IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

Case No. A690/04

In the matter between

THE MINISTER OF SAFETY AND SECURITY **Appellant**

And

RALPH WARREN MEYER **First Respondent**
ERNEST SIMPSON **Second Respondent**

JUDGMENT

DAVIS J:

Introduction.

This is an appeal against a judgment delivered in the Magistrate's Court, Cape Town in terms of which the appellant was awarded damages in the sum of R40,000 as a result of certain words uttered by second respondent who was employed by the South African Police Services ('SAPS') as an administrator/radio operator.

The factual background

On 20 March 2000 first respondent drove in a blue Toyota Venture patrol vehicle to investigate a case involving a stolen vehicle. Pursuant to this police operation, first respondent, who was accompanied by Sergeants Rhode and Duda had contact with the police radio control centre. The following exchange then took place:

'Gesprek begin op 22:09:
XR-332 Is there no case number?
Beheer Go to Enquiries and test the vehicle and get the case number there.
XR-332 No man – you are the one who giving the code 6, so you have to know

everything of the vehicle.

Beheer Ja Duda…as you may well know you also work inside and you also make code 6 when you sit in the sender, where the heck am I suppose to get the case number from as if I just got the code 6 and the people just phone it true now.
XR-332 You must said that the complainant is still busy with the case there la..police station.
Beheer Ja obvious I will give the case number if there was one.
WM-28 Control you must not speak so "vinning" English because there is not a English word like "sender".
Beheer On the control……on the control.
XR-358 Beheer gee daai ou a "piece of mind"!
Beheer Het julle verstaan wat daai man met die groot oë gesê het?...en daai coke glass brille!
WM-28 Wie is dit?...wie is dit?....Identifiseer daai persoon……ons ken nie mense met groot oë hier nie….wie is dit nou?
Beheer Groot oë en dik brille…..hy werk vir Radiobeheer….wie is hy?
WM-28 Nee ek ken nie so 'n persoon nie.
Beheer Hy is 'n inspekteer en hy ry bestuur 'n Venture.
WM-78 Nee ek het nog nie iemand gesien wat in 'n blou Venture ry nie…gee ddai ou se van man?
WM-17 Hulle sê hy lyk soos 'n "camelion"……"camelion".
WM-18 Beheer WM-18
Beheer Ek luister
WM-18 Wat praat julle so oor die man se algemene toestand?....hy is gelukkig oor daai brill.
Beheer Hoe lyk dit jy het ook 'n paar dik brille as jy nou vir hom "cover"
WM-276 Beheer gou in 9 daar……'

First respondent testified that he had been teased and tormented mercilessly while at school. It was common cause that first respondent suffers from a condition known as Crouzon Syndrome. This Syndrome presents with prop topic maxillary hypoplasia and class III occlusion. He expected that his acute facial features would not be a significant consideration in a professional police environment. He testified further as to the impact of the content of the words uttered by second respondent: 'Toe ek daai woorde gehoor het, het dit my, dit was 'n direkte aanval op my professionele – professionaliteit, en ek nie my werk daai aand soos altyd 100% voltooi of gedoen nie. Ek was diep geskok…'

Second respondent admitted that he was the operator in the radio control room who had uttered the words 'het julle verstaan wat daai man met die groot oë gesê het? En daai Coke glass brille….groot oë en dik brille…..hy werk vir radio beheer….wie is hy…hy is 'n inspekteur en hy ry bestuur 'n Venture'. He sought to justify his conduct on two separate grounds, namely that it was first respondent who uttered the words 'Beheer gee daai ou a piece of mind' which second respondent described as a provocative statement aimed at himself and secondly that the words uttered by him had been spoken in jest.

The magistrate found that 'the remarks go too far to be merely jest and cannot be equated with the use of nicknames, …..' Furthermore she made the finding that the words 'gee daai ou a piece of mind' were not spoken by first respondent and therefore there was no basis for the alleged provocation. The magistrate held that the remarks were 'defamatory in the sense of exposing the Plaintiff to ridicule at the very least. The colleagues who overheard the remarks, despite their respect for the Plaintiff, could not have helped having a laugh and thinking how the Second Defendant described the Plaintiff'.

In the alternative, the magistrate found that an injuria had been committed, in that first respondent's dignity had been injured by the manner and content of the words uttered on the police radio. Following **Minister of Police v Rabie** 1986(1)(117) (A) the magistrate found that the words had been uttered while second respondent was on duty and acting in the course and scope of his employment with appellant. Having so found in favour of first respondent, he awarded damages in the amount of R40,000.

The Key Issues.

This appeal deals with four separate questions, namely the existence of defamation, the existence of an iniuria, thirdly whether second respondent acted within the course and scope of his employment with appellant and fourthly the **quantum** of damages in the event of first respondent being successful in respect of an action based either on defamation or the iniuria. Mr Eia, who appeared on behalf of first respondent, submitted that defamation entailed the wrongful and, intentional publication of words or behaviour concerning another person which has the effect of injuring that person's status, good name or reputation. See **Neethling Potgieter and Visser Law of Delict** (4th ed) at 338. Mr Eia submitted, on the basis of first respondent's evidence concerning his acute facial features, together with the evidence of his colleagues Duda and Rhode that the words constituted abuse. According to Duda, the words were clearly designed 'to defame

or demoralize the person they were directed to, who is Inspector Meyer'.

Mr Eia's submission regarding defamation appears to stretch the criteria for defamation to the point where the distinction between defamation and an action based on an **iniuria** is obliterated. As Burchell **Personality Rights and Freedom of Expression**: **The Modern Action Injuriarum** (1998) at 189-190 submits 'The test evolved by our courts over the years for determining what consists defamatory matter is whether the imputation lowers the plaintiff in the estimation of right-thinking persons generally.' In the joint judgment in **Mohomed v Jassiem** 1996(1)SA 673 (A) at 702 A-B the critical question was posed thus: 'Were the words defamatory of Jassiem despite the fact that they lowered his esteem in the eyes of only the particular community in South Africa and not in the eyes of the public generally'.

Accordingly, my difficulty with first respondent's case based upon defamation is the absence of evidence to the effect that first respondent's reputation as a police officer was reduced in the eyes, even of his own specific police community. In this regard, the following extract from respondent's own evidence is important:
'Voor die voorval het hulle vir jou respekteer, na die voorval het hulle jou respekteer, hulle dink no glad niks minder van jou nie?----Nee, Hulle – ek kan nie vir hulle part dink nie. Dit is wat ek glo.
Nee, maar die aanduiding wat u nou vir die Hof gegee het dat die mense dink nog nie, hulle het nog nooit vir jou 'n aanduiding gegee hulle dink minder van u nie?---Nee'
Neither of Sergeant Rhode or Duda was prepared to testify that after the incident first respondent was no longer respected by his colleagues or that his reputation as a police officer had been diminished. To the contrary, both denied that other police officers 'had seen him in a lesser light'.

The fact that there is insufficient evidence to justify an action on the grounds of defamation is not however dispositive of the case. As an alternative claim, first respondent brought an action on the grounds of an impairment of his dignity. In order to ground a successful action for damages for injury to dignity, there must be:

a) an impairment of a person's dignity

b) which was perpetrated with **animus injuriandi** See in general **Minister of Justice** v **Hofmeyr** 1993(3) SA 131(A). As long ago as 1908 **Innes CJ** said in **R v Umfaan** 1908 TS 62 at 66 that **iniuria** was 'a wrongful act designedly done in contempt of another, which infringes his dignity, or his personal reputation. If you look at the essentials of **iniuria** we find ….that they are

three. The act complained of must be wrongful; it must be intentional; and it must violate one of those real rights, those rights **in rem** related to personality which every free man is entitled to enjoy'. The advent of a constitutional state in this country has reinforced the strength of the common law action for **iniuria**. Section 10 of the Republic of South Africa Constitution Act 108 of 1996 provides that every one has inherent dignity and the right to have their dignity respected and protected.

The words spoken by second respondent undermined the dignity of first respondent. The use of these words represented an aggressive act towards first respondent and constituted impairment of his dignity. The ultimate criterion for determining the impairment of a person's dignity is not the sensibilities of a particular plaintiff nor of a hypersensitive individual but that of a reasonable person. In this case, the words which sought to remark upon the physical features of a fellow police officer and to draw attention to marked physical differences, were construed to be an impairment of first respondent's dignity by his colleagues, who heard it. This much is clear from their testimony. It represented an assault on the dignity of first respondent. For these reasons, I am of the view that the words spoken by second respondent constitute an **iniuria**.

This then raises the question as to the potential liability of appellant. In **Minister of Police v Rabie** 1986(1) SA 117(A) at 130H-I **Van Heerden JA** said 'In determining whether an employee's activities were divorced from his employer's affairs, the former's intention or motive is material. Thus as a general rule, whether the tortuous act of an employee is not directed, at least partially, to a furtherance of his employer's business, but is done for some purpose of his own having no relation to his employment, the employer is not liable. In particular there is no vicarious liability if the act of the employee is not performed for the accomplishment of an object for which he was employed but in the furtherance of personal animosities….Hence it is often said that an employer cannot be held liable if his employee performed an independent act, or acted for a purpose personal to an employee, or was motivated entirely by personal reason such as malice or spite….. If there is a sufficiently close connection between such a capricious or wanton act and other conduct of his in furtherance of his employer's business, the latter may be held liable. But if there is no connection between the wrong and such other conduct the intention with which the employee acted, even if he is purported to do so on behalf of his master, is generally decisive over the question whether the wrong was committed within the scope of his employment.'

Mr Salie, who appeared on behalf of appellant, submitted that there had been a history of animosity between first and second respondent. The latter had therefore acted for his own purpose. Furthermore, second respondent had acted way beyond the code of conduct for Public Service Act personnel employed in the SAPS. That code of conduct places upon any employee the duty "***inter alia*** to be polite, helpful and reasonably accessible in his or her dealings with the public, at all times treating members of the public as customers who are entitled to receive high standards of service, to have regard to the circumstances and concerns of the public in performing her or his official duties in the making of decisions affecting them, to not abuse her or his position in the public service to promote or prejudice the interest of any political party or interest group, to respect and protect every person's dignity and her or his rights as contained in the Constitution."

Mr Salie submitted that these clauses called for a restrained approach from a radio operator such as second respondent. The language which he employed had not been sanctioned in terms of his contract with the SAPS; and had been uttered outside of the course and scope of his employment.

The words employed by second respondent were uttered in his capacity as a radio operator during his hours of employment with SAPS. An examination of the transcript reveals that part of the conversation that took place clearly promoted the objects of second respondent's employer in that it dealt with issues of crime control and detection. That additional words were used during the employment by second respondent of his employer's radio system pursuant to his duty as a radio operator, does not itself mean that he was not then acting within the course and scope of his employment. As was acknowledged in **Minister van Veiligheid en Sekuriteit** v **Japmoco BK** 2002(5) SA 649(SCA), at para 11 an act which falls in the scope of employment even where it conflicts with an emphatic ban from the employer and even where the employee acted intentionally and not negligently. The closer the connection between the employee's action for his own interest and the purpose and the business of employer, the more likely that the employer would still be liable. (at para 11)

Obviously, each case must be decided on its own facts. In this case, the offensive words were uttered during second respondent's performance of his duties as a radio operator. That he acted in a manner which was contrary to the code of conduct can be accepted. That he acted during the course of his employment as a radio operator is similarly manifest from the examination of the transcript. To hold that he was not acting in the course and scope of his employment would be to mandate a court to employ a blue pencil test whereby certain of the words of the transcript would be deleted so as not to qualify as having been uttered within the course and scope of his employment. The balance of the text would then be held to fall within the course and scope of his employment. That, in itself, is indicative of a conclusion that the passage of insulting remarks was spoken in one brief encounter and during a period where the second respondent was being employed by the appellant. Furthermore, during this period he was acting in the course

of his employment as a radio operator. For these reasons, the magistrate was correct in finding that appellant was vicariously liable for an **iniuria**.

Quantum.

There is no rigid formula for the determination of the quantum of damages to be awarded in terms of a successful action based on **actio injuriarum** See Visser and Potgieter **Law of Damages** (1992) at 404 ff. A court must of course take consideration of the high premium placed on the protection of human dignity guaranteed by our common law and now enshrined in the Constitution. However, as the court observed in **Argus Printing and Publishing Co. Ltd** v **Inkatha Freedom Party** 1992(3) SA 579 (A) at 590 E, an action for defamation and therefore, by extension for any other form of **iniuria,** is intended to vindicate the reputation of the plaintiff and not to provide a road to riches.

In this case the first respondent did not, on the evidence suffer a reduction of his reputation. His dignity and feelings unquestionably were hurt by the statements uttered by second respondent. However, the events which gave rise to the present dispute took place within the context of an exchange between colleagues over a police radio. In this specific context it can be expected that a somewhat more robust exchange would be likely to take place than would be the case in more genteel company. A level of latitude with regard to the nature and content of exchanges on this kind of radio should be recognized. In this case, second respondent exceeded an acceptable level of latitude. His remarks were hurtful and went beyond the bounds of jest. This was not a series of good-natured remarks which could be classified as fun. The evidence indicated that listeners did not regard the words employed as a joke. In my view, the words employed insulted first respondent. They were not however destructive of his dignity or reputation. An award of R40,000 is manifestly excessive in this context. As a guide the magistrates award can be compared, for example, to the award of R50,000 for a far more serious form of defamation in **Independent Newspaper Holdings Limited and Others** v **Suliman**, (unreported decision of the Supreme Court of Appeal, case no. 49/2003; judgment delivered on 28 May 2004).

While Mr Eia urged this Court not to interfere with the considered award of damages

by the magistrate, this invitation must be declined. The award is significantly excessive when weighed against the impairment of first respondent's dignity.

In view of the result, it cannot be said that any party was substantially successful so as to justify an award of costs.

For these reasons the following order is made:

1. The appeal succeeds.
2. The order of the magistrate is set aside and replaced by the following
   Judgment is given for the plaintiff against first and second defendants jointly and severely in the sum of R3,000 together with costs, such costs to include the cost of counsel on the bar counsel tariff.
3. In respect of this appeal there is no award as to costs

_____

DAVIS J

I agree

_____

MEER J