

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 4104/13

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

.....
DATE

.....
SIGNATURE

In the matter between:

CHALOM RAYMOND EDWARD

Plaintiff

And

WRIGHT GRAHAM

First Defendant

TEREZAKIS MARCELLE

Second Defendant

J U D G M E N T

WEINER J:

Background

[1] The Plaintiff has issued summons against the first and second Defendant. Only the first Defendant (“Wright”) was represented at the trial.

[2] The Plaintiff claims:

2.1 In claim one, damages arising out of alleged defamatory statements alleged to have been published by affidavit before the Constitutional Court. This claim refers to the affidavit of Wright in his capacity as the attorney for the second Defendant ("Mrs T") in response to the Plaintiff's application for leave to appeal to the Constitutional Court.

2.2 In claim two, damages for loss of income arising out of alleged fraudulent affidavits of Mrs T filed in the High Court in Durban and also before the Law Society for the Northern Provinces (LSNP), which affidavits were filed pursuant to a complaint by Mrs T to the LSNP. The Plaintiff contends that Wright owed him a duty of care to verify the truth and accuracy of the allegations made by Mrs T before instituting the application in the High Court and distributing the complaint to the LSNP.

[3] The papers in this matter run to several thousands of pages. After hearing both parties, the court *mero motu* issued an order in the following terms:

"In terms of Rule 33(4) of the Uniform Rules of Court:

1. *The issues of quantum and merits are separated.*
2. *The court is to determine by way of legal argument:*

2.1 *Whether the proceedings before the Constitutional Court, the High Court in Durban and the LSNP, as referred to in both claims 1 and 2 constitute privileged occasions.*

2.2 *If so, Plaintiff's claim 1 is to be dismissed.*

3. *If the proceedings are held not to be privileged, the court is to decide:*

3.1 *Whether the statements in claim 1 are defamatory.*

3.2 *Whether there exists the legal duty as set out in claim 2."*

No evidence will be led in respect of the foregoing issues which will be decided by means of legal argument only.

4. *The balance of the issues, if any, are postponed sine die."*

[4] The reason for the issue of this order is that, in my view, the legal arguments on privilege and the duty of care, if decided in the Defendants' favour would dispose of the matter in its entirety. The Plaintiff relies, in his pleadings, on three affidavits deposed to by Wright and/or Mrs T (and the confirmatory affidavits thereto). The defamation and duty of care claims are based on the allegations in these three affidavits. In opposing the order in terms of Rule 33(4), he submitted that he wished to rely on thousands of other documents in his evidence in relation to the defamation claim. In my view, it was therefore convenient and just and equitable to attempt to curtail the matter by hearing the legal issues first.

Pleadings

[5] The Plaintiff, an attorney, issued summons against Wright also an attorney and Mrs T who was Wright's client.

Claim One

[6] The Plaintiff claimed that statements made by Wright were malicious and *prima facie* defamatory, injurious and intentionally designed by Wright

and Mrs T to reduce the Plaintiff's esteem (both professionally and personally) in the eyes of his peers, in the city of his employment (viz Johannesburg) and in his own eyes. The statements referred to by the Plaintiff are contained in Wright's answering affidavit under Constitutional Case No CCT132/12 signed by Wright on 21 January 2013 (and confirmed by Mrs T), which affidavits were delivered by Wright's correspondents to the Plaintiff and the Constitutional Court on 24 January 2013.

[7] The Plaintiff sets out in 14 numbered paragraphs in the particulars of claim, the statements that he claims are defamatory and injurious. I will give a few examples, as this issue, in view of the decision to which this Court has come, is not one which it is necessary for the court to decide at this stage.

[8] The statements were of the following nature:

- 8.1 Plaintiff's affidavit is verbose, convoluted and repetitive.
- 8.2 The affidavit contains half-truths and downright lies.
- 8.3 Plaintiff refuses to recognise general exceptions to the parol evidence rule.
- 8.4 Plaintiff does not explain the law fully and his conduct is therefore disingenuous, dishonest, deceitful and deprecatory.
- 8.5 Mrs T applied to have the Plaintiff removed as an attorney of record due to a conflict of interest, the Plaintiff having previously acted for both Mrs T and her husband ("Mr T").

8.6 The Plaintiff has managed to create such havoc in the courts and has upset many judges in the KZN Province.

[9] The Plaintiff claims that these statements constitute a breach of his legal and constitutional rights, a reduction in his value as a lawyer and should attract compensatory damages of R200 000,00 for each such statement.

[10] The Plaintiff contends that the offending affidavit in the Constitutional Court (case no 132/12) refers to a confirmatory affidavit by one Jeanique Naiker ("Naiker") in which she states that she has read the affidavit of Wright and confirms the contents insofar as it concerns Anthony Rome Attorneys. Mrs T also signed a confirmatory affidavit in which she confirmed the contents of Wright's affidavit. Accordingly the Plaintiff contends that the defamatory statements were published to Naiker, the registrar of the Constitutional Court and to the Constitutional Court judges in Johannesburg who read the record of the proceedings.

Background

[11] It appears from Mrs T's various affidavits that the Plaintiff had launched a Rule 43 application in the Durban High Court on behalf of Mr T against Mrs T. That application was not successful. The Plaintiff, on behalf of Mr T, sought leave to appeal which was not granted. He thereafter petitioned the Supreme Court of Appeal (SCA) for leave to appeal which application was also refused. A week after the Rule 43 order was granted, he advised his client to approach the Magistrate's Maintenance Court to have a re-hearing. He then took the issue to the Constitutional Court which also refused his application for leave to appeal.

[12] The papers in this matter run to several volumes. It appears that there are various matters in the Durban High Court under Case Numbers 3883/12, 13706/13 and 8589/09. They are all concerned with the divorce proceedings between Mr and Mrs T. One of the matters concerns a claim by Mrs T against the Plaintiff for defamation and is of the same nature as the counterclaim which forms part of the present proceedings.

[13] The next matter is an urgent interdict brought by the Plaintiff against Mrs T to prevent her from executing a warrant. The application was heard on 12 December 2014 and dismissed. Leave to appeal was heard and also dismissed. An application for leave to appeal to the SCA has apparently been filed. [at the stage of this hearing, the result of this application is not known]

[14] In the third case, a matter which has dragged on for several years, there was an application for rescission of judgment and leave to appeal to be heard in the Durban High Court on 8 December 2014.

[15] In case 8589/09 the affidavits deposed to by Wright, on behalf of Mrs T in 2012, are in answer to the Plaintiff's application to the Constitutional Court for leave to appeal against the decision in relation to a costs order which arose in the Durban proceedings. The conduct of the Plaintiff in these proceedings was the basis of the complaint to the LSNP.

Claim 2

[16] This claim is of a different nature but arising out of the same proceedings. The Plaintiff contends that on 18 June 2009, Wright, purporting to act as attorney for Mrs T, instituted an *ex parte* application out of the

Durban High Court under Case No 8589/2009 for relief concerning the Plaintiff's conflict of interest in acting for Mr T in a divorce, when he had previously acted for both parties. According to the Plaintiff, the application is fraudulent in that the majority of the allegations constitute perjury and are false and without foundation.

[17] In addition, he refers to a similar affidavit, signed by Mrs T on 7 June 2009, submitted to the LSNP in support of a complaint against the Plaintiff. He says that same is also fraudulent. It is common cause that the complaint to the LSNP has not yet been determined. The Plaintiff contends that the institution and delivery of the said application and complaint to the LSNP and the allegations made therein are wrongful and unlawful.

[18] The basis of claim 2 is that Wright had a legal duty to the Plaintiff to verify the truth and accuracy of the allegations made by Mrs T before instituting and distributing the affidavit and the LSNP complaint. Wright failed or neglected to do so and accordingly breached his professional duties and duty of care to the Plaintiff, who is a member of the public and a practising attorney. His claim is one for damages based upon his practice suffering a loss of income of R2 400 000,00.

Defences

[19] In regard to claim 1, Wright denies the fact that the statements made were defamatory. There is some dispute as to whether or not the allegations in paragraph 2.2 of Plaintiff's claim 1 were admitted by Wright in regard to their defamatory nature. For the reasons below, this is not relevant at this

stage. The main thrust of his defence however, is that the statements were made in legal proceedings in response to (defamatory) allegations or averments made against Wright in the same legal proceedings by the Plaintiff. Further, that in such proceedings, Wright was under a duty to make the statements, and the registrar and the judges of the Constitutional Court were under a similar duty to receive them. The statements, according to Wright, were pertinent and germane to the issues arising in such proceedings. Accordingly, the affidavit was privileged and Wright was acting in furtherance of the interests of his client and without malice.

[20] In regard to claim 2, Wright denies that there was any such duty of care on him to act as the Plaintiff alleges. Alternatively, he has filed a counterclaim and he prays that judgment be stayed pending the decision on the counterclaim.

[21] The counterclaim alleges that the Plaintiff made defamatory, false and wrongful statements of and concerning Wright, with the intention to defame him and injure him in his reputation.

The Defence of Privileged Occasion

[22] Wright contends that the crisp issue to be determined is whether the affidavits filed in the Constitutional Court, the Durban High Court and the LSNP were filed within the context of a privileged occasion. If so, this would rebut the inference of unlawfulness.¹ In each of the instances that the Plaintiff

¹ Burchell, *Law of Defamation in South Africa* 1985 at page 238

claims the unlawful statements were made, Wright was acting as Mrs T's attorney and not personally as a litigant.

[23] Wright has referred to the *Law as to Solicitors*² (quoting with authority *Lilly v Roney* 61 LJQB 727) as authority for the proposition that statements made in the course of, or in connection with, judicial or quasi-judicial proceedings are protected under the privilege. Privilege exists where 'someone has a right or duty to make, or an interest in making, specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right or duty to learn of an interest in learning of such assertions'³ In *Penn v Fiddel*⁴ privilege was found to exist in proceedings before a rent council. In *Zwiegelaar v Botha*⁵ defamatory statements were made in a meeting of creditors of a company being wound-up. Legal proceedings in a court obviously fall into such category, as do proceedings before a disciplinary tribunal.

[24] A Defendant does not however, escape liability merely because the statements are made in judicial or quasi-judicial proceedings. He must show that the statements were relevant and germane to the matter at issue.⁶

[25] In addition, in order to rebut the right to this protection, the Plaintiff can show that Wright was actuated by an improper motive and malice. The *onus* would be on the Plaintiff to prove malice on the part of Wright.⁷

² D Herbert 1932 page 12

³ *Neethling et al*, Neethling's Law of Personality p145

⁴ 1954 (4) SA 498 (C)

⁵ 1989 (3) SA 351 (C)

⁶ *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA)

⁷ *Tuch and Others NNO v Myerson and Others NNO* 2010 (2) SA 462 (SCA) at para [11].

Germane to the Issue / Relevance

[26] In regard to the statements, Wright denies that they constitute defamatory matter alternatively pleads that they were germane to the issue at hand and were connected to the issues before the Constitutional Court. In Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others⁸ it was held that relevance in the context of qualified privilege should not be equated with relevance in a strict evidential sense. What is logically irrelevant may not necessarily be irrelevant in relation to privilege and the test is not as rigid as with the evidentiary test. Wright has argued that his statements are in all respects germane to the issues before the Constitutional Court and were in answer to allegations contained in the founding affidavit in the Plaintiff's application for leave to appeal. Accordingly they are clearly relevant to the occasion and privileged on that basis.⁹

[27] The issue of qualified privilege was dealt with extensively in the judgment of *Van der Berg* supra¹⁰ where Smalberger JA held:

"... The defamatory statement having been published in the course of civil judicial proceedings is privileged provided it satisfies the requirements for relevance. In this respect, it was incumbent upon the respondents to show that it was relevant to an issue arising in or in connection with the condonation application."

[28] Smalberger JA went on to state that the concept of relevance has not been universally defined. It has been described in various matters as *"relevant to the purpose of the occasion"*¹¹.

⁸ 2001 (2) SA 242 (SCA)

⁹ *Van der Berg* supra at para [21]

¹⁰ at [21]

¹¹ at [22]

[29] At [24] Smalberger JA held:

“While the public interest undoubtedly requires that the approach to relevance in relation to privilege should not be too strict or rigid least witnesses or deponents to affidavits be unduly restricted or fettered in their testimony or depositions, thereby detracting from their right to freedom of speech (cf Zwegelaar v Botha supra at 358E-F), too liberal or wide an approach to relevance could effect the undermine or negate a defence person’s right to the protection of his or her dignity.”

Malice

[30] A privileged occasion cannot be misused. A Plaintiff in a defamation suit must show that the Defendant exceeded the bounds of privilege, that is, he acted with malice. According to Neethling¹² malice means more than ‘spite’ or ‘ill-will’. Any motive that does not originate from a “sense of duty or the desire to protect an interest” gives rise to improper motive or malice”.¹³

[31] In Basner v Trigger¹⁴ the court held that inasmuch as the Defendant had a common interest with the Commission’s terms of reference and inasmuch as the defamatory matter complained of was relevant thereto such matter was uttered on a privileged occasion and the Appellant was not liable unless the Respondent proved malice.

[32] In Naylor and Another v Jansen¹⁵ a statement was found to be one of qualified privilege. When speaking of qualified privilege, Scott JA¹⁶ said the following:

¹² *Supra* at page 149

¹³ *Neethling supra*

¹⁴ 1946 AD 83

¹⁵ *Jansen v Naylor and others* [2005] 4 ALL SA 26 (SCA)

¹⁶ *Supra* at [11]

“In the event of it being shown that the statement was made with knowledge of its untruthfulness, the inference that would arise, in the absence of any indication to the contrary, would be that the statement was actuated by malice”

[33] In the same Judgment, *Borgin v De Villiers and Another*¹⁷ is cited, in which Corbett JA finds:

‘The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though proof that the Defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice.’

Facts of the Present Matter

[34] In the present matter, the main issue in the High Court in Durban was whether or not the Plaintiff had a conflict of interest in representing Mr T. It is common cause that, in acting for Mr T, the Plaintiff has instituted proceedings in the Durban High Court and the KZN Provincial Division as well as in the Durban Magistrate’s Court, the Supreme Court of Appeal and the Constitutional Court. In addition, proceedings are pending before the LSNP.

[35] According to Wright, the allegations made against the Plaintiff in these proceedings are in response to affidavits deposed to by the Plaintiff in the Durban High Court and the Constitutional Court. Some of these allegations against Wright, to which he responded, are the following:

35.1 Terezakis has been impoverished by Wright;

35.2 Wright has colluded in perjury and in a fraudulent application;

¹⁷ 1980 (3) SA 556 (A) at 578H

35.3 Wright presented a false subpoena and filed a fraudulent practice note;

35.4 Wright was dishonestly engaged in a false procedure and in abusive court procedures with an ulterior motive;

35.5 Wright behaved fraudulently;

35.6 Wright has filed false affidavits.

[36] From the foregoing it can be seen that these proceedings are fraught with allegations made by both attorneys against each other in a most undesirable and unprofessional manner. There has been a failure to deal with the merits of each particular matter and an *ad hominem* attack in respect of both parties.

[37] In the application in the Durban High Court, Mrs T was applying to have the court declare the Plaintiff's representation of Mr T a conflict of interest, and that such representation should accordingly be terminated. In setting out the background to the matter, it was germane to the issue for Mrs T to set out precisely how the Plaintiff had, according to her, initially represented both parties in various matters over many years. She alleged that an attorney's conduct in so acting would be unprofessional.¹⁸

[38] It is clear that all the allegations made in those proceedings are germane to the issue of whether there was a conflict of interest and whether or not the Plaintiff should have acted for Mr T.

¹⁸ *Retha Meiring Attorney v Walley* 2008 (2) SA 513 (D&CLD).

[39] The Plaintiff submits that the Defendants only pleaded that the offending affidavits were privileged. They did not plead that the affidavits were delivered on a privileged occasion as is set out in the court order which I made *supra*. The Plaintiff also claims that Wright's plea to claim 1 is vague and embarrassing and the plea to claim 2 does not set out a defence as it amounts to a bare denial.

[40] In my view the Plaintiff's contention that the Plaintiff has pleaded that only the affidavits are privileged and not the occasion, cannot be upheld. The allegation by Wright that the statements were made in legal proceedings and in answer to allegations or averments made against Wright in the same legal proceedings, places such statements within the context of a privileged occasion. The statements were made either in High Court proceedings, Constitutional Court proceedings or to the LSNP, all of which have been held to amount to privileged occasions in which affidavits filed therein are privileged.

[41] The Plaintiff's additional problem with the defence raised to claim 1 is that Wright had no duty to speak in deposing to the affidavit in the Constitutional Court proceedings. The Plaintiff contends that because Mrs T did not sign the answering affidavit but Wright did (with a confirmatory affidavit by Terezakis) that the occasion is therefore not privileged.

[42] In regard to claim 2, the Plaintiff contends that Wright had a legal duty to the Plaintiff to verify the truth and accuracy of the allegations contained in Mrs T's affidavit and that he failed to do so. In so doing, he breached his

professional duties and breached his duty of care to the Plaintiff as a member of the public and practising attorney.

[43] The Plaintiff was unable to point to any authority to back up this submission.

[44] This duty would impose upon an attorney a highly burdensome task in having to investigate the truth and accuracy of every statement made to him by a client which he may place in an affidavit. Having regard to the fact that the attorney/client relationship imposes a duty upon the attorney to advance the interests of his client even where it could cause harm to the opposite party, this burden does not seem to give rise to a legal duty of care, as submitted by the Plaintiff.¹⁹ In *Shabangu*, a lawyer innocently submitted a fraudulent claim on behalf of a client who deposed to affidavits stating that she was the wife of the deceased. The court held that it was impossible to lay down a test as to when an attorney is under a legal duty to persons other than a client. The lawyer proved that he was misled by his client, and this was upheld. There is no allegation that Wright was aware, when preparing the affidavit, that the allegations were false. Wright's counsel submitted that counsel and/or attorneys are afforded protection and need not believe in the truth of the statements arising from their instructions.²⁰ The Plaintiff would have to demonstrate subjective knowledge on the part of Wright that the evidence pleaded was false²¹.

¹⁹ *Road Accident Fund v Shabangu and Another* 2005 (1) SA 265 (SCA)

²⁰ *Joubert and Others v Venter* 1985 (1) SA 654 (AD) at 702

²¹ *Joubert supra* at 705

[45] This duty contended for by the Defendants would have the consequence that an attorney would have to approach, for instance, opposing parties, to enquire as to the veracity of his client's submissions. This would breach attorney/client privilege and subvert the attorney/client relationship. The Plaintiff has not shown in either claim 1 or 2 that Wright made such statements knowing them to be untrue and therefore actuated by malice, as defined in the authorities cited above.²² Wright claims that he had a duty to protect his client's interests and therefore did not act maliciously.

[46] Accordingly, in relation to Claim 1, the Plaintiff's claims are ousted by the fact that they are privileged, and made on a privileged occasion. In relation to Claim 2, similarly, privilege is a defence to the claim. In addition, the Plaintiff has failed to establish that Wright has the duty of care relied upon by the Plaintiff or that Wright breached same.

[47] In regard to costs, this court intends to show its disapproval of the unprofessional manner in which both parties have conducted themselves by ordering each to pay their own costs.

[48] Accordingly, the following order is made:-

- 1 The Plaintiff's claims are dismissed;
- 2 Each party is to pay their own costs.

WEINER J

²² *Naylor supra* at [11]

APPEARANCES:

For the Plaintiff:	Appeared in Person
For the 1st Defendant:	I. Pillay
Instructed by:	Ningiza Horner
Date of Hearing:	24 March 2015
Date of Judgment:	4 June 2015