IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: 4018/2011

JONATHAN PATRICK BLIGNAUT Plaintiff

and

PROTEA COIN GROUP First Defendant

(ASSETS IN TRANSIT AND ARMED REACTION)

BULELANI LENNOX VANI Second Defendant

Coram: **Chetty J**

Heard: **11 – 13 May 2015**

Delivered: **21 May 2015**

Summary: ***Delict*** *– Defamation – Iniuria – Double action – Whether phrase* ***"bad attitude"*** *defamatory – Assault - Evidence – Probabilities – Action dismissed*

JUDGMENT

Chetty J:-

[1] The plaintiff instituted action against the defendants based on the *actio injuriarum* claiming damages for *iniuria*, defamation and assault. The offending conduct was formulated separately and particularised as –

> "**INIURIA:**
>
> 8. The degrading, humiliating or ignominious treatment and insult of the Plaintiff consisted of:-
>
> 8.1 The Second Defendant waving his hands at the Plaintiff, following the Plaintiff inside the Engen Quick Shop and back to the Plaintiff's vehicle;
>
> 8.2 The Second Defendant telling the Plaintiff that he has "a "s. . . attitude", that the Plaintiff "is difficult and must 'f. . . off', repeatedly using the words 'f off' towards the Plaintiff;
>
> 8.3 The Second Defendant furthermore swearing at the Plaintiff: "I will take you to the toilets and f. . . you up", "f. . . you" and "I will f. . . you up you hear me get out of here";
>
> 8.4 The Second Defendant swearing at the Plaintiff 'f . . . you, you ma se p. . . " and "f . . . you";
>
> 8.5 Acting as set out in paragraph 11 herein below.
>
> **DEFAMATION**
>
> 11. The aforesaid degrading, humiliating or ignominious treatment and insult of the Plaintiff, as particularised in paragraph 8 above, furthermore constituted wrongful defamation of the Plaintiff in that:-

11.1 It was directed at the Plaintiff at the Engen Service Station Forecourt, Humerail, Port Elizabeth, in the presence of other members of the public including persons such as the petrol attendants, including persons known to the Plaintiff as Alfred Blok and Vandre Nel, as well as other Engen employees and clients at the said Service Station.

11.2 It violated the Plaintiff's reputation and fama and evidenced the Second Defendant's contempt of the Plaintiff, having conveyed that the Plaintiff is rude and should be regarded with contempt and disrespect. In the premises the Plaintiff suffered damages in the amount of R150,000.00, which amount the First Defendant, alternatively the Second Defendant, despite demand, failed, refused and/or neglected to pay to the Plaintiff.

ASSAULT:

12. The assault of the Plaintiff, that took place in public and within sight of members of the public consisted of:-

12.1 The Second Defendant acting throughout in a threatening manner towards the Plaintiff and having verbally threatened the Plaintiff;

12.2 The Second Defendant having approached the Plaintiff from behind with the intent to assault the Plaintiff and only being prevented from doing so due to the intervention of an Engen petrol attendant who restrained him;

12.3 The Second Defendant having followed the Plaintiff whilst holding his R5 Automatic Assault Rifle in his hands;

12.4. The Second Defendant, when having moved a distance of about 10 metres from the Plaintiff, crouching on his one knee and aimed the R5 Automatic Assault Rifle at the Plaintiff as if to shoot him;

12.5 The Second Defendant moving towards the Plaintiff's vehicle with the R5 Automatic Assault Rifle in his hands and when approximately one metre from where the Plaintiff was seated in his vehicle, aiming the said rifle at the Plaintiff as if to shoot him."

[2] Notwithstanding the compartmentalisation of the *iniuria* and defamation components of the plaintiff's claim in the particulars, a composite amount of R150 000, 00 for damages was sought thereanent. Suffice it to say that the formulation of the claims amount to a splitting of causes of action. In respect of the assault, the plaintiff claimed general damages in the sum of R220 000, 00 and R39 029, 54 and R17 160, 00 for past and future medical expenses respectively. At the inception of the trial, and at the behest of the parties, I directed that the merits of the action be determined separately from quantum.

[3] The particulars of claim ascribed the actionable conduct to the second defendant and the sartorial reference to him being attired in ***"civilian clothes"***, was, as I shall in due course elaborate upon, deliberate and designed to provide justification for the plaintiff's conduct. Thus, in order to corroborate the plaintiff's version, his counsel, Ms *Potgieter*, without demure from Mr *Venter*, sought to

introduce closed circuit television footage (the footage)[1] of the events which unfolded at the Engen Garage on the morning of 12 October 2011. The footage, so I was informed, was intended as an aide memoire given the effluxion of time. During the adduction of the *viva voce* testimony at the trial however, it soon became apparent that the footage, rather than memory, informed the narrative to the extent that during the hearing, Ms *Potgieter* sought to importune the second defendant to admit a scenario which she contended the footage clearly established. She adopted a similar stance during argument which elicited a riposte from Mr *Venter* that perhaps the parties had been observing different footages. Suffice it to say that whist the footage is clear in respect of certain events, in others it is less clear, and blurred, thereby providing fertile ground for imaginative postulations.

[4] It is common cause that the plaintiff entered the Engen convenience store (the shop) at approximately 09:29 a.m. He testified that he parked his vehicle, (the Caravelle) as was his custom, right in front of the entrance of the shop and entered to purchase his newspapers and a bottle of water. Having done so, he exited the shop, got into the Caravelle and whilst in the process of driving off, the second defendant knocked on his passenger window. When he opened it, the second defendant admonished him saying that he ***"had a s. . . attitude"*** and should go and 'f. . .' himself. Affronted thereby, he alighted from his vehicle and remonstrated with the second defendant saying that he could not talk to him in that fashion. The second defendant's account of this initial encounter between himself and the plaintiff is substantially different. His version was that prior to the plaintiff alighting from his

[1] Admitted in evidence as exhibit 1.

vehicle he had motioned to him to move the vehicle. When he failed to do so and instead entered the shop, the plaintiff discourteously rebuffed him using expletives.

[5] The footage shows the Caravelle stopping in front of the shop. Shortly thereafter the second defendant enters from the frame, looking in the direction of the driver of the Caravelle (the plaintiff), raising his left arm horizontally and motioning to the plaintiff to move his vehicle. The footage further shows the plaintiff dismounting the Caravelle and an exchange between the plaintiff and the second defendant immediately prior to him entering the shop. During his evidence in chief, and, notwithstanding being referred to the footage, he steadfastly maintained that, save for the second defendant beckoning him to move his vehicle, no words were uttered between them. Under cross-examination the plaintiff initially denied that there was any exchange between himself and the second defendant as pleaded by the defendants, but, as the cross-examination progressed, he recanted from his earlier position and conceded that whilst there may have been an exchange of words between himself and the second defendant, he could no longer remember the import thereof. The concession was not voluntary but impelled by the footage depicting a face-off between himself and the second defendant. I accept that there was an exchange of words between the plaintiff and the second defendant.

[6] When regard is had to the statement which the plaintiff made to a member of the South African Police Services a few hours later, the untruthfulness of the denial tendered in his testimony in chief is readily apparent. Therein he admitted that after the second defendant beckoned him to move his vehicle, ***". . . it was explained to***

me by the suspect that their vehicle would park there where I was standing parking". Moreover the statement records two reasons for ignoring the request to move the vehicle, firstly, that he did not see the necessity of moving the vehicle, and secondly, that the second defendant ***"was dressed in a khaki shirt and pants and what looked like a safari hat. I didn't know who this suspect was or what his purpose was at the store"***. As adumbrated hereinbefore, the particulars of claim described the second defendant as being dressed in civilian clothes.

[7] The justification advanced by the plaintiff for refusing to move the Caravelle is contrived. He could have been under no illusion that the second defendant was a civilian. The latter's evidence that he was dressed in a khaki uniform, over which he wore a black bullet proof vest and a black top is corroborated by the footage. It furthermore depicts - a gun belt strung over his shoulders from which a LMB semi-automatic rifle is suspended, a large black pistol holster strapped to the side of his right lower limb, a prominent insignia of the first defendant clearly visible on the second defendant's right chest. Visually, the second defendant was not a mere civilian. He was in uniform, armed to the hilt and the plaintiff's evidence that the second defendant presented as a civilian is blatantly untrue.

[8] Furthermore, the first defendant's crewman, Mr *Richard Jantjies'* (*Jantjies*), evidence went unchallenged. He testified that when their armoured vehicle arrived at the garage, it was compelled to stop behind the Caravelle which impeded them from parking the armoured vehicle where they were accustomed to. *Ex facie* the footage, the armoured vehicle is clearly marked and it would have been obvious to all but the

visually challenged what its purpose at the shop was. In argument however, Ms *Potgieter*, with scant regard for both the footage and the testimony of *Jantjies*, had the temerity to state that the Caravelle did not obstruct the armoured vehicle. Later footage in fact depicts the armoured vehicle reversing, and stopping to the left of the entrance to the shop where the cash containers retrieved from the garage by *Jantjies* were deposited in its vault. During the execution of that manoeuvre, the Caravelle remained in its original position and clearly obstructed the armoured vehicle. These objective factors consequently compel the conclusion that the plaintiff's evidence that, the second defendant was a civilian, as such he was unaware of what his purpose at the shop was, he did not impede the armoured vehicle and he did not use offensive language to the second defendant is demonstrably false.

[9] The plaintiff's untruthfulness regarding the initial encounter with the second defendant permeates the entire body of his evidence. His testimony concerning the words allegedly uttered by the second defendant when he approached the Caravelle after he exited the shop is directly contradicted by his own witness, *Alfred Blok* (*Blok*), who corroborated the second defendant that he (i.e. the second defendant) merely said to the plaintiff that he had a bad attitude. This innocuous statement however precipitated an unfortunate chain of events.

[10] The plaintiff's evidence apropos the utterances of the second defendant after he had alighted from his vehicle on the second occasion is again directly contradicted by *Blok*. I interpolate to say that the plaintiff's evidence was that *Blok* was in close proximity to him throughout this period. *Blok* however steadfastly

maintained that the second defendant merely said that he was not afraid of the plaintiff, that he had a bad attitude and that he was a “m . . .r f. . . r”. In his particulars of claim, the plaintiff alleged that the threat implicit in the statement that he would be taken to the toilets and beaten up, amounted to an assault and instilled a belief in him that he would be assaulted. The second defendant denied having uttered any such veiled threat and his evidence that he did not utter the words attributed to him in fact finds corroboration in *Blok’s* testimony. *Blok* conceded that had these words been uttered he would have heard it given his proximity to the plaintiff and the second defendant.

[11] On a conspectus of the evidence and in particular the conflict between him and *Blok*, I have no hesitation in rejecting the plaintiff’s version. Ms *Potgieter’s* submission that the footage depicts the second defendant as being ***“out of control”*** in comparison to a calm and collected plaintiff is, to say the least, astonishing. What the footage in fact shows is a retreating second defendant being followed by a wildly gesticulating plaintiff. Under cross-examination the second defendant readily conceded that in consequence of being taunted by the plaintiff, he lost his temper, removed the rifle from its belt, placed it in the rear of the armoured vehicle and invited the plaintiff to act in accordance with his threat. Such a reaction clearly does not amount to an assault or a threat. The probabilities furthermore clearly favour the second defendant’s version. Why else would he, on the common cause facts, have removed his rifle if the plaintiff had not challenged him? The answer is patently clear – he responded, albeit gratuitously, given his function to ensure the safety of Jantjies, to the provocative conduct of the plaintiff. His evidence that he thereafter

realised the folly of his reaction, desisted and returned to the armoured vehicle is corroborated by the footage.

[12] The plaintiff's evidence concerning this episode of the confrontation is furthermore at variance with his pleaded case where, under the assault rubric, he alleged that the second defendant followed him ***"whilst holding his R5 automatic assault rifle in the air"***. Neither the footage, nor the plaintiff's *viva voce* testimony or *Blok* corroborate this averment. I have no hesitation in accepting the second defendant's account of the interaction between himself and the plaintiff. He was, contrary to the submission made by Ms *Potgieter*, an impressive witness whose evidence moreover accords with the probabilities.

[13] The plaintiff's evidence concerning the pointing of the rifle is equally contrived. In his particulars of claim he alleged that: -

> "12.4. The Second Defendant, when having moved a distance of about 10 metres from the Plaintiff, crouching on his one knee and aimed the R5 Automatic Assault Rifle at the Plaintiff as if to shoot him;
>
> 12.5 The Second Defendant moving towards the Plaintiff's vehicle with the R5 Automatic Assault Rifle in his hands and when approximately one metre from where the Plaintiff was seated in his vehicle, aiming the said rifle at the Plaintiff as if to shoot him."

[14] In argument, Ms *Potgieter's* submission that the footage unequivocally substantiates the plaintiff's testimony hereanent was, as adumbrated earlier, met with the riposte from Mr *Venter* that he and Ms *Potgieter* must have observed totally different footage. Objectively viewed, the footage does not corroborate the plaintiff's version that the second defendant either pointed the rifle at him or took aim at him. His evidence hereanent is, in conformity with his earlier testimony, punctuated with deception. On a conspectus of the evidence adduced, I am satisfied that the plaintiff's evidence is contrived and I unreservedly accept the second defendant's version of events.

[15] The remark, admittedly made by the second defendant, that the plaintiff had a bad attitude, is clearly not defamatory. A reasonable person of ordinary intelligence would not have regarded it as such. As Harms J.A. remarked in ***Le Roux and Others v Dey***[2]:-

> "[8] A publication is defamatory if it has the 'tendency' or is calculated to undermine the status, good name or reputation of the plaintiff. It is necessary to emphasise this because it is an aspect that is neglected in textbook definitions of defamation because it is usually said that something can only be defamatory if it causes the plaintiff's reputation to be impaired. That is not the case, as Neethling explains with reference to authority:
>
> 'It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was

[2] 2010 (4) SA 210 SCA at 213

> actually injured, is almost completely ignored in the evaluation of wrongfulness of defamation. In fact, generally a witness may not even be asked how he understood the words or behaviour. In addition, it is required only that the words or behaviour was calculated or had the tendency or propensity to defame, and not that the defamation actually occurred. In short, probability of injury rather than actual injury is at issue. It can be concluded, therefore, that the courts are not at all interested in whether others' esteem for the person concerned was in fact lowered, but only, seen objectively, in whether, in the opinion of the reasonable person, the esteem which the person enjoyed was adversely affected. If so, it is simply accepted that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense.'"

Objectively, the plaintiff's esteem would not have been adversely affected by the innocuous statement that he had a bad attitude. His disparagement of the second defendant provided the catalyst for the rebuke, which is clearly not actionable.

[16] In the result the following order will issue: -

The plaintiff's action is dismissed with costs.

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D. CHETTY

JUDGE OF THE HIGH COURT

Obo the Plaintiff:	*Adv Potgieter*
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Obo the Defendant:	*Adv Venter*
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