



REPUBLIC OF NAMIBIA

CASE NO. I 2727/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HIRONIMUS

KITUKWAPO

ASHIPALA

Plaintiff

and

POPAWA

THEUFELUS

Defendant

CORAM: VAN NIEKERK, J

Heard: 19, 20 June 2012

Delivered: 30 July 2012

JUDGMENT

VAN NIEKERK, J: [1] In this matter the plaintiff instituted action against the defendant for damages in the total sum of N\$230 000. In the particulars of claim the plaintiff alleges that the defendant unlawfully assaulted him by beating him with fists and bottles and by throwing a broken bottle in the plaintiff's right eye, as a result of which the plaintiff lost the sight in that eye. In respect of this injury the plaintiff claims damages of N\$180 000. The plaintiff further alleges that the assault took place in public and within sight of members of the public. In respect hereof he claims N\$50 000 for *contumelia* suffered.

[2] During the case management process it was agreed and ordered that the issue of liability be separated from the issue of *quantum*. On 19 and 20 June 2012 this Court heard evidence and argument in order to determine whether the defendant is liable for the plaintiff's damages.

[3] The defendant in his plea denies liability. Although he admits that he hit the plaintiff once with his hand while holding a glass, he pleads that he acted in self defence against the plaintiff who was attacking him after the defendant attempted to stop a fight between the plaintiff and the defendant's friend. He further admits that the incident took place within sight of some members of the public, but denies having knowledge of the allegation that the plaintiff lost his eye sight or that he suffered *contumelia*.

[4] In his testimony the plaintiff said that he is a lance corporal in the Namibian Defence Force stationed at the Grootfontein Military

Base. On the date of the incident at about 3 - 4 am he was off duty at a night club with his girl friend having drinks. The defendant, who he knew as a colleague, came to his girlfriend on three occasions and called her outside the club. On each occasion they stayed outside for a while. The plaintiff asked his girlfriend what she was discussing with the defendant, but did not receive any information. Shortly after she returned on the third occasion, the defendant approached the plaintiff where he sat drinking and punched him with his fists. The defendant was accompanied by three or four other men who also beat the plaintiff with their fists until he momentarily lost consciousness. When he came to, he noticed his assailants running to the outside of the club. He decided to follow them to find out why they had beaten him. Outside he found the defendant alone and asked him why he had beaten him. The defendant threw an empty glass at him when they were about 1 metre apart. The glass broke and injured the plaintiff, who held both hands covering his face while blood was flowing from the wound. He was assisted by another male person who stopped the blood and took the plaintiff to hospital where he was treated. After a number of operations by different doctors the ultimate diagnosis was that the plaintiff has lost the sight in his right eye permanently.

[5] During cross-examination the plaintiff denied that it actually was one Natangwe Jakob (hereinafter "Jakob")(later called by the defendant as a witness) who called the girlfriend outside. He was persistent that it was the defendant. He also denied that the fight

inside the club was only between him and Jakob. He also denied the defendant's version of self defence in all respects.

[6] The plaintiff called a witness, Julius Nuunyango, (hereinafter "Nuunyango") who corroborated him in all material respects regarding the events which occurred outside the club.

[7] The defendant testified in support of his case. He stated that he went to the club in the company of Jakob and one Manyando. A fight later started between the plaintiff and Jakob. The reason for the fight was that they were both involved with the same woman. He and Manyando intervened to stop the fight. The defendant actually succeeded in pulling Jakob away from the plaintiff, whereupon Jakob went outside, followed by the plaintiff.

[8] A short while later the defendant also went outside. He found another colleague, one Timotheus, holding the plaintiff from the back by his arms while Jakob and Manyando were approaching the plaintiff from a distance of about 6 - 7 metres with stones in their hands. The defendant testified that he still had a glass containing his drink in his hand. He said to the others that they should stop the fight and went closer to them. The plaintiff then somehow freed himself from Timotheus' grip and stormed forward with a knife in his hand. Hereafter the defendant's evidence is not entirely clear, as he gave different versions of the events. At times he stated that the plaintiff

wanted to stab Jakob, at times he said that the plaintiff wanted to stab “someone” and at other times he said that the plaintiff wanted to stab him (the defendant). Under cross-examination it emerged more clearly that when the defendant saw Timotheus holding back the plaintiff and saw Jakob and Manyando approaching with stones, he spoke to Jakob, who told him that the plaintiff wanted to stab them with the knife. Thereupon the defendant went towards the plaintiff and pleaded with him they should stop the fighting. When the plaintiff freed himself, it seems that, according to the defendant, the plaintiff stormed towards the defendant. According to the defendant, he moved backwards 2 or 3 steps. However, the plaintiff moved too fast and when the defendant could not move any more, he hit or punched the plaintiff with the glass from a distance of about 1 metre. The defendant stated that he was fearful of the knife, that the attack was imminent and that he acted in self defence. The plaintiff went down screaming. The spectators then came closer and one of them assisted the plaintiff.

[9] The defendant called Jakob as a witness. He corroborated the defendant in several respects, but also contradicted him on material aspects. Whilst the defendant said that he saw Jakob and Manyando outside approaching the plaintiff with stones in their hands, Jakob testified that, although they did pick up stones, they were actually running away from the plaintiff and that it was the latter who was approaching them. Furthermore, whereas the defendant stated that he spoke to the plaintiff to stop the fight while Timotheus was still

restraining the plaintiff and that the plaintiff then broke loose and stormed at him with the knife held up, Jakob testified to a different order of events. He said that the plaintiff first broke loose from Timotheus and approached him and Manyando with the knife, whereupon the defendant spoke to the plaintiff and asked him to stop fighting. Only then the plaintiff stormed at the defendant. These contradictions were not satisfactorily explained.

[10] There were other contradictions in the defendant's case. Firstly, his counsel repeatedly put it to the plaintiff that it was Manyando who held the plaintiff back, but when the defendant and Jakob testified they both stated that it was Timotheus. The defendant attributed this contradiction to a misunderstanding between him and his counsel. However, it should be noted that the defendant sat close to his counsel when the plaintiff was cross-examined and not once did he correct the misunderstanding which allegedly arose.

[11] Secondly, it is common cause that the defendant was convicted in the magistrate's court on a count of assault with intent to commit grievous bodily harm arising from this incident. Whilst the defendant and Jakob were adamant in this Court that the defendant hit the plaintiff with the glass, it is common cause that in the magistrate's court they were both recorded to have testified that the defendant threw the glass at the plaintiff. The defendant admitted in this Court that this is what he testified in the magistrate's court, but could not

explain why he did so. When it was suggested to him by the plaintiff's counsel that he must have realized after his conviction that a throwing of the glass did not fit in with his story that the plaintiff was so close to him that he had no choice but to defend himself and that he changed his story in the civil case before this Court, he merely responded by saying "I won't say anything to that". The defendant did not make a good impression on me when he was questioned about this aspect. He appeared hesitant to answer and to be unsure of himself. He certainly did not come across as credible on this point.

[12] The defendant could not explain why the plaintiff wanted to attack him who throughout, on his version, was the peacemaker and who actually helped the plaintiff inside the club by pulling Jakob away from the plaintiff while Jakob was fighting with the plaintiff. On his own version it is inherently improbable that the plaintiff would have attacked him.

[13] It is further improbable that the glass, described as a normal beer glass, which broke in his hand when he hit the plaintiff on the eye, caused him no injuries, as he testified. The fact that he sustained no injuries fits in better with the plaintiff's version that he indeed threw the glass.

[14] Jakob testified that after the plaintiff was injured he held his face with his hands and said "sorry guys". This was never put to the

plaintiff or his witness. The impression I have is that this piece of evidence came as a surprise to the defendant's counsel. The defendant certainly never testified to this effect. If the plaintiff had indeed said this, it would have been an important piece of evidence which tended to indicate that he was the guilty party. I am sure the significance of this would not have been lost on Jakob, who was an intelligent, eloquent and argumentative witness who clearly did not feel intimidated by counsel or the Court. The probabilities are that he would have informed counsel of this fact during consultation so that this version would have been put to the plaintiff and his witness. On the probabilities I conclude that he added this detail as embellishment, but that the plaintiff did not actually say this. This finding impacts negatively on the credibility of Jakob.

[15] He was also confronted with the record of his testimony in the criminal trial. There he stated that the defendant did not intervene in the fight inside the club, whereas before this court he stated that the defendant did so. When requested to explain this contradiction he was evasive and argumentative.

[16] When the plaintiff testified, defendant's counsel put it to him that Jakob called the girlfriend outside because prior to 25 October she had been his girlfriend and that he spoke to her about the fact that she was drinking beer, something which she allegedly never did before. However, when Jakob testified he said that the girl was actually his

girlfriend and that he had spent the previous night with her. He further testified that he only greeted her, that he was not angry when he found her with the plaintiff, but that it was the plaintiff who became angry and hit him in the face. On this version Jakob did not call the girlfriend outside at all. These contradictions were not explained.

[17] Jakob further testified that the plaintiff's knife disappeared after the defendant injured the plaintiff. He said that the plaintiff's friends rushed to him at that time and suggested that they could have taken the knife. However, there is no other witness who testified that the plaintiff had any friends there. These answers were given in cross-examination. Once again I have the impression that they were simply made up. I also think it improbable that, if there indeed was a knife, not one member of the defendant's group picked up the knife with which they had been attacked to hand it over to the police as evidence.

[18] The plaintiff made a good impression on me, as did his witness who was a neutral witness. It was not disputed that he was merely a colleague to both the plaintiff and the defendant who also happened to be there that night, whereas Jakob was the defendant's friend who went to the club that night in the company of the defendant.

[19] In weighing the evidence presented in this case I bear in mind that the onus is on the defendant to prove that his act of injuring the plaintiff was justified (*Felix v Mabaso* 1981 (3) SA 865 (A)).

[19] In light of the credibility findings made and having considered the contradictions on material aspects and having weighed the probabilities as set out above, I find that the plaintiff was unlawfully attacked by the defendant and his friends inside the club. When he went outside to enquire from the defendant about the reason why, he was assaulted further when the defendant threw a glass at him which injured his eye to the extent that he lost its sight. I am satisfied on the probabilities that the plaintiff did not have a knife, that he did not attack anyone and that the defendant did not act in self defence. It is further common cause that the events occurred in the presence of members of the public.

[20] In the result I find the defendant liable for such damages of the plaintiff as may be proved. The issue of costs stands over.

(Signed on original judgment)

VAN NIEKERK, J

Representation for the parties

For the plaintiff:

Mr C J Jansen van Vuuren
Krüger, Van Vuuren & Co

For the defendant:

Mr T

Nekongo

Sisa Namandje & Co. Inc