

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 11478/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

(4) Date: **13 June 2023**

Signature:

In the matter between:

TINOTENDA RUSSEL RUSERE

Plaintiff

And

SAVOY ENTERTAINMENT CENTRE

1st Defendant

IFEANY MADU

2nd Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an action for damages which arose out of an assault by the 2nd defendant on the plaintiff who sustained a broken leg. The second defendant was at the time employed by the first defendant as a security guard at the latter's premises.

- [2] In terms of rule 33 the merits were separated from the quantum. The Court need only determine the merits of the action. An order to this effect was made accordingly. Advocate Muza called the first plaintiff to testify.

B. BACKGROUND

- [3] The plaintiff testified that on 28 May 2019 he had visited Savoy Entertainment Centre to have some refreshments. He had a backpack and a cell phone in his possession. A sling bag was displayed to the court as an exhibit. On arrival at the entrance the security guard on duty requested him to put the backpack in a card box where everybody put theirs. The plaintiff refused to do so because according to him the bag contained his money and special personal effects. He instead requested the security guard to feel the bag to determine if there were any harmful things which could endanger the patrons.
- [4] The plaintiff was standing at the entrance lobby. After the security guard had failed through the backpack, he let the plaintiff in into an area that is marked 'in'. The witness was pointing at and referring to a map.
- [5] The plaintiff was accompanied by a friend, he pitches two 300ml beers for them both. They had only two beers each. They did not stay long since the witness received a call to report home in order to attend to his daughter who was having epileptic seizures. He had to go home and administer some traditional medicines that only he could administer. He informed his friend about this development and suggested that they should leave.
- [6] They walked back to the entrance lobby so they could exit. The security guard refused them permission to leave. He started insulting them saying: "don't pretend like you are loaded, you don't have any money!". He commanded them to get out and pushed the plaintiff who fell down on the area marked "V" on the map.

- [7] The security guard followed him to the area where he had fallen, he made as if to stomp on him but missed his face and stepped on his leg next to the inner knuckle of his ankle. The witness tried to stand up but could not because his ankle was starting to swell. His friend came over and removed his shoe and his socks and helped him to stand up. He stood leaning on his friend when someone whom he assumed was the manager approached them and offered to take him home. The plaintiff refused and said that he needed to go to a hospital.
- [8] During this ordeal at the entrance lobby, the witness never resisted any of the security guard's instructions but got stomped, nonetheless.
- [9] The plaintiff's leg was broken. His friend went outside and secured a vehicle to transport him to hospital. His friend suggested that they should go to the police station first because without a letter from the police, the hospital was not going to attend to him. They went to the police station and opened a case of assault. The police went back to Savoy with his friend, Gift Baloyi to make further investigations. The plaintiff was left at the police station due to the condition of his foot. Within 15 minutes the police were back at the police station with the security guard from Savoy, i.e., the second defendant.
- [10] The second defendant saw the condition of the plaintiff's foot and started begging for forgiveness, he even offered him money. The plaintiff was not interested in all this due to the intense pain he was feeling at the time, no amount of money could pay him for that. Some of the police officers were suggesting that he should rather take their money that was offered. The second defendant was taken into custody whilst the witness was taken to hospital where he stayed for one full week.
- [11] The doctors operated on the plaintiff's ankle and inserted screws that he will have for the rest of his life. It took him three months to recover but he still has

residual pains when it is cold and must rely on analgesics from the pharmacy from time to time.

[12] The plaintiff waited for a phone call from the police regarding a trial date in the matter, all in vain, it seems the second defendant was set free. The criminal case was opened on 28 May 2019, three years later he has not yet been called to court.

[13] The second defendant did not reach out to the plaintiff, he only approached the latter's nephew who stays at Sunnyside and asked him to arrange for them to meet and settle this matter because he was on the verge of losing his job at Savoy. The plaintiff did not agree to these overtures since he has referred this matter to his lawyers.

[14] This incident has negatively affected his life, for example, he had future plans to join cruise ships to work as a food and beverage manager but because of the injury he's still here. If he stands for a long time his piles get worse and he must use anal pessaries for relief. He had a Ford Bantam vehicle which he had bought for R75,000 and had to sell it for R40,000 to pay rent. He is also no longer sexually active as he used to be due to the pain.

[15] The plaintiff was then cross-examined at length by Mr. van der Merwe. He was stood rigorous cross examination. The questions highlighted a token system that is used at the entrance of the venue whereby a patron is obliged to leave his bag at reception in exchange for a token which is then retained in exchange for the bag on departure. The plaintiff denied having been in possession of a tin of "flying fish" beer and being drunk on arrival at the venue. Nothing of significance came out of the questioning.

[16] The matter proceeded again on 26 September 2022. Mr. Muza closed the plaintiff's case. Mr. van der Merwe applied for absolution from the instance,

opposed by Mr. Muza. Various authorities were referred to and considered, the application was dismissed. Mr. van der Merwe called the 2nd defendant to testify.

[17] Mr. Ifayi Madu took the oath and testified about an incident of May 2019 at the time when he worked as security by the gate and reception of Savoy entertainment Centre. He confirmed that he had met the plaintiff while at work.

[18] He was standing by the gate and was talking to someone who was selling shoes. The two gentlemen came and one of them is the plaintiff he did not know them at the time one was drinking a flying fish beer which is an alcoholic beverage. The one who was drinking is the plaintiff, he asked him to finish his beer before going inside or giving him the beer to keep before he could enter. The plaintiff refused and said he should call his boss. The other guy said to the plaintiff that they should rather go but the plaintiff was very argumentative. The friend got inside while the plaintiff remained outside making noise. The witness left him there and went to attend to other patrons.

[19] The plaintiff came in and the witness met him at the entrance lobby. The plaintiff came towards the witness while still holding the open beer and another which was inside his unzipped bag. He then took out two R10 notes and threw them at the witness saying he must go and eat because he can see that he is suffering. He claimed to earn R20 000 every month at his workplace. The witness never picked up the money, a car guard came and took the money. The plaintiff went back to the gate. There he violently shook the gate and caused an obstruction. The witness went and removed the plaintiff's hands from the gate and opened it for customers to pass. He left the plaintiff outside to go and attend to other customers. He returned later and found the plaintiff sitting not far from the gate. He went to call his manager who spoke to the plaintiff and the plaintiff left with his friend.

[20] The friend came with the police after a month, they said someone opened a case against the witness and that he must accompany them to Pretoria central police station. He obliged and when he arrived at the police station he saw the plaintiff, he was locked up and released the following day and has never heard from the police again.

[21] Mr. Muza then cross-examined the first defendant. The witness denied the assault but confirmed that he was taken by the police to the police station where he encountered the plaintiff. According to the first defendant the police encouraged both parties to try and settle the matter. According to this witness this happened a month after the occurrence of the confrontation with the plaintiff. This concluded the case for the first defendant.

[22] In his closing address Mr. Muza stated that the first defendant was executing his duties as a security guard acting in his scope of duty. He submitted that the second respondent should be held vicariously liable for the assault because vicarious liability does not require an instruction to be given. He submitted that on a balance of probabilities the plaintiff has discharged the onus of proof. On the merits the court should find in favor of the plaintiff.

[23] Adv. Van der Merwe in his closing address question the applicability of the doctrine of vicarious liability in this case, stating that it must first be determined whether an unlawful incident took place. The plaintiff is a single witness he should have subpoenaed his friend to testify. The court should draw a negative inference on his failure to call his friend because there were means to secure his attendance. This scene sketched by the plaintiff is more improbable than that of the defendant. The court should order absolution from the instance. Alternately the court should order that the plaintiff's claim be dismissed.

C. THE LAW ON VICARIOUS LIABILITY:

[24] The legal provisions relating to vicarious liability are by and large settled and trite. One of the recent cases is *Stallion Security (Pty) Ltd v. Van Staden*¹ wherein the court in giving an example of conduct by an employee that may attract vicarious liability by his employer cited the example of an assault committed by a bouncer whilst removing a troublesome patron from his employer's pub.² The example not dissimilar to the instant case.

D. DISCUSSION

[25] I was invited to treat the plaintiff's evidence with caution as being that of a single witness and draw an adverse inference on his failure to call his friend as a witness. When weighing the evidence of a single witness the court should consider its merits and demerits and be satisfied that the truth has been told before accepting it. In this matter, the parties involved in the fracas, the location and time of the incident are not disputed. There was a verbal exchange between the plaintiff and the second defendant which preceded the event complained about. That too is beyond dispute. The evidence by the single witness can be safely accepted.

[26] The second defendant takes no issue with all the above except when it comes to the stomping incident. He denies forcefully but does not offer any explanation as to how the plaintiff could have sustained the broken limb. This is strange because the second defendant states on his version, that when he was taken to the police station, he encountered the plaintiff and the two of them were encouraged to resolve the matter, which matter then if there had been no assault?

[27] I find therefore that the plaintiff had made a nuisance of himself on the day in question, provoking the second defendant. Initially he refused to hand over the

¹ {2020} 1 SA 64 (SCA)

² Ibid at paragraph [15].

bag as requested by the 2nd defendant, and apparently communicated with the latter in uncomplimentary language. Eventually, in removing the plaintiff, the second defendant resorted to excessive force constituting an assault which resulted in the injuries complained of.

[28] In the circumstances, the first defendant is vicariously liable for the actions of the second defendant. The plaintiff succeeds and the merits are awarded in his favour.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 26 September 2022

Date of Judgment: 13 June 2023

On behalf of the Plaintiff: Adv. C.Z. Muza.

Instructed by: Nandi Bulabula Inc.

On behalf of the Defendant: Adv. J.G. van der Merwe.

Instructed by: Helen Karsas Attorneys

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 13 June 2023.