

SOUTH AFRICA / JUDGMENT

Kgothule v Dlamini and Others

(380/2012)

[2014] ZAFSHC 40 (27 March 2014)

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COURT

Free State High Court, Bloemfontein

BEFORE

M H Rampai

CASE / FILE NUMBER

380/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No. : 380/2012

In

the matter between:-

DAN

ANDREW MOKHUWE

KGOTHULE.....

Plaintiff

and

JABULANI

DLAMINI.....First

Defendant

DARLINGTON

MAJONGA.....Second

Defendant

FREE

STATE TIMES (PTY)

LTD.....Third

Defendant

ENROLLED:

24 MARCH 2014

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 27 MARCH 2014

[1] This is an application for absolution from the instance. The application was set down for hearing on Tuesday, 20 March 2013. I heard the testimonies of two witnesses, namely the plaintiff and his witness, the Honourable Premier Mr E.S. Magashule. The plaintiff's

case was then closed.

[2] On Friday, 20 March 2013, being the date on which the plaintiff closed his case, the defendants immediately applied for absolution

from the instance.

[3] I did not instantly hear the argument. Instead I asked the two counsels to file written heads of argument. However, I did not

determine specific timelines for that purpose. Worse still, I postponed the matter sine die. I am indebted to the two counsels for the initiative they took. They reached a gentlemen's agreement. The heads were filed on 28 August 2013 and 20 September 2013 by the defendants and the plaintiff respectively.

[4] By administrative mistake the court file was never brought or forwarded to my chambers after the filing of the written heads of argument, but inadvertently filed away in the general office. As a result of the error I was unaware that the parties had complied with my direction to file heads. The matter was recently brought to my attention by the attorneys. I apologise for all this delay. The delay was due to a combination of the aforesaid errors.

[5] Now I turn to the application. In his particulars of claim the plaintiff averred that he was defamed by an article written by the first defendant, edited by the second defendant and published by the third defendant. The article complained of appeared in the provincial newspaper, the Free State Times, on July 15, 2011 – vide plaintiff's annexure "a".

[6] The article featured prominently as a front-page headline. It was written in very bold letters. Its main heading read:

"Magashule faces revolt."

Its subheading read:

"MECs threaten to resign."

[7] Immediately before the subheading the colour photographs of the three members of the executive council in the Free State Province were displayed. The plaintiff's photograph was one of them. He was identified by his names.

[8] The plaintiff averred that the article contained the following words:

“The three MEC’S have been fingered in allegations of corruption involving lucrative government tenders, a source with (sic) the National Intelligence Agency told the Free State Times.”

[9] The plaintiff’s pleaded case was firstly that the aforesaid statement was per se defamatory. This was the plaintiff’s main cause of action. Secondly or alternatively the plaintiff alleged that

the article as a whole and the statement in particular insinuated to a reasonable reader that the plaintiff was forced to resign in order to avoid dismissal on account of his corrupt activities. That innuendo or stigma was the plaintiff’s alternative cause of action.

[10] In their joint plea the defendants pleaded that the statement or article complained of was neither per se defamatory nor was the article amenable to having any defamatory innuendo, in other words, any secondary meaning, drawn from it.

[11] Paragraph 4 of the defendants’ plea reads as follows:

“4.

AD PARAGRAPHS 7 THEREOF:

4.1 The defendants deny each and every allegation contained in this paragraph.

4.2 The defendants specifically plead that it is bad in law to consider the meaning of the quoted statement in isolation, but nevertheless

deny that the quoted statement (even in isolation) is defamatory per se or that it is reasonably capable of the defamatory meaning alleged.

4.3 The defendants go on to plead that, in the context of the article as a whole, the reasonable reader would:

- (a) Have correctly understood the statement to be nothing more than a report of allegations;
- (b) Have appreciated that accusations, allegations and suspicion do not equate to guilt;
- (c) Have known that every person is innocent until proven guilty; and
- (d) Not have unjustly prejudged the matter by interpreting the quoted statement to mean that the plaintiff was corrupt and/or lacking moral standards and/or involved in any illegal activities to enrich himself.”

[12] Paragraph 5 of the defendants’ plea reads as follows:

“5.

AD PARAGRAPHS 8 AND 9 THEREOF:

5.1 The defendants deny each and every allegation contained in these paragraphs, and specifically plead that:

5.1.1 The article, in its ordinary sense, is neither defamatory per se nor reasonably capable of the defamatory meaning alleged in paragraph 8 of the Particulars of Claim;

5.1.2 The article is not reasonably capable of bearing the meaning attributed to it in the alleged innuendo pleaded in paragraph 9 of the Particulars of Claim.

5.2 The defendants go on to plead that the reasonable reader of the article would:

5.2.1 Have understood that the article was intended to describe the difficulties and political tribulations being faced by the Free State Premier and was not intended as an attack on the Mec's;

5.2.2 Have understood the statement quoted in paragraph 6 of the Particulars of Claim as pleaded above;

5.2.3 Have correctly read the article to mean that any threats of resignation (even though these have been denied) were the result of dissatisfaction flowing from the possibility of being dropped from the cabinet in favour of the Premier's 'blue-eyed boys' and not related to the allegations of suspicion;

5.2.4 Have appreciated that the allegations of resignation were denied by the Premier's office as well as the other two MEC's."

[13] In brief the defendants pleaded that the article published by the third defendant on 15 July 2011 was neither defamatory per se nor could the innuendo as sought to be drawn successfully withstand legal scrutiny

[14] The plaintiff testified that the article as a whole adversely and publicly portrayed him as a corrupt person. Such portrayal was false, malicious and defamatory. This was the first leg of his case - the ordinary meaning of the words in the article.

[15] The plaintiff also testified that the defendants publicly portrayed him as a member of a rebellious faction of the ANC, which was engendering rebellious sentiments and mobilising political dissent and revolt against the premier. This was the second leg of the plaintiff's case - the innuendo to be drawn from the article.

[16] I was asked to absolve the defendants from the instance. In *Claude Neon Lights SA Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H Miller AJA had this to say about the applicable test:

"... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[17] In *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at para [2] Harms JA re-affirmed the correctness of the test and added that:

“This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff.”

[18] The first elementary question to ascertain, assuming that an article is per se defamatory, is whether the ordinary reasonable person reading such an article attributed to the defendant, would be likely to believe that it refers to the plaintiff – *Sauls and Others v Hendrickse* [1992] ZASCA 68; 1992 (3) SA 912 (A).

[19] The rule is that evidence tendered to prove how a particular witness understood a statement said to be per se defamatory in the primary sense of the word or to show whether it indeed disparaged the claimant in the witness’ eyes – is inadmissible. In a defamation case the test is objective and not subjective.

“It does not matter what effect or different effects the statement happened to have on some or other assortment of its readers or

hearers. What counts is the effect it was calculated to have on its general body of readers or hearers. The best evidence of that, and consequently all that may be considered, is the actual language used at the time. The statement's interpretation, and its appraisal as defamatory or not once it has been construed, are therefore issues which the Court must decide with reference to such language alone.”

Demmers v Wyllie and Others 1978

(4) SA 619 (D) at 624A – C.

[20] The objective standard was articulated in *Demmers*, supra, at 624E – 625A per Didcott J:

“The first question thus involves the linguistic interpretation of the article's selected portions, read together with one another and in their setting as a whole.

One must try not to approach this task like a lawyer poring over a contract, a will, or a statute. A ‘coldly logical cast of mind’, according to COLMAN J in *Hassen v Post Newspapers (Pty) Ltd and Others* (supra at 564E - G), would not be a recommended tool, even if one had it. The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education. How such a figure is likely to have understood the article is the enquiry that faces me. His usual reading habits, in relation to the sort of newspaper which concerns one, must be postulated. The *Sunday Tribune*, I think it fair to say, belongs to the popular press, not among highbrow journals or those with intellectual appeal. The ordinary reader of an organ like that does not study its contents critically, analyse them astutely, dissect them minutely, or search them for nuances and subtle implications. He tends rather to take them at their face value, without much discernment. While sufficiently inquisitive about what he reads to go to the trouble of doing so, he is inclined, moreover, to browse through it once only, and then to pass to whatever catches his eye elsewhere in the newspaper. By and large, it follows, its impact on his mind is immediate and the impression

gained from it an overall one. He seldom notices ambiguities or contradictions which are not blatant.

When they are present, the most obvious meaning is all that strikes him as a rule. This, I believe, is an adequate précis of the various authorities on the topic.”

[21] There is an important connection between the ordinary meaning of the words alleged to be defamatory and the reasonable reader. In *Sindani v Van der Merwe & Others* 2002 (2) SA 32 (SCA) at para [11] Brand AJA commented about the way a reasonable reader would ordinarily figure out the ordinary meaning of the statement or words said to be libellous:

*“The ordinary meaning of the words under consideration does not necessarily correspond with their dictionary meaning. The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply (see, for example, *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 20F - G). It must also be borne in mind that the ordinary reader has no legal training or other special discipline and that*

'if he read the article at all would be likely to skim through it casually and not to give it concentrated attention or a second

reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there'

(per Lord Pearson in *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156 (HL) at 1184). Consequently, a court that has of necessity subjected a newspaper article under consideration to a close analysis must guard against the danger of considering itself to be 'the ordinary reader' of that article (see also *Ngcobo v Shembe and Others* 1983 (4) SA 66 (D) at 71C - D).”

[22] The parties agreed that it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader the meaning which defames the plaintiff.

[23] In casu it was undisputable that the newspaper article referred to three members of the executive council in the Free State Province and that the plaintiff was one of them.

[24] The plaintiff identified the particular passages in the article which, he contended, constituted defamatory matter. He also stated the respects in which the article was allegedly defamatory of him.

[25] The thrust of the alleged defamatory material was encapsulated in the following extracts from the article:

“The three MECs have been fingered in allegations of corruption involving lucrative government tenders, a source with the National Intelligence Agency told the Free State Times.”

- [26] Whether the particular article is ex facie the article defamatory of the plaintiff is a question to be determined objectively using, as a yardstick, the hypothetical reasonable reader of normal intelligence and judgment. Allegations of corruption, involving lucrative government tenders, were serious allegations. An ordinary reader fleetingly reading the article as a whole, without astutely, critically and analytically dissecting it as a seasoned defamation lawyer would have done – would have understood that the premier had taken such a dim view of the plaintiff's alleged conduct that he had signalled his intention to drop him from the Provincial Council.
- [27] According to the article the plaintiff revolted against the premier and threatened to resign in order to avoid his looming axing. The ordinary reader, browsing through the whole of the article, would have gained the immediate impression that the looming axing of the plaintiff was primarily and dominantly informed by the premier's determination to eradicate corruption rather than to create opportunities for his alleged cronies. That in brief, was the ordinary meaning a reasonable reader would have attributed to the article.
- [28] It was the plaintiff's evidence that he declined to have advertisements of his department placed in the Free State Times.

He believed that what he regarded as the libellous article published on July 15, 2011 was actuated by his steadfast refusal to officially do business with the third defendant.

- [29] In these circumstances and without prejudging the ultimate outcome of the complete hearing, it does appear to me that certain passages in the article referred to, are prima facie defamatory of the plaintiff. The prima facie defamatory features of the article cannot, in my view, be trivialized or disregarded, because the defendants labelled them as mere untested allegations by a third. It follows, therefore, that the defendants have a case to answer. In the ordinary course of events, absolution at the end of a plaintiff's case, should be sparingly granted – Gordon, supra. In my view dictates of fairness require nothing less in the instant matter. Accordingly I am not inclined to absolve the defendants from the instance.

- [30] There will be the following order:

30.1 The defendants' application for absolution from the instance is dismissed.

30.2 The defendants are directed to pay the costs of the application, jointly and severally, the one paying the others to be absolved.

M. H. RAMPAL, J

On behalf of plaintiff: Adv P du P Greyling

Instructed by:

Bokwa Attorneys

BLOEMFONTEIN

On behalf of defendants: Adv S Tsangarakis

Webber Attorneys

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