

SOUTH AFRICA / JUDGMENT

Roux v Powell (17499/18) [2019] ZAWCHC 132 (4 October 2019)

[2019] ZAWCHC 132**COURT**

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

17499/18

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IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

CASE NO.: 17499/18

In the matter between:

LYNETTE MARY ROUX Plaintiff And OLIVER MICHAEL POWELL Defendant

JUDGMENT DATED: 4 OCTOBER 2019

LE GRANGE, J:

Introduction:

[1] This is an exception by the Defendant to the Plaintiff's particulars of claim as amended. The Plaintiff issued summons against the Defendant for damages pursuant to an alleged defamation. The plaintiff alleges that the defendant maliciously and intentionally

published defamatory statements about her on the Internet and that, despite demand, he has refused to remove them. She seeks damages and a final interdict, directing the defendant to remove, alternatively, amend what he had published. It is common cause that Gamble J on 31 August 2018[1] granted an interim interdict directing the Defendant to remove his website. In that matter Gamble, J had sufficiently set out the background facts upon which the Plaintiff relied for the interim relief. For present purpose, it only needs to be mentioned that in 2004, the Plaintiff was appointed by the Family Advocate to conduct an enquiry in the context of litigation between the Defendant and the unmarried mother of his son. The Plaintiff filed her report to the court and in 2005, the Defendant laid a complaint against the Plaintiff to the Health Professions Council of South Africa, ("HPCSA") for unprofessional conduct. The Defendant's complaint to the HPCSA took almost 10 years to resolve. The HPCSA in December, 2014 found the Plaintiff guilty of

unprofessional conduct that arose out of her involvement in the Defendant's litigation. The HPCSA decision was subject to an internal appeal and in October 2015, the appeal body set aside the finding of unprofessional conduct and completely exonerated the Plaintiff. The Defendant, in December 2014, however created his Webpage, wherein he published his first post.

Grounds of exception:

- [2] In casu, The Defendant has raised four grounds of complaint namely, that; (i) the first post on the internet is not capable of being interpreted as defamatory in the manner the Plaintiff alleges; (ii) the particulars of claim are vague and embarrassing in that the post was not misleading and or incorrect and that the defamatory statement had been overtaken by events; (iii) there is no allegation in the particulars of claim that the second post was defamatory; and (iv) there is no legal basis for alleging in the particulars of claim that the Defendant was under a legal duty to remove the website.

The Pleadings:

- [3] Having regard to the grounds of complaint, the entire exception falls to be determined by reference to the pleadings as it stands[2]. Moreover, since these are proceedings on exception, the Defendant has the duty as the excipient to persuade the court that upon every interpretation which the plea can reasonably bear, no defence is disclosed and thus bad in law[3]. The publication the plaintiff complains of is pleaded in paragraph 4 of the particulars of claim and reads as follows:

"4. During about December 2014, the defendant:

4.1 created a website with address <https://lynetteroux.wordpress.com> ("the Website"), alternatively caused the Website to be created;

4.2 posted the following comment, alternatively, caused the following comment to be posted, on the Website ("the First Post"):

"HPCSA v DR LYNETTE ROUX. JUDGMENT HANDED DOWN AGAINST DR LYNETTE ROUX ON 08 DECEMBER 2014. DR ROUX WAS FOUND GUILTY OF UNPROFESSIONAL CONDUCT BY THE HPCSA BUT IS TO APPEAL THE JUDGMENT.";

4.3 Created a hyperlink to a copy of the Finding ("the Hyperlink"), alternatively caused the Hyperlink to be created;

4.4 created the following tags, alternatively, caused the following tags to be created ("the Tags"); which promote the Website appearing in the results of the Internet searches containing the word(s) used in one or more of the Tags:

4.4.1 "Dr Lynette Roux",

4.4.2 "Health Professional Council";

4.4.3 "Judgment Against";

4.4.4 “Lynette Roux”;

4.4.5 “Lynette Roux Psychologists”;

4.4.6 Malpractice”;

4.4.7 “Psychologist”;

4.4.8 “Unethical”; and

4.4.9 “Unprofessional”.

[4] In paragraph 6 and 7 of the particulars of claim, it is further alleged that the Defendant established the website with the sole or predominant intention of defaming the Plaintiff and that the post was wrongful and defamatory in that it was and remains

understood by readers of it to demean the Plaintiff’s reputation.

[5] The Plaintiff has also aver in the particulars of claim that the facts set out in the first post became outdated and incorrect by 27 October 2015. The Plaintiff demanded the website be removed. However, despite being aware of the demand the Defendant refused to do so. Instead he posted a second remark on 25 August 2016 on the Website which read as follows.

“The decision was reversed on appeal. A copy of the judgment can be obtained from the HPCSA or Bowman Gilfillan Attorneys.”

Submissions:

[6] The principal argument advanced by Counsel for the Defendant, Mr. D Vitten, was the language of the first and to an extent the second posts, when read by the average reasonably informed internet reader, simply do not hold the meaning contended for by the Plaintiff. It was further contended that the initial post simply makes a qualified report of the finding of the HPCSA, and although it holds propositional content, it conveys no normative meaning on the part of the reporter and therefore, so the argument goes, the impugned statement does not carry any ‘illocutionary force’. For this proposition reliance was placed on the dictum of *Waldis and Another v Van Ulmenstein*[4]. In that matter Davis J, discussed the article that was penned by Prof Anton Fagan[5] wherein the majority judgment of the Constitutional Court in *Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)[6] was criticised.

[7] Davis J, expressed the view that Prof Fagan correctly invoked the approach to speech developed by John Searle *Speech Acts: An Essay in the Philosophy of Language* (1969), in which a distinction is drawn between various forms of speech and, in particular, the emphasis on the importance of what Searle refers to as speech with ‘illocutionary force’. See also John Searle & Daniel Vanderveken *Foundations of Illocutionary Logic* (OUP 1985) in which the concept is developed extensively; and Peter Tiersma ‘The Language of Defamation’ 1988 (66) *Texas Law Review* 303.

- [8] In short, ‘utterances with a professional content but no illocutionary force cannot be defamatory. In other words, the point made is that to defame someone is to make probable one or more of a particular set of consequences by performing conduct of a particular kind or nature (see Fagan at 402)’. Stated differently, speech must contain a specific form of assertion before it can be regarded for the purposes of the law as being defamatory.
- [9] According to Davis J, the concept of illocutionary force must be distinguished from propositional content (or express as a proposition) as, in the former case, the illocutionary force connotes the effect of the words which the speaker intended to convey. As Searle *supra* writes –

‘often in actual speech situations, the context will make it clear what the illocutionary force of the utterances are without its being necessary to make the appropriate explicit illocutionary force indicator’.

- [10] Mr. Vitten, also submitted that all four complaints raised in the exception needs to be considered against the background that the statement(s) complaint of had no illocutionary force. It was further argued that here can be no duty arising in the circumstances of this case where information was imparted through a historical report of the finding of a statutorily created regulatory body, the HPCSA, and the fact that this finding was overturned on appeal. According to Mr. Vitten, the world at large is entitled to receive this information and our Constitution protects this receipt. Moreover, the bland reporting of fact in a public space such as the internet about a professional cannot create or impose a duty upon the defendant to alter the record of what has occurred that exists within the space created by the internet.
- [11] Counsel for the Plaintiff, Mr. Morrisey, submitted that despite the views expressed in the article by Prof Fagan, no issue was taken with the long-established principle that a defamatory assertion need not be explicit, and that an implied assertion is actionable. It was further argued that publication and or posting of the impugned statement(s) complaint of on the internet, in its context, was not bland and or propositional but indeed carried ‘illocutionary force’ and is *per se* defamatory. For this proposition reliance was placed on the dictum in *Hassen v Post Newspapers*[7]. In that case the plaintiff had been pictured in a newspaper adjacent to an article alleging that the person pictured had been charged with an attempt to defeat the ends of justice (the newspaper had intended to picture someone else). In considering the defamatory nature of the article, the court *inter alia* held that:

“On general principles, therefore, it seems to me that it is defamatory to say of a person that he has been, or is about to be charged with a crime, although in certain circumstances a defendant can escape liability for such a publication.”

- [12] Mr. Morrisey further contended that there is no vagueness in the particulars of claim and is the Defendant not embarrassed from pleading. With regard to the second posting, it was argued that the Plaintiff need not to show that every allegation made in a publication is defamatory as her case does not rest on such an assertion and lastly, that the allegation

regarding the legal duty is irrelevant to the Plaintiff's primary cause of action and will only become relevant if the Defendant pleads and establishes a ground of justification for his original post.

Discussion:

[13] In the light of this background and contentions, it is perhaps necessary to deal briefly, with the general principles relating to the law of defamation. It is trite law that defamation is defined as the wrongful and intentional publication of defamatory words or conduct that refers to a plaintiff[8].

'At common law, the elements of the delict of defamation are:

- (a) the wrongful and
- (b) intentional
- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff'

[14] Once a plaintiff establishes that a defendant has published a defamatory statement concerning himself/herself it is presumed that this publication is both wrongful and intentional. A defendant wishing to avoid liability for defamation must raise a defence(s)

which rebuts either the requirement of wrongfulness or intention.

[15] The argument advanced by Prof Fagan and the obiter remarks by Davis, J in Van Ulmenstein[9], are insightful but it is important to consider this case within the prism of the prevailing law and constitutional imperatives[10]. Moreover, Prof Fagan, accepts that 'an assertion can be implied. It can also be made non-verbal such as a cartoon, where its likely effect may have been not to cast doubt upon the plaintiff's moral character, but only to arouse hatred against him/her, or ridicule him/her, or bring him/her into contempt, or even just to cause him/her to be shunned and avoided.' (page 400).

[16] In any event, it is established law that a professional person can recover damages if the impugned article or utterances "touches

him in the way of his calling".[11] The latter position was affirmed by the Constitutional Court and summarised in Dey[12], as follows:

"Examples of defamatory statements that normally spring to mind are those attributing to the Plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct. But defamation is not limited to statements of this kind. It also includes

statements which are likely to humiliate or belittle the Plaintiff; which tend to make him or her look foolish, ridiculous or absurd; and which exposed the Plaintiff to contempt or ridicule that renders the Plaintiff less worthy of respect by his or her peers.”

(Footnotes omitted)

[17] In my view having regard the statement(s) in its entire context, even invoking the concept that it must possessed illocutionary force, remains defamatory of the Plaintiff in its primary sense. The first posting in December 2014 was prominently displayed in large font. Tags were also created promoting the Website. If any person wanted to do internet searching and typed in the certain keyword(s) as stipulated in para 4.4 of the particulars of claim, it will automatically promote the said Website. The first post became outdated and incorrect by 27 October 2015. The Plaintiff demanded the website be removed. Despite the Defendant being aware of the demand and the factual inaccuracy of the first post and having the power to remove it, he refused to do so. Instead he posted a second remark on it on 25 August 2016 where the font was remarkable smaller and different than the initial posting.

[18] In this instance, it is perhaps apposite to repeat what Gamble J, stated in the interim interdictory relief. At para 43, the following was said[13].

“What Mr. Powell (the Defendant) has done is to say in prominent terms that Dr Roux (the Plaintiff) was found guilty of professional misconduct but intends to appeal the finding – no more and no less. What was the point of saying that in the first place if not to portray Dr Roux in a bad light? And, what is the point of continuing to say in 2018 that Dr Roux behaved unprofessionally in 2004 but in 2015 was found not to have conducted herself unprofessionally in 2004, without giving any indication as to what the nature and extent of that alleged unprofessional conduct was, or the basis for her exoneration?”

[19] In my view the reasonable, normally intelligent, right thinking member of society, when he/she reads that a professional person known to them

has been found guilty of unprofessional conduct, - and an appeal is pending- ‘may withhold final judgment but, temporarily at any rate, the news will tend to lower that person in their estimation, and will certainly diminish their willingness to associate with such a person’[14].

[19] There is also no vagueness in the Plaintiff’s particulars of claim. With regard to the second posting, the Plaintiff need not to show that every allegation made in a publication is defamatory as her case does not rest on such an assertion and lastly, I am in agreement with the contention that the allegation regarding the legal duty is irrelevant to the Plaintiff’s primary cause of action. It will only become relevant if the Defendant pleads and establishes a ground of justification for his original post. Moreover, it is in general impermissible to deal with the question of public benefit on exception, as the Court will ultimately be called upon to decide that issue in the light of the evidence led at the trial. The same applies to the alleged truth of a defamatory charge[15].

[20] For these stated reasons I am not persuaded that the Plaintiff's claim against the Defendant is bad in law. It follows that the exceptions to the Plaintiff's particulars of claim cannot succeed.

[21] In the result the following order is made:

1. The exceptions are dismissed with costs.
2. The Defendant is directed to plead within 20 days, after date of this order, to the Plaintiff's particulars of claim.

LE GRANGE, J

[1] Roux v Powell (WCC) Case No 5694/17 31 August 2018 (Unreported).

[2] Baliso v FirstRand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC) at 303D-E.

[3] Ocean Echo v Old Mutual Life 2018 (3) SA 405 (SCA) at para [9].

[4] 2017

(4) SA 503 (WCC).

[5] Fagan: The Constitutional Court loses its (and our) sense of humour: Le Roux v Dey 2011 (128) SALJ 396.

[6] 2011

(3) SA 274 (CC).

[7] 1965

(3) SA 562 (W) at 564D-565E. See also Kemp and Another v Republican Press (Pty) Ltd 1994 (2) SA 261 ECD at 265 D.

[8] See Loubser et al (eds) The Law of Delict in South Africa 2 ed (OUP

2010) at 340. In Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 18:

[9] See ft 4.

[10] See: Le Roux v Dey, ft 6 supra.

[11] Channing v South African Financial Gazette & Others 1966 (3) SA 470 (W) at 476E; see also Hassen supra, ft 7 at 565 G-H.

[12] Ft 6 supra at para 91(c).

[13] See ft 1.

[14] See Hassen v Post Newspapers at 565 C;

[15] See Kemp and Another, *supra* ft 7.

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