

SOUTH AFRICA / JUDGMENT

Nolte v Minister of Safety & Security and Another (3444/10) [2014] ZAECPEHC 1 (31 January 2014)

[2014] ZAECPEHC 1

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

3444/10

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – PORT ELIZABETH

Case

No: 3444/10

DATE:

31 JANUARY 2014

In

the matter between

ALWYN

JACOBUS

NOLTE.....Plaintiff

And

MINISTER

OF SAFETY &

SECURITY.....First

Defendant

SENIOR

SUPERINTENDENT M J MAPENA.....Second

Defendant

JUDGEMENT

Revelas J:

- [1] The plaintiff instituted an action for damages against the defendants arising out of an affidavit deposed to by the second defendant on 29 June 2009 concerning him, for purposes of opening a criminal case, as well as invoking disciplinary measures against him. The second defendant accused the plaintiff of misappropriating departmental funds to finance an unauthorized journey by aeroplane from Port Elizabeth to Gauteng. The plaintiff alleged that the contents of the second defendant's affidavit were per se defamatory and contained "various false, wrongful and defamatory statements" pertaining to him and that the affidavit was deposed to with the intention "to maliciously prosecute and defame [him], and "to injure his reputation and dignitas".
- [2] The second defendant, instituted criminal proceedings against the plaintiff by laying a criminal charge of alleged fraud against him at the Kwa-Nobuhle police station in June 2009.
- [3] During 2009, when the events which gave rise to the present matter occurred, the plaintiff and the second defendant were policemen

stationed at Kwanobuhle, respectively holding the ranks of superintendent (presently called lieutenant-colonel) and senior

superintendent (presently called station commander). Their relationship had been marked by friction and both had different explanations for their attitudes. The plaintiff felt that he had been "targeted" by the second defendant who did not want him at the station because he had previously lodged a grievance about the unauthorized use of state vehicles by members of the SAPS at

Kwanobuhle. The matter was investigated by a policewoman named Christoffels who, according to the second defendant, held that there was no such abuse.

- [4] It was common cause in this matter that when the second defendant deposed to the affidavit in question, he was acting within the course and scope of his employment as a police officer.
- [5] The relevant and offending part of the second defendant's affidavit appears in paragraphs 4, 5 and 6 thereof which reads as follows:

"I have since discovered that he [the plaintiff] has travelled by flight contrary to the approval. Further he has intentionally, unlawfully misrepresented the facts by obtaining and completing a different application whereupon he sought the approval of Ass Comm Kapp of Motherwell Cluster. He by-passed me (Station Commissioner of Kwanobuhle) to obtain such approval.

He has furthermore presented the fraudulent application to Uitenhage Accounting Station: Finance, by passing the Kwanobuhle Station

Finance. He could not be helped at the Uitenhage Accounting Station: Finance and was referred to Kwanobhule Station Finance. At the latter station the fraudulent application was presented to me. Attached to the fraudulent application dated 22/6/2009 are receipts of the Carlson Wagonlit Travel Agency, the SAPS 501 signed by him. Regarding the airplane ticket, and his statement dated 17-06-2009. The fraudulent application has been completed after he has undertaken the journey. Ass Comm Kapp signed it on 22 June 2009. The journey was on 02 to 05 June 2009.

The conduct of Supt Nolte is calculated to defraud the SAPS and he has sought to misrepresent the facts, and to bypass normal channels and procedures. I regard his conduct as criminal and serious.”

- [6] The Director of Public Prosecutions (NDPP) declined to prosecute in this matter. The disciplinary proceedings instituted at the behest of the second defendant was abandoned and/or expired, it is not certain which, after 35 months without any evidence being led or any findings made.
- [7] It was admitted in the defendants’ plea, that the contents of the docket which contained the second defendant’s affidavit was understood by the plaintiff as well as various individuals to whom the contents were conveyed or “published” that the second defendant intended to convey that the plaintiff –
- Committed at least one criminal offence;
 - Is dishonest;
 - Had committed fraud;
 - Should be criminally charged with the alleged offences of unlawful misrepresentation and fraud.
- [8] The defendants denied that the second defendant acted maliciously when he laid the charges, or that he had the intention to injure the plaintiff or damage his reputation and dignitas. The defendants pleaded that the allegations were true and made in the public interest, alternatively, that the allegations in question were made by the second defendant in the discharge of his duties as station commander in order to have the allegations investigated and that “the publication was addressed to a person(s) who had the right and/or duty to receive it”, (presumably persons such as the investigating officer and prosecutor). In addition they pleaded that the second defendant made the statements in good faith and in the belief that the allegations levelled against the plaintiff were correct.

GENERAL PRINCIPLES

- [9] At common law the delict of defamation is defined as the wrongful and intentional (in the case of a non-media defendant) publication of a defamatory statement concerning the plaintiff claiming he or she has been defamed or their reputation has been diminished. 1

- [10] A statement is defamatory if a reader of ordinary intelligence might reasonably understand the words published in their ordinary sense to have a meaning which reduces the plaintiff in the estimation of the reader in question.²
- [11] The Constitutional Court held in *Kumalo and other v Holomisa*³ paras 35-40, that the principles of the common law as developed in *National Media Limited and others v Bogoshi*⁴ are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression. These principles must now be applied to the

facts.

THE

FACTS

- [12] The following facts, which were either common cause, or not dispute, gave rise to the events which brought the parties to court:
- [13] During May 2009 the plaintiff and Constable Zweni (also stationed at Kwanobuhle Police Station) received call-up papers from the first defendant's head office in Pretoria to attend a training course from 3 to 5 June 2009. The plaintiff was the coach of the national South African Police tug-of-war team and the training which was to take place in Pretoria, was in preparation of the Police Olympic Games to be held in Vancouver, Canada.
- [14] Travel arrangements had to be made by the various police officers (mostly athletes) who were required to travel to Pretoria. All the athletes, of whom many were constables, travelled to Gauteng by aeroplane. The plaintiff and Constable Zweni (also from the Kwanobuhle police station) both travelled to Gauteng by aeroplane, but without the necessary authority from their senior, the second defendant. Their aeroplane tickets were however authorized on their return from the training, by a police commissioner from Uitenhage police station, Commissioner Kapp.
- [15] Prior to their departure, the plaintiff had unsuccessfully attempted to persuade the second defendant that to travel to Gauteng from Port Elizabeth by aeroplane would be more efficient and economical than the option of undertaking the journey by bus or motor vehicle, with the extra accommodation costs such road travel would involve. The second defendant was not prepared to authorize a journey by aeroplane and signed the necessary authority for both Constable Zweni and the plaintiff to travel to Gauteng by bus. Based on the aforesaid travel authority, they each received an advance from the finance department at Kwanobuhle in the amount of R2 420-00 in cash.
- [16] Constable Zweni testified that when she learnt that all the other athletes who went for the same training in Pretoria were travelling by aeroplane to Gauteng, she also used her advance for a bus journey, to purchase an aeroplane ticket instead for R1 834-00. She testified that the

difference of R586-00 between her advance and the price of aeroplane ticket, she spent and when she returned from Gauteng, she requested the finance department to deduct it from her salary. The plaintiff also purchased an aeroplane ticket for R1 834-00 and travelled by air to Gauteng, where he participated in the training. He dealt as follows with the R586.00 he had left over: He repaid the R400-00 he did not utilize to the finance department on his return, thus creating a saving. The plaintiff also approached Commissioner Kapp in Uitenhage who signed the necessary authorisation for the aeroplane ticket. The remainder of his advance he used for meals whilst at the training.

THE EVIDENCE

[17] The plaintiff's explanation for his actions was that before he approached the second defendant, he had established that to travel by aeroplane was cheaper than to travel by bus. He added that it was also more efficient in that it excluded the need for extra accommodation as one could fly and arrive in Gauteng early in the morning, whereas the bus would arrive the night before the training, necessitating an extra night's accommodation. He added that one would also be more refreshed for the physical activities to be undertaken on the first day of training after flying, as opposed to two long days on a bus. He said had prepared a document which illustrated the savings for the department and had explained it to the second defendant, but to no avail.

[18] On the second defendant's version, when the plaintiff approached him about the transport issue, the plaintiff simply

insisted from the outset, without any explanation, that he and Constable Zweni should travel by aeroplane. The second defendant also added that there was a moratorium on air travel by members of the SAPS, except for directors, at the time, and therefore he had a further reason to decline authorization for air travel to Gauteng as requested by the plaintiff. The second defendant tried to give the impression that the plaintiff did not place any material before him to motivate his request. He testified that because the plaintiff provided no vouchers or quotes for the tickets he declined to give them (the plaintiff and Zweni) the necessary authorisation. The plaintiff explained that one is usually given a ticket price telephonically by the airlines and that as a rule, no written quotes are issued.

[19] Once the second defendant had learnt that the plaintiff's air ticket was authorized by Commissioner Kapp without any recourse to him, he said he suspected fraud and opened the criminal proceedings. As I understood him, he believed that the authority given to the plaintiff by Commissioner Kapp, thus bypassing him, meant the existence of some form of collusion between the plaintiff and the commissioner.

[20] Constable Zweni testified that she was asked by the second defendant on her return, the plaintiff had influenced her to travel to Gauteng by aeroplane instead of by bus. She denied that she had been. The second defendant disputed that he had posed such a question to Constable Zweni.

[21] The plaintiff lodged a grievance against the second defendant concerning several matters, which included the second defendant's

affidavit and the referral of the air travel matter for criminal investigation. According to the second defendant, he and the

plaintiff were both interviewed by a panel consisting of four senior police officials regarding this grievance. The plaintiff disputed that the second defendant was ever present with him at any such meeting with a panel. The outcome of the grievance was never communicated to the plaintiff and the second defendant was unable to provide an answer in this regard. There was no outcome, it seems.

DISCUSSION

[22] The statements made by the second defendant about the plaintiff in the paragraphs cited from his affidavit are per se defamatory. There was also publication of these statements. Accordingly, two presumptions arise, namely (a) that the statements were unlawful and

(b) that the statements were made animo iniuriando.⁵ This places on the defendants an onus to rebut these presumptions. Unlawfulness may be rebutted by showing it was made in the public interest and therefore lawful.⁶

[23] During argument, the question of a qualified privilege was raised insofar as the defamatory statements were raised in criminal judicial proceedings. The defendants did not traverse this defence in their pleadings nor in the evidence proffered.

[24] The plaintiff argued that reliance on a qualified privilege was in any event precluded by the malice which actuated the statement. The plaintiff's case was further that the statements were false and the second defendant had no reasonable grounds to believe them to be true. The aforesaid, if accepted, would also preclude a qualified privilege.

[25] The particular category of privilege which would arise in this case is where the offending statement was published by one person in the discharge of a duty (which was pleaded by the defendants) or the protection of a legitimate interest to another person who has an interest in receiving it. Such persons would be the second defendant, the respective officials of the NDPP and officials of the first defendant tasked with conducting the disciplinary enquiry.⁷

[26] In the Borgin matter (supra) ⁸ it was stated that the test for privilege as defence in a defamation action is an objective one where:

"the court must judge the situation by the standard of the ordinary reasonable man having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way he did? And in answering this question the court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one. (See generally De Waal v Ziervogel (supra at 122-3); Benson v Robinson & Co (Pty) Ltd 1967 (1) SA 420 (A) at 426 D – F; Suid-Afrikaanse Uitsaaikorporasie v O' Malley (supra at 402 – 3))."

- [27] One has to closely examine the second defendant's conduct to determine whether he was merely discharging his duties when he made the affidavit under consideration. The second defendant testified that there were three routes to follow in circumstances where there were indications or a suspicion that a police officer had committed an offence or misconduct. The first was a criminal investigation, the second an investigation in respect of serious disciplinary breaches and thirdly, a less formal investigation for less serious disciplinary breaches. In the case of murder an inquest would be held, he explained. Other criminal conduct would be referred to the NDPP. Serious disciplinary breaches (which could result in dismissal) would be referred to a disciplinary enquiry and less serious offences, where a warning would suffice, the police officer in question would be interviewed by a superior ranking police official. Serious cases or criminal offences would be referred to both criminal and disciplinary investigations.
- [28] In the determining what would have been reasonable steps for the second defendant to take in the circumstances, one has to examine the plaintiff's conduct, and not only the second defendant's suspicions.
- [29] The second defendant alleged (in his affidavit and in court) that the plaintiff approached him and insisted on air travel. He disputed that he had been informed of the costs applicable to the different modes of transport to be used by those officials attending the training in Pretoria.
- [30] It seems inherently more probable in the circumstances, that the plaintiff would have first attempted to persuade the second defendant to authorize air travel, as opposed to travel by bus, instead of simply insisting from the onset on air travel without any motivation, as the second defendant's affidavit suggests. The second defendant also denied that he was upset with the plaintiff because he bought an aeroplane ticket instead of a bus ticket when this proposition was put to him. It is doubtful that this was the case, if one has regard to the history between them and the approach adopted by the second defendant when he learnt about the journey by aeroplane instead of a two-day long bus trip.
- [31] The evidence that the other trainees and athletes involved in the Gauteng training exercise (all police officers) were authorized to travel by aeroplane was not disputed. Therefore the second defendant's reason to refuse the plaintiff's request,

namely because there was a moratorium on air travel, seems implausible. The second defendant disputed Constable Zweni's

evidence that she had met with him regarding this incident and that he had asked her if the plaintiff influenced her to travel by air. He also denied that he and Constable Zweni ever spoke about this incident. He said that the plaintiff had dealt with the travel arrangements for both of them at all times.

[32] Constable Zweni impressed me as an honest witness who candidly admitted to facts adverse to her. It is improbable that the second defendant would not have taken up the matter with her when he found out that she and the plaintiff had travelled to Gauteng in an aeroplane, contrary to his authority, and not by bus. The general tone of his affidavit made shortly after this incident suggests that the second defendant perceived his authority to have been undermined which upset him. On the facts which presented themselves to the second defendant at the time, both the plaintiff and Constable Zweni were equally guilty of a rather minor transgression of a disciplinary nature. The second defendant also suspected Commissioner Kapp of colluding with the plaintiff. No investigation was done in respect of Kapp. In my view, to single out only the plaintiff for prosecution and investigation, but not Constable Zweni and Commissioner Kapp, speaks volumes of the second defendant's approach to the matter and his attitude towards the plaintiff.

[33] The plaintiff also relied upon the existence of the Regulations for the South African Police: Official Travelling and Transport – economy and Control. Regulation 23(1)(b) thereof is the relevant provision which reads:

“A member shall, subject to the provisions of regulation 23 (3) undertake an official journey by the most economical means with due

regard to available means of transport, route, duration and all other items of expenditure applicable in the circumstances.”

(Rule 23 (3) relates to situations where no public transport is available for the official journey to be undertaken, which is not applicable to the present matter).

[34] When the plaintiff gave evidence, he clearly demonstrated that air travel, as was undertaken by himself and all the other police officers concerned, was the most efficient, expeditious and economical means of transport. Moreover, the plaintiff's

actions were in compliance with the applicable regulations cited above. The second defendant's refusal to authorize the air

travel in the circumstances was contrary to the regulations concerned and made no sense.

[35] Even if he did not accept the plaintiff's word for the price of the aeroplane tickets, the second defendant, faced with the information placed before him by the plaintiff (i.e. why air travel could be cheaper than road travel) could have verified it, before dismissing his request out of hand and authorizing a trip which, as it turned out, did not comply with the regulations. The second defendant did not even consider the request and therefore he did not apply his mind to the reasons given by the plaintiff for his request.

[36] At the very best for the second defendant, the plaintiff's decision not to travel by bus was a mild form of disobedience or minor insubordination which did not justify serious disciplinary action. More importantly, the disobeyed instruction was contrary to Regulation 23 and common sense.

[37] The second defendant testified that the point at which he became suspicious, was when he realized that Commissioner Kapp had

authorized (ratified probably is a better word in these circumstances) the aeroplane journeys of the plaintiff and Constable Zweni after their return. His belief that Commissioner Kapp was in cahoots with the plaintiff, raises the further question namely, why

Commissioner Kapp was not called upon to testify. Any suspected misrepresentations made by the plaintiff (as the second defendant

alleged in his affidavit) would have been made to Commissioner Kapp. There could never have been be any question of misrepresentation by the plaintiff in circumstances where he repaid the difference between the money allocated for bus travel and the cheaper air travel and thus saved the relevant department money. Clearly Commissioner Kapp considered it proper, and even necessary, in the circumstances to authorise the purchase of an aeroplane ticket. There was patently no basis for a prosecution.

[38] The actions of the plaintiff were clearly proper and reasonable, albeit contrary to an instruction and could have been dealt with, if really necessary, in informal disciplinary proceedings insofar as they may have constituted insubordination or a refusal to carry out an instruction.

[39] Viewed objectively, only a person whose actions were actuated by malice would have opted for criminal prosecution in the prevailing

circumstances. Based on the evidence presented, I must conclude that the second defendant's conduct was indeed actuated by such malice.

[40] It is not open to the defendants to rely on a privileged occasion or qualified privilege in this matter. The malicious prosecution

initiated by the second defendant's affidavit, the cited contents of which are per se defamatory, exceeded the boundaries of, and therefore forfeited the protection of any privilege. The second defendant did not act reasonably and no person in his position could have regarded the defamatory material as necessary to advance the prosecution of the plaintiff since any prosecution would be malicious.

[41] A successful plaintiff in a defamation action is entitled to an award for general damages. It is also trite that the courts have a wide discretion in determining such awards ex aequo et bono, having regard to the circumstances of the case. It was argued by the defendants that in determining an appropriate award I should have regard to the fact that the publication was limited in that only a few persons had insight into the affidavit and had actually read the second defendant's affidavit. The defendants' argument has merit. However, it must also be taken into account that through the endeavours of the second defendant, an unresolved disciplinary enquiry, purportedly investigating fraud allegations against him, hung over the head of the plaintiff for more than two years. There can be little doubt that the plaintiff's

colleagues knew about the allegations levelled against him and his reputation must have been diminished thereby in his workplace and at the Uitenhage Police Station where the case against him was investigated. The plaintiff also testified that as a result of this matter his mental state changed and his personality was affected, which negatively impacted on his home life.

- [42] In awarding damages in matters of this nature, courts should also have due regard to awards made in similar cases. In *Van der Berg v Coopers & Lybrandt (Supra)* 10 the following words of caution were expressed in this regard:

“Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yard stick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately, a Court must, as best as it can, make a realistic assessment of what it considers just and fair in the circumstances. The result represents little more than an enlightened guess”.

- [43] *Watermeyer J*, in *Muller v South African Associated Newspapers Ltd and Others*¹¹ stated as follows:

“In estimating the amount of damages to be awarded the Court must have regard to all the circumstances of the case. It must, inter alia, have regard to the character and the status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done.”

- [44] In *Buthelezi v Poorter and Others* 12 it was held that a court:

“is also entitled to take into account the conduct of the defamer from the time the libel was published until judgment to the extent that such conduct is directly connected with the wrong sued on”.

- [45] In *Chetcuti v Van der Wilt*¹³ the defendant, acting out of revenge for being dismissed by the plaintiff, falsely reported to social welfare officials that the

plaintiff and his wife were sexually abusing foster children placed in their care. No prosecution followed. In the subsequent action

instituted by the plaintiff, the court took into consideration that the publication of the statement of the defendant, which was

defamatory per se, was made to a small number of officials. Also, that the defendant never apologized to the plaintiff. The plaintiff

was awarded R15000.00 for defamation (R51 285.00 at present day value).

[46] In *Dercksen v Webb* 14 the appellant was awarded R28 000.00 (at present day value) for the utterances made by his employer who accused him of theft and

dismissed him.

[47] In *Mkhize v Media 24 Ltd* 15 an amount of R220 000.00 (at present day value) was awarded to a plaintiff when the defendant newspaper erroneously reported that he was involved in the assassination of a political figure. Obviously the wide publication of the statement was the reason for such a substantial award.

[48] The plaintiff was a man of good standing in the community as a policeman, family man and as a coach for tug-of-war teams, not only for the South African Police Services, but also for the national Springbok team. His standing was definitely undermined by the actions of the second defendant who never let up, not even in Court when all the facts proved the contrary, in persisting accusing the plaintiff falsely of fraud. I have already referred to the longstanding pending disciplinary hearing which came to nought. The second defendant never apologized to the plaintiff when it should have been apparent to him that the plaintiff did not commit fraud. Persons in the plaintiff's working circles where his reputation was vested, must have wondered why he was being investigated over such a long period of time.

[49] The awards of South African Courts in defamation cases have always tended to be on the conservative side. Counsel for the plaintiff, at the onset of the proceedings, properly conceded that the amount claimed by the plaintiff (R500 000.00) was unrealistically high in the circumstances and if compared to awards granted by the courts in similar matters. He also conceded that the limited publication in this case meant that a much smaller amount should be awarded.

[50] In my view, an award of R58 000.00 would be appropriate in the circumstances.

[51] The following order is made:

1. The defendants are jointly and severally liable, the one paying the other to be absolved, to pay damages to the plaintiff in the amount of R58 000.00 (fifty eight thousand Rand), plus interest thereon, calculated at the applicable legal rate, from the date of judgment to the date of payment.
2. The defendants are to pay the plaintiff's cost of suit, jointly and severally, the one paying the other to be absolved.

E. REVELAS

JUDGE OF THE HIGH COURT

For the Plaintiff: Adv P. Mouton and Adv N Barnard

Port Elizabeth

Instructed by: Struwig Hattingh

Counsel for the Defendant: Adv Simoyi

Port Elizabeth

Instructed by: State Attorneys

Date Heard: 19 November 2013

Date Delivered: 31 January 2014

1Khumalo v Holomisa [2002] ZACC 12; 2002

(8) BCLR 771 (CC) at 778 D-E and also JM Burchell The Law of Defamation in South Africa (1985).

2Argus Printing and Publishing CO Ltd v Esselen's Estate 1994

(2) SA 1 (A).

3At 785H-787G and para [35]-[40].

4 1984

(4) SA 1169 at 1207D.

5Joubert and Others v Venter 1985

(1) SA 654 (A) at 696 A and Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others [2001] All SA 425 (A) at 426 (Editor's Summary). Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977

(3) SA 394 (A) at 402-3.

6Borgin v De Villiers and Another 1980

(3) SA 557 (AD) at 571 F-G.

7De Waal v Ziervogel 1938 AD 112 at 121 – 3.

8At 577 E – G.

9Salzman v Holmes 1914 AD 417 at 480.

10At paragraph [48].

111972(2) SA 589 (C) at 595 (A).

121975(4) SA 608 (W) at 613H-I per Williamson AJ

13 1993

(4) SA 397 (TK).

14 [2008] 2 All SA 68 W.

15 [2008] JOL 21651 [N].

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