

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A10/07

In the matter between:

**TRIDENT SECURITY SERVICES
(PROPRIETARY) LIMITED**

First Appellant

LOURIC LOUW

Second Appellant

and

SYLVIA NOMTITI BAKANA

Respondent

JUDGEMENT DELIVERED ON THE 5th DAY OF APRIL 2007

NDITA, J:

Introduction

[1] This an appeal against the decision of the magistrate of Wynberg who ordered the appellants to pay damages in the sum of R70 000,00 to the respondent for the impairment of her dignitas in

IN THE HIGH COURT OF SOUTH AFRICA

two respects, in that:

- a) her dignity was impaired; and
- b) her privacy was invaded,

[2] For ease of reference, the parties are referred to as in the court *a quo*.

[3] The plaintiff is Sylvia Nomtiti Bakana, an adult female of 10299 Sandile Park, NY 110, Gugulethu, Western Cape. The first defendant is *Trident Security (Pty) Ltd*, a company duly incorporated in accordance with the Laws of the Republic of South Africa, with its principal place of business at 95 Loop Street, Cape Town, Western Cape. The second defendant is Mr Eric Louw, an adult male employed by the first defendant as a Security Officer at 95 Loop Street, Cape Town.

FACTUAL BACKGROUND

[4] On 28 October 2005 at Woolworths, Cavendish Square, Claremont, the second defendant, acting in the course and scope of

his employment with the first defendant, stopped and demanded that the plaintiff hand over her bag at the entrance/exit of the aforesaid store. The plaintiff duly complied with the demand and handed over her bag. The second defendant proceeded to unpack the contents of the plaintiff's bag on the trading floor of the store in full view of other patrons.

[5] When he discovered that the bag did not contain any stolen property belonging to Woolworths, the second defendant returned the bag to the respondent.

[6] The plaintiff testified that she felt invaded, humiliated and degraded by the second appellant's conduct.

[7] The defendants, on the other hand, aver that, when the plaintiff left the store, she caused the sensormatic alarm to be activated, and that prompted the first defendant to request permission from the respondent to search her bag so that he could locate what activated the sensor. Furthermore, there was no cause for the plaintiff to feel degraded because firstly, she had consented to the search, and, secondly, the search was conducted with due regard to her dignity and privacy in a private place away from the entrance to the store.

[8] Ms Christine Wyngaard, who is also employed by the first defendant, testified that she was stationed in a control room where she was instructed by one Robert Morris, her supervisor, to monitor the plaintiff's movements in the store, which she then proceeded to do by making use of various CCTV cameras. The plaintiff relies in her pleadings only on the conduct of Louw. Her surveillance by Wyngaard at the instance of Morris is therefore not part of her cause of action. The evidence of the surveillance is, however, admissible as it forms the background against which all of the evidence must be

evaluated.

[9] There is a factual dispute as to where the search of the plaintiff's bag was conducted. Not much turns on this, because it is common cause that the search occurred on the trading floor close to the entrance and that other shoppers could see it occur.

THE ISSUES

[10] The first question to be adjudicated upon is whether the infringement of the respondent's dignity and privacy was wrongful.

APPLICABLE LAW

[11] The right to dignity "*embraces ... the subjective feeling of dignity or selfrespect or the personal sense of selfworth, a person's pride in his own moral value. Infringing a person's dignity means insulting that person.*" Neethling, Potgieter, Visser: **Law of**

personality 2nd Ed P28. A person's privacy is infringed through the unauthorised acquaintance by outsiders with a person or his/her personal affairs. This may occur in two ways. One, where an outsider becomes acquainted with a person or the person's private affairs, and, two, where an outsider who is already acquainted with the person or personal affairs of a person, causes others to become

acquainted with the person or the person's affairs that have nevertheless remained private.

[12] With regard to whether the infringement of the respondent's dignity and privacy was wrongful, Neethling *et al* comments as follows at 354:

“If the plaintiff proves that he feels insulted in circumstances where the reasonable person would have felt insulted, a presumption of wrongfulness arises which the defendant may rebut by proving the existence of grounds of justification.”

ANALYSIS

[13] The plaintiff's unchallenged evidence clearly establishes that her subjective feeling of dignity and self-respect and her privacy had been infringed. It is clear that a reasonable person in the position of the plaintiff would have felt insulted. Louw's conduct was therefore wrongful unless the defendants raise a valid defence.

[14] The defendant's principal defence is that Louw's conduct was not wrongful. The defendant raises two grounds of justification in their

plea:

- 1) Louw's conduct was justified by the fact that the sensormatic alarm had been activated by the plaintiff passing through the sensors of the alarm; and
- 2) The plaintiff had consented to the search of her bag and the display of its contents.

[15] There appears to be uncertainty in the law as to whether the onus, which rests on the defendants, is a full onus or is in the nature of an evidential burden ("weerleggingslas"). On the facts of this case, it does not, in my view, make a difference. As I demonstrate hereunder, the defendants did not, in my view, discharge the onus or adduce the necessary cogent evidence and the presumption or inference of wrongfulness should stand.

[16] There is a dispute of fact, in regard to the first ground of justification, on the issue whether the plaintiff triggered the alarm. The plaintiff denies that she had passed through the sensors of the alarm and that she triggered it at all. According to her, Louw was speaking on his radio as she approached the exit and he stopped her before she reached the sensors. Louw and Wyngaard both say that the plaintiff did pass through the sensors and that the alarm was activated. However, two facts are common cause:

- a) there was nothing belonging to Woolworths in the plaintiff's bag and consequently, the alarm should not, if it was working properly, have gone off even if she did pass through the sensors; and

- b) the plaintiff passed through the sensors with her bag twice immediately after being searched without the alarm going off.

[17] The defendants accordingly rely on a malfunction of the alarm, that is, that it was triggered in circumstances where it should not have gone off had it been functioning properly. Technical evidence explaining how the alarm works and whether and how it was possible that the alarm could have been incorrectly triggered once when the plaintiff first passed through the sensors, but not again when she passed through the sensors twice soon afterwards, was clearly available to the defendants. Such evidence was, however, not adduced by the defendants. The defendants relied instead on vague, speculative and inconsequential evidence by Louw, Wyngaard and Phike (a cashier in the employ of Woolworths) of previous instances where the alarm is said to have been triggered without proper cause. Bearing in mind that the onus rests on the defendants at least to adduce evidence to substantiate the ground of justification they rely upon and thereby to rebut the inference (if not the presumption) of

wrongfulness, the evidence is, in my view, not convincing at all. There is no evidence beyond lay speculation by the witnesses of why and how the alarm was triggered in other instances. There is no indication of what relation the facts of those instances bear to the facts of the present case. In my view, the probabilities favour the plaintiff's version that she had not yet reached the sensors when she was stopped by Louw. I say this despite the evidence of Louw that the alarm did go off. According to the plaintiff Louw told her when she challenged him about his conduct that he **thought** that the alarm had been triggered. Wyngaard's evidence, that she saw the lights of the alarm flashing, does not give any indication of why the alarm went off. At best she is assuming that the plaintiff had triggered the alarm. Phike's evidence that the plaintiff told her that the alarm did go off is also not persuasive. Firstly, the plaintiff pointedly denied this when it was put to her in cross-examination. The plaintiff stated that if the alarm had gone off, she would have concluded that Louw was doing his job. Secondly, I think Phike may in the emotionally charged atmosphere have been mistaken in what the plaintiff had said to her. It is not unlikely that the plaintiff had said that the security people

claimed that the alarm went off. In the absence of proper technical evidence of how the alarm could have been triggered in the circumstances where it is common cause that it should not have done so, and in fact did not do so when the plaintiff passed through the sensors twice soon after she was searched, it cannot, in my view, be found that the alarm was triggered by the plaintiff's passing through the sensors of the alarm.

[18] The question may then be asked why, if she did not trigger the alarm, the plaintiff was stopped and searched by Louw. There would, on the evidence, appear to be a reason why the plaintiff was stopped and searched. It is common cause that the plaintiff's movements in the store had been monitored through the use of CCTV cameras by the security personnel at the instance of their supervisor Morris. Morris, who was terminally ill at the time of the trial, did not testify. It is probable that Louw was instructed by radio to stop and search the plaintiff before she left the store. The plaintiff says she saw Louw speak on his radio as she approached the exit. Wyngaard denies that she issued such an instruction, but Morris, who on the evidence was

suspicious of the plaintiff's conduct in the store, may have issued the instruction.

[19] It was not the defendants' case at the trial that they were justified in stopping and searching the plaintiff's bag because she had behaved in a suspicious manner while she was moving around the store. In fact, Wyngaard, who did the surveillance at the behest of Morris, did not think that she was behaving suspiciously at all.

[20] Bearing in mind the onus born by the defendants, they have, in my view, not established the first ground of justification relied upon. They have not adduced cogent evidence to show that Louw's conduct was justified by the alarm being triggered.

[21] The second ground of justification relied upon is consent. The high water mark of the defendant's case in this regard is what was put to the plaintiff in cross-examination, namely, that she was asked by Louw "*can I look at your bag*" and that she replied "yes". It is true that Louw testified that he asked "*may I search your bag*" to which the plaintiff replied "yes". However, this is not what was put to the plaintiff. Further, in order to qualify as valid defence, the consent given must satisfy certain requirements. These requirements include that the plaintiff had full knowledge of and realised and appreciates the nature and extent of the infringement to which she was consenting. What is

required is sometimes referred to as “informed consent”. By giving her consent to Louw to look at her bag, it cannot be said that she consented to the search in the manner in which it was conducted. The evidence is that searches of this nature are usually conducted in the privacy of an office. At best for the defendants, the plaintiff can be said to have consented to such a search in private. The defendants have not, in my view, proven that the plaintiff knew what Louw was about to do and that she realized, appreciated and consented to the nature and manner of the search that was to be carried out. It follows that the second ground of justification has not been established.

[22] The defendants have not shown that Louw had a valid basis for conducting the search. Louw testified that he conducted the search because the plaintiff triggered the alarm. This, in my view has not been established. The defendants have consequently not shown that Louw subjectively believed that he did have a valid ground for conducting the search. It follows that the requirement of fault, *animus iniuriandi*, was also fulfilled.

CONCLUSION

[23] It is common cause that, on the pleadings that when Louw carried out the search, he was acting within the course and scope of his employment with his employer Trident. The defendants are therefore liable, jointly and severally for the damages suffered by the plaintiff.

QUANTUM

[24] In the light of these findings the damages awarded require assessment. Clearly the treatment the complainant was subjected to was humiliating and degrading. I have no doubt that, not only was her privacy violated, the conduct of the respondent constituted an affront to her dignity. To this end she also gave evidence that:

“Then I came home and the whole incident came back to me because when I arrived home I didn’t tell my family, then I was sitting down and they see that I was crying because the whole incident came back. Then I told them what happened to me it’s when I took the phone book, I phoned the head office and told them what happened to me, so they said they were going to

take the matter because what happened to me was very wrong”.

[25] Although there is no established criterion for the assessment of damages for non-patrimonial loss, this court must however, in assessing the compensation to be awarded to the plaintiff, take into account the general level of award of damages for defamation and associated *injuria*e in South Africa over the years. For instance, the Appellate Division (as it then was) in **Areff v Minister of Police** 1997 (2) SA 900 awarded damages in the sum of R1000, 00 (current value R19 300,00) to a 41 years old director of a company who had been arrested and detained for two hours. In **Independent Newspaper Holdings Ltd and others v Suliman**, case number 49/2003, the Supreme Court of Appeal considered the award of R50 000,00 to be appropriate for defamation and affront to dignity where a newspaper had published a defamatory statement pertaining to the arrest and subsequent overnight detention of the appellant on allegations of bombing of the Planet Hollywood restaurant at the Waterfront in Cape

Town. Similarly, and in this division, in **Seria v Minister of Safety and Security** 2005 (5) SA 130, Meer J succinctly lays out amounts previously awarded in comparable cases in assessing what is fair and appropriate compensation. In the **Seria** case for example, the plaintiff claimed damages in the sum of R150 000,00 for damages arising out of his arrest for an alleged violation of Section 8(1)(a) of the Domestic Violence Act 116 of 1998. He was detained in police custody for 18 hours. The court came to the conclusion that a sum of R50 000, 00 was a fair and proper award for the unlawful arrest. In a comparable case of **Stapelberg v Afdelingsraad van die Kaap** 1988 (4) SA 875 (C) a young attorney of Cape Town, whilst helping an old man place notices under car windscreen wipers was wrongfully assaulted, insulted, and belittled by a traffic inspector and later detained for three hours. The court held that the unlawful actions of the traffic inspector caused the plaintiff to suffer extreme humiliation especially because the incident occurred on his honeymoon in the presence of his wife. The court also found the conduct of the traffic officer to have been cruel and malicious and considered an amount of R10 000, 00 (an equivalent of R45 200, 00 according to the consumer price index)

as an appropriate award. Without downplaying the degradation and humiliation suffered by the plaintiff, an award of damages of a sum of R70 000, 00 by the court *a quo* seems, in my view, inconsistent with the general approach of the courts. One has to be mindful of the fact that, although the occurrence did have more lasting effects on the plaintiff, the actual time frame of the incident could not have been more than two hours.

[26] Counsel for the appellant sought to persuade us that the award of damages should not only serve as compensation but also punishment to the wrongdoer in order for it to be effective. The purpose of an award of money in a case such as this is to afford the plaintiff some satisfaction for the invasion of her privacy and the affront to her dignity. To that extent, it may therefore be contended that a punitive element to the award should be retained which can, in an appropriate case, serve to offset the plaintiff's feelings of injustice and outrage caused by the infringement of her personality rights. (See for instance the discussions in **Fose v Minister of Safety and Security** 1997 (7) BCLR 851 (CC) at paragraphs [62] and [63] pp

884-6; Visser and Potgieter: *Law of Damages*, 2nd Ed 464).

However, recently the Supreme Court of Appeal in **The Minister of Safety and Security v Seymour** (2006) (6) RSA 67 has reiterated that the pattern that emerges from comparing damages awards reveals that courts are not extravagant in compensating the loss. Indeed, the approach of the courts has consistently been that:

“Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss”.

(Seymour supra, paragraph 20)

[27] In the result, I consider that an award of R30 000, 00 as compensation for the violation of the plaintiff’s privacy and affront to dignity would be appropriate. That is so startlingly disparate from the award made by the court **a quo** to warrant interference on those grounds alone.

COSTS

[28] The general rule is that costs follow the result. However, in this

case, each of the parties has achieved a measure of success. In these circumstances, it would not be fair to dub either the plaintiff or the defendant as the losers in the appeal. They have both achieved substantial success. To order one side to pay the costs of the other would not be appropriate. It would be fairer to order each of them to pay their own costs of appeal.

[29] For the reasons stated above, I would issue the following order:

1. The appeal on the merits is dismissed but succeeds on the quantum.
2. The order of the court *a quo* is set aside and substituted with the following order:

“The defendants are ordered to pay the plaintiff the sum of R30 000, 00, as damages, jointly and severally, the one paying the other to be absolved, together with costs.”
3. Each of the parties is ordered to pay its own costs on appeal.

NDITA, J

I agree and it is so ordered.

LOUW, J