



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

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

DATE: 26 August 2021

SIGNATURE OF ACTING JUDGE:

CASE NO: 4215/2020

In the matter between:

ABM COLLEGE SA (PTY) LTD

First Plaintiff / Respondent

COLLEGE ON HILLS (PTY) LTD

Previously SHEPARD ACADEMY

Second Plaintiff / Respondent

and

MEDIA 24 HOLDINGS (PTY) LTD

Defendant / Applicant

JUDGMENT

Delivered: The order below was granted on 13 August 2021 at 9h30. This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12h00 on 26 August 2021.

PRETORIUS AJ:

[1] The plaintiffs (respondents in this application) claim that the defendant (applicant in this application) published an article on 4 February 2019 in the Daily Sun newspaper and its website (*"the article"*).

[2] The article reads as follows:

"STAY AWAY FROM BOGUS COLLEGES

- (1) Fong Kong colleges stop students being able to progress to a better future.
- (2) The Department of higher education has shut down three colleges.
- (3) ABM College SA, Shepherd Academy and Witbank College in Polokwane were all closed for operating without accreditation.
- (4) Umalusi spokesman Sphiwe Mtshali said they would wait for the colleges to submit proof of registration and accreditation.
- (5) Mokgehele Mokgehele, the colleges' principal, said the institutions advertised non-accredited courses to check whether they are in demand.
- (6) He said the colleges would get the courses accredited if there was a high demand.
- (7) Higher education official Shaheed Essacks advised prospective students not to enrol at ABM College SA.
- (8) "We are investigating Shepherd Academy as well.
- (9) "Our investigation will be concluded within a week.

- (10) “We want students to know about the colleges that are operating illegally,” she said.”

[numbering added for convenience of reference]

- [3] The plaintiffs launched an action against the defendant in which they claim damages resulting from alleged defamatory material published in the article by the defendant.
- [4] The defendant raised four complaints in respect of the plaintiffs’ particulars of claim in a notice in terms of rules 18(12), 23(1) and 30(2)(b). Complaints 1 and 2 are similar and are distinguished by the fact that they pertain to the first and second plaintiffs respectively. Complaints 1 and 2 involve that the plaintiffs have failed to plead sufficient facts in relation to innuendos relied upon in claims 1 and 2 of the particulars of claim, particularly paragraphs 8, 9, 10, 13, 15 and 16 thereof. As a third and fourth complaint the defendant contends that the plaintiffs have failed, in contravention of rule 18(10), to plead their alleged special damages in such a manner as to enable the defendant to reasonably assess the quantum thereof and plead thereto.
- [5] In its application in terms of rule 30(1), the defendant seeks an order setting aside, as an irregular step, the plaintiffs’ particulars of claim together with ancillary relief.
- [6] It is not required of me to deal with the merits of complaints 3 and 4 as the plaintiffs have conceded, in their heads of argument and during argument, that the said complaints have merit and indicated that they will amend their particulars of claim accordingly. The defendant has however insisted that an order be granted in respect of complaints 3 and 4 despite the concession.
- [7] In complaint 1 the defendant complains that the first plaintiff has failed to plead sufficient facts in relation to the innuendos relied upon in claim 1 of the particulars of claim. The defendant’s complaint pertains to, according to its notice and founding affidavit, paragraphs 8, 9 and 10 of the particulars of claim.

- [8] Complaint 2 is similar to complaint 1 but here the defendant complains that the second plaintiff has failed to plead sufficient facts in relation to the innuendos relied upon in claim 2 of the particulars of claim. Paragraphs 13, 15 and 16 of the particulars of claim are implicated in this regard.
- [9] Because of the similarities in complaints 1 and 2, I will deal with them simultaneously. In paragraphs 8 and 13 of the particulars of claim the plaintiffs plead what they allege to be the contents of the article. In paragraphs 10 and 16 of the particulars of claim the plaintiffs plead that the alleged contents of the article (pleaded in paragraphs 8 and 13) are wrongful, unlawful and defamatory of the plaintiffs and that *“they were intended and were understood by readers of the newspaper and its website to mean”* what is pleaded in paragraphs 10 and 16 of the particulars of claim.
- [10] The defendant contends that when the contents of the article is compared with the pleaded averments in paragraphs 8 and 13 it is clear that the plaintiffs rely on the innuendos pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff) for purposes of attributing a secondary meaning to the allegations pleaded in paragraphs 8 and 13. The defendant complains:
- (10.1) that the plaintiffs have failed to plead any facts or circumstances to justify the innuendos pleaded paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff) and, more particularly, that the plaintiffs failed to plead facts or circumstances to demonstrate that the material allegations in the article complained of actually convey the secondary meaning pleaded in the relevant paragraphs;
- (10.2) that the material allegations pleaded in paragraphs 8 and 13 do not attribute the meanings pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff);

- (10.3) that the allegations pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff) are not found anywhere in the article and are subjective allegations inserted by the plaintiffs who believe that the allegations were intended by the defendant to mean what they pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff); and
- (10.4) that what is pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff) therefore constitute innuendos and no further facts are pleaded by the plaintiffs to substantiate the allegations pleaded for the purposes of attributing another meaning to the material allegations pleaded in paragraph 8 and 13 or as set out in the article.

[11] As such, so the defendant contends, the plaintiffs' claims are incapable of sustaining a cause of action in that insufficient facts and circumstances are alleged to show that the statements contained in the article were capable of bearing the secondary meanings attributed to them. In the alternative the defendant contends that the failure to plead sufficient facts and circumstances to justify the innuendos relied upon constitutes non-compliance with rule 18(4) resulting therein that the plaintiffs' particulars of claim constitutes an irregular step within the meaning of rule 18(12). As a further alternative the defendant contends that the particulars of claim are vague and embarrassing in that it cannot be established from the pleaded allegations on what basis readers understood the statements to bear the secondary meanings pleaded.

[12] In response, the plaintiffs deny that they rely on any innuendos or that they attribute any secondary meanings to the material allegations pleaded in paragraphs 8 and 13 of the particulars of claim. The plaintiffs contend that paragraphs 10 and 16 reference the additional sting that the article carries and that no mention is made of an innuendo. As such, so the plaintiffs contend, the implied meaning of the words used is part of the primary or ordinary meaning of the words and must not be confused with an innuendo.

[13] The test in a defamation action is whether a reasonable person of ordinary intelligence, having heard or read the defendant's words, might reasonably understand those words as conveying a meaning defamatory of the plaintiff.¹ The reasonable person in this context *"is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto"*.²

[14] Can it be said that a reasonable person of ordinary intelligence might reasonably understand the words of the article to mean or to convey a meaning of what is pleaded in paragraphs 10.2, 10.3 and 10.4 (in respect of the first plaintiff) and 16.2, 16.3, 16.4 and 16.6 (in respect of the second plaintiff)?

[15] The disputed paragraphs in the particulars of claim read as follows:

"10. The said words, in the context of the article, are wrongful and defamatory of first plaintiff in that they were intended and were understood by readers of the newspaper and its website to mean that first plaintiff is:

10.1 ...

10.2 Not provisionally or at all registered with the Department of Higher Education and Training as a Private College in terms of Section 31(3) of the Continuing Education and Training Act, 2006 (Act No. 16 of 2006); and/or

10.3 Nnot (sic) provisionally or at all registered to provide continuing education and training in respect of any of their advertised courses or at all; and/or

10.4 Operating illegally;"

and

¹ *Basner v Trigger* 1945 AD 22 32; *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 1018
² *Demmers v Wyllie and Others* 1980 (1) SA 835 (A) 842H

“16. The said word (sic), in the context of the article, are wrongful and defamatory of second plaintiff in that they were intended and were understood by readers of the newspaper and its website to mean that second plaintiff is:

16.2. Not provisionally or at all registered with the Department of Higher Education and Training as a Private College in terms of Section 31 (3) of the Continuing Education and Training Act, 2006 (Act No. 16 of 2006); and/or

16.3. not provisionally or at all registered to provide continuing education and training in respect of any of their advertised courses or at all; and/or

16.4. operating illegally;

16.6. Students should not enrol at the second plaintiff at all;”

[16] The plaintiffs conceded that the allegations pleaded in paragraphs 10.2 and 10.3 (in respect of the first plaintiff) and 16.2 and 16.3 (in respect of the second plaintiff) were not directly stated in the article but argues that it can be implied by a reasonable person of ordinary intelligence from numbered paragraph (4) of the quoted article, being:

“Umalusi spokesman Sphiwe Mtshali said they would wait for the colleges to submit proof of registration and accreditation.”

[17] In support for this contention, the plaintiffs rely on *Argus Printing*³ where it was held:

“... in determining the natural and ordinary meaning of the words in issue the Court must take into account not only of what is expressly said, but also of what is implied.”

[18] On that basis can it be said that a reasonable person of ordinary intelligence might reasonably understand the words of the article to *imply* the meaning of what is pleaded in paragraphs 10.2 and 10.3 (in respect of the first plaintiff) and 16.2 and 16.3 (in respect of the second plaintiff)?

³ *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A)

- [19] It may be implied (even understood) from the article that the plaintiffs were not accredited for all the courses they advertised. In fact, the article reports that the plaintiffs' principle acknowledged this. However, the allegation that the plaintiffs were not *provisionally or at all registered* with the Department of Higher Education in terms of *section 31(3) of the Continuing Education and Training Act, 2006* and/or that the plaintiffs are *not provisionally or at all registered to provide continuing education and training in respect of any of their advertised courses or at all* is a bridge too far.
- [20] I am not convinced that a reasonable person of ordinary intelligence will reasonably understand *or imply* from the said words in paragraph (4) of the article to mean what is pleaded in paragraphs 10.2 and 10.3 (in respect of the first plaintiff) and 16.2 and 16.3 (in respect of the second plaintiff). To attribute the meaning the plaintiffs contend for will require the support of extrinsic facts passing beyond general knowledge.
- [21] As such, the paragraphs 10.2, 10.3, 16.2 and 16.3 contains a possible secondary meaning and constitute an innuendo. The plaintiffs are therefore required to plead additional facts or circumstances to justify the innuendos pleaded. In the absence thereof, those paragraphs of the particulars of claim are incapable of sustaining a cause of action in that insufficient facts and circumstances are alleged to show that the statements contained in the article were capable of bearing the secondary meanings attributed to them. I am also persuaded that the failure to plead sufficient facts and circumstances constitutes non-compliance with rule 18(4) and moreover render the relevant paragraphs vague and embarrassing in that it cannot be established from the pleaded allegations in support of the plaintiffs' claims on what basis readers of the newspaper understood the statements to bear the secondary meanings pleaded.
- [22] Turning to paragraphs 10.4 and 16.4 of the particulars of claim, it is not stated pertinently in the article that the first or second plaintiff operates illegally. The plaintiffs ostensibly rely on the words in numbered paragraph (10) of the quoted article, being a direct quote of the official Shaheed Essacks. Those words are therefore not attributable to the defendant. Moreover, I am not convinced that a

reasonable person of ordinary intelligence will reasonably understand or imply from the said words in paragraph (10) of the article, read in context, that the plaintiffs are operating illegally. These words were published in the context of pending investigations into colleges and to inform students of legally operating colleges.

[23] What remains is paragraph 16.6 of the particulars of claim. In numbered paragraph (7) of the article it was reported that “*Higher education official Shaheed Essacks advised prospective students not to enrol at ABM College SA*”, ostensibly a reference to the first plaintiff. I could find no words in the article from which it can be understood or implied that “*students should not enrol at the second plaintiff at all*”. Paragraph 16.6 of the particulars of claim pertains to the second plaintiff, not the first plaintiff.

[24] In conclusion I make reference to the oft quoted words in *Imprefed*:⁴

“At the outset it need hardly be stressed that:

‘The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.’

(*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:

‘The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.’”

[25] For the aforesaid reasons and in accordance with the wide powers afforded in terms of rule 30(3), which reads:

“If at the hearing of such application the Court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties

⁴

Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)

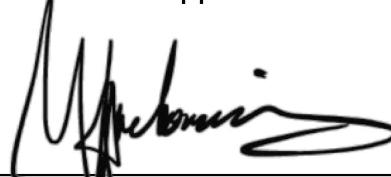
or as against some of them, and grant leave to amend or make any such order as to it seems meet"

I propose striking out the paragraphs in the particulars of claim complained of and affording the plaintiffs an opportunity to amend their particulars of claim.

[26] So far as costs are concerned, the defendant has been substantially successful in its application and there is no reason to deviate from the normal principle that the costs follow the result.

The following order is granted:

1. Paragraphs 10.2, 10.3, 10.4, 12, 16.2, 16.3, 16.4, 16.6 and 18 of the plaintiffs' particulars of claim are struck out;
2. The plaintiffs are ordered to amend their particulars of claim within 10 (ten) days from date of this order;
3. Leave is granted to the defendant to approach this Court on the same papers, duly supplemented, for an order to dismiss the plaintiffs' claims in the action should the plaintiffs fail to amend their particulars of claim within 10 (ten) days from date of this order;
4. The plaintiffs are ordered to pay the costs of the application.



JF PRETORIUS

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING: 11 AUGUST 2021

13 AUGUST 2021

DATE OF JUDGMENT: 26 AUGUST 2021

COUNSEL FOR THE APPLICANT: B D STEVENS

INSTRUCTED BY: MAHODI ATTORNEYS

COUNSEL FOR THE RESPONDENT: F J MOOLMAN

INSTRUCTED BY: JURGENS BEKKER ATTORNEYS