 October 2019

[1] Delange v Costa (1989) 2 All SA 267 (A) at [16], as confirmed in DE v RH 2015 (5) SA 83 (CC) at [19] and [21]

[2]

[2007] ZACC 18; 2008

(3) SA 232 (CC) at [19] and [25]

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Prepared on 12 October 2026 · Esheria