



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**CASE NO. 1521/14**

**HELD AT MBABANE**

In the matter between:

**THEMBILE KUNENE**

**PLAINTIFF**

**And-**

**SWAZILAND DEVELOPMENT &**

**SAVINGS BANK**

**1<sup>st</sup> DEFENDANT**

**THEMBI DLAMINI**

**2<sup>nd</sup> DEFENDANT**

**Neutral Citation:** *Thembile Kunene vs Swaziland Development & Savings Bank  
& Another [1521/14] [2019] SZHC 239 (5 December  
2019)*

**Coram:** **M. LANGWENYA J.**

**Heard:** **20 November 2019; 21 November 2019; 5 December 2019**

**Delivered:** **5 December 2019**

**Summary:** *Civil Procedure- pleading- claim for damages in respect of  
impairment of plaintiff's dignity and reputation- plaintiff  
also states character and reputation was defamed-*

*defamation and  
complained of not  
uttered in-*

*action iniuriarum distinguished- words  
stated in language they were allegedly*

*Delict- action iniuriarum- dignitas- principles governing  
action-failure to plead actual words used in action for  
defamation render plea defective- no amendment-  
judgment cannot be obtained for defamation on pleading as  
it stands.*

## **JUDGMENT**

- [1] The plaintiff is an adult female LiSwati and an optometrist stationed at the Hlathikhulu Government hospital. She has a bank account at the first defendant.
- [2] The first defendant is a financial institution established in terms of the King's Order-in-Council Number 49 of 1973 capable of suing and being sued in its own name. It has its principal place of business in Mbabane in the Hhohho region.
- [3] The second defendant is an adult female LiSwati and an employee of the defendant. She is stationed at the first defendant's branch in Manzini.

[4] On 24 October 2014, the plaintiff sued out summons against the defendants citing impairment of her dignity and reputation. Plaintiff claims the following in her particulars of claim:

- one paying the**
- (a) Payment of the sum of E150,000 (one hundred and fifty thousand Emalangeneni) being general damages suffered in respect of the impairment of plaintiff's dignity and reputation, the other to be absolved.**
  - (b) Interest on the aforesaid amount at the rate of 9% per annum.**
  - (c) Costs of suit.**
  - (d) Granting further and or alternative relief.**

[5] The words complained of and said to have been uttered by the second defendant with the intention of injuring, humiliating and degrading plaintiff are captured in the book of pleadings in the following terms:

**convinced  
defraud the  
circumstances, your**

**'You stole the sum of E2 000.00 from the ATM. The CCTV camera footage indicates that the money was taken and the bank is accordingly that your actions amount to theft coupled with the intention to bank of the said sum of E2 000.00 and that in the account will be debited with the said amount.'**

[6] The main issue confronting me is whether the plaintiff has made out a case for the Court to grant it the relief that it is seeking namely-the payment of E150 000.00 in general damages suffered in respect of the impairment of plaintiff's dignity and reputation.

[7] In order to answer the question I'm faced with, I will firstly summarize the evidence placed before me, set out the legal principles applicable to the dispute and apply those legal principles to facts of the matter.

### **The Plaintiff's Evidence**

[8] It is the case of the plaintiff that on 26 August 2013 she sent PW1 to withdraw money from her account at the auto teller machine (ATM) in the Manzini branch of the first defendant. When the ATM did not discharge the money, PW1 was advised by the first defendant, Manzini branch to inform the plaintiff to report the glitch with the Nhlanguano branch where the account is held. On 27 August 2013, the plaintiff reported the problem at Nhlanguano branch as advised. After laying the complaint, plaintiff's account was credited with the amount of E2 000.00.

[9] In September 2013, the plaintiff was called by the second defendant and informed that the bank had carried out its ATM accounts' reconciliation and found that the money plaintiff complained of not receiving on 26 August 2013 was in fact discharged by the ATM. For that reason, the bank informed plaintiff that it was going to reverse the transaction of September 2013 by debiting her account with the sum of E2 000.00. It is the evidence of the plaintiff that it was during the call made by the second defendant that the utterances complained of were made. The second defendant is said to have uttered the said words in SiSwati. Notably, the words are only stated in the English language.

- [10] The plaintiff's evidence is to the effect that the second defendant invited her to visit the bank so she could view the CCTV footage complained of. It is her evidence that she subsequently came to the Manzini branch of first defendant and viewed the CCTV footage in the presence of a certain Mr Mavuso-the branch manager as well as two female employees who were never introduced to her.
- [11] According to the plaintiff, when she watched the CCTV footage she did not see money being discharged from the ATM when PW1 withdrew money from it. This aspect of plaintiff's evidence is confirmed by the defendants.
- [12] After watching the CCTV footage, the two female employees left the room and plaintiff remained with Mr Mavuso. Mr Mavuso is said to have apologized for the insults leveled at her by the second defendant. Mr Mavuso is further said to have assured the plaintiff that her money would be returned to her provided she reduced her complaint of not receiving her money from the ATM into writing. The plaintiff says she insisted that the second defendant should apologize for insulting her. Plaintiff says she was very angry.
- [13] During cross examination, the plaintiff conceded that Mr Mavuso never apologized for insults leveled at the plaintiff but only for inconvenience caused to the plaintiff.

[14] In her evidence in chief, the plaintiff stated that on 24 February 2014, the first defendant credited her account with an amount of E2 000.00. Plaintiff into Court exhibit 'A' which is a statement reflecting the transaction of 24 February 2014. Exhibit 'A' reflects a bank statement showing that the first defendant did credit plaintiff's account with the said amount in February 2014.

[15] It was only during cross examination that the plaintiff conceded that the transaction of 24 February 2014 had nothing to do with the events of August 2013 and September 2013 regarding this matter. It was conceded by plaintiff that the transaction of 24 February 2014 was correcting itself not that the bank was crediting the plaintiff for the amount complained of. When confronted with this explanation from the first defendant, the plaintiff said she made a mistake about the transaction of 24 February 2014 and stated that she was never credited by the bank to compensate her for the transaction of 26 August 2013.

[16] Plaintiff says she was disappointed to be accused of theft by the second defendant who was acting in the course and within the scope of her employment when she made the utterances complained of. When asked how she arrived at the amount of E150 000.00 being the amount of her claim, the plaintiff stated that her character had been defamed as she had been a customer of the first defendant for many years. When quizzed further on what exactly she was suing for-injury to her dignity or suing for injury to her

reputation. Her response was that she was suing for both-that is injury to her dignity and injury to her reputation.

### **Defendants'Evidence**

[17] The defendants called two witnesses-Thembi Dlamini and Belinda Dlamini.

[18] It is the evidence of the second defendant-Thembi Dlamini that she has been an employee of the first defendant for twenty-three years, twelve of those years she worked as a teller ATM supervisor. In September 2013 she received a call from first defendant's branch in Nhlangano of a reversal of a transaction in her bank account. The transaction was immediately reversed because she was going to Siphofaneni to load cash at their branch there and the police who would escort them were already waiting for her.

[19] It was in September 2013 when DW2-Belinda Dlamini had done the ATM accounts reconciliation that she got a report that plaintiff's account ought not to have been credited with E2 000.00 she complained had not been discharged by the ATM because, according to their reports and reconciliations, the plaintiff had received the money as it had been discharged from the ATM. According to Belinda, the bank reconciliation was done manually.

[20] It is Thembi Dlamini's evidence that when she called plaintiff to convey findings of the bank concerning plaintiff's ATM transaction of August 2013, the plaintiff was emotional and stated that '*ngisho kutsi yena amdzala kangaka yena angatsi akayitfoli imali kani uyitfolile*' which translates to 'Do I mean that plaintiff, old as she is would say she has not received her money when in fact she has?' The plaintiff is said to have asked the second defendant if she meant plaintiff is a thief. The second defendant says she tried to calm the plaintiff and even told her that-that is not what she meant and further stated that the glitch complained of was a common occurrence at the bank.

[21] It was explained to the Court that the ATM machine are at times slow to emit the cash. She stated that some customers would withdraw money from the ATM and when the machine took some time to discharge the money, the customers would leave and the money once discharged would be taken by the next customer coming to make transactions in the ATM. The practice of the bank is to then view the CCTV footage to see if the money was discharged and then taken by another customer. If this is so, the bank calls the customer who may have taken money that does not belong to him and convenes a meeting in which the customers arrange how they will reimburse each other.

[22] When second defendant called the plaintiff, she promised to view the CCTV footage and revert to her. The plaintiff did not cooperate-so the argument



goes. It was while the second defendant was watching the CCTV footage with other bank employees that she observed a customer who is a nurse come to withdraw money from the ATM that she called the plaintiff to enquire if she is a nurse. Plaintiff did not take kindly to the question and said as much. It was when the second defendant enquired from the plaintiff why she did not report the incident inside the bank that she was told that the plaintiff had sent PW1 her daughter to make the withdrawal. When second defendant viewed the CCTV footage she then saw plaintiff's daughter using the ATM but did not see the money being discharged from the ATM because PW1 was too close to the auto teller machine.

[23] The second defendant says she later invited the plaintiff to come and view the CCTV footage. When the plaintiff subsequently came to the bank to view the footage, the second defendant was not present. She was only informed by DW2 that when they viewed the footage with the plaintiff, they did not see the money being discharged from the auto teller machine.

[24] It is the evidence of the second defendant that she never uttered the words stated in paragraph 8 of plaintiff's particulars of claim. She states that she was speaking in the SiSwati language when she called the plaintiff. The second defendant told the Court that she could not have made the said utterances because she knows that ATM glitches happen as they carry out their work; also, it would have been against her training in customer service to have spoken to a customer using the words alleged.

- [25] The second defendant testified that in all her working life at the first defendant, she has never been subjected to a disciplinary hearing nor reprimanded for failing to deal with customer in a professional manner. She states that prior to this incident, she did not know the plaintiff and she is still baffled why the plaintiff would make up such a story against her.
- [26] During cross examination, the second defendant stated that it is the bank's practice to credit customers' accounts before investigations are carried out when there is a complaint such the one from the plaintiff. This, the bank does to obviate inconveniencing the customers through delays since their bank reconciliation reports take some time to prepare.
- [27] During cross examination, the second defendant further conceded that when she viewed the CCTV footage, she did not see the cash being discharged from the ATM when PW1 used the machine even though their reports reflected that the cash came out.
- [28] It was also stated by the second defendant during cross examination that when she called the plaintiff, she had already formed the opinion that the money was discharged by the auto teller machine when it was withdrawn by the plaintiff or her daughter. She denied making the utterances alleged as, in her view, the customer cannot steal her own money. It was her view that plaintiff's money was discharged but taken by another customer who used the ATM after plaintiff's daughter left the ATM after processing a

withdrawal of the money. The second defendant says she watched the footage with Belinda. When the plaintiff came to view the footage, the second defendant was not present.

[29] When the second defendant made the call to the plaintiff, she testified that she did so in the presence of Belinda Dlamini. Belinda heard the conversation and testified that she heard nothing untoward being said by the second defendant during the call to the plaintiff.

### **The Law**

[30] The plaintiff's claim hinges on injury to her dignity and reputation. Plaintiff states further that the amount claimed is based on defamation of her character. The two are not synonymous. In plaintiff's particulars of claim there is only one cause of action: impairment of plaintiff's dignity and reputation. I conclude therefore that plaintiff's reference to defendants having defamed her character was ill-founded and does not require further consideration. It is however relevant to address the issue of the law pertaining defamation in order to distinguish it from the plaintiff's claim.

[31] In an action for defamation the actual words used are the material facts. It is a basic rule of pleading that all material facts must be pleaded. Therefore, in an action for defamation the actual words used, or the part complained of, must be pleaded by setting them out in the particulars of claim. If the words

are in a certain specific language-in this case-SiSwati, the actual words ought to have been set out in SiSwati followed by a literal translation. Failure to comply with this rule of pleading renders the pleading in this matter defective and in the absence of an amendment to cure the defect, the plaintiff cannot obtain judgment for defamation of character on the basis of the pleading as it stands<sup>1</sup>.

[32] Defamation is a type of *iniuria* affecting the *fama* or reputation of the plaintiff. Defamation is a species of *iniuria* affecting the *fama* or reputation of the plaintiff. Put differently, it is an aggression on the *fama* or reputation of the plaintiff<sup>2</sup>. To constitute defamation, the words must impute discredit to the plaintiff or tend to lower her in the estimation of others; or expose her to hatred, contempt or ridicule; or to injure her reputation in her office, trade or profession; or to injure her financial credit. Words which merely injure the feelings or cause annoyance but which in no way reflect on the character or reputation or tend to cause one to be shunned or avoided are not considered to convey a defamatory imputation. Thus it is well settled that words which merely injure the feelings or cause annoyance or anger but which in no way reflect on the character or reputation or tend to cause one to be shunned or avoided are not considered to convey a defamatory imputation<sup>3</sup>. Even if the Court were to take the translation of the words said to have been uttered by the second defendant as correct and in accordance with the law-which is not the case here- the law is trite that words calculated

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<sup>1</sup> *International Tobacco Company of South Africa Ltd v Wolheim & Others* 1953 (2) SA 603.

<sup>2</sup> In his work, *The Roman and the Roman Dutch Law of Injuries* at page 24, De Villiers defines a person's reputation as 'that character for moral or social worth to which he is entitled amongst his fellow men'.

<sup>3</sup> *Gatley on Libel & Slander* 7<sup>th</sup> edition, paragraph 17 at page 40.

to annoy or to injure one's feelings but not reflective of one's character or reputation do not amount to defamation. Such words, just like vulgar abuse, are not likely to lower the reputation of the person to whom it is addressed. On the contrary, among reasonable people, it is more likely that such utterances would lower the reputation of the person who makes it<sup>4</sup>.

[33] The plaintiff says she was in the company of certain people when she was allegedly defamed by the second defendant. Who those people are, the Court has not been told. Why those people were not called to give evidence is also not clear. Even more importantly, what words were allegedly uttered by the second defendant in the SiSwati language- the Court is none the wiser. This is said in the context of a requirement for proving defamation, namely that the words complained of must have been published or publicized to a third party.

[34] The law provides for a cause of action for injury to a person's dignity. This is known as *dignitas* and is a species of *action iniuriarum* which is open to a plaintiff who claims that the defendant has committed an intentional wrongful act which constitutes an impairment of her person, dignity or reputation. Acts which are insulting in the sense that they amount to degrading and humiliating treatment of a person fall not under the head of defamation but of injury to dignity of a person.

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<sup>4</sup> *R v Walton* 1958 (3) SA 693.

[35] *Dignitas* has been said to be concerned with the plaintiff's sense of self-worth. In defining dignity, Melius de Villiers spoke of the in-born right to the tranquil enjoyment of one's peace of mind; and the valued and serene condition in one's social and individual life which is violated when one is subjected to offensive and degrading treatment, or exposed to ill-will, ridicule, disesteem or contempt. The essence of the delict of *dignitas* is insult.

[36] It is trite that plaintiff's dignity is not impaired if the defendant lacked *animus iniuriandi*. *Animus iniuriandi* means the intention to injure<sup>5</sup>.

[37] In plaintiff's particulars of claim, she alleged that she was humiliated and degraded by the words allegedly uttered by the second defendant quoted in paragraph eight of the particulars of claim and suffered damages in respect of impairment of her dignity and reputation<sup>6</sup>.

[38] In order to establish an action of injuries, the plaintiff must establish the following essential requisites: a) an intention on the part of the offender to produce the effect of his or her act; b) an overt act which the person doing it is not legally competent to do; and c) 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<sup>7</sup>.

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<sup>5</sup> *Whittaker v Roos & Bateman* 1912 AD at 124-125.

<sup>6</sup> See paragraph 12 of Plaintiff's Particulars of Claim at page 6 of the Book of Pleadings.

<sup>7</sup> De Villiers on *Injuries*

[39] The important element emphasized on injury or impairment of one's dignity is that the injury must be an act or words of an insulting, degrading or humiliating or ignominious character. Thus, it was held in *Brenner v Botha*<sup>8</sup> that to constitute a verbal injury the words must impair plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment. The injurious words must have been directed at the plaintiff and the words must have the effect of hurting plaintiff's dignity.

[40] In their plea, the defendants deny uttering the words complained of or any words derogatory, insulting or defamatory of the plaintiff.

[41] This, being a civil suit, the burden of proof lies with the plaintiff. To decide in her favour, the Court has to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on a balance of probabilities.

[42] The versions of the disputants herein are irreconcilable. The plaintiff states that the second defendant made the utterances complained of in plaintiff's particulars of claim. The defendant denies ever making those utterances. The

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<sup>8</sup> 1956 (3) SA 257.

question is how should the Court approach the issues so as to make a finding on the disputed issues? In *SFW Group Ltd and Another v Martell Et Cie and Others*<sup>9</sup>, Nianeber JA suggested the following formula:

**‘The technique employed by our Courts in resolving factual disputes of this nature may conveniently be summarized 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’s candour and demeanour; (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 extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version and (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events...’**

[43] The defendant states that when she called the plaintiff to inform her of the reversal of the credit made earlier by the bank in her account, the plaintiff was emotional. The plaintiff is said to have enquired from the second defendant if she meant that plaintiff was a thief. This evidence is not controverted. The defendant says there is no way the plaintiff could have stolen her own money, from her bank account-for that reason, among others the defendant says she could not have made the utterances complained of.

[44] The plaintiff’s case was dented during cross examination when she conceded that the defendant never credited her account with the amount complained of in February 2014; that the manager of the first defendant never apologized

<sup>9</sup> 2003 (1) SA 11 (SCA) at 14H-15E



for the insult allegedly leveled at plaintiff by the second defendant; and that the words allegedly complained of were uttered not in English but in SiSwati. That the plaintiff is said to have been emotional when she was called by the second defendant is uncontroverted; that the plaintiff allegedly asked the second defendant rhetorically if she meant she was a thief is also not disputed.


[45] The case for the defendants is more probable than that of the plaintiff in that: it was not the first time the bank dealt with a problem such as faced by the plaintiff in withdrawing money from the ATM as such there would be no reason to be aggressive and nasty to a customer. The defendants stood to gain nothing accusing a client-of so many years- of theft. In fact, the plaintiff concedes that the branch manager Mr Mavuso apologized for inconvenience caused to her. This is not the behaviour of a bank that is hell bent on humiliating and degrading its client. The fact that the plaintiff is still a customer of the defendant is also telling. It is also inconceivable that the second defendant would accuse the plaintiff of 'theft' of her money-and the second defendant said so much in her evidence. It is more probable that an emotional plaintiff may have interpreted the call made by the second defendant as implying she stole money following the rhetorical question plaintiff allegedly posed to the second defendant about her being a thief.

[46] The second defendant did not know the plaintiff prior to this incident. As a supervisor of her department, trained in customer care and with no history of mistreating clients-it is unlikely that she made the utterances complained of.

[47] It was submitted on behalf of the plaintiff that the second defendant conceded that when she called the plaintiff, she was of the view that the latter had taken the money hence the reversal of the credit. What this submission misses is the fact that the second defendant states in evidence that the basis of the reversal of the credit of plaintiff's bank account was not based on what the CCTV footage revealed in as much as it was based on ATM accounts' reconciliations and reports. This evidence is confirmed by DW2. The second defendant told the Court how, on many occasions bank clients withdrawing money from the ATM would leave the machine before it fully processed the transaction and the assistance the bank gave to clients who found themselves in a difficult position as plaintiff. This evidence was not disputed by the plaintiff.

[48] From the above assessment of evidence, there is however nothing to go by to determine whether subjectively the plaintiff's dignity was impaired. The mere fact that she says so cannot be proof thereof. The plaintiff ought to have provided some explanation of how the alleged utterance is insulting in proof of her claim. This in my view, she did not do.

[49] In the circumstances and for the above reasons I find that no claim has been made for injury to dignity and defamation and accordingly, the claim is dismissed with costs.



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**M. LANGWENYA J.**

For Plaintiff:

Mr M. Motsa

For Defendants:

Mr S. V. Mdladla