

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: 4086/2019

In the matter between:

BONGANI MALIZA

Plaintiff

and

G4S CASH SOLUTIONS (PTY) LTD

First Defendant

KEVIN GOVENDER

Second Defendant

JUDGMENT

Rugunanan J

[1] The plaintiff instituted action against the defendants claiming damages jointly and severally for defamation and consequent reputational harm in the sum of R2 million. His claim arose in the circumstances set out hereunder.

[2] The plaintiff is a resident of Mthatha and a former employee of the first defendant. In circumstances unrelated to the merits of this matter he ceased being employed by the first defendant on 23 April 2019.

[3] The first defendant, G4S is a private company in Mthatha (hereinafter referred to either as 'G4S' or the first defendant, depending on the appropriate context). It has a footprint in the greater area for providing cash-in-transit services. The second

defendant, Mr Kevin Govender, is an employee of the first defendant and discharges duties in the capacity of its regional director.

[4] During the period March 2018 to November 2018 the first defendant experienced a sudden spate of robberies and/or attempted robberies involving its cash-in-transit vehicles.

[5] The case for defamation that is alleged by the plaintiff occurred during a conference call on 14 November 2018 during which the plaintiff alleges that the second defendant wrongfully defamed him by making the following factual statement:

‘You are a robber and every staff member is afraid of you.’

[6] Among those present on the conference call, plaintiff alleges were staff members and members of the public. The conference call took place in the local office of the first defendant attended by a manager, Mr Clint Dippenaar together with the plaintiff and two employees of the first defendant, namely Mr Bangile Ndila and Mr Benedict Shange. The conference call was hosted remotely from another province by the second defendant Mr Kevin Anand Govender.

[7] It is not disputed by the defendants that the conference call took place among those aforementioned in attendance.

[8] It is denied however that the statement alleged by the plaintiff was uttered by the second defendant. In amplification of the denial the defendants plead that it had come to their attention that the plaintiff could possibly have been involved in or associated with robberies. Regard being had to the nature of the business conducted by the first defendant, the information concerning the plaintiff was viewed in a serious light and required investigation.

The legal position and the issue to be decided

[9] I propose to deal with the stages of enquiry in a claim based on defamation before identifying the issue in terms of which the matter falls to be decided.

[10] Defamation consists of the wrongful and intentional publication of a defamatory statement concerning the plaintiff.¹

[11] There is a two-stage enquiry for determining whether the statement is defamatory.

[12] In the first stage, the ordinary meaning of the words used must be established. In determining the meaning of the statement complained of, the court is not concerned with the meaning which the maker of the statement intended to convey, nor is it concerned with the meaning given thereto by the person to whom it was published. It is irrelevant whether the person believed the statement to be true or whether they thought less of the plaintiff.² The meaning of the statement is determined objectively by the legal construct of the reasonable reader and is not a matter on which evidence may be led.

[13] In the second stage, one asks whether that meaning was defamatory in that it was likely to injure the good esteem in which the plaintiff was held by the reasonable or average person to whom the statement was published.³ Once publication of the defamatory statement has been proved, it is then presumed that the publication was wrongful and published with the intention to injure (*animo iniuriandi*). A defendant seeking to avoid liability must raise a defence that excludes, and must adduce admissible evidence rebutting, either wrongfulness or intention.⁴ Stated differently the onus rests on the defendant to establish either that the publication was not wrongful or that it was not published with the requisite intention.

[14] The defendants deny that the alleged statement was made. What this entails is that the issue that falls to be decided at the outset is whether the statement was made. For reasons that follow the finding on this issue renders it unnecessary to delve into the two-stage enquiry.

¹ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 18; *Du Toit v Coetzee* 2022 JDR 1555 (FB) paras 9-13.

² *Le Roux v Dey* 2011 (3) SA 274 (CC) para 89.

³ *Economic Freedom Fighters and Others v Manuel* 2020 (3) SA 425 (SCA) para 30.

⁴ *Economic Freedom Fighters and Others v Manuel supra* para 36.

[15] A total of six witnesses testified during trial. The plaintiff testified on his own behalf and called three witnesses namely; Mr Bangile Ndila, Mr Luxolo Sangqu, and Mr Siphosake Vuso. Testifying for both defendants were Mr Kevin Anand Govender (who also did so in his capacity as second defendant) and Mr Benedict Shange. Logically, the scope of the evidence of the witnesses is confined to the issue identified for determination.

[16] The denial by the defendants occasioned conflicting versions between the parties. The following *dictum* in *National Employers' General Insurance Co Ltd v Jagers*⁵ lays down the proper approach for determining the facts in a civil trial:

“It seems to me, with respect, that in any civil case, as in any criminal case the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

The evidence

⁵ 1984 (4) SA 437 (E) at 440D-G. See too *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-F; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 30.

[17] To begin with, though maintaining that he is proficient in English the plaintiff elected to testify in IsiXhosa. He testified at the outset that the second defendant who chaired the conference call stated that it came to his ear that the plaintiff is a robber and causing people to be killed in the company. The evidence even though given in translation is discordant with the factual statement as pleaded and quoted earlier in this judgment. At no stage of his examination-in-chief did the plaintiff's testimony come anywhere close to repeating verbatim what the second defendant is alleged to have said, neither did he confirm what is set out in the particulars of claim.

[18] In cross-examination, and as the plaintiff's testimony progressed, his evidence about what was said to him by the second defendant, excluded the imputation that he is a robber and morphed somewhat into an obscure assertion that the second defendant said that he caused people to be killed. When it was put to him directly that the version of the second defendant would be that the utterance or statement (as factually pleaded) was not made at all, the plaintiff denied that version. I interpose to state that it is somewhat of a curious anomaly for the plaintiff to proffer a denial when indications are that he could not clearly and accurately recollect the factual statement on which his case was pleaded and in the same breath maintain that he understood what was said to him during the conference call.

[19] In addition, the plaintiff conceded that at the time of the conference call he knew that it was the first defendant's protocol to act on information and investigate matters involving cash in transit robberies and that the police would also be solicited for investigative assistance. He conceded that the first defendant 'must do something' where the interests of its employees rendered it necessary to do so – suggesting by implication that the first defendant could not adopt a supine approach on matters of safety. He conceded further that he had known that a shop steward had raised concern with the first defendant about his alleged involvement in the robberies. In this regard he took no issue with it being put to him that it could have been employees within the ranks of the shop stewards who may have made allegations about his involvement in the alleged robberies.

[20] When testifying, the second defendant Mr Govender maintained in evidence-in-chief and during cross-examination that he never made the statement or utterance

as pleaded by the plaintiff. He testified that he brought it to the attention of the plaintiff that concerns were raised by shop stewards that the plaintiff, and certain other individuals may possibly be involved, that employees were scared of the plaintiff and that the plaintiff should be aware that the concerns were being investigated.

[21] This version of the second defendant is supported by the plaintiff's own witness Mr Ndila's whose evidence was unequivocal. He narrated that at the conference call the second defendant laid it bare that the plaintiff was 'suspected' of the robberies at the company and that the company was 'investigating'.

[22] Mr Shange who testified for the defendants recounted that what was conveyed on the conference call was that the second defendant received information from sources, among them shop stewards, to the effect that the plaintiff might be involved in criminal activities. He fairly agreed that it might be upsetting for somebody to be investigated for possible involvement in criminal activity but that did not amount to the subject being labelled a criminal.

[23] Mention must be made of a further aspect of the evidence. It pertains to a document contained in the defendants' trial bundle. Its heading is styled Subject – Suspicious Activity of Staff Member'. The document is dated 14 November 2018 and bears the plaintiff's signature of receipt. Consistent with the version of the second defendant, it states:

'The purpose of the meeting was to discuss the following with Mr Bongani Maliza
It has come to the attention of the G4S SID Intelligence Department that you could possibly be involved or associated with criminal elements.

That in the light of the business conducted by G4S, such activities are regarded as suspicious.

That the employee Mr Bongani Maliza is going to be monitored closely ...'

[24] The plaintiff alleged that the document was signed at a later stage under duress and that it does not correctly reflect what was discussed. No evidential foundation was introduced to support this rebuttal. It is moreover improbable that incorrect facts would have been recorded in the document in contemplation of defending a defamation action instituted almost a year later. While accepting that the document is not a word- for- word transcript of what was discussed during the conference call it is unmistakable in its recordial of an investigation or monitoring of the plaintiff.

[25] In my assessment of the evidence, this is certainly not a matter in which the probabilities are evenly balanced. The plaintiff was an unsatisfactory witness whose version was not supported by Mr Ndila. As for Mr Sangqu and Mr Vuso, the remaining witness called by the plaintiff, they were clearly not present on the conference call neither as employees of the first defendant nor as members of the public. Their evidence is therefore irrelevant to the issue to be decided and does not warrant scrutiny.

[26] In argument counsel for the defendants correctly drew attention to three noteworthy aspects in evaluating plaintiff's credibility, namely:

26.1 Under cross-examination he initially stated that he could not recall being a victim during a cash-in-transit heist whilst employed by G4S. He later denied that he was present at any robbery involving G4S transit vehicles. He conceded however – after a specific incident on 26 July 2018 at First National Bank Mthatha was put to him – that he was present as a G4S employee during that heist. This would undoubtedly have been a traumatic experience and it is improbable that he would have plainly forgotten about it. That he was present during the FNB incident is borne from the testimony of the second defendant and Mr Shange who both confirmed that he was performing duties on behalf of G4S when that incident occurred.

26.2 The allegation is made in the particulars of claim that other members of the public were present on the conference call. This aspect was not dealt with at all during the plaintiff's evidence in chief. Unable to explain how or what basis this allegation had interceded in his pleadings he conceded during cross-examination

that there were no members of the public present and only those G4S employees mentioned in the recordial of the aforementioned document that he had signed.

26.3 Again with reference to the particulars of claim, it is alleged that the plaintiff was subsequently dismissed from G4S for 'issues unrelated herein'. Stated otherwise he was dismissed for issues unrelated to the disputed defamatory statement that was made during the conference call on 14 November 2018. A notice to attend a disciplinary hearing and a notice informing of the outcome of that hearing (contained in the defendants' trial bundle) both confirm that the plaintiff was dismissed for 'gross misconduct' – unrelated, as it were, to the issues in the particulars of claim. Despite confirming that he signed these documents he maintained nonetheless in his evidence that his dismissal was related to the conference call.

[27] The second defendant was an impressive witness. He has a remarkable track record in the security industry with years' of accumulated investigative acumen and experience. He holds an elevated and responsible position within the structures of the first defendant. I need not traverse aspects of his evidence relating to the first defendant's *modus operandi* when it investigates security-related issues affecting its delivery of cash-in-transit services. He answered questions skilfully and methodically, without hesitation, contradiction or prolixity. I have no hesitation in concluding that he was a good witness.

[28] On the appropriate test in *Jagers* I am unable to find that the plaintiff's version is true and accurate and therefore acceptable, and that the other version advanced by the defendants is false or mistaken and falls to be rejected. The basis of the plaintiff's claim is founded on the allegation that the second defendant called him a robber and that employees were afraid of him. That, on the probabilities seen in the light of the credibility of the witnesses, is not supported by the overwhelming evidence that the second defendant only related concerns that had been raised with him by third parties for purposes of investigating whether there may be any substance to those concerns. In the circumstances the balance of probabilities does not favour the plaintiff – he has not discharged the onus and I am unable to accept his version as being probably true.

[29] In the result, the plaintiff's action is dismissed with costs.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

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