IN THE EQUALITY COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: E2982/2010
DATE HEARD:31/1/2011
1/2/2011
8/6/2011
25,28,29/8/2014

DATE DELIVERED: 5/9/2014

In the matter between

ANDERSON CHINEDU ANYIKWA **Complainant**

and

CUBANA HAVANA LOUNGE/CAFÉ **First Respondent**
CUBANA LATINO CAFE CC **Second Respondent**

JUDGMENT

PICKERING J:

[1] This is an action brought by the complainant in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("the Act"). The complainant alleges that he was unfairly discriminated against in contravention of the provisions of the Act, by being refused entry by a doorman in the employ of first respondent to a certain "*social cafe*" known as the Cubana Havana Lounge/Cafe situated in Beach Road, Port Elizabeth on the ground that he is a Nigerian national. He alleged that in denying him entry the first respondent's employee had been acting in pursuance of a company policy to exclude Nigerian nationals because of certain problems which had allegedly being experienced in other outlets of the franchise.

[2] The proceedings, in which he sought very wide ranging relief, were originally instituted only against the First Respondent as the owner and

operator of the Port Elizabeth Cubana Havana Lounge - Latino Cafe ("the Latino Cafe"). It is common cause that first respondent operated the Latino Cafe in terms of a franchise agreement between itself and the franchisor, the second respondent.

[3] After the commencement of the trial it became part-heard. Prior to the finalisation thereof the second respondent terminated its franchise agreement with first respondent. The company which operated the franchise, namely Gapwedge Properties 53 (Pty) Ltd, was liquidated and its director was sequestrated. This led to first respondent's attorneys withdrawing from the matter on 31 July 2014. In the meantime second respondent had been joined as such by order of this Court. The trial thereafter resumed with Mr. Van Riet S.C. now representing second respondent.

[4] The complainant, a [……] year old man, is a registered medical practitioner, having qualified during February 2004 in Nigeria. He came to South Africa during 2006, taking up employment with the Department of Health in Keiskammahoek, before relocation to Port Elizabeth during November 2007, where he is presently employed at Livingstone Hospital. He is a permanent resident of South Africa.

[5] Since his arrival he has also obtained a number of South African qualifications. He is a member of the South African College of Medicine. He has a diploma in obstetrics. He is a qualified trauma doctor and a member of the Trauma Society of South Africa. He also has a Master's degree in Business Administration.

[6] He stated that on the evening of Saturday, 19 June 2010, he made the fateful decision, based on recommendations of colleagues, to dine at the Latino Cafe on the Port Elizabeth beach front. He proceeded alone towards the premises and stepped down from the pavement of Beach Road onto the pedestrian walkway which runs in front of the lounge. It is common cause that motor vehicles also have access to this walkway from Beach road.

[7] He stated that he then noticed a senior colleague of his, a certain Dr. Smith, who was a passenger in a motor vehicle which was being driven on the pedestrian walkway immediately in front of the lounge. He denied that there was at that time a red carpet on the pathway of the lounge which would have prevented any motor vehicles from driving on that portion of the walkway.

[8] Dr. Smith, having alighted from the motor vehicle, approached him. The complainant waited to greet him. Dr. Smith was in the company of certain other persons, one being his wife and the others being either friends or family of his. Although complainant had no intention of joining Dr. Smith's party he walked towards the entrance of the restaurant with him.

[9] At the door complainant was stopped by the restaurant's doorman who asked him where he was from. It is common cause that this doorman is one Ike Enwere. This surprised complainant because the doorman did not ask the other persons in his company the same question. Complainant replied that he was from Port Elizabeth, wanting to identify himself as a local in contra-distinction to the numbers of foreign tourists who were in South Africa at the time for the Soccer World Cup. It is apposite to mention that Port Elizabeth was the host city for the Nigerian soccer team.

[10] The doorman then said "*no, that is not what I mean, where are you from originally*?" Complainant replied that he was from Nigeria at which the doorman told him that he was very sorry but Nigerians were not allowed into the restaurant. Complainant was shocked by this. He told the doorman that his actions amounted to racism which, to the best of his knowledge, was not allowed in South Africa and he insisted on speaking to the manager.

[11] Dr. Smith then asked the doorman why Nigerians were not allowed into the restaurant. The doorman replied that this was a policy decision as the restaurant chain had experienced problems with Nigerians at one of their other restaurants elsewhere in South Africa.

[12] According to the complainant Dr. Smith explained to the doorman that complainant was a medical doctor, who was well known to him; that they worked together; and that he could vouch for the fact that complainant did not sell drugs. The doorman reiterated, however, that he had strict instructions not to allow Nigerians into the restaurant.

[13] Complainant stated that he noticed that other black persons who wished to enter the restaurant were asked were they were from, whereas whites and coloured patrons were freely allowed in. He stated that two or three Nigerians were refused entry but two Congolese were allowed in.

[14] When it became obvious to complainant that the doorman was adamant in his refusal he encouraged Dr. Smith and his entourage to go ahead and to enjoy their dinner. In reply Dr. Smith said that he had lost his appetite but he did eventually enter the restaurant.

[15] Because he had never experienced such treatment in his life complainant decided to lay a complaint with the police. He proceeded to the Humewood Police station and reported what had happened. He insisted that members of the police services should return with him to the restaurant. Two uniformed policemen, namely, Captain Kennedy and Warrant Officer Williams, did so. As soon as the doorman saw them he went into the restaurant, emerging with two white men and a white woman. The white woman introduced herself and the men as being part of the management team of the restaurant. Although complainant could not remember her name it is common cause that she was one Nadia van Mollendorff.

[16] Complainant then challenged the doorman to repeat in the presence of the police what he had earlier said. One of the white men, however, merely pointed to the "*right of admission reserved*" sign above the entrance door and told the policeman that he was not obliged to say anything further. The police then left and the management team entered the restaurant, leaving complainant standing outside feeling, in his words, like a fool.

[17] It was put to complainant under cross-examination by Mr. Van Zyl, who appeared for the first respondent, that the doorman would deny having uttered the words alleged by complainant. Complainant responded heatedly to this proposition saying, *inter alia*, that if the doorman could not tell the truth about his nationality then he doubted whether "*he could say any truth in his life*." This riposte had reference to the fact that the doorman had stated in an affidavit in answer to complainant's founding papers, that he was a Congolese national. This averment was also put by Mr. Zyl to complainant. According to complainant, the doorman was in fact Nigerian. It was a well known ruse amongst dishonest Nigerians, he said, to pass themselves off as Congolese in order to obtain refugee status, something which was not available to Nigerians. I accordingly requested Mr. Van Zyl to take instructions on the matter during the tea adjournment. On resumption Mr. Van Zyl, somewhat abashed, stated that the doorman would say "*yes, I was born in Nigeria and I have a Congolese father.*"

[18] It was put to complainant that Dr. Smith was in fact not present when his alleged conversation with the doorman took place and that Dr. Smith and his group were already inside the restaurant at that time. Complainant dismissed this averment as a "*blatant, huge lie.*"

[19] It was put to him further that the real reason why he had been refused entry into the restaurant was because his dress fell foul of the first respondent's dress code. He denied that the doorman had made any mention of his dress. The first time any mention had been made of a dress code, so he said, was in a newspaper report (AA18), on 16 July 2010, when the franchisor's spokesperson, a certain Ms. Campbell, had stated that she did not know why complainant had been refused entry but had pointed out that the restaurant had a strict dress code. Plaintiff had thereafter seen the doorman's affidavit in which it had been alleged that he had not been properly dressed.

[20] It was put to complainant that he had been wearing a t-shirt without a collar, jeans and tackies. He denied this, pointing out that the incident had

happened during winter and that he would never have worn such attire at that time. He averred that he had been properly and neatly dressed in a shirt with a collar, a roll neck jersey, a smart pair of long trousers and a pair of black so-called "*Italian shoes*", these shoes being a type of smart, leather half-boots. He stated that he would not have attended the restaurant dressed as alleged by the respondent. Because he was going out for an evening dinner he had dressed in smart casual clothes. He stated that Dr. Smith was many years his senior and that, if he had been dressed as alleged by first respondent, he would have "*disappeared*" the moment he saw him.

[21] Dr. Anyikwa stated further that had he in fact been improperly dressed he would simply have gone home and changed his clothing in order to meet the dictates of the dress code rather than have proceeded to the police station in order to lodge a complaint.

[22] He averred that the incident had been deeply humiliating and insulting, not only to him but to all law-abiding Nigerians. It had completely undermined his dignity and self-worth.

[23] Captain Kennedy, stationed at the Humewood Police station, testified that he and Warrant Officer Williams were called out to the restaurant on the night in question. He stated that he did not see the complainant at the police station but was merely advised that he should attend to a complaint there. He and Williams accordingly proceeded in the police van to the restaurant. He had very little recollection of the detail of the events of the night because, so he said, the complaint did not appear to him to be of a particularly serious nature. He could not recall what the doorman had said. Whilst he recollected the presence of a white woman he could not remember what she might have said. He recalled, however, that the complainant had approached them and had complained that he had been denied entrance to the restaurant, not because of the way that he was dressed, but because of his citizenship, namely that he was a Nigerian. The complainant was, in his opinion, neatly dressed, although he could not remember whether he was wearing casual or

formal clothing. There was nothing wrong with his clothing which he described as "*clean"*.

[24] He stated that, to the best of his recollection, complainant and the management personnel who were present, had told the police that they would resolve the problem amongst themselves.

[25] It was put to him that it appeared that he recollected very little of the incident to which he replied that he really had no reason whatsoever to do so because no docket was opened.

[26] Warrant Officer Williams, a policeman with the serendipitous initials "P.C.", stated in his testimony that on the night in question complainant arrived at the Humewood Police station and lodged a complaint concerning his denial of access to the restaurant. According to Williams complainant was upset at that stage and mentioned that he had been refused entry because of the fact that he was Nigerian. He requested the police to accompany him to the restaurant. According to Williams he and Kennedy agreed to do so in order to observe what was happening. Complainant proceeded ahead of them in his own vehicle whilst Williams and Kennedy followed him in the police van. They parked the police van on the pedestrian walkway approximately 10 metres from the entrance to the door. Both he and Kennedy proceeded to the entrance where complainant was already present. They met the doorman at the entrance. Williams informed the doorman of the fact of the complaint and told him that they, the police, were present merely as observers. This appeared to make the doorman somewhat agitated. His reaction, however, was to point at the "*right of admission*" sign.

[27] Williams then requested the doorman to call management to discuss the matter. Thereafter a white man and a white woman emerged from the restaurant. They introduced themselves as the management team. Williams explained to them that complainant was aggrieved at what had happened and suggested that because this incident had occurred on private premises the parties should attempt to resolve it themselves. The two members of

management agreed, saying they would discuss the matter. They made no mention whatsoever of complainant's dress being unsuitable. It was put to Williams, under cross-examination by Mr. van Zyl, that the doorman would say that he advised the police that the complainant was not allowed in because of his dress. Williams stated that that would be a lie. He denied further that the female manager, Ms. Van Mollendorff, had made any mention of complainant's dress. All that they had said was that they would discuss the matter.

[28] Williams accordingly regarded the matter as closed and he and Kennedy left.

[29] He confirmed having made an affidavit on 26 October 2010 concerning the incident and confirmed having stated therein that complainant was neatly dressed and did not look out of place in relation to other patrons visiting the club. Questioned under cross-examination as to why he had mentioned the fact of complainant's dress in his affidavit, if in fact the matter had not been raised at the time of the incident, he stated that he had done so because he had been approached some time after the incident to make a statement in respect of what had happened. He had spoken to complainant who had advised him that his dress on the night in question was now at issue. It was for this reason that he had included this in his affidavit. He reiterated, however, that complainant had never mentioned that there had been any problem with his dress on the night in question. Neither had management. It was only the doorman who had pointed to the "*right of admission*" sign. He stated that to the best of his recollection complainant was wearing a long sleeved jersey with a V-neck and a diagonal type pattern on the chest. He was also wearing a shirt with a collar, long casual trousers and black closed shoes.

[30] Dr. Lionel Smith stated that he had qualified as a medical practitioner during 1970 and had thereafter qualified as a specialist anaethetist. He had been head of the Anaesthetics Department at three Metropole Hospitals, namely, Dora Nginza, Livingstone and Provincial. He was presently the

acting head of the department because he was also employed on a full time basis as an associate professor at Walter Sisulu University. He had come to know complainant through his work at the hospitals, where complainant was working in the department of surgery, obstetrics and gynaecology.

[31] Because of the content of his evidence it is unfortunately necessary and relevant to put on record that Dr. Smith is a coloured man.

[32] He stated that on the night in question he had arranged to have dinner at the restaurant with his wife, his sister-in-law, and a Professor Potgieter of Natal University and her husband. They were already at the restaurant when he arrived in his brother's motor vehicle. He disembarked from the motor vehicle at the end of Beach Road where the pedestrian pathway goes down to the restaurant. By coincidence he met complainant on the pathway and they walked together towards the restaurant whilst Dr. Smith's brother was looking for parking. He assumed that complainant was going to go into the restaurant but he did not invite him to join his party. At the entrance the doorman stopped complainant and said "*we don't allow Nigerians in the club*". Dr. Smith stated that he had not heard the doorman say "*where are you from?*". Complainant in response asked the doorman, "*why are you not allowing me in?"* and the doorman again said, "*we don't allow Nigerians in*." Dr. Smith did not hear the doorman proffer any reason as to why Nigerians were not allowed in. There was, however, some conversation going on that he did not hear because his attention was otherwise engaged, looking for his brother. He assumed also that the matter would be settled amicably because of complainant being a doctor who would be able to explain that there was no reason why he should not go into the club. He then saw the doorman pointing at the "*right of admission*" sign. He said to the doorman that he was a medical doctor and that complainant was also a medical doctor and a colleague of his, to which the doorman replied "*we have the right of admission*" and also mentioned the word "*dress code*". The doorman did not elaborate on this "*dress code*".

[33] It was put to Dr. Smith that, according to complainant, no mention had been made that evening about his dress. Dr. Smith stated, however, that he was absolutely clear that the words "*dress code*" had been used because this caused him to check not only complainant's attire, but also his own as well as that of all the other patrons passing by at that moment. He stated that complainant was wearing a long sleeved jersey with a round neck which did not enable him to see whether his shirt had a collar or not. He was also wearing a pair of light coloured trousers and closed shoes. His clothing was neat and comparable to that of other patrons who were being allowed in. He himself was wearing a pair of Woolworths trousers, a Woolworths zip-up jersey with a collar and a pair of slip on brown shoes. He stated that he did not see any other persons being turned away. When it appeared that the matter was not going to be resolved amicably he said to complainant "*well man I have lost my appetite*". Complainant, however, said "*sir you go in and enjoy your party and I will sort this out*". Asked as to why he had told complainant that he had lost his appetite he stated as follows:

> "*Because it was unpleasant for me as well. I have been institutionally refused access to restaurants, in the white side of the post office and had to go to a segregated school and it brought back all those memories and I really found it distasteful that one black person should say things like that to another. Not that I excuse the white person to say that.*"

[34] He stated further that "*I was feeling sick in my stomach that things like this should still happen in South Africa*".

[35] Under cross-examination he stated that he did not recall the doorman having said that Nigerians were not allowed in because of the drug problem. He reiterated that he heard the doorman saying "*we do not allow Nigerians in here*" and that he also had heard the words *"right of admission*" and the words *"dress code*".

[36] When it was put to him that this would be denied by the doorman he replied that the doorman *"can say what he wants to sir, I am saying what I heard.*"

[37] Mr. Maziem Enwere, also known as Ike, testified on behalf of first respondent that he commenced employment as a doorman with the franchisor, the present second respondent, during 2006 in Cape Town. Whilst there he received training from the aforementioned Nadia van Mollendorff. That training encompassed all aspects relating to safety and security as well as to the rules relating to the dress code policy.

[38] He was thereafter promoted to head doorman and was seconded to the Cubana outlet at Bloemfontein before being transferred to Port Elizabeth as head doorman and head of security at the Latino Cafe in Beach Road.

[39] He stated that, after 7pm, men wishing to enter the premises were required to wear "*smart casual*" dress. Items of clothing such as collarless t-shirts, tracksuits, open shoes, trainers or tackies were not allowed. He confirmed that there was a "*right of admission reserved*" sign at the door.

[40] On the day in question, 19 June 2010, he began his shift as head doorman at 7pm. He was at his station just inside the entrance door of the restaurant when complainant approached the door. Complainant was alone and not in any group of people. He was wearing a t-shirt without a collar, jeans and a pair of tackies. It was put to him under cross-examination by Mr. Smith, who appeared for complainant, that complainant had in fact been neatly dressed in a lounge shirt and a pullover jersey. To this he replied "*I cannot recall" b*efore reiterating that complainant had in fact been wearing a collarless t-shirt.

[41] He stated that he accordingly stopped the complainant and advised him of the dress code policy. At this the complainant became angry and abusive, raising his voice and swearing, and, in Enwere's words, using the "*F*" word. He told Enwere that he was meeting with friends who were already

inside the restaurant but Enwere reiterated that complainant could not enter unless he dressed properly. At this the complainant continued to swear in foul language and asked whether he was being refused entry because he was from Nigeria. At that stage, according to Enwere, he had no idea that complainant was Nigerian. He denied that he had ever told complainant that Nigerians could not enter or that he had asked him where he was from originally.

[42] Complainant then demanded to speak to the manager. Enwere raised his hand to attract the attention of Nadia van Mollendorff who was at the hostess desk. When she arrived Enwere told her that "*the young man here has not got a proper dressing code*." Whilst she spoke to the complainant Enwere returned to his post. He did not hear their conversation.

[43] Enwere denied that complainant had been in the company of Dr. Smith outside the restaurant. He stated that no one was standing with complainant and he denied that anyone had spoken to him telling him that the complainant was a colleague of his.

[44] He stated, however, that after some time, he saw complainant, who was still outside, making a phone call on his cell phone. Immediately thereafter a man who had been in the restaurant came out and spoke to complainant before going back inside. According to Enwere he could not remember if this man was black, white or coloured because, so he said, "*I am not too good in colour*."

[45] Complainant then remained standing outside the restaurant for approximately thirty minutes before leaving. After a while he returned with two policemen. One policeman remained sitting in the police vehicle. The other came to the restaurant and advised Enwere that complainant had laid a complaint. Enwere told him that complainant had been refused entry because of the dress code. The policeman then went to speak to Nadia van Mollendorff.

[46] He stated with regard to his nationality that he had been born in Nigeria of a Congolese father. He had a Nigerian passport and alleged that he had lost his Congolese passport.

[47] Mr. Anthony Agboola testified that he was a Nigerian studying at Nelson Mandela Metropolitan University towards his Masters Degree in Development Studies. He had come to South Africa during 2007. He stated that he was a regular patron of the Latino Cafe and had in fact attended its opening on 11 June 2010. *Mirabile dictu* he had, on that very evening, been "*bounced*" or refused entry to the premises because of his casual attire. He discovered the next day that the doorman who had refused him entry was in fact Ike Enwere who turned out to be a close neighbour of his. Enwere had even apologised to him for having to "*bounce*" him but had told him just to ensure in future that he dressed properly.

[48] According to Agboola the Latino Cafe was an upmarket venue frequented by numerous Nigerians. At the time of the World Cup large numbers of Nigerians attended the Cafe and watched their national team in action on television. He knew of at least two other doormen, apart from Enwere, who were Nigerians.

[49] Ms. Nadia van Mollendorff testified that she had been in the employ of second respondent at its head office in Cape Town since it had first commenced business during 2002. Although she is presently the company secretary her duties, she said, encompassed much more than that. She was tasked, inter alia, with the training of doormen for the various Cubana franchises around South Africa of which there are presently twelve, including that in Port Elizabeth.

[50] She stated that in the case of certain of the outlets the franchisor (ie second respondent) was involved in running the operation whereas in the case of other outlets the franchisees operated for their own profit. First respondent had fallen into this latter category.

[51] She stated that the Latino Cafe was neither a club nor a restaurant but an upmarket "*social cafe*", which included a "*lounge environment*". It was, she said, all about status, a place where social highfliers came to socialise, eat, drink, dance and, most importantly, to see and be seen. Indeed, its logo was "*come see ... and be seen."*

[52] Because of the type of patron the Latino Cafe wished to attract, and the market to which it catered, two inflexible rules regulating admission to the restaurant were in place. These were a minimum entry level age of 23 years and a strict dress code. This dress code, which comes into operation at 7pm, requires patrons to wear, at the very least, clothes of a semi-formal nature, consisting in the case of men, of a collared shirt, neat trousers and closed shoes. Items of clothing such as t-shirts, tackies, sneakers or trainers were strictly forbidden.

[53] Van Mollendorff stated that second respondent's rules especially relating to the dress code were impressed upon all trainee doormen.

[54] With specific regard to first respondent's head doorman, Enwere, she denied that he had been employed by second respondent whilst working at first respondent's business. After completion of his training he had been employed as a doorman at the Bloemfontein franchise where his wages had been paid by the franchisee. The same situation pertained at the Port Elizabeth outlet where Enwere's wages were paid by the franchisee and not by second respondent. In stating that he was employed by second respondent Enwere had misconstrued the situation. The only involvement which second respondent had with Enwere after he had completed his training had been to furnish his name to the respective franchisees in Bloemfontein and Port Elizabeth whereafter they had taken the decision whether or not to employ him. She stated that after his appointment Enwere had sourced all the other doormen who were employed by first respondent and had trained them himself but under her supervision. The doormen whom he had recruited were all Nigerians.

[55] As stated above, it was common cause that the Port Elizabeth franchise opened its doors to the public on 11 June 2010. Prior to this opening there had been two so-called "*dry runs*" to ensure the restaurant's smooth operation on opening night. Van Mollendorff stated that whenever a new outlet opened she would work there for its first week of operation in order to ensure that everything ran smoothly. Because of the World Cup she had been deployed by her head office to work at the Port Elizabeth franchise for two weeks. She agreed that during this period, whenever Enwere or any other doorman required advice or assistance with a problem, they would approach her. She conceded that it was fair to say that she exercised some degree of control over Enwere. She conceded too that when the doormen implemented second respondent's admission rules and regulations they did so "*under my control and direction*".

[56] It was put to her under cross-examination that she in fact had an overriding responsibility with regard to the implementation of those rules. Although she initially denied this she then conceded that if, for instance, she thought a doorman was applying the rules too strictly, she would "*educate*" him and would, in fact, if not happy with his reasons, override him.

[57] With regard to the incident involving the complainant she stated that she had been on duty inside the restaurant when Enwere called her to assist him, saying that there was a "*situation*" at the door. According to her she ascertained that Enwere needed her to verify that the complainant was not correctly dressed. Asked why Enwere should have needed her assistance to verify such a simple issue she stated that she felt he needed her advice and insight.

[58] At that stage the police were not present. She spoke to complainant who was extremely unhappy. Asked what exactly she had said to complainant she replied that "*I would have told him that he was not allowed in because of his dress.*" Pressed on this issue she said that "*that is what I normally say*." Eventually, when it was put to her that it was clear that she

had no actual recall of the conversation she stated that she remembered that that was what she had in fact told him.

[59] The evidence of Williams and of Dr. Smith regarding complainant's attire was put to her. Although she had initially stated that complainant had been wearing a collarless shirt and open shoes she now stated that she could not recall that he was wearing a jersey. She stated that his shoes did not comply with the dress code but when asked to describe them said that she could not recall what type they were. She added that "*I just know that they did not comply*."

[60] She denied that it was the policy of second respondent to discriminate against Nigerians. Approximately 70 – 80% of second respondent's clientele were black persons, of whom a large proportion were Nigerians. She stated that it would not make commercial sense to discriminate against them and that it would, in fact, be tantamount to economic suicide to do so.

[61] As will have been seen from what is set out above the versions of complainant and of respondent are irreconcilable and mutually destructive. The approach to be adopted in such circumstances appears from a number of cases such as National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E), (referred to with approval in Baring Eiendomme Bpk v Roux [2001] 1 All SA 399 (SCA); Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA) at 14J – 15D; and Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) where the following is stated at 589G:

> "*It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of the proven facts and the probabilities of the matter under consideration.*"

[62] Two matters became common cause in the course of argument. Mr. Smith conceded, very fairly and correctly, that in the light of the evidence especially of van Mollendorff and, to a lesser extent of Agboola, he could not

contend that it had been proven that it was a policy of second respondent to exclude and thereby to discriminate against Nigerians. In making this concession he stressed that he was in no way conceding that Enwere had not told the complainant that such was indeed the respondents' policy. He conceded too that it had to be accepted that Enwere was at the time in the employ of first respondent. He submitted, however, that it was clear from van Mollendorff's evidence that at the time of the incident Enwere was under her control and direction to such a close degree as to render second respondent vicariously liable for any wrongful conduct committed by him in the course of his duties as a doorman.

[63] For his part, Mr. Van Riet also fairly and correctly conceded, with reference*, inter alia*, to Midway Two Engineering and Construction Services v Transnet Bpk 1998 (3) SA 72 (SCA), that second respondent was indeed vicariously liable for any wrongful conduct proved to have been committed by Enwere in the course of his duties as a doorman.

[64] I turn then to consider the evidence.

[65] Complainant was an extremely emotional witness. He broke down in tears on a number of occasions during the course of his testimony and he clearly took great umbrage at the suggestion put to him under cross-examination that his evidence was false. At no stage, however, did I gain the impression that he was a dishonest witness.

[66] Both Williams and Kennedy were reasonably good witnesses, although their evidence, in particular that of Kennedy, was, understandably so, vague in certain respects.

[67] Dr. Smith was, in my view, an outstandingly good witness who withstood an extremely aggressive cross-examination with quiet dignity, only betraying his emotions at the very end of his evidence when he stated, with reference to Mr. Van Zyl, that "*you look for the truth rather aggressively from my side.*" Although he knew complainant the latter was a very junior doctor in

relation to him and addressed him as "*sir*", something said Dr. Smith, which all the Nigerian doctors call their superiors. Dr. Smith can safely be regarded as an entirely independent witness.

[68] I was unfavourably impressed by Enwere who created the impression of being a defensive and evasive witness. It is clear, in my view, that he was doing his utmost to distance himself from any suggestion of contact with Dr. Smith. He denied that the complainant had approached the door in the company of Dr. Smith. In the light of Dr. Smith's evidence this denial cannot be true.

[69] It is clear that his evidence that the complainant called some-one inside the restaurant who then came out and spoke to him is a fabrication. It was never disputed that the only member of the public to whom the complainant spoke at the scene was Dr. Smith. Yet, on the latter's evidence, he had not yet entered the restaurant when the incident occurred. Enwere's evidence that he did not know whether the man who came out and spoke to the complainant was black, white or coloured, because he was "*not good in colour"* is nothing short of ludicrous.

[70] Nothing need be said of Agboola's evidence which established that Nigerians were indeed allowed into the restaurant at the relevant time. Van Mollendorff was generally a good witness who also created the impression of being honest. It was, however, in my view, clear that, with regard to the complainant's attire on the night in question she was to a very large extent reconstructing what she had said and seen.

[71] Mr. Van Riet submitted that it could safely be accepted that, on the night in question, complainant had indeed complained that he had been discriminated against on the grounds of his Nigerian nationality and that he subjectively believed that he had been so discriminated against. It was clear, however, so he submitted, that complainant felt exceedingly strongly about the fact that he and his countrymen were discriminated against and widely accused of being involved in nefarious activities, including drug dealing, and

that this was something about which he was extremely sensitive. It followed therefore, so Mr. Van Riet submitted, that, if complainant had indeed been refused entry on the basis of his improper dress, he in all probability jumped to the conclusion that it was because he was a Nigerian. Such a Hypothesis, he submitted, was entirely in accordance with the evidence of Enwere. In these circumstances the fact that, as was common cause, complainant had burst into tears in Beach Road after being refused entry was a neutral factor. So too was the fact that he had laid a complaint with the police on the basis that he had been discriminated against.

[72] Mr. Van Riet submitted further that complainant's evidence that no mention whatsoever had been made at the restaurant to the dress code was refuted by his own witnesses and was therefore clearly false. In this regard he referred in particular to the evidence of Dr. Smith who had stated that he was "*absolutely clear*" about the fact that the words "*dress code*" had been raised in the context of the restaurant's right to refuse complainant admission and who had further stated that he was certain that the words "*dress* code" had been used "*not only once because I had checked both his clothes and mine.*" Mr. Van Riet referred further to the evidence of the two policemen who he said, had both stated that they had been told by the complainant that night that it was alleged that he was not properly dressed. In these circumstances, so he submitted, it was clear that Enwere had told the truth and that complainant had wilfully lied, thus leading naturally to the conclusion that it was the allegation of improper dress that had led complainant to conclude that he was being discriminated against on ethnic grounds. That, so Mr. Van Riet submitted, was the end of the matter.

[73] In my view, however, the matter cannot so simply be disposed of. Mr Van Riet's submissions ignore the clear evidence of Dr. Smith as to what he heard. It is so that the complainant's evidence is contradicted by that of Dr. Smith with regard to the words "*dress code*". The evidence, however, must be considered holistically and, when this is done, the anomalies in the complainant's evidence concerning the use of the words "*dress code*" lose a great deal of significance. In any event this issue cuts both ways: whereas,

Enwere alleged that he told Williams that the complainant had been refused entry because of the dress code, Williams denied that he said any such thing and stated that Enwere had merely pointed at the "*Right of Admission*" sign. Furthermore, contrary to Mr Van Riet's submissions, Williams in fact made it clear that he had first heard about the "*dress code*" when he was asked to make a statement in October 2010. As to Kennedy it is clear that his recollection of the incident was extremely vague.

[74] In my view it is necessary first to consider whether or not complainant was in fact dressed as alleged by Enwere. I am of the view that the evidence of Van Mollendorff, in this regard, does not take the matter much further. Whereas she initially appeared to confirm Enwere's evidence as to complainant's clothing it later transpired that she was in fact unable to say whether or not he was wearing a jersey and was quite unable to describe his shoes. Her evidence in this regard was, in my view, clearly a reconstruction of the events of that night. Furthermore, as was stressed by Mr. Smith, whereas the two policemen and Dr. Smith all made affidavits shortly after the incident when the events were fresh in their minds Ms. Van Mollendorff only attested to her affidavit in January 2011, some six months later.

[75] According to Enwere complainant was wearing a collarless t-shirt, jeans and tackies. His evidence in this regard was roundly refuted by two entirely independent witnesses, Warrant Officer Williams and Dr. Smith, both of whom stated that he was in fact wearing a jersey, long trousers and closed shoes, and, according to Williams, also a shirt with a collar. There is too the evidence of Captain Kennedy to the effect that although he could not remember exactly what complainant was wearing he had been neatly dressed and there was nothing wrong with his clothing which he described as being "*clean*". There is a sartorial chasm between the clothing described by Enwere and that described by Williams and Dr. Smith. There can be no question here of one or other being mistaken: one of the versions must be false.

[76] In my view the probabilities are overwhelmingly in favour of complainant's version. As was stated by him he was proceeding to eat dinner at the restaurant on a winter's night. It is, in my view, quite improbable that in these circumstances he would have been dressed as alleged by Enwere. Furthermore, according to Dr. Smith, the complainant's attire was comparable not only to his own but to that of other patrons who were admitted to the restaurant. Neither Williams nor Dr. Smith had any motive whatsoever to testify falsely in this regard.

[77 Complainant also testified that had he met Dr. Smith whilst being dressed in a t-shirt and tackies he would have "*disappeared*" as fast as possible. It was abundantly clear that he had great respect for Dr. Smith to whom he referred as "*sir*".

[78] I am satisfied therefore that Enwere's evidence as to complainant's clothing can safely be rejected as false.

[79] This then changes the entire complexion of the matter. If the complainant's clothing was neat and clean and consisting of a collared shirt, jersey and closed shoes then there was, quite simply, no reason whatsoever for Enwere to have singled him out and to have refused him entry on the basis of the dress code. Mr. Smith submitted that if it was not complainant's clothing which gave rise to him being refused entry, then the only plausible inference to be drawn was that he was refused entry on the basis that he was a Nigerian as alleged by him.

[80] Mr Van Riet submitted, however, that it was highly improbable that a Nigerian doorman would refuse entry to a fellow Nigerian whom he had never seen before. The fact that Enwere was also a Nigerian was, strangely, withheld by him from first respondent's legal representatives and I have considerable doubt as to the veracity of his evidence concerning his alleged Congolese ancestry.

[81] Whatever the motivation of Enwere might have been, a matter on which one can only speculate, the evidence of Dr. Smith is, in my view, decisive of the matter. According to him, he heard Enwere saying "*we don't allow Nigerians in*" not only once, but twice. It was then that he spoke to him, vouching for the complainant's good character. His further evidence also bears repeating, namely, that "*I have lost my appetite*" and "*was feeling sick to my stomach that things like this should still happen in South Africa*", because "*I have been constitutionally refused access to restaurants, in the white side of the post office and had to go to a segregated school and it brought back all those memories…."*

[82] This heartfelt evidence, given by an entirely independent, highly respected and eminent medical specialist, strips Enwere's evidence to the contrary of any merit or credence. I find therefore that complainant has discharged the onus of proving that he was refused entry to the Latino Café because of his Nigerian nationality.

[83] Mr. Van Riet did not dispute that, should it be found that the complainant was refused entry to the Latino Cafe by Enwere because he was a Nigerian national, such action would fall squarely whithin the definition of "*discrimination*" contained in section 1 of the Act, read with the definition of "*prohibited grounds*" therein. I am satisfied in all circumstances that Enwere's actions unfairly discriminated against the complainant on the basis of his ethnic origin as a Nigerian.

[84] The question then arises as to what compensation should be awarded to complainant. Obviously, had the complainant been denied access to the premises as a matter of policy, then such damages as he might have been awarded would have been very considerably higher. In these circumstances, however, where complainant has been a victim of an isolated incident of discrimination committed by an employee, contrary to second respondent's policies, the award must be considerably less. Mr. Van Riet submitted that an award of R20 000,00 would be sufficient to compensate complainant for the

humiliation and indignity which he suffered. Mr Smith contended, on instructions from the complainant, for an amount of R 300 000.

[85] I have had regard to the matter of Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park, Equality Court, TPD case No 26926/05 in which Basson, J, awarded the complainant, who had been unfairly discriminated against on the basis of his homosexual orientation, damages in the sum of R 75 000 for the impairment of his dignity and emotional and psychological suffering. Mr Smith referred further to two settlement agreements involving the Broederstroom Holiday Resort and the Sliver Club respectively.

[86] The above matters provide some guidance but are all distinguishable from the present matter, involving, as it does, an act of unfair discrimination committed by an employee contrary to his employer's instructions.

[87] The contention that an award of R 300 000 would be appropriate can be rejected out of hand. Nevertheless, the incident was deeply upsetting and humiliating for the complainant. The indignity suffered by him was also compounded by Enwere's false testimony against him. In my view, in all the circumstances an award of R 40 000 would be appropriate compensation.

[88] The complainant also sought an order that the second respondent make an unconditional apology. I am of the view, that, although it has been found that second respondent has no policy of discrimination against Nigerians, it should indeed apologise for the actions of its doorman which occasioned the complainant such hurt. This matter received considerable publicity in the press and such apology, apart from being made to complainant personally, should therefore be published, at second respondent's expense, in the Herald newspaper and the Weekend Post. The terms of the apology can be determined by the legal representatives of the parties. Should they be unable to agree thereon they can approach the Court for directions.

[89] With regard to costs I am satisfied, in the exercise of my discretion, that second respondent should be ordered to pay the complainant's costs from the date of second respondent's joinder to these proceedings.

[90] The following order shall issue:

1. The second respondent shall pay to the complainant the amount of R 40 000.00 for the impairment of his dignity and emotional and psychological suffering;
2. The second respondent is to publish an apology to the complainant, in terms to be agreed upon between the legal representatives of the parties, in the Herald and Weekend Post newspapers and is to apologise personally to complainant;
3. The second respondent shall pay the complainant's costs from the date of its joinder as such to these proceedings.

……

J D PICKERING

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: D Smith instructed by Rushmere Noach – M C Vollgraaff

For the 1st respondent: B Van Zyl

For the 2nd respondent: R Van Riet SC instructed by Minde Shapiro & Smith Inc – A Pepler