

SOUTH AFRICA / JUDGMENT

Kleynhans v Read (5693/07) [2009] ZAGPPHC 335 (31 August 2009)

[2009] ZAGPPHC 335

COURT

North Gauteng High Court, Pretoria

BEFORE

Sapire AJ

CASE / FILE NUMBER

5693/07

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THE
HIGH COURT OF SOUTH AFRICA
NORTH
GAUTENG PRETORIA
KLEYNHANS,
JOHN PAUL
PLAINTIFF
V
READ,
BRIAN
DEFENDANT
CASE
NO. 5693/07

DATE:

31 AUGUST 2009
Civil
Trial
Coram
Sapire AJ

JUDGMENT

The plaintiff has sued the defendant claiming damages in an amount of R200 000. The claim as originally framed in the statement of claim was based on an alleged defamation. At a late stage the Plaintiff amended the particulars to add and include a claim for injuria based on the same allegations.

There is also a claim for R2508 for damage caused by the defendant manhandling the door of a vehicle in which the Plaintiff was driving.

The Defendant, in pleading to the claim has admitted using the words complained of addressing them to Jacob Moroke and N Bavuma but states that he was justified in so doing because of the facts alleged in the defendant's counter claim. The evidence led at the trial indicates that Bavuma probably did not hear the words complained of being spoken.

The defendant alleges in his counterclaim that the Plaintiff said of him "You are a kaffer boetie and a soutie", and that this "insult" provoked the use of the words complained of by the plaintiff. The Defendant claims that by these words he was humiliated and degraded, entitling him to the payment of damages in an amount of R250 000. It is also the provocation he alleges which caused him to use the words complained of by the plaintiff. The Defendant alleges that the words quoted constituted an unlawful intrusion upon his personal privacy and a wrongful and intentional injury to his reputation and mental well-being. The Defendant's allegations appear fanciful but need be examined and analysed as the evidence which I heard and accept discloses that on the balance of probabilities the words were not said by the Plaintiff.

The words complained of by the Plaintiff and which were admittedly used by the Defendant within the hearing of the persons mentioned above are

- a. "You are a typical fucking Dutchman"
- b. "You fucking cunt".
- c. "I hate all you Dutchmen. You are all the fucking same" and
- d. "You are a fucking Vlok. Are you going to wash my feet as well"

The plaintiff alleges that these words, apparently taken together and in the context in which the were used and "published" have a meaning understood by those hearing them, that

- a) Plaintiff is a racist
- b) As a racist, the Plaintiff should repent for his sins by washing the Defendant's feet
- c) Plaintiff lacks and / or is of low morality
- d) Plaintiff discriminates against people of colour, in particular against Mr Moroke

- e) Plaintiff is a miser and skinflint by refusing to pay a fee (“tip”) sounding in money to Mr Moroke.

The circumstances in which the offending words were spoken are as follows.-

On 29th October 2006 the Plaintiff, who is an executive in a well known company, hosted a golfing day at the Woodhill Golf Club. A group of about twenty business associates participated in the event. The party had completed play for the day and took drinks on the terrace adjoining the Club house.

The Defendant was also at the club where he entertained a business associate, from about three o'clock onwards. The Defendant

maintains that he drank about three Jamesons. (Jameson, for the uninitiated is the brand name of an Irish whiskey.)

After Plaintiff's party had left, the waiter, Mr Moroke, nicknamed Maestro, who had served drinks to Plaintiff's group found a bag which had apparently been inadvertently left behind by one of Plaintiff's guests. The waiter was about to hand the bag to the Plaintiff who had remained behind at the club after the departure of his guests. The Defendant who apparently saw this, told the waiter to ask for a tip from Plaintiff as a token of gratitude for his honesty. The waiter told the Defendant the plaintiff had already paid him two hundred rand as a gratuity for serving drinks to the golfing party and that he did not think that any further payment was called for...

This did not deter the Defendant who then told the plaintiff to give the waiter a tip. The defendant replied as the waiter had, that he had just tipped him two hundred rand, implying that he would pay nothing further. At this the defendant was incensed and spoke the offending words in the presence of the waiter.

Both Maestro and the Plaintiff testified that the plaintiff said nothing to provoke the outburst or defendant's subsequent behaviour. The words alleged in the counterclaim according to them were not used by the plaintiff.

The Defendant became aggressive and showed signs of an intention to physically assault the plaintiff but he was restrained by the waiter. The plaintiff then went to where his car was parked intending to go home. The Defendant followed him, and when the plaintiff opened the car with a remote the defendant opened one of the doors and forced it wider open than was intended, thereby damaging the hinges. The cost of repair was R2085.00 for which the Plaintiff seeks payment in his second claim. The Defendant admits that he caused the damage and the amount claimed in respect thereof, but does not admit that it was the plaintiff who suffered the damage. This claim I will deal with later. To the parties to a case, even such as this, the issues are in their subjective perceptions of great importance. So it is with the Plaintiff who sees the defendant's conduct, with particular reference to the use of the words complained of, as labelling him as a racist. This he feared might prejudice him in his position with his company and with his business and social contacts. I doubt that right thinking people hearing of the incident would be affected in their estimate of the plaintiff.

The occurrence would, but for reports made to the club management and the company, by whom the waiter was employed, not have become known to anyone who was not present at the time. The events which I have sketched in broad outline would not have tended to lower the Plaintiff in the estimation of right thinking people who came to know of it. If anything the recounting of what happened reflects badly only on the Defendant whose conduct was uncouth unbridled and aggressive probably as a result of the liquor he had consumed.

Perhaps he had more Jameson than that to which he admitted.

The Defendant's outburst called for an immediate unequivocal apology from him, to be expected once he had cooled off and was no longer under the influence of the liquor he had consumed. Had there been a sincere apology this case would not have come to court.

It remains to consider whether the words complained of are in themselves defamatory or bear the innuendo pleaded.

"You are a typical fucking Dutchman"

I accept that the appellation "Dutchman" is a reference to Afrikaans speaking people usually used in a denigratory sense. The use of an adjectival present participle of the word which originally connoted sexual intercourse, but which now has become a meaningless expletive used mindlessly to lend emphasis, does nothing to add to the sting of the word "Dutchman" The sentence standing alone was not defamatory as we do not know what trait of a "Dutchman" was being referred to. Neither in my view does the sentence amount to an insult which should have hurt the Plaintiff. The entire sentence standing alone is not defamatory in its primary sense, nor does it convey the innuendo ascribed to it.

*You fucking cunt".

These words addressed to anyone are crude abuse. . Frequent use has made them meaningless. The Defendant explained that he understood the words to mean that the Plaintiff was an idiot. Even considered in conjunction with the other sentences of which the Plaintiff complains they do not contribute to the substantiation of the innuendo alleged.

"I hate all you Dutchmen. You are all the fucking same"

This statement by the defendant of his own racist prejudices is not defamatory of the Plaintiff in its primary sense, nor does it lend point the innuendo alleged

You are a fucking Vlok. Are you going to wash my feet as well?"

This sentence is another example of Defendant's befuddled thinking at the time. What he had in mind, is the penance made by a former minister in the Nationalist government, for his crimes in the days of apartheid. The penance took the biblical form of his washing the feet of the Archbishop. By likening the Plaintiff to the Minister and his act of penance, the Defendant was not defaming or insulting the Plaintiff. On the contrary he was comparing him to a man who had seen the error of his ways in the past and had done what he saw was best to shrive himself of his

guilt. The words are not defamatory in their primary sense, and are not capable of being interpreted to have the meaning of the innuendo alleged.

The words complained of are not defamatory and not capable of the defamatory meaning attached to them by the Plaintiff. Any racialism

to be found in the context in which the words were used, arises from defendant's self proclaimed dislike of Afrikaans speaking

persons. They are further, although used as invective not so insulting as to be actionable.

The Plaintiff is, because I find that no defamatory or insulting meaning attaches to the words complained, of, not entitled to any award of damages on his main and alternative claims.

The claim for damages for injury to the car in which the Plaintiff was travelling requires little analysis. The Defendant concedes that he was responsible for the damage and liable therefor. The Defendant contended however that as the vehicle was not that of the plaintiff the plaintiff had not suffered the damage. There was clear evidence however that the Plaintiff had borrowed the car from his son and was liable to his son for damage to the vehicle while it was in his possession. It does not matter that the vehicle belonged to the Plaintiffs son's employer and that there was no first hand evidence that the son was liable to his employer for damage to the car. What is of importance is that the Plaintiff as between his son and himself was obliged to restore the car in the condition in which was when he took possession of it. Plaintiff will succeed on this claim.

COSTS

Although the plaintiff has not succeeded on his main claim and was unjustified in bringing his claim in the High Court I will ward him his costs because

- (a) It was the defendant who in the first instance gave offence and abused the Plaintiff by his uncouth aggressive behaviour for which refused to apologise unconditionally,
- (b) The defendant sought to justify his conduct by alleging that he was provoked by being insulted by the Plaintiff. On the evidence and the balance of probabilities no such provocation took place.
- (c) The defendant himself unsuccessfully counterclaimed for an amount even greater than that claimed by the plaintiff on even flimsier and unsubstantiated grounds.
- (d) The Defendant made a poor impression as a witness indicating that by his arrogant reluctance to appease the Plaintiff with an apology he prolonged the litigation.

There will be judgement as follows

- (a) Plaintiff's claim 1 is dismissed
- (b) On claim 2 the defendant is ordered to pay to the plaintiff the amount of R 2508

- (c) Defendant's counterclaim is dismissed
 - (d) Defendant is to plaintiff costs
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