

SOUTH AFRICA / JUDGMENT

## Mills v Coetzee and Others (39881/14) [2018] ZAGPPHC 965 (20 November 2018)

[2018] ZAGPPHC 965

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

39881/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 39881/14

In

the matter between:

LANCE

FRITZ MILLS

Plaintiff

and

CHRISTOPHER

COETZEE

1st

Defendant

LOUIS

COETZEE

2nd

Defendant

WILLEM

PELSER

3rd

Defendant

**JUDGMENT**

MNGQIBISA-THUSI, J

- [1] The plaintiff, Mr Lance Mills, is seeking damages as a result of the loss he suffered due to injuries sustained after allegedly being assaulted by Mr Christopher Coetzee ("the first defendant"); Mr Louis Coetzee ("the second defendant"); and Mr Willem Pelser ("the third defendant") .
- [2] The third defendant has allegedly disappeared and the plaintiff is no longer pursuing a claim against him.
- [3] In their plea the defendants, who are siblings, deny assaulting the plaintiff. They allege that the plaintiff was assaulted by the third defendant.
- [4] The matter proceeds only on the issue of liability.
- [5] The first defendant has instituted a counter-claim against the plaintiff for damages suffered as a result of an assault by the plaintiff who allegedly grabbed him and pulled him back, causing him to fall over.
- [6] It is common cause that the defendants were convicted in the Pretoria North Regional Court of assault with intent to commit grievous bodily harm after being charged with assaulting, amongst others, the plaintiff. Further, the defendants' appeal against conviction was dismissed. Flowing from the Hollington rule[1], it is apposite to indicate that the criminal court's

**conclusion**

on the guilt of the defendants does not carry any weight in these proceedings towards proving the defendants' liability to the plaintiff.

- [7] It is not in dispute that the plaintiff was assaulted on 4 August 2012 at a nightclub known as Die Brouery ("the club"),

situated at corner Marija and Zambezi avenues, Sinoville, which club was at the time owned by the plaintiff and his wife, Mrs Sarah Ann Louise Mills ("Mrs Mills"). Further that the plaintiff did sustain serious injuries as a result of the assault.

- [8] The only issue in dispute is the identity of the plaintiff's attackers. In order to succeed in his claim, the plaintiff bears the onus of proving on a balance of probabilities that he was assaulted by the defendants. With regard to the counter-claim the onus lies with the first defendant to prove on a balance of probabilities that the plaintiff assaulted him.

- [9] The plaintiff's evidence is as follows. On the night in question at around 01h00 he and his wife were standing just outside the entrance of the club welcoming customers and greeting those leaving. They saw a group of people approaching the entrance and one member of the group was holding a glass with alcohol. They called the manager, Mr Juan-Pierre Michael Thoms ("Mr Thoms"), not to allow the person to enter the premises with the glass as this was contrary to the rules of the club. Plaintiff identified the person holding the glass as the second defendant. During the conversation between Mr Thoms and the second defendant a verbal altercation ensued. Shortly thereafter the group entered the premises after the second defendant emptied his glass.
- [10] Thereafter a security guard at the premises, Mr Paulus Khumalo ("Mr Khumalo") blew his whistle and they came down to investigate. Mr Khumalo informed them that Mr Thoms was being assaulted by three people. He identified the second defendant as one of the people assaulting Mr Thoms. He requested Mr Khumalo to open the fire escape door and he rushed upstairs. As he was coming up the stairs, he was shouting 'stop, stop'. On reaching the upper floor he saw the first defendant standing at the door with both his hands holding the door frame and kicking Mr Thoms. Mr Thoms was between the first and the second defendants. The second defendant was also hitting Mr Thoms with fists and kicking him. He also saw a third person who was obscured by a door and he could not make him out. He grabbed the first defendant by his left upper arm and right shoulder. The first defendant, in reaction to being held by the shoulder, pushed him back, hitting him with his elbow on the side of the face. He lost his balance and fell to the ground. The first defendant also fell back and landed on the stairs' landing zone. As he was lying on the ground the second defendant approached and repeatedly jumped on his face, neck and back. He tried to defend himself but could not because his right hand was underneath the first defendant. The second defendant continued to beat him until he lost consciousness. When he regained consciousness, the defendants had already left. He went to the police station with Mrs Mills to lay a charge and thereafter went to seek medical attention.
- [11] The plaintiff further testified that he did not know the third defendant but was informed by the police that a third suspect was also involved in his assault.
- [12] The following version of the defendant was put to the plaintiff. That the plaintiff was wrong in say that the first defendant was part of a group when he arrived at the club. In fact the first defendant had arrived with his girlfriend in a separate car. Further that the defendants would deny that the second defendant was the person who was holding a glass when they arrived at the club, but that it was the first defendant. Further that the second defendant would testify that he had an altercation with Mr Thoms at the door when he wanted to go outside to receive a telephone call from Mr Claassen who wanted to know if the defendants were already inside the club. Further, that Mr Thoms came and grabbed the second defendant by his arm telling him that he could not go outside with his drink. That the plaintiff approached and told the second defendant that if he wanted to cause trouble he must leave.

- [13] Furthermore it was put to the plaintiff that the first defendant will testify that he does not remember seeing the plaintiff with his wife when they arrived. The second defendant would testify that the plaintiff was not with his wife when they arrived but with Mr Thoms and another person. That Mrs Mills was at the bar where she served him.
- [14] The plaintiff disputed the defendants' version put to him.
- [15] A further version put to the plaintiff was that the defendants would testify that there was a dance off on the club floor. That there was some friction amongst the dancers and Mr Thoms came closer to where the defendants were. That the second defendant was in an altercation for the second time with Mr Thoms. That the defendants will testify that the Mr Thoms grabbed the second defendant and the second defendant tried to push Mr Thoms away. The first defendant came to his assistance and had grabbed Mr Thoms by his collar with his back to the fire door. Whilst the first defendant was holding Mr Thoms, the plaintiff grabbed him from behind. Due to the fact that first defendant already had a couple of drinks, he landed on his back and sustained scratches to his neck and a bruise to his elbow. Whilst lying on the floor the first defendant saw someone step over him to where plaintiff was. Further that the second defendant had called him and they left. Further that the first defendant would deny kicking, stepping or jumping on the plaintiff's chest or body. Further that first defendant would deny seeing the second defendant assaulting the plaintiff.
- [16] The plaintiff conceded that before losing consciousness he did not see the first defendant assaulting him. He testified that he was told by witnesses and the police that a third person was also involved in his assault.
- [17] Further it was put to the plaintiff that the second defendant would further testify that at some stage scuffle ensued between Mr Thoms and the second defendant. That they only left the club when the first defendant was lying on the floor and Mrs Mills had told him to leave the club and she had followed him to his car. Further that the second defendant would deny ever assaulting the plaintiff in any manner. Furthermore that during the same morning after they left the club, Mr Pelser told them that he was concerned that he might have killed the plaintiff and thought that he should not have jumped on top of him the way he did.
- [18] The next witness called by the plaintiff was Mr Thoms. His evidence is as follows. On the day of the incident he was employed as a bouncer at the club. On the night in question the plaintiff asked him to assist with some managerial duties which included, inter alia, welcoming customers.
- [19] Mr Thoms testified that a certain gentleman tried to enter the club with a glass containing alcohol, contrary to the rules of the club. He identified the person as being the second defendant. Shortly thereafter there was a fight inside the club, whereby the defendants were assaulting another patron whose name he did not know. Plaintiff requested him to go inside the club and break up the fight. He stepped in between the people who were fighting and that is when the second defendant pushed him towards the exit door and hit him with a fist on his right cheek. Second defendant made reference to the earlier altercation they had

when the defendants arrived at the club. The second defendant also swore at him and an altercation ensued. He tried to protect himself by holding on to the door frame. The defendants pulled his shirt over his head and he was unable to see who else was assaulting him. As he was being assaulted he ended up in a sitting position to try to protect himself.

[20] Mr Thoms conceded that he did not actually see the first defendant assaulting him. Mr Thoms further testified that he did not see the assault on the plaintiff.

[21] The next witness called by the plaintiff was Mr Khumalo, a security guard at the club. In his testimony Mr Khumalo substantially

confirmed the plaintiff's evidence with regard to the events leading to the plaintiff going upstairs after a fight broke up. Mr Khumalo confirmed that he was the one who alerted the plaintiff about the fight inside the club. Mr Khumalo testified that although he was downstairs when the plaintiff went upstairs, he was able to see the second defendant assaulting someone whom at that stage he could not identify. He testified that he was able to see the second defendant assaulting someone as the light upstairs was lit. It was only when he later went upstairs that he discovered that the person being assaulted by the second defendant was the plaintiff as he found him lying on the floor injured.

[22] The next witness for the plaintiff was Mrs Mills. Mrs Mills testified that on the day in question she was standing outside with her husband when a patron tried to enter the bar with a drink. They heard the sound of whistleblowing and they requested Mr Thoms to investigate what was going on as Mr Khumalo was blowing the whistle and also pointing towards the upper floor. She then saw a commotion and a group of about five people beating Mr Thoms and she went to them. On reaching them she saw that Mr Thoms' shirt had been pulled over his head. She ordered the tall man amongst the people who were assaulting Mr Thoms to leave and she followed him with his girlfriend outside. She testified that when she went to intervene in the assault on Mr Thoms, she saw a person lying on the stairs. She later went to him and discovered it was the plaintiff whose face was badly swollen, with blood coming out of his nose and ear. The plaintiff told her that he was assaulted by the tall man. Mrs Mills testified she went outside and found the second defendant with his girlfriend. She took the make and registration number of the car the second defendant was travelling in. Mrs Mills further testified that she did not know Mr Pelser.

[23] The defendants' version put to Mrs Mills was the following. That the second defendant will testify that when she saw Mr Claassen, she asked him where the gentleman with a blue shirt was. Mrs Mills responded that she could not recall seeing Claassen at the scene of the assault although she knows that he was a defence witness at the defendants' criminal trial. Further it was put to Mrs Mills that it was the first defendant who had a glass of alcohol and who tried to enter the bar and was prevented until he emptied the glass, which version was denied by Mrs Mills.

[24] Thereafter the plaintiff closed his case.

- [25] The first defendant's evidence is as follows. On the day in question he was drunk when he arrived at the club. He was made to empty his glass which had alcohol before entering the club. Inside the club there was a dance off on the floor and an altercation between two people took place. At this stage the second defendant, who was close to the people who were fighting, told him that the problem was sorted out. As he went back to the dance floor, he looked back and saw the second defendant wrestling with another man. He identified the person as Mr Thoms. He denied that the second defendant and Mr Thoms were fighting. He rushed towards them and grabbed Mr Thoms by the collar. The next moment he was being pulled from behind and he fell backwards together with a man who helped him to his feet. As he was lying on the ground he saw Mr Pelser stepping over him and disappearing. The second defendant called him and he followed him outside and they left.
- [26] The first defendant further testified that at the time he fell, the second defendant was in front of him. He denied hearing the plaintiff shouting 'stop, stop'. He also denied purposely hitting the plaintiff with his elbow or seeing the plaintiff being assaulted. The first defendant further testified that at a later stage Mr Pelser told him that he was responsible for throwing the man lying on the stairs down. He admitted that after his arrest he did not tell the police what Mr Pelser had told him. He explained that he did not inform the police about what Mr Pelser had told him because Mr Pelser's parents were the ones who secured an attorney for them and they had advised them to tell the police only what they had seen. The first defendant testified that it was only at a later stage that he discovered that Mr Pelser had lied in his police statement.
- [27] Under cross-examination the first defendant testified that he does not remember holding the doorframe while the second defendant and Mr Thoms were fighting. With regard to the rest of the questions put to him under cross examination the first defendant's response was that he could not remember.
- [28] The second defendant also testified and his evidence is as follows. On the night in question he arrived at the club after his friends had gone there. There was dance off between his friend Ivan and another person. He later went outside to answer the call from his friend Mr Claassen. As he stepped outside Mr Thoms grabbed him by his hand and told him that he could not go outside with a drink. He slapped and pushed away Mr Thoms. The first defendant asked Mr Thoms what he was doing. The plaintiff came storming towards them and told him to leave. That is when Mrs Mills chased him out of the bar. Mrs Mills also accused him of assaulting the plaintiff and followed him to his car. He denied assaulting the plaintiff. He further denied that the first defendant assaulted the plaintiff as he was lying on the ground on the lower level although he did not know how the first defendant ended on the stairs. He further testified that Mr Pelser told him that he assaulted the plaintiff but he did not personally see the assault on the plaintiff. He further denied assaulting Mr Thoms.
- [29] The defendants called Mr Ivan van Heerden as a witness. Mr Van Heerden admitted that he did not testify at the criminal trial of the defendants. He testified that he was at the club with the defendants when a fight broke out between the defendants and Mr Thoms. He went

towards them but by then the fight was over. The plaintiff came through the door and grabbed the first defendant from behind. Mr Pelser grabbed the plaintiff and threw him through the fire escape. Mr Pelser invited him to come and look and he saw the plaintiff lying on the ground full of blood. On expressing his concern to Mr Pelser, Mr Pelser responded that maybe he should not have jumped on the plaintiff's face. Thereafter he (Van Heerden) left the club.

[30] The next witness called by the defendants is Mr Leicester Chari Ferdinand Strubel Claassen. He testified that on the night in question he was outside the club and had phoned the second defendant. As the second defendant came out of the door holding a glass, Mr Thoms told him that he could not go outside with his drink. Mr Thoms grabbed the second defendant by his hand. The plaintiff who was sitting nearby told the second defendant to leave. Claassen testified that after ordering drinks together with the defendants, he went to a toilet inside the club and when he came back, there was fight on the dance floor. The second defendant told him not to get involved. He testified that whilst at the bar, with the defendants standing approximately about 3m from him, there was a fight which was taking place on the lower level with a lot of people watching. The defendants left. He went to his car to get cigarettes and shortly thereafter went to the toilet the second time. On coming out of the toilet Mrs Mills asked him where his friend in a sky blue shirt was. He pointed Johan Muller to Mrs Mills and she said he was not the person she was looking for.

[31] There are two mutually destructive versions before the court. In dealing with the issue of mutually destructive versions, the court in Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others[2] stated that:

"[5] The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows . To come to a

## conclusion

on the disputed issues a court must make findings on (a) the credibility of various factual witnesses;

- (b) their reliability and
- (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as
- (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors

mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or the improbability of each party's version on each of the disputed

### issues.

In the light of its assessment of (a), (b) and

- (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing the latter. But when all factors are equipoised probabilities prevail"[3].
- [32] It is common cause that on the 4 August 2012 the plaintiff was assaulted at the club and he sustained injuries. It is also common cause that the defendants were at the night club when the plaintiff was assaulted but deny being responsible for the assault. The plaintiff's evidence on the events preceding his assault is corroborated substantially by the evidence of Mr Khumalo and up to a certain point by that of Mrs Mills. According to the plaintiff, the only person he could identify to have assaulted him whilst lying on the ground is the second defendant. Plaintiff testified that during the assault he lost consciousness and could therefore not positively state that it was only the second defendant who assaulted him as he was informed that other people were involved. The assault on the plaintiff by the second defendant was corroborated by Mr Khumalo who was in a position of seeing what was going up the stairs where the assault took place as the area was well lit.
- [33] The plaintiff and his witnesses were impressive when giving evidence and came across as credible. I am satisfied that the evidence they gave is reliable and believable particularly with regard to the second defendant assaulting the plaintiff.
- [34] On the other hand the evidence of the defendants and their witnesses did not sound truthful. They were not impressive witnesses. Their evidence that Mr Pelser admitted to assaulting the plaintiff appears to be a well-rehearsed fabrication. It is improbable that Mr Pelser would have assaulted the plaintiff and as they testified did not witness the assault even though they were in close proximity to where the plaintiff was assaulted. Furthermore, plaintiff's evidence is corroborated by the first defendant that they both fell to the same area. How probable is it that the first defendant could not have seen his brother assaulting the plaintiff. The only reason could be that the first defendant was trying to distance himself from the assault so that he could not be implicated. I am satisfied that there is sufficient and direct evidence that the second defendant did assault the plaintiff.

[35] With regard to the first defendant, the plaintiff testified that the first defendant reacted violently by hitting him with an elbow when he grabbed his shoulder in trying to stop the assault on Mr Thoms. As a result he fell the night in question and that they be held liable for the loss he suffered as a result of the assault.

[38] In the result the following order is made:

1. The defendants are liable to compensate the plaintiff for all proven or agreed loss suffered as a result of the injuries he sustained in the assault on 4 August 2012 at the Die Brouery.
2. The defendants to pay the costs of this action.

NP MNGQIBISA-THUSI

Judge of the High Court

For plaintiff Advocate A Van der Westhuizen (instructed by De Bruyns Attorneys) and for the defendants Mr LD Isparta (instructed by Botha Bezuidenhout Attorneys Inc.)

- [1] In *Hollington v F Hewtll10rn* [1943] KB 587 (CA); [1943] 2 All ER 35, the court held that a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that an accused committed the offence of which he was convicted. This decision has been followed by our courts. See further *Prophet v National Director of Public Prosecutions* [2002] ZACC 9; 2002
- (2) SACR 196 (SCA) at para [42].
- [2] 2003 (1) SA 11 (SCA).
- [3] See also *National Employer's General Insurance v Jagers* 1984(4) SA 437 (E) at 4400-G.

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