REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26369/2021

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

20 February 2023 **…….**

In the matter between:

SINDISA TESSA TSOTETSI	1 ST
PLAINTIFF	
SINDISA TESSA TSOTETSI (OBO HER MINOR CHILD)	
THESELE TSOTSETSI	2 ND
PLAINTIFF	
TSHEGO MOLEFE	3 RD
PLAINTIFF	
XOLANI MAKROTI	4 TH
PLAINTIFF	
THEBE TSOTETSI	5 TH
PLAINTIFF	

AND

MINISTER OF POLICE DEFENDANT

Coram: MUDAU J

Heard: 17 February 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 February 2023.

Summary: Civil proceedings - Trial - Irregularity in - Action on unlawful arrest by members of the South African Police Service- Defendant accepting onus to begin - At end of defendant's case plaintiff calling no evidence - Plaintiffs, though not closing case nor leading evidence, asking for judgment in their favour.

Held- to allow the applicants' application for judgment at that stage without applicant having closed their case is not only prejudicial to the respondent, but would amount to an irregularity.

Order: application dismissed with costs.

J U D G M E N T

MUDAU, J:

[1] This is an opposed application for judgment at the close of the case for the defendant. For convenience, the parties are referred to in this application as cited in the action. The plaintiffs (applicants) instituted action against the defendant in this court for damages suffered as a result of their arrest and subsequent detention by members of the South African Police Service ("SAPS"). It is alleged that members of the SAPS acted within the course and scope of their employment with the defendant. From the pleadings, the arrest and detention are not placed in dispute. The defendant (respondent), bore the duty to begin and the onus of proof to show by reason of this admission, on a balance of probabilities, that the arrest of the plaintiffs was lawful in terms of subsection 40(1) of the Criminal Procedure Act, 51 of 1977.

[2] The onus being clearly on the defendant, this court heard the defendant's evidence, in particular the evidence of the witnesses that the defendant called.

[3] At the close of the defendant's case, plaintiff's counsel Mr Naidoo (an attorney with a right of appearance in this court) without closing his case with reference to the purported common law position, asked for judgment in plaintiffs' favour on the ground that the onus which rested on the defendant has not been discharged. In the heads of argument prepared for this application he not only deals with the evidence led on behalf of the defendants, but sets out a summary of the facts. I deliberately refrain from commenting thereon for reason that their final determination must depend on the facts ultimately established at the end of the trial.

[4] The legal representative for the plaintiffs, relied for his proposition on, inter alia, an unreported judgment, *Pather v Minister of Police*[1] by Nkosi AJ and the authorities referred therein. In *Pather*, the court stated at paragraphs 31.1 to 31.3 as follows:

> "31.1 That plaintiff is entitled to apply for judgment at the close of the Defendant's case without leading evidence and without closing its case. It was submitted on her behalf that the test to be applied is similar to that of absolution from the instance where a Plaintiff has not discharged its onus. It was further submitted that if a Defendant upon whom the onus of proof rests has failed to lead such evidence in discharge of that onus to the effect that a reasonable man could have not come to the conclusion that it might be accepted, the court would be entitled to give judgment for the Plaintiff.
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> 31.2 This proposition of an application for judgment, where the Defendant bore the onus and before the Plaintiff closing its case or leading evidence, was introduced in the old case of Siko v Zonsa 1908 (T) 1013 where the court held that it would be a useless (exercise) waste of time to proceed with the matter further.
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> 31.3 The Siko case was confirmed as an applicable principle in the case of Hodgkinson v Fourie 1930 (TPD) 740 at page 743 where it was held as follows: 'At the close of the case of the one side upon whom the onus lies, the question

[1] 14512/13 [2016] ZAGPPHC 215 (31 March 2016).

which the judicial officer has to put to himself is: 'is there evidence on which a reasonable man might find for that side.'"

[5] The *Pather* judgment and the passages referred to above were subsequently followed in *Guntu v Minister of Police*[2], another unreported judgment by the Eastern Cape Division, Mthatha (per Noncembu J), which Mr Naidoo also relies upon. I am inclined to disagree with the approach taken in those judgments for the reasons that follow.

[6] The quoted paragraphs do not help the plaintiffs for the simple reason that in paragraph 29 of the *Pather* judgment, it is recorded that "*Plaintiff closed its case without testifying*". That alone is a distinguishing feature to this matter. However, to the extent that it is suggested *Pather* set out the correct legal position from the quoted paragraphs and the authorities relied upon, it is appropriate to deal with that proposition.

[7] *Siko v Zonsa,*[3] relied upon in the *Pather* and *Guntu* matters, was an action where the issue was one of fact regarding the sale of a certain wood and iron hut. The defendant, on whom the onus lay, testified to a version, which if true was a good defence, and called corroborative evidence. The magistrate, without hearing the evidence for the plaintiff, gave judgment for the latter on the ground that he did not believe the evidence for the defendant. It was held, on appeal by Solomon J with Mason J concurring, that while that evidence stood uncontradicted, judgment could not be given in the plaintiff's favour. The procedure adopted by the magistrate was described by the learned Judge as "extremely unsatisfactory" and that the decision fell to be set aside and the case remitted to the magistrate to hear the evidence for the plaintiff. Put simply, contrary to what is referred to in *Pather* and *Guntu*, this procedure was specifically denounced in *Siko*.

[2] 962/2021 [2022] ZAECMHC 33 (8 September 2022).
[3] 1908 (T) 1013.

[8] In *Hodgkinson v Fourie*[4], relied upon in *Pather*, the plaintiff sued in a magistrates' court on a promissory note. The defendant pleaded the non-fulfillment of a suspensive condition, and led evidence in support of the plea. At the conclusion of this evidence, and without plaintiff leading evidence or closing his case as this court is urged to do regarding this matter, the magistrate gave a judgment for plaintiff, stating in his reasons that the defendant's evidence was not impossible or on the face of it improbable, but that it did not convince him and that the defendant had thus not discharged the onus which rested on him. On a subsequent appeal, it was a held that the judgment of the magistrate should be set aside and the case referred back to the magistrate for the magistrate to hear the plaintiff's evidence in rebuttal, or, should the plaintiff elect not to call evidence and to close his case, to decide the case on the recorded evidence.

[9] The authorities quoted in the above matters quite clearly do not support the conclusions arrived at in both the *Pather* and *Guntu* matters. I respectfully disagree with them. The Hodgkinson matter, which is a judgment of this Division (TPD as it then was) by De Waal JP, and with which Krause J concurred was in any event binding or at the very least persuasive and not properly dealt with in the *Pather* matter.

[10] As early as 1933, in the matter of *Schuster v Geuter*[5] Van Heerden J held, and I agree 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. The *Schuster* case was followed in *Scheepers v Video & Telecom Services*[6] (Eksteen J and Mullins AJ concurring) wherein the procedure followed was exactly the same as the applicants contend in this matter in that the defendant accepted the onus to begin. At the end of the defendant's case, the plaintiff called no evidence nor closed its case, but asked for judgment, which application the Magistrate entertained and granted judgment in plaintiff's favour.

[4] 1930 (TPD) 740.
[5] 1933 SWA 114.
[6] 1981 (2) SA 490 (E).

It was held on appeal, that the magistrate had committed an irregularity in entertaining and allowing the respondent's application for judgment at that stage without the respondent having closed its case.

[11] It was further held, that

> "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… . 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."[7]

I agree. Prejudice is likely to be the result, if it is later established, prima facie, that the defendant discharged its burden of proof.[8]

[12] Rule 39 of the Uniform Rules of court lays down pertinently the procedure for the conduct of the trial. Rule 39 (13) reads:

> "Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

[13] It follows, accordingly, that this application was poorly conceived. I consequently hold that to enter judgment in circumstances where the plaintiffs have not led any evidence or closed their case would be a serious irregularity. As to the question of costs, Counsel for the defendant argued that the conduct by

[7] Above at pg. 491.
[8] *Belonje v Greyling Schelling en Kie Bpk* 1956 (2) SA 632 (T).

the legal representative of the plaintiffs justified an order for cost *de bonis propriis* on a punitive scale. I do not think that such an order for costs is warranted for the mere fact that the legal representative for the plaintiffs as he contended, relied on existing judgments. I agree. For the reasons stated above, the plaintiffs' application falls to be dismissed with costs following the result.

Order

[14] The application is dismissed with costs.

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T P MUDAU

Judge of the High Court

Date of Hearing:	18 February 2023
Date of Judgment:	20 February 2023

APPEARANCES

For the Applicants:	Mr L Naidoo
Instructed by:	Logan Naidoo Attorney
For the Respondent:	Adv. K Mashile
Instructed by:	State Attorney