

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: 1766/2009

JEREMY LUKE RIEKERT

First Plaintiff

SHEILA ANN RIEKERT

Second Plaintiff

And

CHRISTOPHER BRANCH

Defendant

Coram: **Chetty, J**

Date Heard: **10 and 11 November 2011**

Date Delivered: **24 November 2011**

Summary: **Delictual** action for damages – Defendant pleading self defence – Medical evidence at complete variance with his version – Consistent only with plaintiff's evidence – Onus not discharged
Quantum of general damages assessed at R150 000.00

JUDGMENT

Chetty, J

[1] During the early hours of the 22nd February 2009, the first plaintiff (the plaintiff), then a first year physical education student at the Nelson Mandela Metropolitan University (**NMMU**), presented himself at the trauma unit of the Greenacres Hospital in Port Elizabeth, where he was examined by Dr L. *Conradie* (Dr **Conradie**). Clinical examination revealed no evidence of drugs or

alcohol and the plaintiff appeared to be calm and co-operated fully. Dr **Conradie** recorded the plaintiff's account of the events which preceded his arrival at the hospital as follows – *“patient reports that he was assaulted tonight. Head butted on left side forehead and sustained human bite wound left thigh”*. His clinical findings he noted as. *“Annular lesion suggestive of human bite wound on lateral aspect of left thigh just above knee. Bruising below left eye. Mild peri-orbital swelling. Depressed fracture left frontal area of forehead with bleeding from left nostril. CT scan report: Depressed fracture of left frontal bone involving left frontal sinus in the roof of the left orbit”*.

[2] On 28 February 2009, Drs *Hein Slabbert* (Dr **Slabbert**) and *Dean Barclay* (Dr **Barclay**), a maxillofacial and oral surgeon and ophthalmologist respectively, performed a joint operation on the plaintiff. The former's, an open reduction and internal fixation of the frontal bone and orbital roof fractures in which he, in his medico-legal report, described as follows:-

“Following induction of anesthesia and intubation the patient was prepared and draped in a supine position. A “fire break” was shaved for preparation of a coronal incision. A coronal flap was raised and the fracture site exposed. The fractured pieces of bone were mobilized, the orbital roof and medial orbital wall was explored and a bony spicule abutting onto the superior rectus was removed. The bony fragments were then replaced and immobilized using Synthes 1.5mm screws and plates. The orbital roof was reconstructed using a resorbable orbital plate secured with a single 1.5mm screw.

The area was irrigated and closed using 2/0, 3/0 Vicryl and Skin Clips. A portable suction drain was placed.”

Dr **Barclay's** participation was necessary to correct the problematic double vision in down gaze in the plaintiff's left eye. During the operation he repaired the depressed fracture over the frontal sinus, repaired the rim of the superior orbit and removed the fragment of bone causing the restriction of the superior rectus muscle. The joint operation proved a resounding success, save for certain *sequelae*, which I shall, in due course advert to.

[3] On 25 June 2009, the plaintiff and the second plaintiff instituted a delictual action for damages against the defendant, Mr. *Christopher Branch*, a fellow student at the NMMU. In their amended particulars of claim they alleged that the defendant wrongfully and unlawfully assaulted the plaintiff by head butting him, gouging his eyes and biting him. In his plea, the defendant denied the unlawfulness of the assault and pleaded that he struck the plaintiff in self defence and in defence of his girlfriend. He denied head butting the plaintiff, contending that he fisted him and counter-claimed, averring, that he had been unlawfully assaulted by the plaintiff.

[4] Prior to the commencement of the trial, the parties, in compliance with the prescripts of Rule 37, held several pre-trial conferences and reached agreement on several key issues, viz the onus, the evidential value of the medical reports, the quantum of the past medical expenses incurred by the second plaintiff and the possible separation of the defendant's claim in reconvention, the quantum

component to stand over for later determination. At the commencement of the trial I made an order in conformity with the last-mentioned request and allowed an amendment to the particulars of claim substituting the plaintiff's mother, Mrs. *Sheila Ann Riekert*, as the second plaintiff.

[5] As regards the burden of proof, the defendant, at the Rule 37 conference, acknowledged that by virtue of his plea, he was saddled with the onus of proving that the force caused by him defending in himself, was, in the circumstances reasonable and commensurate with the plaintiff's alleged aggression. That concession was properly made and although Mr. *Naidu*, in the course of his argument suggested otherwise, the legal position is trite. It is settled law that the onus rests upon the defendant. See **Mabaso v Felix**¹.

[6] The defendant moreover, not only admitted the quantum of the second plaintiff's past medical expenses in the sum of R91 788. 42, but the "*correctness*" of the content of the medical reports and consented to the reports of Drs **Conradie, Meintjies, Barclay, Slabbert** and **Keeley** being admitted as evidence without the need for them to be called as witnesses. Notwithstanding the aforementioned admission Mr. *Naidu* argued that I should not defer to the opinion expressed by Dr **Keeley** in view of what he contended were patent contradictions in his report. The submission is, in my view, untenable. The admission at the Rule 37 conference is at variance with the argument advanced and there is nothing to gainsay Dr **Keeley's** conclusion that the injury to the plaintiff's left

¹ 1981 (3) SA 865 (A)

supra-orbital ridge and adjacent frontal sinus and superior wall of the orbital cavity was caused by a fierce blow from a hard concave surface and not a fist.

[7] Whilst it is true that a court remains the final arbiter and is not bound by expert testimony, it will not lightly reject expert evidence falling within the purview of the expert witnesses' field. An analysis of Dr **Keeley's** report and those of the other medical experts demonstrates, quite unequivocally, the soundness of his opinion. Dr **Keeley's** report was assailed simply because it refuted the defendant's evidence that he had punched and not head butted the plaintiff. It is clear from Dr **Keeley's** report that the injury was consistent with a head butt and this affords corroboration for the plaintiff's testimony.

[8] It is unnecessary to systematically dissect the evidence adduced during the trial because the defendant's version is not only entirely incompatible with the medical opinion but moreover improbable in the extreme. Simply put, the injuries to the plaintiff could not have been caused in the manner testified to by the defendant. It is consistent only with the version deposed to by the plaintiff and his witnesses. It was readily conceded by Mr. *Niekerk* that neither the plaintiff nor *Darren Ausmeier* could be described as particularly impressive witnesses but that fact does not inure to the benefit of the defendant. He was an equally unimpressive witness and upon a holistic appraisal of the evidence, his version is clearly contrived. I am satisfied that he was the aggressor, head butted the plaintiff and clearly did not act in self defence.

Quantum

[9] Although the plaintiff claimed a composite amount of R600 000.00 in respect of *contumelia* and general damages, Mr. *Niekerk* submitted that a fair award would be in the region of R250 000.00. Although Dr **Keeley** expressed the view that the plaintiff made a remarkable recovery, the uncontroverted evidence is that he still suffers occasional headaches and experiences short episodes of facial neuralgia which will endure for the remainder of his life. Save for the aforementioned there are no other lasting *sequelae*. It is furthermore not in issue that the plaintiff was hospitalized for four days and in recuperation for approximately two weeks. Although there were other persons in the vicinity, the actual head butt was totally unexpected and by the time the plaintiff and the defendant fell to the ground, the latter was in the ascendancy, and the fight, over, in a matter of minutes. The *contumelia* suffered by him must be assessed accordingly. All things considered I am of the view that an award of R150 000.00 to be a fair sum to compensate the plaintiff for general damages and *contumelia*.

[10] As regards the merits of the defendant's claim in reconvention, Mr. *Naidu* was constrained to concede that there was no evidence to support such a claim and properly made no submissions thereanent.

[11] In the result the following orders will issue: -

1. The defendant is ordered to pay the plaintiff the sum of R150 000.00 as and for general damages.
2. The defendant is ordered to pay the second plaintiff the sum of R91 788. 42 in respect of past medical expenses.
3. Interest on the aforesaid amounts from the date of service of the summons until date of payment.
4. Costs of suit, including the fair and reasonable qualifying expenses of Dr. Keeley.
5. The defendant's counter-claim is dismissed with costs.

D. CHETTY
JUDGE OF THE HIGH COURT

On behalf of the Plaintiffs':

(041) 501

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