IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. A375/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE 11 SEPTEMBER 2020
SIGNATURE

In the matter between

R Claassen **Appellant**

and

S Barnard **Respondent**

Coram: Meyer J, Mdalana-Mayisela J, Munzhelele AJ

JUDGMENT

Munzhelele AJ

Introduction

[1] An order for absolution from the instance with costs was granted with costs in the Pretoria High Court (Tlhapi J) against the appellant in respect of the delictual claim for damages arising from a gunshot injury, which he sustained on 7 March 2014. The trial court found in favour of the respondent in respect of his delictual counter-claim for damages arising from an assault perpetrated on him and ordered that the appellant was responsible for 100% of

the proven damages suffered by him as a result thereof. The appellant brought an application for leave to appeal against these orders by the Pretoria High Court.

[2] He was subsequently granted leave to appeal against both orders by the trial court. The core question to be decided on appeal is whether the court a quo assessed the mutually destructive versions of the appellant on the one hand and the respondent and his witnesses on the other hand properly, when it ultimately found that the respondent and his witnesses were credible and reliable witnesses.

[3] During argument before us Advocate Stanley who was representing the appellant could not pursue the argument that an order of absolution from the instance cannot be made at the end of a trial in terms of the law. He realised that he was the one who was mistaken; not the trial court.

Background facts

[4] The material facts which constitute the background to this appeal were fully canvassed in the judgment of the court a quo. Very briefly the respondent and his friend Mr Frikie Nel (Mr Nel) `found themselves at Kroonstad resort on the 7th March 2014 waiting for their car (a Toyota Fortuner) to be fixed before they could continue their journey to Johannesburg. After Mr Nel received a phone call that the car had been fixed and would be delivered to them at the entrance gate to the Kroonstad resort, Mr Nel and the respondent proceeded to the gate. While walking to the gate the appellant approached them, accusing them that they had stabbed one Mr Huebsch with a knife. They both denied these allegations.

[5] They proceeded to their car. The appellant told them not to leave but to wait for the police to arrive. The two got into their car intending to drive off. The appellant, seeing that they were driving off, jumped onto the running board below the driver's door, trying to remove the car keys from the ignition. He was not able to take the car keys from the car. From here onwards the accounts of the appellant on the one hand and of the respondent and his witnesses on the other hand diverge. The respondent maintained that the appellant also attacked him while he was sitting in the car by punching him in the face with his fist, which the appellant denied. The aggression then escalated resulting in the respondent producing a fire-arm and firing shots;

according to the respondent into the ground as warning shots in order to stop the approaches by and attacks of the appellant, and according to the appellant the shots fired were aimed at him.

[6] What is, however, common cause, is that at some stage when the respondent got out of the car, the appellant pulled the respondent's shirt above his head and punched him in the face with his fist. According to the appellant they were still in that standing position, when he heard another gunshot fired, which turned out to be the one that entered his abdomen. According to the respondent, on the other hand, once the appellant had pulled his shirt above his head and punched him in the face, they both landed on the ground, rolling and wrestling and the appellant trying to get hold of his firearm. It was during that struggle that the firearm went off and caused the appellant to sustain a gunshot wound to his abdomen. The appellant denied that the two of them rolled and wrestled on the ground. Mr Nel and an independent eyewitness, Mr Jonker, who did not know the appellant or the respondent, saw the respondent and the appellant wrestling on the ground when a firearm shot went off.

[7] Adv Stanley argued on behalf of the appellant that the court a quo did not properly consider the mutually destructive versions of the appellant and the respondent more specifically with regard to the contradictions between the evidence of the respondent and his two witnesses regarding the shooting and the assault on the appellant. He also argued that the credibility of all three witnesses was questionable.

[8] On the other hand Adv Zietzman argued on behalf of the respondent that the main issue to be decided by the court a quo was whether the appellant was shot while standing or whether the shot was fired when they were on the ground wrestling over the gun. He argued further that there are two witnesses (Mr Nel and Mr Jonker) who said that the appellant and the respondent were on the ground wrestling when the shot was heard.

Legal principle

[9] We are called upon by the appellant to decide on factual issues as well as on credibility. As was said in *S v Leve* 2011 (1) SACR 87 (ECG) at para 8:

"The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The

trial court's findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See also the well-known case of *R v Dhlumayo* and Another 1948 (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204C-F.".

[10] It is a trite principle that when dealing with mutually destructive versions, the trial court will have to evaluate the credibility of the various witnesses, the reliability of their evidence as well as the probabilities accorded to such testimony. (See *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA) Nienaber JA).

Discussion

[11] The trial judge was alive to the fact that the respondent's evidence and that of his witnesses were not without discrepancies, but found the discrepancies as there were to be immaterial and took into account that there was a lapse of time from the date of the incident to their testimony in court. In *Mkohle* 1990(1) SACR 95 (A) Nestadt JA said:

'contradictions per se do not lead to the rejection of a witness' evidence .... They may simply be indicative of an error'.

The Judge further quoted with approval the case of S *v Oosthuizen* 1982 (3) SA 571 (T) quoting from 576G-H:

'it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were 'of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction'. One could add that, if anything, the contradictions points away from the conspiracy relied on. (98f-g)'

[12] A reading of the record supports the court a quo's favourable credibility finding of Mr Jonker as a witness and the reliability of his evidence. He testified that he was able to see both the appellant and the respondent wrestling on the ground when a shot went off. The evidence of Mr Jonker was of an independent witness who impressed the trial Judge. The trial Judge critically examined the differences in the evidence of the appellant and that of the respondent and his witnesses with a view to establishing whether the appellant's evidence is reliable and found the evidence of the appellant to be unreliable and improbable in the circumstances.

[13] The trial Judge's evaluation of the evidence is, in my view, above criticism. I am unable to hold that her findings of fact and credibility are vitiated by any irregularity and an examination of the record of the evidence does not reveal that those findings are patently wrong. In fact, an examination of the record of the evidence leads me to agree with the trial Judge that the appellant had been the aggressor from the outset when he started with baseless accusations of the person who had been stabbed. Without enough information regarding the stabbing of his friend, he accused the respondent and even started to be violent with him. That is, he assaulted him and also wanted to take the car keys from the moving car of the respondent. He even pulled the shirt of the respondent over his head to disorientate him and to disarm him of his firearm.

[14] From the totality of the evidence, the respondent was not the aggressor. The appellant sustained the gunshot wound to his abdomen during the wrestling and rolling on the ground. There are two witnesses who saw them wrestling on the ground during which time the firearm had been discharged. It is improbable that the appellant would have repeatedly approached the respondent, being the person who was armed with a fire-arm, and even hit him in the face, if the respondent acted aggressively towards him.

[15] The trial Judge was justified to find on a balance of probabilities that the appellant failed to prove his case. Upon a consideration of the judgment of the trial court, it is apparent that the Judge had thoroughly assessed the facts on both versions of the parties when she made her findings on credibility, reliability and the probabilities. I have further found that the trial Judge had properly applied her mind in assessing the mutually destructive versions, as a result the argument of the appellant in submitting that she did not deal with mutually destructive versions correctly is therefore misplaced. I can, therefore, not interfere with the trial judge's findings.

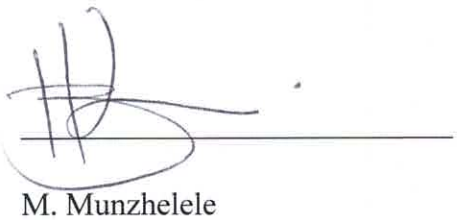
[16] I will proceed now to consider the order that appellant was 100% responsible for the proven damages suffered by the respondent. Appellant conceded that he assaulted the respondent with fists. During evidence it was apparent that the appellant wanted the respondent not to drive from Kroonstad. He wanted him to wait for the police to arrive. The reason for that was that the appellant was accusing the respondent of having stabbed Mr Heubisch. The appellant testified that he was defending himself when he assaulted the respondent. However, he dismally failed to prove any such self- defence.

[17] The trial Judge when analysing the evidence found that appellant was the aggressor throughout the incident. The respondent did nothing to the appellant which warranted him to

defend himself in the circumstances. Appellant took the law into his own hands; he accosted the respondent. The trial judge found correctly when she ordered that the appellant was responsible for the proven damages which the respondent had suffered.

[18] In the result the following order is proposed.

The appeal is dismissed with costs.



M. Munzhelele

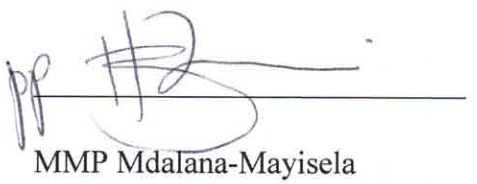
Acting Judge of the High Court

Johannesburg

I agree and it is so ordered:

P.A. Meyer
Judge of the High Court
Johannesburg

I agree



MMP Mdalana-Mayisela

Judge of the High Court

Johannesburg

Appearance on behalf of the appellant: Adv. Stanley

Instructed by: VZLR INC

Appearance on behalf of the respondent: Adv. Zietzman

Instructed by: Day & Schilling Attorneys

Date Heard: 12 August 2020

Date Delivered: Heard through video recording and the judgement was uploaded on Caselines on 11 September 2020.