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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1438/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

K[...] A[...] B[...]

PLAINTIFF

and

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA (NUMSA)**

1ST DEFENDANT

ANDILE WISEMAN ZITHO

2ND DEFENDANT

MAMOJABENG CONSTANCE MOLATLHOE

3RD DEFENDANT

HEARD ON: 24 JANUARY, 25 JANUARY & 3 MARCH 2023

JUDGMENT BY: CHESIWE, J

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by email. The date and time for delivery is deemed to be at 14h00 on 21 July 2023.

BACKGROUND

[1] The Plaintiff instituted a defamation action against the Defendants, claiming damages totalling R1 000 000, 00. The Plaintiff allegedly suffered as a result of the Second Defendant who uttered in a meeting that the Plaintiff is human immunodeficiency virus (HIV) positive.

[2] The summons was duly served on all three Defendants and the Defendants had filed a notice to defend the action on 14 April 2021. The Plaintiff is an employee of the First Defendant.

PLAINTIFF'S CASE

[3] The Plaintiff's case was narrated by the Plaintiff herself and one witness. The Defendant's case was narrated by the First and Second Defendants on whether Defendants' disclosure of the Plaintiff's HIV status constitutes defamation.

[4] The Plaintiff took the stand and testified that On 27 February 2021, there was a grievance meeting which was directed towards Mr. Andile Wiseman Zitho (herein after referred to as the Second Defendant). In the meeting there were 14 people who are colleagues of the Plaintiff and the Defendants while some were from management.

[5] Before the meeting could commence, the Second Defendant inquired in the meeting as to who the author of the grievances that were lodged with the Chairperson, Mr. Andrew Chirwa was. It followed that Mr. Chirwa, responded that it was not necessary to ask for the author of the grievances.

[6] The Second Defendant proceeded to voice in the meeting as they sat there that, "some of them will not be getting along after the meeting as they could only guess what he was about to say to them." And this is where the Second Defendant immediately proceeded to utter in that very grievance meeting that the Third Defendant informed him that the Plaintiff is HIV positive.

[7] The Plaintiff stated that she did confide in the Third Defendant in 2007 regarding her HIV status. She regarded the Third Defendant as a friend and sister

and had no reason to believe that the Third Defendant would repeat it to anyone. She further denied that she disclosed her HIV status to other people in the office. The Plaintiff alleges that immediately after the disclosure of her HIV status in the meeting, she was no longer well. She was admitted at a hospital and had to consult a psychologist for therapy session. The Plaintiff further stated that the Second Defendant came to comfort her, but did not apologise for the utterances made in the grievance meeting.

[8] The Plaintiff testified that these utterances made her to have suicidal thoughts. It disturbed her at work and she as a result thereof made a lot of mistakes. Further that the Second Defendant became very harsh towards her when she made mistakes.

[9] Under cross-examination, the Plaintiff stated that she did not lodge a complaint with the Commission for Conciliation, Mediation and Arbitration (CCMA) nor with the employer. She said, the Second Defendant did not respect the employees' confidentiality and that on the day of the meeting, the Second Defendant made her status known, and walked out of the meeting laughing. The Plaintiff denied that she disclosed her HIV status to other employees.

[10] The Plaintiff's first witness was Mathapelo Galada. She testified that on 27 February 2021, she was also in the grievance meeting. The meeting was meant to address the grievances that employees lodged against the Second Defendant as their immediate supervisor. Instead, the Second Defendant told them in the meeting that "what he was about to say will cause confusion amongst them." The Second Defendant told them they talk about confidentiality, whereas the Third Defendant told him that the Plaintiff is HIV positive.

[11] Mathapelo further testified that she was not aware of the Plaintiff's HIV status. She was shocked and hurt as she never thought the Plaintiff's HIV status would be mentioned in a meeting which was supposed to resolve the grievances employees had against the Second Defendant and that it was wrong for the Second Defendant to utter in a meeting about the Plaintiff's HIV status.

[12] Under cross-examination, Mathapelo said she had no interest in this case and maintained that the Second Defendant did not address the issues that were raised, but instead mentioned the Plaintiff's HIV status which was not necessary for the Second Defendant to mention in the meeting.

[13] No further witnesses were called. The Plaintiff closed her case.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[14] The Plaintiff had instituted an action for defamation damages against the First, Second and Third Defendants. At the close of the Plaintiff's case, Counsel for all three (3) Defendants brought an application for absolution from the instance, from the bar. Counsel on behalf of the Plaintiff opposed the application. As per the background of this matter, the Plaintiff is suing for damages based on an incident that took place on 27 February 2021, in which the Second Defendant allegedly uttered words to the effect that the Plaintiff is HIV positive. Counsel for the Defendants in the application for absolution from the instance submitted in oral argument submitted that based on the allegations as stated in the particulars of claim, the Plaintiff has not raised allegations of *animus iniuriandi*. The Plaintiff has not proven or furnished any evidence of intent to defame by the Defendants. Furthermore, it was submitted that there was no publication on the part of the Second and Third Defendants. Instead, the co-workers were supportive to the Plaintiff on the day in question. Counsel submitted that if no evidence against the Second and Third Defendant exists, it therefore follows that absolution must follow. Counsel for the Plaintiff in opposing the application, submitted that the application for absolution from the instance on behalf of the Defendants in that the Plaintiff could not prove publication if incorrect as the Second and Third Defendants in their papers by disclosure and utterance had proved publication. Further that the Third Defendant was correctly cited and jurisdiction was established and the Plaintiff merely pleaded wrongfulness.

[15] It is trite that the test to be applied by Court when absolution is sought at the end of the Plaintiff's case is whether there is evidence upon which a reasonable

person might find for the Plaintiff. In **Gordon Lloyd Page & Associates v Rivera and Another** ¹, the Court held that:

“The test for absolution to be applied by the trial court at the end of the plaintiff’s case was formulated in Claude Neon Lights SA Ltd v Daniel 1976 (4) SA 403 (A).

[16] Furthermore, Rule 39(b) of the Uniform Rules of Court Provides that at the close of the Plaintiff’s case, the Defendants may apply for absolution from the instance. This implies that the Plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution.

[17] As far as inference from the evidence is concerned, the inference relied upon by the Plaintiff must be reasonable, especially where the Court has to consider whether there is evidence upon which a reasonable person might find for the Plaintiff. In the case of doubt as to what a reasonable Court might do, the Court should lean on the side of allowing the Plaintiff not to be lightly deprived of her remedy without the evidence of the Defendant being heard. A Defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.

[18] In this regard, reference is made to **Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd** ². One cannot turn a blind eye to the Plaintiff’s evidence. If absolution is granted, the Defendant is not called upon to answer to the Plaintiff’s claim which result in an unfair result to the Plaintiff. If also granted, Counsel will have put a version before court during cross-examination on the basis that the witness of the Defendant will come and testify, with the consequence that the Defendants’ version is not tested. Absolution should not be granted lightly.

[19] In circumstances where the Plaintiff’s case is so weak, that no reasonable court can find in favour of the Plaintiff, absolution may be granted. However, in the ordinary course of events, it will nevertheless be granted sparingly, but when the

¹ 2001 (1) SA 88 SCA at para [2]

² 1971 (4) SA 90 (RA)

occasion arises. A Court should order in the interest of justice. As a general rule where absolution at the close of the case is refused, avoid unnecessary discussion of the evidence. In reaching a conclusion, whether absolution should be granted, it is not required of the Court to evidently look at the evidence as would be required at the end of the trial. The onus on the Court is less stringent as there should only be evidence on which a Court can or may find in favour of the Plaintiff.

[20] This Court in applying its mind reasonably to the Defendants' application, cannot simply ignore the issues as raised by the Plaintiff and its witnesses, as these have to be answered. Based on the above application for absolution from the instance, it therefore ought to be dismissed.

DEFENDANTS' CASE

[21] The Second and Third Defendants took to the stand. The Second Defendant testified that he learned of the Plaintiff's HIV status out of concern as the Plaintiff was always off sick. He was informed by the Third Defendant in 2010 about the Plaintiff's HIV status. The Second Defendant conceded that there was a meeting, which was called to deal with the grievances of the employees.

[22] The Second Defendant explained that there was a first seating which was around April 2021. This meeting was for purposes of the staff members to explain their grievances. This meeting was followed up by the meeting of 27 February 2021 in which the Second Defendant had to answer questions from the meeting of the first seating. The Second Defendant indicated in the meeting of 27 February 2021, he needed to explain that the people who lodged the grievances were not confidential about each other's private matters and proceeded to make an example that he knew since 2010 that the Plaintiff was HIV positive as he was told by the Third Defendant. He said, after mentioning that the Plaintiff was HIV positive, the Plaintiff started to cry. The meeting was adjourned to give the Plaintiff time to calm down. The meeting resumed and when it ended, he then apologised in the presence of all present at the meeting and to the Plaintiff further proceeded to comfort her and said that he was sorry.

[23] The Second Defendant denied that there was confusion in the meeting nor was there any reaction from the people who were in the meeting. The Second Defendant further indicated that since this incident, the working relationship between himself and the Plaintiff has been professional as the Plaintiff is his subordinate, neither has there been tension as he is the one that got the Plaintiff to be promoted from being a cleaner to receptionist. The Second Defendant further submitted that on 23 January 2023, he gave the Plaintiff instructions to perform some work for him and that the Plaintiff diligently followed these instructions.

[24] The Third Defendant, Mamojabeng Constance Molatlhoe testified that in 2007, the Plaintiff confided in her that she was HIV positive. Further that the Third Defendant and the Plaintiff were good friends to the extent that they shared personal issues. In 2010, the Plaintiff disclosed that she is HIV positive as the Second Defendant had raised a concern about the Plaintiff having not been at work for a long period. The Third Defendant explained that she communicated the Plaintiff's status to the Second Defendant in confidence.

[25] The Third Defendant mentioned that on 27 February 2021, she was present in the meeting when the Second Defendant made the example on the issue of confidentiality which was on the agenda that he knew about the Plaintiff's HIV status and had never divulged this information to anyone. The Third Defendant stated that it was tense in the meeting after the disclosure of the Plaintiff's HIV status. The Third Defendant mentioned that the Second Defendant apologised immediately in the meeting. The Third Defendant explained that before the Second Defendant could divulge the Plaintiff's HIV status, he cautioned all present in the meeting that what he was about to say, may shock all in the meeting. That was the Defendants' case.

[26] It is trite that a duty rests on a litigant to give evidence that is sufficient to persuade the Court at the end of a trial that his or her claim or defence succeeds. The rule being that the party who claims something has to satisfy the Court that he or she is entitled to the relief sought.

[27] The elements of defamation as stated in **Le Roux and Others v Dey**³, are

“The wrongful and intentional publication of a defamatory statement concerning the Plaintiff.”

[28] The Court in determining whether a statement is defamatory, has to establish the ordinary meaning of the words and whether that meaning is defamatory in that it has the likelihood to injure the Plaintiff’s reputation or good name as defamation laws are generally aimed at protecting a person’s right to an unimpaired reputation and good name.⁴

[29] The Plaintiff in order to succeed, is further required to show she suffered an impairment to her dignity. This will involve whether the Plaintiff’s subjective feelings have been violated and her dignity has been impaired.

[30] According to the Plaintiff in her oral testimony she did not expect that the Second Defendant would utter in a meeting of 14 people her HIV status. As a result, her feelings were hurt, she cried immediately after hearing of her HIV status in a meeting. She thereafter made a lot of mistakes in her work and that the Second Defendant was very harsh towards her when she made these mistakes. What hurt the Plaintiff most is that the Second Defendant laughed when he walked out of the meeting.

[31] The Plaintiff’s evidence is corroborated by Mathapelo Galada (Plaintiff’s second witness) that she was shocked when the Second Defendant made mention of the Plaintiff’s HIV status as she had no knowledge of this.

[32] The Second Defendant’s contention that he apologised to the Plaintiff as he did not mean to hurt the Plaintiff and that the utterances were an example to bring to the employees’ attention how confidentiality works as he had kept the knowledge of the Plaintiff’s HIV status. The Second Defendant’s defence that it was an example is

³ (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC)

⁴ (See *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC))

questionable. Of all the examples that could have been made particularly in a meeting, he instead chose to use the Plaintiff's HIV status as an example. The Plaintiff could have not imagined her HIV status been cited as an example.

[33] Though the Second Defendant indicated that he apologised to the Plaintiff, and conceded that it was wrong on his part to cite the Plaintiff's HIV status as an example, whereas the Plaintiff denied that the Second Defendant apologies to her.

[34] In **NM and Others v Smith and Others**⁵, the Court held as follows:

"There is nothing shameful about suffering from HIV/AIDS. HIV is a disease like any other; however, the social construction and stigma associated with the disease make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment. These pessimistic perceptions persist to fuel prejudice towards people living with HIV/AIDS"

[35] The Second Defendant to disclose in a meeting of 14 people, the HIV status of the Plaintiff should be regarded as public defaming of one's privacy, dignity and reputation of her name. It is indeed not the Second Defendant's place to disclose the HIV status of the Plaintiff or to disclose such sensitive detail about one's health in a meeting which meeting had nothing to do with the Plaintiff's state of health. The Plaintiff's HIV status is her private medical information which was shared without her consent. Even if the Plaintiff had confided in the Third Defendant, it was clarified that the Third Defendant was known to the Plaintiff like a sister and consent was not given to divulge the Plaintiff's HIV status.

[36] The Second Defendant's apology came after the harm had already been done. One can take into consideration the apology which can be a sign of remorse, but it is however seen as been delayed as all present in the meeting had already learnt of the Plaintiff's HIV status.

[37] The Plaintiff testified in a forth right manner and even cried during her testimony and court had to adjourn. This clearly informs that the Plaintiff sustained

⁵ (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC)

injuries to her reputation and dignity. Further that the aspect of privacy is significant and protected by our Constitution. The more sensitive the information of a person, the more it is important to protect such. ⁶

[38] I am therefore persuaded that the Second Defendant in mentioning the Plaintiff's HIV status in a meeting, constituted a wrongful act on his part and has thus defamed the Plaintiff's dignity, reputation and further violated her right to privacy of personal information.

DAMAGES

[39] The Plaintiff claimed an amount of R1 000 000-00 from all three (3) Defendants. Counsel on behalf of the Defendant submitted that the Court is to take into consideration that on the Plaintiff's version, the Second Defendant showed remorse by apologising. In determining quantum in respect of defamation, the Court has to take into consideration the seriousness of the defamation, the extent of publication, the reputation, character and conduct of the Plaintiff and the motives and conduct of the Defendant. **(See Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 at 595)**

[40] In **Esso Standard SA (Pty) Ltd v Katz** ⁷, the Court said the following:

"It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty."

[41] In determining quantum, the Court must have regard in respect of defamation, the seriousness of the defamation, the nature and extent of the publication, the reputation of the character and conduct of the Plaintiff, further the motive and conduct of the Defendant. ⁸

⁶ (See NM and others *Supra* at para [132])

⁷ 1981 (1) SA 964 (A)

⁸ (See Muller v SA Associated Newspaper 1972 (2) SA 589)

[42] In **Dikoko v Mokhatla**⁹, the following was stated:

“There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person’s reputation and honour as if these were marketplace commodities. Unlike businesses, honour is not quoted on the stock exchange. The true and lasting solace of the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest price to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.”

[43] The Plaintiff in the particulars of claim contends that damages in the amount of R1 000 000-00 would be appropriate award. No arithmetical calculations were advanced, nor is there an obligation on the Plaintiff that such calculations be advanced. However, it is well established in comparison with other cases that this is helpful in quantifying damages in a defamation claim.

[44] In **Dikoko supra**, the Constitutional Court granted an award of R110 000-00 for defamation wherein the Defendant had deliberately acted to falsely implicate the Executive Mayor of the Southern District Municipality.

[45] In **NM and Others supra**, Constitutional Court granted the Applicants each an award- of R35 000-00 wherein the Applicants’ HIV status and names were published without their consent in a book.

[46] In **Independent Newspaper Holdings Ltd and Others v Suliman**¹⁰, the Plaintiff’s picture was published in the Cape Times that he was a suspect in a Cape Town bombing. The Plaintiff claimed R1 000 000-00, the Court granted an award of R90 000-00. On appeal, the SCA awarded R50 000-00.

[47] In the matter of **Tsedu and Others v Lekota and Another**¹¹, the Plaintiff who was a prominent office bearer of the African National Congress, brought an application against the City Press wherein an article that stated that ANC Top Brass

⁹ 2006 (6) SA 235 (CC) at para [109]

¹⁰ (49/2003) [2004] ZASCA 57; [2004] 3 All SA 137 (SCA)

¹¹2009 (4) SA 372 (SCA)

spied on one another as apartheid agents was published, therein the Plaintiff was awarded R150 000-00 and R112 500-00 respectively. On appeal, both amounts were reduced to R100 000-00.

[48] The Second Defendant having apologised to the Plaintiff may be regarded as a mitigating factor. Furthermore, the Plaintiff is still employed by the First Defendant and the Second Defendant is still the immediate supervisor. The Second Defendant testified that the working relationship between himself and the Plaintiff is very cordial and professional. Thus burdening the Defendants with a huge claim would be unfair.

[49] In my view, a defamation claim should not be embarked upon for purposes of generating an income and that such awards generally tend to be conservative when taking into consideration the comparative cases. The defamation in this matter therefore does not warrant a huge amount as claimed by the Plaintiff. As stated in **NM and others *supra***, there is nothing shameful about HIV/Aids except for the negative stigmatization perpetuated by those who persists to treat the disease as shameful.

[50] Therefore, taking into consideration the authorities cited above, and in respect of the defamation claims, I am of the view that an award of R100 000-00 would be fair and reasonable in the circumstance.

[51] In respect of costs, it is trite that costs follow the event. The Plaintiff is therefore entitled to the costs of the litigation. However, a punitive cost order is not warranted in this case.

[52] Accordingly, the following order is made:

1. The Plaintiff's claim for damages is awarded;
2. The Defendants shall pay the Plaintiff an amount of R100 000-00 jointly and severally;

3. The Plaintiff is awarded interests thereon at the permissible legal rate (as promulgated from time to time), calculated from the date of judgment to date of final payment;

4. The Defendants shall be liable for the Plaintiff's costs of suit on a party and party scale as taxed or agreed.

S. CHESIWE, J

On behalf of the Applicant: Mr. K Matee
Instructed by: Matee Attorneys
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On behalf of the Defendant: Adv. HP van Nieuwenhuizen
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