IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case number: 33261/2011

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

BUTI SAMUEL MOKOENA — Plaintiff

and

GERT SWART TRANSPORT CC — First Defendant

GERT SWART — Second Defendant

JUDGMENT

SATCHWELL J:

1. Plaintiff sues for damages arising out of an assault perpetrated upon him by second defendant. The assault is not in dispute. Defendant has pleaded self-defence and provocation.

2. At commencement of trial the court ordered a separation of issues in terms of Rule 33(4) at the request of the parties. Accordingly this court will only determine the issue of liability of defendants.

3. The background to the events of 3rd February 2009 may succinctly be stated without entering into those details which have no bearing on the issues in dispute.

4. Plaintiff runs an auto electrical business with a number of employees. A vehicle owned and operated by second defendant was brought in for repairs during December 2008 and was returned with continuing problems on 2nd February 2009. Dissatisfied with the work carried out by plaintiff's business, first defendant personally accompanied his driver when the vehicle was returned for further repairs on 3rd February.

5. First defendant complained about the ongoing failure to return the vehicle to second defendant in proper working condition and plaintiff commenced making enquiries of his employees who had previously worked on the vehicle. For the moment I do not deal with the content or manner of interaction between plaintiff and second defendant as claimed by each of them and their witnesses.

6. It is common cause that second defendant hit plaintiff a blow on the left side of his face. Plaintiff fell to the ground – ie the floor of his workshop.

7. The medical records as well as the evidence of two specialist surgeons indicate that plaintiff suffered a blow of considerable force which effected serious injuries to the left side of plaintiff's face. Plaintiff sustained a fracture of the left zygoma and of the orbital floor; resulting opthalmological problems; a fracture through the anterior wall of the left maxilla. He was hospitalized, underwent surgery, endured lasting difficulties and pain and there still remain certain deficits.

8. The significance of these injuries and the evidence of both Doctors Hoffman and Rossouw is that the second defendant did not merely slap plaintiff nor inflict a light tap to plaintiff's face. This can only have been a blow propelled with *"significant force"* which pushed plaintiff off his feet and caused him to fall to the ground. This was a

blow which broke bony structures which are *"quite sturdy"*. Such type of fractures are of the type *"normally associated"* with motor vehicle accidents[1].

9. Much time was spent at trial on a dispute whether or not the blow had been struck by second defendant's fist or the butt of a gun held in his fist. To my mind, it is of no relevance to the assault itself. It has never been suggested that the blow was premeditated and occurred as anything other than a sudden and surprising event. However, I appreciate that credibility findings on the differing versions as regards the use the fist or the butt of a gun may possibly also affect credibility findings on the facts alleged in support of the defence of provocation.

10. Plaintiff did not see the blow coming to his face and testified in court he has no knowledge of the use of the butt of a gun. He disclaimed any reports or statements where he referred to a gun. Plaintiff's wife, Mrs Mokoena, testified she saw first defendant remove an object from the back of his waist and use this to hit her husband. She, too, disclaimed statements made by her. Employees of plaintiff, Nomsa Thabethe and David Seleke testified they saw plaintiff draw out a firearm and use the butt to hit plaintiff. Thabethe disclaimed a statement made by her while Seleke was cross-examined on his evidence at a criminal trial where there was no significant difference between his evidence there and in this matter. The disclaimers by these witnesses of statements made to the SAPS was a vain and futile attempt to avoid a contradiction in evidence. That such avoidance was attempted regrettably did no more than cast doubt on the veracity of anything said by these witnesses.

11. The medical evidence was not conclusive though it tended towards the use of something other than a fist alone. Dr Hoffman took the view that such injuries would normally be caused by a *"heavy object"*, that use of a *"metallic heavy object was likely"* and that the *"puncher would sustain significant injury to his hand"*. However, he said that he could not *"categorically say that a punch in the face [by a fist] could not have caused this fracture"*. Dr Rossouw conceded the possibility of both versions: *"in the right circumstances"* it was possible that a fist could have caused the injuries and equally so it was *"possible, depending on kinetic energy"* for a butt of a firearm to have been used although he felt that the butt of a ,32 weapon would be *"unlikely"* because a *"bulkier object"* would be needed. Similarly, he would expect injuries ranging from *"bruising to fracture"* of the assailant's knuckles.

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[1] Quotes from the evidence of both Doctors Rossouw and Hoffman.

12. Second defendant denied he was carrying a firearm on that day or that he made any use of a weapon. He had sustained no injuries to his fist.

13. I cannot make a conclusive finding that the butt of a firearm was used by second defendant. He gave very good reasons why he was not carrying a firearm on that date although the nature of the clothing worn by himself was disputed by all plaintiff's witnesses. Plaintiff himself saw nothing and the other witnesses (save for Seleke) cannot be relied upon in this regard. I can appreciate that the surprise and horror of this incident led to many a discussion and sharing of recollections amongst employees and family. That may well explain why so many people now claim to have seen the butt of a gun of which there was originally no mention.

14. Defendants have pleaded self defence by reason of plaintiff twice *"hitting [second defendant] in the face with an open hand"* with the result that second defendant *"then immediately struck plaintiff in the fact"* which he was *"justified in doing so as second defendant's actions were necessary for his own protection".*

15. Whether or not plaintiff slapped second defendant in the face prior to second defendant's assault of plaintiff, does not support the justification of self-defence. This was conceded in the course of the trial by defendants' counsel. There is no indication that the assault upon plaintiff was necessary for the protection of second defendant. There was no suggestion that second defendant was subjected to a dangerous situation – an aggravating or irritating environment or interaction perhaps but no danger. It was never suggested that the blow by second defendant was reasonably necessary to protect him in any way. Furthermore , there is nothing to suggest that (even if second defendant had felt himself to be in any danger) second defendant could not have just walked away – as he eventually did.

16. The plea of self-defence excluding wrongfulness must be rejected.

17. The alternative plea of provocation was presented on the basis that *"the plaintiff provoked second defendant by unlawfully hitting him through the face twice. Second defendant reacted immediately after he was hit the second time by striking plaintiff once in the face".* It is not absolutely clear whether the alleged provocation is tendered as a defence excluding fault or to negate intention. I must consider both.

18. Second defendant testified that, whilst he and plaintiff were in discussions, he (second defendant) was *"getting frustrated"* and that plaintiff was *"talking louder and*

waving his hands" . Second defendant complained that he was being *"charged for something not fixed"* at which plaintiff *"slapped the side of [my]face"*. Second defendant then gave his keys and phone to his own employee, Patrick Sepetlo, because he *now "wanted to hit him back"* but he did not do so. He says he *"calmed down"* and said *"please don't do this again, if you do I'll bliksem you"*. There was further discussion in the course of which plaintiff said that he *"was going to return the money paid"* by second defendant and then plaintiff slapped second defendant again. Under cross-examination he described these slaps as *"klaps"* or *"pushing in the face"*.

19. Suffice it to say that plaintiff, his wife and his employees all denied there were any such slaps.

20. Second defendants employee, Patrick Sepetlo, saw two slaps and was of the view that they were deliberately performed. His concession that they might have been no more than gestures was not a concession to plaintiff's counsel's version but a concession to the cross-examination – *"let it be"*.

21. The night before he gave evidence, Sepetlo was visited at his home by plaintiff and others. He was variously warned that he must tell the *"truth, just the truth "* and that he would receive a *"share"* of the plaintiff's millions of when he was paid. Of course this approach was most improper and should never have taken place. However, this conversation does not lead me to conclude that Sepetlo was threatened and asked to tell lies. He said he was told to tell the *"truth"* and was promised a financial share in the expected favourable result. If the conversation had been different I might have concluded that plaintiff and his friends were attempting to suborn perjury as a support for plaintiff's version but that is not what Sepetlo says happened.

22. I note that second defendant initially denied the blow upon plaintiff or that any such blow could have caused the injuries sustained by plaintiff. I was referred, not only to the initial plea prior to amendment, but to the version put by second defendant's attorney at the criminal trial. Counsel for plaintiff, Advocate Mkhize, prepared an interesting and very thorough argument on whether or not this court could have regard to a version put by a legal representative in another court. I accept the argument that legal representatives appearing for an accused in a criminal trial and cross-examining witnesses on behalf of that accused have authority to make admissions on behalf of the client and that such an admission made in the course of one trial may be proved in the subsequent trial. No explanation was offered by second defendant that there had been any misunderstanding which head led to the earlier plea or the version tendered

at the criminal trial. However, I think this entire point is moot. The assault by second defendant has now been conceded. That this assault caused the injuries is also now conceded. The original denial is not of assistance to me in determining the credibility of second defendant on an entirely different issue – the slaps alleged to have constituted provocation. I do not base my findings on what happened at the criminal trial.

23. These alleged slaps are certainly inconsistent with events as described by second defendant. He made it clear throughout the trial that he considered himself to be the aggrieved party on the day in question – he repeated that he had *"paid for wiring in December and for the alternator the previous day"* and that this vehicle problem for which he had paid twice had still not been satisfactorily repaired – *"I have paid for two things not working", "you charged me for something not fixed"*. He was sufficiently embroiled in this issue to wait at the auto electrical workshop for plaintiff to return. He explained his dissatisfaction to plaintiff.

24. According to second defendant, plaintiff slapped him once and then told second defendant he was *"going to give back the money for repairing the alternator"* . This is hardly consistent with the alleged earlier aggression. It is even less consistent with the alleged subsequent aggression. Why slap someone, offer to pay them back and then slap them again? Clearly plaintiff, on second defendant's own version, was avoiding the problem and resolving the dispute.

25. On the evidence of second defendant, it was he who was not satisfied with the offer from plaintiff to return monies already paid. His evidence under cross-examination was that *"he offered me money back for the alternator but the car was still not right and he charged me for December. I said I still paid for electrical and you must fix it"*. Plaintiff was is the party who made an offer of settlement whilst second defendant was the party who still felt aggrieved and that he was not receiving the satisfaction for which he came to the workshop, waited, and then confronted plaintiff.

26. I find it highly improbable that the two slaps happened as described by second defendant and confirmed by Sepetlo.

27. Even if they had happened, these slaps would not constitute a defence excluding intent or accountability. This could not have been an " extreme case provoking to a degree of anger which effectively impaired second defendant's mental capacity to have animus"[2]

28. Furthermore, even if these slaps had happened I would have been unable to find that they constituted provocation negating unlawfulness. Second defendant says he was angered after the first slap, handed his keys and phone to Sepetlo because he intended to hit plaintiff. However, he did not do so. He testified that he *"calmed down"*. In effect, that was the end of that round of provocation. Second defendant's temper was no longer lost. Second defendant's version that he then warned plaintiff that he would *'bliksem'* him if he slapped him again may have been a warning or a taunt but does not constitute an attempt to avoid further confrontation.

29. Even if there had been one or two slaps I do not find that second defendant could have relied thereupon as a ground of justification for his assault. The slaps were not sufficient to justify handing over keys and phone preliminary to the blow; the handing over of the keys and phone suggests sufficient time to consider what was about to happen and make it possible by freeing up second defendant's fist; the blow did not follow immediately upon the alleged first slap but the second; the blow was certainly not *"moderate, reasonable and commensurate in nature and degree with the provocation".*[3]

30. In any event I have found that I am not satisfied, on a balance of probabilities, that second defendant has discharged the onus of proving one or two slaps happened as described by second defendant.

31. The final issue for determination is the liability of the first defendant. First defendant is a close corporation of which second defendant is both member and manager of it's business operations. The vehicle in question was taken to plaintiff's premises for repairs for and on behalf of the business of first defendant. Payment was made for the original and subsequent repairs by an employee of first defendant and for and on behalf of first defendant– Sepetlo. Second defendant went to plaintiff's premises to resolve the ongoing difficulty with the vehicle taking an employee of first defendant with him.

32. In such circumstances, I cannot see how the first defendant can escape liability for the actions performed by a member of first defendant close corporation as also the

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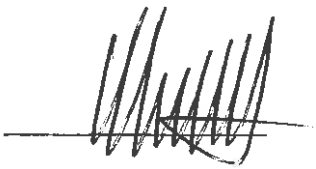
[2] See the discussion in LAWSA at paragraph 111 of Volume 8, part 1.
[3] See the authorities at footnote 15, paragraph 95 LAWSA Volume 8, Part 1.

manager of the business operations of first defendant whilst such member and manager was acting in the course and scope of his membership and management. It would be perfectly acceptable to utilize the word "employment" because the liability of not necessarily that of an employee in the sense of a servant but because the member and manger is employing his skills and responsibilities for the benefit of the first defendant at the time of these events.

33. In the result an order is made as follows:

    a. First defendant and second defendant are both liable for one hundred per centum of the damages sustained by plaintiff as a result of the wrongful and unlawful assault perpetrated upon plaintiff on 3rd February 2009.
    b. Such damages shall be determined at continuation of this trial and such damages as awarded shall be paid jointly and severally by both first and second defendants the one paying the other to be absolved.
    c. First and second defendants are jointly and severally liable, the one paying the other to be absolved, for plaintiff's party-party costs of this action to date.

Dated at Johannesburg on this day the 18th of November 2013.



K.SATCHWELL.

Counsel for Plaintiff: Adv. L.P. Mkize

Counsel for Defendants: Adv L. Strydom

Attorneys for Plaintiff: Nkosi Nkosana Inc.

Attorneys for Defendants: Erasmus Attorneys

Date of hearing: 23rd 24th, 25th and 29th October 2013

Date of Judgment: 20th November 2013