**IN THE HIGH COURT OF SOUTH AFRICA**

**EAST LONDON CIRCUIT LOCAL DIVISION**

**Reportable / Not Reportable**

**Case No: EL 500/2017**

In the matter between:

**CLINT CHARLES VAN DER WESTHUIZEN** Plaintiff

and

**GARY EDWARD RIEGER** Defendant

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**JUDGMENT**

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**NQUMSE AJ:**

**Introduction:**

[1] This action concerns a claim by the plaintiff for damages against the defendant arising from an incident which occurred on 23 July 2018 at Gonubie in East London. Both plaintiff and defendant who are residents of East London, and operating unrelated businesses, encountered each other for the first time on this fateful day. The plaintiff's claim for damages arises from insults and assault which are denied by the defendant.

**The evidence:**

[2] The plaintiff testified that on 23 July 2016 he was driving on the Gonubie main road in East London when he suddenly saw a white Isuzu bakkie that intended to drive into his vehicle. He avoided colliding with it and he drove up to the parking lot next to the Gonubie Hotel.

[3] The white Isuzu bakkie came and parked next to his vehicle. The driver opened his passenger's window and asked why he was driving "so shit". He in turn asked him why he wanted to drive into his vehicle. The driver of the Isuzu shook his head and drove off.

[4] He immediately thereafter heard someone who turned out to be the defendant screaming through the window of his vehicle uttering these words:

> "I will fuck you up, I have photos of you, fuck off back to Duncan Village jou 'poes', I will kill you, I am the boss of Gonubie."

[5] He further testified that due to feeling that he was being denigrated coupled with the fact that he was not from Duncan Village, a black area that is crime ridden, he alighted at once from his vehicle. He went up to the defendant and asked why

was he threatening him. The defendant's response was "it's because I am a 'poes' a 'fucken poes.' Whilst he was still on his way to the defendant approximately 1 to 1 ½ metres from him, the defendant pulled out a can of pepper spray and sprayed him until it was empty. At first he thought he was sprayed on his face but later when he was at home, he realised that he had been sprayed on his face, chest, and eyes.

[6] Whilst he was at the scene he informed the defendant that he will report him to the police and at the same time had asked him to follow him to the police station. Instead the defendant pepper sprayed him again in the view of car guards from whom he asked if they saw what the defendant was doing to him. They affirmed by nodding their heads.

[7] He further informed the defendant that he had taken down the registration number of his vehicle and still implored him to accompany him to the police station. As he went back to his vehicle, the defendant who had his vehicle idling, suddenly pulled off towards him as if he was going to knock him down.

[8] He further testified that he drove to the police station whilst the defendant was driving fast and closely behind him in a dangerous manner. The defendant drove in such a manner that the plaintiff skipped the red robots for fear of being bumped from behind or even being killed by the defendant. At the police station he laid a complaint against the defendant and he also mentioned the presence of car guards who had witnessed the incident.

[9] After the plaintiff was informed by the police that his case will be weak without witnesses, he set off to look for the car guards and upon finding them he requested that they furnish the police with their statements. He further informed them that they will be given money by the court as witnesses and should therefore not be concerned about losing their takings as car guards when requested to testify in court. At about 15h00 he went home and took a shower. After taking a shower he noticed

that the effects of the pepper spray were getting worse. He struggled to breathe and as a result he went to Medicross Hospital where he was nebulized and was also given a cream for his burning face and eye drops for the itching eyes. He also experienced panic attacks for which he was advised to take medication.

[10] The fact that he was a coloured man and what was done to him was done by a white man, troubled him the most. He felt that his dignity was violated when he is sent to Duncan Village. This further reminded him of his experience as a child when he got arrested for touching a police vehicle that led him to be detained for five hours, whereafter he was released with a warning that “vat weer op ‘n polisie kar”. That experience according to him was his first taste of apartheid.

[11] Whilst he was waiting for the progress in his criminal case against the defendant, he learned that the wife of the investigating officer in his case was working for the defendant. According to him, his criminal case against the defendant disappeared and that is why he is before this court. He has been yearning for this day in order to have the defendant, who has displayed himself to be a vile person and who had used the word ‘poes’ so many times, to be stopped as he was afraid that somebody may be killed by the defendant.

[12] He further testified that the defendant was stalking him whenever he drives around Gonubie to visit friends. This he reported to the police and also launched an application for a protection order, which did not bear any positive results since the defendant is a rich person who gets away with his deeds.

[13] When the plaintiff was asked in cross examination to repeat the words that were allegedly uttered by the defendant, he repeated them as follows:

> "He will fuck me up, he has photos of me, I must fuck off back to Duncan Village, you 'poes'; and go and drive like that there. I will kill you, he is the boss of Gonubie."

He further confirmed that the defendant said he will "fucken kill him".

[14] He also said if he drove in an erratic manner on that day it is because he was trying to get away from a threat. He does not know why the car guards wrote statements alleging that he promised to give them money. Neither does he know why they said in their statements they have decided against testifying in that criminal matter because he had not paid them the money he had promised to them. He conceded that he did not tell the police that the defendant wanted to kill him by running him over at the parking lot.

[15] He also conceded that paragraph 3 of his statement to the police where he stated that he was pepper sprayed twice on the face is incorrect. He also agreed that nowhere did he mention in his statement that the defendant wanted to kill him, neither did he mention that the defendant drove close behind him and forced him to drive through red robots.

[16] When it was put to him that the defendant will say in his testimony that on the day in question, he noticed a black BMW driving dangerously, he said he had no comment and could not answer to that statement. He was unable to explain why does it play a big role that the defendant is a white man.

[17] Dr. Andre Du Plessis testified that on the day in question he was working at Medicross when the plaintiff came at about 20h00 complaining of having been pepper sprayed. He presented with red eyes, a reddish congestion on his throat, his blood pressure was high and he was experiencing difficulty in breathing. The

symptoms he presented with were consistent with being pepper sprayed. He further testified that due to the aerosol compound in the pepper spray its effects get delayed. It is therefore a probability that it could have lasted from about 13h00 to 20h00 when he saw the plaintiff. However, he could not rule out the possibility that the plaintiff may have been sprayed much later during the day than the time he indicated.

[18] He gave the plaintiff eye drops to decrease the irritation on his eyes and nebulized him to stop the congestion on his chest.

[19] He agreed that the effect of pepper spray on the face should be worse at the time of being sprayed than it is later, although it depends on the dosage of the spray and where it was directed on the body of the person. If the spray was on the face it may not have been possible for the plaintiff to have driven up and down with ease. However, he could have been sprayed on his clothes and touched that area and thereafter wiped off his eyes causing them to burn and his face to be irritable.

[20] The defendant testified that he is a director of a group of companies. He has been involved in community projects of Gonubie. He has sponsored township rugby clubs. Gonubie is very close to his heart. On 23 July 2017 he was coming out of Spar in Gonubie when he noticed the vehicle of the plaintiff, a black BMW, driving on their main road at approximately 140km per hour. He followed the plaintiff until the parking lot next to Gonubie Hotel, where he noticed drivers of two vehicles reprimanding him for his manner of driving. He further testified that when the plaintiff drove past his vehicle with his window opened, he asked him why was he driving like a ‘mad man’. He told him to ‘push off’ and go to Duncan Village and not come and drive in their place like a mad man. The plaintiff who appeared angry jumped out of his car, approached him in an aggressive manner and asked him what he was saying.

[21] The defendant pulled out from the pocket of his driver's door an expired canister of pepper spray which he had collected when he had gone for a hunting trip with friends. He showed it to the plaintiff and he backed off, not without the plaintiff challenging him to alight from his vehicle as he was going to "fuck" him up. That is when the plaintiff said he will call the police to which he responded that there was no need.

[22] He also testified that the plaintiff said he will lay a charge against him for having pepper sprayed him. In response, he told the plaintiff that he will also lay a charge against him for reckless driving.

[23] As the plaintiff drove off to the police station he was still driving recklessly. This caused him to follow him and when the plaintiff drove into the police station, he turned and went home. He confirms the presence of the car guards who were in the parking lot but he estimates them to have been 70 metres away although he later conceded that they may have been nearer than 70 metres.

[24] When asked under cross examination why he saw the need to reprimand the plaintiff for his driving seeing that he had already been reprimanded by the other two drivers, he said he felt like doing so as a bona fide citizen of Gonubie and a law abiding citizen. He further stated that the reasons for him to tell the plaintiff that he must go and drive at Duncan Village, is because he is a coloured and there were many coloureds staying at Duncan Village. Neither does he find it offensive to tell a coloured person to go back to Duncan Village.

[25] When asked how the plaintiff could have had pepper spray on his face, he said he may have done it to himself.

[26] He admitted to having been convicted previously of assault against someone who he alleges had an eye on his wife. When asked why he was following the plaintiff from the parking lot towards the direction of the police station, he said he wanted to see where he was going to.

[27] John Bage is a warrant officer in the South African Police Service stationed at the Gonubie Police Station. He testified that as part of his duties, he takes down statements from complainants and as a routine he notes any injuries he may have observed. He was the officer in charge when plaintiff came to report the incident between himself and the defendant. He noticed no injuries when he took down his statement.

[28] Phillip Botha is a warrant officer in the South African Police Service. He testified that he was the investigating officer of the criminal case against the defendant. During his investigations he obtained statements from the car guards but they later withdrew their statements claiming that they have not been paid the money they had been promised by the plaintiff.

[29] Under cross examination Botha conceded that if the car guards were lying in their earlier statements under oath it is also possible that they could also be lying in their subsequent statements. He confirmed that his wife was working for the defendant but that had no bearing in his investigations of the case against the defendant.

[30] This concludes the evidence that was led from both the plaintiff and the defendant.

[31] In paragraph 3 of the particulars of claim the plaintiff sets out the words and utterances of the defendant as follows:

> "Go back to Duncan Village and drive like that there you poes. You will get fucked up here."

[32] The defendant denies having uttered the offensive words complained of, instead he says he uttered the following statement:

> "Push off and don't come and race around our village. Go and race on the race track."

[33] Mr. Cole for the defendant from the outset took issue on whether the plaintiff's cause of action is based on defamation or on injuria. He made specific reference to the words used in paragraph 4 of the particulars of claim which states "the plaintiff has been defamed in his integrity".

[34] His criticism of the particulars of claim has merit seeing that they are not so clinical in setting out with precision whether the claim is based on defamation or on injuria. Although they appear as a hybrid between defamation and injuria, plaintiff's counsel submitted that the claim is founded on injuria. Having considered the manner in which they are framed and the nature of the evidence that was led I am of the view that plaintiff's cause of action would be more properly characterized as being one for damages for injuria and for assault. I shall accordingly therefore treat the particulars of claim as such.

[35] As correctly pointed out by counsel for the defendant, the evidence before court is mutually destructive and therefore the approach adopted in *National Employees General Insurance v Jagers*[1] finds application. It was held in that case that in deciding whether the plaintiff has discharged the onus of proof, the estimate of the credibility of a witness will be inextricably bound up with a consideration of the

[1] 1984 (4) SA 437 ECD at 440 D – F

probabilities of the case and, if the balance of probabilities favour the plaintiff, then the court will accept his version as being possibly true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case than they do to the defendant's, the plaintiff can only succeed if the court nonetheless believes him and is satisfied that his version is true and that the defendant's version is false.

[36] This approach was again stated in *SWF Group Ltd and Another v Martell Et Cie and Others*[2] as follows:

> "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of B his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence C of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded

[2] 2003 (1) SA 11 at para 14 I – 15D

> in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[37] It is common cause that on the day of the incident, plaintiff drove his vehicle on the Gonubie main road in such a manner that attracted the attention of other road users. He has admitted in his own evidence that he had exceeded the speed limit and drove his vehicle in an erratic manner albeit according to him it was an attempt to avoid a threat by another road user. The objective facts are such that it can be reasonably inferred that the plaintiff drove his vehicle recklessly.

[38] It is further common cause that the reprimand he received from the other drivers due to the reckless manner he drove his vehicle was scathing and was infused with lavatory language. It is further common cause that the defendant pursued the plaintiff to the parking lot and joined in the reprimand, by asking why plaintiff drove like a "mad man".

**Analysis of the evidence:**

[39] Both plaintiff and defendant are single witnesses in as far as the exchange of words between them at the parking lot near Gonubie Hotel and what followed thereafter.

[40] The manner in which the plaintiff adduced his evidence is plainly characterized by over exaggeration with vitriol coupled with hate against the defendant and at times gave evidence on certain aspects of the incident which in all

probabilities was false. This is borne out in a number of accounts from his testimony but most notably is the glaring utterances as set out in the particulars of claim and the disparity in his evidence in court.

[41] In the particulars of claim he averred the utterances of the defendant as “go back to Duncan Village and drive like that there you poes. You will be fucked up here”. In his evidence in chief he added other derogatory words effectively changing the words uttered to be the following: “I will fuck you up, I have a photo of you. Fuck off back to Duncan Village you poes, I will kill you, I am the boss of Gonubie,” When he was asked under cross examination to repeat what was said to him by the defendant. He said, defendant said “he will fuck me up, he has photos of me, I must fuck off back to Duncas Village, ‘you poes’; and go and drive like that there’. ‘I will kill you, he is the boss of Gonubie.’

[42] The changes in the text in the particulars of claim, compared to his evidence in chief and under cross examination is glaring. I tend to agree with counsel for the defendant that had he informed his counsel of the utterances that appears in the latter texts, these would have been set out in the particulars of claim. None of the statements plaintiff made to the police, A1 and A6 which were attached to the defendant’s trial bundle, reflect the words in the latter text. Nowhere in these statements does the plaintiff allege that the defendant uttered the words “I will kill you, I am the boss of Gonubie”. Instead, both statements bear the text that has been pleaded in the particulars of claim.

[43] The vengeance and hate the plaintiff harbours against the defendant is further demonstrated in his incomprehendible allegation that the defendant wanted to kill him at the parking lot and when he drove behind him when he was driving to the police station. His exaggeration which is actuated by hate has further become evident when he said, he is before court to have the defendant stopped otherwise he is afraid lest the defendant kill somebody. There was no evidence before court to

support this allegation. More so, despite the alleged threat to his life, that was never reported to the police. Who is this person that is going to be killed by the defendant?

[44] I am constrained not to agree with the defendant's counsel that the tears shed by the plaintiff in the witness box are not necessarily as a result of the pain caused by the insults he alleges to have suffered, instead they are part of his theatrics and emotional displays. That having been said I am not in agreement with him when he says that they are a display of 'crocodile tears' aimed at avoiding questions. The least I can make out of the plaintiff's tears is that they demonstrate the palpable anger he has against the defendant.

[45] Another falsity in plaintiff's evidence is when he said he had to jump red robots owing to the defendant driving closely and dangerously behind him. Once again none of his statements made to the police make mention of this allegation. This is another obvious exaggeration of what he says happened.

[46] The defendant had also his share of difficulties which do not render his evidence without blemish. He pleaded that he never uttered the words as averred by the plaintiff in the particulars of claim. Instead he uttered the words "push off and don't come race around our village. Go and race on the race track". However, in his evidence in court he said he told the plaintiff to push off and go to Duncan Village and not come to drive in their place like a mad man. The words he had pleaded do not include "Duncan Village" neither do they bear the words "drive like a mad man". He did not proffer any explanation why the words "go back to Duncan Village" came up for the first time during his evidence before court.

[47] According to the defendant, plaintiff's aggressive behavior against him was triggered by reprimanding him for driving dangerously. However, the difficulty with this proposition is that earlier, the plaintiff was reprimanded by two men using unsavory language which should have incensed him to challenge their verbal attack.

It appears that he instead shrugged off their reprimand without any altercation. Whereas when he got a reprimand from the defendant, he took umbrage and approached the defendant asking what he was saying. The only probable reason that could have triggered this kind of reaction is that the defendant must have uttered offensive words that were more denigrating or inflammatory causing the plaintiff to lose his temper as he did.

[48] I therefore find no other reason for plaintiff's reaction save to find that that the defendant uttered the words that are set out in the particulars of claim.

[49] The facts suggest that when the plaintiff approached the defendant he was not calm but was in an aggressive mood as alleged by the defendant. This is also borne out in his invitation for the defendant to alight from his vehicle in order "to fuck him up". I accept that his behavior could have instilled fear in the defendant causing him to ward off any potential attack that may ensue. This is how the pepper spray finds its ways into the equation.

[50] However, according to the defendant the pepper spray canister was empty with an expiry date of 2014. He acquired it from a friend who wanted to throw it away thereby causing litter to the hunting field. He kept this empty can in his vehicle from 2014 to 2016, presumably forgot to dispose of it as he would not have had any purpose for keeping it. However, it defies any logic that the defendant will return from a hunting trip, with an empty can of pepper spray that was to be discarded by his friend, but stopped him from doing so but instead of asking his friend to throw it away elsewhere, he decides to keep it for a period of approximately two years. Nevertheless, he quickly remembers it when approached by the plaintiff. I find his version on this aspect completely unbelievable and improbable. Whilst there is no other evidence to contradict the manner he acquired the canister, what I find improbable is how he would have kept an empty canister that is useless in his vehicle for such a long time. I therefore reject his version and find on probabilities that he kept the pepper spray because it had contents in it.

[51] I find the doctor's evidence that the plaintiff was not sprayed directly on his face, but on his clothes more probable and reject his version that he was sprayed on his face. The effects that he suffered on his face and eyes may have been brought to bear by touching his clothes and wiping off his face

[52] The evidence of Warrant Officer Bage did not take this matter any further except to confirm that he took down statements from the car guards, who first implicated the defendant but later deposed to other affidavits recanting their earlier version by reason of not being paid by the plaintiff as promised. Nothing much can be deduced on what pertains to the car guards as I am unable to make any credibility findings on their conflicting statements without their testimony being tested in cross examination. The submission by counsel for the defendant that plaintiff is fortunate that he has not yet been charged for bribery and attempting to defeat the ends of justice is not supported by any credible evidence. It is therefore my view that no consideration needs to be placed thereon.

[53] I turn now to deal with the question whether the words I found to have been uttered by the defendant have the effect of impairing the dignity of the plaintiff.

[54] Counsel for the defendant contended that to call somebody a 'poes' is essentially a meaningless abuse and to say to another 'you will get fucked up here' conveys only that some aggression will be metered out to someone, but does not infringe on the dignity of a person. He also contended that much as it is difficult to ascribe damages to the words 'go back to Duncan Village". If there are any damages that should flow therefrom, they deserve to be minimal.

[55] In order to have an appreciation of the effect of the offensive words uttered, I find it necessary as a point of departure to consider the imperatives of the

Constitution of the Republic of South Africa[3](the Constitution). The value of human dignity safeguarded and promoted, inter alia, by the recognition of a right to dignity in the Bill of Rights. The comparable centrality of human dignity in the interim Constitution prompted the Constitutional Court to describe the right to human dignity and the right to life as the most important part of human rights.[4]

[56] Human dignity, the achievement of equality and the advancement of human rights and freedom are the foundational values of our Constitution.[5] These values enjoy the first spot in the ranking of rights enshrined in the Bill of Rights.[6]

[57] In *Dawood and Another v Minister of Home Affairs and Others; Shadahi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*[7] the following is stated:

> "[35] The value of dignity in Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth for all human beings. Human dignity therefore informs Constitutional adjudication and interpretations at a range of all levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to the constitution, it is a judicial and enforceable right that must be respected and protected …"

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[3] Act 108 of 1996.
[4] *S v Makwanyane* 1995 (3) SA 391 (CC), para 144.
[5] See Section 1 of the Constitution.
[6] *S v Makwanyane supra; National Coalition for Gays and Lesbians Equality v Minister of Justice* 1999 (1) SA 94 (CC)
[7] 2000 (3) SA 936 (CC) (2000 (8) BCLR 837 ) para 35

[58] In cases of verbal injury, other than defamation, the words complained of must impair the plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.[8] In *Brenner*[9] the words "bloody bitch" was used and the court said "although therefore, the word "bitch" might be meaningless as affecting the reputation of the person to whom it is applied the words "bloody bitch" used in the context complained of by plaintiff was certainly offensive and intended to humiliate the plaintiff.[10] The import of the case above is that the context in which the words are used plays a significant role.

[59] Recently the Constitutional Court in a unanimous judgment in *Rustenburg Platinum Mine and SAEWA obo Meyer Bester and Others*[11] had to consider the approach to be adopted in the determination whether words are derogatory and racist. Theron J said the following:

> "That Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognize the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the enquiry without recognizing that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our part of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the Labour Appeal Court's decision sanitized the context in which the phrase "swart man" was used assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptions in a past-apartheid South Africa."

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[8] See *Brenner v Botha* 1956 (3) SA 257 (TPD)
[9] *Supra*
[10] Jbid
[11] .Case No. CCT 127/17 Rustenburg Platinum Mine v SAEWA and Others [2018] SACC 13

[60] The court continued and said "the past may have institutionalized and legitimized racism but our Constitution constitutes a "radical and decisive break from that part of the past which is unacceptable. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterized by "*strife, conflict, untold suffering and injustice". "Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others …"*

[61] I turn now to consider the words used by the defendant and the context in which they were used. To justify the words "go back to Duncan Village …" the defendant said it is because he perceived the plaintiff to be a coloured. It is implicit in my view that the defendant classified the plaintiff on the basis of the colour of his skin and find it befitting of him to reside in a coloured or black area as opposed to any other white suburb in the vicinity of East London. I also find it hypocritical for the defendant to say he was actuated by love for the citizens of Gonubie and their children when he said the plaintiff must go back to live like that in Duncan Village, not in their area, giving an impression that he does not place equal value to the lives of the residents and children of Duncan Village to the lives of those living in Gonubie. It is that context that causes me not to agree with counsel for defendant who seem to suggest that to be told to return to Duncan village 'a place known to be home of many thousands of coloured people', cannot attract any negative connotations.

[62] If Gonubie is not a race track, does it mean Duncan Village is one? When defendant says 'you will be fucked up here" for his manner of driving, could that be a suggesting that Duncan Village should accommodate bad behavior of drivers? Put differently, does it suggest that Duncan Village is a lawless place that does not require restraint from its road users. It is for these reasons that I find that the context in which the words "go back to Duncan Village" carried in them a racial connotation that was derogatory and that would as a matter of course impair the plaintiff's dignity.

[63] I turn to deal with the word poes. "The HAT Verklarende Handwoordeboek van die Afrikaans Taal" by Odendaal et al defines "poes" as meaning, "vroulike skaamdele, vulva". In the "Reader's Digest Afrikaans – Engelse Woordeboek" "skaamdele" is defined as meaning "genitalia, private and sexual parts of a woman". From these definitions, it is undoubtedly so, that a man who is referred to as being a "private part" of a woman must surely find it insulting and his dignity impaired thereby.

[64] As was stated by Pickering J in *Ryan v Petrus*[12] that in a case of verbal injury, otherwise than in cases of defamation, the words complained of must impair plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment. I therefore find that the word 'poes' in the circumstances was not used in an innocuous sense but was intended to be harmful and to humiliate the plaintiff, thereby impaired his dignity.

[65] In the light of the aforegoing I find that whilst plaintiff was not an impressive witness who even lied in some respects. I nevertheless find on the probabilities of this case that he has discharged the onus on him and I therefore reject the defendant's version that he did not utter the words set out in the particulars of claim and his denial of using a pepper spray to assault the plaintiff.

[66] I now come to deal with the appropriate damages that need to be awarded. As was stated in *Ryan v Petrus*[13] that in assessing damages regard must be to had to a range of factors arising from the circumstances and facts of the case, including the nature and gravity of the violation of the plaintiff's dignity, the social standing of the parties and the absence of an apology by the defendant.

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[12] 2010 (1) SA 169 ECG
[13] *Supra* at page 177 para D – E.

[67] In *Brenner and Botha,*[14] Boshoff, AJ makes reference to *Botha v Pretoria Printing Works Limited*[15] where Innes, CJ (as he then was) remarked over a century ago as follows:

> "when one man slaps another's face there may be no great pain inflicted and no doctor's bill incurred, but the insult offered to the man attacked is a thing which the court is justified in compensating by substantial damages. If Courts of law do not intervene effectively in cases of this kind, then one of two results will follow – either one man will avenge himself for an insult to himself by insulting the other, or else will take the law into his own hands. I do not think that the principle of minimizing damages in actions of injuria is sound. Where the injury is clear, substantial damages ought as a general rule to be given. …"

Boshoff AJ at page 262 remarks that at the same time the court should not lose sight of the general circumstances under which the injuria was committed.

[68] Whilst in this matter the assault on plaintiff is as a result of being pepper sprayed and not the ordinary assault which Innes CJ referred to in the case of Botha above. I find the principle enunciated very apposite. That having been said, it will be remiss if I were to lose sight of the role that was played by the plaintiff in this matter. It is my view that had the plaintiff not alighted from his vehicle and confronted the defendant in the manner he did, most probably an altercation would not have ensued as well as the use of pepper spray and the insults that followed. The lack of restraint by the plaintiff has contributed immensely in my view in the unacceptable behavior of the defendant. This does not in any way excuse the wrong committed by the defendant even more so in the absence of remorse from him.

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[14] *Supra* at 262 para A.
[15] 1096 TS 910 at p 716

[69] Given all the circumstances surrounding this matter I find the following awards appropriate:

1. For the claim of injuria the plaintiff is awarded an amount of R50 000.00 (fifty thousand rands).
2. For assault, the plaintiff is awarded an amount of R10 000.00 (ten thousand rands).
3. The defendant is to pay the costs of suit including the cost of counsel.

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**V M NQUMSE**

**ACTING JUDGE OF THE HIGH COURT**

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| Counsel for the plaintiff | : | Mr. J Bester |
| Instructed by | : | Matyeshana Townley Inc.<br>East London |
| Counsel for the defendant | : | Mr. S Cole |
| Instructed by | : | Cooper Conroy Bell & Richards Inc.<br>East London |
| Dates heard | : | 12 - 14 December 2018 |
| Date judgment delivered | : | 7 March 2019 |