

SOUTH AFRICA / JUDGMENT

Mangadi v De Beer (1426/05) [2013]

ZANWHC 39 (28 March 2013)

[2013] ZANWHC 39

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

1426/05

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IN THE NORTH WEST

HIGH COURT

MAFIKENG

CASE NO.: 1426/05

In the matter

between:

JOHANNES MANGADI

.....PLAINTIFF

and

GIDEON DE BEER

.....DEFENDANT

JUDGMENT

LANDMAN J:

- [1] Golf is not classified as a contact sport. But then golf is not played in the club house, where the plaintiff, Mr Mnagadi, was pushed, shoved or hit and injured by the defendant, Mr Gideon de Beer. This is a claim for damages suffered. The decision as regards the merits as defined in my earlier order, have been separated from the quantum of damages.

The undisputed evidence

- [2] The plaintiff is a member of the Lichtenburg Golf Club. He and three friends were playing golf on 2 November 2002 when they encountered three young men, Jean (to whom I shall refer as Jean) and Michael de Beer and Phillip Pretorius (since deceased) were playing ahead of them and who were delaying play. In accordance with the rules of golf, the plaintiff asked

them whether his party could play ahead. This request was denied. One of the young men kicked a ball belonging to the plaintiff's party into the rough. The plaintiff went to speak to him and was told he should use another golf course. The plaintiff was upset by this. One of the young men, Michael aged 13, phoned his father and reported that some men were swearing at them and wanted to hit them.

- [3] Both parties repaired to the vicinity of the Club House. At one stage the plaintiff, then 57, decided to enter the club house to obtain water from the water cooler which was situated there near a pillar which was near the kitchen serving hatch. The water cooler was about 13 metres from the glass doors. The plaintiff was busy filling his plastic "Energade" bottle with water and ice when Jean, a nineteen year old student and rugby player, entered the club house through the kitchen door. He was in an aggressive mood and started shouting as he came through the doorway. He balled his fists.
- [4] The plaintiff was surprised and turned and moved away from Jean intending to leave through the glass doors. As the plaintiff walked away he said he felt Jean breathing down his neck. Jean was aggressive. He said: "Ek vat nie kak van mense soos jy af nie. Kom ons afreken met jou. Ek is klaar met die kak van jou. Ek gaan jou donner."
- [5] The defendant drove to the golf course, parked, met his son Michael. He calmed him and asked him where Jean was. Michael told him that Jean and Phillip had gone to drink water. He went to look for the Caddy Master. Michael accompanied him. He knew that Jean and Phillip were in the club house but he did not see them. He found the Caddy Master, William, at the kiosk which is near the glass doors of the main, course facing, entrance. He said he wanted the number of the manager.
- [6] The plaintiff was afraid that Jean would hit him while his back was turned and so he turned around and came face to face with Jean. The plaintiff began retreating to the glass doors by walking backwards. Jean was poking at The plaintiff with his fingers. The plaintiff was holding the plastic bottle at its base and used it to ward off Jean's poking fingers by using it as a shield in front of his (The plaintiff's) face. The plaintiff said to Jean that he cannot speak to him in that manner. He is not Jean's peer and he has a daughter who is older than Jean.
- [7] At this time the plaintiff was standing to the left of a counter of the sports shop which juts into the hall; at the counter's inner most edge.
- [8] It was while he was at the Caddy Master's kiosk that the defendant heard something which caused him to walk to the club house.
- [9] Thus far all that has been set out is either common cause or cannot be disputed.

Disputed evidence

The plaintiff

- [10] The plaintiff while standing near the counter, which is nine metres, from the glass door, says he heard something hitting him from behind on his right jaw. He fell against the counter and then fell to the floor and was dazed or lost consciousness. He came to, was on his knees, he was aware of two persons. His spectacles had been knocked off and were broken. The bottle had fallen on the floor. He is unable to say what hit him.
- [11] The plaintiff stood up and asked the defendant why he had assaulted him. The defendant said “Jy praat nie so met my seun nie”. The defendant had no reason to assault him. The defendant also said “You want me to repeat it again?” The defendant asked his son whether he was all right.
- [12] The plaintiff was injured. He reported the matter to the police and was given a J88 form which was completed by a Dr Kraai whom the plaintiff consulted. Xrays were taken. He later testified at the criminal trial of the defendant. The golf club investigated the incident. I may add that the defendant laid a charge against the plaintiff with the Police but no prosecution ensued.
- [13] Dr Kraai confirmed the plaintiff’s injuries.

The defendant

- [14] The defendant says he heard a hard scream which probably translates as yelling. And at the same time he heard “n Aangsbevange stem” which translates as a panic stricken voice which he recognised as belonging to Jean. He could not hear what was being said. Both sounds came from the club house. He walked hurriedly to the glass door of the club house. He entered and saw a big man standing right up against his child at a 15% angle. The defendant saw the man’s back. He could not see both his hands; only his right hand. He did not see Jean’s hands. The big man shoved a bottle with an aggressive action in his child’s face. The big man was shouting at his son at the top of his voice. He saw the bottle go flying through the air and the man assumed a boxing position. This was when Jean lifted his right hand and knocked the bottle out of the plaintiff’s hand. The defendant had no doubt that the man was about to assault his son. The defendant moved forward and pushed the man away from his child. It took 5 to 6 seconds to reach the plaintiff. Under cross examination the defendants said that a stamp (push) is a “hit”.
- [15] The defendant demonstrated this action. He moved forward with his left elbow bent and his fist clenched. His fist was at the level of his shoulder. When the plaintiff stood next to the defendant it was seen that the defendant’s fist was in line with The plaintiff’s jawbone and cheek. I might add that both the defendant and his son Jean are 1.79 m in length (wearing shoes) and that the plaintiff (wearing shoes) is 10 cm shorter. The defendant is currently stocky while the plaintiff is currently heavy. The plaintiff cannot be classified as a big man in terms of physique. He would be a big man in so far as he was clearly a middle aged adult.

- [16] The defendant does not know with which part of his left upper limb he struck the plaintiff. Neither does the plaintiff. There was no blow with a fist and no fight. He had no intention of assaulting the man. The defendant turned to his son and asked him whether he was all right.
- [17] The plaintiff was on his knees. He stood up from the floor, took off his spectacles on the counter, took up a position before the defendant and assumed the stance of a pugilist. The plaintiff was as aggressive as previously. He asked The plaintiff whether he wanted to assault him as you would my son". Other came in and the plaintiff said to them: "Look at the blood. Look at the Blood. He (the defendant) pushed (stamp) me.
- [18] Under cross examination The defendant said that had the plaintiff and Jean been two to three paces apart he would not have deliver a blow ("hou gee") but rather have intervened to calmed the two. He did not walk into the club house with the intention of assaulting the plaintiff. He agreed that there would be no need to intervene once the bottle had been struck out of the plaintiff's hand provided The plaintiff had backed off/stepped back. When he saw the bottle fly he thought the plaintiff was going to assault Jean. He moved forward instinctively. Jean was not aggressive. He was told after the incident that the men had threatened to hit Jean and his party with golf sticks. He did not say to the plaintiff: "Jy praat nie so met my kinders nie". It was put to the defendant that he could have shouted "Stop, hou op" but he did not. The defendant said that he acted instinctively once the bottle went flying. He said the plaintiff would not have heard him because the plaintiff was shouting so loud.
- [19] The defendant's statement to the Police, dated 9 December 2002, which he drew with assistance and had typed, was elicited in cross examination. The whole statement became admissible. Paragraphs 5 and 6 are particularly relevant. They read:
- "5. Op hierdie stadium het ek gehoor dat iemand in the klubhuis baie hard skreeu-praat. Ek het op daai stadium gehoor dat my seun Jean, terugpraat en het ek in daai rigting beweeg. Toe ek in die klubhuis inbeweeg het ek gesien dat 'n swart manspersoon met 'n waterbottel in my seun se gesig druk en het ek gesien my seun klap die waterbottel uit sy hand uit. Die man het op daai stadium teruggetree en sy hande gelig en het ek op daai stadium geglo dat hy vir Jean gaan slaan. Ek het onmiddelik vorentoe beweeg en die man weggestamp van my seun af. Hy het geval en opgespring, sy bril afgehaal en op die toonbank gesit. Hy het sy hande opgetel in 'n slaan houding en ek het vir hom gevra of hy ook vir my wil aanrand. Hy het sy hande laat sak en omgedraai en sy bril van die toonbank afgehaal en op sy gesig gesit.*
6. Op daai stadium het daar ongeveer drie ander persone ingekom waar onder andere 'n caddy of twee. Onmiddelik toe hy hulle sien inkom het hy vir hulle gesê kyk hoe het hy my geslaan en kyk die bloed. Ek het vir hom gelag en gesê waar is die bloed en wie het jou geslaan."
- [20] In answer to my questions the defendant said that he did not know what type of bottle it was. He agreed that the water cooler was more or less where the plaintiff said it was. There was nothing else that he could have done to defend Jean.

Evaluation

- [21] The plaintiff was a good witness who made a favourable impression. He could possibly have made a concession as regards one or two propositions put to him but his failure does not detract from his reliability and credibility.
- [22] The defendant had a version of the events and with one or two exceptions he consistently stuck to it. His version taken on its own could have been plausible. But, in context and having regard to the probabilities and the evidence which could have been led but which was not led. It casts doubt on his version.
- [23] The undisputed facts place Jean as the aggressor. It is true that a defence of mistake can nevertheless be raised.
- [24] The defendant said in his evidence that he heard anxiety in Jean's voice while at the kiosk. But his statement says that Jean was answering back. This is more consistent with an aggressive Jean than an anxious Jean.
- [25] The defendant would have seen Jean's face as he entered or came closer because Jean was about 10cm taller than the plaintiff who is not physically a big man. It is unlikely that Jean would have warded off the bottle with his right hand unless he had assumed a pugilist position.
- [26] Looking at the points of dispute between the defendant and the plaintiff then I arrive at the conclusion that Jean could potentially give evidence on every item in dispute and that his evidence could support the defendant's evidence of "noodweer" or necessity.
- [27] It is clear that Jean would probably have said that Phillip Pretorius was present in the club house. The defendant said that he relied on his own version and said that Jean's version contradicted his version. He did not say in what respects Jean's version would have contradicted his version. A copy of Jean's statement to the police has been discovered.
- [28] Even in the absence of the statement, I can accept that he would contradict the defendant's evidence in some aspects and as the point in issue is a narrow one I may assume that he would contradict him on more material issues. Jean would be able to assist in proving the defendant's defence that:

He called out in an anxious shout or scream;

He struck the bottle out of the plaintiff's right hand using his own right hand.

That managed lifted his right hand made a fist and drew back to launch;

That the plaintiff's spectacles were not knocked off his face and were not broken.

That the plaintiff said he would assault the defendant.

- [29] It is true that Jean was summoned to testify by the plaintiff. This was proffered by Adv Theron as a reason for not calling Jean to testify for the defendant. There is no merit in this. Had the defendant wanted to call his son he could have done so. I am aware of the dictum in *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 714H to 717A but this has no application here. I am entitled and I do draw an unfavourable inference from the defendant's failure to call Jean to the witness stand. There was no need for the plaintiff to call Jean as a witness the essential part of his evidence; that he was assaulted stands uncontested.
- [30] I find that the plaintiff's evidence was more probable than that of the defendant and that on the facts he did not act in noodweer. He intentionally assaulted the plaintiff by delivering a blow to his right cheek or jaw. He acted out of anger.

Noodweer

- [31] However, should this matter go further, I need to say something should it be found that the defendant's evidence be accepted in preference to that of the plaintiff.
- [32] The defendant admits that he struck or hit or pushed the plaintiff and pleads that he did this to avoid his son Jean being assaulted by the plaintiff which assault was imminent. At the end of the trial his defence had mutated to one of "putative necessity". He believed that Jean as about to be assaulted by the plaintiff. However I shall deal with both the objective and the putative defence.
- [33] Neethling Potgieter and Visser, *Deliktereg*, 93-94 define the defence of necessity or noodweer as:

"Nood toestand is aanwesig wanneer die dader deur oormag in so 'n posisie geplaas word dat hy sy geregverdigde belange of die van ander slegs kan beveilig deur 'n redelike aantasting van die reg of die goed van 'n andere."

- [34] In *Abraham Christiaan Duvenhage v Kenny De Kock* (Unreported HCFS, Case Number 3233/2009, Delivered 15 September 2011), it was said at para 16 that:

"Eiser dra die bewyslas om die elemente van die onregmatige daad, synde aanranding in casu, te bewys, dit wil sê dat verweerder hom onregmatig en met die nodige bedoeling aangerand het deur hom met die vuus te slaan wat tot gevolg gehad het dat hy beserings opgedoen het. Insoverre verweerder die handeling ontken is eiser dus verplig om die Hof op 'n oorwig van waarskynlikhede te oortuig dat die elemente van die onregmatige daad, uitgesluit dit wat met quantum verband hou, bewys is. Verweerder het in die alternatief gepleit dat, indien bevind word dat hy eiser wel met die vuus geslaan het, wat ontken is, hy in noodweer opgetree het en bygevolg gesteun op 'n regsverdigingsgrond. Alvorens en totdat eiser die Hof oortuig dat hy wel deur verweerder met die vuus geslaan is, trek verweerder geen bewyslas nie. Staan dit eenmaal vas dat verweerder eiser inderdaad met die vuus geslaan het, moet hy die Hof op 'n oorwig van waarskynlikhede oortuig van sy verweer, synde noodweer. Vergelyk MINISTER OF LAW AND ORDER v MONTI [1994] ZASCA 139; 1995

(1) SA 35 (A) te 39G – H en MABASO v FELIX 1981

(3) SA 865 (A) te 875.”

[35] In *Ntamo v Minister of Safety & Security* 2001(1) SA 830 (TK) at 841A-C, Madlanga AJP considered the proportionality of use of lethal force by the police in circumstances of that case. The Court held that the police had to justify their resorting to lethal force. The court provided examples of factors that may be relevant to justification, which, in my view, are useful in this case. They are:

- (i) The imminence of danger;
- (ii) how threatening the danger is to life or limb;
- (iii) the nature of the instrument, if any, the attackers use in waging the unlawful attack;
- (iv) the proximity of the attacker and the attacked;
- (v) the mobility of the attacker and the celerity of his/her movement;
- (vi) how easy or difficult it would be to apply force to a less delicate part of the body.

[36] Van Winsen JA said in *Intanjana v Foster & Minister of Justice* 1950(4) SA 398 at 406 (A) that:

"The very objectivity of the test however demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind and at the time he acted. The Court must be careful to avoid the role of an armchair critic, wise after the event, weighing the matter in the secluded security of the courtroom.

[37] There was no real imminent assault. The bottle which the defendant had apprehended as a weapon had been removed from the plaintiff's hand. The most was that there could be fisticuffs. But Jean had defended himself by knocking away the battle. It is reasonable to suppose he could defend himself against fists.

[38] Even if there was imminent danger of an attack, the defendant could have shouted at the plaintiff. I do not accept that the plaintiff would not have heard him within the confines of the clubhouse. At least the defendant could have shouted a warning. He did neither. The defendant could have grabbed or tackled the plaintiff from behind. He could have distracted the plaintiff by pulling at his clothes. He did none of this.

[39] In the premises I find that the defendant

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

date of hearing : 17 October 2006

10 may 2012

11-15 March 2013

date of judgment : 28 march 2013

counsel for the plaintiff : Adv maritz; later adv hattingh

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