



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

CASE No.: 3074 /2016

In the matter between:

TILANA ALIDA LOUW

Plaintiff

and

JAN MATTHEUS CHRISTIAAN FOURIE N.O.

First Defendant

NETCARE UNIVERSITAS HOSPITAL

Second Defendant

Judgment by: VAN RHYN J

Heard on: 6 JUNE 2024

Delivered on: 8 JULY 2024

- [1] The plaintiff, Tilana Alida Louw, a female employed as a theatre manager at a private hospital at Bloemfontein, instituted an action on 1 July 2016 against Dr S P Grobler, cited as first defendant, and Netcare Universitas Hospital ("Netcare"), the second defendant, for payment of damages under the *actio iniuriarum*. Netcare is situated at Universitas, Bloemfontein and is operated in terms of a public private partnership under the auspices of Netcare Ltd, a public company with its principal place of business

situated at Sandton, Gauteng. Dr Grobler passed away and was substituted as a defendant by the executor of his deceased's estate.

- [2] The action between the plaintiff and the estate of the late Dr Grobler (herein after referred to as "Dr Grobler") was settled in terms of a confidential settlement agreement. Netcare, somehow, became aware of the terms of the confidential settlement agreement and pleaded details thereof in its amended plea. Subsequent to an order issued by this court during 2021, Netcare had to comply with the plaintiff's Rule 35(3) notice, and after several amendments to her particulars of claim, the matter was certified trial ready and enrolled for hearing of evidence.
- [3] The background to this claim is as follows: The plaintiff obtained a nursing diploma at the University of the Free State in 1984. The next year she completed a post basic diploma. After gaining experience as a scrub nurse since 1987, she commenced her employment with Netcare as a Surgical Theatre Manager, also referred to as a "unit manager" from 1 April 2005. Her job description entailed that she was charged with overseeing and managing the operating theatres at the hospital which also included managing the theatre staff and monitoring patient care in the theatres.
- [4] When she commenced with her task as theatre manager she was warned by the then hospital manager, amongst others, that one of the surgeons, who conducted a private practice at Netcare and performed surgeries at the hospital's surgical theatres, has an "aggressive type of personality". The plaintiff soon met with Dr Grobler and his temper tantrums as did numerous other employees who worked with him in the surgical theatres.
- [5] The plaintiff averred that Dr Grobler continually and with the intent to injure her, verbally abused her during the period 1 April 2005 to 2016 by hurling profanities, insults, blasphemous language and obscenities at her while in the presence of other operating theatre staff and even members of the public. Even though counsel appearing on behalf of the plaintiff, Mr Steyn and counsel on behalf of Netcare, Mr Bezuidenhout, as well as the plaintiff during her testimony, consciously avoided reference to the particular words uttered by Dr Grobler during the trial, I am of the view that the nature of the case, extent and measure of the plaintiff's claim against Netcare cannot be evaluated without having regard to the profanities, insults and obscenities articulated by Dr Grobler.

[6] During 2018 the plaintiff amended her particulars of claim to include the specific profanities and racial slurs. The said profanities, insults and obscenities included, but were not limited to the following as pleaded in paragraph 7 of the particulars of claim:

- "7.1 calling the plaintiff a "poes";
- 7.2 Calling the plaintiff a "wit kaffirmeid";
- 7.3 Calling the plaintiff a "kont";
- 7.4 Calling the plaintiff a "fokken bitch";
- 7.5 Saying to the plaintiff that he wanted to give her a "poesklap";
- 7.6 Saying to the plaintiff that he wanted to "bliksem" her."

[7] The claim against Netcare is that it failed to come to the assistance of the plaintiff, notwithstanding her numerous requests and lodgement of complaints. Netcare failed to act against Dr Grobler, notwithstanding the fact that it was common knowledge that he treated the plaintiff and other theatre staff in a similar way. Netcare failed to deal with the allegations of verbal abuse seriously and expeditiously and permitted Dr Grobler wide latitude in his conduct towards the staff and in particular the plaintiff. Netcare furthermore failed to create a working environment in which its employees were protected and not subjected to verbal abuse. The psychological wellbeing, mental tranquillity and dignity of Netcare's employees, in particular that of the plaintiff, were not preserved and protected in that Netcare failed to take all or any reasonable steps in this regard.

[8] It is therefore alleged that, by virtue of the foregoing, Netcare had wrongfully breached its legal duty owed to the plaintiff to create a work environment free from verbal abuse and intimidation and to take reasonable care of the plaintiff's safety which included a duty to protect her from psychological harm. As a result of Netcare's failure to act, the plaintiff was humiliated and degraded, suffered shock, anguish, fear and anxiety. Her mental tranquillity and emotional integrity were disturbed and she suffered self-image disturbances. The plaintiff suffered severe psychological and psychiatric trauma manifesting as post-traumatic stress syndrome and major depressive disorder for which she requires psychotherapy treatment.

[9] On 6 October 2021 plaintiff again amended her particulars of claim by inserting the following paragraph:

"17 In addition to the damages to which the plaintiff is entitled as aforesaid, the plaintiff is: -

- 17.1 in pursuance of the actionable injuries committed by the first defendant as pleaded above; and

17.2 in pursuance of the second defendant's actionable failures which allowed the first defendant's actionable injuries to continue to be committed as pleaded above;

and in accordance with the judgment in *Le Roux and Others v Dey and Others* [2011] ZACC 4 at paragraphs 195 to 203, but especially at paragraph 203, entitled to an order for an apology from each of the first and second defendants in the form contained in prayer 3 below."

[10] In the prayers, the claim for payment of R627 000.00 with interest and costs furthermore included the following specific prayer:

"3. The first and second defendants are each directed to publish a written apology in a conspicuous manner in the Volksblad newspaper the (sic) within 30 days from the date of the court's order as follows:-

3.1 the first defendant is to apologise for his conduct as set out in paragraphs 5 to 7 of the particulars of claim; and

3.2 the second defendant is to apologise for its conduct as set out in paragraphs 12 to 13 to of the particulars of claim."

[11] As a result of the numerous amendments to the plaintiff's particulars of claim, Netcare, over the years accordingly also amended their plea. Netcare pleaded that the plaintiff made complaints about alleged insults and profanities during 2005 and 2012. Netcare was however unable to locate any complaints to be consistent with what is alleged in paragraph 7 of the amended particulars of claim. Netcare acknowledged that the plaintiff acted on behalf of other staff members in making complaints regarding abusive language by Dr Grobler. Netcare accepted that when Dr Grobler insulted the plaintiff as pleaded, she felt humiliated and degraded. Netcare denies that the plaintiff suffered damages in the amount claimed or at all.

[12] Netcare denied that it breached its legal duty owed to the plaintiff and pleaded that when complaints or grievances were brought to the attention of Netcare, steps were taken against Dr Grobler which, *inter alia* consisted of the following;

12.1 by instituting a grievances investigation;

12.2 by taking management steps;

12.3 by convening meetings; and

12.4 by taking action against Dr Grobler to apologise for his conduct.

[13] The matter was enrolled to be heard on 5 to 7 and 9 February 2024 and from 12 to 14 and 16 February 2024. The plaintiff presented her testimony and was cross examined

over 3 days. Without concluding her cross-examination, the parties agreed to commence with the evidence in chief of one of her expert witnesses, Professor (emeritus) Halton Cheadle. Professor Cheadle's cross-examination spanned one full day on 13 February 2024 and was not concluded. Both the cross-examination of the plaintiff and her expert witness stood over to proceed when the matter resumed on 3 June 2024. On 3 June 2024 an open tender was made by Netcare.

[14] The Notice of Unconditional Offer of Settlement dated 3 June 2024 provides as follows:

"...the Second Defendant by way of offer in full and final settlement of the Plaintiff's entire claim as set out in Plaintiff's prayers to its Summons, the Second Defendant, having duly furnished written authority hereto to its attorney of record herein, hereby:

1. Instructed and caused the publication of the following statement in a conspicuous manner in the Volksblad newspaper:

' 3 June 2024

Dear Ms Louw

Subject: Letter of apology from Netcare

On behalf of Netcare, we wish to express our most sincere apologies for the many years of distress and anguish that you felt. We acknowledge the events that unfolded and regret that it has taken this long to reach resolution.

All Netcare staff members and associated healthcare workers should always feel that they are protected and supported by the company and its management and that their concerns and grievances are heard and acted upon. This is endorsed by our company values, particularly those of Compassion and Dignity.

The healthcare professionals who worked within our hospitals are tasked with the immense responsibility of safeguarding the lives and best interests of the patients in their care, often under considerable pressure. However, this should not impact the respect and harmony of the work relationship required.

Netcare will always endeavour to take all reasonable steps in providing our employees with a conducive work environment and must do so with the highest regard for patient safety.

We apologise sincerely that you felt that Netcare did not sufficiently support you in the execution of your duties while being subjected to the disrespect and hurtful actions at the hands of an independent fellow healthcare practitioner.

We hope that you will be able to find peace and healing after these traumatic events.

Yours sincerely,

Dr Richard Friedland and Dr Erich Bock.'

2. Tenders to make payment in the sum of R300 000.00 (three hundred thousand rand) towards the plaintiff's claim of damages and past and future medical expenses;

3. The Second Defendant also tenders to make payment of:

3.1 50% of the plaintiff's taxed or agreed costs, on a party and party scale, up to the date of the settlement being reached between the plaintiff and first defendant; and

3.2 the plaintiff's taxed or agreed costs, on a party and party scale, incurred after the settlement being reached between the plaintiff and the first defendant, until date of delivery of this offer."

[15] The plaintiff, feeling aggrieved by the wording of the apology and the scale of costs tendered, did not accept the formal, open and with prejudice tender by Netcare. More specifically, the plaintiff refused to accept the published apology and also seeks to pursue an order for punitive costs against Netcare. The plaintiff, however, accepted the quantum of damages, both the general damages and damages in respect of future medical expenses, and the costs incurred up to and including the settlement between the plaintiff and Dr Grobler.

[16] After indicating in chambers that the open tender is not accepted, the plaintiff as well as Professor Cheadle were called to the witness stand but no further questions were posed to either of them in cross-examination. During re-examination both witnesses re-affirmed their testimonies in chief. By agreement between the parties, the joint minutes of a pre-trial meeting held between Mr Chris Sampson (clinical psychologist) and Dr Stephen Walker (counselling psychologist) in respect of the plaintiff was submitted as evidence. Both the plaintiff's and Netcare's cases were closed. The matter was postponed to the following day for argument.

[17] Mr Steyn argued that the open tender brings to an end Netcare's contesting of all but the apology relief sought by the plaintiff. What remains for the court to decide is the following:

17.1 Whether the plaintiff has made out a case for the relief relating to an apology; and

17.2 the scale of costs to be awarded from the date of the settlement between the plaintiff and the first defendant.

[18] The *actio iniuriarum* is available where an accountable defendant has wrongfully and intentionally (*animo iniuriandi*) injured the bodily integrity, dignity or reputation (*corpus, dignitas* or *fama*) of the plaintiff.¹ The *actio iniuriarum* are utilised to claim

¹ Le Roux and Others v Dey 2011 (3) SA 274 (CC) at [141].

compensation when dealing with multiple personality interest infringements. In **Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)** the majority as penned by Brand AJ, held that the same conduct cannot give rise to two actions under the *actio iniuriarum* and as the plaintiff's defamation claim in **Roux v Dey** succeeded, a claim for the wrongful and intentional impairment of the plaintiff's dignity had to fail.²

- [19] In the matter at hand the plaintiff's claim against Dr Grobler was for damages for defamation as a consequence of the verbal abuse, hurling of profanities and insults at the plaintiff during the period 2005 until 2016. The claim against Netcare is not based upon the same conduct by Dr Grobler, but, *inter alia*, as a result of the failure of Netcare to deal with the complaints of verbal abuse, the failure to create a working environment in which its employees were not subjected to verbal abuse, humiliating and degrading conduct. Mr Steyn argued that Dr Grobler and Netcare are not joint wrongdoers. They each committed a separate and self-standing delict against the plaintiff. If infringements of more than one personality interests are proved to be present, it has to be considered as a factor when determining damages.³
- [20] The right to dignity is recognised as an independent personality right within the concept of *dignitas*.⁴ The right to human dignity is also recognised as a fundamental right in section 10 of the Constitution. A person's dignity embraces his or her subjective feelings of dignity or self-respect. In **Khumalo v Holomisa**⁵ the court held as follows regarding the different forms of *iniuria* from the point of view of the impact of the Constitution:

"The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual."⁶

² Le Roux v Dey (supra) at [139].

³ NM v Smith 2007 (5) SA 250 (CC) paragraphs 71 to 82.

⁴ Jackson v NICRO 1976 (3) SA 1 (A).

⁵ 2002 (5) SA 401 (CC).

⁶ Khumalo v Holomisa (supra) at paragraph 27. (footnotes omitted).

- [21] On behalf of the plaintiff it is contended that the claim for a published apology follows from the rekindling of such remedy by the Constitutional Court in **Le Roux v Dey**. Netcare maintains that the publication of an apology is unjustified in the circumstances as the plaintiff's case revolved exclusively on the injuries suffered by her self-esteem and self-worth (which reflects inwardly), and not her good name or reputation as perceived by the general public at large (or the reasonable observer). Netcare contends that the guidance to be obtained in case law all pertain to an apology following upon a finding in defamation claims. Netcare did not publish any injurious actions or omissions and the plaintiff, on her own version, presented evidence regarding the profanities hurled at her personally by Dr Grobler. Therefore, the publication of an apology by Netcare is simply not borne out of the facts of this case.
- [22] Plaintiff testified that she witnessed and experienced numerous incidents when Dr Grobler uttered the profanities stated in the particulars of claim, not only directed towards her but also towards other staff members. Thereafter she handled the complaints submitted by the staff members regarding his conduct. She forwarded the complaints to her senior employees at Netcare. According to the plaintiff, the complaints remained largely unanswered. The plaintiff explained that several of the scrub nurses refused to work with Dr Grobler where after she would step in and assist him during surgeries until the next scrub nurse was appointed and trained to take over the responsibility as scrub nurse.
- [23] The plaintiff testified that her sense of duty and pity for the patients, many of them being cancer patients who were in dire need of urgent and timeous surgeries, caused her to bear the brunt and endure the constant abuse, defamatory remarks and insults by Dr Grobler. According to the plaintiff she was informed that she and the other personnel were not allowed to lay any complaints against a medical doctor. Her evidence was clear that she had been informed on numerous occasions that Dr Grobler was a so-called "money spinner" for Netcare.
- [24] During her testimony the plaintiff referred to the Grievance Procedure implemented by Netcare. The procedure consisted of an informal and formal procedure. The plaintiff, with reference to the Plaintiff's Trial Bundle – Volume 2, explained how, over a period of approximately 10 years since 2005 many complaints were lodged by submitting the

prescribed "Incident Management Form" as well as letters and email messages containing serious complaints and incidents pertaining to the conduct of Dr Grobler.

- [25] The Plaintiff's Trial bundle furthermore contained an email from a patient complaining that she received information that she had been physically and verbally attacked by Dr Grobler while under anaesthesia. During argument Mr Steyn reiterated, as he did at the commencement of the trial, that such evidence was presented not as proof of the truth thereof, but as proof that there were complaints lodged with Netcare, not only by the plaintiff in her personal capacity but also by assisting other staff members and in some instances by the public all pertaining to the vulgar language regularly uttered by Dr Grobler. After many years of service, the plaintiff was suspended and thereafter dismissed. When the plaintiff referred the dismissal to the CCMA, Netcare relented and entered into a settlement agreement with her. The testimony by the plaintiff stands uncontested.
- [26] The evidence presented by Professor Cheadle related to what a reasonable employer in the position of Netcare, faced with similar complaints and under similar conditions would have done, acting with the necessary care, skill and diligence, which would ordinarily be expected from a reasonable employer. He is a seasoned and highly qualified labour law expert. He has 52 years' experience in labour relations matters. He, *inter alia* practised as a so called "labour lawyer", representing both trade unions and employees and advising on employment policies and procedures. He later became a ministerial advisor to the Minister of Labour and acted as the convenor of the task team that drafted the Labour Relations Act.⁷ He has subsequently provided advice and recommendations to the National Economic Development Labour Advisory Council (NEDLAC) regarding labour legislation and codes of good conduct.
- [27] During his testimony in court he confirmed that he had regard to the body of evidence contained in the Plaintiff's Trial Bundle and concluded in his expert report (as contained in the Expert Trial Bundle) that Netcare failed on various levels in the implementation of the precautionary measures which it had itself put in place. The precautionary measures that a reasonable employer in the circumstances of Netcare would institute include:

⁷ Act 66 of 1995.

- 27.1 the development of a policy on harassment and abuse;
- 27.2 a grievance procedure to allow management to address those grievances;
- 27.3 informing all who work or enter the premises of the policy and the consequences of contravening it;
- 27.4 training supervisors and managers on the content of the policy and grievance procedure and how to handle grievances;
- 27.5 Including the policy as a term and condition of employment in the contracts with medical practitioners who conduct their practices on the employer's premises;
- 27.6 regular reports on implementation of the policy to senior management; and
- 27.7 a regular monitoring of the implementation of the policy by senior management based on those reports and a regular review of the policy.

[28] Most employers have introduced grievance procedures in terms of which employees are permitted to raise grievances concerning their treatment. Many grievance procedures include in their wide definitions of the grievance, conduct such as verbal abuse, insults and humiliation. Formal grievance procedures play an important human resource role namely: to provide employees with a formal channel to raise grievances without fear of victimization and secondly, it gives management the opportunity to address complaints and grievances. It furthermore provides an important source of information on the state of human relationships within the workplace and for senior management, who are not present at each different site of the workplace, the state of how human relationships are being managed.

[29] Netcare introduced a standard policy for handling grievances which provided for grievances being lodged with the employee's immediate line manager, or if the particular grievance involved the immediate line manager, the next senior level of management. The policy also envisages that executive and senior management are responsible to review the policy and that compliance is subject to an assessment process in line with Netcare risk and quality assurance processes.

[30] Each of the numerous complaints submitted by the plaintiff or other employees, should at least trigger an investigation of one kind or another even if human resources, on an

informal basis, endeavour to resolve the issue where interpersonal conflict surfaces. This is of particular importance where people work in highly stressful situations (surgical theatre). Often interpersonal conflicts can be mediated and solved with an apology or reorganizing of the relationship but if the issue is more serious some action is required. Netcare, however, in most instances failed to act under these circumstances.

- [31] With reference to Netcare's Admitting of Privileges Terms and Conditions relating to the conduct of private medical practitioners such as Dr Grobler, who conduct an independent medical practice at Netcares' premises/hospitals, Professor Cheadle testified that admitting privileges may be revoked under certain conditions. At the discretion of Netcare's General Manager or recommendation of Netcare's Clinical Practice Committee admitting privileges may be revoked for any reason including, *inter alia*, 'abusive behaviour or harassment'. Professor Cheadle explained that in large organisations such as Netcare, the implementation phase of risk management, is ensuring that the policy is implemented.
- [32] The reporting system has to be accurate and comprehensive in order that proper monitoring can take place. The second phase is to review the implementation of the policy to ascertain whether the policy is indeed effective. Taking into consideration that a considerable number of incidents and complaints were received by Netcare starting in 2004 up to 2017 regarding the abusive behaviour and vulgar language used by Dr Grobler, Professor Cheadle testified that "... it just seems to me, cries out for a review at some stage". Professor Cheadle opined that the failure to review the implementation of the policy by senior management under these circumstances would not be what a reasonable employer would do.
- [33] The clause dealing with harassment, discrimination and/or abuse of any nature which includes violence/bullying contained in Netcare's policy, provides that such conduct is not acceptable, will not be permitted or condoned. The policy requires that all employees are fairly and equitably treated and that all reports of any type of harassment, discrimination or abuse will be treated seriously and empathetically.
- [34] According to professor Cheadle, given the number and content of the grievances lodged against Dr Grobler and given Netcare's zero-tolerance approach to harassment, a reasonable employer would have warned Dr Grobler about his

behaviour after the first complaint and would have terminated its contract with him, at the very least, after the third incident. He furthermore opined that it is evident from the alleged facts and the contents of the Plaintiff's Trial Bundle, that the precautionary measures were not properly implemented nor were they properly monitored, reported to or acted upon by senior management – all of which a reasonable employer in the position of Netcare would have ensured. Put differently, Professor Cheadle opined that Netcare failed to comply with the standard of care expected of a reasonable employer in the position of Netcare.

- [35] The disputed issue, apart from the scale of costs issue, is whether the plaintiff is entitled to a public apology and payment of damages from Netcare where she had been defamed by Dr Grobler for a period of a decade, during which period her employer, Netcare, failed to protect her, and if so the ambit of such an apology.
- [36] In an article in *Obiter*⁸, the Nelson Mandela University Law Journal, André Mukheibir, (a professor at the Department of Private Law at the Nelson Mandela Metropolitan University), provided an insightful study pertaining to the origin of the *amende honorable* and the possible reincarnation or revival of this remedy. She remarked as follows in: Reincarnation or Hallucination? The revival (or not) of the *amende honorable*:

"The *amende honorable* had its origin in both Germanic and canon law. The action was actually a combination of three remedies. In terms of the *declaratio honoris*, which had its roots in Germanic customary law, the perpetrator declared that he had made his declaration in the heat of the moment. The aggrieved party could then claim that the perpetrator retracts his defamatory words and deny the truth thereof (with the so-called *palinodia* or *recantio*) and secondly claim an admission of guilt and an apology (with a *deprecation*). The *amende honorable* was generally regarded as compensatory. Voet, however, regarded a recantation as carrying with it a great enough penalty, because the person who had to withdraw his defamatory words was 'handed over to the words of penitence', but the action was still civil rather than criminal. The *amende honorable* was generally accepted to have fallen into disuse, while the *amende profitable* again became known as the *actio iniuriarum*" (references omitted)

- [37] According to Mukheibir the *amende honorable* had been relegated to single paragraphs in textbooks for more than a century "...until it took nothing less than two very modern day South African phenomena such as black empowerment and the controversial arms deal to recall this very aged European remedy. The irony should not be lost on us" In **Mineworkers**

⁸ André Mukheibir (2022) *Obiter*, 25(2); <https://doi.org/10.17159/obiter.v25i2.14.865>.

Investment Company (Pty) Limited v Modibane⁹ Willis J investigated the origins of the *amende honorable* and explained as follows:

"[18] Melius De Villiers in *The Roman and Roman-Dutch Law of Injuries* says at p 177:

'In the systems of jurisprudence founded upon Roman Law a legal remedy has been introduced which was entirely unknown to the Romans, known as the amende honorable.

...

This remedy took two forms. In the first place, there is the palinodia, recantatio or retractio, that is, a declaration by the person who uttered or published the defamatory words or expressions concerning another, to the effect that he withdraws such words or expressions as being untrue; and it is applied when such words or expressions are in fact untrue. In the second place there is the deprecatio or apology, which is an acknowledgement by the person who uttered or published concerning another anything which if untrue would be defamatory, or who committed a real injury, that he has done wrong and a prayer that he may be forgiven'."

[38] Willis J concluded as follows: "The *amende honorable* was not abrogated by disuse. Rather, it was forgotten: a little treasure lost in a nook of our legal attic. I accordingly come to the conclusion that the remedy of the *amende honorable* remains part of our law".¹⁰ The plaintiff in **Mineworkers Investments Company v Modibane** instituted two defamation actions against the defendant consisting of three claims, one was based on a letter by the defendant, the second upon a telephone conversation between the defendant and a manager and the third claim arose from statements made by the defendant to a journalist.

[39] In **Young v Shaikh**¹¹ the plaintiff, an electronic engineer with a long association with the arms industry who's company was not awarded a government contract, alleged a conflict of interest in the part of the Shaikh brothers regarding the contract being awarded to a French company having regard to the fact that the one brother had corporate relations with the French company. During a news programme on eTV the defendant accused the plaintiff of having embarked upon a campaign of corruption and slander by using the media. The plaintiff instituted an action for damages and the court, because of the grave nature of the defendant's defamation, did not regard an apology as adequate and serving the interests of justice.

⁹ 2002 (6) SA 512 (W).

¹⁰ *Mineworkers Investments* (supra) at page 23 -24.

¹¹ 2004 (3) SA 46 (C).

- [40] The remedy, an apology, was also mentioned again in **Mthembi-Mahanyelle v Mail and Guardian Ltd**¹² where the court found that the publication of the defamatory article was not unlawful because it was justifiable in all the circumstances of the matter with the result that it was not necessary to consider the arguments regarding the *amende honorable* or an apology to the plaintiff to set the facts straight¹³.
- [41] In **NM v Smith**¹⁴ the *amende honorable* came under discussion in matters concerning media freedom and the law of privacy. In **Van Greunen and Another v Govern**¹⁵ an attorney sought an interdict against a disgruntled debtor, the respondent, and an order restraining the respondent from publishing any defamatory statements regarding and concerning the applicant. The applicant furthermore sought an order that the respondent publish an unequivocal and written apology in several newspapers circulating in the area where the applicant practised as an attorney. The court, with reference to **Tau v Mashaba and Others**¹⁶ declined to grant the order for the publication of an apology on application and granted the interdict sought by the applicant. The reason for such an order being that an applicant is not entitled to damages in the form of an apology on application.
- [42] In **Dikoko v Mokhatla**¹⁷ the facts were as follows: The plaintiff was the chief executive officer of a district municipality. The defendant was the executive mayor of the same municipality. The Provincial Auditor General questioned the overdue indebtedness of the defendant who had accumulated a long overdue excess in respect of an excessive cell phone allowance. The Provincial Auditor General was not satisfied with the agreement between the defendant and the district municipality's council to write off the debt in respect to the defendant's cell phone account.
- [43] The defendant was summoned to appear before the North West Provincial Public Accounts Standing committee to explain his indebtedness. During his appearance he made defamatory remarks about the plaintiff. The plaintiff sued him for damages. The high court awarded damages against the defendant. The defendant was unsuccessful at the Supreme Court of Appeal where after he applied for leave to appeal to the

¹² 2004 (6) SA 329 (SCA).

¹³ *Mthembi-Mahanyelle v Mail and Guardian* (supra) at [75]-[76].

¹⁴ [2005] 3 All SA 457 (W).

¹⁵ (5395/2022) [2023] ZAFSHC 104 (6 April 2023).

¹⁶ 2020 (5) SA 135 (SCA) at [20] and [28].

¹⁷ 2006 (6) SA 235 (CC).

Constitutional Court. The Constitutional Court granted the application for leave to appeal but eventually dismissed the appeal.

- [44] Both Mokgoro J and Sachs J recognised the fact that the *actio iniuriarum* was not entirely satisfactory in solving the damage caused by the defamatory remark by the defendant. It was held that the *amende honorable* was better suited in allowing opportunity for reconciliation between the parties and the *actio iniuriarum*, with its focus on monetary considerations, could neither repair the plaintiff's dignity nor effect reparation between the parties. The Constitutional Court held as follows:

"The notion that the value of a person's reputation has to be expressed in rands in fact carries the risk of undermining the very thing the law is seeking to vindicate, namely the intangible, socially-constructed and intensely meaningful good name of the injured person. The specific nature of the injury at issue requires a sensitive judicial response that goes beyond the ordinary alertness that courts should be expected to display to encourage settlement between litigants. As the law is currently applied, defamation proceedings tend to unfold in a way that exacerbates the ruptured relationship between the parties, driving them further apart rather than bringing them closer together. For the one to win, the other must lose, the scorecard being measured in a surplus of rands for the victor."¹⁸

- [45] The cause of action against Netcare is the *actio iniuriarum* which grants relief for an impairment of the person, dignity or reputation of the plaintiff, which impairment is committed wrongfully and *animo iniuriandi* (intentionally). The claim against Netcare relates to its failure to come to the plaintiff's assistance and failure to deal with the allegations of verbal abuse and bullying. Notwithstanding Netcare's policy regarding bullying and harassment, explained by Professor Cheadle, Netcare deliberately turned a blind eye to the complaints submitted by the plaintiff and implored her to assist Dr Grobler as a scrub nurse when none of the other scrub nurses were prepared to go into the surgical theatre with him. Mr Steyn argued that the plaintiff alleged and proved impairment of the relevant aspect of personality relied on during her testimony in court.
- [46] With reference to the test for finding intention as per **Crots v Pretorius**¹⁹ and **Le Roux v Dey**²⁰ Mr Steyn contended that Netcare acted intentionally (in the form of *dolus eventualis*) in not enforcing steps to protect its employees in general and the plaintiff

¹⁸ At paragraph 111.

¹⁹ 2010 (6) SA 512 (SCA) at [11].

²⁰ At paragraph 129.

in particular. In the absence of rebutting evidence, the *prima facie* evidence became conclusive evidence.

- [47] With reference to paragraphs 195 to 203 of **Le Roux v Dey**, Mr Steyn argued that even though the Constitutional Court did not propose a reinstatement of the *amende honorable*, the order that was suggested should be made "...flows from a general principled justification for it".²¹ Therefore the Constitutional Court re-introduced the concept of a court enforced apology for actions based on the *actio iniuriarum* as a damages measure. On behalf of the plaintiff it was argued that to find that this case against Netcare does not justify an apology order because it is not a defamation case, misses the point because defamation is a species of *iniuria*. In the heads of argument by Mr Steyn it is contended that: "The plaintiff was humiliated and degraded, accordingly she demands, and it is only right that she be apologised to in public".
- [48] The plaintiff's wish and claim for an apology from Dr Grobler, prior to his death, would have included a recantation or a formal withdrawal of the defamatory words and remarks to repair her injured honour and the acknowledgement by him that he had done wrong. Having regard to the evidence and the legal principles referred to in the case law, this would have been justified.
- [49] In Chapter 1 of **Wille's Principles of South African Law**²² the core characteristics of law, its distinctiveness as a mode of social organization are defined as: "Law serves diverse functions in society, but its hallmark is the stipulation of rights and duties, which, if uncertain or not complied with, are determined in court and, if necessary, enforced on the authority of court orders. In doing so, law provide such reasons for acting (or refraining from acting) in prescribed ways and holds people responsible, to each other as well as to society at large, when they fail to comply with such reasons." The concept of justice is concerned with "giving persons their due".²³
- [50] The *amende honorable* can be traced back to medieval canon law with its basis as Christian forgiveness.²⁴ The remedy was applicable in slandering or defamation cases. An apology as always weighed heavily in determining the quantum of damages in defamation cases. The *amende honorable* was not a remedy in matters pertaining to the infringement of a persons' dignity by insulting words, belittling or contemptuous

²¹ At [202].

²² Juta (Ninth Edition), 2007 at p3.

²³ Wille (supra) at p 15.

²⁴ Zimmerman; The Law of Obligations –Roman Foundations of the Civilian Tradition (1990) at 1072.

behaviour. The specific nature of the injury, being “the intangible, socially-connected and intensely meaningful good name of the injured person”²⁵ in defamation matters, justified not only an award or the provision of *solatium* for (sentimental) damages, but an apology by the defendant for defamatory remarks which could do more to restore the plaintiff’s dignity than a monetary award.

- [51] The *actio iniuriarum*, the remedy for defamation also places strain on the right to freedom of expression, because potential defendants could be intimidated by large damages awards from exercising this right.²⁶ As is evident from the case law referred to, the *amende honorable* has been applied in matters to give to the defendant an opportunity to make an appropriate public apology in lieu of paying damages and that the victim of defamation have his or her damaged reputation restored by the remedy of a public apology.
- [52] Having regard to the fact that the *actio iniuriarum*, in our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas* and taking into consideration that our Constitution also provide a framework for the protection of personality rights, there is no sharp line that can be drawn between these injuries to personality rights as they often overlap in the typical wrongs which form the object of the *actio iniuriarum*.²⁷ Although different manifestations of *iniuria* has over time been applied, some of which has become obsolete, and the application of the *actio iniuriarum* has adapted in accordance with the changing of human and social values, I am not convinced that, taking into consideration the facts of the matter at hand, the plaintiff has made out a case for the expansion of the remedy under the *actio iniuriarum* in matters not related to defamation, to include a published apology.
- [53] Such an extension of the *amende honorable* would inevitably have the result that plaintiffs in matters such as malicious and wrongful legal proceedings and arrest, insult, invading of privacy and wrongful assault will have recourse to a published apology by for example, the Minister of Police or the National Prosecuting Authority. Clearly this was never intended by the reintroduction or revival of the *amende honourable*.

²⁵ Dikoko v Mokhatla at par 111.

²⁶ National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA); Mineworkers Investments Co (Pty) Ltd v Modibane 2002 (6) SA 512 (W).

²⁷ Wille’s Principles of South African Law p 1166.

- [54] The plaintiff accepted the amount tendered by Netcare as to the quantum of damages, both general damages and the damages in respect of future medical expenses. Mr Bezuidenhout, with reference to previous and similar findings on the quantification of damages, argued that the amount tendered and accepted by the plaintiff, namely R300 000.00 emphasise that despite publication of an apology by Netcare, the plaintiff's vindication of her rights far exceeds that which she would normally have been entitled to.
- [55] As to costs, the plaintiff seeks an order for costs on the attorney and own client scale, alternatively, on the attorney and client scale. The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be²⁸. The ordinary practice is, of course, that costs follow the event but this principle is subject to the general rule that costs, unless expressly otherwise enacted, are in the discretion of the court²⁹.
- [56] A court is entitled to award punitive costs against a party as a sign of the court's displeasure with such party's conduct. I agree with the argument on behalf of the plaintiff that Netcare evidently allowed its employees to be abused by Dr Grobler for its own financial interests. Furthermore, Netcare was acquainted with Dr Grobler's disgusting behaviour even prior to the appointment of the plaintiff as the unit manager.
- [57] Mr Bezuidenhout argued that Netcare not only delivered a formal tender for a personal apology, but also made numerous further tenders to the plaintiff, all of which were simply rebuffed with a response of seeking a complete capitulation by Netcare. On 31 January 2024, before the commencement of the trial, Netcare formally tendered an apology to the plaintiff. This tender was made in accordance with Rule 34(1) & (5) and expressly contained the reservation that Netcare shall disclose this offer to the court at the appropriate time and if indicated, after judgment for purposes of consideration or reconsideration of any costs order made or to be made. Mr Bezuidenhout, however revealed the tender made during January 2024 during his arguments pertaining to costs.

²⁸ Erasmus v Grunow 1980 (2) SA 793 (O) at 798 B-C.

²⁹ Union Government v Heiberg 1919 AD 477 at 484.

- [58] The content of the apology has been included in the heads of argument submitted on behalf of Netcare. The plaintiff rejected this tender and insisted that an apology be published. In terms of Rule 34(12) and after a court has given judgment on the question of costs in ignorance of the offer or tender, the question of costs shall be considered afresh in the light of the offer or tender, provided that nothing provided in the subrule shall affect the court's discretion as to an award of costs.
- [59] Netcare's contention in respect of costs is thus: the plaintiff's request for punitive costs is not borne out of the facts of the case but is premised upon a punitive intent pursued by her against Netcare. In this regard attorney and client costs do not qualify as delictual damages and therefore not a form of compensation for damages suffered. Furthermore, the award of a punitive costs order is exceptional.
- [60] On behalf of Netcare it is therefore argued that the costs incurred for argument on the 4th of June 2024 occasioned by the plaintiff's refusal to accept the published apology as well as costs tendered, be paid by the plaintiff on a party and party scale.
- [61] I am of the view that, having regard to the fact that the plaintiff submitted numerous complaints, without any appropriate response from Netcare, she is entitled to a punitive cost order against Netcare. The situation continued for a period spanning a decade. Thereafter she had to commence with litigation against Dr Grobler and Netcare for almost 8 years, which litigation included interlocutory applications and an exception. Only after presenting evidence for 7 days, did Netcare present an open tender which included not only payment of damages but also an apology which resulted in all but the apology and a portion of the costs to become settled.
- [62] The tender puts an end to the quantum of damages. This was accepted by the Plaintiff on 3 June 2024, the day on which the tender was made. Netcare has published an apology in accordance with the tender in the Volksbald, from what I was informed during argument, such publication to be effected most probably on the 5th of June 2024. Even though I am of the view that the relief sought in respect of a published apology is not a competent remedy for the specific species of personality infringement in the matter at hand, the plaintiff has evidently been victorious.
- [63] The only issue is therefore the scale of costs to be awarded from the date of the settlement between the plaintiff and the claim against the first defendant, to be awarded against Netcare. I take into consideration that the apology that Netcare made in their

tender was not accepted by the plaintiff on the basis that the exact words did not comply to her understanding of a statement of regret for having done wrong or the hurt caused by Netcare's failure to act. I agree with the plaintiff's perception that the expression:

"We apologise sincerely that you felt that Netcare did not sufficiently support you in the execution of your duties while being subjected to the disrespect and hurtful actions at the hands of an independent fellow healthcare practitioner", do not, in its plain and ordinary meaning, convey a sincere regret and remorseful apology. What is actually conveyed by this particular sentence is that Netcare is sorry to learn about the way the applicant perceived and felt about their inaction and failure to support her during in the execution of her work. It would have been different if the apology read as follows: "We apologise sincerely that Netcare did not sufficiently support you in the execution of your duties...". (My underlining)

[64] An offer of settlement must be made timeously and should be responded to promptly as it is usually made with a view of curtailing the possible escalation of costs. The defendant should not decide only on the morning of the trial to make an offer and so hope to avoid liability for costs.³⁰ Accordingly, I am satisfied that in this particular case a judicial exercise of a discretion requires me to not only declare the plaintiff's two expert witnesses as necessary witnesses for purposes of taxation but to make an order that Netcare pay the plaintiff's costs on an attorney and clients scale. I am not convinced that, having regard that no order is made in respect of the apology as sought by the Plaintiff, that costs on an attorney and own client scale is appropriate in this matter.

[65] The following order is made:

1. The second defendant shall pay to the plaintiff the sum of R300 000.00 (three hundred thousand rand) towards the plaintiff's claim for damages and past and future medical expenses.
2. The second defendant shall pay 50% of the plaintiff's taxed or agreed costs, on a party and party scale, up to date of the settlement being reached between the plaintiff and first defendant.

³⁰ See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678H.

3. The second defendant shall pay to the plaintiff the taxed or agreed costs on an attorney and client scale incurred after the settlement being reached between the plaintiff and the first defendant, until and including the arguments heard on 4 June 2024.
4. The expert witnesses, Dr Stephen Walker and Professor Halton Cheadle are declared necessary witnesses for purposes of taxation.


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I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Plaintiff:

Instructed by:

ADV. J W STEYN
KRAMER WEIHMANN INC
BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

ADV. W J BEZUIDENHOUT
WESSELS & SMITH INC
BLOEMFONTEIN