



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

**REPORTABLE
CASE NO: 2349/2019**

In the matter between:

SAKHE ANGELA TUTSHANA

PLAINTIFF

and

**KENTUCKY FRIED CHICKEN
(MADEIRA DRIVE THRU – MTHATHA)**

1ST DEFENDANT

JOLA

2ND DEFENDANT

JUDGMENT

Notyesi AJ:

Introduction

[1] Mr Sakhe Angela Tutshana, the plaintiff, is a male person employed as a nurse at Bedford Hospital, Mthatha. He instituted an action for damages against Kentucky Fried Chicken (“KFC”) and one Mr Mncedisi Tunyiswa Jola, the first and

second defendants respectively, arising from a squabble that had occurred at the premises of KFC resulting in an alleged assault of the plaintiff by the second defendant.

[2] In his particulars of claim, the plaintiff alleged that on 24 March 2019, at approximately 22h00, he was wrongfully and unlawfully assaulted by the KFC staff members, including the second defendant, when he had attended to the KFC, Madeira Street Drive Thru outlet to purchase food. The plaintiff alleged that he was assaulted with a knobkierie to the head resulting in him suffering injuries, for which he received medical attention at the Mthatha General Hospital. According to the plaintiff, the assault was unjustified. The plaintiff contended that at all material times during the alleged assault, the KFC staff and the second defendant, who assaulted him, were acting within the course and scope of their employment with the first defendant and therefore, the first defendant is liable to compensate him for their conduct.

[3] The defendants admit that there was a squabble between the plaintiff and the second defendant and customers of the KFC outlet which took place on 24 March 2019 and that altercation had started approximately at 21h30 until 00h00. According to the second defendant, the plaintiff, who was under the influence of alcohol, started to assault him with his hands and thereafter head-butted him. The second defendant alleged that the squabble had ensued as a result of the plaintiff's refusal to obey the instruction that he should remove his vehicle which had blocked a driveway leading to the pay point in the drive-thru and thereby causing a traffic congestion.

[4] The second defendant pleaded that, for the reason of his assault by the plaintiff, he had no option other than to defend himself from the aggressive plaintiff and the customers who were blocked by the plaintiff also joined the second defendant. Accordingly, the defendants contended that the second defendant's actions and the customers that had joined him in assaulting the plaintiff, were justified and in the circumstances, their actions were necessary and lawful to thwart off the aggression of the plaintiff.

[5] Prior to the commencement of the pleadings, the issues of quantum and liability were separated by the parties. The trial proceeded before this Court on the issue of liability only. During the pre-trial procedures, the plaintiff had accepted that he had a duty to begin leading evidence.

The issues

[6] On the pleadings, the issues for determination of liability are:

- (a) The lawfulness of the assault of the plaintiff; and
- (b) Costs.

The evidence

[7] The plaintiff was the only witness who testified in support of his case. In his testimony, he stated that he was employed as a male nurse at Bedford Hospital, Mthatha. He testified that he was resident at Tyumbu Location. On 24 March 2019,

he went to KFC Madeira Street to purchase food. On his way to KFC, he drove a Golf car. He arrived at KFC at approximately 22h00. He was accompanied by his brother, his younger sister and two lady friends.

[8] On arrival at KFC, he entered the drive-thru leading to a speaker where orders are made by customers of the KFC outlet. His brother exited the vehicle in order for him to effect payment for the food. According to the plaintiff, the reason his brother exited the vehicle is that the pay point was distant from him as a driver. At that stage, he also exited the vehicle in order to call for the order as he could not communicate properly through the speaker.

[9] They were advised that the speed point was not working due to network issues and the KFC security guard advised them to proceed to the next window with a speed point. They left their vehicle and proceeded to the next window. His brother paid for their order and left him waiting for the order whilst conversing with the KFC security officer. At that stage, he requested his brother to bring the vehicle closer as they had left it when exiting for placing the order and making payment. The order was delivered to him, and he proceeded to check and verify the order.

[10] According to the plaintiff, as he was verifying his order, he noticed that there was a squabble involving his brother and persons from an Avanza which was behind their vehicle. He then left his order at the window and proceeded to his brother. He directed his brother that they should leave the place as there was a squabble and confrontation between him and the persons from the Avanza. At that stage, his

brother left the customers he was quarrelling with and went to their vehicle. The plaintiff also proceeded to their vehicle and opened the driver's door. The other passengers in his vehicle had also joined the squabble between his brother and other customers from the Avanza.

[11] The plaintiff further testified that as he was entering the driver's seat, he noticed that his brother was in front of the vehicle, and he was assaulted by one of the customers from the Avanza vehicle. He also noticed another man with a KFC uniform, with a name tag written "Jola". The plaintiff testified that the man from KFC approached them and ordered that they should leave - he was shouting. The plaintiff testified that he responded to the instructions that they should leave by saying that he could not leave as his brother was being assaulted in front of him.

[12] According to the plaintiff, the KFC employee repeated that they should leave as he had told them previously and he then held him by the scruff of his neck ordering him to leave. He then slapped him twice with an open hand on his face and pressed his finger against the plaintiff's eye, pushing him into the vehicle. At that stage, according to the plaintiff, he got into his vehicle. The plaintiff further testified that, on entering the vehicle, he switched off the music from their vehicle and tried to explain to the KFC employee that his brother was assaulted and that he was trying to intervene. The KFC employee ordered them to leave and pushed him into the vehicle.

[13] According to the plaintiff, he exited his vehicle and retaliated to the KFC employees' assault by fighting back. The plaintiff further testified that the KFC

employee kicked him, saying that he should get back to the vehicle and he retaliated as he was being kicked. The plaintiff testified that at that stage, his younger sister intervened and entered between him and the KFC employee. They were fighting, holding each other and she was trying to stop the fight between him and the KFC employee. According to the plaintiff, the KFC employee was trying to bypass the sister in order to continue hitting and kicking him. The KFC employee got hold of him and dragged him and all that time, he was assaulting him with his fists and the plaintiff was fighting back, retaliating from the blows of the KFC employee.

[14] According to the plaintiff, whilst they were holding each other, the KFC security guard came and applied pepper spray on him and then he freed himself and ran past their motor vehicle. As he was running, the KFC employee came from behind and kicked him, causing him to fall close to the rear of the vehicle and he suffered some lacerations in his elbows. The plaintiff testified that as he was laying on the ground, the KFC employee came and lifted him up and continued assaulting him with his fists.

[15] The plaintiff testified that he managed to free himself again, ran towards his vehicle and as he was running towards his vehicle, the KFC employee struck him on his head with a knobkierie. After he was struck with a knobkierie, he bled and turned to face the KFC employee. Again, the KFC employee struck him with a stick, and he tried, at that time, to ward off the blows the KFC employee continued to assault him and he fell down. According to the plaintiff, the KFC employee continued to assault him as he was laying on the ground and he sustained injuries to his head. According to the plaintiff, the KFC employee eventually stopped assaulting him.

[16] The plaintiff testified that his younger brother, during this time, had called the police and they arrived. When the police arrived, they advised him to go to the Madeira Street police station to lay a charge of assault. At the police station, the police provided the plaintiff with a J88 form and directed that he should go to a doctor to examine him. He went to the hospital where the form was completed and thereafter, he laid charges against the KFC employee. The plaintiff stated that they had done no wrong to the KFC employee and that he was amazed of being assaulted. According to the plaintiff, he was never informed about the outcome of the criminal case that he had laid against the second defendant.

[17] The plaintiff was cross-examined. During cross-examination, the plaintiff was unable to explain the contradiction between his testimony and his particulars of claim. It was pointed out to him that, in his particulars of claim, it was stated that he was assaulted by staff members of the KFC, including one Jola, and that in his evidence in chief, he testified that he was only assaulted by one KFC employee (the second defendant). The plaintiff was unable to explain this contradiction, although he insisted that he was assaulted by the second defendant. It was put to the plaintiff that when they arrived at the KFC drive-thru, they were under the influence of alcohol and that they caused a commotion, blocking the traffic at the drive-thru and playing loud music.

[18] It was put to the plaintiff that, on their arrival next to the speaker, they all exited the vehicle, carrying glasses, shouting, and dancing. The plaintiff disputed that he was under the influence of alcohol, although he accepted that his brother and the

other passengers, except for his sister, were indeed under the influence of alcohol. It was put to him that there was video footage which showed them all carrying glasses with alcohol. The plaintiff accepted that he came out with a glass, but disputed that it had alcohol, saying that it contained cranberry juice. It was put to the plaintiff that he was the one who was aggressive towards the second defendant and that he started the fight. The plaintiff disputed that. It was suggested to the plaintiff that the second defendant acted in self-defence when he assaulted him.

[19] The plaintiff's case was thereafter closed as he had called no further witnesses.

[20] On behalf of the defendants, two witnesses testified. The first witness to testify was the second defendant. The second defendant testified that his full names are Mncedisi Mthunyiswa and that he is popularly known as Jola. He testified that he was employed by KFC and stationed at the Madeira Street outlet. He was a supervisor at the time of the incident. He testified that on 24 March 2019 at approximately 21h30, he was at work. He testified that whilst he was still engaged in his duties, he heard loud music near the speaker. The speaker is linked to the order point. He then noticed a Golf with all doors opened and the passengers of the vehicle were out of the vehicle dancing and carrying glasses. The cashier, who was supposed to take their orders, directed them to lower the volume of the music from their car. She also requested them to place their order.

[21] According to the second defendant, the plaintiff and his companions simply ignored the request to lower the music and just proceeded to dance. They were in a

joyful mood. The second defendant, as the supervisor, instructed the security guard to approach the persons in the Golf and request them to lower the volume of the music from their motor vehicle and that they should drive to the next window. The second defendant indicated that he wanted the persons of the Golf to be served speedily so that they could leave the drive-thru. The Golf also blocked the traffic of the drive-thru.

[22] According to the second defendant, indeed, the security guard approached the persons in the Golf and requested them to lower the volume of their music and to move to the next window where they would place their order. In response, the plaintiff, who was the driver of the Golf, simply drove to the other side, instead of proceeding to the second window, as requested. He then stopped the vehicle next to the first window. The second defendant testified that, once the Golf was next to the first window, the driver stopped the vehicle and the occupants exited, carrying glasses in their hands. The second defendant further testified that the plaintiff was also carrying a glass, dancing with the persons accompanying him.

[23] According to the second defendant, the security guard again approached them and requested that they should drive to the second window where they could place their order, as previously directed. In response, the persons in the Golf left their vehicle and walked to the second window. The second defendant testified that there was an Avanza vehicle that was patiently waiting behind the Golf and that there were two other bakkies and a small vehicle behind the Avanza. The Avanza started hooting for the Golf, whilst the passengers of the Golf were busy dancing, carrying glasses. According to the second defendant, the plaintiff was making some gestures towards the occupants of the Avanza, pointing out with his middle finger.

[24] The second defendant testified that, at that stage, he decided to go to the second window and assist the cashier so that the plaintiff and his friends could be served quickly in order for them to leave immediately. The second defendant further testified that the plaintiff and his friends, upon the request of the security guard to approach the second window, proceeded to the second window, although after some delays. The second defendant observed that the plaintiff and his friends were under the influence of alcohol, and they were continuing to drink alcohol from the glasses that they were carrying.

[25] The second defendant testified that upon the arrival of the plaintiff at the second window, he served them. The plaintiff was aggressive, and he said that they have rights as customers. The second defendant testified that all this time, the people from the Avanza were panicking. At this stage, a man accompanying the plaintiff approached the occupants of the Avanza and there was an argument between him and the occupants of the Avanza. On the other hand, the plaintiff placed his order and it was an order for nine pieces of Kentucky Fried Chicken. The second defendant served the plaintiff accordingly and requested the plaintiff to proceed to the cashier to effect payment. At that stage, the plaintiff called out to his companions to come and make payment.

[26] The second defendant testified that; indeed, the companion came to the cashier. The companion of the plaintiff inserted his bank card in the speed point and simply left without entering the PIN number, going back to the persons in the Avanza. The companion later returned, driving the motor vehicle and he stopped

next to the second window. At that stage, the companion came out of the vehicle and the plaintiff gave him the speed point so that he could insert his PIN number to the speed point. Once the companion inserted his PIN number, the plaintiff took the speed point without handing it back to the cashier and went back to the Golf. The plaintiff later returned, and he handed the speed point to the second defendant.

[27] According to the second defendant, after the plaintiff had made the payment, the plaintiff took his order and he opened it, whereupon he took one piece and ate it. During all this time, the people from the Avanza were shouting, frustrated and panicking. The people of the Avanza came out of their vehicle. At that stage, the plaintiff approached them and as he was doing so, he was eating his piece of meat. According to the second defendant, shortly thereafter, he noticed the plaintiff hitting one of the persons from the Avanza. The second defendant also noticed that the companion of the plaintiff also joined in the fight between the plaintiff and the persons from the Avanza. Thereafter there was a scuffle and that is how the fight began.

[28] The second defendant testified that the security guard tried to intervene. According to the second defendant, it then became necessary for him to intervene as well as the matter was getting out of hand. He called the security guard to open the door for him so that he can try to intervene and stop the fighting between the persons from the Avanza and the plaintiff, who was assisted by his companions.

[29] The second defendant testified that when he went out, he found the plaintiff standing against the door of his vehicle shouting and he approached him, asking that

they should leave. According to the second defendant, the plaintiff ignored him. The second defendant then held the plaintiff by his shoulder and pushed him inside his motor vehicle. At that time, the plaintiff was resisting, although he eventually overpowered him as he pushed the plaintiff inside his vehicle.

[30] According to the second defendant, once the plaintiff was pushed inside his vehicle, the second defendant stepped back after the driver's door was closed. According to the second defendant, surprisingly, the plaintiff hurriedly came out from his vehicle and came straight to him. The second defendant testified that the plaintiff started to assault him with many slaps, asking who he was pushing him like that into a vehicle. The second defendant testified that he tried to ward off the slaps. The second defendant testified that at that stage, the plaintiff started to throw punches at him. The second defendant reversed; however, the plaintiff was throwing punches and head-butted him.

[31] The second defendant testified that, as a result of the plaintiff's aggression and assault, he felt that he had no other option and decided to retaliate by defending himself against the plaintiff. The second defendant testified that a fight broke out between him and the plaintiff and that there was a scuffle. According to the second defendant, the customers who were the onlookers, joined in the fight and assisted in assaulting the plaintiff.

[32] According to the second defendant, one of the persons from the Avanza had a stick and he struck the plaintiff twice on his head. The second defendant testified that throughout, he was grappling with the plaintiff, pushing one another and

engaged in the exchange of punches. The second defendant testified that during the scuffle, he got the stick and assaulted the plaintiff with the stick. The plaintiff ran towards the front of a vehicle and the occupants of the vehicle that he ran towards, also assaulted him. The second defendant further testified that it was at that stage that the security guard came with the pepper spray and sprayed the plaintiff. The second defendant also testified that the plaintiff was further assaulted with a stick by a man wearing blue shorts and a white shirt, causing him to fall.

[33] The second defendant further testified that the plaintiff was also kicked whilst laying on the ground. The second defendant further testified that when the plaintiff was laying down on the ground, he drove the plaintiff's vehicle into a parking bay. The plaintiff, at that stage, called his sister and asked that she take photos of the scene. The second defendant further testified that, after parking the plaintiff's vehicle, he got inside the building and made a telephone call to the police. Approximately at 00h00, the police arrived and made enquiries about the incident. The second defendant gave his explanation to the police and thereafter the police informed him to open a case of assault at the police station.

[34] According to the second defendant, the police also requested the plaintiff and his companions to drive to the police station and unfortunately, the plaintiff was drunk and so were his companions. According to the second defendant, they were all unable to drive and the plaintiff's vehicle was driven to the police station by a police officer.

[35] The second defendant testified that he did open a case of assault against the plaintiff. The second defendant had also obtained a J88 which was completed by a doctor.

[36] The second defendant was cross-examined. It was disputed that he immediately laid charges of assault against the plaintiff. It was further suggested that the second defendant was the first person to assault the plaintiff. It was further suggested that the second defendant had exceeded the bounds of his self-defence for reason that, when he assaulted the plaintiff with a stick, the plaintiff was posing no danger to him. During cross-examination, contradictions were pointed to the second defendant relating to how many times he assaulted the plaintiff with a stick.

[37] The next defence witness was Mr Siphosethu Moyakhe. He testified that he was employed at KFC as a security guard. He testified that at approximately 21h30, a navy Golf arrived at the Madeira Street KFC outlet. The Golf was playing loud music. He approached the persons occupying the Golf to go to the second window so that they can be served. They drove around and stopped at the first window instead of the second window. They exited their vehicle, carrying glasses in their hands and the car was playing loud music. He again approached them and requested that they should move to the second window. Instead of driving their vehicle to the second window, they walked. Mr Moyakhe requested them to remove their vehicle. They ignored him and walked to the second window, dancing with glasses in their hands. According to Mr Moyakhe, the plaintiff was in the company of four other persons to make a total of five persons. They were dancing, carrying glasses and shouting.

[38] According to Mr Moyakhe, there were other customers who waited to be served. There was a quarrel between the persons of the Golf and the customers that were driving a vehicle behind their vehicle. Mr Moyakhe testified that there was a fight between the customers from the Golf and those from the vehicle that was coming from behind. He tried to intervene though he was overpowered. The second defendant came out to assist him to stop the fighting. The second defendant held the plaintiff and pushed him inside the Golf. Mr Moyakhe testified that the plaintiff pretended to be sitting inside the Golf, however, he came out and lashed out at the second defendant with an open hand in his face. According to Mr Moyakhe, the second defendant then retaliated and there was a fight. Mr Moyakhe further testified that customers also joined and assaulted the plaintiff.

[39] According to Mr Moyakhe, the second defendant also obtained a knobkierie and assaulted the plaintiff. Mr Moyakhe further testified that the security guards intervened at that stage and stopped the fight. Mr Moyakhe further testified that the vehicle of the plaintiff was driven by the second defendant to the parking bay.

[40] Mr Moyakhe was cross-examined. During cross-examination, Mr Moyakhe conceded that the second defendant acted out of anger when he assaulted the plaintiff with a stick.

[41] After the evidence of Mr Moyakhe, the parties submitted evidence from CCTV footage as an exhibit. The footage had been played by the parties with certain

admissions made relating to the scene. The parties agreed about the contents of the CCTV footage and thereafter the case was closed.

[42] The CCTV footage was watched by all parties, including the plaintiff, the second defendant and the witness.

[43] That was the totality of the case.

Common cause facts

[44] On the totality of the evidence, certain facts are common cause between the parties. The incident forming the subject of these proceedings, took place on the night of Sunday, 24 March 2019. It is common cause that at the time of the incident, the plaintiff was in the company of his younger brother, sister and two other persons. It is also undisputed that the plaintiff's passengers consumed alcohol, and that the plaintiff was seen by the second defendant also carrying a glass, although the contents in the glass remain in dispute, whether it was alcohol or juice.

[45] It is also undisputed that there was a squabble involving the plaintiff and his companions with other patrons of the KFC who were travelling in an Avanza motor vehicle. It was never put in dispute that the companions of the plaintiff had emerged out of their vehicle carrying glasses containing alcohol and dancing within the vicinity of the drive-thru with loud music emanating from their vehicle. The scuffle between the plaintiff and the second defendant remains undisputed. It is also undisputed that the plaintiff was assaulted by the second defendant and other customers and that

the second defendant was also assaulted by the plaintiff. It is also undisputed that the plaintiff was at one stage assaulted with a knobkierie by the second defendant.

[46] What remains in serious dispute is whether the plaintiff was assaulted by the second defendant in self or private defence as alleged by the second defendant.

Contentions of the parties

[47] Mr *Sintwa*, counsel for the plaintiff, submitted that the assault of the plaintiff was unjustified and that the actions of the second defendant were unlawful. In advancing the submission, Mr *Sintwa* contended that the plaintiff was not a danger to the second defendant and that there was no attack on the second defendant by the plaintiff. He contended that the attack on the plaintiff by the second defendant was unlawful and that there was no probable cause or provocation from the plaintiff.

[48] Insofar as the conflicting versions of the plaintiff and the second defendant are concerned, Mr *Sintwa* submitted that the second defendant was not a credible witness and that he had contradicted himself in many respects and that the Court would be justified in rejecting the second defendant's evidence and that of his witness in preference of the plaintiff's evidence. Mr *Sintwa* had conceded, in his submissions, that the plaintiff's evidence had some contradictions, although he described them as of a minor nature.

[49] On the contrary, Mr *Mpeto*, counsel for the defendants, submitted that the defendants had proved that the plaintiff was the aggressor on the date in question

and that the second defendant, acting together with the patrons of KFC, was justified in defending himself against the plaintiff's aggression. He contended that the plaintiff had caused a nuisance on the premises and blocked the traffic of the drive-thru. Mr *Mpeto* submitted that the plaintiff was ordered by the second defendant to leave the premises and he ignored the instructions and instead, assaulted the second defendant. The contention of Mr *Mpeto* in this regard, was that in such circumstances, the second defendant was justified in defending himself against the plaintiff. Similarly, Mr *Mpeto* submitted that the plaintiff was not a credible witness and that his uncorroborated evidence should be rejected. He pointed out that the plaintiff had contradicted himself in many respects and that was consistent with a witness who is not telling the truth about the events leading to the incident of assault.

[50] Mr *Mpeto* contended that the plaintiff, on the day in question, was under the influence of alcohol and that he was uncontrollable as a result of alcohol consumption. Mr *Mpeto* has also urged this Court to draw adverse inferences against the plaintiff for the failure to call his companions, especially his younger sister, who, according to the plaintiff, had intervened when he was assaulted. Mr *Mpeto* pointed out that the reason why the plaintiff did not call his witnesses, is that he knew that they would contradict his version and that he was not telling the true story about the incident.

Legal principles

[51] Where the defendant, in an action against him based on assault, as is the case here, has pleaded self-defence, the onus is generally upon him to plead and

prove that the force used in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression.¹ The test for determining self-defence is objective, that is, whether a reasonable person in the position of the defendant, would have considered that there was a real risk that death or serious injury was imminent.²

[52] In *Zandisile Ntsomi v The Minister of Law & Order*,³ Kumleben JA quoted from the case of *Ntanjana v Vorster and Minister of Justice*⁴ 1950 (4) SA 398 (C) 406 A-D and outlined the principles as follows:

“The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic-wise after the event, weighing the matter in the secluded security of the courtroom.... Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person acting in a situation of imminent peril. “Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons’ per Innes JA in *Union Government v Buur* (1914, AD 273 at p 286).”

[53] In *Ntamo & Others v Minister of Safety & Security*⁵ it was stated that where the threatened harm can be avoided without the use of force, self-defence cannot

¹ *Mabaso v Felix* 1981 (3) SA 865 (A) at 874.

² *Mngwena & Another v Minister of Safety & Security* 2006 (4) SA 150 SCA at 158C-D, see also *Lufuzo*

Mbangi v Minister of Safety & Security, unreported judgment of the Eastern Cape Division, case no: 891/2006 at 30 ('Lufuzo Mbangi').

³ *Ntsomi v Minister of Law & Order* 1990 (1) SA 512 (C) at 528F-G.

⁴ *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 (C) 406A-D.

⁵ *Ntamo & Others v Minister of Safety & Security* 2001 (1) SA 830 (TKHC) at 836H-J ('Ntamo').

succeed. When force is necessary to neutralise the threat of harm, the force must not be more than is reasonable to achieve that purpose.

[54] In *Bennet v Minister of Police*,⁶ the court held as follows:

“The normal course the law requires a plaintiff who seeks damages for humiliation (contomelia) 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 action injuriarum.”

[55] On the central issue regarding the circumstances leading to the assault of the plaintiff, the parties have adduced conflicting versions. The plaintiff maintained that he was assaulted by the second defendant without any form of justification, whilst on the other hand, the second defendant maintains that he acted in private defence and that his actions were necessary in the circumstances where the plaintiff was aggressive and that it was the plaintiff who started the fighting. In these circumstances, the court would have to evaluate and decide on the credibility of witnesses and thereafter, determine whether the probabilities favour one or the other version, and would have to decide what evidence is acceptable and why.

[56] In *National Employers’ Mutual General Insurance Association v Gany*⁷, it was stated:

⁶ *Bennet v Minister of Police* 1980 (3) SA 24 (C)

⁷ *National Employers’ Mutual General Insurance Association v Gany* 1931 AD 187 at 199

“Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false.”

[57] In the matter of *The National Employers’ General Insurance v Jagers*⁸ 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.”

[58] In *Stellenbosch Farmers’ Winery Group Limited and Another v Martell CIE and Others*⁹ it was held:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on

⁸ *The National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (ECD) at 440D-441A

⁹ *Stellenbosch Farmers’ Winery Group Limited and Another v Martell CIE and Others* 2003 (1) SA 11 (SCA) para 5. See also *SPW Group Ltd and Another v Martell ETCIE and Others* 2002 (1) SA 11 at 14I-15E.

the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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."

Analysis and evaluation of evidence

[59] In relation to the assault, the plaintiff has formulated his particulars as follows:

"On or about the 24th of March 2019 at about 22h00, the plaintiff was unlawfully, wrongfully and intentionally assaulted by Kentucky Fried Chicken (KFC) staff members including the one Jola at KFC Madeira. The plaintiff was assaulted with a Knobkerrie with various blows on the head and the others from behind, straight at the back and also with fists all over the body."

[60] On proper scrutiny of the above allegation, the suggestion by the plaintiff is that he was assaulted by more than one staff member of KFC and the second defendant. In his oral evidence, the plaintiff changed the picture completely, adducing evidence that he was only assaulted by the second defendant. There was no explanation for this contradiction. On the contrary, the second defendant, with the corroboration of his witness, Mr Moyakhe, testified that the plaintiff was the first to assault the second defendant. In response, the plaintiff was assaulted by the second defendant and the customers of KFC, not the staff members of KFC as alleged by the plaintiff in the particulars of claim.

[61] The plaintiff was not alone at the time of the incident. He was accompanied by his younger brother, sister and two other persons. For some inexplicable reasons, the plaintiff elected not to call any of his companions of the day. Whether or not a party should call a witness, is inherently problematic as the Court is not in a position to know all the reasons why a witness is not called as the Court is not privy to the relationship between the party and the witness.

[62] In *Minister of Safety & Security v Zoyisile Stanley Ntopane NO*¹⁰ Greenland AJ held:

“[i] . . . so each case must be judged on its own merits and the Court should only draw an adverse inference if it is safe to do so. See *Webronchek v LK Jacobs 1 co Ltd* 1948 (4) SA 671 (A). In that case, Van der Heever JA set out that:

“moreover a litigant who calls witness vouches, as it were, on pain of being discredited himself, for his probity and truthfulness. The potential witness may be untruthfully, hostile, he may have a bad memory of an unfortunate presence. After all the Plaintiff was entitled to rest

¹⁰ *Minister of Safety & Security v Zoyisile Stanley Ntopane NO* case no: A85/07

his case upon evidence which he considered adequate to discharge the onus which lay upon him.”

[ii] See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A), the principle was laid down as follows:

“where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises.”

[iii] In the case of *Just Names Properties II CC & Another v Fourie & Others* 2007 (3) SA 1 (W) Jajbhay J, mindful of *Webranchek v LK Jacobs* supra, however concluded –

“In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her non-appearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision . . .”

[63] Similarly, in this case, the plaintiff’s sister, who is alleged to have intervened when the plaintiff was allegedly assaulted by the second defendant, has not been called and should have been called. This Court was not informed as to what the reasons were for her non-appearance as a witness. The evidence of the plaintiff’s sister, in my view, was material because the plaintiff is alleged to have been an aggressor by the second defendant and his witness. In circumstances where the Court accepts the version of the second defendant, without doubt, the second defendant would have been entitled to defend himself against the plaintiff’s aggression. Accordingly, I must draw certain reasonable inferences from the failure to call for evidence of the person who is alleged to have intervened and who was in a

position to observe the events as they unfolded. I hold the view that the plaintiff's sister was a material witness in this regard.

[64] Another hurdle in the plaintiff's case is the allegation that he and his companions were under the influence of alcohol and that they had caused a fracas at KFC, also blocking the traffic in the drive-thru. The evidence of the video footage which was played by the parties clearly shows the plaintiff carrying a glass, together with his companions. The evidence of the second defendant, although it had shortcomings, on the whole, was supported by the evidence of Mr Moyakhe and the video footage regarding the behaviour of the plaintiff, together with his companions. I have no doubt in my mind that the plaintiff and his companions were the main cause of the squabble at the KFC outlet and that the second defendant, in his capacity as a supervisor, was obliged to intervene in order to restore law and order in the premises.

[65] The plaintiff was asked by the second defendant to leave the premises and he was assisted by the second defendant to get into his vehicle. He resisted the reasonable request and instead, assaulted the second defendant. On the evidence, as a whole, I have no doubt in my mind that the plaintiff and his companions were troublesome as a result of the influence of alcohol.

[66] The plaintiff attempted to distance himself from the influence of alcohol. He suggested that on the date in question, he had played football and that he was drinking juice. When questioned in this regard, he suggested that he played football until approximately 17h00. Despite his version, he suggested that he was still thirsty

at about 21h00. I find this to be improbable. The evidence of the second defendant and his witness is that the plaintiff was under the influence of alcohol, and I cannot fault this evidence in the circumstances of the case. I also accept that the patrons of KFC assaulted the plaintiff on the day. The evidence was that he was provoking the patrons from the Avanza vehicle pointing them with the middle finger. He had blocked the patrons from proceeding through the drive-thru.

[67] The evidence of the plaintiff was not convincing. He had contradicted himself in many respects and his evidence contained many improbabilities. I accordingly reject the evidence of the plaintiff. The plaintiff tried to suggest that he is the one who had called the police or that the police were called by his companions. When questioned on this aspect, it became clear that he was merely speculating in this aspect. In this regard, I quote from the record:

“Mr *Sintwa*: How did they come there, the policemen?

Mr Tutshana: My younger brother, M'Lord called for the police.

Mr *Sintwa*: Alright. In other words, it is not the defendant who called the police.

Mr Tutshana: No M'Lord. The police were called by us, M'Lord.

Court: So, you are not in a position to say, KFC could indeed called the police or did not call the police

Mr Tutshana: I know, M'Lord that the police were called by us”

[68] The younger brother of the plaintiff was not called and therefore, this aspect of evidence would be hearsay, especially since the plaintiff does not claim to have been present when his brother made the call to the police. The plaintiff could not truly

dispute the allegations of the second defendant that he is the one who had called for the police. It is obvious that the plaintiff was not present when the second defendant contacted the police.

[69] The second defendant was also an unimpressive witness. He contradicted himself in certain respects. He contradicted himself in relation to hitting the plaintiff with the stick or knobkierie and how he had obtained the stick or knobkierie with which he assaulted the plaintiff. However, I do not hold the view that he was not telling the truth. His evidence in material respects was corroborated by his witness, Mr Moyakhe, and to that extent, his evidence is more reliable than that of the plaintiff. I find the testimony of Mr Moyakhe to have been honest, reliable and truthful.

[70] On the totality of the evidence, I do find that there was a fracas at the KFC drive-thru, which had led to a fight between the plaintiff, the second defendant and the patrons of the KFC outlet. The plaintiff, acting together with his companions, was the cause of the commotion and squabble. The behaviour exhibited by the plaintiff, together with his companions, is consistent with persons who were under the influence of alcohol. The second defendant assaulted the plaintiff, acting in his self-defence and against the actions of the aggressive plaintiff.

[71] The plaintiff has failed to discharge the onus resting upon him to prove his case on a balance of probability and the second defendant, too, insofar as the further assault of the plaintiff was concerned, was not convincing, although, Mr *Mpeto*

submitted that the second defendant was acting in self-defence. My view, in this regard, is that the second defendant was acting out of the plaintiff's provocation at some stages during the process of the assault. The fighting between the plaintiff and the second defendant was sort of like a movie scene. I am unable to say that the second defendant exceeded his bounds of self-defence at a particular stage of the fighting due to its nature, which was like a movie scene.

Costs

[72] The plaintiff, in my view, was involved in a fracas at the KFC outlet. It appears that the actions were brought about as a result of alcohol consumption. I have found that the plaintiff was not a credible witness. I have also found that the second defendant was not a credible witness. Both the plaintiff and the second defendant, in my view, are not entitled to any costs. Neither of the two parties has made out a case. The total picture on the evidence as a whole is that there was fighting, rather than an unprovoked assault. For these reasons, I will not award costs against the plaintiff, though the defendants are successful. On an analysis of evidence, the fighting could have been stopped without any form of violence by the plaintiff and the employees of the first defendant. The plaintiff could have walked away and the second defendant could have called the police from the beginning. I am constrained not to award costs in this matter against any of the parties. The entire evidence was unsatisfactory by all the parties.

Conclusion

[73] The plaintiff has failed to make out a case of assault and I come to the conclusion that the plaintiff's claim should be dismissed. For reason that I have found that this was a brawl and that the second defendant or the security guards of KFC could have done better, I will decline to award costs in their favour.

Order

[74] In the result, the following order is made:

1. The plaintiff's claim is hereby dismissed.
2. Each party shall bear its own costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION

APPEARANCES:

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