SWAZILAND HIGH COURT

HELD AT MBABANE

Civil Trial No. 985/1999

In the matter between

BOY KUNENE Plaintiff

and

WALTERMAMB Defendant

Coram: Annandale, ACJ

For Defendant: Mr. P.R. Dunscith

Mr. T.L. Dlamini

JUDGMENT

10th February 2005

Collegiality in the workplace unfortunately has its darker moments when people who seemingly used to get along just fine suddenly find themselves in a situation where things are said that causes offence to others to the extent that forgiveness will neither be sought, nor granted. Such a situation arose in the

morning of the 9th" February 1999 where two men, colleagues of long standing, and both employed at the Hhohho Regional Administration offices in Mbabane, entered into a confrontational and irreversible war of words. Both are mature Swazi men, one of them now retired.

As most quarrels start, it was a small and seemingly innocuous event that triggered a situation that got out of hand and caused the aggrieved party to institute legal action. The plaintiff now claims E50 000 due to alleged contumelia and impairment of his dignitas which he says he suffered at the tongue of the plaintiff in the presence of others. The infamous words are alleged to be: "stop shitting you dog, you fool, 'voertsek', away from me" uttered in Siswati as "Asukunya wena yinja, usilima, uyinkhebelele, fuseki lapha kimi".

The defendant pleads an absolute denial of ever having said so and blames the plaintiff who would have implied that he bewitched the car keys which the plaintiff had lost but were recovered by the defendant and were rudely demanded from aim, with the latter refusing it, sending him back. The defendant further pleads that such words as quoted above in any event would not have the effect of lowering the plaintiff in the estimation of the persons who were present at the time, wherefore the plaintiff did not suffer any damages at all, and most certainly not to the tune of E50 000.00.

When the matter came to be heard as a trial both litigants testified and each called witnesses in an effort to prove and disprove the aforesaid allegations. Common to the dispute is that on the date of the incident, both plaintiff and defendant were at work and that plaintiff lost possession of the keys to the car which he was to use during the day in the course of his duties. It is also common cause that the defendant at some time got hold of the keys and that the plaintiff was sent to him by

another person to ask for it, that the defendant told him that he did not have it anymore and that thereafter, the events turned sour. Eventually the keys were restored to the possession of the plaintiff.

The issue at stake is what exactly transpired between the two men and what words were uttered by whom, further, that if indeed the alleged words and innuendo were used by the defendant whether it could give rise to the cause of action and if so found, to what extent it caused any damages to the plaintiff.

Otherwise put, the factual issue, the onus of which lies with the plaintiff, is whether the defendant uttered the alleged words or not. The legal issue is, if indeed the factual issue is proven, whether the words are to be construed as contumelious, with the intention of Injuring the dignity and fame of the plaintiff, and if so, to what extent.

Insofar as the version of the plaintiff goes, it is a clear and straightforward account. He had to drive to Siteki on the fateful day to collect the Regional Secretary at Nhlangano at one 13h00, having left him there the previous day. On his arrival at work he proceeded to wash his car but found it to need petrol. He took a petrol voucher to the office of one Nomsa to have it signed, a process which requires her to also have the keys for the vehicle as the registration number are on a tag with the keys. He testified that she was not available, so he left it there and returned outside to wash the car, found her and asked her to fill in and sign the voucher.

Soon afterwards she came out, told him that she had signed the voucher and then she left for a meeting.

Once he had finished cleaning the car he returned to the office, only to find that the keys are not with the fuel voucher. While searching for the keys the office messenger told him that the keys were outside, with a Mr. Manana. He went out, finding Manana talking with the defendant.

It was at this stage, according to the plaintiff, that the defendant excepted and told him that he did not come for the keys earlier when he was called. It was during this process that the utterance that forms his complaint was made. He adds that various people were in the vicinity who heard the harsh words at the office entrance, two of which were Sihlongonyane and Dlamini (his witnesses).

He eventually received the keys from the office messenger after his wings "had been clipped. His efforts afterwards to have the matter reconciled and addressed by his overseers did not meet with success, so he instructed his attorney to pursue the matter.

He denies having looked for trouble by accusing the defendant of "bewitching" the car keys to make it disappear or enticement in any other manner.

The version regarding the keys of defendant, as put to him in cross examination, was that he did not leave the keys in the office but that it fell out of his pocket, that Manana alerted him of it, but without a response from him.

He strongly denied having said that the keys were bewitched, or that the time of the incident was in the early morning before the offices opened or that only Nandi and Manana were present at the time.

The evidence of the defendant about the same incident naturally has a different slant. He also says that the plaintiff arrived at work with the car and started to wash it. However, he has it that he first finished washing the car and when replacing the hosepipe where it is kept, it is only then that the keys fell down. He said that he called him, twice, to alert him to it but that he was told not to worry him.

After he stored the hosepipe, he has it that the plaintiff on his return to the car fruitlessly started searching for the keys in his pockets, then going to the office to look for it. He said that when the keys fell down it was picked up by Nandi (the messenger) who gave it to him, and that he overheard her telling the plaintiff about it, while he looked for the keys in the office, also that he heard his response being one of "why do you boother me".

It was then, as he says, that the plaintiff came out, stood in front of him, demanding the keys. He then told him that he would not give him the keys that he has to go to the person who told him that he had the keys and that he annoys him (the defendant).

The messenger, Nandi, then got the keys from him, and when giving it to the plaintiff, the latter said that the keys are bewitched.

He has the time of the incident at 07h45, before the office opened, and that the people plaintiff talked about and also the two he called as witnesses, were not there. It was only the two litigants, Nandi and Mr. Manana. He denies having even raised his voice, especially denying the words complained of. He testified that there is no love lost between the two parties and that plaintiff is a difficult man to get along with. He further stated that the clerk, Nomsa, whom plaintiff said to have done the fuel

requisition form, was not yet at work, it being too early.

In cross examination, the defendant first denied that he told plaintiff that he annoys him by asking for the keys, later changed it to an admission of being angry. This was because the plaintiff bothered him by asking him for the keys which he was told was with the defendant, also for not reacting initially when he called him. Defendant sent him back to Nandi for the keys which he had with him at the time.

Throughout, defendant disacknowleges that any members of the public were present. In particular, he disavows the presence of the two men called by the plaintiff as witnesses regarding the incident, stating them to have been "just collected from the veld. "

This version is starkly in contrast with defendants extra-curial statement set out in a letter by his own attorney. Exhibit "A" is a letter by attorneys N.J. Hlophe dated the 26th March 1999, then acting for defendant. It is addressed to plaintiff's attorney in response to a letter of demand. Therein, the contrary version is spelled out as follows in paragraph 3:-

"Our client denies ever uttering the said words to your client but alleges that it is your client who was <u>in the presence of workmates and other members of the public</u> referred to him as a "witch" by saying he had since bewitched some car keys." (my underlining).

It is hard to reconcile the different versions of the defendant as being in consonance with the truth. When it suits him, he alleges, through his attorney, that both workmates and members of the public were present during the incident. When not, he says that no members of the public were there. One cannot have it both ways. Over and above the evidence of plaintiff and his two witnesses that there were indeed not the workmates of the litigants present but also members of the public, I also consider

what the Regional Secretary's office does and where it is situated. Large numbers of people have to attend at the offices for diverse reasons. It is on a street corner in a busy area of Mbabane with a wide open parking area where cars are washed adjacent to the street leading to the Police Station and a multi storey building.

The plaintiff's witness, Dlamini, has the time of the incident at around 10h30 to llhOO. The second witness of the plaintiff, Sihlongonyane, as well as plaintiff himself, testified that the incident took place during normal office hours, after the office had opened and that people came and went. They did not state the time any closer than that.

On the other hand, the defendant's instructions and evidence was that the office had not yet been open to the public, that it was around 07h45 when the plaintiff came in with the car and washed it.

The crux of this aspect is whether the differences in time estimates affects the credibility of the witnesses. If plaintiff arrived twenty minutes before eight, would he have finished washing it, attended to the petrol voucher and embark on his search for his keys, which all preceded the verbal altercation, still before office hours commenced and the attendant presence of members of the public? It would have to be so for the defendant to be believed about the public presence and plaintiff to be disbelieved in that regard.

Considering the probabilities and also bearing in mind the defendant's instructions to his attorney regarding the presence of public when he allegedly would have been on the receiving end of plaintiff's verbal abuse, I find by far the more likely truth to be that the incident occurred after commencement of

work hours and that indeed members of the public were present.

This much was confirmed by Sihlongonyane and Dlamini, both stating their presence and the reasons for them to be there.

The witness called by defendant, Manana, gave evidence as near as possible to that of his patron. Too near. An overall comparison of the two sets of evidence raises a suspicion of collaboration and rehearsal.

The ongoing refrain of the defendant and his witness is that they remain adamant that only four employees were present throughout the whole of the episode. This could only be possible if only one incident of short duration was under consideration. They also insist "that the defendant remained calm, cool, collected and polite when the plaintiff asked him for the keys. Yet, he deemed it fit to tell his attorney and the court that he was critically insulted by the plaintiff who was said to have accused him of bewitching the keys.

The 'carbon copy' nature of Manana's evidence is further evident from his unsolicited insistence on the absence of any members of the public. Yet, the offices are on a busy street corner with the car washing area between the street and the building. Passers-by have to move up and down the street, an arms length away from the cars that park there.

A further aspect of the impression that Manana made as witness is that he tends to adjust his version in

accordance with questions asked of him.

For instance, he testified in chief that plaintiff dropped the keys after he had finished washing the car. In cross examination, it changed to the effect that it fell before he finished the washing process.

One can only speculate as to why the defendant wants to convey that Manana, his witness, is a person that he just happens to know from work "for not long". Manana on the other hand has the period as one of "thirteen years."

When all of the evidence as a whole is considered, I find it hard to believe that plaintiff's allegation is spurious. All of the probabilities favour a factual finding that indeed there was a verbal altercation between the two men, arising from the defendant's actions and reactions regarding the car keys. It was at this time that the defendant lost his self control and uttered the words complained of and doing so in a raised voice. At that time, there were some people who attended at the offices for their business, as well as colleagues of the two men. They overheard what was said when defendant insulted plaintiff.

The factual finding of this court, having heard the evidence, observed the witnesses and considered the arguments of their attorneys, is that on the day in issue, the plaintiff was insulted by the defendant, who told him to "stop shitting you dog, you fool, voertsek away from me" (freely translated from Siswati.)

It now requires consideration of whether such words justify the claim for damages.

In this regard, the heads of argument which Mr. Dunseith prepared were very useful and I record my appreciation of it.

The actio iniuriarum, an aequilian action for damages to the dignitas and fama of a plaintiff requires that it has to be proven that there was an unlawful impairment to the dignity or repute that was done with the intent to injure, or animus iniuriandi. To infer the latter two elements an impairment to the dignitas first has to be established.

In the situation at hand, there is no plea or defence of either unlawfulness or animus iniuriandi being absent - it is only the utterance of the phrase "stop shitting, you dog, voertsek away from me" that has been denied.

It has already been factually found that the defendant did utter these words. To determine if the words per se establish contumelia, I will have regard to the views of the defendant himself.

In cross examination, he said that if such words were directed against somebody, it would be bad, an insult, and if he was so addressed, he would be "pained", and if in public, he would feel humiliated.

The defendant's evidence is that he felt likewise - "insulted", his "soul felt injured" and that he felt "lowered in (his) self esteem." Members of the public that were present were not mere "public" - as pastor in the Jericho Red Gown Church, with a congregation in the Dlangeni area, there were members of his church who also heard the defendant's insult.

Whichever way one views the words, I have no hesitation in holding it to be insulting, humiliating,

contumelious and injurious to the self esteem, dignity and repute of anybody against whom it may be directed by whoever and wherever. There was no lawful excuse on the part of the defendant to do so and there is no reason to find that the utterance was made with any other intent than to injure the plaintiff as aforesaid.

The final issue to determine is the quantum of damages to be awarded.

A convenient list of some of the relevant factors to help in the assessment of damages is found in Buthelezi vs Poorter and others, 1975 SA 608 (W) at page 613 G - H. These are the character and status of the plaintiff, the nature of the words used, the effect that is calculated on the plaintiff, the extent of publication of the words and the subsequent conduct of the defendant and in particular his attempts to rectify the harm done.

In casu, the plaintiff adduced un controverted evidence that he is a pastor iri his church and that he has a congregation of the "red gown" members' of their church, that he also has a prophetic calling and that he is known in neighbouring states for that. It is a general association of the public that such people would themselves refrain from using crude language and that others would also generally refrain from using foul language in the presence of pastors, let alone using foul, abusive and insultive words to address them.

By their very nature, the words complained of equate the plaintiff to a canine who is to stop defecating, which must "voertsek" or go away, a word with which the canine connotation is fortified.

The calculated effect that this had on the plaintiff was that he felt ridiculed and humiliated. However much one may be a lover of dogs, to be sworn at by being called a dog is certainly no complimentary form of address.

At the time of the incident, there were colleagues of both plaintiff and defendant in their presence, over and above members of the public like Sihlongonyane and Dlamini. To everyone who overheard the defendant, it would convey the message that plaintiff is an untrained dog-like somebody who is told in the rudest manner to move away from someone like the defendant. His colleagues got to know of it, so did his congregation.

Plaintiff tried in vain to get his superiors to address the issue. He had to go to a lawyer with his plight. It was further compounded by the unrepentant response of the defendant, conveyed through a letter by his own attorney, in which he was accused of equating the defendant with a witch in the presence of members of the public, and being called upon to pay damages of E80 000. Nowhere is there even a hint of apology from the defendant but purely and outright denial with a counter accusation and a demand for E30 000 more than the eventual claim.

Both litigants are mature in years, at retiring age. Both might have limitations on their ultimate status in the hierarchy of the civil service, they are and were drivers, but that does not also mean that they are insensitive and open to abuse. Plaintiff is entitled to be compensated by the defendant and the court has an obligation to come to his aid.

The plaintiff claims E50 000 plus costs. I think it is too much. His attorney referred to Brenner v Botha 1956 (3) SA 257 (TPD) where some sort of guidance could be found. There, a young female employee

who cut materials for a haberdasher was dismissed, to be told that she is useless, cannot measure, and amongst other insults, called a "bitch". This was held to be a verbal injury, impairment of her dignity, degrading and ignonimous. In 1956, she was awarded 25 British Pounds, a sizeable sum at the time.

There are a number of other precedents where people were awarded damages for being called all sorts of names, including equations with favourite beasts of the animal kingdom. It is a practise at best to be discouraged. It can be very expensive to do so.

The contumelia in the present action goes further than a mere canine equation. The defendant was subjected to a short string of abusive

insults.

When all of the ingredients have been stirred in the pot and I consider all relevant factors as enumerated above, it is my considered view that the plaintiff should be awarded a sum of E20 000 as damages. It is so ordered.

Costs are ordered to follow suit.

J.P. ANNANDALE

ACTING CHIEF JUSTICE