REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

CASE NO: 12314/19

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

21/10/2021
DATE

SIGNATURE

In the matter between:

KETCHER A E **PLAINTIFF**

And

JORDAAN J **DEFENDANT**

J U D G M E N T

Judgment handed down: This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 21 October 2021.

MOGOTSI, AJ:

INTRODUCTION

[1] The Plaintiff instituted an action against the defendant for delictual damages based on unlawful assault that happened at an annual golf tour held at Sun City in 2018.

[2] The plaintiff alleges that the defendant assaulted him by violently pushing him aside causing him to lose balance, and falling to the ground, landing on his left shoulder and hitting his head against the wall. The assault took place in public and within sight of members of the public.

[3] As a result of the assault, the Plaintiff sustained a fracture of his shoulder and had to undergo surgery. Dr. JW Bithrey, an orthopaedic surgeon, stated that M. Plaintiff sustained a Neer Group 2 type 5 left lateral clavicle fracture. The fracture is comminuted and displaced. It required surgical fixation, screws and suspensory fixation with a tight rope. He further opined that due to the severity and location of the fracture, there is an increased risk of non-union of the fracture of up to 56 per cent.

[4] The Defendant specifically pleaded that the Plaintiff was the cause of his own injuries. He further pleaded that the Plaintiff had a glass of whiskey on one hand and was standing in front of the television causing a nuisance. The plaintiff was requested to move to the side so that the television is not obstructed further. Whilst moving to the side, the plaintiff's foot connected with the couch resulting in the plaintiff losing his balance and falling against the wall. The plaintiff did not attempt to prevent the fall, Instead, he tried to keep the glass of whiskey in his hand for it not to spill. It is apposite to mention at this stage that the version of the Defendant, which was put to the witnesses was that the Plaintiff obstructed his view of the television, he requested him to move on several occasions to no avail. The Defendant nudged or slightly pushed him and he took some steps before falling.

[5] By agreement between the parties the matter proceeded only in respect of the issue of liability. The issue of quantum was postponed *sine die* and would be determined at a later stage.

[6] Two witnesses testified for the Plaintiff. They were Mr. David Plant and Mr Ketcher, the Plaintiff. In broad terms, their account of what happened is as follows. The Defendant was watching an important cricket match on television. He unsuccessfully requested the Plaintiff on several occasions to move from obstructing his TV view. The game was at a critical stage in that AB de Villiers was batting the last over. He got up quickly, approached the Plaintiff and violently pushed him.

[7] During cross-examination of the Plaintiff, his version became inconsistent, and he contradicted the version of Mr. Plant. Initially, he testified that he left the bottle of whiskey in his room and later recanted and stated he took it with him. He testified that prior to the attack he was walking back and forth between the patio and the kitchen and in the process, he crossed the

television area 4-6 times, and Mr. Plant testified that he, the Plaintiff, was standing in front of the television set in line with the Defendant, obstructing his view. He testified that no one was seated on the couches in the lounge area watching the game and Mr. Plant testified that there were other people seated on the couches watching the game. He gave different accounts of what he was doing immediately prior to the pushing. He initially said that he was walking and later said he was standing still. He testified that upon falling he fell backwards and hit his head against the wall and later said he did not hit the wall but the tile floor. Mr. Plant testified that the Plaintiff took a shower at Sun City, and he denied this. According to Mr. Plant there were two single armchairs in the television room, and he denied this.

[8] The Plaintiff closed his case, and the defendant unsuccessfully brought an application by virtue of Rule 39 (6) of the Uniform Rules for absolution from the instance. The Defendant closed his case without leading evidence.

SUBMISSIONS BY COUNSEL FOR THE APPLICANT

[9] Counsel for the Plaintiff submitted that:

9.1 It is common cause that the Plaintiff was pushed, and the contentious issue is the extent of the force.

9.2 The Defendant did not plead justification.

9.3 The Defendant had the motive and intent to push the Plaintiff. He was watching an important cricket game, the Plaintiff was obscuring his view, he repeatedly requested him not to obscure his vision to no avail and he got irritated, got up and pushed him out of the way.

9.4 The Defendant had the necessary intent. The Defendant did not accidentally bump the Plaintiff out of the way. The evidence indicates that he was getting more and more frustrated by the conduct of the Plaintiff and decided to violently push him away.

9.5 The resignation email from "the Club" penned by the Defendant more specifically the following sentence "Even though it was not my intention to hurt Arthur, I feel guilty about what happened" implies that it was the Defendant who hurt the Plaintiff. The version of the Defendant that the Plaintiff fell on his own has no merit. The fact that some members of the club were unhappy with him because he injured the Plaintiff indicates that the Defendant pushed him.

9.6 The Defendant was tasked to draft the addendum to the Club's Constitution specifically to cater for violent events. If the Plaintiff fell by himself there would be no need for the amendment of the Club's Constitution to specifically deal with events involving violence.
9.7 The Defendant's failure to testify implies that he would give evidence adverse to his case and in favour of the Plaintiff.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT

[10] Counsel for the Defendant submitted that the Plaintiff's action should be dismissed with costs based on the following:

10.1 The Plaintiff is not a credible and reliable witness. He contradicted himself on many occasions.

10.2 The demeanour of the Plaintiff was not satisfactory. He adjusted his version during cross-examination, and he was called on several occasions to answer the questions directly.

10.3 The discrepancies between the version of the Plaintiff and that of Mr. Plant are such that it is improbable to determine how the assault took place.

LEGAL PRINCIPLES

[11] In the matter of *The National Employers' General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440D – 441A* the court held as follows:

> *"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false."*

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer (Supra):*

> *"I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the*

truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[12] In *Bennet v Minister of Police 1980 (3) SA 24 (C)* the court held as follows:

"The normal course the law requires a plaintiff who seeks damages for humiliation (contumelia) to allege and prove that the defendant intended whether directly (dolus directus) or indirectly (dolus eventualis) to injure plaintiff. There is no need to allege an improper motive save perhaps in order to show defendant's true intention or to help in assessing the quantum of damages.... But normally plaintiff must allege and prove animus injuriandi, the claim being founded on the actio injuriarum."

EVALUATION

[13] In my view, the version of the Defendant that was put to the witnesses to the effect that he nudged or slightly pushed the Plaintiff implies that the cause of action is common cause.

[14] It is common cause that the Defendant was watching a cricket match on television and the Plaintiff was obscuring his view. The Defendant, on several occasions, unsuccessfully requested the Plaintiff to move away. According to him he had to change seats but the Plaintiff continued to obscure his view. Shortly before the incident, AB de Villiers was betting the last over with a couple of balls left in the over. This was a crucial moment of the game. Probabilities are that he wanted to see that last over and the Plaintiff was obscuring his view. In my view, it is probable that he quickly approached the Plaintiff and violently pushed him in order for him not to miss that last crucial over.

[15] In *Groenewald v. Groenewald 1998 (2) SA 1106 (SCA)* the court held as follows:

"For the purposes of answering the first question the defendant would be held to be at fault as long as he intended to cause harm to the plaintiff, even if he did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if a reasonable person in the position of the defendant would have

realized that harm to the plaintiff might be caused by such conduct, even if he would not have realized that the consequences of that conduct would be to cause the plaintiff the very harm he actually suffered or harm of that general nature."

[16] In my view, prior to the pushing he foresaw the possibility of causing harm to the Plaintiff, however, since he was acting in the heat of a moment, he reconciled himself to that possibility. He thereafter regretted his decision and immediately approached the Plaintiff and uttered the following words, "Ketchy, why did you make me do this?".

[17] The Plaintiff's case is also based on objective evidence. The Defendant was tasked to draft an addendum to the Club's Constitution specifically to cater for violent events. If the Plaintiff was not pushed violently there would not have been a need to draft the addendum. He, defendant, emailed his resignation on the 18 June 2018. The Plaintiff received medical treatment immediately after the incident. These objective facts, amplifies the probability that the assault on the Plaintiff was serious and violent.

[18] There is a significant space between the corner couch where it is alleged that the Plaintiff was before being pushed and the wall where he landed. In my view, for him to land meters away from the couch, sufficient momentum is required. Probabilities are that he was violently pushed.

[19] It is clear *ex facie* the record that the Plaintiff adjusted his version during cross-examination thereby contradicting himself and Mr. Plant. Counsel for the Defendant submission is that he is an unreliable witness. The line of cross-examination the Defendant's counsel sought show the Plaintiff was under the influence of liquor. Counsel for the Plaintiff made concessions regarding the reliability of the Plaintiff.

[20] In my view, the Plaintiff was under the influence of liquor and does not have an independent recollection of the events. When testifying, he was unaware that he should confine himself to what was within his knowledge and not what he was told. He instead improvised and conjured a version. In my view he did not deliberately endeavour to mislead the court. Recollection is fallible more so in instances where one did not witness the incident as it unfolded. I am not persuaded that he was an unreliable witness.

[21] The Plaintiff's case is not only based on his version but also that of the Mr. Plant. Counsel for the Defendant, in my view, is correct in not levelling any criticism against him because he was an honest and reliable witness.

[22] In the matter *Elgin Fireclays Ltd v Webb, 1974 (4) SA 744 (AD)* at (p. 750) Watermeyer, C.J. states:

"now where a witness, who is available and able to elucidate the facts, is not called by a party such failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. Ex hypothesi, such adverse inference only arises if the witness in question

is able to elucidate the facts or may, from the circumstances, be presumed to be able to."

[23] It is trite law that once infringement is proved, the Defendant bears the onus to prove an excuse or justification for the assault. Counsel for the Plaintiff's argument that the defendant was expected to address these specifics and he failed in order to avoid giving evidence adverse to his case. I am persuaded by these submissions more so that his version that was put to the witnesses differs from his plea.

[24] Having regard to the conspectus of the evidence placed before me, I am satisfied that, the Plaintiff has proved on balance of probabilities that he was violently pushed by the Defendant.

[25] It is trite law that costs follow the results.

[26] In the result, I grant the following order:

1. The Defendant is liable for 100 percent of the Plaintiff's proven damages.

2. The Defendant to pay costs relating to liability aspect of the plaintiff's claim, such costs to include:

2.1 The costs of the trial from 11-13 October 2021.

P. J. M MOGOTSI

Acting Judge of the High Court

Date of hearing: 11-13 October 2019
Date of judgment: 21 October 2021

Appearances

For applicant: Adv Maritz

For respondents: Adv Janse Van Rensburg