

SOUTH AFRICA / JUDGMENT

Bekker v Minister of Police (1077/15) [2017] ZAGPPHC 197 (18 May 2017)

[2017] ZAGPPHC 197**COURT**

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse

CASE / FILE NUMBER

1077/15

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NUMBER: 1077115

DATE: 18 May 2017
ARNO
BEKKER
Plaintiff
v
THE
MINISTER OF
POLICE
Defendant

JUDGMENT**MABUSE J:**

- [1] This Is a claim by the plaintiff, one Mr. Amo Bekker ("Bekker"), against the defendant who is cited in this matter in his official capacity, for damages based on an emotional shock and psychological trauma that the plaintiff experienced when he allegedly witnessed the members of the South African Police Services ("SAPS") assault his brother in law, a certain Mr. Pierre Christo van der Watt ("van der Watt").
- [2] The incident in question took place on 3 February 2012 in Xanadu Eco Estate, at the house of the said Van der Watt.

[3] Before I turn to the circumstances that gave rise to Bekker's claim, it is only proper that I place certain common facts on record. The following matters were not in dispute:

- 3.1. the locus standi of Bekker;
- 3.2. the jurisdiction of the Court;
- 3.3. the citation of the defendant;
- 3.4. that Bekker has complied with section 3 of the Institution of Legal Proceedings Against Certain Organs of State at NO. 40 of 2002;
- 3.5. that the incident took place on 3 February 2012 at Van der Watt's house.

[4] It is not in dispute that:

- 4.1 on 3 February 2012 and at the house belonging to the said van der Watt's family there was a domestic violence event that required the intervention of the members of the SAPS;
- 4.2 as a consequence of the said event members of the SAPS were called to that particular house;
- 4.3 that members of the SAPS drove to that particular house which was located in Xanadu Eco Estate in three motor vehicles which arrived at the particular house at certain intervals, one after the other;
- 4.4 that the police officer, Alfred Mosheledi Mpye ("Mpye"), arrived at the particular house with another police officer In the first of the three police motor vehicles and that warrant officer Albertus de Viviers du Toit ("du Toit") also arrived at that particular in the third police motor vehicle of the three motor vehicles;
- 4.5 that the members of the SAPS spoke to both Van der Watt and Elmarise van der Watt ("Elmarise"), van der Watt's wife, and that van der Watt was at all material times aggressive;
- 4.6 that the police escorted Elmarise into his house so that she could go and collect the stuff she needed to use where she was going to sleep that particular night;
- 4.7 that a scuffle took place in the house and that there are two versions as to what precisely took place in the house;
- 4.8 that as a consequence of that scuffle van der Watt sustained certain bodily injuries about which he has testified and which were aptly captured in the clinical records of Brits Medi-clinic and which were collectively admitted as an exhibit into evidence.

The parties had also agreed that the photograph album consisting of the photographs of van der Watt be handed in as an exhibit. The disputes between the parties in this matter are how van der Watt sustained his bodily injuries that evening and secondly, which is of paramount importance whether or not Bekker was present when the incident took place or when van der Watt sustained those injuries. Bekker's case is that Van der Watt was assaulted by the members of the SAPS in his house, in his presence, whereas the defendant denies this. On the contrary, the defendant's case

is that van der Watt was not assaulted by the police, that during the incident that took place in the house Van der Watt sustained some injuries when he tried to headbutt warrant officer du Toit but missed him and hit the corner of a door frame, and furthermore when he tumbled down a staircase in the house. Secondly, the defendant's case is that when the incident in which Van der Watt sustained his injuries in the house took place, Bekker was not present.

THE EVIDENCE IN SUPPORT OF BEKKER'S CASE

- [5] I now turn to the evidence in support of Bekker's case. Apart from his own evidence, the plaintiff led the evidence of Van der Watt, Elmarise, and finally, of one Franco Pierre Visser ("Visser"). I will deal with the evidence of all these witnesses singly and in the order in which they testified. I have to point out that although the bulk of the evidence tendered was centred on what happened before the scuffle in the house, this matter is not about what preceded the scuffle but firstly, about the scuffle itself and more importantly about whether or not the plaintiff was present in the house when the Incident took place.

THE EVIDENCE OF VAN DER WATT

- [6] He described himself as a building contractor who was staying in Hartebeespoort Dam where he was born and bred. He testified that on 3 February 2012 he had an argument with his wife, Elmarise. His daughter called the security who were just close by. The police were called in. They arrived between 19h00 to 20h00 after the argument between him and his wife had been resolved.
- [7] Upon the police arrival, he had a discussion with them. During this discussion Elmarise told the police that the problem that she had had with him had been resolved. It was a coloured police man that he and Elmarise spoke to.
- [8] After speaking to the police he left them and Elmarise outside and walked into his house. While he was in his house he saw six police officers, among them one du Toit, whom he was seeing for the first time, in the house. Because this du Toit had had an affair with Elmarise before, he asked him what he was doing in his house. In his view, du Toit was not an appropriate person to attend to their problem. On being asked what he wanted in the house, du Toit told him that he had work to do and that he, Van der Watt, should not stand in his way. Furthermore he told du Toit that he had no right to be in his house.
- [9] Du Toit was aggressive to an extent that he pointed a finger at him. At this stage they were all on the top floor of his house. He asked du Toit again what he was doing in his house and du Toit told him that because of the nature of the complaint either him or Elmarise had to leave the house. His mission at that particular house was just to protect Elmarise while she was packing the stuff she wanted to use where she was going to sleep that night.

- [10] He asked du Toit where his wife was going to sleep. At that stage du Toit pushed him in his face. He pushed him against the wall and told him that Elmarise would go with him. He felt threatened and acted accordingly. He headbutted du Toit and stood away from him thereafter. In reaction du Toit whipped out his service firearm and hit him with it in the face. As a consequence of this blow to his face with a firearm, he sustained bruises to his forehead and nose.
- [11] After du Toit had hit him with the firearm all the police officers joined and hit him with 400 to 500mm long torches. He tried in vain to block some of the blows. At one stage he knelt down as an act of submission but still the assault on him continued unabated. The blows were so severe that he asked them to arrest him instead. Still the assault, which included being kicked, continued. The police continued assaulting him by kicking him and hitting him while he was on his knees.
- [12] In the midst of this onslaught he heard the voice of a man who warned du Toit about a shaft. This was the voice of Bekker. He could also hear his wife plead with the police to stop the assault on him and telling them that he was the breadwinner. Du Toit told Elmarise that in her husband she was only interested in money.
- [13] The police handcuffed him after which one police officer hit him with a torch. At this stage he was lying in a pool of blood. He was then led down the staircase whilst at the same time he was being kicked. As they were walking down the staircase du Toit managed to push him off the stairs. He fell down and tumbled down to the bottom of the stairs. He was lifted up from where he had fallen, taken to the police motor vehicles and driven to the local police station where he was detained in a holding cell.
- [14] He was referred to the photograph album which contained his photographs. These photographs showed the injuries that he had

sustained during the aforementioned incident. He told the Court that all the injuries that he sustained were inflicted upon him by the members of the SAPS. He continued with his evidence and testified that following the assault upon him by the police he sustained

several bodily injuries, e.g. a broken nose, loss of teeth (two frontal teeth), head injuries and neck problems. The injuries that he sustained were captured in the clinical records of Brits Medi-Clinic which was handed in as exhibit 'B'.

THE EVIDENCE OF ELMARISE

- [15] Elmarise confirmed that on 3 February 2012 an incident took place between her and her husband as a consequence of which the police came to their house to investigate it. She called such an incident 'an altercation'. The police asked her if she wanted to lay any charges against her husband but she refused to do so. One of the police insisted that either she or her husband should leave the house and go and sleep somewhere. She volunteered to go and pack her stuff and to go and sleep somewhere.

[16] She then walked into the house where her husband already was. She got Into the bedroom to pack what she needed to for the night. Suddenly the fight started when she was about to get into her bedroom. She witnessed it. She was about to get into her bedroom when she saw one of the police officers, du Toit, who came to join the other police officers, pull out a gun. Du Toit hit her husband with the gun on the forehead. All the police officers then started hitting her husband with their torches. They handcuffed him. He went down on his knees in submission. He did not fight with the police officers. They continued beating him though. Her brother, Bekker, tried to Intervene but in vein. They pulled him up and took him downstairs. When they approached the front door du Tait kicked him. Her husband lost a lot of blood. She sat next to him because it appeared that he was going to pass out. Her daughter fetched water from the swimming pool and tried to wash away the blood from his face. The police officers put her husband in the police van and drove him away to the police station.

THE TESTIMONY OF BEKKER (THE PLAINTIFF)

- [17] After receiving a call from his mother who had asked him to go to van der Watt's house on 3 February 2012, Bekker, the plaintiff, drove to the house, no. 186 Xanadu Eco Estate, where on his arrival, he found two estate securities outside the house. He found Van der Watt and Elmarise talking to each other. They were not fighting. The police then arrived at the house and explained to them why they were there. Van der Watt said something to the police. He could not remember what he said but after van der Watt had said it he told the police that when van der Watt said what he told them he was merely teasing them.
- [18] The second police motor vehicle arrived while van der Watt was still outside the house. After a while a third police motor vehicle arrived at the house, it was from this motor vehicle that du Tait came out. Elmarise came out of the house and told du Tait that he should not be there. She told him to leave. Van der Watt was at this stage inside the house.
- [19] During a discussion in which he, Elmarise and the police took part the police suggested that as the matter they had come to investigate was a domestic violence matter, the victim, in other words Elmarise, should leave the house. He then proposed that Elmarise could go and spend the night at his house. She could come back and discuss their problems the following day. it was at this stage that Elmarise decided to go and pack what she would need for that particular night. As she got into the house the police followed her. He followed the police inside the house and as soon as he was in the house on the top floor he went to sit in a separate bedroom just close by.
- [20] While he was in that bedroom, he heard a commotion in the house. He walked out only to discover the police bunched around van der Watt. The police and van der Watt were involved in some kind of a struggle. They disappeared into a spare room and knocked against a door. He immediately realised the danger of what was going to happen. He then ran to them and warned all of them about the shaft in the house.

[21] He noticed that van der Watt was being beaten up. He tried to pull one policeman away but could not. Van der Watt was being beaten up properly by the police with torches. He saw a lot of blood. At one stage van der Watt was on all fours while he was constantly being beaten up. While van der Watt was being beaten up, he himself was sitting helplessly at the corner of a bed. They lifted Van der Watt up and took him down stairs. He followed them. He saw du Tolt push van der Watt downstairs. Upon this he shouted at them and warned them to be careful. He asked them why they used so much force against van der Watt. By the time he got to the front door, van der Watt was already there having fallen and rolled down the stairs. He was placed inside the police motor vehicle and thereafter taken to the police station.

[22] Franco Pierre Visser ("Visser") was the plaintiff's last witness. That he was an expert was not in dispute. The method that he used to assess the plaintiff was also not in dispute. He was a clinical psychologist. He told the Court that he had assessed Bekker and having done so compiled a report which contained his assessment of him. The purpose of the report, which had been commissioned by Bekker's attorneys, was to ascertain if the incident of 3 February 2012 had had any psychological effect on the plaintiff. The

assessment was done on 8 April 2016 after Bekker had witnessed the assault of his brother-in-law by the police. The report basically

dealt with the psychological makeup of Bekker. It stated in paragraph 6, among others, that:

"His emotional challenges might have a direct link to his witnessing the brutal assault and detention of his brother in law in 2012."

[23] The defendant's first witness was one Alfred Mosheledi Mpye ("Mpye"), a constable in the South African Police Services stationed at Hartebeespoort Dam Police Station. He testified, inter alia, that on 3 February 2012 he was officially on duty in the company of constable Mokoena when he received a domestic violence complaint at the plaintiff's house. They immediately drove to that particular house. The security at the main gate led them to the particular house where the relevant incident had taken place. Upon their arrival the security personnel only pointed out the house to them and returned but not before they told them that they would not get into that particular house as the owner, a man, had threatened to assault them. After alighting from the motor vehicle a woman with two kids came running to them. On observation he noticed that the woman had bruises on her face. They also noticed that the night dress that she was wearing was torn somewhere on the shoulder. They introduced themselves to this woman and explained to her the purpose of their presence at her house. The woman started crying and as she was crying she made a report to them about her husband. She told them that her husband, Van der Watt, was molesting her; that he hit her with fists, and throttled her and grabbed her by her clothes; furthermore she explained that it was not the first time that her husband assaulted her.

- [24] While she was still explaining to them a man came running from the side of the house. He was shouting to them all the time. In one of his hands he was carrying a bottle of liquor. In an insulting language he asked them what they were doing on his premises. Still using the same type of language he ordered them out of his premises. As he was doing so they were still outside the premises. The woman and the children took cover behind the police.
- [25] The man, who was aggressive at all material times, chased them away and told them that he was busy assaulting his wife; that he wanted to kill her and that they should come back later to collect her corpse. All their attempts and his wife's attempt to calm him down bore no fruit. Elmarlse then requested them to escort her into the house so that she could collect the stuff she wanted to use where she was going to sleep that night. That man was van der Watt. Van der Watt, who was still furious, warned them, on hearing that his wife had asked for escort from the police, hat no one was going to get into his house. Upon this warning he called for backup. Two police officers, constables Mothlapi and Modise arrived on the scene.
- [26] He enquired from Elmarise if she wanted to open a case but she refused and cited the fact that if van der Watt should go to prison because of the case there will be big problems on his return and secondly, the fact that van der Watt was the only bread-winner and that she and the children would be out of support if he went to prison. Another motor vehicle arrived on the scene while they were still standing outside. This motor vehicle parked across the street from where they were standing. No one came out of this motor vehicle. There was one person in this motor vehicle and that person was also the driver of the said motor vehicle. That person was Bekker. Three police officers, constable Ngoben, Matlapoa and warrant officer du Toit arrived at the scene in another police motor vehicle shortly thereafter. While all the police officers were still standing outside van der Watt's house with Elmarlse and the kids and van der Watt was standing on the balcony of the house, a voice came from the motor vehicle that had parked across the street. This voice screamed and asked the police to help his sister. He said:

"Please help my sister because this man will end up killing my sister."

The voice said that he was afraid of getting out of his motor vehicle because he had already been threatened with assault and death by van der Watt if he got into the premises.

- [27] They asked Elmarise if they could arrange a place of safety for her for the evening. She told them that it was not necessary for them to do so as she would sleep at her younger brother's house. She then requested them to escort her into the house so that she could go and collect what she needed for the night. Van der Watt who was still on the balcony and insulting them, told them that they were not enough. Despite what he said the police decided that they would not let Elmarise get into the house alone. Somehow they all managed to get into the house.

- [28] When they went into the house Bekker was still in the said motor vehicle, this time with the two children. Elmarise got into the bedroom she had pointed out and closed the door behind her. Thereafter van der Watt, who was still aggressive and throwing insults at them, appeared. He told them that he would beat them up. They tried to calm him down but did not succeed. They told him that they had simply escorted his wife so that she could fetch her goods as she had decided to go and spent the night somewhere. At the same time Elmarise tried to calm him down too but without any measure of success.
- [29] Van der Watt then approached constables Ngobeni and Motlhabane. He was still aggressive. He shoved them aside and approached du Toit. He hit du Toit with fists in the face. They tried to intervene. He simply brushed them aside. This time he grabbed du Toit by his shirt and head-butted him in the face. As a consequence of the head-butt, du Toit staggered back. They grabbed him so that he did not fall into the shaft in the house. As a consequence of being punched in his face and of being headbutted in the face du Toit bled profusely from his nose. As this assault took place Elmarise was still in the room she had gone into to fetch her bag. Van der Watt pushed them aside and tried to headbutt du Toit again. He missed du Toit and hit the corner of the door frame with his forehead. He then saw blood from his forehead. Both Van der Watt and du Toit bled and du Toit bled profusely.
- [30] They managed to restrain Van der Watt and to handcuff him. They took him downstairs to the police motor vehicle. Van der Watt sustained further injuries when he fell from the stairs.
- [31] Bekker was at this stage still in his motor vehicle with the children. From where he was, outside the house, Bekker could not see what happened inside the house. Somehow as he was being taken to the police motor vehicle van der Watt saw Bekker, who was still with the children. He screamed at him that he had told him that he did not want to see him at his house.
- [32] He testified furthermore that Bekker was not in the house when the incident in the house took place. Because of this fact, he could not have seen van der Watt assault du Toit. Firstly, when they walked into the house they left him outside. Secondly, he had told them on his arrival that he was afraid of van der Watt. Thirdly, they found him outside the house on their way to the motor vehicle with van der Watt. Fourthly, van der Watt screamed at him while he was being taken to the police van and told him that he did not want to see him at his house.
- [33] The defendants second and last witness was one Albertus de Viviers du Toit ("du Toit"), a warrant officer stationed at Hartbeespoort Police Station who had, at the time of his testimony, been a member of the SAPS for at least fifteen years. His evidence, save here and there, is in line with the evidence of Mpye in many material respects. It is of supreme importance, though, to bear in mind that he and Elmarise had an intimate relationship together at one stage before this incident. It is consequently understandable that there would be bad blood between him and van der Watt.

- [34] He testified, among others, that on 3 February 2012 he was present at van der Watt's house and more importantly In the house where the incident that constitutes the subject matter of this case took place. He arrived at that particular house in full police uniform in the company of his crew, in particular constable Ngobeni after they had been called as a backup for a domestic violence related matter.
- [35] On his arrival he found other members of the SAPS and to his big surprise Elmarise. He observed that Elmarise had been crying. He further observed that she was wearing a night dress; that the night dress was tom in the area of one of the shoulders and that she had an abrasion or laceration on the left side of her face. He then interviewed her and Elmarise made a report to him concerning her husband Van der Watt. Following the said report he asked her if she was keen on laying charges against her husband but she was not, for fear of losing her only source of financial and material support, interested in laying any charges against her husband. His further observation was that both Elmarise and her children were traumatised.
- [36] While still with Elmarise and some of his colleagues, he heard someone calling him from across the street. It was the plaintiff,
- Bekker. Bekker shouted at him and begged him to help his sister Elmarise. He then walked up to Bekker to talk to him. He knew Bekker from the time he had an affair with Elmarise. He asked him about the circumstances surrounding the event that took him to that particular house and why he did not intervene. Bekker told him that he was very scared of van der Watt and what van der Watt could do to his sister. He again begged him to assist his sister. He asked him why he did not speak to van der Watt. He told him that he could not as van der Watt had told him not to come to his house. Van der Watt threatened to assault him if he visited the house. He then left Bekker and went back to Elmarise.
- [37] At the request of Elmarise who had expressed a desire to go and sleep at a safe place and who had undertaken to come back to her house the following day when van der Watt would be sober, they accompanied Elmarise into the house to collect her bag. All the seven police officers accompanied Elmarise into the house. Bekker did not accompany them into the house. He was never in the house. Once in the house Elmarise walked into one of the rooms and closed the door behind her.
- [38] In an attempt to calm him down, he spoke to van der Watt who was still angry and furious. He explained to him that they were only there to assist Elmarise to collect her bag and as soon as she had done so they would leave. Van der Watt became even more infuriated and unreasonable. From the point at which van der Watt pushed aside constable Ngobeni and Motlhabane, the evidence of this witness is in line with the evidence of Mpye.
- [39] On their way to the police motor vehicle with van der Watt he looked for a tap so that he could wash off blood from his nose and mouth. When he could not find It, he resorted to the swimming pool where he washed his face. While he was still washing his face at the swimming pool Elmarise approached him. She apologised to him for her husband's conduct.

Having washed off blood from his face he got into the motor vehicle and drove to the police station. Van der Watt was driven to the police station where he was detained. While he was busy working in his office Bekker came to him and thanked him for having rescued his sister.

[40] du Tollwent to seek medical treatment. First he was medically treated by the paramedics who had come in an ambulance before he was treated by Dr. JD Robbertse, who, having examined him, completed a medico-legal examination report. According to such report, du Toit had sustained the following injuries:

- 40.1. a right-side contusion temporal area;
- 40.2. left-side contusion temporal area;
- 40.3. 1 cm laceration brow;
- 40.4. lip or right-side outer and into laceration;
- 40.5. left-side temporal parietal abrasion, and
- 40.6. ape static and nasal contusion.

This report was handed in as an exhibit. It was part of the documents discovered by the defendant.

[41] When they came out of the house with van der Watt, Bekker was still outside at his motor vehicle. He was never in the house with them. He was never in the house when the assault took place. He denied that Elmarise, If ever, begged them to have mercy on her husband.

[42] He conceded that van der Watt had some injuries. He denied though that he was assaulted by anybody in the house. According to him he had sustained some injuries when he tried to headbutt him but missed and hit the corner of the door frame with his forehead and the other injuries when he fell on the stairs as they took him down. Nothing that they had in their possessions could inflict such injuries. As they walked into the house, their torches were in their motor vehicles. There was no need for them to carry their torches into the house because there were lights in the house.

[43] During cross-examination he confirmed that he bled profusely as a consequence of the assault by van der Watt on him; that if Bekker was in the house nothing could have prevented him from seeing him bleeding. He testified furthermore that van der Watt's injuries were not consistent with the alleged assault upon him by the police; that a torch would have left a blue mark and not made any laceration. He did not know when Elmarise emerged from the room in which she had gone to fetch her bag. He only noticed her standing by at one part of the room when they were struggling with her husband.

[44] The duty to prove that he is entitled to the relief that he seeks lies on the plaintiff. The case of Pillay v Krishna and others 1946 A page 946 lays down the fundamental principles that govern the onus of proof In our law. All these principles have their origin In the Corpus

Juris. The first of these principles which is of importance to this matter states as follows: “semper necessitas probandi incumbit illi qui agit” which simply means that if one person claims something from another in a court of law then he has to satisfy the court that he is entitled to it. See also *Neethling v The Weekly Mail and Others* [1993] ZASCA 203; 1994 (1) SA 708 AD at page 761B. Bekker must therefore establish his claim. He must not only make allegations in his pleadings but must also backup such allegations with credible evidence. Accordingly he must prove the assault upon van der Watt and, in addition, that he witnessed it and thirdly, and lastly, that it caused him psychological trauma.

- [45] I now turn to establish as to whether Bekker has discharged that onus. As a starting point Bekker testified that when he arrived at van der Watt's house he found Elmarise and van der Watt outside talking to each other. He arrived at that particular house before the police, which made him the first person to arrive at the scene, apart from the security. Neither Elmarise nor van der Watt testified about seeing Bekker at that stage. They should have seen him because nothing prevented them from seeing him inasmuch as he saw them. Moreover he arrived there in his motor vehicle and parked it where they could see it and where they should have seen him emerge from the motor vehicle. They were not engaged in any activities that could have taken their concentration away from him. There is no explanation from Bekker why Elmarise and van der Watt did not mention him in their evidence at this stage. In the circumstances the inescapable conclusion that the Court has arrived at is that they did not mention Bekker's presence at this stage because he was not present at all.
- [46] Bekker continued with his evidence and told the Court that upon the arrival of the members of the SAPS, he and van der Watt approached them. In his presence van der Watt said something to the police. He could not remember precisely what van der Watt said to the police but he remembered that he himself told the police that van der Watt was merely teasing them when he said what he could not remember. This evidence of Bekker did not enjoy the support of van der Watt. Nowhere in his evidence did Van der Watt mention that when he spoke to the police Bekker was present. As far as it concerned van der Watt, he was with his wife when he spoke to the police after which he walked into the house. Bekker was not there. There is no reason why van der Watt would in his evidence fail to mention Bekker's presence when he spoke to the police. The fact that he did not mention him means that Bekker was not present. It is of paramount importance to point out also that in her evidence, Elmarise failed to mention that Bekker was

present at any stage before he got into the house. In the absence of such evidence the Court is entitled to infer that Bekker was not present.

- [47] Elmarise told the Court that one of the police officers insisted that one of them, in other words, either she or van der Watt would have to leave the house that evening. She agreed that in such a case she would have to go into the house and pack her bag. According to Bekker, he was involved, with Elmarise, in a discussion with the police at this stage. Elmarise did not mention that he was present at this stage.

- [48] The fact that neither van der Watt nor Elmarise did not testify that he was present lend credence to the evidence of Mpye and du Toit. Mpye told the Court, It will be recalled, that as they were still standing outside van der Watt's house another motor vehicle, a private motor vehicle, arrived and parked across the street and that no-one came out of the said motor vehicle even at the stage they walked into the house. It was never put to du Toit that Bekker was also present at the scene when he, du Toit, arrived there. This is despite the fact that du Toit mentioned the names of all the people that he found at van der Watt's house except Bekker's name, du Toit testified that he knew Bekker. This evidence is not in dispute. He testified that while he was busy interviewing Elmarise he heard a voice of a man coming from the motor vehicle that had parked across the street. He walked across the street to the said motor vehicle where he found Bekker in the motor vehicle. This evidence was not challenged. He asked Bekker why he was there and why he was not assisting his sister Elmarise. Bekker told him that he was scared of van der Watt and what he could do to his sister. Again Bekker begged him, du Toit, to protect his sister. When he asked him why he did not speak to van der Watt himself Bekker told him that van der Watt had told him that he did not want to see him at his house. He left Bekker there and walked back to where Elmarise and some of his colleagues and the children were.
- [49] The fact that he was always at his motor vehicle accounts for the reason why, neither van der Watt nor Elmarise, did not mention his presence at the early stages of their evidence. In my view it shows that Bekker has fabricated his evidence to give an impression that he was present when the police spoke to Van der Watt and Elmarise.
- [50] Elmarise told the Court that as she walked into the house the police followed her. She had not invited them. On the other hand, the police testified that she requested them to accompany her into the house to fetch her bag. The evidence of Elmarise is improbable. Why would the police accompany her into the house if, firstly, she had not invited them; secondly, if she had told them, in other words, the police that she and her husband had resolved their fight; thirdly, if she had told them that she did not want to lay any charges against her husband; and fourthly, when van der Watt was so aggressive and ordered them from his premises; fifthly, when van der Watt was even more angry to see du Toit; and sixthly, she had told du Toit that she did not want him to be part of the police who were attending that domestic violence issue. In the premises it was highly unlikely in the circumstances of the case that the police would have walked into the house with her. Accordingly, the most probable evidence is that she asked the police to escort her into the house while she went to fetch her bag. Of course there were well founded reasons why she had to do so. Contrary to what she told the police that she and van der Watt had resolved their dispute, she knew that it was not true. Her husband was still furious. She was afraid of him. That her husband was still furious is manifested by his threats that he would murder her and that they must return to fetch her body; his refusal to be calmed down; his persistent use of insulting language against the

members of the police force who were merely doing their job and finally, the fact that the poor children sought cover behind the police.

- [51] The duty was upon Bekker to prove that he was present when the police interviewed both Elmarise and van der Watt. He should leave no doubt in the mind of the Court about his presence. Bekker cannot testify about the circumstances under which the police accompanied Elmarise into the house because he was not present when Elmarise asked the police to accompany her into the house to fetch her bag.
- [52] To recap, Bekker and his witnesses' version was that Bekker was present in the house when he witnessed the police assault van der Watt, whereas the defendant's witnesses' version is firstly, that van der Watt was not assaulted and secondly, that Bekker was not in the house when van der Watt sustained the injuries captured in his medico-legal examination report.
- [53] I now turn to the Incident as it happened inside the house. Bekker testified that as the police walked into the house he followed them and went to occupy Van der Watt's son's bedroom. No-one of the police testified that they saw Bekker walk into the house with them or behind them. To make matters worse for him, neither van der Watt nor Elmarise saw him enter the house. Van der Watt testified that the first time he became aware that Bekker was present in the house was during the commotion that took place in the house when Bekker screamed a warning. The first time Elmarise became aware of the presence of Bekker in the house was when she remembered Bekker saying "they are going to kill you downstairs". This happened, according to her testimony, when the police were carrying Van der Watt downstairs after he had been handcuffed. This took place after van der Watt had, on his own version, headbutted du Toit.
- [54] It would appear that Elmarise and Bekker in particular did not witness the incident that took place in the house. These are the

reasons.

54.1. van der Watt asked du Tait what he was doing in the house. Du Tait responded and told him that he had work to do. Neither Elmarise nor Bekker heard this conversation despite the fact that both of them claim that they were in the house. They should have heard this conversation because they were both in the house. No explanation has been furnished why they did not hear this conversation. The conversation was certainly not conducted softly or in a friendly manner;

54.2. van der Watt testified furthermore that du Tait acted aggressively at him by pointing a finger at him all the time. Neither Elmarise nor Bekker saw this;

54.3. van der Watt asked du Tait what he was doing in the house. du Tait responded by telling him that because of the nature of the complaint they were attending at that particular house, he van der Watt, would have to leave the house seemingly for that particular evening. This evidence was not supported by either Elmarise or Bekker, both of whom claim that they were in the house and saw the fight;

54.4. Van der Watt testified furthermore that du Tait, on being asked what he was doing in the house, said that he was there to protect Elmarise while she was packing her bag in order to go and spend the evening somewhere. This conversation was not heard both by Elmarise and Bekker because neither of them testified about it despite their presence in the house;

54.5. van der Watt continued with his testimony and testified that he asked du Toit where his wife, in other words Elmarise, was going to spend that particular evening. Again neither Elmarise nor Bekker testified about this conversation; no explanation forthcoming from her why she did not see van der Watt headbutt du Toll. It was not only van der Watt who testified that he headbutted du Toit. Both Mpye and du Toit testified about it. Mpye saw van der Watt first punch du Toit with fists in the face and thereafter headbutt him. Du Toit himself testified that van der Watt hit him with a couple of fists in the face before he headbutted him, still in the face, in particular on the nose. As a consequence of the said attack he sustained some injuries and bled profusely from his nose. He submitted proof of his injuries. Accordingly Elmarise, if she saw the fight start and Bekker, if he was in the house, should both have witnessed the incident in which Van der Watt first punched du Toit in the face and thereafter head-butted him on the nose and should therefore have seen it and also should have seen him bleed. They should have told the court about it.

54.7. Moreover no one testified that du Toit had those injuries when he arrived at van der Watt's house. There is evidence, though, that while he was there he sustained some injuries. Even on the evidence of van der Watt, who testified that he head-butted du Toll, the probabilities are that du Toit suffered some injuries as a result. There is medical evidence by Dr. Roberlse that on his return

from van der Watt's house du Toit had some injuries. So, the conclusion is inescapable that du Toit suffered those injuries in van der Watt's house and in the circumstances set out in the defendant's witnesses' evidence;

54.8. van der Watt told the Court furthermore that du Toit fished out a firearm and hit him in the face with it. As a result he sustained bruises on the forehead and nose. According to Elmarise, du Toll hit him on the head with the forearm. This witness saw, in my view, a different event. If the evidence of van der Watt is anything to go by there is no explanation why van der Watt would sustain bruises on the forehead and nose after being hit with a gun in the face. This is highly unlikely. While I am still on this

point, van der Watt tendered no evidence In support of his evidence that the bruises that he sustained allegedly when he was hit with a firearm by du Toll were caused by a firearm. This is so despite the fact that from the onset he knew that the defendants witnesses disputed that they assaulted him. It is not enough just to tender the evidence of Injuries;

54.9. if the evidence of Elmarise is to be accepted it is highly Improbable that having been hit with the flrearm on the head van der Watt should sustain bruises on the forehead and nose;

54.10. after Van der Watt had punched du Toil with fists In the face and headbutled him on the same place, which neither Elmarise nor Bekker witnessed, du Toll bled from the nose. This is very important. Neither Elmarise nor Bekker saw du Toil bleed. In my view, if both of them witnessed the incident and if during the incident both of them saw blood streaming down the face of van der Watt they should have seen the blood coming out of du Toil's nose. It they could see blood in the face of van der Watt because they were in the house and furthermore because the lights were on they should have seen du Toit bleed at the same spot and under the same circumstances.

In particular Elmarise should have seen du Toil bleed because she followed him out to the swimming pool where he washed the blood off his face in her presence. Her evidence that she did not see him bleed Is untrue and shows that she is an unreliable witness.

[55] The defendants' witnesses did not deny that van der Watt had sustained some Injuries. They explained that van der Watt sustained

the injuries on the forehead when he missed du Toil and hit the comer of door frame with his forehead. This evidence is, in my view, more probable than van der Watt's evidence. They also explained that he sustained further injuries when he fell of the stairs. From the nature of the injuries and their location on the body of van der Watt that is more likely. The plaintiff tendered no expert evidence as to what the cause of his injuries was. This Bekker had to do for three reasons. Firstly, the defendant's witnesses denied that they had assaulted van der Watt In any way; secondly, they had disclosed what the cause of such injuries was and thirdly, and finally, du Toil In particular had testified that the injuries that van der Watt had sustained could not have been caused by torches. They were inconsistent with the alleged assault upon him. He testified that if van der Watt had been hit with torches he could not sustain the type of injuries that he had exhibited before the Court. Finally, ha testified that he had undergone medical training and therefore spoke with authority when he testified that van der Watt would not have sustained the kind of Injuries that he had on that particular evening if he had been assaulted with torches.

[56] There are other factors which make the evidence of Bekker and his witnesses false. Firstly, du Toll testified that because there were lights in the house, it was unnecessary for them ID take the torches along into the house. Secondly, even if they had torches why would six police officers all take their torches when they got into the house which had been property illuminated. It would make no sense in the circumstances to carry so many torches .into the house if there would not have been the need to use them. Thirdly, there was no evidence that as the police officers walked into the house they had torches with them. Where did the

torches all of a sudden come from in the house? Fourthly, Bekker's description of the Incident or the so-called assault on Van der Watt by members of the SAPS was so sketchy as not to be true. His failure to see the injury on du Toll and to observe that he was bleeding from the nose suggest, In my view, that he was not present In the house and, If he was present, he was dishonest in failing to testify about the condition of du Toit As for Elmarise she was selective in her memory. She chose to remember certain Incidents and conveniently forgot about important evidence. She was, in my view, dishonest In failing to mention that du Tolt had

Injuries and that he bled from the nose and that she found him at her swimming pool washing the blood off.

[57] If Elmarise was present when the fight started in the house, as she claimed, she should have seen van der Watt punch du Toll In the face, grab him by the collar of his shirt and headbutt him In the face. Even If one was to accept that she was not present when the fight started surely she should have seen du Toit bleed and should have testified about it. More so she saw her husband bleed. It was inconceivable that she did not see du Toit bleed. A failure to testify about matters which are unquestionably within one's knowledge is akin to a witness who has witnessed an event take place but who, for her own interest, withholds such vital evidence from the Court. It is also akin to a witness who deliberately gives false evidence. In this regard I am fortified by *Galante v Dickinson* 1950 (2) SA 480 (A) at page 465 where the court had the following to say:

"in the case of the party himself who is available, as was the defendant, here, it seems to me that the inference is, at least obvious and strong that the party and his legal advisors were satisfied although he was obviously able to give very material evidence as to the costs of action, he could not benefit and might wall because of the facts known to himself damage his case by giving evidence and subjecting himself to cross-examination."

I applying this principle to the current case both van der Watt and Elmarlse should have testified about the injuries on du Toit. This was within their knowledge. They chose not to testify about It because that would have destroyed Bekker's case. In the premises

there is sufficient evidence on the basis of which this Court may make a finding that the defendant's witnesses' version is more

probable than the plaintiff's. The Court regards the false evidence that van der Watt and Elmarise gave with regard to the provenance of du Toit's Injuries and his bleeding, a factor in favour of the defendant

[58] The evidence of Visser was not helpful. It was Inconclusive. It failed to establish that Bekker sustained any emotional trauma as a consequence of the alleged assault.

[59] Mr. van Eeden ("van Eeden"), counsel for the plaintiff, challenged the contents of the defence witness's statements. In my view they gave reasonable explanations why they did not in their statements mention some of the events that took place there. For instance, du

Toit was asked why he did not mention in his statement the fact that Elmarise and the children took cover behind the police. His response was that the statement had nothing to do with Elmarise and the children but ITIOI9 to do with the charges he had intended laying. Again it was pointed out to him that in his statement he had failed to mention that Elmarise's clothing was torn and that she had some Injuries. His answer was again that his statement was meant for the charges he had contemplated laying. It was put to him on two occasions that he had fabricated his testimony and he denied it on each such occasion. On the whole I am satisfied with the testimony of the defendant's witnesses. I cannot find any fault with them or their testimony. Finally, van Eeden put it on record in his written address that van der Watt testified that he had instituted a claim against the defendant arising from the unlawful arrest and detention and assault by the members of the defendant pertaining to the incident in question of 3 February 2012. Under oath he confirmed that the matter was settled and that the defendant accepted liability for the arrest,

detention and assault on an apportionment basis of 50%. According to him the agreement was subsequently made an order of the Court.

According to van Eeden, the order is not disputed. In conclusion he stated that in the order it was clearly slated in unequivocal terms that van der Watt was unlawfully arrested, detained and assaulted and that the defendant was liable for 50% of van der Watt's proven or agreed damages.

[60] In the first place the fact that there is a Court order constitutes no proof that Bekker was present in the house. Secondly, the circumstances in which the settlement was made have not been placed before this Court. Consequently this Court has no knowledge why the settlement was reached. Thirdly, on the facts before this Court such settlement would lad< any legal foundation. On the facts before me this matter could not be settled as suggested by van Eeden In particular in favour of Bekker or van der Watt. In view of the order I anticipate making van der Watt was not assaulted by the defendant's employees. I have to state here that Bekker and his witnesses simply embellished their evidence. Fourthly, Ms. Kgatia, counsel for the defendant questioned the said settlement agreement She indicated that the claim that van der Watt had instituted against the defendant and which led to the Impugned Court order was settled without authority. Accordingly, van Eeden could not use It as a leverage in favour of Bekker.

[61] Finally I find that the plaintiff has not proved his claim. Accordingly the following order is made:

"The plaintiff's claim is dismissed with costs".

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff:

Adv. JC van Eeden

instructed by:

Messrs Geyer Labuschagne Attorneys

Counsel for the defendant:

Adv. M Kgatla

Instructed by:

The State Attorney

Date Heard:

3-9 February 2017

Date of Judgment:

18 May 2017

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Prepared on 13 October 2026 · Esheria