

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Date: 2011-08-25

Case Number: 64514/10

REPORTABLE

In the matter between:

MINISTER OF TRADE AND INDUSTRY

Applicant

and

EDWIN MATANE MPHAHLELE

First Respondent

LOUISE KRITZINGER

Second Respondent

JUDGMENT

SOUTHWOOD J

- [1] On 8 April 2011 this court granted a judgment by default in favour of the first respondent against the Minister of Trade and Industry, the applicant, for payment of damages in the sum of R15 million. The first respondent claimed this amount as damages for defamation. On 8 June 2011 the applicant launched this application in terms of Rule 31(2)(b) for an order setting aside the default judgment granted on 8 April 2011 and on 13 June 2011 the first respondent's attorney, Mr.

S.N. Molele of SN Molele Incorporated delivered a notice of intention to oppose and the first respondent's opposing affidavit. The applicant did not deliver a replying affidavit and on 5 July 2011 Mr. Molele delivered a notice of set down for hearing on the opposed roll of 22 August 2011. The first respondent's attorney filed a practice note and heads of argument but the applicant did neither. The first respondent seeks an order dismissing the application with costs on the scale as between attorney and client.

[2] On 17 August 2011, after perusing the available record, I requested my registrar to direct a letter to the two attorneys acting on behalf of the parties and to send copies to the following people: Ms. A.M. Mosidi, the State Attorney, Pretoria; Mr. R. Davies, The Minister of Trade and Industry; Ms. I. Sick, the Private Secretary of the Minister of Trade and Industry; Mr. P. Gordhan, the Minister of Finance; Ms. J. Scott, the Private Secretary of the Minister of Finance (the reasons for doing so appear from the letter which is filed at p131-134 of the applicant's record). In this letter I sought an assurance that the applicant did not wish to proceed with the application as it seemed inappropriate to deal with the matter on an unopposed basis.

[3] Shortly after this letter was faxed to all the parties concerned on 18 August 2011, the applicant's attorney filed the applicant's replying affidavit and the applicant's counsels' practice note and heads of argument and a bundle of correspondence between the applicant's and

first respondent's attorneys. It appears from the correspondence that the applicant's attorney, the State Attorney, objected to the enrolment of the matter because the first respondent had not complied with the relevant practice directive: he had not served the index of the papers on the State Attorney to enable the State Attorney to file a practice note and heads of argument. After the State Attorney unsuccessfully attempted to have the first respondent remove the matter from the roll the State Attorney immediately instructed counsel to prepare a practice note and heads of argument. These were served and filed on 18 August 2011.

- [4] The papers filed by the first respondent do not have an index. It is therefore not possible to determine whether the first respondent did comply with the practice directive. Where the applicant had not filed a replying affidavit and did not seem to be pursuing the matter the first respondent was entitled to index and paginate the papers and then enrol the matter for hearing. But the practice directive requires that on completion of the index it must be served immediately on the other party and must include prominently on the front page the date on which it was completed. The applicant then had 15 days from that date to serve and file heads of argument. If the first respondent did not comply with these requirements the applicant would not know that he had to file heads of argument. This an adequate reason for the applicant's failure to file his replying affidavit and practice note and heads of argument before the roll closed.

[5] It is clear that if the judgment is not rescinded it will be a serious miscarriage of justice. The first respondent's particulars of claim are excipiable: they are vague and embarrassing and/or they lack averments which are necessary to sustain an action. Furthermore, the damages awarded are out of all proportion to any wrong committed and far exceed previous awards for serious defamations. These issues will be dealt with in turn.

[6] The elements of the delict of defamation are:

- (i) the wrongful and
- (ii) intentional
- (iii) publication of
- (iv) a defamatory statement
- (v) 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. A defendant who wishes to avoid liability for defamation must then raise a defence which rebuts unlawfulness and intention see ***Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC)** para 18; ***Le Roux v Dey* 2011 (3) SA 274 (CC)** paras 84 and 85. 'Publication' means the communication or making known to at least one person other than the plaintiff. The most obvious

way of doing this is by speech or print – see ***Le Roux v Dey supra*** para 86. A statement may have a primary and a secondary meaning. The primary meaning is the ordinary meaning given to the statement in its context by the reasonable person. The secondary meaning is a different meaning from the ordinary meaning which arises in the special circumstances of the case. This meaning will be attributed to the statement by someone having knowledge of those special circumstances. A plaintiff who relies on such secondary meaning (also called innuendo) must plead the special circumstances from which the statement derives its secondary meaning – see ***Le Roux v Dey supra*** para 87.

- [7] Where the plaintiff contends that the published statement is defamatory *per se*, a two stage enquiry must be undertaken. In the first, the ordinary meaning of the statement must be established. In the second, it must be determined whether that meaning is defamatory. The test to be applied in the first stage is objective. The question is what meaning the ordinary reader of reasonable intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have regard not only to what is expressly stated but also to what is implied. The court is not concerned with the meaning the maker of the statement intended to convey or with the meaning given to it by the persons to whom it was published. In the second stage the court must decide whether the meaning established is defamatory: i.e. if it is likely

to injure the good esteem in which the plaintiff is held by the reasonable or average person to whom it has been published (or put differently, if it would ‘tend to lower the plaintiff in the estimation of right-thinking members of society generally’). Consequently a statement is defamatory if it attributes to the plaintiff that he has been guilty of dishonest, immoral or otherwise dishonourable conduct – see ***Le Roux v Dey supra*** paras 89 and 91.

- [8] Paragraph 5 of the particulars of claim contain the allegations which underlie the whole claim:

‘On 23rd July 2010 at Pretoria, alternatively, Johannesburg, the defendant (*obviously the second defendant*) stated to Brooks and Brand a firm of attorneys, of and concerning the plaintiff that “all fraudulent information was removed”. (My emphasis).

This statement is alleged to mean that the plaintiff is dishonest in the following respects:

- (1) that he misled the Companies and Intellectual Properties Registration Office that he is a director of Tension Overhead Electrification (Pty) Ltd t/a Tractionel Enterprise;
- (2) that he is corrupt;
- (3) that he is untrustworthy; and

(4) that he is a fraudster

and the additional sting that plaintiff is –

(5) not a law-abiding citizen;

(6) a coward; and

(7) without any moral fibre.

- [9] The allegation that the defendant stated to Brooks and Brand ‘of and concerning the plaintiff that “all fraudulent information was removed”’ is the only allegation of what the second defendant did. There are no allegations of the circumstances in which the statement was made. In my view, as it stands, the allegation is meaningless and cannot be understood in any grammatical sense. The words ‘all fraudulent information was removed’ do not refer to any person or attribute any wrongdoing to anyone, particularly not the first respondent. The particulars of claim are therefore vague and embarrassing - see ***Screening & Earthworks (Pty) Ltd and Another v Capital Outsourcing Group (Pty) Ltd; Capital Outsourcing Group (Pty) Ltd v Screening & Earthworks (Pty) Ltd*** [2008] 1 All SA 611 (B) para 8.

[10] The particulars of claim also lack averments to show that the statement was in fact made 'of and concerning the plaintiff'. Since this is essential in a defamation action the particulars of claim do not disclose a cause of action – see ***Le Roux v Dey supra*** para 84; ***Khumalo and Others v Holomisa supra*** para 18; ***SA Associated Newspapers Ltd v Pelser 1975 (4) SA 797 (A)*** at 810C-H. If the plaintiff is not referred to by name in the statement the special circumstances which would have identified the plaintiff to the addressees must be pleaded – see ***Argus Printing & Publishing Co Ltd v Weichardt 1940 CPD 453*** at 459-60; ***Visse v Wallach's Printing & Publishing Co Ltd 1946 TPD 441*** at 446.

[11] A second reason why the particulars of claim do not disclose a cause of action is that the statement 'all fraudulent information was removed' does not expressly or by implication attribute to any person any form of wrongful conduct let alone the meanings alleged. It is therefore at least arguable that the ordinary reader of reasonable intelligence would understand it to mean that the information has been removed from some record or document and nothing else.

[12] A court which is requested to grant judgment by default should not do so unless the summons and/or the particulars of claim contains a valid cause of action – see ***Cohen Ltd v Koekemoer 1949 (2) SA 807 (SWA)*** at 808-809; ***Theron v Coetzee 1970 (4) SA 37 (T)*** at 48D-E.

[13] The situation does not change if the circumstances in which the statement was made are taken into account (these are not in dispute on the papers). They can be summarised as follows:

- (1) On 19 July 2010 in ***J Boshoff NO and 10 Others v Mphahlele ME and 10 Others*** under case number 40771/2010 this court granted an interim order interdicting the first respondent and 6 other respondents from performing or purporting to perform any acts as directors and company secretaries of the 10th respondent (Tension Overhead Electrification (Pty) Ltd) and ordered the 11th respondent (CIPRO) to restore the status quo in its records of the 10th respondent's directors and company secretaries as at 20 June 2010;
- (2) On 20 July 2010 attorneys Brooks and Brand addressed a letter to CIPRO enclosing a copy of the order and requesting that CIPRO give effect to it;
- (3) On 22 July 2010 Tina Rabilall, a CIPRO official, addressed the following e-mail to Louise Kritzing, the 2nd respondent (and the 2nd defendant in the action) under the subject 'Tension Overhead Electrification (Pty) Ltd/Reg No 1982/010497/07. Urgent Application Johannes Boshoff NO and Others/Mphahlele ME and Others case number 40771/10':

'Hi Louise.

The above matter refers.

Kindly attend to the removing of directors as per the court order attached.

The court has ordered CIPRO to restore the status quo in the records of the above Company as at 20 June 2010.

Mphahlele M Edwin

Makgae Hellen Kentse

Khumala Mpini Meschack

Brachini Osvaldo

Mphahlele M Thomas

CFP Management Services (company sec).

The above persons are interdicted and restrained from being directors and Company secretary of the above Company. Thus remove them as active directors and Co sec.

CM29 with tracking number 19516078.

Audrey: prepare change request forms attach mail.
Please attach court papers.

Thanks all';

- (4) On 23 July 2010 the second respondent sent the following e-mail to Trish Kriel of Brooks and Brand and Tina Rabilall with copies to Audrey Rakau and Viyani Mkohla, two CIPRO officials:

‘Subject: Re Fwd: Tension Overhead Electrification (Pty) Ltd/Reg No 1982/010497/07: Urgent application Johannes Boshoff NO and others/Mphahlele ME and others case number 40771/10

Attachments: 198201049707.htm

Good afternoon

The matter has been sorted out and the information has been restored to what it should be.

The CM29 with tracking nr 19516078 had been deleted from the system.

All Fraudulent information was removed as per your instruction below.

Regards’

The ‘instruction below’ was the e-mail from Tina Rabilall to the second respondent on 22 July 2010.

- [14] In my view even when read in this context the ordinary meaning of the words does not include an implication that the first respondent committed fraud. It is at least arguable that the ordinary reader of reasonable intelligence would understand that certain wrong (inappropriately described as ‘fraudulent’) information had been removed from the CIPRO records. It is also at least arguable that the

ordinary reader postulated would not understand the statement to attribute, either expressly or by implication, fraudulent or any other wrongful conduct to any person. The statement therefore does not appear to be defamatory.

- [15] But even if it is accepted that the particulars of claim do contain a valid cause of action and/or that the facts referred to justify an award of damages, the damages awarded are unprecedented and far exceed what reasonably could have been awarded. A claim for damages for defamation is obviously not a liquidated claim and a court which is required to grant judgment must, in every case, assess the damages to be awarded in the light of all the facts and circumstances of the case. (These were set out in an affidavit deposed to by the first respondent). Awards in previous cases offer some guidance but are obviously not binding as they are made in the light of the facts and circumstances of the cases concerned. Nevertheless awards made in other cases may demonstrate that an award is palpably excessive and clearly disproportionate to the circumstances of the case. Such an award will be reduced on appeal despite the wide discretion of the trial court to award damages – see **Salzmann v Holmes 1914 AD 471** at 480; **Le Roux v Dey 2010 (4) SA 210 (SCA)** para 42.

- [16] The trial court did not give reasons for the award but it is clear that there were a number of facts and circumstances which should have limited the amount of the award. These include the fact that there was

no malice; the applicant's officials immediately tendered an apology for the inappropriate use of the word 'fraudulent' and there was very limited publication, to three or four people at most. In recent cases where the defamation was serious and there was wide publication the awards have been far less than R15 million – see e.g. ***The Citizen 1978 v McBride* 2010 (4) SA 148 (SCA)** paras 1 and 45-48; ***The Citizen 1978 v McBride* 2011 (4) SA 191 (CC)** paras 129 and 136; ***Tsedu and Others v Lekota and Others* 2009 (4) SA 372 (SCA)** paras 3 and 25; ***Mogale and Others v Seima* 2008 (5) SA 637 (SCA)** paras 1 and 8-18; ***Le Roux v Dey* 2010 (4) SA 210 (SCA)** paras 1 and 42-48; ***Le Roux v Dey* 2011 (3) SA 274 (CC)** paras 150 and 200-206. I have not been referred to one case where there has been an award in excess of R200 000.

- [17] The applicant would therefore be able to make out a case for an award of much less than R15 million – probably less than R100 000.
- [18] The first respondent has sought to defend his judgment with reference to the technical rules relating to applications for condonation and applications for rescission in terms of Rule 31(2)(b). He points out that the applicant was informed of the judgment on 11 April 2011 and only launched the application on 8 June 2011 (i.e. some 18 days late) and that the applicant has not made out a case for condonation. With regard to the granting of the default judgment he contends that the applicant has not shown 'good cause' as required by Rule 31(2)(b).

- [19] With regard to condonation, the first respondent relies on ***Federated Employers Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A)** at 362G-H where the court said:

‘In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice ... The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed.’

While the explanation for the non-compliance is not convincing and suggests that proper attention was not given to the matter this is far outweighed by the other factors. The degree of non-compliance was not great. In addition the case is important (it involves a judgment for R15 million), the applicant’s prospects of success are very good, the court is not inconvenienced and it is essential for the administration of justice that the clearly erroneous judgment be corrected. The facts speak for themselves and condonation should be granted for the applicant’s delay in launching these proceedings.

- [20] The requirements for rescission were set out in ***Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O)** at 476-477:

- ‘(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be *bona fide* and not made with the intention of merely delaying the plaintiff’s claim.
- (c) He must show that he has a *bona fide* defence to plaintiff’s claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.’

Once again the facts speak for themselves. Although the explanation for the default lacks detail and was rightly criticised by the first respondent’s attorney it is clear that the default was not wilful or grossly negligent and that for some inexplicable reason the summons was not brought to the attention of the responsible person. The applicant is obviously *bona fide*. He seeks to rectify a judgment which is patently wrong. The applicant has a *bona fide* defence. The first respondent does not have a valid cause of action and, in any event, in my view, on the known facts, it is highly improbable that the first respondent will succeed in proving that he was defamed. The letter from the applicant’s Department apologising for the statement made is not an admission of defamation let alone an admission of liability for

defamation. Finally, even if the first respondent was defamed, an award of damages will be considerably less than R15 million.

[21] The parties agree that the applicant should pay the wasted costs of the first respondent's application for judgment by default and that the costs of the application be costs in the cause.

[22] The second defendant who was cited as second defendant in the action played no part in these proceedings. The first respondent did not obtain a judgment against her.

[23] The following order is made:

- I Condonation is granted for the late filing of the applicant's application for rescission;
- II The judgment by default granted in favour of the first respondent on 8 April 2011 under case number 64514/2010 is rescinded and set aside;
- III The applicant is granted leave to file a notice of intention to defend the main action within 10 (ten) days of this order;
- IV The applicant is ordered to pay the first respondent's wasted costs in the application for judgment by default;

- V The costs of this application will be costs in the cause;
- VI It is noted the applicant was represented by two counsel and the question of the costs of two counsel is reserved.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 64514/2010

HEARD ON: 22 August 2011

FOR THE APPLICANT: ADV. S.J. MARITZ SC
ADV. S. MANGOLELE

INSTRUCTED BY: State Attorney

FOR THE FIRST RESPONDENT: MR. S.N. MOLELE

INSTRUCTED BY: SN Molele Incorporated

DATE OF JUDGMENT: 25 August 2011