

SOUTH AFRICA / JUDGMENT

De Jager v Netcare Limited (42041/16)

[2024] ZAGPPHC 503 (23 May 2024)

[2024] ZAGPPHC 503**COURT**

North Gauteng High Court, Pretoria

BEFORE

M P Motha

CASE / FILE NUMBER

42041/16

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Policy**FLYNOTES:****CIVIL**

PROCEDURE – Constitutional issue – Submissions
by amicus curiae –

Substantial

claim against hospital for blindness in one eye – Including
general damages and loss of income – Hospital
seeking to

introduce report of private investigator who conducted
surveillance of plaintiff – Contention that plaintiff
lives

normal life – Plaintiff contending that evidence of
investigator violating constitutional right to privacy –

Matter postponed for plaintiff to comply with Uniform Rule 16A to
afford any interested party opportunity to be admitted
as amicus

curiae.

REPUBLIC**OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case**

number: 42041/16
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHERS JUDGES: NO
(3)
REVISED
23
MAY 2024
In

the matter between: NICOLAAS
J DE JAGER
PLAINTIFF
and
NETCARE
LIMITED
DEFENDANT

JUDGMENT

MOTHA, J:

Introduction

[1] Do programmes such as Uyajola 99 and Cheaters, to mention but a few, fall foul of section 14 of the Constitution, in their effort to uncover the elusive and sometimes illusive truth? Or does the proportionality analysis under s 36 of the Constitution come to the rescue? In a matter for patrimonial damages involving a 66- year-old male, a preliminary point about a possible violation of his right to privacy has emerged. Just a few days before the hearing of the matter, the plaintiff raised the issue. This necessitated an adjournment of the matter to afford the defendant an opportunity to respond. The bone of contention is the surreptitious surveillance of the plaintiff and his family by Mr. Dion Pienaar, a forensic private

investigator, at the instance of the defendant.

[2] In essence, the plaintiff submitted that the evidence of Mr. Dion Pienaar is irrelevant, immaterial and cannot prove or disprove the extent of the plaintiff's damages[1]. If anything, the argument goes, it violates his constitutional right to privacy, s 14 of the Constitution. Hence, this objection which seeks to exclude his report and evidence.

The parties

[3] The plaintiff is Nicholas Jacobus De Jager, an adult male businessman, born on 28 February 1958.

- [4] The defendant is Netcare Limited, a company that provides medical services and is duly incorporated and registered under the company laws of South African.

Facts

in brief

- [5] On the 18th of February 2014, the plaintiff underwent a successful right eye phacoemulsification cataract extraction. On the 18th of March 2014, the plaintiff underwent an unsuccessful left eye phacoemulsification cataract extraction by Dr Eugene Pretorius at the defendant's Pretoria East Hospital[2]. The plaintiff contracted Toxic Anterior Segment Syndrome (TASS), which resulted in blindness in his left eye.
- [6] Using Rule 33(4), the parties separated the liability and quantum. On 20 February 2018, the question of merits was settled at 100% in favour of the plaintiff. Subsequently, the defendant made two interim payments to the tune of R4.5 million to the plaintiff for damages claimed.
- [7] On 11 January 2019, the plaintiff amended his particulars of claim, and claimed a sum of R24 887 600.64 alternatively an amount of R25 737 600.64, computed as follows:

"12.1 Past medical/hospital expenses

R 333 298.64

12.2 Future medical expenses

R 4 338 107. 00

12.3 Past loss of earnings/ earning capacity

R 668-9642. 00

12.4 Future loss of earnings/earning capacity

R 13 526 553. 00

12.5 General damages

R 850 000. 00

Total

R 25 737 600. 64"[3]

- [8] Consequently, in terms of Rule 28 of the Uniforms of Rules of Court, the defendant amended its plea and at paragraph 6.2, pleaded as follows:

"6. 2.1 The plaintiff now resides in the Western Cape and enjoys all daily activities of life, unaided and without assistive devices, despite plaintiff being blind in his left eye;

6. 2.2 The plaintiff ambulates without any walking aids and does not experience loss of balance;

- 6. 2.3 The plaintiff enjoys outdoor living and does not use sunglasses for protection against direct sunlight;
- 6. 2.4 The plaintiff drives, without any impairment, a motor vehicle and shows no hesitation when passing other vehicles and/or pedestrians and navigates traffic at normal speed and is capable of travelling at high speed;
- 6. 2.5 The plaintiff is the owner of a firearm licence, having been renewed since the accident;
- 6. 2.6 The plaintiff's participation in daily activities of his life is indicative thereof that he lives a normal life with no impairment in ambulating, no impairment experience when shopping and drives a motor vehicle without any hesitation."^[4]

Issues

- ^[9] On 1 April 2022, the defendant filed Rule 36(9)(b) in respect of Mr. Dion Pienaar, as already stated a Private Forensic surveillance investigator, who owns Jodion and Associates. Having been appointed by the Hills Forensic Investigators (Pty) Ltd, he will testify that he received instructions, from attorneys acting on behalf of the defendant, to investigate the lifestyle of the plaintiff. His testimony is the genesis of this application. According to him, his brief was, inter alia, to investigate whether the plaintiff drives a modified motor vehicle for disabled persons as claimed and uses any assistive devices when ambulating.
- ^[10] Having not been provided with the plaintiff's picture, Mr. Pienaar searched on social media and obtained photos of the plaintiff's

family photograph, including him carrying his grandchild. The surveillance was conducted over an extended period as follows:

Chronology of surveillance

18 to 20 August 2020

- ^[11] During the period 18 to 20 August 2020, the surveillance happened at 3[...] S[...] Street, Grootfontein, Pretoria. For three (3) days the surveillance failed to yield positive results as the house was closed without a sign of a motor vehicle or Mr. NJ de Jager.

21 August 2020

- ^[12] Upon further social media search, Mr. Pienaar obtained the information that Mrs. De Jager resides in the Western Cape at address no 1[...] D[...] Road, Dobson, Gordons Bay. Therefore, Mr. De Jager, as husband of Mrs. De Jager could be located in the Western Cape.

26 August 2020

- ^[13] Mr. Pienaar headed to the Western Cape for further investigation.

27 August 2020

[14] The initial surveillances were done at 1[...] and 1[...] D[...] Road, Dobson, Gordons Bay but were unsuccessful, as the properties were found closed with no visible movement of people that could be identified or positively linked to Mr. NJ De Jager.

28 August 2020 (Friday)

[15] The surveillance was extended to Mr. Nick De Jager (jnr)'s address at [...] D[...] Road, Northern Paarl. Two motor vehicles were found parked at these premises, a white VW Tiguan with registration letters and numbers C[...] 5[...] and white Opel Corsa LDV with registration letters and numbers C[...] 2[...].

[16] At approximately 16: 22 Mr. De Jager (junior) was observed parking the white VW Tiguan registration letters and numbers C[...] 5[...] and installing a Thule roof storage system on the roof of this vehicle. Mr. de Jager (junior) and his family departed from the property driving in the general direction of Gordons Bay.

[17] At 18:21 the VW Tiguan arrived at 1[...] D[...] Road, Dobson Gordons Bay, the property previously kept under surveillance.

29 August 2020 (Saturday)

[18] On this day the VW Tiguan was still parked at 1[...] D[...] Road, Dobson, Gordons Bay with the gate closed and no movement.

30 August 2020 (Sunday).

[19] At 6:00 the surveillance commenced at 1[...] D[...] Road, Dobson, Gordons Bay. At 8:40 the VW Tiguan with registration letters and numbers C[...] 5[...] and a Toyota Fortuner with registration letters and numbers C[...] 1[...] departed from the residence. Mr. NJ De Jager was the driver of the Toyota Fortuner and Mrs. Leonore De Jager his passenger. The two vehicles travel as a convoy in the general direction of Paarl.

[20] At 9:33 the vehicles stopped at [...] D[...] Road, Northern Paarl and Mr. NJ De Jager and his wife entered the residence with a small boy. Next, at 9:51 they departed from [...] D[...] Road, Northern Paarl. They stopped at Checkers in Northern Paarl and the couple alighted from the vehicle accompanied by a small boy (appearing not older than three years). They were observed as they walked in the direction of Checkers and Mr. De Jager returned to the vehicle to fetch a mask for the young child. "Inside the store Mr. De Jager assisted his wife with the shopping, locating items and bringing those items to a trolley, he did so unassisted not using any walking aids. Mrs. De Jager was pushing the trolley and Mr. De Jager assisted with locating the items. They were observed as they bought prepared meals." [5]

[21] "At 10 30 Mr. De Jager returned to his vehicles holding the hand of the young boy at the same time and he also carried a Checkers shopping bag with items packed in the store. At 10:18 the couple travelling in the Fortuner with the young boy arrived at [...] D[...] Road, Paarl, where Mr. De Jager was in the driver seat of the Fortuner.

- [22] At 11:51 the group travelled in the Fortuner, driven by Mr. De Jager (jnr) to the Total service station in Piketberg... At 11:54 the group in the Toyota Fortuner, driven by Mr. De Jager (Jnr) wherein Mr. De Jager and his wife were seated on the backseat, continued in the general direction of Clanwilliam and they stopped at Caltex stop in Clanwilliam at 12:57. It appeared as if the restrooms were used. Mr. De Jager was observed walking unassisted, holding the hand of the small boy which at times was pulling on his hand."[6]
- [23] "At 13:05 everyone returned to the Toyota Fortuner, and they departed for Cederberg Municipal Garden and Camping Area where they arrived at 13:23... It was clear that Mr. De Jager does not need any form of assistance while walking around as he had no walking aids. He continued by himself, not waiting for anyone to assist him. At one point he waited for the group to catch up so that a group photo could be taken. Here he had no assistance in walking on the uneven ground he managed walking up a small incline, stopping in the middle of this incline, to take a picture of his grandchild. At no point was he being assisted, he appeared sure-footed. it is further noted that Mr. NJ de Jager was not wearing any form of sunglasses other than his normal glasses..."[7]

- [24] At 14:41 they departed from the Cederberg of Municipal Grounds and arrived at [...] D[...] Road, Northern Paarl at 17:52. "At 18:03 Mr. NJ De Jager climbed into the driver's seat of the Toyota Fortuner C[...] 1[...], departing in the general direction of Gordons Bay Mr. De Jager departed from Paarl just before sunset driving into the setting sun, at time exceeding the national speed limit. Mr. De Jager's visual impairment does not appear to affect his ability to drive under these circumstances. He arrived at 1[...] D[...] Road, Dobson, Gordons Bay after sunset, driving part of the route at nighttime and again his visual impairment does not appear to affect his driving capacity. At 19:08 Mr. De Jager with his wife arrived at 1[...] D[...] Road, Dobson Gordons Bay. After parking the vehicle no further movement was observed."

31 August 2020 (Monday)

- [25] Mr. De Jager was observed as he departed from the residence now in a silver Toyota Hilux with registration C[...] 7[...] and he was accompanied by an unidentified white male...

1 September 2020 (Tuesday)

- [26] Mr. De Jager was observed departing from 1[...] D[...] Road Dobson Gordons at 9: 12 but made a U-turn return and parked the Toyota Hilux in the garage and closed the door...At 10:08 Mr. De Jager was observed as he was walking around in front of the garage at 1[...] D[...] Road Dobson Gordons Bay, wearing a light laboratory coat and blue overhual pants.
- [27] At 13:34 Mr. De Jager and a white male departed from the residence in the Toyota Fortuna with registration number C[...] 1[...] driven by Mr. De Jager. They arrived at 1[...] R[...] Street Beaconville at

1430. Mr. De Jager was observed then wearing dark glasses. Whilst driving in the direction of 1[...] R[...] Street, it was noted that Mr. De Jager exceeded the speed limit and appeared not to be hampered by his visual impairment. They were observed as they removed a turbo charger from the back of the Toyota Fortuner taking it into the company at 1[...] R[...] Street. They departed from the R[...] Street address at 14:53 and arrived at 1[...] D[...] Road Dobson Gordons Bay at 15:41.

[28] Following this report the defendant posed questions to the plaintiff in terms of Rule 37 (4) and the plaintiff responded. For completeness' sake, it prudent to capture some of the exchanges:

Question 1.1

Does the plaintiff still reside at 3[...] S[...] Drive, Grootfontein, Gauteng?

Question 1.4

Is it admitted that the Plaintiff during August 2020 (in particular 18 August 2020 to 2 September 2020 resided at 1[...] D[...] Road, Dobson, Gordons Bay, Western Cape?

Answer

These constitute matters for evidence and/or cross-examination; alternatively same are interrogatories to which the Plaintiff is not required to submit and/or is irrelevant.

Question 3.1

Is it admitted that the Plaintiff's son, Mr. de Jager (junior) was during 28 August 2020 to 30 August 2020 residing at [...] D[...]

Road, Northen Paarl?

No

Question 3.3.

Is it admitted that the Plaintiff's son Mr. Nick de Jager (jnr) had access to a motor vehicle during the period 28 to 30 August 2020 a VW Tiguan with registration number C[...] 5[...]?

Question

3. 4

Is it admitted that the Plaintiff's son, Mr. de Jager (junior) and his family (wife and minor son) spent the period 28 August 2020 (Friday) to 30 August 2020 (Sunday) in the company of the Plaintiff and his wife?

Question

3. 6

Is it admitted that on 30 August 2020 (Sunday) the Plaintiff had access to the use of a motor vehicle, a Toyota Fortuner with registration

number C[...] 1[...]?

Question

3. 7.

Is it admitted that at some stage on Sunday, 30 August 2020 during the late afternoon, early evening he was the driver of the Toyota

Fortuner with registration C[...] traveling from Paarl, Western Cape in the direction of Gordon's Bay, Western Cape?

Question

3. 8.

Is it admitted that on 31 August 2021 (Monday) the Plaintiff had access to the use of a silver Toyota Hilux with registration number C[...] 7[...]?

Question

3. 9.

Is it admitted that on Monday, 31 August 2020 he was driving his silver Toyota Hilux with registration number C[...] 7[...]?

Question

3. 10.

Is that meeting that on Tuesday, 1 September 2020 the Plaintiff had access to the motor vehicle Toyota Fortuner with registration number C[...] 1[...]?

Question

3. 11.

Is it admitted that during the afternoon of 1 September 2020 the Plaintiff drove the Toyota Fortuner with registration number C[...]

1[...]?

Question

4. 1.

Does the Plaintiff admit the observation notes contained in the expert summary of Mr. Dion Pienaar as contained in paragraph 17 (inclusive of sub paragraph 17. 1 to 17. 4) thereof?

Question

6. 3.1

Is it admitted that the Plaintiff in the period 30 August 2020 (Sunday) enjoyed outdoor living and did not wear sunglasses during outdoor living on the day?

Question

6. 4.1

Is it admitted that Plaintiff drives without any impairment a motor vehicle?

No.

The plaintiff submits that this surveillance amounted to the violation of his Section 14 constitutional right to privacy.

Legal framework

[29] Rule 16A of the Uniform Rules of Court reads as follows:

"(1)

- (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
- (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
- (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
- (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the board for a period of 20 days."

[30] The purpose of this rule is to afford any interested party an opportunity to be admitted to the proceedings as *amicus curiae* (friend of the court). In *Fourie And Another v Minister Of Home Affairs And Others* [8] the court said:

"The purpose of the rule is to enable parties interested in a constitutional issue to seek to be admitted as *amici curiae* in the case in which the issue is raised so that they can advance submissions in regard thereto." [9]

[31] Referring to the matter of *Shaik v Minister of Justice and Constitutional Development* [10], Counsel for the defendant submitted that, by way of an example, parties in Divorce matters use private investigators and might be interested to appoint *amicus curiae*. Therefore, it was important to comply with Rule 16A, he submitted. Counsel for the plaintiff,

submitted that the court should take a leaf out of Rogers JA, as he then was, in the matter of *Shelfplett v MEC For Environmental Affairs*. [11]

[32] As already stated at the commencement of this judgment, this issue might pique the interest of some people who might want to be heard. I am not convinced that it is in the interest of justice to dispense with the requirements as envisaged in 16A(9). It appears to me that the practical way to get round the parties' failure to deal with Rule 16A is to adjourn the judgment for 20 days for the plaintiff to correct the misstep. Accordingly, I direct that the parties comply with Rule 16A of the Uniform Rules of Court to a T. Upon the expiry of 20 days, this court will issue a directive on the way forward, if there are any takers. If there are none, this court will proceed and finalise the judgment. The advantages for this course are patent, namely: the postponement of the matter is averted, the court is likely to hear from amici curiae who might fortify its judgment and finally compliance with the Rules, which cannot be overstated, would have been achieved.

Order

1. The plaintiff is ordered to comply with Rule 16A(1)(a) within seven days of this

ruling.

2. The plaintiff is ordered to furnish this court with a report-back on 19 July 2024.
3. Costs are reserved.

M.P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 20 May 2024

Date of judgment: 23 May 2024

APPEARANCES:

COUNSEL FOR PLAINTIFF: B. P. GEACH (SC) W. BOTHA D. SEKWAKWENG INSTRUCTED BY:
VAN NIEKERK ATTORNEYS INC. COUNSEL FOR PLAINTIFF: S. JOUBERT (SC) INSTRUCTED BY:
WHALLEY VAN DER LITH ATTORNEYS

- [1] Heads of argument of the plaintiff para 4 page 2
- [2] Particulars of claim page 5 para 3
- [3] Defendant's heads of argument p4
- [4] Supra page 5 to 6
- [5] Dion Pienaar summary of testimony page10 para 13.3
- [6] Supra p 69 para 13.6 to 13.7
- [7] Supra p71 para 13.8
- [8] 2005(3) SA 429 SCA,

[9] Supra page 452 E

[10] 2004(3) SA599 (CC)

[11] 2012 (3) SA 441

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