



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED: YES

17/09/2024

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SIGNATURE

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DATE

CASE NO: A26/2023

In the matter between:

BERTHA ELSIE MOKOENA

APPELLANT

and

MEC FOR EDUCATION, MPUMALANGA

FIRST RESPONDENT

RR MASHEGO

SECOND RESPONDENT

J. MOKOENA

THIRD RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 17 September 2024 at 10:00.

JUDGMENT

Ryneveldt AJ

Introduction

[1] This case was brought before this Court, with the main intent to appeal the whole judgment and order handed down by the Court *a quo* per Magistrate Theron at the Mhala Civil Regional Magistrate Court under case number 26/2017(B). The Appellant's case against the three Respondents was dismissed in its entirety on the ground that the Appellant failed to prove her case on a balance of probabilities.

[2] It is the Appellant's case before this Court, that the Court *a quo* failed to appropriately appraise relevant facts and legal principles. Consequently, it arrived at a wrong decision by finding that the Appellant did not prove her case under the *actio iniuriarum* and the *actio legis aquiliae* causes of action.

Brief Factual Matrix

[3] It is common cause that when the matter served before the Court *a quo*, the Appellant was employed as a teacher by the Department of Education in Mpumalanga ("the Department"). The case relates to the events that led to her dismissal and subsequent general and special damages that she suffered as a result.

[4] However, the Department realized its oversight concerning the Appellant's dismissal, retracted the unfair dismissal, and reinstated the Appellant in September 2015. For the Appellant, the damages suffered were irreversible. Thus, the Appellant instituted civil proceedings against all three Respondents for a total sum of R315 161.67 jointly and severally.

[5] At the time of the unfair dismissal, the Appellant was a Grade 8 and 9 Economic and Management Science teacher at Mathipe High School, a teaching position she held since February 2008.

[6] It was common cause among the parties that from time to time the Department would compile an excess list. This is a list where excess educators are placed in terms of a collective agreement 2/2003 and a provincial collective agreement 1/2014.

[7] On 06 February 2014, the Appellant's name was placed on an excess list. She objected to the placement of her name. On 04 March 2014, a new access list was compiled. Accordingly, the Appellant was advised to report for duty at Moduping Combined School from 01 January 2015.

[8] Throughout the process initiated by the Appellant to resolve her being placed on the excess list, she communicated her view in various letters in which she made her dissatisfaction known. She did not report for duty at Moduping Combined School in January 2015. With time the Appellant was once again requested to report for duty on or before 29 July 2015 at Moduping Combined School.

[9] On 27 July 2015, the Appellant was discharged from duty. However, on 18 August 2015, the letter of discharge was withdrawn following which she was reinstated as an educator. As a consequence of the aforesaid, she did not receive her August 2015 salary. The department only paid her salary in September 2015.

[10] The Department conceded during the proceedings before the Court a *quo* that when compiling the educators excess list, the wrong procedural processes were followed. The Appellant decided not to pursue a labour law unfair dismissal remedy against the Department but instead initiated a delictual remedy against it and the other Second and Third Respondents based on the *animus iniuriandi* and *actio legis aquiliae*.

[11] The Appellant contended that the Second Respondent ("Mashego"), a principal at Moduping Combined School, knew about the incorrect excess list. Despite this, he continued to compile a report indicating that she did not report for duty at Moduping Combined School. The Appellant alleged that the Third Respondent ("Mokoena") was instrumental in placing her name on the excess list in her absence in a meeting held on 06 February 2014.

Magistrate Court Findings

[12] After weighing the relevant facts and applicable legal principles, the Court *a quo* concluded that an employer's statutory responsibility and obligations to make sure that its employee(s) are not dismissed unfairly cannot give rise to a delictual claim. For the Court *a quo*, no wrongfulness could be attributed to an employer who dismisses its employee unfairly because the remedy available for an aggrieved employee against the employer is set out exclusively in the Labour Relations Act 66 of 1995, as amended ("the LRA").

[13] Thus, for all intents and purposes, the alleged wrongful act of the Department by unfairly dismissing the Appellant and the resultant failure to pay her August 2015 salary timeously could not be regarded as a wrongful act in delict according to the Court *a quo*. Furthermore, the Court *a quo* said, the Appellant was the creator of her own misfortune in that she could not hold the Respondents especially Mokoena liable in delict.

[14] The Court *a quo* found that insofar as the manner in which the excess list was compiled, the rights of the Appellant were not infringed. As such, it could not be a wrongful act giving rise to a delictual claim. The Court *a quo* concluded that there was no justification to find that all three Respondents caused her injury under the *animus iniuriandi*.

Issues on Appeal

[15] Whether the Magistrate wrongly appraised herself on the relevance of the LRA in that the issues placed before the Court *a quo* did not involve and/or relate to any labour issues as encapsulated in the LRA. Accordingly, it should not have had any bearing on the outcome of the matter.

[16] Whether the Appellant established, on a balance of probabilities, her delictual claim based on the *actio iniuriarum* and the *actio legis aquiliae*

The Law

Actio legis acquiliae

[17] The Constitutional Court in *Country Cloud Trading v MEC, Department of Infrastructure Development*,¹ gives a summary of the approach our law takes to a wrongfulness inquiry in that “the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.” See also *Loureiro and Others v Invula Quality Protection (Pty) Ltd*.²

[18] When a Court is faced with the criterion of wrongfulness in delict, culpability for an act committed by one party that causes injury to another party is inadequate to establish delictual liability. Prejudice must be created in an improper manner, which is legally repugnant or unjustified. If there is no wrongdoing, a party may not be held accountable³.

[19] The Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁴ stated that wrongfulness is an objective inquiry, in that “... the enquiry into wrongfulness, is an after the fact, objective assessment of whether the conduct which may not be *prima facie* wrongful should be regarded as attracting legal sanction. In *Knop v Johannesburg City Council* the test for wrongfulness was said to involve objective reasonableness and whether the *boni mores* required that ‘the conduct be regarded as wrongful. ...The ultimate question is whether on a conspectus of all the relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.’”

¹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 21.

² *Loureiro and Others v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53.

³ Neethling et al *Law of Delict* 5 ed at 31.

⁴ *Steenkamp NO v Provincial Tender Board Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 41 and 42.

[20] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA*,⁵ the Supreme Court of Appeal stated that:

“...in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful.”

[21] In *H v Fetal Assessment Centre*,⁶ the Constitutional Court clearly stated that although all elements of delict it is for the Courts to look at the reasonableness to impose liability:

“In addition to the general normative framework of constitutional values and fundamental rights, our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability, even on an assumption that all the other elements of delictual liability – harm, causative negligence and damages – have been met, on grounds rooted in the Constitution, policy and legal convictions of the community...”

Actio Iniuriarum

[22] It goes without saying that the common law’s *actio iniuriarum* upholds the notion of *dignitas*, which safeguards both privacy and dignity⁷.

[23] Section 10 of the Constitution encapsulated the imperativeness of human dignity, and in *Dawood and Another v Minister of Home Affairs and Others*,⁸ the Constitutional

⁵ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA) para 12.

⁶ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC) para 51 and 67.

⁷ *NM and Others v Smith and Others* [2007] ZACC 6; 2007 (5) SA 250 (CC) para 48.

⁸ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paragraph 35.

Court made it clear “that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be 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.”

[24] To take it further the Supreme Court of Appeal in *Le Roux and Others v Dey*⁹ made it clear that the term “dignity” covers several concepts and one of these concepts is a Plaintiff’s self-worth. With this said the Court held that self-worth is the “inborn right to the tranquil enjoyment of one’s peace of mind; and the valued and serene condition in one’s social or individual life which is violated when one is subjected to offensive and degrading treatment, or exposed to ill-will, ridicule, disesteem or contempt.”

[25] In *Minister for Justice and Constitutional Development v Tshishonga*,¹⁰ the Labour Appeal Court stated that when the Labour Court is presented with a non-patrimonial loss claim, the *actio iniuriarum* can be used to establish a reasonable and equitable compensation, if the circumstantial facts so permit [emphasis placed on circumstantial facts].

[26] The legal scholars *Neethling, Potgieter and Visser*¹¹ expounded that a party is entitled to claim damages for *iniuria* in the form of defamation for the infringement of his/her good name, reputation and status if the so-called injury was intentional.

[27] In the context of the *actio iniuriarum* under which the present claim falls, the Appellate Division in *Delange v Costa*¹² said:

⁹ *Le Roux and Others v Dey* 2010 (3) All SA 497 (SCA) para 20.

¹⁰ *Minister for Justice and Constitutional Development v Tshishonga* [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC).

¹¹ Neethling et al *Law of Delict* 5 ed at 331.

¹² *Delange v Costa* 1989 (2) SA 857 (A) at 862E-F.

“In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the ‘algemene redelikhedsmaatstaf’. . . This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful.”

Application of the Law

Labour Relations Act 66 of 1995, applicability

[28] As stated *supra*, the law is unambiguous that the remedy opted for by a party should be clearly delineated. The Appellant’s case as presented in her particulars of claim makes out her causes of action based on the *actio legis aquiliae* and *actio iniuriarum* respectfully, and thus the onus rested on the Appellant to prove her case on a balance of probabilities for both of these causes of action.

[29] A crucial point of departure for this appeal is to look at the Court a *quo*’s frame of reference in so far it relates to the Appellant’s causes of action and how it differs and or relates to the unfair dismissal remedy encapsulated in the LRA, if any.

[30] Joubert in LAWSA¹³ crystallizes the following in so far it relates to available statutory remedies and their interpretation: “If the statute prescribes a special remedy for the enforcement of the duty, it is likely that the civil remedy was not contemplated, but this does not necessarily exclude a civil remedy.”

[31] As aforementioned, the legislators did not intend the LRA unfair dismissal remedy to eliminate a party’s civil remedies under the law. As such, the Court a *quo*’s view that “an employer’s statutory duty not to unfairly dismiss an employee is not wrongful in a *delictual* sense,” should not be narrowly interpreted, in essence, it calls for a wider interpretation, and to give full meaning to a broader connotation is the fact that the Court

¹³ Joubert LAWSA (2nd ed) Vol 8 Part 1 para 74.

a *quo* analysed the trial evidence as presented in light of the *actio legis aquiliae* and *actio iniuriarum* legal requirements, as is evident in the Court a *quo*'s findings.

[32] The Gauteng Local Division in *Chowan v Associated Motor Holdings (Pty) Ltd and Others (Chowan)*¹⁴ amplifies that, “if only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.”

[33] The Court in *Chowan* goes on to state that a Labour Court with specified LRA remedies does not necessarily mean that other remedies cannot be adjudicated in other Courts.

[34] The Court a *quo* aptly adjudicated the matter based on the evidence presented during the trial and its reference to the LRA should be interpreted as an indication that it understood that the Appellant's causes of action stemmed from a labour dispute and thus had their own merits in delict. If not, it could have rejected the Appellant's claim outright or overemphasized the jurisdictional quandary. It is notable that it did not do this. Furthermore, it should be noted that the issue of jurisdiction was previously addressed hence it did not feature prominently before the Court a *quo* during the trial.

Balance of probabilities

[35] The Constitutional Court reaffirmed an appeal Court stance in *Makate v Vodacom (Pty) Ltd*¹⁵ in that “appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In *Bitcon*, Wessels CJ said:

¹⁴ *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018 (2) All SA 720 (GJ); 2018 (4) SA 145 (GJ) para 53.

¹⁵ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016(4) SA 121 (CC) para 37.

‘The trial judge is not concerned with what is or is not probable when dealing with abstract businessmen or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were’.”

[36] The Court in *The National Employers’ General Insurance v Jagers*¹⁶ emphasized the importance of credibility and probabilities in determining the value of the evidence presented in a civil trial, accordingly, it stated that:

“The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true.”

[37] Examination of the trial record submitted in this appeal shows that the evidence against Mashego and Mokoena does not support the Appellant’s case. Rather, it appears that the Appellant is attempting to establish a case against all three of the Respondents by using the unfair dismissal (common cause facts, which were admitted and resolved timeously) as a launching pad to express her long-simmering resentment toward her perceived working conditions.

[38] Thus, it comes across as though the Appellant’s unfair dismissal provided an avenue for her long-simmering dissatisfaction to be released. It does not necessarily mean that once an expert confirms that an event could be directly related to the incident in question, the Court must solely place reliance on the expert opinions to the exclusion of the body of the other evidence presented during trial. The significance that expert witnesses play in helping the court reach a just and equitable decision has been made clear by the courts on several occasions. The Supreme Court of Appeal in *NSS obo AS*

¹⁶ *The National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (E) at 440F.

*v MEC for Health, Eastern Cape Province*¹⁷ reiterated that “even if experts agree on a matter within their joint expertise, that is merely part of the total body of evidence.”

[39] Based on the expert evidence of the Appellant, her mental health can be attributed to incidents related to her workplace. However, Dr van Zyl gave evidence that other factors should also be taken into consideration with the Clinical history namely, family history, sexual history, psychological history, and habits.

[40] When reviewing evidence, the Court is required to consider all of the evidence from a holistic perspective and, as a result, must undertake an impartial objective investigation into wrongfulness. As stated above in the Constitutional Court decision of *Steenkamp NO v Provincial Tender Board Eastern Cape*, all relevant facts and circumstances must be considered when the court holds a party accountable, but only if public policy and public interest require it.

[41] It is clear from the evidence presented that the Appellant could not have suffered such severe hardship and harm because of the wrongful dismissal in that we are talking about a one-month salary payment that was paid one month late. On the realisation that the dismissal was erroneous and that it should not have happened in the first place, the Department detected and corrected its oversight without any delay.

[42] How this one incident on which the Appellant builds her case baffles the mind, and it is not as if it happened before to the Appellant, or that the Appellant had to endure lengthy periods of endless litigation to make her plight known and get the desired outcome of being reinstated with compensation.

[43] Taking public policy and public interest into account, the Appellant’s case cannot be supported in finding the unlawful dismissal to be wrongful in a delictual sense, because doing so would expose public institutions to unnecessary litigation for *bona fide* mistakes

¹⁷ *NSS obo AS v MEC for Health, Eastern Cape Province* [2023] ZASCA 41; 2023 (6) SA 408 (SCA) para 25.

that may creep in from time to time, especially when it is picked up and corrected timeously by a public institution when pointed out by the offended party.

[44] Mashego had a duty and responsibility to disclose where the Appellant reported for duty and holding him directly liable cannot be justified and violates public policy, which requires public authorities to intimate the facts as they are.

[45] This Court concurs with the Court a quo's credibility assessment of the evidence presented in respect of Mokoena. "It is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and the probabilities of the matter under consideration."¹⁸ The Supreme Court of Appeal in *City of Cape Town v Mtyido*¹⁹ reiterated that an appeal court will not generally interfere with a trial court's credibility findings unless the findings are wrong.

[46] The Supreme Court of Appeal in *Bee v Road Accident Fund*²⁰ stated that one of the principles that need to be observed by an appeal Court, is that the trial Court's factual findings are presumed to be correct in the absence of clear demonstrable errors. A holistic approach of the evidence presented demonstrates that the actions of the Respondents to directly or indirectly place the Appellant on the excess list, which led to her unfair dismissal cannot be seen as being wrongful for the reasons already canvassed.

Order

In the result, I propose the following order:

The judgment and order of the Court a quo is set aside and substituted for the following:

"The claim is dismissed with costs, including those of Counsel."

¹⁸ *Santam Bpk v Biddulph* [2004] ZASCA 11; (2004) 2 All SA 23 (SCA) para 5.

¹⁹ *City of Cape Town v Mtyido* [2023] ZASCA 163 para 23.

²⁰ *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 46.



D L-J RYNEVELDT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

I agree



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES

Counsel for the Appellant: Adv VE Kruger
Instructed by: Scheepers Attorneys

Counsel for the Respondent: Adv Z Gumede
Instructed by: State Attorney

Date of Judgment: 17 September 2024