

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civ. Case No. 3118/05

In the matter between

MAKHOSAZANA DLAMINI

Plaintiff

VS

RADIO SHOP

Defendant

CORAM

Mamba J

FOR Plaintiff

Mr. S. Dlamini

FOR Defendant

Mr. S. Mamba

JUDGMENT
28th April, 2011

[1] It all started with the plaintiff purchasing an electronic gadget or item described as a Television game from the defendant for a sum of E250.00. This gadget turned out to be not fit for (the declared) purpose.

[2] The plaintiff who is an adult Swazi female person lives in Mbabane. She is a holder of a BA Degree from the University of Swaziland and works as a school teacher in one of the local schools. She is a chorister as well.

[3] The defendant is a retail business establishment operating a general dealership in Manzini near the bus rank in that city.

[4] On or about 30th July 2005, the plaintiff approached the defendant's premises aforesaid and offered to purchase an electronic gadget or product which has been described in this proceedings as a Television game; a rather nondescript appellation for a contrivance which enables one to play games with the aid of a Television set. The gadget to which I shall hereinafter refer to as a Television game was, according to the plaintiff said to be brand new and functional. By the latter I understand the plaintiff to be saying that the Television game was said to be fit for the purpose for which it was made and for which it was being sold by the defendant and purchased by her. The plaintiff was served or attended to by an employee known as Chester.

[5] These representations were made to the plaintiff by the defendant's employees at the said business premises and acting within the course and scope of their employment or as servants or agents of the defendant. In making these representations, the defendant's servants or employees intended that they be believed and acted upon by the plaintiff. The assertion or representation that the Television Game was working or functional was a material or essential term of the agreement and but for it, the plaintiff would not have purchased the Television game. In other words, she was induced by the said representations to purchase the item.

[6] The plaintiff purchased the Television game for her minor son. She testified that after taking the Television game home she discovered after showing it to her son, that it was not brand new and was non-functional and this gravely disappointed her son and gravely embarrassed her. She also stated that when the said representations were made by the defendant's

employees, the employees knew that such representations were false and the Television game was not fit for the declared purpose.

[7] For the next four days she travelled by public transport between Mbabane and Manzini in an attempt to be either given a new and functional Television game or have the one given to her fixed in a workmanlike manner. Neither of these things happened. Instead the defendant's servants lied to her and publicly humiliated her in these respects:

"14.2 Sending her from one technician to another as if to assist her in getting the television game to working order; 14.3 Lying to her that she was being referred to the manager who would reimburse the purchase price paid by her when she was actually being referred to other technicians;

14.4 Making her wait for extended periods of time whilst they attended to their customers."

[8] Initially when the plaintiff came to complain to the defendant, Chester acknowledged that the item had been purchased from the defendant and that it was not working. This was on Monday, just two days after the purchase. She was made to leave the Television game at the shop and instructed to collect it on the following day when it would have been repaired or fixed by the defendant. She agreed to this but when she returned the next day, it had still not been fixed and again Chester asked her to return the next day which she did. But again the gadget had not been put in order and she then demanded her money back and cancelled the sale. This was after

the servants of the defendants refused to test the Television game and demonstrate to her that it had been repaired and was now functioning as expected. Eventually a technician employed by defendant admitted to her that the Television game was faulty but he could not identify the malfunction or fault. She was asked to return the next day once more. Surprisingly though, a day later on 5th August, 2005 another employee of the defendant known as Ray gave the Television game to the plaintiff saying that it had now been fixed. But alas again this was not true. She took it back and cancelled the sale and unsuccessfully demanded her money back.

[9] In its plea, the defendant first raised a special plea stating that the "Radio Shop is not a firm .. and further lacks the necessary power to sue and be sued in its own name but is merely a trade name of a private company called Jasha Investment (Pty) Ltd The rest of the plea - on the merits - was a blanket denial of the transaction ever taking place between the parties. The special plea together with the claim for legal fees by the plaintiff were both abandoned by the respective parties at the start of the hearing.

[10] The defendant led the evidence of Chaken Makama who worked as a Salesman and technician at the defendant's premises. His evidence was basically that electronic or digital items are normally tested at the shop before being given to purchasers. He also testified that receipts are also usually given to such purchasers. He also confirmed that Chester was one of the employees of the defendant at the relevant time but had left in 2007. He was unable to deny the evidence of the plaintiff in anyway and I accept it as true. The plaintiff gave her evidence in a straight forward manner. She was

able to tell the court what occurred on each day and with whom she interacted at the defendant's business. It was a blow by blow account of her experiences both at the defendant's shop in Manzini and in her house in Mbabane where she attempted to use the Television game on her Television set. She has, in my judgment proven or established that:

(a) Defendant's employees made the said representations to her that the Television game was functional or working.

(b) The said representations were made by them with the sole aim that she should believe them and act on them by buying the television game.

(c) She believed them and acted on them and purchased the Television game.

(d) The said representations were false and the defendant knew or must have known them to be false.

(e) The plaintiff was induced by the false representations to purchase the item, to her loss and prejudice.

(f) She lawfully resiled from the contract, returned the Television game to the defendant and demanded her refund. She has not been repaid the purchase price despite demand.

[11] From the above facts, it is my considered view that the plaintiff has established her case in respect of her claim for a refund of the purchase price and transport costs. The said costs were incurred because each time she spoke to the defendant's servants, she was given a firm undertaking that the Television game would be ready the next day and she must return to get it. These were false promises and were made at the very least without any regard to their veracity or probity. She is entitled to the refund for E250.00 plus the transport costs she incurred in the sum of E 150.00; in all totaling E400-00.

[12] I now turn to examine the issue of damages in respect of the infringement or impairment of her dignity.

[13] Besides the common law to which I shall return and concentrate presently, section 18(1) of our Constitution makes the following quaint and absolute prohibition: "The dignity of every person is inviolable." In contrast to this provision, s14 of the Constitution of South Africa starts with an affirmation that "everyone has inherent dignity" and then goes on to provide that everyone has a right to have his dignity respected and protected.

[14] Dignity as a notion or concept is very difficult to define. It relates to one's self worth; the very essence of being human. In the National Coalition for Gay and Lesbian Equality v of Justice Ackermann J referred to the right to dignity as the "Cornerstone" of the South African Constitution. See also Minister of Police v Mbilini 1983(3) SA 705(A) at 715-716

[15] In a paper entitled "Dignity and Substantive Equality", R. O'Connell states: "That dignity is a difficult concept to define is a commonplace, but we should note that some of these Judges made determined efforts to give a content to this concept. In particular in the landmark case of *Law v Canada* where Iacobucci J. discussed the idea and he is worth quoting at length;

" Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by "laws which are sensitive to the needs" capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognized a full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all the circumstances regarding the individuals affected and excluded by the law?"

This sets out a fairly detailed analysis of what dignity means in the Canadian context. It does not eliminate scope for disagreement however. In particular, it asks not merely how the claimant feels she or he has been treated but also whether that feeling is "legitimate",

whether there is a reasonable basis for a feeling that one's dignity has been assaulted".

[16] Jonathan Burchell, "Personality Rights and Freedom of Expression. The Modern Actio injuriarum," Juta & Co 1998 at 329 states as follows:

"The rights to equality and privacy, like so many other human rights, are rooted in respect for human dignity. Infringements of the right to equal treatment of persons who may form part of historically vulnerable groups or other persons, and invasions of their privacy, are particular manifestations of group or individual indignity.

Protection of dignity under the common law has the same supple, overarching quality as its constitutional counterpart. This synergy can only serve to enrich both complementary branches of the law.

The Appellate Division in *De Lange v Costa*, 1989(2) SA 857 (A), has authoritatively laid down the general test for determining dignity under the common law:

(a) The plaintiff's self-esteem must have been actually (subjectively) impaired and

(b) a person of ordinary sensibilities would have regarded the conduct as offensive (tested by the general criterion of unlawfulness - objective reasonableness).

The ultimate criterion determining an impairment of dignity is not the sensibilities of the plaintiff, nor that of the hypersensitive individual, but that

of the reasonable person." I, with respect agree and endorse this exposition of the law.

[17] In an action based on injuria, a litigant must establish three essential elements or requisites namely :

"i. An intention on the part of the offender to produce the effect of the act;

ii. An overt act which the person doing it is not legally competent to do; and which at the same time is

iii. An aggression upon the right of author, by which aggression the other is aggrieved which constitutes an impairment of the person, dignity or reputation of the other" (per Smallberger JA in De Lange (supra).

See also R v UMFAAN, 1908 TS 62, WHITTAKER v ROOS AND BATERMAN; MORANT v ROOS AND BATERMAN 1912 AD 92 at 130, R v CHIPA AND OTHERS, 1953 (4) SA 573(A) at 576. Once a plaintiff establishes the second element stated above, ie the overt wrongful act, the intention to injure the plaintiff by the defendant is presumed. This presumption is of course rebuttable. Where such rebuttal is wanting, the plaintiff then has to prove that he suffered an impairment of his dignity or self-worth. "This involves a consideration of whether the plaintiffs 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 *minimimis non curat lex* (De Lange (supra) at 860)." And in Botha v Pretoria Printing Works Limited, 1906 TS 710 at 714 INNES CJ stated:

"When one man slaps another's face there may be no great pain inflicted and no doctor's bill; 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 he 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."

[18] I observe that although in the above cited quotation the learned CJ refers to insult as being the offending conduct he was still talking about an impairment of dignity. Such insult or conduct impacts on one's self-worth or dignity. An insult is an invasion of or an affront to one's dignity. Jonathan Burchell (supra) at 331 states:

"For some years there has been controversy over whether *contumelia* is a requirement for the remedy for impairment of dignity. *Contumelia* was variously defined in terms of 'insult' or 'intention to insult or impair dignity'.

In so far as the concept of *contumelia* included 'intention', it was superfluous, as the requirement of *animus injuriandi* covered intention in all its forms. In so far as *contumelia* meant 'insult' it emphasized an aspect of dignity, but was far too restrictive formulation of the test for determining 'dignity', especially as a narrow definition of 'dignity' could unduly inhibit the potential of the *actio injuriarum* to complement the protection of human dignity under s 10 of the Constitution. As Van den Heever JA in *Foulds v Smith* observed, '...too much emphasis in the *actio injuriarum* is laid on *contumelia*' in the sense of 'insult'.

Smallberger JA in the passage from *De Lange*, correctly, does not even mention *contumelia*, in whatever of the two senses it had been used in the past.

The most recent reference to *contumelia* is in *Brandon v Minister of Law and Order* where *contumelia* was required as an element which had to be pleaded in a wrongful arrest case. But, it is worth noting that the judge in *Brandon* defined *contumelia* as 'the impairment of subjective feelings of dignity and self-respect'. This approach is entirely compatible with that taken in *De Lange* as in neither *Brandon* nor *De Lange* did the court require 'insult' to be pleaded or confine the remedy to 'insult'. There is no need to add insult to *injuria*. What is involved in the remedy for impairment of dignity is subjective impairment of dignity which also infringes objective limits of reasonableness. That is not to deny that many cases of impairment of dignity will involve personal insult, but to emphasize that the remedy is broader than insult cases".

[19] The impairment of dignity may be constituted by words or conduct. In the present case it was both. The plaintiff was repeatedly told a lie; first that the Television game was new and fit for use or functional; secondly that it had been properly fixed. She was publicly humiliated by being made to attend to the defendant's business on a daily basis for about four successive days. At the shop, she was either made to wait for long periods of time unattended by the defendant's employees or shunted from one employee to another aimlessly. This conduct and words by the defendant's employees did subjectively injure the plaintiff in her self-esteem or dignity. Any reasonable man in her position would have been so injured too.

[20] The value of the item purchased by the plaintiff may seem miniscule but the most relevant factor or consideration herein is the conduct of the defendant following that transaction. The plaintiff cancelled the purchase and returned the Television game to the defendant and is therefore entitled to a refund of the purchase price thereof. Regarding the offending words and or conduct by the defendant's agents, the following points are to be noted:

- (a) The defendant's conduct was not just a simple incident, it was persisted in over a period of four days until the plaintiff gave up and resiled from the sale.

- (b) The defendant has not offered an apology to the plaintiff for its acts or conduct and

(c) When the plaintiff cancelled the sale and returned the Television game and demanded her refund, the defendant failed to refund her the money she had paid.

(d) The injury suffered by the plaintiff did not just end at the defendant's place of business in Manzini. She had to endure this indignity before her own son each time she came home and told him she had bought him a Television game, when the gadget turned out to be not working.

[21] Private businesses or entities such as the defendant are there to serve the public. The public expect to be and should be treated with dignity and respect by such entities. This did not happen in this case. An impairment of one's dignity in almost all cases, may never be adequately compensated in monetary terms. This is so because it is essentially a matter grounded on injured feelings. The extent of such injury and its monetary compensation is value laden and thus bound to vary from case to case, generation to generation, jurisdiction to jurisdiction and so on. I have not had the benefit of comparable local cases to assist me in this case. None was referred to me and my preliminary research yielded none.

[22] In the present case the plaintiff has claimed a sum of E10,000.00 for the impairment of her dignity. I have referred to her personal circumstances and her role or status in life and also to the nature of the indignity she was made to endure. That she has been vindicated by this court - by finding in her favour - should act as an emotional measure of assuaging her injured

feelings. As Nathan CJ in *Kunene v Shabangu*, 1979 -1981 SLR 185 at 187C, quoting Greenberg J in *Innes v Visser*, 1936 WLD 44 at 45; reminded us that "the figure of justice carries a pair of scales, not a cornucopia or horn of plenty." I hold that taking into account all the relevant factors herein, she is entitled to an award of E8,000.00 in respect of the impairment of her dignity.

[23] In the result, I make the following order:

(a) The defendant is ordered to pay to the plaintiff the sum of E400.00; being in respect of the purchase price (E250.00) paid by the plaintiff and E150.00 in respect of her traveling expenses.

(b) The defendant is ordered to pay to the plaintiff a sum of E8000.00 as damages for the impairment of her dignity plus interest thereof at the rate of 9% per annum with effect from 28th April, 2011.

(c) The defendant is ordered to pay the costs of this action.

MAMBA J

