THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 236/2007
Reportable

In the matter between:

THINANDAVHA GERSON RALIPHASWA — Appellant

and

TSHAMMBENGWA THOMAS MUGIVHI — 1st Respondent

M M CHIBAMBU — 2nd Respondent

MINISTER OF SAFETY AND SECURITY — 3rd Respondent

Coram: CAMERON, COMBRINCK JJA and SNYDERS AJA
Heard: 12 MARCH 2008
Delivered: 27 MARCH 2008

Summary: Damages for iniuria – defamation and unauthorised, invasive search during which appellant was indecently assaulted – when adverse inference for failure to call witness not justified.

Neutral Citation: This judgment may be referred to as *Raliphaswa v Mugivhi* (236/2007) [2008] ZASCA 17 (27 March 2008)

J U D G M E N T

SNYDERS AJA/

SNYDERS AJA:

[1] The appellant was unsuccessful before Hetisani J in the Thohoyandou High Court with a claim for damages based on defamation and indecent assault and was ordered to pay the respondents' costs on an attorney and client scale. It is with the leave of this court that he appeals.

[2] The appellant pleaded that the first and second respondents defamed him by addressing him as 'tsotsi' and injuriously humiliated and degraded him by 'pulling his private parts' during a search. The respondents limited their defence to a denial of these allegations.

[3] The first and second respondents are members of the South African Police Service (SAPS) in the Thohoyandou district. The third respondent is the Minister of Safety and Security whose vicarious liability, in the event of a successful claim, is common cause. Merely for the sake of convenience I refer henceforth in this judgment to the first and second respondents as 'the respondents'.

[4] On 28 April 2003 at approximately 10:00 the appellant, according to his evidence, was driving his car, accompanied by Mr Khakhu, along a gravel road past an informal market in Itsani. On the road were humps designed to reduce the speed of passing traffic, apparently constructed by the traders from the market. The appellant regarded these as dangerous to motorists because of their height. He stopped to suggest to the traders that the size of the humps be reduced.

[5] Whilst they were having an amiable discussion about the humps the respondents and two police reservists arrived in a white Golf. The first respondent, the driver, stopped in front of the appellant's vehicle, nose to nose, about five paces away.

[6] There are material disputes about the events that followed. I deal with the appellant's evidence first. He testified that the respondents summoned him by addressing him as 'tsotsi' and gesticulated with their fingers for him to come to them. They said they wanted to search him. He did not approach them but asked whether

they were addressing him. The respondents confirmed and again addressed him as ‘tsotsi’.

[7] The respondents reached the appellant and insisted on searching him. He asked to see their appointment cards and a search warrant, both of which they failed to produce. Both then took him by the belt around his waist, one in front and one at the back, and lifted him off the ground. They proceeded to search him and the policemen to his front touched his private parts to the extent that the appellant asked, ‘why are you holding me by my private parts?’. After the search one of the unidentified police reservists accompanying the respondents stepped forward and berated the respondents for what they had done to the appellant. Khakhu materially corroborated the appellant’s version except for one aspect to which I will return.

[8] It is common cause that immediately after this incident the appellant went to the police station where he ascertained the names of the respondents. He laid a charge against them, but the case was never prosecuted. He could not ascertain the name of the ‘good Samaritan’ reservist, because the police refused to give it to him.

[9] Although the respondents denied that they addressed the appellant as ‘tsotsi’ or searched him, they confirmed that there was a disturbance involving them and the appellant. Aspects of the respondents’ version, and the probabilities arising from it, strongly support the appellant’s version.

[10] This brings me to the respondents’ version. They were assigned search and patrol duties for the day. Their attention was drawn to the appellant because he did not park to the side of the road. Tshivhambu, the passenger, who was the second respondent, approached the appellant and asked permission to search him. The appellant refused. Mughivi, the driver, gave the improbable version that after he produced his appointment card and the appellant had written down details from it, the appellant demanded to be searched. They did not give in to his demand because of his earlier refusal, but confined themselves to a search of the boot of the appellant’s vehicle, conducted by Tshivhambu. This they did because the appellant’s noisy reaction to the request to be searched caused them to suspect that he was hiding something. The search revealed nothing.

[11] This evidence gives rise to the probability that the respondents did search the appellant consistent with their duties and suspicion, which was unfounded.

[12] Mugivhi did not hear the initial exchange between the appellant and Tshivhambu, but denied that he heard Tshivhambu calling the appellant a 'tsotsi'. Tshivhambu on the other hand, testified that the appellant snatched Mugivhi's appointment card and said, 'It is not true that you are on duty, you are a tsotsi'. Tshivhambu, the last witness of four in the trial, asserted for the first time during his evidence that it was in fact the appellant who used the word 'tsotsi'. This belated disclosure fundamentally eroded the respondents' denial of the appellant's version. It supports the appellant's version that the word 'tsotsi' was used and strips the policemen's denial of any reliability.

[13] Generally the respondents' evidence contains numerous contradictions, evasive answers and improbabilities. There is no need to deal with the detail thereof in the light of the conclusion reached above on the two major factual issues.

[14] Khakhu corroborated the appellant's evidence in material respects. He differed in that he said Tshivhambu put his hand inside the appellant's pants when he held his private parts. It seems Khakhu was simply exaggerating. It does not detract from the reliability of the appellant's version and it was also not argued on behalf of the respondents that this is a material contradiction in the appellant's case.

[15] In this court the respondents persisted with the argument that the court below was justified in drawing an adverse inference against the appellant from the failure to present the evidence of the sympathetic reservist who berated the respondents. The appellant's uncontradicted evidence was that he did not know the identity of this reservist and, despite his request, the police refused to disclose it to him. The appellant took a grave risk to allege that this reservist berated the respondents as they were colleagues and could easily have called him to contradict the appellant. The question may well be asked why they did not. When a witness is equally available to both parties, but not called to give evidence, it is logically possible to draw an adverse inference against both.[1] The party on whom the onus rests has no

[1] *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671 (A) 681-682.

greater obligation to call a witness, but may find that a failure to call a witness creates the risk of the onus proving decisive.[2] In the present matter the appellant did not have an opportunity equal to the respondents to call this witness. The adverse inference drawn by the trial court against the appellant was unjustified in the circumstances. An adverse inference in any event does not operate to destroy a case otherwise proved, which is what the appellant managed to do.[3]

[16] The respondents called the appellant a 'tsotsi'. The appellant pleaded that 'tsotsi' means 'dishonest person'.[4] This meaning was not denied in the respondents' plea. The appellant confirmed this meaning during his evidence and although it was put to him that there are different meanings to this word, these suggestions were never pleaded or developed as a defence. No doubt, to be called a 'dishonest person' is defamatory as it would tend to lower the appellant in the estimation of right-thinking members of society generally.[5] Khakhu heard the defamatory words. Although the evidence does not establish the extent of the publication of the defamation, it seems inevitable, considering the circumstances in which the words were uttered, that some publication took place. It was common cause that the incident happened in public, within earshot and full view of traders, customers and passers-by. The appellant's evidence that the fracas aroused interest amongst people in the vicinity was not challenged or denied.

[17] Once the defamatory nature of the words used has been established it is presumed to have occurred intentionally and unlawfully which presumption gives rise to an evidentiary burden on the respondents to establish some lawful justification or excuse.[6] Because of the nature of the respondents' defence, a bare denial, no evidence was adduced to rebut the presumption.

[18] The appellant was subjected to an invasive and humiliating search. This amounted to an iniuria. In addition, it was done without probable cause. Some remarks about that is required, particularly since respondent's counsel submitted that a search on mere suspicion was justified. Mugivhi testified that he knew that they

---

[2] *Brand v Minister of Justice* 1959 (4) SA 712 (A) 715F-716F.
[3] *Brand* above at 716F.
[4] The *Concise Oxford English Dictionary* 2002 defines 'tsotsi' as 'a young black urban criminal', an even stronger meaning than the appellant relied upon.
[5] *Independent Newspapers Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) 152h-153g.
[6] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1215B-I.

were not entitled to search a person without a reasonable suspicion. The only facts advanced to attempt to justify the search were that the appellant did not stop his car to the side of the road and he made a lot of noise once confronted by the respondents. Having been called a 'tsotsi' this was perfectly understandable.

[19] In the absence of consent or a search warrant members of the SAPS are entitled to search an individual only in circumstances authorised by s 22(b) of the Criminal Procedure Act 51 of 1977 (CPA), namely when it is believed, on reasonable grounds, that a warrant will be issued if applied for and that the delay in applying for a warrant would defeat the object of the search.[7] These provisions were designed to protect rights to privacy against abuse of power by members of the SAPS. Even when a search is justified it shall, in terms of s 29 of the CPA 'be conducted with strict regard to decency and order'.

[20] The appellant is the sheriff of the magistrate's court for the district of Thohoyandou and as such is a prominent and respected member of the local community. He has held this position since 2000. He has also been the elected chairman of the Community Police Forum[8] of Itsani since 1996. During 1996 he was a member of the executive of the local Civic Association and since then has remained involved in an advisory capacity. He is a member of the International Pentecostal Church. From 1990 until 2000 he was a politician. During that time he held the position of coordinator of the National Party for the Limpopo Province. Prior to 1990 he was a clerk employed by the former Department of Works. He is a qualified teacher and had occasion to practise that profession earlier in his career.

---

[7]Section 22: 'A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –
(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
(b) if he on reasonable grounds believes –
(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
(ii) that the delay in obtaining such warrant would defeat the object of the search.'
Section 21(1): 'Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued –
(a)by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction;'.
These provisions should further be read with s 13(1) of the South African Police Service Act 68 of 1995 which provides: 'Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."

[8]Established by the South African Police Service Act 68 of 1995.

[21] An award of damages involves an assessment of a just and fair compensation in the circumstances to assuage the appellant's wounded reputation and feelings. In making that assessment I have consulted past awards, though mindful that no two cases are ever the same.[9] The appellant is a man of standing in the community. Although he was defamed there is no evidence to suggest a vast impact on his reputation. No apology was ever forthcoming. The two incidents, the defamation and the iniuria, occurred at the same time. He was humiliated in public. Without underestimating what the appellant had suffered, it is not one of the more serious cases of injuria. In the circumstances a just and fair award for both the defamation and the indecent search would be the amount of R25 000,00.

[22] This award falls within the ambit of the magistrate's court jurisdiction. Bearing in mind that the appellant is an officer of the court, he was entitled to approach the high court. I should add that the high court's order that the appellant should pay the costs on an attorney and client scale gives rise to concern. Not only did the Judge make no effort to support this award with any reasons, the record itself was entirely bare of justification for it.

[23] I grant the following order:

(1) The appeal succeeds with costs

(2) The order of the court below is replaced by the following order:

'The respondents are ordered, jointly and severally, to pay to the appellant:

(a) the amount of R25 000;

(b) interest on the amount of R25 000 at the rate of 15,5% from date of judgment to date of final payment;

(c) costs of suit.'

---

[9] Some of the cases considered in making an appropriate award are: *Raubenheimer v Greeff* 1975 (3) SA 237 (C); *Udwin v May* 1978 (4) SA 967 (C); *De Flamingh v Pakendorf; De Flamingh v Lake* 1979 (3) SA 676 (T); *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 25 (A); *Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk* 1981 (2) SA 373 (O); *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA).

_____

S SNYDERS

ACTING JUDGE OF APPEAL

AGREE:

CAMERON JA

COMBRINCK JA