REPUBLIC OF SOUTH AFRICA

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

CASE NO: A3074/14

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

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DATE SIGNATURE

In the matter between:

MALATSI TSHEPANG CALVIN Appellant

And

THE MINISTER OF POLICE Respondent

SUMMARY

Delict – civil procedure – unlawful arrest, detention and assault – application for absolution from the instance at the close of the plaintiff's case – test for re-stated – plaintiff's *locus standi in iudicio* or authority to institute legal proceedings pursuant to alleged unlawful arrest and detention – plaintiff testifying and calling witness to corroborate his testimony – defendant not

calling witnesses but applying for absolution from the instance – appeal upheld.

J U D G M E N T

MOSHIDI, J:

[1] This appeal brings into direct focus the test to be applied in granting absolution from the instance at the close of the plaintiff's case as well as a plaintiff's *locus standi in iudicio* in legal proceedings. Mr T C Malatsi ("*the appellant*"), appeals against the judgment and order of the learned magistrate, sitting at Randfontein Magistrates' Court on 26 May 2014. In terms of the judgment and order, the magistrate granted absolution from the instance against the appellant, as plaintiff, at the close of his case.

THE PARTIES

[2] I shall, henceforth, and for the sake of convenience, refer to the appellant as "*the plaintiff*" and the respondent as "*the defendant*", respectively.

THE BACKGROUND

[3] The plaintiff instituted action against the defendant for damages based on unlawful arrest and detention and prosecution by members of the

defendant, acting within the course and scope of their employment with the defendant.

[4] The summons was issued during March 2013. In June 2013 the defendant filed a notice of intention to defend the action. At the end of August 2013, the defendant, through the state attorneys' offices, served and filed a plea only. The plea, was essentially a bare denial of the plaintiff's allegations, as dealt with later below. The summons was issued pursuant to the plaintiff delivering to the defendant, a notice in terms of sec 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("*the Act*"), on 24 January 2012. The applicability of the Act i.e. its compliance or otherwise by the plaintiff, was therefore not an issue in the trial. Neither was it an issue on appeal before us.

THE PLAINTIFF'S PARTICULARS OF CLAIM

[5] The facts giving rise to the action were simple and uncomplicated. In his particulars of claim,[1] the plaintiff alleged as follows:

> "*5. On or about Sunday, 11 December 2011 at or about 03h00 at or near the Mohlakeng police station, Randfontein, the plaintiff was arrested maliciously, alternatively without a warrant, by a police officer, whose full and further particulars are not known to the plaintiff, who is apparently known as Molepo. The plaintiff was arrested without intending to bring him to justice, alternatively without lawfully exercising the discretion to arrest, alternatively without probable cause.*

[1] See paras 5 to 8, record p 27.

6. Thereafter the plaintiff was detained at the instance of the aforesaid police officers, whose full and further particulars are not known to him, until he was released from custody at or near the Randfontein police station at or about 09h30 on or about 11 December 2011.

7. The arrest and detention of the plaintiff was aggravated by the following features:

7.1 The plaintiff was arrested on spurious grounds and maliciously when there was no reason for his arrest;

7.2 The plaintiff was repeatedly assaulted by a policeman, as is more fully described below;

7.3 The plaintiff was held in custody for drinking in public when the policeman who did so well knew this to be false;

7.4 The policeman involved abused the plaintiff egregiously, when he should have protected the plaintiff.

8. As a result of being so arrested and detained, the plaintiff has suffered the following harm:

8.1 Deprivation of liberty;

8.2 Inconvenience and discomfort;

8.3 Contumelia."

[6] In paragraph 10 of the particulars of claim, the plaintiff alleged that:

"*10. On or about 11 December 2011 at or about 03h00 and thereafter, the plaintiff was unlawfully assaulted by a police officer, whose full and further particulars are not known to the plaintiff, but who is apparently known as Molepo, as follows:*

10.1 At or near Mohlakeng Police Station by manhandling the plaintiff from the police station to a police van and thereafter spraying the plaintiff with pepper spray;

10.2 At or near the Randfontein Police Station by repeatedly beating and punching the plaintiff."

[7] Based on the above allegations, the plaintiff asserted that he suffered, *inter alia*, pain over a period of approximately 8 weeks, bruises, lacerations, and injuries to his ribs, and *contumelia*. He attended at the Leratong Hospital, and a clinic, where he was treated. Consequently, he claimed certain damages.

THE DEFENDANT'S PLEA

[8] In response to the allegations set out in the particulars of claim, the defendant, in its plea, although surprisingly and rather significantly, admitting the identity of the plaintiff, tendered an exclusively bare denial. In addition, the defendant, however, admitted that the plaintiff had complied with the provisions of sec 3(2) of the Act.

THE EVIDENCE OF PLAINTIFF

[9] At the trial, the plaintiff testified on the events of the early hours of Sunday 11 December 2011. He also called as a witness, his church Pastor, Mr Moses Nthla ("*Nthla*"). In the light of the view which I take in the matter, it is unnecessary to traverse all the evidence on the merits. In short, the plaintiff's evidence came to this: on the night of 10 December 2011, he slept at his friend's house. The friend is Bitho ("*Bitho*"). The next morning, at about 03h00, he and Bitho left the house and walked towards Bitho's place of employment. Whilst travelling, a motor vehicle appeared, apparently driven

by a drunken driver, who later appeared to be friendly to the local police. The vehicle drove over Bitho. The latter sustained certain injuries.

[10] The plaintiff screamed at the driver of the vehicle to stop, which the driver later did. At the same time, another vehicle appeared on the scene and stopped. It was driven by an off-duty policeman. It was a private vehicle. The off-duty policeman was known to the plaintiff as '*Terry*' in the township. At the suggestion of Terry, all the parties involved drove to the local Mohlakeng police station. On arrival there, and when the plaintiff pointed out the driver who drove over Bitho, that driver instantly hit the plaintiff with a fist on the face. The plaintiff ran behind the front desk counter. At that stage the policeman referred to the in the plaintiff's particulars of claim, Molepo ("*Molepo*"), arrived. Molepo was also known to the plaintiff by that name in the township.

[11] On the evidence of the plaintiff, Molepo, apparently friendly to the driver who drove over Bitho, immediately acted in a biased manner. Molepo wanted to assault Bitho. He took Bitho and placed him inside a police vehicle outside. Thereafter, the plaintiff was also placed by Molepo in the same vehicle. The vehicle was driven by Molepo to the Randfontein police station. The inside of the vehicle smelt of pepper spray. Molepo was not immediately interested in the plaintiff's and Bitho's versions of the events.

[12] At the Randfontein police station, Molepo produced certain documentation, which he ordered the plaintiff to sign. He asked for the

plaintiff's names. He said the plaintiff was arrested for '*drinking in public*'. The plaintiff denied the allegations, and said he did not even drink alcohol. The plaintiff refused to provide his proper names in full. Molepo then assaulted the plaintiff. In the end, the plaintiff out of fear, provided his correct first name, '*Tshepang*', but instead, gave his mother's maiden surname, '*Hlalele*'. This is reflected on the SAP10. Bitho, who was frightened by Molepo's assaults on the plaintiff, decided to cooperate fully with Molepo, and gave his full and proper names. These names are reflected on the SAP10 as '*Pitso Mokobi*'. The SAP10 also reflects that Constable Molepo arrested '*Tshepang Hlalele*', '*Pitso Mokebi*' on charges of '*drunkenness*'. The pair was placed in the police cells at about 03h50 on 11 December 2011. Their rights were read to them and the SAP14 notices issued.

[13] The plaintiff's plea to two female police officials to intervene, fell on deaf ears. Later that morning, after Molepo had searched the plaintiff, and found a cellphone in his possession, he again assaulted the plaintiff by hitting him with fists on the upper body and ribs. This was so, in spite of the plaintiff's apology for not having mentioned the cellphone initially. The plaintiff testified that the cell in which he was placed was cold, smelly and contained about 5/6 other detainees who smoked dagga. This was offensive to the plaintiff since he was a non-smoker. The plaintiff testified that he was released from the police cells at about 09h00 that morning without any prosecution for the alleged charges. The SAP10 reflects that, '*Tshepang Hlalele*' and '*Pitso Mkobi*' were released at about 08h40.

[14] On the evidence of the plaintiff, immediately upon his release, he proceeded directly to his pastor, Nthla, and reported the circumstances of his arrest, treatment and detention by Molepo. Nthla gave the plaintiff money to seek medical treatment. The plaintiff had visible injuries which Nthla tried to capture on cellphones without success. Nthla also advised the plaintiff to seek legal assistance from the plaintiff's attorneys of record, i.e. the Wits Law Clinic. When he testified, Nthla, in large measure, corroborated the plaintiff's testimony. There were, however, a few minor contradictions in the evidence, such as what time exactly the plaintiff reported to Nthla after his release, and the exact amount of money which Nthla gave to the plaintiff etc. However, in my view, these contradictions were immaterial to the main issues in dispute at the trial.

ABSOLUTION FROM THE INSTANCE

[15] The defendant did not call any witnesses in rebuttal of the plaintiff's allegations. Instead, the defendant's attorney of record launched an application for absolution from the instance, which was granted by the learned magistrate. In the heads of argument before us, the plaintiff argued that the decision of the magistrate, in granting absolution from the instance, was flawed for a number of reasons. In particular, the plaintiff, argued that the finding that the plaintiff lacked '*the necessarily locus standi*', was incorrect. I agree with the plaintiff's contention in this regard, and find it necessary to first deal with this aspect of the matter which, in my view, is decisive of the appeal.

THE PLAINTIFF'S *LOCUS STANDI*

[16] In essence, the magistrate found that the plaintiff had no legal standing, in the sense of authority, to institute the proceedings. Now it is trite law that it must appear from the pleadings that the party thereto has the necessary legal standing or *locus standi in iudicio*. See in this regard, *Inc Mars v Candy World (Pty) Ltd*,[2] and *Kommissaris van Binnelandse Inkomste v Van der Heever.*[3] It is also so that the duty to allege and prove *locus standi in iudicio* rests on the party instituting the proceedings – in this case, the plaintiff. See *Trakman NO v Livshitz.*[4] The plaintiff must have an adequate interest in the subject-matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought. In *Kommissaris van Binnelandse Inkomste, supra*, the requirements of *locus standi* was enunciated as follows:

> "*Die plig om locus standi te beweer en te bewys het op die respondent (as applikant in die Hof a quo) gerus (Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) op 575H–I). Die vraag is of die respondent op sy weergawe die vereiste 'voldoende belang' (soos bv 'n direkte of werklike belang) by die aangevraagde regshulp gehad het (Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) op 387J–388H; 389I–390A; Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) op 533J–534E).*"[5]

[17] In applying the above legal principles to the facts of the present matter, it is readily plain that the plaintiff has a direct, adequate and substantial

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[2] 1991 (1) SA 567 (A) at 575.
[3] [1999] 3 All SA 115 (A); also reported at 1999 (3) SA 1051 (SCA).
[4] 1995 (1) SA 282 (A) 287B-F.
[5] *Ibid* para [10].

interest in the proceedings. He alleged unlawful arrest, unlawful assault and detention by the police at the behest of Constable Molepo. It is improbable on his detailed version that such conduct did not occur. His version, save for the incorrect surname which was his mother's surname, was supported largely by the police documentation. The address he furnished to the police was his mother's address. He gave a credible reason why his used his mother's maiden surname. The police would have easily traced the plaintiff at the given address. All of these were merely denied by the defendant through a bare denial plea. The bare denial did not advance the defendant's cause at all and/or to sufficiently rebut the plaintiff's assertions. The denial was highly technical in nature. The plaintiff's version was corroborated substantially by his witness, Nthla, for the defendant to rebut the allegations by credible evidence to the contrary. This did not happen. Regrettably, the magistrate in arriving at the conclusion mentioned above, relied on several irrelevant considerations, such as that the plaintiff's names did not appear on the SAP14 and SAP10 registers; that the plaintiff lied to the police with regard to his real names; and that the plaintiff failed to properly '*identify the police official*' who allegedly assaulted him.

[18] In fact, close scrutiny of the documentation of the defendant, shows that the considerations of the magistrate were not factually correct for a number of reasons. For example, one of the plaintiff's names, '*Tshepang*', appears more than once on the SAP10. It was never denied that the plaintiff is known as '*Tshepang*". In any event, the full names and identity of the plaintiff were admitted in the defendant's plea. There is no evidence on

record that the plaintiff failed '*to identity Molepo*'. The actual notice of rights was never produced in evidence by either party. Further, in any event, these were all matters that were peculiarly within the knowledge of the defendant. In my view, the magistrate ought to have adopted a more robust approach in viewing the effect and import of the defendant's bare denials. (Cf in the context of motion proceedings, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,*[6] and *Soffiantini v Mould.*[7] Had this approach been adopted, the magistrate would have found that the plaintiff had succeeded in making out, on probabilities, a *prima facie* case against the defendant. The magistrate would also not have found that the plaintiff lacked *locus standi in iudicio* in the proceedings.

[19] For all the above reasons I conclude that the magistrate's finding that the plaintiff had no *locus standi* was clearly incorrect and a misdirection. On this ground alone, the appeal must succeed.

THE TEST IN APPLI CATIONS FOR ABSOLUTION FROM THE INSTANCE

[20] For the sake of completeness, it is necessary to deal with the test in applications for absolution from the instance, although being well known by now. In *Mazibuko v Santam Insurance Co Ltd and Another,*[8] the Court said:

> "*In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff had adduced evidence upon which a court,*

[6] 1949 (3) SA 1155 (T) at 1165.
[7] 1956 (4) SA 150 (E) at 154G-H.
[8] 1982 (3) SA 125 (AD) at 132H.

> *applying its mind reasonably, could or might find for the plaintiff; in other words whether the plaintiff has made out a prima facie case. This is trite law.*" (underlining added)

In *Gordon Lloyd Page and Associates v Rivera and Another,*[9] a case in which the appellant, a partnership, claimed payment of damages from the respondents because of an alleged unlawful appropriation of the applicant's confidential information, and in which, at the end of the appellant's case on the merits, the Court *a quo* had granted absolution from the instance with costs, the Court said:

> "*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 Daniel 1764 (4) SA 403 (A) at 409G-H in these terms:*
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> > *'…*[W]*hen absolution from the instance is sought at the close of 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. (Gascoyne v Paul and Hunter 1977 TPD, 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).'*
>
> *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 and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2).*"

See also *De Klerk v Absa Bank Ltd and Others,*[10] on which the appellant in the instance matter also relied.

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[9] 2001 (1) SA 88 (SCA) para [2].
[10] 2003 (4) SA 315 (SCA) para [1].

[21] Once more, in applying the above legal principles to the facts of the instant matter, it is more than plain that the magistrate evidently did not apply the test correctly. My immediate reaction is that the magistrate, in both the *ex tempore* judgment and the subsequent reasons for judgment, either ignored completely or misconstrued the corroborated evidence led by the plaintiff. In particular, the finding that, "*the evidence led by the plaintiff and the testimony relied on by only his witness, … was … uncorroborated*", was not supported by the objective facts and evidence adduced by the plaintiff, viewed holistically. The impression that the magistrate expected the plaintiff to lead evidence that '*establishes what would finally be required to be established*', (see *Claude Neon Lights (SA) Ltd, supra*), was evinced strongly in the judgment. This was an incorrect approach in applying the test. In any event, the question of the plaintiff's *locus standi* was not pleaded specifically by the defendant. In addition, sec 12(1) of our Constitution provides that,

> "*Everyone has the right to freedom and security of the person, which includes the right –*
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> *(a) not to be deprived of freedom arbitrarily or without just cause;*
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> *(b) not to be detained without trial;*
>
> *(c) to be free from all forms of violence from either public or private sources;*
>
> *(d) not to be tortured in any way; and*
>
> *(e) not to be treated or punished in any cruel, inhuman or degrading way.*"

In this matter, when approached objectively, barring its weaknesses, and the evidently over-exaggerated fact that the plaintiff, on arrest, used a partly alias,

the evidence show that the plaintiff was in fact arrested, detained, assaulted by the police and subsequently released without charge. In these circumstances, it was incumbent on the defendant to, at least, lead evidence rebutting the plaintiff's allegations, which were far too detailed to be simply ignored. I find that the plaintiff had clearly '*crossed the law threshold of proof that the law sets when the plaintiff's case is closed but the defendant's is not*', as enunciated in *De Klerk v Absa Bank Ltd and Others, supra.* For these reason too, the appeal must succeed. The matter must be remitted to the trial court, not to a different magistrate to determine appropriate damages, as argued by the plaintiff, but to continue with the trial on the basis that the plaintiff had made out a *prima facie* case. Indeed, in *Minister of Justice v Hofmeyer,*[11] the Court said:

> "*The plain and fundamental rule is that every individual person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are prima facie illegal. Once the arrest or imprisonment has been admitted or proven it is for the defendant to allege and prove the existence of grounds in justification of the infraction. The detention to which the plaintiff was subjected constituted an infraction of his basic rights, and, in particular, of his right to bodily integrity.*"

COSTS

[22] There was no credible reason made out or advanced why the costs should not follow the result in the event of the appeal succeeding. It is clearly also a discretionary matter.

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[11] 1993 (3) SA 131 (A) at 153D-F.

ORDER

[23] In the result the following order is made:

1. The appeal succeeds with costs.

2. The order of the magistrate, on the application by the defendant for absolution from the instance, at the end of plaintiff's case, is hereby set aside and replaced with the following order:

"*The defendant's application is dismissed with costs.*"

3. The case is referred to the trial court for further hearing.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur:

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T S MADIMA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPELLANT	J M VAN ROOYEN
INSTRUCTED BY	WITS LAW CLINIC
COUNSEL FOR THE RESPONDENT	F F OPPERMAN
INSTRUCTED BY	THE STATE ATTORNEY JOHANNESBURG
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