G.P.-S.33967—1968-69—1,000.

J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(Appellate Provincial Division.)
(Provinsiale Afdeling.)

In forma pauperis application (opposed) and

Appeal in Civil Case.
Appèl in Siviele Saak.

HENDRICK JAMARTE (S.A.) and [illegible] JAMARTS (M.R.) *Appellant,*

versus

1. THE MINISTER OF POLICE 2. JASPER JOHANNES RUDOLPH 3. DIRK MARTHINUS JOSEPH *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Messrs. Sidney M. Horwitz, Arvan & Lewis	*Respondent's Attorney* / *Prokureur vir Respondent* D.o.p. S.A. (Bmfln.)
Appellant's Advocate / *Advokaat vir Appellant* B. Wilkes	*Respondent's Advocate* / *Advokaat vir Respondent* D.O. Debenhurst

Set down for hearing on
Op die rol geplaas vir verhoor op 17 — 5 — 1971

2, 3, 5, 7, 8.

Coram, van Blerk, Rumpff, Jansen, Rabie et Muller — J.J.A.

9.45 am — 11.00 am
C.P.D. 11.15 am — 12.45 pm
2.15 pm — 2.25 pm

C.A.V.

27.5.1971. Muller, J.A. — The application is dismissed with C.C.

Writ issued / Lasbrief uitgereik	Bills Taxed.—Kosterekenings Getakseer.		
	Date. / Datum.	Amount. / Bedrag.	Initials. / Paraaf.
Date and initials / Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

HENDRIK JANUARIE (Senior) ..... 1st APPLICANT.

HENDRIK JANUARIE (Junior) ..... 2nd APPLICANT.

AND

THE MINISTER OF POLICE ..... 1st RESPONDENT.

JASPER JOHANNES BURGER ..... 2nd RESPONDENT.

DIRK PETRUS LOSPER ..... 3rd RESPONDENT.

Coram : Van Blerk, Rumpff, Jansen, Rabie et Muller, JJ.A.

Heard : 17 May 1971 Delivered : 27 May 1971

J U D G M E N T .

Muller, J.A. :

This is an application, under Rule 4 of the Rules of this Court, for leave to prosecute an appeal in forma pauperis and for condonation of the applicant's delay in complying with the requirements of sub-rule 4 (7) (a). The application is opposed.

The present proceedings relate to an action instituted by the applicants in the Cape Provincial Division for damages

for ..... /2

for alleged wrongful arrest, assault and malicious prosecution. The following events gave rise to the action.

Second respondent and third respondent are, respectively, a European sergeant and a Coloured constable in the South African Police. Both are stationed at Touws River in the Cape Province. I shall for convenience refer to them as Burger and Losper respectively.

On the afternoon of 13 July 1968 Burger, while on duty and accompanied by Losper, arrested a Coloured man by the name of Michael Kleyn outside the Loganda hotel in Touws River for drunkenness. Kleyn did not resist arrest, but while he was being conducted by Burger to the police van two other Coloured men intervened and forcibly freed Kleyn from custody.

It was common cause at the trial that first applicant was one of the persons who freed Kleyn from custody; but there was a dispute as to the identity of the other person concerned. Burger and Losper testified that it was the second applicant, but this was denied.

According to Burger, he decided not to recapture Kleyn

there ..... /3

there and then because there were a number of Coloured persons standing about outside the hotel, some of whom adopted a menacing attitude. He decided rather to look for police reinforcements and, with that object in mind, he and Losper drove away in the police van. They went to the railway station and there found constable Saayman of the Railway Police who was agreeable to come to their assistance. The three of them drove back into Touws River and, while on their way, they noticed a motor car going in the direction of the Steenvliet Coloured township. It was the same car which Burger and Losper had seen earlier that afternoon outside the Loganda hotel at the time of Kleyn's arrest. They followed this car into Steenvliet, and when it stopped outside a certain house, Burger and his companions pulled up nearby. After Burger had spoken to the driver of the car, he, with the assistance of Losper and Saayman, arrested the two applicants who were seated in the back of the car. According to the police, both the applicants resisted arrest and had to be removed forcibly from the car and loaded into the police van.

The ..... /4

The applicants were taken to the police station and detained for the night in the cells. They were later charged in the Magistrate's Court with rescuing an arrested person (Michael Kleyn) from lawful custody (Sect. 39(2) of Act No. 56 of 1955, as amended), and obstructing, hindering or interfering with the police in the exercise of their powers or the performance of their duties (Sect. 27(a) of Act No.7 of 1958).

Both applicants were convicted, but successfully appealed to the Cape Provincial Division against their convictions. The judgment of the court of appeal in the criminal case has not been placed before us, but the grounds upon which the applicants succeeded are summarised as follows in the judgment of the court in the subsequent civil action to which I am about to refer;

> "Die appèl is toegestaan en die geleerde Regter President in sy uitspraak het glad nie op die twispunte ingegaan nie. Hy het die breë houding ingeneem dat, wat ookal die ware feite mag wees, en selfs as die getuienis vir die Staat in sy geheel aanvaar word, die polisie takloos was om in te meng. Hy het opgemerk dat na sy mening, selfs as Klein dronk was ,was Wagenstroom besig om hom na Wagenstroom se voertuig te lei, blykbaar om hom huis-toe te neem. Die omstandighede

was ..... /5

> was sulks dat, na sy mening, inmenging deur die Polisie nie vereis was nie, en dat daar geen vervolging behoort te gewees het nie. Aangesien die arrestasie "onregmatig" was, was dit nie verkeerd vir Kleyn se vriende om in te meng nie en ook nie teen hulle eie inhegtenisneming te verset nie."

After the applicants had succeeded on appeal they caused summons to be issued against the Minister of Police, Burger and Losper for damages for wrongful arrest, assault and malicious prosecution. The matter was defended and came to trial before Watermeyer, J.

The applicants' case, as set out in the pleadings and further elucidated at the trial, was:

(a) that Michael Kleyn was not drunk when Sergeant Burger arrested him and took him into custody outside the Loganda hotel. His arrest was therefore not lawful;

(b) that second applicant took no part in rescuing Michael Kleyn from the custody of Burger. First-applicant did take part in rescuing Kleyn but, inasmuch as Kleyn was not in lawful custody (because

his ..... /6

his arrest was unlawful) first applicant committed no offence;

(c) that the subsequent arrest of the applicants by Burger and Losper at Steenvliet was, accordingly, without lawful cause, and therefore wrongful - so also their subsequent detention;

(d) that the applicants were physically assaulted by Burger while detained at the police station;

(e) that, consequent upon applicants' unlawful arrest, Burger and Losper maliciously caused the aforementioned criminal proceedings to be instituted against them.

The defendants, (respondents in the present proceedings,) denied liability. In particular, their defence was that Michael Kleyn was drunk when arrested and that both applicants took part in rescuing him from lawful custody. Consequently, so it was contended, the subsequent arrest and detention of the applicants was not wrongful. It was further denied that any unlawful assault was committed on the applicants or that their criminal prosecution was malicious. Burger admitted that second

applicant ..... /7

applicant had, for a short period, been handcuffed while in the cell at the police station; first with his hands behind his back and later with one hand to an iron bar covering the cell window. According to Burger such action was justified inasmuch as second applicant became boisterous when placed in the cell and would not desist from kicking and banging on the cell door.

After hearing evidence and argument the trial court granted judgment for the defendants (the present respondents) with costs. It is in respect of this judgment that the applicants seek leave to prosecute an appeal in forma pauperis.

In order to grant the application this Court must be satisfied that there are reasonable prospects of success on appeal (Macrose v. Robinson 1946 A.D.1). Counsel for the applicants, accepting that to be the position, contended that there were indeed such prospects; and in this regard he directed an attack against the judgment of the court a quo relative to specific aspects of the case in respect of which it was contended that the learned trial Judge had erred.

In the first place counsel contended that the learned

Judge ..... /8

Judge had erred in holding that the defendants (the present respondents) had, at the trial, discharged the onus of proving that the arrest of Michael Kleyn, which started off the sequence of events, was lawful.

The arrest of Kleyn, being without warrant, could be justified only on one or more of the grounds mentioned in section 22(1) of the Criminal Procedure Act, No.56 of 1955, as to which the learned Judge remarked as follows in his judgment:

> "Ingevolge Artikel 22(1)(a) van Wet 56 van 1955 kan 'n vredebeampte sonder lasbrief iemand in hegtenis neem wat 'n misdryf in sy teenwoordigheid pleeg, en ingevolge Artikel 22(1)(j) is hy geregtig om iemand in hegtenis te neem wat op redelike gronde daarvan verdink word dat hy 'n misdryf ingevolge 'n wetsbepaling op die vervaardiging, verskaffing, besit of vervoer van bedwelmde drank, pleeg of gepleeg het. Die Drank Wet No.30 van 1928 is so 'n wetsbepaling, en ingevolge Artikel 166(i) daarvan is dit 'n misdryf om dronk te wees op 'n plek waartoe die publiek toegang verleen word."

The onus being on the defendants, Watermeyer, J., saw the position as follows

> "....om te slaag moet die Verweerders my op 'n oorwig van waarskynlikhede oortuig dat Kleyn dronk was, of

ten minste ..... /9

> ten minste dat Tweede Verweerder (Burger) redelike gronde gehad het om te dink dat Kleyn dronk was."

And, after dealing with all the evidence on this aspect of the case, his finding was

> " Op die getuienis van Tweede Verweerder, Derde Verweerder en Samuel was Kleyn klaarblyklik dronk, en hulle getuienis op 'n oorwig van waarskynlikhede oortuig my dat dit wel die geval was."

Counsel for the applicants submitted that the evidence did not justify a finding that Kleyn was drunk within the meaning of section 166(i) of the Liquor Act, No. 30 of 1928. In this regard reference was made to the meaning of the word "drunk" as defined in various dictionaries, and the argument was propounded that, even on the evidence of Burger, Losper and Samuel Nyongama, Kleyn was not so intoxicated as to have justified his arrest for drunkenness.

In the course of the argument questions also arose, firstly, as to the applicability of section 22(1)(j) of the Criminal Procedure Act to the circumstances of the present case and, secondly, as to whether an arrest under section 22(1)(a) of the Act could be justified on reasonable grounds for suspecting that a person is drunk.

Paragraph ..... /10

Paragraph (j) of section 22(1) authorises the arrest of any person "reaonably suspected of committing or having committed an offence under any law ("wetsbepaling" in the Afrikaans text) governing the making, supply, possession or conveyance of intoxicating liquor ..." The question posed was whether this paragraph was at all intended to bear on the offence of being drunk, that offence not being concerned with the making, supply, possession or conveyance of intoxicating liquor.

The second question posed was whether paragraph (a) of section 22(1) could be relied upon to justify an arrest of a person suspected on reasonable grounds of being drunk, if it should later transpire that the person arrested was in fact not drunk. (See in this regard Tsose v. Minister of Justice and others 1951(3)S.A.10(AD.) at p.18.)

Interesting though these questions may be, I do not think that they call for a decision in the present case, because of the finding of the trial court that Kleyn was in fact drunk. Assuming the correctness of that factual finding, then an arrest under section 22(1)(a) of the Act was not unlawful. And on the

evidence ...../11

evidence of Burger, Losper and Samuel Nyongama the trial court was, in my view, justified in coming to the conclusion that Kleyn was in fact drunk when he was arrested by Burger. Shortly before the arrest he was seen to proceed towards and enter the public bar of the hotel and did so with a staggering gait ("slinger-slinger"). When he later emerged from the bar, immediately before the arrest, he was supported by Dirk Wagenstroom. He was unsteady on his feet and nearly fell down the steps leading from the bar. According to Burger, he smelt of liquor, his eyes were bloodshot and his speech slurred.

Subject to consideration of the trial court's findings as to the credibility of the witness^es, a matter to which I shall advert presently, no valid grounds were, in my opinion, advanced for questioning the court's conclusion that Kleyn was drunk. That being the case, his arrest was lawful, and it must follow that the conduct of the applicants in interfering and rescuing him from custody was unlawful. Their subsequent arrest and detention was accordingly justified in law.

It ..... /12

It was further contended that the trial court had erred in its finding that the defendants (the present respondents) had discharged the onus of proving that second applicant was the person who had assisted first applicant in rescuing Michael Kleyn from custody. The court's finding on this aspect of the case was as follows:

> "Na deeglike oorweging is ek oortuig ook dat die tweede persoon wat Kleyn bevry het Tweede Eiser was, en nie Hendrik Januarie was nie, maar om regverdig teenoor Tweede Eiser te wees moet ek erken dat op die tweede vraag voel ek nie so sterk soos op die eerste vraag nie. Ek mag hier terloops sê dat in ieder geval sou Tweede Verweerder en Derde Verweerder geregtig gewees het om Tweede Eiser te Steenvliet op aanklag van oortreding van Artikel 27(a) van Wet 7 van 1958 in hegtenis te geneem het, want soos ek reeds gesê het, aanvaar die Hof dat Tweede Eiser die polisiebeamptes in die uitvoering van hulle pligte gehinder het deur aan Eerste Eiser vas te klou toe Tweede Verweerder en Derde Verweerder gepoog het om hom in hegtenis te neem."

It was argued before us that the learned trial Judge had sought to justify his finding concerning second applicant's participation in the rescue of Michael Kleyn on the basis that he (second applicant) could, in any event, have been arrested for his subsequent conduct at Steenvliet. This contention is not sound.

It ..... /13

It is clear from the passage in the judgment quoted above that the learned Judge made an independent finding concerning the complicity of second applicant in the rescue of Michael Kleyn. He then went on to state that there was justification, not for his earlier finding, but for second applicant's arrest because of the latter's subsequent conduct at Steenvliet. I can find no fault with the learned Judge's reasoning.

In regard to this aspect of the case it was also argued that the court a quo, in considering the testimony of second applicant, drew inferences adverse to him for which there was no justification. In one respect I agree with the criticism levelled by counsel at the reasoning of the trial Judge. It concerns the following passage in the judgment

> "Hier is daar weer 'n reeks eienaardige omstandighede te vinde. In die eerste plaas, alhoewel Eerste Eiser en Tweede Eiser besluit het om saam na die Hotel te gaan drink, Eerste Eiser in die sitkamer, en Tweede Eiser in die kroeg. Tweede Eiser se verklaring dat as hy saam met sy vader drink hy respek vir hom sal verloor, is miskien verstaanbaar, maar dit klink vir my snaaks."

For myself, I can find nothing peculiar in the attitude of a son who, though accompanying his father to an hotel with the object

of ..... /14

of having a drink, feels that it would be disrespectful to drink in the father's presence. But this was a matter of minor importance and, as will be noted, the learned Judge did no more than state that he found such an attitude strange. There are sufficient other grounds mentioned in the judgment for the finding that second applicant was not a reliable witness.

While dealing with the question of the reliability of second applicant as a witness, it will be convenient also to mention another matter in respect of which the learned Judge was criticised with regard to his appraisal of second applicant's testimony. It concerns something that took place at an inspection *in loco*. In his testimony second applicant, when referring to the fact that he had, while being detained after his arrest, been handcuffed for some time to an iron bar in the cell of the police station, stated that in the position in which he was handcuffed he could not stand with his feet flat on the ground but had to stand on his toes, which caused him much suffering. An inspection *in loco* proved that this was not true, and, in dealing with this matter in his judgment, the learned Judge stated

" Tweede Eiser ..... /15

> "Tweede Eiser het baie gewag gemaak oor die feit dat hy aan die venstertralie vasgeboei is, en ek het dit raadsaam beskou om 'n inspeksie van die sel te hou. As gevolg van die inspeksie is ek tevrede dat Tweede Eiser die aangeleentheid oordryf het. Alhoewel hy sy arm omhoog moes hou toe dit aan die tralie vasgemaak is, was dit glad nie nodig dat hy op sy tone staan nie. Hy kon op sy plat voete gestaan het. Wat nie 'n goeie indruk op my gemaak het nie, was die feit dat by die inspeksie wou die Tweede Eiser die Hof mislei deur sy rug te buig en sodoende voor te gee dat hy feitlik moes hang. Hy wou nie met sy rug plat teen die muur staan nie." (My underlining.)

The point sought to be made by counsel for the applicants was that the learned Judge had erred in that, when recording his findings made at the inspection, he failed to include therein, or otherwise to notify the parties, of the unfavourable impression gained by him of second applicant because of what is mentioned in that part of the judgment underlined above.

Counsel argued that the trial court had in this respect committed an irregularity which was prejudicial to the accused.

That a trial court is obliged to acquaint the litigants with findings made at an inspection in loco is clear (see e.g. R. v. Smith 1949(4)S.A.782(O.P.D.) at p.785), and the

reason ..... /16

reason therefor is obvious.

In the present case the object of the inspection in loco was mainly to establish the truth or otherwise of second applicant's contention that he could not, while handcuffed to the iron bar, stand with his feet flat on the ground; but it also involved the question whether, even if he could ~~do~~ so have stood, the position in which he was made to stand did not cause him suffering by reason of the degree to which his arm was extended above his head. In the circumstances, the manner in which second plaintiff demonstrated how he had to stand was part of the factual enquiry. That being so, it was the duty of the learned Judge, in recording his findings on inspection, to have mentioned what he had observed in the demonstration; and his failure to do so must, strictly speaking, be regarded as an irregularity.

In the particular circumstances, however, it is of no material effect. The inspection had clearly shown that in respect of the more important issue - namely, whether the witness could or could not have stood with his feet flat on the ground - he had attempted to mislead the court. The learned Judge's appraisal of second applicant as a witness could, therefor, hardly have been affected to any appreciable degree by the impression, not recorded in the findings on inspection, but alluded to in the judgment.

It is clear from the judgment that the learned Judge gave

gave ...../17

gave proper consideration to all the evidence bearing on the question whether second applicant was one of the persons involved in the rescue of Michael Kleyn. He had the advantage - which this Court ~~does~~ did not have - of seeing and hearing the witness and observing their demeanour; and, in the absence of a clear indication that he had erred in a material respect, this Court cannot justifiably interfere with his finding that the respondents (defendants below) discharged the onus of proving, on a balance of probabilities, that second applicant was so involved (R. v. Dhlumayo and another 1948(2)S.A.678(A.D.)).

The above remarks apply with equal force to the remaining issues in the case, namely, the alleged assault upon the applicants while they were in ~~the~~ custody at the police station and the charge of malicious prosecution; both matters in respect of which the onus was on the plaintiffs (applicants in the present proceedings). There too the trial Judge properly considered all the evidence and came to the conclusion that the applicants had not established their case. Also in respect of those issues I cannot find that the trial court erred in any material respect.

I agree ..... /18

I agree with counsel for the applicants that Burger's conduct relative to the recording of certain matters in the Occurences Book kept at the police station is subject to severe criticism. But this matter, as well as other aspects in respect of which criticism was levelled against Burger, were duly considered by the court; and I can find no valid reason for coming to a different conclusion than that reached by the trial court, namely, that, upon the evidence as a whole, the balance of probabilities favoured the defendants (respondents in the present proceedings).

Counsel for the applicants contended, however, that, even if Burger's evidence were accepted, the handcuffing of second applicant constituted an unlawful assault upon him. But Burger gave reasons for having acted as he did and, his evidence, and therefor his reasons, having been accepted, I consider that the restraint placed upon second applicant was not without justification.

To sum up: there is in my judgment no reasonable prospects of success on appeal. The application is accordingly dismissed with costs.

G. v. R. Muller

Judge of Appeal.

Van Blerk, J.A.
Rumpff, J.A.
Jansen, J.A.
Rabie, J.A.

} Concur.