

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

2024/10/15
DATE

SIGNATURE

APPEAL CASE NO: A2024-070143
CASE NUMBER: A QUO: 34/2022

In the matter:-

BALAEETSE JOHN KEPADISA

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

INTRODUCTION

1. The appellant instituted a claim against the respondent in the Regional Court for the Regional Division of Gauteng, held at Roodepoort, for damages in the

amount of R400,000.00 flowing from the appellant's alleged unlawful arrest and detention by members of the South African Police Service.

2. The appellant's arrest and detention on a charge of rape was common cause on the pleadings. The respondent therefore had the onus to prove its defence of lawful arrest in justification of the arrest and subsequent detention.
3. At the closure of the respondent's case, and prior to the appellant having adduced evidence, the Learned Magistrate requested the parties to prepare and submit heads of argument in reply to a question phrased as follows:

“Considered the common cause facts, does the evidence presented for the defendant, prove its defence as pleaded? Moreover, if the evidence on record prove the defendant's defence, would it be necessary for the plaintiff's evidence to be heard, before a judgment on the action is made.” (sic)

4. The matter was subsequently postponed for the parties to present argument addressing the question raised by the Learned Magistrate.
5. In the appellant's argument *a quo*, the appellant took issue with the court's entitlement to adopt the procedure in question, and moreover to grant any judgment prior to the appellant's evidence having been heard.
6. Having analysed the evidence presented by the respondent as well as the respective parties' submissions, the Learned Magistrate concluded as follows:

“[36.] Having regard to the entire body of evidence and the authorities quoted, I conclude that the arresting officer exercised his discretion appropriately. His conduct to arrest the plaintiff was reasonable as authorised by the provision in section 40(1)(b) of the CPA. It would not have been expected of the arresting officer to leave the plaintiff to his own means and warn him to appear in court, at some later stage, on the serious allegations of rape.

[37.] His detention after the arrest was inevitable, as he had to be brought before a court, to be dealt with in terms of section 60(11)(a) of the CPA. The evidence overwhelmingly proves that the arrest and detention was lawful and justified.

[38.] The crisp pronouncement therefore to be made, is that the defendant discharged its burden and proved its defence. The plaintiff’s evidence cannot take the action further. The correct course to follow is for the plaintiff’s claim to be dismissed....”

PROCEDURE TO BE ADOPTED WHERE THE BURDEN OF PROOF IS ON THE DEFENDANT

7. Rule 29 of the Rules Regulating the Conduct of Proceedings in the Magistrates’ Court of South Africa lays down the procedure for the conduct of a trial.

8. Rule 29(8) provides as follows:

“Where on the pleadings the burden of proof is on the defendant, the defendant shall first adduce his or her evidence, and if necessary, the plaintiff shall thereafter adduce his or her evidence.”

9. This means that only once the defendant upon whom the burden of proof rests has established a *prima facie* defence, would it be necessary for a plaintiff to adduce evidence to rebut the *prima facie* defence so established.

10. The words “if necessary” as utilised in the rule do not mean that the court can decide whether it is necessary for a plaintiff to be afforded an opportunity to adduce evidence in rebuttal, or that the court can preclude a plaintiff from adducing evidence.
11. It is evident from the judgment *a quo* that the Learned Magistrate is cognisant of the fact that an order for absolution from the instance is incompetent where a defendant is burdened with the onus to prove its defence.¹ However, in support of the decision to dismiss the appellant’s claim without allowing the appellant to adduce evidence, the Learned Magistrate relied on the following:

“[23.] ... In *OSZ Tayob Trading Pietersburg (Pty) Ltd v Ramusi* the court held the following:

‘In the event where the defendant has the burden or proof, the court may grant judgment for the plaintiff, if the defendant is unable to prove its defence in respect of which it has the onus. If the court is satisfied that the defendant has succeeded in proving its defence, dismissal of the claim must follow. There is no room for an order for absolution of the instance when the onus of proof rests with a defendant.’
[My emphasis]”

12. The *OSZ Tayob* judgment however is not authority for the proposition that a plaintiff’s claim can be dismissed without a plaintiff having been afforded the opportunity of adducing evidence in rebuttal of the defence presented by a

¹ See judgment *a quo* para [23].

defendant. The discussion of the topic in the OSZ Tayob matter should be viewed in the following context:

- 12.1. in that matter, the defendant had adduced evidence and then closed her case;
 - 12.2. thereafter, the plaintiff elected to close its case without calling any witnesses;
 - 12.3. the *prima facie* defence established by the defendant was therefore not challenged. It was in this context that the Learned Judges made reference to a dismissal of a plaintiff's claim inevitably having to follow.
13. In the current matter, at the time of the respondent closing its case, the Learned Magistrate was clearly of the view that the respondent had established a *prima facie* defence. The appellant was however entitled to adduce evidence in an attempt to rebut the *prima facie* defence as set up by the respondent.
14. Given the common cause facts pertaining to the arrest of the appellant on a charge of rape, and the clear provisions of section 40(1)(b) of the Criminal Procedure Act, read with Schedule 1 to the Act, it is difficult to fathom the evidence that could be adduced by the appellant in an attempt to challenge the lawfulness of the arrest and subsequent detention. The appellant can

however not be deprived of the opportunity to try and do so, and the matter must be remitted to the Magistrate accordingly.

THE APPROPRIATE ORDER ON APPEAL

15. According to the appellant's practice note² he seeks an order, on appeal, in the following terms:

“4.2.1 The appellant's appeal is upheld.

4.2.2 The judgment of the Court *a quo* is set aside.

4.2.3 The defendant's case is dismissed.

4.2.4 Costs are to be paid by the defendant including the costs of the appeal.”

16. Even though it is correct that the Learned Magistrate erred in granting an order dismissing the appellant's claim, the appellant is not entitled to an order having the defendant's case dismissed.

17. The appellant should be afforded an opportunity of adducing evidence in an attempt to rebut the *prima facie* defence established by the respondent.

18. Both the appellant and the respondent are entitled to have this matter finalised expeditiously, and as cost-effectively as possible. The best way to ensure this is to remit the matter to the Learned Magistrate Matthys who has

² At CaseLines 16-14 to 16-8.

already expended judicial resources in hearing the *viva voce* evidence presented by the respondent.

19. The respondent, prudently, did not oppose this appeal. We therefore see no reason why the respondent should be mulcted in costs.

20. In the circumstances, it is ordered that:-

20.1. The judgment and order of the court *a quo* dated 15 March 2024 is set aside.

20.2. The matter is remitted to Regional Magistrate R.E.F. Matthys to be dealt with as a part-heard trial, and for the appellant to be furnished an opportunity of adducing evidence as contemplated in Magistrates' Court Rule 29(8).

20.3. There is no order as to costs.



B Mostert AJ

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I concur:



S Potterill J

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

Date of Hearing: 15 October 2024

Date of judgment: 15 October 2024

Counsel for the applicant:
Instructed by:

ADV N NEMUKULA
LETLHAGE ATTORNEYS

Counsel for the respondents:

NO APPEARANCE