



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D2963/2016

In the matter between:

GARY FEATHERBY

PLAINTIFF

and

THOKOZANE ZULU

DEFENDANT

ORDER

The following order shall issue:

1. The plaintiff's claim succeeds with costs.
2. The defendant is ordered to pay the plaintiff an amount of R100 000 (One Hundred Thousand Rand).

JUDGMENT

Steyn J:

[1] The plaintiff instituted action against the defendant, claiming payment of the sum of R750 000 (Seven Hundred and Fifty Thousand Rand) based on the fact that the defendant had defamed him in two publications, which were electronically distributed to the Chief Director of the Department of Labour; the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA); the Executive

Committee of the Bargaining Council for the Contract Cleaning Industry (BCCCI); the Secretary of the BCCCI; the Provincial Secretary of the South African Transport and Allied Workers Union (SATAWU), and the Chairperson of the National Contract Cleaners Association (NCCA). The second publication was published on 7 December 2015 and sent to the recipients listed in annexure B, attached to the particulars of claim.

[2] Copies of the published statements were attached to the particulars of claim. The relevant parts of 'A' read as follows:

'5. This Bargaining Council is run like somebody's general dealer

I believe that the nature and the composition of Bargaining Council suggest that it must be run on democratic principle (sic), however in this Council (sic) it seem Mr Featherby believe that he can do as he pleases, going out of his way to protect the dishonest (and God knows what else) people in return that they do whatever he instruct them to do, which enable him to control the Council. On the other hand he resent those who does their work with integrity and honesty, whom he cannot manipulating and control. His obsession with controlling and manipulating of everything negatively affect the functioning of the Council. A question needs to be asked is this Bargaining Council benefitting employers and employees in the industry or only certain delegates who believe that they must personally benefit from every opportunity that arises in the Council. When there is a tender or employment opportunity they think about their relatives first and have to be told that they must follow proper processes, which in many cases will be reluctantly followed but the original decision before the process never changes. The investigation needs to determine whether the EEA and its Amendments and B-BBEEA are considered when awarding tenders and employing people.

6. Investigation of withdrawal of arbitration awards for a certain company represented by the delegate of the Council

On Monday 19 October 2015 there was a decision to withdraw awards of certain company represented by the delegate of the Council, investigation to determine the following:

- Is the Secretary empowered to withdraw the arbitration awards, one of the award had been a subject of an unsuccessful rescissions application?
- Is it fair that other companies attend their cases and when they have awards against them they abide and pay but this company which does not respect the Council process is allowed to get away by not complying with awards?
- Does this not give the company concerned a competitive advantage against its competitors?

- Is it fair that this company which had not been complying for some time be given special treatment because it is represented by the delegate of the Council?
- Is it fair to the agents that the person responsible for cases not going forward, is (according to him) empowered to withdraw the awards issued by the Commissioner?
- Is there any awards in the past that was withdrawn by the Secretary?

Hard working colleagues are so negatively affected by what is happening in this Council, including the sabotaging of their cases to such that one of them has been referred for anger management therapy and I appeal to the DOL to conduct an investigation on this and other matters before something very bad happen to this Council.

Furthermore should anyone believe that there is anything that should be investigated against MYSELF I invite that person to provide information so that it could be part of the investigation. My motivation for writing this memo to the Department is my quest for JUSTICE to the cleaning employees and FAIR competition among cleaning employers.¹

[3] When the matter was heard, it was not disputed that the statements were authored and distributed to the recipients via email by the defendant. What remained to be determined was whether the content of the statements was defamatory in nature and made with the intention to defame the plaintiff as claimed. The defendant, in his plea, denied that the statements were defamatory of the plaintiff. He claimed to have acted in terms of his duties as a member of the council and that his conduct was justified since it was protected by qualified privilege. The matter proceeded on both merits and quantum.

Legal position

[4] In *Lawsa*,² the delict of defamation is defined as the 'unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff'. It is trite that once a plaintiff establishes that a defendant has published a defamatory statement concerning him, that it is presumed that the publication was both unlawful and intentional.

[5] Further, at para 114 of *Lawsa supra*, the author FDJ Brand states that '[d]efamatory statements include statements which injure the reputation of the

¹ See pages 11 and 12 of the papers.

² 14(2) *Lawsa* 3 ed para 111.

person concerned in his or her character, trade, business profession or office or which expose the person to enmity, ridicule or contempt’.

[6] In *Tsedu & others v Lekota & another*,³ Nugent JA found a judgment of an English court helpful in understanding defamatory statements:

“The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.”⁴

(My emphasis.)

[7] In determining whether the statements are defamatory, I am guided by the approach of the Supreme Court of Appeal (SCA) in *Smalle v Southern Palace Investments 440 (Pty) Ltd (121/2016)*⁵ stating:

‘A statement is defamatory if, on an ordinary reading by a reasonable person, it has the effect of injuring a person’s reputation. Statements can have a primary and a secondary meaning. The primary meaning is the ordinary meaning and the test is an objective one, requiring no evidence. A two stage inquiry is required to establish whether a primary statement is defamatory. The first is whether the words are reasonably capable of referring to the plaintiff and the second is whether the reasonable person would regard the words as referring to the plaintiff.’⁶

(Original footnotes omitted, my emphasis.)

[8] Corbett JA, in *Borgin v De Villiers & another*,⁷ observed:

‘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

³ *Tsedu & others v Lekota & another* 2009 (4) SA 372 (SCA).

⁴ *Ibid* para 13.

⁵ *Smalle v Southern Palace Investments 440 (Pty) Ltd (121/2016)* [2016] ZASCA 189 (1 December 2016).

⁶ *Ibid* para 23.

⁷ *Borgin v De Villiers & another* 1980 (3) SA 556 (A) at 578H.

stated by him were true may give rise to the inference that he was actuated by express malice. . . .’

[9] The SCA, in *Le Roux & others v Dey*,⁸ held that the following approaches be followed in determining wrongfulness:

‘[6] To answer the first question a court has to determine the natural and ordinary meaning of the publication: how would a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning the court must take account not only of what the publication expressly conveys, but also of what it implies, ie what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words.

[7] It may be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise. One must have regard to the nature of the audience. In this case the main target was the school children at the particular school, but it also included at least teachers.

[8] A publication is defamatory if it has the “tendency” or is calculated to undermine the status, good name or reputation of the plaintiff. It is necessary to emphasise this because it is an aspect that is neglected in textbook definitions of defamation because it is usually said that something can only be defamatory if it causes the plaintiff’s reputation to be impaired. That is not the case, as Neethling explains with reference to authority:

“It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was actually injured, is almost completely ignored in the evaluation of wrongfulness of defamation. In fact, generally a witness may not even be asked how he understood the words or behaviour. In addition, it is required only that the words or behaviour *was calculated or had the tendency or propensity* to defame, and not that the defamation actually occurred. In short, *probability of injury* rather than actual injury is at issue. It can be concluded, therefore, that the courts are not at all interested in whether others’ esteem for the person concerned was in fact lowered, but only, seen objectively, in whether, in the opinion of the reasonable person, the esteem which the person enjoyed was adversely affected. If so, it is simply accepted that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense.”

⁸ *Le Roux & others v Dey* 2010 (4) SA 210 (SCA).

(Original footnotes omitted, my emphasis.)

Evidence

[10] I shall now turn to the evidence that was adduced at trial. The plaintiff, Mr Featherby, the managing director of Proline Services for over 40 years, testified that the company is contracted in cleaning services and also provides care to the elderly. He confirmed that the alleged defamatory statements were sent to the BCCCI, as well as to the recipients per the address list on the email, attached as annexure A. Personally, he received a copy of the publication in his capacity as chairman of the BCCCI. An executive committee consisting of a chairman, a vice-chairman and four delegates manages the BCCCI. The BCCCI takes care of the interests of 17 000 cleaners that fall within its jurisdiction. The chairman and vice-chairman are appointed in terms of the BCCCI Constitution at the annual general meeting every year. The chairmanship alternates between the employee party and employer party every second year. The chairman of the BCCCI exercises his powers in conjunction with the vice-chairman, who at the time of the publications was Mr E Bina. The content of annexure A, paras 5 and 6, were read into the record as well as the content of annexure B. According to the plaintiff, when the defendant published the statements, he did not produce any proof of any of the allegations.

[11] The plaintiff explained that he understood the statements to convey that he was corrupt to the core and unethical. He confirmed that council resolutions and decisions are not taken in isolation but in consultation with the BCCCI executive committee and that, decisions made by the BCCCI are minuted. Personally, he never had control over tenders and employment opportunities. No proof was ever submitted in relation to the alleged tenders or employment opportunities. He confirmed that annexure B was sent to the KZN NCCA members.

[12] It was his evidence that, PricewaterhouseCoopers (PwC) was instructed by the executive committee to investigate all of the allegations that were made by the defendant. PwC finalised their investigation in 2016. He has seen the findings and the report issued by PwC. There was no proof of the allegations that were made by the defendant. The defendant lodged a complaint regarding the investigation and the report issued. His complaint was submitted to the director of PwC and the investigator of the allegations. The findings were not changed after the defendant's

complaint. In relation to both of the defamatory statements, the plaintiff felt that he was personally under attack as the defendant alleged that he was corrupt.

[13] According to him, the defendant was the compliance manager and his job was to attend to the compliance duties of the BCCCI. He was aware of the fact that the defendant was concerned about a company, Khayisa Cleaning (Khayisa), which was not issued a certificate of compliance. The chair, vice-chair and secretary of the council were of the view that the company was not compliant with all of the requirements. At a subsequent meeting, the defendant tried to persuade the council to give Khayisa a certificate of compliance. Despite the defendant's attempts to see to it that Khayisa received a certificate, the council terminated the contract with Khayisa since it was not compliant. It failed to provide sufficient provident funds to its employees and assure that there were sufficient funds for the annual bonuses of its employees.

[14] The plaintiff explained that the publications certainly had the effect that some people perceived him to be corrupt and that the statements affected his relationship with the Department of Labour and those representing the department. He felt hurt by the statements that were made by the defendant since he was of the view that they had had a good relationship in the past.

[15] In cross-examination, the plaintiff was asked how PwC became involved in the forensic investigation. He explained that the BCCCI was given the names of three forensic investigators and that the council decided on PwC as the preferred investigator. In his view, there was no factual basis for the allegations made by the defendant. He confirmed that Mr Patrick Mkhize (Mr Mkhize) had also made a defamatory statement about him and that he had instituted a defamation suit against Mr Mkhize as well. Mr Mkhize however apologised and he withdrew the case against Mr Mkhize.

[16] The defendant testified in his own defence. He has known the plaintiff since 2005, when he still employed by another company that was represented on the BCCCI. In 2011, he applied for and was appointed as senior agent with the council. According to him, he was promoted and served as the deputy secretary of the BCCCI. He stood in for the secretary whenever the secretary was not available.

During his work as an inspector, he had to inspect companies who failed to comply with the basic conditions and regulations of the industry. If they were not compliant, a case was opened against them. He was in charge of opening the case and taking it to the stage of conciliation whereafter, the secretary of the BCCCI, Mr Venter, would take it further. In his view, cases would disappear after the conciliation process. He discussed the disappearance of the cases with Mr Venter but the discussion bore no fruit. He then requested a meeting with the chair and vice-chair in 2012. In attendance at the meeting were the plaintiff, Mr Paul Judkins (Mr Judkins), Mr Colin Mshe and the secretary, Mr Venter. The plaintiff, as chair, resolved the issue by suggesting that the communication at the BCCCI should be improved. He was not satisfied with the outcome of the meeting. In 2014, he confided in Mr Judkins and informed him that cases were still disappearing.

[17] In March 2015, Mr Mbina undertook to attend to the issue and he ensured them that cases disappearing would no longer take place. The defendant explained that he felt that the plaintiff was making decisions that were not all his to make. According to him, Khayisa was successful in complying with all of the industry's requirements but the BCCCI decided not to give the company a certificate. His explanation for distributing the first memorandum ('A') was because he wanted the BCCCI to be investigated. It was not his intension to attack the plaintiff. He believed in what he had stated in the memorandum.

[18] In cross-examination, he was asked to explain certain allegations, especially since he said he did not intend to defame the plaintiff. When asked to explain the statement that the BCCCI was run like someone's general dealer, he could not give an explanation. He also had great difficulty in answering how his beliefs resulted in conclusions without any factual foundation for those beliefs. He conceded that PwC concluded that there was no wrongdoing at the BCCCI. He stated in his evidence-in-chief that the second memorandum was distributed to the recipients to show and explain that he was not working with the unions. Again, he was taken through an analysis of the entire memorandum (annexure B), paragraph by paragraph, which did not correspond with his contention that the document was sent to clarify his position viz-a-vis the unions. He conceded, albeit reluctantly, that the document did not reflect what he had claimed earlier. He however persisted in his contention that

the statements were not a vicious attack on the plaintiff's reputation or his integrity. The defendant did not call any witnesses to testify.

Evaluation

[19] Based on the evidence in totality, it has been shown on a balance of probabilities that the statements were made by the defendant and distributed to the individuals on the address lists. In a consideration of the content of the statements, it is clear that the words used in the statements are not difficult; they are understandable to the ordinary person and written in plain English.

[20] In my view, to say that the plaintiff is 'going out of his way to protect the dishonest' and that he resents those who do their work with honesty and integrity, had to tarnish the plaintiff's reputation and discredit him in his professional standing. Given the content of both memorandums, I am of the view that words published are defamatory in nature and most certainly caused the plaintiff to be defamed.

[21] Having so found, it is necessary to consider whether the statements published by the defendant were protected by qualified privilege as pleaded by the defendant. The SCA, in *National Education, Health and Allied Workers Union & another v Tsatsi*,⁹ recognised that one of the 'occasions that enjoys the benefit of the defence [qualified privilege] is an occasion where the statements were published in the discharge of a duty or exercise of a right'.¹⁰ Whether a statement was relevant to the occasion will be determined by reason and common sense.¹¹ As was held in *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & others*, '[r]elevance in the context of qualified privilege is not to be equated to relevance in the strict evidential sense'.¹²

[22] During the defendant's testimony, he conceded that he had no factual foundation for a number of the allegations. In fact, the allegations went beyond his duties as compliance officer. He did not simply request an investigation into the affairs and conduct of the BCCCI. He also did not explain in annexure B his position in relation to the unions. In fact, he made bold statements about the conduct of the

⁹ *National Education, Health and Allied Workers Union & another v Tsatsi* [2006] 1 All SA 583 (SCA).

¹⁰ *Ibid* para 11.

¹¹ See *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & others* 2001 (2) SA 242 (SCA) para 26.

¹² *Ibid* para 25. See also *Crawford v Albu* 1917 AD 102 at 124, where fair comment was treated as analogous to a plea of qualified privilege. At 133, the court regarded comment to be fair whenever it is relevant and made without malice.

plaintiff that was not supported by any evidence. In my view, once it is shown that the allegations made are not relevant to the issues at hand, then the defence of qualified privilege cannot protect the statements. Given the facts of this case, the defendant has failed in his defence that the statements were protected by qualified privileged and hence lawful.

[23] I am satisfied that the plaintiff succeeded on a balance of probabilities in proving his claim.

Award

[24] Having found in favour of the plaintiff, this court still has to determine the quantum of the award. This court's discretion should be informed by the circumstances of the case, and the prevailing attitudes of the community.

[25] This court has a wide discretion in determining the award of general damages. I have already found that the plaintiff in his position at the BCCCI was defamed as being corrupt and not honest. The conduct of the defendant to make public allegations that could not be supported by any factual foundation was wrong. I will however take into account that the statements were not widely circulated. There was no evidence that members other than those recipients on the lists had received the defamatory statements. The plaintiff also testified that he still works at the BCCCI and in my view; the impact of the statements had a temporary effect on his professional standing at the council.

[26] Having considered all of the above factors, in my view, a fair and reasonable award in the circumstances of this matter would be R100 000 (One Hundred Thousand Rand).

Costs

[27] The plaintiff as the successful party is entitled to costs. In argument, Mr *Chetty*, for the defendant, argued that costs, if awarded should be on the magistrates' courts scale, as the matter should not have been pursued in the high court. In my view, if the defendant felt so strongly about the issue that this matter should have been heard in the lower court, he should have applied for a transfer to another forum at the pre-trial stage. I am satisfied that the issues raised, sufficiently warranted a hearing at this forum.

Order

[28] In the result, the following order shall issue:

1. The plaintiff's claim succeeds with costs.
2. The defendant is ordered to pay the plaintiff an amount of R100 000 (One Hundred Thousand Rand).

Steyn J

APPEARANCES

Counsel for the plaintiff	:	Mr M Titus
Instructed by	:	Macgregor Erasmus Attorneys 114 Bulwe Road, Glenwood Durban Ref:Mpho Titus/sb/BAR1/0012
Counsel for the defendant	:	Mr K Chetty
Instructed by	:	Lushen Pillay Attorneys Suite 130, First Floor 320 Dr Pixley Kaseme Street Durban Ref:RM/Z325L/HC
Date of Hearing	:	16 and 17 November 2020
Date of Judgment	:	29 January 2021