

SOUTH AFRICA / JUDGMENT

Thaba v Haffajee and Another (49831/11) [2016] ZAGPPHC 3 (5 January 2016)

[2016] ZAGPPHC 3

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

49831/11

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 49831/11

5/1/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

JOHN
THABA PLAINTIFF
and
FERIAL
HAFFAJEE 1ST
DEFENDANT
NEWS24 2ND
DEFENDANT

Coram:

HUGHES J

JUDGMENT**HUGHES J**

[1] The plaintiff's action against the defendant's is for damages arising from deformation. The defendant's having published a defamatory

article about the plaintiff on 11 January 2011 in one of its newspapers, the City Press, which is widely read and distributed in

South Africa.

[2] The plaintiff alleges that the article so published was wrongful and defamatory. At the time that the article was published, the plaintiff was a councillor for ward 60 of the Ekurhuleni Metropolitan Municipality. As a result of the publication he was withdrawn as a candidate for re-election as a councillor.

[3] The plaintiff pleads that the defendants were aware or ought to have been aware that the publication of such untruth and defamatory

remakes would result in the plaintiff being withdrawn as a candidate or that it would lead to the public questioning his integrity and sincerity.

[4] There were two claims by the plaintiff. The first being a claim for special damages, in the amount of R1,2 million, under the Aquilian action, for loss of earnings and the second claim was for general damages of R200 000.00, under the actio iniuriarum for defamation.

[5] At the close of the plaintiff's case the defendant's sought absolution from the instance which was granted in respect of the

claim for special damages. The reasons for the granting of absolution are incorporated herein below.

[6] The article that the plaintiff places reliance upon, that is untrue and defamatory, is set out below as per paragraph 5 of his

particulars of claim:

"Community members are up in arms in ward 60 Katlehong, Ekurhuleni, over claims that Councillor Thaba gave out chicken packs, money and alcohol to win votes in Sphamandla infonnal settlement. At least eight community members confirmed the chicken bribe claims... A community member warned that councillors are taking advantage of poor people. After Sphamandla residents were fed on the evening of

January 8, they were then transported in a truck to a local school where they voted in favour of Thaba, said a source."

- [7] The defendants have admitted that the article in question contains defamatory allegations and accepts that it bears the onus to show that the publication of the defamatory article was not wrongful.
- [8] In dealing with the claim for special damages, the plaintiff testified that he was in fact the chairperson for the African National Congress (ANC) of ward 60 and a councillor of that ward. At that stage he earned a monthly salary of R25 408.00 which was paid by the municipality. He saw the article on the front page of the City Press on Sunday 30th January 2011. He testified that he was angry about the publication to such an extent that he could not even chair a meeting that was scheduled for the same day as the publication. In addition his colleagues made inquiries from him as regards the article at this meeting.
- [9] He testified that on 28 January 2011 he had received a call from a journalist who asked him to comment about the allegations that he had supplied voters with alcohol, chicken and money for them to vote in his favour. Though the person who called advised that he was a journalist he was not sure whether it was the author of the article published on 30 January 2011.
- [10] Mr Thaba was removed as a councillor on 18 May 2011 and has not been employed as such since his removal. He believes that his removal came about as a result of the fabricated allegations in the article. The removal of him as a councillor has now left him in the position of just an ordinary member of the ANC.
- [11] He further, testified that the "damages done to him are such that he will not be in active politics any longer". He stated that because of the article the ANC will not revisit his position as an ordinary member.
- [12] With regards to the timing of his removal as a candidate for re-election as a councillor he testified that he was removed after
- the screening committee had convened. He confirmed that he it had been this committee that had recommended his removal as a candidate
- for re-election as a councillor.
- [13] In cross examination, it was pointed out to him that the screening committee had met at 4pm on 27 January 2011 when the decision to remove him was taken. This was prior to the article been published on 30 January 2011. When this was put to him the plaintiff advanced no comment.
- [14] In the plaintiffs pleadings the case made out for special damages placed reliance on two articles, the one mentioned above of the 30 January 2011 and another of 20 March 2011. The later article deals with the allegations that he was removed as a candidate for re-election as a councillor, the caption of the article reads "Chicken man axed from ANC". The plaintiff states that this publication was also untrue, wrongful and defamatory as it leads a reader to believe that he was allegedly buying votes (which is contrary to ANC policy) and by doing so

he was exploiting the poor for his own selfish needs. Further, that he was a cheat and corrupt.

THE SPECIAL DAMAGES CLAIM

[15] In *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011(5) SA 329 (SCA) at para [10], Brand JA sets out how a claim for special damages ought to be couched:

"[10] The respondent's contention was that, although its claims for both special and general damages were couched in the form of a defamation action, its claim for special damages contains the four well-known elements of an Aquilian action, namely, (a) a wrongful act or omission, (b) fault (in the form of either *do/us* or *culpa*), (c) causation and (d) patrimonial loss. In support of this contention, which found favour with the court *a quo*, the respondent referred to allegations in its particulars of claim that the publication of the professed defamatory article was intentional and wrongful and that the respondent suffered the damages claimed as the result of that publication."

[16] On the pleadings alone the plaintiff has not made out a case in line with that required in an Aquilian action. He has not in any way set out the facts that he places reliance upon to demonstrate any of the elements mentioned above. See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para [2]:

"...The case does not therefore have to be decided on bare allegations only but on allegations that were fleshed out by means of annexures that tell a story. This assists in assessing whether or not there may be other relevant evidence that can throw light on the issue of wrongfulness. I mention this because, relying on the majority decision in *Axiam Holdings Ltd v Deloitte & Touche*/ the plaintiff argued that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact bound. That is not true in all cases. This court for one has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are *Lillicrap*, *Indac* and *Kadir*. Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation."

[17] In the pleadings and the evidence adduced by the plaintiff, in my view, the plaintiff has failed to set out or even prove causation, as he alleges that the defamatory publication was the reason for his removal as a councillor. In the circumstances he has not succeeded in demonstrating his claim for patrimonial loss of income as a councillor.

[18] This is especially so if I take into account the fact that the decision of removal of the plaintiff's name as a candidate for

councillor took place prior to the article being published. Thus, the article could not have been the cause of him being removed as a councillor. The screening committee had taken this decision on 27 January 2011 and as at then would not have had any knowledge of the article that was only published on 30 January 2011.

- [19] As the article was not a sine qua non for the removal of the plaintiff as councillor and no evidences, whatsoever, has been adduced by the plaintiff, for me to come a conclusion otherwise and find in favour of the plaintiff. The plaintiff has failed in his pleadings as well as in his testimony to make out a case for the special damages.
- [20] In the result I am not convinced that there is any evidence before me upon which, if I applying my mind reasonably to such evidence, might lead me to finding for the plaintiff. See *Claude Neon Lights (SA) Ltd v Danie/1976 (4) SA 403 (A)* at 409G - H. Thus in the circumstances absolution from the instances is granted.

THE DEFORMATION CLAIM

- [21] Turning to deal with the claim for the defamatory article the parties are ad idem that the article does in deed contain defamatory allegations. However, the defendants aver that the article was not wrongful in the circumstances. The defence raised by the defendants is that the publication was reasonable in the circumstances.
- [22] The onus rests with the defendant to show this reasonableness and I now deal with the evidence adduced by the defendants.
- [23] The author of the article, Cedric Mboyisa, testified for the defendant. He stated that the climate within in which the article was written was political as it was during highly contested local municipal election. The plaintiff was one of the contenders, ANC chairperson and a councillor. He obtained a tip off from his 'sources' and acted upon it by going to ward 60 to verify that

information obtained from the source.

- [24] He testified that during the course of him verifying the information obtained from his source he interviewed members of the community of ward 60 and spoke to, Brian Sokutu, the ANC spokesperson about the allegations that had been made. In his discussion with Mr Sokutu, he was advised by Mr Sokutu that "if these claims are brought to our attention we should be able to investigate them." He further attempted, telephonically, to obtain a comment about the allegations from the plaintiff himself before he wrote and published

the article.

- [25] The plaintiff refused to comment regarding the allegations of him having given member of Sphmandla informal settlement chicken, alcohol and money in exchange for voting support. Mr Mboyisa's evidence is that the plaintiff knew that he was speaking to a journalist when the comment on the allegations was sought. He had not in any way denied or disputed the allegations that a comment was sort. Instead it emerged during the plaintiffs evidence that he expected Mr Mboyisa to rather seek an audience with him, in person, to discuss the allegations.

[26] Mr Mboyisa even further, in that, he went to the store where the chicken had been allegedly purchased and confirmed with an employee of the store, that indeed all the chicken in the store had been purchased by a group of people, which was a first for the store.

[27] In dealing with the plaintiff's claim for general damages I am mindful of the dicta of Brand JA set out in *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* supra at para [21]:

"As appears from these judgments, the underlying reasoning went along the following lines: defamation derives from the *actio iniuriarum*. This Roman remedy was available not to recover economic loss, but for the protection of personality rights consisting of physical integrity (*corpus*), dignity (*dignitas*) or reputation (*fama*). In the same way as a corporation has no *corpus*, it can have no *dignitas* nor *fama* in the sense of a personality right. What it can have is a reputation in the sense of 'goodwill'. But that reputation is not a personality right. It is an integral part of the corporation's patrimony. Damage done to the reputation could therefore constitute a patrimonial loss for which compensation could be claimed under the *actio legis Aquiliae* and not the *actio iniuriarum*." [My emphasis underlined]

[28] The defendant raises the defence of reasonableness of the publication and reliance is placed on that stated in *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212:

"In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication

account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper."

[29] The defendant's argues that as the publication involved the media as a defendant and a politician being the plaintiff, the defence of reasonableness can be raised. The defendant further argues that it is afforded both the media privilege and the political privilege, as both are in existence in this case. In these circumstances more latitude is granted as long as the defendants do not lower the standard of care when writing and publishing such articles. See *Mthembi-Mahanyele v Mail Guardian Limited* 2004 (6) SA 329 (SCA) where Lewis JA had the following to say about politics, politicians and political privilege:

'[65] Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: it is one of the founding values expressed in s 1(d) of our Constitution: 'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness' (my emphasis). And see further s 92(3)(a) read with s 195 (1)(a) to (f) and s 195(2) of the Constitution which govern the basic values and principles of public administration. In *Holomisa* Cameron J said: 'Our constitutional structure seeks to nurture open and accountable democracy. Partly to that end, it encourages and protects free speech and expression, including that practised by the media. If the protection the Constitution affords is to have substance, there must in my view be some protection for erroneous statements of defamatory fact, at least in the area of "free and fair political activity".'

[30] It is trite that in considering the defence of reasonableness regard needs to be had of the interest of the public, the nature, extent and tone of the allegations, the nature of the information upon which the allegations are based, the reliability of their source, the steps taken to verify the source, the opportunity given to the person concerned to respond and lastly the need to publish before establishing the truth of the content in a positive manner. See *National Media Ltd & Others* supra at 1212H- 1213C.

[31] Did the publication have to be published as and when it was without positive establishment of the truth of the contents?

[32] The defendant responds in the affirmative and to this end explains that the climate at the time was of local municipal elections with the allegations made pertaining directly to these elections. The public in that climate had a right to know of the manner in which one of its candidates, being a chairperson of the ANC and prominent figure, was obtaining voter to vote for him.

[33] The ANC spokesperson, Brian Sokutu, had been advised of the allegations and had promised to look into the allegations if such

claim was brought to their attention. Which they did, if one takes into account that the plaintiff was eventually removed as a

councillor and is now merely an ordinary member of the ANC.

[34] In conclusion of this specific aspect, it must also be remembered that Mr Mboyisa makes it clear from the outset that these are "allegations from community members" and he did not make them out to be the truth.

[35] With regards to the source of the information, Mr Mboyisa testified that he received a tip off from his source however allegations were corroborated by the information from the different community members themselves that he had interviewed. As stated above he even went so far as to verify the purchase of the chickens. The manner, in which he went about dealing with the information, the source, the community and the employee at the store, to my mind, is in tune with keeping the standard of care as regards the source and its reliability in check.

[36] The plaintiff testified that he was asked to comment on these allegations but declined to do so. On the other hand the defendants

states that the plaintiff was angry and said it did not matter if the allegations were published as he would win anyway. In the

circumstances, in my view, it matters not which one of the two scenarios are accepted, the fact remains that the plaintiff was given an opportunity to comment and failed to do so, at his own peril.

[37] I agree with the defendants that it is evident from the article published that these are merely allegations made by the community

members and are not conclusive. These allegations were still open to robust debate in the specific climate that prevailed at the time that they were published. Therefor the tone, in my view, was in line with the prevailing climate of local municipal elections.

[38] Lastly, the plaintiff has not dispelled these allegations and that the defendants view as being reasonably true. This is further

compounded by the fact that in the trial the plaintiff was unable to even advance a response when asked 'what more did he expect of the defendants prior to them releasing the article so published'.

[39] In the circumstances set out above I find that the defendants have succeeded in demonstrating that the article so published was not done wrongfully and that it was reasonable to publish the allegations at that particular time and manner. The plaintiffs claim for general damages must fail.

[40] Consequently the following order is made:

[1] The plaintiff's claims for both special damages and general damages are dismissed with costs on a party and party scale.

W. Hughes

Judge of the High Court

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