

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 5124/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

06-02-2023

DATE

PD. PHAHLANE

SIGNATURE

In the matter between:

JOLANDA KOEKEMOER

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

CAPTAIN STOBBE

2ND DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION

3RD DEFENDANT

JUDGMENT

PHAHLANE, J

[1] The plaintiff instituted a claim for damages against the defendants relating to her unlawful arrest and detention which occurred while acting as an informant of the first defendant on 3 February 2011. At the commencement of the proceedings, Mr. Stevens appearing on behalf of the plaintiff informed the court that the matter will proceed in respect of the **merits only**, and for the heads of damages relating to **unlawful detention only**, against all three defendants. The plaintiff was the only witness who testified in support of her case and at the close of her case, all the defendants brought an application for absolution from the instance in terms of Rule 39(6) of the Uniform Rules of Court.

[2] The facts can briefly be summarized as follows:

2.1 According to the particulars of claim, on or about August 2010, the first defendant duly represented and authorised thereto by the second defendant, engaged the plaintiff about acting as an undercover agent for the first defendant. The opportunity entailed that the plaintiff would infiltrate fraudulent credit card schemes and gather information about the manner which these schemes operate and would report and disclose the details of how the schemes operate and the names of the individuals involved in the said schemes.

2.2 It was agreed that the second defendant would provide the plaintiff with instructions and duly manage her participation or interaction with members of the alleged scheme or syndicate. During February 2011, the plaintiff was given instructions to infiltrate a scheme that traded in the purchase and sale of stolen credit cards. The plaintiff's duties included the sale of these stolen credit cards in that she would purchase these stolen credit cards and then use the said cards to establish the identities of the parties involved, and to gather details about the scheme.

[3] I will only highlight the aspects, which in my view, are relevant aspects pleaded by the plaintiff in respect of this specific heads of damages:

The claim against the first and second defendants

“6.1 At all relevant times the first and second defendants were under illegal duty to:

6.1.1 Ensure that the plaintiff was properly managed.

6.1.2 Give the plaintiff reasonable instructions.

6.1.3 Ensure that measures were in place to facilitate the plaintiff’s release from detention (in the event of the plaintiff being arrested in the execution of her duties as an undercover agent).

6.1.4 Arrange for the plaintiff’s release from detention (in the event of the plaintiff being arrested in the execution of her duties as an undercover agent).

6.1.5 Support the plaintiff in the execution of her duties as an undercover agent.

6.1.6 Take reasonable measures to ensure the safety of the plaintiff.

6.4 The first and second defendants failed to comply with one or more or all of their legal duties pleaded herein above and without derogating from the allegation, they:

6.4.1 Failed to ensure that measures were in place to facilitate the plaintiff’s release from detention.

6.4.2 Failed to make any, alternatively, proper arrangements to ensure the plaintiff release from detention.

6.4.3 Abandoned the plaintiff.

6.4.4 Failed to manage the plaintiff.

6.4.5 Failed to take reasonable measures to ensure the safety of the plaintiff.

6.4.6 Failed to give the plaintiff proper instructions”.

The claim against the third defendant

“7.1 At all relevant times to the action, the prosecutor, prosecuting the matter had a legal duty to:

7.1.1 Prosecute the matter against the plaintiff without fear, favour or prejudice.

7.1.2 Ensure that the plaintiff enjoy her constitutional rights which included but are not limited to the rights, respect and protection of her dignity to freedom and security to privacy and the right to freedom of movement.

7.3 On 7 February 2011, the plaintiff was brought to the Roodepoort Magistrate's Court and the prosecutor, prosecuting the matter was given confidential information concerning the plaintiff being an undercover agent of the first defendant”.

- [4] The issues for determination are (a) whether the defendants failed in their respective legal duties to protect the plaintiff and ensure her timeous release from detention, and consequently her first appearance in the Roodepoort Magistrate's court after the arrest –and (b) whether the defendants respectively acted in breach of such duty and whether such breach was negligent.
- [5] The plaintiff testified that when she was recruited, she met the second defendant (“captain Stobbe”) on 2 August 2010 at Cornish Cattle in Irene, who was at the time in the company of a gentleman who was apparently her superior, named Phillip. She gave them information regarding credit card fraud as to how they operated because she had previously been engaged in such activities, and when they parted ways after the meeting, she was paid around R8000 for the information she gave and had agreed to work with them.
- [6] On 10 August she met captain Stobbe at Wimpy restaurant in Zambezi Road where she signed an agreement to operate as an informer, and she was not

given a copy of the agreement. She said she is not sure what was stipulated in the agreement, but captain Stobbe explained to her that in terms of the agreement she signed, she had to report everything to her (ie. captain Stobbe) and further that she should not sell the information to other sources. According to her, she gave weekly reports to captain Stobbe about the syndicate and in the process of her undercover duties, some of the syndicate members and role players were successfully arrested. The purpose of joining the police operation was to shut down the syndicate.

- [7] She testified that in terms of the agreement, she was expected to report her dealings with captain Stobbe with regards to the scope of what she was doing on every occasion, but that very often, the transaction would happen on the spot and she would not have the opportunity to inform captain Stobbe of what she was doing at that moment and of the syndicate members she was engaging with when the opportunity arose.
- [8] On 3 February 2011, the plaintiff got arrested after having made a successful purchase of goods at three different shops at Clearwater mall. She said the police were summoned and she informed captain Stobbe of her arrest. She alleges that a white security officer cuffed her and paraded her at the mall while she was handcuffed. She was ultimately put at the back of the police van and taken to Roodepoort police station where she did not get good treatment from the police.
- [9] While at Roodepoort police cells, she requested that her medication be brought and her request was denied. She was thereafter detained at the Johannesburg prison which is normally referred to as Sun City, and explained that while in detention, she was badly treated and sexually assaulted with an Appletizer bottle. She alleges that she was victimized and humiliated by the inmates in the cells and forced to clean the toilet with her tooth brush every time, and was instructed to brush her teeth with the same toothbrush. She was also physically assaulted with the soap socks on a daily basis.

[10] With specific reference to her court appearances at the Magistrate court, she testified that she was denied bail by the Magistrate who called her a fraudster and a criminal, and also treated her badly. She said she is not upset with captain Stobbe because “she tried within her ability to help her” and expressed her dissatisfaction towards the people who refused to grant her bail. She specifically said she is “mostly upset with the people that did not allow her bail because she was prosecuted for a crime that was not really a crime that she committed on purpose”. (underlining added for emphasis)

[11] She confirmed under cross-examination by Mr. Mtshweni that she did not have any employer-employee relation with the South African Police Service (SAPS); that she was rendering services to the police freely and voluntarily; that she was not allowed to disclose any terms of her engagement to anyone including the members of SAPS; that she read through the agreement and understood it before she could sign it; that she understood her mission under the terms for which she signed the agreement for,- although she was adamant that she was never given a copy to familiarize herself to the terms of the agreement. With regards to the question that she was not allowed to engage in any violent activities unless she was defending herself, she stated that she does not remember that aspect. (underlining added for emphasis)

[12] The plaintiff testified that on the 17th of February when she appeared before the magistrate, she disclosed to the magistrate that she was an informer. She said when captain Stobbe confirm this issue upon being questioned by the court, the magistrate still did not believe captain Stobbe. The magistrate called her a criminal.

[13] Of importance to her testimony, she confirmed under cross-examination by Mr. Mtshweni that she was not denied bail because captain Stobbe did not do anything to assist her. She conceded that although she was informed that her address/proof of address had not been confirmed for her to be considered to be

released on bail, such decision was vested on the magistrate. When confronted with her allegations as pleaded in paragraph 6.4 of her particulars of claim, she responded that she does not know what her attorneys noted in her particulars of claim.

[14] The plaintiff's allegation that she was abandoned by captain Stobbe as pleaded, contradicts her evidence that when she informed captain Stobbe of her arrest, captain Stobbe attended court on more than one occasion and even exposed their identity as the handler and informer respectively.

[15] Having said that, she however conceded that the information as contained in her pleadings was the information that could have only come from her when giving instructions to her attorneys. She was confronted with part of what was pleaded as regards the allegation that captain Stobbe abandoned her and did not make proper arrangements to ensure her release from detention, as well as the dates mentioned in her notice to the first defendant in which it is stated that during those specific dates mentioned, captain Stobbe approached the state prosecutors on numerous occasions informing her that the plaintiff was the police informant and even brought the casefile as proof thereof.

[16] In her response, she stated that she never doubted that captain Stobbe tried everything to get her released and stated that she agrees that captain Stobbe never abandoned her. With regards to the treatment she received while at the Johannesburg Correctional Services, she confirmed that she is aware that the correctional services where she was detained falls under the control of the Minister of Correctional Services and not the Minister of Police. Further that the warder whom she alleged had referred to her as an *impimpi*, was employed by correctional services, and that the people who were responsible for her safety while in detention at Sun City, were the warders in the employ of correctional services and not the Minister of Police.

[17] The plaintiff stated that when she breached the conditions of the agreement which she signed, captain Stobbe also breached the agreement because the agreement stipulated that captain Stobbe was responsible for her safety. She was asked once more about the terms of reference in the agreement and she changed her version and responded that she does not remember the contents of the agreement.

[18] Under cross-examination on behalf of the third defendant, she confirmed that she was not allowed to commit any offence. She was confronted with a report she made in which she stated that “*she made a decision to proceed in her activities and committed an offence without consulting with captain Stobbe first*”. She responded that she had to make a decision on the spot because she did not have the opportunity to consult with captain Stobbe. It was then put to her that her actions contradicted the terms of her agreement which she told the court about, -- that she was not allowed to commit any offence and that captain Stobbe was supposed to have been informed of any activities she engaged in first, beforehand.

[19] The plaintiff confirmed and repeated her evidence that there was no guarantee in the agreement she signed that captain Stobbe will get her out of custody if she were to be arrested or prosecuted for the crimes she committed, where there was *prima facie* evidence against her. She however stated that she once discussed this issue with captain Stobbe as to what will happen to her because she knew about the agreement. She said when she enquired, captain Stobbe told her that the issue can be discussed with the investigating officer or the state prosecutor. Nonetheless, she conceded that the decision to deny her bail was vested with the magistrate and not the prosecutor.

[20] The plaintiff closed her case and all the defendants applied for absolution from the instance. Counsel on behalf of the plaintiff indicated the intent to seek a postponement for the following reasons:

- a) That the agreement signed by the plaintiff was not discovered.
- b) There is a breach of the agreement given the fact that there is no physical agreement.
- c) That counsel needs to have proper consultation with the plaintiff with specific reference to the agreement.
- d) That a violation of the plaintiff's constitutional rights in terms of the normal criminal processes of being detained for longer than was necessary without bail being afforded to her, forms the basis for a postponement.
- e) There is no evidence before court that the plaintiff did not get a fair trial in terms of section 35 of the constitution, and neither was this pleaded.

[21] It was submitted that since the incident occurred eleven years ago, the plaintiff should be afforded an opportunity to discover the document to be inspected so that she can familiarize herself with its contents. A further ground for seeking a postponement was that the plaintiff would be prejudiced by the contents of the agreement and its terms of reference which she have forgotten. Mr Stevens indicated that requests were made, to have the document discovered but that was never effected. Surprisingly, counsel thereafter conceded that there was an invitation to inspect and make copies and that invitation was never effected by the plaintiff. He further conceded that the plea contains some of the material terms of the agreement. The only issue is that it would have been preferable for the plaintiff to have the physical copy of the agreement.

[22] The application for a postponement was met with an objection based on the following grounds:

- a) That the terms of reference of the agreement have been pleaded as contained in the particulars of claim.
- b) That a notice in terms of Rule 35(6) dated 19 August 2015 and served on the State Attorney on 20 August 2015, where the plaintiff sought to inspect this agreement was made - the plaintiff was invited by the defendant to do so and to also make copies, but the invitation was not honored.

- c) Had Rule 35(6) not been complied with, the plaintiff had the remedy of bringing an application to compel discovery, but that was not the case.
- d) That in addition to this notice, there is a notice in terms of Rule 36 where the plaintiff was once again invited by the defendant to inspect the document and the invitation was ignored.
- e) There is a letter dated 5 February 2015 from the State Attorney Mr Duvenage in which he invited the plaintiff's attorney and informed them that the document is available, and they should arrange a date of when to come and inspect the documents and make copies, and this letter was not responded to¹.
- f) That the plaintiff was not taken through the issues which were not pleaded to, but to those which she pleaded to and brought them up herself during her examination in chief and under cross-examination.
- g) That the plaintiff knew that the document was important to her case but ignored it and that declining the invite to inspect and make copies of the document was at her own peril, particularly because the plaintiff wants the document for herself.

[23] Having considered the submissions by all parties, I was of the view that there would not be any prejudice suffered by the plaintiff. Even though the plaintiff wanted to distance herself from knowledge of the agreement, she repeatedly confirmed under cross-examination on behalf of all defendants that she knew about the agreement which she discussed with captain Stobbe. It may very well be that this agreement was signed in 2015, but the plaintiff brought up the specific terms of this agreement in her evidence in chief and repeated same under cross-examination. It can therefore not be correct to conclude that due to the lapse of time since the agreement was signed, the plaintiff had forgotten what was contained in the agreement. On the other hand, the plaintiff's case had been closed and there is no indication whether there is an intent to reopen her case. Under the circumstance, the application for a postponement was refused.

¹ Caselines 001-459.

[24] **Absolution from the instance.**

First and second defendant's submissions are as follows:

- a) What has been pleaded by the plaintiff at paragraph 6.4 of her particulars of claim is not what has been demonstrated in her evidence.
- b) There can be no fault on the part of the defendants that the plaintiff spent twenty-four (24) days in detention because the decision to release was vested in the magistrate. That in this regard, the plaintiff conceded that the magistrate is not a member of SAPS and was the one who repeatedly refused to grant her bail because she was vested with the decision to release her.
- c) That it would have been unreasonable for the plaintiff to have expected captain Stobbe to instruct the prosecutor to drop the charges against her, or instruct the magistrate to release her on bail – considering the many concessions she made.

Third defendant's submissions are as follows:

- a) There is no evidence before court by the plaintiff that the NPA initiated her detention because the plaintiff had repeatedly indicated and stated that it was the magistrate who refused to release her on bail and not the prosecutor. Further that the prosecutor never opposed her release from custody.
- b) The plaintiff testified that she had committed fraud and knew that there was no guarantee that she would not be prosecuted.

[25] The principle relating to absolution from the instance are trite. The correct approach to an absolution at the end of the plaintiff's case was stated by Harms JA in ***Gordon Lloyd Page & Associates v Riviera***² that:

² Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 92E-93A

“The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in Claude Neon Lights (SA) Ltd V Adelson (2) 1958; (4) SA 307 (T):

“....(W)hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff. (Marine & Trade Insurance Co Ltd v van der Schyff 1972 (1) SA 26 (A) at 37G-38A)”.

[26] In ***Ruto Flour Mills v Adelson***³ the court applied the test as follows:

*“.....Is there evidence upon which a reasonable man might find for the plaintiff? (see also ***Gascoyne v Paul and Hunter***⁴; ***Claude Neon Lights (SA) Ltd v Daniel***)⁵*

[27] The foregoing is the approach to be applied in determining whether or not the plaintiff has crossed what has been referred to as the low threshold of proof that the law sets when the plaintiff’s case is closed but the defendant’s is not⁶. It is necessary to have regard to and assess the evidence for that purpose. Having said that, the answer to the question whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might find for the plaintiff, must be determined against the backdrop of two issues namely: the case pleaded by the plaintiff *vis-à-vis* the evidence led by the plaintiff.

³ 1958 (4) SA 309 TPD at 309D.

⁴ 1917 SALR 173 (TPD).

⁵ 1976 (4) SA 403 (A) at 409G-H.

⁶ 2001(1) SA 88 (SCA) at 92E - 93A.

[28] Reasons for order and judgment

If one has regard to what was pleaded by the plaintiff *vis-à-vis* her evidence, the following issues are of importance:

- (a) With regards to her paragraph 6.1 and 6.4, her evidence contradicted her pleadings when she testified that: (1) she received instructions from captain Stobbe on how to carry out her mandate but that on several occasions, she acted without informing captain Stobbe of her dealings or getting instructions because there was no time for her to contact captain Stobbe to get reasonable instructions (2) she cannot fault captain Stobbe for being arrested and detained because she admits that she committed an offence while appreciating that she was not allowed to commit an offence in terms of the agreement (3) captain Stobbe tried, and took reasonable steps to ensure that she was released, while she did that by exposing both of them as handler and informer respectively. In this regard, she conceded that she was never abandoned by captain Stobbe (4) she confirms that when she was in prison captain Stobbe came to see her and told her that she was doing her best to assist her.
- (b) The plaintiff then made the following concessions: (1) that captain Stobbe attended court; (2) that it was the magistrate who refused to grant her bail (3) that captain Stobbe was not in charge of the prison where she was detained and could not have influenced the prison officials to release her because captain Stobbe is not a member of correctional services (4) that captain Stobbe was not the commander of the investigating officer and (6) was not employed by the NPA to can have influenced the prosecutor. With this in mind, it should be noted that the plaintiff pleaded at paragraph 7.1.1. that the prosecutor, prosecuting the matter had a legal duty to prosecute the matter without fear, favour or prejudice.
- (c) With regards to her paragraph 7.1 and 7.3, and with particular reference to paragraph 7.3 of her particulars of claim, the plaintiff testified that the information was given in open court to the magistrate, and the magistrate did not believe this information. There is no evidence before court that confidential information was given to the prosecutor. There is also no

evidence before court that the prosecutor insisted that the plaintiff remain in custody. Ms. Barnard submitted, and correctly so, that as regards paragraph 7.8 of the particulars of claim, there is no evidence before court by the plaintiff that the third defendant initiated her arrest.

[29] For the court to have regard to all the evidence before it in order to come to a just decision, the plaintiff must have laid the necessary foundation showing *prima facie* that the defendants are liable for the damages claimed. The evidence of the plaintiff contradicted her particulars of claim in all material respects. Consequently, the plaintiff failed to make out a *prima facie* case against all the defendants. Accordingly, the plaintiff failed to show that the defendants failed in their respective legal duties to protect her and ensure her timeous release from detention. She also failed to show that the defendants respectively acted in breach of such duty and were negligent.

[30] Having considered the totality of the evidence, the arguments and submissions made before me, and in light of the circumstances of this case, the answer to the question whether there is evidence upon which a reasonable person or the court applying its mind reasonably to such evidence, might find or could give judgment in favour of the plaintiff, must be given in the negative. Accordingly, the defendant's application for absolution from the instance must succeed.

[31] In the circumstances, I make the following order.

1. The application for absolution from the instance is granted with costs.



06/02/2023

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of hearing

31 January to 1 February 2023

Judgment Delivered

6 February 2023