

SOUTH AFRICA / JUDGMENT

Van Der Westhuizen v Ntshabele (2014/27063) [2015] ZAGPJHC 51 (20 March 2015) [2015] ZAGPJHC 51

COURT

South Gauteng High Court, Johannesburg

BEFORE

P Boruchowitz

CASE / FILE NUMBER

2014/27063

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2014/27063

DATE: 20 MARCH 2015

In the matter between

NADIA VAN DER WESTHUIZEN.....PLAINTIFF

And

MORGAN MOTLOGELWA NTSHABELE.....DEFENDANT

JUDGMENT

BORUCHOWITZ J:

- [1] This is an unopposed action in which the plaintiff claims damages for defamation. The relevant facts emerge from the plaintiff's oral testimony and a damages affidavit filed on her behalf.
- [2] The plaintiff, Nadia van der Westhuizen, is a human resources manager employed by a company, Blue Turtle Technologies, which carries on the business of the delivery of specialised IT software solutions. The defendant is Mr Morgan Motlogelwe Ntshabele, who was employed by the company as a business analyst, but was retrenched on 24 June 2013.

- [3] In her capacity as the human resources manager of the company, the plaintiff's responsibilities include the training and development of employees and investigating and resolving workplace issues. And it was also her responsibility to preserve employer/employee relationships through implementing an effective employee relations strategy. To properly perform this function it was necessary for the plaintiff to create trusting relationships between herself and staff members. To this end she would interact with them on a daily basis and they in turn would approach her in order to discuss any problems that they experienced in the workplace.
- [4] After the defendant was retrenched on 24 June 2013, the plaintiff was required to assist with his retrenchment procedure and had the duty to obtain various company assets from him which included a laptop and an internet and access card which he still had in his possession.
- [5] On 25 June 2013 the plaintiff and a co-employee, Mr Dintle Matshikane, approached the defendant at the premises of the company and requested that he sign the necessary documents pertaining to the retrenchment and also that he return the company assets which were still in his possession.
- [6] The defendant blamed the plaintiff and made accusations that it was her fault that he was retrenched. He called her "a liar" and refused to hand over the company assets. The defendant stood up and approached the plaintiff in a threatening manner. At this point, Mr Matsikane pushed the defendant away from the plaintiff and explained that the company had the right to retrieve its assets. This incident occurred in an open-plan office and was witnessed by various people, including members of the public and a number of co-employees.
- [7] Later in the day, when the defendant started leaving the company premises, the plaintiff again approached him in the company of a Miss Talent Machaka. The defendant thereupon called the plaintiff "a racist" and "a liar" and suggested that his retrenchment was her fault. As the plaintiff did not want Ms Machaka to hear what the defendant was saying, she requested her to return to the company premises. Whilst Ms Machaka was walking away the defendant continued to insult the plaintiff by calling her an "unintelligent white girl". All of this was overheard by Ms Machaka. After vilifying the plaintiff in this manner, the defendant continued his attacks and stated: "You think you're clever", and this was followed by a threat that he would "teach [the plaintiff] a lesson".
- [8] As a consequence, the plaintiff was humiliated and scared and immediately went to the boardroom, closed the door in order that no-one could see her and burst into tears. She had to retain her full composure in order to face her fellow-employees after the incident. What the plaintiff found to be particularly disturbing were the defendant's statements to the effect that she was racist, dishonest and an unintelligent white woman.
- [9] In the summons the plaintiff alleges that in consequence of the foregoing, she has "endured pain and suffering and has been damaged in her reputation".

[10] The relevant legal principles are well established. In *Khumalo & Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) para [18], it was held that a plaintiff suing for defamation must establish a wrongful, intentional publication of a defamatory

statement concerning the plaintiff. Once a plaintiff has established that the defendant has published a defamatory statement concerning

the plaintiff, it is presumed that the publication was both unlawful and intentional. The defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention (see, also, in this regard, *Le Roux & Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) para [85]).

[11] A statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable average person to whom it has been published. It includes not only statements that expose a person to hatred, contempt or ridicule, but also statements that are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd or which render the plaintiff less worthy of respect by his or her peers (*Le Roux v Dey*, para [91] and cases there cited).

[12] The statements imputed to the defendant, which were uttered in the presence of the plaintiff's co-workers, are per se defamatory of the plaintiff. Applying the two-stage inquiry postulated in *Le Roux v Dey*, a reasonable observer would have understood the plaintiff to be racist, that is to discriminate on the basis of race and to be dishonourable and of low intelligence. On the basis of the evidence and probabilities, the conduct and statements made by the defendant humiliated and belittled the plaintiff, rendering her less worthy of respect by her co-workers and subordinates and are thus defamatory of the plaintiff. It must be presumed therefore that the statements made were both wrongful and intentional.

[13] I turn now to the quantification of the plaintiff's damages.

[14] The amount to be awarded to the plaintiff falls within the discretion of the Court. In this regard a number of principles have been recognised by our courts. Monetary compensation for harm of this nature is not capable of being determined by any empirical measure. Awards made in other cases might provide a measure of guidance but only in a generalised form (*Tsdedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) para [25]).

[15] Among the factors to be taken into account are the nature and gravity of the defamatory words, falseness, nature and extent of publication, malice, rank or social status, absence of an apology, and motive and the general conduct of the defendant (*Mogale & Others v Seima* 2008 (5) SA 637 (A) paras [2]–[17]; *Lawsa* (2 ed) Vol 7 para 94).

[16] Public policy also plays a role. Our courts have not been generous in their awards in view of the inhibiting effect of the law of defamation on freedom of expression. This was emphasized by Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* [1992] ZASCA 63; 1992 (3) SA 579 (A) at 590E-F, where the following oft-quoted statement was made:

“... An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation and not as a road to riches ...”

[17] But, the use of racially derogatory language is regarded by right-minded members of South African society as reprehensible (*Sindani v Van der Merwe & Others* 2002 (2) SA 32 (SCA) para [15]). The right to freedom of speech is not an unfettered one and excludes the use of racially derogatory language. The use by the defendant of hate speech, which is constitutionally unprotected, is an aggravating circumstance which justifies a substantial award. However, a note of caution ought to be sounded: Notwithstanding the prevailing attitudes in the community, care must be taken not to award overly large sums of damages lest doing so might encourage or foster litigation (*Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* [2000] ZASCA 77; 2001 (2) SA 242 (SCA) para [48]).

[18] The words used and general conduct of the defendant were of a serious nature. The reference to the plaintiff, in the presence of other employees of the company that she is dishonest, a racist and unintelligent, clearly infringed the plaintiff's sense of self-worth (*dignitas*). The words used were clearly intended to insult, humiliate and belittle the plaintiff in the presence of her co-employees. The defendant sought to create the impression that the plaintiff was a racist, dishonest, and that his retrenchment was her fault.

[19] Our law draws a distinction between claims for injury to dignity (*dignitas*) and reputation (*fama*) (see *Khumalo* para [27] and *Le Roux v Dey* para [154]). Although in the summons damages are only claimed for defamation, the evidence discloses that the words and conduct of the defendant also infringed the plaintiff's *dignitas* and this factor must be taken into account in assessing an appropriate quantum.

[20] The defamatory words used in the context of the present case had the effect of seriously infringing the plaintiff's reputation (*fama*). As I have already indicated, the plaintiff is employed as the human resource manager of a company. Her duties require her, among other things, to investigate and resolve workplace issues and to preserve employer/employee relationships. She works with staff members on a daily basis and in order to properly perform her daily functions needs to create a trusting relationship between herself and the staff. How the plaintiff is perceived is very important to her and the role that she portrays in the company. Staff members need to feel free to discuss any problems they may be experiencing in the workplace. If no trusting relationship exists or is compromised in any way they will no longer feel free to discuss these problems with her. As human resource manager she most certainly cannot be perceived as a racist, liar or someone that cannot be trusted. The defamatory words and statements which were uttered in the presence of the

plaintiff's co-employees thus clearly injured the plaintiff in her good name and reputation.

[23] A further aggravating circumstance is that despite service of the summons upon him, the defendant has not sought to tender an apology or to withdraw the allegations made (see *Le Roux v Dey* paras [150] and [203]).

[24] Having regard to all of the factors mentioned above, I am of the view that an award that would meet the justice of this case would be the sum of R50 000.

[25] The following order is made:

(a) The defendant is ordered to pay the plaintiff R50 000 as compensation.

(b) The defendant is ordered to pay the plaintiff's costs.

P BORUCHOWITZ J

JUDGE OF THE HIGH COURT

DATE OF HEARING : 24 October 2014

DATE OF JUDGMENT : 20 March 2015

ON BEHALF OF PLAINTIFF : ADVOCATE T COLYN

INSTRUCTED BY : VAN DER MERWE & ASSOCIATES

Ref: M Roux/caroline/V369/001

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