

SOUTH AFRICA / JUDGMENT

Finnaughty and Others v Malan and Others (22/15159) [2023] ZAGPJHC 1477 (29 December 2023) [2023] ZAGPJHC 1477

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

22/15159

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 22/15159

In the matter between:

FINNAUGHTY,
HEATHER
First Excipient
KASONKOMONA,
CANDY
Second Excipient
COGLE,
CHARMAINE
Third Excipient
and
MALAN,
JEAN-PAUL
First Respondent
MALAN,
BARBARA
Second Respondent
CRICHTON,
VANESSA
Third Respondent
JORDAN,
STUART

Fourth Respondent

JORDAN,

NIKKI

Fifth Respondent

PILLAY,

KUMARAN

Sixth Respondent

PILLAY,

NATISHA

Seventh Respondent

DAVISON,

PETER

Eighth Respondent

DAVISON,

YOLANDE

Ninth Respondent

DAWSON,

DAVID

Tenth Respondent

DAWSON,

MICHELLE

Eleventh Respondent

In re the matter between:

MALAN,

JEAN-PAUL

First Plaintiff

MALAN,

BARBARA

Second Plaintiff

CRICHTON,

VANESSA

Third Plaintiff

JORDAN,

STUART

Fourth Plaintiff

JORDAN,

NIKKI

Fifth Plaintiff

PILLAY,

KUMARAN

Sixth Plaintiff

PILLAY,

NATISHA

Seventh Plaintiff

DAVISON,

PETER

Eighth Plaintiff

DAVISON,

YOLANDE

Ninth Plaintiff

DAWSON,

DAVID
Tenth Plaintiff
DAWSON,
MICHELLE
Eleventh Plaintiff
FINNAUGHTY,
HEATHER
First Defendant
KASONKOMONA,
CANDY
Second Defendant
COGLE,
CHARMAINE
Third Defendant
MCBMA
PROPERTIES
Fourth Defendant

JUDGMENT

YACOOB J:

1. The excipients and respondents in this matter are all residents of a freehold complex called Saint Cloud Estate, and members of the St Cloud Homeowners Association NPC (“HOA”). The excipients are, or were at the time proceedings were instituted, also members of the board of directors of the HOA.
2. The respondents instituted an action against the excipients and the former property managing agent of the HOA, MCBMA Properties (Pty) Ltd (“MCBMA”), claiming damages for defamation, resulting from a notice published by email on 25 February 2022 to 47 members of the HOA. It is not clear whether this notice was published to all members of the HOA.
3. The excipients have noted an exception to the particulars of claim on the basis that it lacks averments necessary to sustain the cause of action. The respondents have opposed the exception, which now comes before me to decide. MCBMA does not participate in the exception, and has apparently been deregistered.
4. The basis of the exception is that the words in the statement which is the subject of the action are not capable of bearing the meaning attributed to them, either in their ordinary sense, or by way of innuendo in the circumstances alleged in the particulars of claim.
5. The parties are ad idem on the elements of defamation, and the test to be applied to determine whether a statement is defamatory. They are also agreed that it is not the ordinary meaning of the statements that is at issue, but whether, in the circumstances alleged in the particulars of claim, the statements bear an innuendo that is defamatory.

6. The respondents contend that the question of innuendo can only be determined by reference to evidence, and therefore that the exception should be dismissed. The excipients contend that there is no allegation in support of which evidence can be adduced, which would result in the conclusion that the defamatory innuendo is present.
7. The question then is whether the background alleged in paragraph 24 of the particulars of claim, if proven, supports the conclusion of innuendo alleged in paragraph 26 of the particulars, with regard to the statements alleged in paragraph 25 thereof.
8. The background alleged is:
 - 24.1. The plaintiffs and the defendants have, since October 2021, been engaged in a dispute regarding, among other things, the Board's purported appointment of a security service provider to the Estate and the publication and validity of HOA's management accounts.
 - 24.2. The plaintiffs and the defendants agreed to refer the dispute to arbitration in January 2022.
 - 24.3. The arbitration has not concluded, alternatively has failed, and the dispute between the plaintiffs and the defendants in ongoing.
 - 24.4. To the knowledge of the addressees, the defendants have referred to the plaintiffs, in the context of the dispute between the plaintiffs and the defendants, as "the concerned group of residents".
9. The statement complained of is contained in an email informing homeowners of the cancellation of a contract with a security service provider and the appointment of a new one. The specific statements within the email complained of are purportedly set out in paragraph 25 of the particulars of claim. The averments in paragraph 25 do not set out the contents of the email accurately.
10. The particulars of claim identify the third, fourth and fifth (unnumbered) paragraphs of the email as having defamatory meaning, and I set those out here, complete with any grammatical or spelling errors.

As you are no doubt aware, the Board of Directors have spent most of their term to date locked in legal battles with the previous board and other "concerned residents" to cancel the contract with TRSS. The Board has been thwarted in every attempt to excise their obligations towards the HOA and its Members regarding the termination of the agreement with TRSS. The Board have also been thwarted with regards to entering into a new agreement with Sys Control Secure, the terms of which are more favourable in terms of cost to the HOA and for the security staff who have guarded the complex for numerous years.

The attempt to resolve the dispute between the group of residents and the HOA via arbitration over the past two months has failed, due to the parties not being able to agree to the terms of the Arbitration, with the "concerned residents" insisting that the HOA pays for the full Arbitration and that they be allowed to submit oral submissions and call witnesses, while the Directors maintain the HOA can only afford a process whereby written submissions from both parties are

considered by the arbitrator (which was initially the terms to which the HOA agreed and persuaded them to proceed with Arbitration – ie, a fixed quote versus a process that could drag on for an indefinite period of time).

The TRSS probation period expires at COB Monday 28 February and as such the Board had no option but to terminate the TRSS contract. Failure to do so will mean that St Cloud is locked into a 3-year contract we can't afford, one that is also detrimental to our guards and thus has a direct impact on our security. The group of "concerned residents" has threatened the Board with High Court action should we go this route, but we have no options left.

11. At paragraph 26 of the particulars of claim it is alleged that the content of the email notice is defamatory, as it contains the false innuendo that the respondents are:
 - 26.1 vexatious;
 - 26.2 irrational and unreasonable;
 - 26.3 dishonest;
 - 26.4 acting selfishly and contrary to the interests of the HOA generally;
 - 26.5 deliberately acting in a manner that threatens the safety and security of the Estate and its residents;
 - 26.6 intentionally, and without just cause, obstructing the Board in the execution of its duties in serving the HOA;
 - 26.7 intentionally, and without just cause, issuing idle threats against the Board, [and]
 - 26.8 insistent that other HOA members' levy contributions fund the resolution of the disputes between the plaintiffs with the first to third defendants.
12. I agree with the excipients that there is nothing in paragraph 24 which supports a conclusion that the impugned statements mean the respondents are dishonest; acting selfishly and contrary to the interests of the HOA; intentionally and gratuitously obstructing the Board; issuing idle threats against the Board, or insistent that the arbitration be funded only from the levy contributions of other HOA members.
13. If there are other facts which are not pleaded which support the conclusion that the statements have this innuendo, it does not help the respondents to say that it is a matter for evidence. Those facts are fundamental to the defamatory meaning complained of and must be pleaded. They cannot be held in reserve for evidence.
14. It seems to me that a conclusion that the Board is saying that the respondents are vexatious, irrational and unreasonable may be supported by the pleadings as they stand, but that is not necessarily defamatory in the context, although it may be insulting.

15. The particulars of claim therefore do not contain the averments necessary to sustain the pleaded cause of action.
16. Since this judgment is being handed down during the festive season, I consider that it is appropriate to give the respondents (plaintiffs) more time than usual to amend their particulars of claim.
17. I therefore make the following order:
 1. The exception is upheld with costs.
 2. The plaintiffs may amend their particulars of claim within 25 days from the date of this order.
 3. Should the plaintiffs fail to amend their particulars of claim within 25 days of this order, their particulars of claim are struck out in their entirety.

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

For the excipients:

HF Jacobs SC

Instructed by:

Marguerite D Loots Attorneys

For the respondents:

D Wild

Instructed by:

Brian Wilken Attorneys

Date of hearing:

03 October 2023

Date of

judgment:

29 December 2023

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Prepared on 12 October 2026 · Esheria