

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

A42/10

5 DATE:

11 MARCH 2011

In the matter between:

WILLEMINA BEZUIDENHOUT

Appellant

10 and

THE STATE

Respondent

JUDGMENT

15 VAN HEERDEN, AJ

The Appellant was charged with one count of assault with intention to inflict grievous bodily harm and one count of *crimen injuria*. Both of the charges relate to an incident that
20 occurred on 28 August 2008 at 14 Tuscany Villas, Table View.

Table View is a gated housing complex in which all of the persons involved in this matter and who gave evidence, save for the District Surgeon, resided. On 9 July 2009, and after a
25 lengthy and protracted trial in which the State led the evidence

of Mrs Schlebusch, who is the complainant, the evidence of Deidre Maitin, the evidence of Joseph Burger, the evidence of Jan Schlebusch (the complainant's husband) and the District Surgeon, Dr R C Whittaker. The appellant gave evidence
5 without calling further witnesses.

It is clear from the evidence that Tuscany Villas is not a peaceful and happy place to live, and little, if any, harmony exist between the residents. There's a long and acrimonious
10 history of conflict between the complainant on the one hand, and the Body Corporate on the other hand. It was also undisputed that Mrs Schlebusch, the complainant, set in motion two criminal charges against the appellant, which charges were not proceeded with. At the time of the hearing of
15 this matter the Body Corporate had instituted proceedings against the complainant for an interdict. Appellant had filed an affidavit in support of the Body Corporate's case in this regard. Appellant had further instituted a civil case against the complainant for defamation and had further through her
20 attorney demanded that the claimant apologise to her in a different matter for words that were said, when appellant apparently reversed into a vehicle belonging to the complainant's family. An apology was not forthcoming, but the matter was not taken further.

The defamation matter instituted and thereafter it was settled on the basis that the complainant would pay her own cost as well as R3 000 towards appellant's costs. There was further evidence of many other cases relating to the complainant, the
5 Body Corporate and other members of Tuscany Villas. It was suggest that this amounted to some 18 in number.

The magistrate when delivering judgment stated in his judgment that the appellant was charged with assault common
10 and *crimen injuria*, this is incorrect, the charge sheet refers to an assault with intention to inflict grievous bodily harm. The magistrate then finds the accused guilty of count 1 and that is as charged, being an assault with intention to inflict grievous bodily harm, which he initially referred to in his judgment as an
15 assault common and found the appellant not guilty on count 2, the *crimen injuria* charge. This in my view is a misdirection in that it is apparent from the judgment that the magistrate was of the view that the charge against the appellant was one of common assault and that he accordingly found her guilty of
20 common assault, although according the judgment she is guilty of assault with intention to do grievous bodily harm.

It is not necessary to deal with the individual evidence of the State witnesses in any detail, save to state that in my view it
25 was clear that the evidence given by the complainant and

Burger was so poor that no reliance can be placed thereon. The complainant's evidence in my view was contradictory, dishonest, aggressive and should be rejected.

- 5 The magistrate appears reluctant to find in her judgment that there may have been instances where State witnesses have tended to contradict themselves. On a reading of the record it is clear that there are numerous and material instances where the State witnesses contradicted themselves and the
- 10 magistrate's finding in this regard is a misdirection. The magistrate further seemed to justify to convict the appellant on a basis that the complainant "before the accused arrived on the scene she was intact and only sustained injuries after she had brushed with the complainant", and therefore accepts that
- 15 there was an assault. The fact that the complainant fell and was injured does not justify finding *per se* that there was an assault. This, in my view, is a further misdirection on the part of the magistrate.
- 20 Save for the District Surgeon the only State witness who attempted to give honest and objective evidence is that of Deidre Maitin, and she states as follows regarding the assault in her evidence in chief:

A42/10

"Sy het vir Me Schlebusch by die arms gegryp, op haar arms gegryp en het vir haar, ek weet nie, ek kan nie sê nie, of sy vir haar geruk het nie, maar me Schlebusch het agter toe geval."

5

At a later stage she says:

"Sy moes haar gehou het, ek weet net sy het vir haar net gehou en gelos, maar sy het toe agter toe geval."

10

Ms Maitin did say however that she did not actually see her push:

"Maar ek het dit nie gesien nie, wat u gesê het wat haar -
15 uit haar hande gehaal het en toe val die vrou? Ja, en toe val sy."

Ms Maitin does mention that there that there was a *geskellery* but cannot recall what was said. The evidence of the District
20 Surgeon is that the complainant had certain minor superficial injuries to the right side of her body which indicated that she fell on her right side.

Appellant's version is that she approached the complainant,
25 who, as she approached her, came towards her down the

ramp, with the result that the complainant was higher than her. She further stated that the complainant came at her aggressively and called her a "*hoer*" and that she came to her in such a manner that she felt threatened. She then put out
5 her hands to protect herself and to hold the complainant at bay. Immediately thereafter, and once the complainant noticed that her husband and Mr Burger were witnesses, she fell to the ground. The complainant denies the version of the appellant.

10 In S v E 2001 SACR 543 SCA at 545A-Cit was stated:

"It is trite that there is no obligation upon an accused person, where the State bears the onus "to convince the Court". If his version is reasonably possible true he is
15 entitled to his acquittal, even though his explanation is improbable. A Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false."

20 In my view appellant gave a satisfactory explanation of what transpired. She stuck to her version and gave a clear and reliable account of events leading up to the incident and the incident itself. Her evidence relating to the false charges brought by the complainant against her was not disputed.

Mr Van der Vijver, for the respondent, contended that the appellant changed her evidence and that she stated that the complainant "*het vorentoe*" *geval*. It is correct that at one part of her evidence it was so stated by the appellant, but if one
5 has regard to her evidence as a whole that the version as put by her is in fact the same. The appellant's version that the complainant fell to the ground without appellant pushing her over is not in my mind, and having particular regard to the relationship between the complainant and the appellant, so
10 improbable that it falls to be rejected. The complainant had fabricated cases against the appellant before and in this regard I refer to *crimen injuria* charges which could not proceed as the evidence was false. In my view the complainant could have fallen as stated by the Appellant
15 although Ms Maitin did not believe complainant's fall was as stated by appellant it is clear that although Ms Maitin tried to give a full description of what transpired she herself says that her attention was not always focused on complainant and appellant as she had her young children with her.

20

The deviousness of complainant is further evident from her evidence as to the serious extent of the injuries suffered by her as a result of a fall, when compared to the objective evidence given by Dr Whittaker, the District Surgeon, as to the
25 minor nature of the injuries resulting from the fall. In my view,

and as stated previously, the evidence of complainant cannot be accepted in any respects. In my view appellant's version that when complainant approached her she warded her off with her hands, and that she did not fall as a result thereof and that
5 complainant fell to the ground as alleged by her is reasonably possibly true, and I am not satisfied that the explanation given by her is so improbable that it is beyond reasonable doubt false.

10 Mr Van der Vijver, on behalf of the respondent, conceded that if it is accepted that when warding off the complainant, as alleged by the appellant, and the complainant fell as a result thereof, that this would not in fact be an assault. In my view
must the learned ~~the~~ magistrate erred in accepting the evidence of
15 the State above that of appellant and I would accordingly uphold the appeal and would make the following order:

In the result the APPEAL IS ALLOWED AND THE CONVICTION AND SENTENCE ARE SET ASIDE.

20



VAN HEERDEN, AJ

25

GOLIATH, J: I agree, and it is so ordered. THE APPEAL IS
UPHELD, THE CONDITION AND SENTENCE IMPOSED BY
5 THE COURT A QUO ARE SET ASIDE.

10

GOLIATH, J