

SOUTH AFRICA / JUDGMENT

Jankielsohn v Booysen and Others

(859/2018) [2019] ZAFSHC 215; [2020] 1 All SA 214 (FB) (11 November 2019)

[2019] ZAFSHC 215

COURT

Free State High Court, Bloemfontein

BEFORE

DAFFUE

CASE / FILE NUMBER

859/2018

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 859/2018

In

the matter between:

ROY
JANKIELSOHN Plaintiff
and
REAGAN
BOOYSEN 1st
Defendant
SELLO
PIETERSEN 2nd
Defendant
THABO
MEEKO 3rd
Defendant
THE AFRICAN NATIONAL
CONGRESS

YOUTH
LEAGUE 4th
Defendant

CORAM: DAFFUE, J
HEARD

ON: 13 & 14 AUGUST 2019

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 11 NOVEMBER 2019

I

INTRODUCTION

- [1] This case is in essence about the balancing of two constitutional rights, to wit the rights to dignity embodied in s 10 and freedom of expression in s 16.[1]
- [2] A well-known and high profile politician feels aggrieved by comments made by certain individuals in their personal capacities and also as members of and on behalf of the Youth League of an opposition party.
- [3] The following expression came to mind when evidence was led: “Die hoogste bome vang die meeste wind” or as the people of the Free State say in Sesotho: “Difate tse telele ke tsona tse tswarang moya o mangata.”

II THE PARTIES AS CITED IN THE PLEADINGS

- [4] The plaintiff is Dr Roy Jankielsohn, merely cited in paragraph 1 of the particulars of claim as a male person residing on a farm in the district of Bethlehem, born on [...] 1967. He is therefore 51 years old. He was represented by Adv KN Peterson, instructed by Horn & Van Rensburg Attorneys.
- [5] 1st defendant is Mr Reagan Booysen, the provincial secretary of the African National Congress Youth League (“the ANC Youth League”) for the Free State Province.
- [6] 2nd defendant is Mr Sello Pietersen, the provincial spokesperson of the ANC Youth League of the Free State Province.
- [7] 3rd defendant is Mr Thabo Meeko, a member of the Free State Provincial Legislature.
- [8] 4th defendant is the ANC Youth League, a duly constituted voluntary organisation with legal personality, deriving its existence from its constitution. Adv IAM Semanya SC appeared for the defendants together with Adv M Ramaili.

III THE PLEADINGS

The plaintiff's case

- [9] Plaintiff pleaded in paragraph 7 of the particulars of claim that 1st and 2nd defendants acted not only in their respective capacities as office-bearers of the ANC Youth League in the Free State, but also in their personal capacities.
- [10] Plaintiff pleaded in paragraph 8 that on 5 October 2017 1st and 2nd defendants jointly issued a statement on behalf of 4th defendant, attached as annexure "A". On the same date 3rd defendant shared and published the statement on Facebook, being a social media platform, widely distributed across the world. The publication is attached as annexure "B".
- [11] The aforesaid statements contain words stated of and concerning the plaintiff as pleaded in paragraph 9 of the particulars of claim, inter alia that he is a "racist" and an "irrelevant white supremacist."
- [12] In paragraph 10 of the particulars of claim it is alleged that on or about 26 January 2018 2nd defendant repeated some of the allegations pertaining to plaintiff in an article published in The Weekly, a newspaper widely distributed in the Free State. A copy is attached as annexure "C."
- [13] In paragraphs 11 – 15 of the particulars of claim allegations are made that defendants defamed the plaintiff by using the words complained of which were intended and understood by readers of the publications to mean that plaintiff is (1) a racist,
- (2) a white supremacist, (3) a clown and (4) irrelevant in the political sphere within which the plaintiff finds himself. Consequently R1m is claimed from the four defendants, jointly and severally.

The defendants' defence

- [14] The defendants' special plea of *lis pendens* insofar as plaintiff also instituted action in the Magistrate's Court, sitting as an Equality Court, has been withdrawn in court before the leading of evidence.
- [15] The defendants admitted the first 7 paragraphs of the particulars of claim in their original plea filed on 11 April 2018 as well as the amended plea filed as recently as 16 May 2019. The significance of the date of filing of the amended plea will become clear later. The locus standi and positions held by the 1st to 3rd defendants are admitted. It is also admitted that 1st and 2nd defendants not only acted as office bearers of 4th defendant, but in their personal capacities as well. The ANC Youth League's locus standi as an organisation is also admitted.

- [16] In sub-paragraphs 2.1 – 2.5 of the amended plea it is averred that plaintiff had defamed the Premier of the Free State, Dr Ace Magashule, and that the statement of 5 October 2017 was published “in order to correct the politically unfounded allegations made by the Plaintiff.” The media statement of 26 January 2018 was published “in response to the lawsuit against the Defendant and the defamatory statement against there then Premier Dr Ace Magashule, secondly by the journalist seeking clarity in relation to the lawsuit by the Plaintiff.”
- [17] In sub-paragraph 2.7 it is pleaded in the alternative that “the utterances complained about were made within the defendant’s

constitutionally protected rights and freedoms, namely the freedom of expression contemplated in section 16 of the Constitution as well as the political rights within the meaning of Section 19 of the Constitution.”

Sub-paragraph 2.7 was inserted when the plea was amended.

- [18] Defendants plead in paragraph 3 of the amended plea to paragraphs 11 -15 of the particulars of claim, averring that “the statements were in essence true and those statements both in the newspaper and on facebook were done in the public interest.”

They further aver that as the parties were politicians and plaintiff used the DA’s website to attack and defame the Premier, they reacted and therefore their statements were made “during the political course or space, not outside the political space or course and the statements were germane to the issue in the political space, also the statements were not statements of fact but response concerning a matter of public interest, namely allegations made against there then Premier.”

IV THE LIQUIDATION OF THE ANC YOUTH LEAGUE

- [19] As indicated supra defendants admitted the ANC Youth League’s standing as pleaded. During the trial defendants’ senior counsel conducted the proceedings clearly based on instructions of all defendants and not a word was ever said by both legal teams that any of the parties, and fourth defendant in particular, lacked locus standi to carry on defending the action. I reiterate that the amended plea was filed this year, to wit on 16 May 2019.
- [20] On the verge of delivering this judgment, I came across media reports suggesting that the ANC Youth League had been liquidated earlier. I requested my secretary to inform both legal teams of these media reports and directed them to deal with the issue in writing on or before 25 October 2019, which they have done. I was also presented with a copy of a court order indicating that the ANC Youth League was finally wound up on 26 July 2018. The conclusion reached in both parties’ written submissions is that this court cannot give judgment against the fourth defendant insofar as its liquidators, if any have been appointed, have not been joined in the proceedings. I agree for obvious reasons, bearing in mind the trite legal principle. Consequently plaintiff now seeks judgment against the three individual defendants only.

V THE RULING ON THE DUTY TO BEGIN

[21] Ms Peterson submitted that the defendants should start with the leading of evidence. She relied on the averments in the amended

plea. I put it to her that the parties agreed in their rule 37 minutes that plaintiff bears the duty to begin and that he will begin. Mr Semenya confirmed that he accepted his brief for the trial based on such agreement. A week before the start of the trial I requested my secretary to communicate with the parties via e-mail in order to ensure that they properly comply with the new rule 37A(10). I was informed that the rule 37 minutes complied with the new rule. Defendants were never requested to revisit the agreement reached. Consequently, I did not deem it fair to make a ruling contrary to an agreement reached between the parties. Furthermore, although new defences are raised in the amended plea, defendants denied in the original plea that the statements were made wrongfully and with the intent to defame plaintiff.

VI THE EVIDENCE

Roy Jankielsohn

[22] Mr Jankielsohn was the only witness that testified in plaintiff's case. He testified that he is the leader of the Democratic Alliance ("DA") in the Free State Provincial Legislature. He was leader of the official opposition in the Legislature between 2006 and 2009 and from 2014 to date. He is a member of the Federal Council of the DA. He also holds numerous other positions. Five degrees were conferred upon him, to wit a BA, BA Honours in Political Science, MA in International Relations, BA Honours in English and a Ph.D in Political Science. He is a former lecturer at the University of the Free State. He is the author of several academic publications and an external examiner for Ph.D students of the Northwest University. He was awarded the Robert S. McNamara World Bank Scholarship for research.

[23] On 4 October 2017 plaintiff delivered a statement in the Provincial Legislature in his capacity as leader of the opposition.[2] The Premier of the province, Mr Ace Magashule, was attacked. It was noted that the Bahcesehir University in Turkey, a private university, had been misled into conferring an honorary doctorate on the Premier. According to plaintiff the university ought not to have conferred the degree if they had done research on Mr Magashule. He quoted a number of reasons in this regard.

[24] During his testimony the plaintiff explained that the information relied upon was in the public domain. It is not deemed apposite to deal with the witness' evidence in this regard or the documentation relied upon in any detail. The examples quoted in the press release are, according to the witness, substantiated by newspaper articles, other documentation and the May 2016 report of the Public Protector.[3]

[25] Plaintiff also testified about information received upon questions asked by him concerning the Province's international student programme. He testified with reference to documentation received from the Free State Department of Education that millions of Rands had been paid to several countries, inter alia to Turkey in 2014/15 – R7.75m, in 2016/2017 -

R32.6m and in 2017/18 - R11.9m. Students were sent by the Province to the particular university and the amounts were apparently utilized for air tickets, tuition, accommodation and the like.

[26] Plaintiff testified about the reaction of the defendants. The publications are not in dispute. The initial statement[4] dated 5 October 2017 was issued by 2nd defendant and placed on the ANC Youth League's Facebook page. 1st Defendant is referred to as the person to whom enquiries should be directed. This statement contains all the words quoted in the particulars of claim which plaintiff alleges are defamatory. On the same day 3rd defendant shared the article which was released on Facebook,[5] causing a wider distribution thereof. On 28 January 2018 the Weekly newspaper published an article based on allegations made by 2nd defendant wherein several of the alleged defamatory remarks were repeated.[6]

[27] According to the plaintiff he was also incorrectly accused of objecting to black students studying abroad. To the best of his knowledge no report was ever issued denying the correctness of the allegations in his report. Defendants did not try to defend Mr Magashule by indicating that plaintiff's report was false, but elected to attack him by defaming his person. He referred to the words used in this regard, but testified that to call a white politician a racist is the biggest insult imaginable. It is criminal to be racist. He also felt aggrieved for being insulted and belittled by young people. These remarks may affect his political career negatively and they also have a bearing as to how this is perceived by his family and other members of the community. Plaintiff testified that by referring to him as a racist, has dangerous implications as he and his family are residing on a farm. Farm attacks in this country are not uncommon.

[28] He questioned the allegation in paragraph 2.3 of the amended plea, stating that the statement was issued to correct politically

unfounded allegations. According to him nothing was corrected in the statement or in any other statement that he was aware of. He regards the defendant's statement as an unsuccessful attempt to defend Mr Magashule.

[29] During cross-examination Mr Semenya emphasised that the DA and the ANC were political opponents, competing for votes. Plaintiff had to concede that there was no indication within the DA that he was not held in the same esteem as before the defendants'

publications. Also, that the accusations of being a racist were never deemed to be accurate, otherwise plaintiff would not be occupying his position in the DA anymore. Mr Semenya discussed with plaintiff the fact that he elected to be in politics – in the political space - and that metaphors are often used to criticise opponents. He is also seen as the face of the ANC's opposition in the Legislature. Time has been spent to deal with the wording of ss 16 and 19 of the Constitution. To an extent the cross-examination was an attempt to obtain concessions from plaintiff about the law pertaining to freedom of expression.

[30] Mr Semenya's reasoning that the ANC Youth League became involved because of the fact that plaintiff had queried the studying

of black students abroad, was met with a response that his report had nothing to do with that: studying abroad was not a consideration.

That concluded plaintiff's case.

Thabo Piet Meeko

[31] Defendants called only one witness, to wit Mr Meeko, the 3rd defendant. He is the current spokesperson of the ANC in the Free State and a Member of Parliament. He testified about his political career. The ANC Youth League has been established to ensure that the ANC is rooted in the masses and

especially the youth. He has known the plaintiff since 2014. The witness was called upon to explain how he defines political contestation and it became clear that he believes that robustness is common while heated debates occur in the National Assembly and the Provincial Legislature of provinces. According to him, although members are protected for what they say inside Parliament, all politicians have the right to speak outside Parliament.

[32] The witness confirmed that the statement of 5 October 2017 was released and that he "retweeted" it. It is his view that it is not uncommon for politicians to call others "racists." He is of the opinion that the DA wants to install the "apartheid legacy" and that has been the case since 1994. Therefore plaintiff is a racist. Anyone or any party that disagree with the ANC or oppose its views, reflects racism and the idea that apartheid must be "maintained."

[33] He testified that the word "redneck" has particular connotation in politics. The South African struggle has

"borrowed various things from Cuba." He believes that the political speech relevant in casu did not and could not incite violence. The word "clown" is used for someone that disagrees with you in politics. A "white supremacist" is someone that advances the ideas of apartheid. A "DA Chihuahua" is someone who is at the forefront of speaking DA rhetoric. Plaintiff should have recognised that his attack on the Premier would not be responded to "with red roses."

[34] During cross-examination the witness denied that the defendants' statement was made with the intention to defame plaintiff, but it was a "political reaction to a political action." When asked whether he would again respond in a similar manner, he stated that one is guided in politics by a number of issues such as time and space whilst ideas are not static. The defendants closed their case after the testimony of Mr Meeko.

VI THE CONSTITUTION

[35] A consideration of the preamble of our Constitution should be the starting point in any matter of a constitutional nature. The following extracts are of importance in this dispute:

“Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Freedom of expression

16.1 Everyone has the right to freedom of expression, which includes-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

16.2 The right in subsection (1) does not extend to-

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Political rights

19.1 Every citizen is free to make political choices, which includes the right-

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party; and
- (c) to campaign for a political party or cause.

19.2 Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

19.3 Every adult citizen has the right-

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.”

VII RELEVANT LEGAL PRINCIPLES

[36] Defamation is the wrongful and intentional publication of a defamatory statement concerning the plaintiff. Once the plaintiff establishes these elements, a presumption is created that the statement was unlawful and intentional and it is for the defendant to rebut this. Several common law defences such as truth and public interest and fair comment, to name only two, could be raised.[7] A full onus rests on the defendant to rebut the presumption created and it must be discharged on a preponderance of probabilities.

Facts must be pleaded and proved that will be sufficient to establish the defence.[8]

[37] In *Khumalo*[9] O'Regan J wrote for a unanimous court:

[21]The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by this Court and other South African Courts. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.....

[25] However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed

in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.

The constitutional value of human dignity

[26] It has long been recognised in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name.

Under our new constitutional order, the recognition and protection of human dignity is a foundational constitutional value. As this Court held in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000

(3) SA 936 (CC) [2000] ZACC 8; (2000

(8) BCLR 837) at para [35]:

'The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.'

[27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn

between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution....

[28] The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity.”

(emphasis added)

[38] In *Masuku and another v South African Human Rights Commission*[10] the following was said in a case dealing with the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, also known as PEPUDA or the Equality Act:

“[16] Since the advent of our Constitution, the right to enjoy freedom of expression is one that has been fiercely promoted and jealously

guarded in this country. Section 15 of the interim Constitution protected both 'speech' and 'expression'. The use of only the wider

concept 'expression' in s 16 of the Constitution has been interpreted as signifying a deliberately expansive approach to constitutional

protection of speech and expression. None of the parties in this appeal take issue with the liberal approach to protection of freedom of expression as demonstrated in the various judgments of the courts around the country.....

[31] In summary, the starting point for the enquiry in this case was that the Constitution in s 16(1) protects freedom of expression. The boundaries of that protection are delimited in s 16(2). The fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. Public

debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional

protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

This judgment is distinguishable from the matter at hand although the SCA discarded the Equality Act and decided to deal with s 16(2) of the Constitution. An application for leave to appeal the SCA judgment has been filed at the Constitutional Court which court will, as informed, hear the application in due course.

[39] In *Hotz and Others v University of Cape Town*[11] the court held:

“A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity.”

[40] In *SAHRC v Khumalo*[12] Sutherland J in dealing with the Equality Act commented as follows:

“[102] In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable

because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism.”

The learned judge found that the question whether harm could be incited by the effect of the speech on the reasonable reader or audience and not whether the intention of the speaker was to incite harm. He added that the standard of the reasonable person, applied to s 10(1) (of the Equality Act) means, therefore whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they imply.[13] Again, I am mindful of the fact that the Equality Act was the applicable Act considered in that matter and not s 16 of the Constitution. Also the facts differ from those in *casu*.

[41] Brand AJ dealt with the meaning to be given to a statement as follows in *Le Roux and Others v Dey*.[14] The primary meaning of a statement is the ordinary meaning given to the statement in its context by a reasonable person.

The second meaning is an innuendo. When a plaintiff relies on the primary meaning, a two-stage enquiry is followed. Firstly, the ordinary meaning of the

statement must be established and secondly it must be considered whether the meaning is defamatory. The ordinary meaning is established by determining what meaning the reasonable reader of ordinary intelligence would attribute to the words.[15]

[42] No one has a licence to publish untrue statements about politicians who also have the right to protect their dignity and reputation,

notwithstanding the finding by the SCA that “the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual,” as explained in *Mthembi-Mahanyele v Mail and Guardian Ltd and Another*.^[16] Lewis JA made it clear that freedom of expression should not be elevated above that of dignity as there is no hierarchy of rights.^[17] This case is distinguishable insofar as it dealt with a claim against a newspaper. The defendant publisher will not be held liable for the publication of defamatory material if it is able to show that it was reasonable to publish.^[18]

[43] An objective test is applied to determine whether the reputation of the plaintiff has been infringed on a balance of probabilities.^[19]

[44] It is apposite to consider the views of the CC in *Le Roux v Dey*:^[20]

“[138] In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her right to a sense of self-worth. But under our common law 'dignity' has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common-law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation.

[139].....

[140] I find myself in respectful agreement with the principle that the same conduct should not render a defendant liable by dint of more than one *actio iniuriarum*. I say that for the reasons that follow.

[141] Traditional learning generally defines *iniuria* as the wrongful and intentional impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*).....

[142] In view of this constant overlapping of manifestations of *iniuria*, duplication of actions would therefore have been expected as a matter of common occurrence, if it were allowed in principle. Yet, like Harms DP, I am unaware of a single case where two actions for *iniuria* were allowed on the same facts. On the contrary, as pointed out by the majority in the Supreme Court of Appeal, it is recognised that an award of damages for defamation should compensate the victim for both wounded feelings and the loss of reputation. I see that as an implicit endorsement of the principle that the plaintiff will not be able to succeed in separate claims for both defamation and infringement of dignity, arising from the same facts.....

[45] In *Khumalo*^[21] the Constitutional Court quoted with approval the following statement by Cory J in *Hill v Church of Scientology of Toronto*:

“False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.”

Writing for a unanimous court, O'Regan J also said in the same paragraph:

“There can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements.”

[46] Although freedom of speech is indisputable, our courts here and abroad are clear: what is permitted is public debate which does not amount to hate speech.[22] It is important to understand that freedom of speech is not an absolute right. Cameron J, writing for the majority in *McBride*, acknowledged that public debate in this country has always been robust, but concluded that the Constitution does not extend freedom of expression to hate speech. Also, every person is afforded the legitimate protection of his/her dignity, including their reputation.[23]

VIII ANALYSIS OF THE FACTS AND THE CONTEXT IN WHICH PUBLICATION TOOK PLACE

[47] The publication of the statement by defendants is not in dispute. It was published for immediate release onto the ANC Youth League's Facebook page and the same day shared by 3rd defendant on his Facebook page. Several of the words used in the statement to describe plaintiff are hurtful and offensive, but in my view acceptable in a political context. However the words “racist” and “white supremacist” fall in a totally different category. In *Masuku*[24] the SCA stated that an offending term such as “racists” does not “connote religion or ethnicity.” We do not deal here with either religion or ethnicity, but with race –based speech.

[48] It must from the onset be pointed out that although defendants aver in paragraph 3.1 of their amended plea that the “statements

were in essence true” and “done for the public interest,” Mr Semenya was adamant in his written and oral submissions that this case is not about the usual common law defences such as truth and public interest and fair comment. He did not try to lay a basis for any of the common law defences during the plaintiff's cross-examination. He unconditionally relied on the defendants' alleged protected rights of freedom of expression contemplated in s 16 and their political rights within the meaning of s 19 of the Constitution.

[49] I did not understand Mr Semenya to argue with much vigour that the statements, especially that plaintiff is a racist and a white supremacist, are not per se and prima facie defamatory. His main submission is that in constitutional law, context is everything. Therefore, in the context of defendants' leader and Premier of the Province being accused as I set out earlier, defendants were fully entitled to react in the manner they did and are entitled to the protection of ss 16 and/or 19. Mr Semenya did not submit that plaintiff had to disprove defendants' defence. In my view defendants attracted a full onus to prove that their speech was protected in terms of ss 16 and/or 19. This viewpoint is in line with the applicable test pertaining to the usual common law defences mentioned above.

[50] I accept that politicians are supposed to be used to some robust communication and that political debate often provoke severe

emotions. Often political role players try to score points in the eyes of their supporters and other members of the public and in doing so, severe criticism may be levelled at the opposition. Having said this, the right to dignity, which includes reputation, will become meaningless if persons are allowed to say whatever they want in the name of freedom of expression.

[51] It is trite that I must try to balance the two constitutional rights. In doing that I shall consider the alleged

defamatory statements within the context they were published. I shall also consider defendants' allegation that their reaction was to correct plaintiff's unfounded allegations.

[52] The defendants' statement kicks off with the allegation that plaintiff's attacks on the Premier were of a racist nature. This is factually incorrect. I accept that the defendants' statement tries to convey that the Premier was indeed deserving of an honorary doctorate degree. The uncontested evidence of plaintiff reveals that millions of Rands have been paid to Turkey to provide for the costs of South African students and that the amount increased to a staggering R32m in the 2016/17 financial year which coincides with the conferral of the honorary doctorate degree. Payments to Turkey dropped the next financial year to just less than R12m. However, even if the defendants' statement was published in order to correct incorrect allegations, the question still remains whether defendants were entitled to make prima facie defamatory remarks towards plaintiff.

[53] Plaintiff is referred to four times as a "racist" and even an "inherent racist" in the document and once as an "irrelevant white supremacist." The repeated use of the word "racist" is, to borrow from Cameron J in McBride,[25] vengeful and distasteful. No steps have been taken against plaintiff by his political party based on the allegations against him. If these were factually true, I have little doubt that a non-racial political party like the DA would have acted immediately by

instituting disciplinary steps against plaintiff. The party insiders, consisting of white and black leaders, would have done

their party a disservice if they allowed a racist to represent them as leader of the Free State Legislature.

[54] The test is not whether those who know plaintiff well would necessarily be influenced by the statement. Clearly, the

statement was meant to be read primarily by members of the ANC Youth League, followers of the Youth League and people who are Facebook

friends of the organisation and Mr Meeko, the 3rd defendant. If the matter is to be considered objectively – i.e. through the eyes of the reasonable readers of the particular facebook pages, or put otherwise, ANC Youth League followers and others that do not know plaintiff well – I am of the view that the readers would accept that plaintiff is a racist and a white supremacist, i.e. a person who believes that the white race to which he belongs is superior to other races.

- [55] It must be one of the biggest insults to accuse a politician, or for that matter anyone else in our diverse society, of being racist or a white supremacist. People are sent to jail for making racist remarks. Racism is an extremely sensitive issue. As stated in Mthembu-Mahanyele[26] the right to dignity is also afforded to high profile public officers. They are entitled not to have their reputations unlawfully harmed. Plaintiff's right to dignity, including his reputation, has been infringed and there can be no dispute in this regard. Mr Semenya did not submit that plaintiff, or for argument's sake, anyone else, may be called a racist without impunity. I quote Sutherland J again who said "utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks." We, as the people of South Africa, must have respect for the dignity of others as "this lies at the heart of the Constitution and the society we aspire to" as Brand AJ said in Dey.[27] He continued to state that "respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity, our aim to create a better society may come to nought."
- [56] There is no justification for the publication of untruths. The statement was published recklessly and with indifference as to whether it was true or false. They were actuated by malice and the sole purpose was a personal attack on the plaintiff. In his evidence Mr Meeko made use of generalisations and placed emphasis on the DA's programme since 1994 to allegedly return to apartheid in order to justify their attack. Plaintiff is labelled and even stigmatised as a racist and white supremacist and it is highly probable that some people might have been incited to cause him and/or his family harm. We experience this on a regular basis in this country. The harm inflicted on foreigners based on rumours, or distorted facts being published, is just one example. I reiterate what Sutherland J said in SAHRC v Khumalo.[28] Mr Meeko was vague during cross-examination. I understand that context is important, but his failure to respond meaningfully to questions put to him as to what their reaction would be to similar comments by plaintiff at the time he testified, speaks volumes.

His attempts to distinguish between plaintiff's comments and their reaction thereto did not bear fruit. Mr Meeko's

subjective belief that defendants' reaction could or did not constitute incitement to cause harm is irrelevant. The matter must be considered objectively. Plaintiff, on the other hand, made concessions when necessary and I find that he was a credible and reliable witness. However, it is not necessary to reject Mr Meeko's version in order to adjudicate the dispute. It is in essence a legal matter that has to be adjudicated based on legal principles. I reiterate that the parties could not present me with any authorities dealing with the defences raised by defendants. Masuku relied upon by Mr Semenya and quoted above, had to be considered in light of the Equality Act. I am satisfied that the statement

involves advocacy of hatred based on race and constitutes incitement to cause harm. The defendants cannot successfully rely on s 16(2) and s 16(2)(c) in particular. They failed to prove there defence.

[57] The reliance on s 19 of the Constitution is ill-founded. I am not prepared to accept that a political party or one or more of its members may use absolute freedom of speech in order to say whatever they want to say about opposition political parties or their office-bearers merely because an election is around the corner. Surely, parties may contest for votes and do that fairly and squarely within their rights as such. Our country will erupt into chaos if it were otherwise. The same principles enunciated above when dealing with freedom of expression and s 16(2) in particular applies. This defence cannot succeed.

IX SOLATIUM

[58] The Supreme Court of Appeal stated in *Langa CJ and others v Hlophe*[29] that “a judge like any member of the public, is entitled to the consolation of damages for defamation if the publication of the statement cannot be justified.” The purpose of granting compensation is twofold: firstly to vindicate the plaintiff’s reputation in the eyes of the public, and secondly, to serve as conciliation to him/her.[30]

[59] Plaintiff claims R1m, but the reasonableness of the claim must be considered in the light of all the circumstances. A court is entitled to refer to other cases in order to consider a solatium, but such cases should merely be used to guide the trial judge. In *Tsedu and others v Lekota and another*[31] R100 000.00 was awarded on appeal to each of the two plaintiffs, the holders of high office in Government, who were accused of having supplied confidential party information to a third party. The present day value of the award is R170 200.00.[32] Nugent JA, writing for a unanimous bench, held[33] that “monetary compensation for harm of this nature (defamation in casu) is not capable of being determined by empirical measure” and that “it would not be helpful to recite other awards.”

I respectfully agree with this dictum and find that there is no substance in Mr Semenya’s argument that plaintiff failed to prove his entitlement to compensation.

[60] Notwithstanding the remarks of the SCA quoted in the previous paragraph, I considered three other cases. In the most recent judgment R500 000.00 was awarded to Mr Manuel, a former Minister in the National Government.[34] The statement about him was held to be understood by the reasonable reader that he was inter alia corrupt and nepotistic. I am of the view that plaintiff is not entitled to such a substantial award. Mr Manuel was not only a well-known National Minister for a long time, but he has established himself as an influential role player in this country.

[61] In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & others*[35] an amount of R30 000.00 was awarded to a senior advocate following an admittedly defamatory statement made in court papers.

Obviously, publication was limited. The present day value thereof is R90 270.00.[36]

[62] In Media 24 Ltd t/a Daily Sun and another v Bekker du Plessis[37] the SCA reduced the award of the trial court to R40 000.00. The plaintiff was a sales agent who was depicted as a racist who valued the value of an onion more highly than the life and well-being of another person. This case is clearly distinguishable as that plaintiff does not have the same high profile as the plaintiff in casu. I do not intend to repeat the plaintiff's impressive CV, but there can be no doubt that he is a man of formidable calibre.

X

CONCLUSION

[63] In conclusion I am satisfied that plaintiff has made out a case based on defamation. The defendants' defences have been rejected. The plaintiff is entitled to reasonable compensation which is fair and equitable. The amount of R300 000.00 is to be awarded.

[64] The general rule is that costs should follow the event and there is no reason to deviate from this trite principle.

XI THE ORDERS

[65] Judgment is granted against 1st, 2nd and 3rd defendants, jointly and severally, the one to pay, the others to be absolved as follows:

- (1) Payment in the amount of R300 000.00.
- (2) Interest a tempore morae on the amount of R300 000.00 from date of judgment to date of payment.
- (3) Costs of suit.

J P DAFFUE, J

On behalf of Plaintiff: Adv KN Peterson

Instructed by: Horn & van Rensburg

BLOEMFONTEIN

On behalf of Defendants : Adv IAM Semenya (SC) and Adv M Ramaili

Instructed by: Moroka Attorneys

[1] Of the Constitution, 108 of 1996.

[2] See pp 1 &2 of exhibit A for a copy of the press release

[3] Contained in exhibit B, pp 20 - 103

[4] Exhibit A, p 5

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- [5] Exhibit A, p 4
- [6] Pleadings bundle, p 20
- [7] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at paras 18 – 20, relying on *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)
- [8] *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* 2011 (3) SA 274 (CC) at para 85
- [9] *Loc cit* at paras 21 & 25 - 28
- [10] 2019
- (2) SA 194 (SCA) at paras 16 & 31
- [11] 2017
- (2) SA 485 (SCA) at para 68
- [12] 2019 (1) SA 289 (GJ)
- [13] *Ibid* at paras 88 & 89
- [14] *Loc cit* at paras 86 -91
- [15] *Ibid* at para 89
- [16] 2004
- (6) SA 329 (SCA) at paras 66 & 67
- [17] *Ibid* at para 42
- [18] *Ibid* at para 46
- [19] *Le Roux and others v Dey loc cit* at paras 168 - 169
- [20] *Ibid* at paras 138 -144
- [21] *Loc cit* at para 35
- [22] *The Citizen 1978 (Pty) Ltd and others v McBride* 2011 (4) SA 191 (CC) at par 100. See also *R v Keegstra* [1990] 3 SCR 697 at p 766 and *Attis v Board of School Trustees, District 15* [1996] 1 SCR 825 at p 877 and *Afri-Forum v Malema* 2011 (6) SA 240 (EqC) para 22
- [23] *McBride loc cit* at paras 99 & 100
- [24] *Loc cit* at para 26
- [25] *Loc cit* at para 102
- [26] *Loc cit* at para 42

- [27] Le Roux v Dey, loc cit at para 202
- [28] Loc cit at para 89
- [29] 2009
- (4) SA 382 (SCA) at para 55
- [30] Esselen v Argus Printing & Publishing CO Ltd 1992 (3) SA 764 (TPD) at 771F-I
- [31] 2009 (4) SA 372 (SCA)
- [32] Quantum of Damages: Quick Guide, 2019 ed at p 232
- [33] Ibid at para 25
- [34] Manual v Economic Freedom Fighters and others [2019] 3 All SA 584 (GJ)
- [35] 2001
- (2) SA 242 (SCA)
- [36] Quantum of Damages: Quick Guide, 2019 ed at p 232
- [37] Corbett & Honey, Quantum of Damages, vol VII at K11-1
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