

SOUTH AFRICA / JUDGMENT

Masiu v Ramos (A217/11) [2012] ZAFSHC 79 (26 April 2012)

[2012] ZAFSHC 79

COURT

Free State High Court, Bloemfontein

BEFORE

J.Y. Claasen, S. Ebrahim, C.J. Musi

CASE / FILE NUMBER

A217/11

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FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA

Case No. : A217/11

In the matter between:-

ISAAC VUSI MASIU

.....Appellant

and

FATIMA DOS RAMOS

.....Respondent

CORAM:

EBRAHIM, J et C.J.
MUSI, J et CLAASEN,
AJ
HEARD
ON: 6 FEBRUARY 2012

JUDGMENT

BY: CLAASEN, AJ

DELIVERED ON: 26 APRIL 2012

[1] This is an appeal against the judgment by Magistrate Erasmus in the Magistrate's Court for the district of Winburg at Winburg. The magistrate granted "ontslag" (discharge) at the end of appellant's case and ordered each party to pay his or her own costs. There is also a cross-appeal, based on the ground that the magistrate erred in his costs order and that he should have ordered the appellant to pay the respondent's costs.

[2] Only the appellant testified. The facts, extrapolated from his evidence and the pleadings, were the following:

2.1 Appellant Isaac Vusi Masiu, is employed as a maintenance officer at the Winburg Magistrate's Court, Free State Province.

2.2 Respondent is Fatima Dos Ramos, residing at Winburg, Free State Province.

2.3 Respondent's husband was ordered to pay monthly maintenance to the respondent. Her husband failed to pay the maintenance punctually and later paid only half of the monthly maintenance. These maintenance amounts were seemingly paid at the magistrate's court (maintenance section).

2.4 Every month the appellant prepared a schedule of all maintenance payments received, faxed it to Pretoria from where electronic payments are made to the separate accounts of all the relevant beneficiaries. Respondent was one of the beneficiaries of this process.

2.5 Respondent phoned a lady by the name of Gloria and the appellant more than once, to complain about the irregular and diminished maintenance she received from her husband.

2.6 Gloria is the person who handled the files of persons whose payments are in arrear. Appellant advised the respondent, telephonically, to visit the office and lay a charge against her husband.

2.7 Respondent wrote a letter, dated 14 September 2010, to the regional manager, Department of Justice, Welkom.

2.8 I quote the contents of the letter:

"I have a court order against my ex husband. He should pay the maintenance by the 1st of every month. I am struggling every month in that I have make (sic) phone calls to the clerk (Vussie) of Winburg Magistrate Court to remind him about my maintenance."

I assumed that once a court order is issued, that means that the court will assist me in obtaining the maintenance. But I was proven wrong. My ex, has been late every month and out of the blue started to pay only half of the maintenance due for 3 months in a row. Nothing was done by the court about this. Can the clerk of the court allow this?

My ex is well known to the people of Winburg. Money is no problem to him, he has several properties, luxury cars, and 4 businesses. He is well known to be able to put him self out of trouble by 'paying off' people to keep quiet or to follow his instructions. He is also a man with children of several women (whom I only found out after marrying (sic) him). He is the type that every thing should be his way; nothing or no one should tell him what is right or wrong.

I can't help but think that the clerk is being paid by my ex to allow him to pay late every month and allow him to only pay half of what he is liable to pay.

I am working every day, have 2 small boys (3yrs & 5yrs) to look after and they rely on me for their wellbeing incl. their schooling and medical.

I am asking for assistance from you, not only for my sake but for my children's and all the other mothers who struggle every month to get their money from the court.

I hope to hear from you soon.

Yours Sincerely

Fatima"

2.9 The clerk, Vussie, referred to in the letter, is the appellant.

The appellant, who is married with two children, was at that stage employed by the Department of Justice for one and a half years and was previously employed as a clerk at the law firm Wessels & Smith, Welkom.

It is common cause and admitted, that the letter was written by respondent and forwarded to the regional manager of the Department of Justice, Welkom. The name of the regional manager is Mr. Hlatshwayo and he was identified in the uncontested evidence of the appellant.

The office manager at the magistrate's court of Winburg, is Mr. Mafereka, who gave the letter to appellant and asked him to read it. He was also identified in the uncontested evidence of the appellant.

An investigation was held because of the contents of this letter, but no disciplinary steps followed.

The appellant testified that he felt very unhappy about the letter. He felt very hurt. During all the years that he worked at Wessels & Smith and the magistrate's court, his reputation and honesty were never questioned. He is claiming R50 000,00 for defamation, the infringement of his good name and reputation and the infringement of his subjective feeling of dignity and self-respect.

The respondent denied that the statements in the letter

are wrongful and/or defamatory;

were made intentionally;

and that the letter injured the appellant in his good name and reputation or dignity.

It was never specifically pleaded or put in issue that respondent denied the publication of the letter.

The sting of the averments in this letter, according to appellant, was that appellant willfully neglected his duties as clerk of the court, in that he allowed the respondent's husband to disobey a court order; allowed the respondent's husband to bribe him and that he was a dishonest and corrupt employee, receiving bribes from the public to allow them to transgress lawful court orders. All this is denied by the respondent.

[3] The magistrate, under a heading "REDES VIR ONTSLAG" gave reasons for the "ontslag" (discharge) on 10 June 2011. He deviated from his reasons after receipt of the notice of appeal, in terms of Rule 51(4), by providing a second set of reasons. I quote firstly the reasons dated 10 June 2011:

"Eiser het getuig hoe dit onder sy aandag gekom het dat daar gelaster was teen hom deur die verweerderes.

Nooit het hy getuig dat dit onder aandag van ander gekom het. Die brief is gerig aan Streekbestuurder en sy Kantoor Bestuurder het dit aan hom oorhandig. Nooit is daar getuig of hulle kennis van dit geneem het nie.

Die brief as sulks het sy net 'n vraag gevra en nie 'n stelling gemaak dat hy geld ontvang het nie. Die toets is nie subjektief nie. Nie wat eiser dink nie. Toets objektief, was dit laster.

Volgens hof het hy nie daarin geslaag om die hof te oortuig dat dit laster was nie.

Die quantum is ook nie bewys hoe hy by die bedrag kom. Hoe het hy by die waarde van skade gekom wat berokken is aan hom.

Hof staan ontslag toe. Eiser nie daarin geslaag het om sy eie te bewys nie.

Elke party sy eie koste dra."

[4] The reasons after the notice of appeal was filed, dated 3 August 2011, read as follows:

"Heel eerste moet hof sê dat die redes vir appèl eers op 29 Julie 2011 ontvang is waar dit hele tyd was, weet hof nie.

Daar was 'n aansoek om absolusie en nie om die eis van die hand te wys nie.

Dit is mos in elk geval geeikte (sic) reg dat die ander party ook aangehoor moet word voor hof finale bevinding maak. Wat hof gedoen het is om die aansoek toe te staan. Absolusie van instansie.

Die brief is nie onderteken deur die respondent. Enige iemand kan dit geskryf het om mee te begin.

Daar word van hof verwag om afleiding te maak, dat die brief tot ander se kennis gekom het. Daar kan baie redes wees hoekom daar ondersoek gehou was.

Hie hof volstaan by feit dat sy het nooit gesê dat hy betaal word nie, maar sy wonder of dit nie so is nie. Rede wat sy aanvoer is dat haar man tot sulke optrede in staat is of doen en dat sy nie gehelp word by Landdroskantoor.

In die brief is dit duidelik dat sy probleme ondervind om haar onderhoud te ontvang, waarop sy geregtig is. As sy nie gehelp word, mag sy seker dink en oplossings vind. Sy het nooit gesê dat eiser geld ontvang van haar man. Wat feit is sy word nie bevredig met die ontvang van onderhoud nie.

As die woorde onregmatig is, moet hof oortuig word dat dit is. Sy het nooit gesê hy het geld ontvang nie, maar sy het gewonder. Nie omdat sy kwaadwilliglik die eiser wil te na kom, maar omdat sy nie sukses het om haar onderhoud te ontvang. Sy soek 'n rede hoekom ontvang sy nie haar onderhoud. As sy verkeerd was, kon eiser mos bewys gelewer het dat onderhoud gereeld en op tyd inbetaal word en so het klaagster dan die gewraakte woorde kwaadwilliglik geuiter en dit het tot kennis van 'n ander gekom.

Maar as dit so is dat sy nie die onderhoud op datum kry of gereeld kry, sou sy geregtig wees om te kla wat moet sy doen om remedie vir haar probleem te kry.

Daar is geen getuienis in die saak, hoe is op die bedrag gekom. Hoe is die skade bepaal nie. Hoe is sy skade berokken om op die eisbedrag te kom. Daar moet sekerlik getuienis wees wat hy meen sy waarde is en wat was die skade wat aan hom berokken het. Hoe het hy op dit gekom. Kan mos nie net sê dat dit is my skade nie. Hoe het hy by dit gekom.

Hof staan weer dat die eis is nie van hand gewys met koste nie. Die aansoek om absolusie was toegestaan. Dit is hoekom hof so kostebevel gemaak het dat elke party sy eie koste betaal. Rede was uit en uit omdat die eiser nie nou daarin kon slaag om hof te oortuig dat dit laster was nie. Hy dit nog steeds op latere geleentheid kan doen.

As die eis van hand gewys was, sou hof totale kostebevel teen die eiser gemaak het, want dan was dit finaal en dit is nie wat hof gemaak het nie.”

[5] Some fundamental errors, contrary to the pleadings, the law and evidence, are reflected in these reasons, such as:

5.1 Evidence was lacking in regard to the publication of the letter in that its contents never came to the knowledge of others. That the investigation could have been for any other reason.

5.2 Respondent only asked a question and did not make any statement.

5.3 No evidence regarding the quantum was given.

5.4 Anybody could have written the letter as it was not signed by the respondent.

5.5 Respondent was only thinking, wondering, whether appellant was corrupt. Appellant could have proven that maintenance was indeed paid and only then was the letter written with the necessary animus iniuriandi, and that it then would have come to the knowledge of others.

5.6 Only if the claim was dismissed, could the court have granted costs to the respondent.

[6] The main issues raised by the appeal and cross appeal concerned:

6.1 Whether appellant proved prima facie all the elements necessary for the actio iniuriarum relating to defamation and/or insult to avoid absolution from the instance; the central issues being whether the letter was defamatory and whether publication occurred.

6.2 The appropriate costs order.

[7] In *KHUMALO AND OTHERS v HOLOMISA* [2002] ZACC 12; 2002 (5) SA 401 (CC) at par. [17], O'Regan J stated that the elements of defamation are:

“(a) the wrongful and

(b) intentional

(c) publication of

(d) a defamatory statement

(e) concerning the plaintiff.”

Notable is the absence of damages. The law presumes that a plaintiff has suffered injury once publication of defamatory matter, concerning plaintiff, has been established.

[8] The following dictum of the Appeal Court, crisply sets out the principles applicable to the law of impairment of dignity.

“I now turn to consider the law which is applicable to the facts of the present matter. Melius de Villiers The Roman and Roman-Dutch Law of Injuries at 27 notes three essential requisites to establish an action for injuria. They are:

I. An intention on the part of the offender to produce the effect of his act;

II. An overt act which the person doing it is not legally competent to do; and which at the same time is

III. An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.’

These requisites are firmly entrenched in our law - see eg *R v Umfaan* 1908 TS 62 at 66; *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92 at 130 - 1; *R v Chipu and Others* 1953

(4) SA 573 (A) at 576A. (In the present instance we are concerned with the impairment of dignity - as to the meaning of which see *Melius de Villiers* (op cit at 24 - 5) and *Minister of Police v Mbilini* 1983

(3) SA 705 (A) at 715F - 716A.)

Logically in an action for injuria one should commence by enquiring into the existence of the second of these requisites, viz whether there has been a wrongful overt act. (It is more common, and probably juristically more correct, to speak of a 'wrongful' rather than an 'unlawful' act.) A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. Once the wrongfulness of such act has been determined *animus injuriandi* will be presumed (*Whittaker v Roos and Bateman* (supra at 124); *Walker v Van Wezel* 1940 WLD 66 at 67). It would be open to the defendant to rebut such presumption by establishing 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 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. Once all three requisites have been established the aggrieved person would be entitled to succeed in an action for damages, subject to the principle *de minimis non curat lex*.”¹

[9] 9.1 A decree of absolution from the instance is granted only if, at the end of plaintiff's case, there is not sufficient evidence upon which a reasonable court could find for the plaintiff.²

9.2 The courts have frequently emphasised that absolution should not be granted except in very clear cases. When inferences are applicable it is not necessarily the only inference nor the readiest inference that need to be made.³

9.3 This court has also decided that where the onus on some issues is on the plaintiff and on others on the defendant, no room for absolution exists.⁴

9.4 There are two presumptions in the law of iniuria regarding impairment of a person's fama or dignitas. Firstly, when a defendant causes a publication that is defamatory or causes insulting matter regarding the plaintiff, a presumption of wrongfulness arises which places a full onus on the defendant to rebut it.⁵

9.5 Secondly, a full onus or at least evidentiary burden (*weerleggingslas*) rests on the defendant to rebut *animus injuriandi* once the publication relating to plaintiff is either defamatory or insulting.⁶

9.6 I can see no reason why the principle enunciated in *SCHOEMAN v MOLLER*, supra, is not applicable when sufficient evidence is presented by plaintiff to trigger the two presumptions.

[10] Mr. Groenewald argued, and the same thought process is echoed in the magistrate's reasons, that the letter could not be defamatory as the respondent only thought or presumed that appellant is corrupt and did not explicitly state that he is corrupt. This line of thinking, seemingly, is based on the principle that thoughts are not punishable in the criminal law or do not attract delictual liability, in the civil law. Certainly, mere thoughts or mere thinking that a person is corrupt, are irrelevant. This is stated in the *Digesta* text D48.19.18: *Cogitationis poenam nemo patitur*, or the Dutch adagium in Huber's *Heedendaegse Rechtsgeleertheyt* 6.1.4:

“want van de gedachten is men alleen aan God reekenschap schuldig.”

[11] But it is quite different if a person converts his/her thoughts into action, like the respondent, writing these remarks in a letter to the superiors of the appellant. It went beyond a mere idea or thought. It became a human act, human conduct, with resultant consequences. In any event the belief in the factual correctness of defamatory words is not a requisite for liability in our law.

[12] The words “cannot help” in the objectionable sentence is a further indication of a thought process and a conclusion. The meaning of the words “cannot help”, in its present context is defined in *The New Shorter Oxford English Dictionary*

(1993) as meaning “there is no way of avoiding it”. The respondent is not “thinking” anymore, she came to a firm conclusion that Vussie is corrupt.

[13] The cardinal question is whether the letter contained defamatory or insulting matter. The magistrate did not even consider the insult leg. The test should be the notional understanding and reaction of a person of ordinary intelligence and sensibilities to these allegations. It must be such that a reasonable person would also have felt insulted.⁷ Words may be defamatory (i.e. impair reputation) as well as constituting an impairment of dignity. Subjecting a person to derogatory words could constitute an impairment of his or her dignity. The action for the impairment of dignity does not require further publication of the offensive matter to a third party.⁸ Mr. Groenewald argued that the difference between defamation and impairment of dignity is that in the last instance, respondent must utter the words directly to the appellant. That is not correct. A plaintiff may become aware of such words in any manner.

[14] The magistrate lost sight of the fact that:

“A publication is defamatory if it has the tendency or is calculated to undermine the status, good name or reputation of the plaintiff. Not that defamation actually occurred. In short, probability of injury rather than actual injury is at issue.”⁹

[15] It is common cause or not contested that respondent wrote the letter, forwarded it to the appellant's superiors, an investigation

followed regarding the contents of the letter and complaints raised in the letter. That the complaints were directed at the appellant.

This open letter, the receipt by appellant's superiors thereof, the handing over of the letter to the appellant by his office

manager, the investigation which followed the letter, clearly proved, prima facie, the requisite publication of matter concerning the appellant. As a general rule, publication is attributed to the respondent if she was aware or could reasonably have expected that an outsider would take cognisance of the words.¹⁰ She wanted and should reasonably have expected an investigation and hearing where others would become aware of her remarks. Generally

there is publication if the defamatory words are made known or revealed to at least one person, other than the defamed person. Of importance also, is the absence of any plea relating to justification, such as privilege or a privileged occasion. It was neither pleaded nor argued that respondent was not responsible for or did not foresee the further publication.

[16] Mr. Groenewald argued that one of the persons who read the letter, should have been called to prove publication. There is no rule in our law that a plaintiff should call the person or persons to whom it was published. The plaintiff in a defamatory action has only to prove on a preponderance of probabilities that there was publication of defamatory matter relating to him.

[17] Here we have an officer of a court, being subjected to at least suspicion of being corrupt, accepting money from respondent's husband to assist her husband to evade a court order. These words raised questions of his integrity, work ethics, criminal propensity and corrupt character. Objectively any officer in the magistrate's court, confronted with such allegations, would be defamed or feel insulted. I have no doubt in my mind that such allegations are in context defamatory and/or insulting.

[18] It has been said that:

*"Interpretation is an objective issue. Actual loss of reputation is not required nor is belief in the defamation."*¹¹

And, may I add, nor is the caveat that "you think", an excuse for defamatory remarks.

*"... a person ... without endorsing it, cannot on the ground that he passes it on as rumour only, escape liability."*¹²

[19] Non-patrimonial damages, in the case of infringement to a person's fama or dignitas, are not proved in the same manner as patrimonial damages. Awards are assessed by the Courts in an endeavour of effecting retribution for the injury. The court determines the amount of injury ex aequo et bono, taking all relevant factors and evidence into consideration. The law

presumes that a plaintiff has suffered an injury to his or her reputation when publication of defamatory matter concerning a plaintiff is proved. The same principle is applicable when a person is insulted. The measure of damages is in the discretion of the court, depending on the circumstances of each case. It follows that the plaintiff need not prove that he or she sustained actual loss.

- [20] I need not dwell on the possible splitting of actions. If the appellant's cause of action for impairment of his dignity flows from the same defamatory publication, he has only one cause of action and claim for damages as any defamatory matter is also insulting.

*"... any defamation is in the first instance an affront to a person's dignity which is aggravated by publication ..."*¹³

- [21] Human dignity is recognised as a fundamental right.¹⁴ Dignity is a separate legal object and one of the recognised personality rights. Neethling, Potgieter and Visser describe it as the subjective feeling of honour or self-respect; a person's pride in his own moral value.¹⁵ For the infringement of this right is it not necessary for any publication nor that the words need to be defamatory. The uncontested

evidence of the plaintiff is that he was severely hurt in his feelings and self-respect. That would have been the reaction of a

person of ordinary intelligence and sensibilities. The presumptions regarding unlawfulness and animus iniuriandi kicked in. If the defamatory action, as a separate claim, was not prima facie proved, there was in any event, no room for absolution regarding the claim for infringement of the plaintiff's dignity. It follows that the cross appeal ought to be dismissed.

- [22] For the above reasons I make the following order:

1. The appeal is upheld with costs. The costs to include the costs of the hearing on 6 February 2012.
2. The cross appeal is dismissed with costs.
3. The order of the court a quo is substituted by the following order:

"The application for absolution is dismissed with costs."

J.Y. CLAASEN, AJ

I concur.

S. EBRAHIM, J

I concur.

C.J. MUSI, J

On behalf of appellant: Adv. P.W. Oberholzer Instructed by:

Wessels & Smith

BLOEMFONTEIN

On behalf of respondent: Adv. W.J. Groenewald

Instructed by:

Symington & De Kok

/sp

1DELANGE v COSTA 1989 (2) SA 857 (AD) at 860 I – 861 F.

2GASCOYNE v PAUL AND HUNTER 1917 TPD 170; OOSTHUIZEN v STANDARD GENERAL
VERSEKERINGSMAATSKAPPY BPK 1981

(1) SA 1032 (A) at 1035 H – 1036 A; BUILD-A-BRICK BK EN 'N ANDER v ESKOM 1996 (1) SA 115
(O) at 123 B – C.

3GANDY v MAKHANYA 1974 (4) SA 853 (N) at 855 – 856.

4SCHOEMAN v MOLLER 1949 (3) SA 949 (O) at 957.

5NEETHLING v THE WEEKLY MAIL AND OTHERS [1993] ZASCA 203; 1994 (1) SA 708 (A) at 770;
HARDAKER v PHILLIPS 2005 (4) SA 515 (SCA) at 524; Neethling, Potgieter and Visser: Law of
Delict (5th Edition) page 310 and 316 and 321 – 322.

6SUID-AFRIKAANSE UITSAAIKORPORASIE v O'MALLEY 1977 (3) SA 394 (A) at 310; HARDAKER v
PHILLIPS, supra; Neethling et al, supra.

7JACKSON v NICRO 1976 (3) SA 1 (A) at 10; MINISTER OF POLICE v MBILINI 1983 (3) SA 705 (A) at
716; DE LANGE v COSTA 1989 (2) SA 857 (A) at 861 – 862.

8Burchell J: Personality Rights and Freedom of Expression (1998) p. 346.

9LE ROUX AND OTHERS v DEY 2010

(4) SA 210 (SCA) at 213 G – 214 D.

10PRETORIUS v NIEHAUS EN 'N ANDER 1960

(3) SA 109 (O) at 112 and 113; VAN VLIETS COLLECTION AGENCY v SCHREUDER 1939 TPD 265
at 268 – 269.

11LE ROUX AND OTHERS v DEY 2010 (4) SA 210 (SCA) at 216 C.

12AFRICAN LIFE ASSURANCE SOCIETY LTD v ROBINSON AND CO LTD 1938 NPD 277 at 302.

13LE ROUX AND OTHERS v DEY 2010 (4) SA 210 (SCA) at 218 F.

14Section 10 Constitution of the RSA.

15Neethling, Potgieter and Visser: Law of Personality (1996) p. 32; JACKSON v NICRO 1976 (3) SA 1 (A) at 4.

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Prepared on 11 October 2026 · Esheria