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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER A265/17

In the matter between

INZINGA RANCH CC APPELLANT

AND

BUSISIWE MASHIYI RESPONDENT

CORAM: SAMELA J; THULARE AJ

JUDGMENT

THULARE AJ

[1] This is an appeal against the judgment of the Equality Court for the district of Wynberg. The gist of the respondent's complaint was that she was unfairly

discriminated against on the basis of her race and gender, as a black woman as well as that she was harrassed. The core of the appellant's answer to the complaint against it was a denial that the alleged discrimination or harassment took place and it was alleged that the appellant's conduct is not prohibited conduct.

[2] The appellant is the owner of […] A. Estate, a freestanding upmarket residential dwelling in Hout Bay in the City of Cape Town (the property). The appellant, represented by Keith Watkins (Watkins), its sole member who was represented by Seeff Properties (the agents) concluded a lease agreement with the respondent in respect of the property for the period 1 October 2012 to 30 September 2013. The respondent left the property before the agreed period in terms of the lease agreement. It is the relationship and developments, in particular the conduct of Watkins towards the respondent which led to the complaint.

[3] The respondent is an African woman and a mother of two children aged 10 and 1 year old. Upon her appointment at Shell (SA) with a condition to relocate from Johannesburg to Cape Town, she engaged the services of the agents who introduced her to the respondent for the lease of the property. She was a highly regarded executive at Shell (SA) and as a result the Migration Station, a unit at the company, got involved in assisting her to secure the property. The background checks by the agents indicated that she was well paid, highly thought of and had no credit difficulties.

[4] The agents used separate lease agreements for their corporate clients and ordinary residential properties. When the agents introduced the complainant to Watkins, he requested the agents to incorporate some of the terms found in a corporate lease agreement into the residential lease instrument with the complainant. The complainant found some of the terms objectionable but after further engagement the parties agreed on the terms to regulate their agreement, which the respondent signed on 27 September 2012.

[5] The appellant had conveyed, through the agents, three issues with the property which needed the attention of the respondent. Firstly, because of the high water pressure in the area, the respondent was requested, when using the kitchen mixer-tap, to hold the tap at the bottom before it was swung and opened. This was to ensure that the water does not jump up and splash onto the person using the tap which may result in injury or damage. Secondly, the respondent was requested to ensure sufficient ventilation in the shower to prevent green algae forming. This included opening the windows for some time when taking the shower or thereafter. The third was that there was strip laminated flooring in the bedrooms which was put in at the request of the previous tenants because of their asthmatic child. Water was anathema to the flooring and the respondent had to be alerted thereto.

[6] The respondent went on a business trip outside the country two days after taking occupation and returned on or around 4 November 2012. On the morning that she left the country she took a shower at about 4 am as she was on the 6 am flight. It was too early and too cold and if she had not been requested she would

not have opened the windows. In opening the windows, she only made a small gap and she had intended to let the shower steam off and close them before she left. She forgot to close the windows, went out of the country and left the windows open.

[7] On 16 October 2012 Watkins received a call at about 2am from the security at the gate to the estate, who informed him that there was a storm and that the curtains were blowing outside of the house through the main bathroom and the en-suite bathroom. He attended to the property the next morning and found the windows open and it was during high winds. Watkins did not only attend to the curtains. Without notice to the respondent, he carried out an inspection of the property. Amongst others, he concluded that the suction, which is the difference between the external and the internal wind pressure caused the trapdoor to vibrate.

[8] Watkins then wrote an e-mail on the 17th October 2012 in which he reported back and also made the suggestion, in line with standard practice at the estate, that the Estate Manager be informed when the respondent would be away for longer periods, and perhaps even leave a remote control key with that Manager. This would ensure that guards provided extra patrol and looked after the property with greater detail. The remote control key would facilitate access in case the alarm went off when the respondent was away. Watkins also suggested that he also be informed of her being away.

[9] The respondent returned on the 4th of November 2012. On the morning of the 5th November 2012, the gate to the property would not open by remote control. She then sent a text message to Watkins to report. Watkins attended to the gate. However, he went further. He inspected and attended to the fountain, the pool, the geyser and the garden. Watkins never sought her permission to go into the property in her absence, opened the house and went into it, which he did regularly thereafter including inspections. She found the conduct of Watkins as invasive.

[10] Around the 19th of November 2012, after the bath of the baby in a free stand-alone bath in one of the bathrooms, when the bath was opened for the water to run out, the respondent noticed that the water drained onto the floor of the bathroom, and did not run down the normal pipes. She requested Watkins to have a look at it. Watkins went into her bedroom to the en-suite bathroom, which had no problems, in her absence. This she saw from the report from Watkins in an e-mail dated 19 November, in which Watkins made reference to the hand-shower in her main bedroom. Watkins attended instead to the mixer in one of the basins. He did not attend to the drainage and the bathtub about which the respondent complained of and she had to get a plumber doing maintenance at her work place to attend thereto. In the e-mail, it was clear that Watkins checked the garden, pool, irrigation system and the fountain which she did not ask him to check, and raised his concerns thereon.

[11] Watkins' correspondence after the free-standing bath complaint was that if she continued to bath the baby in the tub then she had to make sure that she did

not push the bathtub backwards, that is, push it towards the wall with her body weight. On Watkins' version, the bath in question is not light, although it is not overly heavy. It would require a reasonable amount of weight to move it. It moved for between 30 to 40 mm, and it would have taken a reasonable amount of weight to move it. Watkins checked the wrong bath, and not the bath to which the respondent referred him for attention. He did not attend to the bath complained of. There was no relationship between the bath that he checked and the bathing of the respondent's child. The respondent found Watkins' response obnoxious.

[12] The respondent spent a lot of time travelling and according to Watkins she could therefore not maintain the property, especially the garden and the pool. His feeling was that the property was well beyond the complainant's ability to handle reasonably, and to ensure that she maintained his standards. The gardener that the respondent appointed came on a bicycle and was not admitted to the estate. The respondent communicated with the agent to arrange for a gardener, and this was of no consequence to him. In his view, the gardener that was appointed and attended to the property needed lessons from him.

[13] The respondent did not pay her rental on time on 1 December 2012 as provided for in the lease agreement because she had been out of the country and could not make contact. She paid the December rental on the $12^{th.}$. Watkins' view was that there could be no good reason for lack of payment of rental. The agents transferred the respondent's deposit to the appellant in lieu of her rental payment at his demand on 5 December 2012. When she was in a position to do

so, the respondent had communicated the reasons for her late payment to the agents, acknowledged that the payment was late and offered to make payment including interest worked out thereon as the lease agreement provided. The respondent upon her return made the payments, and the amount she paid was repaid into the deposit. Watkins was aware of and also party to the arrangement that the amount paid to him from the deposit would be paid back into the deposit when the respondent paid the December rental upon her return from arranging the expatriation of a body of a relative back into the country.

[14] Against this background and knowlegde, on the 13th December 2012 Watkins threatened the respondent with cancellation of the lease agreement and eviction proceedings unless the respondent agreed to his unilateral addition of a new term into the lease agreement. The term sought to be confirmed in writing to Watkins Attorneys by the respondent was that in the event of any future or late payment of the monthly rental appellant would be entitled to forthwith cancel the lease agreement and proceed to take legal steps to have the respondent evicted from the property. The respondent did not agree to this term. Furthermore, the appellant had demanded that as part of that new term, the respondent put in place a debit order for the rental payments and also to make further commitments with regard to the upkeep of the property.

[15] The respondent negotiated and entered into the lease in her personal capacity. When the respondent did not timeously pay rental in December 2012, on the 7th of December 2012 Watkins wrote an e-mail to the agent and threatened the agent with being joined as a party to legal action as they had

assured him that she was a quality tenant. Watkins also communicated with the respondent's employer on the 13th December 2012, drawing their attention to their image should he proceed with legal action to recover rental. He demanded from Shell (SA) that they guarantee the respondent's rental payments. He further demanded, through Shell (SA) that the respondent should put a debit order in place to secure timeous rental payment and also attend to the garden and pool to his liking.

[16] Watkins used the threat of cancellation of the lease agreement and eviction of the respondent as a weapon to extract satisfaction of his demands from the respondent through Shell (SA). Already on 13 December 2012, Watkins suggested to Shell (SA) that the respondent should cancel the lease and find alternative accommodation and that he would facilitate such a move on the understanding that he was in no way financially prejudiced. Watkins proceeded with this trajectory throughout. At a meeting he caused to be called on the 18th December 2012 with the respondent and the agents, he persisted on the terms made to Shell (SA) and further repeated his concerns with the garden and pool. Following the meeting, Watkins caused perplexes to be drilled, for the legs of the bath to be placed within to prevent the self-standing bath from moving.

[17] By 22 December 2012, Watkins asked the respondent to look for something more manageable for her as he would not continue to be accommodative. He had concluded that the property did not fit the respondent's lifestyle and was beyond her ability to manage. He suggested that she work towards vacating the property by the end of February. According to him the property was deteriorating before

his eyes and he could not be accommodating any further. He was irritated at what he viewed as a lack of interest by the complainant on litany of issues he raised. For example, he was not happy that the respondent did not use a pool maintenance business, Mainstream Pools in Hout Bay, to attend to his pool.

[18] There were differences of opinion between Watkins and the respondent on the maintenance of the property. For instance, she raised concern that the sprinkler irrigation did not cover the whole garden and had blind spots to which Watkins should attend, whereas Watkins expected her to get an additional sprinkler and that she was to move it around to water all the plants. This difference of opinion resulted in the mulberry tree not sprouting leaves on time. Watkins ascribes this to the respondent alone. Furthermore, when the sprinkler irrigation malfunctioned and ran throughout, which caused the respondent a R6000-00 waterbill, she turned it off, and Watkins had to attend to it, which caused him displeasure. There is no explicable reason on the facts as to why the malfunction of the sprinkler is attributed to the respondent alone.

[19] The complainant left her niece in charge of the property and the children when she left on a business trip. The niece had allowed some visits by her acquaintance and had fetched that person from the gate of the estate without any communication with the estate manager or the security at the gate. The security personnel had raised this with the estate manager as a security risk, who elevated it to Watkins who in turn took it up with the complainant.

[20] The respondent was upset, during January 2013, when she was advised by Watkins through an e-mail that the house had a bad smell which smelt like fish. Her bins were taken out every day and there was no such smell at the property. She felt discriminated against, and the statement was condescending. This e-mail to her arose out of a report which Watkins had received after he had asked the Estate Manager to go to the property and to attend to the sprinkler and the pool. The respondent acknowledged that the adverse allegations were made by the estate manager and not Watkins.

[21] The respondent advised Watkins on or about 23 April 2013 when he visited the property that evening that she would be moving out of the property at the end of that month. The e-mail from Watkins to her on 24 April 2013 records some of the differences. In that e-mail, Watkins' views of the respondent on their relationship and its problems is telling. The material part of this view is expressed as follows:

"I yet again offered to discuss your perceived grievances, oblique problems, with the view to finding an amicable solution."

[22] Some terms of the lease agreement require specific mention. Clause 3.1 provides as follows:

"3. DEPOSITS

3.1 When the TENANT signs the LEASE the TENANT will pay a deposit of R39 000-00 (Thirty nine thousand rand only) to the LANDLORD. This is equal to 1 ½ months rental, (the Damages Deposit). The LANDLORD will put the Damages Deposit and any other deposit in a bank account and all interest that is earned on the Damages Deposit will be for the TENANT."

[23] Clauses 8.1, 8.8, 8.9 and 8.10 provides as follows:

"8. TENANT'S OBLIGATIONS

8.1 Be responsible to look after the PREMISES and return the PREMISES at the end of this LEASE in the same good order and condition as received when the LEASE began, except for fair wear and tear. For the purposes of the LEASE, fair wear and tear will mean damage to the PREMISES caused by ordinary use by the TENANT and exposure over time. …

8.8 Keep the grounds of the PREMISES in a clean and tidy condition, free from all litter, and keep hedges and lawns trimmed, and the flowerbeds neat, tidy and free from weeds and the entire garden watered regularly.

8.9 Maintain the swimming pool, its motor and filtration plant, and keep all pool cleaning equipment in good working order and free from all obstruction and contamination. The TENANT shall pay for and administer such chemicals as are necessary for the proper maintenance of the pool, including the proper and frequent filtration of the water.

8.10 The LANDLORD and/or SEEFF shall be entitled to:

8.10.1 Check the PREMISES at all reasonable times after giving 24 (twenty four) hours' oral or written notice to the TENANT.

8.10.2 Make such repairs and alterations as he may deem necessary for the safety, preservation or improvement of the PREMISES, both externally and internally.

8.10.3 Should the TENANT fail to maintain the PREMISES and/or goods, the LANDLORD or SEEFF shall be entitled to carry out the necessary repairs and maintenance work and to recover the full costs from the TENANT."

[24] Clause 12 provides as follows:

"12. BREACHING THE LEASE

12.1 If either the TENANT or the LANDLORD breaches a material term of the LEASE in any way whatsoever, the LANDLORD or the TENANT is allowed to give the other 20 (twenty) business days' written notice.

12.2 The party who breaches the LEASE will be liable for all legal costs incurred by the other party, including collection commission, as well as legal costs on the scale as between attorney and own client."

[25] Some of the terms contained in the annexure to the lease agreement, which are further conditions of the lease agreement, are also worth reference. Clause 2 thereof reads as follows:

"2. See Clause 2 Any rental payment received after the 3rd day of the month for which the rental is due, shall be subject to a penalty of 10% (ten percent) of the Monthly Rental. The TENANT hereby acknowledges this penalty to be fair and reasonable and undertakes to pay such penalty on demand. Should such penalty not be paid on demand, the TENANT agrees to the deduction of same from the deposit.

If rental is received late, as specified in Clause 2.3 of the lease agreement, more than three times during the Lease Agreement period, the Tenant shall be liable to pay further 50% (fifty percent) of the existing Monthly Rental as an additional deposit."

[26] Clause 4 of the annexure provides as follows:

"4. See Clause 3 In the event of the LANDLORD or his AGENT using the deposits as provided for in Clause 3.2 during the fixed period of the Lease Agreement, the TENANT shall be liable to re-instate the deposit in accordance with Clause 3.1 of the lease agreement.

Clause 8 of the annexure provides as follows:

"*8. See Clause 12 of the lease agreement: BREACH*

12.1 Should the TENANT breach this Lease Agreement by failing to make any rental payment within the stipulated period, the LANDLORD will be entitled, but not obliged, to cancel this Lease Agreement forthwith by written notice to the TENANT's chosen domicilium and will be entitled on such cancellation, to repossess(ion) of the PREMISES and apply the deposit.

12.2 Should the TENANT breach any term or condition of this Lease Agreement other than by way of non-payment of rent and fail to remedy such breach after having been given 3 (three)

days and written notice of such breach, then the LANDLORD will be entitled, but not obliged, to cancel this Lease Agreement and repossess the PREMISES."

[27] The magistrate found that looking at the facts as a whole, the respondent had proved that the appellant had unfairly, indirectly discriminated against the respondent based on her race and that there was no justification for the appellant's conduct. The magistrate further found that the barrage of e-mails that Watkins sent to the respondent were unwarranted and sent for the purpose of harassing the respondent, also based on her race. The magistrate ordered payment of damages in the sum of R30 000-00. The magistrate further ordered the appellant to make a written apology to the complainant to be forwarded to the clerk of the court within 3 days of the order.

[28] The respondent conceded that the adverse comments about the smell at the property were made by the estate manager and not by Watkins. In my view it is correct that the statements cannot be attributed to Watkins. The statements made cannot be imputed to Watkins. It is simply a stretch too far to seek to hold the appellant responsible for an observation and report by the estate manager, however false and hurting it may be. Furthermore, in my view, the respondent's niece bringing in individuals after hours into the estate without any engagement and control with the security establishment at the estate, is a security risk which the security guards had an obligation to raise with the estate manager. It is simply far- fetched to attribute that to the appellant and to seek the protection of the court from such reckless behavior by the respondent's niece.

[29] Section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (the Act) provides as follows:

*“**Prevention and general prohibition of unfair discrimination***

6. Neither the State nor any person may unfairly discriminate against any person.”

Section 7 of the Act provides as follows:

*“**Prohibition of unfair discrimination on ground of race***

7. Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

…

(b) the engagement in any activity which is intended to promote, or has the effect of promoting exclusivity based on race.”

Section 11 of the Act provides as follows:

*“**Prohibition of harassment***

11. No person may subject any person to harassment.”

[30] In my view, race as envisaged in section 7(b) refers to a concept which is built on a set of ideas working together as part of a mechanism which have an interconnecting network resulting in a composite and complex whole. The constituent parts of this concept of race include being built on structures, systems, knowledge, skills and attitudes. In its attitudes, it includes the state of mind, heart, meaning, appreciation, judgment and purpose. It refers amongst others to the intellect in the head, the emotional intelligence in the heart, the humanity in conduct, the sensibility in conclusions, recognition of the good qualities of others and the reasons for which something is done. It is this constituent part, to wit, attitudes, which the facts of this case place under the judicial microscope on this concept of race.

[31] In order to determine whether the respondent was unfairly discriminated against on the ground of race, the attitude of the appellant should be looked at in the context in which the appellant thought of and felt about the respondent. The appellant's vantage point, frame of mind and its way of looking at things are helpful indicators in that enquiry. The context in which the attitude was displayed dictate whether race was used to unfairly discriminate against the respondent. The test is an objective one and is simply whether a reasonable, objective and informed person, on hearing what happened, would perceive that to be unfair discrimination based on race – [*Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13 at para 38].

[32] The court in *Rustenburg supra* continued as follows in that paragraph 38:

"[38] This is in accordance with the test for whether a statement is defamatory, as enunciated in Sindani:

"The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply,"

[*Sindani v van der Merwe* [2001] ZASCA 130; [2002] 1 All SA 311 (A) at para 11].

The test is whether, objectively, the attitude displayed by the appellant towards the respondent was capable of conveying to the reasonable observer that the conduct of the appellant had a racist meaning – [*Rustenburg supra; Mohammed v Jassiem* 1996 (1) SA 673 (SCA) at 711.

[33] At para 52, the court in *Rustenburg supra* continued as follows:

“[52] The past may have institutionalized and legitimized racism but our Constitution constitutes a “radical and decisive break from that part of the past which is unacceptable.” Our Constitution rightly acknowledges that our past is one of deep societal divisions characterized by “strife, conflict, untold suffering and injustice”. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination. …”

[34] Trepidation is a feeling of fear or anxiety about something that may happen. Even before the lease agreement was signed, on Watkins’ own version, he had misgivings about the respondent which were not based on facts that would ordinarily give a reasonable prospective landlord reason to hold. His self-confessed trepidation about the respondent even before the lease was concluded remained unexplained. There are no facts that sustain a conclusion to which Watkins arrived at later and expressed in writing that the respondent had been unsatisfactory from the first day. Watkins had an adverse attitude towards the respondent even before the lease agreement was concluded, which could not be explained by the facts that prevailed. It is this adverse attitude that informed and drove the conduct of Watkins towards the respondent.

[35] Watkins portrayed himself as an engineer by training and thus aware of, and attendant to detail, which extended to the management of his properties. His approach to his business and properties made it highly improbable that he would have given a mandate to the agents, which did not include the terms to which he was prepared to agree, in the provision of the lease. The agents, a reputable and well-known player in that industry, would not have provided the terms of their

residential lease agreement to the respondent if they did not have the mandate from the appellant, at that time, to do so. On the balance of probabilities, Watkins sought to add the new terms to the residential lease agreement he had mandated the agents to act on, in order to satisfy his trepidation, after the identity of the prospective lessee, an African woman, was known to him. It was only after the respondent's identity was known to him that the new terms became necessary, to put his trepidation at ease.

[36] A tenant who comes from out of town, and may not be aware of the challenges that may arise as a result of the water pressure in the neighbourhood, such that opening the tap may result in her being splashed with water, should be informed of such eventualities. It is reasonable for the landlord to alert the new tenant to everything unusual about the property, its surrounds and the neighbourhood. Water splashing out when one opened the tap is an outstanding, unusual and remarkable occurrence and if it is hot water it carries with it the risk of injury. With the high water pressure in Hout Bay, it was necessary for the appellant to formally introduce the probable danger to the respondent in order for the respondent to align her approach to the tap relative to the danger. This induction and orientation was necessary and in the best interests of the respondent. It does not offend the respondent's right to equality.

[37] The inspection of the property beyond attending to the curtains, when Watkins attended to the property after being called during the respondent's absence, was contrary to the spirit which characterized the written lease agreement. In terms of the lease agreement, Watkins was not at liberty to do an

inspection as and when it pleased him. The lease agreement, in all its provisions in clause 9 which deals with inspections, does not provide for the respondent to inspect the property during the subsistence of the agreement. The five sub-clauses refer to the inspection before the tenant moves into the property (clause 9.1), seven days after the tenant moved in (clause 9.2), when the lease comes to an end within 3 days of the last day (clause 9.3), within seven days of the last day of the lease agreement if the tenant did not attend the inspection referred to in clause 9.3 (clause 9.4) and the last inspection once the tenant had vacated the property. The thrust of the agreement between the parties was a joint inspection at a time which suited both parties. Even if the appellant were to inspect the property during the subsistence of the lease, reasonably, it could not do so without reasonable prior notice to the respondent.

[38] The superiority complex of a racist mindset is the basis for its self- elevation to the status of holding the monopoly of wisdom. It judges without understanding. It seeks in its expression to insult the intelligence of others. It feeds itself on the assumption that it knows more than others and that others do not have faculties sufficient to receive, process and digest information to enable them to gain understanding and have knowledge, for it alone has the excellence of mind. The mindset of the other is inherently ignorant and there can be no power in their thinking and doing. The other cannot be critical, creative or contemplative. It pretends that only it can be profound in thinking, keeping and doing. In my view, the conduct of Watkins against the respondent had been driven and characterised by this mindset and thinking.

[39] Watkins had an inflated sense of being more equal than the respondent as parties to the agreement. His feelings of self-importance caused him to believe that he could see, think and do better than the respondent. His excessive arrogance was displayed by his disregard of the agreed terms of the lease. In his outlook and frame of mind, the respondent was not worthy of any privacy which the lease agreement envisaged in its inspection provisions, and did not deserve his consideration and respect as her humanity commanded. She did not deserve private and undisturbed use of the property.

[40] Watkins was asked to attend to the malfunctioning gate, which is outside the house. There was no reason for him to enter the house and carry out an unscheduled inspection again contrary to the terms of the lease agreement on that day. There was no reason, when the respondent had switched off the geyser to save on electricity consumption whilst she was at work, for him to put the geyser on. Watkins was unable to provide any explanation as to why he switched on the geyser. He intruded because of his sense of entitlement, and could do as he pleased because he was superior to the respondent in his view.

[41] A mindset which works on racist attitudes seeks to simplify and justify itself through distortion of the reality. It seeks to make the complex interplay between attitudes and human rights simplistic, and undermines the pain it causes to those on the receiving end of its extremes. The presence, authority and humanity of others are footnotes which should not exist where it excels, for others are sub-human and are bestowed an undeserved favour when recognized in fairly limited instances. Its narration is that the humanity of others is questionable. It holds that

others are not worthy of respect unless they are validated and their industry is acknowledged by its ilk. Its veins have no capacity to carry empathy for the other.

[42] On his own version, the answer that Watkins provided to the respondent on the bath that drained the water onto the floor and not through the waste plug was based on assumptions. He assumed that the person who bathed the respondent's baby would get onto their hands and knees whilst outside the bathtub, and that it is then easy to move the bath away from its connection with one's body weight. His comment that whoever bathed the baby should make sure that they do not push the bathtub towards the wall with their body weight, is founded by this speculation.

[43] The assumption is clearly based on speculative opinions. It derives from the respondent being a mother who had to bath a baby. Except that the bath that he had checked had moved, there is no basis for this speculative opinion of Watkins. The leak is linked to the movement of the bath. The dot between the movement of the bath and the weight on the bath by the person who bathed the respondent's child had no factual basis. No basis existed for Watkins to link the movement of the bath with the bath of the respondent's baby, which is on a different floor. The bath he checked was not the one used to bath the respondent's child. In Watkins' mindset, the couple who had moved out who also had children, the youngest being about 4 or 5 years old could not have moved the bath. They were a French couple.

[44] The attitude of Watkins was subtle and had a semblance of innocence and a pretence of sensitivity for social expediency. It was brutal to the dignity of the respondent. It was an attack on the integrity and humanity of the respondent. The insincerity that was so trite and obvious was hidden in the absurd pretence intended to create a pleasant impression that all was above board and all was well. The sad reality and tragedy of humanity is that racists themselves believe their own charade.

[45] Watkins belittled the issues that caused the respondent distress in their relationship. The suffering of the respondent was never part of his consideration. He was blind to the strain he caused in their relationship through his conduct. Even at the time that the respondent indicated to him her intention to leave the property, he referred to what the respondent saw as harmful matters needing attention of being dealt with and overcome as oblique. In scientific terms, this means that the respondent's issues are neither parallel nor at a right angle.

[46] It follows that Watkins saw the respondent's concerns as irrational and without substance. In simple terms, in Watkins' view, the respondent was mad to complain. Yet in the same breath he invited the respondent to a discussion with a view to find an amicable solution. This is an insult to the respondent's intelligence, consistent with his conduct throughout their relationship. The characteristics that racism display are invasive and painful.

[47] Watkins spent time, travel and effort in pursuit of the respondent from the first available opportunity. For all intents and purposes, he took over the day to

day management of the property which was supposed to be under the control of the respondent. He steadily, surely and consistently built up a case through a series of irregular inspections, demands and correspondence. There was a built-up which led to his production of a testament of sins. Based on the testament, he suggested to the respondent to find alternative accommodation or face being evicted.

[48] It is not for this court to speculate on the reasons as to why the appellant did not have the guts to refuse the respondent a lease agreement on the basis of race, in the face of the involvement of Shell (SA) and the agents. Once the respondent had accepted terms which he had deliberately made onerous, he clearly began a path of travel in pursuit of one objective, to wit, to deliberately cause an environment which would have the respondent, of own accord, to cancel the lease and vacate the property.

[49] Watkins frequented and manifested himself regularly at the property. He haunted the respondent's residence. He tracked and chased the respondent like a prey. He hounded her and refused to leave her. Watkins clearly clothed his conduct with borrowed robes, initially as a concern for the welfare of the respondent and later as a concern for the upkeep of the property. The true colours of his mast throughout were that the property was beyond the lifestyle and management of the respondent. He had no conscience capable of appreciation for his shameful conduct as he haunted and hounded the respondent out of his property.

[50] If it truly was about the non-payment of the December rental, payment thereof plus interest by the respondent should have been sufficient, even if late, moreso because it was in line with the lease agreement and the respondent was willing to comply and indeed complied. The lease agreement envisaged the possibility of late payment and made provision therefor. Moreover, appellant had agreed to the arrangement of being put in funds from the deposit whilst the respondent was overseas until the respondent returned. There was no prejudice to appellant.

[51] If it truly was about the concern on the state of the garden, facilities and utilities, the respondent's arrangement of a gardener ought to have been sufficient for the appellant. Watkins had expressed a desire to provide lessons to the garden services. There would have been no issue where a gardener was appointed, working under the training and guidance of Watkins as he preferred. It was by design that the standard to be met for the upkeep of the property, which had no objective measurement tools, only existed in the mind of and was known only to Watkins.

[52] The developments in the lease of the property had an element of a lineage. The identity of the respondent as a propective lessee begat trepidation. Watkin's trepidation begat unusual terms to a residential lease agreement concluded through the agents. The unusual terms of a residential lease agreement through the agents begat amongst others unusual attention, manipulation and control of the respondent by Watkins. The extremes of the general attitude including the unusual attention, manipulation and control by Watkins, begat hostility by the

respondent. Watkin's extreme attitude also begat his conclusion that the property was beyond the lifestyle and management of the respondent. The appellant found a reason which appeared legitimate but which was actually aimed at excluding the respondent.

[53] The underlying, murking and shrouded truth is that Watkins was disquiet and dismayed, which means he had a feeling of worry and cause for concern and distress, extreme anxiety, sorrow and pain in having a lease agreement with and have an African woman in his property. Watkins had a fear of having an African woman in his property as a lessee. This is the true reason and direct ancestor from which the sequence of all the developments in the lineage directly evolved from.

[54] Racists prefer the supreme test for exclusion to be a mystery. It is driven by greed, self-gain and self- gratification. It seeks to render its victims vulnerable and helpless. One of its foundations is manipulation which thrives on having its victims under threat of violence or adverse consequences as well as anxiety at economic disenfranchisement and depression at its brutality. It is not a surprise that the respondent was constantly placed under the threat of cancellation of the lease agreement and eviction. Racism is corrupt in its communication and outloook.

[55] The appellant was simply dishonest in his denial that his conduct was not influenced by the race of the respondent. As examples, Watkins could not explain the basis for his trepidation. There is objectively no plausible explanation for his disregard for the terms of the lease agreement in his haunting and hounding of

the respondent. The whole of a series of Watkins' attitudes and conduct is evidence of prejudice in the power relations where he had the ability to create an environment where the respondent's right to dignity was impaired. The appellant had no justification for such attitude and conduct. In my view a reasonable, objective and informed person, on hearing what happened, would perceive that the attitude and conduct of Watkins was unfair discrimination based on the race of the respondent.

[56]Racism of White on Black has an urge for the oppression and dispossession of Blacks in South Africa, and to make White South Africans beneficiaries of its attitudes. Every time that there is manifestation of racist attitudes, White South Africans generally and indirectly benefit. This is because it is an attitude which breeds below the threshold of a widespread reaction of interest and excitement. It makes it convenient to be easily discarded by practitioners as existing in its victim's mind only. This blame on the victim sounds as a valid excuse, to cubicle it as an attitude that is generally below the surface of their conscious mind, and it is difficult to notice that it controls and influence race relations. It is attitudes of the kind of the appellant that maintains geographical factors like human settlement areas influenced by race. The appellant used racial prejudice to create geopolitical power in a manner characteristic of the apartheid era in South Africa.

[57] The recognition of the human rights of all races in economic contestation and human settlement is necessary to reform historically racial prejudices in order to create a new South African identity in which apartheid logic of separate racial development has no room. Racism remains the greatest barrier to our common

humanity and must be mercilessly dismantled. The greatest difficulty with racists is that they are like litigants who judge their own case and order absolution from the instance even before pleadings close.

[58] One can try to explain to someone who does not understand, however, it is a futile exercise to seek moral equivalence with someone who refuses to listen, to understand and is in denial. It is impossible to speak to the hearts and minds of those to whom the humanity of the other race is simply invisible if non-existent and their pain trivialized. Watkins' conduct towards the respondent demonstrated all the hallmarks of unjustified discrimination on the basis of race. It is clear that there are traces and elements of the apartheid past and Watkins had not embraced the new democratic order. There is nothing which stands as evidence to the possibility of rehabilitation at this stage.

[59] At para 53 of *Rustenburg supra,* it was said:

"… We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that "de-racialising South African society is the new moral and political challenge that our young democracy should grapple with decisibvely". He went on to say that "we need to marshall our resources in a visible campaign to combat racism – in the workplace, in our schools, in residential areas and in all aspects of our public life". This Court has echoed such sentiments when it recognized that "South Africans of all races have the shared responsibility to find ways to end racial hatred and outstandingly bad outward manifestations".

At para 57 it was said:

"[57] As a country in transition, South Africa faces the on-going challenge of how to generate and maintain processes that restore dignity, create political and economic equality, and promote a culture of human rights."

[60] In my view the attitude and conduct of the appellant found the concurrent unfair discrimination on the ground of race and harassment of the respondent. This is a run-of–the–mil claim for equal worth. In as much as the issue of race may be an emotional one, it should not be up to individuals to define for themselves which areas of their social and economic life would be “constitution free zones”. For these reasons, I would make the following order:

1. The appeal is dismissed.
2. The appellant to pay the costs

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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MI SAMELA

JUDGE OF THE HIGH COURT

Applicants' Attorneys: *Butler Blankenberg Nielsen Safodien Inc.*
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