

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NUMBER: 58/2023

In the matter between:

SULA PETRONELLA BANDA

PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION SECOND DEFENDANT

Neutral citation: *Banda v Minister of Police and Another (58/2023) 05 September 2025*

Coram: Stanton J

Heard: 25 August 2025

Delivered: 05 September 2025

Summary: *Action for damages – Unlawful arrest and unlawful detention – Onus on the Minister of Police – Application for judgment at the close of the first defendants' case – Plaintiff did not close her case – Application for judgment dismissed.*

ORDER

1. The plaintiff's application for judgment at the close of the first defendant's case is dismissed.
 2. The plaintiff shall pay the defendants' costs in respect of the application for judgment on a party and party scale B as set out in Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court.
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JUDGMENT

Stanton J

Introduction:

- [1] The plaintiff instituted an action against the first defendant, the Minister of Police, and the second defendant, the National Director of Public Prosecutions, claiming damages:
- 1.1 In respect of claim 1, resulting from an unlawful arrest on 15 January 2021; and her wrongful and/or unlawful detention for three days from 15 January 2021 to 18 January 2021;
 - 1.2 In respect of claim 2, resulting from her unlawful detention from 18 January 2021 until 02 June 2021; and
 - 1.3 In respect of claim 3, resulting from her malicious prosecution.

- [2] The parties agreed that the merits and the quantum should be separated and that the trial should only proceed in respect of the merits of the plaintiff's first claim against the first defendant.

The pleadings:

- [3] According to the plaintiff's particulars of claim, she was unlawfully arrested without a warrant of arrest, and unlawfully detained due to the following:

- 3.1 At no stage was any offence committed in the presence of the arresting officer, alternatively, and only in the event that an offence was committed in the presence of the arresting officer, the arresting officer failed to exercise his discretion on whether or not to arrest, and thereafter detain the plaintiff judicially and/or rationally and not in an arbitrary manner;
- 3.2 Alternatively, the plaintiff did not commit a Schedule 1 offence as envisaged in the Criminal Procedure Act 57 of 1997 ("the Act");
- 3.3 Alternatively, the arresting and/or detaining officer did not harbor a reasonable suspicion that the plaintiff had committed a Schedule 1 offence as envisaged in the Act;
- 3.4 Alternatively, the arresting or detaining officer failed to appreciate that he had a discretion on whether or not to arrest and/or detain the plaintiff;
- 3.5 Alternatively, the arresting or detaining officer failed to exercise his discretion on whether or not to arrest, and thereafter detain the plaintiff, judicially and/or rationally and not in an arbitrary manner; or
- 3.6 Alternatively, the plaintiff was not released from detention at the appropriate instance, as the detaining officer failed to exercise his discretion on whether or not to detain, alternatively, continued to detain the plaintiff inappropriately under the circumstances.

- [4] The defendants defended the matter. In terms of the first defendant's plea, the arrest and detention from 15 to 18 January 2021 were lawful as the plaintiff was arrested after having been pointed out by the complainant as the individual who had shoplifted items at the PEP store. The defendant furthermore pleaded that the plaintiff's arrest and detention were lawful in that they were affected in accordance with s 40(1)(b) of the Act that allows for the arrest, without a warrant, in circumstances where there is a reasonable suspicion that a Schedule 1 offense had been committed. The plaintiff was charged with theft that is classified as a Schedule 1 offence.
- [5] It is not in dispute that: (a) The plaintiff was arrested on 15 January 2021 on a charge of theft; (b) The plaintiff was arrested without a warrant of arrest; (c) The plaintiff was detained for three days from 15 January 2021 until she was taken to court on 18 January 2021 for her bail application; (d) Sergeant Paint was the arresting officer; (e) Sergeant paint acted within the course and scope of his employment with the first defendant when he effected the arrest; and (f) The charge against the plaintiff was withdrawn on 02 June 2021.

The evidence:

- [6] The defendant called two witnesses to discharge his onus, Sergeant Paint, the arresting officer, and Warrant Officer Gouvea, the investigating officer.

Judgment after the close of the first defendant's case:

- [7] After closing the first defendant's case, the plaintiff applied for judgment without leading evidence. The issue for consideration is whether the plaintiff is entitled to judgment in these circumstances.
- [8] In a previous unreported judgment,¹ I held the opinion that such an application could be granted in certain circumstances. However, on being confronted with

¹ Radiokana v Minister of Police (1609/2017) [2020] ZA NWHC 52 (17 September 2020).

the plaintiff's application for default, a sense of unease lead to a historical analysis into the courts' approach to applications of such a nature.

- [9] In *Arter v Burt*,² the court observed, per Innes CJ that “*The onus, it should be remembered, was on the defendant. If he discharged it he was entitled to judgment; if he failed to discharge it then the plaintiff was bound to succeed. In either event there was no room for absolution...The position created by the onus seems for the moment to have escaped attention.*”
- [10] In *Hirschfeld v Espoch*,³ it was held that where the onus of proof on the pleadings lies upon the defendant and the defendant fails to discharge the onus, the court should not grant absolution from the instance.
- [11] In the unreported judgment of *De Lange and Another v Minister of Police*, (“*De Lange*”)⁴ the court followed and applied the principles set out in *Schuster v Geuther* (“*Schuster*”)⁵ when it held:

‘I have perused Herbstein and Van Winsen and I find no authority to this effect, not on the page cited, nor elsewhere. Erasmus⁶ is authority for the proposition that judgment cannot be granted in favour of plaintiff unless, at the close of defendant's case, plaintiff has either closed its case, or has adduced evidence.

In *Schuster v Geuther* the Court dealt with this exact question. The Court compared absolution from the instance at the end of the plaintiff's case, as opposed to judgment after defendant had adduced evidence. It was pointed out that an order for absolution does not finally dispose of the issues between the parties. A plaintiff is entitled to re-institute proceedings should he so wish. The Court stated:

“Mr Goldblatt wishes to move for judgment without closing his case. This I think he cannot do; it is entirely within the discretion of the plaintiff as to whether, and if so, what

² 1922 AD 303 at 306. See also *Nelson v Marich* [1952] 3 All SA 161 (A).

³ 1937 TPD 19. Also see *Ramnath v Bunsee* [1961] 2 All SA (N).

⁴ (31026/2017) [2017] ZAGPPHC 1062 (01 September 2017). At paras 25 to 27.

⁵ 1933 SWA 114.

⁶ Supreme Court Practice at page D1 – 534.

evidence he wishes to tender. He may, therefore, close his case at this stage and move for judgment, but it seems to me that he cannot ask the Court to judge on a substantial issue between the parties before the Court is in possession of all the evidence which the parties propose to tender. I rule therefore that it is not competent for the plaintiff to move for judgment without closing his case.'

- [12] *Schuster* was followed in *Scheepers v Video & Telecom Services*,⁷ where the Court made the following remark:

'In a case where the onus rests upon the plaintiff a defendant is entitled to ask for absolution from the instance at the close of plaintiff's case on the ground that he has failed to make out a prima facie case. Such a decree, if granted, will not be in the nature of a final judgment between the parties, and the plaintiff will be able to institute fresh proceedings on the same cause of action. Where, however, the onus is on the defendant, there is no room for a decree of absolution from the instance, and any judgment given must be a final judgment as between the parties. The distinction between the two is obvious and in *Schuster v Geuter* 1933 SWA 114 Van Heerden J held that it was not competent for a plaintiff in a matter where the onus was on the defendant to move for judgment at the end of the defendant's case without closing his own case.

- [13] In *De Lange* the court concluded that "it was not competent to grant judgment unless the plaintiffs closed their case, or adduced evidence".
- [14] In the most recent judgment of *Tsotetsi and others v Minister of Police*,⁸ the court, after perusal of various judgments, held that "case law establishes that if the onus is on the defendant, the court cannot, after he has led his evidence, give judgment for the plaintiff unless and until the plaintiff closes his case."
- [15] In the absence of closing her case, the plaintiff's application for judgment therefore stands to be dismissed.

The following order is made:

⁷ 1981 (2) SA 490 (ECD) at page 491.

⁸ [2023] JOL 57935 (GJ),

1. The plaintiff's application for judgment at the close of the first defendant's case is dismissed.
2. The plaintiff shall pay the first defendant's costs in respect of the application for judgment on a party and party scale B as set out in Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court.



STANTON J

On behalf of the plaintiff:	Mr J Pearton
On instructions of:	GMI Attorneys
On behalf of the defendants:	Mr M Ramabulana
On instructions of:	The State Attorney