Summary – MOKOENA V GERT SWART TRANSPORT

1. Damages arising out of an assault perpetrated by second defendant. The assault is not in dispute. Defendant has pleaded self-defence and provocation.

2. Whether or not plaintiff slapped second defendant in the face prior to second defendant's assault of plaintiff, does not support the justification of self-defence which was conceded in the course of the trial by defendants' counsel. There is no indication that the assault upon plaintiff was necessary for the protection of second defendant; no suggestion that second defendant was subjected to a dangerous situation – an aggravating or irritating environment or interaction perhaps but no danger. It was never suggested that the blow by second defendant was reasonably necessary to protect him in any way. There is nothing to suggest that (even if second defendant had felt himself to be in any danger) he could not have just walked away.

3. The alternative plea of provocation was presented on the basis that *"the plaintiff provoked second defendant by unlawfully hitting him through the face twice. Second defendant reacted immediately after he was hit the second time by striking plaintiff once in the face".* It is not absolutely clear whether the alleged provocation is tendered as a defence excluding fault or to negate intention so both must be considered. These alleged slaps are inconsistent with events as described by second defendant: he made it clear that he considered himself to be the aggrieved party on the day in question; he was sufficiently embroiled in this issue to wait at the auto electrical workshop for plaintiff to return; according to second defendant, plaintiff told second defendant he was "*going to give back the money for repairing the alternator"* which is hardly behavior consistent with the alleged earlier aggression and is even less consistent with the alleged subsequent aggression. Why slap someone, offer to pay them back and then slap them again? Clearly plaintiff, on second defendant's own version, was avoiding the problem and resolving the dispute. According to second defendant, it was he who was not satisfied with the offer of settlement from plaintiff while it was plaintiff who was the party who made an offer of settlement and second defendant was the party who still felt aggrieved.

4. I find it highly improbable that the two slaps happened as described by second defendant and, even if they had happened, these slaps would not constitute a defence excluding intent or accountability. This could not have been an " extreme case provoking to a degree of anger which effectively impaired second defendant's mental

capacity to have animus" . Even if these slaps had happened I would have been unable to find that they constituted provocation negating unlawfulness. Second defendant says he was angered after the first slap, handed his keys and phone to Sepetlo because he intended to hit plaintiff. However, he did not do so because he *"calmed down*". In effect, that was the end of that round of provocation and second defendant's temper was no longer lost. Second defendant's version that he then warned plaintiff that he would '*bliksem'* him if he slapped him again may have been a warning or a taunt but does not constitute an attempt to avoid further confrontation. Even if there had been one or two slaps I do not find that second defendant could have relied thereupon as a ground of justification for his assault. The handing over of the keys and phone suggests sufficient time to consider what was about to happen and make it possible by freeing up second defendant's fist; the blow did not follow immediately upon the alleged first slap but the second; the blow was certainly not *"moderate, reasonable and commensurate in nature and degree with the provocation".*

5. The final issue for determination is the liability of the first defendant. First defendant is a close corporation of which second defendant is both member and manager of its business operations. The vehicle in question was taken to plaintiff's premises for repairs for and on behalf of the business of first defendant. Payment was made for the original and subsequent repairs by an employee of first defendant and for and on behalf of first defendant. Second defendant went to plaintiff's premises to resolve the ongoing difficulty with the vehicle taking an employee of first defendant with him. In such circumstances, I cannot see how the first defendant can escape liability for the actions performed by a member of first defendant close corporation as also the manager of the business operations of first defendant whilst such member and manager was acting in the course and scope of his membership and management. It would be perfectly acceptable to utilize the word "employment" because the liability of not necessarily that of an employee in the sense of a servant but because the member and manger is employing his skills and responsibilities for the benefit of the first defendant at the time of these events.