

UBUNTU AND THE AMENDE HONORABLE – A MARRIAGE BETWEEN AFRICAN VALUES AND MEDIEVAL CANON LAW*

1 Introduction

The South African law of damages purports to be compensatory in nature. Although the inherent historical punitive element of the *actio iniuriarum* is generally recognised, the Constitutional Court has held that punitive damages have no place in South African law, because they would *inter alia* violate the public law-private law divide (*Fose v Minister of Safety and Security* 1997 3 SA 786 (CC)). The *actio iniuriarum*, the remedy for defamation, also places strain on the right of freedom to expression, because potential defendants could be intimidated by large damages awards from exercising this right (*National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); and *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 6 SA 512 (W)). At the same time it protects the right to dignity of the individual.

In the past decade the idea has been mooted by academics and also in our case law that the revival of the medieval *amende honorable* in our law would solve the problem of balancing the rights to freedom of expression and dignity (Midgley “Retraction, Apology and Right to Reply” 1995 *THRHR* 288; and Mukheibir “Reincarnation or Resuscitation? The Revival (or not?) of the *Amende Honorable*” 2004 *Obiter* 2). This remedy involves an apology by the defendant, and because with this remedy a potential defendant does not face financial ruin, his right to freedom of expression is upheld. At the same time an apology by the defendant for defamatory remarks could do much more to restore the plaintiff’s dignity than a monetary award.

This note juxtaposes the African concept of *ubuntu* with the *amende honorable*, a remedy which may be traced back to medieval European canon law. In the Constitutional Court judgment of *Dikoko v Mokhatla* (2006 6 SA 235 (CC)) two of the judges opined that the *amende honorable* has a place in the South African law of defamation, and moreover, that it is fully compatible with the notion of *ubuntu*.

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2 The *Amende Honorable* – a Medieval Lesson in Christian Forgiveness

The *amende honorable* can be traced back to medieval canon law, although it is often mistakenly regarded as having originated in Roman-Dutch law (see, eg, Mokgoro J and Sachs J in *Dikoko v Mokhatla*, in respectively par 63 and 116; and as well as Neethling, Potgieter and Visser *Law of Delict* (2006) 13). The very basis of the *amende honorable* is that of Christian forgiveness, as opposed to the punitive nature of its counterpart, the *amende profitable* (also known as the *actio iniuriarum aestimaria*) (Zimmerman *The Law of Obligations - Roman Foundations of the Civilian Tradition* (1990) 1072).

The *amende honorable*, used during medieval times entailed (in terms of a resolution of the Council of Carthage and later repeated in a decretal of Gratian), that a cleric could pray for pardon in case of slandering another person. The remedy was three-fold: firstly it contained a declaration that the statement was made in heat without any intention to defame; secondly it entailed the retraction of the defamatory words to repair the injured person's honour and the acknowledgement by the perpetrator that he had done wrong. The retraction and the acknowledgement can both be traced to canon law. In the third instance the offender offered an acknowledgement that he had done something wrong and he then asked for forgiveness. This notion of asking for forgiveness can be traced back to the teachings of the medieval Christian Church. (See generally with regard to the *amende honorable* De Villiers *The Roman and Roman-Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet's Commentary on the Pandects, with Annotations* (1899) 177-178; Mukheibir *The Wages of Delict – Compensation, Satisfaction, Punishment?* (Unpublished thesis, University of Amsterdam 2007) 38-39; and Zimmerman 1072).

The *amende profitable* or *actio iniuriarum aestimaria* was essentially the same as the Roman law *actio iniuriarum*. The plaintiff used this to claim damages and the remedy was punitive in nature. Zimmerman recognised the remedy as having originated in Germanic customary law, but "with the essential attributes of the Roman *actio iniuriarum* ... grafted onto it" (1072).

Both the *amende honorable* and *amende profitable* became part of Roman-Dutch law. Voet (47.10.17) described the *amende honorable* as consisting of a recantation, or a formal withdrawal in the case of wrongful words. In the case of a written defamation, the recantation had to be in writing. Where the injury consisted of an act other than wrongful words, a recantation was not possible; instead the aggrieved party could claim a *deprecatio* or an apology. The *amende honorable* was actively transmissible, therefore the children of a deceased who had been insulted or injured, could claim it on his behalf.

In Roman Dutch law the *amende profitable* and the *amende honorable* could be brought together in one action, one to claim satisfaction, and the

other one to claim a retraction and apology. The *amende profitable* was neither actively nor passively transmissible. The *amende profitable* developed into the present day *actio iniuriarum*, while until recently it was thought that the *amende honorable* was no longer part of South African law (*Hare v White* (1865)1 Roscoe 246 247).

During the twentieth century the *actio iniuriarum* was the only available remedy for plaintiffs in defamation cases. Although no longer an *actio poenalis* or a punitive action as it had been in Roman law and (in the guise of the *amende profitable*) during medieval and Roman-Dutch times, it is regarded by leading authors on the South African law of damages as having retained an element of punishment and even revenge (Visser and Potgieter *Law of Damages* (2003)). In this respect it is anomalous within a system which purports to be compensatory.

In recent times the *amende honorable* has made a comeback. In 2002 in *Mineworkers Investment Co (Pty) Ltd v Modibane* (2002 6 SA 512 (W)) the court held that a remedy such as the *amende honorable* would be a solution to solving the problem of balancing the rights to freedom of expression and dignity and that it would be compatible with the spirit, objects and purport of the Bill of Rights (par 28):

“Even if the *amende honorable* had never existed, the imperatives of our times would have required its invention. In my view, it is entirely consonant with ‘the spirit, purport and objects’ of the Bill of Rights in our Constitution that a person who has committed a wrongful act by defaming another should, in suitable circumstances, be given an opportunity to make an appropriate public apology in lieu of paying damages; and, no less importantly, that the victim of a defamation should similarly have the opportunity of having a damaged reputation restored by the remedy of a public apology. In the circumstances of this particular case, I am satisfied that it would be just and equitable that the defendant be given a choice between making a public apology or paying damages.”

In 2004 in *Young v Shaikh* (2004 3 SA 46 (C)) the court per Nel J held that, even if the *amende honorable* had not fallen into disuse, it would not serve any purpose in that instance, because the defamation had been of such a serious nature, and a clear message had to be sent to defendants that they could not rely on the right to freedom of expression to justify “baseless and selfish attacks on the integrity of others” (57E).

Although the remedy was mentioned again in later cases (such as *Mthembi-Mahanyele v Mail and Guardian Ltd* 2004 6 SA 329 (SCA); and *NM v Smith* [2005] 3 All SA 457 (W)) the facts of the cases were such that a decision as to the existence or not of the *amende honorable* in South African law could not be made.

3 Ubuntu – African Restorative Justice

The term *ubuntu* has become well-known in the post-apartheid South Africa. It is a contraction of the expression *umuntu ngumuntu ngabantu*, which means “a person is a person because of other people”. It has been

described as follows (Mukheibir *The Wages of Delict* 50-51):

“*Ubuntu* ... is not capable of being defined in purely Western terms. Certainly an attempt to compare it alongside Western philosophical precepts with a view to making some scientific comparison will not yield acceptable results. Because of its purely African nature it cannot be forced into European conceptual pigeonholes and it cannot be explained with any measure of precision that would be intellectually satisfactory to the Western mind. There may be analogous concepts in Western thoughts, such as compassion, humaneness, restorative justice, collectivity; *ubuntu* comprises all of these and so much more. In essence it is something to be experienced rather than to be explained. Seeing Nelson Mandela do the “Madiba Shuffle”, watching people in abject poverty share the last morsel of food with the neighbours, seeing a rainbow nation appear in a country that for all intents and purposes was on the verge of erupting into civil war – *ubuntu* is that and more.”

Ubuntu has also received judicial recognition. It was referred to in the post-amble of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) under the heading “National Unity and Reconciliation”; this post-amble gave rise to the Promotion of National Unity and Reconciliation Act (34 of 1995) which was the legislation in terms of which the Truth and Reconciliation Commission was constituted. When the constitutionality of the Truth and Reconciliation Commission was challenged, reference was again made to the post-amble of the 1993 Constitution (see the judgment of the Constitutional Court in *Azanian Peoples Organisation (Azapo) v President of the Republic of South Africa* 1996 4 SA 671 (CC)). In addition *ubuntu* was very prominent in the Constitutional Court decision of *S v Makwanyane* (1995 3 SA 391 (CC)) in which it held that 277(1)(a) of the Criminal Procedure Act (51 of 1977), which provided that the death penalty is a competent sentence for murder, was invalid and therefore unconstitutional, on the basis that it constituted “cruel and inhuman punishment”.

Although *ubuntu* is not formally recognised in the Constitution of the Republic of South Africa Act, 1996, the Constitutional Court has referred to it in numerous landmark decisions such as *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae) Lesbian and Gay Equality Project v Minister of Home Affairs* (2006 1 SA 524 (CC), the decision recognising gay unions) and *Hoffmann v South African Airways* (2001 1 SA 1 (CC)). It has thus become one of the unwritten values embodied in the new constitutional dispensation.

Recently it featured very prominently with regard to the law of defamation in *Dikoko v Mokhatla*, which is discussed in the next paragraph.

4 A coming together of cultures – *Dikoko v Mokhatla*

4 1 Facts

The facts in *Dikoko* are as follows: the plaintiff was the chief executive officer

of the Southern District Municipality; the defendant was the executive mayor. The defendant had by far exceeded his monthly cell phone allowance of R300 and had accumulated an excess of R3 200, which was long overdue. The Provincial Auditor-General had in letters to the plaintiff questioned the overdue indebtedness of the defendant and was not satisfied with an agreement between the defendant and the council to write the debt off. The auditor-general called on the defendant to appear before the North West Provincial Public Accounts Standing Committee to explain his indebtedness. In the course of his explanation he made a defamatory remark about the plaintiff (see par 6), as a result of which the plaintiff sued him for damages.

The High Court awarded damages in the amount of R110 000 against the defendant. He appealed for leave to appeal to the Supreme Court of Appeal; he also appealed against the quantum of damages as being excessive. The Supreme Court of Appeal dismissed the claim without providing any reasons. He eventually appealed to the Constitutional Court claiming privilege on the basis of section 28 of the Structures Act and section 3 of the North West Structures Act. The Constitutional Court per Moseneke DCJ granted the application for leave to appeal, but dismissed the appeal.

4.2 *Ubuntu and the amende honorable*

Both Mokgoro J and Sachs J recognised the fact that the *actio iniuriarum* was not entirely satisfactory in resolving the damage caused by a defamatory remark and held that the *amende honorable* was far better suited to defamation cases. In particular it was not focussed primarily on monetary considerations, but on reinstating the plaintiff's dignity, while allowing an opportunity for reconciliation between the two parties. The *actio iniuriarum* with its focus on monetary considerations could neither repair the plaintiff's dignity nor effect reparation between the parties. Sachs J felt particularly strongly about the overt focus of the current law of defamation on monetary considerations and the lack of opportunity to repair the damages relationship between parties (par 111):

"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."

Both Sachs and Mokgoro were of the opinion that the *amende honorable* was far more compatible with the notion of *ubuntu* than the *actio iniuriarum* with its focus on monetary reparation. *Ubuntu* is part of the cultural heritage of South Africa and it is the spirit of *ubuntu* that facilitated a peaceful transition from the divided society of the past to the present. It is compatible

with both national and international trends towards restorative justice. Thus Sachs J (par 114):

“The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu – botho.”

The *amende honorable*, with its emphasis on apology and retraction would do far more to restore the plaintiff's dignity than an amount of money. In addition there would be an opportunity to repair the broken relationships between parties.

The *amende honorable* should not, according to Sachs J, totally replace the *actio iniuriarum*. It was conceivable that an insincere defendant could abuse the apology and retraction to avert a large award of damages being made against him. Instead, the courts should adopt a flexible approach in this regard.

4.3 Back to the future?

Unfortunately it appears that the judgments of Mokgoro J and Sachs J will for the time being only be of academic importance. Despite the fact that the *amende honorable* had somehow found its way into the Constitutional Court, and despite the fact that it harmonises very well with the principles underlying our Constitution, it remains on the periphery of the legal sphere. Moseneke DCJ made reference to the notion of a law of defamation based on restorative justice, commenting that the reasoning in this regard had been “persuasive”; at the same time he held that the issues raised (the reintroduction of the *amende honorable* and its compatibility with *ubuntu*) had not been raised in the trial court and could therefore not be addressed here (par 86).

5 Conclusion

As early as 1995 Midgley recognised the advantages of the *amende honorable* in South African law. Subsequently Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibane* held that, if the *amende honorable* had indeed been abrogated by disuse, it would be good to reinstate it or allow a similar remedy, because it could facilitate a balance between the rights to dignity and freedom of expression and thus would be compatible with the spirit, objects and purport of the Bill of Rights. The reputation of the aggrieved party could be reinstated, thus recognising the right to dignity,

while freedom of expression would not be undermined by the threat of large damages awards.

The Constitutional Court in the judgments of Mokgoro J and Sachs J recognised the compatibility between the *amende honorable* and the African notion of humaneness as embodied in the African saying *umuntu ngumuntu ngabantu*. The *amende honorable*, it was held, could achieve much more than a mere award of damages, firstly to restore the plaintiff's reputation and secondly to restore the relationship between plaintiff and defendant which would otherwise remain adversarial.

In a system of damages which claims to be compensatory, the *actio iniuriarum* as an *actio vindictam spirans* seems to be somewhat anomalous. In addition our Constitutional Court has held that punitive damages are out of place within the constitutional order. These are reasons enough for wanting to revive (if indeed it has fallen into disuse) the *amende honorable* or a similar remedy. This argument is only strengthened in the light of the spirit of *ubuntu*. One could only hope that *ubuntu* does not degenerate into an over-utilised cliché which is seldom practised, and that true regard will be had to the spirit thereof as well as to the notion of compensatory damages.

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