

SOUTH AFRICA / JUDGMENT

Ramakarane v Lephoi (4474/2020) [2023] ZAFSHC 133 (21 April 2023)

[2023] ZAFSHC 133

COURT

Free State High Court, Bloemfontein

BEFORE

Africa

CASE / FILE NUMBER

4474/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 4474/2020

In the matter between:

TSEPISO RAMAKARANE Plaintiff

and

SELLOANE LEPHOI Defendant

CORAM: AFRICA, AJ

HEARD ON: 25 JANUARY 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 9h00 on 21 April 2023.

INTRODUCTION

[1] This is an action for defamation, allegedly suffered when the Defendant made public defamatory statements against the Plaintiff on the 25th of June 2020 and the 2nd of October 2020, respectively. Plaintiff feels aggrieved by the defamatory statements made, which has been damaging to his reputation and dignity. Reputational damages are claimed by Plaintiff as follows:

1.1 Payment in the amount of R500 000.00 (five hundred thousand rand);

1.2 An unconditional public apology to be made and broadcasted by the Defendant on the airways of Sesotho Radio Station;

1.3 Cost of suit;

BACKGROUND

[2] Plaintiff submits that on the 25th of June 2020, the Defendant made an airwaves publication statement at Setsoto Community Radio Station whose listenership spans the towns of Ficksburg, Clocolan, Marquard, Ladybrand and other parts of Lesotho; that the Plaintiff is corrupt (doing Mayofonyofo at Setsoto Local Municipality) and specifically alleging that the "High court has already ruled that the man has been corrupt" [1]

[3] Further, the Defendant .on the same Radio Station imputed unfounded allegations of fraud and squandering of funds intended to electricity, against the Plaintiff.[2]

[4] Again on the 2nd of October 2020, the Defendant was on the airwaves still imputing allegations "malfeasance" against Plaintiff regarding his duties as Municipal Manager of Sesotho Local Municipality.[3]

[5] Plaintiff alleges that the incessant and demeaning public statements are recalcitrant utterances and Defendant intend to cause them to be perceived as rogue character in the purview of the Community he serves and the broader public.[4]

[6] Defendant submits that she is a community activist who was part of interviews and /or discussions on the Setsoto Community Radio Station on or about 25 June 2020 (the first discussion) and 2. October 2020 (second discussion), respectively. [5]

[7] The Defendant inter alia referred to a judgment granted by the Honourable Court in a Review Application under case number 855/2019, a copy of which is attached hereto as annexure "PLE5".[6]

[5] From the aforesaid Judgment the following is inter alia evident:[7]

5.1 That plaintiff is the municipal manager of Setsoto Local Municipality;

5.2 Despite various deficiencies the plaintiff declared the third respondent in the application, Sibamwu Building Contractors (Pty) Ltd (Sibamwu) as the successful tenderer;

5.3 The court concluded that the conduct of the plaintiff was ostensibly not in tandem with the prescripts of the law;

5.4 The court held that the plaintiff's failure to comply with the clear provisions of the Supply Chain Management Act and Regulations demonstrates that the plaintiff's conduct was unlawful, which rendered the decisions irregular and invalid;

5.5 The plaintiff gave Sibamwu an opportunity to transform a non-responsive tender into a responsive one;

5.6 The court held that the conduct of the Plaintiff was arbitrary and was at best an irrational exercise of his mandate, culminating in a decision not supported by reports in his possession and a process outside the parameters of the law;

5.7 The Plaintiff acted in an unfair and unjust manner, outside the scope of his powers, so as to guarantee success in favour of Sibamwu;

5.8 The court granted a punitive cost order against the Plaintiff, in his personal capacity, due to his conduct.

[6] The Defendant accordingly denies that any of the statements made by her during the first and second discussions were scandalous, false and defamatory of the Plaintiff.

[7] The Defendant further denies that any of the statements made by her during the first and second discussions were wrongful and/or were made with the intention to injure the Plaintiff.

[8] The Defendant specifically pleads the following:

8.1 The statements made by the Defendant during the first and the second discussions were essentially true;

8.2 The Publication of the statements made by the Defendant during the first and the second discussions was in the public interest.

[9] It is common cause that on 16 September 2020, the Plaintiff through his attorney of record, Ponoane Attorneys, issued a letter of demand requesting the defendant to make a public apology and compensation in the amount of R250 000.00.[8]

SUMMARY OF EVIDENCE

[10] Tshepiso Ramakarane ("Plaintiff") testified under oath that he is 60 years of age and has been a civil servant for 34 years. He commenced as a prosecutor in 1988 and occupied numerous offices, including:

2000- Appointed Land Claims Commissioner

2007 - Appointed HOD in dept. of Agriculture in Free State

2009- Appointed Head of Commissions

2010 - Seconded: Acting Head of Department of sports

2011 - Seconded: Special Advisor to the Mangaung Municipality

2011- Seconded: Stabilize municipality for 6 months

2012- Appointed Municipal manager in Setsoto, until June 22

[11] Mr. Ramakarane feels aggrieved, humiliated and defamed as his dignity was infringed and his 34 years of public service tarnished by the utterances made by the defendant on 25 June 2020, which utterances was repeated on 22 October 2020. He said that as Head of Administration, as Accounting Officer and as part of his fiduciary duties, he is expected to uphold the law. He regards himself as a person of integrity and these utterances repeated on various media platforms. To this end was Mr. Ramakarane was even contacted by people, wanting to get his side of the story. The Sesotho expression used "Manyofonyofo" is a superlative of corruption. According to Mr. Ramakarane, to be accused of corruption denotes:

- a) He acted in bad faith
- b) He acted for personal benefit
- c) Bribery
- d) Everything he always fought against

[12] Until today, these utterances still cause Mr. Ramakarane distress and all he needed was an apology, which the Defendant refused. Mr. Ramakarane testified that he does not know the Defendant personally, therefore his recourse was to seek legal assistance to have the defamatory statements detracted. He got to know of the publication soon after it was made, because the Council by then have placed him on special leave. Mr. Ramakarane then requested a clip and having heard the words uttered, it infringed his dignity and was falsehoods, hence he sought legal recourse. Mr. Ramakarane confirmed that the letter sent to Defendant dated 16 September as appearing on page 93 of plaintiffs bundle and the reply thereto as it appears on page 96. On 24 June 2020, there would have been a Council meeting where he was placed on Special Leave.

[13] Adv. Groenewaldt objected to the use of Annexure "A" as annexed to the particulars of claim. The bone of contention was that the transcription to the English language was not done by a Transcriber, hence the issue of authentication was raised. He argued that the translations used by the Defendant, has a transcription certificate annexed thereto. Adv. Groenewaldt argued that Plaintiff must prove that annexure "A" is admissible and that the translation from the Sesotho language to the English language was done by a qualified translator.

[14] The court upheld the objection and ruled that annexure "A" cannot be used. in the absence of English of the document being

authenticated by a Qualified Translator.

[15] Adv. Ponoane requested for the services of a court interpreter to be utilized, who is employed in the service of the State, in translating from the Sotho version to the English language.

[16] The court allowed for the services of the interpreter to be used. In this instance, a certain Ms. Thembisile Mtwisha (interpreter)

confirmed that her mother tongue is Sesotho and she speaks, write and read the said language.

[17] Mr. Ramakarane further testified that in giving context to the background of this matter, it emanated from a Bid submitted to the Municipality for the construction of VIP toilets. Both the Bid evaluation and the Bid adjudication committee, recommended that TML Civils ("TML") was appointed. When the appointment letter was brought to Plaintiff, all documents relating to the Bid was not submitted to him. He then refused to sign the appointment letter and insisted the documents be brought to him. Plaintiff in turn contacted the Chair of the Bid Adjudication Committee to inform that this is a strange anomaly, that he is just expected to sign the appointment letter, without supporting documents.

[18] The following day all the documents were send to Plaintiff and he saw that the documents were fraught with inconsistencies. An unsigned letter was sent to TML on which basis they approached the court and on Review it was ruled (on 17 May 2019) that TML, should have been afforded the same opportunity, to augment its bid, as Sibamu Building Contractors (Pty)Ltd ("Sibamu").[9]The court further found that Plaintiff's decision to appoint Sibamu, is invalid and unlawful. Further, that the tenders must be evaluated side by side within 30 days, so that any concerns Plaintiff may have about misrepresentations, TML should have the opportunity to respond.

[19] TML on 25 May, withdrew their participation. The Court find that the appointment of Sibamu will stand, if they find validation of fraud or misrepresentation by TML..

[20] The Rescission Application was dismissed on two grounds:

1. Counsel had to Appeal
2. Issues of fraud by TML had been ventilated and is not new, in the rescission application.

[21] Further, that part of the Order made on 17 May 2019, was that Plaintiff acted unlawfully and a punitive cost order was made against Plaintiff, in his personal capacity. Thereafter, the Council sought to place Plaintiff on Special Leave, on the basis of the court judgment. The interview on 25 June 2020, was premised on the Councils deliberations of 24 June 2020. Plaintiff states that despite Defendant's articulation that he is corrupt, dishonest and generally not morally upright, does he have no doubt that he acted uprightly.

- [22] Subsequently, both Directors of TML have been arrested and the matter has been transferred for trial in November 2022. Plaintiff also dismissed the Management Supply Chain involved in the TML case. The three Municipalities confirmed that the completion certificates submitted by TML, was not only fraudulent but the completed work was done by a different Company. The relevant documents appear as from pages 89, 90, 91 and 92. (Exhibit Bundle A)
- [23] Plaintiff testified that nowhere in the Court Judgment is there any implication of corruption made against him.
- [24] Ms. Thembisile Mtwisha was asked to translate from the Sesotho language as it appears in the Sesotho FM Interview with MME Selloane Lephoi (bearing a transcriber certificate) into the English language. She started translating as from page 58 (Exhibit Bundle B) from paragraph 15 and 20. Page 61, paragraph 20, page 63, paragraph 15, page 64, paragraph 5 and 20, page 66, from the first line.
- [25] Plaintiff further testified that that the allegations against him of fraud and corruption were malicious, deeply hurting and wholly untruthful. The words Manyofonyofo means corrupt; Bo menemene means corruption and fraud.

Plaintiff said that certain allegations are vague but the net effect of it all is that it has been demeaning and an encroachment on his dignity. Plaintiff said that paragraph 5 at page 64 refers to a countersuit, which he bears no knowledge of as he has never been sued by anyone for millions. Plaintiff said that he struggles to find any relevance with regard to the Eskom issue, except that what is being said by the Defendant in this regard is derogatory and demeaning. He said that he has never been accused of any cases of fraud pertaining to Eskom or the selling of Sites. To the contrary, Plaintiff has opened numerous criminal cases where Sites were allocated not in line with the law. Plaintiff said that it is his belief that anyone with whistleblowing allegations to come forward and at no stage was he charged.

- [26] On 24 June 2020, Plaintiff was already on Special Leave and suspended in November. In March 2021, Plaintiff obtained an interdict for unlawful suspension and the CCMA made an award and Plaintiff served out his contract until it came to an end on 30 June. Plaintiff states that he has dedicated his entire life to work in public service and he feels aggrieved and humiliated by the utterances made that he is unethical and corrupt. Plaintiff says that no amount of money can undo the harm done to his name but he simply wants redress and justice. He requests a retraction of the statement in the community where it was made and the costs incurred in respect of bringing this application.
- [27] During cross examination, Plaintiff was referred to the letter of demand as appearing on page 93 of Plaintiff's Bundle, where at paragraph 7, the demand is a public apology and an amount of R250

000. It was put to Plaintiff that the main issue is the Review Judgment and he was requested to read the 8 clauses of the said order verbatim into the record. It was put to Plaintiff that in his evidence in Chief, he never said that he "favoured" the Third Respondent. Plaintiff said that when he testified he did not give an annotation of all 8 clauses, but only states what was said in the main.
- [28] Plaintiff conceded that nowhere in the order is he ordered to adjudicate the bids "side by side". Plaintiff conceded that a personal cost order was made against him. Plaintiff conceded as at page 145, paragraph 4, that "... only four
- (4) bids were found to be compliant and proceeded to the next level for functionality scoring. The bid of the third respondent was not among the four". With reference to page 146, paragraph 5, it was put to Plaintiff that he was untruthful, because the BEG[10] and the BAG[11] recommended the bid. Plaintiff replied that he understood. It was put to Plaintiff that paragraphs 7,8,9,10,14,15,16,17,18,19,20,21,24,25,28,
- implies that Plaintiff broke the law and compromised procurement policies to facilitate the success of the third respondent and that means that plaintiff did not act honestly. Plaintiff responded that during Review proceedings you cannot give oral evidence but his suspicions were confirmed by all three (3) municipalities and it was conclusively found that fraud was done by TML. Plaintiff said that on 24 May, TML withdrew from all court processes after plaintiff complied with the court order to invite them to the re-assessment.
- [29] Plaintiff was again referred to page 155-156, paragraphs 28 and 29 and the fact that he did not answer the question whether that was the conduct of an honest person. And further that the cost order against him in his personal capacity, is at the very least indicative of gross negligence. Plaintiff responded: "I see that". Paragraph 32, page 157 was put to plaintiff that he was not bona fide and his behaviour in covering his tracks meant that he did not act fairly. Plaintiff responded: "I see that".
- [30] It was put to Plaintiff that he helped an unresponsive bidder and he was bypassed by BEG and BAG, in his conduct. Plaintiff responded that he does not agree because he is not here to challenge the judgment of Judge Mathebula. Plaintiff maintains that he acted in accordance with the Regulations which empowered him as an accounting officer to refer the matter back. Further that clause 6 of the Order states that once the BEG found that the decision to reject is correct, then the acceptance of the third respondent's tender will stand. Plaintiff states that there is no way that the court would implement something that is corrupt. And subsequently, Plaintiff's suspicions were validated by the three (3) municipalities, which according to Plaintiff vindicated him, in that TML acted fraudulently. Plaintiff says that if the paying of a punitive cost order is the price he had to pay to prevent a fraudulent company from doing business with the State, then he will do it again. Plaintiff concedes that he did not act in accordance with Regulation 14, in giving TML an opportunity. Plaintiff reiterated again that he is not here to deal with the judgment but the allegations made against him in the media, by Defendant, which is spurious.

[31] It was put to Plaintiff that he nevertheless tried to have the judgment of Judge Mathebula rescinded. Further that paragraph 51, page 120 (Exhibit B) states that Plaintiff's success was based on the fact that the wrong Regulation was used, therefore the Court did not say that Plaintiff was innocent. Further that Plaintiff's success in the CCMA was on a technical point and no finding was made on the merits that he was innocent. Plaintiff responded that there was no court finding stating that he was guilty.

[32] It was put to Plaintiff that during the Radio Interview he did not disclose the content of the Court Order fully and that he made it seem all technical and not that he did something wrong. It was put to Plaintiff that he was on Radio to respond to the Court Order but he failed to inform the listeners of the material findings of the court order. Plaintiff responded that he is not here to argue the Judgement and in his view he gave the tenets of the Order namely:

1. That he did not comply with the procurement framework;
2. That despite the punitive cost order, plaintiff has a clear conscious.

Plaintiff says that it is now an undisputed fact that TML did not do work in the three municipalities, and Plaintiff had the Supply Chain Managers dismissed and he will keep fighting those who seek an unfair advantage.

[33] It was put to Plaintiff that despite having a second opportunity to disclose the Court Order, he did not and that he maintained to the public on the airways that his decision was correct, despite the wording of the Court Order. Plaintiff responded that Clause 6 of the Oder meant that his decision stood. Plaintiff said that the R5Million rand that was paid was not an upfront payment but was for material and Site establishment and as it stands, the project was executed and completed. Plaintiff is of the view that had the validation of the fraud on the part of TML been before the Review Court, then a different decision would have been reached.

[34] Plaintiff was referred to the Radio Interview dated the 2nd of October 2020 at page 70 (Exhibit B) at the bottom where defendant gives her definition of corruption. Further at page 72 where it reads "Those are the two definitions that I wanted to give so that listeners can understand when I said that this man is full of corruption in the municipality". In this regard Plaintiff was referred to page 288 which reads: Chapter- Auditor General Audit Findings.

At page 292: 46 Irregular expenditure 2019 2018

41826512: 49 813134

SCM processes and procedures

not followed

71 394 787

Cashiers short banking 1030

[35] Plaintiff said that despite the shortfall of R1030, it does not mean that the money was stolen, only that there was non-compliance. It is fruitless expenditure that is more problematic. Plaintiff says that procurement without inviting bids is not a crime. He said that a finding of criminality must be reported by the AG, which in this instance was never done. When asked to explain the overpayment of 531145, Plaintiff said that there was a historical miscalculation that there was an overpayment and they issued letters that the monies must be recouped. In respect of the Unauthorized expenditure, it is a non-cash item.

44 Unauthorized expenditure 2019 2018

855 835 944 262 833 219

[36] It was put that Defendant will say that places like Zone 8 and ext. 11 in Ficksburg are mostly populated by Lesotho citizens and that they live in the RDP houses. In Site 6, an RDP house was given to a certain Mr Mkampapo, who is a Lesotho National. Also in Zone 8, RDP houses were being occupied by illegal Lesotho Nationals and Zone 8 is said to be the murder capital of the Free State. Plaintiff said that he bears no knowledge and that it has nothing to do with the Municipality. If a Site had to be allocated, then Housing and Human Settlements works in tandem. Further, that (at page 72) Themba Zondo possesses a diploma, whilst someone with a Social Science Degree, was required. Plaintiff replied that a NQ Level 8 = Post Matric qualification, therefore a 3-year degree. When he applied as Director, Zondo had already served as LED Manager and had an NQ Level 7 and an Application for waiver was done and accepted.

[37] It was put to Plaintiff that Defendant will say that everything she said in both interviews are the truth and in the interest of the community. At page 163 it reads "The accounting officer was notified of the material irregularity on 30 March 2021 and was invited to make written submission on the actions taken and those that will be taken to address this matter". The late payment resulted in interest of R2 837 021. Plaintiff conceded that at times they did not pay Eskom on time.

[38] Page 165 is a letter addressed to the Sesotho Local Municipality and page 166 is Plaintiff's response. Page 152 is a Lease Agreement, yet 5.1 reads "The Lease Contract is rent free. in all four units, this is to counter the costs incurred by the lessee for the renovation made on the old post office building prior to occupation". The Lease was for a period of 36 months and clause 5.1 does not set out the renovations that has to be done. Plaintiff responded that they used a derelict building and the lessee had to renovate the building.

[39] It was put that Defendant never used the word "fraud" and that she gave her definition of corruption. Plaintiff said that "bo menemene Manyofonyofo" is a superlative, the extreme.

It was put to Plaintiff that when Defendant used the word "thing" it was used as a filler word and not meant to describe the AG or Zonda. Plaintiff said it is derogatory.

[40] Paka Mavaleliso ("Mr. Mavaleliso") testified under oath that he is employed as the Speaker of the Sesotho Municipality. He confirms plaintiff assumed responsibilities at the Sesotho Municipality as a Municipal Manager in 2018. Mr. Mavaleliso states

that there was turmoil before the Plaintiff arrived, which led to the death of Andries Tatane. The people were fighting due to service delivery issues and Plaintiff was sent to assist with the challenges. Plaintiff was seconded as Municipal Manager and later appointed. Prior to Plaintiff's appointment, in terms of the Audit outcome, the Municipality was on a disclaimer but since his appointment, they had a positive outcome.

[41] Mr. Mavaleliso said that he knows the Defendant as she is a resident of Ficksburg, just like him. She is a person who fights for lack of service delivery in Sesotho and is often on the community radio station. After Plaintiff's contract expired, did he not re-apply and his post was advertised. Defendant was one of the applicants. Defendant did not make the shortlist and a certain Malatjie was appointed. Mr. Mavaleliso states that as Speaker, he was given the list of people who applied. He said that Defendant most of the time made allegations on radio that things had gone from bad to worse, which was totally incorrect. In the respect of the last Audit Report, the municipality improved from a disclaimer to being unqualified. He further said that Plaintiff was totally against corruption and quickly took steps in referring people to the financial board for disciplinary steps. Mr Mavaleliso states that what he knows as the Council about TML, is that Plaintiff brought it to the Council's attention immediately and he was given authority to file a criminal case. The Council were told that the appointment of TML was not properly done.

[42] Mr Mavaleliso said that he is not aware of Plaintiff being involved in "Manyofonyofo" and that such will be a very unfortunate statement against him. If there is a complainant against the accounting Officer, then it must be brought to the attention of the Executive Mayor and the Defendant did not approach the executive mayor, that he knows of. Previously the Municipality had a disclaimer and it improved to unqualified for three (3) consecutive years; 2012-2013; 2014- 2015; 2016-2017.

At some point the Council took a resolution to suspend Plaintiff and they regressed. This year again, the municipality had an unqualified audit.

[43] During cross examination, Mr Mavaleliso said that he was aware of Defendant fighting for a lack of service delivery. He confirmed that Defendant applied for the post in May 2022 but stated that the advert was clear with regard to the requirements and the Defendant did not make the top five. Mr Mavaleliso said that he did not know of any wrongdoing when Plaintiff was Municipal Manager. He said that the Judgment of Judge Mathebula was brought to the attention of the Council but he has not read it recently. It was put to Mr Mavaleliso that what Defendant said on radio was the truth and it was in the public interest to tell the truth as an activist. Mr Mavaleliso responded that some of the things mentioned by the Defendant was simply untrue.

THAT CONCLUDED PLAINTIFF'S CASE

[44] Selloane Elizabeth Lephoi ("Defendant") testified under oath that she lives in Ficksburg and is a business consultant and community activist. She is involved in many Forums and various projects/organisations such as;

1. Chairperson of Ficksburg my home
2. Executive member for Sesotho delivery forum
3. Sechaba Sa Ficksburg

Defendant states that on 25 June 2020 she was on Sesotho FM Radio station. Defendant read page 32 starting from the word "Presenter",

into the record. She confirmed that the Plaintiff was given an opportunity to give his version to the listeners. Defendant then

decided to call in that day, because the community needed to know the truth. Defendant then read page 47, paragraph 30 until page 48, into the record. She said nowhere did she say that the court found the Plaintiff guilty of corruption.

[45] Page 69, refers to the interview on 2 October 2020. Defendant said that she was called by the news producer about a letter she had received. (letter of demand page 93 of Bundle). Defendant read page 70 from paragraph 15 into the record. She said that she gave a definition of what corruption is on page 71, from paragraph 5. At page 72, paragraph 15, Defendant refers to the Auditor General and the findings of the AG on page 288, 291, 292 (Bundle B). Defendant read into the records:

1. Irregular expenditure
2. Unauthorised expenditure
3. Fruitless and wasteful expenditure
4. Shortcomings in 2018 and 2019
5. Procurement without inviting competitive bids
6. Cashier's short banking-under investigation

[46] Defendant in explaining the appointment of Themba Zondo("Zondo") said that the advertisement called for Degree in Social Development or equivalent. When the appointment was done, Zondo did not have a degree, yet he was appointed as Director.

[47] Defendant said that Ole (Power System) page 153, according to the documents is situated in Vanderbilj Park, and Plaintiff said that is his hometown and this company was awarded the job. Further, is the issue with the RDP houses, which should be issued to the poor citizens of the country but when you go to the physical addresses, the house is occupied by illegal immigrants or the landlord of the property is an illegal immigrant and rent is paid to

Lesotho nationals. Defendant read page 74 paragraph 5 into the record. She explained that page 165 refers to an application for a business site and page 166 is the response from the municipality and stated that no tender was issued for sites in Ficksburg, yet the sites are occupied. Page 152 refers to a Lease Agreement and there was no tender process in respect of this lease agreement and it is not known what the value of the renovation is, according to the agreement.

[48] Defendant said that page 85 is the judgment she referred to, whilst on air. She said that she is the one that came to the conclusion that plaintiff is corrupt and not that the court said so. Defendant said that the actual wording is to be found on page 99, paragraph 30 and on page 100, paragraph 32 and 33. Defendant said that the reason for the cost order was for the high-handed manner Plaintiff used and the fact that he downplayed his actions. Defendant said that she wanted the truth to come out. Defendant further read into the records at page 95, paragraphs 21,22,25 and 28 and said all this was never disclosed during the interview on air. Defendant maintained that during both interviews, her words used was the truth.

[49] Defendant stated that the word "nthwena" was used as a filler word, when she could not find the right word.

Defendant conceded that she did apply for the position of Municipal Manager because she could not sit by and let her hometown sink in filth. She said that she did write a letter to the mayor and a meeting was requested where she spoke of the conditions of the roads, water and sanitation. Defendant confirms that she did give a definition of corruption in the interview and the reason she called-in, was because she wanted to tell the community the truth.

[50] During cross examination, Defendant explained that she was the Chairperson of Ficksburg my Home, Spokesperson of Sesotho Service Delivery and a committee member of Seshaba Ficksburg. Defendant said that she was aware of The Prevention and Combating of Corrupt Activities Act 12/2004 (PCCA), however she did not in terms of Section 34 (h) which creates a duty to report corrupt transactions, report anything to the police. Defendant also did not report these alleged allegations of corruption to the public protector. Defendant denied that she went on air at Sesotho FM Radio, to profile herself for personal interest. She however confirms that she applied for the position of Municipal Manger, when Plaintiff did not renew his contract. Defendant said that she holds various degrees and occupied various positions. Defendant said that it makes no sense that she would be fighting Plaintiff simply because he was an outsider of Ficksburg. She said that investors and _roll-players, will come to Ficksburg, having acquired knowledge and skill elsewhere, and if the people of Ficksburg benefitted from them, then there is no problem. Defendant confirmed that she did say that Plaintiff must go home. Defendant said that the problem she had with the company of Vanderbilj, is their performance. The company was supposed to sort out the issues with electricity but it failed to do so and now monies are owed to Eskom. Defendant confirms that she said that this was corruption. Defendant said that she did not report this to the police because she told the people that was being billed that it is incorrect and they should go and report or open a case. It was pointed out to Defendant that this case falls under section

34(h)- that she was the one who uttered the words that Plaintiff is "Manyofonyofo". Defendant conceded.

- [51] When asked why she opted to go on Radio as oppose to reporting this matter to the police, Defendant said that the issue of electricity affected the community and that the people affected by this mismanagement, should go and report. Defendant said that she used the word "corrupt" because whilst being interviewed, the Plaintiff lied on air to the community and he should have said what was in the judgment.
- [52] Defendant conceded that the Letter of Demand came after the 25th of June and that on the 2nd of October, defendant said that she defined corruption to the community and gave examples of what she said. Defendant said that she did not take the AG Report to the police. It was put to Defendant that Plaintiff was brought to Sesotho and improvements was made. Defendant responded that now the sewer overflows, now there are potholes, now the drains are blocked and it gets flooded. It was put to Defendant that the list mentioned is complainants about service delivery and is not corruption as defined by the Act. Defendant said that a failure in service delivery does not happen in a vacuum and that corruption is a pre-cursor to a failure in service delivery for example if funds is not used for infrastructure, that is breaking the law. And if people serve their own interest, there is a relationship between corruption and a failure to deliver services. Defendant said that she is aware that Plaintiff opened a case of fraud and corruption against the TML officials but he did not act immediately, as he only opened the criminal case in 2020, yet the information was given to Plaintiff in
2018. When Plaintiff failed in his court case, he took the information and approached the three (3) municipalities, which was the information he used in his Rescission Application. Only after the Rescission Application was denied, that is when Plaintiff opened the criminal case.
- [53] Defendant said that she stands by her assertion that Plaintiff is doing "Manyofonyofo" (corruption) with illegal immigrants, despite not having reported it. Defendant said that she does not know whether the Plaintiff received gratification from those immigrants. She also does not have information that Plaintiff received money from the company in Vanderbilj or whether Plaintiff received any money or gratification, in the appointment of Zonda. Defendant also do not know whether Plaintiff received money in the allocation of business sites. Defendant said that the AG does not mention that Plaintiff was given money or gratification.
- [54] It was put to Defendant that her accusations of corruption are not based on substance but on false information which is malicious in serving her own interest, to profile her to later apply for that position. Defendant responded that none of the information she provided is false and that she used the English Dictionary in defining corruption, which refers to an abuse of power. It was put to Defendant that she had a duty to report the corrupt activities when she became aware of it, but she failed to report it to the relevant authorities.

[55] Defendant concedes that the Judgment did not find the Plaintiff guilty of corruption because nowhere was the word corruption, used. Defendant concedes that her attorney in response to the Letter of Demand wrote a letter at page 97 (of Exhibit A) stating that "The judgment speaks for itself". Defendant states that Plaintiff is corrupt and she clearly pointed out why, based on the words used by the court, in referring to the position he held. Defendant said that the Judgment says how the laws were broken and how an unresponsive bid became a responsive one. Defendant concedes that Sibamu was ultimately appointed but that was in terms of the remedial action that had to be taken. She says further that the judgment is cast in stone and the court had found then that the appointment of Sibamu was incorrect, hence the personal cost order. Defendant further conceded that the court in its judgment did not use the word "corrupt" but said that the court found that the Plaintiff bended the rules. Defendant based her definition of corruption on the English Dictionary meaning, in that Plaintiff chopped procedures which are clearly outlined. Defendant said that Bo menemene is dishonesty but that-dishonesty is not fraud.

[56] When asked why such a strong word as corruption is used, when Plaintiff is not responsible for the appointment of Directors,

Defendant said that as the accounting officer, he makes the recommendation which council approves or disapproves. Asked what was

corrupt or fraudulent in the response letter (page 166) by Plaintiff, defendant said that the manner in which Sites are allocated is dishonest without tender processes taking place.

[57] When asked how "overspending" amounts to corruption, Defendant said that the expenditure was "unauthorised";

Plaintiff did not follow the law and that is corruption. It was put to Defendant that Municipal Finance Management Act 56 of 2003 (MFMA) would not have allowed for it and Plaintiff would have been jailed for it. Defendant said that because the Defendant did not go to the council, it was unauthorised. Defendant further stated that the AG Report did not make a finding of corruption against the Plaintiff, but the report explains Plaintiff's corruption, which is the irregular expenditure, shortcomings, deviations, cashiers short banking, all which is corruption according to Defendant's interpretation.

[58] When asked what corruption was done by Plaintiff if a tender process was done, in respect of Ole, Defendant said that she has questions about the company's appointment and that the matter is presently with the Hawks. Defendant says that an open process in terms of the bidding could have been done and in respect of Eskom, if the monies collected is not used to pay Eskom, that is dishonesty and a material irregularity.

[59] It was put to Defendant that she has a personal vendetta against the Plaintiff, even writing to the Minister, complaining that Plaintiff's salary was R2M.

Defendant said that in this regard Plaintiff had to pay back R700 000,00 from his own pocket and that Plaintiff's version was contested.

THAT CONCLUDED DEFENDANT'S CASE

- [60] It is prudent for this court at the outset, to deal with the argument raised that Plaintiff failed to prove the Defendant's alleged publications as set out in the particulars of claim. It is indeed so that this court ruled that Annexure "A" to the Plaintiff's particulars of claim, purporting to be the English translation of the Sesotho Radio interview was inadmissible as on the face of it, it did not correspond with the English version, so transcribed by a qualified translator, who affixed a transcription certificate to verify it to be a true and correct transcript of the proceedings recorded.
- [61] However, as argued by Plaintiff, that there was discovery of the Sesotho version of the Radio interview and the English translation has always been a part of the particulars of claim. To this end, Defendant even filed an amended pleaded to this document and Plaintiff has not taken any issue. This court then ruled that the Sesotho language interpreter, so employed by the State, can be utilized to translate directly from the discovered Sesotho version, into the English version.
- [62] The argument that Plaintiff failed to prove the Defendant's alleged publication as set out in the particulars of claim, is not sustained. The principles governing Exceptions to particulars of claim are useful mechanisms to weed out cases without legal merit. These mechanisms were not employed.
- [63] As stated above, Defendant denies that any of the statements made by her during the first and the second discussions were scandalous, false and defamatory of the Plaintiff. Defendant further denies that the statements were wrongful and/or were made to injure the Plaintiff. Defendant specifically pleads that the statements made were essentially true and that the publication of the statements made, were in the public interest.
- [64] Defendant states that the presenter of the Sesotho community radio station was initially in conversation with the Plaintiff. The presenter referred to the judgment and the Plaintiff was granted an opportunity to respond to the judgment on air.[12]To the mind of Defendant is was clear from the first conversation that the Plaintiff failed to convey all the relevant facts to the judgment to the listeners during the interview. Once she heard that Plaintiff did not disclose all the true facts relating to the judgment to the listeners, she decided to phone in. [13]
- [65] In proving her defence that the first and second statements were at least essentially true and in the public interest, this court extensively referred to the judgment of honourable Judge Mathebula, with Judge Murray concurring.

[66] Without rehashing the judgment verbatim, is it so that the court expressed its reservations in relation to the conduct of Plaintiff, in no uncertain terms. The court as an example of its reservation, found that:

"The Plaintiff's conduct was ostensibly not in tandem with the prescripts of law. Plaintiff's failure to comply with the clear provisions of the Supply Chain Management Act and regulations demonstrated that his conduct was unlawful, which renders his decisions irregular and invalid. (paragraph 20) The court held that the arbitrary conduct of the Plaintiff did not measure up to that standard (paragraph 21). The court found that at best, it was an irrational exercise of Plaintiff's mandate (paragraph 21). The court held that the inescapable conclusion is that the integrity of the procurement policies was compromised to facilitate the success of the third applicant in being awarded the tender (paragraph 28). The court held that in the exercise of his duties as the accounting officer of the Municipality the Plaintiff displayed at the very least, gross negligence by ignoring and actively bending the said guidelines and regulations governing matters of that nature (paragraph 31). The court further held that his behaviour was that of a person who utilised his power regardless of and in contempt of the very laws that empowered him to act. He did so without any bona fide reasons and unreasonable perpetrated his improper actions. His behaviour in covering his tracks by providing reasons that were found to be an afterthought points to a person whose commitment to fairness and clean governance is found wanting. This is contrary to the Constitution of the Republic and cannot be condoned by any stretch of the imagination. (paragraph 32).

[67] Even having regard to the personal cost order that the court granted as a significant tool in combating for example ineptitude in government, nowhere in the Judgment as correctly pointed out by the Defendant, has the court ruled the Plaintiff to be Corrupt.

[68] So too, does none of the AG reports state that Plaintiff is Corrupt, despite the Irregular expenditure, SCM processes not followed; Cashiers short banking; Unauthorised expenditure, appointment of Director Zonda, Site allocations; RDP houses being occupied by foreign nationals; late payment of Eskom and Lease Agreement with Ole.

[69] The Defendant wants this court to believe that based on the wording of the judgment and having referred to the atiovementioned, that this clearly points out that Plaintiff is Corrupt, in line with her definition of Corruption as per the Oxford Languages Google Search, thus labelling plaintiff's conduct as dishonest and being an individual who is in a position of power, doing his work in a dishonest or untruthful manner.

LEGAL PRINCIPLES OF DEFAMATION[14] AND APPLICATION

[70] Defamation, can be defined as the unlawful publication of a defamatory statement concerning another statement. Plewman AJ[15] defined defamatory statements as follows:

"...a defamatory statement is one which injures the person to whom it refers by lowering him in the estimation of the ordinary intelligent or right-thinking members of society..."

[71] In the case of *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*[16], the SCA confirmed that the test for determining whether words have a defamatory meaning is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.

[72] The legal principles to be applied were summarised by the Constitutional Court in the case of *Le Roux and Others v Dey*[17]. The CC further stated that:

"In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by persons to whom it was published, whether or not they believed it to be true, or whether or not they thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied." (my emphasis)

[73] O'Regan J in the case of *Khumalo and Others v Holomisa*[18] described the relationship between the right to freedom of expression and dignity and held that although freedom of expression is fundamental to our democratic society, it is not a paramount value. O'Regan said that it must be construed in context of other values enshrined in our Constitution, particularly the values of human dignity, freedom and equality.

[74] The Defendant, just as Plaintiff are no ordinary members of society. They are both intellectually sophisticated and clearly occupy a high standing within the community. The Plaintiff and Defendant was neither remarkably good or remarkably bad witnesses. This court is mindful that to rely on demeanour alone, would amount to a misdirection. Plaintiff correctly points out that it is peculiar for Defendant as a person who holds a position of authority in various organisations, aimed at combatting the lack of service delivery will, if the information at her disposal concretely points to Corruption on the part of the Plaintiff, not act thereupon and report such information, knowledge or suspicions to the relevant authorities. It is the view of this court that the information at the disposal of Defendant and which she relied upon, provided her with no armor, in this connection.

[75] The Defendant conceded that she is the person who came to the conclusion that Plaintiff was corrupt. This conclusion is supported by a statement made in a letter of reply from the Defendant's attorneys, in which the following is states:

"Your office must surely agree that the conduct of the Municipal Manager is suspicious and for a layman, it takes no stretch of the imagination to conclude that he may have been or may still be implicated in criminal conduct"

[76] To the mind of this court, is this exactly the impression that was sought to be implied to the reasonable listeners of Sesotho Community Radio, when the Defendant made the statements of Corruption in the first and second discussion or interview. The fact that

Defendant gave a definition of corruption during the second interview, is of no consequence in light of the fact that the court is not concerned with the meaning which the maker of the statement intended to convey but rather what is expressly stated and also what is implied. In the absence of proof of corruption, is it the view of this court that these utterances or statements of Corruption is defamatory.

[77] This court is mindful that the defences raised, protects freedom of speech and serve the public interest by ensuring that certain kinds of defamatory statement can be made with impunity. In this court's view, the utterances made of Corruption by the Defendant were harmful to the good name and reputation of the Plaintiff and amounted to a violation of Plaintiff's dignity. This court finds that the Defendant has failed to prove on a balance of probabilities that the statement of Corruption made against Plaintiff, on a public platform, namely Sesotho Radio, was true and in the public interest.

[78] Reputation and dignity are discrete concepts. Respect for reputation and dignity of others is a requirement of our law with unfortunate consequences for defaulters. Thus, damages arising from defamation, fall to be awarded to an injured party thereto. In the case of Dikoko[19], the difficulty that courts face when quantifying damages in defamation cases was rationalized in the following terms namely:

"There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the stock Exchange. The true and lasting solace for the person wrongly injured, is the vindication by the court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur..."

[79] Some of the important factors to be considered to determine the quantum in defamation actions, was emphasized in the case of Muller [20], as follows"

"...the character and 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"

[80] Plaintiff is a career public servant, having started as a public prosecutor in September 1988 and occupied various Senior Management positions thorough his career, spanning 34 years. That much was attested to by Mr Mavaleliso, who testified that he was not aware of Plaintiff being involved in Corruption and that such a statement will be very unfortunate. The Defendant attempted to justify her defamatory statements in the way that she orchestrated her defences during tile trial. Notwithstanding a letter of demand, the defendant failed to take any steps to apologize for the defamatory statements made.

[81] This court is mindful that awards generally tend to be conservative because defamation actions should not be embarked upon for the purpose of generating income.

[82] As a general rule, costs are awarded to the successful party.

ORDER

[83] In the result, this court makes the following order in favour of Plaintiff, against the Defendant:

1. That the Plaintiff's claim for damages is granted and Plaintiff is awarded the amount of R350 000,00 (Three hundred and fifty thousand rand only);
2. Defendant is to make an unconditional public apology and it to be broadcasted on the airwaves of Sesotho Radio Station;
3. Defendant is liable for Plaintiff's costs of suit on the scale as between party and party.

AFRICA, AJ

APPEARANCES:

COUNSEL FOR PLAINTIFF: Adv. Ponoane

Instructed by: Ponoane

Attorneys

COUNSEL FOR DEFENDANT: Adv. Groenewald

Instructed by: Symington

De Kok Inc.

- [1] Particulars of claim, paragraph 3.
- [2] Particulars of claim, paragraph 4.
- [3] Particulars of claim, paragraph 5.
- [4] Particulars of claim, paragraph 7.3
- [5] Defendant's Amended Plea, paragraph 4
- [6] Defendant's Amended Plea, paragraph 7.1
- [7] Defendants Amended Plea, paragraphs 8.1 to 8.8
- [8] Plaintiff's written heads, page 3, paragraph 11
- [9] Third Respondent in Case number: 855/2019.
- [10] Bid Evaluation Committee.
- [11] Bid Adjudication Committee.
- [12] Record, Defendant's Trial Bundle, p.32, line 1 to 5.

[13] Paragraph 21, defendant's written heads of argument.

[14] Article by Alisha Naik, published 12 November 2021.

[15] Hix Networking Technologies v System Publishers (Pty) and another 1997 (1) SA 391 (A).

[16] 2004 (6) SA 329 (SCA).

[17] 2011 (3) SA 274 (CC).

[18]

[2002] ZACC 12; 2002 (5) SA 401(CC) (2002 (8) BCLR 771; (2002] ZACC 12) para 25.

[19] 2006 (6) SA 235 (CC} at para (109-110].

[20] 1972 (2) SA 589 (C) at 595.

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