THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 447/2023

In the matter between:

ANDREW MERRYWEATHER **APPELLANT**

and

OLIVER SCHOLTZ **FIRST RESPONDENT**

GERARD DAVID PETER SCHOLTZ **SECOND RESPONDENT**

Neutral citation: *Merryweather v Scholtz and Another* (447/2023) [2024] ZASCA 150 (6 November 2024)

Coram: PONNAN, SMITH and UNTERHALTER JJA and KOEN and MANTAME AJJA

Heard: 23 September 2024

Delivered: 6 November 2024

Summary: Appeal – civil appeal from full court – trial court's reliance on inadmissible evidence constituting an irregularity – appellant failed to discharge onus on admissible evidence – no special circumstances justifying grant of special leave to appeal to the Supreme Court of Appeal.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town, (per Slingers J, with Goliath DJP and Ralarala AJ, sitting as a court of appeal).

The appeal and cross appeal are struck from the roll with costs.

JUDGMENT

Koen and Mantame AJJA (Ponnan, Smith and Unterhalter JJA concurring)

Introduction

[1] This is an appeal against a judgment of the Full Court of the Western Cape Division of the High Court, per Slingers J, with Goliath DJP and Ralarala AJ concurring (the full court), which upheld an appeal from a decision of Meer J (the trial court). The appellant, Andrew Merryweather (Andrew)[1] had succeeded before the trial court in a delictual claim against the first respondent, Oliver Scholtz (Oliver), but he was unsuccessful in a claim for the payment of his costs against the second respondent, Oliver's father, Gerard David Peter Scholtz (Gerard).[2] The trial court granted leave to Oliver to appeal to the full court against the judgment, and to Andrew to cross-appeal the refusal of the costs order against Gerard (the cross-appeal).

[2] The full court set aside the order of the trial court and replaced it with an order dismissing Andrew's claim with costs. The full court did not make a separate order in respect of the cross-appeal. It reasoned that the cross-appeal was conditional on the failure of Oliver's appeal, and as the appeal succeeded, the cross-appeal fell away.

[1] The various role players are referred to by their first names rather than their surnames, for ease of reference, to distinguish between Andrew and his brother Nicholas, and Oliver and his father, Gerard. No disrespect is intended.

[2] The trial court in its reasons stated that there was no evidence warranting a costs order against Gerard and that it was in the circumstances disinclined to grant the costs order against him.

[3] Special leave[3] to appeal was granted on petition to this Court, in respect of both the appeal and the 'cross appeal'. That two judges of this court granted special leave to appeal does not mean that we are not required to consider whether we should entertain the appeal.[4] The judges considering the petition did not have the benefit of the full appeal record. It remains for this Court on a conspectus of the full record to determine whether there are indeed special circumstances present. That is because this Court will not interfere with a decision of a court, given on appeal, even if it considers the decision may possibly be wrong, unless there is some additional factor or criteria that play a part in the granting of special leave.[5] The preliminary question in this appeal is whether there are such special circumstances present to justify a further appeal to this Court. In answering that question, and particularly given the divergence between the trial court and the full court in respect of both the approach to and assessment of the issues, a rather more detailed consideration of the evidence than at first blush may appear necessary, is unavoidable.

Background

[4] During the early hours of 9 September 2006, a physical altercation occurred between two groups of young men at the Engen garage, Vineyard Motors, in Main Road, Newlands, Western Cape. The one group consisted of Andrew, his younger brother, Nicholas Robert George Merryweather (Nicholas), and a friend, Progress Mphande (Progress). The other group included Oliver, Joel Thackwray (Joel), Liam Hechter (Liam), Shane David Waldendorf (Shane) and Dane Killian (Dane). During the altercation Andrew sustained a compression flexion type V fracture of his seventh cervical vertebrae, with an incomplete spinal cord injury. This injury has left him permanently partially paralysed, and wheelchair bound.

[5] Oliver, Joel, Liam, and others from their group, excluding Shane who had become a witness for the State, were charged criminally in the regional court, Wynberg (the

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[3] Section 16(1)*(b)* read with Section 17(3) of the Superior Courts Act 10 of 2013.
[4] *National Union of Mineworkers v Samancor Ltd* [2011] ZASCA 74 para 15.
[5] *Westinghouse Brake and Equipment (Pty) Ltd* v *Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) (*Westinghouse*) at 561E-F.

criminal trial) with the attempted murder of Andrew, and assault with intent to do grievous bodily harm in respect of Nicholas. Joel was convicted of the assault, but that conviction was set aside on appeal. Oliver and his other co-accused were acquitted on all the charges.

[6] Andrew (as the first plaintiff) and Nicholas (as the second plaintiff) had in the interim instituted an action for damages, the subject of this appeal, against Joel, Liam and Oliver, as the first, second and third defendants respectively.[6] Default judgment was granted against Oliver,[7] but rescinded on appeal.

[7] At the commencement of the trial, the trial court ruled,[8] relying upon *Mabaso v Felix,*[9] that, as Oliver was invoking self-defence, he bore the duty to begin and should ordinarily bear the onus of proving the self-defence. It is trite law that the duty to begin must be determined with reference to the allegations in the pleadings.

[8] In the original particulars of claim dated 15 April 2009, Andrew alleged that Joel, Liam and Oliver wrongfully, unlawfully and provocatively referred to him as a homosexual, and intentionally assaulted him by grabbing and pushing, kicking and punching and throwing and/or tackling him against a stationary motor vehicle. The allegation of 'tackling' was amended subsequently, on 19 August 2019, to 'spear tackling' after that term had been referred to during the criminal trial.

[9] In his plea, Oliver denied having referred to Andrew as a homosexual. He also denied wrongfully and intentionally assaulting Andrew. He pleaded, 'without derogating

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[6] On 25 March 2010 Andrew's action against Joel and Liam was separated from his action against Oliver, his action against Oliver was separated from Nicholas' action against Joel, Liam and Oliver, and the trial by Andrew against Oliver was ordered to proceed on a default judgment basis.
[7] Default judgment for R10 291 100 was granted against Oliver on 14 June 2013.
[8] The application was premised on Rule 39(11) of the Uniform Rules of Court which reads as follows:
'Either party may apply at the opening of trial for a ruling by the court upon the onus of adducing evidence and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice'. The ruling is reported as *Merryweather v Scholtz* 2020 (3) SA 230 (WCC).
[9] 1981 (3) SA 865 (A).

from the aforesaid denial, and purely in amplification thereof', that: Andrew and Nicholas had taunted him; Progress had prodded and pushed him, and knocked him under his chin; Nicholas had grabbed his shirt in an aggressive manner; he had put his arms around Nicholas to prevent any further attack; and, Andrew hit him on his back whereupon he let go of Nicholas. He pleaded further that after he had pushed Andrew off and he (Oliver) was in the process of moving away, Andrew then came towards him as if to tackle him. To avert this attack, he grabbed Andrew at the side of his shoulders, turned him with a swivel action and pushed him away, whereupon Andrew accidentally lost his footing and fell. He alleged that throughout the unlawful attack and/or further threatened attack on him, he had reasonable grounds to believe that Andrew posed a physical danger to him, and that the physical force used by him against Andrew was in the circumstances necessary to repel Andrew's attack and commensurate with the attack.

[10] On a proper construction of the pleadings, the denial of the assault meant that the duty to begin and the overall onus remained on Andrew.[10] The ruling of the trial court regarding the duty to begin was wrong.[11] This is implicit from the trial court's own reasoning that there was 'an admission to an assault . . . *albeit not the precise assault as described in the particulars of claim'.* (Emphasis added) The ruling resulted in Oliver having to present his case before Andrew adduced any evidence. This, however, need not unnecessarily detain us because it is not in contention that for Andrew to succeed with his claim, he bore the onus to prove the spear tackle.[12]

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[10] In *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd* 2004 (6) SA 252 WLD at 255H–256 D the Court observed that the term *'onus* of adducing evidence' has two meanings. 'It refers firstly to the duty to commence leading evidence and secondly to incidence of the *onus* of proof.'

[11] If regard is had to the case that was pleaded, the trial court erred in ruling that Oliver had a duty to begin for inter alia the following reasons; the trial court was incorrect when it found that the respondent's plea was one of confession and avoidance and that *Mabaso* was therefore triggered; the trial court formed a view that Oliver assaulted Andrew before the evidence was adduced. In substantiating this view, it went on to state that, a push being an application of force to the body of Andrew constituted an assault which incorporates an inherent intention to injure. The trial ran throughout on the understanding that Oliver had an intention to injure Oliver. It therefore commenced on the wrong premise.

[12] Andrew had to prove his case, specifically the harm caused – *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838G-839H and *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) para 13 where it was held that for the element of *dolus* to be established in the context of delictual claims for bodily injuries, it is insufficient to prove that the defendant intended to apply force. It is also necessary to prove that the defendant applied force with the intention to cause harm – see *Groenewald*

[11] Oliver's witnesses accordingly testified on the assumption that Andrew's case would establish a spear tackle, with the impact to the top (vertex) of Andrew's head. But for the ruling, Oliver would have had the opportunity to have applied for absolution from the instance at the end of Andrew's case if the spear tackle were not to have been proven. Again, we will pass over the obvious prejudice to Oliver in this regard.

The factual evidence

[12] The evidence of the events which preceded the final interaction between Andrew and Oliver when Andrew was injured, has little significance, beyond providing context. It can be summarised as follows. The young men from the two groups were all, to a greater or lesser extent, affected by having been out drinking. Oliver however maintained that he was not tipsy. After an evening of celebrating Dane's eighteenth birthday, he and the others in his group gathered at the Engen garage where Mrs Killian, Dane's mother, was to collect them.

[13] Andrew and Progress had arrived at the garage after a night of 'clubbing'. Andrew parked his vehicle in front of the automatic teller machine (ATM) in the forecourt of the service station. Progress described Andrew as on the way to being drunk, and that his speech had slowed down. Progress had consumed three beers. Nicholas, who had been to a high school old boys' function where he had consumed four beers, and thereafter went clubbing, joined Andrew and Progress at the garage. He remarked that Andrew was tipsy and saying 'irrelevant stuff'.

[14] Around 1.45 am, whilst waiting for Mrs Killian, there was an exchange of words between the two groups. Oliver denied making any homophobic comment as alleged in the particulars of claim. Andrew allegedly lost his temper. He told Oliver to move away from his (Andrew's) car, or he would get someone to assault him. Nicholas did not know

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v Groenewald 1998 (2) SA 1106 (SCA) at 1112F-I and *Roux v Hattingh [*2012] ZASCA 132; 2012 (6) SA 428 (SCA) at paras 17, 18 and 26. In essence, for Andrew to succeed with his delictual claim and for Oliver be held liable for the injuries that Andrew sustained as a result of him striking the car, Andrew had to establish that when Oliver executed the movement, he intended him to strike the car and be harmed in the manner pleaded. The litigant who asserts must prove – *Pillay v Krishna & Another* 1946 AD 946 at 951-952 and *Goliath v MEC for Health* [2014] ZASCA 182; 2015 (2) SA 97 (SCA) para 8.

who had started the verbal altercation that ensued. He described Andrew as a 'bit aggressive', but he could not hear what was said.

[15] A physical altercation then followed. Nicholas said that he stepped in between Andrew and Oliver to prevent anything further happening. Oliver grabbed his shirt and pushed him back. He grabbed Oliver by the collar close to his neck. During this scuffle they moved towards the ATM. He was thereafter thrown to the ground, by someone else, a person wearing white shoes, probably Joel, who kicked him whilst he was on the ground. He ended up lying on his side in the alcove and lost sight of Oliver while on the ground.

[16] Oliver stated that he had prevented Nicholas from striking at him by placing his arms around Nicholas. He next felt an impact from behind, probably from Andrew, which resulted in him letting go of Nicholas. He pushed Andrew so that they became separated. Andrew staggered a few steps back but managed to find his balance. As Mrs Killian had arrived, Oliver turned to proceed to her car.

[17] Up to that point there had been a physical exchange, but without any, or significant, injuries. The trial court and the full court both devoted some attention to who had been the catalyst for the events that occurred. The trial court concluded that it was Oliver, or his group, whereas the full court concluded that it was Andrew and his group. In our view, a resolution of this issue is immaterial to the outcome of the appeal. Even if Oliver was the catalyst, there would have been no injury resulting in Andrew's paralysis, had the subsequent events summarised below not occurred.

[18] The events material to this appeal occurred after there was a brief interlude and Oliver started to move towards Mrs Killian's car. Andrew rushed at him, as if to tackle him. Oliver described how Andrew came from his right, at a rapid speed, in a rapid explosive movement towards him. When Andrew came within reach, in order to avert the attack, he grabbed Andrew at the side of his shoulders, and as they were about to collide, he stepped to his right, turned Andrew and using his momentum, pushed him. It was a fast

swivel movement, but with sufficient force to get Andrew away from him and to avoid any collision. He let go of Andrew when his arms were at full length. He saw Andrew lose his footing and fall in the direction of the car parked in the parking bay. He did not see Andrew actually hit the car and had no recollection of hearing Andrew hitting the car, although he conceded that he would have heard it. He denied having thrown or spear tackled Andrew against the motor vehicle, or that he pushed Andrew off his feet, intending Andrew to lose his footing.

[19] Andrew could not contradict Oliver's evidence. He had no recollection of the events from the time he said he looked into Oliver's eyes, probably when Oliver released Nicholas from the bear hold, or possibly when Oliver grabbed him by his shoulders when he was rushing towards Oliver, until he was lying on the ground injured and paralysed. He did remember being concerned about Nicholas, and understandably looked to see where Nicholas was. From his position, lying on the ground, he could see Nicholas lying on the ground and being kicked by someone with white shoes. This evidence was consistent with what Andrew had stated in an affidavit, deposed to in April 2007 shortly after the incident, when the facts would have been considerably fresher in his mind, and with which he was confronted during cross examination. There is no reason why Andrew would be untruthful in saying that he saw Nicholas on the ground being kicked, particularly given his concern as to what had happened to his younger brother.

[20] Progress did not witness what happened between Oliver and Andrew during this stage and could not contradict Oliver's evidence. He simply said that he heard a loud bash while he was pushing others away from him.

[21] Nicholas did not see Andrew rushing towards Oliver. He (Nicholas), had been thrown to the ground. He did not know who did this as it all happened so quickly. On a reading of the evidence, it seems that this person probably was Joel.[13] Nicholas was lying

[13] Joel said that on his way to Mrs Killian's car something caught his attention and he observed Oliver being wrestled by Nicholas on the pavement between bays 2 and 3, and Andrew also being there right in front of Oliver facing him but more to his side. Joel moved towards them. His focus was on Nicholas. Andrew and Oliver had moved out of his sight. He remembered throwing a punch, which it seems struck Nicholas. He

on the ground, in the alcove. While on the ground he had lost sight of Oliver, Andrew and Progress.

[22] Nicholas was subsequently assisted by Progress. He claimed that within seconds after being helped up, he saw Oliver execute what he described as a rugby spear tackle on Andrew. He demonstrated that Oliver, whilst facing Andrew, had picked Andrew up with both hands from around his waist area, lifted his feet about 30 centimetres off the ground, then tilted him with his back towards the ground, nearly parallel to the ground and his face upwards-facing, and that Oliver then threw Andrew so he fell backwards against the vehicle in parking bay 3. This parking bay was on the extreme right of the three diagonal parking bays in front of the ATM (the other two being vacant at the time). He testified that the back of Andrew's head hit the wheel or fender on the passenger side of the vehicle parked there. This evidence of Nicholas was the only direct evidence to contradict Oliver's version and constituted the highwater mark of Andrew's case against Oliver.

[23] Nicholas was confronted with the evidence he gave at the criminal trial: that Oliver had picked Andrew up at the shoulders. Nicholas said he was not sure whether it was at the waist or shoulders. It would be improbable that a person could be picked up by the sides of his shoulders and lifted 30 centimetres into the air. On his own evidence Nicholas' opportunity for observation was limited. As he said, 'it all happened very quickly'. But significantly, he testified that it was the back of Andrew's head, as opposed to the top or vertex which hit the fender or wheel of the parked vehicle.

[24] Nicholas conceded that if Andrew was correct in saying that he saw him (Nicholas) on the ground being kicked, then he (Nicholas) could not have seen Andrew being tackled. When Andrew was confronted with this concession by Nicholas he changed his

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thereafter went to Mrs Killian's car and did not know what happened to either Oliver or Andrew. He did not see Oliver push Andrew or 'spear tackle' him. They all eventually boarded Mrs Killian's car and Nicholas came to the car and banged on the window and side door aggressively.

evidence from previously having said that while lying injured on the ground he saw Nicholas lying on the ground being kicked, to that '[t[here is no possible way I could have seen my brother'.[14] Andrew had however said more than once, and some time apart - in the affidavit of April 2007 and when he gave evidence before the trial court – after there had been ample time for reflection, that he had seen Nicholas lying on the ground. Accepting Andrew's evidence that he saw Nicholas lying on the ground, Nicholas could not have got up from the ground and thereafter witnessed Andrew allegedly being spear tackled, as Andrew had by then already been tackled, struck his head against the vehicle, and was lying paralysed next to the vehicle. Given these contradictions in Nicholas' evidence, his account of the alleged spear tackle cannot be accepted. The direct evidence fell woefully short of establishing the pleaded allegations in support of Andrew's claim.

The expert evidence

[25] Andrew however also sought to gain some support for his version from the opinion evidence of two experts, Dr David Glynne Welsh (Dr Welsh) and Mr Cornelius de Jongh (Mr de Jongh), that his injury was more probable to have resulted from a spear tackle, than a flexion force injury as would result from Andrew striking the back of his head against the vehicle. Following the high court's ruling on the duty to begin, Oliver had testified first, followed by Joel, then the medical expert, Professor Robert Neil Dunn (Professor Dunn), the chair of the Orthopaedic Surgery Department at the University of Cape Town, and Mr Trevor John Cloete (Mr Cloete), a senior lecturer in mechanical engineering at the University of Cape Town. Andrew's case started with the evidence of Progress, followed by that of the ambulance paramedic, Elizabeth Howes, Andrew's medical expert, Dr Welsh, an orthopaedic surgeon and the doctor who operated on Andrew after his injury, Mr Cornelius de Jongh (Mr de Jongh), a biomechanical expert, then Nicholas, and finally Andrew.

[26] Dr Welsh described a spear tackle as involving the body being less than parallel to the ground, with the person tackled lifted off the ground, the head passing through 90 degrees, and with the body driven into the ground. The testimony of Oliver, his witnesses

[14] Andrew then also testified that he no longer had memory of Nicholas being kicked while on the ground.

and the experts were all directed at Andrew's claim as pleaded, namely that Oliver had executed a spear tackle, thereby causing Andrew to sustain the injury that he did.

[27] It was only after they had testified that Nicholas described how Andrew's body was parallel to the ground when he came into contact with the vehicle and that the back of his head came into contact with the vehicle. That evidence, even if it was accepted, did not fit Dr Welsh's description of a spear tackle.

[28] It has been held in, inter alia, *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another*,[15] that expert witnesses should generally not be required to express opinions until they are presented with the factual evidence upon which they have to express an opinion. Because this did not happen before the trial court, the expert witnesses gave evidence and were cross-examined on a hypothetical basis, not in accordance with the established facts or all of the relevant factual evidence.

[29] Accordingly, the opinions of the experts were of little value to the trial court and could not tip the scales in Andrew's favour. It is therefore not necessary to analyse the evidence of the experts any further. Suffice it to say that Professor Dunn was of the view that one could not say from an expert medical perspective which of the two scenario was more probable. He complained that 'nowhere were we given the clear facts, otherwise Dr Welsh and I would have had something to conclude . . .'.
It was furthermore probable, having regard to Andrew's state of sobriety, that he might well have lost his footing and fallen backwards against the car, after the swivel push manoeuvre. The combined expert summary of forensic scientists, Claire Lewis and Mr Cloete, admitted in evidence by consent, supported the proposition that individuals affected by alcohol are susceptible to injuries sustained during ground level falls because of their compromised co-ordination and reactions.

[15] [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 99.

In the trial court

[30] The trial court concluded that the demeanour of Andrew and his witnesses was not that of lying and unreliable witnesses. In rejecting Oliver's claim of reasonable self-defence and finding that Oliver had executed a spear tackle on Andrew, the trial court relied on Shane's evidence in the criminal trial to the effect that 'what he saw was not self-defence.' It concluded that this did not favour Oliver's self-defence version.

[31] Apart from this being inadmissible opinion evidence, the trial court had previously ruled that the contents of an affidavit deposed to by Shane, which foreshadowed his evidence, was 'not admissible.' In addition, during the early stages of the trial, the trial court ruled that the record of the criminal trial was admitted provisionally, as provided in s 3(3) of the Law of Evidence Amendment Act (the Act).[16] Section 3(3) provides that hearsay evidence may be provisionally admitted in terms of s 3(1)*(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends will himself testify in such proceeding, provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account, unless the hearsay evidence is admitted in terms of subsection 1*(a)* or *(c)*.

[32] The admissibility of the criminal record was never revisited by the trial court, after it had been admitted 'provisionally'. The evidence of witnesses who testified at the criminal trial, but who were not called to testify before the trial court, was therefore inadmissible. Specifically, Shane was not called as a witness. Shane's evidence was not admitted by the trial court in terms of s 3(1)*(a)* nor *(c)* of the Act. There was no evidence that Shane was unavailable to testify. The evidence that Shane might have given at the criminal trial was consequently inadmissible. The trial court's reliance on that evidence constituted a material irregularity.[17]

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[16] The Law of Evidence Amendment Act 45 of 1998.

[17] Although this irregularity was identified as a ground of appeal in the appeal to it, the full court did not rule separately on it, probably because it had concluded that the appeal, in any event, had to succeed on the merits.

In the full court

[33] The onus of proof, as a matter of law, always remained on Andrew to establish that Oliver assaulted him by 'spear tackling' him, and that the other requirements for delictual liability were satisfied. The full court concluded that the trial court had committed irregularities and had regard to evidence which was inadmissible. In that regard, the full court was undoubtedly correct. It also concluded, on an evaluation of the evidence, that Andrew had not proved his case. It concluded that it was more probable that Andrew was injured as a result of the swivel and push defence and that Nicholas' description of the spear tackle was not established. It found that Oliver's reaction to avert the further threat to him was reasonable.

[34] Andrew appeals the full court's judgment on the basis that it misapplied or misunderstood the relevant evidence and superficially applied the legal principles germane to this matter. On behalf of Andrew it was contended that the full court erred as it: failed to have regard to the evidence in its totality; failed to ensure that the conclusions reached accounted for all the evidence; failed to distinguish probabilities and inferences from conjecture and speculation; failed to properly consider the probabilities; failed to draw inferences only from objectively proven facts; and, failed to follow the approach to factual disputes as stated in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* (*Martell*)[18] in regard to irreconcilable versions.

[35] We are not persuaded that the full court erred. The full court rightly concluded that little weight could be attached to any opinion that Nicholas' pick-up, tilt and throw face-up backward version, assuming that he in fact witnessed it, was more probable than the swivel-push scenario explained in Oliver's evidence. Upon a reading of the experts' evidence, one is left with the clear impression that it could not be said, as a matter of probability, that the injury was more probably caused by a spear tackle, and not the swivel diversion movement described by Oliver, and that the latter was not reasonable in the

[18] *Stellenbosch Farmers Winery Group Ltd and Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA) para 5. See also *National Employers' General v Jagers* 1984 (4) SA 437 (E) at 440D-441A.

circumstances. Andrew had failed, at the level of fact, to adduce evidence in support of his pleaded case. His claim was therefore unsustainable.

[36] Andrew's criticism of the judgment of the full court is without merit. The conclusions of a court must account holistically for whatever inferences may reasonably be drawn, and for all the evidence. The judgment of the trial court did not account for all the evidence or the contradictions. The fact that the trial court had the opportunity to observe the witnesses and to make credibility findings must yield to the import of the admissible evidence and inferences that could properly be drawn from the evidence. It is clear, when regard is had to the versions of Andrew and Nicholas, that their respective recollection of the material events was not reliable, was irreconcilable, and not credible. This is apparent *ex facie* the record and is not dependent on any findings relating to their demeanour, upon which the trial court had placed much reliance. The full court, properly considering the evidence holistically, concluded that Oliver had acted in self-defence and that his conduct was commensurate with the threatened attack.

Are there special circumstances present?

[37] Reverting then, against the aforegoing factual backdrop, to what has been identified as the preliminary question in this appeal, namely whether there are such special circumstances present to justify a further appeal to this Court? Special circumstances require more than reasonable prospects of success; such as that the appeal deals with a substantial point of law, or is a matter of great importance to the parties or the public, or that the prospects of success on appeal are so strong that the refusal to grant leave to appeal would result in a denial of justice for the party seeking leave to appeal.[19] This list of what may constitute special circumstances is not exhaustive.

[38] The appeal does not raise a substantial point of law, nor is it an issue of great importance to the public. Andrew's prospects of success turn on various factual disputes.

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[19] *Westinghouse* fn 5 above at 561E-F; *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* (260/2017) [2018] ZASCA 26 (23 March 2018).

These disputes have already been considered carefully in the unanimous judgment of the full court by three judges.

[39] Andrew's counsel was requested to indicate the special circumstances and any issues of law warranting the attention of this Court. He contended that the issues appealed against are of importance to Andrew and that nothing was done by the full court to motivate its overturning the judgment of the trial court, and that in its assessment of the evidence, it misapplied or misunderstood the relevant evidence and it thereby superficially applied the law. We disagree for the reasons set forth earlier in this judgment. The importance of the matter to Andrew and Oliver does not extend beyond the interest any litigant to a *lis* would have in achieving success.

[40] There is accordingly no reason why this Court should determine any matter arising from the first appeal further. This Court is being inundated with appeals on factual issues, which are not truly deserving of its attention. Appeals do not assume importance or raise prospects of success, by the mere say-so of an appellant. The appeal roll will be clogged unnecessarily if this trend of appeals on factual issues in non-deserving matters were allowed to continue.

Conclusion

[41] The normal criterion of reasonable prospects of success applies to both 'special leave' and 'leave'.[20] Given that there is no merit in the appeal, there are no reasonable prospects of success,[21] much less special circumstances, which demand that the factual issues require further reconsideration by this Court. There is no reason why this Court should reconsider any matter arising from the judgment of the full court. The relevant issues have been considered comprehensively by the full court. Having had the benefit

[20] *Westinghouse* fn 5 above at 561E-F.
[21] *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) paras 16-17.

of the full record and all the evidence, we conclude that there are no special circumstances present in this matter.[22]

[42] That being so, the appropriate order is that the appeal and 'cross appeal' be struck from the roll with costs.

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P A KOEN

ACTING JUDGE OF APPEAL

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B P MANTAME

ACTING JUDGE OF APPEAL

[22] *Westinghouse* fn 5 above and *National Union of Metalworkers of South Africa and others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39.

Appearances

For the appellant:	J Whitehead SC and S Botha
Instructed by:	DSC Attorneys, Cape Town
	Rosendorff Reitz Barry, Bloemfontein.
For the respondents:	B D J Gassner SC
Instructed by:	Chennels Albertyn, Cape Town
	Honey Attorneys, Bloemfontein