

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	<input checked="" type="checkbox"/> YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<input checked="" type="checkbox"/> YES
(3) REVISED.	<input checked="" type="checkbox"/> YES
14/2/12	14/2/12
DATE	SIGNATURE

CASE No. 44038/2010

14/2/2012

ISAAC MABENA

Plaintiff

and

ANDREW BENJAMIN MABENA

First Defendant

ZULU BOY EDWARD MABENA

Second Defendant

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] The Plaintiff claims damages, jointly and severally, the one paying the other to be absolved, from the two Defendants pursuant to injuries he sustained and the impairment of his personality rights and physical integrity arising out of him allegedly being assaulted by the two Defendants on or about 21 July 2008 at 5606 Mamelodi Gardens, Mamelodi West.

.../...

[2] In paragraph 5 of the Defendants' Plea, as amended in the course of the trial, the Defendants pleaded as follows:

"The First and Second Defendants admit the Plaintiff's allegations in respect of the date and place of the incident.

The First and Second Defendants specifically plead that they were at the premises and that they were with two other people who were also known to the Plaintiff.

The First and Second Defendants deny that they wrongfully and unlawfully assaulted the Plaintiff by kicking and punching him and clubbing him with pick axe handles.

The First Defendant specifically pleads that he acted in self-defence after the Plaintiff had hit him with the pick handle."

[3] The Plaintiff was the only witness who testified on his behalf whilst, in addition to the evidence of the two Defendants, I also heard the evidence of a certain Ms. Elizabeth Malatjie who was called to testify on their behalf.

The evidence of the Plaintiff

[4] As is apparent from Plaintiff's evidence, the First and Second Defendants are the older brothers of the Plaintiff.

[5] It appears from the evidence that the parents of the Plaintiff and the two Defendants are deceased. The Plaintiff and the Second Defendant were both living in the family home. On the premises are, apart from the main house, a number of rooms which are, together with rooms in the main house rented out by the Plaintiff. The Plaintiff received the rental which, according to him, is utilized to pay electricity and other

.../...

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expenses to maintain the property.

[6] This state of affairs seems to be and to have been on the day of the incident a bone of contention between the brothers.

[7] On 21 July 2008, the Plaintiff testified, whilst sitting in the back yard of his home the First Defendant arrived at his place in a bakkie. The First Defendant, without greeting the Plaintiff, called the Second Defendant who was at the time in the front yard. He saw them having a conversation, but he could not hear what they were saying.

[8] They called a gentleman known as Paul who rented one of the outside rooms. He heard them telling him to pay his rental into their banking account.

[9] The Plaintiff, however, said to them that Paul must pay the rental to him. The First, thereupon, went to his bakkie from where he fetched a pick axe handle and returned to him where he was sitting. He attempted to run away, but the Second Defendant prevented him from doing so. They then started hitting him with their fists and the First Defendant aimed a blow at him with the pick handle. He warded the blow off with his hands. In the process he fell down, whereupon, the Defendants and two of the Second Defendants' friends, known as "*Chief*" and "*Seconds*" who joined in, assaulted him by hitting and kicking him. He was unable to see with what he was struck by all of them. He, however, saw the First Defendant struck him a blow on his left leg with the pick handle. The two Defendants and their friends then left after telling him that they will be back again.

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[10] He, whilst suffering excruciating pain, succeeded in crawling into the house. He was unable to walk as his leg was fractured. In the house he called his brother Peter (now deceased) who picked him up from the floor and assisted him to his car from where he took him to the hospital. In the hospital he was treated for the pain he suffered and a plaster of Paris cast was placed over his left leg to ensure the proper union of the femur.

[11] According to a Report by and Authorised Medical Practitioner on the Completion of a Medico-Legal Examination (J88) (which is incidentally annexed to the Particulars of Claim and forms part of the trial bundle of documents) completed on 23 July 2008 -

- (a) the Plaintiff was admitted on a stretcher in a lot of pain;
- (b) his clothes were scattered with blood;
- (c) he sustained the following injuries, namely -
 - (i) a laceration in the occipital area of the skull;
 - (ii) a laceration in his shoulder;
 - (iii) a laceration in his right leg which was sutured; and
 - (iv) a fracture of the fibula of the left leg.

(I may mention that the Plaintiff confirmed these injuries in his evidence and that the parties agreed at the pre-trial proceedings that copies *"of the documents to the used in the trial bundle should serve as evidence of what they purport to be without formal proof thereof"* although the contents and correctness thereof were not admitted)

[12] Because of his injuries he was unable to pursue his employment for a period of three months during which period he was only able to move around on crutches. He was remunerated for only half of that period during which he suffered loss of earnings in an amount of R3 783.

[13] Under cross-examination it was put to the Plaintiff that the First Defendant will testify -

- (a) that on the day in question there was a fight between him and the two Defendants because he wanted the Second Defendant to leave the house;
- (b) that the First Defendant came over to the house to assist the Second Defendant;
- (c) that when the First Defendant arrived the Plaintiff went into the house and came out with a pick handle because he wanted to hit the Second Defendant;
- (d) that the First Defendant then intervened and the Plaintiff then hit him;
- (e) that he then took the pick handle and hit the Plaintiff once;

.../...

- (f) that the Plaintiff then fell to the ground and thereafter ran away;
- (g) that the injuries he sustained was inflicted by the First Defendant in self-defence;
- (h) that the two other persons thereafter arrived on the scene.

[14] The Plaintiff denied these allegations in so far as they conflicted with his version as testified in chief.

The evidence of the First Defendant

[15] The First Defendant, having dealt with the history of the house and the disputes regarding, particularly, the rental moneys received by the Plaintiff, testified that on 21 July 2008 he went to the house after the Second Defendant called him to come and to assist him as the Plaintiff was assaulting him.

[16] It appeared that the Plaintiff wanted the Second Defendant to move out of the house.

[17] An argument ensued, whereupon, the Plaintiff ran into the house and came out with a pick handle and attempted to hit him. He succeeded in grabbing the handle and wanted to hit him with the handle, but he grabbed it. He pulled it out of Plaintiff's hand, whereupon, the Plaintiff ran into the house where he locked himself in.

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[18] They then left taking the handle with them and went to the police station where they reported the incident.

[19] He denied that he or any one else assaulted the Plaintiff and that the Plaintiff got injured.

[20] The Plaintiff laid a charge against them and they were with two others charged, but the charges were eventually dropped.

[21] He was referred to a statement he made on 28 July 2008 relating to this incident. As is apparent from this statement (**bundle p. 22**) he stated as follows:

"I don't deny the allegations laid against me. The complainant is the one assaulted (sic) me with a pick handle. I took that handle from him and assaulted him."

[22] Under cross-examination the First Defendant was questioned about the various contradictory versions as they emerged from the evidence and as they appear from the pleadings. He, however, persisted that he did not hit the Plaintiff.

[23] On a question as to how the Plaintiff incurred the various injuries, he indicated that he did not know how the injuries were sustained.

[24] He was, thereupon, referred to an affidavit (**bundle p. 47**), being an affidavit he made on 9 September 2008 in defence of a protection order sought by the Plaintiff (**bundle p. 39**) in which he, *inter alia*, stated the following:

.../...

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"On 21st July 2008 he was not assaulted by any one, he was injured by the pick handle he was having as he fell when he was wielding it trying to hit Edward On 21st day of July 2008 we had gone to him to clarify that matter and he got angry and took out a pick handle and in the process he got himself injured as he was drunk."

[25] The questions evoked no coherent answer,

The evidence of the Second Defendant

[26] The Second Defendant, on being asked what he knows about the Plaintiff's allegation that he was assaulted, indicated that he knows nothing about an assault.

[27] He testified that on the day in question the Plaintiff said to him that he was not supposed to sleep in that house and that he was going to kill him. Furthermore, he said that he was the last born son and was supposed to remain in that house. He, thereupon, phoned the First Defendant who then came to the house and asked what was going on.

[28] On the First Defendant's arrival he asked the Plaintiff what was going on. The Plaintiff ran into the house and came out with a pick handle and approached him with it. He, however, ran away. The First Defendant then succeeded in pulling it out of Plaintiff's hand. The Plaintiff then ran to the house, but fell at the door, got up and ran into the house. They then left and went to the police station where they reported the incident. His two friends, Chief and Second, only arrived at the scene the moment they were about to drive off to the police station.

[29] He did not see the Plaintiff sustaining any injuries, but to his surprise he noticed the following day that the Plaintiff's leg was in a plaster of Paris cast.

[30] Under cross-examination he was referred to a statement (**bundle p. 49**) in which he confirmed the correctness of a statement (**bundle p. 47**) made by the First Defendant. At first he denied having ever seen the statement made by the First Defendant, but later denied that he ever read the First Defendant's statement.

The evidence of the Defendants' witness

[31] The Defendants called a witness, Elizabeth Malatjie, to testify on their behalf.

[32] She testified that she at the time resided in the Plaintiff's home until some time in 2008.

[33] According to her she was at home on the day of the incident. The First Defendant, so she testified, arrived at the house looking for the Second Defendant. She saw the Plaintiff running into the house and came out with a pick handle. He approached the First Defendant. She then went into her room to phone her husband. She did not see any assault on the Plaintiff. She also did not see that he was injured. She only saw the Plaintiff falling down at the door. She also did not see the two other men, Chief and Seconds.

[34] Under cross-examination she was referred to a statement (**bundle p. 50**) she

made on 9 September 2008 in which she stated that she saw the First Defendant arriving looking for the Second Defendant, that the Plaintiff went into the house coming out with a pick handle attempting to hit the Second Defendant, but that he fell and injured himself. She was unable to confirm having said that the Plaintiff injured himself or at what time the incident occurred or what happened to the Plaintiff after the incident.

Evaluation of the evidence

[35] As is evident from the above summary of the evidence the case of the Defendants is not only in various contradictory, but also inherently incredible.

[36] A conclusion to that effect hardly calls for any extensive analysis of the evidence, but I will briefly deal with some of the many discrepancies in the Defendants' case.

[37] **Firstly**, there is the contradictions in the evidence of the two Defendants. According to the First Defendant the Plaintiff attempted to attack the Second Defendant with the pick handle, whereupon, the Plaintiff ran into the house after he forced the handle out of the Plaintiff's hand. On the other hand the Second Defendant stated that he ran away as the Plaintiff approached him and that the Plaintiff ran away after he was disarmed by the First Defendant and fell at the door, but again got up and went into the house. They both denied that the Plaintiff was assaulted or in any way injured,

[38] **Secondly**, there is the contradiction between their evidence on the one hand and their case as put to the Plaintiff under cross-examination and their plea as amended

in the course of the trial on the other. Under cross-examination it was put to the Plaintiff, as is more or less contended in their plea, that the First Defendant acted in self-defence and, as is apparent from what was put to the Plaintiff, he, after having disarmed the Plaintiff, struck the Plaintiff once. This allegation was, as already indicated, contradicted in all respects by both Defendants in their evidence.

[39] **Thirdly**, both versions of the Defendants are contradicted by statements they made in defence of the protection order sought by the Plaintiff and by the First Defendant in response to a criminal charge laid against them after the alleged attack on him. As already indicated the First Defendant in a statement made by him to the police he in effect admitted having assaulted the Plaintiff after he took the pick handle away from him. In his statement made in defence of the protection order, being a statement confirmed by the Second Defendant, the Defendants denied that they assaulted the Plaintiff and contended that he injured himself when he fell because he was drunk. These allegations are in all respects contradicted by the Defendants in their evidence (which incidentally also conflict with their Plea and the proposition put to the Plaintiff under cross-examination).

[40] **Fourthly**, the Defendants' evidence is so much more rendered inherently incredible by their failure to explain the objective evidence of the injuries sustained by the Plaintiff

[41] From the foregoing it is obvious that the two Defendants were, to say the least, pathetic and deliberate liars and perjurers. Their versions are obviously farfetched and

improbable.

[42] In view of their unreliable and untruthful evidence, the evidence of the witness called on their behalf can not be accepted in so far as it was aimed at corroborating their evidence. Otherwise her evidence contributed very little, if any, to their versions of the events.

[43] On the other hand the evidence of the Plaintiff is strongly corroborated by the objective evidence of the serious injuries he sustained.

[44] He impressed me as a credible witness and I have no doubt that his evidence as to the assault perpetrated on him by the two Defendants and the two other men concerned who obviously all acted in concert.

[45] The evidence clearly shows that the Plaintiff was a victim of a vicious attack on him.

[46] Bearing in mind the seriousness of his injuries and the obvious pain and inconvenience he suffered for a considerable period after the assault coupled with the degree of humiliation which accompanied the assault calls, apart from the patrimonial damages he suffered, for a substantial award in general damages.

Order

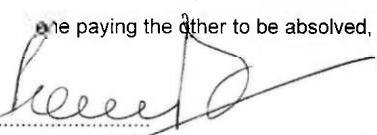
[47] In the result I make the following order:-

1. The First and Second Defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, to the Plaintiff -

(a) in respect of loss of earnings, an amount of R R3 783;

(b) in respect of general damages, an amount of R80 000.

2. The First and Second Defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the Plaintiff's costs of the action.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF PLAINTIFF

ADV B STEVENS

On the instructions of:

J W WESSELS & PARTNERS
811 Schoeman Street
Arcadia
PRETORIA
Ref: Mr. J W Wessels/nvr/SM 1194
Tel: 012 343 1410

ON BEHALF OF THE DEFENDANTS

ADV C BRUWER

On the instructions of:

MNISI ATTORNEYS
4th Floor, Suite 446
Van Erkom Building
217 Pretorius Street
PRETORIA

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DATE OF HEARING

1 and 2 February 2012

JUDGMENT DELIVERED ON

14 February 2012