



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

12/2/2017

DATE

eices

SIGNATURE

Case No. A 715/16

In the matter between:

EDWARD DE LANGE

Appellant

and

M. S STEMELA

Respondent

JUDGMENT

MILLAR AJ

- [1] This is an appeal from the Equality Court for the district of Tshwane held at Pretoria.
- [2] The appellant appeals against the whole of the judgment and the order of the Learned Magistrate Maluleke who on 11 August 2016 dismissed the appellants complaint brought in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 "the Act".
- [3] At the commencement of the hearing the appellant applied for condonation for the late filing of the application for a date for the hearing of this appeal and for the filing of further documents. The application was not opposed as there was no appearance for the respondent and condonation was granted.
- [4] The appellant is an attorney who represented a client in an action brought in the Magistrates Court against the respondent. The respondent is a church minister. The appellant's client had sued the respondent for R300,00 and costs. A judgment was granted by default. The capital of R300,00 was subsequently paid, leaving an outstanding amount for legal costs of R500,00.
- [5] This is what caused the respondent to go to the offices of the appellant on 15 March 2016.

[6] What occurred on that day and what was alleged to have been said between the parties subsequently led to the appellant lodging a complaint at the Equality Court against the respondent. Complaints of this nature are commenced and lodged by completing the prescribed form¹.

[7] The particulars of the claim and the relief sought are to be completed in Part E of the form - The complaint that was lodged gave the following particulars -

"The nature of the complaint which was to also reflect full details of the complaint, the date of the incident, the particulars of possible witnesses as well as the rights that had been violated and the reasons for the belief a right had been violated was completed as follows - "Please see annexed affidavit. Right to dignity, person, equality, privacy, property due to assault and hate speech"

How has it affected you? was completed to state "Extremely traumatizing. Body injured. To supply copy of medical records"

Documents: Are there any documents to substantiate your complaint? The response was "Medical records and expenses. See annexed and to be obtained."

¹ see s 20 (2) read together with s 30 (b) of the Act

Relief sought: *"Unconditional Apology. R100,000.00 damages. Medical expenses"*

- [8] Particulars of the complaint were set out in an affidavit by the appellant. The respondent filed an answering affidavit and the appellant a reply. The respondent subsequently filed a further affidavit. It suffices to state that both parties had sufficient opportunity to place their respective cases and evidence before the court.
- [9] The appellant alleged that the respondent had arrived at his office at approximately 15h15 on 15 March 2016 and had insisted on being furnished with a *"paid up letter"* indicating that all amounts due by him in respect of capital, costs and interest had been paid. A listing with the credit bureau had caused the respondent to go to the appellant's office to request this. The appellant indicated that he could not furnish the letter as the costs had not been paid and also that the respondent could not just arrive at his office and expect to be seen. The appellant showed the respondent his computer diary which showed that he had appointments and was fully engaged until 17 March 2016². The respondent was not prepared to come back on a later date and insisted on receiving his letter there and then.

² the copy of the electronic diary forming part of the record is illegible - see annexure EDL 5 page 28

[10] The appellant then asked the respondent to leave and it was then that the respondent is alleged to have said to the appellant that:

- he did not want to assist him because he, the appellant was a white person and the respondent was a black person;
- he was a racist;
- he would do everything in his power to close his business down as it was a white owned business, and
- the respondent was tired of being oppressed as being a black man in South Africa by white people such as the appellant.

[11] The appellant then apparently tried to call the South African Police Services but was unsuccessful. The screenshot from his cellular telephone³ shows that he made this attempt at 15h05 but the date of the attempt does not appear from the document. The attempt to call the Police apparently triggered a reaction from the respondent who then leant over the desk towards the appellant and said that he wanted his *"paid up letter"* and would not leave the office until he had been given it or *"his body was in a coffin"*

[12] The appellant who stated that he felt scared then moved around his desk towards the respondent. It is at this point that the respondent is alleged to have

³ Annexure EDL 6 page 29

moved in front of him and struck him on the left side of the chest. He then fell backwards and injured his right elbow in the process.

[13] In regard to this event the appellant stated:

*"As a result of the assault on me I fell backwards, only managing to stop my fall with my right arm which was injured in the process. I must mention that I suffer from a permanent medical condition in my right elbow due to a previous accident, that I have minimal strength in this arm and must avoid any injury to it. I also have a temporary medical condition in my left leg and cannot currently walk properly "*⁴

[14] Notwithstanding the lack of strength in the right arm, limited mobility with the left leg and what was later stated to be a fractured rib, the appellant managed to push the respondent over and after he stood up was able to take him by the collar and force him out of the office and ultimately off the property.⁵ . During this process the appellant said that the respondent had been *"shouting and swearing and repeating what he had previously said. "*⁶

[15] The altercation continued with the respondent standing just inside the gate. The respondent then called the South African Police Services. It was at this time that

⁴ see paragraph 13.3 on page 10

⁵ see paragraphs 14.3, 15.1 and 15.2 page 11

⁶ see paragraphs 15.1 page 11

a certain Mr Booysen is alleged to have overheard the altercation, and called for "*backup*" from private emergency responders. Mr Booysen is alleged to have indicated his willingness to testify for the appellant and also about a "*racial attack on him*" by the respondent⁷. The Police then arrived and the altercation ended.

[16] The respondent for his part did not place in issue that he had gone to the office of the appellant on the day in question. He specifically denied making the statements complained of or that there had been a scuffle between them. No affidavit by Mr Booysen corroborating either the version of the appellant or the alleged attack on him by the respondent was placed before the court.

[17] The version of the appellant is fraught with difficulties - notwithstanding the appellants claimed physical injuries and limitations, he was able to escort the respondent "*by the collar*"⁸ off the premises. Furthermore the medical report⁹ upon which the appellant sought to rely was based only upon a clinical examination conducted two days after the incident.

[18] The medical practitioner did not find any visible signs of the assault which the appellant complained of and did not send the appellant for any radiological examinations to confirm his clinical diagnosis of a fractured rib.

⁷ paragraph 17.2 page 12

⁸ paragraph 14.3 on page 11

⁹ page 41

- [19] The conclusions of the doctor in paragraph 8 of the form J88 completed by him simply do not follow from the clinical findings and are not consistent with the injuries described by the appellant. In regard to the relevant medical history the Doctor recorded "*No chronic illnesses of note*" ¹⁰. Noticeably absent is any reference to the right elbow which the appellant stated he had injured¹¹ or to the weakness of the left leg.
- [20] The altercation is alleged to have consisted of both verbal and physical elements - the verbal elements being the uttering of the words as set out above. It is those utterances which formed the basis of the complaint lodged. The appellant sought however to rely on the injuries and statements to pursue a claim for damages and also for medical expenses.
- [21] The only medical record that was furnished was the J88 and no further medical records or proof of any medical expenses were placed before the court.
- [22] When dealing with motion proceedings such as in the present case, and where a material dispute of fact arises on the papers, it has been held that the test to be

¹⁰ paragraph 11.1 on page 41

¹¹ paragraph 13.3 on page 10

applied is that set out in *STELLENBOSCH FARMERS WINERY LTD v STELLENVALE WINERY (PTY) LTD*¹² where the court held that :

"It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order"

[23] In the present matter there is a clearly material dispute of fact in regard to what was said and what transpired during the altercation.

[24] In the absence of any evidence from Mr Booysen to corroborate the version of the appellant and the inconsistencies between the version of the appellant and the medical report, together with the respondents denial of the utterances and scuffle, the appellant is not able to establish and the court cannot find that the statements complained of were in fact uttered on the papers before it.

[25] Counsel for the appellant argued that the fact that the respondent had answered a number of the allegations in the founding affidavit with the word "Noted" meant that those allegations had to be taken to be admitted. The argument was

¹² 1957 (4) SA 234 (C) at 235 E-G see also: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) @ 623 I to 624 A

advanced that the answer had to contain clear and unequivocal denials or other positive averments but in the absence of these the answer given was tantamount to an admission. Counsel submitted in response to a question from the bench that it made no difference that the respondent was an unrepresented lay person.

[26] The submissions are unpersuasive. The affidavits in application proceedings *"...constitute not only the evidence but also the pleadings and therefore, while it is not necessary that the affidavits 'should set out a formal declaration or [an answering] affidavit set out a formal plea, these documents should contain, in the evidence they set out, all that would have been necessary in a trial"*¹³.

[27] The use by the respondent of the word "Noted" did not detract from his denial of the essential allegations that he had had uttered the statements complained of or that he had assaulted the appellant. He was clear and unequivocal in his denial of this and his use of the word "Noted" certainly did not amount to an admission. Indeed the ordinary meaning of the word is *"Specially noticed, observed or marked"*¹⁴- wholly inconsistent with the meaning contended for by Counsel.

[28] In the present case where the dispute could only be adjudicated through the leading of viva voce evidence as to what actually transpired and was said, the

¹³ Civil Practice of The High Courts Vol. 1 5th Ed 2009 at page 439 and the authorities referred to therein

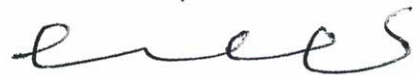
¹⁴ Shorter Oxford English Dictionary 5th Ed 2002 at page 1946

Learned Magistrate was correct in finding that there was no evidence of discrimination, hate speech and harassment against the appellant.

[29] In the circumstances I make the following order:

The appeal is dismissed with costs.

I AGREE,



**A MILLAR
ACTING JUDGE OF THE HIGH COURT**



**N. MALI
JUDGE OF THE HIGH COURT**