IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Case No: 3720/2018

In the matter between:

TYEKS SECURITY SERVICES CC **APPELLANT**

and

ZOLANI SEMEKAZI **RESPONDENT**

JUDGMENT

Tokota ADJP:

Introduction

[1] The respondent/plaintiff instituted an action against the appellant/defendant in the court *a quo* claiming damages arising out of the alleged assault by one security guard, an employee of the appellant, in the amount of R4 520 000. At the commencement of the proceedings the court *a quo* granted separation of merits from quantum in terms of Uniform rule 33(4). It therefore dealt with the merits only and

postponed determination of quantum *sine die*. For the sake of convenience the parties in this judgment will be referred to as plaintiff and defendant instead of respondent and appellant. The court held that the defendant was liable for the proven or agreed damages. This appeal, which is directed at that order, is with leave of the Supreme Court of Appeal.

The plaintiff's version

[2] On the night of 23 September 2017 the plaintiff together with his brother (Sive) and two Maqokolo sisters who were also with their relative decided to attend a party at Ngangelizwe Township, Mthatha. It was about 19h00 when they arrived at the party. According to the evidence, the two ladies remained in the car and did not enter the venue where the party was being held. Although this did not come out clearly from the evidence it appears that one of the Maqokolo sisters was married to the plaintiff's brother.

[3] It was at about 22h00 when Sive, the plaintiff's brother, apparently got injured at the party. He suffered a fracture on his leg. No one knew how he got a fracture. The plaintiff carried him to the car and they all proceeded to a nearby clinic. On their arrival at the clinic they found two security guards at the gate who were on duty. These security guards were employed by the defendant.

[4] One of the security guards brought a wheelchair and Sive was driven by means of that wheelchair inside the clinic. Although this has been denied by the defendant's witness I find that a wheelchair was used. One of the ladies (Siphokazi) talked to the security guard who indicated that this was a hospital case and she informed him that they wanted a referral letter. The plaintiff pushed the wheelchair and placed Sive onto a bed. The nurses were also busy attending to Sive. The plaintiff was requested to leave the consulting room. He refused saying his brother was scared of injections and therefore he wanted to be there to assist the nurses.

[5] The nurses were not impressed and called the security guard to remove the plaintiff. The evidence relating to how the plaintiff sustained a wound on his head is at the centre of this judgment. For the reasons that follow, I find that the plaintiff was forcibly removed by the security guard and he was resisting resulting in him being pushed as result he fell on the floor.

[6] Sive was eventually transported to hospital. It is not clear what happened thereafter. Also for the reasons that follow I find that Sive was admitted in hospital. On 12 October 2017 the plaintiff consulted Dr Ncapayi and a J88 form was completed in terms section 212(4) of the Criminal Procedure Act 51 of 1977. It is not clear from the form whether this was completed in hospital but a stamp of Dr P I Ncapayi is affixed to it. Dr Ncapayi recorded on the form the following: '[p]atient was pushed fell on posterior head, sustained laceration on scalp (now healed)'. Under cross-examination, there is also a reference to a visit in hospital on 19 October 2017 but no medical report forming part of the papers before us was available.

[7] The plaintiff testified and explained how he sustained a laceration on his head. He testified that he was assaulted by a security guard having been pushed or pulled and kicked resulting in him falling. He fell on the ground and he woke up in hospital where he regained consciousness. He sustained an open wound which was stitched and bandaged after which he was discharged from hospital.

The defendant's version

[8] The defendant called one witness, Mr Zembe, a security guard, who was on duty during the night in question. He testified that on 23 September 2017 he was one of the security guards who were doing night duty. Sive was brought by the plaintiff and two ladies to the clinic. They offered a wheelchair but it was rejected. He testified that Sive was taken inside the clinic to the consulting room. Whilst the nurses were attending to him the two ladies were seated. The plaintiff was rowdy and shouting at people.

[9] Mr Zembe testified that he was called by the nurses to come and remove the plaintiff from the consulting room. When the plaintiff was requested to leave he reversed towards the door unwillingly. When he arrived at the doorway he stopped and wanted to attack Mr Zembe by attempting to slap him. The plaintiff slipped and fell on his back. He was shouting at all times. In his view, the plaintiff was drunk and Mr Zembe could smell liquor on him. After the plaintiff fell Mr Zembe 'let go of him' and called for backup. The plaintiff got up and said he was going to lay charges.

[10] Under cross-examination Mr Zembe denied having grabbed the plaintiff by his collar. He denied that he pulled him and tripped him as a result of which the plaintiff fell. He denied ever pushing the plaintiff notwithstanding the defendant admitting the same in the amended plea. He said there were four people instead of five. He denied the use of a wheelchair saying they rejected it. He said the fracture was usually fixed at the clinic. He disputed the fact that the plaintiff was not driving the vehicle when they came. Mr *Mhlawuli* who appeared for the defendant however did not dispute this under cross-examination. But he insisted that the driver was a male person. The other security guard who was on duty that night has since left the employment with the defendant. The conduct of the plaintiff was uncontrollable as he was shouting telling nurses to use a brufen medication.

The findings of the court *a quo*

[11] The court *a quo* found that the plaintiff was assaulted by the security guard and held that the defendant was liable for damages suffered by the plaintiff. In the court's view an attempt to grab a person is enough to inspire a belief that force is to be applied. It found that the evidence of the plaintiff was corroborated by that of Ms Maqokolo and found support in the pleadings. He rejected the evidence of the security guard 'out of hand' as being 'opportunistic'.

Parties' argument

[12] Mr *Notshe SC*, who appeared for the defendant, put emphasis on the behaviour of the plaintiff at the clinic and argued vehemently that he was drunk. He submitted that

the plaintiff had an evidential burden to prove that he was not drunk. I do not agree. There is an accepted principle of '*semper necessitas probandi incumbit ei qui agit*', meaning: that the necessity of proof always lies with the person who lays charges. He submitted that the court *a quo* erred in holding that the defendant was liable for damages.

[13] Mr *Notshe* contended that there were independent witnesses such as nurses to corroborate the plaintiff's version if he was telling the truth. His witness, Ms Maqokolo, cannot be free from bias as she is his sister in law. For example the plaintiff testified that one of the nurses intervened on his behalf by asking the security guard and said 'security what are you doing' at the stage when he was falling on the ground. There is no evidence that this witness was not available.

[14] Mr *Cole SC,* who appeared for the plaintiff, contended that the plaintiff's version was not put to the defendant's witness and therefore that version remained in extant.

[15] Mr *Cole* faintly argued that the Supreme Court of Appeal erred in granting leave to appeal in that it concentrated on the grounds of appeal. This argument cannot be correct. When the Supreme Court of Appeal considers a petition, affidavits and the record are placed before it. At the end of the day no reasons are given for the decision. Mr *Cole's* suggestion is based on speculation.

Discussion

[16] It is true that the intention of the perpetrator of an assault can be inferred from the act by which a physical assault is carried out. Where, for example, an assault is preceded by a threat, there can be no reason why the intention cannot be inferred from the contents of the threat, unless, obviously, it appears that the perpetrator does not have the intention or the ability to carry out the threat. In the instant case there was no evidence from which an inference could be drawn that when the security guard pushed the plaintiff, he was not removing him from the room but was intending to assault him.

[17] In this matter the court is faced with two mutually destructive versions of the parties. In order to assess which version is more probable, it is perhaps expedient to evaluate the evidence adduced in support of each party's case. Where the court is faced with two mutually destructive versions the proper approach was restated in *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others*,[1] where Nienaber JA said:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'[2]

[18] In *National Employers' General Insurance Co Ltd v Jagers*,[3] Eksteen AJP stated thus—

' . . . where there are two mutually destructive stories, [the plaintiff] can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and

[1] *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14J-15E.
[2] Also reported on Saflii and Butterworths electronic search engine: [2002] ZASCA 98; [2002] JOL 10175 (SCA).
[3] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437(E) at 440E.

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.'

[19] It is true that a party is obliged to put to the witnesses of his opponent so much version as will be adduced by him. The rationale of this rule is that the other party should be forewarned of what the version of the other party will be so as to afford him an opportunity to deal with it.[4] This rule, however, is not inflexible and is not intended to be a mechanical and senseless exercise. It has been said:

'The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where 'a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box'.[5]

It may be enough if the plaintiff was aware of what the case of the defendant would be.

[20] In my view the court *a quo* committed an error in the evaluation of evidence. It also made no credibility findings. Although the plaintiff testified that he was admitted in hospital being unconscious and was treated there, no medical records produced to support the veracity of this evidence were available. Ms Maqokolo could not confirm the admission in hospital. In fact, she testified that on the following day or so she phoned her sister who informed her that the plaintiff was sleeping at his brother's place. The

[4] *Small v Smith* 1954 (3) SA 434 (SWA) at 438F; *Van Tonder v Kilian NO en 'n Ander* 1991 (2) SACR 579 (T) (1992 (1) SA 67) at 585A; *President of the RSA v SARFU* 2000 (1) SA 1 (CC); (1999 (10) BCLR 1059; [1999] ZACC 11) at para 61.
[5] *SARFU* ibid para 64.

question was asked: ‘Do you know whether or not the plaintiff was admitted to hospital? Answer: ‘No I don’t know’. She did not corroborate the evidence of unconsciousness.

[21] Days later the plaintiff’s witness was told that the plaintiff was not feeling well and had visited a private doctor. The plaintiff testified that he sustained a laceration on his head on 23 September 2017. If he went to hospital being unconscious and having sustained an open laceration one would have expected medical evidence from hospital to support that evidence, more particularly that on his version he testified that he ‘bled a lot’ and ‘was weak from excessive bleeding’. Instead, he only went to see a doctor on 12 October 2017 with ‘healed’ laceration on the scalp. Unfortunately, the doctor did not estimate the age of the healed laceration and this was not canvassed at the hearing. Even then the reason for going to the doctor was because he was ‘shivering’, suspecting a reaction to antiretroviral medication (ARV’s). The court *a quo* made no finding in this regard.

[22] The plaintiff testified that he could not say how long he remained in hospital because he was unconscious and he gave the impression that he remained there for some time. He was asked if he was given any treatment after he woke up in hospital. He never answered this question. Instead he said he did not understand it. He was asked why it took him three weeks before going to hospital if he was injured on 23 September 2017. He never answered this question. All he said was that he went to hospital because he was ‘shivering’ and he thought it was because of the ARV’s that he was taking.

[23] He avoided certain questions. For example, the question was asked:

Question: ‘If you were not aware whatsoever of what happened after you had been bandaged, how did you know you were in hospital?’

Answer: ‘At the time I was at the clinic M’Lord having been grabbed by the back of my neck, my neck by the security then he shook me down, after the security M’Lord had grabbed me with the back of my neck, he pushed me down onto the ground.’

[24] Again he was asked:

Question: 'Were you then given treatment at hospital, for your head injury?'

Answer: 'I have said this, M'Lord before that, when I woke up in hospital, my head was already bandaged, and it was aching.'

The questions relating to the delay in going to hospital after the alleged assault were as follows:

Question: 'Can you tell the court if you were injured on 23 September 2017 why did it take you three, plus minus three weeks for you to visit the hospital?'

Answer: 'When I left hospital, M'Lord I recovered my consciousness in hospital and I had been taken to hospital in a motor vehicle. My hospital records were kept by my elder brother. What transpired on 19 October 2017 that I don't know.'

[25] Again it was suggested to him that if he was injured on 23 September 2017 the report on 12 of October 2017 would be referring to some other incident. One would have expected him to deny this suggestion. Instead his answer was as follows:

'I'm only M'Lord talking about the incident that occurred on 23 September. And this was happening to me that is what I'm telling the court.'

This question was asked three times but was never answered.

[26] Furthermore the following questions were not answered in that he did not deny certain allegations but gave half answers: Mr *Mhlawuli* for the defendant put the version of the defendant as follows:

Question: 'He will come and testify (referring to the defendant's witness) that when you arrived with Sive you were drunk, so much that when the nurses asked you to leave the room, you refused even told them, which injection they must use to help Sive?'

Answer: 'I have never myself worked at the clinic M'Lord I know nothing about injections.'

Question: 'He will tell the court that you were so drunk that you refused the nurses instruction to leave that the nurses had to call security to come and help them?'

Answer: 'When I discovered it was in 1997 that I was HIV positive I never consumed liquor since then M'Lord.'

From the above it is clear that he did not deny that he refused to leave the room. He did not deny that the nurses had to call a security guard to assist them. I therefore find that his conduct at that clinic was not user friendly hence it was thought he was drunk necessitating the need for calling the security guard to remove him by force.

[27] In *S v Hadebe and Others*,[6] citing with approval from *Moshephi and Others v R*[7] it was held:

'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[28] It may be so that the evidence of the security guard is also subject to severe criticism as well but the onus is on the plaintiff to prove his case on a balance of probabilities. Even if it could be suggested that Mr Zembe lied (which suggestion cannot be excluded) there was a vestige of truth on the overall testimony of the defendant's witness. However, I am unable to find fault in rejecting his evidence as unreliable and only accept it where it accords with the natural effects of the events. I am also of the view that his evidence was prone to minimization of events.

[29] When one breaks down the material aspects of the plaintiff's case the evidence is fraught with improbabilities.

(a) It is highly improbable that if he was admitted in hospital there would be no records to that effect or that such records would be given to his brother.

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[6] *S v Hadebe and Others* 1998(1) SACR 422 (SCA) at 426*e*.
[7] *Moshephi and Others v R* [1980] LAC at 59F-H.

(b) It is highly improbable that Ms Maqokolo would not have noticed that the plaintiff was unconscious. She would have been aware further if he was admitted in hospital as he said so.

(c) It is highly improbable that on 12 or 19 October he would visit hospital for the injury which he suffered on 23 September 2017. By that time the wound on his head had already healed if regard is had to the doctor's report.

(d) As he could not deny that he was refusing to leave the consulting room it is highly unlikely that pushing him away was intended to assault him rather than removing him away from the patient to allow the nursing staff to perform their duties uninterrupted.

(e) It is highly improbable that hospital records would be kept by the brother of the plaintiff.

(f) Although I make no finding that the plaintiff was drunk it is interesting to note that although he fetched Sive from the party where he broke his leg no one seems to know how his leg was fractured.

[30] Moreover, the court *a quo* did not make a finding as to whether there was an intention to inflict injuries on the plaintiff by the security guard. The onus was on the plaintiff to prove the assault on a balance of probabilities. C R Snyman *Criminal Law* 5 ed (2008) at 455 defines the elements of the crime of assault as follows:

'(a) conduct which results in another person's bodily integrity being impaired (or the inspiring of a belief in another person that such impairment will take place); (b) unlawfulness and (c) intention.'

At 461, the learned author says about assault with intent to do grievous bodily harm, that—

'(a)ll the requirements for an assault set [out] above apply to this crime, but in addition there must be intent to do grievous bodily harm.'

[31] With regard to Mr Zembe's evidence, I conclude that his evidence is also not reliable in material respects. He denied anything which would tend to favour the plaintiff.

I find that it is improbable that a wheelchair would be refused when an offer was made on the arrival of Sive. In any event that evidence remained unchallenged under cross-examination of the plaintiff's case. I also find it improbable that the plaintiff would be reversing when asked to leave which caused him to slip and fall. I have reservations about the evidence that there was a threat by the plaintiff to slap him.

[32] That said, the plaintiff still has a duty to prove his case on a preponderance of probabilities. In my opinion he failed. For the above reasons the appeal should be upheld.

[33] With regard to costs the general rule is that costs should follow the event. There is no reason why the rule should not apply.

[34] In the result the following order will issue:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and substituted with:
   'The plaintiff's claim is dismissed with costs''

B R TOKOTA
ACTING DEPUTY JUDGE PRESIDENT

I AGREE

B PAKATI
JUDGE OF THE HIGH COURT

I AGREE

T MALUSI
JUDGE OF THE HIGH COURT

Appearances:

For the appellant Instructed by Mbulelo Qotoyi Attorneys	*V S Notshe SC*
For the respondent Instructed by Mjulelwa Inc	*S Cole SC*
Date of hearing:	30 January 2023
Date delivered:	22 March 2023