

SOUTH AFRICA / JUDGMENT

Piperdi v Minister of Police (71/2019) [2019] ZAECHGC 83; 2020 (1) SACR 572 (ECG) (10 September 2019) [2019] ZAECHGC 83

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S. Rugunanan, J. D. Pickering

CASE / FILE NUMBER

71/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA 71/2019

Date heard: 23 August

2019

Date

Delivered: 10 September 2019

In

the matter between:

AZAM
PIPERDI
Appellant
and
THE
MINISTER OF POLICE
Respondent

JUDGMENT

RUGUNANAN, AJ:

[1] The appellant (as plaintiff in the court a quo) instituted action in the Magistrates' Court, Port Elizabeth, in which he claimed damages for an unlawful search and seizure conducted by members of the South African Police Services. A search of the appellant's business premises in Arcadia was conducted on 17 April 2014 and in the process two of his cellphones were seized.

[2] The appeal to this Court is against the Magistrate's dismissal of the action. The dismissal was based on a factual finding that the respondent's witnesses, Warrant Officer Zaine Bosch and Captain Rynhardt Swanepoel, were good witnesses whose versions were not improbable. This conclusion is informed by the Magistrate's observation of the demeanour of the witnesses when they testified as he found them to be clear, calm and forthright during examination in chief and in cross-examination. It is on this basis that the Magistrate accepted the version of the respondent's witnesses that the appellant consented to the search and seizure, and rejected the appellant's version that there was no consent, as highly improbable. In my view the Magistrate's finding was wrong.

[3] Tritely, it is only in exceptional cases that a court of appeal will be entitled to interfere with the evaluation of oral evidence by a trial court.[1] A trial court has the benefit of seeing and hearing the witnesses, assessing their personality and demeanour and evaluating the content of their evidence in the light of the atmosphere of their re-creation of events. A trial court is in the best possible position to determine

the essence of what was said and how it impacted on the person against whom it was said.[2] In *S v Monyane and Others* [3] it is stated that a court's powers to interfere on appeal with the findings of fact of the trial court are limited. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[4] This is a case in which a plain reading of the record leaves me in no doubt that the Magistrate's findings of fact and credibility are insupportable.

[4] Section 22 of the Criminal Procedure Act [5] ("the Act") provides as follows:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

- (a) if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question; or
- (b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.”

[5] The Constitution provides that everyone has a right to privacy, which includes the right not to have their property searched or their possessions seized. This right is subject to reasonable and justifiable limitation in terms of the limitation clause (section

36). This limitation has to be weighed against the fundamental right to privacy and a balance must be struck between the protection of the individual’s right and the maintenance of law and order. Because a search and seizure invariably entails an invasion of privacy the courts are duty-bound to view them critically and to ensure that such action was reasonable and justifiable in the circumstances.[6]

[6] In the proceedings before the court a quo the respondent denied the search, but at the close of the appellant’s case the respondent’s plea was amended to indicate that the search without a warrant was justified in accordance with section 22(a); alternatively section 22(b) of the Act. Despite the plea being amended to admit the search the record shows that the respondent’s witnesses inexplicably continued to deny the search and downplayed their conduct as a mere “walk-through” of the appellant’s premises without touching anything. A reading of their evidence, despite their seniority and experience, does not inspire confidence that they conducted themselves responsibly.

CONSENT

[7] The version discernible from the testimony of the appellant is that the search was unlawful because his consent was not obtained. In the case of *Magobodi v Minister of Safety and Security and Another*

[7] it was held that proper consent must be voluntary. The record reveals that neither did Bosch nor did Swanepoel obtain the appellant’s consent before they proceeded with the search. Bosch was questioned on whether he straightforwardly asked the appellant for permission to conduct the search. He evaded the question by answering on more than one occasion that he said to the appellant “You say you are innocent so you don’t mind if we walk through.” The appellant testified that he gave way to the will of the policemen because he felt scared and was intimidated by their presence.

Relevant to the search itself the appellant stated the police officers did not ask his permission. In examination in chief Bosch

was pertinently asked if he requested permission to conduct a search. He responded:

“No, we said to him, listen you are saying you are innocent, so you don’t mind if we walk up and down and so he said “No”, he was walking with us.”

- [8] Applying the test in resolving disputed facts as stated in the case of Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others,
- [8] the contention advanced on behalf of the appellant that consent to conduct the search was not obtained and that his conduct was not voluntary, is correct.

DELAY

- [9] Section 22(b) of the Act provides that a warrantless search is lawful if the police official believed on reasonable grounds that a warrant would be issued and that the delay in obtaining it would defeat the object of the search.
- [10] On this aspect it is necessary to consider the undisputed evidence on the version of the respondent's witnesses. Bosch testified that he had information of the hijacking of a cigarette delivery vehicle that took place at about 11h00 that morning. The vehicle belonged to a tobacco company. Information indicated that the vehicle used in the hijacking was a white Bantam bakkie and that this vehicle would be delivering the stolen goods at a shop in Arcadia.
- [11] While driving in the area, Bosch spotted a white Bantam bakkie reverse parked in front of the appellant's business premises as if it were going to offload. He observed a known criminal emerging from the premises. When this person saw Bosch, he jumped into the bakkie which immediately sped off. Bosch gave chase but lost the bakkie even though he radioed for assistance while in pursuit. On observing the bakkie speeding off from the appellant's premises Bosch concluded that its occupants must have gone there to sell the cigarettes. For this reason he went back to the appellant's premises after the car chase and notified Swanepoel telephonically.
- [12] Bosch further testified that the appellant appeared to have been very nervous and he thought that the appellant might have been guilty because he was sweating profusely. Swanepoel arrived at the premises together with another gentleman from the tobacco company who would have identified the cigarettes from their packaging.
- [13] Although Swanepoel indicated in a written statement that a search warrant would not have been issued, he testified that he believed that a warrant would have been issued had it been applied for. When Bosch was cross-examined on the discrepancy between his version that a warrant would have been issued and the version of Swanepoel in his statement that a warrant would not have been issued, Bosch stated that Swanepoel was incorrect in his statement. The change in stance by Bosch and Swanepoel was a disingenuous attempt to give testimony that accorded with the amended plea. Considering that Bosch, from the moment of his arrival, had spent an approximate hour and a half at the appellant's premises, it is concerning that no evidence was elicited from him as to why he could not have secured the premises while Swanepoel or perhaps some other member applied for a search warrant.

- [14] In the circumstances the actions of the respondent's witnesses were certainly not reasonable and justifiable whether in terms of section 22(a) or (b) of the Act.

SEIZURE

- [15] It was the appellant's evidence that an unidentified police officer in the company of Bosch and Swanepoel dispossessed him of two Nokia cellphones; one that he held in his hand and another (in which he stored alternative numbers of some of his contacts) which he kept in one of his pockets. He specifically stated that he did not voluntarily give up these phones and felt uncomfortable about the police officer going through them. Moreover he testified that he was asked to accompany Bosch and Swanepoel to their offices in Shirley Street "because they want to see something in my phone".
- [16] At the offices he observed his phones being connected to a laptop. This was done without his permission. He was later advised that he could go but he insisted that he required both his phones for business purposes. For this reason he stated that he did not voluntarily leave his phones with the respondent's witnesses. It became necessary therefore for him to contact an attorney for assistance in retrieving the phones and in this regard he incurred legal expenses in the amount of R5 750,
08. Applying the same test in Stellenbosch Farmers' Winery supra it is improbable that the appellant consented to his cell phones being seized nor is it probable that he voluntarily agreed that their contents be scrutinised. Accordingly, the Magistrate's rejection of the appellant's version of the seizure is

erroneous. Once again, no evidence was led from the respondent's witnesses as would have justified the seizure under section 22 (b).

DAMAGES

- [17] In the particulars of claim, the damages claimed by the appellant are set out in the following paragraphs:

"9. In and as a consequence of the aforesaid unlawful and wrongful conduct of the SAPS members, the plaintiff:

9.1 was severely traumatised;

9.2 suffered contumelia and inuria (sic)

... ;

14. As a result of the foregoing, the Plaintiff suffered damages in the amount of R85 750,08 made up as follows:

General damages (unlawful search and seizure) R80 000,00

Special Damages

R5 750,08”

[18] In Aaron’s Whale Rock Trust v Murray & Roberts Ltd and Another

[9] it is stated:

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable

loss.”

(my own emphasis in bold)

[19] Except for special damages for the amount of R5 750,08 which the appellant has proven in respect of professional legal services, the record evinces less than sufficient factual detail for assessing general damages. No evidence of adequate sufficiency was led to support the allegation in paragraph 9.1 of the particulars of claim and to an extent, paragraph 9.2. Acknowledging that a court must, even with scant material at hand, attempt to assess damages, I consider it unjust to both parties where damages have obviously been suffered, as a result of the respondent’s (vicarious) wrongdoing, to attempt to quantify such damages with the quality of evidence available. This would be tantamount to an exercise in guesswork. The present is a case in which it may be said with some justification that the appellant ought to have been adequately prepared to testify on the quantum issue.

[20] In the circumstances I make the following order:

- (i) The appeal is upheld with costs;
- (ii) The matter is remitted to the Magistrate for determination of general damages.
- (iii) The Magistrate’s order is set aside and substituted by the following order:

“Judgment is granted in favour of the plaintiff for:

- (a) Payment of the amount of R5 750,08 as and for special damages;
- (b) Interest thereon at the prevailing legal rate from date of judgment to date of payment;
- (c) Costs of suit.”

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree.

J. D. PICKERING

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv. M. Du Toit

Instructed by

Karsans Inc.

c/o N. N. Dullabh & Co

Makhanda / Grahamstown

For Respondent: Adv N. James

M. Godolozzi Attorneys

[1] S v Francis 1991 (1) SACR 198 (AD) at 204e

[2] S v Nqangule (CA&R 378/2007) [2008] ZAECHC 98 (19 June 2008) paragraph [5]

[3] 2008 (1) SACR 543 (SCA) at paragraph [15]; see also S v Hadebe and Others 1997

(2) SACR 641 (SCA) at 645 e-f)

[4] It is settled since Rex v Dhlumayo 1948 (2) SA 677(AD) at 705 that a court of appeal will be slow to interfere with a trial court's evaluation of oral evidence. The findings of fact which are made on the strength of his evaluation are presumed to be correct, and, in the absence of a material misdirection, the court will not disturb those findings unless a reading of the record clearly shows that they are insupportable, Nqangule supra. See also Kunz v Swart and others 1924 AD at 655; Taljaard v Sentrale Raad vir Ko-operatiewe Assuransie Bpk 1974 (2) SA 450 (A) at 452A-B.

[5] Act No. 51 of 1977 as amended

[6] In Mistry v Interim Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC) paragraph [24] the following is stated: "In S v Makwanyane and Another this court held that there was no absolute standard which could be laid down for determining the reasonableness and justifiability. Principles could be established, but the application of those principles to particular circumstances could only be done on a case-by-case basis: 'This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the

importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.' "

- [6] In *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) paragraph [24] the following is stated: "In *S v Makwanyane and Another* this court held that there was no absolute standard which could be laid down for determining the reasonableness and justifiability. Principles could be established, but the application of those principles to particular circumstances could only be done on a case-by-case basis:

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- [7] 2009 (10) SACR 355 (Tk) at 360 g

- [8] 2003 (1) SA 11 (SCA) paragraph [5] "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) the reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness box, (ii) is bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability

or improbability of particular aspects of his version ... "

- [9] 1992 (1) SA 652 (C) at 655 H-J, and cited with approval in *Helderberg Car & Propshaft Centre CC t/a Propshaft Centre v Nexor 519 t/a Protec Crane Hire* (CA177/2011) [2012] ZAECGHC 41 (24 May 2012) at paragraph [37]

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