

SOUTH AFRICA / JUDGMENT

Van Rooyen v Vodacom Service Provider Company Ltd (Pty) (3652/2010) [2011] ZAECPEHC 14 (24 March 2011) [2011] ZAECPEHC 14

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Andrews

CASE / FILE NUMBER

3652/2010

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE, PORT
ELIZABETH)
CASE
NO: 3652/2010
IN

THE MATTER BETWEEN:

RENEE
PAUL VAN ROOYEN
.....PLAINTIFF
And
VODACOM
SERVICE PROVIDER COMPANY (PTY)
.....DEFENDANT

JUDGMENT

ANDREWS, AJ

[1] The plaintiff applies for the following order by default judgment:

- a) an order that the defendant shall forthwith take the necessary steps to remove the plaintiffs name from any listing with the National Credit Bureau or any other institution which indicates that an amount is owing by the Plaintiff to the Defendant;
- b) payment of the amount of R200,000 as and for damages;

c) costs of suit.

[2]

Background

The plaintiff's combined summons was issued on 1st December 2010 and served on the defendant at its principal place of business on the 2nd of December, 2010. The defendant failed to enter an appearance to defend. The summons indicates the basis of the plaintiff's claim follows.

- [3] The plaintiff is a senior advocate seeking damages for the defamatory publication of his name with the National Credit Bureau, which has indicated that his name had been listed, and that he had been "handed over," As a result of this listing, the plaintiff's bank refused to extend overdraft facilities to him, which he required for the conduct of his business as an advocate and for acquiring and developing and letting properties, which is his business. The plaintiff notified the defendant that he disputed the claims and was prepared to litigate the matter, but no steps to recover the debt were ever taken by the defendant. Despite demand, the defendant has failed to remove the plaintiff's name from the National Credit Bureau listing, and it remains, published for perusal to the world, on the internet. Any bank or credit provider would therefore have access to this information,
- [4] The plaintiff testified that he has been an advocate since 1977, and a senior counsel since 1992. Matters handled by him have been reported in 30 to 40 decisions. He has been requested to act as a judge in this court at least eight times. His judgments of this court are also reported. He testified that the listing, through a website in the USA, did not serve as a notification of litigation but was a mechanism to advise the public that he is a bad credit risk, and as such is a warning to creditors not to extend credit to him. It states that he was been "handed over" on 27 April 2010 but this was untrue information since he first received a letter suggesting that this would take place on 25 August 2010. On the same day he replied by letter disputing the claim and warning the defendant not to proceed to list him. However the defendant proceeded to list him and did not notify him that it had done so. He discovered that he had been listed when in August 2010 he was advised by his bank that it did not intend extending an overdraft facility to him because of a negative credit listing. Although this situation had been rectified with one of his banks, the other has refused to extend an overdraft facility to him.
- [5] The plaintiff is 62 years old and for his pension is intending to develop certain properties which he owns, at an estimated cost of between R3.5 and R5.5 million.. This will require him to obtain financing and he is concerned that such financing might not be forthcoming, and that contractors may not be willing to contract with him, due to the defendant's negative publication. The listing has as a result acutely embarrassed him,

- [6] The plaintiff averred that the listing was wrongful, unlawful and defamatory in that it signifies to the world at large that the plaintiff is a bad credit risk, does not pay debts which are due, owing and payable, and that it is necessary for his creditors to institute legal action to recover relatively small amounts of money from him which are due, owing and payable when in fact no amounts at all were due, or the existence of the debt is the subject of a bona fide dispute. The refusal to remove his name from the list was mala fide, wrongful and unlawful and calculated to cause the damage to the plaintiffs good name and reputation, and his creditworthiness with his bankers and the community at large.
- [7] As a consequence of the defendant's conduct the plaintiff averred that he had suffered damages in the amount of R200,000. Further, that apart from the serious nature of the defamation, and its wide publication, the defendant had done nothing to mitigate the damages caused.
- [8] As regards the quantum of damages, the plaintiff averred that he had a clear right to the relief which it sought in the first prayer, namely that the listing be terminated. The plaintiff justified the quantum of damages for defamation on the basis of the fact that he is a professional of high standing with every right to extend his assets who has been thwarted to a great extent by the conduct of the defendant. He is now precluded from doing a substantial property development. The publication was extremely wide and the defendant has done nothing to mitigate the damage caused. Although the defendant was warned repeatedly that it was acting unlawfully it has to date failed to remove the listing.
- [9] The defendant did not enter an appearance to defend. I am satisfied that the plaintiffs evidence demonstrates that the defendant has in the past and continues to publish false, damaging information regarding his creditworthiness, on a globally accessible website indicating that he is a bad credit risk who does not pay his debts which are due and that legal steps were being taken to recover such a debt owing to the defendant. This information is not true, and was published recklessly by the defendant, after it had been warned not to do so by the plaintiff. The defendant had done nothing to mitigate the damage caused to the plaintiff. It did not take any legal steps to recover any monies allegedly owing. As a result of its publication of the listing banking institutions had become aware of this information, and had indicated to the plaintiff that they were not prepared to extend credit to him. This position has harmed the plaintiffs potential to raise funds to develop his assets. His considerable professional reputation has been placed in jeopardy. The defamation was serious in light of the personal, financial and professional interests that it could, and did damage. The publication was to the whole world, readily accessible to anyone at any time who has access to the internet and the plaintiff was not even notified that such publication had taken place. . The plaintiff now faces uncertainty as to whether he will be able to engage in a planned large scale development requiring significant financing and contracts, because he does not know how the financial community will react to information tarnishing his creditworthiness which has been on the internet for almost a year, The plaintiff has therefore made out a case for the relief sought in the summons herein.

Quantum

[10] Generally speaking as stated by Grosskopf JA in *Argus Printing & Publishing Co Ltd v inkatha Freedom Party*¹ "our courts have not been generous in their awards of solatia. An action for defamation has been seen as the method whereby a plaintiff "vindicates his reputation, and not as a road to riches"². In the case of *De Flamingh v Pakendorf*, *De Flamingh v Lake*³ an advocate was said to have failed in his professional duties. An award of R2 500 was against each of the defendants, (Equivalent to an amount of approximately R55 000 in 2010). In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd*⁴ an allegation was made that a senior advocate had deliberately perverted- the course of justice. An award of R30 000 was made. (Equivalent to an amount of approximately R53 000 in 2010). Smaiburger, JA stated the following words of caution regarding the guidance that can be obtained from other reported judgments when , evaluating the appropriate quantum of damages in defamation cases:

"Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend on the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best it can, make realistic assessments of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings/"

[11] In the *Van der Berg*⁵ case, the court referred to various factors which were Considered when making an award of damages in a defamation case involving an attorney. These include the extent of the publication, whether the defamatory statement was believed or the appellant lowered in the esteem of colleagues or whether he suffered any consequences as a result thereof.

[12] In the present case, the plaintiff clearly suffered consequences of a financial nature if not to his reputation as a lawyer, and the publication was to the world. Financial institutions had no hesitation in acting on the information as if it was indicative of a truth, namely that the plaintiff was a credit risk. The ongoing potential consequences of this publication are as yet unknown but based on the reactions of financial institutions to date could be serious, and the plaintiffs significant business plans have been placed at risk.

[13] Having regard to the above cited cases and the factors mentioned an amount of R50 000 is considered to be an appropriate award in damages to the Plaintiff.

It is ordered that the defendant;

(i) forthwith take the necessary steps to remove the plaintiffs name from any listing with the National Credit Bureau, and any other

institution which indicates that any amount is owing by the plaintiff to the defendant;

(ii) pay the sum of R50 000 to the plaintiff as and for damages;

(iii) pay costs of suit on a party and party scale.

DATED AT PORT ELIZABETH ON THIS 24th DAY OF MARCH 2011 ANDREWS, A (Acting Judge)

DATE HEARD : 24th FEBRUARY 2011

DATE DELIVERED : 24th MARCH 2011

For the Plaintiff : ADV O Ronaasen

Instructed by : FRIEDMAN SCHECKTER

75 Second Avenue

Newton Part

PORT ELIZABETH

NO APPEARANCE FOR THE DEFENDANT

1[1992] ZASCA 63; 1992 3 SA 579 (A)

2Id page 590 E

3 1979 3 SA 676 (T)

42001(2) SA 242

5Parag 46

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