IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 48145/2011

Date: ~~12~~ 13 March 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

13/3/2014 .....
DATE ~~SIGNATURE~~

In the matter between:

DANIEL JACOBUS VAN HEERDEN Plaintiff

And

ALWYN J BEZUIDENHOUT Defendant

JUDGMENT

PRETORIUS J,

[1] The plaintiff issued summons against the defendant for the payment of R150, 000.00. The cause of the action is the *action iniuriarum.* The

claim is for pain and suffering, loss of amenities of life and nervous shock.

[2] The defendant pleaded justification and/or self-defence. The plaintiff argued that the defendant bears the *onus* to begin, referring to the principles as set out in **Mabaso v Felix 1981 (3) SA 865 (A)** at 874. The court considered all the arguments and determined that the plaintiff had the *onus* to begin in these particular circumstances.

[3] The evidence of the plaintiff, Mr van Heerden, was that on 28 March 2011 at 15h00 he attended a birthday celebration of a common friend, Mr Smith. The defendant and his brother, Mr Carl Bezuidenhout, and other friends were also present. According to Mr van Heerden he had arrived at Mr Smith's house at 15h00. He had consumed no alcoholic beverage at the time. The plaintiff was 61 years old at the time of the incident.

[4] The plaintiff and defendant had a history that the plaintiff had the defendant's girlfriend's car towed away from his premises. This action by the plaintiff led to hostility between them.

[5] Mr Smith's evidence was that when the defendant heard that the car had been towed away the defendant said: *"Nou tart die ou man my."* This version was denied by the defendant. According to the plaintiff,

he, Mr Smith and the defendant and his brother were sitting at the glass table talking to one another. Mr Smith got up to attend to the braaivleis fire; he and the defendant got up to refill their glasses with whiskey. According to the plaintiff the defendant assaulted him by hitting him with his fist on his ear and then on his chin, without any provocation. The defendant hit him three or four times and he fell onto his back on the ground. He got up as Messrs Smith and Bezuidenhout intervened by pulling the defendant away from the plaintiff. His left ear was bleeding; he felt dizzy and had a headache as a result of the assault. He went home after some time. He visited the doctor, who prescribed painkillers and other medicine.

[6] He was humiliated by this assault. He denied that he had been drunk when the incident took place, as he had only consumed three single whiskies at the time. He had his glass in his hand when he fell. He denied hitting either the defendant or his brother with the glass. He denied that the defendant had only hit him with an open hand, which caused him to fall and injure his ear. He did not see the defendant hitting him with his clenched fists, but assumed it was the case due to the severity of his injuries.

[7] The plaintiff testified that he and the defendant had previously had problems regarding the defendant's girlfriend's motor vehicle which he had parked at the plaintiff's garage.

[8] Mr Smith confirmed Mr van Heerden's evidence as to the events of 28 March 2011, but testified that Mr van Heerden had been at his place of employment and that Mr van Heerden had consumed one beer at approximately 11h00, before leaving for Mr Smith's house. He did not see the actual assault, but when he turned around the plaintiff was on his back and he and the defendant were exchanging blows. His evidence was that they had to separate the plaintiff and defendant, by pulling the defendant away from the plaintiff.

[9] The defendant is a policeman who is 15 years younger than the plaintiff. He is also a much bigger man as he is 2,01m in length and weighs 120kg. He denied that Mr Smith was present during the assault as he had gone to the lounge to play some music- this version was never put to Mr Smith and the court accepts Mr Smith's evidence. The defendant admitted that he had had a lot to drink at the time, as had everybody else, except his brother. His evidence was that he was angry as the plaintiff tried to hit him with a glass he had in his hand.

[10] His brother came in between and told him to leave Mr van Heerden alone as he was drunk. His brother confirmed this conversation and that he had felt a blow from the back, which caused his glasses to fall onto the floor. He did not see the defendant hitting the plaintiff- he only saw Mr van Heerden lying on his back on the floor, with the defendant on top of him. Mr Bezuidenhout, the defendant's

brother, indicated that he was standing with his back to the plaintiff with his hands on his brother's, the defendant, chest. He was obviously trying to stop the defendant and did not regard the plaintiff to be dangerous at that stage.

[11] The court takes note that this was a celebration where quite an amount of liquor was consumed by all. The witnesses contradicted one another as to how the assault had taken place. The court can, however, on the defendant's own evidence find that he slapped the plaintiff at least once, which caused the defendant to fall down on his back. The plaintiff had an injury to his ear, which caused his ear to bleed and his jaw was bruised and swollen. His injuries caused him to visit a medical practitioner for treatment. Mr Bezuidenhout, the defendant, had no injuries at all.

[12] If the court accepts that the plaintiff was threatening the defendant and that he was trying to hit the defendant with a glass in his hand, the question is whether the defendant could have had reasonable grounds to believe that the defendant was in physical danger.

[13] Here the court takes cognisance of the fact that the defendant is much taller and younger than the plaintiff. He could not give any reasons for not simply grabbing hold of the plaintiff to prevent an

attack. His brother was apparently hit by the plaintiff, which caused the defendant to slap the plaintiff. There was at no stage any imminent danger to the defendant himself.

[14] In **S v Makwanyane and Another 1995 (3) SA 391 CC** at paragraph 138 Chaskalson P held:

> *"Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim."*

[15] I cannot find that the defendant's use of force was commensurate with the plaintiff's aggression if I consider all the facts and the above *dictum,*

[16] The defendant had to prove on a balance of probabilities that by hitting the plaintiff to such an extent that he fell on his back, that he had acted reasonably or justifiably to defend himself. The court comes to the conclusion, having regard to all the evidence and the injuries that the plaintiff sustained that the defendant did not acquit himself of this *onus*.

[17] Therefore the on the defendants own version he should be held liable for the assault on the plaintiff. Due to the circumstances prevailing on that day and the injuries the plaintiff suffered, it is clear that the amount claimed is excessive and should be substantially reduced.

[18] This action was enrolled for hearing on 29 November 2012. Due to the fact that the defendant had not disclosed the relevant documents, it was postponed *sine die* and the defendant had to pay the costs occasioned by the postponement.

[19] It was enrolled for 4 March 2014 for hearing. On 4 March 2014 the matter was allocated by the Deputy Judge President to be heard by me. At the outset, counsel for the defendant indicated that he had only had instructions to let the matter stand down. I made several enquiries as to where the legal representative was, but according to both counsel his phone went unanswered. In the end the matter was adjourned until 5 March 2014 when counsel for the defendant had still not made an appearance at 11h45.

[20] The court indicated that counsel for the defendant had to be in court on 5 March 2014 to inform the court of any reason why an order *de bonis properiis* should not be granted against him for the costs of 4 March 2014.

[21] On 5 March 2014 the court started earlier to ensure that the matter could be finalized. Mr Broodryk, the attorney who was appearing for the defendant, was questioned as to his where abouts the previous day. He told the court that he had been in court in the Gauteng Local Division, Johannesburg and therefor he sent junior counsel to let the matter stand down until he was available.

[22] He did not apologize at all for all the inconvenience he had caused to the court, counsel, witnesses and even his own witnesses who were present and ready to proceed at court on 4 March 2014. His excuse was that he thought in this disrespectful and contemptuous manner he would ensure that the action would not lose its place on the roll and thereby he would assist the plaintiff to have the matter finalized.

[23] In **Visser v Cryopreservation Technologies CC 2003 (6) SA 607** at paragraph 6 Patel J found:

> *"[6] What is pertinent in this matter, now, is whether there is any justification to grant such an order. The principle of awarding cost de bonis propriis was summed up by Innes CJ in Vermaak's Executor v Vermaak's Heirs 1909 TS 679 at 691 as follows:*
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> > 'The whole question was very carefully considered by this Court in Potgieter's case (1908 TS 982), and the general rule was formulated to the effect that in order to justify a

personal order of cost against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have **been mala fide, negligent or unreasonable.**'" (Court's emphasis)

[24] The aim of an order *de bonis propriis* is to indemnify a party against an account for costs from his own representative. In this instance Mr Broodryk said he would deal with his clients and an order *de bonis propriis* should not be granted.

[25] Mr Broodryk acted wilfully as he admitted that he was in another court in a different division, knowing that he had to be present in this court. It has been found that a prayer for an order for costs *de bonis propriis* must be made, but in **Naidoo v Matlala NO 2012 (1) SA 143 GNP** Southwood J held at paragraph 15:

"The absence of a prayer is no obstacle. In the applicants' counsel's heads of argument notice was given that such an order would be sought. The general rule is that the unsuccessful party is mulcted in costs and the failure to pray for costs is not sufficient reason per se for depriving a successful litigant of his costs where the other party has appeared and opposed the claim — see Sing v Sing 1911 TPD 1034 at 1038 – 1039; Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) (1999 (5) BCLR 549) at 632J – 633B.

In my view there is no reason to depart from the general rule and there is good reason to order the first respondent to pay the costs in his personal capacity on the scale as between attorney and client."

[26] In this instance Mr Broodryk was informed on the day he did not appear, through junior counsel he had briefed to stand the matter down, that such an order will be made. He could not provide any reason as to why he should not pay the costs on a punitive scale. The reasons for ordering that he pays the costs are:

- That he, without informing the Deputy Judge President at roll call, indicated through counsel that the matter was ready for trial;
- This resulted in a court standing down and being inconvenienced for a day;
- The plaintiff's counsel and clients, as well as his own clients were inconvenienced by having to wait a day for him to appear as they were all present at court on 4 March 2014 and ready to proceed;
- He was warned that such an order would be granted;
- He admitted to double briefing – not even in the same division, but in another division;

- The reason for the previous postponement was to enable the defendants to disclose certain documents, which 15 months later had still not be done.

[27] His excuse that he tried to prevent the plaintiff losing its place on the roll cannot be entertained. The conduct of Mr Broodryk must be investigated by the law society, and if necessary, appropriate action must be taken against him. The fact that Mr Blignaut, for the plaintiff, did not insist on such a cost order cannot play a role in awarding punitive cost order, as the blatant disregard and contempt of court cannot go unpunished.

[28] The following order is made:

1. Payment of an amount of R15,000.00;
2. Interest a *tempore morae;*
3. Costs on magistrate's court scale, but Mr J Broodryk, attorney for the defendant is ordered to pay the costs of 4 March 2014 on the scale as between attorney and client;
4. The registrar is requested and directed to send a copy of this judgment together with the record to the President of the Law Society of the Northern Provinces to investigate the conduct of Mr J Broodryk of Neil Esterhuizen & Ass ING in the light of this judgment and to take whatever action against him which the law society considers appropriate.

Judge C Pretorius

Case number	: 48145/2011
Heard on	: 4 March 2014
For the Applicant / Plaintiff	: Adv Blignaut
Instructed by	: Bekker
For the Respondent	: Mr Broodryk
Instructed by	: Neil Esterhuysen & Ass. ING.
Date of Judgment	: 13 March 2014