

SOUTH AFRICA / JUDGMENT

Hazyview and Others v Mashaba (A711/2015) [2017] ZAGPPHC 1034 (6 September 2017)

[2017] ZAGPPHC 1034**COURT**

North Gauteng High Court, Pretoria

BEFORE

E E Sethole, S S Mphahlele

CASE / FILE NUMBER

A711/2015

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Source record**HIGH COURT OF SOUTH
AFRICA****(GAUTENG DIVISION,
PRETORIA)****Not****reportable****Not****of interest to other Judges****CASE NO:**

A711/2015

6/9/2017

In

the matter between:

BUCO

HAZYVIEW

1st

Appellant

HANTIE

LESLEY

2nd

Appellant

JACO

BOOYSEN

3rd Appellant

And

MANFORD

DUMAZILE MASHABA

Respondent

JUDGMENT

SETHOLE,AJ

1. This is an appeal directed against a judgment of Magistrate MP Sibuyi sitting in the district court of White River, in terms of which the Magistrate upheld the claim for wrongful search by the appellants who

were the defendants in the court a quo, against the respondent who was the plaintiff in the court a quo.

2. The claim was against the first to the third Appellants. The second and third Appellants were employees of the first Appellant and were allegedly acting in the course and scope of their employment with the first Appellant.
3. The Respondent, instituted an action for damages against the Appellants for a stop and search for which an amount of R 50 000,00 was awarded.
4. The Appellants' appeal against the judgment by the court a quo on the ground that there was, in fact, no search conducted on the Respondent alternatively, should the court find that there was a search, the

amount awarded by the trial court should be reduced.

The background

5. On the 08th November 2012, the Respondent who is a pastor, while exiting BUCO hardware in Hazyview (the shop), was stopped by the second and third Appellants and searched. Following the search, Respondent was made to wait for approximately 30 minutes at the entrance of the hardware on suspicion of having being in possession of stolen goods. Respondent was with his congregants, Mr Moses Maseko, Mr Shadrack Mashaba and Senior Pastor Mr Gedion Mavimbela.

6. Respondent avers in his papers that while being searched, he was harassed, humiliated and degraded by the actions of the second and third Appellants. The Appellants deny the allegations against them.

7. During the course of the trial, it became apparent that the Respondent was pursuing his claim solely on the basis that he was searched by the second and third Appellants which caused inuria on his person.

8. On the other hand, the Appellants adduced evidence in support of its

defence in respect of the search. At the end of the trial, the court was faced with two mutually destructive versions. The trial court accepted the Respondent's version and rejected the version of the Appellants and awarded damages for R 50 000,00 in favour of Respondent. The Appellants now appeals against that judgment.

The evidence

9. Before identifying the issues on appeal I will proceed to set out a brief

exposition of the evidence adduced during the trial proceedings. The Respondent, Manford Dumazile Mashaba and his three witnesses

testified. Second and third Appellants testified for the Appellants.

10. The Respondent testified that on the day in question he went to BUCO to buy some material and as he was inside the shop he received a call from the MEC for Agriculture and had to move outside due to the noise inside the shop. As he exited the shop, he was stopped and informed that he was a suspect. Second Appellant searched him and nothing was found on his person. He was kept in the shop for about 30 minutes and thereafter chased away and informed not to buy from the same shop

again.

11. According to the Respondent, "there was somebody else by then who was in possession of a camera. And he was shooting pictures at me with that camera or taking a video".

12. Mr Gedion Mavimbela, a pastor and a witness for the Respondent, testified that he went to BUCO on the day in question with the Respondent. He confirmed that the Respondent received a call and decided to go out of the shop and was arrested as he was leaving the shop. He did not witness the search on the Respondent and neither did he hear the conversation between the Respondent, the second and third Appellants.

13. Mr Moses Maseko, testified for the Respondent. His testimony is similar to that of Mavimbele. He testified that on the date in question he went to BUCO in the company of the Respondent, Mavimbela and Mashaba. He was first to enter the shop. He heard a noise from behind. He turned around and then noticed that there was a commotion caused by a group of people. From where he was standing he could not witness the reason of the commotion.

14. Mr Shadrack Mashaba, also testified for the Respondent. He testified that people who went to BUCO were 6 in number he waited outside the shop whilst the others entered the shop. He witnessed a commotion between the Respondent and other people but could not hear their conversation. Neither did he witness any search conducted on the Respondent.

15. The second and third Appellants deny having searched the Respondent. I therefore deem it not necessary, to detail their testimony.

16. From the record, it is not clear on what basis did the trial court reject the version of the Appellants and accepted that of the Respondent.
17. I now turn to the fact that the trial court was faced with mutually destructive versions. I am of the view that the magistrate failed to apply recognised principles when dealing with two mutually destructive versions and that he had, as a result, failed to consider the inherent improbabilities in the Respondent's evidence. On appeal, Counsel for the Appellants submitted that the trial magistrate failed to indicate the basis upon which he found the credibility of Appellant's witnesses to be lacking.

Conclusion

18. It is trite that a party who asserts has a duty to discharge the onus of proof. In *African Eagle Life Assurance Co Ltd v Cainer* 1980
- (2) SA 234 (W) at 237D-H. Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany* 1931 AD 187 as follows:

'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version '

19. The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

20. The Respondent went to an extent of testifying that there is someone who was capturing pictures or a video of him being searched but failed to render an explanation why such evidence was not presented at the hearing of this matter.
21. The trial court concluded that the security officer by virtue of his occupation, he was to search people and therefore Respondent could have been searched. That approach is incorrect. The Respondent must prove his case on a balance of probabilities as required in a civil case.
22. In the present case the Respondent failed to discharge the onus to prove that he was searched during the trial. The nature and extent on which he was searched is not clearly defined, if at all.
23. I am of the view that Respondent failed to prove that he was searched for the following

reasons:

23.1. The Respondent is the only witness who testified on the search on his person. Even though the courts are not to reject his evidence solely due to the fact that he was a single witness. his evidence has to be approached with caution having regard whether he has an interest or bias on the matter. His evidence should be accepted by the court as evidence of a single witness which is clear and satisfactory in every material respect. (R v Mokoena I 93 OPD 79 at 8 I). I am, however, not convinced that he proved his case on a balance of probabilities that he.: was in fact searched.

23.2. He does not detail how the search was conducted on him.

23.3. On arrival at the shop. in company of Respondent they were all six in number and no other person in his company witnessed the search.

24. For these reasons mentioned. it follows that the appeal succeeds.

As a result I propose the following order:

1. That the appeal by the Appellants is upheld with Costs.

E E SETHOLE

Acting Judge of the High Court

I agree and it is so ordered.

S S MPAHLELE

Judge of the High Court

Date of judgment:

For the appellant: Adv.

J Lourence

Instructed by: Fullard

Mayer Morrison c/o Friedland Hart

Solomon & Nicolson Attorneys, Pretoria

For respondent: Adv

Instructed by : S.K

Magagula Attorneys, Nelspruit

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Prepared on 24 October 2026 · Esheria