

NOTES / AANTEKENINGE

THE LAW OF DELICT AND PUNITIVE DAMAGES*

1 Introduction

In two recent case-law *dicta*, one of the Constitutional Court, it was made perfectly clear that there is no room in the South African law of delict for awarding punitive damages. In *Dikoko v Mokhatla* (2006 6 SA 235 (CC) 263) Mokgoro J expressed it as follows:

“Equity in determining a damages award for defamation is ... an important consideration in the context of the purpose of a damages award, aptly expressed in *Lynch* [1929 TPD 974 at 978] as solace to a plaintiff's wounded feelings and not to penalise or deter people from doing what the defendant has done. Even if a compensatory award may have a deterrent effect, its purpose is not to punish. Clearly, punishment and deterrence are functions of the criminal law. Not the law of delict ... In our law a damages award therefore does not serve to punish for the act of defamation. It principally aims to serve as compensation for damage caused by the defamation, vindicating the victim's dignity, reputation and integrity. Alternatively, it serves to console.”

A similar approach is also apparent from *Seymour v Minister of Safety and Security* (2006 5 SA 495 (W) 500), where Willis J stated unequivocally that it “is trite that the primary function of awards for damages under the *actio injuriarum* is to compensate the victim for his or her *injuriae*, and is not exemplary” (see also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 823-828; *Innes v Visser* 1936 WLD 44 45; *Lynch v Agnew* 1929 TPD 974 978; *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771; and *Collins v Administrator, Cape* 1995 4 SA 73 (C) 94).

It is, however, debatable whether this view accurately reflects the position in positive law, or, if it does, whether the *de lege ferenda* approach in our law should not be different. Under South African law there is consensus that the *actio legis Aquiliae*, in terms of which patrimonial damages may be claimed, and the action for pain and suffering aimed at non-patrimonial damages for bodily injuries, have purely compensatory functions - punitive damages are

* This note is an adapted version of a report on South African law for a project of the European Centre for Tort and Insurance Law in Vienna, Austria, of which the author is a Research Fellow. The purpose of the project is to ascertain to what extent different legal systems permit (even covertly) punitive damages to be awarded. An expanded Afrikaans version of the report will also be published in a memorial volume for the late Prof Hans Visser.

thus completely out of the question (see *Fose v Minister of Justice supra* 822; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917; see also Visser and Potgieter (assisted by Steynberg and Floyd Visser and Potgieter's *Law of Damages* (2003) 174-176; and Van der Walt and Midgley *Principles of Delict* (2005) 217). But not so in the case of the *actio iniuriarum* which is traditionally directed at *solatium* (solace money) or (personal) satisfaction (sentimental damages) for an *iniuria* – that is, the wrongful and intentional infringement of an interest of personality (see, eg, *NM v Smith (Freedom of Expression Institute as amicus curiae)* 2007 5 SA 250 (CC) 265-266, 289; *Dikoko v Mokhatla supra* 258; *Hofmeyr v Minister of Justice* 1993 3 SA 131 (A) 154; *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 849; see also Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 39-40, 57; and Burchell *Personality Rights and Freedom of Expression. The Modern Actio Iniuriarum* (1998) 133-135).

2 Roman-Dutch law

At common law *solatium* or satisfaction had the character of punitive damages, since the *actio iniuriarum* was a penal action in the form of an *actio vindictam spirans* (action breathing punishment). In the assessment of the sum awarded for an *iniuria*, the punishment of the perpetrator was therefore the exclusive object. In *Salzmann v Holmes* (1914 AD 471 480) (see also *Bruwer v Joubert* 1966 3 SA 334 (A) 337-338; *Die Spoorbond; Van Heerden v SAR* 1946 AD 999 1005; and De Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 180). Innes ACJ stated that “the sum awarded was originally in the nature of a penalty”, but that “the penalty was ... necessarily apportioned to the extent to which the plaintiff suffered from the injury inflicted; and that depended upon the circumstances of each case”.

3 South African courts

3.1 General approach

In contradistinction to Roman-Dutch law the general approach of our courts has been that the *actio iniuriarum* has a compensatory as well as a penal function. Apart from the fact that the awarding of satisfaction under the *actio iniuriarum* provides solace (compensation) for injured feelings, case law also confirmed its punitive function to neutralise the plaintiff's feelings of injustice for the (intentional) invasion of his interests of personality. A punitive element in damages for *iniuria* is therefore still present, but punishment is no longer the exclusive object (see Visser and Potgieter 464; Neethling “Personality Rights: A Comparative Overview” 2005 *CILSA* 222; and Erasmus and Gauntlett (revised by Visser) “Damages” (1995) 7 *LAWSA* 74). In for example *Pauw v African Guarantee and Indemnity Co Ltd* (1950 2 SA 132 (SWA) 135), the court expressed it thus: “Under the *actio injuriarum* damages are given in the form of a *solatium* for injured feelings and as a punishment of the defendant in order to assist in salving the injured feelings of the plaintiff” (see also *Salzmann v Holmes supra* 480 and 483; *Gray v*

Poutsma 1914 TPD 203 211; *Bruwer v Joubert* 1966 3 SA 334 (A) 338; *Potgieter v Potgieter* 1959 1 SA 194 (W) 195; *Mhlongo v Bailey* 1958 1 SA 370 (W) 373; *Buthlezi v Poorter* 1975 4 SA 608 (W) 615-618; *SA Associated Newspapers Ltd v Yutar* 1969 2 SA 442 (A) 458; *Gelb v Hawkins* 1960 3 SA 687 (A) 693; *Brenner v Botha* 1956 3 SA 257 (T) 262; *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501-502; *Chetcuti v Van der Wilt* 1993 4 SA 397 (Tk) 399-401; *Africa v Metzler* 1997 4 SA 531 (Nm) 538 and 539; *cf Fose v Minister of Justice supra* 822-823; and *Visser and Potgieter* 464 fn 265). The following *dictum* in *Masawi v Chabata* (1991 4 SA 764 (ZH) 772) must be read against this background since punishment is no longer the primary object of the *actio iniuriarum*:

“As regards *quantum*, it must be borne in mind that the primary object of the *actio iniuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The Court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim ...”

3.2 Examples from case law

A few examples from case law will demonstrate this approach. The leading case in this regard is *Salzmann v Holmes* (*supra*; see *Fose v Minister of Justice supra* 822 fn 165). Here the defendant on three occasions published slander of the plaintiff imputing to him the crimes of rape and murder. The court found for the plaintiff and in assessing the damages, took into account especially the continued malice and ill-feeling of the defendant towards the plaintiff over a period of six years, as well the grave nature of the slander (482):

“It is difficult to imagine one more gross, for the plaintiff was said to be guilty of the two most serious crimes known to the law ... Under these circumstances, the Court should have awarded a very substantial sum by way of compensation to the plaintiff for the *contumelia* inflicted, and by way of penalty upon the defendant for his aggravated and malicious defamation.”

As is also illustrated by the following two cases, the need for punitive damages has come to the fore especially in cases dealing with defamation. In *Buthlezi v Poorter* (*supra* 615-616; for analogous cases, see *Kahn v Kahn supra* 500, 501-502; *Chetcuti v Van der Wilt supra* 399-401; and *Africa v Metzler supra* 538-539) the plaintiff, a politician, had been accused in a daily newspaper of hypocrisy and dishonesty, and had been pictured as a man who had misled his friends and followers – according to the court (641) a “more vicious piece of character assassination it would be hard to imagine”. The defendants raised the defence of justification but abandoned it on the afternoon before trial. The court (615-616) held that this fact seriously aggravates damages, and this is even more so where the defendants then for the first time admitted that the offending article was false, defamatory and malicious. Williamson AJ continued (615-616):

“I would have expected that anyone with any sense of decency who on discovering that he had wrongly cast so grave and hurtful a slur would make

haste to apologize or at the very least to explain that he had acted in good faith. No such attempt was made by any one of the defendants and they maintained an unrepentant attitude throughout. I regard their attitude as scandalous and deserving of the gravest censure.”

The court (617-618) held that “the appropriate way of impressing upon all concerned that attacks of the kind to be found in this case are not to be lightly made is by awarding substantial damages”; that “the penal element in the damages to be awarded” should not be affected by the success or failure of the defendants’ attempt to ruin the plaintiff; that “it is well recognised that the Court is justified in awarding exemplary damages in an appropriate case”; and that “the present case is indeed an appropriate case for such an award” – “[o]ne finds only aggravating features in the conduct of the defendants”.

In *SA Associated Newspapers Ltd v Yutar* (*supra* 458; and *cf* also *Gelb v Hawkins supra* 693) the Appeal Court described an imputation that the plaintiff (Deputy Attorney-General) deliberately misled the court, as “one of the most humiliating insults which could have been offered to any person in [such a] position”. Having found that there was “highly persuasive indications of a purposeful attempt [on the part of the defendants] to inflict injury” on the plaintiff, Steyn CJ continued:

“[It] is something so disgraceful, so much at variance with an elementary fundamental duty, as to be unpardonable. If discovered, it could not possibly be countenanced or overlooked. To ascribe such conduct to the respondent was defamatory in the highest degree, and calls for punitive damages.”

The next two decisions concern damages for adultery. A case in point is *Bruwer v Joubert* (*supra* 338), where Rumpff JA stated that in appropriate circumstances there is a penal element (“strafelement”) in the assessment of damages involved and that, with reference to *Viviers v Kilian* (1927 AD 449), “it is only right that profligate men should realize that they cannot commit adultery with married women with impunity”. In this regard the attitude of the perpetrator after the *iniuria* plays an important role in determining the amount of *solatium* or penalty to be paid – an honest apology acts like a balm on the wound while persistence burns like salt on it, tending to amplify and aggravate the injury, for example, where the defendant relentlessly continued with the adulterous relationship, even, to add insult to injury, in the plaintiff’s home (see *Bruwer v Joubert supra* 339; and *cf Valken v Berger* 1948 3 SA 532 (W) 536).

Another case on adultery is *Potgieter v Potgieter* (*supra*). Here the adulterous third party (defendant) treated the innocent spouse (plaintiff) afterwards with contempt, whereupon the latter shot and seriously wounded him. The court (195) held that there “is a penal element in this form of damages” and that the defendant “certainly deserves to be penalised”. But Hiemstra J opined that the assault on the defendant must have a negative effect on the amount of damages:

“The money is awarded to the claimant to assuage his injured feelings. He has however in a more robust way richly obtained balm for his wounded soul.

The cry of pain, the writhing form of his adversary ... have given the plaintiff intense satisfaction in some primitive manner."

Accordingly his damages were substantially reduced.

Finally, *Brenner v Botha* (*supra*) involved insult or infringement of dignity. In this case a store manager addressed a store assistant (plaintiff), who had made a mistake, as follows: "Clear out, you bloody bitch, before I throw you out." Boshoff AJ (262) found that the words were certainly offensive and intended to humiliate the plaintiff. As far as the assessment of damages was concerned, he remarked that in cases founded upon *iniuria* which involves insult, substantial damages are awarded by the courts. The damages, which are difficult to assess, are "primarily compensation for wounded feelings", but are "to some extent punitive in cases such as this" (*cf* also *Mhlongo v Bailey* 1958 1 SA 370 (W) 373, a case involving invasion of privacy).

3.3 Assessment of damages

Before dealing with the assessment of damages, clarity should be obtained about the terms "punitive", "exemplary" and "aggravated" damages. Since the expressions "punitive (penal) damages" and "exemplary ('bestraffende') damages" are often used interchangeably and confusingly by the courts and jurists, it should be noted that they connote the same meaning, namely damages awarded to punish the defendant (see *Fose v Minister of Justice supra* 822; *Kahn v Kahn supra* 500, 501-502; *Chetcuti v Van der Wilt supra* 399-401; *Africa v Metzler supra* 538, 539; Visser and Potgieter 464; Burchell *The Law of Defamation in South Africa* (1985) 290; and *cf* Visser "Toekenning van 'Exemplary Damages' in 'n Geval van Laster" 1998 *THRHR* 150ff). But the same cannot be said of aggravated damages. Aggravated damages may include punitive damages but may basically only be compensatory damages and may therefore differ from punitive damages. However, as stated by Ackermann J in *Fose v Minister of Justice (supra* 822; see also Visser 1998 *THRHR* 153; and Burchell *Defamation* 291), "it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the *iniuria* have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word". In fact, according to Burchell (*Defamation* 291 fn 15 and 293-294) it is difficult to determine whether in certain cases the court was considering aggravated damages or punitive damages. So, in these cases an award of aggravated damages may substantially be the same as an award of punitive damages (*cf* also Van der Walt and Midgley 217), making the distinction between the two a purely semantic exercise (but see Burchell *Defamation* 293-294).

There is no fixed formula for the determination of the quantum of damages or satisfaction obtainable through the *actio iniuriarum*. The court assesses the amount, which is completely in *arbitrio iudicis*, by taking into account all relevant factors and circumstances *ex aequo et bono* (see generally Visser and Potgieter 448ff; and Neethling's *Law of Personality* 60).

In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* (2001 2 SA 242 (SCA) 260) Smalberger JA expressed it thus:

“The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess.”

As said, some of the factors that may legitimately be taken into consideration in aggravating or mitigating (extenuating) damages, may relate to the punitive element of damages, while others may be indicative of compensation (*solatium*) for injured feelings, although, in many instances, it will be difficult to determine whether a factor relates to compensation or to punishment. In any case, the courts do not distinguish between the amount for compensation and the amount added as punitive damages, but make a lump-sum award (see *Duba* “Additional Damages and Section 24(3) of the Copyright Act 1978” 1998 SALJ 468; and *Burchell Defamation* 292).

The factors influencing the amount of damages with regard to defamation, will be used as illustration (see generally, also for relevant case law, *Burchell Defamation* 294ff; *Burchell Personality Rights* 435-436; *Visser and Potgieter* 449ff; *Neethling's Law of Personality* 169-170; and *Van der Merwe and Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 442). First of all, malice on the part of the defendant (*eg*, where he was aware of the untruth of his defamatory assertions), is an aggravating factor and the court may well award exemplary or punitive damages. Other factors which may also aggravate the damages are the particularly drastic or insulting nature of the defamation, reckless or irresponsible conduct on the part of the defendant, the wide distribution of the publication concerned, the position and esteem of the plaintiff, the fact that the defamatory remarks were repeated, the injurious or damaging consequences of the defamation, and the defendant's perseverance in denying liability. As a general deduction in this regard it may be stated that aggravating factors directly related to the reprehensible conduct or attitude of the defendant, may perhaps be more prone to punishment than those not so related, although watertight compartments can obviously not be made. On the other hand, factors that relate directly to the harm suffered by the plaintiff to his good name or reputation, are more susceptible to compensation.

Mitigating factors or circumstances reducing the amount of compensatory or punitive damages (see generally *Burchell Defamation* 301-306; *Visser and Potgieter* 458-461; *Neethling's Law of Personality* 169-170; and *Van der Merwe and Olivier* 442), on the other hand, include the bad reputation, character or behaviour of the plaintiff, the truth of the defamatory assertions, provocative conduct on the part of the plaintiff, the limited or negligible extent of the publication, an apology by the defendant, unnecessary delay by the plaintiff to institute the action for defamation, the absence of intent or malice on the part of the defendant; and the fact that the defamation has been in circulation for a considerable time.

4 Dogmatic viewpoints

Three dogmatic viewpoints can be discerned amongst South African writers.

Visser and his co-authors fully support and propagate the view that the idea of punishment is inherent in the concept of satisfaction for personality infringement; in fact, according to them a true concept of satisfaction is impossible and meaningless without the idea of somehow punishing the perpetrator. Although satisfaction has no fixed content, in practice it operates by neutralising the feelings of outrage and revenge of the victim of an *iniuria* through the infliction of punishment on the perpetrator by condemning him to pay the victim an amount of money (see Visser and Potgieter 190-193 and 464; Visser "Genoegdoening met Betrekking tot Nie-vermoënskade" 1983 *TSAR* 55; *Neethling's Law of Personality* 59-60; and *Masawi v Chabata supra* 772). The granting of damages as satisfaction is the law's reaction to an injury to personality which has no "natural" monetary equivalent and where a type of factual or financial restitution is impossible, or as stated by Nugent JA in *Minister of Safety and Security v Seymour* (2006 6 SA 320 (SCA) 326), "[m]oney can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss".

Although, as Visser ("Damages – Wrongful Arrest and Detention – Quantum of Damages" 2008 *THRHR* 176) opines, "this vindictive element of the *actio iniuriarum* is often understated, ignored or even denied", he firmly believes that "the action has to a certain extent retained its character as an *actio vindictam spirans*" since it displays all the characteristics which are relevant in satisfaction: *animus iniuriandi* (intent) is generally a requirement which highlights the moral blameworthiness of the defendant; its penal nature obliges the defendant to pay an amount of money as a private penalty in favour of the plaintiff; and precisely as a result of its penal nature, it is neither actively nor passively transmissible before *litis contestatio* since it cannot serve its purpose after the death of the victim or the perpetrator (see Visser and Potgieter 191-192; *Masawi v Chabata supra* 772; Scott *Die Geskiedenis van die Oorerflikheid van Aksies op Grond van Onregmatige Daad in die Suid-Afrikaanse Reg* (1976) 13-16, 31, 161-163, 169, 190-191 and 198-9; Burchell *Defamation* 137; *Neethling's Law of Personality* 78; and *cf* also Van der Merwe and Olivier 239). But Visser and Potgieter do not exclude the idea that satisfaction may also have an element of compensation in the sense that the receipt of money assuages the plaintiff's wounded feelings and therefore makes him happy. Seen thus, satisfaction maintains a position somewhere between compensation and punishment (see Visser and Potgieter 190 and 192; *cf* Van der Merwe and Olivier 245; and Burchell *Defamation* 293).

However, serious criticism by academics has been levelled against awarding punitive damages under the *actio iniuriarum* (see Van der Walt and Midgley 3-4; Van der Merwe and Olivier 245 fn 6 and 246; *Neethling's Law of Personality* 58 fn 208; Burchell *Defamation* 291-294; Burchell *Delict* 187; Burchell *Personality Rights* 448; and see also the cases cited in par 1

above). Van der Walt (*Delict: Principles and Cases* (1979) 6; and see also *Fose v Minister of Safety and Security supra* 823) which expresses it as follows:

“The historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law. The basic purpose of a civil action in delict is to compensate the victim for the actual harm done. In the case of impairment of personality by wrongful conduct it may be difficult to determine the amount of the *solatium* which will confer personal satisfaction or compensation for the injury, but in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such an assessment. The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct.”

To cater for this view, Van der Merwe and Olivier (238 fn 72, 245 fn 6 and 246) suggest that the penal character of the *actio iniuriarum* should be relinquished. They argue that this action can hardly still have a punitive function in the light of the distinction between private and criminal law. However, Visser and Potgieter (192 and 193; and see also Visser “Genoegdoening in die Deliktereg” 1988 *THRHR* 487-489), contend that the action can then no longer be seen as providing true “satisfaction” since without an element of penance this concept is empty and meaningless. Although they concede that the concept of a private penalty violates the dogmatic distinction between private and public law, “it appears that there is at present no viable alternative to the retention of the *actio iniuriarum* with its penal element”.

A third view opts for a reconciliation of these two diametrically opposed viewpoints: the one that the *actio iniuriarum* with its penal element should be retained, and the other that this action should be rigorously cleansed of all penal characteristics so that only its compensatory function remains. The following considerations appear to open the door for a reconciliatory approach: First, it is very often extremely difficult to distinguish between and consequently separate the punitive and compensatory elements in damages for an iniuria (see Burchell *Defamation* 290-294; *SA Associated Newspapers Ltd v Samuels supra* 48; and see also par 3 3 above). Second, even punitive or exemplary damages may (sometimes) be seen and therefore function as part of compensation (see Burchell *Defamation* 292; Van der Walt and Midgley 217; *Gray v Poutsma supra* 211; and *Masawi v Chabata supra* 772). Third, (aggravated) compensation may have a deterrent effect – even though deterrence is mainly a function of criminal law – and thus promote the preventive function of the law of delict (see Visser and Potgieter 464; *cf* also Van der Walt and Midgley 217; but see Burchell *Defamation* 292-293). The deterrent effect has also been mentioned by our courts (see *Dikoko v Mokhatla supra* 263; *Africa v Metzler supra* 539; and *Buthelezi v Poorter supra* 717). Fourth, a judge, and not a jury, has control over the extent of damages in our law – the award of a jury is likely to be unpredictably higher than that of a judge (see Burchell *Defamation* 293). Burchell *Defamation* (292) seems to favour such a reconciliatory approach where he says:

“In essence, the controversy surrounding punitive damages is one of emphasis. The critics of punitive damages rightly stress that the court in a civil case must not make an award of damages (or a portion of that award) purely to penalize the defendant for his conduct or to deter people in future from doing what the defendant has done: punishment and deterrence are functions of criminal law, not delict. But even the critics of ‘punitive’ damages would ... accept that factors aggravating the defendant’s conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. The emphasis must therefore be on compensating the plaintiff, not on making an example of the defendant.”

Keeping this in mind, aggravating damages may be made to do the work of punitive damages (Burchell *Defamation* 293), or as Van der Walt and Midgley (217) explain, “‘exemplary’ or ‘punitive’ [damages] should not necessarily be regarded as punishment for the defendant’s conduct. Instead, where ... aggravating circumstances are present, a larger *solatium* – ‘aggravated damages’ – is required to assuage the plaintiff’s feelings”, which puts “the focus ... properly on the plaintiff, not the defendant”. In this way provision is made for a disguised penal element that will still do justice to the true concept of satisfaction, a concept which, according to Visser and Potgieter (192), as indicated, is impossible and meaningless without the idea of somehow punishing the perpetrator.

5 Conclusion

In conclusion it may be stated that although at common law the *actio iniuriarum* had a penal character, under the courts it developed a dual function, namely to claim satisfaction, firstly as compensation (*solatium*) for injured feelings as a result of an intentional violation of personality rights, and secondly as a punishment (punitive damages) to assuage the plaintiff’s feelings of outrage for the injustice had he suffered. However, because of the extreme difficulty in practice to distinguish between the compensatory and penal elements, and in light of the valid criticism leveled against awarding punitive damages in a civil action, it is submitted that aggravating compensatory damages may be made to fulfil the function of punitive damages so that the latter are not regarded as punishment for the defendant’s conduct, but rather also as compensation for outraged feelings, and in this way still do justice to the true concept of satisfaction.

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