

SOUTH AFRICA / JUDGMENT

Democratic Alliance v Rulumeni (88/2021) [2023] ZASCA 1 (13 January 2023) [2023] ZASCA 1

COURT

Supreme Court of Appeal

BEFORE

Makgoka, Nicholls, Hughes, Goosen, Salie

CASE / FILE NUMBER

88/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 88/2021

In the matter between:

DEMOCRATIC ALLIANCE

APPELLANT

and

NTOMBENHLE RULUMENI

RESPONDENT

Neutral citation: Democratic Alliance v Rulumeni (88/2021) [2023] ZASCA 1 (13 January 2023)

Coram: MAKGOKA and NICHOLLS and HUGHES JJA and GOOSEN and SALIE AJJA

Heard: 1 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 13 January 2023.

Summary: Delict – infringement of dignity – whether interview in changing room wrongful and intentional – conduct not wrongful in light of legal convictions of community – intention to harm dignity not established.

ORDER

On appeal from: Eastern Cape Division of the High Court, East London Circuit Court, (Mjali J, sitting as court of first instance).

1 The appeal is upheld with no order as to costs.

2 Paragraphs (i) and (iii) of the order of the high court are set aside and replaced with the following order:

‘(i) The plaintiff’s claim under the *actio iniuriarum* is dismissed.

(iii) The plaintiff is to pay the costs of this action, such costs to include the costs of two counsel.’

Goosen AJA (Makgoka, Nicholls and Hughes JJA and Salie AJA concurring)

[1] The appeal is against an order of the Eastern Cape Division, East London Circuit Court (the high court), which held the appellant liable for payment of damages for the infringement of the respondent’s dignity. The appeal is with the leave of this Court.

[2] The respondent instituted action against the appellant in October 2017. She formulated two claims in her particulars of claim. The first was founded on the *actio iniuriarum*. She alleged that the appellant had wrongfully and intentionally injured her dignity on 6 February 2016, when the officials of the appellant interviewed her in a ‘female ablution block’. She sought damages in an amount of R10 million as a solatium. The second claim, arising from the same events, was one for pure economic loss. She claimed that the wrongful and intentional acts of the appellant resulted in her not being selected to serve as a representative of the appellant as a municipal councillor, and that she consequently suffered a loss of potential earnings. The trial before the high court, in July 2019, proceeded only on the question of liability. On 15 October 2019, the high court found the appellant liable to the respondent in respect of her first claim based on the *actio iniuriarum*. It dismissed the claim for pure economic loss, and ordered the appellant to pay the costs of the action.

The

facts

[3] The respondent was a member of the appellant political party and had served as its representative in the Buffalo City Municipal Council. In 2015 the appellant initiated its internal selection process for municipal councillors in preparation for the local government elections to be held in 2016. The respondent applied to be a councillor to be placed on the appellant’s party list.

- [4] The appellant's selection process involved several steps. The first of these was an assessment conducted by the appellant's Electoral College. Those candidates approved by the Electoral College were then interviewed by a selection panel. Following interviews by the selection panel the candidates were ranked on the basis of their performance. The ranked list was presented to the Electoral Commission of South Africa (the IEC) as being the list of candidates to be appointed to the municipal council in proportion to the votes secured by the appellant in the election.
- [5] The Electoral College sat from 27 to 29 November 2015. The respondent was interviewed and assessed by it. It is common cause that the respondent was 'red flagged' by the Electoral College. This was as a result of certain probity findings made by the Electoral College. The effect of this was that the respondent did not advance to the second stage of the process, namely the selection panel interviews. These interviews were conducted from 8 to 10 January 2016.
- [6] The respondent, after being informed that she was not advanced to the selection panel stage and upon establishing that she had been 'red-flagged', lodged an appeal against this finding. Her appeal was successful. As a result the respondent was interviewed by the selection panel on 6 February 2016. The interview was conducted in a room adjacent to a conference venue at Bunker's Hill Golf Estate, where a training programme for candidates was to be conducted.

The cause of action

- [7] The relevant portions of the respondent's particulars of claim read as follows:

'The Defendant's agents, acting within the course and scope of their mandate, intentionally infringed the Plaintiff's personality right to dignity and harmed her feelings in the following manner:

12.5 At Bunker's Hill, Plaintiff was ushered by the Defendant's agents through a hall full of DA candidates, and led through a door leading into the female ablution block, that is when she was told, in a changing room adjoining female toilets and bathrooms, that, that is where the interview would proceed.

12.6 The plaintiff was shocked, humiliated, and extremely pained by the hastily unfolding events. She felt her dignity being lowered, and her sense of identity under assault.'

- [8] Paragraph 12, quoted above, confines the alleged wrongful conduct to the choice of venue for the interview held on 6 February 2016. The first four sub-paragraphs set out the background and events preceding the interview.

The evidence

- [9] The respondent presented extensive evidence about the events preceding the interview held on 6 February 2016. Much of this evidence is irrelevant to the claim as formulated.

[10] On Saturday 6 February she drove to the Bunker's Hill Golf estate, for her re-scheduled interview. She arrived at approximately 8.15 am. She saw several candidates milling around outside the venue. She decided to wait in her vehicle. At about 8.25 am she walked to the venue. She was met by Mr Mileham. She was taken to the room where the interview was held. She described it as an ablution facility. A sign on the door leading to the room indicated that it was the ladies' toilets. She was then given a

choice topics upon which to speak for five minutes and was given few minutes to prepare her speech.

[11] The panellists left the room and she sat at a dressing table to prepare her notes. While doing so one of the candidates entered the room. She asked the respondent what she was doing there. The respondent said that she dismissed the person, whom she knew, telling her not to disturb her. Shortly after that another woman entered the room. She was carrying an infant and she walked through the room and disappeared into the back of the area.

[12] When the selection panellists returned she was told that she could present her speech and that thereafter she would be asked a few questions. Just as she was about to commence her speech, the woman carrying the infant came back into the room via an archway separating the back area of the room. Ms Stander, who served on the panel, immediately confronted the woman. According to the respondent, Ms Stander gave the woman a tongue-lashing for disturbing them. She said that she had announced to the delegates that they were

not to enter the room because they were busy with an interview. The respondent then presented her speech and was interviewed by the panellists.

[13] The respondent described her reaction upon realising that the interview was to take place in the room leading to the ladies' toilets as one of shock. She said that she felt degraded and humiliated because it was a toilet. The interview took place when all the other candidates had gathered. She said that she felt her dignity was assaulted and she experienced it as humiliating and insulting. Her feelings were compounded when she joined the other candidates in the hall. She told one of them, a Ms Dlepu, what had happened to her. Ms Dlepu, who testified, confirmed that the respondent had told her about the interview. She said that she

appeared to be in shock

[14] Approximately one month after the selection panel interview, the outcome of the selection process was announced. This was in the form of a presentation of the ranked candidate list. The respondent was not present when this occurred. Mr Mileham contacted her telephonically and told her that she was ranked 25th on the list. She was surprised and aggrieved by this. Her ranking meant that she was unlikely to secure election as a councillor. Mr Mileham informed her that she could file an appeal against her ranking.

- [15] A few days later she lodged a written appeal. In it she raised a complaint about the manner in which she had been excluded from the interviews because of the 'red-flagging'. She complained about the fact that she was not informed about the appeal outcome, and that her scheduled interview on 5 February 2016 had not occurred. She stated that she felt that her dignity was assaulted by the interview being conducted in an ablution facility and that her ranking was unfair.
- [16] The appellant presented the evidence of Mr Mileham. He served as the chairperson of the selection panel. Mr Mileham explained that the members of the selection panel were not involved in the Electoral College assessment process. The task of the selection panel was to interview candidates who had been assessed by the Electoral College and, based on their performance in the interview, to rank the candidates.
- [17] Mr Mileham explained that the selection panel process had to be completed by 8 February 2016. The first opportunity, after the outcome of the respondent's appeal, was on 5 February. It could not proceed on that day because Ms Stander, who was a member of the panel, did not arrive. Mr Mileham re-scheduled the interview to take place on the Saturday morning at the Bunkers Hill Golf Estate, where a training programme for candidates was scheduled to take place.
- [18] He explained that when the respondent arrived, many candidates had already assembled and had entered the hall. There was clearly some confusion about the scheduled time for the interview as, according to him, the time was 8.00 am, whereas the respondent believed it was scheduled for 8.30 am. As a result, the hall could not be used for the interview as had been intended. He had looked, without success, for an alternative venue. As they were under pressure to complete the selection process, they decided to use the room leading to the ladies' toilets. No other venue was available. The venue consisted only of a hall, kitchen and the venue used for the interview. Under the circumstances it was the best that could be done to ensure that the interview was held. He testified

that he asked the respondent if she was 'okay' with holding the interview there and she did not object. He explained that it was not a toilet. It was a well-appointed cloak-room or changing room – carpeted, furnished and private. It was separated from the hall by a door. The toilets were off the room, through an archway and they all had doors.

- [19] Shortly before the interview was to take place an announcement was made that candidates should not enter the room. He said that he, and the rest of the selection panel, had no intention to cause any insult to the dignity of the respondent. He was not aware that she felt insulted or humiliated by the choice of the venue. He first became aware that she felt that way about a month after the interview when she lodged an appeal against her ranking on the candidate list. He confirmed that he had, on behalf of the appellant, tendered an apology during a process mediated by the Human Rights Commission. He did so because he never intended to cause any insult and he accepted, with hindsight, that the choice of the venue was not ideal because it had caused offence.

The claim based on the *actio iniuriarum*

[20] In order to establish an actionable impairment of dignity, the respondent was required to establish each of three elements, namely

an intentional and wrongful act resulting in the impairment of her dignity.[1] The enquiry usually commences with the second element, namely whether the conduct complained of is wrongful. The reason is that in the absence of wrongful conduct, the intention with which it is committed is irrelevant. It is then also unnecessary to enquire into the subjective effect of the conduct, ie whether it in fact gave rise to an impairment of dignity.

[21] Once it is established that the conduct was wrongful, the intention may be presumed. It is then open to the defendant who is sued to rebut the presumption of intention by establishing one or more of the grounds of justification for such conduct, or that the conduct was not carried out *animo iniuriandi*. As was stated in *Delange v Costa*: [2]

‘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 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 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 minimus non curat lex*.’

[22] Insofar as wrongfulness is concerned the court applies the criterion of reasonableness. It is an objective test that requires that the conduct complained of be tested against the prevailing norms of society in order to determine whether that conduct can be regarded as wrongful.[3]

[23] In this instance, the conduct complained of was the holding of the interview in what the respondent described as a toilet or ablution facility. The offending conduct, said to be wrongful, was the choice of the venue for interviewing the respondent on 6 February

2016. It is important to lay emphasis upon this for two reasons. Firstly, in order to sustain a claim for the impairment of dignity the overt act giving rise to the infringement must be wrongful. Secondly, the particular wrongful act or acts must be carried out with the subjective intention to injure the dignity of the respondent.

[24] For wrongfulness to be established therefore, the choice of interview venue would have to be found to be objectively wrongful having regard to the values and norms of the society. As was held in *Delange*, [4] ‘the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby’. The high court, however, did not engage with this inquiry. It found that the conduct was wrongful merely because of the nature of the venue, which it described as an ‘ablution facility’.

[25] This labelling of the venue either as ‘a toilet’ or ‘an ablution facility’ is unhelpful. Rather, the focus should have been on the attributes of the room itself, and its layout. The photographs forming part of the record show that it was a large carpeted room containing lockers, a dressing table, wall mounted mirror and a couch. The toilets were housed in separate spaces behind closed doors. As correctly testified by Mr Mileham, the room served as a changing room or cloak room. In the circumstances, the room cannot be described as ‘a toilet’ or ‘an ablution facility’. It is a room from which those facilities are accessed. But that does not make the room either of those.

[26] To find that the use of the particular space was objectively wrongful it would be necessary to hold that the use of the particular space for an interview, does not accord with the values of our society. Given the attributes of the space, described above, it cannot be said that the use of such a space offends the values of our society. The high court was accordingly wrong to hold, on these facts, that the choice of venue was wrongful. On this basis alone the respondent’s claim ought to have failed. However,

even if wrongfulness could be said to have been established by the mere choice of the venue, this is not sufficient to establish

liability. The respondent was still required to establish that the appellant’s agents acted with the intention to infringe her dignity.

[27] The high court reasoned that the intention to infringe the respondent’s dignity was apparent from the series of incidents which preceded the holding of the interview. This included her red-flagging by the Electoral College; not being informed timeously of the outcome of her appeal; and Ms Stander’s not attending the interview on 5 February 2016. The high court erred in this regard. These prior incidents served as no more than background to what had occurred during her interview on 6 February

2016. They had no bearing on whether the appellant’s choice of the interview venue was made with the intention to injure the respondent’s dignity. In any event, the uncontested evidence on behalf of the appellant was that none of the panel members were involved in the prior incidents. Nor, significantly, was there any challenge to Mr Mileham’s evidence that there was never any intention to offend or infringe the respondent’s dignity by holding the interview where it was held.

[28] What is more, the respondent’s case was not premised upon any alleged wrongful or intentional conduct prior to the interview. It was premised upon the wrongful and intentional infringement of her dignity by interviewing her in the ladies’ toilet or ablution facility. This much is clear from the manner in which her particulars of claim were formulated and from her evidence. She stated unequivocally, for example, that her dignity was not attacked or infringed by what had occurred on the day before the interview. Although she had felt aggrieved that the interview could not proceed on that day, it was not her case that this fact,

together with preceding events had constituted an infringement of her dignity. Thus, the high court's basis for inferring intention from those events does not withstand scrutiny.

[29] In all the circumstances, it follows that the appeal must succeed. Before I conclude, it is necessary to mention one aspect. Counsel for the appellant placed on record that the appellant re-iterated its prior and unequivocal apology to the respondent for any hurt or insult that she felt or experienced as a result of what had occurred. It did so on the basis that it accepted that the choice of venue was not appropriate. It accepted that she felt offended, although such offence was never intended. As a gesture of this, the appellant sought no costs order against the respondent on appeal.

[30] I therefore make the following order:

GG GOOSEN

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant

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[1] Whittaker v Roos and Bateman; Morant v Roos and Bateman 1912 AD 92 at 130-131; R v Chipo and Others 1953

(4) SA 573 (A) at 576A.

[2] Delange v Costa 1989

(2) SA 857 (A) at 861C.

[3] Ibid at 862F.

[4] Ibid at 862E.

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