

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1508/2008

In the matter between:

TSELENG THERESIA LENGAU

Plaintiff

and

MANGAUNG SUN (PTY) LTD t/a
WINDMILL CASINO

1st Defendant

AARON MONE

2nd Defendant

RISKCURE CLOSE CORPORATION

3rd Defendant

HEARD ON:

1, 2, & 4 MARCH 2011

DELIVERED ON:

9 JUNE 2011

KUBUSHI, AJ

INTRODUCTION

[1] This is an action based on *injuria*. The plaintiff, a duly admitted and practising attorney and a patron of Windmill Casino, is claiming damages from the first and second defendants for alleged wrongful and intentional accusation by the second defendant of stealing a cell phone. The factual situation is that, on or about 30 July 2007 and at Mangaung Sun trading as Windmill Casino (the first

defendant in this matter), the second defendant acting as a security supervisor and within the course and scope of his employment with first defendant, accused the plaintiff of having stolen a cell phone. This conduct of the second defendant according to the plaintiff infringed upon her dignity and caused her to suffer damages in the amount of R5 000 000.00. The plaintiff held first defendant vicariously liable for the conduct of second defendant.

- [2] The defendants denied the allegations of the plaintiff and pleaded that second defendant acting under a reasonable belief that the plaintiff had picked up a cell phone belonging to one of the patrons of the casino, requested plaintiff to accompany him to the interview room within the casino. The plaintiff, according to the second defendant voluntarily accompanied him to the interview room where she was questioned about the lost cell phone. The defendants denied further that at no stage was the plaintiff searched by the second defendant or by anybody else. And that the words uttered by the second defendant if at all, were not intended to impair the dignity of the plaintiff.

- [3] The first defendant had also pleaded specifically that second defendant had at all material times acted in his capacity as a security officer in the employ of RiskCure Close Corporation a company employed by the first defendant to assist with security at the casino, and had as a result denied vicarious liability. On the basis of this plea first defendant applied for RiskCure Close Corporation to be joined as a party to the proceedings. This defence was however withdrawn by the first defendant and required no further consideration by this court.

EVIDENCE

- [4] The evidence of the witnesses for both parties differs on matters of detail but the following facts are either common cause or not disputed. The second defendant, accompanied by Mr Thulo, approached the plaintiff, who was with a certain Ms Mopeli, and requested her to accompany him to show her something. They took her through the casino to an office, which second defendant referred to as the interview room. In the interview room they found a certain lady whose name was Ms Phokojoe. In the interview room there were cameras and monitor screens that were projecting the image on the

gaming floor. There in the interview room the plaintiff was questioned about the lost cell phone. She was also shown a video footage which showed her picking up something from the floor at the area where the cell phone in question was alleged to be lost.

[5] What happened inside the interview room during the interview and outside the interview room after the interview is what is in dispute. The plaintiff testified that she was accused of having stolen a cell phone by the second defendant in the interview room and on the gaming floor after the interview which allegations were denied by the defendants. The plaintiff called Ms Mopeli, an acquaintance of hers whom she had met at the casino, as a witness. The second defendant testified in the defence of the defendants and called two witnesses, namely Ms Phokojoe the monitoring officer who was manning the interview room that night and Mr Thulo the security officer who was present at all material times.

[6] At the beginning of the plaintiff's cross examination, a video footage was played to the Court. The footage was in two

parts, the first part depicted what happened on the gaming floor before plaintiff was taken to the interview room and it had no sound track. The second part had a sound track and depicted what happened in the interview room. A transcript of what was said in the interview room was also provided to the court.

THE ISSUE IN QUESTION

- [7] The issue to be decided by this court is whether or not the conduct alleged in the summons amounted to degrading conduct and if so, whether or not the plaintiff's dignity was impaired by such conduct.

THE RELEVANT LAW

- [8] The law relating to the delict of *injuria* is well established and recorded in numerous authorities. *Injuria* was defined in the early case of **R v Umfaan** 1908 TS 62 66 as follows:

“an *iniuria* is a wrongful act designedly done in contempt of another, which infringes his dignity, his person and his reputation”.

The three essential elements required to establish *injuria* were enunciated in the leading case of **De Lange v Costa** 1989 (2) SA 857 (A) as:

- i) an intention on the part of the offender to produce the effect of his or her act (*animus injuriandi*);
- ii) an overt act which the person doing it is not legally competent to do (wrongful act) and which at the same time is
- iii) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person's dignity or reputation of the other. See also the **R v Umfaan**-case above.

- [9] In an unreported case of the Constitutional Court **Le Roux and Others v Dey and Others** CCT 45/10 [2011] ZACC 4 (decided on 8 March 2011), confirming the decision taken in **De Lange v Costa** above the court observed in the minority decision of Froneman J and Cameron J that what the common law requires for a dignity claim to succeed are three elements: a deliberately inflicted, wrongful act, that impairs the plaintiff's dignity.

WRONGFUL ACT

[10] The Court in the **De Lange v Costa**-case above decided that in an action for *injuria* the enquiry should commence with whether there has been a wrongful overt act or not. Unless a wrongful act is established intention becomes irrelevant, as does the question whether, subjectively, the plaintiff's dignity was impaired.

[11] A plaintiff, in a case of *injuria*, bears the onus of proving the factual element, which, once established, gives rise to an inference of unlawfulness. In determining whether or not an act complained of is wrongful the court applies the criterion of reasonableness. This is an objective test which requires the conduct complained of to be tested against the prevailing norms of society in order to determine whether such conduct can be classified as wrongful. This approach was confirmed in the majority judgment written by Brand AJ in the **Le Roux and Others v Dey and Others**-case above, where the court held that to satisfy the objective element, our law requires that a reasonable person would feel insulted by the same conduct. In **Jackson v SA National Institute for Crime Prevention & Rehabilitation of Offenders** 1976 (3) SA 1

(A) at 10G – H (13F) the Court described the objective test as:

“...an objective standard which for example could be constituted by the notional understanding and reaction of a person of ordinary intelligence and sensibilities”.

See also **De Lange v Costa** above.

[11] If a plaintiff proves that he or she feels insulted in circumstances where a reasonable person would also have felt insulted, a presumption of wrongfulness arises which the defendant may rebut by proving the existence of a ground of justification for his or her conduct. If he or she does not succeed in doing so, wrongfulness is certain. See Neethling, Potgieter and Visser in **The Law of Delict**, 5th ed at p322.

APPLICATION OF THE LAW TO THE FACTS

[12] The plaintiff's claim as *per* her summons, is based on her being accused of stealing a cell phone in the presence of other patrons of the Casino and by being submitted to a search of her clothing for the alleged stolen cell phone. The

Court in **Foodworld Stores And Others v Allie** [2002] 3 All SA 200 (C) at 209 c – f and 210 d stated that it is necessary to set forth, in the relevant pleadings, the words, conduct or behaviour complained of. In addition substantially the same words as are pleaded must be proved. In *casu* the plaintiff had to prove that she was accused of stealing a cell phone and that she was submitted to a search of her clothing.

[13] The evidence before this court does not indicate that the plaintiff was submitted to a search of her clothing. The plaintiff herself admitted in her reply to the request for further particulars and during cross examination that she was not submitted to such a search. This court is therefore not going to consider this point.

[14] As already stated in paragraph 5 above, the plaintiff relied, in her evidence, on two incidents where the second defendant accused her of stealing the cell phone. According to the plaintiff, the first incidence happened in the interview room. In my perspective, based on the evidence of what happened in the interview room, the plaintiff had come nowhere near making out a case for *iniuria* based on an accusation that

she had stolen a cell phone. On the contrary she was clearly, in my view, not being accused but was being given an opportunity to tender an explanation on what she had picked up from the floor. The video footage and the transcript provided vital evidence that showed that the plaintiff was on several occasion told that she was not being accused of stealing but was being asked to explain what she picked up from the floor. Her explanation that she did not take the cell phone was accepted and that is why she was allowed to go and no criminal charges were preferred against her.

- [15] In my view, in the circumstances sketched out above a reasonable person would not have felt insulted. The second respondent, as a security supervisor, had reasonable grounds for believing that the plaintiff had picked up something from the floor as depicted in the cameras in the interview room. He was in charge of and responsible for security in the casino and would have been expected by any reasonable person to have acted as such. What happened in the interview room is consistent with the kind of investigation one would expect to be conducted to determine whether the plaintiff in fact had picked up the cell phone or

not. My finding is that this conduct of the second defendant does not amount to an unlawful act constituting an *injuria*.

[16] The second incident happened on the gaming floor after the interview. The court in this instance is faced with two opposing versions of what happened. According to the plaintiff, when she came out of the interview room she was confronted by a group of patrons who were curious to know what was happening. Amongst these patrons was Ms Mopeli. She testified that she waited for about 30 minutes outside the interview room for the second defendant to come and report to her, as promised, what the outcome of the investigation was. When none was forthcoming she requested Mr Thulo to call him. When the second defendant came to the gaming floor, he accused her of having stolen the cell phone and even demonstrated to her how she picked up the cell phone from the floor. He accused her and demonstrated as such in the presence of the horde of on lookers and in particular Ms Mopeli.

[17] Second defendant denied having accused, nor demonstrated as alleged by the plaintiff. According to him he could not

have promised to provide the plaintiff with the outcome of the investigation so soon after the incident. He confirmed that he was called by Mr Thulo to the gaming floor and that he was then confronted by the plaintiff who informed him that she will not leave the casino until she had been told the outcome of the investigation. He denied having spoken to Ms Mopeli during that time. His evidence was corroborated by that of Mr Thulo.

- [18] The court in **Stellenbosch Farmers' Winery Group & Another v Martell Et Cie And Others** 2003(1) SA 11 (SCA) case laid down the technique generally employed by a court in resolving factual disputes where there are two irreconcilable versions before it. To come to a conclusion on disputed issues a court must make a finding on
- i) the credibility of the factual witnesses,
 - ii) their reliability, and
 - iii) the probabilities.

- [19] This court found the evidence of the plaintiff to be unsatisfactory in that her evidence and that of her witness, Ms Mopeli, contradicted each other on material aspects.

Both the plaintiff and Ms Mopeli testified that they were at all material times in the presence of each other and close enough to can see and hear what the other was doing and saying. However, their versions of how the events in the gaming room unfolded are different.

[20] The plaintiff testified that she waited for a long time for the second defendant to come to report to her, she estimated the time at about 30 minutes she even had to send Mr Thulo to call him. On the other hand Ms Mopeli testified that the second defendant and Mr Thulo came to the gaming floor following each other immediately after the plaintiff had been in the gaming room she estimated the time as being five minutes. She also testified that she did not see the plaintiff send Mr Thulo to call the second defendant. Ms Mopeli testified that she is the one who talked to the second defendant immediately he appeared, asking him why he has not called her. The plaintiff testified that she is the one who was talking to the second defendant at all times and is adamant that Ms Mopeli did not speak to the second defendant, which fact is also confirmed by the second defendant and Mr Thulo.

[21] Though I would regard the plaintiff as a reliable witness but not so her witness Ms Mopeli. She seemed to have a selective memory. During cross examination when the contradictions between herself and the plaintiff were put to her, she would have a lapse of memory regarding those particular incidents. For example she could not remember whether or not the plaintiff and the second defendant talked about the outcome of the investigation nor remembered whether they spoke about what happened in the toilet after the phone went missing.

[22] Both the second defendant and his witness, Mr Thulo, were in my view, reliable witnesses. They were steadfast in their narration of what happened in the gaming floor and Mr Thulo was able to corroborate every aspect of the story of the second defendant. There were contradictions in their evidence, which to me were not material. It was alleged by the plaintiff's legal representative that one could safely assume that there was a measure of loyalty between the second defendant and Mr Thulo. I do not agree. The second defendant and Mr Thulo were not friends but knew each other because they worked at the same place. At the

time of testifying, Mr Thulo had already left the employment of the first defendant for a year and was working for a different company, namely, FG Security at Black Mountain Hotel. I therefore cannot see how he could have been loyal to the second defendant.

[23] Between the two versions, I find that of the second defendant to be reasonably probably true. Firstly, I find it strange that the second defendant would ask the plaintiff to wait for a response to the outcome of the investigation. The plaintiff was asked to provide her cell phone number, which she did, and the normal procedure would have been for second defendant to phone her and inform her of the outcome of the investigation at a later date. Secondly, there seem to be no logic in the second defendant accusing the plaintiff of having stolen the cell phone when the plaintiff was just asking about the outcome of the investigation.

[24] Another factor is that, if the second defendant did not want to tell this court the truth why would he corroborate the plaintiff's story. His evidence confirms that of the plaintiff in that Mr Thulo was sent by the plaintiff to call him, which is

denied by her own witness, and that the time that had lapsed before he came to the gaming room was about 30 minutes. He also testified, as the plaintiff did, that the plaintiff threatened to shout from the top of the table. As regards the incident on the gaming floor, I find that the plaintiff failed to establish a factual basis on which an inference could be made that the second defendant did accuse her of stealing a cell phone.

[25] I conclude therefore that plaintiff has failed on a balance of probabilities to prove an essential element of the *injuria*, namely, the wrongful act. And where the plaintiff has failed to prove that there was any wrongful act the issue of whether there was *animus injuriandi* on the part of the defendant and whether the plaintiff's dignity has been impaired becomes irrelevant.

[26] In the circumstances the Plaintiff's claim is dismissed with costs.

E.M. KUBUSHI, AJ

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