NOT REPORTABLE

CASE NO: I 3306/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERNST AUGUST KUBIRSKE **PLAINTIFF**

and

REINHARDT SIEBERHAGEN **DEFENDANT**

CORAM: **SMUTS, J**

Heard on: 30 and 31 May 2011
Delivered on: 09 June 2011

JUDGMENT

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1. **SMUTS, J** [1] In this action the plaintiff claimed N$100,000.00 for an *injuria* perpetrated by the defendant upon him. The cause of action arises

from an sms (short messaging service) which the plaintiff had received upon on his cellular telephone from the defendant's cellular telephone. The message was terse and was in the Afrikaans language. It read: **"Antwoord jou foon jou poes"**. The parties accepted a freely translated version of this message is **"Answer your phone you cunt"**.

2. [2] It was initially disputed that the sms was sent but the defendant amended his plea at the outset of the proceedings to admit having sent the sms. It was also admitted in the course of his evidence that the words in their ordinary meaning have an injurious and offensive connotation.
3.
4. [3] The elements of an action based upon *injuria* were thus essentially not in issue. What is essentially in issue between the parties is the quantum of the plaintiff's damages.

5. [4] At the outset of the proceedings, the defendant's counsel, Ms C van der Westhuizen, sought to place on record that the defendant had made a "without prejudice" offer of N$5,000.00 to the plaintiff together with costs on a magistrate's court scale on the preceding Thursday, 28 May 2011. Ms van der Westhuizen also pointed out that this offer was no longer made without prejudice and that it was, at the commencement of the proceedings on 30 May 2011, made unconditionally.

[5] When Ms van der Westhuizen referred me to the offer made "without prejudice", I enquired as to whether the defendant wished to invoke Rule 34. She responded in the negative and stated that the defendant wanted to place the offer on record and to record that it was unconditional with immediate effect. As it is not permissible to refer to negotiations and offers made without prejudice, I then enquired from Ms H Schneider who represented the plaintiff as to her attitude concerning this disclosure. Ms Schneider did not then object to the disclosure of the "without prejudice" offer and instead proceeded to confirm that it had been made and that it had been rejected and that the plaintiff furthermore rejected the current unconditional offer. Ms Schneider then made

an opening address and proceeded to call the plaintiff who gave evidence.

[6] Given the fact that the essential elements of *injuria* were no longer in issue, most of the facts material to the cause of action were not in essence disputed. The plaintiff testified that he had received the text late on a Saturday afternoon or early on a Saturday evening from a number which he later established to be that of the defendant although he had assumed in the circumstances that the sms had been sent from the defendant. He stated that the defendant was living in an adulterous relationship with his estranged wife and that there were protracted divorce proceedings which were currently pending. He further testified that he had instituted an action against the defendant for alienating his wife's affection and that those proceedings were also currently pending.

6. [7] The plaintiff also gave evidence that he was very shocked by the insulting terms of the text. He said that he felt humiliated and that his dignity was impaired. He stated that he found that the use of the expletive in question was gravely offensive to him and that he is a prominent member of his church and active in its affairs.

7.

8. [8] In cross-examination it emerged that the event in question had occurred on 4 September 2010, sometime after the plaintiff and his wife had separated and more than a year after divorce proceedings had been instituted. They had reached an interim arrangement concerning the custody of their two minor children. Relevant for present purpose is their much younger son, Nikolai, who was at the time of the sms, 6 years old, having reached that age a few weeks before the incident occurred. Pursuant to the interim arrangement, Nikolai was spending the weekend with the plaintiff. He had been in telephonic contact with Mrs Kubirske, as was is his custom when he is separated from her. According to her evidence, which was not placed in issue in this respect, he had cried on the phone and she then promised to call at the plaintiff's house to give him a hug and comfort him. She then called at the plaintiff's residence and requested the plaintiff to permit Nicolai to come to the gate.

9.

10. [9] It was common cause that the plaintiff refused to let her have contact with the child and that there followed an exchange between them. Mrs Kubirske stated in her evidence that the plaintiff used a derogatory term in Afrikaans in chasing her away, namely the Afrikaans word **"voertsek"** and further stated that it was his house and his twin with Nikolai and that she should leave. The plaintiff denied that he used that specific term but did not deny the tenor of his message. It was also common cause that the young child was able to observe this scene.

11. [10] Mrs Kubirske then departed from the plaintiff's house and was distressed by what had occurred and then proceeded to the defendant in an upset state. She repeatedly tried to reach the plaintiff by telephone in a bid to see her son. The plaintiff in cross-examination admitted that he had received some twelve missed calls from her number. Mrs Kubirske also requested the assistance of the City Police to intercede in the matter. It was not contested that this had occurred and that the duty officer had requested her to endeavour to contact the plaintiff. When the plaintiff failed to answer these calls, the defendant, who accompanied Mrs Kubirske to the police, then sent the sms in question.

12.

13. [11] The defendant, who is a psychiatrist, gave evidence. He admitted that he is romantically involved with Mrs Kubirske, but stated that this relationship had only commenced at the end of 2009. It is common cause that Mrs Kubirske had obtained a restitution order in October 2009 already, having instituted divorce proceedings in August 2009. The defendant denied that the relationship had commenced prior to the institution of the divorce proceedings.

14.

15. [12] The plaintiff further testified that he felt that the plaintiff was vindictive towards him. He referred to institution of the damages action against him for alienation of Mrs Kubirske's affection and stated that the plaintiff had also laid a complaint against him with the Medical Council of Namibia for allegedly treating Mrs Kubirske whilst being in an intimate relationship with her. The

plaintiff had in cross-examination admitted that he had laid such a complaint and stated that he did so by reason of the fact that he had noted in his medical aid claims that these had included a prescription provided by the defendant. The defendant explained that the prescription in question was for sleeping tablets and that Mrs Kubirske had a long history of insomnia and for that reason he had prescribed the medication. He denied that he had provided therapy or treatment to her and had merely provided a prescription for medication which she had previously repeatedly required.

16. [13] The defendant stated that he had sent the sms to the plaintiff because Mrs Kubirske had been in a distressed state after being chased away from the plaintiff's home in front of the young child who had wanted to see his mother. The defendant said that Mrs Kubirske was extremely upset and frustrated at being unable to reach the plaintiff in a quest to see young Nikolai. He further testified about the several efforts made by Mrs Kubirske to contact the plaintiff which had been without success. He stated that he then became angry and felt provoked by what he termed **"the plaintiff's uncalled for action"**. He felt that it was obvious that the young child wished to see his mother and that there was no understandable reason why the child should be kept from his mother except for what he termed the **"plaintiff's selfishness"**. The defendant further stated that he felt that the plaintiff was being unduly vindictive both towards him as well as being pathologically jealous because of his relationship with Mrs Kubirske.

17.

18. [14] The defendant also stated that he was not in the habit of making derogatory and insulting remarks but that the sms to the plaintiff had been the culmination of the events that afternoon and is to be seen within the context of what had transpired before that and primarily because of the frustration he felt when Mrs Kubirske was unable to get the plaintiff to answer his telephone. He stated that his intention was to get the plaintiff to answer his phone. He said that he felt that he had been provoked into sending the rude sms to the plaintiff and acknowledged that it was wrong to have "cursed" him in the manner he had done so.

19.

20. [15] The defendant also referred to a defamation action which he had instituted against the plaintiff. He said that he had however decided to withdraw that action in the interests of peace and as an act of goodwill and primarily in the interest of Nikolai. He also explained that the previous denial of the sms had been of a tactical nature, upon advice, given perceived difficulties with regard to proving an sms.

21. [16] Mrs Kubirske also gave evidence. She also stated that she only became romantically involved with the defendant some time after she had commenced divorce proceedings and in January 2010. She further stated that she was deeply distressed following her exchange with the plaintiff on the day in question. She also confirmed the defendant's evidence about her making repeated calls to the plaintiff's number and that the duty police officer had advised her to endeavour to contact the plaintiff. She stated that she was extremely concerned about their child's wellbeing at the time and was very frustrated, particularly at the manner in which she had been chased away outside the plaintiff's home in front of her young son and his subsequent refusal to take her calls. She confirmed that she did not try to contact her young son the next day.

22. [17] In her submissions, Ms Schneider argued that the requirements for the *actio iniuriarum* were established. She argued that there had been an overt act intentionally perpetrated with *animus iniuriandi* which had been wrongful and that this had resulted in an aggression upon the rights of the plaintiff. She also correctly stressed the value to be attached to dignity, both under the common law and more recently reinforced Article 8 of the Constitution. In the course of the proceedings, the plaintiff amended his damages to N$35,000.00. Ms Schneider sought, with reference to authority, to justify an award of that magnitude.

23.

24. [18] At no stage did Ms Schneider object to the earlier reference to the without prejudice offer but submitted that an award in excess of N$5,000.00

should be made and that an award in the range of N$35,000.00 was justified by the defendant's conduct. She also referred to the absence of any apology on the part of the defendant. But I pointed out to her that she had not raised this with him in cross-examination and had not afforded him the opportunity to do so or to provide an explanation why he would not do so in the event of a refusal to do so. I certainly found it surprisingly that she had not raised this, given the authority referred to by her in argument being joint judgment of Cameron and Froneman JJ, in the Constitutional Court in South Africa in Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae)[1] in which they dealt in some detail with the need for Courts to make orders as to apologies and proposed that an order of that nature which the majority of that court accepted. It is clear from the various judgments of that Court that the issue of an apology had been canvassed in some detail in the proceedings - with reference to both evidence of the parties as well as submissions including that advanced by the Restorative Justice Centre on that very issue.

25.

26. [19] Whilst the issue of an apology was not canvassed at all in the cross-examination of the defendant, it was quite clear to me from his testimony and his demeanour that he was contrite about what had occurred. He also acknowledged that he had acted wrongly and stated that his motive was to prompt the plaintiff to answer his telephone. The fact that he had withdrawn a defamation action against the plaintiff as a token of goodwill, is also a factor to be taken into account in this context.

27.

28. [20] Despite the well-reasoned approach of the joint judgment of Cameron and Froneman JJ in the Le Roux matter concerning the need for an apology and to direct one, in the absence of the issue being canvassed in evidence and only fleetingly referred to in argument and without any relief sought in that regard, I decline to be further drawn on the issue.

29. [21] Ms van der Westhuizen submitted that the claim, even amended downwards to N$35,000.00 remained exorbitant in the absence of any

[1] 2011 (3) SA 274 (CC).

publication of the insult to any other parties. I am inclined to agree. Ms Schneider was not able to produce any authority to justify the quantum claimed, even in the amended claim. I also agree with Ms van der Westhuizen that the foul language used by the defendant should also be seen within its context. In doing so, I wish to make it clear that I certainly regard the language as being entirely unacceptable and that it would and did give rise to an affront and an infringement of the plaintiff's dignity. But as was also stressed in the judgment of Skweyiya J, in the Le Roux matter[2], albeit in an entirely different context,

> **"It is a well recognised principle of our law that adjudication must occur within context".**

30. [22] Ms van der Westhuizen then proceeded to refer to the context within which the insult had occurred. I agree that the damages should be considered and be determined by taking that context into account. Bearing in mind the context, she submitted that the offer made by the defendant (earlier and at the commencement of the proceedings) of N$5,000.00 was more than reasonable and that the plaintiff's costs should be restricted to the date of the earlier offer and should only arise on a magistrate's court scale and that the costs of the trial should be awarded to the defendant on a High Court scale.

31. [23] Both counsel acknowledged that there would not appear to be authority directly on point. In the Le Roux matter, the Constitutional Court reduced an award of damages to R25,000.00 in respect of the publication of a computer created image depicting the faces of the deputy principal of a school superimposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture. It would appear that there had been wide publication of this image within the school context. The High Court had awarded R45,000.00 in damages. This award was ultimately reduced to R25,000.00 by the Constitutional Court. Other decisions involving the action *iniuriam* were also referred to. I have considered them. I have also considered the approach of the Supreme Court in Trustco International v Shikongo[3] where a

[2]At par 208
[3]Unreported, November, 2010..

damages award for a serious defamation which had been prominently published in a publication with a wide circulation concerning the then Mayor of Windhoek was reduced on appeal to the Supreme Court from N$175,000.00 to N$100,000.00.

32. [24] Taking into account these authorities and the context within which the injurious conduct had occurred, I consider that the unconditional offer made by the defendant provides more than adequate compensation in the circumstances and would in my assessment constitute a more than adequate and reasonable award of damages.

33. [25] After I reserved judgment, plaintiff's counsel, Ms Schneider, sought to file further submissions concerning the disclosure by Ms van der Westhuizen of the "without prejudice" offer made the previous week. The filing of this further material was done without the prior agreement of her opponent and without the leave or invitation of this Court. It is not acceptable for counsel to seek to place further material after judgment has been reserved without such consent. If it is unreasonably withheld the proper course would be to request the Court through the Registrar to receive the material or to make application to re-open the case. This did not occur. It is certainly not good enough merely to do so on notice to the other side as was done in this instance. I must voice my displeasure at this attempt to place further material before me. This was also not a case where there was an attempt to direct the Court to further authority on point which had been handed down subsequent to the Court reserving judgment. The further argument provided does not raise any authority which had been handed down after judgment had been reserved. I accordingly disregard the further argument filed. I also find it surprising that there was an attempt to do so because of the implied waiver of privilege relating to the reference to the without prejudice offer on the part of Ms Schneider. Instead of objecting to the reference to it when afforded the opportunity is to do so, Ms Schneider instead acknowledged and confirmed that such an offer had been made and stated that it had been rejected. Even when this was again referred to argument, Ms Schneider did not in reply submit that it should be disregarded or should not have been disclosed. Her conduct thus was consistent with a

waiver of the privilege attached to such a communication.

Costs

[26] The plaintiff's original claim of N$100 000 was hopelessly excessive. But even after amendment to N$35 000, it remains unsustainably on the high side. There is no basis to contend for quantum in this matter in excess of an award in the Magistrate Court. Plainly the plaintiff should be restricted to costs on the scale.

[27] The fact the an unconditional offer was made in the amount awarded should preclude the plaintiff from receiving any costs subsequent to it and should require him to pay the defendant's costs thereafter. The earlier offer which was made without prejudice should not have been disclosed. Even though there would appear to have been waiver on the part of the plaintiff at its disclosure by reason of the conduct of his counsel, disclosures of that nature should not be made by counsel in the first place I have decided in the exercise of my discretion to award the plaintiff his costs up to the day before the commencement of proceedings which started on 30 May 2011 and require that he thereafter pay the defendant's costs of the trial, to include the costs of 30 and 31 May 2011 and the costs related to receiving the further argument of the plaintiff filed subsequent to reserving judgment.

34.

35. **Conclusion**

36. [28] I accordingly make the following order:

37.

37.1. 1. Damages in the sum of N$5,000.00 are awarded to the plaintiff.

37.2. 2. The plaintiff is awarded his costs on a Magistrate's Court scale up to the day before the hearing, namely 29 May 2011, on the Magistrate's Court scale.

37.3. 3. The plaintiff is directed to pay the defendant's costs of this trial from its first day 30 may 2011 onwards and to its conclusion on a High Court scale including any costs related to receiving the further argument sought to be placed before Court by the plaintiff. The defendant's costs are to include the costs of one instructed and one instructing counsel.

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SMUTS, J

ON BEHALF OF THE PLAINTIFF	MR F G ERASMUS
Instructed by:	FRANCOIS ERASMUS & PARTNERS
ON BEHALF OF DEFENDANT	ADV. SCHNEIDER
Instructed by:	ETZOLD-DUVENHAGE