

**IN THE REPUBLIC OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Date of hearing: 14 and 16 March 2015

Date of judgment: 24 March 2015

Case Number: 36090/13

In the matter between:

**SHAWN WILKEN**

Plaintiff

and

**RUAN UYS**

Defendant

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**JUDGMENT**

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**A B ROSSOUW A J**

- (1) The plaintiff issued summons against the defendant for payment of an amount of R402 077.10 in respect of damages suffered as a result of an unlawful assault.

(2) The parties applied for a separation of quantum and merits in terms of rule 34(3) of the Uniform Rules. I granted the application.

(3) In paragraph 3 of the plaintiff's particulars of claim the plaintiff alleges the following:

'On or about the 5th October 2012 and at or near Heidelberg Club, the defendant unlawfully assaulted the plaintiff by hitting him over the head, causing him to fall. The assault took place in public and within sight of members of the public.'

(4) The defendant pleaded to paragraph 3 of the plaintiff's particulars of claim as follows:

'The content of this paragraph is denied and plaintiff is put to the proof thereof.

Alternatively and only in the event of this Honourable Court finding that the Defendant did strike the plaintiff as alleged or at all then in that event the Defendant pleads justification in that he was justified in doing in as much as the Plaintiff has attacked him by striking at him with his fist to the

Defendant's face and the defendant's actions where necessary for his own protection.'

- (5) Based on the well known case of *Mabaso v Felix* 1931 (3) SA 865 (A) 875, if the plaintiff proves the assault, then the defendant has the onus to prove his justification ground, which, in this case, is self-defence.
- (6) The plaintiff was in his late twenties and the defendant was about twenty during the incident referred to infra and they are more or less of the same build and height.
- (7) The plaintiff called three witnesses including himself.
- (8) The plaintiff testified that on Friday 5 October 2012 his two friends, Riaan Kruger and Hennie Marx picked him up with Kruger's car at the airport between 7 and 8 pm. The plaintiff came all the way from Kathu for his bachelors party that had been arranged for the following day in Parys. Kruger had organised the party. The plaintiff would sleep over at Kruger's place in Heidelberg. They decided to go to a club in Heidelberg for a few drinks since they had not seen each other for quite some time. They went directly to the club. They arrived at the club between 8 and 9 pm. The club was busy but not overcrowded and loud music was playing. The plaintiff could not remember how much alcohol he consumed, but according to

him he could still walk, talk and stand. According to the plaintiff the three of them were not together all the time. Later in the evening, between 11 and 12 pm when the plaintiff was standing at the bar, the defendant approached him from his right and indicated with his hand that he wanted to ask the plaintiff something and when the plaintiff turned towards the defendant to hear what the defendant had to say the defendant hit him with his fist on his right cheek close to his ear which caused him to fall over backwards. At that point in time Marx was standing about a metre to the plaintiff's left. He further testified that he was hospitalised and placed in an artificial coma for two weeks. He could not remember whether he danced or not. It was put to him that his behaviour was intended to arouse angry feelings ('erg opruiend'), that he was severely intoxicated ('erg onder die invloed'), that he touched a girl's buttocks, that he was admonished by someone because of his bad behaviour and that he was involved in an argument with the person who admonished him, that he threw ice at the defendant and that he swung his fist in the direction of the plaintiff's face, all of which the plaintiff could not admit or deny because of his poor memory. He further testified that touching a girl's buttocks was not in his nature. The defendant blamed his poor memory on the *sequelae* of the assault and not on the alcohol.

- (9) Marx corroborated the plaintiff's evidence up to the point where they arrived at the club. He testified that they picked the plaintiff up at the

airport at about 7pm and that they arrived at the club at about 8pm. He said that there was a 'buzz' at the club. The club was not overcrowded, but it was reasonably busy. He said they all had something to drink, but he could not remember how much. He testified that he and the plaintiff went to the dance floor, that two girls, a blonde and a brunette, were in their space the whole time, that they did not speak to the girls, that he disliked the girls' behaviour as a result of which he and the plaintiff returned to the bar. Much later, about half past ten, the brunette and her boyfriend approached Marx where he was standing at the bar. The boyfriend accused Marx of pointing his middle finger at his girlfriend. He said that he saw a few people 'hovering' around which caused him to suspect trouble. Marx pleaded innocence whereafter the couple left without incident. After some time had elapsed and while he was sitting or standing with his back towards the plaintiff, busy talking to someone else, he heard chairs and tables fall and that is when he saw the plaintiff on his back with his eyes open. That is when he also noticed Kruger's presence. He saw the defendant straddling the plaintiff in 'a combat position'. He further testified that when the defendant saw the plaintiff was unconscious the defendant got a fright whereafter the defendant and his friends left the club. He also testified that Kruger followed the defendant, that other people prevented Kruger from doing so and that the defendant's friends shouted "Los hom dat ons hom bliksem!". He also heard someone saying something about the police and that is when the defendant's friends disappeared. Marx could not

remember what they drank and how many drinks they had. Marx described his and the plaintiff's condition that night as 'tipsy'. On a scale of 1 to 10 where 1 is sober and 10 extremely intoxicated he said that he and the plaintiff were about a 5. He said that he and the plaintiff were together most of the time and that Kruger was not with them all the time. The ambulance and the police arrived after someone had called them. The defendant was taken to hospital from where he was transferred to another hospital.

- (10) Riaan Kruger also corroborated the plaintiff's evidence up to the point where they arrived at the club. He said that they arrived at the club at about 8pm. He said that when they entered the club a group of men stared at them, that it made him uneasy, but they ignored it. According to Kruger they were together most of the time. He further testified that they had about three to four beers and three to four double brandies each. On a scale of 1 to 10 he also gave himself and his friends a 5. He said that the plaintiff and Marx went to the dance floor and they later returned. He did not notice the blonde and the brunette. He was within hearing distance when one of the defendant's friends approached Marx accusing Marx of pointing his middle finger at his girlfriend and that he (Kruger) told the person that they did not want trouble. He then advised the plaintiff and Marx that they should have their last drink and leave. Kruger then saw the defendant approaching the plaintiff from the other side of the bar. He saw

how the defendant hit the plaintiff on the left side of his face with his right hand whereafter the defendant fell with his right ear on the table behind him. He further testified that the plaintiff did not throw a punch at the defendant. He was about a half a metre from the plaintiff when it happened. Marx was standing with his back towards the incident. He testified that after the incident he grabbed the defendant by the collar, that the defendant ran away, that he followed the defendant, but that a number of men stopped him at the door. After the incident the defendant and his friends immediately left the premises. He said that the plaintiff was in hospital for two weeks and that he visited him every day during that period.

- (11) The defendant testified in his own case and he called one witness.
- (12) The defendant's evidence can be summarised thus: On 5 October 2012 the defendant together with GC du Plessis and Quinton Nortje went to the club in Heidelberg. He had about two, but not more than three Castle Light beers. He said that the plaintiff was drunk and that at one stage an elderly person ("n oom") spoke to the plaintiff about his bad behaviour. During the evening he heard that the plaintiff touched a certain Marli Pretorius' buttocks on the dance floor and that she was very upset about it. To his best recollection a certain Bezuidenhout talked to one of the plaintiff's friends about the incident on the dance floor and Bezuidenhout

also told the defendant about the incident. He testified that after being informed of the incident he approached the plaintiff with the intention to talk to him about his bad behaviour, ie his loudness and the incident on the dance floor. According to the defendant, the plaintiff was very drunk ('baie dronk'). The plaintiff said that on a scale of 1 to 10 he would give the plaintiff an 8. He testified that when he stood in front of the plaintiff, the plaintiff shot the ice that was in plaintiff's glass in the direction of his face and that the ice hit him on his chest. The plaintiff then threw a punch at him, but missed. It was then that the defendant hit him with his open left hand on the right side of his face whereafter the plaintiff fell backwards and bumped his head against a table. At that point in time one of his friends, ie Jaques du Preez, was standing next to him and du Plessis was standing right behind him. He did not know where Quinton was. Thereafter the defendant left the club and drove away because he did not want any further trouble. He further testified that he played rugby for the Bulldogs and that he was fit and physically powerful person at the time of the incident. He denied that Kruger grabbed him by the collar. According to him, Kruger never touched him. During his evidence in chief his counsel asked him whether it was necessary to hit the plaintiff. He replied by saying that he believed that it was not necessary and immediately thereafter said he acted in self-defence ('Ek glo nie dit was nodig nie. Ek het hom uit selfverdediging geklap'). He left the scene before the ambulance and the police arrived

- (13) The last witness was GC du Plessis. He testified that the plaintiff was very loud and was seeking attention. He said that the plaintiff threw ice at the defendant on more than one occasion and at one stage he thought that the defendant and the plaintiff were friends because of plaintiff's behaviour. He also witnessed the incident. He testified that the plaintiff did not throw ice at the defendant when the defendant stood in front of the plaintiff. He saw that the plaintiff assumed a boxing stance and that is when the defendant hit the plaintiff on the side of his face whereafter the plaintiff fell sideways and bumped his head against a table. Thereafter the defendant left because he did not want further trouble and he left with the defendant.
- (14) The defendant must prove that there was an unlawful attack, that he had reasonable grounds for thinking that he was in danger of serious injury, and that the means he used were the only or least dangerous means whereby he could have avoided the danger. Honest and reasonable belief of immediate danger is required. The question that must be asked is whether a reasonable man in the position of the actor would have considered that there was a real risk that serious injury was imminent. Furthermore, force is not reasonable if it is either unnecessary or disproportionate to the evil to be prevented. The latter are two separate and distinct requirements. (*Minister of Law and Order v Milne* 1998 (1) SA 289 (W) 292J-294D).

(15) The defendant bears the onus to prove that he was attacked by the plaintiff. He testified that the plaintiff swung his fist in the direction of the defendant's face immediately after the plaintiff had thrown ice at him. He called du Plessis to corroborate his evidence in this regard. Du Plessis testified that no punch was thrown at the defendant and that the plaintiff did not throw ice at the defendant when the plaintiff and defendant were facing each other. Marx and Kruger corroborated Du Plessis' evidence that no ice was thrown and that the plaintiff did not swing his fist in the direction of the defendant's face. In the light hereof and mindful of the defendant's own witness discrediting him, the defendant has failed to prove that he was attacked in the manner described by him or at all.

(16) Even If I accept the defendant's evidence that he was attacked, then, the defendant on his own version confronted a man that was severely intoxicated. I find it improbable that a person in such a state could pose a physical danger to the defendant who was on his own admission not only fit and physically powerful, but sober as well. The defendant also did some damage to his own case when he testified during his evidence in chief that in his view it was not necessary to hit the plaintiff. He thereby by necessary implication admitted that he could have taken less drastic measures to avoid the danger. The fact that he immediately thereafter said that he acted in self-defence does not, in my view, neutralise his concession in this regard. Furthermore, it is common cause that he hit the

plaintiff with a tremendous force. Even if I accept that the defendant was attacked and that the defendant had no alternative but to hit back, the amount of force that he exerted on the extremely drunk plaintiff was under the prevailing circumstances excessive. Furthermore, the fact that the defendant did not wait for the police to tell his side of the story and the fact that he immediately left the scene without enquiring as to the well-being of the plaintiff is, in my view, a clear indication that the defendant knew that he had overstepped the boundaries of reasonableness.

(17) I conclude that the defendant, on his own version, has failed to prove that he was justified in acting in the manner he did.

(18) in the result, I make the following order:

1. The defendant is ordered pay the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff's costs.

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**A B ROSSOUW A J**

DATE: 2013-03-24

**DATE OF HEARING: 14 and 16 MARCH 2015**

**DATE OF JUDGMENT: 24 MARCH 2015**

FOR THE PLAINTIFF

ADVOCATE: C A BOONZAAIER

ATTORNEYS: SERFONTEIN VILJOEN & SWART

FOR THE DEFENDANT

ADVOCATE: F VAN DER MERWE

ATTORNEYS: DE BEER ATTORNEYS % MACROBERT

ATTORNEYS