

SOUTH AFRICA / JUDGMENT

Minister of Safety and Security v Pavier (37286/2013) [2017] ZAGPPHC 727 (15 November 2017) [2017] ZAGPPHC 727

COURT

North Gauteng High Court, Pretoria

BEFORE

Nkosi

CASE / FILE NUMBER

37286/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

16/11/2017

CASE

NO: 37286/2013

Reportable:

No

Of

interest to other judges: No

In the

matter between:

MINISTER OF SAFETY AND

SECURITY

Applicant

And

PAVIER

JOHANNA

Respondent

JUDGMENT

NKOSI AJ:

INTRODUCTION

- (1) This is an application for leave to appeal the judgment of this court delivered on the 23 June 2017. The applicant is also seeking condonation for the late filing of the application. Both applications are opposed by the Respondent.
- (2) The factual findings and conclusions on points of law made by the court in its judgment are the subject of this application for leave to appeal.

CONDONATION

- (3) The Respondent opposed the application for condonation on the basis that the Applicant had ample time to prepare for leave to appeal within the prescribed time period. There were no further submissions made for the opposition of the application.
- (4) The Attorney entrusted with this matter at the state attorney's office deposed to an affidavit and gave an extensive and reasonable explanation for the delay. Her explanation accounted for the reasons why there was a delay and how it came about. In my view, she managed to show good cause why the court should condone the lateness of the application. I was therefore satisfied that in the exercise of my discretion the appropriate order was to grant the application for condonation. I accordingly ruled in favour of the Applicant and granted condonation.

MERITS IN BRIEF

- (5) The Respondent was arrested without a warrant by Constable Ravele for dealing in second hand goods without being in possession of a valid certificate issued in terms of the Second Hand Goods Act 23 of 1955 ("The Act"). The goods in question were off-cuts of copper cables and some scrap metals. She was ordered to follow the Police to the Police station in her own bakkie. After a while at the Police station, she was told that she was to be locked up in the Police cells and she instantly collapsed and gained her full consciousness in hospital where her wrist was cuffed to the hospital bed.
- (6) The Respondent alleged that the arrest was unlawful. She further alleged that she was assaulted and ill treated by the Police which allegations were denied by the Applicant.
- (7) In justifying the arrest, the Applicant alleged that the Respondent contravened the provisions of the Second Hand Goods Act read with Section 40(2) of the Criminal Procedure Act 51 of 1977 and with schedule 2 of the said Act. The alleged assault has always been denied by the Applicant.

DUTY TO BEGIN

(8) The Applicant conceded, and correctly so, that it bore the onus to prove that the arrest was justified but it disputes that it bore the duty to begin and adduce evidence.

(9) Rule 39 (11)[1] states that;

"Each party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice."

An application was made to court for a ruling on the issue of the duty to begin. The court ordered the Applicant (Defendant) to begin and adduce evidence. It is this ruling inter alia which is challenged in this application.

(10) The issues before court were the lawfulness of the arrest, the assault and quantum. The Applicant had the duty to justify the arrest whereas the Respondent had a duty to prove her assault allegations and the quantum. The arrest happened first and the assault thereafter. The chronology of events and the convenience of dealing with evidence in that order as the incident unfolded persuaded the court to rule that the Applicant bore the duty to begin. Although the issue of the duty to begin was not dealt with in *Duarte v Minister of Police*[2] , however the court made the following comment;

"The Defendant accepted the duty to begin. It became evident that generally the chronology of events is not in dispute"

In *Duarte's* case, the Plaintiff claimed that he was unlawfully arrested and assaulted and this scenario is congruent to the matter before me.

(11) Rule 39 (13) provides;

"Where the onus of adducing evidence on one or more of the issues is on the Plaintiff and that adducing evidence on any other issue is on the Defendant , the Plaintiff shall first call his evidence on any issue in respect of which the onus is upon him.... "

In *Minister of Safety and security v Sekhoto*[3] the Honourable Harms DP stated;

"Presumably because the Plaintiff's bore an onus in respect of some of the issues in the case especially in relation to the other claims, they testified first".

(12) Having regard to the provisions of Rule 39 and the remarks referred to above in *Sekhoto's* case I am persuaded that there is a reasonable prospect that another court would come to a different conclusion.[4]

PHOTOS AND DVD VIDEO EVIDENCE

(13) The Applicant contends that the court erred in disregarding that the photos on page 37 of bundle F, index to trial bundle constitutes real evidence and the fact that there was no written statement and/or affidavit by the plaintiff acknowledging the photos and or photographs on page 37 of bundle F.

- (14) I do not agree with the Applicant's submission. The case was not centred around the photos and video footage. The Respondent was able to testify and inform the court how she got arrested, why she got arrested and what happened during and after the arrest until her release from Police custody. She was able to do so without the aid of the photographs and the video footage. Her oral evidence alone was sufficient to enable the court to make findings concerning her arrest, detention and assault. The photographs and the video footage were not a requirement for her claim to succeed.
- (15) The evidence of Constable Ravele and the Respondent were similar in several material respects. It is common cause that the Respondent failed to produce a certificate entitling her to deal in second hand goods. It is further common cause that the Respondent produced an affidavit as well as a letter which was written in Afrikaans and gave them to Constable Ravele. In doing so she was explaining to Constable Ravele how she got to be in possession of the goods. It was at that stage that Constable Ravele informed her that he was arresting her for failure to produce a valid certificate. I must add that Ravele was questioned why he did not consider other forms of securing Respondent's attendance in court, for instance issuing a warning or a summons to appear in court. He did not give any acceptable explanation.
- (16) It is also common cause that whilst at the police station, the Respondent collapsed and was taken to a clinic and later to a hospital by the police. When she regained her consciousness she was on a hospital bed with her wrist cuffed to the hospital bed. Her evidence which remains unchallenged was that the handcuff was very tight causing her pain and that incident took place on the 16 February 2012. Whilst laying on the hospital bed, the two police officers ill-treated her by making nasty verbal remarks which instilled a lot of fear on her. In my view the manner in which the Respondent was hand cuffed given her age as well as the remarks made by the police officers support the Respondent's allegation of assault which according to evidence before court commenced on the 16 February 2012 and ceased the next day.
- (17) Constable Ravele, as an arresting officer, was only able to relate the incident from the moment he met the Respondent till the moment the Respondent collapsed at the police station. The respondent was always under police guard at the hospital and in her particulars of claim as well as in her evidence before court she was consistent that she was assaulted by the police when she was in hospital and on her way back from the hospital. There is no evidence from the applicant's side to dispute the Respondent's evidence in this regard.

SECOND-HAND GOODS ACT

- (18) In the court's judgment, it was accepted that she did not produce any valid certificate permitting her to dealing with second hands goods and the only conclusion to be made is that she did not have any. However the court's concern was whether the act permits a police who is not armed with a warrant of arrest to arrest a transgressor of the act. The court reached a conclusion that the police officer was not empowered to arrest and that such

arrest was unlawful. The applicant argued that the arresting officer was permitted to do so by the second hand goods act read with section 40(2) of the criminal procedure act further read with schedule 2 thereto.

(19) Section 40(2) states;

"If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances."

Schedule 2 makes it an offence to deal in precious metal where a person has no authority to do so. The second hand goods act makes no provision for the arrest of a person who contravenes the provisions of that act. If the arrest was effected in terms of the second hands goods act read with section 40(2), it therefore follows that the Second Hand Goods Act should provide for and enable the arrest of a person in order for section 40(2) to be applicable. Section 40(2) permits a warrantless arrest if the legislation which is being contravened allows for the arrest of a person. Schedule 2 is not a schedule to the second hand goods act but it is to the criminal procedure act.

(20) The second hand goods act 23 of 1955 has since been repealed and the new act, Second Hand Goods Act 6 of 2009 came into effect on 30 April

2012. It was argued by the applicant that leave to appeal should be granted so that the Supreme Court of Appeal court should be ceased with the interpretation of the provisions of second hand goods act as well as section 40(2). The Applicant submitted that the appropriate court would be the supreme court of appeal. I do not agree because the interpretation of the repealed legislation is now academic and the relevant provisions of the said act are minimal. Whilst I accept that in issues of interpretation of the law, there is a likelihood of a different interpretation. I am not persuaded that this is a matter to be referred to the Supreme Court of Appeal. I am of the view that the full bench of this division should hear the appeal and determine whether the arrest was justified under the provisions of the Second Hand Goods Act 23 of 1955 read with Section 40(2) and schedule thereto. I am further persuaded in this regard that there is a reasonable prospect another court would come to a different

conclusion.

ORDER

I. Leave to appeal to the full bench of this division is granted.

II. The Respondent is to pay the costs of the application.

NKOSI AJ

APPEARANCE

For the Applicant

: Advocate Kwindu

Instructed by

: State Attorney, Pretoria

For the Respondent

: Advocate Swart

Instructed by

: Erwee Attorneys

Date of Hearing

: 26 October 2017

Date of Judgment

: 15 November 2017

[1] Rule 39(ii) of Uniform Rules of the Court

[2] Duarte v Minister of Police (201/34042) [2013]2 AGP JHC 51 (7 March 2013).

[3] Minister of Safety and Security v Sekhoto (2011(1) SACR 315 (SCA); [2011] 2 ALL SA 157 SCA at para8

[4] Section 17(1)(a)(1) of the Supreme Court Act, 2013.also see Mont Chevaux Trust v Goosen 2014 JDR 2325 at para 5,6 and 15; also Daantjie Community v Crocodile Valley Cirrus Company Pty LTD [2015] ZAL CC 7 (28 July 2015) at para 3

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Prepared on 12 October 2026 · Esheria