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N v H

D M DELANGE / P R COSTA

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

D M DELANGE

Appellant

and

P R COSTA

Respondent

CORAM: CORBETT, JOUBERT, SMALBERGER,
VIVIER, JJA, et NICHOLAS, AJA

HEARD: 3 NOVEMBER 1988

DELIVERED: 14 MARCH 1989.

J U D G M E N T

SMALBERGER, JA :-

The appellant, Douglas Michael Delange ("Delange"), is the managing director of Olienhof Farm (Pty) Limited ("Olienhof"). The respondent, Phillip Raphael Costa ("Costa"), conducts business under the name F Costa and Son ("Costa and

Son"). Olienhof and Costa and Son are producers and canners of olives, and compete with each other on local markets. Both Delange and Costa are prominent members of the South African olive industry ("the industry").

On 21 March 1985 Delange, on behalf of Olienhof, wrote to Costa, as manager of Costa and Son, in the following terms ("the letter"):-

"Dear Philip
STOCK OF TABLE OLIVES

We confirm having been advised by the Department of Agriculture, Economics and Marketing that you have 116 metric tons table olives for sale.

We have on numerous occasions during business hours and after hours attempted to communicate with you by telephone, but to no avail. We must therefore assume that the stock you have are not for sale. We must furthermore assume that some of your stock, more specifically Calamata, are of imported origin.

We are frightfully sorry to have been so persistent in trying to get in touch with you, but you will realize that we have large local demands for the products and that in

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such dynamic conditions vital decisions are made daily.

When we therefore could not communicate with you we had no alternative but to assume the above."

In a letter dated 1 April 1985 addressed to Delange personally, Costa replied as follows ("the reply"):-

"Dear Adv Delange

I acknowledge receipt of your letter dated 21st ult. today.

It would appear that you have made quite a number of groundless assumptions re the S A Olive Industry of late, so a few more wouldn't make any difference.

What you can assume - in fact the purpose of this letter is to confirm it - is that we are not prepared to negotiate any transactions with you until we are satisfied that your motives are in the interest of your country's industry."

(It is common cause that the reference to "your country's industry" was to the olive industry.)

The outcome of this exchange of correspondence was an action instituted by Delange

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against Costa in the Magistrate's Court, Paarl, for damages for injuria in the sum of R5 000-00.

Delange failed both in his action and in his subsequent appeal to the Cape of Good Hope Provincial Division.

He now appeals to this court with leave of the court a quo.

Delange, in his particulars of claim, alleged that his dignity and self-esteem had been impaired by Costa's statement in the reply that he was not prepared to negotiate with Delange "until we are satisfied that your motives are in the interest of your country's industry". The alleged sting in the statement is identified (in paragraph 4) as follows:-

"Met gemelde stelling het Verweerder (Costa) bedoel om te beweer, en is hy ook so deur Eiser (Delange) verstaan, dat Eiser se optrede in die verlede in en met betrekking tot die olyfbedryf:

(a) gemotiveer was deur oorwegings wat nie in die beste belang van die Suid-Afrikaanse olyfbedryf was nie;

(b) inderdaad strydig met die beste belange van die Suid-Afrikaanse olyfbedryf was."

In response to the request for further particulars it was alleged that the statement had been made "wrongfully". The plea amounted to a denial of the allegations made.

In order to determine whether the terms of the reply constitute an actionable injuria regard must be had to the relevant factual background against which the exchange of letters took place. Only Delange and one other witness testified at the trial. The evidence of the latter can be disregarded. According to Delange, Olienhof is the largest producer of olives in South Africa. It operates three farms. Apart from producing and canning olives it also runs a processing plant for the extraction of olive oil. Delange stated that since becoming involved in the industry he had travelled extensively overseas doing research in the

interests of the industry; imported new olive varieties; helped to improve the quality of locally grown olives; and been instrumental in obtaining better prices for the products of the industry. He had actively promoted the industry in a positive way, and had contributed substantially towards its improvement and growth. He denied ever having acted contrary to the industry's interests. He took pride in his achievements on behalf of Olienhof and the industry generally. Costa was aware of his involvement and achievements in the industry (and Costa probably knew that he valued such achievements).

According to Delange he was deeply hurt ("ernstig gekrenk") by the reply because, after all he had done for the industry, his motives were being called into question by no less a person than Costa, whose standing in the industry he respected. He felt

so strongly about the humiliation he had suffered that he was prepared to reconsider his future in the industry. Despite this somewhat exaggerated reaction, it can be accepted that Delange felt genuinely wounded in his self-esteem by what he considered to be an unjustified attack on his good name.

It emerged from cross-examination of Delange that Olienhof wanted to purchase olives on the overseas market. But for the import duty payable imported olives were cheaper than those grown locally. Olienhof hoped to obtain a suspension or reduction of the import duty payable on overseas purchases. To succeed it had to satisfy the authorities that there were no locally produced olives for sale which it could purchase. Delange on behalf of Olienhof applied to the Department of Trade and Industry for a rebate on import duty. He did so without the knowledge or

approval of the Olive Growers Association ("the Association") of which Olienhof was a member. The Council for Trade and Industry prepared a report on the application, a copy of which was handed in at the trial. The report admittedly contained certain factual inaccuracies e g the statement that Olienhof was "die enigste kweker van olywe wat ook verwerking behartig". Delange denied that he was the source of the inaccurate information. What matters is not whether he was the source of such information, but the impression which the report must have created. When Olienhof's application became known it caused dissension in the ranks of the Association and evoked criticism from its members. Delange confirmed that the matter had been raised at a meeting of the Association, and that Costa had been strongly critical of his conduct. Amongst others the accusation was made that

Olienhof was trying to secure certain benefits which were in its interests only.

It may reasonably be inferred from the evidence that Delange's purpose in writing the letter to Costa and Son was to obtain confirmation that it did not have olives for sale. Letters with a similar purpose in mind were apparently written on behalf of Olienhof to other producers of olives. One such purported request for the purchase of olives ended with the statement "(i)f we do not receive your response to the above within two days from date hereof we will assume that you are unable to deliver". The recorded assumptions were presumably intended eventually to serve as evidence of the unavailability of locally produced olives and thereby to further the case for relief from import duty on imported olives.

I now turn to consider the law which is applicable to the facts of the present matter. Melius de Villiers: The Roman and Roman-Dutch Law of Injuries at p 27 notes three essential requisites to establish an action for injuria. They are:

- "I. An intention on the part of the offender to produce the effect of his act;
- II. An overt act which the person doing it is not legally competent to do; 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, dignity or reputation of the other."

These requisites are firmly entrenched in our law - see e g R v Umfaan 1908 T S 62 at 66; Whittaker v Roos and Bateman 1912 AD 92 at 130/1; R v Chipso and Others 1953(4) SA 573 (A) at 576 A. (In the present instance we are concerned with the impairment of dignity - as to the meaning of which see Melius de Villiers op cit at pp 24/5 and Minister of Police v

Mbilini 1983(3) S A 705 (A) at 715 F - 716 A.)

Logically in an action for injuria one should commence by enquiring into the existence of the second of these requisites, viz., whether there has been a wrongful overt act. (It is more common, and probably juristically more correct, to speak of a "wrongful" rather than an "unlawful" act.) A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. Once the wrongfulness of such act has been determined animus injuriandi will be presumed (Whittaker v Roos and Bateman (supra) at 124; Walker v Van Wezel 1940 W L D 66 at 67). It would be open to the defendant to rebut such presumption by establishing one of the recognised grounds of justification. If the defendant fails to do so the plaintiff, in order to succeed, would have to establish the further requirement that he suffered an

impairment of his dignity. This involves a consideration of whether the plaintiff's subjective feelings have been violated, for the very essence of an injuria is that the aggrieved person's dignity must actually have been impaired. It is not sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities. Once all three requisites have been established the aggrieved person would be entitled to succeed in an action for damages subject to the principle de minimis non curat lex.

It was contended on behalf of the appellant that if a person intentionally sets out to insult and impair the dignity of another who is known to be highly sensitive, and succeeds in doing so, such person's conduct would be actionable. This, it was argued, was in essence what had happened in the present instance -

Costa had deliberately set out in the reply to insult Delange, who was known to him to be a man of not inconsiderable self-esteem and heightened sensitivity, and had achieved his object. In this respect it was sought to place reliance on the decision in Jackson v S A National Institute for Crime Prevention and Rehabilitation of Offenders 1976(3) SA 1 (A).

It is doubtful, to say the least, whether the facts provide a proper foundation for the argument advanced. Costa and Delange were not very well acquainted, and there would seem to be insufficient evidence to justify the inference that Costa knew that Delange was the somewhat sensitive person he has been shown to be. But even if a proper factual basis for the argument exists, it is not well founded.

Jackson's case was a matter decided on exception.

The question whether there had been a wrongful act

was not specifically raised. In the course of his judgment JANSEN, JA considered whether dignitas is an objective concept or whether it relates to the subjective feelings of the individual. He ultimately left open the question whether an objective or subjective test was applicable in regard to the assessment of impairment of dignitas, but assumed the test was subjective. The appeal was dismissed (and the exception upheld) on the basis that the facts pleaded were insufficient to sustain an inference of animus injuriandi. Because proof that the subjective feelings of an individual have been wounded, and his dignitas thereby impaired, is necessary before an action for damages for injuria can succeed, the concept of dignitas is a subjective one. But before that stage is reached it is necessary to establish that there was a wrongful act. Unless there was such an

act intention becomes irrelevant as does the question whether subjectively the aggrieved person's dignity was impaired. I do not understand the judgment of JANSSEN, JA to suggest that all that is required for a successful action for damages for injuria are words uttered animo injuriandi towards another which offend such person's subjective sensitivities, and in that sense impair his dignitas. If this were so it could lead to the courts being inundated with a multiplicity of trivial actions by hypersensitive persons. (See Burchell: 1977 SALJ at pp 7/8; Neethling: Persoonlikheidsreg : 2nd Edition : at p 193.) According to Melius de Villiers op cit at p 37, "(s)o long as an act is outwardly lawful it cannot be an injury, with whatever intention or motive it may have been committed. Even when a person entertaining an injurious intention believes an act which he commits to

be injurious when it really is not such, his intention will not affect the character of the act". Likewise the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.

In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness - the "algemene redelikhheids-maatstaf" (Marais v Richard en n Ander 1981(1) SA 1157 (A) at 1168 C). This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot

give rise to an action for injuria. (Walker v Van Wezel (supra) at 68.) For words to be injurious they must infringe one of the "absolute rights of personality". (Whittaker v Roos and Bateman (supra) at 122; Walker v Van Wezel (supra) at 68). There is no such thing as an absolute right not to be criticised. A person must be prepared to tolerate legitimate criticism i e criticism which is fair and honest. Put differently, an act done in the exercise of a right is not a wrongful act, and can therefore not constitute an injuria. Honest criticism is such an act. (Melius de Villiers (supra) at pp 15/16.)

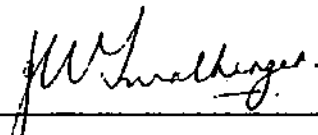
Whether in given circumstances criticism may be regarded as legitimate must depend upon i a the relationship of the parties involved and the nature of the affairs they engage in. Businessmen who engage in competition (like politicians who take part in

public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual.

Delange's complaint is that in the reply Costa accused him of being motivated by considerations which were contrary to the best interests of the industry. This is much the same as saying that he was motivated by self interest, and that cannot be regarded as a basis for an injuria. Costa probably appreciated that the purpose of the letter was to advance Delange's case for a reduction of import duty on imported olives. He presumably did not regard this to be in the interests of the industry and was telling Delange that until he (Costa) was satisfied to the contrary he was not prepared to enter into any transactions with him. In my view, all things considered, it cannot be said that Costa's statement

exceeded the bounds of legitimate criticism. To hold otherwise would be to impose unjustified restrictions on the right to criticise. The communication on which Delange's action was founded therefore did not constitute a wrongful act, and accordingly no injuria was committed by Costa, even though subjectively Delange's dignity was impaired.

In the result the appeal is dismissed with costs.



J W SMALBERGER
JUDGE OF APPEAL

CORBETT, JA)
JOUBERT, JA) CONCUR
VIVIER, JA)
NICHOLAS, AJA)