

SOUTH AFRICA / JUDGMENT

Du Toit v Coetzee (A122/2021)

[2022] ZAFSHC 105; [2022]

HIPR 198 (FB) (2 June 2022)

[2022] ZAFSHC 105

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Litheko

CASE / FILE NUMBER

A122/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A122/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

JOHANNA

MAGDALENA DU TOIT

Appellant

And

MICHIEL

COETZEE

Respondent

HEARD

ON:

09 MAY 2022

CORAM:

MATHEBULA, J et LITHEKO, AJ

JUDGEMENT

BY: LITHEKO, AJ

DELIVERED ON: 2 JUNE 2022

Introduction

- [1] This is an appeal against the decision of the Magistrate Court for the district of Bloemfontein, in which the Appellant's claims for sentimental damages for the infringement of her dignity and reputation were dismissed with costs. The appeal is unopposed.

The parties

- [2] The Appellant is Johanna Magdalena Du Toit, a 45-year-old female Travel Agent who holds a Diploma in Travel and Tourism and is employed as such by a travel agency known as Travel Counsellors. In this Court she was legally represented by Adv. B Knoetze SC, on instructions of Spangenberg Zietsman and Bloem Attorneys.
- [3] The Respondent is Michiel Coetzee, an adult businessman on whose behalf Mr L J Pienaar of YDE Attorneys appeared in the court a quo. There was no appearance for the Respondent in this Court and no heads of argument were delivered on his behalf.

Factual**Background**

- [4] The Appellant's claims arose from these facts: During November 2018 the Respondent requested her to make flight tickets and accommodation arrangements for him and his life partner for their trip to Spain. The Appellant compiled a quotation for that service and discussed same with the Respondent whereupon the Respondent paid the quoted amount. In the evening of the day on which he paid, the Respondent contacted the Appellant enquiring whether he could cancel the bookings. The Appellant undertook to look into it and revert to the Respondent with a response. On the 17th November 2018 she advised the Respondent that the bookings could not be cancelled. The Respondent became angry and uttered these words to the Appellant: 'jy is 'n skelm'; 'ek dink jy is 'n skelm'; and later he sent a WhatsApp message saying, 'Ek glo dit, jy seker jou kinders gaan haal? Ek al voor jy die goed gestuur het die antwoord gehad. Maar geweet jy stuur dit met brawade want jy het my klaar gespyker en geweet dit kan nie omgedraai word nie'.
- [5] The Appellant became emotional and cried. She had made travel and accommodation arrangements for the Respondent about four times in the past. It was the first time in her 20 years' career as a Travel Agent that she had been insulted by a client in that manner.

- [6] The Appellant later heard from her colleague, Nina Gerdener, her brother Stefanus Oosthuizen, her sister Lucille Schultz, her mother Hendrina Oosthuizen and her fiancé, James Gilliland that the Respondent had spoken to them and had said of and concerning her that she is a crook, she stole money from him and that he would never do business with her or Travel Counsellors anymore.
- [7] As a result, the Appellant instituted an action against the Respondent claiming damages for defamation and for injuria. In his plea, the Respondent denied that he uttered the said words to the Appellant and/or that he published words of similar meaning to the above mentioned people. He pleaded in the alternative that, in the event it was found that he made the alleged utterances, they were either not defamatory or he did not act wrongfully. He also pleaded that he had a duty to inform the Appellant's colleagues and they had a corresponding duty to know of the Appellant's conduct. In his evidence, however, he neither disputed the utterances he was alleged to have made to the Appellant, nor denied the publications he was alleged to have made to people referred to above. He testified that he is sorry and he did not intend to cause any harm to the Appellant or her family as they are his friends. His actions, he testified, were consequently not wrongful. It would seem that the court a quo dismissed the Appellant's claims on the strength of this evidence and made a finding that he did not intend to cause harm to the Appellant.

The Issue

- [8] The issue raised by the appeal is whether the court a quo was correct in finding that the Respondent had no animus injuriandi and that his actions were not wrongful.

The legal position

- [9] Notwithstanding the limited issues raised by the appeal, I propose to deal with all the elements of defamation and injuria in order to properly address the above issue.

Defamation

- [10] Defamation consists in the wrongful and intentional publication of a defamatory statement concerning the

plaintiff.[1]

- [11] In determining whether a statement is defamatory, the following two-stage enquiry is conducted. Firstly, one establishes the ordinary meaning of the words used and, secondly, one asks whether that meaning was defamatory in that it was likely to injure the good esteem in which the plaintiff was held by the reasonable or average person to whom the statement was published.[2] In determining the meaning of the statement complained of, the court is not concerned with the meaning which the maker of the statement

intended to convey nor is it concerned with the meaning given thereto by the person to whom it was published. It is irrelevant whether they believed the statement to be true or whether they thought less of the plaintiff.[3]

[12] Once the publication of defamatory statements has been proved, it is presumed that the publication was wrongful and *animus injuriandi*. A defendant wishing to avoid liability must raise a defence that excludes, and adduce admissible evidence rebutting, either wrongfulness or intention.[4]

[13] It is accepted that a statement is defamatory of the plaintiff if there is a likelihood that it may injure the good name in which he or she is held by the reasonable or average person to whom it has been published. The question is whether the statement was calculated to expose a person to hatred, contempt or ridicule or it could attribute to the plaintiff that he or she is dishonest, immoral or is guilty of dishonourable conduct. It may also include statements which are likely to humiliate or belittle the plaintiff or make him or her look foolish, ridiculous or absurd, or less worthy of respect by his peers.[5]

Injuria

[14] There are three essential elements to establish an action for injuria, namely, (i) an intention on the part of the defendant to produce the effect of his act (*animus injuriandi*) (ii) an overt act which the defendant is not legally entitled to do, constituting (iii) an infringement of the plaintiff's right resulting in an impairment of the person, and dignity of the plaintiff.[6]

[15] To be wrongful, an act, in relation to a verbal or written communication, would have to be one of an offensive or insulting nature. *Animus injuriandi* is presumed once the wrongfulness of an act is determined, and the burden of rebuttal shifts to the defendant to establish one of the recognised grounds of justification. If the defendant fails to do so, the plaintiff in order to succeed, would have to establish the further requirement that he suffered an impairment of his or her dignity. This involves a consideration of whether the plaintiff's

subjective feelings have been violated, for the very essence of an injuria is that the aggrieved person's dignity must actually have been impaired. It is not sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities. Upon establishment of all the three requisites, the aggrieved person would be entitled to succeed in an action for damages subject to the principle of *de minimis non curat lex*. [7] The criterion of reasonableness is applied in determining the wrongfulness of the conduct complained of.

Application of the legal position

[16] It is noteworthy that the court *a quo* found that, "in this matter publication or utterances of alleged defamatory statements concerning the plaintiff is not in dispute" and correctly determined that "the onus rested on the defendant to prove the facts that dispel *animus injuriandi* or wrongfulness." [8]

- [17] The Respondent's grounds of justification in his testimony was that he did not have the intention to cause the Appellant any harm and he apologised for his actions, these actions being the insults hurled at the Appellant and the defamatory statements concerning the Appellant which were communicated to the Appellant's family members, her fiancé and her colleagues. The Respondent also testified that the Appellant and her family members, who are his family friends, knew the kind of language that he speaks and that when he uttered and wrote the defamatory statements, they knew that he meant no harm. The Respondent however did not produce any evidence of any previous communications between him and the Appellant or her family members to demonstrate that, although the words complained of were defamatory per se, as the court a quo correctly found, they had a non-defamatory innuendo.
- [18] The Respondent also attempted to justify his conduct by attributing same to the Appellant's failure to carry out his instructions despite her knowledge of his financial situation. Failure on the part of the Appellant to perform in terms of the contract between Respondent and her constitutes breach of contract in my view and the Respondent's legal remedy would have been to sue for contractual malperformance.
- [19] In its judgement,[9] the court a quo concludes that it was confronted with two irreconcilable versions and had to determine facts on the basis of the probabilities, the credibility of various witnesses and their reliability. I am of the view that considering the fact that the court a quo had found that the statements complained of were defamatory per se, the approach that it adopted in the determination of the issues was a misdirection. In the first instance the versions were not irreconcilable as the Respondent's grounds of justification were that he had no animus injuriandi and consequently bore the onus of proof in respect of that ground. Secondly the Respondent, rather than the Appellant, is the one whose evidence was totally divorced from the case that he pleaded.
- [20] The Respondent's testimony, coupled with the tenor of his legal representative's cross examination of the witnesses raised the issue of wrongfulness and while the court a quo was correct in its identification of this as one of the issues to be decided, it arrived at a conclusion that did not enjoy the support of the authorities referred to and was not founded on the facts. The court a quo held that none of the Appellant's witnesses testified that the esteem in which they held her was diminished in any way. Despite the irrelevance of the witnesses' subjective views, that holding clearly ignores the fact that the Appellant's mother's uncontroverted testimony was that she informed the Respondent that 'stealing' is a strong word whereupon he resorted to "screwing". It cannot be argued otherwise than that when she protested at the use of the word 'stealing'

she did so to demonstrate her dissatisfaction with it being used with reference to the Appellant. Secondly, the Appellant's colleague testified that, although she and the Appellant do the same job, she learnt everything that she knew about the travel agency work from the Appellant. This is indicative of the esteem in which she must have held the Appellant coupled with the fact that she did not even agree with the criticism that the Respondent had levelled against the Appellant.

[21] The court a quo referred to the Respondent's testimony that he did not publish anything on social media platforms such as Hallo Peter, Facebook or Trip Advisor concerning the conduct of the Appellant. The court a quo however does not indicate in what manner this constitutes justification for publishing to the witnesses to whom publication of the defamatory statements was made. The court a quo also emphasised that the Appellant's mother and brother did not regard the matter as being serious. This conclusion disregards the Appellant's mother's testimony that when the Respondent contacted the Appellant's co-workers, they all were of the view that he was taking the matter out of hand. In any event, when determining wrongfulness, the question whether the good name of the person involved has in fact (factually) been infringed, is irrelevant.[10]

[22] In its assessment of the evidence of the Appellant's fiancé, Adv. James Gilliland, the court a quo found that his evidence that the Respondent orally stated to Appellant's colleagues that he 'would no longer work with Travel Counsellors, they steal' did not carry much weight as it was hearsay evidence for the reason that they did not testify. However, the record shows that a colleague of the Appellant, Nini Gerdener testified in the proceedings before the court a quo and confirmed that the Respondent said that 'he will no longer work with Maggie, the Appellant and Travel Counsellors, because they steal, they stole his money'. The court a quo also concluded that the testimony of Adv. James Gilliland had to be approached with caution as he is the fiancé of the Appellant. However, the court a quo did not indicate how and what cautionary measures it applied in the treatment of his evidence. There are no cogent reasons why his

evidence was singled out of the others who even have closer familial ties with the Appellant. His evidence appears to have been rejected in its totality despite the fact that it was 'confessed and avoided' in the plea and it was not denied by the Respondent in his testimony.

[23] In paragraph 50 of its judgement, the court a quo states that:

"I was therefore satisfied that after applying a proper interpretation of the words used the Defendant did not have the necessary intention and did not act unlawfully and that therefore I find that there is no evidence that the esteem held by any of the witnesses of the plaintiff had been diminished."

This conclusion is inconsistent with the court a quo's finding that there was proof that the words complained of were published and that they were defamatory per se, casting upon the Respondent a duty to prove on a balance of probabilities that he did not act wrongfully or animus injuriandi. It is difficult to understand the reasoning of the court a quo in this regard because under no circumstances can words that are found to be defamatory per se and therefore casting a duty on the Respondent to rebut their legal meaning, can simultaneously be properly interpreted

to exclude the very wrongfulness and intention that it is presumed they prove.

[24] The conclusion arrived at in paragraph 53 of the court a quo's judgement is also anomalous in that it presupposes that if a defamatory statement that is wrongfully published is an opinion held by the Respondent about the Appellant, then there is sufficient disproof of animus injuriandi. This is in my view a misconstruction of the authorities whereupon the court a quo based this conclusion.

[25] For the above reasons, I find that Respondent did not succeed in rebutting the presumption that he had animus injuriandi or that he acted wrongfully when he published the defamatory matter about the Respondent. This conclusion also finds application in so far as the action for injuria is concerned. I deal below with the grounds whereupon I concluded that the Appellant is entitled to succeed on both claims despite the following statement in the case of *Le Roux v Dey* [11]:

"I am unaware of any instance in the history of the actio injuriarum where a particular defamatory act gave rise to two causes of action... The reason is in my view any defamation is in the first instance an affront to a person's dignity which is aggravated by publication. Someone who is not affronted by a publication and who does not feel humiliated will not sue for defamation".

[26] In the instant case, the Respondent is sued for the impairment of the Appellant's dignity on the basis of offensive and insulting words that he uttered directly to the Appellant, (injuria) and the publication of defamatory statements concerning the Appellant to her family members and her colleagues. There are therefore two distinct delicts that are involved entitling the Appellant to sue for damages for both. However, as stated further in the paragraph to which I have referred, "the award of damages compensates the plaintiff for injured feelings and for the hurt to his or her dignity and reputation" and for that reason, to avoid over compensation for an injury that stems from one wrongful conduct, it may be necessary depending on circumstances of a given case to make one global award for both claims, i.e. defamation and injuria.

[27] In the case of *Dikoko v Mokhatla*[12], the Constitutional Court said:

"It is a well settled general rule that the assessment of sentimental damages properly resides within the province of a trial court. It is better suited to the task having had the opportunity to evaluate at first hand the evidence and demeanour of the parties".[13]

[28] The question at this point therefore is whether the court a quo, having been found to have been wrong in not upholding the claims of the Appellant, is better suited to the task of assessing the damages? I am of the view that the facts in this appeal are unique and this court is in no worse position than the court a quo to properly assess sentimental damages. In any event, in the *Dikoko* case referred to above, the Constitutional Court further said:

“In defamation cases in particular, compensation is for sentimental damages which perforce are inexact and no more than a conjectural estimate. They cannot readily be translated into monetary terms. The discretion exercised in such cases, therefore, falls within the category of discretion strictly so-called.”

[29] I am of the view that special circumstances which justify this encroachment upon a function which is intrinsic to the trial court are that the court a quo had dismissed the actions and for that reason, in its opinion the Appellant was not entitled to any compensation.

Damages

[30] It is trite that in assessing damages in a defamation case a court must have regard to the nature of the defamatory statements, the extent of the circulation of the publication and the effect the publication had on the plaintiff.[14]

[31] In *Gelb v Hawkins*[15], the determination of compensation in a defamation case was said to relate:

“in the main to contumelia (meaning contempt or insult), but does not overlook the elements of loss of reputation, and penalty; which means that on the facts of the case, the plaintiff’s humiliation, and not loss of reputation, was the major factor in deciding quantum.”[16]

[32] In *SA Associated Newspapers Ltd en ‘n Ander v Samuels*[17] it was held that the amount of damages in a defamation case compensates the plaintiff for injured feelings and for the hurt to

his or her dignity and reputation.[18]

[33] A person whose dignity has been wrongfully impugned deserves appropriate financial recompense to assuage his or her wounded feelings.[19]

[34] Mr. Knoetze SC submitted that there are factors in this matter which, owing to their aggravating nature, warrant an award that is reflective of such circumstances. The circumstances, he argued, are the following:

34.1 The Respondent knew the Appellant’s family members and singled them out as the addressees of his defamatory statements to cause the Appellant greatest humiliation and embarrassment.

34.2 The Respondent published the defamatory statements to other people that Appellant cheated him and stole from him.

34.3 The Respondent’s apology was made for the first time in his testimony in court and therefore not genuine but an afterthought.

34.4 The Appellant was distraught for a couple of days. She began to doubt her competence and was emotionally upset. She had to explain the events that led to the Respondent’s actions to her manager.

34.5 The defamation was perpetrated over a number of days despite threats of a civil suit against him.

[35] He submitted that in the circumstances and taking into consideration the extent of the publication, the effect that the defamation and insult has had on the Appellant, and the consumer price index and the fact that the rights that the Appellant sought to protect are constitutional rights, an award that is appropriate is R75,000.00 for defamation and R30,000.00 for injuria.

[36] Mr. Knoetze SC referred us to cases wherein comparable awards were made, which serve as a useful guide. They are:

36.1 *Le Roux v Dey*, (CC) supra, the Constitutional Court reduced the amount of R45,000.00 by the High Court to R25,000.00 for defamation.

36.2 *Tuch v Myerson* 2010 (2) SA 462 (SCA), the Supreme Court of Appeal awarded damages in the amount of R30,000.00 for defamation.

36.3 *GQ v Yedwa and Others*, the High Court awarded an amount of R10,000.00 for injuria in November 1994.

36.4 *Dikoko v Mokhatla* (supra) the Constitutional Court dismissed an appeal against an award of R110,000.00 for defamation published, inter alia, in a newspaper.

[37] No doubt the Appellant was wounded in her self-esteem by what she considered to be unjustified attack on her good name and her dignity. The publication of defamatory matter concerning her was however made to a relatively small number of people, the majority of whom were her immediate family. Despite this however she is entitled to sufficient recompense for the affront to her dignity and fama. I consider an amount of R30,000.00 for damages for defamation and R20,000.00 for damages for injuria just and equitable in the circumstances.

Costs

[38] Mr. Knoetze SC argued that despite the fact that the Respondent did not oppose the appeal, costs should follow the cause on the basis that the Respondent was at liberty to abandon the judgement and his failure to do so was indicative of his support thereof. I am of the view that there is no just cause for not applying the general rule applicable to costs.

Order

[39] I would therefore propose the following order:

1. The appeal is upheld.
2. The Respondent is ordered to pay the costs of the appeal.
3. The order of the court a quo is set aside and in its place the following order is made:

“1. The plaintiff’s claims for both defamation and injuria succeeds with costs.

2. The defendant is ordered to pay to the plaintiff:

2.1 R30,000.00 as damages for defamation.

2.2 R20,000.00 as damages for injuria.”

M. S. LITHEKO, AJ

I concur and it is so ordered.

MATHEBULA, J

For the Appellant: Adv. Knoetze SC

Instructed by:

Spangenberg Zietzman and Bloem Attorneys

Bloemfontein

For the Respondent: No appearance

/bmokhoro

[1] Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) at paragraph 18.

[2] Economic Freedom Fighters and Others v Manuel 2020 (3) SA 425 (SCA) at paragraph 30.

[3] Neethling, Potgieter and Visser: Neethling’s Law of Personality

(2005) at 136. Le Roux v Dey 2011 (3) SA 274 (CC) at paragraph 89.

[4] Economic Freedom fighters and Others v Manuel (supra) at paragraph 36.

[5] Le Roux v Dey (supra) at paragraph 91.

[6] Whittaker v Roos and Batman 1912 AD 92 at 130 – 131.

[7] De Lange v Costa [1989] 2 All SA 267 (A) at 271.

[8] Paragraphs 32 – 35 of the judgement.

[9] At paragraph 42.

[10] Neethling et al (supra) at 136.

[11] Le Roux v Dey 2010 (4) SA 210 (SCA) at paragraph 23.

[12] 2007

(1) BCLR 1 (CC).

[13] At paragraph 93.

[14] Dikoko v Mokhatla (supra) at paragraph 101.

[15] 1960

(3) SA 687 (A).

[16] At 693 H.

[17] 1980

(1) SA 24 (A).

[18] At 39 F – G read with 40B.

[19] Van den Berg v Coopers and Lybrand Trust (Pty) Ltd and Others [2000] ZASCA 77; 2001

(2) SA 242 (SCA) at 260 H.

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