REINCARNATION OR HALLUCINATION? THE REVIVAL (OR NOT) OF THE *AMENDE HONORABLE*

1 Introduction

For once it seems almost appropriate to say "in with the old". The last ten years have seen many new developments being introduced into the law, and it has been almost unheard of to unearth relics from the past. Yet this is precisely what has happened over the last two years with a remedy that had been all but forgotten, the so-called *amende honorable.* It was generally accepted that this remedy had fallen into disuse, when, lo and behold, it suddenly made an appearance in 2002 in the Witwatersrand Local Division. In 2003 it appeared again in the South, albeit much more tentatively. The possible recurrence of this old remedy is very telling in this modern, constitutional era, where it has become more appropriate most of the time to discard the old. But let us start at the very beginning ...

2 Apology offered

During the Roman-Dutch Law period the *actio iniuriarum* made way for two separate remedies, the *amende profitable* and the *amende honorable* (Midgley "Retraction, Apology and Right to Reply" 1995 *THRHR* 288; and Zimmerman *The Law of Obligations* (1990)). The former served the same purpose as the *actio iniuriarum,* namely to claim satisfaction (Neethling, Potgieter and Visser *The Law of Delict* 4ed (2001) 15; and Van der Walt and Midgley *Principles and Cases* (1997) par 10). The *amende honorable* had its origin in both Germanic and canon law (Zimmerman 1072). The action was actually a combination of three remedies (Zimmerman 1072). In terms of the *declaratio honoris,* which had its roots in Germanic customary law, the perpetrator declared that he had made his declaration in the heat of the moment (Zimmerman 1072). The aggrieved party could then claim that the perpetrator retract his defamatory words and deny the truth thereof (with the so-called *palinodia* or *recantatio*) and secondly claim an admission of guilt and an apology (with a *deprecatio*) (Voet 47 10 17 from Gane *The Selective Voet being the Commentary on the Pandects* (1957); and Zimmerman 1072). The *amende honorable* was generally regarded as compensatory (Van der Walt and Midgley par 10; and Voet 47 10 17). Voet, however, regarded a recantation as carrying with it a great enough penalty, because the person who had to withdraw his defamatory words was "handed over to the words

of penitence" (Voet with reference to Seneca 47 10 17), but the action was still civil rather than criminal (Voet 47 10 17).

The *amende honorable* was generally accepted to have fallen into disuse, while the *amende profitable* again became known as the *actio iniuriarum* (according to Van der Walt and Midgley par 10. Neethling *et al* 15, however, regard both these actions as having fallen into disuse and being replaced by the *actio inuriarum;* see also *Hare v White* (1865) 1 Roscoe 246 247; *Ward-Jackson v Cape Times Ltd* 1910 WLD 257 263; and *Lumley v Owen* 3 NLR NS 13).

For more than a century, the *amende honorable* was relegated to single paragraphs in textbooks. Curiously enough, it took nothing less than two very modern day Southern African phenomena such as black empowerment and the controversial arms deal, to recall this very aged European remedy. The irony should not be lost on us.

3 Apology offered and accepted – *Mineworkers Investment Company (Pty) Ltd v Modibane* 2002 6 SA 512 (T)

3 1 The facts

The plaintiff, MIC, was a black empowerment company, that instituted two defamation actions against the defendant. These actions were consolidated into one trial. The first action consisted of three claims. Claim A was based on a letter written by the defendant to certain senior persons at Johnnic Holdings, the holding company of the magazine *Financial Mail*. Claim B arose from a telephone conversation between the defendant and a strategy manager at BP, and claim C arose from statements made by the defendant to a journalist from *The Star* newspaper. In all the above cases the statements made were of the effect that the plaintiff company had betrayed the black empowerment cause and was acting for its own gain, or that it was incompetent.

The plaintiff sought that the following order be made (par 15):

> "(1) Directing the defendant to pay the plaintiff an amount of R285 000 subject to para 3 below.
>
> (2) Directing the defendant to pay the plaintiff interest on the aforesaid sum at the rate of 15,5% p.a. from date of judgment to date of payment.
>
> (3) The order in para 1 above shall take effect only in the event that the defendant fails to publish the following apology in a full page advertisement in the Business Day newspaper within ten days of the date of this order:
>
> 'APOLOGY AND RETRACTION TO MINEWORKERS INVESTMENT COMPANY (PTY) LTD
>
> To the extent that I have made statements to certain individuals and in the public media stating or implying that the Mineworkers Investment Company (Pty) Ltd (MIC) has behaved dishonestly in its dealings with me, I unequivocally retract all such

> imputations and unreservedly apologise that they were made. I regret any inconvenience caused to MIC.
> JOE MODIBANE'"

The plaintiff was therefore claiming an apology and retraction of the defamatory words from the defendant, and should the defendant fail to do the former, he would then have to pay damages in the amount of R285 000. What the plaintiff was in actual fact doing, was attempting to institute an action which supposedly had fallen into desuetude.

3 2 Decision and reasoning

Willis J reviewed the history and apparent demise of the *amende honorable* and held that it had not been abrogated by disuse; after rummaging in the legal attic so to speak, Willis J rediscovered the "little treasure" in some "nook" (par 24), no doubt amongst a few cobwebs, because it had well and truly been hidden for more than a century.

One of the "cobwebs" seems to have been the guarded approach by the courts to the remedy. The reason for that was that the only way in which the remedy could be enforced was by means of civil imprisonment and the courts had been loath to do this. This, according to Willis J, was not sufficient reason to regard the remedy as having been abrogated.

Another reason for the disappearance of the remedy had been the influence of English law, which did not have such a remedy, and the fact that during a certain period in South African law it was believed that our law was similar to English law.

Willis J furthermore held that even if he were wrong, and that the *amende honorable* had indeed fallen into disuse, there were good reasons why a remedy similar to the *amende honorable* should be available in South African law. An award of damages is not always a satisfactory remedy, because it does not strike an adequate balance between freedom of expression and protection of reputation, because

(1) it cannot adequately protect the reputation of the plaintiff; and
(2) it imposes restrictions on freedom of expression, because of the potentially financially debilitating effect it could have on a defendant (par 25).

In this instance a public apology would be a much more practical solution – it could remedy the harm done to the reputation of the plaintiff, and would be far less expensive than an award for damages. An apology would thus serve to encourage, rather than to inhibit, freedom of expression (par 25).

Willis J furthermore regarded a remedy such as the *amende honorable* as appropriate within the present constitutional context (par 28). The Constitution in section 173 provides that the courts have to develop the common law "taking into account the interests of justice". Willis J also referred to the following sections of the Constitution, namely, section 39(2), which provides that the courts, when developing the common law, have to promote the spirit, purport and objects of the Bill of Rights; section 38, which provides that whenever any fundamental right has been violated, that a court may "grant appropriate relief"; and section 172(1)(b) which grants a court the power, when it decides any constitutional matter, to make any order that is "just and equitable" (par 28). Willis J thus came to the following conclusion (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 a appropriate public apology in lieu of paying damages; and, no less importantly, that the victim of a defamation, should similarly have the opportunity to have 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"** [own emphasis].

With the choice given to the victim between paying damages, which, traditionally in terms of the *actio iniuriarum* had a punitive element, and making a public apology, it seems as if here could be a move towards tempering the punitive element of the *actio iniuriarum* by providing an alternative, more conciliatory, alternative.

4 No more Mr Nice Guy - *Young v Shaikh* 2004 3 SA 46 (C)

4 1 The facts

This case took place with the notorious international multimillion rand arms deal as its backdrop. The plaintiff was an electronic engineer and director of a company known as CCHH. The plaintiff's area of speciality was real time data communications for mission-critical distributed systems in the area of combat systems for naval combat ships. He had a long prior association with the arms industry (see 51A and further). His company, CCHH, was amongst a number of companies tasked by Armscor to develop technologies in which they had specialized. CCHH was a specialist in data communication and was approached for the development of a system architecture known as an Information Management System (IMS).

By 1999 CCHH had fully completed and tested the IMS in accordance with the specifications given to it. Eventually, however, the plaintiff's company was not awarded the government contract, despite the fact that it had

submitted a cheaper tender than the French company to whom the contract was eventually awarded. It became apparent that Armscor and the Navy had been advised by one of the companies in the Shaikh fold (see below) not to acquire an indigenous system (52E-I).

The defendant, Yunis Shaikh, had two brothers, Chippy and Shabir. Chippy was the chief of acquisitions for armaments at the Department of Defence, and Shabir had shares in various companies in South Africa and France (see 52E-F for an exposition of the corporate relations between the different companies), including a company known as African Defence Systems (ADS). ADS eventually was awarded the tender.

An investigation was launched by the Director of Public Prosecutions and Young was subpoenaed as a witness. He alleged a conflict of interest in the part of Chippy Shaikh, and suggested that the contract had been awarded to ADS because of the fact that his brother had been a director of that company.

Soon after that the defendant was interviewed on a news programme of eTV, a local television station, and in this programme the defendant accused the plaintiff of having embarked on a campaign of sleaze and slander by means of using the media, of lying and in fact not having developed any product.

Young instituted an action for damages, to which the defendant pleaded that although some of the statements had exceeded the boundaries of fair comment, he nevertheless denied having any *animus iniuriandi*. The defendant also offered an unconditional and unreserved apology. The attorney of the defendant furthermore submitted with reference to *Mineworkers Investment Company (Pty) Ltd v Modibane* (*supra*), that Young should have been satisfied with a publication of an apology in lieu of damages.

4 2 Decision and reasoning

Nel J awarded an amount of R150,000.00 in damages as well as costs.

The judge certainly was not in a mood to rummage for little treasures in legal attics, and from his words it is clear that he expected the legal attic to be as bare as Mother Hubbard's cupboard:

> "Even if the 'little treasure' can be recovered from a 'nook in our legal attic', I do not believe that a published apology in this matter would serve the interests of justice."

In this instance, because of the grave nature of Shaikh's defamation, Nel J did not regard an apology as adequate and serving the interests of justice.

One of the reasons forwarded in the *Modibane* case for reinstating the *amende honorable*, had been the fact that it did not impose financial hardship on the culprit. The fact that Shaikh had shown no compunction when he attacked Young's integrity was held by Nel J to be an aggravating factor, to the extent that there should have been no reasons to avoid serious financial harm to Shaikh.

At the same time the judge was also trying to send a message that freedom of expression was not a licence for infringing the right to reputation. In response to the reference in *National Media v Bogoshi* (1998 4 SA 1196 (SCA)) to the chilling effect that defamation actions could have on freedom of expression, Nel J had the following to say (57E):

> "If the award which I intend to make will have a 'chilling' effect on possible future and similarly baseless and selfish attacks on the integrity of others, it would certainly, in my view, be an additional reason not to make use of the lost 'little treasure'."

In short, it is clear that Nel J was intent on punishing this particular defendant, and secondly to make certain that he deterred future defendants from acting in a similar fashion. He saw no reason to use the *amende honorable* or a similar remedy in this instance, because all the reasons which has been given for using it by Willis J in *Modibane* were kindling to his cause and he was adamant not to let this defendant get off lightly.

5 To turn the cheek or not

The judges in the two cases adopted virtually opposing stances – Willis J was of the opinion that the defendant should not suffer undue hardship and this seems to indicate that he was of the opinion that, where possible, the defendant should not be unduly punished. Nel J, on the other hand, had no sympathy for the defendant before him, and in addition wanted to send a clear message to any future defendants. He clearly wanted to punish the defendant, and furthermore deter future defendants from similar conduct.

There are, however, certain factual differences between the facts of the two cases:

(1) in the first case the request for the apology came from the plaintiff whereas in the second case it did not come from the plaintiff, but from the defendant;
(2) in the first case the damages claim was conditional on the defendant not apologising; in the instance of the defendant making a public apology and retraction, there would be no claim for damages, whereas in the second claim the defendant offered his apology almost as a defence;
(3) in the first case the plaintiff was a corporation, in the second case the plaintiff was an individual, whose integrity as a person had been attacked.

Whether Nel J's reluctance to invoke the *amende honorable* could (in part) be attributed to these factual differences or whether it was due to the fact that the defamation in this particular case was so outrageous, or he generally regarded infringement of reputation as so serious that it should not yield before anything, not even the right to freedom of expression, and that a serious infringement of that right should therefore be punished accordingly, is not entirely clear.

As early as 1995 Midgley (293) had been of the opinion that a retraction and apology should be available as an alternative remedy to the *actio iniuriarum.* He was of the opinion that such a remedy would have the following advantages (293-294):

(1) mitigate damages claims
(2) serve as incentives to settle claims out of court
(3) the fact that it requires minimal amendment to the principles currently in force.

Midgley of course could not foresee that the courts would reintroduce (or rediscover) what he regarded as "the now defunct *amende honorable*" and instead he suggested that Parliament intervene by means of a short act providing for alternative relief in the form of an apology and retraction (296).

It is submitted that the option of the *amende honorable* or a similar remedy should be available. In the end the courts can and should balance the right of freedom of expression and the right to reputation. In a democratic society neither of these rights ought to be given preference. There have been many decisions in this regard. Specifically where there are rights that seem to be in conflict with one another, the courts have to balance these rights against one another in an assessment of proportionality (*S v Makwanyane* 1995 3 SA 391 (CC) par 104). It has furthermore been held that although principles can be established, these principles will have to be applied on a case by case basis (*S v Makwanyane* (*supra*) par 104).

There have also been a plethora of defamation cases in which the matter of balancing the rights of reputation and freedom of expression have been dealt with by the courts (*Khumalo v Holomisa* 2002 5 SA 401 (CC); *Van der Berg v Coopers & Lybrand Trust* 2001 2 SA 242 (SCA); *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); *Gardener v Whitaker* 1996 4 SA 337 (CC); and *Du Plessis v De Klerk* 1996 3 SA 850 (CC)). In *Du Plessis v De Klerk* (*supra*) freedom of expression did not succeed as a defence against defamation, because that case was decided under the 1993 Constitution (Constitution of the Republic of South Africa 200 of 1993) which was held in that case not to have horizontal application. Subsequent cases decided

with reference to the 1996 Constitution (Constitution of the Republic of South Africa Act 108 of 1996), which has horizontal application, have held that freedom of expression does not automatically give a defendant a defence against infringing a plaintiff's right to his good name.

In *Khumalo v Holomisa* (*supra*) the Constitutional Court held as follows (par 25 and 28):

> "However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality ...
>
> The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other."

The right to dignity, including the right to reputation, is equally deserving of protection and in each case the two conflicting rights need to be weighed up against each other. It is submitted that Willis J was correct by stating that *amende honorable* could go a long way towards facilitating this balancing process.

It is furthermore submitted that the *amende honourable* should only be available if the plaintiff consents thereto. Where a plaintiff does claim satisfaction and the court instead foists an apology upon him against his will, the conciliatory purpose of the remedy will be lost.

Although the *actio iniuriarum* retains a punitive element, our law of delict generally should not be used to punish, as seems to have been the intention in *Young v Shaikh*. As Lord Devlin said in 1964 in a well-known *dictum* in *Rookes v Barnard* ([1964] AC 1129), a *locus classicus* of exemplary damages in English law, the idea of using the civil law to punish remains anomalous. South African writers such as Van der Walt and Midgley have echoed this sentiment (par 3):

> "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 *solatium* which will confer personal satisfaction or compensation for injury, but in principle all factors and circumstances tending to introduce penal factors 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 the criminal law to punish and thereby discourage such conduct."

Despite the penal nature of the *actio iniuriarum*, there is no reason why, in suitable cases, the law should not offer another alternative, particularly where the plaintiff has requested it as in the *Modibane* case. This is particularly so in the light of the fact that in general the South African law of

damages is compensatory and does not recognise punitive or exemplary damages as a separate remedy (as recently confirmed by the Constitutional Court in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC)). It is therefore submitted that the *Modibane* decision is, in the current constitutional dispensation, the better of the two under discussion.

The *amende honorable* recently made an appearance in the unreported Supreme Court of Appeal decision of *Mthembi-Mahanyele v Mail & Guardian Limited* SCA (case no 054/2003). The respondents (defendants) in that case had requested further arguments regarding the introduction of new remedies, in particular the *amende honourable*, but because the publication in the particular case was not found to have been wrongful, it was not necessary to consider the matter (see par 75 and 76).

6 Conclusion

Whether the *amende honorable* is back to stay is not clear. It is submitted that a remedy of this kind has a place in South African law, particularly in managing the precarious balance between freedom of expression and the right to reputation. Essentially our law of delict is compensatory, not punitive, and a remedy which focuses on apology and reparation can go a long way to reinforce the notion of compensation in the law of defamation which has retained punitive elements of yore.

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