IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

CASE NO. 1385/2000

In the matter between:-

NOEL RICHARD SEYMOUR — **PLAINTIFF**

and

PAUL KIRK — **DEFENDANT**

JUDGMENT

KRUGER J.

The plaintiff, an administration manager in the employ of Independent Newspapers, instituted an action against the defendant for damages in the sum of one hundred and thirty thousand Rand (R130 000,00).

It is alleged by the plaintiff that:-

a) On 2 May 1998 the defendant planted a bag at or near the plaintiff's residence, which bag contained a number of tablets, several bullets, and a note (the contents of which will be referred to later in this judgment);

b) During the night of 7 June 1998 the defendant made anonymous phone calls to the plaintiff's residence and breathed heavily when the phone was answered;

c) On 8 June 1998 the defendant locked the outside gate to the plaintiff's premises with a chain and a padlock;

d) On 12 July 1998 the defendant activated a tear gas grenade at the plaintiff's premises;

e) On 12 October 1998 the defendant fired at the plaintiff's premises with a 9 mm pistol and penetrated the nursery window;

f) On various occasions the defendant published to third parties that the plaintiff had a criminal record for drugs.

The plaintiff testified and called various witnesses, amongst whom an expert forensic ballistic investigator, Mr Cobus Steyl. The defendant and Mark David Bristow gave evidence in support of the defendant's case.

I do not propose referring at length to the testimony of the various witnesses, but will rather draw attention to the important aspects thereof, which should be considered in the light of the probabilities, inherent or otherwise.

In respect of the first incident alleged, the plaintiff testified that his wife had found the plastic bag containing tablets, bullets and a note which read:-

> "Noel here is the stuff you and Bruce discussed. Forget the money for the bullets what are friends for after all. Bruce reckons the juice is great. Two tablets a day on a full stomach. The stuff is called methyl testosterone as ya discussed it costs R500, just pay Conan. He reckons the E won't be a hassle 25 tablets is no problem but it will cost R55 a time."

At the time of the discovery, the plaintiff was at the family cottage at Zinkwazi (some 90 km away) and the incident was communicated to him via telephone. He instructed his wife to report the matter to the police. Although testifying that he was concerned that "someone was trying to implicate me as someone who is involved with drugs" and that he regarded the bullets as "a threat", the plaintiff only attended at the police station a week later to view the said bullets, tablets and note. This despite him having returned home a few days earlier. By this time the police had already sent the tablets to be tested.

His testimony was corroborated by his wife, Meryl Catherine Seymour, and by Sergeant Bramley. Although there was the same discrepancy regarding the contents of the plastic bag – as opposed to the entry in the SAPS 13 Register, the evidence clearly shows that the contents handed over to Inspector Bramley were indeed those as alleged by the plaintiff. The defendant denied any involvement in the incident, alleging that he had never been to the plaintiff's home.

Telephone Calls

The plaintiff alleged that during the early hours of the morning on Sunday 7 June 1998, two telephone calls were made to his home. These calls were answered by his wife who reported to him that someone had breathed heavily on the phone on both occasions.

There was a further allegation by the plaintiff that during the evening of 7 June 1998 his son answered the telephone and reported that an unidentified white male had made certain defamatory remarks about him. This incident, however, has not been relied upon by the plaintiff in his claim against the defendant.

Mrs Seymour confirmed her husband's evidence relating to the telephone calls. She further confirmed that her husband was asleep in another room at the time and she did not consider it necessary to awake and inform him of same.

Although he regarded the matter as a "cowardly" act, the plaintiff did not seem to have been perturbed by the incident and did not regard it as serious enough to warrant a report to and investigation by the police. There is also doubt whether Mrs Seymour was concerned about the phone calls as she could not recall discussing the incident with her husband until after the gates had been chained and locked.

During the course of the trial, it became common cause that the two telephone calls referred to were made from the defendant's cellular phone. The defendant denied having personally made the calls. He alleged that:-

a) He often left his cellular phone laying around and that anyone would use it;
b) People would frequently ask to borrow his phone;
c) He was not the exclusive user of the cellular phone but that others shared the use of same.

Plaintiff's padlocked gate.

On 8 June 1998, at approximately 6h30, the plaintiff noticed that his domestic worker and gardener could not gain entry to the property. Upon inspection, he discovered that there was a large chain around the gates secured with a padlock. He used an angle-grinder to cut the lock. He later reported the matter to the police who, he alleged, were not really interested and who allowed him to keep the chain and padlock. Mrs Seymour confirmed this evidence, although she alleged that she had noticed that the domestic worker and gardener could not gain access and that she discovered that a chain and padlock had been placed around the gate and that she had then reported the matter to her husband. The plaintiff testified that he viewed the incident as "another threat to me".

Bart Marinovich, a colleague of the defendant at the time, testified that during a discussion with the defendant, the defendant mentioned that he had placed a chain and padlock around the plaintiff's gate. The defendant had also mentioned that he had reported that the plaintiff's vehicle had been stolen; that he had "bombed" the plaintiff's house and that the plaintiff had a drug problem. He dismissed these allegations as "nonsense". He however mentioned the matter to his girlfriend – who was the plaintiff's secretary. A

few days later he was summoned to a meeting with the plaintiff and informed him of his discussion with the defendant.

William Harper, also a colleague of the defendant, confirmed this incident as well. Like Marinovich, he too dismissed the matter as he did not take the defendant seriously.

The defendant denied any knowledge of this incident and further denied the evidence of Marinovich and Harper.

Teargas Canister.

Mrs Seymour testified that during the morning of Sunday, 12 July 1998, she discovered a discharged teargas canister and its pin on the property. She placed the objects into a plastic bag. She telephoned the plaintiff, who was at Zinkwazi, to report the matter. The plaintiff confirmed the report made to him by his wife. He testified that he felt "helpless" and "concerned" about his wife who was 7 months pregnant at the time. Under cross-examination, he conceded that after discussing the matter with his wife, he decided to return home that evening. Mrs Seymour further testified that she felt "secure" at the time.

Mrs Catherine Dix testified that the defendant had telephoned her on a Sunday evening. He reported that a grenade had been thrown into the plaintiff's property. He denied any involvement but was concerned that he would be the first person to be implicated. Her evidence was not challenged on this aspect.

The defendant confirmed the telephonic conversation with Catherine Dix. He confirmed that he had heard that he had been implicated in the matter and denied all knowledge of same.

Shooting incident.

At approximately 07h00 on 13 October 1998, the plaintiff testified that he was requested by his wife to come into the nursery where she and the baby had been sleeping. He discovered a hole in the curtain, window pane and in the wall. On the carpet he and his wife found two fragments of the bullet. The plaintiff testified that he was very angry – "Someone had threatened me and my family. I was determined to get to the bottom of it all, at all costs". The matter was duly reported to the police and the plaintiff employed an armed guard at his home. Neither the police nor an independent ballistic expert, employed by the plaintiff, were able to find the spent cartridge case. Mrs Seymour once again confirmed her husband's version. In particular she remarked that her husband's "concern took on a new dimension – he was very concerned".

Inspector Jackson testified that he had attended at the scene and removed the two bullet fragments which he found on the carpet.

Inspector Claasen testified that she could not conduct a ballistic test on the firearm as the barrel had a bulge in it which made it impossible to use. She was also unable to conduct any microscopic examination of the bullet jacket as it had been damaged.

During the course of the trial, it became common cause that:-

a) The bullet had been fired from a 9 mm pistol;

b) The firearm, which Inspector Claasen referred to, belonged to the defendant and that it was a 9 mm pistol.

Mr Steyn, a ballistics expert, also testified on behalf of the plaintiff. He confirmed that he was requested by the plaintiff to conduct a ballistic investigation into a shot which was fired at his (plaintiff's) home. In the presence of Captain Joubert of the South African Police Service, he examined the defendant's firearm. He confirmed that the firearm was not capable of being fired. This was because there was a bulge in the barrel, which obstructed the movement of the slide to such an extent that the total backward and forward motion of the slide was impossible.

In order to conduct a ballistic test, the bulge was filed down. This, however, did not assist as the bulge on the inside caused the bullets to slip or jump, thereby creating a different set of markings on the bullets.

It was ultimately decided to cut the barrel of the firearm. Thereafter further tests were conducted. Mr Steyl testified that he concentrated on the "skid" marks, which are formed when the bullet enters the barrel on its exit. As a result, he positively matched the bullet jacket found on the scene with a bullet fired from the defendant's firearm during the tests.

Mr Steyl was extensively cross-examined by Ms Lange (for the defendant). Save for a discrepancy relating to the size of the barrel that was cut, his findings and methodology, although challenged, revealed no inconsistencies.

The defendant denied:-

a) That he had fired a shot into the plaintiff's home; and
b) That his firearm was used in the alleged shooting.

In particular, he denied that his firearm was capable of firing. He testified that his firearm had jammed whilst he was at a shooting range. This incident occurred prior to the 13 October 1998. The defendant gave various reasons why the firearm had jammed. In reply to the plaintiff's list of admissions sought, the defendant stated that the firearm "became damaged for a reason that is uncertain". In his evidence in chief, he said that he had used reloaded ammunition – which he had reloaded himself – and had probably used too little gunpowder. Under cross-examination, he testified that it was an "accumulation of lead filings" that probably caused the firearm to jam.

Mark Bristow confirmed that he was present with the defendant when the firearm jammed. This was a few weeks prior to the making of his statement to the police (2/11/98). He also confirmed that he had met the defendant during the early hours of the morning of the 13th October 1998. He testified that the defendant was under the influence of alcohol and had difficulty in gaining entry into his vehicle. He then escorted the defendant to his home. He left the defendant at his home at approximately 03h15.

The defendant did not call any expert witnesses to rebut the evidence of Mr Steyl. He alleged that the police refused to return his firearm to him thereby preventing him from employing the services of a ballistics expert. In this regard it is essential to note that the trial was originally enrolled for hearing on 22 November 2000. The defendant, however, brought an application for an adjournment *inter alia* on the grounds that he required time to obtain his firearm from the police (which he alleged was now available) and to employ the services of a forensic expert – thereby affording him "the opportunity to prepare (his) defence". This, however, was not done, the defendant alleging that the police's refusal to return his firearm had prejudiced him in the conduct of his defence. It is also significant to note that since 22 November 2000 the

defendant failed to seek assistance from the Courts to enable him to timeously and adequately prepare for the trial.

Publication that the plaintiff had a criminal record for drugs.

The plaintiff did not give any evidence pertaining to this allegation. Indeed Mr Salmon, for the plaintiff, appears to have conceded this in argument – viz. that the evidence of the plaintiff and his wife established all the other allegations as contained in the Summons.

Running parallel to all the incidents described above is:-

a) The defendant's alleged relationship or infatuation with Angela Catlett; and
b) The disciplinary hearing and its consequences, instituted by the plaintiff against the said Angela Catlett.

It is common cause that:-

a) Angela Catlett was in the employ of the Independent Newspapers at the time.
b) Disciplinary proceedings were initiated by the plaintiff against Catlett;
c) As a result of the disciplinary hearing, there was tension amongst the staff – those who were of the opinion that Catlettt had been ill-treated and those who were not of the same opinion;
d) The defendant and Catlett became friendly with each other during 1998 (prior to the first incident alleged);
e) The defendant became aware of the dispute between the plaintiff and Catlett.

Although the defendant described his relationship with Catlett as a "plutonic friendship", the evidence suggests that there was more to it than what the defendant was prepared to admit. The defendant testified that:-

a) Catlett would join him for a drink and a game of pool at a bar called "The Horse with no name";
b) Catlett would phone him repeatedly – virtually every day and on some days up to three or four times a day. One call in particular lasting 100 minutes;
c) He would also call her frequently – eg. On 4/6/98 between the hours of 16h47 and 22h21, he phoned Catlett on six occasions.

Marinovich testified that the defendant "fancied" Catlett and that she "strung him along" and that he gained the impression that the defendant was keen to impress her.

William Harper testified that Catlett was the defendant's girlfriend and that they spent a lot of time together. It was further put to the plaintiff under cross-examination that it was common knowledge that the defendant was associated with Catlett.

The defendant denied participating in any or all of the acts described aforesaid. He further denied any knowledge as to who was responsible, but speculated in this regard. The defendant testified that because of the success of his investigative journalism, he had many dangerous and powerful enemies. He testified that it was possible that any of these enemies would seize any opportunity to implicate him in the commission of these acts. Central to this theory is the knowledge by his enemies that:-

a) He was associated with Catlett; and
b) The animosity between the plaintiff and Catlett and disciplinary action against Catlett.

Both he alleged were common cause. As a result, he testified that it would be easy for someone to start a rumour that the events complained of did occur.

I agree with the submission that the evidence adduced on behalf of the plaintiff established that the incidents complained of (save for the publication that the plaintiff had a criminal record for drugs) did in fact occur are not fabrications as alleged by the defendant. These acts were clearly of an intimidatory nature.

The question remains, however, whether the defendant is responsible for any or all of the said intimidatory acts. It has been submitted by both counsel for the plaintiff and defendant that these intimidatory acts were linked and were not isolated incidents.

The essential aspect pertains to the shooting incident. The evidence strongly suggests that the defendant's firearm was used and that it was the defendant himself who fired the shot. In considering the defendant's evidence in this regard, the following is noted:

1. The defendant's inability to provide a consistent explanation/reason why the firearm jammed (discussed above).

2. The defendant's account of the shots fired immediately before the firearm jammed was consistent with there being no bullet left in the barrel to cause the obstruction. This was contradicted by Bristow who testified that he and others tried to "clear the round" from the barrel and that they even "banged it on the floor".

3. Bristow further testified that in the process of trying to remove the bullet, the defendant cut his hand. The defendant testified that he cut his hand as a result of the recoil when the third shot was fired.

4. Both the defendant and Bristow were unable to indicate when the "jamming" incident took place. This despite the incident occurring a few weeks prior to the day that they made their statements to the police.

5. Both the defendant and Bristow issued statements to the police. Both statements referred to events after the shooting incident. The defendant's version was that he and Bristow had been misled by the Investigating Officer who informed them that the Tuesday's date was the 14th and not the 13th of October 1998. Bristow however stated that he had merely duplicated the entry from his pocket book. The pocket book was, however, not produced as evidence.

6. The defendant was uncertain whether the cartridge case had been ejected. He was however adamant that the firearm could not be disassembled as the slide could not move. When it was put to him that there was no cartridge case in the firearm when it was handed in to the police, he conceded that the slide must have moved all the way back in order to eject the cartridge.

7. The incident of the jamming of the firearm and what actually transpired on that day (as outlined above) must be weighed against the evidence of the defendant that he has sufficient knowledge to deliberately accomplish this.

8. No one other than the defendant was in possession of the firearm during the relevant period.

9. Bristow was unable to recall why he was travelling in Bulwer Road on the night of 12th/13th October 1998. He assumed that he was returning from a complaint as he was on duty that night. However he could not adequately explain his presence in the Umbilo area when he was on duty in the Pinetown area.

10. It is also improbable that Bristow would allow the defendant to drive his vehicle given the inebriated state that he was in (as described by both the defendant and Bristow). When specifically questioned on this aspect he responded by saying that he was uncertain whether his crew actually drove the defendant's vehicle or whether they followed the defendant.

11. It is further unlikely that he (Bristow) would have spent approximately 65 minutes with the defendant and would have neglected his patrol duties (in Pinetown) as a result thereof.

I am satisfied that on the evidence before Court that :

(a) The defendant's firearm was indeed used in the shooting incident; and

(b) That it was the defendant who fired the shot.

Both the defendant's and Bristow's evidence cannot be accepted and appear to be a conspiracy to absolve the defendant of liability.

The concession by Counsel that the acts were "an obvious chain of events" is however not sufficient to hold the defendant responsible therefore. The plaintiff testified that after the discovery of the bullets, tablets and the note, he reported the matter to the Managing Director, Deputy Managing Director and the Financial Director. It was agreed between them that the matter would not be made public in order to try and obtain a reaction from the culprit. The same

course of action was agreed upon after the incidents relating to the locking of the gate and the discovery of the discharged tear-gas canister.

Despite this agreed course of action, the witnesses, Marinovich and Dix, testified of the defendant's knowledge of the various incidents.

It is important to note that the defendant had knowledge of the tear-gas canister incident despite the plaintiff's agreed course of action referred to above before the said incident became public knowledge.

In considering the totality of the evidence (as outlined above) I am satisfied that on a balance of probabilities, the defendant was responsible for the series of intimidatory acts, that preceded the shooting, as well. The defendant's bare denial of the incidents and his speculations and suggestions must be rejected as false. The probabilities of a person or persons committing these acts in an attempt to "sideline" the defendant as an investigative reporter are wholly improbable and are a figment of his imagination. It is noted that this speculative theory is based on the defendant's relationship with Angela Catlett and the repercussions of the disciplinary enquiry held against her. The defendant consistently denied that his "relationship" with Angela Catlett was anything beyond friendship. If this were indeed so, his speculative theory becomes more improbable and is to be rejected. The defendant was not an impressive witness and constantly tried to substantiate his answers in an attempt to convince the court that he was honest and truthful in his testimony.

These intimidatory acts coincided with the developments relating to the Catlett disciplinary enquiry. This reinforces the evidence of the plaintiff's witnesses who testified that the defendant was infatuated with Angela Catlett and was seeking her affection. These acts were committed by him to impress her and to show his support of her in respect of the said enquiry in the hope that she would accede

to his amorous advances. There is no doubt that he was responsible for these cowardly acts of terror against the plaintiff and his family and must accordingly be accountable therefore. The plaintiff relied on the *actio iniuriarum* in support of his claim. In *O'Keefe v argus Printing and Plublishing Co Ltd and Another* 1954 (3) SA 244(C), Watermeyer AJ confirmed that it "is the action for damages open to a plaintiff who can show that the defendant has committed an intentional wrongful act which constitutes an aggression upon his person, dignity or reputation."

In *Delange v Costa* 1989 (2) SA 857 at 862, Smalberger JA held:

> "... Because 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 of whether subjectively the aggrieved person's dignity was impaired.
>
> ... 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 1168(C). 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."

In considering each of the incidents in isolation it is noted that save for the locking of the gate and the shooting incident, the others did not seem to affect the plaintiff personally. The bullets, tablets and notes were found by the plaintiff's wife and retrieved by the plaintiff from the police a week later. It is significant to note that he did not insist upon a case being opened for investigation.

The plaintiff was not the recipient of the abusive phone calls. The calls were answered by his wife and she only informed the plaintiff thereof on the following

morning. Neither the plaintiff or his wife were particularly interested or concerned about this incident.

As regards the tear-gas canister incident, the plaintiff confirmed that the canister was found by his wife. Although he alleged that he was "concerned", he did not do anything at all but chose to remain at his holiday cottage – approximately 90km away. His behaviour was certainly not in keeping with his alleged concern for the safety of his wife who was seven months pregnant at the time.

The only incidents which resulted in action by the plaintiff related to the locking of the gate and the shooting at his house.

There is no doubt that the plaintiff, his family and his employees were greatly inconvenienced when the gate was chained and locked. The plaintiff clearly saw that as an act of intimidation which was borne out by his response and actions thereafter.

The shooting incident was clearly a threat to the plaintiff and his family. This was the final straw. The cumulative effect of all the previous acts of intimidation resulted in a vow to discover and expose the person or persons responsible. That these acts, cumulatively, constituted an act of aggression upon his person, dignity or reputation, there can be no doubt.

The plaintiff has claimed the sum of R130 000.00 (one hundred and thirty thousand rand) as damages.

In ascertaining the award to be made I am aware of the comments of Holmes J (as he then was) in the case of Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) at 287:

> "I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense."

The courts, when awarding damages of this nature must not unnecessarily burden the defendant in the plaintiff's favour, it must however, not be so conservative that the plaintiff does not obtain adequate compensation.

The plaintiff has also sought a punitive costs order against the defendant. It is trite that a court has a discretion to be exercised judicially upon a consideration of the facts of each case, in awarding the costs of the action.

Having taken into account all the relevant circumstances, judgement is granted in favour of the plaintiff as follows:

(a) Payment of the sum of R60 000.00 (sixty thousand rand)

(b) Interest a tempore morae

(c) Costs of suit to be taxed on the High Court tariff on the scale as between attorney and client, such costs to include:

  (i) the wasted costs occasioned by the adjournment on 22 November 2000

  (ii) the qualifying fees of the expert witness Mr Steyl.