IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

Case No.: CA540/2002
Date delivered: 2003/1/9

In the matter between:

COMMUNICATION SPECIALISTS CC First Appellant
JOHAN BASSON Second Appellant

and

MIKE POULTER Respondent

J U D G M E N T

LEACH, J:

The first appellant, the first defendant in the court *a quo*, is a close corporation which carries on business in Port Elizabeth, *inter alia* servicing and maintaining two-way radio systems and the computers which form part of such systems. The second appellant, the second defendant in the court *a quo*, appears to be the first appellant's principal member. It is common cause that during the period June to December 2000, the respondent performed work and rendered services for and on behalf of the first appellant in respect of which he submitted an account in the sum of R14 010,60 and that, when the first appellant refused to pay, he sued it for payment. It is also common cause that the first appellant's refusal to pay was contained in a letter written on its behalf by the second appellant in which reference was made to the respondent's "miserly actions", "underhanded means" and "reprehensible business ideas". Pursuant thereto, the respondent also sued the two appellants, jointly and severally, for payment of

R30 000,00 as damages for *injuria*.

The matter came before a magistrate in Port Elizabeth, who found for the respondent on both claims. On the first, the first appellant was ordered to pay the full amount claimed of R14 010,60 in respect of work done and services performed while on the second the two appellants were ordered, jointly and severally, to pay the plaintiff R3 000,00 as damages for *injuria*. It is against this judgment that the appellants now appeal to this Court.

The material facts relevant to these claims are relatively uncomplicated. The only witness to testify was the respondent. He described how he and the second appellant had become friendly years before at a time when they were both employed in the South African Police. The second appellant subsequently left the police and set up a business which he conducted through the first appellant. Several years later, the respondent followed suit and ultimately also started his own business, servicing two-way radio systems although his special expertise appears to have been in the field of the computers required for two-way radio systems, a field in which he had greater expertise than the second appellant.

After setting up his own business, the respondent and the appellants formed a working relationship. The respondent had a small business and in order to cater for the fact he was not at all times available to attend to work which he had

contracted to do, the second appellant, through the first appellant, agreed to do certain work on his behalf. As a *quid pro quo* he would do certain work for the appellants when called upon to do so, Neither party charged each other for their respective services, it being a case of one hand washing the other. As the appellants provided him a backup and as he was able to provide them with a measure of expertise they lacked, a mutually beneficial a working relationship evolved.

However, with the passage of time, the respondent found that he was doing more and more work for the appellants with them doing less and less for him so that the relationship was becoming unfairly one-sided. Eventually, he felt that he had had enough of the situation and in June 2000 he met with the second appellant and said that he did not think they could continue to carry on without charging each other and that from then on they should each keep an account of the work that they did for each other and then settle up from time to time. The second appellant did not disagree and they thereafter conducted their business on this understanding. Subsequently, on 29 December 2000 the appellant came to the respondent's home and the respondent's account was discussed. The respondent gave him a detailed bill which the appellant undertook to pay by 15 January 2001. The services detailed in this bill are the services in respect of which the respondent ultimately issued summons.

Unfortunately, 15 January 2001 came and went without the respondent receiving

payment. Correspondence followed and culminated in a letter dated 10 February 2001 in which the respondents refused to pay the account (this being the letter founding the claim for *injuria* to which I will revert in more detail in due course. In the light of this refusal, summons was issued in due course.

Although certain aspects of the respondent's version were disputed during cross-examination, especially his allegation that in June 2000 he had agreed with the appellants that the parties would thereafter charge for the work that they did for each other and would balance up from time to time (it was put to him that no such agreement had occurred), the appellants failed to lead any evidence to dispute what he had said. Their failure in this regard is surprising, to say the very least, and one can only speculate as to why they adopted such a course. But be that as it may, the case falls to be decided upon the only evidence placed before court, namely, that of the respondent already outlined above.

In the light of the evidence, I turn now to deal with the respondent's claims. His first claim was purely for services rendered during the period June to December 2000 which the appellants, on 29 December 2000, had agreed to pay on or before 15 January 2001. Unfortunately this simple claim was the victim of inelegant and inaccurate formulation in the particulars of claim prepared by the respondent's attorney, which reads as follows:

> "CLAIM 1
> 4. (Respondent) and (first appellant) entered into an agreement with the following terms:

(i) That (respondent) would render services to (first appellant);
(ii) That in return for the aforesaid (first appellant) would render services of equal value to (respondent);
(iii) The aforesaid agreement was reached on the basis that the parties are involved in work of a similar nature.

5. On or about June 2000 the (respondent) and (first appellant) carried *(sic)* their agreement and the parties agreed as follows:

(i) That from June 2000 onwards the (respondent) would account *(sic)* (first appellant) for all work and (first appellant) would pay for same;
(ii) That for work performed up until June 2000 the (first appellant) was still under *(sic)* obligation, as in terms of the old agreement, to render services of an equal value.

6. On or about December 2000 the parties further varied their agreement as follows:

(i) That (first appellant) refused to render services of an equal *(sic)* similar value to (respondent), which value *(sic)* had already been rendered by (respondent) prior to June;
(ii) That (first appellant) would compete with (respondent) for work;
(iii) That it was prepared to pay to (respondent) in full a reasonable value for all work done to date.

7. The reasonable value of services performed by (first Appellant) for (respondent) as *(sic)* (fespondent's) special instance and request is a sum of R14 010,60.

8. The (respondent) avers that (first appellant) indebtedness arose at or about 29 December 2000 and interest was to accrue from that date."

Presumably the word "carried" in paragraph 5 of this claim must be read as meaning "varied". What is set out in paragraph 5 (ii) is furthermore irrelevant, as the respondent has at no stage ever sought to recover payment for services rendered prior to June 2000. In addition, I do not see how a refusal to render services as alleged in paragraph 6 (i) can be regarded as a variation of an agreement as is alleged in that paragraph. Moreover the allegation in paragraph 6 (ii) is in no way relevant to the claim. But notwithstanding the deficiencies in the pleading and even if the particulars of claim do no credit to the draftsmanship of the pleader, the allegations are in my view sufficiently clear to support an allegation that the first appellant had agreed to pay the respondent for services

rendered for the period June to December 2002 and that the amount due as at 29 December 2000 was R14 010,60.

It was argued by *Mr Brisley*, who appeared on behalf of the appellants (both on appeal and in the court *a quo*) that although the appellants had not led any evidence to rebut the respondent's factual allegations, they had not been obliged to do so as the respondent's own evidence was inconsistent with the contract the respondent had relied upon in his particulars of claim. His argument, based upon various authorities, was that it had been incumbent upon the respondent to prove by way of admissible evidence the existence and terms of the agreement on which he relied and that the agreement set out in the particulars of claim quoted above was inconsistent with the respondent's evidence as I have already outlined. *Ergo*, so the argument went, the evidence had not established the case the appellants had been called to court to meet.

In my view there is no merit in this argument. As I have said, the respondent's claim is no more than one for services rendered during the period June to 29 December 2000 and such a claim is envisaged by the pleadings. *Mr Brisley* sought to argue that there had been no suggestion in the pleadings of payment by setting off the appellants' charges on the one hand against those of the respondents and settling the balance as the respondent stated in evidence, and as there is a clear distinction between payments made in money and the giving of reciprocal services, the contract deposed to was not that alleged in the

pleadings and the respondent had therefore failed to prove his case. However, in my view, a monetary claim may be settled either by way of set off or by making a monetary settlement. It is not suggested that there were any services rendered by the appellants which should be set off against the amount of the respondent's claim and the appellants in any event agreed to pay that claim, when the account was rendered on 29 December. There therefore seems to me to be no doubt that the respondent had proved both the existence of the claim upon which it relied and the amount thereof, and the magistrate was therefore perfectly correct in finding in his favour in respect of the claim for R14 010,60. The appeal on this claim is therefore ill founded.

I turn now to consider the claim for *injuria* based upon the letter of 10 February 2001 in which the appellants refused to pay the respondent's claim for services rendered. It reads as follows:

> "Your correspondence dated 5th February 2001 refers.
>
> I regard your sudden change of plans without any consideration to ourselves as unethical as well as to say the least underhanded.
>
> I would like to record the following:
>
> We for several years now have had an agreement whereby work was done between ourselves on a no cost basis.
>
> Work performed by ourselves was never done on a time / money basis as it was based on a mutual agreement and never on a monetary basis.
>
> There was never a new understanding or agreement that future assistance from a certain date would be chargeable.
>
> When calling at my house you presented me with a document that indicated work done and time spent. You indicated that this document was to show your assistance over a certain period.

> Only afterwards with your request and a discussion of this matter it became clear as to your intentions.
>
> Your idea was that you were in the process of negotiating work in East London area for yourself and that our East London office was to work at a special rate to yourself which was to be offset against your made up account which was at normal rates. In other words we supply our services at a cheap rate working off your normal rated account and in the process you pocket a clean income from your services in East London.
>
> After the refusal of this bright idea which was only beneficial to yourself you indicated that you do not intend doing East London's servicing any longer.
>
> **Your miserly actions as well as underhanded means have ruined a healthy relationship as well as exciting future business opportunities.**
>
> **As far as I am concerned your reprehensible business ideas are the worst that I have every experienced in my entire business career.**
>
> I further find your facsimile very amusing, especially the accumulated interest.
>
> I feel that this attitude towards us has now allowed us the opportunity to be available to quote on the same work that you are performing." (my emphasis).

The words emphasised formed the basis of the respondent's complaint in the pleadings. Read together with the allegation in the second sentence that the respondent's actions were "**unethical as well** as . . . . . **underhanded**" the letter has to be construed as an allegation made by the second appellant, on behalf of the first appellant, that the respondent was a person who had acted unethically, deviously and in a manner worthy of censure or rebuke (*cf.* the definition of "reprehensible" in the Shorter Oxford English Dictionary). What then has to be considered is whether this should be regarded as being an actionable *injuria*.

In order to succeed, a person claiming damages for *injuria* must prove (a) a wrongful overt act which constitutes (b) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment

of the person, dignity or reputation of the other and (c) an intention on the part of the offender to produce the effect of his act – see for example *Delange v Costa* 1989 (2) SA 857 (A) at 860 – 861 and the authorities there cited. Moreover, as Smalberger JA went on to say in *Delange's* case at 861:

> "Logically in an action for *injuria* one should commence by enquiring into the existence of the second of these requisites, *viz*. whether there has been a wrongful overt act. (It is more common, and probably juristically more correct, to speak of a 'wrongful' rather than an 'unlawful' act.) A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. Once the wrongfulness of such act has been determined *animus injuriandi* will be presumed (*Whittaker v Roos and Bateman* (*supra* at 124); *Walker v Van Wezel* 1940 WLD 66 at 67). It would be open to the defendant to rebut such presumption by establishing one of the recognised grounds of justification. If the defendant fails to do so the plaintiff, in order to succeed, would have to establish the further requirement that he suffered an impairment of his dignity. This involves a consideration of whether the plaintiff's subjective feelings have been violated, for the very essence of an *injuria* is that the aggrieved person's dignity must actually have been impaired. It is not sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities. Once all three requisites have been established the aggrieved person would be entitled to succeed in an action for damages, subject to the principle *de minimis non curat lex*."

The learned judge of appeal went on further at 862 to say:

> "Because proof that the subjective feelings of an individual have been wounded, and his *dignitas* thereby impaired, is necessary before an action for damages for *injuria* can succeed, the concept of *dignitas* is a subjective one. But before that stage is reached it is necessary to establish that there was a wrongful act. Unless there was such an act intention becomes irrelevant as does the question whether subjectively the aggrieved person's dignity was impaired. I do not understand . . . . . that all that is required for a successful action for damages for *injuria* are words uttered *animo injuriandi* towards another which offend such person's subjective sensitivities, and in that sense impair his *dignitas*. If this were so it could lead to the courts being inundated with a multiplicity of trivial actions by hypersensitive persons. . . . . In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the 'algemene redelikheidsmaatstaf' (*Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1168 C). This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might would his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*. . . . . For words to be injurious they must infringe one of the 'absolute rights of personality' . . . . . There is no such thing as an absolute right not to be criticised. A person must be prepared to tolerate legitimate criticism, ie criticism which is fair and honest. Put differently, an act done in the exercise of a right is not a wrongful act, and

> can therefore not constitute an *injuria*. Honest criticism is such an act. . . . . Whether in given circumstances criticism may be regarded as legitimate must depend upon, *inter alia*, the relationship of the parties involved and the nature of the affairs they engage in. Businessmen who engage in competition (like politicians who take part in public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual."

In considering the question of the wrongfulness of the publication, it was argued on behalf of the appellants that, objectively viewed, the letter in question could not be construed as being a wrongful action and that the respondent, as a businessman, had exposed himself to this type of criticism, notwithstanding the respondent's undisputed evidence that he felt insulted and degraded by what had been said.

To allege that a person had acted unethically, deviously and in an underhand manner and in a way deserving censure which is, in effect, what the second appellant alleged against the respondent, does in my view constitute an act of an offensive or insulting nature. Testing them against prevailing norms of society, the words of which the respondent complains are, objectively determined, insulting and cannot be regarded as legitimate or honest criticism, even if the respondent is a businessman. Applying the criterion of reasonableness I am therefore satisfied that the words, objectively determined, constitute a wrongful insult from which *animus injuriandi* is to be presumed. The appellants' evidence further was that he was extremely distressed by having been insulted in this way. *Inter alia*, he stated:

> "Yes I was insulted tremendously. You can imagine how one should feel if you were married to someone for 15 years literally and that thing suddenly came to an end and

> certain accusations for thrown across to you and accused you of deceit and all kinds of funny things how would you feel? I mean I had helped this man out of the generosity of my heart and that is the kind of response I got. Of course I was hurt. I was hurt deeply by it".

In the light of this and what I have set out above, there can be no doubt that all three elements of an *injuria* have been established. What then falls for consideration is whether the trial court's award was excessive as was suggested by *Mr Brisley* on behalf of the appellants.

It is well settled that in the assessment of damages of this nature, a trial court has a wide discretion to award what it considers to be a fair and adequate compensation for the injured party, regard being had to all the relevant circumstances of the case. Consequently, in the absence of any misdirection or irregularity, this Court will not interfere on appeal with a trial court's award of damages unless there is a substantial variation or a striking disparity between the amount awarded and what this Court considers ought to have been awarded.

In my view, such a disparity exists *in casu*. The award of R3 000,00 as damages seems to me to be strikingly excessive. By no stretch of the imagination can the insult be regarded as a severe *injuria*, notwithstanding the respondent's evidence as to how insulted he felt on receiving the letter. Although what the second appellant said cannot be regarded as fair criticism, the respondent is a businessman and, by the very nature of the competitive market place, business people often do say unkind things about each other. I can accept that the respondent felt belittled and insulted by the second appellant having said that he

acted deviously and reprehensibly but, although this cannot be regarded as a case of *de minimis*, it was not an overly severe insult nor was it published to anyone other than the respondent himself. In these circumstances I am of view that an award of no more than R1 000,00 should have been made as damages. There is sufficient disparity between that amount and the amount awarded in the court *a quo* to oblige this Court to interfere. In respect of the respondent's second claim, the appeal must therefore succeed to the extent that the damages are to be reduced to R1 000,00.

That brings me to the question of costs. On the principal claim, that for payment of services rendered, the appeal must fail. The appellants can only succeed on the second claim and then to the limited extent that the damages they are to pay are to be reduced. In these circumstances *Mr Brisley* correctly conceded that it cannot be said that the appellants have enjoyed substantial success on appeal and that their success in respect of the reduction of the damages on the second claim is insufficient to justify an order of appeal costs in their favour.

Essentially, had the appeal proceeded solely in respect of the second claim, the appellants would have achieved a degree of success by having the damages reduced. On the first claim, however, the respondent has been successful. In these circumstances, it is my view that the appropriate order is to oblige each party to pay their own costs of appeal.

In the result, the appeal succeeds to the limited extent that the amount of the damages awarded by the magistrate in respect of *injuria* is reduced from R3 000,00 to R1 000,00 and the magistrate's award is altered accordingly. The appeal is otherwise dismissed. The parties are to pay their own costs of appeal.

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L.E. LEACH
JUDGE OF THE HIGH COURT

MHLANTLA, J:

I agree.

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N. MHLANTLA
JUDGE OF THE HIGH COURT

SUMMARY

Delict - claim for *injuria* – allegation that a businessman had acted unethically, deviously and in a matter worthy of censure or rebuke

constitutes an actionable *injuria* – although not a case of *de minimis*, damages of no more than R1 000,00 justified in all the circumstances.

Judgment delivered 9 January 2003.