

SOUTH AFRICA / JUDGMENT

Bikitsha v MEC for Department of Education, Eastern Cape and Another (1742/2010) [2013] ZAECMHC 35 (21 November 2013)

[2013] ZAECMHC 35

COURT

Eastern Cape High Court, Mthatha

BEFORE

J W Eksteen

CASE / FILE NUMBER

1742/2010

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IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN CAPE, MTHATHA

Case No.: 1742/2010

Date Heard: 6 November

2013

Date Delivered: 21

November 2013

In the matter between:

VIOLA LINDA BIKITSHA

.....Plaintiff

and

THE MEMBER OF THE
EXECUTIVE
COUNCIL, DEPARTMENT OF
EDUCATION,
EASTERN CAPE

.....First

Defendant

THE PRINCIPAL:

MANGQUKWANA JSSSecond

Defendant

JUDGMENT**EKSTEEN J:**

- [1] The second defendant is the principal of the Mangqukwana Junior Secondary School (herein referred to as “the School”) in the district of Libode. The plaintiff claims damages from the first and second defendants under the *actio iniuriarum* arising from alleged insulting and degrading statements made by the second defendant, acting in her capacity as principal of the School.
- [2] The plaintiff is an educator at the School and a member of the second defendant’s staff. She and the second defendant were at University together and they have been close friends and colleagues for many years prior to these events.

Background

- [3] The background leading up to the unfortunate events which give rise to the action are not contentious. It is common cause that during the earlier part of February 2010 there was a persistent and repugnant smell noted in the staffroom of the School. On at least one occasion scholars were called in to remove furniture in search of the possible source of the smell which was thought to be a dead rat, but to no avail. On a particular day, and there is a dispute in respect of the exact date, a meeting of the School Governing Body (herein referred to as the “SGB”) was held in the office of the second defendant. There were approximately ten persons present. The plaintiff was the secretary of the SGB and the second defendant was the chairperson. The plaintiff therefore sat alongside the second defendant during the course of the meeting as she was tasked to take the minutes of the meeting. It was during this meeting that the second defendant formed the impression that the plaintiff exuded an unpleasant smell. It would appear that she concluded that the plaintiff was the source of the repugnant smell which had permeated the staffroom in the preceding weeks. She accordingly resolved to call the plaintiff into her office privately to raise the issue with her. This she did. Again

there is some discrepancy as to the precise timing thereof. The plaintiff states that it occurred on the day after the SGB meeting

had been held whilst the second defendant states that it occurred on the same day immediately after the meeting. Nothing turns on the dispute relating to the dates.

- [4] Be that as it may, it is the events which occurred during this private meeting in the second defendant’s office which gives rise to the litigation.

The Evidence

- [5] The plaintiff testified that on the day in question she was called to the office of the second defendant. Second defendant advised her that she had received complaints from other members of staff that the plaintiff was emitting a foul smell and that she had personally also smelt it at the SGB meeting. She said that the plaintiff smelt like a dead dog. The plaintiff, who says that she suffers from an impairment of smell, enquired from the second defendant as to the source of the smell. Upon this enquiry the second defendant was non-committal but suggested that her sister once had a lung infection which caused her breath to smell. She therefore suggested that it was possible that the plaintiff may have a lung infection and she accordingly suggested the plaintiff go to the hospital and have an X-ray and a medical examination. The plaintiff initially thanked the second defendant for drawing it to her attention and she later proceeded to hospital.
- [6] Before proceeding to hospital, however, she first went home to fetch her medical card. There she encountered her daughter, Francis. She says that she was angry and she reprimanded Francis for not telling her that she exuded an unpleasant smell. Francis, however, denied that there was any unpleasant smell about her.
- [7] Plaintiff then proceeded to the hospital. There she first saw a female doctor. When she related her complaint to the doctor the doctor told her not to waste her time and declined to examine her. She was, however, not satisfied and approached a nursing sister in an endeavour to have a proper examination. A male doctor was then called. He examined her but could find nothing abnormal. He called another female doctor, one Dr Mpuko, to confirm his finding. She agreed and a brief report was drawn to confirm that nothing abnormal had been detected. Armed with this report she returned to the School the following day and handed a copy of the report to the second defendant. The second defendant made no comment.
- [8] The plaintiff accepts, if there were complaints, that the second defendant was entitled to broach the subject with her but, she states that she was humiliated by the manner in which it was done. She feels that her dignity was violated and she was hurt. Moreover, when Francis advised her that there was no smell about her and the doctors thought that she was wasting their time she was annoyed. Second defendant has not, she says, ever apologised. In all this time the plaintiff had to return to work at the School and she says that she has felt fearful each day as she does not know whether other teachers think that she smells. She has lost her self- confidence and she feels that she is not the person that she once was. Although she felt emotionally shocked she was never incapacitated, did not take leave and did not seek any medical or psychological treatment to alleviate her condition.
- [9] The plaintiff is married to a lawyer and she says she knows her constitutional rights. She claims R500 000,00 for emotional shock, R500 000,00 for impairment of dignity and reputation and R500 000,00 for the invasion of her privacy.

- [10] Under cross-examination the plaintiff confirmed that she was aware of the smell in the staffroom shortly before the event, but denies knowledge of any suggestion by others that it may have emanated from her. She confirms too that she was present at the SGB meeting and sat next to the second defendant. She states, however, that no one complained at the meeting of any unpleasant smell. The plaintiff denies that she was treated with dignity by the second defendant and says that she was particularly hurt to be compared repeatedly to a dead dog.
- [11] In respect of her visit to the hospital the plaintiff says that the second defendant instructed her to go to hospital to be examined and to have an X-ray. The second defendant, she says, was in a position of authority over her and she released her from her duties at school early and sent her to hospital. She perceived it to be an instruction.
- [12] On a specific enquiry from the Court as to whether it was an instruction or a suggestion the plaintiff declares that it may have been a suggestion rather than an instruction. In consequence, however, of the manner in which she was spoken to she interpreted it as an instruction. She was, however, aware that the second defendant did not have the authority to give her an instruction of that nature.
- [13] The plaintiff's daughter, Francis Bikitsha, testified that she was at home on the afternoon in question with a friend, whom she did not identify, when her mother came home. She thinks that it was approximately three o'clock in the afternoon when her mother arrived but states that she came home at the usual time after the close of the school day. Her mother, the plaintiff, was upset and was crying. She confirms that she was confronted by the plaintiff who enquired why she had not told her of the unpleasant smell. Both she and her friend, she says, approached the plaintiff in an endeavour to detect a smell but could smell nothing abnormal. She assured the plaintiff that had there been an unpleasant smell about the plaintiff she certainly would tell her. She had never smelt anything unpleasant about the plaintiff.
- [14] The second defendant then testified. She states that the SGB meeting was held in her office which is a small office and it lasted approximately three hours. Soon after the meeting commenced she realised that the smell emanated from the plaintiff and that it was serious. So much so that her throat became dry. After the meeting adjourned she decided that she had to address the issue forthwith with the plaintiff. She says that she did not receive reports from other members of staff and she advised the plaintiff of her own accord that as principal and the manager of the staff she had a duty to ensure a secure and healthy environment. She advised the plaintiff that she exuded a bad smell and she should go to see a doctor. The plaintiff enquired from her where the smell came from and she declared that she was not sure but that it was a terrible smell and that it is not healthy. On enquiry as to the nature of the smell second defendant says that she advised the plaintiff of her sister's condition and the lung infection to which I have referred earlier. On this basis she advised the plaintiff to go to hospital and be examined. She denies in cross-examination that she ever told the plaintiff that she smelt like a dead dog and says that she spoke to the plaintiff in a dignified

and professional manner in bringing a sensitive issue to her attention.

[15] Mr Bikitsha, acting on behalf of the plaintiff, put it to the second defendant that she had in fact instructed the plaintiff to seek medical

attention, to submit to an examination, and to have an X-ray. This the second defendant denied. She denied too that she had said that the plaintiff in fact had a chest infection and that she had released the plaintiff early from her duties in order to go for a medical examination. She states that the plaintiff left the school at the ordinary time after the close of the school day.

[16] It was further put to this witness that she had in fact instructed the plaintiff to procure a medical report for her perusal and that the plaintiff had done so. She confirms, in reply, that the plaintiff did indeed bring her medical report to her but denies that she ever instructed the plaintiff to produce a medical report. She states that she had no particular interest in the plaintiff's medical condition and did not read the report. She further denies that she had any intention to hurt the plaintiff and that she did not impair the plaintiff's dignity. She realised that the matter was sensitive and it is for that reason that she called the plaintiff in privately.

[17] Finally Mrs Xulaba, a fellow educator at the School was called on behalf of the second defendant. Her evidence does not advance the matter at all and it is not necessary herein to dwell on the content thereof Suffice it to say that this witness knew nothing of the event.

[18] Mr Young, on behalf of the defendants, argues that conduct of the second defendant was legally justified as the second defendant was entitled

and indeed obliged, as principal of the School to address the issue with the second defendant in the circumstances which prevailed. This, I think would be correct if she had received such complaints from members of staff and indeed the plaintiff concedes that. The same, in my view, would apply if the second defendant on her own observations had cause for concern. This, however, would not confer upon her the right to abuse the occasion and to subject the plaintiff to degrading and humiliating treatment. On her own admission she did not receive reports from any members of her staff that the unpleasant smell emanated from the plaintiff and, on the evidence it appears her own perception was erroneous. I shall revert to this issue below.

Relief sought

[19] The *actio iniuriarum* grants relief for an impairment of the person, dignity or reputation of the plaintiff which impairment is committed wrongfully and *animo iniuriarum*. A plaintiff bears the onus to allege and prove impairment of the relevant aspect of personality relied upon. (See *Bennett v The Minister of Police and Another* 1980 (3) SA 24 (C) at 37.) I have alluded earlier to the plaintiff's claims for an impairment of her emotional well-being, her dignity and reputation and an invasion of her privacy. I shall deal with these heads of damage separately below.

Emotional shock

- [20] In *Bester v Commercial Union Versekeringsmaatskappy van Suid-Afrika Beperk* 1973 (1) SA 769 (A) it was held that the brain and nervous system are as much part of the physical body as an arm or a leg. As a result a physical injury is not absolutely necessary to found liability. (See *Bester supra* at p. 779.) A plaintiff must, however, prove, not mere nervous shock or trauma, but that he or she had sustained a detectable psychiatric injury. (See *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) at 61I. See also *Barnard v Santam Beperk* [1998] ZASCA 84; 1999 (1) SA 202 (SCA) at 216 (SCA).) This would ordinarily require expert evidence.
- [21] In the present case the plaintiff has testified as to her emotions. She found it very difficult to go back to the School, and, probably as a result of her impairment of smell, was always fearful that others might perceive her to emit a foul smell. She says she lost her self-confidence and that the trauma and emotion has left her feeling that she is not the person that she used to be.
- [22] I do not think that this establishes emotional shock as is required to be proved. I have noted earlier she was not incapacitated. She did not take leave. She did not seek either medical or psychological treatment. No medical evidence has been tendered in support of this claim. I do not think that such an injury has been proved. Indeed Mr Bikitsha, when I raised this difficulty with him, indicated that he would not persist in the claim for emotional shock. In the circumstances no more needs to be said in this regard.

Impairment of dignity

- [23] There is no evidence of any publication by the second defendant or anyone else of the remarks which were made in the private meeting between herself and the plaintiff. Mr Bikitsha, correctly in my view, did not seek to rely on any impairment of reputation despite the allegation in the particulars of claim. In issue is accordingly the impairment of dignity.
- [24] In *Rex v Umfaan* 1908 TS 62 at p. 66, Innes CJ, referred to the three essentials of inuira as follows:

‘The act complained of must be wrongful; it must be intentional; it must violate one or other of those real rights, those rights in rem, related to personality, which every man is entitled to enjoy. Chief Justice DE VILLIERS, in *Laws of Injuries*, says (p. 27):

“With these ingredients to hand it will be found that there are three essential requisites to establish an action of injury. They are as follows- (1) an intention on the part of the offender to produce the effect of his act; (2) an overt act which the person doing it is not legally competent to do; and which at the same time is (3) 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.”

Earlier he says, “Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim, and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right.”

[25] It is necessary first to make a factual finding as to what was in fact said to the plaintiff. It is not in dispute that the second defendant told the plaintiff that she emitted a foul smell. The plaintiff herself is unable to comment in this regard not only because it related to her own bodily odour but because she has an impaired smell. The balance of the evidence, however, leads me to conclude that the statement by the second defendant was factually inaccurate. Both the plaintiff and her daughter, Francis Bikitsha testified as to the events which occurred at the plaintiff’s home that afternoon. Francis attempted to detect any unsavoury odour on the body of the plaintiff, but could smell nothing unusual. The evidence of Francis was not challenged in cross-examination. The plaintiff testified that the doctors at the hospital thought that she was ridiculous and they could detect no unpleasant smell on the plaintiff. Whilst the doctors were not called to testify the plaintiff’s evidence in respect of that report stands uncontested.

[26] The real sting, however, of which the plaintiff complains, is the manner in which it was communicated to her and the fact that she was compared to a dead dog. This, is of course in dispute. It was not initially alleged in the particulars of the plaintiff’s claim that this statement was made. In February 2012, however, the plaintiff filed a notice of intention to amend to introduce the allegation that the second defendant had “alleged that the smell emanating from the plaintiff’s body was like that of a dead dog”. It was the only amendment to the particulars of claim. It was duly affected and in January 2013 the defendant responded by filing an amended plea specifically to address the amendment to the particulars of the plaintiff’s claim. The allegation that the second defendant had uttered these words was not placed in dispute. By virtue of the provisions of Rule 22(3) of the Uniform Rules of Court it is accordingly deemed to be admitted. It was not seriously challenged in cross-examination of the plaintiff either. In these circumstances the vehement denial of the second defendant must be rejected.

Wrongfulness

[27] This brings me to the question of wrongfulness. In *Delange v Costa* 1989

(2) SA 857 (A) at 862 Smalberger JA said:

‘Because proof that the subjective feelings of an individual have been wounded, and his dignitas thereby impaired, is necessary before an action 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

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. To address the 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.’

- [28] The “notional understanding and reaction of a person of ordinary intelligence and sensibilities” is therefore of paramount importance. If the plaintiff proves that she felt insulted in circumstances where the 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 conduct. (See Neethling, Potgieter and Visser: Law of Delict (5th ed) p. 322 and the authorities there referred to.)
- [29] As stated earlier the defendants contend that the conduct of the second defendant was justified as she had an obligation arising from the position which she occupied and the legislation governing it to act. Her first difficulty in this instance is that, on the weight of the evidence, her perception was clearly wrong. The problem in the present matter, however, is not so much that the second defendant broached the subject of the unpleasant odour with the plaintiff, but the manner in which it was done and the terminology which was utilised. I think that the comparison of a human being to the stench of decaying animal carcasses is indeed humiliating and degrading and any self respecting person of ordinary intelligence and sensibility would have felt insulted thereby. Even if the second defendant was justified in raising the issue, and on the evidence I do not think that she was, she was not justified in doing so in the manner in which she did.

Intention

- [30] Animus iniuriandi, or intention, which is an essential element of the delict, is implied from acts alleged which constitutes an infringement of an absolute right of personality. Like wrongfulness, it is presumed from the alleged conduct of the defendant (compare in this regard Brenner v Botha 1956 (3) SA 257 (T) at 261A-B and the authorities referred to therein).
- [31] In these circumstances I think that the conduct of the second defendant does constitute an intentional aggression upon the plaintiff’s right to dignity. Indeed, Mr Young, correctly in my view, conceded that in the event that I find that second respondent did compare the plaintiff to a dead dog, then animus iniuriandi is to be inferred. The plaintiff’s claim in respect of an impairment of her dignity must accordingly, in my view, succeed.

Invasion of privacy

- [32] Mr Bikitsha argues that the plaintiff’s privacy was invaded by having been subjected to a medical examination and by the second defendant’s

insistence to receive a medical report. These issues are in dispute.

[33] In respect of the former Mr Bikitsha contends that I should find that the medical examination occurred as a consequence of an instruction given by the second defendant in a position of authority which the plaintiff was obliged to comply with. The examination itself which resulted directly from the instruction, constitutes an invasion of her privacy, or so the argument goes. He contends in support of this argument that the plaintiff was relieved of her duties at school and sent away early on the day in question to attend to a medical examination. This, it is argued, is indicative thereof that the plaintiff had no choice but to subject herself to the examination. I do not think that the evidence permits of such factual findings. Firstly, the plaintiff conceded that it may well be that the second defendant was merely making a suggestion when she referred the plaintiff to medical examination. Secondly, she acknowledged that she was aware thereof that the second defendant had no authority to give instructions in respect of medical treatment. Thirdly, the evidence

of Francis Bikitsha is destructive of the plaintiff's version that she was relieved early on the day in question. In these

circumstances, the evidence of the second defendant appears to me more probable and must be accepted on this issue.

[34] The effect of the factual finding above is that the plaintiff voluntarily took up the advice of the second defendant and sought a medical examination. This is borne out by her own evidence that when the first doctor declined to examine her she persisted and approached a nursing sister to summon a doctor so that she might be examined.

[35] The second argument is equally problematic. It is common cause that the plaintiff did return with a medical report which she handed to the second defendant. Mr Bikitsha argues that the second defendant's perusal thereof constituted an invasion of the plaintiff's privacy. I think, however, on the evidence of both the plaintiff and the second defendant the second defendant did not peruse the medical report. Mr Bikitsha contends, nevertheless, that the second defendant instructed the plaintiff to bring a medical report. There could be no other reason for her to deliver it, so the argument goes. I do not think that the argument can be sustained. The plaintiff did not in her evidence in chief suggest that she was instructed to bring a medical report to the second defendant. It only arose in re-examination and appears to me to be an afterthought to counter the concession made by the plaintiff relating to the suggested medical examination. Moreover, I think that there may be numerous reasons for the plaintiff to have done so. One that commends itself is that the plaintiff, who on her own evidence was angered at the realisation that there was in fact no unpleasant odour emanating from her body and that she had been wrongly singled out, sought to prove her point.

[36] In all the circumstances I do not think that the plaintiff has established a case founded on the invasion of her privacy.

Quantum of damages

- [37] The minute of the pre-trial conference records that the parties agreed that the merits and quantum should be separated and that the trial should, at this stage, be directed only at the issue of liability. At the hearing neither party sought an order for the separation of issues. The matter only arose during argument, after both sides had closed their cases. I raised concern that it did not appear to me that this was a matter in which the issues could conveniently be separated. Mr Bikitsha intimated that the plaintiff had no other evidence which he could tender in respect of the quantum of damages other than that which had already been tendered. On reflection he accordingly requested that I decide the quantum of the plaintiff's damages on the evidence which has been presented. Mr Young did likewise.
- [38] I have indicated earlier that the plaintiff seeks R500 000,00 in respect of the impairment of her dignity. In *Brenner v Botha* supra it was recognised that the task of assessing, in terms of money, the compensation for a loss which is not pecuniary is obviously difficult, and the difficulty is increased by the fact that damages are to some extent punitive in cases such as this. It is compensation for wounded feelings. I take into consideration the fact that the plaintiff, as an educator, is a professional person. She is 54 years of age and a married woman. The insults to which she was subjected were unprovoked and, as it turns out, unfounded. These are aggravating features.
- [39] On the other hand, there was no publicity given to any of these statements and the extent to which a person's feelings are hurt is often dependent, in some measure, on the degree of publicity. (Compare *Brenner v Botha* supra at p. 262C-D.) In *Brenner's* case, a plaintiff who had been subjected to public abuse was awarded compensation of £25 (R50). I think that the facts of *Brenner's* case may serve as a guide, to the extent that previous decisions can, of the kind of damages which should ordinarily be awarded for this kind of infringement.
- [40] Previous decisions can, of course, only provide limited guidance as each case must be decided on its own peculiar facts. I am mindful thereof that the facts of the present case are not on all four with *Brenner's* case. I have been referred too to *NM and Others v Smith and Others* [2007] ZACC 6; 2007 (5) SA 250 (CC). In the *NM* case the names of three woman had been published in a book in which their HIV status was revealed to the world at large. They were the plaintiffs and they were, in the final appeal, awarded R35 000,00 each as damages. I think that the *NM* case, by virtue of the extensive publication of the information, concerned a far more serious violation of dignity than that to which the plaintiff herein has been subjected. Moreover, the *NM* case concerned both an impairment of dignity and an invasion of privacy.
- [41] I am mindful in comparing *Brenner's* case, which was decided in 1956, of the ever changing mores of our society and more particularly of the current constitutional dispensation in which human dignity is a foundational cornerstone. In seeking guidance from this decision, and other previous decisions I am acutely conscious of the impact which the ravages of

inflation have had upon the value of money in the interceding years. Notwithstanding all these considerations I am constrained to recognise that the seriousness of the infringement has been grossly overstated. I consider that an award of R20 000,00 would constitute fair compensation.

[42] In the result the first and second defendants are ordered, jointly and severally the one paying the other to be absolved, to pay to the plaintiff:

1. The amount of R20 000,00.
2. Interest on the said amount calculated at the legal rate from a date fourteen days after judgment to the date of payment.
3. Costs of suit, on the appropriate Magistrates' Court scale.
4. Interest on the plaintiff's taxed costs calculated at the legal rate from a date fourteen days after judgment to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Mr Bikitsha on behalf of Bikitsha & Associates, Mthatha

For Defendant: Adv D T Young on behalf of State Attorney, Mthatha

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