

SOUTH AFRICA / JUDGMENT

Rabe v Marais and Another (A81/2022; 139/2019) [2023] ZAMPMBHC 51 (13 September 2023) [2023] ZAMPMBHC 51

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse, Gumede

CASE / FILE NUMBER

A81/2022; 139/2019

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FLYNOTES:

CIVIL LAW – Defamation – Qualified privilege – Neighbourhood feud – Letters written to police, NPA and LPC about neighbour and his attorney – Magistrate accepted that occasion was privileged, that there was no malice and the situation of frustration of appellant at inaction on his complaints – Not open to the magistrate to conclude that the statements so published by the appellant were not relevant or germane to the issue at hand – Appeal against award of damages succeeding.

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)
APPEAL CASE NO.: A81/2022
COURT A QUO CASE NO.: 139/2019
(1)
REPORTABLE:NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: YES

DATE: 13/09/2023

SIGNATURE

In the matter between:

JAN
ANDRIES RABE
Appellant
and
HENDRIK
ABRAHAM MARAIS
First Respondent
PHILLIP
JACOBUS HATTINGH
Second Respondent

JUDGMENT

Coram: Roelofse AJ et Gumedede AJ

GUMEDE AJ:

1. Appellant appeals against the whole judgment and the order of Magistrate Van Rooyen which was granted on 1 November 2022, in terms of which, the Magistrate ordered the appellant to pay damages in the amount of fifty thousand rand plus interest to each respondent, in an action for defamation.
2. The facts of this case are largely common cause.
3. Defamation against the first respondent stems from a letter that the appellant wrote to the Legal Practice Council on 25 February 2019, in which he complained against the first respondent and accused him of having obtained confidential communication by unethical and/or corrupt means and then trying to use this “illegally obtained” documentation to threaten the appellant.
4. The appellant also published two defamatory statements in respect of the second respondent. The first one was made to the Provincial Commissioner of the Police, Mpumalanga on 4 October 2019 and the second statement was made to Adv KH van Rensburg on 18 October 2019. The first statement stated that

“I believe my below email reply to my attorney is self-explanatory, as to why I have a serious complaint against the Dullstroom SAPD.

I have no doubt that there is a special (corrupt) relationship between the Dullstroom SAPD and Mr Hatting. I know that some of the SAPD members buy meat and “afval” directly from Mr Hatting (he keeps sheep on a farm outside of Dullstroom)”

5. The second statement consists of a letter written by the appellant to the National Prosecuting Authority which reads as follows:

“The attached supporting documents (letters) gives a clear depiction of the background supporting my complaint against the Emakhazeni State Prosecutor (Jones) for what I believe to be a clear corrupt association between the State Prosecutor (Jones), the Dullstroom SAPD and Mr Hatting.”

.....

“Considering the circumstances described in the attached letters, it is clear to me, that between Mr Hatting, Dullstroom SAPD and the State Prosecutor lies a corrupt relationship.”

6. Both respondents alleged that the contents of the above statements were wrongful and defamatory and were understood by the addressees and intended by the appellant to mean that the respondents were dishonest and corrupt. In the alternative the respondents alleged that the statements carried the additional sting that they are without moral fiber, they are of questionable character and are not trustworthy.
7. The appellant admitted that he made these statements but denied that the statements were defamatory. In the alternative, he averred that the statements were published on a privileged occasion.

BACKGROUND

8. The facts which led to these incidents are contained in the judgment a quo and can be summarized as follows:
9. In 2017, the second respondent moved into a property in Dullstroom, across the home of the appellant and soon brought animals into the property (cattle, sheep, horses).
10. These animals attracted blue flies which caused nuisance and prompted the appellant to lodge a complaint with Emakhazeni Local Municipality. The Municipality issued a formal notice to the second respondent.
11. Appellant alleges that when the second respondent received the notice, he threatened the appellant's wife by telling her that she should sleep well at night and that she should watch her dogs as they have a tendency to get lost or poisoned.
12. The appellant's wife is alleged to have reported the incident to the police who are said to have refused to assist her until the intervention of the station commissioner.[1]
13. Approximately a year later, the appellant and his wife planted trees on their sidewalk and also placed wooden poles between the sidewalk and the road. The second respondent cut off the wooded poles with a chainsaw, leading to his arrest for malicious injury to property but the prosecuting authority declined to prosecute.
14. This aggrieved the appellant who then wrote the aforesaid letter to the Provincial Police Commissioner and the NPA.

15. A few weeks after the appellant wrote the aforesaid letters, he received a letter of demand from the first respondent, claiming damages for defamation of the second respondent. In the letter of demand, the first respondent quoted verbatim from the letters which the appellant had sent to the Provincial Police Commissioner and the NPA and which the appellant had believed were confidential communication.
16. Appellant then decided to lay a complaint against the first respondent with the Legal Practice Council as he was of the view that the second respondent had obtained these letters through unethical and corrupt means.

GROUND OF APPEAL

17. Having unsuccessfully defended the defamation claim by the respondents, appellant raised the grounds of appeal, which in broad terms can be summarized as follows:
 - a. He disputes that the letters he wrote to the Police Commissioner and the NPA were defamatory of the second respondent as the accusation in those letters were directed at the police and prosecuting authority and not directed at the second respondent;
 - b. He also disputes that the letter he wrote to the Legal Practice Council regarding the complaint against the first respondent was defamatory;
 - c. He criticizes the Magistrate for the inability to distinguish between the requirement of relevance and malice in defamatory cases;

THE IMPUGNED STATEMENTS

18. Appellant denies that the aforesaid impugned statements were defamatory. In the alternative, he raises the defense of privilege.
19. The court accepted that the impugned statements were indeed defamatory and had to consider the question whether the appellant could escape liability on the grounds of privilege.
20. Given the restrictions on the court of appeal, there is very little if anything to say on the finding that the statements were defamatory.
21. On the question of qualified privilege, the court a quo held as follows:

“For the defence to succeed, the defence must also show on a balance of probabilities that the defamatory statement was relevant and germane to the privileged occasion. Once the defendant is able to discharge the onus, the provisional protection of qualified privilege is established. The protection may however be defeated if the plaintiffs can show that the defendant in publishing the defamatory statements was actuated by an improper motive or malice or that the defendant abused or exceeded the ambit of qualified privilege.”[2]
22. In its reasoning, the court began by acknowledging that in this case, the respondents failed to raise the issue of malice in response to the appellant’s plea of qualified privilege.

23. The court also acknowledged that the appellant is entitled to report a legal practitioner to the LPC which is the controlling body of the attorneys' profession and concluded that the defamatory statements contained in the letter in respect of the first respondent was made on a privileged occasion.
24. The court further acknowledged that statements made to the Police Provincial Commissioner as well as that made to the NPA in respect of the second respondent, were also made on a privileged occasion.[3]
25. Having found that the statements complained of were made on a privileged occasion, the court proceeded to consider whether the words complained of were relevant or germane to the occasion.
26. The court cited a decision of the Supreme Court of Appeal in *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Others* where it states that relevance in the context of qualified privilege should not be equated to relevance in the strict evidential sense. What is logically irrelevant may not be necessarily irrelevant in relation to qualified privilege and the test is not as rigid as with evidentiary test.[4]
27. The court reasoned that the crux of the complaint to the LPC regarding the first respondent was that he came in possession of confidential

communications in a suspicious manner which the appellant wanted the LPC to investigate. The court then proceeded to find that appellant had no evidence that the communication was obtained in a corrupt or unethical manner and it was not necessary for him to make such defamatory statement as the LPC would have investigated the complaint even in the absence of the impugned statement. For this reason, the court found that the defence of qualified privilege is not available to the appellant.[5]

28. A similar finding was made in respect of the second respondent. The court concluded that the appellant abused the occasion when he stated that the second respondent was involved in a corrupt relationship with the SAPS and the Belfast prosecutor.[6]
29. The problem with that conclusion is that the court had already set out the test to determine relevance, which the court acknowledged is not as rigid as relevance required in the strict evidential sense.
30. In the context of the statement that was made by the appellant, in the circumstances where the appellant had a long-standing dispute with the second respondent who has always been represented by the first respondent, wherein the appellant's complaints to the police, fell on deaf ears until an instruction from a superior is made before their complaint was attended.
[7]

31. Furthermore, during trial, the appellant had been questioned about his intention in writing a letter to the police and he stated that he was frustrated with the non-action of the police and the NPA, at no stage he accused Hatting (second respondent) of anything. The appellant further indicated that the NPA had denied that Prosecutor Ms Jones supplied the first respondent with the privileged

confidential letters which had been sent to the police and the NPA.[8]

32. In finding that the appellant went too far in making defamatory statements, the court did not reject and/or dismiss the above explanation by the appellant. It made no adverse finding against the appellant in that regard. In any event, the Supreme Court of Appeal in *Borgin v De Villiers and another*[9], confirmed that the defence of qualified privilege is, not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice. In this case, malice is not in issue. The appellant expressly testified that that he believed that the first respondent obtained the confidential communication by illegal means[10], the court a quo did not reject the appellant's testimony in that regard or find to the contrary.

33. In the circumstances where the Magistrate had

- a. accepted that the occasion in which the statement were made was privileged,
- b. accepted that there was no malice on the part of the appellant as non was pleaded,
- c. accepted the explanation of frustration and evidence of the appellant that Ms Jones who is now said to be the person who provided the first respondent with the impugned letters, had denied same;[11]

it is therefore not open to him to conclude that the statements so published by the appellant were not relevant or germane to the issue at hand. To do so is a clear misdirection which must be corrected by the appeal court.

34. In the premises, I make the following order:

1. The appeal succeeds with costs.
2. The judgment and order of Magistrate D Van Rooyen, made on 1 November 2022 is set aside and replaced with an order that the first and second plaintiffs' claims against the defendant are dismissed with costs.

PP.

Z GUMEDE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

I agree and it is so ordered.

ROELOFSE AJ

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 13 September 2023 at 10:00.

APPEARANCES

For the applicant : AP ELS

Instructed by : COURZYN HERTZOG & HORAK

For the Respondent : HF FOURIE

Instructed by : HA MARAIS INC, BARBERTON

Date of hearing : 2 JUNE 2023

Date of judgment : 13 SEPTEMBER 2023

- [1] Judgment, para 17
- [2] Judgment, para 49
- [3] Judgment, paras 51-53
- [4] Judgment, para 54
- [5] Judgment, para 55-56
- [6] Judgment, para 58
- [7] Judgment para 18
- [8] Transcript, vol 3.1, p56, line 15 - 17
- [9] 1980 (3) SA 556 (AD) at p 578H-579G
- [10] Transcript, vol 3.1, p62, line 25 to p63, line 2
- [11] Transcript, vol 3.1, p56, line 15-17

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Prepared on 10 October 2026 · Esheria