REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 597/05
Reportable

In the matter between:

MERVYN DENDY **APPELLANT**

and

UNIVERSITY OF THE WITWATERSRAND **FIRST RESPONDENT**
NEIL GARROD **SECOND RESPONDENT**
ANDREW ST QUINTIN SKEEN **THIRD RESPONDENT**

CORAM: SCOTT, FARLAM, VAN HEERDEN, JAFTA et PONNAN JJA
HEARD: 12 MARCH 2007

DELIVERED: 28 MARCH 2007

SUMMARY: Constitution – Delict – *Injuria* – Alleged violation of plaintiff's constitutional right to dignity – conduct complained of not such as to violate dignity of reasonable person – unnecessary to develop common law in terms of s 39 (2) of Constitution.

Neutral citation: This judgment may be referred to as *Dendy v University of the Witwatersrand* [2007] SCA 30 (RSA).

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Boruchowitz J, sitting in the Johannesburg High Court, in which exceptions to two claims brought by the appellant against the first respondent, the University of the Witwatersrand, were upheld. The judgment of the court *a quo* has been reported: see *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W).

[2] The claims against which the exceptions were successfully taken concern alleged injuries to the appellant's right to dignity in terms of s 10 of the Constitution, and/or at common law. The first claim was said to have arisen from the manner in which the appellant's application for appointment to a chair of law at the university was dealt with, in that, so it was alleged, various procedural irregularities took place. The appellant contended that these irregularities constituted a violation of certain of his rights as entrenched in the Bill of Rights contained in chapter 2 of the Constitution. Details of the alleged violation are set out in paragraphs 2.12 and 2.13 of the appellant's particulars of claim, which are quoted *in extenso* in para 8 of the judgment of the court *a quo.* The second claim concerned an alleged failure by the university or its agents to furnish the appellant with the reasons that his application for a chair of law was unsuccessful and with a copy of the minutes of the meeting of the committee which considered his application. This failure, so it was contended, also constituted a wrongful violation of certain of the appellant's constitutional rights. Details of this alleged violation are set out in paragraph 3.24 of the appellant's particulars of claim, which is quoted in para 51 of the judgment of the court *a quo.* In both claims it was alleged that as a result of conduct complained of the appellant 'felt insulted and humiliated . . . and a reasonable person in the position of the [appellant] would have felt so insulted and humiliated.'

[3] Exception was taken to both claims on the ground that the facts pleaded in support of the claims were insufficient to disclose a cause of action, not reasonably capable of injuring the appellant's dignity or causing him insult or humiliation and not sufficient to justify a remedy in damages.

[4] The court *a quo,* in a careful and comprehensive judgment, rejected

the appellant's submission that the common law had to be developed in terms of s 39(2) of the Constitution because it failed to promote the spirit, purport and objects of the Bill of Rights.

[5] The learned judge held (at para 27) that the common law position applicable to this case had been authoritatively laid down by Melius de Villiers in *The Roman and Roman Dutch Law of Injuries* (1899) p 27 in a passage which was approved by the Transvaal Supreme Court in 1908 (*Rex v Umfaan* 1908 TS 62 at 66) and by this court on a number of occasions, culminating in *Delange v Costa* 1989 (2) SA 857 (A) at 860I-861A. The passage in question reads as follows:

'(T)here are three essential requisites to establish an action of injury. They are as follows:-

I. An intention on the part of the offender to produce the effect of his 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 another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other."

[6] The judge continued (at para 28):

'Prior to *Delange* there was judicial controversy as to whether injury to dignity must be tested subjectively or objectively. Compare *Walker v Van Wezel* [1940 WLD 66 at 71] and *Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders* [1976 (3) SA 1 (A) at 12]. In *Delange* the Court recognized the need for objective limits to be placed on the action for injury to dignity in order to keep it within manageable proportions. It accepted that an entirely subjective test of dignity had the potential for opening the floodgates to successful actions by hypersensitive persons who felt insulted by statements or conduct which would not insult a person of ordinary sensibilities. And so it fashioned what is in effect a hybrid test, one that is both subjective and objective in nature. To be considered a wrongful infringement of dignity, the objectionable behaviour must be insulting from both a subjective and objective point of view, that is, not only must the plaintiff feel subjectively insulted but the behaviour, seen objectively, must also be of an insulting nature. In the assessment of the latter, the legal convictions of the community *(boni mores)* or the notional understanding and reaction of a person of ordinary intelligence and sensibilities are of importance [Neethling's *Law of Personality* at 194-5]. In *Delange* Smalberger JA summarized the position as follows [at 862A-G]:

"(B)ecause proof that the subjective feelings of an individual have been wounded, and his *dignitas* thereby impaired, is necessary before an action for damages for *injuria* can succeed, the concept of *dignitas* is a subjective one. But before that stage is reached it is necessary to

establish that there was a wrongful act. Unless there was such an act intention becomes irrelevant as does the question whether subjectively the aggrieved person's dignity was impaired. I do not understand the judgment of Jansen JA to suggest that all that is required for a successful action for damages for *injuria* are words uttered *animo injuriandi* towards another which offend such person's subjective sensitivities, and in that sense impair his *dignitas.* It this were so it could lead to the courts being inundated with a multiplicity of trivial actions by hypersensitive persons. (See Burchell 1977 *SALJ* at 7-8; Neethling *Persoonlikheidsreg* 2nd ed at 193.) According to *Melius de Villiers op cit* at 37,

'(so) long as an act is outwardly lawful it cannot be an injury, with whatever intention or motive it may have been committed. Even when a person entertaining an injurious intention believes an act which he commits to be injurious when it really is not such, his intention will not affect the character of the act.'

Likewise the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.

In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the "algemene redelikheidsmaatstaf" *(Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1168C). This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria. (Walker v Van Wezel (supra)* at 68.)*'*

[7] The learned judge held (at para 29) that the legal position as laid down by this court in *Delange v Costa* was consistent with the Constitution and needed no adaptation to bring it into harmony therewith.

[8] Applying the law as laid down in *Delange's* case he held (at para 32) that the only 'overt' act complained of was the decision not to appoint the appellant to a chair of law and said that there was

'nothing inherent in the decision not to appoint the [appellant] which could conceivably be characterised as being of an offensive or insulting character. Objectively considered the defects of a procedural nature about which he complains cannot be characterised as offensive or insulting when tested against the objective criterion of reasonableness. Moreover the decision in question was *"outwardly lawful"*.'

[9] The learned judge also held (at para 33) that the appellant's argument overlooked the principle affirmed in *Delange* that only conduct that is offensive

or insulting can form the basis of an action for *injuria.* He held (at para 34) that, while the constitutional violations alleged may be wrongful, the conduct upon which they were premised was not of an overt character.

[10] The judge also upheld a contention advanced before him by counsel for the university to the effect that the plaintiff was not entitled to bring an action for damages to obtain redress for the violations of which he complained because he had had at his disposal the remedy of review. He said (at para 35):

'The conduct of the Selection Committee, if proved, would have been reviewable under the common law and the Constitution [footnote omitted]. The setting aside of the decision of the Selection Committee would, in my view, have constituted sufficient vindication of the rights that had been infringed, and would in large measure have assuaged the plaintiff's wounded feelings.'

[11] His reasons for upholding the exception to Claim B are set out in paras 49 to 59 of his judgment. He held (at para 54) that the only 'overt act' complained of was the refusal to furnish the appellant with the reasons for his non-appointment and copies of the minutes. This refusal was not of an offensive or insulting character and an application of the principles in *Delange* thus led on this claim also to the upholding of the exception. Here also he held (at para 56) that another reason for upholding the exception was the fact that there were effective alternative remedies at the appellant's disposal, with the result that he had no right of action in damages by reason of the violation complained of.

[12] The appellant advanced a number of wide-ranging arguments in his submissions before this court, most of which he had advanced before the court *a quo* and which are summarized in its judgment.

[13] Among the arguments advanced was the contention that the reliance by the court *a quo* on the fact that the decision of the selection committee was 'outwardly lawful' and not offensive or insulting was incorrect. He submitted in this regard that this doctrine of the common law, which was affirmed in *Delange's* case, required development and modification in terms of s 39(2) of

the Constitution to bring it in line with the increased importance accorded under the Constitution to human dignity. He also contended that the court *a quo* had erred in holding that the remedy in damages was not available to him and that he should instead have instituted review proceedings in respect of Claims A and B or, in the case of Claim B, brought an application for access to the reasons for the committee's decision under ss 32(1) and 33(2) of the Constitution. In this regard he pointed out that Boruchowitz J (at para 45 of his judgment) had said that '[a] successful review or the grant of interdictory relief obliging [the university] to furnish reasons would go a long way to assuage his wounded feelings and at the same time serve to vindicate the infringement of his fundamental rights.' In this regard he submitted that, even if the decision of the selection committee were set aside on review and the university ordered to give him the reasons and the minutes, this would not have the effect of erasing the hurt, humiliation and insult suffered when the violations took place.

[14] I am satisfied that the two claims under consideration cannot succeed for a reason which renders it unnecessary to consider the correctness of these submissions. I shall assume (without deciding) that these submissions are correct.

[15] Although as pointed out by the Constitutional Court (in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 28) - '(d)ignity is a difficult concept to capture in precise terms'[1], it is clear, as was pointed out by the court *a quo* (at para 14 of its judgment) that '(f)or present purposes . . . there is little difference between the right to dignity as it is comprehended under the Constitution and its common-law counterpart.' That is because what the appellant is claiming is an award of damages to assuage his wounded feelings arising from the insult and humiliation he suffered as a result of the procedural irregularities of which he

[1] See also Stuart Woolman, 'Dignity' in Woolman *et al Constitutional Law of South Africa* 2 ed Original Service, paras 36.2 and 36.3; Johann Neethling, 'Die betekenis en beskerming van die eer, *dignitas* en menswaardigheid in gemeenregtelike en grondwetlike sin' in C Nagel (ed) *Gedenkbundel vir JMT Labuschagne* 85 and Gay Moon and Robin Allen QC, 'Dignity Discourse in Discrimination Law. A Better Route to Equality?' [2006] *EHRLR* 610.

complains and the refusal to give him the reasons for the committee's decision and the minutes of its meeting.

[16] Although, as I have said, the appellant submitted that part of the *ratio* of the *Delange* decision is no longer good law, he accepted as still valid the double requirement recognised in *Delange* that the conduct complained of must not only be insulting from a subjective point of view but must also be insulting when viewed objectively. That is why he pleaded that a reasonable person in his position would have felt insulted and humiliated by the conduct of one or more of the members of the selection committee and of those officials of the university who refused to give him the reasons for the committee's decision and the minutes.

[17] As this is an exception the court has to accept the correctness of the facts pleaded. This means, amongst other things, that it must be accepted that the appellant did feel insulted and humiliated as a result of the conduct complained of in Claims A and B. But this court is able, at this stage already, to decide whether a reasonable person in the appellant's position would have felt insulted and humiliated thereby. The appellant emphasised in argument before us that his claims were not based on his failure to be appointed to a chair in law, but rather on the manner in which the decision not to appoint him was arrived at and the subsequent refusal to give him the reasons and minutes he asked for. I can understand that he must have been disappointed and distressed when he learnt that he had not been appointed. But, as I have said, he does not claim damages because of such feelings of disappointment and distress, nor could he.

[18] The court must also accept for the purposes of deciding the exception that the irregularities complained of took place and that at some stage the appellant became aware of them. (He could not have felt insulted and humiliated until he became aware of the irregularities.) In my opinion the reaction of a reasonable person in the position of the appellant who became aware of the manner in which the decision not to appoint him had been arrived at and that that decision could accordingly be set aside on review in

consequence thereof would not have had feelings of insult and humiliation but rather feelings of elation and relief. The same applies in relation to the refusal of the reasons and the minutes. A reasonable person in the position of the appellant would have realised that the refusal was not sustainable and that the university would, if taken to court, be ordered to provide the reasons and minutes. Here again, the reasonable person's reaction would not have been one of insult and humiliation.

[19] As feelings of insult and humiliation were *facta probanda* on both Claims A and B it follows, in my view, for the reasons I have given that both claims fail to disclose a cause of action. It follows that the appeal must be dismissed with costs.

[20] The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING

SCOTT	JA
VAN HEERDEN	JA
JAFTA	JA
PONNAN	JA

PONNAN JA

[21] I have had the benefit of reading the judgment of my Brother Farlam with which I am in agreement. A further aspect that I wish to address and to which I now turn, is the contention by the appellant that the court is obliged by the Constitution to develop the common law so as to give a person in his position a claim for damages for breach of his constitutionally entrenched

rights. According to the appellant, the common law should be developed in order to render the *actio injuriarum* available to a natural person if the defendant wrongfully and intentionally violates one or more of the plaintiff's constitutionally entrenched rights in such a manner as to cause the plaintiff to suffer hurt, humiliation or insult in circumstances in which a reasonable person in the plaintiff's position would likewise feel hurt, humiliated or insulted. This development would then, so the appellant asserts, enable such a plaintiff to recover from the defendant a solatium in the form of monetary compensation for the hurt, humiliation or insult thus suffered by him or her.

[22] That courts are enjoined to develop the common law, if this is necessary, is beyond dispute. That power derives from sections 8(3) and 173 of the Constitution. Section 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights' (*S v Thebus* 2003 (6) SA 505 (CC) at para 25). This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes (*Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 49). The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the section 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 55). (See also *City of Tshwane Metropolitan Municipality v RPM*

Bricks (Pty) Ltd [2007] SCA 28 (RSA) para 20.)

[23] A court, faced with such a task, is obliged to undertake a two-stage enquiry. First, it should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent. If the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. (See *S v Thebus* at para 26.)

[24] An integral part of the first enquiry, it seems to me, is to enquire in any given matter whether the common law is deficient, and, if so, in what respect. The appellant is in essence a disgruntled applicant for promotion. He complains of a range of procedural irregularities in the assessment of his candidacy, but not of the resultant decision. His further complaint relates to the failure of the University to furnish him with reasons for his non-appointment or to supply him with copies of the minutes of the meeting at which the decision was taken. Those complaints could have been vindicated respectively by the remedies of review or a relatively simple application to compel production of the documentation and the reasons sought. Those remedies were available to the appellant and on his own version he was aware of them, yet he chose to forego them. Instead he seeks to fashion a novel claim, which he contends is mandated by the court's obligation to develop the common law in terms of s 39(2) of the Constitution. It bears noting that the novelty is entirely self–created, the appellant having consciously chosen to eschew a range of legal remedies that have

traditionally served to vindicate the complaints encountered here. Those remedies in one form or another were available to the appellant at all stages of the process. The common law, which has not been shown to be wanting, was therefore broad enough to provide the appropriate relief in this case. The appellant elected instead to saddle what has proven to be an unruly horse. It therefore in this instance could hardly be contended that the common law was deficient. Much less, in any specific respect. It follows in my view that the first postulated enquiry must yield a negative response. In any event, in his formulation of the development contended for, the appellant accepts that the alleged violation of a plaintiff's constitutionally entrenched rights must be hurtful, humiliating or insulting from both an objective and a subjective standpoint. Like Farlam JA, I am of the view that the appellant fails at the objective threshold. He thus fails to bring himself within the ambit of his own formulation of the development contended for. It therefore follows that this issue warrants no further consideration.

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V M PONNAN
JUDGE OF APPEAL

CONCURRING:
VAN HEERDEN JA
JAFTA JA