

REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-12-10

Case Number: 57590/2007

In the matter between:

CATHARINA MARIA VIVIERS

Applicant/Plaintiff

and

NOMTSHAKAZI CELEAN JENTILE

Respondent/Defendant

JUDGMENT

SOUTHWOOD J

- [1] The plaintiff applies for judgment by default against the defendant for payment of damages in the sum of R50 000 for *iniuria* and damages in the sum of R70 000 for assault. The plaintiff's summons was served on the defendant personally on 28 June 2010 and she has not delivered a notice of intention to defend. (It should be noted that in the plaintiff's particulars of claim the plaintiff claimed payment of the sum of R100 000 for *iniuria* and R200 000 for assault.)

- [2] Before the hearing, the plaintiff, as she was entitled to do, filed two affidavits (one by her and one by her doctor, Dr. Antoinette de Beer) in support of her claims – see ***Havenga v Parker* 1993 (3) SA 724 (T)** at 725E-726J: ***Abraham v City of Cape Town* 1995 (2) SA 319 (C)** at 323F-G. At the hearing, in answer to a question whether the plaintiff intended to rely on the affidavits, the plaintiff's counsel replied in the affirmative. She informed the court that although the plaintiff was present she would not call her to give evidence as the plaintiff could not add anything to what is contained in the affidavits.
- [3] Although it is not the practice to lead evidence on the merits (i.e. the wrongful act and its consequences) where application is made for judgment by default on a damages claim, in claims for damages based on *iniuria* and for general damages under the *actio lex aquilia*, the merits of the case must be considered by the court to determine the quantum of the damages and, where necessary, the court should receive evidence to amplify the allegations in the particulars of claim. This is what has happened in the present case. Although the plaintiff has two separate claims in her particulars of claim the plaintiff's affidavit makes it plain that the insulting words were spoken and the physical assault took place during the same incident on 5 July 2007. The plaintiff's legal advisors have pleaded two separate causes of action because they consider this to be jurisprudentially correct.

- [4] The followings facts appear from the plaintiff's particulars of claim and affidavits. The plaintiff was born on 2 January 1965 and was therefore 42 years old at the time of the incident on 5 July 2007. The plaintiff was employed as a secretary in the Department of Defence and had worked there for 19 years. Previously she had worked in a bank for 8 years. At the time of the incident the plaintiff was assisting in the finance department of the Department of Defence in the Poyntons Building. The defendant is also employed by the Department of Defence. She is a Staff Sergeant.
- [5] Prior to the incident the Department of Defence had obtained a garnishee order against the defendant's salary. On 5 July 2007 the defendant went to see the relevant official at the Department of Defence's offices in the Poyntons Building to make enquiries about the garnishee order. When the defendant arrived at the office where the plaintiff was working the official was otherwise engaged and the plaintiff was speaking on the telephone. The defendant went and stood in front of the plaintiff's desk and demanded that the plaintiff assist her immediately. The plaintiff replied that she was busy on the telephone and that she would assist her as soon as she, the plaintiff, was finished on the telephone. The defendant then left the office.
- [6] After the plaintiff had completed her telephone call she went to the banking department on the 23rd floor of the Poyntons Building to attend to some business and then returned to her office.

[7] When the plaintiff arrived back at her office the defendant was there. As soon as she saw the plaintiff the defendant, who is physically bigger than the plaintiff, assaulted her. In full view of other employees of the Department the defendant punched the plaintiff once in the face and kicked her once on the right lower leg. The defendant also told the plaintiff to 'fuck off' and called her a 'white bitch'. She also said to the plaintiff: 'Ek gaan jou vrek skiet of ek gaan iemand kry om jou dood te maak'. This also took place in the presence of other employees of the Department. The plaintiff does not say how many of her co-workers were present and merely refers to them in the plural.

[8] The plaintiff says that she was very humiliated and degraded as a result of the words addressed to her by the defendant.

[9] According to the plaintiff, as a result of the assault she sustained the following injuries:

- (1) a bruised upper lip;
- (2) a bruised lower leg; and
- (3) hyperventilation due to shock;

and she suffered post traumatic stress disorder from 5 July 2007 until about 30 July 2007. Dr. De Beer confirms that she found all of the injuries when she examined the plaintiff on 5 July 2007 and that she also found the plaintiff to be suffering from post traumatic stress disorder. She booked the plaintiff off from work from 6 July 2007 to 30 July 2007 and treated her with Urbanol and Cipralex. The plaintiff says she still takes this medicine but does not explain why. Neither does Dr. De Beer.

[10] If this is all that Dr. De Beer can say it is clear that the plaintiff's injuries were not serious and that the condition she described as post traumatic stress disorder was neither serious nor of long duration. It appears that the plaintiff has a nervous disposition as Dr. De Beer says that the plaintiff was suffering from a general anxiety disorder at the time of the incident. While this does not affect the question of damages it probably explains how the plaintiff would experience the incident. It is significant that Dr. De Beer says nothing about the plaintiff's allegations that she will have to undergo further medical treatment by a psychologist and that she will suffer a loss of income in the future whilst having medical treatment. There is no evidence that the plaintiff suffered mental torture and any serious trauma and discomfort.

[11] The defendant was obviously angry when she insulted and assaulted the plaintiff. In the absence of any evidence that she was provoked the plaintiff's allegations regarding the reason for the incident must be

accepted. The defendant went to enquire about the garnishee against her salary; she demanded that the plaintiff assist her immediately and when the plaintiff refused to do so she became angry and reacted in the manner set out in the particulars of claim.

[12] The plaintiff's counsel has not been able to refer to any reported cases which would support an award of damages for *iniuria* of R50 000 and for assault of R70 000. There are very few reported cases which deal with damages for such claims and the cases merely indicate that the courts usually award substantial damages for such wrongful acts.

[13] In ***Brenner v Botha* 1956 (3) SA 257 (T)** (i.e. 54 years ago) where the plaintiff sued the defendant for *iniuria* (for insult) the full court awarded the plaintiff damages of £25. In that case the defendant (the plaintiff's employer) had said to her (after she made a mistake measuring material) 'You are too useless you cannot even measure material'; (and after she had apologised and explained why she made the mistake) 'You are talking bunkum. I want to be sick when I see your face. For my part you can clear out. Clear out.' and 'You bloody bitch' and 'Clear out before I throw you out of this bloody shop.' The court clearly regarded the award of £25 as substantial and commented that in cases founded on *iniuria* which includes contemelia substantial damages are always awarded by the court. In ***Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N)** (i.e. 34 years ago) where a policeman had referred to the plaintiff as 'kaffer' and persisted in doing

so after the plaintiff had objected to this, the full court held that this was an unfounded aggression upon the plaintiff's dignity and ordered the Minster to pay damages of R150. In ***Mbatha v Van Staden 1982 (2) SA 260 (N)*** (i.e. 28 years ago) the court awarded the plaintiff damages of R2 000 for the insults and assaults which occurred after an altercation about a parking place. At the scene the defendant repeatedly addressed the plaintiff as 'kaffer', he threatened the plaintiff and talked loudly and excitedly of murdering the plaintiff, slapped his face twice and threw a punch at the plaintiff's head, which missed. At the police station, when the policeman left the room the defendant resumed calling the plaintiff 'kaffer', repeated the threats and punched him twice in the face, knocking him to the floor and stunning him. He then kicked the plaintiff a few times in the back while the plaintiff lay on the floor.

- [14] The determination of damages for non-patrimonial loss or damage is a matter for the discretion of the court. In the exercise of its discretion it is proper for the court to take into account previous awards and make allowance for increases in such awards. Nevertheless the result cannot be determined with mathematical precision and awards in previous cases are merely a guide. The object of an award is to see justice done – it must be fair to both sides. See ***De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA)*** paras 58-65.

[15] With regard to the *iniuria* claim the plaintiff's counsel contends that the insult is worse because the defendant called the plaintiff a white bitch and not just a bitch. According to plaintiff's counsel this is worse because the word 'white' introduces a racial element or undertone into the insult. In this regard she referred to ***Sindani v Van der Merwe and Others 2002 (2) SA 32 (SCA)***. In my view her reliance on this case is misplaced as the court was dealing with a completely different situation in the context of a claim for defamation. While the context in which the words are used obviously affects their meaning and how they are understood I cannot agree that the use of the word 'white' introduce an element of racism into the insult. Insofar as the plaintiff is a white person this is simply an accurate description of her light complexion. The use of the word 'bitch' is clearly insulting as it implies that the plaintiff is a lewd or unpleasant or malicious or treacherous person. The plaintiff also relies on the threat to kill her in the *iniuria* claim. This is clearly correct. As pointed out in ***Minster of Police v Mbilini 1983 (3) SA 705 (A)*** at 715F-G one of the rights protected by the *actio injuriarum* is the right to an unimpaired dignity which was defined by Melius de Villiers in *The Roman and Roman-Dutch Law of Injuries* as 'that valued and serene condition in his social or individual life which is violated when he is, either publically or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt'. The court also referred with approval to the following passage from the same work:

‘Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment, and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right’.

It is aggravating that the words were uttered in the presence of other co-workers.

[16] The assault was not serious. Neither the plaintiff nor the doctor are able to say much about the injuries or their sequelae. This is obviously because there is not much to say. In the absence of clear evidence as to the symptoms of post traumatic stress disorder suffered by the plaintiff it cannot be found that this had any substantial effect on her.

[17] Where the delicts were committed in the same incident it serves no purpose to make two separate awards and a globular award of damages will be made – see e.g. **Brenner v Botha** *supra* at 260A-F: **Mbatha v Van Staden** *supra* at 263C-D.

[18] In my view the plaintiff is entitled to substantial damages even though the insult and assault were not repeated and the assault itself was not serious. In my view an appropriate award of damages is the sum of R50 000.

[19] The following order is made:

- I The defendant is ordered to pay to the plaintiff the sum of R50 000;
- II The defendant is ordered to pay the plaintiff's costs of suit.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 57590/2007

HEARD ON: 1 December 2010

FOR THE APPLICANT/PLAINTIFF: ADV. R. FERGUSON

INSTRUCTED BY: Erasmus Scheepers Attorneys

DATE OF JUDGMENT: 10 December 2010