




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 23000/2017**

<b><u>DELETE WHICHEVER IS NOT APPLICABLE</u></b>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>10/02/2020</u>	
DATE	SIGNATURE

In the matter between:

**FREDERICK PETRUS FOURIE**

Plaintiff

and

**WAYNE STEFAN DU TOIT**

Defendant

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**JUDGMENT**

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**YACOOB J:**

1. On 16 August 2014 Mr du Toit playing in the finals of a rugby league at Marks Park Sports Club.<sup>1</sup> His wife attended the evening with him. Mr Fourie was also at the event. Mr Fourie and Mr du Toit got into an altercation after the match and Mr du Toit fell backwards, injuring himself in the process.

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<sup>1</sup> It was common cause that, although the pleadings referred to Pirates Rugby Club, the incident took place at Marks Park Sports Club.

2. Mr Fourie laid assault charges against Mr du Toit, and the charges were prosecuted in the Johannesburg Magistrate's Court, but Mr du Toit was discharged in terms of section 174 of the Criminal Procedure Act, 51 of 1977.
3. Mr Fourie, the plaintiff, now seeks damages from Mr du Toit, the defendant, for the harm he has suffered. Mr du Toit, in turn, has instituted a counterclaim for malicious prosecution relating to the charges laid by Mr Fourie.
4. It is common cause that there was an altercation between the two men. It is also not disputed that Mr Fourie suffered certain injuries. What is at issue are the details of the encounter between the two men, and the cause of Mr Fourie's injuries.
5. The parties agreed and requested that the merits of the claims should be separated from the quantum, and I made an order accordingly. Quantum has been postponed *sine die*.

### **The plaintiff's case**

6. The plaintiff's first witness was Mr Ashley Slater. He was an eyewitness. He was playing in the semifinal of the rugby tournament, which started at 9pm. Mr Slater had arrived at Marks Park at about 7pm.
7. The Mr Fourie was already there, in the bar area, buying a drink at the bar. At that time he greeted the Mr Fourie, and although he was not drunk he had obviously had "a couple of drinks". Mr Slater did not know Mr du Toit and could not say whether he was there or not.

8. After he met Mr Fourie in the bar, Mr Slater changed into his kit and went to warm up and play the match, which his team won. He was walking back towards the Bar area with two friends, Messrs Labuschagne and Poulter. This was at about 11pm, as the match lasted 40 minutes per half, and had a half time of about 15 minutes. The match had been played on the B field. Mr Slater and his friends were standing at the side of the A field, 20 to 30 metres from the bar, and Mr Slater was facing the bar area. The whole area was brightly lit for the night games.
9. Mr Slater saw Mr Fourie talking to a woman, whose back was against the wall. He then saw another man (it is common cause this was Mr du Toit and the woman was Mrs du Toit)) near Mr Fourie, who then punched Mr Fourie. Mr Fourie fell down.
10. Mr Slater was shown some photographs of the area, and identified where the incident took place, as well as where he and his friends were standing. Mrs du Toit was standing leaning on the wall between the bar window and a sign, and Mr Fourie was across from her, facing her. Mr Fourie had his left arm on the wall which the woman was leaning against.
11. Mr Slater testified that he did not see much of the interaction, and could not see Mr Fourie's face because his back was towards Mr Slater. He testified that it did not look from what he could see as an aggressive encounter. Mr Fourie did not hold or grab Mrs du Toit at all. He saw Mr du Toit hand something, a wallet or phone, and his drink to his wife and then punched Mr Fourie in the face.

12. Mr du Toit punched Mr Fourie once, with his right hand, in the face. Mr Fourie fell backwards and Mr Slater ran across and grabbed Mr du Toit by the hoodie he was wearing and asked him what he was doing. Some of the other rugby players separated them.
13. Mr Slater then turned his attention to Mr Fourie, and found Mr Labuschagne (the plaintiff's other witness) already with him. He noticed that Mr Fourie had some bruising on his cheek and that he was bleeding a lot, and was already lying in a puddle of blood. While Mr Labuschagne tried to telephone an ambulance, Mr Slater went to the changing rooms to call one of the rugby players who was a firefighter and knew some first aid. Mr Nel, the firefighter, got to Mr Fourie after about four minutes, and turned him from his back into the recovery position. The paramedics arrived 15 or 20 minutes after that.
14. When Mr Slater returned to Mr Slater he did not see Mr du Toit and also did not look for him. He did not see him when the paramedics arrived. Mr Slater was certain that Mr du Toit did not "separate" Mr Fourie from Mrs du Toit as pleaded by Mr du Toit, and that Fourie did not simply fall because he stumbled or tripped or was intoxicated. He was adamant that Mr Fourie fell as a result of Mr du Toit's blow.
15. The incident happened very quickly, within the space of about five seconds, there was not really time in between for him to look away. However Mr Slater did not actually see exactly how Mr Fourie fell because he ran towards Mr du Toit after he punched Mr Fourie. He did see him falling, but his attention was on Mr du Toit.

16. Mr Slater was also certain that the area depicted in photographs of the area submitted in evidence was as it was on the night. In particular, there was concrete at the place where Mr Fourie's head had landed. There was also no big 20 or 30cm step down from the bar area, where Mr Fourie may have stumbled. He had played at Marks Park regularly although it was not his club.
17. Also, Mr Slater had not had anything to do with the taking of the photographs, and placement of certain markers. He did not know why one item was in the picture if it was a marker.
18. Mr Labuschagne was the plaintiff's second witness, he was a team mate of Mr Slater's, he was "on the bench" and did not actually play. He arrived at sometime between 18h30 and 19h00 to attend the match. He had been at school with Mr du Toit. They are friends but do not see each other regularly.
19. Mr Labuschagne first saw Mr Fourie around 19h00 or 19h30 in the vicinity of the bar. Mr Labuschagne was with his wife and teammates. He interacted with Mr Fourie for between 5 and 10 minutes. Mr Fourie was not at that stage heavily intoxicated. Mr Fourie was "enjoying himself".<sup>2</sup>
20. After the match Mr Labuschagne and his teammates went back towards the change rooms and stopped on the side of the field near the bar, having a conversation. They noticed an altercation at the bar area. Mr Labuschagne looked up, he saw Mr Fourie falling, and ran up to help his friend. There was blood all over Mr Fourie's face.

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<sup>2</sup> It is not certain whether Mr Kriel meant by the question whether Mr Fourie was "enjoying himself" that he was somewhat intoxicated.

21. Mr Labuschagne did not see Mr du Toit hit Mr Fourie as his side was toward the bar. As far as Mr Labuschagne knows nobody at the scene suggested that Mr Fourie tripped and fell.
22. Mr Labuschagne had noticed Mr Fourie at the bar area before the altercation, while he was walking back after his match, and before his group had stopped to converse. He did not notice Mr Fourie making physical contact with Mrs du Toit, nor did he notice that Mr Fourie appeared to be heavily intoxicated. He saw Mr Fourie apparently enjoying the evening with a drink in his hand.
23. Mr Labuschagne did not see what happened between Mr Slater and Mr du Toit. He was concerned with Mr Fourie, there was blood on the back of his head and a cut on his bottom lip.
24. Mr Labuschagne identified the area in the plaintiff's photographs as where the incident happened. He said Mr Fourie took the photographs and Mr Labuschagne was not with him. However in cross examination he conceded that Mr Fourie asked him to go with him and he did. Mr Labuschagne confirmed Mr Slater's description of the area, including that it was brightly lit on the night, that there was concrete in the area where Mr Fourie landed, and that there was no large step.
25. Mr Labuschagne acknowledged that he and Mr Slater were friends and had occasionally discussed the incident the day after it happened but not more than that.
26. He thought that Mr Fourie wanted him to go and show him where the incident took place for purposes of the photographs because he had been in a lot of pain and bleeding and probably did not recall exactly what had happened. Mr

Labuschagne had placed the flip flops in the picture which indicated where Mr Fourie had fallen and so on.

27. He was certain that Mr Fourie's back was towards the field, but he could not say more about his position. He heard a commotion at the bar area, that is what attracted his attention. Mr Slater then shouted Frikkie and started running, and Mr Labuschagne did too. He saw Mr Fourie falling straight backwards. It all happened very quickly.

28. Mr Labuschagne is certain that he saw the plaintiff fall straight backwards. He did not turn or try and save himself. Mr Labuschagne did not see anything that was consistent with Mr du Toit's version. He contends that he would have done so even though he was not facing the bar, they were still within his line of vision.

29. Mr Fourie was the plaintiff's last witness. He is as a plumber and works as a site foreman in a construction company owned by his brother. He had never before met Mr or Mrs du Toit. As a result of his injuries he was in a coma for a week and in hospital for some time after. He suffered a brain injury, lost a tooth and gets mild headaches. He also suffered a split lip. He also is now afraid to speak to strangers.

30. He remembers going to Marks Park with his friend Mark and Mark's wife, and arrived around 6.30 before the sun went down. He was drinking but he doesn't remember if he was intoxicated. He was talking to Mark and Charl, his friends. He remembers going to the bar and going to the toilet, but the rest of his memory is what people tell him happened. He remembers neither his interaction with Mrs du Toit nor the altercation.

31. Mr Fourie laid the criminal charge because the club manager of the Police rugby team told his brother Mr du Toit had assaulted Mr Fourie, and Mr Fourie's brother told him. Mr Slater and Mr Labuschagne had also told him Mr du Toit had assaulted him. He believed what he was told.

32. Under cross examination Mr Fourie said that he only went to the bar and started drinking after the 7pm game had started. The contention that he was "happy" meant only that he was a happy person. He agreed that he had more than five drinks but did not know if he'd had more than ten. He was having double brandies and coke.

33. Mr Fourie agreed that anything could have happened but he didn't remember it, and that he believed what he had been told, that Mr du Toit hit him in the face.

#### **The defendant's case**

34. Mr du Toit was the defendant's first witness. He was playing in the Joburg Police second team and also as a reserve for the first team. He played until around ten and then sat on the bench. After the team celebrated a win, he went and changed, found his wife, and then went to get a drink. This was just after 10.30pm.

35. He came outside after getting a drink from the bar, he had been inside for two or three minutes. He saw someone gripping his wife. He put his drinks down and came in between them. His wife's back was towards him at an angle. He heard his wife saying "no". After he came between his wife and the other person (who was Mr Fourie), he turned around and saw that Mr Fourie had fallen.



36. Mr du Toit bent over Mr Fourie who mumbled something. He could smell alcohol on him. He told his wife that Mr Fourie was just drunk. He denies that he hit Mr Fourie.
37. Mr du Toit then got up and a number of people gathered, and Mrs du Toit felt uncomfortable so they left. Mr du Toit's evidence was that nobody grabbed him or challenged him. Mr Fourie's friends were merely standing around and talking with Mr Fourie.
38. His evidence was that the criminal case cost him a job opportunity in Australia and caused a lot of stress and expense. In his view there was never sufficient evidence against him, and he testified that a police officer had told him he doesn't know why "they are pushing this further".
39. According to Mr du Toit there was no concrete slab at the place where the incident took place, and that there was quite a high step, between 20 and 30cm. He did not see Mr Fourie fall, he heard him hit the ground. He does not know how Mr Fourie got a split lip and a broken tooth.
40. Mr du Toit did not know Mr Fourie before, and also did not know Mr Slater and Mr Labuschagne.
41. In cross examination Mr du Toit testified that he "did a loop" and came between them. There was no force, he simply moved between them. He thinks that Mr Fourie fell immediately, or a split second later. He does not think the contact between him and Mr Fourie made Mr Fourie fall. He thought that Mr Fourie may have lost his balance as he let go of Mrs du Toit.

42. In cross examination however Mr du Toit conceded he had physical contact with Mr Fourie in breaking the contact of Mr Fourie's arm with MRs du Toit.

43. It was Mr du Toit's impression that Mr Fourie was so intoxicated that he could not stand properly or keep his balance. It was also his impression that he was intimidating Mrs du Toit. Mr Fourie has said something to her Mr du Toit could not hear.

44. Mr du Toit stated that he had seen Mr Fourie while he was in the bar – urinating at the side of the bar and he told the bartender about it. This was never put to Mr Fourie in cross examination. He also says he did not see any blood gushing from Mr Fourie's nose and mouth, but this too was never put to the plaintiff's witnesses.

45. Mr du Toit said that to the extent his evident differed from his pleadings, he was simply trying to explain himself. Where the pleadings refer to him having acted as he did to "protect the physical and emotional integrity" of Mrs du Toit, he did not draw the pleadings so he could not answer to that. He did believe she was in danger and needed to intervene.

46. When it was put to Mr du Toit that there was no evidence that the prosecution was malicious, Mr du Toit stated that there was evidence but his attorneys had advised him it was not for this part of the case. In his view the prosecution was malicious because the investigating officer had told him Mr Fourie and his brother were hounding the investigating officer.

47. Mrs du Toit testified next. She testified that she was standing outside the clubhouse on the stoep waiting for her husband while he got a drink. She was

leaning against the wall with her shoulder, and heard someone speaking to her. It was Mr Fourie. He said he'd been watching her the whole day. He was coming from behind the clubhouse.

48. She then asked him not to speak to her because he was really drunk and slurring and could not make eye contact. She asked him not to speak to her, and he came into her personal space. He then grabbed her arm and started pulling her towards him. She tried to resist, and her husband came out at that point.

49. Between the time Mr Fourie approached her and her husband came back, it was a minute or two, probably less than two minutes.

50. Mr Fourie had been swaying around trying to say something when he approached her. After he grabbed her hand she had to move forward so that she did not fall forward. She felt uncomfortable that he had been watching her all day.

51. Mrs du Toit was not aware of anything in Mr du Toit's hands, she was not focused on her husband but on trying to get away from Mr Fourie. Mr du Toit came in between her and Mr Fourie, and she saw Mr Fourie turn and walk away from them. In fact he turned away as Mr du Toit came between them. Her husband then turned and saw Mr Fourie on the ground. He bent over him, She asked Mr du Toit if Mr Fourie was okay, he said yes, and they left.

52. Mrs du Toit does not remember that there was any concrete on the ground. There was just the ground. There was a ledge that she would sit on when waiting for her husband, about 20 or 30 cm high.

53. In her opinion Mr Fourie was under the influence of alcohol, he was slurring, did not look her straight in the eye, and was drooling. She did not like what he said and felt intimidated.

54. When the inconsistency between her evidence that Mr Fourie turned and walked away, and Mr du Toit's evidence that he heard Mr Fourie fall immediately he came between Mr Fourie and Mrs du Toit, she said that she did not focus on Mr Fourie as she was disturbed. However she had earlier been certain that Mr Fourie walked away. Later she said that when she followed her husband to where Mr Fourie had fallen it was behind her. She did not notice any injuries. There were people around him who were just standing there.

55. Mrs du Toit stated that there was no conversation between her and Mr Fourie, and he did not stand with his hand against the wall. She also stated that although it was not dark on the stoep it was also not brightly lit. She was sure her husband did not punch Mr Fourie. When her husband turned around to see what had happened, Mr Fourie was not injured.

## **Analysis**

56. The questions then to be determined are whether:

56.1. Mr du Toit hit Mr Fourie;

56.2. Mr Fourie's injuries resulted from the encounter, and

56.3. Mr Fourie laid charges against Mr du Toit without a reasonable basis and out of malice.

57. The two versions that have been presented before me in the main claim are mutually destructive.

58. The first is that Mr du Toit punched Mr Fourie (for whatever reason), Mr Fourie fell backwards, and was injured both by the punch and by the fall. The fall resulted in him hitting his head on a concrete slab on the ground, which caused a head injury.

59. The second is that Mr Fourie was extremely drunk, lost his balance and fell when Mr du Toit gently inserted himself between Mr Fourie and Mrs du Toit, and was not visibly injured at the time Mr and Mrs du Toit last saw him. There was no concrete slab on the ground at that time.

60. It is notable that, rather than pleading a justification such as personal defence or necessity, Mr du Toit's version is simply that he did not do anything to Mr Fourie that may have resulted in the injuries, and in fact, that there were no visible injuries when he left him.

61. The approach to be followed by a court in deciding on mutually destructive versions is well- established. It is summarized by the Supreme Court of Appeal:<sup>3</sup>

To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not

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<sup>3</sup> *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at [5].

necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

62. It is not disputed that Mr Fourie was injured and spent some weeks in hospital.

The injuries he describes are also not disputed. As a matter of logic, they are consistent with someone being punched in the mouth (the split lip and broken tooth) and falling to hit their head on a hard surface (the head injury and unconsciousness).

63. It is also not disputed that Mr Fourie was talking to Mrs du Toit, and that she did not welcome his company. I accept for purposes of this analysis that she found him unpleasant and intimidating. I accept also that Mr du Toit was concerned and wished to protect her from the unwelcome advances Mr Fourie was making.
64. Taking as equal the demeanour of the witnesses, there are a number of fundamental improbabilities in Mr du Toit's version which weigh against his case.
65. The first is that, Mr du Toit being concerned to protect his wife from the unwelcome attention of Mr Fourie, he inserted himself between them extremely gently in a way that would not have impacted Mr Fourie had he not been so drunk that he could not keep his balance. In my view the likelihood is that Mr du Toit was not concerned with being gentle, and is more likely to have been rough towards Mr Fourie.
66. The second is that Mr Fourie fell so hard as a result of this apparently gentle movement by Mr du Toit, that Mr du Toit heard the fall rather than seeing it (his version being that his back was towards Mr Fourie), despite there being allegedly no concrete or hard surface on which he could have hit his head.
67. The third is that, although Mr Fourie was apparently so drunk that he could barely walk, he was inside the bar urinating, and then had time to come outside and accost Mrs du Toit before Mr du Toit came outside, despite Mr du Toit being away from her for less than two minutes.
68. There is nothing fundamentally improbable, in my view, in the versions of the plaintiff's witnesses. Taking into account the injuries for which Mr Fourie was

hospitalized, and that there is no contention that either of the eyewitnesses had anything to gain from false testimony, the likelihood is that the events after Mr du Toit came out of the bar occurred in the manner described by Mr Slater and Mr Labuschagne.

69. Mr Kriel suggested that, if the injuries were in fact suffered as contended, and Mr Fourie did not move after the incident, until the ambulance picked him up, and there was no other incident, the plaintiff ought to have brought more witnesses to testify to that. As it is the plaintiff brought two witnesses to testify to the events, which are essentially undisputed. One wonders how many witnesses would have satisfied Mr Kriel.

70. In any event the defendant also did not bring further witnesses to support his version, despite the number of people that were there on the night. So there is nothing in that submission.

71. On the probabilities, therefore, I find for the plaintiff.

72. As far as the counterclaim is concerned, it was contended for Mr du Toit that Mr Fourie had no real basis for laying the charges, and that his persistence was proof of malice.

73. In my view there is no proof of malice on Mr Fourie's part. He suffered a devastating injury and reasonably believed that Mr du Toit had inflicted it on him. The counterclaim must fail.

74. In the circumstances I make the following order on the merits of the claim and counterclaim:



- (1) The plaintiff's claim is successful on the merits.
- (2) The issue of the quantum of the plaintiff's claim is postponed *sine die*.
- (3) The defendant is to pay the costs of the plaintiff's claim.
- (4) The counterclaim is dismissed with costs.



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**S. YACOOB**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances**

Counsel for the Plaintiff	: W.C Carstens
Instructed by	: Jonathan Van Druten Attorneys
Counsel for the Defendant	: C Kriel
Instructed by	: Spruyt Lamprecht & Du Preez Attorneys
Date of hearing	: 14 and 18 June 2019
Date of judgment	: 10 February 2020