

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO : 26184/2011



REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED.

In the matter between:

PRINCE MANGOSUTHU BUTHELEZI

Plaintiff

and

BDFM PUBLISHERS (PTY) LIMITED

First Defendant

PETER BRUCE

Second Defendant

PROTAS MADLALA

Third Defendant

JUDGMENT

WILLIS J:

[1] The plaintiff is H.R.H. Prince Mangosuthu Buthelezi. He has instituted a defamation action against three defendants. He has claimed damages in an amount of R200 000- together with interest and costs as well as the publication of an apology and a 'retraction'. Counsel referred, throughout their submissions, to the plaintiff as 'the Prince'. I shall do likewise. The alleged defamation arises from an article published on 30 June 2010 by *Business Day*, a daily newspaper of which the first defendant is the owner and publisher and the second defendant, Peter Bruce, the editor. In that article it was reported that the third defendant, 'an independent political analyst' had said that the Prince 'has always been a violent man'. I shall refer to the first defendant as 'the newspaper' and the second defendant as the 'editor'.

[2] The newspaper and its editor, but not the third defendant, have excepted to the plaintiff's particulars of claim on the basis that 'when the article is read as a whole it sets out, in a balanced fashion, competing viewpoints in relation to the plaintiff and his attitude to violence in the past and the future'. The newspaper and its editor further contend, in their exception, that 'the author and publishers

of the article do not, in the article, endorse any one of those viewpoints'. In the circumstances, the newspaper and its editor allege that the Prince's particulars of claim lack averments necessary to sustain a cause of action and that, accordingly, the Prince's claim should be dismissed, with costs.

[3] The article in question reads as follows:

Buthlezi sounds that familiar warning

BY SIBONGAKONKE SHOBA, JUNE 30 2010

"IF YOU warn a person when you cross the street that there is a snake, that there is a mamba there, that does not mean that you put it there."

This is how Inkatha Freedom Party (IFP) leader Mangosuthu Buthelezi responded to suggestions that his warning - that violence would erupt should the African National Congress (ANC)-led tripartite alliance march to Ulundi before the first democratic elections - was an attempt to threaten his opponents.

Mr Buthelezi warned the ANC and its allies that, if they marched to Ulundi, the Bhishe massacre would look like a school picnic. About 28 people were killed by Brig Oupa Gqozo-led soldiers in Bhishe in 1992. After this warning, the planned march to Ulundi was called off. But that was then.

Now, with just weeks before he faces near certain challenge, Mr Buthelezi is again warning of violence. But this time not against his traditional political foes, but those within the IFP.

Writing in his online newsletter, Mr Buthelezi warned of a threat of violence at the party's planned elective conference next month if differences within the organisation were not resolved.

"As the IFP approaches its annual general conference, the leadership of the party is apprehensive over the threat of violence," he wrote. He called for an urgent leadership meeting to iron out differences before the conference.

Mr Buthelezi is facing a revolt within the IFP , which he formed 35 years ago. A faction within the party, led by the IFP Youth Brigade, wants Mr Buthelezi to be succeeded by party chairwoman Zanele Magwaza-Msibi next month. Supporters of both Mr Buthelezi and Ms Magwaza-Msibi, who call themselves the friends of VZ (Ms Magwaza-Msibi's first name is Veronica), have clashed in recent months .

Youth-wing leaders who have publicly supported Ms Magwaza-Msibi have been expelled for sowing division in the party.

Mr Buthelezi says this is a result of a "disappearance" of respect, which has been replaced by "rudeness and vulgarity".

"The corrosion of a culture of respect can only end in bloodshed. We need to arrest this development," said Mr Buthelezi.

Political analysts differ on the motive behind these statements.

Political analyst Aubrey Matshiqi says he agrees with Mr Buthelezi that the emerging feature of violence in "our black politics" must be eradicated. But Mr Matshiqi cautioned against predicting unrest at the planned congress. "He himself is feeding in to this culture of violence."

Mr Matshiqi says it is self-serving for Mr Buthelezi to blame the lack of respect for the chaos in his party. "He is saying show respect for me because I'm older, instead of saying I'm a credible leader." He says Mr Buthelezi has a history of threatening opponents with a possibility of violence "when he did not get what he wanted" in the '80s and '90s. "He would say there would be violence and violence will follow," says Mr Matshiqi.

Independent political analyst Protas Mgalala agreed, saying Mr Buthelezi "has always been a violent man".

The Rev Musa Zondi, IFP secretary and Mr Buthelezi's right-hand man, says comments linking his party leader to violence "do not deserve a decent comment". "That argument is not sustainable. (Mr Buthelezi) is talking about the reality within the IFP . Violence has been used in all our conferences."

Siphamadla Zondi, a political analyst with the Institute for Global Dialogue, concurred with the Rev Zondi, saying Mr Buthelezi's warning was out of genuine concern.

"I don't think he is saying this as a threat to his opponent. It is not in his interest to do that because it would make him look bad," says Mr Zondi. He blames the tension within the IFP on the leadership's actions to silence the youth.

"Mr Buthelezi should have allowed a smooth transition... The IFP tried to silence the youth instead of harnessing it to deepen democracy."

Analysts say it does not matter who put the snake on the street, the IFP must kill it before contesting next year's elections.

[4] The Prince alleges that the following passages in the article:

(i) Now, with just weeks before he faces near certain challenge, Mr Buthelezi is again warning of violence. But this time not against his traditional political foes, but those within the IFP...

(ii) Mr Buthelezi has a history of threatening opponents with a possibility of violence "when he did not get what he wanted" in the '80s and '90s... and

(iii) Independent political analyst Protas Mgadlala agreed, saying Mr Buthelezi "has always been a violent man".

taken in context would have been understood by the ordinary reader as stating that the Prince is a violent man and is willing to or was intending to use the threat of violence against his political opponents within the Inkatha Freedom Party (IFP). Accordingly, so it is alleged, the article was defamatory of him.

[5] Separate allegations were made in the Prince's particulars of claim of defamation by Protas Madlala, the third defendant, in making the allegations which appear in this article. The Prince's claim against the third defendant is thus not necessarily joint and several with the newspaper and its editor but may stand alone.

[6] As Davis J (as he then was) said in *Glaser v Heller*¹ and repeated in *Kahn v Stuart*,² ‘The true object of an exception is either, if possible to settle the case, or at least part of it, in a cheap and easy fashion’. This was approved by Steyn J and Broeksma AJ in *Suburban Real Estate Limited v Whall and Bocking*³ and it seems by necessary implication to have been approved in this division of the High Court by Botha AJ (as he then was) in *Marais v Steyn en 'n Ander*.⁴ In *Dharumpal Transport (Pty) Limited v Dharumpal*⁵ it was said that the main purpose of an exception was ‘to avoid the leading of unnecessary evidence’.⁶ This *dictum* has been followed in numerous cases.⁷

[7] In general, the rule is that an exception has to be decided by the court on the pleadings themselves without the leading of evidence.⁸ Again, in general, pleadings tend to be skeletal but flesh may sometimes be discerned on the bones without the bones being dressed by the giving of *viva voce* evidence. A court may, in appropriate circumstances, stray a little outside the pleadings to have regard to the surrounding circumstances: as was said by Harms JA (as he then was) when he delivered the unanimous judgment of the Supreme Court of Appeal (SCA) in *Telematrix (Pty) Limited t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*:⁹

¹ 1940 (2) PH F119 (C)

² 1942 CPD 386 at 391

³ 1951 (3) SA 409 (C) at 415C-D

⁴ 1975 (3) SA 479 (T) at 487E-F

⁵ 1956 (1) SA 702 (A)

⁶ At 706D-E

⁷ See, for example, *Barclays National Bank Limited v Thompson* 1989 (1) SA 547 (A) at 553G; *Inzalo Communications & Event Management (Pty) Limited v Economic Value Accelerators (Pty) Limited* 2008 (6) SA 87 (W) at paragraph [45].

⁸ *Dendy v University of the Witwatersrand and Others* 2007 (5) SA 382 (SCA) at paragraph [16]

⁹ 2006 (1) SA 461 (SCA)

Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility.¹⁰

[8] Relying on the case of *R v Tager*¹¹ in which what was then known as the Appellate Division of the Supreme Court of South Africa ('the AD') distinguished between knowledge which the judge has as a result of being an individual observer and knowledge which is 'notorious',¹² I may fairly have regard to the fact that political violence in the province of Kwazulu/Natal since the mid-1980's has become a notorious fact. The report of the Truth and Reconciliation Commission¹³ records that it is widely accepted that as many as 20 000 lives may have been lost as a result of this violence.¹⁴ In the three month run-up to the first democratic elections in 1994 approximately 2000 people were killed as a result of political violence in Kwazulu/Natal.¹⁵ It is also notorious that the *dramatis personae* in this violence have been the supporters of the IFP and the African National Congress (ANC) respectively.¹⁶ For the purposes of this judgment, the factual detail is unimportant. What matters is that, like the daubs of an impressionist painting, a picture of the situation has been created that is both vivid and embellished in our collective memory. This picture of violence is not only tragic but inimical to our progress as a nation. Even if I am wrong in having regard to these notorious facts,

¹⁰ At paragraph [3]

¹¹ 1944 AD 399

¹² At 343-4

¹³ 1999; Chapter 3, Volume 3, Juta's: Cape Town.

¹⁴ *Ibid.*

¹⁵ See South Africa Survey for the Institute of Race Relations 2000/2001; SAIRR: Johannesburg

¹⁶ See The Report of the Institute of Race Relations (*supra*); South Africa Survey for the Institute of Race Relations 2000/2001 (*supra*) and Rupert Taylor's *Justice Denied: Political Violence in Kwazulu-Natal After 1994*, Volume 6; Centre for the Study of Violence and Reconciliation: Johannesburg, 2002 at p3.

my ultimate decision would be no different. The notorious facts merely strengthen the conviction with which I have reached my conclusion.

[9] Our law protects the right of the Prince to *fama* or reputation.¹⁷ In his particulars of claim the Prince describes himself merely as the head of the IFP, a duly registered political party. The Prince may have been guilty of undue modesty. It is an understatement to describe the Prince as the head of a political party. He is much more than that. He has served as Acting President of our country. The Prince rivals H.M. Queen Elizabeth II as a public figure who has been around and reported upon for as long as almost anyone can remember. In his a long career in public life, the Prince has attracted both admirers and detractors. In public affairs and, in particular, political contestation in South Africa, the Prince has a *fama* that is so well established that it is impervious to a newspaper article reporting on the *contumeliae* (insults) of the kind in question which were allegedly made by the third defendant. As the Afrikaans proverb goes, ‘Die hoogste bome kry die meeste wind’. This may be somewhat inelegantly translated into English as “The taller the tree, the more it is buffeted by the wind’.

[10] The case also has to be decided against a constitutional right to freedom of expression, which expressly includes the freedom of the press,¹⁸ as well as a common law reluctance to regard political utterances as defamatory. As was said by Grosskopf JA, delivering the unanimous judgment of the court in *Argus Printing and Publishing Company Limited v Inkatha Freedom Party*,¹⁹ this

¹⁷ See, for example, *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at paragraphs [17], [18] and [19].

¹⁸ See section 16 of our Constitution.

¹⁹ 1992 (3) SA 579 (A)

reluctance stems from the fact that it is recognized that 'right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him by other politicians or political commentators'.²⁰ Accordingly, in a political context, the traditional test of determining whether the words of which there is a complaint tend to lower the plaintiff 'in the estimation of right-thinking people' is not easily straddled.²¹

[11] In the *Argus Printing and Publishing v Inkatha* case Grosskopf JA went on to say that '(w)hen one is dealing with political matters, a great deal of latitude is traditionally allowed for comment'.²² The learned judge also referred to the celebrated words of Ludorf J, in *Pienaar and Another v Argus Printing and Publishing Company Limited*,²³ known to every student learning about the law of defamation in the university for the first time:

(T)he courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies agricultural union on the subject of pruning roses.²⁴

²⁰ At 588F

²¹ *Argus Printing and Publishing Company Limited v Inkatha Freedom Party (supra)* at 587H

²² At 589E

²³ 1956 (4) SA 310 (W) at 318C-E

²⁴ *Argus Printing and Publishing Company Limited v Inkatha Freedom Party (supra)* at 587J-588A where Ludorf J's words in *Pienaar and Another v Argus Printing and Publishing Company Limited (supra)* at 318C-E were referred to. Of course, today no judge would be so politically incorrect to refer to the pruning of roses in the context of an association of 'ladies' but it is difficult to repress a smile at imagery that so exquisitely makes a good point. Since Ludorf J wrote his judgment, women have done such a superlative job as monarchs, presidents, prime ministers, bishops, judges, lawyers, doctors, professional persons generally, entrepreneurs, business and trade union leaders, scientists, astronauts, athletes and sporting stars that they have, with trumpets blaring, defeated the arguments of the 'male chauvinists'. And many of the finest cultivators of roses are now men. Ludorf J's point about the need to avoid prissiness in the

In *The Citizen 1978 (Pty) Limited v McBride (Johnstone and Others, amici curiae)*,²⁵ the majority of the Constitutional Court endorsed the general thrust of *ratio* for the decision in the *Argus Printing and Publishing v Inkatha* case.²⁶

[12] It has long been recognized in our law that the words in respect of which there is a complaint by the plaintiff must not only be insulting from a subjective point of view but must also be insulting when viewed objectively.²⁷ The objective test is measured against a criterion of reasonableness (an 'algemene redelikhheidsmaatstaf').²⁸

[13] The opening sentences of the article in question, viz.

"IF YOU warn a person when you cross the street that there is a snake, that there is a mamba there, that does not mean that you put it there."

This is how Inkatha Freedom Party (IFP) leader Mangosuthu Buthelezi responded to suggestions that his warning - that violence would erupt should the African National Congress (ANC)-led tripartite alliance march to Ulundi before the first democratic elections - was an attempt to threaten his opponents.

together with the closing sentence, viz.

evaluation of political discourses is surely well understood by even those most grimly determined to eradicate any idea that women may prefer more delicately phrased utterances than men.

²⁵ 2011 (4) SA 191 (CC)

²⁶ See paragraphs [99] to [100]

²⁷ See *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92 at 130-1; *R v Chipso and Others* 1953 (4) SA 573 (A) at 576A; *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1168C; *Delange v Costa* 1989 92 SA 857 (A) at 862E; *Dendy v University of the Witwatersrand and Others* 2007 (5) SA 382 (SCA) at paragraph [16]. This line of cases traces authority back to Melius De Villiers' (1899), *The Roman and Roman-Dutch Law of Injuries: A Translation of Book 47, Title 10, of Voet's Commentary on the Pandects*; Juta's: Cape Town at p27. Johannes Voet, in turn, drew deeply from the well of Roman Law. See also *Le Roux v Dey* 2011 (3) SA 274 (CC) at paragraph [89].

²⁸ The 'algemene redelikhheidsmaatstaf' was set out in the *Marais v Richard* case (*supra*) and approved in *Delange v Costa* (*supra*) and *Dendy v University of the Witwatersrand* (*supra*).

Analysts say it does not matter who put the snake on the street, the IFP must kill it before contesting next year's elections.

provide parameters or matrices to the article which give it context. As Lord Steyn said in *R v Secretary for the Home Department, ex parte Daly*,²⁹ “In law, context is everything”. This was approved by the Supreme Court of Appeal in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd*.³⁰ The importance of context in defamation actions has pertinently been affirmed by the Constitutional Court in the case of *Le Roux v Dey*.³¹

[14] Mr *du Plessis*, who together with Ms *Pudifin-Jones* appeared for the Prince, submitted that it is not only the context of the offending statements in the article itself which is relevant to the question of whether the article is defamatory but also the context and circumstances in which the article was published. In other words, so he submitted, the court needs first to obtain a bigger picture of what the reasonable reader would understand when reading the article. This, so the argument went, was a matter for evidence.

[15] Mr *du Plessis* also placed especial reliance on the case of *Sutter v Brown*³² in which Innes CJ, delivering the unanimous judgment of the AD, held that where the words in question were not *per se et propria significatione contumelium inferent* (i.e. not defamatory in their ordinary and natural signification) but had a secondary meaning the significance of which would be appreciated by the hearers and which secondary meaning would be defamatory, then evidence would be

²⁹ [2001] 3 All ER 433 (HL) at 447 a

³⁰ 2003 (1) SA 155 (SCA) at paragraph [1]

³¹ 2011 (3) SA 274 (CC) at paragraphs [40] to [43] and [99]

³² 1926 AD 155

necessary.³³ Innes CJ was here referring to an innuendo.³⁴ No innuendo or secondary meaning to the words in question has been pleaded by the Prince. The audience of this publication is the general reading public (although it may fairly be recognized that, in general terms, that reading public of this newspaper is drawn mainly from the better educated classes in the country). The audience is not a group of 'insiders' or 'those in the know' who may understand there to be some kind of innuendo. The case of *Sutter v Brown* does not assist the Prince.

[16] Mr *Du Plessis* further submitted that, the correct test to be applied at exception stage is whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff. In this regard he relied on the following cases: *Basner v Trigger*;³⁵ *Conroy v Stewart Printing Company Limited*;³⁶ *Argus Printing and Publishing Company v Esselen's Estate*;³⁷ *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*.³⁸ In his submission the word 'might' is central to the analysis, as it indicated a mere possibility, not a probability. Relying on *National Union of Distributive Workers v Cleghorn & Harris Limited*³⁹ and *Mangope v Asmal*,⁴⁰ he submitted that the test on exception is not whether the statement is defamatory on a balance of probabilities, but rather whether it is 'reasonably capable' of conveying a defamatory meaning and, if so, that the exception must fail.

³³ At p162-5

³⁴ At p162

³⁵ 1945 AD 22 at p32

³⁶ 1946 AD 1015 at p1018

³⁷ 1994 (2) SA 1 (A) at p20

³⁸ 2004 (6) SA 329 (SCA)

³⁹ 1946 AD 984

⁴⁰ *National Union of Distributive Workers v Cleghorn & Harris Ltd* 1946 AD 984; *Mangope v Asmal* 1997 (4) SA 277 (T) at 284B-I.

[17] In response to Mr *du Plessis*' submissions that the matter could not be decided without the hearing of evidence, Mr *Budlender*, who appeared for the newspaper and its editor, retorted there was an authoritative answer: in *Le Roux v Dey* (*supra*), Brand AJ, delivering the judgment of the majority of the Constitutional court, said:

Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.⁴¹

Mr *Budlender*'s reliance on *Le Roux v Dey* has provided the complete answer to the point of Mr *du Plessis* about the need to hear evidence before deciding this matter.

[18]The context in which the article is read gives it the following overall import:

(i) that, although not everyone will agree that the Prince is entirely innocent of the political violence, the Prince could be understood to have merely warning about the real possibility of violence over the issue of the leadership of the IFP rather than fomenting it himself; and

(ii) that political violence was metaphorically analogous to a dangerous snake which the IFP had a duty to kill.

[19] In the absence of an unequivocal call to his followers within the IFP to bring about an end to on-going political violence in the province of Kwazulu/Natal,the

⁴¹ At paragraph [90].

Prince, as its head, cannot escape being tainted with the suspicion that he may bear some responsibility, at least in part, for it. This does not mean that he is indeed in favour of the use of political violence or that he himself resorts to it or promotes it. The article in question does not suggest that this is indeed the case. It merely raises the possibility that it is true because certain commentators believe it to be so. If the Prince's alleged complicity in the violence is true, it is for the public benefit and in the public interest that it be known.⁴²

[20] The article in question cannot be defamatory for a reason that is mathematical in both its simplicity and its lucid beauty: it leaves open the possibility that the Prince is not complicit in Kwazulu/Natal's political violence (in which case there is no defamation) but, on the other hand, recognizes that there are those who believe that he is. If the Prince's complicity in the violence is true, the fact that it would be for the public benefit that this be known would quash the action.⁴³

[21] The order of the court is the following:

- (i) The first and second defendants' exception is upheld;
- (ii) The plaintiff's claim against the first and second defendants is dismissed with costs.

⁴² The truth of the words of which there is complaint in an action, in together with the fact that their publication is for the public benefit or in the public interest constitutes, in law, a ground of justification or defence. See for example, *South African Associated Newspapers Limited v Yutar* 1969 (2) SA 442 (A) at 452A (read with 450D-E and 453D); *Neethling v Du Preez and Others* 1994 (1) SA 708 (A) at 770A-B.

⁴³ *Ibid.*

DATED AT JOHANNESBURG THIS 18th DAY OF SEPTEMBER, 2012

N. P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. *M. du Plessis* (with him, Adv. *S. Pudifin-Jones*)

Counsel for the First and Second Defendants: Adv. *S. Budlender*

Attorney for the Plaintiff: Lourens De Klerk

Attorney for the First and Second Defendants: Rosin Wright Rosengarten

No appearance for the Third Defendant (who did not take exception to the Plaintiff's Particulars of Claim)

Dates of hearing: 4th September, 2012

Date of judgment: 18th September, 2012

