

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 213/2006

In the case between:

THE STATE

versus

SEFABATHO JONATHAN MOLAPO

CORAM: RAMPAL, J *et* C.J. MUSI, J

JUDGMENT: C.J. MUSI, J

DELIVERED ON: 10 AUGUST 2006

[1] This is a automatic review in terms of section 302 read with section 304 of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The accused was convicted by the magistrate Edenburg on 15 February 2006 of contravening **section 17 (1) (a)** of the Domestic Violence Act 116 of 1998 (the DVA). He was sentenced to 8 months imprisonment which was suspended

for three years on certain conditions.

[3] The allegations in the charge sheet were that the accused had on 4 February 2006 at Edenburg wrongfully and intentionally contravened a condition of a protection order issued by the magistrate Edenburg on 30 November 2000 by swearing at the complainant, Loma Afrika Molapa, by saying to her “Nywana ya mmao” (jou ma se poes).

[4] The accused pleaded guilty. The magistrate then proceeded to question him in terms of **section 112 (1)(b)** of the Act.

The following was recorded in this regard:

“Ondervraging in terme van Artikel 112 (1)(b) Wet 51/1977

(V): Verstaan u die aanklag teen u?

(A): Ja.

(V): Is daar op 30/11/2006 ‘n interdik ingevolge Wet 116/98 teen u uitgereik deur die Landdros Edenburg?

(A): Ja.

(V): Was die interdik ten gunste van Loma Afrika Molapo en het dit u onder andere verbied om klaagster te vloek?

(A): Ja.

(V): Vertel nou asseblief die hof wat het op 04/02/2006 plaasgevind wat gelei het tot die aanklag teen u?

(A): Daar het die dag probleme ontstaan omdat klaagster by ons woonhuis drank verkoop het en sy weet sy mag nie. Die klaagster was onder die invloed van sterk drank. Sy het toe op my begin vloek toe ek kos by haar gevra het. Sy het gesê as ek by 'n inisiasie skool was sou ek geleer kook het. Ek het haar gekeer om nie so met my te praat nie. Toe sê sy ek kan my moeder by die begrafplaas gaan wakker maak dat sy vir my kan kom kos kook. Ek het toe kwaad geword en die klaagster toe gevloek en die woorde geuiter soos vervat in die klagtestaat.

(V): Het u enige reg gehad om klaagster so te vloek?

(A): Nee, maar dit was as gevolg van kwaad word.

(V): U weet deur klaagster te vloek verbreek u die voorwaardes van die interdik verleen ingevolge Wet 116/1998.

(A): Ek het dit geweet.

Hof: Meneer, Molapo na aanleiding van u pleit van skuldig en na ondervraging in terme van Artikel 112 (1) (b) Wet 51/1977 is die hof tevrede en oortuig dit was u bedoeling om skuldig te pleit en ook dat u al die bewerings vervat in die aanklag erken. Derhalwe vind die hof u skuldig soos u gepleit het...”

[5] I requested the magistrate to furnish reasons for the conviction and sentence. In a terse reply, in relation to the conviction, he states that:

“Nadat die beskuldigde gepleit het en die landdros hom ondervra het in terme van Artikel 112 (1)(b) Wet 51/1977 was die landdros tevrede en oortuig dat die beskuldigde al die bewerings vervat in die aanklag erken. Aldus die

skuldigbevinding.”

[6] I also requested the Director of Public Prosecutions: Free State to furnish me with his opinion. Mr Pretorius attached to that office, supplied me with a memorandum with which Mr Hiemstra SC (Deputy Director of Public Prosecutions Free State) agreed. Mr Pretorius is of the view that the complainant's actions amounts to mere provocation and that the provocation establishes the accused's intention. He argues that there is nothing that indicates that the provocation eliminated the accused's culpability. I do not agree with this argument because it misses the point completely.

[7] In terms of **section 17 (1)(a)** of the DVA, it is an offence not to comply with a prohibition, condition, obligation or order imposed in terms of section 7¹.

1. Section 17 (1)(a) of the DVA reads as follows:
 (1) Notwithstanding the provisions of any other law, any person who-
 (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;
 (b) contravenes the provisions of section 11 (2) (a)
 (c) fails to comply with any direction in terms of the provisions of section 11 (2)(b); or

It is clear from the penal provision that contravening **section 17 (1)(a)** is indeed a very serious offence.

[8] In casu it is common cause that the accused swore at the complainant. The fact that he swore at her should however not be the end of the enquiry. The magistrate should inter alia, enquire whether the act was committed unlawfully and intentionally.

[9] In our law three interest of human personality are protected. These are the physical integrity, the reputation (*fama*) and dignity. Violations of a person's dignity are prosecuted as

(d) In an affidavit referred to section 8 (4)(a), wilfully makes a false statement in a material respect, is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Section 7 reads as follows:

- (1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from
 - (a) committing any act of domestic violence;
 - (b) enlisting the help of another person to commit any such act;
 - (c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
 - (d) entering a specified part of such a shared residence;
 - (e) entering the complainant's residence;
 - (f) entering the complainant's place of employment;

(g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or

(h) committing any other act as specified in the protection order...”

crimen injuria. Impairment of *fama* is prosecuted as defamation and violation of the interest in corpus is prosecuted as assault.² The interest that the magistrate sought to protect with the prohibition was clearly the complainant’s dignity. Dignitas is broadly speaking a person’s “self respect, mental tranquillity and privacy.”³ The transgression of the prohibition in the protection order should not be seen in isolation. A protection order cannot deprive an accused person of a defence, that is good in law, against an allegation or charge. In essence what the accused was prohibited from doing was not to impair the complainant’s dignity thereby committing the offence of crimen injuria. It must therefore be proved that his conduct amounted to crimen injuria. In my view, if the alledged transgression of a prohibition – in a protection order – is tantamount to an offence (statutory or common law) then all the elements of that offence as well as the elements of transgressing section

17(1)(a) have to be proved beyond a reasonable doubt in order to render a conviction of contravention of section 17(1)(a) of the DVA tenable.

2. Milton JRC: South African Criminal Law and Procedure 3rd Vol II page 492.
3. S v Jana 1981 (1) SA 671 (TPD) at 674 A – 675 A.

Put differently, if on the same facts the accused would have a valid defence if charged with a specific offence – other than contravening section 17 (1)(a) of the DVA – then that defence should also be valid if he/she is charged with contravening section 17 (1)(a) of the DVA. Therefore if the accused would have a valid defence if he was charged with crimen injuria that same defence should be good in law if he is charged with contravening section 17 (1)(a) of the DVA by impairing the complainant's dignity.

- [10] Dignity is a fundamental constitutional right. Everyone has a right to have their dignity respected and protected⁴. In **Dawood, Shalabi and Thomas v Minister of Home Affairs** 2000 (2) SA 936 (CC) at paragraph 35 O'Regan J puts it

thus:

“Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.

4. Section 10 of the Constitution of the Republic of South Africa 1996 states that:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

In many cases, however where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”⁵

In **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at paragraph 146 Chaskalson P (as he then was) held that the right to life and the right to dignity are the most important rights in chapter 3 of our constitution.

[11] Therefore in dealing with domestic violence, and other

matters, due regard must be given to the fundamental rights of the complainant as well as the accused. In this matter the complainant in effect called her 37 year old husband an uninitiated man. This is tantamount to calling him a boy. In many, if not all South African black cultures on initiation a boy acquires the status of a man. Initiation therefore confers a socially approved status of adulthood on a boy.

5. Footnotes omitted.

This status confers certain rights and responsibilities on the man.⁶ It has been held – albeit in another context – that it is offensive to call a grown man a child.⁷ When the accused admonished the complainant she continued with her vituperative language, with reference to his deceased mother. It is clear, that the complainant uttered the words in order to impair the accused's dignity.

[12] If the magistrate's questioning of the accused was informed

by these social context realities he would have questioned the accused with more insight and awareness. The fact that the accused said that he swore at the complainant because he was “kwaad” should also, in my view, have solicited more questions from the magistrate. The fact that he was angry does not, without more, mean that he had no lawful reason to act in the manner that he did.

[13] If the right to dignity is a justiciable and enforceable right that is worthy of respect and protection then a person has the right to act – proportionally – in defence of that right.

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- 6. See TW Bennett: A sourcebook of African Customary law for Southern Africa, Juta & Co, Ltd 1991 at page 174 -5; 342.
 - 7. S v Mostert 2006 (1) SACR 560 (WPD) at 573 a – b.

In fact this principle has long been recognised in our law.

In **R v Van Vuuren and Another**, 1961 (3) SA 305 (E) at 308 B – C Van der Riet J said the following:

“But it seems to me that provided that the force is strictly commensurate with the requirements of restraint in the prevailing circumstances, defence against injury should include both injury to the person and dignity, for injury to the latter may

be even more serious than the former and less easily remedied.”

I agree fully with this view. The complainant was not kind and considerate, she was insultative and demeaning. She used or rather misused the protection order as a convenient device to inflict the very same pain that the law protected her against. Physical wounds heal but those inflicted by words often last forever. In the midst of the attack on his dignity the accused had, in my view, all the right to defend it by retorting in the manner that he did. In the context of this case it is clear that the accused acted in self defence. The magistrate should have entered a plea of not guilty in terms of section 113 of the Act.

[14] There is another reason why this conviction should be set aside. It is not clear whether the complainant’s dignity was indeed impaired. In **S v Jana** (*supra*) at 675 A – B Human J correctly concluded that:

“The concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively in that it depends upon

the particular person and the circumstances whether it can be said that his dignitas has in fact been impaired.”

It is therefore essential that the charge sheet should allege what effect the words of the accused had upon the complainant. See **R v J** 1953 (3) SA 495 (EDLD) at 496 A. One cannot infer, in this matter, that the effect of the words is implied by the words used if one has regard to the words used by the complainant. The accused did not admit that his words impaired her dignity. The conviction ought to be set aside and the matter remitted to the magistrate so that he should act in terms of section 113 of the Act.

[15] In the circumstances, I make the following order:

- (a) The conviction and sentence are set aside.**
- (b) The matter is remitted to the magistrate to act in terms of section 113 of the Act and proceed with the trial.**

C.J. MUSI, J

I concur.

M. H. RAMPAL, J

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