

SOUTH AFRICA / JUDGMENT

Miruka v Pelser (898/2014) [2016] ZANWHC 18 (12 May 2016)

[2016] ZANWHC 18

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele

CASE / FILE NUMBER

898/2014

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IN THE NORTH WEST HIGH COURT

MAHIKENG

CASE NO: 898/2014

DATE: 12 MAY 2016

In the matter between:

O.C. MIRUKA.....APPLICANT

And

THEUNS G. PELSER.....RESPONDENT

APPLICATION FOR LEAVE TO APPEAL

KGOELE J

DATE OF HEARING :26 FEBRUARY 2016

DATE OF JUDGMENT:26 FEBRUARY 2016

DATE OF REASONS :12 MAY 2016

FOR THE APPLICANT : ADV. W.P. SCHOLTZ

FOR THE RESPONDENT: ADV. MAREE

REASONS

FOR JUDGMENT

KGOELE J:

[1] The applicant in this matter was a defendant in an action wherein the respondent who was the plaintiff sued him for damages alleging that his reputation was tarnished by the statement he made and send to other people through an e-mail which was wrongful and defamatory. I handed down a Judgment and order of this action on the 29 June

2015. The said Judgment/order was couched as follows:-

“THAT : The plaintiff’s action succeeds

THAT : The defendant to pay the plaintiff an amount of R100 000-00 as damages

THAT: Interest on the amount of R100 000-00 at a prescribed rate of 9% per annum a tempora morae THAT: Costs be of suit”

[2] The applicant unsuccessfully applied for leave to Appeal the whole of the said Judgment/ Order that application was heard and the ruling/order thereof was made on 26 February 2016. On the 13 April 2016 the applicant requested reasons for the ruling/order

handed down and the reasons follows hereunder. For the sake of convenience I will refer to the parties as applicant and respondent

respectively.

[3] In his application for leave to Appeal the applicant relied on one or more of the following grounds:-

First and Second grounds

[4] It was submitted that the Court misdirected itself by concluding that it was not required to decide as to whether there was “publication” and if it was found to have transpired, specifically the extent and the context of the publication, as these issues are considered important factors in determining the quantum.

[5] To bolster this argument it was contended that it appears from the judgment that the Court had the view that it was not necessary to determine as to whether the defamatory statements were published in lieu of the applicant admitting in his plea to sending the e-mail under question to the individuals mentioned in the respondent’s claim. The applicant’s Counsel argued further that it is however trite that the dispatching of an e-mail, the fact that an e-mail has been “sent”, does not automatically translate thereto that the electronic message was in fact received by the addressee. Publication in the context of a defamation claim requires that the content(s) objected to be brought to the attention of a third party to such an extent that it allows the third party to give meaning to the content.

- [6] It is the view of Counsel that appeared on behalf of the applicant that the Court ought to have concluded that it was required to decide as to whether there was evidence that the matter complained of, therefore the e-mail referred to under paragraphs 1 to 3 of the judgement, was published by the applicant, and if so:-
- To which extent it was published; and
 - The context of the publication.
- [7] These grounds would in my view not render the Appeal to have reasonable prospect of success. The difficulty the applicant is facing is that no plea of non-receipt and non-publication was entered into by him.
- [8] It is evident that the respondent, being one of the addressee, received the e-mail. It was furthermore not disputed that as a result of this defamatory e-mail, a disciplinary hearing was held during which the respondent was found to be not guilty of the alleged plagiarism. It is inconceivable that such drastic steps (disciplinary action) would have been reverted to if none of the addressees received the e-mail. It is furthermore inconceivable that the applicant would send an e-mail to 83 addressees without the intention of them receiving it.

Third Ground

- [9] To support this ground Counsel for the applicant submitted that the Court erred in law, alternatively failed to exercise a judicial

discretion in determining as to whether the statement complained of is defamatory by relying on the reasonable man test without taking various important factors into account such as:

9.1 The individuals to which the subject e-mail was copied constitute members of the Faculty Board, an appropriate forum to discuss

plagiarism, irrespective as to whether it is discussed as an allegation or an academic matter; and

9.2 The issues and allegations relating to plagiarism are common within the scientific field and academic fraternity;

9.3 That the individuals to which the subject e-mail was copied would in all probability have a well-founded understanding as to what constitutes plagiarism and misconduct in relation to the publication of matter in an inappropriate fashion.

- [10] This ground is based in my view on speculations, is unsubstantiated and the Appeal would not have reasonable prospects of success based on it. I am saying this because no evidence was placed before Court by the applicant from which any of these said factors could have been taken into account. No application is before this Court for leave to give further evidence on Appeal. Reliance placed on factors which this Court should have considered and to which no evidence was adduced cannot and should not have been considered by this Court.

Fourth Ground

[11] The gravamen of this ground is that the Court misdirected itself in finding that the contents of the subject of the e-mail constitute defamation, when in fact:-

11.1 The applicant simply alluded that the respondent's conduct, as recorded in the e-mail, may constitute plagiarism; and

11.2 The applicant's view constituted either fair comment or the truth, which is to the benefit of the public, in that:-

- (a) The respondent admitted to the publishing of the matter objected to by the applicant and in the manner as alleged in the subject e-mail; and
- (b) The Court ought to have concluded that the statements complained of are not defamatory, as the respondent could not establish

unlawfulness. The respondent admitted his failure to acknowledge the Supervisor in respect of the PhD dissertation, part

of which was published by the respondent. The Supervisor is in fact regarded as a co-author of the dissertation.

[12] This ground does not as well have reasonable prospect of success in an Appeal of this matter. I have thoroughly dealt with this ground in my judgment and do not wish to repeat same except to add that even if the argument of "duty bound" is considered, the question remains, why then notify 83 people? No facts and/or documentation were placed before Court confirming and showing the alleged duty imposed on the applicant to report plagiarism and/or in which manner such duty ought to be exercised. The reliance by the applicant on the established practice is therefore baseless and unsupported by evidence.

[13] I pause here to indicate that one must keep in mind that the respondent's version of the facts (including that the statement

made by the applicant in the e-mail was malicious and defamatory) were not tested in cross-examination, nor was a different version

pleaded and/or placed before Court by the applicant.

[14] Arguments advanced also that the applicant did not say respondent committed plagiarism and merely recorded his opinion in terms of which he is of the view that applicant's conduct may be regarded as plagiarism also does not reflect the correct understanding of the facts / pleadings that were before this Court. Paragraph 4.11 on page 29 of the paginated pages the applicant said

in his plea:-

“Defendant further pleads that when he forwarded the email dated 23 march 2014 to the approximately 83 persons, he had done so only after confirming that indeed the plaintiff had presented a publication as though it was his own work and failed to credit the author of certain parts of the publication”

[15] Furthermore, in paragraph 6 of his plea he admitted the contents of paragraphs 7.1, 7.2, 7.3, 7.4 and 7.5 of the respondents particulars of claim which were couched as follows:-

“The statement was understood by the addresses and was intended by the Defendant to mean that the Plaintiff is dishonest and not of good moral fibre, in inter alia the following respects:-

7.1 That the plaintiff commits plagiarism;

7.2 That the plaintiff acts fraudulently;

7.3 That the plaintiff conducts himself in an unethical manner and subjects himself to unethical practices;

7.4 That the plaintiff commits verbal abuse;

7.5 That plaintiff commits acts of racism and discrimination

[16] The argument also of the fact that the applicant’s statement was solely premised on the fact that respondent failed to mention the actual Supervisor as a co-author would not succeed in an Appeal. Firstly I dealt with this issue thoroughly in paragraph 24 of my judgment. Secondly, whether the respondent did or not concede during trial that he did not acknowledge the Supervisor of the student does not take the matter further. As indicated in my judgment, the University through its Legal Adviser who was vested with all the documentation that were required to establish plagiarism, remarked that they could not establish same from the documentation provided. The Legal Adviser of the University is in my view best suited to conclude on whether there was plagiarism or not better than this Court in this matter because as indicated in my judgment, he/she was seized with these documents which the applicant did not attach in his papers nor disclose all these information in support of this defence in our matter.

Fifth ground

[17] In an attempt to salvage the applicant’s case Adv. Scholtz reformulated his submissions he made above and argued that the Court misdirected itself in finding that the respondent discharged the required onus, considering inter alia that:-

- The respondent failed to establish publication; and
- Failed to establish that the respondent exceeded the limits of relative privilege; and
- The respondent failed to establish that the applicant exceeded the limits of the defence of fair comment.

[18] The arguments advanced in respect of this ground are a repetition of the grounds already dealt with above albeit in a different format. I have already dealt with them above and in my judgment and need not repeat same.

Sixth ground

[19] It was further submitted on behalf of the applicant that the e-mail by the Legal Advisor can at best be regarded as circumstantial

evidence and the Court misdirected itself by relying on the contents of this e-mail considering that the Legal Advisor never testified.

The probative value of this evidence is self-serving considering the fact that the applicant was not afforded an opportunity to challenge this evidence by means of cross examination.

[20] I reiterate that the applicant did not place any version of events before the Court in his examination in chief. No dispute or issue was taken with any of the documents discovered and relied on by the respondent. The respondent testified about this e-mail and the contents thereof, and the applicant did not even cross-examine on it. The challenge to this e-mail is rather belated. This ground also would not render the Appeal to have reasonable prospect of success.

[21] The second leg of this ground is to the effect that the defendant was under the impression that there is a ground of justification for publishing the matter objected to. To expand on this contention applicant's Counsel submitted that one of the aspects of animus injuriandi is subjective intent and requires the person who made the defamatory statement to have been "conscious of the wrongful character of this act.

[22] I have dealt with the arguments raised herein above in the other grounds raised earlier and need not repeat same.

Seventh Ground

[23] This ground relates to the defence of relative privilege which had been raised in other grounds that I already dealt with above. I can just add that to raise this issue now is to make use of the "back door" to place unsubstantiated allegations before this Court.

Eighth Ground

[24] As the eighth ground to support his application for leave to Appeal the applicant contends that the Court misdirected itself in finding that:-

24.1 The respondent co-published some work of a colleague, in fact according to him it is common cause that the respondent co-published

part of a dissertation by a student and not a colleague; and

24.2 The respondent assisted the applicant in establishing a publishing career, whilst it is in fact the applicant who assisted the respondent in establishing a publishing career.

[25] These contentions show lack of a proper reading and comprehension of the contents of my judgment. Nowhere did I make these two findings mentioned in this ground in my judgment. There were no submissions made in both the heads and during the arguments in Court to substantiate this ground. It is therefore clear that the applicant has no leg to stand on also on this ground.

Nineth, Tenth, Eleventh, Twelfth and Thirteenth

[26] A summarised version of all these grounds is to the effect that the Court, upon considering the factors with the view of determining

quantum, held the view that the defamatory statement was not only “very serious”, but also regarded it as a possible “career

ender”. According to the applicant’s Counsel the evidence in this matter however reflected the opposite, considering

the advancements in the respondent’s career since the cause of action arose. The evidence in relation to the latter ought to have been considered by the Court as a mitigating factor. The Court misdirected itself in accepting that the respondent had to relocate as a consequence of the alleged defamation. The Court ought to have come to the conclusion that the respondent’s relocation had nothing to do with the defamation, considering the fact that the respondent was already promoted from an Associate Professor to a Professor during October 2014, which was indicative of the fact that the alleged defamation had no impact insofar as the respondent’s career advancement. The sole inference to be drawn in relation to the respondent’s relocation is that he simply relocated as a result of the fact that he was offered a better position at the University of Kwa-Zulu Natal, the acceptance of which would require a relocation.

[27] In addition it was submitted that the Court ought not to have considered any evidence in relation to the applicant’s conduct pursuant to the issuing of Summons insofar as determining as to whether the applicant had an ulterior motive upon publishing the alleged defamatory statement. It is the applicant’s contention that the Court’s award is excessively disproportionate or grossly unreasonable and does not commensurate with the limited publication of the statement as well as the slight injury to the respondent’s reputation. This is inter alia premised on:-

- The Court’s failure to consider the limited damage to the defendant’s career or possible advancement thereof, in as far as mitigating factor and;
- The Court’s failure to take into consideration possible mitigating factors.

[28] Regarding the relocation of the respondent, sight should not be lost that in his testimony nothing was placed by the applicant in contrary to what applicant had said and therefore this Court took into account the uncontested evidence given by the respondent as to the

reason for his relocation. To infer, as the applicant submits, that the “respondent’s relocation” was due to the “fact that he was offered a better position” would be tantamount to drawing conclusions out of thin air in oppose to considering the evidence placed before Court. It is inconceivable that as the applicant suggests, the Court should just have assumed a set of facts which were not placed before it and which is contra to the facts placed before it. It is trite law the Courts draw inferences from proven facts only. I am thus not persuaded by the above submissions that this Court did not correctly consider the relevant facts and authorities in coming to the determining of the quantum in this matter. There are no prospects of success in as far as these grounds are concerned.

[29] The application for leave to Appeal to the Full Bench of this Division was therefore dismissed with costs by this Court based upon the above mentioned reasons which informed me that there are no reasonable prospects that the Appeal would succeed if this application is granted.

A M KGOELE

JUDGE OF THE HIGH COURT

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