

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: **A120/2024**

In the matter between:

G[...] N[...]

Appellant

And

A[...] S[...] N[...]

Respondent

Neutral citation: *N[...] v N[...]* (A120/2024) [2025] ZAFSHC 160 (4 June 2025).

Coram: Daffue and Daniso JJ

Heard: 18 November 2024

Delivered: 4 June 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H30 on 4 June 2025.

Summary: Court *a quo* dismissed a husband's claims of assault and institution of malicious proceedings against him by his wife at the time – appeal by the unsuccessful husband – court of appeal dismissed the appeal with costs.

ORDER

The appeal is dismissed with costs, inclusive of the costs of counsel on scale A.

JUDGMENT

Daffue J

Introduction

[1] A couple, married out of community of property for a short while, was involved in an acrimonious relationship. Prior to tying the knots of marriage they were in love and respected each other, but soon after the marriage ceremony things started to turn sour. In a strange turn of events the husband decided to institute action against his wife to claim damages for assault and instigation of malicious proceedings. A learned magistrate, seated at the Magistrate's Court in Bloemfontein, dismissed the husband's claims whereupon he decided to seek redress from the High Court on appeal. More about this later.

The parties

[2] The unsuccessful plaintiff in the court *a quo*, Mr G[...] N[...], a captain in the South African National Defence Force (SANDF), is the appellant in these proceedings. Adv LBJ Moeng appeared for him on instructions of Kramer Weihmann Inc, Bloemfontein.

[3] The defendant in the court *a quo*, Ms A[...] S[...] N[...], is the respondent in the appeal. She was represented by Adv PS Mphuloane in the court *a quo* and on appeal on instructions of Mphatswe Attorneys, Bloemfontein. I shall herein later refer to the parties as cited on appeal to avoid any confusion.

The appellant's claims

[4] The appellant instituted four claims against the respondent which can briefly be summarised as follows:

- a. claim 1, to wit assault in that on 29 July 2021 the respondent hit the appellant with an earphone cable in respect of which the appellant claimed damages in the amount of R50 000 for pain and suffering for which he had to use medication for approximately three days after the event;
- b. claim 2, insofar as later on the same day, the respondent assaulted the appellant by hitting him with a wooden stick in which case he claimed damages in

the amount of R80 000 for pain and suffering; it is the appellant's case that in respect of both alleged assaults he received treatment at the Pelonomi hospital;

c. claim 3, in that on the same day the respondent wrongfully and maliciously set the law in motion by providing false information to members of the South African Police Service (SAPS) at the Bloemspuit police station that the appellant had threatened to obtain a gun with which he would shoot her, which caused the appellant to be forcefully removed from his residence by the Tempe Military Police, as a consequence of which he has suffered damages in the amount of R50 000 for *contumelia*, deprivation of freedom and discomfort; and

d. on/or about 3 November 2021, the respondent wrongfully and maliciously set the law in motion by applying for and obtaining an *interim* protection order in presenting false information which *interim* order was eventually and after presentation of evidence dismissed on 13 December 2021, causing the appellant to suffer damages in the amount of R50 000.

The respondent's defences

[5] The respondent denied that she had assaulted the appellant as alleged, but also alleged that the appellant was threatening her and that she reacted in self-defence.

[6] The respondent alleged in respect of claim 3 that she had reported the appellant's threatening behaviour to SAPS as she was afraid of him, but denied the remainder of the allegations in the paragraphs under reply.

[7] In respect of claim 4 the respondent denied providing false information to the court, but admitted that the *interim* protection order was dismissed.

The court a quo's judgment

[8] The court *a quo* referred to the two mutually destructive versions of the parties. It accepted that the appellant's evidence 'was consistent', but found that he 'recorded almost everything that transpired between them as a couple and [presented] a well-collated events recordal of events', but he 'presented bias on his side of the story.' The court *a quo* continued as follows:

‘The plaintiff presented a person who wanted his will to prevail no matter what. Even Mr Qwabe was concerned about his anger. It is even troubling that the Defendant had to live in fear in her own house. New rules appeared to have been set by the Plaintiff.’

[9] The court *a quo* was furthermore critical about the attitude of the appellant and stated that although he was articulated, ‘the bias on his person and what he was entitled to leaves a lot to be desired.’ It continued as follows:

‘I got the impression from the Plaintiff that he calculated every move about their dispute. The testimony of Mr Qwabe is telling if he can go as far as asking a department to substitute a colleague because of the Plaintiff.’

[10] The court *a quo* found on the probabilities that the appellant had failed to prove the two alleged assaults and his two claims relating to the institution of malicious proceedings. The court *a quo* referred to and considered the test applicable to mutually destructive versions and the approach to be adopted as set out in *Stellenbosch Farmers’ Winery Group Ltd. and Another v Martell & Cie SA and Others*.¹

[11] The court *a quo* decided to dismiss the action with no order as to costs, contrary to the general rule that the successful party is entitled to their costs. We do not have to concern ourselves with that part of the order in the absence of a cross-appeal.

The grounds of appeal

[12] I do not intend to fully quote the grounds of appeal. The following will suffice. It is alleged that the court *a quo* erred in not considering crucial evidence by the appellant that was not disputed by the respondent, such as that he had requested the respondent to take him to hospital after he had been attacked with a wooden spoon (not a wooden stick as pleaded in the particulars of claim), that the respondent grabbed him at a stage and banged his head against the wall, that the

¹ *Farmers’ Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

respondent's neighbour was the cause of the disputes between the parties and that a male colleague of the respondent interfered with the parties' household.

[13] It is also alleged that the court *a quo* erred to considering the evidence of Pastor Qwabe whilst his version was never put to the appellant. The court *a quo* also erred, so it is alleged, in finding that the appellant presented as a strong-willed person who wanted his will to prevail no matter what and that the respondent lived in fear in her own house.

The applicable test on appeal

[14] It is well established in our law that the trial court is tasked with analysing and evaluating the evidence, and that an appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. The Appellate Division, relying on the frequently quoted *dicta* in *R v Dhlumayo and Another (Dhlumayo)*,² reiterated the trite principle in *S v Francis*:³

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited. . . . Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'

As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings.' (References omitted.)

[15] More recently, in *Makate v Vodacom (Pty) Ltd*⁴ (*Makate*), the Constitutional Court also considered the above principles in the words of Jafta J, writing for a unanimous court:

² *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

³ *S v Francis* 1991(1) SACR 198 (A) at p 204; see also *S v Pistorius* 2014 (2) SACR 315 (SCA) para 30.

⁴ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 37; *AM and Another v MEC for Health, Western Cape* [2020] ZASCA 89; 2021 (3) SA 337 (SCA) para 8.

'[37] ... Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial....

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court....'

[16] Having referred to the authorities, a court of appeal may often be in a better position than the trial court, with the benefit of the full trial record, to draw inferences particularly in respect of secondary facts. In *Makate*⁵ the Constitutional Court reminded us as follows:

'[40] But even in the appeal the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this court affirmed:

"What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the cold printed word. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to tie the hands of appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."

Evaluation of the evidence

[17] The court *a quo* correctly held that the appellant bore the onus to prove all elements of the delicts, *ie* the two assault claims and the two claims relating to the

⁵ *Ibid* para 40; see also *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para 14.

institution of malicious proceedings. Although the respondent relied on self-defence in her plea, this must be seen in proper context. It is apparent from her plea that she denied assaulting the appellant. Consequently, the appellant had to prove the assault. Only then would it be necessary to consider the plea of self-defence relied upon to prove justification. If the action as alleged was admitted, reliance on self-defence would attract an onus to prove that.⁶ This is not the case. The appeal might have been considered differently if the respondent admitted the assaults.

[18] I accept that the cold record often does not reflect all that had happened in the trial court, but in this case the record undoubtedly supports the conclusions arrived at by the court *a quo*. I got a distinct impression from a reading of the record and the transcripts relied upon that the appellant regarded himself as almighty, bearing in mind his rank as Captain in the SANDF and the fact that he is legally trained. I got a further distinct impression that he is a treasure hunter. The two parties lived together in peace in the respondent's house prior to the marriage ceremony, but things changed drastically once the parties married out of community of property with the exclusion of the accrual system. The appellant became aware of the fact that he would not have any right to claim an interest in the respondent's immovable property which she had purchased long before the start of their relationship. It is and will remain her property even in the event of a divorce or upon her demise.

[19] It is also apparent that the appellant is a jealous person. He did not respond kindly to the neighbourly relationship the respondent had with her male neighbour. The evidence makes this clear. Furthermore, the appellant was dissatisfied with the fact that the respondent, being a traffic officer, worked in shifts with a male colleague. He clearly despised this situation.

[20] I am satisfied that the court *a quo* cannot be faulted for the remarks made about the appellant. The mere fact that he went so far as to make tape recordings in order to assist his case to be instituted is sufficient to show his intentions all along. His attitude in his communication with the respondent as recorded by him speaks volumes. He often addressed his wife as 'madam.' This is in my view quite extraordinary. His irritated and arrogant approach is clearly demonstrated in his evidence and the recorded communication. He became aware that he would not be

⁶ *Mabaso v Felix* 1981 (3) SA 865 (A) p 876E-G.

entitled to any pecuniary interest in the respondent's immovable property as a consequence of the marriage regime, unlike as he thought would be the case. Consequently, he devised a scheme to obtain money from the respondent. That scheme collapsed in the court *a quo* and there is no reason to assist the appellant in his endeavours to benefit to the respondent's detriment.

[21] Although the court *a quo* did not mention the appellant's motive in launching these proceedings, the following passage in his cross-examination is telling:

'Mr Mphuloane: You are claiming to have been assaulted but you did not even open a case of an assault.

Mr N[...]: As I have testified to say that it is important then that issues first be resolved within the family. Remember, the marriage was still very young so I had to get the families together.

Mr Mphuloane: So now you are instituting ... Why do you institute this action?

Mr N[...]: Okay, I am instituting the action because she has demonstrated, as far as I am concerned, that at no stage did she ever intended to be my wife. She only wanted certain benefits.'

Later on the cross-examination continued as follows:

'Mr Mphuloane: You are instituting this proceedings today because you established that she does not want to be your wife anymore.

Mr N[...]: No. she never wanted to marry me. She only wanted certain benefits, for me to renovate the house and to put it at the standard where it is now.

Mr Mphulona: So, that is why you are suing her?

Mr N[...]: Correct.' (emphasis added)

This passage must be seen in light of the totality of the evidence and what I have mentioned in the previous paragraph.'

[22] In my view it is improbable that a grown-up man would find it necessary to be admitted at a hospital in order to obtain medication and/or medical treatment for the clearly minor injuries sustained by the appellant on his version. I have no doubt that he went to the hospital, well-knowing that the respondent was on her way to report his aggressive actions to her family and/or the SAPS. It was in any event extremely arrogant to insist (if his version could be believed) that the respondent, the alleged aggressor, should take him to hospital as if he was not in a position to drive there on his own in his own vehicle. His version should have been rejected as false, or at best, wholly improvable. In my view the version of the respondent pertaining to what transpired between the parties relating to the earphone cable and the wooden spoon are more probable as the court *a quo* found. The appellant did not file a claim for assault after his head was allegedly hit against the wall by the respondent, but again, this version appears to be improbable that and is just another example of the appellant's motive to portray the respondent in a bad light.

[23] The evidence of Pastor Qwabe was not put to the appellant. In my view, nothing turns around this in the circumstances. The appellant has shown himself to be a jealous person. The many counselling sessions with the Pastor was never denied. It became clear to the Pastor that the appellant believed that the respondent's male colleague was interfering with their marriage. Appellant's attorney had full opportunity to cross-examine the Pastor and even reminded him of specific issues raised by the appellant during the counselling sessions. Eventually the appellant's attorney merely questioned the relevance of the Pastor's evidence that the appellant had threatened to kill the male colleague.

[24] Insofar as the claims based on malicious proceedings are concerned, I am satisfied that the appellant did not prove the four requirements. In my view, the actions of the respondent have always been *bona fide* in an attempt to ensure her safety in view of the appellant's aggressive and violent behaviour. No finding was or could be made that she acted without reasonable and probable cause, or that she acted with malice, *ie* the intention to injure the appellant.

Conclusion

[25] The court *a quo* correctly found that the appellant failed to prove his case on a balance of probabilities. Consequently, the appeal should be dismissed. There is no

reason why the costs should not follow the result. The successful respondent is entitled to the costs of the appeal.

Order

[26] The following order is made:

The appeal is dismissed with costs, inclusive of the costs of counsel on scale A.

JP DAFFUE J

I concur

NS DANISO J

Appearances:

For appellant:	LBJ Moeng
Instructed by:	Kramer Weihmann Inc Bloemfontein

For respondent:	PS Mphuloane
Instructed by:	Mphatswe Attorneys Bloemfontein