

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

Delivered on 10 May 2019

Case No: HCAA13/2018

SHONISANI RALSON MUKKHWANTHELI

APPELLANT

AND

DR. NTAVHANYENI PHASWANA

FIRST RESPONDENT

MEMBER OF EXECUTIVE COUNCIL

EDUCATION LIMPOPO PROVINCE

SECOND RESPONDENT

HEAD OF DEPARTMENT

JUDGMENT

MULLER J:

- [1] The appellant instituted action for defamation against the respondents in the Limpopo Local Division Thohoyandou. The action was dismissed with costs. The court held that the first respondent lacked the intention to injure the good name of the appellant and also held that the appellant has failed to establish wrongfulness.
- [2] Leave to appeal was granted to the Full Bench by the court *a quo*.
- [3] Both the appellant and the first respondent are employees of the second respondent.¹ The appellant is a teacher and the first respondent is the Circuit Manager: Soutpansberg North Circuit of the department. The second respondent is Member of the Executive Council of the Education Department in Limpopo. The liability of the second respondent is based upon the principles of vicarious liability.
- [4] On 19 February 2015 the first respondent addressed a letter to the District Senior Manager of the department in which alleged misconduct of the appellant was reported with a request that such conduct be investigated. The contents of the letter formed the basis of the action instituted by the appellant.

¹ Hereinafter "the department".

- [5] The relevant portion of the letter which the appellant claimed was defamatory of and concerning him is quoted in his particulars of claim. It reads:

"Kindly note that Liphakha Primary School learners did not affiliate or take part in sports this year. This is having a direct link with all the allegations against Mr. Mukhwatheli S.R. Learners at Liphakha Primary School could be disadvantaged simply because there is a Sports Organizer coordinator with a personality disorder.

Decisive action should be taken against anybody who undermines authority lest we find ourselves in all lawlessness situations."

- [6] The respondents in their plea denied that the letter was published or that the contents is wrongful and defamatory of the appellant. In addition to the aforementioned it was also pleaded that the letter was written as an internal measure to solve issues at school. The defences were that there was no publication of the letter and absence *animus iniuriandi* and also qualified privilege.²

- [7] There are, therefore, four issues to be considered.

1. Whether the letter was published unlawfully;
2. Whether the statement in the letter is reasonably capable of conveying to the reasonable reader a meaning which defamed the appellant;
3. Whether the first respondent was under a duty or has a legitimate interest in publishing the letter and whether the person to whom the letter was published has a similar duty or interest to receive it.
4. Whether *animus iniuriandi* has been established.

² The plea of qualified privilege could have been better formulated.

- [8] It was, despite the plea, common cause at the trial that the letter reached the addressee. It was not disputed that the letter came to the attention of the appellant when the letter was handed to him when he requested and was given a copy of same from two ladies attached to the office of the addressee who was charged with the investigation of the alleged misconduct.
- [9] The words in the context used conveyed to the reader that the learners of Liphakha Primary School did not affiliate or take part in sports due to the sports organizer who suffered from a personality disorder.³ There is no doubt that the letter referred to the appellant who was the sport organizer of that school.⁴ The reference to the appellant in the letter as being a teacher with a personality disorder is *prima facie* defamatory of and concerning the appellant. The statement, in my view, would 'tend to lower the appellant in the estimation of right-thinking members of society generally'.⁵
- [10] Two presumptions arise with proof of the defamatory words. The first is that that the publication is unlawful and the second is that the statement was made with the intention to defame.⁶ These presumptions create a full onus which must be discharged on a balance of probabilities.⁷ In *May v Udwin*⁸ it was held that:

"Once the presumption of *animus injuriandi* and unlawfulness have arisen from the publication of the defamatory matter an onus (in the form of a "weerleggingslas") rests on the defendant to rebut them. The presumption of *animus injuriandi* may be rebutted by proving a defence (a so-called

³ In *Rutland v Jordan* 1953 (3) SA 806 (C) 814 E-F it was held that a statement in an affidavit that there was a possibility that the plaintiff might be found to be mentally diseased is defamatory.

⁴ The heading of the letter in any event referred to alleged misconduct against the appellant.

⁵ *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 703I.

⁶ *Joubert and Others v Venter* 1985 (1) SA 654 (A) 696A.

⁷ *Mohamed and Another v Jassiem supra* 709H-I.

⁸ 1981 (1) SA 1 (A) 10 E-G.

“skulduitsluitingsgrond”) which negatives the inference of *animus injuriandi*... A defendant may rebut the presumption of unlawfulness by proving a defence (a so-called “regverdigingsgrond” or justification ground) which is directed at establishing that the publication of the defamatory matter was lawful. One of the ways in which a defendant may rebut the presumption of unlawfulness is by proving that the publication of the defamatory was made on an occasion of qualified privilege. The publication of the defamatory matter is then regarded as being in the interest of public policy, and, therefore, as being lawful.”

[11] In *Hardarker v Phillips*⁹ the court dealt with unlawfulness as a defence:

“The element of unlawfulness is more often than not sought to be rebutted by the defendant attempting to establish one or other of the well-established defences which either owe their origin to or bear the influence of English law. These typically include qualified privilege in relation to judicial proceedings and fair comment. But the defences available to rebut unlawfulness do not constitute a numerous clauses. In the final analysis, whether conduct is to be adjudged lawful or not depends on a balancing of the constitutionally enshrined right to dignity, including as it does the right to reputation on the one hand, and the right to freedom of speech, on the other.”

[12] A bare denial by the respondents would not have been sufficient. The respondents pleaded facts which will justify the absence of unlawfulness. The appellant elected not to serve a replication despite the necessity for the appellant to prove that the respondents acted with malice and abused or exceeded the ambit of the qualified privilege.

⁹ 2005 (4) SA 515 (SCA) par 15.

- [13] The employment relationship of the parties within the department, viewed objectively, is such that publication of the letter was privileged. The first and second respondent enjoyed the right to or legitimate interest to make statements to and to receive statements from the other. The truthfulness of the statement has no bearing whether they were germane to the occasion. However, if the statement was made with knowledge of its untruthfulness the inference would arise that it was actuated by malice, in the absence of any indication to the contrary.¹⁰
- [14] The respondents had to prove that that the statement was relevant to the issue. For if it has no relevance to the issue, the defence cannot succeed. Relevance in the context of qualified privilege is not capable of precise definition. Phrases such as 'in some measure relevant to the purpose of the occasion' and 'germane to the matter dealt with' are employed to describe what is essentially a value judgment of which there are guiding principles but which is not governed by hard and fast rules.¹¹
- [15] The statement was made in the course of the existing employment relationship. The First respondent reported, as the circuit manager, the conduct of a teacher attached to a school under his supervision which in his opinion should be investigated to District Senior Manager of the department which is his superior.
- [16] The appellant was the chairperson of sport for the circuit. As such he was also in charge of arts and cultural activities and must ensure that that the children of his school Lephaka Primary School affiliate to participate in sport activities. The

¹⁰ *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) 578H.

¹¹ *Van den Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) par 26.

appellant is also the secretary of the school governing body and as such a signatory to the cheque account of his school governing body. He at a meeting has indicated that he will not release money for the children to participate in sport.¹² In addition the appellant as chairman of the sport committee was unable to account for money collected during his tenure as chairman.

[17] When the sport committee of which he was the chairman was re-elected, he was not re-elected. The appellant indicated at the meeting that the election of the new committee is unlawful and that he is going to continue as chairman of the committee.

[18] The first respondent regarded the actions of the appellant undermining his authority. He wrote the letter to his superior simply to report what he perceived as misconduct and requested an investigation. He explained that he made reference to the personality disorder in the letter to indicate that:

"It is when a person's thinking and doing of things, behaviour is not structured."

[19] The first respondent denied that he had the intention to defame the appellant. He stated under cross-examination that he came to that conclusion due to the behaviour of the appellant at the meeting with the governing body the purpose of which was to discuss the learners being disadvantaged. During that meeting the appellant alleged that the department declared him additional to the post establishment of the school. He swore at the first respondent at that occasion

¹² It was put to the first respondent that the governing body has decided that the funds will be used for the development of the school and nothing else. He conceded that such a decision could have been reached but that he was unaware of it. He considered participation in sport as cardinal and equal to academic participation in schools.

and stormed out of the meeting despite being informed that he was not declared to be in excess.¹³

[20] The First respondent was also asked what he meant by 'decisive action should be taken against anybody'. He replied that decisive action is action which is in line with the law and policies of the department.

[21] The first respondent, in the letter to his superior, referred to previous correspondence and the allegations levelled at the appellant in that letter. He stated that the matter is escalated for investigation and decisive action to be taken against anyone who undermines authority. The unacceptable behaviour of the appellant at the meeting where he flatly refused to make funds available to affiliate the learners from his school without saying that it was a decision of the governing body caused first respondent to conclude that the appellant suffered from a personality disorder.¹⁴

[22] Freedom of expression in labour relations allows for such allegation in a statement in a labour matter such as this where the First respondent has the right and the duty to report misconduct to his superior. A defamatory statement under circumstances such as this is protected as long as it is relevant or germane to the occasion and reasonably appropriate.¹⁵ The letter was intended to report a teacher which *prima facie* committed misconduct to a higher authority to investigate. The statement was relevant or germane and reasonably appropriate to the purpose of the occasion and is, in my view,

¹³ The first respondent was criticized during cross-examination for failing to plead the facts upon which he relied to have come to the conclusion that the appellant suffered from a personality disorder.

¹⁴ It was not put to the respondent in cross-examination that the appellant informed the meeting of the decision of the governing body not to make funds available for sport.

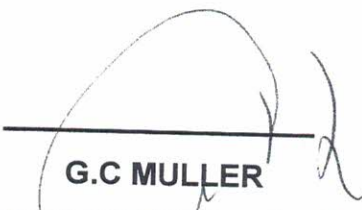
¹⁵ *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA).

worthy of protection afforded by the law. There is no evidence to suggest that the First respondent acted with an improper motive or with malice. The appeal must fail.

- [23] Mr Ravele who appeared on behalf of the appellant urged us not make a costs order against the appellant. He contended that the claim was instituted to vindicate his constitutional rights. It is a claim *ex delicto* based on the *actio iniuriarum* where different constitutional rights were at play. Be that as it may, this action is no different from other delictual claims that are before courts on a daily basis in which costs orders are granted. This court has a wide discretion to award costs. There is no reason why, in this case, the costs should not follow the result.

ORDER

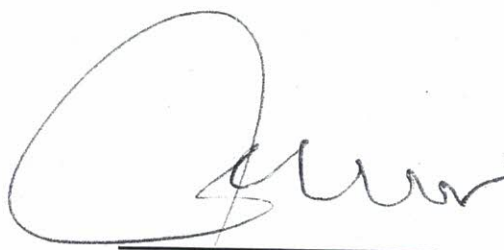
The appeal is dismissed with costs.


G.C MULLER
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I agree


E.M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I agree

A handwritten signature in black ink, consisting of a large, stylized capital 'L' followed by a series of loops and a final flourish.

L.G.P LEDWABA
ACTING JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE