

SOUTH AFRICA / JUDGMENT

Mokotong v Sishen Iron Ore Company (Pty) Ltd (98428/2015) [2017] ZAGPPHC 536 (22 July 2017) [2017] ZAGPPHC 536

COURT

North Gauteng High Court, Pretoria

BEFORE

TSS Malatji

CASE / FILE NUMBER

98428/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 98428/2015

Not

reportable

Not

of interest to other judges

Revised.

22/7/2017

In

the matter between:

MASHILO

MOKOTONG Plaintiff/Respondent

And

SISHEN

IRON ORE COMPANY (PTY)

LTD Excipient/Defendant

JUDGMENT

MALATJI, AJ

1. This is an opposed exception taken by the defendant, the Sishen Iron Ore Company (Pty) Ltd, to particulars of claim delivered on behalf of the plaintiff, Mr Mashilo Mokotong. In what follows, I shall refer to the excipient as "the defendant" and the respondent as "the plaintiff".
2. The plaintiff seeks payment of the aggregate sum of R 22 1666 666, 66 consequent upon an incident that occurred on 29 September 2014 at the defendant's Kumba Iron Ore operations in Sishen, Northern Cape Province, where the plaintiff was at the time employed as the defendant's Manager: Sustainable Development.[1]
3. The genesis of the plaintiff's action is set out as follows in paragraphs 5 and 6 of his particulars of claim:

"5 On or about 29 September 2014 and at the plaintiff's foresaid place of employment, the plaintiff was wrongfully and intentionally dismissed from his employment by being accosted at his place of employment by security personnel acting on the instruction of the defendant's general manager and escorted to his office and afforded one hour to clear his office of his personal belongings under the supervision of the security personnel and thereafter escorted off the premises of his place of employment by the security personnel and instructed not to re-enter his place of employment ('the plaintiff's dismissal').

6. The plaintiff's dismissal took place in view of the plaintiff's fellow employees."
4. This incident (to which I refer henceforth as "the dismissal incident") has given rise to three claims advanced by the plaintiff in this action:

4.1. The first claim is for general damages founded in defamation, on the basis of which the plaintiff claims the sum of R1 000 000, 00;

4.2. In the alternative to the first claim, the plaintiff claims the sum of R1 000 000, 00 as damages consequent to an injury of his dignity ("the second claim"); and

4.3. The third claim is for the sum of R21 166 666, 66, allegedly being special damages in respect of the loss of future income to be suffered by the plaintiff as a result of the dismissal incident, which was triggered by the plaintiff having been declined employment at another mine.

5. The defendant has taken exception to the first and third claims on grounds I shall presently describe.

First exception

6. As I have indicated, the plaintiff's first claim is for general damages founded on defamation. He founds his claim on the following

allegations :

"The dismissal of the plaintiff by the defendant in the manner set out in paragraph 5 and 6 above was wrongful and was done with the intention of injuring the plaintiff in his reputation and was as such defamatory of the plaintiff in that it was understood by the plaintiff's fellow employees to mean that the plaintiff is;

(i) A thief and/or a fraudster;

(ii) A dishonest and/or untrustworthy employee;

(iii) Not a law abiding citizen;

(iv) Is without moral fibre; and/or

(v) Is guilty of unconscionable conduct."

7. The conventional essentialia of a claim founded in defamation are trite. They are (a) the wrongful and (b) intentional

(c) publication of (d) defamatory statement (e) of or concerning the plaintiff.[2]

8. The defendant's first exception holds forth that the plaintiff has failed to allege the fourth of those elements: a defamatory statement of and concerning him that could found an action for defamation.[3] Therefore, contends the defendant, the plaintiff's claims lacks averments necessary to sustain a cause of action.[4]

9. The defendant's logic is that the act of dismissal as pleaded is not a "statement" within the contemplation of the common law of defamation.

10. While the essentialia of a claim founded in defamation referred to in paragraph 7 above are conventional, they are by no means exhaustive to the point of requiring only a "statement" in the conventional sense of the spoken or written word. Burchell,[5] as do many judgments of our courts, uses the nomenclature of "defamatory words or conduct" (my underlining). He opens

his discussion of the requirement of publication thus:

"Publication is the act of making known a defamatory statement, or the act of conveying an imputation by conduct, to a person or persons, other than the person who is the subject of the defamatory imputation."

11. In Williams and Another v van der Merwe,[6] Van Rensburg J accepted Burchell's definition of defamation as:

"(t)he unlawful, intentional, publication of defamatory matter (by words or conduct) referring to the plaintiff, which causes his reputation to be impaired."

(my underlining)

12. Most recently, in *Majolica Pottery (Venda) (Pty) Ltd v Barrow & Coetzee And Others*,^[7] Foxcroft J accepted that "the conduct of the alleged defamer [in that case a firm of attorneys] in issuing a summons against [the appellant] and then taking judgment against it would tend to diminish the reputation of the victim in the eyes of right-thinking members of the community". He reasoned, in that regard, that "it is certainly defamatory to say that one has had to take a judgment against that person. That will normally mean that the person against whom the judgment has been taken is unable to pay."^[8]
13. It follows in my view that, at the level of principle, conduct which does not take the form of the spoken or written word is still capable of being defamatory, provided that the imputation attributable thereto tends to lower the esteem of the subject thereof in the eyes of the society. Whether it actually does so is a different enquiry.
14. I accordingly hold that the first exception stands to be dismissed on this ground.

Second exception

15. As I have indicated above with reference to paragraphs 5 and 6 of the particulars of claim, the plaintiff alleges that his dismissal on the manner described in paragraphs 5 and 6 of the particulars of claim was defamatory in that it was understood by the plaintiff's fellow employees to mean that the plaintiff is "a thief and/or fraudster; a dishonest and/or untrustworthy employee; not a Jew abiding citizen; is without moral fibre; and/or is guilty of unconscionable conduct."
16. The defendant's second exception is that the plaintiff's dismissal as alleged in paragraphs 5 and 6 of the particulars of claim is neither per se defamatory of the plaintiff, nor is it reasonably capable of conveying any or all the meanings pleaded in paragraphs 7.1 to 7.6 of the particulars of claim which I have just quoted in paragraph 15 above.
17. The plaintiff alleges in paragraph 6 of the particulars of claim that the dismissal incident "was as such defamatory of the plaintiff in that it was understood by the plaintiff's fellow employees to mean that the plaintiff is" and then proceeds to list, in paragraphs 7.1 to 7.6, the meanings to which I have referred. I understand the plaintiff here to plead the implied meaning of the dismissal incident, which is regarded as part of its primary or ordinary meaning, and not a secondary meaning (also referred to as an innuendo) as the plaintiff has not pleaded any special circumstances from which the dismissal incident could derive a secondary meaning.^[9]
18. The test for determining whether an article (or, in this case, imputation by conduct) is defamatory in its ordinary meaning (i.e. per se defamatory), involves a two-stage enquiry. The first is to establish the natural or ordinary meaning of the article or conduct. The second is whether that meaning is defamatory. The test to be applied is an objective one, namely what meaning the reasonable reader (or observer) of ordinary intelligence would attribute to the words (or conduct) read (or observed) in the context of the article (or situation) as a whole.^[10]

19. I do not consider that, without more, the mere fact that the plaintiff was accosted by the defendant's security personnel on the defendant's premises, where he was employed, escorted to his office and allowed an hour to clear his office of his personal belongings and thereafter escorted off the premises with the instruction not to re-enter the defendant's premises is capable of conveying the implied meanings of the dismissal incident alleged in paragraphs 7.1 to 7.6. I do not consider that the dismissal incident described above was capable of being understood by onlookers as meaning that the plaintiff is "a thief and/or fraudster; a dishonest or untrustworthy employee; not a law abiding citizen; is without moral fibre; and/or is guilty of unconscionable conduct". This appears to me to stretch the realm of possibility.
20. However, in his heads of argument, and in oral argument, the plaintiff's counsel urged me to hold that the dismissal incident conveyed to the plaintiff's fellow employees who witnessed his dismissal in this manner that:
- "7.1 He has committed a transgression which is so serious that his immediate dismissal and removal from the premises was warranted.
- 7.2 He could not be trusted to clear out his office without the security personnel being present;
- 7.3 He could not be trusted to leave the premises without being accompanied by the security personnel;
- 7.4 This conduct, at the very least, conveyed that he was an untrustworthy employee."
21. I agree that the circumstances attendant on the dismissal incident as pleaded were likely to be understood to mean that the plaintiff had committed an act of misconduct of sufficient magnitude to warrant his immediate removal from the premises under the supervision of security personnel. This would be per se defamatory as it would tend to lower the esteem of the plaintiff in the eyes of persons who observed the conduct complained of.
22. I would therefore also dismiss this ground of exception.

The third exception

23. This ground of exception is directed against the plaintiff's third claim, for special damages allegedly consequent upon the plaintiff's loss of future income as a result of the alleged defamation. Its basis is succinctly stated in paragraph 11 of the particulars of claim as follows:

"11. The plaintiff has suffered special damages in an amount of R21 166 666.66 as a result of his dismissal in the manner set out in paragraph 5 and 6 above, which amount represents the loss of future income the plaintiff has suffered after being declined employment by Tshipi Manganese Mine in the Northern Cape as a result of the manner in which he was dismissed by the defendant . .

24. While there seems to be some dichotomy about what is meant by "special damages" between the parties, I find it uncontroversial to accept that the "special damages" claimed by the plaintiff in paragraph 11 of the particulars of claim are the "special damages" consequent to defamatory conduct as contemplated in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd as Amici Curiae)*[11] ("Media 24").

25. Simply put, the defendant's third exception is that the plaintiff's claim for special damages lacks averments necessary to sustain a cause of action because:

25.1 a claim for special damages is not available under a claim for defamation, which derives from the *actio iniuriarum*, but only under the *actio legis Aquiliae* to the extent that the requirements for Aquilian action have been satisfied;[12]

25.2 in order to establish for Aquilian liability, the plaintiff must plead the facts on which it relies in support of the allegation that the defendant's conduct is wrongful in the circumstances of the case, as the wrongfulness of the defendant's conduct cannot be inferred from the nature of the loss that the plaintiff has allegedly suffered. The plaintiff has failed to do so; and[13]

25.3 neither has the plaintiff alleged a breach of duty resting upon the defendant that would give rise to a claim for the loss that the plaintiff is alleged to have suffered.[14]

26. In *Media 24*, the respondent sought special damages in the form of lost profits from the appellant publisher consequent upon a defamatory article published in the appellant's newspaper, alleging that the article was defamatory of it and that it was published with the intention to defame and to injure it in its business reputation.[15] The appellant publisher raised a special plea (which the SCA considered akin to an exception), contending that a claim for special damages is not available under an action for defamation, which derives from the *actio iniuriarum*, but only under the *lex Aquilia*. [16]

27. The SCA held that:

27.1 a plaintiff (whether a corporation or a natural person) who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the Aquilian action;[17]

27.2 in a claim for pure economic loss, wrongfulness depends on the existence of a legal duty and the imposition of that duty is a matter for judicial determination involving criteria of public and legal policy. In the result, conduct causing pure economic loss will only be regarded as wrongful - and therefore actionable - if public or legal policy considerations require that such conduct should attract legal liability for the resulting damages;[18]

27.3 As a matter of pleading, a plaintiff claiming for pure economic loss must allege wrongfulness and plead the facts in support of that allegation. It does not follow that because a defamatory publication is wrongful for purposes of a defamation action, that policy considerations will automatically indicate the imposition of liability for pure economic loss resulting from that publication. Consequently, the respondent's allegation in its particulars of

claim that the statement was "wrongful" for purposes of its defamation action may not be adequate in the present context. Whether it is adequate or not will depend on judicial determination as to what is wrongful in the context of a claim for actual loss resulting from a defamatory publication; and[19]

27.4 in order to found a claim for special damages, the statement injurious to the plaintiff's reputation must at least be proved to be false.[20]

28. These principles, which bind me, clearly find application here. In answer to this ground of exception, the plaintiff points out merely that he has pleaded that he was wrongfully and intentionally defamed by the defendant. However, the plaintiff has not pleaded any facts in support of his allegation of wrongfulness to enable the Court to conduct the exercise of determining whether public and legal policy consider the dismissal incident to be wrongful for purposes of pure economic loss - in fact, the allegation of wrongfulness seems to have been pleaded in the strict defamation sense. Nor has he pleaded the essential requirement set out in Media 24 - that the imputation allegedly resulting from the alleged dismissal incident was false.

29. It follows that this exception must be upheld.

Costs

30. It would appear to me that the plaintiff has achieved substantial success in this exception and should be entitled to his costs. Since he succeeded in two of the three exceptions raised, it would be fair to award him two thirds of his taxed or agreed costs in relation to the exception.

Order

31. In the result, I make the following order:

1.1 The defendant's first and second exceptions are dismissed;

1.2 The defendant's third exception is upheld;

1.3 The plaintiff is granted leave, within 15 days of this order, to deliver a notice of his intention to amend his third claim as referred to in this judgment, failing which the third claim shall be ipso facto dismissed; and

1.4 There defendant shall pay two thirds of the plaintiff's costs in relation to the exception.

TSS MALATJI

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL

DIVISION, PRETORIA

Date of Judgment: 22 July 2017

Counsel for the Defendant/Excipient: Adv K Motshwane

Instructed by: Werksmans Attorneys

Counsel for the Plaintiff/Respondent: Adv EP Van Rensburg

Instructed by: VZLR Inc.

[1] I state this as a fact as I am obliged, for purposes of determining the exception, to accept the plaintiffs allegations in his

particulars of claim as true

[2] Khumalo & Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 at para [18]

[3] Exception, paras 3 and 4

[4] Exception, paras 5

[5] Jonathan Burchell, The Law of Defamation in South Africa, Juta & Co. Ltd., Johannesburg, 1985, page 82 et seq

[6] 1994 (2) SA 60 (E) at p 63

[7] 1999 (1) SA 1166 (C)

[8] Majolica Pottery, supra, page 1179

[9] Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4) para [87]

[10] Sindani v Van der Merwe 2002 (2) SA 32 (SCA) ([2002] 1 All SA 311), at pars [10] - [11]; Mthembu-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA) (2004 (11) BCLR 1182; [2004] 3 All SA 511; [2004] ZASCA 67) at para [25]; National Union of Distributive Workers v Cleghorn and Harris Ltd 1946 AD 984 at 997--8

[11] 2011 (5) SA 329 (SCA) ([2011] ZASCA 117)

[12] Exception, para 11

[13] Exception, para 12

[14] Exception, para 13

[15] Media 24, supra, para [3]

[16] Media 24, supra, para [7]

[17] Media 24, supra, para [9]

[18] Media 24, supra, para [11]

[19] Ibid

[20] Media 24, supra, para [11]

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