THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 534/13

In the matter between:

LOURENS STEPHANUS PRINSLOO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Prinsloo v State* (534/13) [2014] ZASCA 96 (15 July 2014)

Coram: Bosielo, Saldulker JJA and Mathopo AJA

Heard: 29 May 2014

Delivered: 15 July 2014

Summary: Criminal law – appeal against conviction – *crimen iniuria* and assault – the proper approach where the state and defence versions are mutually destructive – evaluation of the probabilities, strength and weaknesses of both versions.

ORDER

On appeal from: Free State High Court, Bloemfontein (Musi and Daffue JJ sitting as court of appeal):
The appeal against conviction is dismissed.

JUDGMENT

Mathopo AJA (Bosielo and Saldulker JJA concurring):

[1] This appeal arises from an altercation about parking at a female residence called *Vergeet-My-Nie* situated at the University of the Free State. The appellant was convicted of two counts of *crimen iniuria* and one count of assault by the Bloemfontein Magistrate Court on 4 January 2012. All the counts were taken together for purposes of sentencing. He was sentenced to a fine of R6 000 or twelve months imprisonment, wholly suspended for a period of five years on suitable conditions. The appellant appealed only against his conviction to the Free State High Court, with the leave of the trial court. The appeal was dismissed on 14 February 2013. The appeal on conviction before us is with leave of the court below.

[2] The circumstances giving rise to the conviction and sentence may be summarised as follows: On 3 February 2010 Ms Mkhiwane, the complainant in count one, testified that she went to the *Vergeet-My-Nie* female residence at the University of the Free State with her two daughters Ms Ayanda Mkhiwane (Ms Ayanda) and Ms Zintle Mkhiwane (Ms Zintle). Her youngest daughter Ms Zintle was enrolled as a first year student and would be housed at that residence. Upon their arrival at the residence there were no available

parking bays. Ms Mkhiwane parked her vehicle next to the residence, in a non-designated spot, as she had to offload Ms Zintle's luggage. After offloading the luggage, they returned to the motor vehicle. She entered first. She then overheard Ms Ayanda speaking to someone and noticed the appellant and three ladies pointing their fingers at them. Ms Ayanda asked them what the problem was. At that stage, the appellant, who was 30 metres away from them, moved towards their vehicle and uttered the following words whilst pointing at her: 'Yes I have a problem but I do not want to talk to you, I want to talk to the stupid and rude one'. The appellant also said to Ms Ayanda that she does not have a driver's licence because she is black.

[3] Ms Mkhiwane alighted from her vehicle to reprimand the appellant not to speak to her in that manner and told him that she was old enough to be his mother. Undaunted, the appellant grabbed her on the chest with his left hand and said, 'I will beat the hell out of you, woman'. She was scared; she lost her balance and informed the appellant that she was going to have him arrested.

[4] Undeterred, the appellant told her that by the time she had him arrested he would have beaten 'the hell out of her' and boasted that he would represent himself in court as he is a lawyer. At that stage the appellant's girlfriend, Ms Blaauw, came and physically pulled the appellant away from the parking lot to the residence. A few seconds later the appellant returned, and in an angry and aggressive manner, pointed at Ms Mkhiwane and her two daughters and blurted the following words: 'Julle fucking kaffirs'. Once again Ms Blaauw intervened and restrained the appellant, who was visibly angry.

[5] According to Ms Mkhiwane, she and her daughters then left the scene to report the incident, however, before they did so, they returned to the residence to ask for the appellant's name. The appellant refused and crudely asked, 'What the fuck are you going to do with the name?' Ms Mkhiwane then decided to take down the registration number of a blue City Golf belonging to one of the women who was with the appellant. She thereafter went to report the matter to a Professor Viljoen at the university. Thereafter she reported the matter at the police station.

[6] In a direct response to a question about how she felt when the words in the aforegoing paragraphs were used, she responded that she felt naked, worthless, belittled, dirty and that she felt like something had been taken away from her. She testified further that she understood the word *kaffir* to be derogatory and racist. It was her evidence further that these words were also heard by a young man who was nearby, and who was equally disturbed and wanted to take up the cudgels on her behalf and assault the appellant. However Ms Mkhiwane stopped him from taking such action. What incensed and humiliated her most was the fact that the appellant uttered those words in the presence of her two daughters and other members of the public.

[7] She denied emphatically under cross-examination that she and her daughters were aggressive and unruly towards the appellant and his companions and that they incited the argument. She reiterated that the appellant was initially talking to her daughter Ms Ayanda, and later approached her after she alighted from the vehicle. At that stage she observed from the appellant's facial expression that he was angry. She disputed the allegations that she referred to herself as a doctor and had threatened to ensure that the appellant did not obtain his degree from the university.

[8] The next witness for the State was Ms Ayanda. At the time of the incident she was reading for her Master's degree at the same university. She corroborated her mother's evidence in all material respects. The last witness for the State was Ms Zintle, Ms Mkhiwane's youngest daughter. Save for a few unimportant discrepancies in her evidence, it is essentially the same as that of her mother and sister. An ill-fated attempt was made to discredit her by pointing out some discrepancies in her evidence in court and the statement which she allegedly made to Ms Elize Saayman, the university internal investigator. The Magistrate rightly attached no value to the statement as she found that it was not property taken from Ms Zintle, and further that it was not read back to her before she signed it. Ms Saayman also confirmed in evidence that the statement was written down in a rush. She only caused Ms

Zintle to sign it the following day, in the absence of her parent or guardian, notwithstanding the fact that she was 17 years old at the time.

[9] The appellant testified in his defence and called the two female friends who were with him at the residence as his witnesses. He conceded in his evidence that he saw a vehicle parked on the pavement and he and his two female friends spoke about the fact that the vehicle was parked at the wrong place. Whilst they were talking, they saw Ms Mkhiwane and her two daughters. Ms Ayanda stood at the front passenger door and asked them whether there was a problem, to which they did not respond. He testified that she appeared aggressive and provocative. Although he did not reside at the residence, he felt obliged to tell them that they had parked in the wrong place. Ms Ayanda then said to them 'Who do you think you are to tell me where to park?' and referred to him as an idiot who wanted to impress the girls he was with.

[10] He testified further that Ms Mkhiwane alighted from her vehicle and calmly took his arm and asked what the problem was. Ms Ayanda kept intervening while he was talking to Ms Mkhiwane. He then told her to keep quiet as he was talking to her mother. He told Ms Mkhiwane that they had parked at the wrong place, whereupon Ms Mkhiwane asked whether the appellant was in charge of the parking area. He told her that he was not in charge but that if they went to campus control they would be told not to park there.

[11] According to the appellant, Ms Mkhiwane suddenly became aggressive and said that the university would castrate him for what he was doing. At this stage Ms Zintle also got out of the car and screamed at him. A serious verbal altercation ensued. Ms Blaauw then came over and removed him from the parking lot. As he was being removed, Ms Ayanda then said to Ms Blaauw 'You must teach your boyfriend to behave' to which she responded 'He knows how to behave'. Ms Ayanda then referred to him as a racist.

[12] The appellant confirmed that he and the two ladies left the scene and returned a few minutes later. He testified that at this stage that Ms Mkhiwane got out of the car, screamed at him and said 'You mother fucker, who do you think you are?'. He further testified that all three of them shouted and swore at him. At this stage Ms Mkhiwane asked for his name and student number and he replied that he is not a student at the university. He refused to provide his personal particulars. She then said that she would find out who he is and would ensure that he does not pass a single subject at the university and does not graduate.

[13] The appellant's friends, Ms Blaauw and Ms Botha, testified in support of his evidence. I find it expedient to deal with their versions together as their evidence is essentially the same. They both described the appellant as calm during the incident and imputed offensive and aggressive behaviour to the second State witness Ms Ayanda. They testified that all three State witnesses swore at the appellant. They denied emphatically that the appellant uttered the words he was accused of. Importantly, they said that Ms Zintle uttered derogatory words to the effect that they should 'Leave the mother fuckers alone'. Ms Blaauw further testified that the appellant was calm and was verbally attacked for no reason. However, her evidence contradicts the evidence tendered by the appellant, in which he admitted that he was angry.

[14] In this court the main thrust of the appellant's contention was that the Magistrate misdirected herself in that she failed to specifically mention in her judgement that she had considered the credibility of the each of the witnesses. It was contended that in so doing she had adopted a piecemeal approach to the evaluation of the evidence. In my view, this contention is misplaced. Although the Magistrate did not explicitly state that she considered the credibility of each of the witnesses, it is clear from her judgment as a whole, that in arriving at her conclusion, she had had regard to the credibility of the witnesses. On the contrary, the record reveals that the Magistrate made a proper assessment and analysis of all the evidence by, amongst other things, weighing the strength and the weaknesses of the state's case *vis-à-vis* that of the appellant, including the probabilities and improbabilities of both

versions of events. It is axiomatic that an examination of the probabilities is not done *in vacuum*. Such an exercise requires an analysis and evaluation of the evidence as a whole. See *S v M* 2006 (1) SACR 135 (SCA) para 189.

[15] An attempt was made to discredit Ms Zintle on the basis that she deviated from her statement to the police. In my view, the alleged discrepancies are not material and cannot affect the probative value of the evidence of the State witnesses. To expect witnesses to remember and recall their evidence *verbatim* appears to me to be irrational. The criticism levelled against Ms Zintle's statement is baseless because on the evidence of Ms Saayman, the statement was taken in a hurry. To my mind this implies that Ms Zintle had little time to consider her statement. This explains why the same statement was altered the next day. It is not unreasonable to assume that she was seriously traumatised by this unfortunate incident. It would be unrealistic to expect her to give a lucid and coherent account of the events shortly after the incident. Furthermore, Ms Zintle, who was a minor at the time, was allowed to depose to a statement without the support or guidance of her parent or legal guardian. In all likelihood she did not intend this statement to replace the evidence which she would give in a subsequent trial. In short, the making of a statement is not the same as giving evidence in court, where in many instances crucial evidence only will only come to light through cross-examination. I find the criticism against her evidence to be without substance. See *S v Mafaladiso* 2003 (1) SACR 583 (SCA).

[16] Counsel for the appellant argued further that because the State witnesses did not repeat in their evidence some of the words which were used in the charge sheet, the State witnesses should be disbelieved as this constituted discrepancies. I do not agree. It is a known fact that the drafting of charge sheets is the prerogative of the Public Prosecutor. This is done on the basis of the facts contained in the statements in the docket made by witnesses. The witnesses play no role or part in this regard. To expect the charge sheet to regurgitate the exact words used by the witnesses when they made their statements to the police is to my mind unrealistic. The evidence given by witnesses is intended to explain and support the averments in the

charge sheet. It is to be expected that witnesses will, whilst giving evidence in court, elaborate and explain the legalistic averments contained in the charge. Consequently, I find this ground to be without merit.

[17] I find the following pieces of evidence by the appellant to be destructive to his credibility and reliability as a witness: first, the appellant fared badly when he was confronted with the evidence of the State witnesses that he had to be dragged from the scene by his girlfriend in order to put a stop to the first altercation at the car; secondly, it is telling that, after being pulled into the dormitory, he returned a few seconds later, still aggressive, and continued insulting them. Furthermore, the appellant contradicted himself concerning the question whether he was angry or not at the material time. He maintained in his evidence in chief that he was not angry with the State witnesses that day. His two witnesses also denied that he was angry. However, later in cross examination he conceded that he became angry during the altercation. Self-evidently, this is a glaring and material contradiction on a material aspect of the case. In my view, this contradiction between the appellant and his witnesses is destructive of their credibility. It is no doubt this contradiction is the result of a poor attempt by the appellant and his witnesses to deny the fact that he was angry and that he blurted these derogatory words while in that state. This contradiction between the appellant and his witness is destructive of their credibility.

[18] It is trite that the State bears the onus to prove the guilt of the appellant beyond reasonable doubt and that there is no duty on the appellant to convince the court of the truthfulness of any explanation which he gives. If his explanation is found to be reasonably possibly true, the court will have no reason to reject it. See *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-E. See also *S v V* 2000 (1) SACR 453 (SCA) at 455B. However, this does not require proof beyond any shadow of doubt by the State. See *S v Phallo* 1999 (2) SACR 558 (SCA) para 10.

[19] The Magistrate delivered a well-reasoned judgment which accounted for all the proven facts. She found the following serious improbabilities in the

appellant's version; first, that the defence witnesses did not hear the appellant swearing at the State witnesses, but they heard Ms Ayanda calling the appellant a racist; secondly, whilst this incident happened at the same place, it is clear that they chose to hear and testify about what was favourable to the appellant; thirdly, although present at the scene, none of them witnessed the appellant grabbing Ms Mkhiwane by her shirt; fourthly, they could not explain why Ms Ayanda reacted in an aggressive manner to the appellant, if he was indeed calm and had only politely informed them that they had parked in an unauthorised place; fifthly, that Ms Mkhiwane, who on the appellant's version, alighted from her vehicle in a calm and composed manner, suddenly and for no reason, hurled abuses at the appellant; sixthly, that Ms Mkhiwane would utter such abusive words in the presence of her own daughters; and lastly, why Ms Blaauw had thought it necessary to pull the appellant away from the parking lot into the dormitory if he was as composed as he alleged. These improbabilities demonstrate unquestionably that the appellant and his witnesses' evidence is unreliable, as correctly found by the trial court. I am satisfied that their evidence was correctly rejected by the trial court as false.

[20] Against this backdrop I have no doubt that the appellant behaved in a high-handed and cantankerous manner, and further that he uttered the words attributed to him. The word *kaffir* is racially abusive and offensive and was used in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. The State witnesses testified about how they felt when so insulted by the appellant. It is trite that in this country, its use is not only prohibited but is actionable as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. I agree with the trial court's finding that such conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.

[21] In conclusion, I find that the trial court was correct in finding that the appellant uttered the words allegedly used, and further that he had intended to and did in fact humiliate, denigrate and injure the dignity of the complainants. It follows that the appeal must fail.

[22] In the result I make the following order:

The appeal against conviction is dismissed.

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R S Mathopo

Acting Judge of Appeal

Appearances

For the Appellant:	R Heathcote SC (with him W J Edeling) Instructed by: Horn & Van Rensburg Attorneys, Bloemfontein
For the Respondent:	S Giorgi Instructed by: Director of Public Prosecutions, Bloemfontein