

SOUTH AFRICA / JUDGMENT

De Lange and Another v Minister of Police (31026/2016, 31027/2016) [2017] ZAGPPHC 1062 (1 September 2017) [2017] ZAGPPHC 1062

COURT

North Gauteng High Court, Pretoria

BEFORE

J.J.C. Swanepoel

CASE / FILE NUMBER

31026/2016, 31027/2016

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

(1)

REPORTABLE

(2)

OF INTEREST TO
OTHER JUDGES

(3)

REVISED

1/9/2017

CASE NOS.: 31026/2016

31027/2016

In the matter between:

ALEC
DE
LANGE
1st Plaintiff
ROEDOLF PETRUS
GRABIE
2nd Plaintiff
and
THE MINISTER OF
POLICE
Defendant

JUDGMENT

SWANEPOEL AJ:

1. Two matters came before me simultaneously. In the first matter, under case number 31026/2016, the plaintiff is Alex De Lange (De Lange). In the second matter, under case number 31027/2016 the plaintiff is Roedolf Petrus Grabie (Grabie). In both matters the Defendant is the Minister of Police. I have been asked to hear the matters simultaneously, and to hand down one judgment in respect of both.
2. The claims arise from an incident that occurred at Bronkhorstspuit on 24 July 2015. The particulars of claim allege that the incident happened on 24 June 2015, but it became common cause during the trial that 24 July 2015 is the correct date.
3. Plaintiffs allege that on 24 July 2015 and at Bronkhorstspuit, they were arrested without a warrant on charges of possession of tranquilizers, by members of the South African Police Services acting within the course and scope of their employment. Plaintiffs allege that after they were arrested, they were detained until 27 July 2015, on which day they appeared before the Bronkhorstspuit Magistrate's Court.
4. It is common cause that the plaintiffs were released on that date, and that no further criminal prosecution followed.
5. I am asked to determine only the merits of both plaintiffs claims
6. It was common cause that plaintiffs were arrested, by police officers who were acting within the course and scope of their employment, without a warrant. The parties were in agreement that the onus^[1] to prove the lawfulness of the arrest rested upon Defendant, and that Defendant had the duty to start.
7. Defendant called Salome van Diepen (previously Opperman). She testified that on the date of the incident she was the owner of the Tavern Pub and Grill in Bronkhorstspuit (the tavern). Both plaintiffs were present at the tavern that evening. During the course of the evening Van Diepen's barman made a report to her that he had overheard Grabie telling another patron that De Lange had gone to buy drugs, and that when he returned they should meet in the bathroom.

The barman was not called as a witness. Van Diepen had seen De Lange earlier that evening, but when the report was made to her he was not in the tavern.
8. Van Diepen asked the barman to tell her when De Lange returned. Van

Diepen then went to report the conversation to one Samuel Jacobus Steinberg, who was also visiting the tavern, and who was known to her as a police officer. Van Diepen specifically mentioned to Steinberg that plaintiffs, who were known to Steinberg, were involved.

9. Later the barman told Van Diepen that De Lange had returned, and she

conveyed that message to Steinberg. Van Diepen asked Steinberg to accompany her to the men's bathroom. Having arrived there, they found the door locked, and she asked Steinberg to knock on the door. When there was no response, Van Diepen asked Steinberg to kick open the door, which he declined to do.

10. A bystander then obliged by kicking open the door. Steinberg entered the bathroom, followed by Van Diepen. I digress to state that the bathroom is very small, some 2 meters by 1.5 meters in size. Van Diepen saw De Lange leaning against one wall with his leg cocked against it. Grabie was standing with his back to the toilet.

11. On the ground, some 10 to 15 cm from De Lange's foot, was a small white plastic bag, approximately 5 cm X 3 cm in size. When Steinberg asked plaintiffs why the door was locked, De Lange said it was for privacy, and he could lock it if he wanted to. Grabie did not say a word.

12. Van Diepen then called another police acquaintance by telephone, and shortly after a policeman by the name of Mahlangu arrived. Van Diepen then left the area of the bathroom.

13. It was put to Van Diepen on behalf of plaintiffs that Grabie had decided to leave the tavern, and De Lange decided to accompany him to the parking area. On the way Grabie decided to go into the bathroom, and De Lange went with him. There they locked the door for privacy's sake, and shortly after it was kicked open. They knew nothing about

the plastic bag.

14. Steinberg testified that he was a police officer with some 25 year's experience. Van Diepen approached him and told him that she suspected "someone" of using drugs in the toilet. She asked him to accompany her to the toilet. They knocked on the toilet door and when the door was not opened, one Danie Kruger kicked it open. The Plaintiffs were in the toilet. Steinberg knew both plaintiffs personally. He knew De Lange especially well as he was married to Steinberg's godchild.

15. Steinberg noticed a plastic packet lying on the floor close to the plaintiffs. He picked it up and asked whether it belonged to either plaintiff. Grabie just looked down without responding. De Lange responded that nothing had been found on him. Steinberg suspected that the packet contained drugs. He describes it as a transparent bag with a white powder inside. Steinberg asked Van Diepen whether she wanted to open a case against the plaintiffs and she replied in the

affirmative. Steinberg stayed with the plaintiffs because he was scared that they would leave. Van Diepen went off to call the police.

16. A while later one Constable Mahlangu arrived. Steinberg handed the plastic bag to Mahlangu, and he pointed out the plaintiffs as being the persons in the toilet where the bag was found. Mahlangu then removed the plaintiffs from the scene.
17. Sipho Patrick Mahlangu testified that on the day in question he was a police officer of 5 years' experience. At about 22h00 to 23h00 he received a telephone call from a Captain Swart who told him that Steinberg was at the tavern, that Steinberg had caught people in possession of drugs, and that he needed assistance. Upon Mahlangu's arrival at the tavern he saw Steinberg, and as the tavern was crowded, he asked Steinberg to accompany him outside. Steinberg was accompanied by two male persons (the plaintiffs), and by a white female. Upon arriving outside the tavern Steinberg told him what had happened. He was holding on the two plaintiffs by the arms. Steinberg told Mahlangu he had found the two plaintiffs in the bathroom. In his

right hand he had a small plastic bag containing something white. Steinberg told him he had arrested the plaintiffs for possession of drugs. He asked Mahlangu to transport the plaintiffs to the police station.

18. Mahlangu duly complied with the request. At the police station he placed plaintiffs in a holding cell. He explained their rights, attended to the signing of the relevant forms, and he then placed the plaintiffs in the cells for persons awaiting court appearances.
19. Finally, Verushca Marais testified that she was the second investigating officer in the case against plaintiffs. She confirms that the prosecution was stopped due to there being no prospect of success. She approached Steinberg on at least two occasions to obtain a statement from him, but he refused to depose to cooperate.
20. At that point the Defendant closed its case. Plaintiffs requested that I grant judgment against Defendants on the grounds that Defendant had not adduced sufficient evidence to discharge the onus. Plaintiffs did not at this stage close their case. I requested Plaintiffs' counsel to address me on whether I could grant judgment against Defendant before plaintiffs had closed their case. After argument, I declined to grant judgment. I undertook to furnish reasons for my decision at the end of the matter. Plaintiff then closed its case, and sought an order that plaintiffs had been unlawfully arrested and detained.

JUDGMENT AFTER CLOSE OF DEFENDANT'S CASE

21. Mr. Mtsweni for Grabie submitted heads of argument both in respect of the question whether judgment could be granted after defendant had closed its case but before plaintiff closed its case, as well as in respect of the merits of the matter. Mr. Mosoma, for De Lange, aligned himself with Mr. Mtsweni's argument.

22. Plaintiffs' argument is that where defendant bears the onus of proof, after it had closed its case, absolution could be granted where there is no evidence upon which a Court, applying its mind reasonably to such evidence, could find for the defendant.
23. Mr. Mtsweni argued that the test that applied to absolution, applied equally to a case where the onus rested upon defendant, and that judgment could therefore be granted. In support of his contention, Mr. Mtsweni referred me to an unreported judgment of *Motsei v Minister of Police*, in *re Phefadu v Minister of Police*[2], a judgment of Baqwa J in this Division.
24. In the *Motsei* matter the Court dealt extensively with the test for absolution from the instance. The learned judge, in referring to *Herbstein and Van Winsen*[3] (at page 20) made the following remark: "The test is similar where a defendant upon whom an onus rests fails to lead such evidence in discharge of that onus with the result that a reasonable man could not come to the conclusion that it might be accepted, the Court is entitled to give judgment for the plaintiff."
25. I have perused *Herbstein and Van Winsen* and I find no authority to this effect, not on the page cited, nor elsewhere. *Erasmus*[4] is authority for the proposition that judgment cannot be granted in favour of plaintiff unless, at the close of defendant's case,

plaintiff has either closed its case, or has adduced evidence.

26. In *Schuster v Geuther*[5] the Court dealt with this exact question. The Court compared absolution from the instance at the end of the plaintiff's case, as

opposed to judgment after defendant had adduced evidence. It was pointed out that an order for absolution does not finally dispose of the issues between the parties. A plaintiff is entitled to re-institute proceedings should he so wish. The Court stated:

"Mr Goldblatt wishes to move for judgment without closing his case. This I think he cannot do; it is entirely within the discretion of the plaintiff as to whether, and if so, what evidence he wishes to tender. He may, therefore, close his case at this stage and move for judgment, but it seems to me that he cannot ask the Court to judge on a substantial issue between the parties before the Court is in possession of all the evidence which the parties propose to tender. I rule therefore that it is not competent for the plaintiff to move for judgment without closing his case."

27. *Schuster* (supra) was followed in *Scheepers v Video & Telecom Services*[6] where the Court made the following remark:

"In a case where the onus rests upon the plaintiff a defendant is entitled to ask for absolution from the instance at the close of plaintiff's case on the ground that he has failed to make out a *prima facie* case. Such a decree, if granted, will not be in the nature of a final judgment between the parties, and the plaintiff will be able to institute fresh proceedings on the same cause of action. Where, however, the onus is on the defendant, there is no room for a decree of absolution from the instance, and any judgment given must be a final judgment as between the parties. The distinction between the two is obvious and in *Schuster v Geuter* 1933 SWA 114 Van Heerden J held

that it was not competent for a plaintiff in a matter where the onus was on the defendant to move for judgment at the end of the defendant's case without closing his own case."

28. Baqwa J, in Motse's case, was of the view that the matter of *Hodgkinson v Fourie*[7] was authority for the contention that judgment could be granted after defendant had closed its case. He stated:

"[11] In the matter of *Hodgkinson v Fourie* 1930 (TPD) 740 at 743 the Court stated as follows:

'At the close of the case of one side upon whom the onus lies, the question which the judicial officer has to put himself is: is there evidence on which a reasonable man might find for that side.

If the evidence is not only not convincing but actually found by the trial court to be utter fabrication, then it is evidence on which a reasonable man would not find, and the Court would then be perfectly justified in granting absolution.'

- [12] The Court thus confirmed the converse of absolution at the end of the plaintiff's case, namely, that judgment can be sought at the end of a defendant's case where the onus rested on that defendant without evidence being led by plaintiff and without plaintiff closing its case."

29. In the *Hodgkinson* matter (a judgment of this Division by De Waal JP, and with Krause J concurring) Fourie (plaintiff in the court a quo) sued Hodgkinson on a promissory note. Hodgkinson admitted the note but denied liability on the ground that repayment depended on the fulfilment of a suspensive condition. The onus being on Hodgkinson, he led evidence. At the conclusion of Hodgkinson's evidence, and without Fourie adducing evidence or closing his case, the magistrate in the court a quo granted judgment for Fourie on the grounds that, although he did not believe Hodgkinson's evidence to be impossible or even improbable, he did not believe that Hodgkinson had discharged the onus which rested upon him.
30. On appeal De Waal JP found that there was uncontradicted evidence by Hodgkinson, upon which a reasonable man might have found for him. In those circumstances the magistrate was not entitled to grant judgment for Fourie unless Fourie had either led evidence in rebuttal, or had closed his case.
31. In his concurring judgment Krause J states:
- "In these circumstances I concur that the magistrate was wrong in not calling upon the plaintiff in this matter to either close his case or to call evidence in rebuttal of the case that had been made out by defendant."
32. The *Hodgkinson* matter is thus distinguishable on the facts from the present matter. In this case, plaintiffs aver that the evidence for defendant is such that no Court, acting reasonably, would find that

Defendant had discharged its onus. In Hodgkinson there was evidence upon which a court might reasonably have found for defendant.

Hodgkinson is thus not authority for the plaintiff's argument. In any event, even if the two matters were not distinguishable, Hodgkinson is not, in my respectful view, authority for the proposition reached by the learned judge in the Motsei matter.

33. In my respectful view therefore the authorities quoted by Baqwa J do not support his conclusion, and I respectfully disagree with him. I therefore made the finding that it was not competent to grant

judgment

unless Plaintiffs closed their case, or adduced evidence. Having made my ruling, Plaintiffs closed their case.

THE EVIDENCE

34. Mr. Mtsweni strongly submitted that the evidence of the Defendant's witnesses was contradictory, and consequently not credible. It is so that there were a number of contradictions between especially Steinberg and Van Diepen. On the other hand, plaintiffs' conduct also raises a number of questions. As a result of the view that I take of

the matter, it is not necessary to make any finding on credibility.

35. It is common cause that plaintiffs were arrested by members of the South African Police Services. Steinberg's version is that he did not arrest plaintiffs, but that he only held them until Mahlangu arrived. He specifically remained with them to prevent them from leaving the premises. He thought that Mahlangu arrested plaintiffs. His version

is confirmed, to an extent, by Van Diepen. She was present when Steinberg first encountered plaintiffs in the toilet. She did not see any arrest, but she does confirm that Steinberg remained with plaintiffs when she went to call the police, and that he held them there.

36. Mahlangu, on the other hand, testified that when he arrived, Steinberg had hold of the plaintiffs' hands. Steinberg told him that he (Steinberg) had already arrested plaintiffs, and that Mahlangu should transport them to the police station for detention. Mahlangu testified that he did not arrest plaintiffs. His role was only to transport them to the police station, where he placed them in a holding cell until they had been advised of their rights. They were then placed into the awaiting court cells.

37. It is common cause that plaintiffs were then detained until 27 July 2015, when they were taken to court and subsequently released.

ARREST

38. Section 39 (1) of the Criminal Procedure Act, Act 51 of 1977 (the Act) provides:

A arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body."

39. Section 39 (2) of the Act provides:

"The person affecting the arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest, or in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant."

40. It is clear that Steinberg arrested the plaintiffs in the sense that he took control of them by holding them in the toilet. He later emerged from the tavern holding them by their hands, and he handed plaintiffs over to Mahlangu. At that stage, according to both Steinberg and Mahlangu, plaintiffs had not been advised that they were under arrest, nor had they been told of the reason for their arrest.

41. The requirement that an arrested person must, at the time of his arrest, or so soon thereafter as is practicable, be advised of the reason for his arrest is peremptory. If an arrested person is not so advised, the arrest is normally unlawful.[8] Steinberg did not, on his own version, place plaintiffs under arrest, and neither did Mahlangu. Clearly, an arresting officer must at least know that he is arresting the arrested person. Furthermore, neither of them complied with the requirement that plaintiffs should be advised of the reason for their arrest.

42. Defendant, in an amended plea, admitted the arrest without a warrant, but pleaded that it was authorized by virtue of the provisions of section 40 (1) (a) of the Act. This section provides:

" (1) A peace officer may without a warrant arrest any person

(a) Who commits or attempts to commit any offence in his presence;"

43. The jurisdictional requirements for an arrest under this section are:

44.1 The arrestor must be a peace officer;

44.2 An offence must have been committed or there must have been an attempt to commit an offence;

44.3 The offence or attempted offence must have occurred in the presence of the peace officer

44. There has been some debate as to when an offence can be said to have been committed in the presence of a peace officer. In *Minister of Justice and others v Tsose*[9] Malan J stated:

"If a peace officer, as a result of observations, honestly and reasonably comes to the conclusion that a crime is being committed he may act upon such opinion or belief even though in subsequent proceedings whether civil or criminal it is not proved that crime was in fact committed."

45. In *Scheepers v Minister of Safety and Security*[10] the Court found that the arresting officer must have personal knowledge of the arrested person's conduct and the facts on which the arrest is founded.
46. It is in this respect that the Defendant has difficulties. On Steinberg's own version he did not know whether the bag contained a prohibited substance. He did not come to the view that an offence had been committed in his presence, because on his evidence he did not know whether the bag contained drugs.
47. Secondly, the arresting officer must make the decision to arrest, and act properly thereon. On Steinberg's version, not only did he not know whether an offence had been committed, he also never made the decision to arrest. He thought Mahlangu would arrest the plaintiffs. Mahlangu arrived some time after the offence was allegedly committed,

and he could not arrest the plaintiffs in terms of section 40 (1) (a) of the Act as no offence was committed in his presence.

48. There remains the question further as to whether the plaintiffs had been in possession of the bag, in circumstances where it had been found at De Lange's feet. The point was made on behalf of plaintiffs that there were many patrons in the tavern that night. It was exceptionally busy, and many people used this bathroom. In my view

Steinberg, even if he had considered whether to arrest plaintiffs, which evidently he did not, could not reasonably have come to the conclusion that plaintiffs were in possession of the drugs.

49. In view of the conclusion that I have come to, I find that the arrest of the plaintiffs was unlawful. I was addressed on the proposition that an arrest can subsequently result in lawful detention, for instance where a magistrate later postpones the accused in custody. Those were not the facts in this matter. Plaintiffs were only taken to court on 27 July 2015, from where they were released. It follows that the detention, subsequent to the arrest, was also unlawful.

50. In the premises I make the following order:

50.1 The arrest of the plaintiffs on 24 July 2015, and their detention until 27 July 2015 is found to have been unlawful;

50.2 Defendant shall pay the costs of the action to date.

J.J.C. SWANEPOEL

Acting Judge of the High Court

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- [1] Minister of Safety and Security vs Tyulu 20095 SA 85 SCA
- [2] Case no; 65356/ 2012, handed down 29 April 2014
- [3] The Civil Practice of the High Court of South Africa
- [4] Supreme Court Practice : at page D1 534
- [5] 1933 SWA 114
- [6] 198 1 (2) SA 490 (ECD) at page 491
- [7] 1930 TPD 740
- [8] Minister of Law and Order vs Kader 1991 (1) SA 41 (AD) at 468
- [9] 1950 (3) SA 88 (T)
- [10] 2015 (1) SACR 284 (ECG)
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