

SOUTH AFRICA / JUDGMENT

Kariega Park Limited v D and Others (CA 252/2017) [2018] ZAECGHC 102 (12 October 2018) [2018] ZAECGHC 102

COURT

Eastern Cape High Court, Grahamstown

BEFORE

RWN Brooks, CM Plasket

CASE / FILE NUMBER

CA 252/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION:

GRAHAMSTOWN

CASE NO. CA

252/2017

KARIEGA

PARK LIMITED

Appellant

and

T

D

First Respondent

N

S

Second Respondent

N

M

Third Respondent

S

N

Fourth Respondent
N E
N
Fifth Respondent
L
M
Sixth Respondent
B
T
Seventh Respondent
T
S
Eighth Respondent
N B
N
Ninth Respondent
Z
N
Tenth Respondent
C C
M
Eleventh Respondent

JUDGMENT

BROOKS J

- [1] The appellant is a company with limited liability and a registered office in Port Elizabeth. It carries on business as a game reserve a short distance from Kenton-on-Sea in the Eastern Cape and provides accommodation for its guests. The respondents are all adult female residents of either Kenton-on-Sea or its neighbour, Bushman's River Mouth. During March 2015 they were employed by the appellant as cleaners at the game reserve's accommodation facilities.
- [2] In October 2015 and April 2016 the respondents individually instituted actions against the appellant in the regional court for the regional division of the Eastern Cape held at Grahamstown. The actions were defended and the appellant filed an identical plea in each. On 10 June 2016 the respondents succeeded in an application for an order consolidating their actions into one. In October 2016 the respondents gave notice of their intention to amend their particulars of claim. The appellant made no objection thereto and in due course the amendments were perfected.
- [3] In the amended particulars of claim the respondent alleged that on 16 March 2015 and at the appellant's premises they were wrongly, intentionally and unlawfully sexually assaulted, alternatively sexually violated by a person employed by the appellant as its catering manager and who was acting within the course and scope of her employment with the appellant. Basic details of the nature of the assault or violation are set out in the particulars

of claim. The allegation is made that the appellant is vicariously liable for the wrongful acts committed by its employee. The respondents then set out the basis for a claim for damages for “impairment to [their] dignity, bodily integrity, emotional and mental anguish, shock and trauma” and an ancillary claim for “contumelia associated therewith”.

[4] In October 2016 the parties’ legal representatives participated in a pre-trial conference convened in accordance with the provisions of section 54 of the Magistrates’ Courts Act 32 of 1944. The minutes thereof were filed of record. It is apparent therefrom that the following was common cause between the parties:

1. On 16 March 2015 and on the premises belonging to the appellant, various sums of money were stolen from guests of the appellant;
2. Pursuant thereto and acting on the instructions of the appellant’s general manager, the appellant’s catering manager conducted individual body searches on the respondents;
3. Subsequently on 19 March 2015, the appellant’s catering manager received a final written warning for her “failure to carry out proper instructions” and in which it was stated that “on or about 16 March 2015, you failed to properly carry out an instruction from your employer to perform a search on certain employees, suspected of committing an act of theft by unilaterally going beyond the instruction given to you to merely search the employees by requiring of the employees that they remove their clothing”;
4. All the respondents have written contracts of employment with the appellant;
5. A set of general rules of conduct for the appellant’s employees is in existence and prescribes inter alia that a failure on the part of an employee to submit to a search is “an instant dismissible offence”.

[5] A trial then ensued. On 3 February 2017 the regional magistrate handed down a written judgment which contained an order in the following terms:

“1. Defendant must provide specialist trauma counselling to those Plaintiffs that require same, to deal with the emotional trauma of the incident.

2. Defendant must provide training by an accredited service provider to all its staff that are involved in security related activities and in particular those that would be involved in the searching of employees;
3. Defendant must present sensitization training on the relevant provisions of the Constitution of the Republic of South Africa and Human Rights in the workplace, to which I have earlier referred, to all its employees;
4. Token Damages in the amount of R45 000.00 (FORTY-FIVE THOUSAND RAND) per Plaintiff is awarded;
5. Payment of the damages must be made within 14 (FOURTEEN) days of Order;

6. Interest will accrue at the relevant legal rate, from date of service of Summons to date of final payment;
7. The Counselling and training specified in Items 1, 2 and 3 of the Order must commence within 90 (NINETY) days of this Order.” (sic)
- [6] What followed was a specific sub-paragraph dealing with the issue of costs. Amongst a number of explanatory statements the following un-numbered orders appear to have been made:

“I directed a higher Counsel’s fee subject to the discretion of the

Registrar, but not to exceed twice the tariff, be awarded;

Defendant to pay the taxed party and party costs of all eleven (11) plaintiffs;

Payment of the costs within 14 (FOURTEEN) days after allocatur, failing which interest will accrue at the prescribed legal rate from due date to date of final payment.”

(sic)

- [7] The appellant has filed a notice of appeal against the whole of the regional magistrate’s judgment. The respondents have filed a notice of cross appeal against the whole of the judgment. Therein the respondents indicate that they abandon the relief granted in their favour in paragraphs 1, 2 and 3 of the order made by the regional magistrate. Both the appeal and the cross appeal are before this court. Central to both are the regional magistrate’s approach to the respondent’s pleadings and their viva voce evidence, the version of events given on behalf of the appellant and the sufficiency thereof, his approach towards the element of wrongfulness and his assessment of an appropriate award of damages.
- [8] In the judgment the regional magistrate set out in detail the evidence placed before him during the trial. All eleven respondents testified. On behalf of the appellant the evidence of its general manager and its catering manager was led. The regional magistrate correctly identified that the respondents bore the onus of proof on a balance of probabilities. However, the manner in which the principle is expressed by the regional magistrate demonstrates the seed of an erroneous approach. He stated the following:

“It therefore followed that the Plaintiffs had a duty to proof (sic), on a balance of probabilities, their stated case.” (Emphasis added).

It is clear from later passages of the judgment that what the magistrate had in mind when referring to “their stated case” was the respondents’ pleadings.

- [9] The assessment of the evidence placed before the regional magistrate was partially prefaced by a statement of principle relating to pleadings. Various cases were referred to[1] and portions of the judgments were set out in this preface. From these it is evident that the

authorities referred to by the regional magistrate considered situations in which evidence had been led in clear departure from the factual content of the pleadings, leading to litigation by ambush and obvious prejudice to the party affected thereby. It is in this context that stringent remarks were made relating to the importance of accurate pleading and the need for amendment where necessary. After re-stating the principle the regional magistrate stated the following:

“Having regard to the aforesaid, I am of the view that it is imperative that the viva voce evidence in Court support the pleading and if it does not correlate that the pleading be amended accordingly”.

[10] In his evaluation of the respondents’ evidence the regional magistrate had regard to their amended particulars of claim. He concluded that he had three versions of events before him in the result. In this approach he erred. He ought not to have had regard to the original, unamended particulars of claim. It is invariably the intention of the pleader that an amendment results in a pleading which supercedes the original. In any event, when cross-examined about some of the allegations contained in the original particulars of claim, then abandoned in the amended particulars of claim, the respondents were consistent in their response, explaining that the initial particulars of claim did not reflect accurately their initial instructions to their attorney. No explanation for the inaccuracy in drawing the initial pleadings ever emerged, but the magistrate ought to have perceived in the evidence of the respondents on the point that their credibility as witnesses could not be adversely affected by the emergence in the initial particulars of claim of features which did not reflect the respondents’ version of events. The regional magistrate’s analysis of the respondents’ pleadings contributed towards his failure to determine where the probabilities lay in the evidence. He erred in finding that the original unamended particulars of claim constituted a “version” before him and erred in comparing this to the amended particulars of claim. The error was compounded when it formed the basis for the regional magistrate to draw adverse credibility findings against the respondents after hearing their evidence.

[11] Moreover, in assessing the viva voce evidence of the respondents in conjunction with the amended particulars of claim the regional magistrate should have given proper

consideration to the substance of the allegations made therein, taking care to avoid a pedantic, formalistic approach[2]. His statement that it is imperative that the viva voce evidence given supports the pleading demonstrated an approach which, in this matter, overemphasised formulaic requirements for precision and formed a premise from which the magistrate lost sight of the essence and substance of the viva voce evidence. He searched unnecessarily for a reason for what he determined was a difference between the respondents’ pleaded

cases and their viva voce evidence. Such differences as may occur are minor and relate to details of the searches more than to the nature thereof. Not surprisingly, there was no cry of protest and prejudice uttered on behalf of the appellant during the trial. There was no litigation by ambush and the appellant knew all along what case it would have to meet. In these circumstances the regional

magistrate ought to have followed more closely the approach of Innes CJ[3] quoted by him in the judgment as follows:

“The object of pleading is to define the issues; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this

instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.”

- [12] In their amended particulars of claim all the respondents pleaded that on 16 March 2015 they were wrongfully, intentionally and unlawfully sexually assaulted, alternatively sexually violated by the appellant’s catering manager. All allege that they were ordered to remove their clothing and were subjected to an intrusive body search. It is only in the details pertaining to the intrusive body search that variations in the pleadings occur. Some of the respondents allege that they were forced to expose their breasts in order to facilitate a visual examination. Some allege that the appellant’s catering manager placed her hands on, groped[4] and/or fondled their breasts. Some make no allegations relating to their breasts. All allege that the catering manager placed her hands on their buttocks and vagina.
- [13] The appellant pleaded to each set of particulars of claim in the same manner. Therein is recorded that a report was made on 16 March 2015 by a guest that money had been stolen from a room. This resulted in an instruction being given to the appellant’s catering manager to conduct a search of those employees who may have had access to the relevant chalet. It is alleged that the catering manager explained to the respondents the nature of her instruction and that they consented to the search. It is alleged that the catering manager conducted the search individually and in private. It is alleged further that the searches entailed a search of the respondents’ bags and their socks, shoes and outer garments once they had been removed. It is specifically denied that the searches entailed the removal of the respondents’ underwear or a body search in whatever manner was alleged by each respondent. It is denied that any physical contact occurred between the appellant’s catering manager and any of the respondents save to the limited extent that she assisted some of the respondents in dressing after the search of their clothing had been completed. An allegation is also made that the searches and the manner in which they were conducted was lawful. Accordingly it is denied that any sexual assault or violation was perpetrated.
- [14] On important aspects of the evidence the regional magistrate was faced with two different versions. His assessment of the evidence was partially prefaced by a reference to the authority emanating from this division[5] in which Eksteen JP stated:

“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 satisfies 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, 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 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."

- [15] However, in approaching the evidence the regional magistrate allowed his perception that the respondents had placed three versions before him to affect adversely his consideration of the viva voce evidence they gave and their credibility as witnesses.
- [16] Although the judgment contains a detailed summary of the viva voce evidence given by each respondent, it does not reveal anything about how the regional magistrate evaluated the evidence in the light of the allegations made in the amended particulars of claim. It is sufficient for present purposes to record that all the respondents gave clear and uncomplicated evidence that they were obliged to undress themselves. Some stated that they were ordered to remove their outer clothing. Some stated that they were ordered to remove their bra's. Some were ordered to remove all their clothing and their underwear. Each respondent stated that the catering manager had placed her hand in between the respondent's buttocks.
- [17] Direct evidence of placing a hand on the respondents' vaginas, or their breasts, or groping and/or fondling their breasts was not given uniformly. In some instances the evidence disclosed that a respondent was ordered to pull her bra, resulting in her breasts hanging out, in some the evidence was that the catering manager had inserted her hand into the bra and searched about therein. Some described the catering manager as pulling at the straps of the bra and looking or feeling between and/or around the breasts.
- [18] The evidence of the appellant's general manager described his response to the complaint of theft received on 16 March 2015. He also confirmed that after the completion of the searches he had held a disciplinary hearing at which the catering manager was challenged with a failure to follow the instructions given to her. The nature of the complaint, identified in the documentation handed in as Exhibit B and the minutes of the pre-trial conference dated 18 October 2016, was that the catering manager had unilaterally gone beyond the instruction given to merely search the respondents and had required them to remove their clothing. Notwithstanding this, the general manager stated that he saw nothing wrong in the catering manager requiring the respondents to undress. He maintained that the disciplinary hearing was necessary because the catering manager had not followed instructions, not because she had required that the respondents undress.

[19] The catering manager confirmed that she held a position superior to the respondents' positions within the appellant's staffing hierarchy, that she knew the appellant's company policy and that it would be a dismissible offence for one of the respondents to refuse to be searched. She stated that she had conducted searches before, and indeed had been searched, but this was the first time she had conducted a search where she requested employees to take off their clothing. She admitted to the use of gloves during the search, claiming this to be in order to maintain hygiene as she did not want to come into contact with the clothing she was to search. She denied that the reason was because she was going to touch the respondents' naked bodies. Accordingly she denied that she had ordered anyone to strip naked or had conducted an intrusive body search with the characteristics alleged by the respondents.

[20] In evaluating the evidence given by the appellant's catering manager the regional magistrate remarked that she made a good impression on him whilst giving evidence. However, he was critical of what he referred to as her "attitude" towards the respondents "and their humanity". In his judgment he referred to a number of the provisions of the

Constitution which address the concept of human dignity and concluded that on the evidence of the catering manager she did not consider any factors connected therewith. He described her attitude as "distant, cold-hearted" and he observed that she "showed a lack of insight into the intrusive nature of what she did".

[21] What is missing in respect of the evidence tendered on behalf of the appellant is, once again, an indication that the regional magistrate considered the extent of the inherent probabilities therein and the truthfulness of the catering manager. Somewhat bizarrely, the regional magistrate appears to have found her evidence to be more acceptable than that given by the respondents, but nevertheless awarded them relief which was not sought in the amended particulars of claim together with what he described as "token damages".

[22] Had the regional magistrate approached the mutually destructive versions of the manner in which the search was conducted in accordance with the approach elucidated in *NATIONAL EMPLOYERS' GENERAL INSURANCE Co LTD v JAGERS*[6] he would have grappled with a number of obvious enquiries. The first is whether the respondents would present themselves in court dishonestly claiming that they had been subjected to an intrusive body search and giving false details of an extremely intimate nature. Had their story been false one would have expected uniformity in its details. In his judgment he remarked on the respondents' use of terms, to describe their ordeal, such as "raped, violated, abused, angry, hurt, humiliated, bad, disappointed, ashamed, lost confidence and dignity taken away". The variations in their descriptions of the searches lend credence to their evidence and dispel any suspicion of invention or collusion. He appears to have accepted that the respondents' primary motive in approaching the court was to express their feelings about the undignified manner in which they were searched.

- [23] A second enquiry which is absent from the reasoning expressed in the judgment relates to the probability that the appellant's catering manager wore gloves in order to protect her own hygiene during the conduct of an intrusive body search involving contact with intimate spaces upon the respondents' naked bodies. This would appear to be a more likely reason for wearing gloves than the one offered by the catering manager, namely that she merely wished to protect her own hygiene in handling the respondents' clothing. Thirdly, the regional magistrate ought to have considered that compared to the obvious sensitivities of the respondents and the unlikelihood of them giving false evidence about such an intimate and demeaning event, it is not improbable that the catering manager, who attracted the criticism that she demonstrated a distant, cold-hearted attitude towards the respondents and lacked insight into the intrusive nature of what she did, and who had been subjected to a disciplinary enquiry about the manner in which she conducted the search, for a number of reasons may have chosen to be less than frank with the court.
- [24] Had the regional magistrate approached the evidence in the correct manner, in my view, he would have concluded that the respondents had satisfied the court on a preponderance of probabilities that their version of events is true and accurate and therefore acceptable and that, in essentials, the version advanced by the catering manager on behalf of the appellant falls to be rejected.
- [25] An intrusive body search conducted contrary to the instructions given by the relevant member of the appellant's staff and which involved ordering the respondents to undress and, amongst other things, feeling between their buttocks constitutes wrongful behaviour which falls within the ambit of the definition of "sexual violation" contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act[7]. Section 1 defines "sexual violation" to include direct or indirect contact between the "...
- (1) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal".

Although there was no specific reference to this piece of legislation in the amended particulars of claim, it is open to the court to have regard thereto in determining objectively the extent to which the behaviour of the appellant's catering manager towards the respondents was wrongful. I have no doubt that the conduct of the catering manager that I have described is fundamentally at odds with the legal convictions of the community. Indeed it may be accepted that current legislation reflects those convictions.

In my view, the outcome of this exercise establishes unequivocally that the course of conduct adopted by the appellant's catering manager was wrongful. Once the wrongfulness of an act has been established, *animus iniuriandi* will be presumed.[8] The resultant harm caused thereby was expressed in various ways by the different respondents, but in essence amounted to an impairment of their dignity and contumelia associated therewith.

- [26] In considering what an appropriate quantum of damages would be in the circumstances of this matter, two cardinal elements are deserving of emphasis. The first is that the right to dignity is enshrined in the Constitution. It has been held[9] that “the importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”
- [27] The second element is that the inequality between the appellant’s catering manager and the respondents in the hierarchy of persons employed by the appellant contributed significantly to the seriousness of the impairment to the respondents’ dignity. Regrettably, one must revert to references to race and social position in order to illustrate the point adequately. The respondents are all black adult women who are employed to accomplish the relatively menial but important task of cleaning the appellant’s accommodation facilities. The appellant’s catering manager is a white adult female who holds a superior, managerial and supervisory position of some trust and esteem in the hierarchy of employees. These factors must have contributed greatly towards the extent of the invasion of dignity experienced by the respondents. Unfortunately, the realities of our common history as South Africans are all too easily recalled by an event in the workplace such as that with which this matter is concerned. Once again, the dicta of O’Regan J in *S v MAKWANYANE AND ANOTHER*[10] are apposite:

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.”

- [28] Several features of the nature of the invasion of dignity suffered by the respondents must be highlighted. The respondents were subjected to sexual violations in the workplace. The appellant’s catering manager was a member of the managerial staff. Her position in the hierarchy of the appellant’s employees was superior to that of the respondents, who held humbler, inferior positions on the same staff. Moreover, the catering manager represented a racial group which perceived itself historically to be superior. The respondents are all of a racial group historically refused respect and dignity. They must have felt vulnerable and at a disadvantage. These features must inevitably have led to an unnecessary rekindling of elements of our painful common history as a nation, aggravating the sense of dehumanisation which the respondents must have experienced. The methodical and insensitive exercise embarked upon by the catering manager meant that the respondents were searched one after the other. For those respondents “standing in line” as it were, the sense of fear and indignation must have been heightened by an awareness of the steady, unavoidable approach of their turn to be searched. It is these features, cumulatively, which must be taken into account in determining the quantum of damages which should be awarded to the respondents. The award made by the regional magistrate was described by

him as “token” damages. The adjective carries with it a sense of levity and undeservedness. In approaching the assessment of quantum in this manner the regional magistrate misdirected himself, entitling this court to interfere with the award made. In my view, an award of R60 000.00 as damages for the impairment of dignity caused by the sexual violation experienced by the respondents, and the contumelia associated therewith, would be appropriate.

[29] What remains is the issue of costs. Recognition was given by the regional magistrate in his judgment to the relative complexity of the matter justifying the involvement of counsel. This, in my view, was appropriate. So too, was the substance of the costs order made. The decision made on behalf of the respondents to make use of two counsel to meet the appeal and to prosecute the cross appeal was also appropriate.

[30] The following order will issue:

1. The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.
2. The cross-appeal succeeds with costs, such costs to include the costs occasioned by the employment of two counsel.
3. The orders made by the regional magistrate are set aside and are replaced with the following:

“1. The defendant is directed to make payment to each of the plaintiffs the sum of R60 000.00 as and for damages for the invasion of dignity and contumelia caused by the sexual violations perpetrated on 16 March 2015, together with interest thereon to be calculated at the prescribed

rate of interest from a date fourteen days after the date of this order to the date of payment.

2. The defendant is directed to pay the costs of suit, such costs to include the costs of counsel subject to the discretion of the registrar but not to exceed twice the amount prescribed by the tariff, and to bear interest at the prescribed rate of interest to be calculated from a date fourteen days after allocation to date of payment.”

RWN BROOKS

JUDGE OF THE HIGH COURT

PLASKET J

I agree

C M PLASKET

Appearances

For the appellant:

Adv TJM Paterson SC (heads of argument)

prepared by Adv D H De La Harpe)

Instructed by

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For the respondent:

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Instructed by

NN Dullabh & Co

5 Bertram Street

Date heard:

21 September 2018

Date delivered:

12 October 2018

[1] KATA v MINISTER OF SAFETY AND SECURITY (2012) JOL 28855 (ECP); IMPREFED (PTY) LTD v NATIONAL TRANSPORT COMMISSION 1993 (3) SA 94 (A) 107 C; KALI v INCORPORATED GENERAL INSURANCES LTD 1976 (2) SA 179 (D) 182 A.

[2] MN v AJ 2013 (3) SA 26 (WCC); SUID-AFRIKAANSE ORDELING BRANDEN ALGEMENE VERSEKERINGSMAATSKAPPY BPK v VAN DEN BERG EN 'N ANDER 1976 (1) SA 602 (A).

[3] ROBINSON v RANDFONTEIN ESTATES GM CO LTD 1925 AD 173 at 198.

[4] It is instructive to have regard to a dictionary definition of the verb “to grope”. The New Shorter Oxford English Dictionary. Grope: Use the hands in feeling; touching or grasping; handle or feel something. Attempt to find something by feeling about especially with the hand as if blind or in the dark. The meaning of feeling or fondling a person ‘clumsily for sexual pleasure’ is a specific and colloquial meaning, not the primary meaning.

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[5] NATIONAL EMPLOYERS' GENERAL INSURANCE Co LTD v JAGERS 1984 (4) SA 437 (E) 440D – 441A

[6] Note 5 supra

[7] Act 32 of 2007

[8] DELANGE v COSTA 1989 (2) SA 857 (AD) 861 C

[9] S v MAKWANYANE AND ANOTHER [1995] ZACC 3; 1995 (3) SA 391 (CC) par [328]

[10] Note 8 supra par [329]

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