REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: **7965/2009**

Before the Honourable Ms Justice Meer
Hearing: 04 November 2019
Judgment Delivered: 06 November 2019

In the matter between:

ANDREW MERRYWEATHER First Plaintiff

and

OLIVER SCHOLTZ Third Defendant

GERARD DAVID PETER SCHOLTZ Fourth Defendant

JUDGMENT

MEER J.

[1] I am required, prior to the commencement of the trial in this matter, to make a ruling, in terms of Uniform Rule 39 (11), on the duty to begin and the *onus* of proof. This requires a consideration of the relevant pleadings. See *Intramed (Pty) Ltd v Standard Bank South Africa Ltd* 2004 (6) SA 252 (WLD) at 256 E and 259 F – G; *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710 H.

[2] In paragraph 7 of the amended particulars of claim, the First Plaintiff pleaded an inuria and intentional assault in the following terms:

"7. During the night of 8/9 September 2006 and at the Engen Garage, Vineyard Motors in Main Road, Newlands, Western Cape, the First, Second and Third Defendants:

(a) wrongfully, unlawfully and provocatively referred to the First Plaintiff as a homosexual;

(b) wrongfully, unlawfully and intentionally assaulted:

(i) The First Plaintiff by grabbing and pushing, kicking and punching him and throwing and/or spear tackling him against a stationary motor vehicle;

(ii) The Second Plaintiff by pushing him and throwing him to the ground and then punching and kicking him."

[3] In paragraph 7 of the Third Defendants plea, as further amended, the Third Defendant pleaded as follows to the First Plaintiff's cause of action, in paragraph 7 of the amended particulars of claim:

"7 **Ad paragraph 7(b) and paragraph 9(b)(i) thereof**

7.1 The allegations made in these sub-paragraphs are denied.

7.2 Without derogating from the aforesaid denial, and purely in amplification thereof:

7.2.1 Third Defendant pleads that on 9 September 2006 and at the Engen Garage ("the Engen Garage"), First and Second Plaintiffs and another man known as Progress Mphande ("Mphande"), initiated a verbal and physical attack on Third Defendant during which, *inter alia*, the following occurred:

7.2.1.1 First Plaintiff swore at and threatened Third Defendant;

7.2.1.2 First and Second Plaintiffs taunted and mocked Third Defendant;

7.2.1.3 Mphande prodded Third Defendant, pushed against his chest and knocked him under his chin;

7.2.1.4 Second Plaintiff approached Third Defendant, swore at him and grabbed his shirt in a manner which was threatening and aggressive;

7.2.1.5 Third Defendant moved forward and put his arms around Second Plaintiff to prevent him from attacking him further;

7.2.1.6 First Plaintiff hit Third Defendant on his back and Third Defendant let go of Second Plaintiff;

7.2.1.7 First Plaintiff grabbed Third Defendant, who in turn grabbed him and pushed him to get First Plaintiff off him, whereupon Third Defendant released First Plaintiff who staggered backwards;

7.2.1.8 When Third Defendant was in the process of moving away from First Plaintiff, First Plaintiff moved towards Third Defendant as if to tackle him and, to avoid being attacked, Third Defendant grabbed him at the side of his shoulders, turned him and pushed him away, whereupon First Plaintiff accidentally lost his footing and fell.

7.2.2 Third Defendant in particular denies that:

7.2.2.1 he threw or tackled First Plaintiff against a motor vehicle;

7.2.2.2 he pushed First Plaintiff off his feet;

7.2.2.3 he intended First Plaintiff to lose his footing.

7.2.3 Throughout the above unlawful attack and/or threatened attack on Third Defendant at the Engen Garage, as particularised in paragraph 7.2.1 above:

7.2.3.1 Third Defendant had reasonable grounds for believing that First Plaintiff posed a physical danger to him;

7.2.3.2 the physical force used by Third Defendant against First Plaintiff was, in the circumstances, necessary to repel First Plaintiff's attack and commensurate with his attack.."

[4] Relying on the case of *Mabaso v Felix* 1981 (3) SA 865 (A), Mr Whitehead, for the First Plaintiff, submitted that the Third Defendant's plea is one of confession and avoidance and that he therefore attracted the *onus* as set out in *Mabaso's* case. In *Mabaso* supra it was held that in actions for damages for *delict* affecting a Plaintiff's personality and bodily integrity, such as assault, that the Defendant should ordinarily bear the *onus* of proving the excuse or justification, such as self-defence. It was stated in *Mabaso*, at 875 A – H, as follows:

"Pleadings are therefore concerned with material facts. The pleadings in a typical case of assault and self-defence, like the present one, reduced to its simplest essentials, would and should take this form:

Plaintiff's particulars of claim:

1. Defendant shot plaintiff in both legs by twice firing a revolver at him.
2. Defendant intentionally fired both shots at plaintiff.
3. In consequence plaintiff was injured and sustained loss or damage in the sum of Rx.
4. In the premises defendant wrongfully and unlawfully assaulted plaintiff and is liable to pay him the said damages.

Paras 1, 2, and 3 contain the material facts upon which plaintiff relies for his claim. On the other hand, para 4 merely contains a submission or conclusion of law following on those facts. And, of course, that submission or conclusion on those alleged facts is well-founded, for any intentional interference with a person's absolute natural rights relating to personality or bodily integrity, which the law protects, is wrongful and unlawful (see, for example, *Whittaker v Roos and Bateman* 1912 AD 92 at 122, 124; *Stoffberg v Elliot* 1923 CPD 148).

Defendant's plea.

1. Defendant admits paras1, 2 and 3 of plaintiff's particulars of claim.
2. Defendant pleads, however –

(a) that plaintiff threatened to ill or seriously assault him;

(b) that in fear of his life or limb he thereupon in self-defence shot and injured the plaintiff as alleged and admitted;

(c) that the shooting was reasonably and legitimately required to defend himself against the plaintiff's aggression.

3. In the premises the defendant denies the submission or conclusion in law contained in para 4.

The material facts upon which the defendant relies are contained in para 2. True, in para 3 he denies the wrongfulness and unlawfulness of the shooting, but that is merely his submission or conclusion in law on the material facts on which he relies. An *onus* of proof relates to factual and not legal issues. Hence, defendant's denial in para 3 has no bearing on the *onus* of proof on the factual issues. On those issues, as crystallized by the pleadings, the *onus* of proof is clearly on the defendant. It is a true case of confession and avoidance, in which the *onus* of proving the avoidance ordinarily rests upon the defendant."

[5] Mr Whitehead pointed to paragraph 7.2.1.8 of the Third Defendant's plea, where it is stated that the Third Defendant "pushed him away", referring to the First Plaintiff. This, he submitted, constituted an assault. He referred me to *LAWSA*, Volume 11 Third Edition, paragraph 277, where it is stated:

"Assault consists in unlawfully and intentionally:

(a) applying force to the person of another directly or indirectly; ..."

and paragraph 279:

"Assault can be committed by the application of force to the body of the complainant."

[6] The Third Defendant, he argued, accordingly admitted to an assault. Like a spear tackle, the assault contended for in the First Plaintiff's particulars of claim, contended Mr Whitehead, a push is also an assault. The fact that the Third Defendant did not admit to the precise type of assault alleged in the particulars of claim, namely a spear tackle, was irrelevant, given that he had admitted to pushing the First Plaintiff and the push was also an assault, so the argument went. It was known, he contended therefore, that there was an assault and the First Plaintiff was in a wheelchair as a result of the assault.

[7] With regard to the intention to injure Mr Whitehead referred me to *Amlers' Precedents of Pleadings* 9th edition at page 57, where it is stated with regard to assault and intent:

"*Animus iniuriandi:* There can be no assault without an intention to injure. *Brown v Hoffmann* [1977] 2 All SA 517 (NC), 1977 (2) SA 556 (NC)."

[8] Referring to *LAWSA,* Volume 15 Third Edition, paragraph 137, Mr Whitehead submitted that the Third Defendant's intention, in so far as it relates to the consequences of his conduct, can take three different forms, namely: *dolus directus, dolus indirectus* and *dolus eventualis*.

[9] Mr Whitehead pointed out that it is admitted that the Third Defendant was the last person in contact with the First Plaintiff before he was injured, and that the Third Defendant self-evidently relies on self-defence. By admitting to pushing the First Plaintiff, there is an admission by the Third Defendant of an assault, which incorporates an intention to injure. Thus, he submitted, the Third Defendant's plea was similar to that of confession and avoidance as in *Mabaso* supra, and the Third Defendant attracted the *onus* of proving paragraph 7.2.3 of the plea and had the duty to begin.

[10] Ms Gassner, for the Third Defendant, countered that the Third Defendant's plea is not one of confession and avoidance, and that he accordingly did not attract an *onus* as set out in *Mabaso's* case. In contradistinction to *Mabaso,* and the case of *Minister of Law and Order v Monti* 1995 (1) SA 35 (AD), the Third Defendant had not admitted the material aspects of the assault alleged by the First Plaintiff. In a true plea of confession and avoidance, she contended, the Defendant admits all the essential elements of the assault, including the *actus reus*, the intention and causation, and consequently attracts the *onus* of proving the element of self-defence or other justification.

[11] In the present matter, she argued, the Third Defendant disputes the essential elements of the assault on which the First Plaintiff's case is based. More particularly, regarding the alleged conduct, the Third Defendant denies that he kicked and punched the First Plaintiff, and threw and/or spear tackled him against a stationary motor vehicle. He denies that he intended the First Plaintiff to lose his footing, and

moreover puts in issue the causal connection between any conduct on his part, and the injuries sustained by the First Plaintiff. He points out that in amplification of his denial, he states in his plea in summary that such physical contact as occurred between himself and the First Plaintiff was not initiated by the Third Defendant and that he acted to ward off acts directed against himself. This, she submits, does not constitute a confession and avoidance plea to the First Plaintiff's cause of action. In as much as there are material disputes on the factual issues relating to the assault in the present matter, the overall *onus* to prove the factual circumstances of the alleged assault remains on the First Plaintiff in the trial.

FINDING

[12] The Third Defendant, in his plea, admits that he pushed the First Plaintiff in self-defence in response to a confrontation. The *actus reus* was the push. Ms Gassner conceded as much. The push, being an application of force to the body of the First Plaintiff, constituted an assault with an inherent intention to injure, as defined in *LAWSA* above. There is thus an admission to an assault upon the Plaintiff, *albeit* not the precise assault described in the particulars of claim. From this we know there was an assault perpetrated by the Third Defendant, and the First Plaintiff fell and is now in a wheelchair.

[13] The particulars of claim thus alleged an assault perpetrated by the Third Defendant, and the Third Defendant's plea admitted an assault, albeit not precisely the exact type of assault alleged in the particulars, and went on to invoke the defence of self-defence. This, in my view, brought the Third Defendant within the ambit of the principle as established in *Mabaso* supra, notwithstanding factual disputes as to the type of assault. Given that principles are of general application, it cannot be that for the *Mabaso* principle to apply, an assault as described by a Plaintiff and admitted to by a Defendant, must be identical or mirror each other, free of factual disputes as to its nature or type of assault. Nor does *Mabaso* supra state so. In my view, it is sufficient that there is an admission of an assault. It matters not, therefore, that the assault in the particulars of claim is a spear tackle and the assault admitted to in the plea is a push in self-defence to avert an attack. Such does not detract from the fact that there is an

admission to an assault, the *actus reus* in this case. I note that I was not referred to any case, nor was I able to find a case, where the principle established in *Mabaso* was distinguished on the grounds relied upon by the Third Defendant.

[14] On the above analysis I find that the Third Defendant's plea is one of confession and avoidance and that the Third Defendant accordingly attracts an *onus* as set out in *Mabaso* supra and bears the duty to begin.

[15] I accordingly grant the following order:

In terms of Rule 39 (11) the Third Defendant bears the *onus* of proof and duty to begin.

Y S MEER
Judge of the High Court

APPEARANCES

Counsel for Plaintiff	:	ADV JOHN WHITEHEAD SC
		ADV STEFAN BOTHA
Instructed by	:	DSC Attorneys
		Ref.: Celeste Wolpe-Munitz
Counsel for Defendants	:	ADV BARBARA GASSNER SC
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