

SOUTH AFRICA / JUDGMENT

Schoeman v Rustenburg Local Municipality (1404/2005) [2011]

ZANWHC 97 (13 October 2011)

[2011] ZANWHC 97

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

1404/2005

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NORTH

WEST HIGH COURT, MAFIKENG

CASE NO. 1404/2005

In

the matter between:

JOHAN

JACOB SCHOEMAN

.....PLAINTIFF

and

THE

RUSTENBURG LOCAL MUNICIPALITY

.....DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The plaintiff claims damages from the defendant in the sum of R950 000.00, arising from the publication of an article by the defendant in a newsletter called “Newslink”, during October 2004.

- [2] The plaintiff, in the particulars of claim, alleges that the newsletter was made available to employees of the defendant and to members of the general public, wherein the following words about and concerning the plaintiff appear under the heading, “Progress

report about the dissolution of the Sanlam Provident Fund”, were stated:

“To show that the matter is very serious, Mr S. Gule from Deneys Reitz Attorneys was appointed to guide and assist the Trustees in regard to the whole process of the dissolvment of the Fund, as well as to:

1. investigate the validity/legal status of the provident fund;
 2. to provide the Trustees with a detailed report concerning the alleged maladministration of the provident fund by Mr Johan Schoeman;
 3. to do anything that is coincidental to the above.”[sic]
- [3] The plaintiff alleged that the statement was understood to mean that he was dishonest in his involvement with the administrator of the Provident Fund and had acted dishonestly/improperly with the administration thereof.

B. PLEA

- [4] The defendant in its plea raised two defences, namely, that:

3.1. the Newlink article does not defame the plaintiff;

3.2. the statement is privileged.

- [5] The defendant abandoned the second defence of privilege.

- [6] Although the defendant in its plea denied that the newsletter was made available to the general public and averred that it was made available only to members of the Sanlam Provident Fund, counsel for the defendant, Adv Van As, conceded that Newlink was distributed to persons other than employees of the defendant who were members of the provident fund.

- [7] The defendant in its plea further denied that the plaintiff was never dishonest in his involvement with the provident fund, nor that he was involved with the administration of the provident fund, and pleaded that there were allegations of maladministration at the provident fund by the plaintiff, which allegations the defendant is currently investigating.

- [8] Hence the only issue in dispute and for this Court to decide is whether the statement is defamatory of the plaintiff, and if so, the quantum of damages.

C. THE FACTS

- [9] The plaintiff testified and gave the Court an insight into his career, which started in 1980 as an insurance advisor in Rustenburg.

- [10] The plaintiff is a well-established independent senior financial advisor and has contracts with many insurance companies, such as Sanlam, Old Mutual and Liberty Life.
- [11] He was awarded the prestigious Eagle Award in South Africa, because of his performance in the insurance industry. He is one of sixty people who hold this award in the country.
- [12] The plaintiff has since 1980 been the employee benefit advisor for the defendant. The plaintiff realised that the employees of the defendant in the lower income group were deprived of a group fund cover benefit. He consulted with the defendant about this issue and the defendant requested quotations from both Sanlam and Old Mutual. In 1994, the plaintiff brokered the provident fund catering for the lower income group of the defendant's employees.
- [13] The provident fund was allocated to Sanlam, for which the plaintiff received a commission from Sanlam Life Limited.
- [14] The provident fund comprised life cover and a disability benefit. The employee contributed 7% of his salary and the defendant contributed 2%, which together comprised the total contribution to the fund.
- [15] In addition to the provident fund, the plaintiff marketed a funeral fund also for the lower income earners which was underwritten by Sanlam. The employees' contribution to the funeral fund was R3.90 per month, which covered the employee, the spouse and the children.
- [16] The deduction and payment of the employees' and the defendants' contributions to the provident fund were done by the defendant.
- [17] According to the plaintiff, he was never involved with the administration of the provident fund.
- [18] The plaintiff testified that the provident fund was administered by trustees appointed by the defendant and Sanlam managed the administration of the provident fund in Bellville.
- [19] He testified further that although it was the defendant's responsibility to assist its employees who are members of the fund with the completion and submission of the disability, death and retirement claims, that the defendant would refer its employees to the plaintiff who then assisted the employees with the submission of their claims to Sanlam.
- [20] The plaintiff assisted the employees with their respective claims and charged a fee for this service, because of the time, effort and staff involved and expenses incurred in the completion and submission of the claims.
- [21] The plaintiff disclosed the fact that he charged a fee for submission of the claims to Mr Andries Boschhoff, the former Municipal Manager of the defendant, Ms Saloojee, the chairperson of the trustees and Mr Gerhard de Vries of Sanlam.

- [22] According to the plaintiff, as an independent financial advisor, he has the right to invoice people with whom he conducts business, and that he had a right to charge a fee.
- [23] The plaintiff testified that when approached by members of the fund to complete and submit claim forms on their behalf, he informed them that they can either go back to the Municipality for assistance or if they wanted him to assist them, then he was going to charge them.
- [24] The fee that the plaintiff charged for the completion and submission of their claims varied from R50.00 to R500.00, depending largely upon the nature and complexity of the claim.
- [25] Counsel for the defendant, Adv Van As submitted that there are at least two employees whom the plaintiff assisted with the submission of their claims, who were not advised that they would be charged a fee for the service.
- [26] Adv Van As also submitted that some of the defendant's employees who are members of the South African Municipal Workers Union ("SAMWU") complained to the defendant about the fees charged by the plaintiff for submitting their claims to Sanlam.
- [27] The plaintiff, during October 2003, received a letter from the defendant informing him that the defendant had decided to dissolve the provident fund.
- [28] The article in the Newsletter was published in October 2004.
- [29] The plaintiff testified that during December 2004, one of his clients, one Mrs Laubsher, an elderly lady, telephoned him and said: "Hoekom sien ek jy het geld gesteel". She told the plaintiff that she has a document that says that he has stolen money.
- [30] Mrs Laubsher was neither an employee of the defendant nor a member of the provident fund. The document she was referring to was the article in the newsletter. Mrs Laubsher's deceased husband was in the employ of the defendant during his lifetime and after his death the newsletter was delivered to her.
- [31] When the plaintiff went to the municipal offices to enquire about the article in the Newslink, he saw the Newslink on the table in the reception on the ground floor as well as on the third floor. The newsletter was freely available to all persons visiting the municipal offices.
- [32] The plaintiff testified that maladministration of funds is a serious offence, and to be accused of dishonesty is one of the biggest transgressions in the insurance and financial industry. He could not act on behalf of the defendant as the seed was planted that he does not meet the standard required in financial institutions. This led him to terminate his relationship with the defendant as the defendant's financial advisor. He felt that as a member of the Rustenburg community, working with huge sums of money, he could not show his face at the Municipality and for this reason, he withdrew from the defendant, thereby losing 80% of

his income.

D. THE LAW

[33] The plaintiff, in its particulars of claim, set out the passage from the Newslink which they allege was defamatory, which passage I have cited supra.

[34] This Court is called upon to determine whether the passage is defamatory.

[35] Defamation is the unlawful publication, animus iniuriandi of a statement concerning another person which has the effect of injuring that person in his reputation.

[36] It is a question of law whether the statement complained of is reasonably capable of conveying to the reasonable reader a meaning

which defames the plaintiff. See *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA).

[37] What the Court must determine is the meaning which the reasonable man would give the passage in its context and whether that meaning is defamatory. See *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616; *Botha v Marais* 1974 (1) SA 44 (A) at 48.

[38] The Court is not concerned at this stage with the meaning which the maker of the statement intended it to convey or with the meaning given to it by the persons to whom it was made or whether they believed it.

[39] The question is whether the words are capable of having a defamatory meaning in their ordinary sense.

[40] In cross-examination of the plaintiff, Adv Van As put it to the plaintiff that the words 'maladministration of the provident

fund' refer to the fact that the plaintiff charged a fee for the submission and completion of the members' claims.

[41] Counsel for the plaintiff, Adv Van der Nest, objected to the question on the grounds that the defendant is introducing a new defence.

[42] The objection was overruled and I allowed the question for the following reasons:

42.1. The defendant at no stage admitted that the words were prima facie defamatory and were used in a non-defamatory sense but persisted with their denial that the statement was defamatory. Hence this was not a new defence.

42.2. The defendant pleaded that there were allegations of maladministration at the provident fund which they are investigating.

42.3. It is the plaintiff's counsel, in examination in chief who posed questions to the plaintiff concerning his involvement in the administration of the fund, the rendering of the service and the charging of fees to the members of the fund.

[43] Adv Van As submitted that the use of the words "alleged maladministration" in such sense is not defamatory in that it would not reasonably be understood by the readers of the Newslink article, (i.e. the employees of the defendant) to be a reference to the plaintiff qua administrator of the provident fund but would instead be understood to be a reference to the plaintiff's involvement in submitting

insurance claims on behalf of employees of the defendant and especially those employees who had complained about the plaintiff

charging an administration or handling fee for such assistance.

[44] The article makes no reference to any complaints about the handling or administration fee charged by the plaintiff for assisting members of the fund in processing their claims to Sanlam.

[45] The article in which the statement appears was written with a view to providing the reader of the article with a progress report concerning the dissolution of the fund.

[46] Hence there is no merit in the submission that this statement must be seen in the above context.

[47] Furthermore the defendant did not plead the meaning which it assigned to the statement or the special circumstances on which reliance was placed in support of the non-defamatory meaning.

[48] Adv Van As also submitted that the meaning of the word 'maladministration' as it appears in the Blacks Law Dictionary, 7th Edition, is a reference to inefficiency or poor management and not dishonesty.

[49] Adv Van der Nest provided the Court with a meaning from the Oxford Advanced Learners Dictionary for maladministration as 'poor or dishonest management'.

[50] Other dictionary definitions for the word 'maladministration' are:

50.1. 'Lack of care, judgment or honesty in the management of something'.

the Cambridge Advanced Learners Dictionary and Thesaurus

50.2 'Corrupt or incompetent administration'.

the Merriam-Webster Dictionary

50.3. 'the fact of managing a business or an organization in a bad or dishonest way'.

the Oxford Advanced Learners Dictionary

- [51] It is clear from the above definitions that the word ‘maladministration’ imputes dishonesty.
- [52] Adv Van As also drew the Court’s attention to the fact that the word ‘maladministration’ is prefaced by the word ‘alleged’, and submitted that this is because there would be an investigation into such ‘alleged maladministration’.
- [53] In the Webster Dictionary, second edition, the word ‘alleged’ is defined as ‘declare as if under oath, state positively without proof’.
- [54] Adv Van der Nest submitted that the statement stated positively that the plaintiff is the maladministrator of the fund without any proof.
- [55] In the case of *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) at 564, the Court found that a statement that a man has been charged with an attempt to defeat the ends of justice is defamatory.
- [56] One can equate being charged with an offence to being accused of maladministration. They are both stated positively without proof.
- [57] The fact that the word ‘maladministration’ is prefaced by ‘alleged’ does not detract from the context of the statement, namely, the seriousness of the matter which warrants an investigation and detailed report concerning the alleged maladministration of Mr Johan Schoeman.
- [58] A person’s reputation is injured if the statement tends to lower him in the estimation of right-thinking members of society generally or if it tends to diminish the esteem with which he is held by others. See *Conroy v Stewart Printing Co. Ltd* 1946 AD 1015 at 1018.
- [59] I am of the view that the use of the words ‘alleged maladministration’, taken in the context in which the statement appears in Newlink is defamatory as it affects the plaintiff’s moral character by implying dishonesty which reflects on his profession as an insurance financial advisor. The statement is capable of conveying to the reasonable reader a defamatory meaning.
- [60] In view of the Court’s finding that the statement is defamatory, two presumptions then arise, namely, the publication was wrongful and the defendant acted *animo iniuriandi*.
- [61] The defendant failed to discharge the onus by establishing either some lawful justification or excuse or the absence of *animus iniurandi* on its part. See *Marais v Gronewald* 2001

(1) SA 634 (T); *National Media Ltd v Bogoshi* 1998

(4) SA 1196 (SCA).

E. QUANTUM

[62] An award of damages in defamation actions serves to solace the plaintiff's wounded feelings and not to penalize or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Factors aggravating the defendant's

conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or act as a solatium. See *Esselin v Argus Printing & Publishing Co. Ltd & Others* 1992 (3) SA 764 (T) at 771C–I; also quoted in *Mogale & Others v Seima* 2008

(5) SA 637 (SCA) at 641 [11].

[63] In the case of *Woods v Glenrand MIB Benefits Services (Pty) Ltd & Another* [2010] JOL 25948 (PFA) at page 6, the Court held that maladministration of a fund gives rise to quasi-delictual liability similar to aquilian liability.

[64] Although the plaintiff in its particulars of claim claimed R950 000.00 for damages, Adv Van der Nest submitted that an

appropriate and fair amount of damages is R150 000.00.

[65] Adv Van As submitted that a minimal quantum of compensation in the amount of R20 000.00 should be awarded to the plaintiff for the following reasons:

65.1 The plaintiff has not established nor proven any damages.

65.2. It is the plaintiff who terminated his business relationship with the defendant.

65.3. The plaintiff conceded that he charged an administration fee with the claimants' consent and that at least two employees were charged an administration fee without their consent.

[66] Adv Van der Nest referred the Court to the case of *Buthelezi v Porter* 1975 (4) 608 (W) at 613H, wherein circumstances relevant to the assessment of damages fell into six categories, namely:

66.1 the content of the defamatory notice;

66.2 the nature of the publication;

66.3 the plaintiff's standing;

66.4 the extent of the publication;

66.5 the conduct of the defendant;

66.6 the recklessness of the publication.

[67] These six categories have been particularly useful in assessing the quantum of damages to award the plaintiff.

[68] I have supra, already canvassed categories 66.1 to 66.4, what remains is the conduct of the defendant and the recklessness of the publication.

[69] After the plaintiff learnt of the publication, his attorney sent a letter of demand dated 06 April 2005, to the defendant. In the last paragraph of the letter of demand, the plaintiff requested the defendant to retract the statement in both the newsletter and in the public media within the Rustenburg Municipality area. To date, the defendant has not replied to the letter. No apology was forthcoming.

[70] Further, no one has contacted the plaintiff to investigate the alleged maladministration. Mr Gule from Deneys Reitz Attorneys, who was appointed to guide and assist the trustees and investigate, also did not contact the plaintiff.

[71] It is apparent that the statement was made recklessly without first conducting an investigation into any allegations of alleged maladministration.

[72] In the assessment of damages, I have had regard to awards made in other Divisions in the Republic of South Africa and have also considered the authorities mentioned by counsel in closing argument.

[73] In *Afrika v Metzler & Another* 1997

(4) SA 531 (NM), the plaintiff who was a doctor claimed damages for defamation arising from publication in *Die Akasia Nuus*, wherein the defendant implied, inter alia, that the plaintiff was dishonest and dishonourable, a racist, committed assault and not a law-abiding citizen. The Court awarded

damages in the amount of N\$30 000.00.

[74] In *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others* [2000] ZASCA 77; 2001

(2) SA 242 (SCA), the Court awarded damages in the amount of R30 000.00 for defamatory statement against a senior counsel appearing for an

insolvent during the course of legal proceedings. The Court in determining the quantum considered the senior counsel's seniority, good standing and reputation as an advocate. It also considered that the statement was made in the field in which the appellants' reputation rests. The fact that there was limited publication to a restricted class of persons was a further consideration and that no apology was forthcoming.

[75] In *Young v Shaikh* 2004

(3) SA 46 (C), the defendant made a defamatory statement concerning the plaintiff's integrity on national television. The plaintiff's reputation and integrity was of importance in the plaintiff's profession as an engineer. The defendant offered an apology in the plea and in evidence. The Court in 2006 awarded damages in the amount of R150 000.00.

- [76] The Supreme Court of Appeal in *Mogale & Others v Seima* 2008 (5) SA 637 (SCA) awarded R12000.00 damages for a defamatory article in a newspaper. The High Court had awarded R70 000.00 and the Supreme Court of Appeal held that “too high an award of damages could act as an unjustifiable deterrent to exercise the freedom of expression and might inappropriately inhibit the exercise of the right” at paragraph (9) at 641A–B.
- [77] In *Tuch & Others v Myerson & Others NNO* 2010 (2) SA 462 (SCA), the applicant’s claim arose because of statements made by the respondents that the applicant had misappropriated R5m to R6m of a portion of a partnership and a statement that if he became a shareholder, he would devote his time and energy to creating as much trouble, unpleasantness and problems as possible. The Supreme Court of Appeal at paragraph [19] at 469A–B held that the Court had a wide discretion to determine an award of general damages that was fair and reasonable, having regard to all the circumstances of the case and the prevailing attitudes of the community and held that R30 000.00 was fair and reasonable.
- [78] In an unreported judgment of *Dijkhuizen v Mukhanyo Theological College* 2011 (JDR) 0440 (GNP), the plaintiff, a lecturer had written a letter concerning fraud in the bookkeeping. The board investigated and found that the

plaintiff’s concerns were not warranted and announced at assembly that “the plaintiff’s accusations were false”.

The Court held that the word conveyed that the plaintiff was dishonest and although the words were uttered to a small group that

honesty and integrity are important in the college environment. The Court awarded damages in the amount of R50 000.00

- [79] No two cases are likely to be identical or sufficiently similar so that award in one can be used as an accurate yardstick in other cases. The award in each case has to depend upon the facts of the particular case seen against the background of prevailing attitude in the community. Ultimately a Court had, as best it could, to make a realistic assessment of what it considered just and fair in the circumstances. See *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Others* [2000] ZASCA 77; 2001
- (2) SA 242 (SCA).
- [80] There is a general trend by our Courts in awarding damages of defamation not to be too generous in their awards of solatia, which practice was commended by the Supreme Court of Appeal in the case of *Mogale & Others v Seima* supra at 643 [18].

- [81] For purposes of quantifying the damages suffered by the plaintiff, I had regard to all the circumstances of the case. I have considered the character and status of the plaintiff, the nature of the words used, the effect that the statement is calculated to have upon him as an insurance advisor, the fact that the plaintiff terminated his relationship with the defendant and the extent of the publication, which was limited to Rustenburg and to people who receive or have access to the Newslink newsletter.
- [82] Taking all the above factors into consideration, together with the conduct of the defendant from the time of publication to date and the recklessness of the publication, I am of the view that an appropriate quantum is the amount of R60 000.00.
- [83] Adv van As submitted that had the plaintiff claimed R150 000.00 in the particulars of claim as opposed to R950 000.00, the matter would have been settled and the Court should take this in account when awarding costs.
- [84] I am of the view that there is no merit in this argument as the defendant has persisted with their defence of the matter. Accordingly
- the costs will follow the result.

ORDER

- [1] Judgment for the plaintiff in the amount of R60 000.00.
- [2] The defendant is to pay the costs on a High Court scale.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 25 AUGUST 2011

DATE OF JUDGMENT : 13 OCTOBER 2011

COUNSEL FOR PLAINTIFF : ADV A.C. VAN DER NEST

COUNSEL FOR DEFENDANT : ADV M.J. VAN AS

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