Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A213/2010

In the matter between:

LESLEY JUDITH YOUNG **Appellant**

And

IAN LESLIE McDONALD **Respondent**

JUDGMENT DELIVERED on 9 NOVEMBER 2010:

BINNS-WARD J:

[1] The respondent instituted action against the appellant in the Knysna Magistrates' Court under two case numbers. The actions were tried together and a single judgment was delivered by the trial court. The appellant comes before this court on appeal against that judgment.

[2] In the first action, under Knysna case no. 1058/2007, the plaintiff claimed R100 000 in damages in respect of the allegedly malicious institution of proceedings against him for an order in terms of the Domestic Violence Act 116 of 1998. The damages were alleged to be in respect of '*contumelia* and discomfort suffered by [him] in the process'. He also claimed R100 000 in damages for defamation arising out of the injury to his reputation allegedly occasioned by the defamatory content of the affidavit made by the respondent in terms of regulation 4 of the Regulations under the Domestic Violence Act, which are set out in Government Notice 1311 of 1998 published in Government Gazette No. 20601 on 5 November 1999.

[3] In the second action, under Knysna case no. 1059/07, the respondent claimed R80 000 in respect of *contumelia* arising from an assault perpetrated on him by two men in a parking area of a shopping mall in George, during which he was dispossessed of a motor vehicle. It was alleged that the assailants had been 'acting within the course and scope of a mandate and instruction they had received from [the appellant]' to whom the vehicle concerned belonged. It was common ground that the use of the vehicle in question had been given to the respondent in terms of an agreement with the appellant. It was a matter of dispute whether the agreement had been properly terminated by the appellant and whether the respondent was in lawful possession of the vehicle at the time he was dispossessed of it in the circumstances aforementioned. The respondent also claimed compensation for the loss of the use of the vehicle, but did not pursue that claim at the trial.

[4] Only a very brief summary of the relevant facts is required. They were not materially in dispute. Indeed, at the hearing of the appeal only the issue of quantum of damages was argued by counsel for the appellant, notwithstanding the absence of formal abandonment of the contentions advanced on the issue of liability in the heads of argument.

[5] The appellant and the respondent, both mature persons in their 60's at the time of the trial, had been in a cohabitation relationship for approximately seven years. During this time they had lived together at the appellant's residence in Knysna. It is clear that the respondent was largely maintained at the appellant's expense during this period. I do not think that it would be inaccurate to describe him as having been a kept companion. The evidence suggests that the couple had an at times stormy relationship; and the indications are that it deteriorated in quality during the final years, culminating in a decision by the appellant, in about May 2006, to inform the respondent that he was required to vacate her property.

[6] By prior arrangement with the appellant the respondent spent some time, spread over four days, at the appellant's house during June 2006 packing his personal possessions, which had been removed by the appellant from the main body of the house to a basement while the respondent had been away attending a wedding at St. Francis Bay and thereafter visiting a parent in Durban. The respondent had very little contact with the appellant during the period he was packing up his possessions; and indeed that remained the position during the ensuing months to November 2006. What little contact the parties had during that time was through intermediaries who were engaged to assist in trying to

resolve the proprietary consequences of the break-up. In this regard it should be mentioned that the respondent apparently believed that he was entitled for some form of financial settlement from the appellant; and indeed litigation in that connection subsequently ensued in the High Court.

[7] The appellant was concerned to regain possession of the motor vehicle of which the respondent had been given the use in terms of an agreement, as aforementioned. She encountered difficulties in giving the respondent notice of termination of the agreement in the specific manner prescribed by the agreement. The respondent, who one suspects lacked the resources to provide his own means of transport, appears to have been unwilling to accept alternative, but effective notice of the termination of the use agreement. Frustrated by her inability to regain the vehicle, the appellant entered into an arrangement with one Errol Kahn - a physically imposing and rather intimidating looking individual by all accounts - who worked as a sometime bouncer or bodyguard, to get the vehicle back for her. The precise nature of the arrangement made by the appellant with Kahn does not appear from the evidence; although Kahn would apparently be allowed the use of the vehicle for a period if he was successful in obtaining it from the respondent. It is also apparent that the appellant entered into the arrangement because she felt that it would afford a quicker efficaciousness in resolving the impasse with respondent than the due processes of the law. The appellant indeed gave evidence that her then attorney had advised her that the only manner in which she would succeed in regaining possession of the vehicle from the respondent was 'to grab it back' from him. It was not in dispute that

Kahn and an assistant were the two men who forcefully relieved the respondent of the vehicle in the shopping mall parking lot on 24 November 2006.

[8] It was also not in dispute that the respondent had a previous, albeit superficial, acquaintance with Kahn and also that he knew that Kahn was a longstanding acquaintance of the appellant. It was not surprising in the circumstances that the respondent should suspect that the appellant might have been behind the assault on him by Kahn in the course of forcibly dispossessing him of the vehicle

[9] The respondent laid criminal charges arising out of the incident in which he had been disposed of the motor vehicle. The police recovered the vehicle at the address of a third party, apparently an associate of Kahn's aforementioned assistant. The police were not willing to release the vehicle to the appellant, apparently because it was an exhibit in a criminal investigation.

[10] Very shortly thereafter, the appellant applied to the magistrate at Knysna for an order against the respondent in terms of s 4 of the Domestic Violence Act. The application was brought without notice to the respondent. Applications for relief under the Act may be brought without notice if the complainant is able to satisfy the court *prima facie* that undue hardship may be suffered by the complainant as a result of the alleged domestic violence if a protection order is not issued immediately.

[11] I do not consider it necessary to describe in detail the allegations made by the appellant in support of her application. Suffice it to say that some - indeed

the most serious - of them were confessedly false. The appellant testified that she was not the author of these falsehoods and that they had been inserted by her then attorney. She also testified that the attorney had failed to correct the statement when she, the appellant, had pointed out the inaccuracies. According to the appellant, the attorney had stated that it was 'not important' to correct the falsehoods upon which the relief sought had been sought. If her evidence in this respect were factually well-founded, how the appellant could possibly have accepted such advice was never explained. The appellant also testified that she had not made the false statements in the context of a sworn declaration; this despite the requirement of the regulations that an application be supported by oath or affirmation as indicated in the form prescribed for use in such applications, and despite the fact that the document submitted in support of the application purports, on its face, to be an affidavit deposed to by the appellant. The magistrate rejected the appellant's evidence in this regard. He found the appellant to be an unreliable witness. A court of appeal does not easily disturb credibility findings by a trial court, but on any approach I do not think that the magistrate can faulted for arriving at this conclusion.

[12] The appellant's evidence as to the alleged role of her erstwhile attorney is inherently improbable. No attempt was made to confirm the evidence by the evidence of the attorney concerned. While this in isolation might have been understandable because of the unlikelihood that the legal practitioner would own up to such deviance; it is nevertheless significant that there was no indication placed on record that the appellant, or her current legal advisors had taken any

steps to draw to the attention of the Law Society what would, if the appellant were to be believed, constitute grossly dishonest and unethical conduct by her erstwhile attorney. It is also significant that the appellant did not withdraw the proceedings after the respondent had delivered a detailed opposing affidavit and even went to the lengths of engaging in the drafting of a replying affidavit, albeit one not deposed to before proceedings were eventually withdrawn in February 2007, with no tender as to costs. As already mentioned, even if all the allegations about the conduct of her then attorney, Ms Leslie Swart, were true, they afforded no justification for the appellant to allow the proceedings to go ahead. It is clear to me that she did so as a means to obtain the release to her from police impoundment of the vehicle taken by Kahn from the respondent

[13] In terms of s 7(2) of the Act, the court may, when issuing an order in terms of the Act, also direct that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property. In this regard the appellant sought, and obtained, an order in her application for the collection of the motor vehicle in issue from the police station where it was being held. This manifested a further abuse of the process. It is apparent from the appellant's evidence at the trial that she had no urgent personal need to obtain possession of the vehicle; indeed, she was committed to lending it to Kahn. This is not the occasion to expatiate on the purpose of the provisions of s 7(2) of the Domestic Violence Act, but they are clearly not intended to provide an unqualified alternative to the ordinary possessory remedies to which the appellant should have had resort to regain property which

she had contractually given the respondent the right to use. Furthermore, it is of concern that her legal representative at the time was, at the very least, not astute to this. There is an exacting duty of care on legal representatives representing complainants in Domestic Violence Act applications to ensure that the provisions of the Act are not abused to obtain relief ulterior to that for which the Act was intended; see *Ex parte Omar* 2006 (2) SA 284 (CC) (2003 (10) BCLR 1087) at para. [61]; *a fortiori*, when the application is made without prior notice to the respondent.

[14] The magistrate held that the proceedings in terms of the Domestic Violence Act had been maliciously instituted and found also that the averments made in support thereof by the appellant were defamatory. He granted the respondent R50 000 in damages for the malicious institution of proceedings and R30 000 for defamation. In case no. 1059/07, the magistrate awarded the respondent R80 000 in respect of the injury to his person and dignity in the assault on him when he was dispossessed of the vehicle. The magistrate ordered the appellant to pay the respondent's costs of suit on the scale as between attorney and client and also made an order that the appellant should pay the respondents costs in the Domestic Violence Act proceedings. The appeal is against the whole of the magistrate's judgment and order.

[15] In regard to the malicious institution of proceedings, the appellant had pleaded that her actions in instituting the proceedings were not unlawful in that she had been justified in bringing the application and that she had not acted *animo injuriandi* in that she *bona fide* believed that she had reason to fear the

respondent. In regard to the defamation claim she likewise pleaded an absence of any *animus* to injure the respondent's reputation.

[16] In the heads of argument filed on behalf of the appellant, counsel addressed argument against the award based on the assault on the respondent, but aside from the issue of quantification of damages advanced very little, if anything, of substance by way of argument on the malicious institution of proceedings or defamation claims. As mentioned, at the hearing counsel confined her oral argument to the issue of quantum, advisedly so in my view.

[17] It is accepted that the institution of civil proceedings without reasonable cause and *animo injuriandi* (the label 'maliciously' is not entirely apposite) is actionable under the *actio iniuriandi*. See Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) at 183-4 (with particular reference to *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 105 and *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 297-299). In my judgment, the magistrate's finding that the appellant had no *bona fide* fear that the respondent would commit an act of domestic violence against her was well-founded. The respondent had had virtually no contact with the appellant for a period of six months by the time that the application was made. The notion that the respondent had been spotted in the appellant's motor vehicle at some distance from her house on one occasion hardly gave rise to a reasonable apprehension of domestic violence. To have been in the vicinity of the appellant's house in the circumstances described in the evidence adduced by the appellant at the trial certainly did not qualify as 'domestic violence', even

within the wide definition of the term in the Act. The history of alleged domestic violence by the respondent towards the appellant during their sometimes tumultuous years in cohabitation did not justify an urgent application under the Act, without notice to the respondent, six months after the respondent had vacated the appellant's house. The strongly given impression arising from the circumstances of the application and the relief sought in terms of it was that it was a device to obtain the effective return of the vehicle. The very nature of a Domestic Violence Act application brings about the implication of unacceptable and anti-social behaviour by the respondent against the complainant. Rather like defamatory statements, the institution of such proceedings intrinsically impacts injuriously on a respondent's dignity in the broad sense. Any respondent made subject to a protection order is terms of the Act is also made subject to a warrant of arrest, for example. The appellant must have appreciated as much, and yet she proceeded recklessly as to the consequences, actuated, as I have pointed out, by improper motives. In my judgment the magistrate correctly found that the alleged *injuria* had been established.

[18] The averments made concerning the respondent in the application for relief in terms of the Domestic Violence Act were undoubtedly defamatory; most saliently the allegation that the respondent appeared to have attempted to poison her by arsenic poisoning and that the respondent was stalking the appellant by coming onto her property and staring at and watching her. The appellant caused these defamatory statements to be published by launching the application. Two presumptions arose upon the publication of the defamatory statements (i) that

the publication was unlawful and (ii) that the statements were made *animo iniuriandi*. See e.g. *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at para. [16]. The appellant failed to rebut these presumptions; indeed, in the context of her *mala fide* use of the procedures under the Domestic Violence Act, it is difficult to conceive how she could have done so. I am accordingly of the view that the court *a quo* correctly held that the appellant was liable in respect of the defamation of the respondent.

[19] The magistrate correctly held that the quantification of damages for injury to personality under the *actio iniuriarum* had to be determined *ex aequo et bono*, with proper regard to the peculiar facts of the case. In this regard a court must bear in mind that the compensation awarded is in the nature of a *solatium*; and that the remedy is not intended to be availed of as a path to riches (cf. *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590E-F and also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) (2007 (1) BCLR 1) at para.s [109]-[110]). While awards in previous cases afford a useful guide, it needs to be remembered that the facts of two cases are rarely identical. The usefulness of reference to awards in previous broadly comparable matters is that it gives the court an idea of an appropriate range within which to fix its award. The law would be not well served if there were no predictability or consistency in the general range of compensatory awards in similar or comparable cases.

[20] A court of appeal will not readily interfere with the determination of an award of general damages by a court of first instance. Due respect must be demonstrated for the trial court's power itself to determine the amount of

damages in the exercise of its judicial discretion. Accordingly, only if there has been a material misdirection by the court of first instance will an appeal court intervene. The award of damages in an amount strikingly disparate from that made in similar cases, or strikingly different from that which the appeal court considers appropriate is an indication of relevant misdirection by the trial court. In the current case, I consider that the trial magistrate erred in failing to recognise or acknowledge that the injury to the respondent's personality occasioned by the injurious institution of proceedings under the Domestic Violence Act and the defamation attendant thereon was very closely interconnected. The two injurious acts were in reality incidences of each other and the external effect of each on the respondent virtually indistinguishable. I therefore consider that a single sum should have been awarded as damages in respect of both heads of claim treated as one for the purposes of compensation.

[21] I am also of the view that the magistrate failed to have adequate regard to the fact that the publication of the defamatory matter was restricted; and to the fact that there was little or no evidence that the injurious actions of the appellant had in fact reduced or affected the esteem in which the respondent had previously been held by right thinking members of the community. Indeed one gains the impression that the magistrate over-emphasised the punitive aspect in assessing damages and in this regard put emphasis on the consideration that a modest award would have little effect on the appellant, who, the evidence suggested, was a woman of relatively considerable means. I think that he was misdirected in doing so. The abuse of the procedures under the Domestic

Violence Act is a most serious matter, but it falls to be dealt with punitively by more appropriate measures, such as criminal charges.

[22] In determining the applicable range within which the award fell to be made I have had regard to the cases referred to in this regard in argument by counsel. In the result I consider that the award of a total of R80 000 in damages for the claims founded on the injurious institution of proceedings and defamation to be so strikingly disparate from comparatively modest awards made in far more grave examples of *injuria* as to warrant interference on appeal. In my view an award in the sum of R25 000 would be fitting in the circumstances.

[23] Turning now to the claim for damages in respect of the contumacious treatment of the respondent during the assault on him by Mr Kahn and his assistant, apparently a Mr Lutz Springboard (*sic*). Liability by the appellant can be established only if she is vicariously liable for the *iniuria*. In this regard the appellant admitted that Kahn had been acting on her behalf in dispossessing the respondent of the vehicle, but maintained that she had not foreseen that any violence or threat of violence would be involved. The magistrate did not believe her. I am not persuaded that the magistrate was wrong in this respect. The probabilities support the conclusion that the appellant intended that the respondent would be at the very least intimidated into surrendering the vehicle to Kahn. She could hardly have thought that the respondent would voluntarily give up the vehicle in the context of his indications that he had not been given the contractually stipulated notice to do so. On her own version the appellant was concerned to grab back the vehicle because she had concluded that the

applicable legal processes were insufficiently effective. She involved Kahn as her instrument in the context of her decision to take the law into her own hands. In my judgment therefore the magistrate correctly held the appellant to be vicariously liable for the acts of Kahn.

[24] The appellant's arguments that she did not act unlawfully in taking back the vehicle and that the assault on the respondent was a trifling matter about which the law should not concern itself are entirely without merit. The rule of law, which is a foundational norm in any civilised society, is fundamentally subverted if the courts tolerate persons taking the law into their own hands instead of following the due processes of the law to realise or defend their rights. I also do not regard the assault on the respondent as a trifling matter; certainly I am not persuaded that the injury to the respondent's feelings in the degrading manner of his treatment by Kahn and his accomplice was so inconsequential as not to be deserving of a remedy. In this regard it bears mentioning that on my reading of his particulars of claim the respondent did not seek compensation for any physical hurt, or for physical pain and suffering, but only for *contumelia*.

[25] Taking into account all the circumstances, including the consideration that the respondent's behaviour in regard to refusing to acknowledge that the appellant had given notice of her wish to have her vehicle returned to her appears to have been somewhat disingenuous and therefore served as a measure of provocation, I consider that an award of R5 000 in damages would have been appropriate. The award of R80 000 granted by the magistrate was quite obviously excessive; and by so gross a margin as to impel interference.

[26] The magistrate granted costs in the two actions before him in favour of the respondent on the scale as between attorney and client. This was avowedly a punitive order to mark the court's displeasure at the appellant's conduct, not only in respect of the matters giving rise to the actions, but also in the manner in which she sought to defend herself against the claims advanced by the respondent. Costs are a matter within the discretion of the trial court and absent a demonstrable and material misdirection, an appeal court will not interfere. I am not persuaded that the existence of any such misdirection has been demonstrated. The appeal against the costs order of the court *a quo* cannot succeed.

[27] The magistrate also made an order directing that the appellant was liable for the respondent's costs in the proceedings instituted by the appellant under the Domestic Violence Act. In doing so he purported to be acting on his understanding of a judgment in those proceedings by Magistrate van der Merwe in case no. G462/2006, delivered on 25 May 2007. It may be inferred from this that the issue of costs in the Domestic Violence Act proceedings had been argued before Mr van der Merwe. In terms of s 15 of the Domestic Violence Act a court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably. The proceedings before the court in the Domestic Violence Act matter are only incidentally before us, with the result, amongst other considerations, that we do not have before us the judgment of Magistrate van der Merwe. In my view we are therefore not equipped to entertain an appeal against the costs order in those proceedings. If

the appellant wishes to pursue that aspect, she must do so by appeal or review in that case. No relief will therefore be granted in respect of the attack on the order by the magistrate in case no. G462/2006.

[28] Finally, it is regrettably necessary to touch on the heads of argument filed in this matter and on the preparation of the record. The record included extensive material which was not germane to the appeal. A voluminous trial bundle had been handed in the court below. Most of it was not referred to in evidence and much of its content was in any event quite irrelevant. The irrelevant matter should have been excluded from the appeal record; certainly the appellant's attorneys should have requested the respondent's consent to omit it and drawn to the court's attention any unreasonable refusal by the respondent to accede to such request. The undesirable position was compounded by a failure on the part of the appellant's counsel to comply with the requirements of Western Cape High Court Consolidated Practice Note 49(2) by, after consultation with the respondent's legal representative, filing a statement setting out which portions of the record were regarded as irrelevant to the appeal and to which counsel did not intend to refer. Our displeasure at these shortcomings, which inconvenienced the court, for which the appellant's counsel tendered an apology, will be marked in the costs order to be made. Subject to the aforegoing, the appellant has achieved substantial success on appeal and is entitled to a costs order in her favour.

[29] It is also necessary, in my view, that the matter of how the proceedings in terms of the Domestic Violence Act came to be instituted in the manner they

were be investigated by the Law Society. It is undesirable that the serious allegations made about the conduct of Ms Leslie Swart in this connection be left undetermined. As mentioned, there are aspects about the application which raise concerns about the role of Ms Swart, quite apart from the issues arising from the respondent's evidence. These are the relief sought in regard to the return of the vehicle held by the police and the fact that the supporting affidavit purports to have been deposed to before Ms Swart herself as the applicant's attorney. Without being understood to anticipate any findings in respect of these or any other aspects of the matter, it is desirable that the Law Society be directed to investigate. A direction to that effect will be included in the order to be made.

Order

1. The appeal is upheld to the extent set out below:

   (a) The award of damages by the trial court in Knysna Magistrates' Court case no. 1058/07 in the sums of R50 000 and R30 000, respectively, in respect of the (i) the injurious institution of proceedings in terms of the Domestic Violence Act and (ii) defamation is set aside and an award in the globular amount of R25 000 is made in substitution therefor.

   (b) The award of damages by the trial court in Knysna Magistrates' Court case no. 1059/07 in the sum of R80 000 in respect of *contumelia* arising out of the assault on the respondent on

24 November 2006 is set aside and an award in the amount of R5 000 is made in substitution therefor.

2. The appeal against the attorney and client costs order made by the court *a quo* is dismissed.

3. No order is made in respect of the appellant's complaint about the costs order made by the magistrate in case no. G462/2006 on the grounds that the proceedings between the parties in terms of the Domestic Violence Act are not before this court in this appeal.

4. The appellant is awarded the costs of the appeal, save that the appellant shall be permitted to recover only 70 percent of the costs in respect of the preparation and perusal of the record.

5. The Registrar is directed to forward a copy of this judgment and a copy of the record on appeal to the Director of the Cape Law Society for an investigation of the conduct of the respondent's erstwhile attorney, Ms Leslie Swart of Knysna, in regard to the application instituted by the respondent in November 2006 for relief against the appellant in terms the Domestic Violence Act.

6. The Director of the Cape Law Society is requested to advise the Registrar in writing of the outcome of the investigation directed in terms of paragraph 5 of this order.

A.G. BINNS-WARD
Judge of the High Court

BAARTMAN J:

I concur.

E.D. BAARTMAN
Judge of the High Court