Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5004/2016

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

12 OCTOBER 2017 **FHD VAN OOSTEN**

In the matter between

S M **APPELLANT**

and

STEPHEN MICHAEL BENNETT **FIRST RESPONDENT**

RYAN ANDRE ASPELLING **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] 'There is nothing to be found in human eyes, and that is their terrifying and dolorous enigma, their abominable and delusive charm. There is nothing but that which we put there ourselves. And that is why honest gazes are only to be found in portraits.'[1] The aftermath of the appellant's perceived gaze in the direction of a table

[1] *Jean Lorrain* in his book *Monsieur De Phocas*.

in the Appleseed Cocktail Bar (Appelseed), in Vanderbijlpark, at which the first respondent and the respondents' girlfriends were seated, lies at the heart of the litigation between the parties eventually culminating in the appeal presently before this court.

[2] Arising from the incident, the appellant (M) and D D (D), who were together that evening, separately sued the respondents for the damages they allege they suffered as a result of an assault by both the respondents (interchangeably referred to as the respondents or Bennett and Aspelling respectively). The two actions were consolidated and came to trial before Collis AJ. After the conclusion of the hearing, and on 28 January 2015, judgment was given in terms of which M's claim was dismissed with costs, including the costs of senior counsel, and judgment granted in favour of D for payment by both respondents, jointly and severally, of the amount of R100 000.00 and costs on the High Court scale. M sought and the court a quo granted leave to appeal to this court.

Background: The trial and judgment of the court a quo

[3] The trial lasted for 11 days: 7 days from 2 October 2013 to 10 October 2013 and a further 4 days from 9 December 2013 to 12 December 2013. Argument was heard in 2014. Altogether 12 witnesses testified, 6 for M and D and 6 for the respondents. In addition a video recording obtained from a single CCTV camera located at and focussed on the bar section of Appleseed, served before the court a quo and was played, referred to, meticulously analysed and hotly debated both in the evidence tendered as well as in argument both in the court a quo and in this court.

[4] The facts of the matter, as well as the evidence adduced at the trial, are comprehensively set out in the judgment of Collis AJ. I do not consider it necessary to repeat the evidence, except insofar as is necessary for the purposes of this appeal. I propose to deal, where relevant, with the evidence of the *dramatis personae* in this matter, who are, of course, the parties to the action, and, in addition thereto, Chipo Benikwa (Benikwa), David Jonathan Bacchus,[2] (Bacchus) and Pietro Pozzan (Pozzan), who testified for the plaintiffs, and Ms Kerry-Leigh Kinnear (Kinnear) and Ms Gillian Kritzinger (Kritzinger), who were called to testify for the plaintiffs. Just to put them into proper perspective: Benikwa was the bartender that

[2] His surname mistakenly referred to in the record of the proceedings as 'Bekkers'.

evening; Bacchus and Pozzan were patrons at Appleseed and together in a group of friends; Kinnear at the time was the girlfriend of Bennett, and Kritzinger, the girlfriend of Aspelling, and they, as a group of four, attended Appleseed to celebrate the birthday of a mutual friend, one Daniel Darosha.

[5] In sum the court a quo, in regard to D's claim, found that Bennett and Aspelling were acting in self-defence in respect of the first incident, which had occurred inside Appleseed, but not in respect of the second incident having occurred outside Appleseed in the parking area, which was held to be an act of revenge.[3] As for M's claim the court a quo found that Aspelling was acting in self-defence, in respect of an unlawful attack perpetrated on him by M and D and that 'Bennet's conduct was a lawful attempt to assist Mr Aspelling in averting the attack by Mr M' and that Bennett accordingly also acted in self-defence in relation to M.[4]

Discussion: the judgment of the court a quo

[6] The credibility of the witnesses was relentlessly attacked by both sides. The witnesses were cross-examined at nauseam in regard to every possible aspect of the case. Their cross-examination extends into hundreds of pages and we were required to trawl through a formidable record, consisting of 14 volumes, running into 1461 pages. Voluminous heads of argument, once again traversing the evidence, have been filed. The video footage and the photographic images taken of certain movements and events was subjected to minute scrutiny and notably differently interpreted not only by the witnesses but also counsel on both sides and at times also the learned judge a quo.

[7] Although the credibility of the witnesses lies at the heart of this case the court a quo has regrettably not made a single finding in regard thereto.[5] Counsel for the respondents sought to find credibility findings hidden in the findings made in regard to probabilities. The argument is misconceived.[6] The correct approach, it has been held,[7] is that findings of credibility cannot be judged in isolation but require to be

[3] Paras [72] to [75] of the judgment.
[4] Para [69] of the judgment
[5] *Stellenbosch Farmers Winery Group Ltd and Another v Martell et CSIE and Others* 2003 (1) SA 11 (SCA) 558C-H.
[6] See *Schmidt & Rademeyer* Law of Evidence 3-4: *Credibility and probability factors distinguished.*
[7] *Santam v Biddulph* 2004 (5) SA 386 (SCA)

considered in the light of proven facts and the probabilities of the matter under consideration. A trial court is enjoined where required to do so, to make credibility findings in order not only to inform the parties thereof but also to enable a court of appeal should the occasion arise, to assess the credibility findings which are of vital importance as the trial court, having had the opportunity to observe the witnesses as they testified, often is in better position than the court of appeal to assess aspects of credibility, for example demeanour. In the present matter this court is disadvantaged without the benefit of credibility findings made by the court a quo resulting in this court now having to assess credibility afresh to which I shall revert.

[8] The learned judge a quo proceeded from the following premise[8]:

> 'In the present matter, the defendants admitted the attack on the plaintiffs, however, they deny the manner in which the attack occurred as alleged by the plaintiffs. The defendants plead justification for their attack on the plaintiffs. Therefore the defendants bear the onus of proving a justification or excuse of the attack that they admit.'

The premise is factually incorrect: in regard to the M claim,[9] Bennett[10] pleaded a denial that 'he assaulted the plaintiff in the manner alleged or at all'. Aspelling[11] pleaded an admission that 'he hit the plaintiff as alleged' and justification in regard thereto 'as the plaintiff had attacked him and the second defendant's actions were necessary for his own protection' and further a denial that 'he kicked the plaintiff as alleged'.

[9] The learned judge a quo identified the crux of the dispute lying in an answer to the question 'How did the whole incident on the night in question start'? Having summarised the evidence adduced the learned judge a quo proceeded to find three improbabilities, which in my view deserve comment. The first is D's evidence that he was unaware of an exchange of words between M and Bennett, which the learned judge reasoned, given the proximity of the bar counter (where D was standing at that time) to the table where Bennett and his friends were sitting, 'is unlikely'. I am unable

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[8] Para [10] of the judgment
[9] M pleaded the alleged assault as follows: 'Both defendants assaulted the plaintiff by punching him with clenched fists and kicking him with shoed feet in/on his face, head and body.'
[10] Who was the first defendant.
[11] The second defendant.

to agree. D testified that the bar was noisy at the time, that he was ordering a second drink at the bar and facing the barman away from the table where Bennett was seated, and therefore not looking in in Bennett's direction and by necessary inference he was unable to overhear the conversation. D's evidence on this score was corroborated by the bartender at Appleseed at the time, Chipo Benikwa. Having regard to these facts, I can see no reason for the finding that D's inability to hear the conversation, which it must be remembered consisted of a few spoken lines only, was 'unlikely'. It is interesting to note that Kritzinger, likewise, testified that she did not hear the conversation while she, it must remembered, was seated with Bennett at the table. No probabilities arise from their inability to hear exactly what was said by others: this is exactly what is to be expected in a busy bar with competing sounds of loud music playing and people talking, and, as for D, his attention focussed away from the conversation.

[10] The second improbability found by the learned judge a quo concerns M's evidence that Aspelling initiated the attack on him without Aspelling 'having been privy to any exchanged words between Bennett and himself, and that the attack was completely unprovoked'.[12] I am unable to agree. M's evidence that he was attacked by Aspelling was corroborated by Benikwa, as well as Bacchus and Pozzan, who were together in Appleseed with friends of theirs. Their evidence stands and was not rejected by the court a quo. The respondents' witnesses moreover all testified that Aspelling did not immediately join them at their table just after they had entered Appleseed. Aspelling confirmed that on his way to their table, he walked over to M and there told him that it was rude to stare. It is accordingly abundantly clear that Aspelling approached M while Bennett and their girlfriends were already seated at their table, which lends credence to M's version. The court a quo's finding accordingly cannot be sustained in the face of the objective corroborative evidence given by three independent witnesses.

[11] Thirdly, the court a quo found the respondents' version probable to the effect that M and D 'were both earlier engaging in staring at the table where Ms Kinnear and Ms Kritzinger were seated' and that the plaintiffs were both involved during the exchange of words with Bennett. The second factual finding is based on an incorrect

[12] Para [62] of the judgment.

assessment of the evidence. None of the respondents' witnesses testified that D was involved in the exchange of words. Be that as it may, a glaring inconsistency in the evidence of Kinnear seems to have been overlooked. Ms Kinnear testified that she was first to take a seat at the table and 'just saw these men (referring to M and D) that were *undressing me* with their eyes, it was very disturbing for me. I do not know if I can *but it looked like they wanted to take us home and just do what* [indistinct]. And I then said to Gillian (Ms Kritzinger) can we go somewhere else, just to avoid conflict.' In cross-examination she expounded that the way in which they were staring, triggered the thought that the men wanted to take them home and 'do nasty things' to them. She told Bennett that 'these old men are staring at us' who then remarked generally that it is rude to stare to which M, who must have overheard the remark, replied 'Ja, it is hey'. Bennett then said to M *'listen now guys, the girls came with us and they are going home with us*'. M asked Aspeling 'do you think you are strong?' to which M replied 'if you youngsters were not here *we would take your girls home and f… them* that is how strong we are'.[13]

[12] The evidence of Kinnear, in my view, was plainly unsatisfactory. She was unable to explain the seemingly imaginary co-incidence that her initial thought was verbally expressed moments later by M. Bennett moreover testified that he said to M that 'the girls are here with us, so stop staring' and therefore did not confirm her version that he had told M 'listen now guys, the girls came with us and they are going home with us'.

The onus of proof

[13] The pleadings determine the onus of proof. In regard to the alleged assault, Aspelling bears the onus of proving the justification relied upon.[14]

[14] Bennett's denial of the alleged assault on M casts the onus on M to prove the assault.

[15] Mutually destructive versions are before this court and the well-entrenched test enunciated in *National Employers' General Insurance Co v Jagers*[15] applies.

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[13] Emphasis added by italicising the words emphasised.
[14] *Mabaso v Felix* 1981 (3) SA 865 (A).

The credibility of the witnesses

[16] I do not consider it necessary to traverse the numerous arguments advanced in regard to the credibility of the witnesses. I have already referred to the absence of credibility findings made by the court a quo. To this I need to add that the court a quo's finding in regard to holding Bennett liable for the assault on D during the second incident, outside Appleseed, implies that his version as to the events, was disbelieved. This must be so as Bennett testified that he had only, by way of warding off the attack on him by D, served 5 to 6 blows to D's body while D was on top of him and choking him with both hands around his throat. Bennett conceded that he had inflicted all the injuries D has sustained that evening. It is common cause that those injuries were of an extremely serious nature. Common sense and sound logic dictate that D's injuries could not have been caused by the actions of Bennett as described by him.

[17] I am satisfied that the credibility of the witnesses must be assed afresh by this court. In *Santam v Biddulph*[16] the Supreme Court of Appeal held:

> 'Whilst a court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) 706). This is especially so where the reasons given for the finding are seriously flawed. Over-emphasis of the advantages which a trial court enjoys is to be avoided lest an appellant's right of appeal 'becomes illusory' (*Protea Assurance Co. Ltd. v Casey* 1970 (2) SA 643 (7) 648 D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) 623H – 624A). It is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

[18] In assessing the credibility of the witnesses the point of departure, and decisive of this matter, is to consider the nature of the injuries suffered by M and D at the hands of the respondents. M's injuries are described as

> 'Multiple contusions and lacerations, including:

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[15] 1984 (4) SA 437 (A) 440D-441A.
[16] 2004 (5) SA 386 (SCA) para [5].

- Left eyebrow laceration approximately 1 cm long;
- Nose laceration approximately 0.3 cm long with nasal bone fracture;
- Bruising of left periocular of approximately 2.5 cm in diameter;
- Bruising of lower eyelids maxilla of 1 x 2 cm;
- Bruising of right lateral torso of 5 x 3 cm and 2 x 2 cm;
- Bruising of right anterior lower leg of 3 x 2 cm;
- Bruising of left lower leg medial-anterior of approximately 2 x 3 cm;
- Upper lip swollen with bruising of approximately 2 x 2 cm; and
- Parietal abrasion of approximately 1 cm in diameter.'

[19] Aspelling's version, in summary, was that he only punched M once on the cheek in reaction to M having pulled back his right hand as if to hit him. In the ensuing scuffle he 'punched downwards once' in an effort to free himself from M. Bennett denied having assaulted M at all. They were seemingly unable to proffer any explanation for the resulting injuries. Counsel for the respondents (who did not appear in the trial) when pressed on this point in argument, submitted that M's injuries could have been caused by 'tables and chairs' in the scuffle that ensued. Once the numerous improbabilities in regard to the proposition were raised, counsel, wisely I should add, did not persist in the argument any further.

[20] In the absence of any explanation by the respondents as to the injuries sustained by M, their version crumbles into oblivion as improbable and it accordingly is rejected as false.

[21] The evidence of Kinnear and Kritzinger, likewise, was seemingly unsatisfactory. Their evidence is replete with clear indications of a fabricated contrived version in a concerted attempt to exculpate the respondents. Examples thereof are not hard to find. They made written statements to the respondent's attorney, Mr Ben Botes, who was called to testify for the defendants and who confirmed that only information obtained from them was noted down in their statements. Both Kinnear and Kritzinger belied his version on this score: they disavowed having provided Botes with

numerous facts and allegations which significantly, cannot be reconciled with their version in court. One example will suffice: in their written statements Aspelling, Bennett and Kinnear pertinently alleged that M and D were seated when the staring incident occurred. The staring incident, it must be remembered, was of fundamental importance to their version and the case of the respondents. The difficulty arising, and this was not only firmly established but also readily conceded by them, is that Kinnear and Kritzinger would not have been able to see M and D had they been sated, staring at them. This must have become apparent to them because in their evidence they all changed their version in testifying that M and D were standing when the staring took place.

[22] Contrary hereto, both M and D, in considerable detail, described the assault on them by both Bennett and Aspelling. Their version, although not entirely free from criticism, was corroborated in all material respects not only by the evidence of Benikwa, Bacchus and Pozzan, but also the nature and seriousness of the injuries they had sustained, as reflected in the medical reports and depicted on the photographs taken of them after the incident.

[23] I do not think that a finding as to who had started the incident is either necessary or decisive of the matter. The facts as a whole clearly show that the respondents instantly became aggressive towards M and D, resulting in a vicious and continuous assault that was perpetrated upon them. On Aspelling's own version, assuming that M indeed intended hitting him, the bounds of self-defence were clearly exceeded.

[24] In conclusion, the appellant has succeeded in proving the assault on him by both the respondents. The dismissal of his claim by the court a quo accordingly falls to be set aside.

Quantum

[25] Finally, I turn to an assessment of the quantum of damages to be awarded to the appellant. The appellant is a practising attorney of long standing in Vereeniging. This incident however bears no relevance to his professional capacity and will therefore not be taken into account in the assessment of damages. Counsel for the appellant submitted that an award of R300 000 as general damages, would be

appropriate. The court a quo awarded D general damages in the sum of R100 000. Although the award is not on appeal before us, I am inclined to think that it is on the low side and I, sitting as a court of first instance, would have awarded a higher amount, particularly in view of the seriousness of the injuries sustained and their *sequelae.* M's injuries, on the other hand, were of a less serious nature.

[26] Having considered all relevant circumstances, I am of the view that the award made by the court a quo in regard to D would be appropriate in regard to M.

Costs

[27] It remains to deal with the costs of the action. Counsel for the respondents unconvincingly proposed that costs on the Magistrate's Court scale would be appropriate. I do not agree. The plaintiffs were entitled to, as they did, to pursue their actions in the High Court and no good reason exists for depriving the appellant from the higher scale of costs (See *Carlin Medical Extrusions (Pty) Ltd v Light-Be-Lighting (Pty) Ltd and Others* (16312/2013) [2013] ZAGPJHC 299 (2 December 2013).

[28] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court a quo dismissing the appellant's claim with costs, is set aside and replaced with:

   'Judgment is granted in favour of the first plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

   1. Payment of the sum of R100 000.00.
   2. Interest on the amount in paragraph 1 above at the rate of 15.5 % per annum, from 22 August 2012 to date of final payment.
   3. Costs of suit on the High Court scale.'
3. The respondents are to pay the costs of the appeal.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
EJ FRANCIS
JUDGE OF THE HIGH COURT

I agree.

_____
MJ TEFFO
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***15 SEPTEMBER 2017***
DATE OF JUDGMENT	***12 OCTOBER 2017***