

SOUTH AFRICA / JUDGMENT

More v Khoza (2022/039544) [2024] ZAGPJHC 619 (9 July 2024)

[2024] ZAGPJHC 619**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Green

CASE / FILE NUMBER

2022/039544

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO. 2022/039544****1. REPORTABLE: NO****2. OF INTEREST TO OTHER****JUDGES: NO****3. REVISED: YES****In****the matter between:****FAITH MATSHEPO****MORE****Plaintiff****and****REUEL****JETHRO****KHOZA****Defendant****Heard:****18 April 2024****Delivered:**

This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines. The date and time for hand down is deemed to be 10:00 am on 9 July 2024.

JUDGMENT

GREEN, AJ

- [1] The Plaintiff issued summons against the Defendant in which she claimed payment of R500,000 (Five Hundred Thousand Rand) being damages which she alleges she suffered as a result of the Defendant having defamed her. The defamation relied on by the Plaintiff is alleged to have occurred during an interview on a television program known as Morning Live on one of the SABC channels.
- [2] The Defendant's response to the particulars of claim was in the form of an exception. The exception raised six (6) grounds of exception. In response to the exception the Plaintiff delivered a notice to amend her particulars of claim. The notice of amendment was met with an objection by the Defendant. The substance of the objection to the amendment proposed by the Plaintiff was that the particulars of claim, in their amended form would remain excipiable.
- [3] It is the Plaintiff's opposed application for amendment that served before me.
- [4] The parties are agreed that given the objection to the proposed amendment is made on the basis that the particulars of claim will remain excipiable, this application is to be approached as if an exception was being raised to the amended particulars of claim.
- [5] In the objection to the proposed amendment the Defendant has raised five (5) grounds upon which it is suggested the amended particulars of claim will be excipiable. I propose to deal with each of the grounds of objection raised by the Defendant.

The first ground

- [6] The first ground of exception is directed at whether the allegations in the amended particulars of claim can be sustained having regard to the transcript of the interview where the Plaintiff is alleged to have been defamed.
- [7] The plaintiff referred me to the Knupffer case^[1] where the House of Lords formulated a two-fold test in order to assess whether the defamatory statements could refer to a Plaintiff. The test was formulated thus:
- "The first question is a question of law – can the article, having regard to its language be regarded as capable of referring to the appellant? The second question is a question of fact, namely does the article in fact lead reasonable people, who know the appellant to the conclusion that it does refer to him?"*^[2]
- [8] The Knupffer test has been followed by South African courts.^[3] The first question in the Knupffer test is one which is susceptible to decision on exception. The second question is a matter for the trial court.

- [9] The first ground of objection must therefore involve a consideration of whether, as a matter of law, the interview can be regarded as capable of referring to the Plaintiff.
- [10] It is of significance that the interview was conducted during a television program. As such, statements made by the Defendant would be heard by the listener at a point in time, and the interview would then move on. Unlike a written article the person listening would not be able to go back to what the Defendant said earlier and compare it to what he said later. The television broadcast is transient medium where the viewer is not afforded the opportunity to repeat the broadcast and apply a critical mind to its contents. It follows that the yardstick to be applied to the first question in the Knupffer test is that of the ordinary reasonable viewer in the context of the program as a whole.[4]
- [11] This point was made in the Skuse case[5] where the court said:

“In the present case we must remind ourselves that this is a factual program, likely to appeal primarily to a seriously minded section of television viewers, but it was a program which, even if watched continuously, would have been seen only once by viewers many of whom may have switched on for entertainment. Its audience would not have given it the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.”[6]

- [12] Similarly in Amalgamated Television Services[7]:

“Whereas the reader of the written document has the opportunity to consider or to re-read the whole document at leisure, to check back on something which has gone before to see whether his or her recollection of it is correct, and in doing so to change the first impression of what message was being conveyed, the ordinary reasonable listener or viewer has no such opportunity”[8]

and in Gordon’s case[9]:

“Particularly in the case of radio and television publications, a plaintiff is entitled to submit to the jury that the reasonable listener or viewer, as the case may be, although deemed to have listened to the whole of what was broadcast, nevertheless may not have devoted the same degree of concentration to it as he would have to a written document. In the case where there is a written document, of course, it is possible for the reader to consider or reread the whole document at leisure”[10]

- [13] Because the broadcast must be viewed as a whole, the temporal sequence in which statements are made is of significance. It is to this point that the Defendant’s first ground of objection is directed. The Defendant says that when the allegations on which the Plaintiff relies for the alleged defamation are viewed in their correct temporal order, and in the context of the interview as a whole, then the article cannot, as a matter of law, be regarded as capable of referring to the Plaintiff.

- [14] The Defendant makes the point that when the transcript of the interview is considered as a whole, it is clear that it is a wide ranging interview that covered numerous topics. In this respect the Defendant refers to the interviewer having said “I know I am jumping from one topic to another because there is so much to talk about. I mean we are running into time problems”. I agree that the interview is a wide ranging one covering different topics.
- [15] The Defendant has identified six issues and a catch-all of “further issues” that were dealt with in the interview. I agree with the Defendant’s identification of the issues that were dealt with in the interview.
- [16] The first issue that was dealt with in the interview is the operations of the PIC. The interviewer asked the Defendant to tell her about the operations of the PIC, how the PIC was doing and whether the Defendant could say that there had been progress at the PIC. In response the Defendant referred to a new board of directors at the PIC and made reference to three (3) positions that “needed to be addressed”. He then referred to the PIC not having a chief executive officer, a chief financial officer or a chief operating officer. The defendant did not name the plaintiff, and this is the only reference to a chief financial officer during the interview.
- [17] The second issue dealt with in the interview is “the state of the PIC”. When answering this question the Defendant referred to the financial position of the PIC and said: “... things were beginning to deteriorate somewhat”. This is said in relation to the PIC’s “cover”. There is no mention of the Plaintiff or the position of CFO when the second issue was discussed.
- [18] The third issue dealt with political interference at PIC. There is no mention of the Plaintiff or the position of CFO when the third issue was discussed.
- [19] The fourth issue dealt with the PIC’s 2019 annual report and the suggestion that it did not provide sufficient disclosure. The Defendant answered this issue without reference to the Plaintiff or to the position of CFO.
- [20] The fifth dealt with a dividend that the PIC paid to the Government of South Africa as its shareholder. The Defendant answered this question without reference to the Plaintiff or the position of CFO.
- [21] The sixth issue dealt with the Ayo transaction in which the PIC was involved and the Defendant was asked “What is the action to be taken around that case?” In answering this question the Defendant said that the board of the PIC was going to make sure that any decision that was made in a manner that is irregular or flouted protocol or procedure is “looked at very closely”. He said that the procedure for granting the loan to Ayo was not appropriate, and that a single individual, an executive, gave that approval without taking it to the board and that individual had been suspended. In response to a question from the interviewer, the Defendant said “She actually appeared at the Mpati Commission and gave her version of what actually happened. And our sense is that in fact something grossly untoward actually took place. But we shall await the report of Justice Mpati.” In answering

the sixth issue the Defendant did not identify the Plaintiff nor did he identify the position of CFO.

- [22] The final category of issues can be described as “further issues” and dealt with dispirit points which do not take the matter further.
- [23] The Plaintiff’s particulars of claim identify the relevant portions of the interview in paragraphs 8 and 9. However, when doing so, the particulars of claim do not follow the chronology of the interview, and instead rearrange the order in which statements were made by the Defendant during the interview.
- [24] On my reading of the interview, when considered as a whole, and when the events are considered in the temporal order in which they occurred, the comments attributed to the Defendant cannot be regarded as capable of referring to the Defendant. I say so for the reasons set out in paragraphs [25] to [29] below.
- [25] The interview was broadcast on television and the viewer would not have been able to go back in time in order to compare what the Defendant said later in the interview to what he said earlier in the interview. This is quite different to an article that is published in the print media where the reader is able to go backwards and forwards within the article in order to draw connections between later and earlier statements.
- [26] The plaintiff was not mentioned by name in the interview.
- [27] The position of CFO, which was occupied by the Plaintiff is mentioned only once during the interview, and that is in the context of that position being vacant. That vacancy is not singled out and is mentioned in the context of two other positions being vacant. All three of these positions are executive positions.
- [28] The reference to an executive in the context of the Ayo transaction could be a reference to any executive, and not only one of the three vacant executive positions that had been mentioned by the Defendant earlier in the interview.
- [29] The Defendant’s identification of the executive as being female does not, in my view, make his statements respect of the Ayo transaction reasonably capable of referring to the Plaintiff.
- [30] The plaintiff’s answer to the first ground of objection is that special circumstances have been pleaded in paragraphs 10 and 11 of the particulars of claim. These paragraphs provide:
- “10. The statements, when referring to a specific individual, referred to the Plaintiff as she was the Chief Financial Officer of the PIC, the only female executive employed by the PIC and under suspension at the time of the statements.*
11. The statements would be understood by a reasonable reader and/or observer, to refer to the Plaintiff as the Defendant referred to:

11.1 a female executive;

11.2. who was the Chief Financial Officer of the PIC;

11.3 who had appeared before the Mpati Commission; and

11.4 who was under suspension at the time of the statements.”

[31] In my view the allegations pleaded in paragraphs 10 and 11 cannot be sustained when the transcript of the interview is read as a whole, and the allegations relied on by the plaintiff are put into their correct chronology.

[32] The transcript of the interview did not refer to the plaintiff as the CFO, nor did it refer to the CFO as being the person suspended for the Ayo transaction. The identification of the executive as being female does not, in my view establish the required link. There is also nothing in the interview to link the position of CFO to an appearance before the Mpati Commission.

[33] The difficulty with the particulars of claim is that they start by dealing with the Ayo transaction, which was the sixth issue, whereas the absence of the CFO is dealt with as the first issue. There is also, on my reading of the transcript of the interview, no connection between the deterioration of the PIC’s financial position, which was dealt with in the third issue, and the reference to the Ayo transaction in the sixth issue.

[34] The interview is not, in my view, capable of being understood to mean that the Defendant said that the executive who approved the Ayo transaction was the CFO, and that the CFO was suspended on account of the Ayo transaction.

[35] It follows from what I have set out above that the first ground of objection to the amended particulars of claim must be upheld. That finding renders the further grounds of objection practically redundant but I will deal with them because they were argued by the parties.

The second and third grounds of objection

[36] The second ground of objection is again directed at the need to read the interview as a whole, and the statements relied on by the Plaintiff in context. The third ground of objection is that the statements relied on by the Plaintiff, when read in context, are not defamatory.

[37] In my assessment the second and third grounds of objection are subsets of the first ground of objection. They are both directed at the need for the interview to be read as a whole and for the statements relied on by the Plaintiff to be placed into their correct context.

[38] Because I have found that the first ground of objection should be upheld, and because the second and third grounds are subsets of that objection, they too must be upheld.

The fourth ground of objection

- [39] The fourth ground of objection is directed at paragraph 13 of the particulars of claim to the effect that references by the Defendant to someone being placed under suspension and that the issue was still under investigation would reasonably be understood as meaning that the Plaintiff gave approval for the Ayo transaction, is unprofessional, unethical, dishonest and untrustworthy, committed a gross misconduct and was suspended as a result of the misconduct.
- [40] This ground of objection too, in my assessment, is a subset of the first ground of objection. It is based on a contention that the interview must be read as a whole and the statements relied on by the Plaintiff considered in context.
- [41] I agree that when the interview is considered as a whole and the statements relied on by the Plaintiff considered in context, the allegations in paragraph 13 of the particulars of claim cannot be sustained.

The fifth ground of objection

- [42] The fifth ground of objection is directed at an allegation that the Plaintiff has not said that the statements on which she relies were wrongful and made with the intention to defame the Plaintiff and to injure her reputation.
- [43] My reading of the particulars of claim is that they make sufficient allegations of wrongfulness and intention to defame. The fifth ground of objection ought therefore not to be upheld.
- [44] For the reasons set out above I will make an order dismissing the Plaintiff's application to amend her particulars of claim. To be clear, my decision to dismiss the application to amend the particulars of claim is based on the manner on which the Plaintiff has formulated her case, and particularly the Plaintiff's inversion of the order in which statements attributed to the Defendant are pleaded. Notwithstanding the dismissal of this application to amend the particulars of claim, the Plaintiff is free to consider a further amendment to her particulars of claim if she is so advised. I say this to make it clear that I do not, in giving this judgement and making the order, deal finally with the merits of the Plaintiff's claim. This judgement and my order is limited to the Plaintiff's proposed pleading of her cause of action.
- [45] There is no reason why the costs should not follow the result and, in my assessment, this is a matter which warrants counsels' fees on scale B.
- [46] For the reasons set out above, I make the following order:

"The Plaintiff's application to amend her particulars of claim is dismissed with costs, such costs to include the costs of counsel on scale B."

I GREEN

Acting Judge of the High Court

Gauteng Division, Johannesburg

Appearances

For the Plaintiff: C LOUIS instructed by Padayachee Attorneys

For the Defendant: L KUTUMELA instructed Werksmans

Date of hearing: 18 April 2024

Date of judgment: 9 July 2024

- [1] Knupffer v London Express Newspapers Limited [1944] 1 all ER 495 (HL)
- [2] Paras. 497 f-g
- [3] CA Newmann CC v Beauty Without Cruelty International 1986(4) SA 675 (c); Aymac CC and Another v Widgerow 2009 (6) SA 433 (w)
- [4] Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network Ltd and Another [2011] 3 All SA 323 (GSJ) at para. 60
- [5] Skuse v Granada Television 1993 WL 964057
- [6] At page 6
- [7] Amalgamated Television Services (Pty) Ltd v Marsden [1998] 43 NSWLR 158.
- [8] at page 165G-166C.
- [9] Gordon v Amalgamated Television Services Pty Ltd & Anor [1980] 2 NSWLR 410.
- [10] at 413C-F.

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