

SOUTH AFRICA / JUDGMENT

Tshivhase v Nel (38617/2011) [2014] ZAGPPHC 16 (11 February 2014)

[2014] ZAGPPHC 16**COURT**

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

38617/2011

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****Case number: 38617/2011****Date: 11 February 2014**

In the matter between: NA TSHIVHASE.....Applicant
 And
 JA NEL.....Respondent

JUDGMENT**PRETORIUS J.**

[1] This is an exception against averments in the plaintiff's particulars of claim. The plaintiff instituted action against the defendant for payment of damages in the amount of R300,000.00 plus costs based on an alleged defamatory remark.

[2] This remark was contained in a replying affidavit which the defendant deposed to in pending litigation. The pending litigation is

proceedings instituted by Ivubu Investments (Pty) Ltd and Siyaya Mining (Pty) Ltd (in liquidation). Mr Theo van der Heever is one of the appointed liquidators of Siyaya. The applicant is the managing director of Ivubu.

[3] The defendant averred in the particulars of claim:

"The second respondent (Mr Theo van den Heever) and Mr Tony Tshivhase, the attorney of record for the respondents (previously IDC's executive vice-president) have a reputation for hi-jacking liquidations."

- [4] The plaintiff alleges that the statement by the defendant is wrongful and defamatory. If the plaintiff wants to rely on innuendo in this application the plaintiff has to set out the defamatory sense attributed to the words and allege that the plaintiff intended to attach a certain meaning to the words in such a way that a person who reads the pleadings will so understand it. This is not the case in the present matter as innuendo was not pleaded.
- [5] The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the pleading. The court has to conduct a two stage enquiry to decide whether the words used in the pleading are defamatory. The first is that the natural or ordinary meaning of the words should be established. According to The New Shorter Oxford Dictionary the word "hijack" means:
- "Steal (goods, formerly spec, contraband etc.) in transit; seize control of (a mean of transport, as, a lorry with goods, an aircraft in flight, etc.) by force; reroute (an aircraft etc.) to a new destination in this way. "*
- [6] The objective question at exception stage is whether the word complained of in pleadings are reasonably capable of conveying to the reasonable reader, with average intelligence and knowledge, that the applicant is defamed.
- [7] The plaintiff's case is that the statement is per se defamatory. According to the plaintiff it was understood by the plaintiff and all parties having sight of the affidavit that it was intended to mean that the plaintiff, as a senior attorney and businessman of standing, was dishonest, that he acted contra bones mores, that he would unlawfully interfere in the administration of justice in regards to insolvent estates and that the plaintiff is not a fit and proper person to act as an attorney.
- [8] In *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 AD the test was confirmed by Corbett CJ at p 20 E - G:

"...the test as to whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff (see at 767E-F). This is unquestionably the correct approach and, as this formulation indicates, the test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply. "

- [9] The court has to take into consideration as to what the words imply. However it was emphasized by Corbett CJ:

“that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be attributed to the words used only by the hearer having knowledge of special circumstances.”

[10] The ordinary meaning of the words, according to the plaintiff, would be that the liquidation process instituted under auspices of the Insolvency Act has been unlawfully and illegally seized by the plaintiff for his own purposes. It is quite clear that “hijack” is a metaphor in this instance and cannot be understood literally.

[11]The plaintiff alleges that the word “hijack” in this context implies an element of dishonesty, underhandedness, unprofessional conduct or unlawful interference.

[12] The court was referred to *Sachs v Werkerspers Uitgewers maatskappy Bpk* 1952 (2) 26 WLD, but it is distinguishable from the present matter, as in the *Sachs* case the court had to deal with the question of innuendo as well, which is not applicable in this application.

[13] The court must take cognisance of the fact that a liquidation entails a series of actions taken, with numerous checks and balances, which is performed under the direct supervision of the Master, which is eventually sanctioned by a court of law. It is not possible to obtain liquidation by force. The only manner which a liquidation can be awarded to a liquidator is through appointment. This, in turn, means that a liquidator will be appointed if he works hard and diligently.

[14] This court cannot find that the implied meanings, as set out by the plaintiff, can be implied from the words used and the plaintiff

therefor has to fail.

[15] Due to the fact that the plaintiff does not rely on innuendo, the court does not have to deal with it.

[16] I have considered all the arguments, pleadings and case law referred to. The court finds that a reasonable person of ordinary intelligence

who reads the word complained of will not find that it conveys a meaning defamatory of the plaintiff.

[17] The following order is made:

1. The exception is upheld with costs;
2. The plaintiff is ordered to remove the cause of complaint by amending his particulars of claim within 10 days of this order;

Judge C Pretorius

Case number : 38617/2011

Heard on : 3 February 2013

For the Applicant / Plaintiff : Adv Smit

Instructed by: Cliffe Dekker Hofmeyer INC.

For the Respondent : Adv Rossouw SC

Instructed by: Jaco Roos

Date of Judgment : 11 February 2013

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