

IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN

CASE NO: 3091/09

In the matter between:

AUBREY VAN RHYNER

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

Y EBRAHIM J:

- 1] The plaintiff claims damages from the defendant in the amounts of R60 000,00 and R358 000,00 for injuries he sustained as a result of allegedly being assaulted twice by an employee of the defendant on 30 January 2009.

- 2] The details of the first assault, as set out in the particulars of claim, are that the defendant's employee, Sergeant Cornelius van Niekerk ('van Niekerk'), 'sprayed the Plaintiff with pepper spray or a similar substance in the face' with the result that the plaintiff: '(1) was temporarily blinded; (2) suffered discomfort to the eyes, mouth and nose; (3) suffered inflammation and irritation of the sensitive areas of the face; and (4) suffered

contumelia.’

- 3] In respect of the second assault the details are that the plaintiff ‘was again assaulted by Sergeant Cornelius Van Niekerk in that he violently and without provocation grabbed the Plaintiff on the shoulder and threw him on a nearby table’ and as a consequence thereof the plaintiff ‘sustained severe bodily injuries, more particularly: (1) multiple bruises and abrasions; and (2) a fractured left ankle.’
- 4] The plaintiff testified that on the evening of 30 January 2009 he was working as a bouncer at Barbies Tavern. Shortly after midnight a fight (‘n deurmekaar baklei’) broke out between patrons. He stood on a ‘muurtjie’ (a seat built into the wall) and tried to stop the fighting but was unsuccessful. The police, who had been summoned by someone, arrived and sprayed pepper spray to stop the fighting, arrested some individuals and took them to the police van. One of the police officers was van Niekerk, whom he knew, on returning to the tavern, walked up to him and grabbed him in front of his chest with his right hand and, without saying anything, sprayed pepper spray in his face with his left hand. Van Niekerk then threw him over a table, his leg striking it, and he fell to the ground with his left leg under his body. He extracted his leg and said it was broken, but van Niekerk did not reply and left. He had not been involved in the fighting and was unarmed and there was no reason for van Niekerk to spray him with pepper spray or throw him over the table.
- 5] Asked by his counsel, Mr Cole, if the pepper spray had affected him, the plaintiff said that his face and part of his mouth began to burn about half an hour later and his

eyes were red. He asked, Constable Mongo, a police reservist, for water to wash his face but he replied this would worsen it and the burning would disappear. Because of the injury to his leg he was unable to walk and had to be carried to the ambulance. At Livingstone Hospital his ankle was placed in plaster and he stayed there for a week. He was in pain then and still experienced pain now and had to take tablets. Questioned about the condition of his left leg prior to the incident he said he had a callous under his foot. In addition to being a bouncer at the tavern he was a painter but due to the injury could no longer do either. He was unable to walk properly, run or ride a bicycle and used a walking stick. Many of the patrons had seen what happened and still spoke about it now. His young daughter was at the tavern and witnessed what occurred.

- 6] Cross-examined by Mr Jooste, who appeared for the defendant, the plaintiff denied that his ankle had been broken on a previous occasion. He admitted that in January 2005 he sustained a knee injury and other minor injuries while in an ambulance that was involved in an accident but his leg was not placed in plaster. He denied pointing to his left leg and telling van Niekerk that his weak leg had been injured but had said that his knee was injured in the ambulance accident. He denied saying that Stanford Casling was responsible for injuring his ankle. He also denied that his daughter had told him to say that it was Cora who grabbed him and threw him on the table. He was not moderately under the influence of alcohol as he drank only one beer. A number of people (he could not estimate how many) were fighting and he climbed onto the built-in seat to push them apart. He then said he tried to stop those on the

built-in seat. He persuaded one of the men, 'Ou Long', to climb off the built-in seat but 'Ou Long's' wife arrived and began to fight. The police had not told people to stop fighting before spraying them with pepper spray. The spray did not affect him but he could smell it. Van Niekerk had walked through the fighting individuals to where he was standing on the built-in seat, grabbed him and sprayed the pepper spray, which was in a blue can, at him and thrown him over the table. The spray only affected him five to ten minutes later when his eyes began to burn. He denied jumping off the seat to escape the spray and insisted there was a table even if three witnesses were to testify this was not the case.

- 7] In terms of rules 36(9)(a) & (b) the plaintiff served notice that an expert witness, Dr C P Jameson ('Dr Jameson'), would testify regarding the composition of pepper spray and its effects and provided a summary of her opinions. Mr Jooste referred to the physiological effects described by Dr Jameson and asked the plaintiff to comment on whether the pepper spray had caused, *inter alia*, 'an involuntary closure of [his] eyes resulting in temporary visual impairment'; his eyes to 'remain red for a period of ten minutes to two hours after contamination'; 'a burning sensation and inflammation of the eyes, mucus membranes and a burning sensation to contaminated skin and tissues'; 'secretion of extensive mucus from the nose'; 'a feeling of heat on the face and the mucus membranes in the nose, lips, and mouth'; 'the contaminated skin [to] become red and the skin [to be] coloured yellow'; 'a shortness of breath, or [to] feel suffocated, and [a] tightness of the chest'; 'cause[d] coughing and gasping for breath'; caused him to 'lose balance, fall to the ground, and ... not be able to hear'; and whether 'the spray [had reacted] on [him]

within one second'. The plaintiff's reply in each instance was that he had not experienced any of these effects. Further, it was only after ten minutes that the pepper spray had some limited effect on him. He also said that no one in the tavern had complained about the pepper spray.

- 8] Questioned about the assertion in the particulars of claim that he had been blinded, the plaintiff said he did not know where his attorney obtained this information. He also denied informing his attorney that he suffered discomfort to his eyes, mouth and nose and that the sensitive areas of his face had become inflamed and irritated.
- 9] Mr Jooste referred to the proceedings in the criminal trial in the Magistrate's Court, Pearston, in which van Niekerk had been charged with assaulting the plaintiff. Questioned on contradictions and inconsistencies between the evidence in that trial and his testimony in the present trial, the plaintiff on numerous occasions could not provide cogent explanations or replied that he had no comment. Examples were the following: in the magistrate's court he testified that the police had come directly to him on entering the tavern and sprayed pepper spray in his face whereas his testimony now was that it was van Niekerk who had done this on returning to the tavern; he had testified then that he told those who were fighting to stop but now said he intervened physically; previously he claimed all five policemen sprayed pepper spray but now said only two did so; he had testified then that there was a cloud of pepper spray but now said this none; his testimony then differed from his present version regarding when he was sprayed with the pepper spray; in his statement to the police, when he laid the charge, he said that the pepper spray was

sprayed into his eyes but had now testified this was not so. The plaintiff was also not able to comment on the contention of the attorney who defended van Niekerk in the magistrate's court trial that he had adjusted his evidence as he obviously would not have been able to see anything after being sprayed in his eyes.

10] Cross-examined further regarding the criminal trial, the plaintiff denied saying it was Stanford who had injured his leg. He claimed he had said, '*Stanford julle polisie het my been gebreek*'. When asked why he had told van Niekerk's attorney that it was Stanford, his reply was, '*Dit was daardie slag wat teen my kop gewees het*'. The blow to his head had caused him to be confused. When it was put to him that a lapse of time could not account for differences in his version as had he testified in the magistrate's court as recently as August 2010, he had no comment. He admitted telling the magistrate that van Niekerk could easily have mistaken him for one of the persons fighting. He had a meeting with van Niekerk sometime later and told him he would drop all further proceedings if he paid R3 000,00. Van Niekerk undertook to pay monthly instalments of R1 000,00 but did not do so. The testimony of Constable Alberts in the criminal trial was correct but not her claim that he smelled of alcohol and was drunk. He did not want to comment on her statement that he had said Casling Stanford pulled him off the built-in seat.

11] Re-examined by Mr Cole the plaintiff said he never mentioned that he sustained an injury to his back. He was trained to grade mohair and despite the injury to his ankle could still do this the work was only available for six months of the year. Since the

incident he had not sought work as an 'in-house policeman' or in the building industry, of which he did not know anything. The medico-legal report prepared by Dr Oliver was then handed in by consent.

12]The plaintiff's daughter, Annamarie Leticia van Rhyner, testified that she was with her father at Barbies Tavern that evening as her mother had gone to Cape Town. She was with her father at the entrance door while he searched people for concealed weapons. At some stage a fight broke out between the patrons and her father spoke to them and they stopped. Ou Long and half of the people fighting went home. Van Niekerk entered and sprayed pepper spray and she left the tavern. Her father was standing on the built-in seat. Van Niekerk also left the tavern but returned and walked up to her father and sprayed pepper spray on his forehead while she was standing next to him. Van Niekerk put the bottle in his pocket and grabbed her father by his shoulders with both his hands. She did not know if he threw her father over the table but saw him lying on the ground and her father said Cora had broken his leg. She went outside and asked two policemen, Rocko and Dursley, to take her to her grandmother's home and they took her there in the police van.

13]Ms van Rhyner, during cross-examination by Mr Jooste, said she only saw van Niekerk using pepper spray. This affected the eyes of the patrons and they left the tavern and the fighting stopped. She did not know if there was fighting thereafter as she went home. When it was pointed out to her she had testified that she returned

to the tavern she said she went to her father as people were still fighting. She was next to her father on the built-in seat when van Niekerk arrived but did not know what her father was doing. Ou Long had already gone home and the fighting had stopped. After van Niekerk sprayed the pepper spray in the tavern her father gave her money to buy chips. This was before her father broke his leg. When asked why her father had not mentioned giving her money for chips she said she was surprised he failed to do so. Van Niekerk sprayed her father against his forehead near his eyes. He closed his eyes and grabbed at them with his hands as they were burning. But, he did not cough. When they threw her father over the table she was next to the jukebox and ran out. Confronted with the fact that she had testified that she did not know if her father had been thrown over the table, she answered, 'Ja meneer ek weet nie want toe ek net sien toe lê my pa op die grond.' Her father's leg was broken and he was crying when she told him she was going home. Asked if her father had not said that Stanford had broken his leg she replied that she really did not know and never heard this. Even though her father's leg was broken she did not stay with him as he was being taken to hospital. The pepper spray burnt her eyes for a short while but she did not notice if it hung like a cloud as she never looked up while walking. This concluded the plaintiff's case.

14]The defendant applied for absolution from the instance which was opposed by the plaintiff. The Court, in an *ex tempore* judgment, dismissed the application for absolution from the instance.

15] Glen Nyati, who worked as a barman at the tavern, was the only witness to testify for the defendant. He gave a description of the layout of the tavern which consisted of two big rooms with a large opening in between. The jukebox and a seat built-in along the wall were in one room and in the other a few tables were affixed to the floor. After the fighting broke out he telephoned the police who arrived and sprayed the area with pepper spray. He could see everything from his position behind a metal framework of burglar bars with a serving hatch. He did not see van Niekerk grab hold of the plaintiff and throw him over a table. There was no table in that room. He had seen the plaintiff sitting on the floor in the middle of the room with one leg underneath him while van Niekerk tried to separate two men who were fighting. In addition to liquor he sold chips but did not remember selling any to the plaintiff's daughter.

16] Cross-examined by Mr Cole he said the juke box was on the left as you entered the tavern and on the right were three tables. Between the door and the jukebox was a small table about a metre away from it. In one room there were tables while in the other there was a jukebox, without any tables, and people danced there. The fighting broke out at the door, where there were tables, before moving to the side where there were no tables. The police had sprayed pepper spray and tried to separate those fighting and he assisted in removing individuals from the tavern. He did not know at what stage the plaintiff injured his leg but a lady named Frederika asked him to telephone for an ambulance, which he did. Van Niekerk did not assault anyone in his presence. Ou Long was one of those fighting but he did not see him

on the built-in seat. When the police arrived Ou Long was still fighting but then stopped and went home. He conceded it was possible that the plaintiff was sprayed with pepper spray while he was outside assisting the police. He heard the plaintiff say that Stanford had broken his leg and he would be in hospital for a long time as his leg had been broken before. The plaintiff, he said, had broken his leg in an accident involving an ambulance and used crutches as his leg was in plaster.

17]Mr Jooste re-examined Mr Nyati and a sketch of the premises he had drawn at the request of Mr Cole was handed in as an exhibit. Referring to the sketch he said the plaintiff had been near the window about three metres from the door opening and it was opposite the hatch where he sold liquor. This concluded the case for the defendant.

18]Mr Cole submitted that the defendant had an evidential burden and had not done anything to discharge it. By not calling van Niekerk to testify, the defendant had not adduced evidence of a fact in issue and ran the risk of the plaintiff's version being believed.¹ Mr Cole recognized that acceptance of the plaintiff's version depended on its probative strength and whether the Court found it sufficiently strong to cast an evidential burden on the defendant. However, an adverse inference could be drawn that van Niekerk's evidence would not have been favourable to the defendant's case. It had not been suggested to Annamarie van Rhyner that her evidence was a fabrication, and the defendant could not argue that should be disbelieved. Even if there were contradictions in the evidence of the plaintiff and his witness, it could not

¹ *Brandt v Minister of Defence* 1959 (4) SA 712 (AD)

be said they were totally devoid of credibility. Their version could not be judged to be less credible than another version as it was the only version. If more than one possible inference could be drawn from the facts the inference least favourable to the party that failed to present available evidence, would be upheld.²

19] Mr Jooste submitted that for the plaintiff's evidence to be accepted the Court would have to hold that the pleadings could be ignored. The Supreme Court of Appeal stated that '[t]he purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.'³ If a party sought to rely on an issue not covered by the pleadings the issue must have been canvassed fully by both sides at the trial.⁴ Mr Jooste differed with Mr Cole in the interpretation of the *Galante* case, in which the negligence of a driver was in issue. What the Court had said was that if the defendant had a duty to rebut and did not call a witness about a fact in dispute then, where there were two possible inferences, one of negligence and the other of innocence, the Court was entitled to select the one most beneficial to the plaintiff. This did not support the submission that an adverse inference was to be drawn where a defendant failed to call a witness. In regard to cross-examination, there was no need to put everything to a witness but only so much of the party's own case or defence that concerned the witness.

² *Galante v Dickinson* 1950 (2) SA 460 (AD) at 465

³ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para [11]

⁴ *Ibid* at para [12]

20] It is common cause that a large number of people were involved in the fighting and when attempts to stop it were unsuccessful the police were summoned. Five police officers arrived and resorted to using pepper spray put a stop to the fighting. A number of people were arrested and removed from the tavern. It is in regard to subsequent events that the parties are in disagreement.

21] The plaintiff provided inconsistent accounts of what transpired thereafter. There were numerous disparities and improbabilities in his version of events. In the statement he made to the police, when he laid a charge of assault against Van Niekerk, he alleged that the police had sprayed pepper spray in his eyes and repeated this allegation when he testified at van Niekerk's criminal trial. However, in his testimony in this Court he stated that only van Niekerk sprayed pepper spray at him and this was directed at his forehead and not his eyes. In the criminal trial he testified that there was a cloud of spray in the air but now said this was not the case. When referred to the particulars of claim, which averred that he had been blinded by the spray, he disavowed this and said he did not know where his attorney obtained this information. He further disavowed that he suffered discomfort to his eyes, mouth and nose and that the sensitive areas of his face had become inflamed and irritated. He asserted that he had not provided these details to his attorney.

22] The plaintiff was clearly an unsatisfactory witness. His testimony regarding the effects the pepper spray had on him was riddled with contradictions and improbabilities. At first he said the pepper spray did not affect him immediately and

it was only some thirty minutes later that his eyes became red and his face and part of his mouth started to burn. Subsequently, he said this occurred after ten minutes. He said he did not wash his face and eyes with water as Constable Mongo told him the burning would disappear and water would only worsen it.

23]The plaintiff disagreed almost entirely with the opinions of Dr C P Jameson, the expert witness who was to testify on his behalf, concerning the effect pepper spray had on an individual. His comments were, to say the least, illuminating. Whereas the opinion of Dr Jameson was that a person would be affected within a second, the plaintiff said he remained unaffected for anything between ten to thirty minutes. Dr Jameson was further of the opinion that the mucus membranes would have become inflamed, the eyes would have closed involuntarily accompanied by a temporary loss of sight, and the person would have extended his/her hands to the face and thereafter the eyes would have remained red for ten minutes to two hours. According to the plaintiff this did not happen to him. In the opinion of Dr Jameson the pepper spray would have caused the person to suffer from shortness of breath or a tightness of the chest or to feel suffocated and to cough and gasp for breath and even suffer a loss of hearing and lose balance and fall to the ground. Once more, the plaintiff responded that this had not happened in his case. He also claimed that no one in the tavern complained about the pepper spray.

24]It is not surprising that Dr Jameson was never called to testify as the plaintiff's evidence of how the pepper spray had affected him conflicted with the opinions

expressed by Dr Jameson in the summary filed by the plaintiff. The plaintiff's evidence also contradicted the averments in his particulars of claim that he was temporarily blinded and suffered discomfort to his eyes and nose. His testimony, both in the criminal trial and in the present matter, that his eyes had not been affected by the spray was patently at variance with the averment that he was temporarily blinded. It is apparent, as was put to the plaintiff during the criminal trial, that he had adjusted his evidence since if he had conceded that he was blinded he would then not have been able to identify who had grabbed hold of him and thrown him onto a table before he landed on the floor.

25] The plaintiff has not furnished a truthful account of what the police and, in particular, van Niekerk did after they arrived at the tavern. If the plaintiff had been sprayed with pepper spray, even if it was merely against his forehead, it is improbable that its effects would only have become apparent some ten to thirty minutes later and not immediately, as opined by Dr Jameson. It is highly unlikely that the plaintiff's eyes would not have closed immediately and that he would, at the same time, not have put his hands to his face. These reactions, in the opinion of Dr Jameson, would have occurred involuntarily.

26] The plaintiff's account of how he was grabbed by van Niekerk and thrown over a table is similarly fraught with improbabilities. Nyati's testimony that there were no tables in the room where this allegedly occurred was not shown to be untrue. His sketch of the premises which indicated where the tables were positioned was not

challenged as being a misrepresentation of the layout of the premises, save that the plaintiff claimed there was a table near where he was standing. Nyati was a credible witness and I accept he has told the truth. He was honest in conceding that he may not have witnessed certain incidents. However, insofar as the positioning of the tables is concerned I accept his evidence in preference to that of the plaintiff and his witness as it accords with the probabilities. It was not disputed that the one room is used for dancing and it is unlikely, in my view, that a table would be placed there as it would be an obstruction to dancers. It is improbable, if the nearest table, as Nyati testified, was at least three metres away that the plaintiff could have been thrown such a distance to land on the table. I find the plaintiff an untrustworthy witness and his testimony cannot be accepted as the truth.

27]The plaintiff's daughter, Annamarie, tried to convey that she had witnessed the entire incident referred to by the plaintiff. Initially she testified that she saw van Niekerk grab her father and throw him onto a table. However, when confronted with the fact that she had, at a stage during cross-examination, stated that she did not know if her father had been thrown over the table, she confirmed this by replying: 'Ja meneer ek weet nie want toe ek net sien toe lê my pa op die grond.' It is evident that Annamarie did not witness her father being grabbed and thrown to the floor but had only seen him lying on the ground and heard him exclaim that his leg was broken. In identifying van Niekerk as the person who had done this to her father she was not truthfully recounting what she had actually observed. It is improbable that she would have remained silent and not have said something, whether to her father or van

Niekerk or someone else, if she had indeed witnessed van Niekerk assaulting her father. Her conduct on seeing her father lying on the ground with his leg broken is not what one would have expected in those circumstances. She made no attempt to console him but immediately left the tavern and requested two of the policemen to take her grandmother's home, which they then did. I find it unlikely that she would have been prepared to associate with any of the policemen if a police officer had been responsible for assaulting her father in such a callous manner. Her testimony does not corroborate the plaintiff's version as to how he came to sustain a broken leg. In my view, Annamarie was not a credible witness and I find her testimony unreliable.

28] The plaintiff bore the onus of establishing, on a preponderance of probabilities, that the defendant's employee had assaulted him in the manner claimed by him. He has failed to discharge this onus. The evidence the plaintiff has presented does not establish that van Niekerk assaulted the plaintiff. In the circumstances, the plaintiff has failed to prove that the defendant is liable to compensate him for any damages he may have sustained. It follows that his claims for damages must be dismissed.

29] In regard to the costs of the action, I can find no reason why the plaintiff should not be ordered to bear the defendant's costs.

30] In the result, there is an order in the following terms:

- a) The plaintiff's action against the defendant is dismissed; and
- b) The plaintiff is ordered to pay the defendant's costs.

Y EBRAHIM
JUDGE OF THE HIGH COURT

17 February 2010

Heard on: 1, 2 and 3 November 2010

Judgment delivered on: 24 February 2011

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