

SOUTH AFRICA / JUDGMENT

S.K.J v P.J and Another (4918/2012) [2016] ZAKZDHC 33 (22 July 2016)

[2016] ZAKZDHC 33

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Masipa

CASE / FILE NUMBER

4918/2012

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 4918/2012

DATE:

22 JULY 2016

In

the matter between: S
K
J.....PLAI
NTIFF
And
P
J.....FIRST
DEFENDANT
DR
PRAVESH
HEMRAJH.....SECOND
DEFENDANT

JUDGMENT

Date delivered: 22 July 2016

MASIPA J:

Introduction

- [1] The plaintiff instituted divorce proceedings against the first defendant and sued the second defendant for damages stemming from an alleged adulterous relationship with the first defendant. The plaintiff tendered to withdraw the claim against the second defendant pursuant to a Constitutional Court decision in the matter of *DE v RH* 2015(5) SA (CC) where the court found that as a result of a change in norms and standards of society, adultery was no longer an offence. Divorce proceedings between the plaintiff and the first defendant were finalised on 1 February 2016 following an agreement between the parties. However, the case between the plaintiff and the second defendant could not be resolved.
- [2] The plaintiff's tender to withdraw the claim against the second defendant was accepted. A notice of withdrawal by consent was filed on 28 January 2016. There was however no tender for costs and the parties sought for this to be determined by the court together with a counter claim for defamation filed by the second defendant against the plaintiff.

The Evidence

- [3] The plaintiff's evidence was that he was married to the first defendant on 13 May 2000 which marriage was dissolved on 1 February
2016. They had a child who was 8 years at the time of their divorce. The second defendant was the plaintiff's general practitioner from when he was 16 years old and also treated members of the plaintiff's family and extended family.

- [4] The plaintiff and the second defendant established a close friendship and lived in the same neighbourhood. The plaintiff helped the second defendant's children with their school projects and with his house and work computer repairs. The plaintiff respected, trusted and looked up to the second defendant who was older than him.
- [5] The second defendant's medical practice is in the old Moss Street, now George Sewpersadh Street, in Verulam, north of Durban. The first defendant used to answer phone calls received on her cellular phone in the plaintiff's presence. This changed in 2009 where she would answer her phone and walk away from the plaintiff. The plaintiff found this behaviour suspicious especially
- when she started coming home late. He was of the view that she was hiding something from him.
- [6] The first defendant was employed in Smith Street, Durban and her working hours were from 08h00 to 17h00. She usually returned home before 18h00, but this changed towards the end of 2009. At that stage, their child was 3 years old. The first defendant's
- explanation for the change was that she was working until late.
- [7] Towards the end of 2009, while the plaintiff was in his workshop at his home, he overheard the first defendant talking to someone on her cellular phone in the nanny's bedroom in a very affectionate manner like a boyfriend and girlfriend would.
- [8] The plaintiff stated that the first and second defendants were friends at the time although there existed a doctor-patient relationship. He inspected the first defendant's phone for messages and calls made or received but found them deleted. He also went through her handbag on 2 February 2011, and he found two Valentine's Day cards but only one was given to him.
- [9] On 15 February 2010 he again went through her handbag and found a female ring wrapped in a tissue hidden inside the bag but did not say anything to the plaintiff. The next day, she told the plaintiff that she had seen a ring which she wanted to buy. A day later, she showed him the ring he had seen in her bag and said she had just purchased it. She took off her wedding band and replaced it with the new ring.
- [10] As a result of this suspicion, the plaintiff installed a tracker on the first defendant's motor vehicle without informing her. The vehicle tracking report covers the period from 23 February 2010 to 11 August 2010 and show that the first defendant travelled from Durban to Verulam and parked at or near Moss Street, where the second defendant's surgery is located.
- [11] The second defendant had two motor vehicle collisions. During this period the tracking device correctly reflected the status of the vehicle and its location. The plaintiff summarised the first defendant's trips to Verulam to be 12 trips spending between 47 minutes to 1 hour 2 minutes.

- [12] The plaintiff and the first defendant visited the second defendant's home. During the visits the second defendant never mentioned that the first defendant assisted his children with their projects.
- [13] It was agreed by counsel for the plaintiff and the second defendant that the cellular phone numbers appearing on the cellular phone account forming part of the bundle of documents correctly reflected the first and second defendant's cellular phone numbers. The plaintiff also compiled a schedule of the phone calls between the first and second defendants. The number of calls made by the first defendant to the second defendant between 1 May 2011 and April 2014 constituted 58,32 per cent of her phone calls. The plaintiff stated that the first defendant occupied a senior position at work and was able to use her cellular phone during working hours. He could not think of any conceivable reason for the regular contact.
- [14] During April / May 2010, there was a disagreement between the plaintiff and the first defendant and out of anger he told the first defendant that he was going to tell her parents about her affair with the second defendant. The first defendant walked away. The plaintiff then reported the incident to her family whom he regarded as their support structure and asked for their help.
- [15] He told the first defendant that he was prepared to work on their marriage for the sake of their child. The first defendant initially challenged him and then became remorseful. During the conversation he undertook not to take the child away.
- [16] After the discussion with the first defendant during 2010, the atmosphere improved for a few months. The second defendant's wife phoned the plaintiff on two occasions. In response to the second defendant's wife's questions, he said that he did not think that the first and second defendants had an affair. This was not true and he did this as he regarded the second defendant as family.
- [17] After four months the first defendant returned to her strange and suspicious behaviour. There was another confrontation on 9 February 2011 about her returning home late. She lost consciousness during this confrontation and he had to get assistance from emergency service to resuscitate her.
- [18] When he took the decision to institute divorce proceedings he informed the second defendant's wife because of their relationship and also because the second defendant was going to be a party to the proceedings. After this the plaintiff continued to live with the first defendant for a year and a half and moved out as their relationship became acrimonious.
- [19] In an email sent to the first defendant dated 24 October 2011 he communicated that there was no possible reconciliation. He sent another email on that day as he was amazed that she had confessed to and then denied the affair.

- [20] It was quicker for the Plaintiff to drive home using the M4 as opposed to driving to Verulam and then to her home. Driving to Verulam first added approximately 15 kilometres to her trip which was unnecessary.
- [21] In respect of the publication of the alleged affair, the plaintiff said that he had only spoken to his mother S B J and S H, the second defendant's wife. He had not spoken to the nursing assistants, Linah Nchamphalala and Sylvia Mtshali.
- [22] After the breakdown of the relationship between him and the first defendant, he went to the second defendant's surgery once with his parents to clarify certain accusations made by the two nursing assistants.
- [23] The plaintiff could not recall any house calls by the second defendant to his family members while the plaintiff and the defendant

lived together. His father had a heart condition during the period of their visit to the second defendant's surgery. He had no comment to the suggestion that the nurse assistants did not say anything out of concern for his father. He was unaware that the nurse assistants had prior to his visit reported their communication with his mother to the police which resulted in statements being made.

- [24] He conceded during cross – examination that he had not witnessed any adultery committed by the first and second defendants.

He also admitted that he was untruthful in his evidence that he had an engineering degree since he had an engineering diploma. He said this was a mistake. He denied the suggestion that he left his employment with Cell C due to allegations of fraud and theft. He agreed that he lied to the second defendant's wife on two occasions.

- [25] The plaintiff was aware that there was a U-Save supermarket on Moss Street frequented by members of the public. There were several destinations that people could go to on Moss Street. While he was married to the first defendant, he never saw the second defendant giving her a present.
- [26] Precious Manqele ('Manqele') testified that she worked for the plaintiff and the second defendant from 2009 to 2011 as a cleaner. During that period, she lived in a caravan outside their house. She used an outside toilet attached to the house. Her working hours were from Monday to Friday 07:30 to 14:30 and 19:00 to 20:00 and Saturday from 07:30 to the afternoon. She left the premises over the weekend. The first defendant allocated her tasks. She confirmed the first defendant's working hours but said that three times a week she would return home late.
- [27] There was a nanny living in the property by the name of Anitha Singh ('Singh'). Singh arrived for work on Sunday evening and left on Friday evening. During Manqele's employment by the plaintiff and the first defendant, the only grocery item purchased by the first defendant was bread. All other items were purchased by the plaintiff.

[28] Manqele knew the second defendant as a family doctor and had also consulted him numerous times. During February 2010, on the birthday of the plaintiff and first defendant's child, Manqele was in the house around 7 a.m. in the kitchen. The first defendant was in the house with the child. Manqele heard the sound of a door suggesting that someone was entering the sitting room. She continued

working.

[29] To clean the bathroom, she had to walk through the passage. When she entered the passage, she saw the first and second defendant in the middle of the passage in a close embrace kissing each other like lovers. Manqele had been in a relationship before and knew how lovers kissed. She could not say for how long they were kissing. She insured that the first defendant saw her and then went out of the house in shock. The first defendant acted like nothing happened and did not say anything, neither did Manqele. Their relationship which had been cordial up to then changed.

[30] She told Singh about the kissing incident and only told the plaintiff about this in 2011. She was dismissed before she could tell him about the second incident. She only told his attorneys about it.

[31] During her employment by the plaintiff and the first defendant, Singh never worked on weekends. They discussed everything and she would have known if Singh worked on Sundays. The birthday party was on a Saturday since Singh was not there. She accepted that the 19th February 2010 was a Friday. She could not recall how old the child was turning. Manqele ordinarily worked until 2 pm on Saturdays but was asked to work overtime on the day of the birthday party.

[32] That day, the plaintiff had left early in the morning to repair an aerial and joined the party on his return. She had not seen him leave. When she heard the door opening it was 7:30 a.m. She had been in the house from 7:00. She did not see the second defendant arrive. She did not wear a watch and used her cellular phone to determine the time.

[33] When she returned to the house after the kissing incident, the second defendant had left. She did not know how long he had stayed for. She did not say anything after witnessing the kiss because she was afraid of being dismissed. She only told the plaintiff about the incident when he asked her about it. If the plaintiff and first defendant were not divorcing, she would not have told him about it.

[34] There was a second incident a few weeks after the first one. She did not know the date for the second incident but said that it was 5 a.m. and she was going to the toilet when she heard the sound of a motor vehicle. The plaintiff had travelled to Johannesburg for work and the first defendant was alone with her child in the house. After hearing the sound, she went around the house to the side of the garage and saw the second defendant's motor vehicle which was turning to the road. She recognised the motor vehicle as that of the second defendant because she had collected medicine from him on previous occasions. There was

no sick person in the house when she went in at 7 a.m. that morning.

- [35] The second defendant drove a small dark grey motor vehicle and not a 4 x 4. She said the second defendant bought the big motor vehicle later. She could not say how long the motor vehicle was there for that morning. Whenever she collected medication from the second defendant, she had to reach out to the car window. She would not have known if someone had arrived in the house the night before. She conceded that the incident occurred during or about the beginning of May. Although the sun was not out at 5 a.m., there was light and the lights outside the house were lit. Despite not recalling the date for the second incident, she said that it had occurred and that her evidence in respect of both incidents was true.
- [36] When she was employed by the plaintiff and the second defendant she was in a relationship with Dan, a gardener from Mozambique. She told them that she was also from Mozambique and only told them the truth after Dan assaulted her. This was the only untruth she told. She left the employment of the plaintiff and first defendant during December 2011 when they told her that they were separating and were going to their respective homes. She went to work for the plaintiff's brother but left due to the heavy workload. She accepted that she had an issue with the first defendant as she believed she was going to dismiss her.
- [37] She attended court as she was asked to and was not promised any payment in return for her evidence. She was to be paid for her lost days of work and for lunch. The plaintiff previously paid for her transport costs from Johannesburg. She attended court on three separate occasions and on the second occasion was given R200 for her lost a day of work.
- [38] When she lived with the Jugernarths, there were lights in front of the garage, next to the gate and an electric pole. These lights were switched on during the night and turned off in the morning. When the second incident occurred the lights were still on. She did not know the number of people who were at the birthday party.
- [39] Ravi Moodley ('Moodley') testified that he is employed by C Track Fleet Management in Durban North as a technical manager and has been in the company for 18 years. He had been living in Durban for 43 years and was familiar with the M4 highway from Durban to La Mercy.
- [40] From Durban to La Mercy there are many shopping centres alongside the M4 highway. He mentioned that those close to the highway included Hyper-by-the-Sea, La Lucia Mall, Gateway and Umhlanga Shopping Centre. Gateway is on the left away from the sea. One could purchase groceries from any of these shopping centres.
- [41] In his position, he has access to software and access to all hardware. He accesses and produces current reports upon request by attorneys. Old reports are requested from Pretoria where the data is kept. He received a request for information on a motor vehicle with registration letters and numbers NJ 33127 during August 2014. Pursuant to that he obtained the information from Pretoria.

- [42] The report which formed part of a bundle is for the period 23 February 2010 to 11 September 2010. The tracking device installed on the motor vehicle provided real time live tracking if anyone wanted to know where the vehicle was. They monitored the vehicle at the client's instance, which in this instance was the plaintiff.
- [43] The device operated with GPS which communicates with a satellite. The device collects the motor vehicle information and communicates it electronically through GPS to a central data base in Pretoria. There were recent developments to the system.
- [44] Moodley received the exhibits as attachments to an email from their support centre which he forwarded to the plaintiff's attorneys. He dealt with client requests on a daily basis. The system was accurate and if there was a query, he investigated it. In respect of live system, if anything suspicious was observed, they called the client and enquired about the cause of the problem. If it was a recovery of a motor vehicle they sent someone.
- [46] The location, date, time, status and position of vehicles fitted with the device are identified through satellite connection with the device. Status identifies whether the motor vehicle engine is on or off. Where the report recorded at or near a specific location, his evidence was that it provided the actual location of the vehicle.
- [47] Where the report stated 'near West Street', he could not say how many metres away from West Street the vehicle was parked. The system identified the closest road to the location of the vehicle. The information is stored in the hub and the system is reliable. They never lost information and retained records, saved and stored them. He certified the information on the report as reliable and correct and was gathered and stored as part of his employers business.
- [48] During cross-examination, he said that the accuracy of the vehicle tracking system never changed. In respect of the 'near West Street' location, he accepted that the phrase placed the vehicle anywhere near West Street and conceded that when the report placed the first defendant's motor vehicle at or near Moss Street, it could have been anywhere near Moss Street.
- [49] In respect of shopping centres between Durban and La Mercy along the M4 highway, he said that he only mentioned those he could recall. Verulam is located north of Durban. He however disagreed when it was put to him that in so far as the report referred to south of Durban it was incorrect. He said the report derived from the map and was correct. He accepted that reference to Durban was in fact eThekwin. In order to fully understand the location, the map had to be used. He said that the machine cannot lie.
- [50] The data collected through the system is archived and extracted on request. He conceded that he did not extract the information

and said it came from the actual system. He did not install the device on the first defendant's motor vehicle and said it was done by their workshop after the plaintiff signed a contract. They did not know who the owner of the vehicle was but knew their client. The report did not identify the driver of the vehicle.

[51] He said on re-examination that an expert was required to explain the location of vehicles. He did not know what the reference point '2.3 South of Durban' meant.

[52] The second defendant's evidence was that he was a medical doctor. He never had a sexual relationship with the first defendant

and never committed adultery. He denied having attended the plaintiff's home on the two occasions referred to by Manqele.

He never owned a small grey motor vehicle, neither did his wife.

[53] He had close family bonds with the plaintiff's extended family as he was their doctor. He and the plaintiff had an excellent

relationship and a close bond beyond that of a doctor and his patient. The plaintiff helped him with computers at his surgery and

during or about 2006 sold him a computer for his home. He had a closer relationship with the plaintiff than the first defendant to the extent that the plaintiff was the listed person on his security reaction records.

[54] The plaintiff went to the second defendant's house approximately four times a month to repair the computer he had sold

to him. They also socialised at his house during the plaintiff's visits. The second defendant's evidence was that he placed a high premise on preserving and protecting family and friendship.

[55] He learnt from his nursing assistants on 7 November 2011 at 16:30, that the plaintiff reported the first defendant's alleged affair to her parents. The nursing assistants told him that the plaintiff's mother went to his surgery on 5 November

2011. He was upset when he heard of that as the information was communicated to him during his consultation. He waited until 17:45 to phone the plaintiff but could not reach him. The reason for the phone call was to discuss the plaintiff's mother's medical results which were concerning and to enquire about the issue raised with him by the nursing assistants.

[56] He left a message on the plaintiff's phone saying that he wanted to see him.

[57] Two days later on 7 November 2011, he was confronted by the plaintiff and his parents at the surgery. He assumed they had come to him for the blood test results but they said they were not. Prior to the plaintiff's arrival at the surgery on 10 November 2011, the two nursing assistants went to the police station and deposed to affidavits. The first defendant was angry and astonished when the second defendant phoned her on 10 November 2011. The plaintiff

confronted the nursing assistants about what was said by his mother about the first defendant's sister.

- [58] The second defendant conceded that the first defendant phoned him about nine times a day. The phone calls were premised on three issues being the stock market, the first defendant assisting his children with their school projects and his activist activity during 2001 – 2008. The plaintiff had requested him to assist the first defendant with the stock market trading.
- [59] From 2009 he collected newspaper clippings on the government's failure to deliver service and corruption. He and the first defendant worked together to ensure that the African National Congress did not achieve the two thirds majority which would allow them to change the Constitution. The first defendant disseminated information by email to church leaders and universities while the second defendant posted it. The information they disseminated was factual with newspaper summaries, date and names. While collating the document, the first defendant went to his surgery to collect newspaper clippings. He did not know the number of times she did this as he did not see her. The clips were left with the nursing assistants to hand to her. The project was discussed openly during the visits by the plaintiff and first defendant.
- [60] He informed his attorneys about the project and documents relating to it were discovered. He said that the plaintiff was vindictive as he knew that there was no relationship between him and the first defendant. He said it was for his advocate to answer why his version on the project, the stock market and the first defendant assisting his children were not put to the plaintiff.
- [61] The second defendant's working hours were from 09:30 or 08:30 to 16:30 or 18:30 when busy. Sometimes the first defendant called him in the evening if she needed to finish an article or required assistance with his daughter. Both the plaintiff and first defendant assisted his children with their projects.
- [62] The first defendant spoke to the second defendant every day. On the days that she managed to see him in the surgery it would have been 16:30. He said that the phone records discovered by the plaintiff were from 2011 while their project commenced in 2009. The first defendant phoned him when she knew that he was not consulting. His wife was aware of the project since it was discussed during visits by the plaintiff and the first defendant.
- [63] The second defendant disputed the version that there was a romantic and sexual relationship between him and the first defendant. The plaintiff's mother told the second defendant's nursing assistants about the adulterous relationship. When a request for further particulars was received by his attorneys asking for the identity of persons to whom the publication by the plaintiff was made, he handed his attorneys affidavits by the nursing assistants. This may have been the reason their names were included on the reply to the request for further particulars. It was apparent that the plaintiff communicated the allegations to his mother who in turn told the nursing assistants.

[64] On Monday 7 November 2011 at about 16:30, Nchamphalala told him that on 5 November 2011, the plaintiff's mother arrived at the surgery around 08:30 a.m. She said that they should stop cleaning and sit next to her. She called the first defendant profanities and said she behaved like her sister who divorced her husband as the first defendant wanted to divorce her son for the second defendant.

She said she was not happy being there and wanted to get another doctor.

[65] The first defendant would also call him on the weekend and would call him when he was with his wife to discuss the stock market. He did not discuss the calls with his wife but said they have an open relationship. The first defendant was doing well with the trading and even used money from there to pay for her daughter's school fees. He had no idea where the first defendant parked when she visited his surgery. He had no idea that his wife phoned the plaintiff.

[66] He accepted that there was a pattern that the first defendant phoned him before 18:00. He said however that they both had family

responsibilities to attend at home during the evening. The first defendant could however phone him in the evening for advice on the stock market of articles relating to the project. The project was not a secret and their spouses knew about it. If the plaintiff did not know, it meant that he was busy with computer repairs.

[67] He alleged that Manqeale told Mtshali that she would be rich after the trial and Mtshali told Nchamphalala. This evidence was challenged as a fabrication since it was not put to Manqeale. She did not inform his attorneys of this and that Nchamphalala could be questioned about it.

[68] He owned two motor vehicles being a Lexus SUV and a Prado. The last time he drove a small vehicle was when he was an intern. The other vehicle which Manqeale could have referred to as small was his C-Class Mercedes Benz.

[69] When Linah Hlengiwe Nchamphalala's ('Nchamphalala') testified, she confirmed the second defendant's evidence. She also said that it was the plaintiff's mother who spoke to the nursing assistants.

[70] Nchamphalala corroborated the second defendant's evidence in respect of the events of 5 November 2011. She also testified that she assisted the second defendant to phone the plaintiff. She confirmed that the plaintiff, his mother and father visited the surgery on Wednesday 10 November 2011. The plaintiff called her and Mtshali to the consulting room where he was meeting with the second defendant since the plaintiff's father was there and had a heart condition. She and Mtshali did not say anything.

[71] Nchamphalala said that she never discussed the incident regarding the plaintiff's mother with the second defendant and did not tell the second defendant's attorneys nor made a statement relating to this. She could not explain how they knew what her evidence would be.

She attended court from the commencement of the trial but had never discussed the matter with the second defendant. He asked her whether Mtshali had called her about issues relating to his surgery. She denied that she wanted to please him or that he could dismiss her for not pledging allegiance with him. She made an affidavit after talking to the plaintiff's mother and posted a copy to her and gave a copy to the second defendant.

Analysis

- [72] It is trite that an act of defamation occurs when a person intentionally infringes upon another's right to good name by wrongfully and intentionally publishing words which have the effect of injuring one's status, good name or reputation. In order for the second defendant to succeed with his claim, he has to therefore prove that the plaintiff published words which were wrongful and intended to injure his status, good name or reputation. It was common cause that the plaintiff published the statements regarding the alleged adulterous relationship between the first and second defendant to the second defendant's wife and to his mother.
- [73] In *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) the court held that in order to succeed with a claim for defamation, a plaintiff must show *animus iniuriandi* i.e. the intention to defame and knowledge of wrongfulness.
- [74] In respect of wrongfulness what must be determined is whether in the opinion of a reasonable person with normal intelligence, the reputation of a person has been injured. See *Tsedu and others v Lekota and another* 2009
- (4) SA 372 (SCA). The determination of wrongfulness is an embodiment of society's *boni mores*. In *Kemp and another v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E), the court held that wrongfulness will be negated if it is proved that the defamatory statements were substantially true.
- [75] The plaintiff concluded from the information available to him that his wife, the first defendant, was having an affair with the second defendant. This was informed by the fact that the first defendant had changed her pattern around him, returning home late, moving away from him when she received phone calls, making countless phone calls to the second defendant and, once he installed a vehicle tracking device on her vehicle, the frequent trips she made to the vicinity of the second respondent's surgery.
- [76] Although the pattern was placed in dispute during the plaintiff's evidence, it became common cause that there were excessive interactions between the first and second defendant. The second defendant in his evidence sought to justify these interactions by introducing versions which he had not put to the plaintiff. The second defendant conveniently remembered that it was the plaintiff

who during one of their family visits requested him to teach and assist the first defendant with trading and that the discussion on his other project and the first defendant's involvement were discussed during one such meeting. He could not explain why these were only raised during his own case.

- [77] It is apparent from the evidence that as a consequence of the plaintiff's suspicions relating to the affair between the first and second defendant, which were reasonable considering the circumstances, his relationship with the first defendant disintegrated. He discussed his suspicions with his mother. This was the first publication which the second defendant is aggrieved from. Can it be said that by discussing this issue with his mother, the plaintiff intended to injure the second defendant's status or reputation?
- [78] The second defendant was the plaintiff's family doctor, as well as that of his parents, for several years. Although this was not specified, they must have held him in high regard. The plaintiff was, however, having a discussion with his mother about an issue which involved his marriage and which had the capability of bringing it to an end. His mother would have had an interest in the issue and reasons thereof. It cannot be said that the alleged affair was disclosed to injure the status or reputation of the second defendant. This was clearly done for the plaintiff's mother to understand why his marriage was disintegrating.
- [79] The evidence of Nchampalala reveals that it was the plaintiff's mother and not the plaintiff who informed her about the alleged love relationship between the first and second defendant. The plaintiff cannot be held liable for this publication since he had confided in his mother. If the second defendant wished to pursue a claim based on the publication to his staff members, he ought to have instituted a claim against the plaintiff's mother or joined her as a party to these proceedings. In the absence of this, the evidence in respect of the publication to the staff members is irrelevant to the plaintiff.
- [80] The second publication is that made to the second defendant's wife. The plaintiff's evidence was that he informed her of the alleged affair when he contemplated instituting legal action against both the first and second respondent. This was because he intended suing them for adultery. As mentioned earlier, the adultery claim was initiated and then withdrawn following the Constitutional court judgment. When he spoke to the second defendant's wife, the decision of RH v DE 2014
- (6) SA 436 (SCA) was not yet determined on appeal. He believed therefore that he had a case to pursue.
- [81] It is common cause that the plaintiff's family and that of the second defendant were friends who visited each other often. The second defendant's own evidence was that the plaintiff was even registered as an alternative contact person with his security company. The plaintiff's explanation was that he told the second defendant's wife about the alleged affair between their respective spouses due to their close friendship. He did not want her to be taken by surprise. Whatever the reason, the plaintiff published information relating to the second defendant to a third party even if she is his wife.

[82] In *Whittington v Bowles* 1934 EDL 142, the court found that communication of words to a spouse of the plaintiff or defendant would not in law constitute publication.

[83] Analogous to the publication to the plaintiff's mother, the question is whether in publishing the words, the plaintiff had any intention to injure the second defendant's status or reputation. No such intention was proven. The only version providing

reasons why the words were said is that which was provided by the plaintiff. In the absence of evidence to the contrary, I have to accept the plaintiff's version that he discussed the alleged affair with the second defendant's wife as a matter of courtesy. Once this is accepted, it cannot be said that there was any intention to injure the second defendant's status or reputation.

[84] *Hefer JA in National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) found that the general criterion of reasonableness is based on consideration of fairness, morality, policy and the court's

perception of the legal convictions of the community. Therefore, courts must in each case determine whether public and legal policy

require particular publication to be regarded as lawful.

[85] In *RH v DE* the court held 'that in the light of the changing mores of our society the delictual action based on adultery . . . has become outdated and can no longer be sustained - that the time for its abolition has come.' The Constitutional Court in *DE v RH* found that the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim. It is therefore not reasonable to attach delictual liability to such an act and that is what public policy dictates.

[86] The plaintiff believed that an adulterous relationship existed between the first and second defendant. On a conspectus of the

evidence, the plaintiff's belief was reasonable. The second defendant denied the existence of the relationship but could not during the plaintiff's case proffer an explanation of the countless and excessive phone calls and visits between him and the first defendant. He only tendered an explanation during his own case as an afterthought and an attempt to sustain his version to refute the relationship.

[87] In determining the defamatory nature of a statement, the question is whether the words complained about are reasonably capable of conveying to a reasonable person a meaning which defames plaintiff. (See *Le Roux and others v Dey* 2010(4) SA 210 (SCA))

[88] Even if the plaintiff's belief was wrong, in view of the decision of *RH*, public opinion no longer considers adultery a taboo. In view of this, a statement to the effect that a person committed adultery can no longer convey a meaning with the propensity to defame a person. A shift in the *boni mores* of society in respect of adultery negates the defamation claim of the second defendant.

[89] The second defendant had a duty to prove that his reputation was indeed injured as a result of the plaintiff's conduct. No such evidence was led. The court cannot assume that because words or statements were made an injury occurred. In the absence of evidence regarding injury to the second defendant's good name, reputation and status, there is no case made out to prove defamation. In any event, society no longer views such conduct with disdain. It can therefore not be said that a statement that someone committed adultery has the effect to injure the reputation, status and good name of the second defendant.

[90] In respect of costs, when the Plaintiff withdrew his adultery claim, the second defendant ought to have foreseen that the foundation on which his case was based ceased. Therefore, he should not have pursued his defamation claim. In any event, the norm is that costs follow the result. The second defendant must as a consequence bear the costs. On the other hand, the plaintiff's decision to withdraw his adultery claim was as a result of the change in the law relating to such claims. Had there not been this change, it was submitted that he would have pursued his claim and had a prima facie case. Indeed on the evidence led I am of the view that he presented prima facie evidence in support of this. I see no reason why he should be held liable for any costs.

[91] In the result, the following order is made:

1. The plaintiff claim against the second defendant is withdrawn with no order as to costs.
2. The second defendant's counterclaim is dismissed with costs.

MASIPA J

APPEARANCES:

For the Plaintiff: Adv P Haasbroek

Instructed by: Richard Evans & Associates

For the First Defendant: Adv Dayal

Instructed by: B E S Agar & Associates.

For the Second Defendant: Adv JBG Wolmarans

Instructed by: Jeff Fobb.

Matter heard on: 1 – 5 February 2016

Judgment

delivered on: 22 July 2016

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