

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

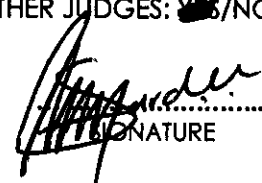
(GAUTENG DIVISION, PRETORIA)

31/3/2016

Case No: A687/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO,
(3) REVISED.

31/03/16.....
DATE


SIGNATURE

In the matter between:

VIPER SECURITY CC

Appellant

and

MOSEFE PILOT SEEMA

Respondent

JUDGMENT

MAGARDIE AJ

1. This is an appeal against the judgment of magistrate S F Ntlati sitting as the Gauteng Regional Court in Pretoria in a matter in which the respondent instituted action for damages arising from an incident of assault at the hands of two security officers employed by the appellant. The court below granted judgment in favour of the respondent. It is the judgment on the merits of the claim that is at the heart of this appeal.
2. A total of four witnesses gave evidence during the trial, namely the respondent himself, supported by a nurse who attended to the respondent's injuries on the day of the assault and two security officers who testified on behalf of the appellant. Although on the first day of the trial a further witness for the respondent was present and warned to attend the trial when the matter was postponed, the witness did not testify on the day on which the matter was postponed for further hearing. The nurse was the only witness that testified to confirm the respondent's injuries as noted in the form J88 handed in during the trial.
3. I must point out that although both parties filed heads of argument for the appeal, we only heard oral argument from the appellant. The respondent was neither at nor represented during oral argument. Our judgment has taken into account the written submission filed on behalf of the respondent.

4. The evidence of the respondent was as follows:
 - 4.1. The incident of assault took place during the morning of 17 February 2014, at the Bosman Square Mall;
 - 4.2. The respondent, a street vendor who sells caps, entered the mall carrying a plastic bag containing his merchandise;
 - 4.3. Two security officers employed by the appellant and who were acting within the scope of their duties confronted the respondent and reprimanded him not to sell his merchandise in the mall. The two security guards ordered the respondent to leave the mall;
 - 4.4. The respondent was attacked/assaulted shortly after being ordered to leave the mall. According to the respondent, the two security officers used open hands, fists, kicking and what felt like batons when assaulting him;
 - 4.5. The respondent managed to escape from the security officers; however, as he was crossing the street, the respondent was grabbed by an unknown person who handed him to one of the security officers. The assailant then dragged and took the respondent to some enclosure where the assault continued. The

security officers also tripped the respondent, resulting in him falling down;

4.6. The respondent's bag fell after the first assault. It was handed back to the respondent by a certain Mr Godfrey Malabotse Dagane. The security officers stopped assaulting the respondent after members of the public asked why the respondent was being assaulted;

4.7. The respondent went to Steve Biko Hospital Crisis Centre where he was attended to by a nurse. The nurse also completed a medical report ("J88 form") on the injuries sustained by the respondent; and

4.8. Later in the day, the respondent returned with the police and pointed out the two security officers to the police, after which they were arrested.

5. The evidence of the appellant was based on the evidence of two security officers, namely Mr Selolo and Mr Botsie. Both witnesses denied that they assaulted the respondent. The evidence of Mr Selolo , the first witness, was as follows:

5.1. The two security guards were on duty on the day of the incident. Whilst acting in the course and within their scope of

employment, they saw the respondent selling caps where after they accosted and reprimanded him not to sell his goods in the mall as hawkers were not allowed to sell in the mall;

5.2. The respondent was not cooperative and they had to make sure that the respondent exited the mall;

5.3. The respondent ran out of the mall shouting at the two security guards. As the respondent ran out of the mall, he dropped his merchandise bag and they followed the respondent with intent to hand over the bag to him;

5.4. Whilst following the respondent, they noticed that he was surrounded by a group of members of the public who were busy assaulting the respondent;

5.5. The two security guards then rescued the respondent from the crowd. They took him through a gate at the back of the mall where they gave the respondent his bag after which he left; and

5.6. Later in the afternoon, the police arrived at the mall with the respondent and arrested them.

6. The evidence of Mr Botsie, which contradicts that of Mr Selolo, was as follows:

- 6.1. After reprimanding the respondent not to sell his merchandise in the mall, the witness, Mr Botsie, remained standing next to Capitec Bank. At that moment, Mr Botsie noticed that his colleague, Mr Selolo, was having some altercation with the respondent;
- 6.2. He then walked towards Mr Selolo and noticed the respondent beginning to run away. As the respondent ran, he dropped his merchandise bag. They picked up the bag and continued to follow the respondent;
- 6.3. They then took the respondent to a delivery gate on the other side of the mall where they gave him his merchandise bag; and
- 6.4 Mr Botsie corroborates his colleague's version that the respondent was assaulted by members of the public and that they, namely Mr Botsie and Mr Selolo, rescued the respondent.
7. The only issue that the court below had to determine was whether the two security officers were responsible for assaulting the respondent.
8. At the end of the trial, the court below was not only confronted with two diametrically opposed versions which were mutually destructive, but also the contradictory versions of the two witnesses of the appellant. In

dealing with the evidence in its totality, the court below made the observation that the respondent was not a perfect witness and that his evidence was also riddled with a few inconsistencies.

9. The court below found that the appellant's version was not only contradictory but also inherently improbable. The court below stated the discrepancies in the appellant's version as the inconsistency between the appellant's plea and the evidence of its witnesses as well as the contradictions between the appellant's witnesses. The court below concluded that the improbabilities and inconsistencies in the appellant's version corroborated the respondent's case. In the end, the court below found that the respondent's evidence proved that the appellant's witnesses assaulted the respondent and that the respondent sustained bodily injuries as a result of the assault.
10. The question that has to be answered in this appeal is whether the court below was correct in finding that the respondent succeeded in discharging his onus on a balance of probabilities by proving the elements of his claim. The nub of the appellant's argument in this appeal is that the respondent's evidence was inconsistent and unsatisfactory in material respects to the extent that he did not succeed in proving his claim on a balance of probabilities. It was argued before us that the court below erred in rejecting the evidence of the appellant's witnesses.

11. It is an established principle of our law that a plaintiff bears the onus of proving its claim and that onus is discharged on a balance of probabilities.¹ In determining whether a plaintiff has discharged the onus to prove a claim, a court is required to consider the oral evidence together with any other documentary evidence as well as surrounding circumstances and probabilities of a case. Many a time a court may be confronted with mutually destructive versions and only one version must be accepted above the other. If the court cannot find that one version should be accepted above the other, the conclusion would be that a plaintiff has failed to prove its claim on a balance of probabilities.
12. In **Mabona & Another v Minister of Law & Order & Others**² it was held that when the court is faced with two conflicting versions, the only one of which can be correct, then the onus is on the plaintiff to prove on a preponderance of probabilities that his version is the truth. Such onus is discharged if the plaintiff can show by credible evidence that his version is a more probable and acceptable version. The credibility of the witnesses and probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into acceptability or otherwise of demeanour and impression of witness evidence, where the importance of any discrepancies or contradiction are assessed

¹ Santam Bpk v Potgieter 1997 (3) SA 415 (O)

² 1988 (2) SA 654 (SE)

against the content of witnesses' evidence and where a particular story is tested against the facts which cannot be disputed and against inherent probabilities so that at the end of the day one can say with conviction that one version is more probable and should be accepted.

13. In **Nieuwoudt v Joubert**³ it was held that the purpose of pleadings is to define issues so as to enable each party to know the case he has to meet. Once the appellant filed its plea in the manner that it did herein, such plea had to be understood to be the basis of the appellant's case and thereby giving the defendant a clear position of the appellant's case that he had to meet.
14. Having regard to what was stated in the foregoing, I am of the view that the approach of the court below to the evidence cannot be faulted. The court below correctly evaluated the evidence and made credibility findings consistent with established legal principles. The appellant's attack that the court below should have found that the respondent did not discharge his onus of proving on a balance of probabilities that the employees of the appellant assaulted him, is certainly misplaced and without merit. It is clear that the court below did not just elevate the evidence of the respondent above that of the appellant. The judgment of the court below clearly demonstrates that, although the respondent was not found to be a perfect witness, his evidence was certainly

³ 1988 (3) SA 84 (SE)

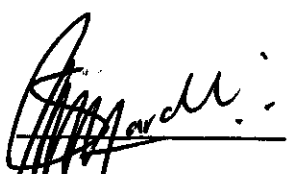
corroborated by not only the inconsistencies, improbabilities and contradictions of the appellant's evidence, but also the material inconsistencies between the appellant's plea and the evidence of its witnesses. Basically, the appellant's evidence was not in accordance with its plea, begging the question as to what informed the plea in the first place. It buttresses the conclusion that the evidence of the appellant was contrived in total oblivion of the plea that was already filed in defence of the claim. On this score, it is apposite to highlight the fact that nowhere in the evidence of the appellant's witnesses was it ever alleged that the respondent was aggressive and refused to leave the mall as was pleaded in paragraph 4.1 of the appellant's plea. In the plea, the appellant stated that as a result of the respondent's refusal to leave the mall, the two security officers grabbed the respondent by his pants and escorted him outside the mall. Nothing is said about the grabbing of the respondent with his pants by both security officers to remove him from the mall. No evidence was adduced in support of this version at all. Of further significance in the many contradictions of the appellant's version is paragraph 4.3 of the plea, which stated that the two security officers rescued the respondent and escorted him through the mall to the main entrance to protect him from the alleged assailants. This version is in total contradiction of what Mr Botsie testified. According to Mr Botsie, the respondent was taken to the back of the mall into some form of enclosure in the loading area. That is a totally different place to what was pleaded as the main entrance. The appellant's witnesses' evidence was tailored to distance

themselves from contact with the respondent. The only contact that the two security officers were prepared to associate themselves with was the belated contrived version that they rescued the respondent from the crowd.

15. There was no case of mistaken identity. It was not in dispute that the two security officers, in the course of and within the scope of their duties in the employ of the appellant, had interaction with the respondent and even took the respondent to the back of the mall after grabbing him from the street. From Mr Botsie's evidence, it is clear there was some altercation between Mr Selolo and the respondent. In this regard, it follows that there was not much of a difference between the evidence of the appellant's witnesses and the respondent.
16. Areas of inconsistencies of the respondent's evidence were pointed out to us the same way as they were in the court below. One of those inconsistencies was alleged to be whether the respondent was assaulted by batons or not. I am not swayed by this argument at all. The transcript of the trial proceedings is clear on this aspect. The respondent said that something that felt like a baton was used to assault him.
17. Even if it were to be accepted for one moment that there was such inconsistency in relation to the instrument of assault, such does not detract from the fact that the respondent was assaulted. Whether it be

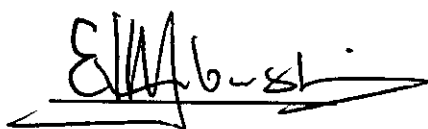
by kicking, open hand, clenched fist or baton, the respondent was assaulted.

18. No plausible reason was advanced as to why members of the public would initiate some assault on the respondent in the glare of the two security guards. I have to accept the respondent's evidence that the appellant's employees manhandled the respondent and were responsible for taking him to a secluded place where they carried on with the assault of the respondent. The appellant's witnesses' account of the incident was fraught with inherent improbabilities and was also so farfetched that the court below was justified in its rejection of same.
19. On the consideration of the conspectus of the evidence, explanations and inconsistencies in the appellant's witnesses' version, probabilities and circumstances of this matter, it is my view that the findings of the court below were correct and in accordance with the law and that the conclusion that the appellant's employees acting in the course and within the scope of their employment were responsible for assaulting the respondent after which the respondent sustained injuries in accordance with what was recorded by the nurse in the J88. There was nothing in law that the appellant's witnesses presented as lawful justification for assaulting the respondent.
20. In the result, the appeal against the judgment of the court below should be dismissed with costs.


S L MAGARDIE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.



E M KUBUSHI

JUDGE OF THE HIGH COURT