

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO.4229/2016

In the matter between

NCEDIWE NGWADLE

First Plaintiff

NOKUTHULA MTHWA

Second Plaintiff

And

WALTER SISULU UNIVERSITY

First Defendant

BRIGID MOSOLA

Second Defendant

JUDGMENT

NQUMSE AJ

[1] This is an action based on defamation in which the plaintiffs claim the sum of three million rand (R3 000 000. 00) each for damages suffered.

[2] The plaintiffs pleaded that on or about 8 October 2015, the second defendant whilst acting within the course and scope of her employment, wrote and published a letter to the plaintiffs, of and concerning them that they were unlawfully issuing clearance certificates for students who were indebted to the first defendant in return for a bribe. The copy of the letter was annexed to the summons and marked Annexure A.

[3] The plaintiffs pleaded further that the second defendant unlawfully caused the copy of the said letter to be published to the plaintiffs' colleagues who are employees of the first defendant, amongst whom were Maggie Chirwa, Mlamli Adonis, Nkululeko

Mjamba, Nyaniso Bunguza and other employees of the first defendant having similar responsibilities as the plaintiffs.

[4] The defendants entered an appearance to defend, service and filing of a plea being done, there was no appearance from both defendants despite having been served with the notice of set down. The election by the defendants not to appear is unfortunate and thus leaving the court at a disadvantage of knowing if there is any defence such as fair comment or justification that there may be, for the publication of the impugned email.

Background Facts

[5] The first plaintiff testified that she is employed by the first defendant. During 2015 and at the time of this incident she was working in the student debt section of the university but has since pursuant to the incident been removed and placed in a different section.

[6] On 8 October 2015 she and the second plaintiff received an email from the Chief Financial Officer, Ms Brigid Mosola in which she mentioned that the plaintiffs were giving students clearance certificates in order for the students to receive their qualifications in return for bribes.

[7] The first plaintiff denies the truthfulness of the allegations against them. She instead stated that a certain student was caught with a fraudulent certificate that bore her signature. The said student was subsequently charged for fraud. She also referred to the expert findings that were annexed in the pleadings as D1- D5 wherein the expert showed how her signature had been copied from original clearance certificates that she had issued lawfully on previous occasions.

[8] According to the first plaintiff, the defamatory email of the second defendant which was published to all and sundry has changed her life. She has stopped attending church since she is perceived by other church congregants as a fraudster. She has also withdrawn herself from mixing with colleagues for the same reason. She also testified that the publication of the email was distributed to her colleagues who are at the Butterworth and East London campuses of the university; to the examination staff at the main campus; and to other staff members to whom Mr Mjamba may have distributed the email since he was instructed to do so by the

second defendant. She further referred to other recipients to whom the email was copied which included Thobeka Tongo, Zongezile Tulethu and others whose names could not be displayed owing to the limitations of the computer from which the email was retrieved. She avers that the email by the second defendant was intended to mean or alternatively to impute an innuendo that plaintiffs are dishonest persons in the following respects:

“8.1 They defraud the accounts of the first defendant, their employer,

8.2 They are dishonest persons who unlawfully enrich themselves at the expense of the first defendant by accepting bribes from students in return for clearing their indebtedness to the first defendant,

8.3 They are unscrupulous persons who engage themselves in criminal activities and are not law abiding citizens,

8.4 They lack moral fibre and should not be trusted by the first defendant, and

8.5 That plaintiffs were acting in common purpose in the furtherance of some or all of the above with the intention to defraud the first Defendant.”

[9] According to the first plaintiff, the impugned publication has injured her good name and reputation. She further stated that not only did the second defendant issue the defamatory publication, she has also demoted her from being a debt administrator to a ledger officer. Concomitantly, her salary was reduced by an amount of R 1 900, 00 per month. The defamatory publication against her has also jeopardised her opportunities of promotion. According to her, she has not succeeded in five interviews at the university, in positions she was eligible to be appointed for but for the publication.

[10] Subsequently on 3 March 2017 both she and the second plaintiff were served with disciplinary charges in which it was alleged that they are being charged for issuing of clearance certificates as per the findings of an internal audit. However, no allegations of fraud or bribery were levelled against them as it was alleged in the email by the second defendant.

[11] The second plaintiff, Ms Nokuthula Mtwla confirmed and aligned herself with the testimony of first plaintiff and further stated that she is suing both the defendants for defamation due to the actions of the second defendant. According to her, she and first plaintiff were performing the same duties of issuing clearance certificates. She further stated that she is a single mother of an 11 year old son to whom she was unable to relate what had happened to her. Neither could she relate it to her parents. She also testified that her mother has since fallen ill as a result of this publication. She has stopped attending church owing to the stigma attached to her as a result of the publication of the defamatory material against her.

[12] She also referred to the clearance certificates appearing in paragraph 6.3 of the expert findings as copies of clearance certificates that were copied fraudulently from clearance certificates that bear her signature and which were lawfully issued by her. She explained that certificates of clearance are issued based on information from the list of students that they receive from the National Student Financial Aid Scheme (NSFAS) as well as from the deposit slips from the banks. This practise has been followed by the university for 9 years and was never queried by its internal auditors.

[13] As a result of the wide publication of the offensive and defamatory email, she is claiming damages to the amount of R3 million. She further stated that since the incident, the stamps that she uses in performing her duties had been taken away and she regards that decision as a demotion.

The Law

[14] In order to succeed on a claim for damages based on defamation (*actio iniuriarum*) the elements to be satisfied were stated in *Khumalo and Others v Holomisa*¹ as the following:

- “(a) the wrongful and
- (b) intentional
- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff.”

¹ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 18.

[15] According to the authors *Francois du Bois et al*² “[u]nlike an action for damages under the Aquilian law, where all the elements have to be established prima facie, the plaintiff in an action for damages for defamation need establish only conduct in the form of a publication of matter which, objectively speaking, is injurious to the plaintiff’s reputation (generally termed ‘defamatory matter’). Once the plaintiff has accomplished this, the other elements of liability are (rebuttably) presumed to exist: that is to say, it is presumed that the publication was both wrongful and intentional”.

[16] Turning to the words contained in the publication. I find it necessary to reproduce the contents of the email which reads as follows:

“Dear Ncediwe, Nokuthula, I received an anonymous call yesterday that informed me that at the N[elson] M[andela] D[rive] Campus (your offices), students who have graduated but did not receive their certificates due to their debts are receiving clearance from you two in return for (bribe) in other words, they pay you and in return you put your clearance stamps on their documents. As a result, some of these graduates have received their certificates while W[alter] S[isulu] U[niversity] sits with their debt. As C[hief] F[inancial] O[fficer] of this institution, I make presentation to various council subcommittees and D[epartment of] H[igher] E[ducation and] T[raining] as well as N[ational] S[tudent] F[inancial] A[id] S[cheme] on how we are dealing with the student debt issue, what actions we are making to resolve it. Your actions (allegations above), if true, are in direct contradiction of what the C[hief] F[inancial] O[fficer]’s office is trying to achieve as through these alleged actions, you are ensuring that the debt issue will never be resolved and thus this institution will never be financially visible. In other words, you are contributing to the financial problems of this institution.

An investigation into these allegations is currently underway and should you be found guilty of taking bribes in return for your issuing clearances that have resulted in the certificates being issued when they should not have been issued, you will not be suspended but you will be fired as this constitutes a fraudulent act. If you are really guilty, you can take this email of mine as your first and final warning (the only other disciplinary activity that will take place is

² Francois du Bois *Wille’s Principles of South African Law* 9 ed. (2007) at pages 1167-8.

your dismissal from the University). What is going to happen from today is the following:

“Mr Adonis (as the person holding an acting position of overseeing the student debt section which covers your areas) will take the clearance stamps from you from today onwards he is the only person who will be clearing students.

- You will be moving to his section (in the other building) so that you can work together properly and share the work.
- I’ve already said before that no more files to be s[ent] to the external lawyers so I hope this activity has since ceased, you will therefore be allocated other responsibilities as Ms Adonis deems fit”.

The email concludes with the words:

“Mr Mjamba: please forward this email to other staff members having a similar responsibility as the two ladies above so that they are aware of what will happen should they be engaging in such fraudulent activities.

Kind Regards

Brigid.

Ms Brigid Mosola CA (SA).”

[17] As it was also stated in *Du Plessis v Media 24*³ by Tokota AJ (as he then was) that “[a]t common law it is not an element of defamation that the statement be false because the defamatory nature of a statement is not dependant on its falsity. Once a plaintiff establishes that a defendant has published a defamatory statement concerning him or her, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then plead and prove a defence which rebuts either the unlawfulness or intention”.

³ *Du Plessis v Media 24 t/a Daily Sun and Another* 2016 (3) SA 178 (GP) at page 184 para 18; See also *Sayed v Editor, Cape Town and Another* 2004 (1) SA 58 (C) at 61; *Borgin v De Villiers and Another* 1980 (3) SA 556 (A); *Marais v Richard and Another* 1981 (1) SA 1157 (A) at 1166 F-1167A; *Neethling v Du Preez and Others*; *Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 770I-J.

[18] As indicated earlier, the defendant elected not to appear and to prove a defence to rebut either the unlawfulness or their intention to defame the plaintiffs. In so doing they lost the opportunity to rebut the unlawfulness of the publication.

[19] I am unable to disagree with the meaning and the import of the statement that it was injurious to the plaintiffs. This is borne out in certain comments and remarks the author makes in the statement such as the words stated at the end of paragraph 2 of the email where the following is said:

“In other words you are contributing to the financial problems of this institution”.

The impugned words continue in the middle of paragraph 3 as follows:

“If you are really guilty, you can take this email of mine as your first and final warning (the only other disciplinary activity that will take place is your dismissal from the University)”

Most notably is the instruction to Mr Mjamba which reads:

“Mr Mjamba please forward to other staff members having a similar responsibility as the two ladies above so that they are aware what will happen should they be engaging in such fraudulent activities.” (My own emphasis).

[20] The ordinary meaning of these remarks in my view, and more particularly the latter part of the remarks is a clear indication that the author had imputed on the plaintiffs that they are fraudsters and were involved in an activity that is plunging the university into financial difficulties.

[21] Taking into account all the statements referred to herein above and a contextual reading given to the entire contents of the publication, I have no doubt in my mind that the publication has the effect of impairing the plaintiffs’ right to dignity and their right to have their dignity respected. The effect of the words in the statement undoubtedly put into question their probity. The publication further presents the plaintiffs as unscrupulous persons who cannot be trusted and who lack moral fibre. I therefore find that the statement or conduct complained of is capable to be understood as being defamatory to the ordinary reader.

[22] A defamatory statement must be published or made known to a third party or more⁴. It is patently clear in this matter that the author of the statement intended it to be distributed as wide as possible and indeed, her quest was satisfied. One needs to go no further than to begin with the persons to which she copied the correspondence or publication. As if that was not enough, the strong instruction to Mr Mjamba which was bolded, that the statement be distributed to other staff members is a clear demonstration and intention that the statement must receive a wide publication within the university community, including its branches in the various parts of the province.

[23] Having found that the email complained of was defamatory, what remains is the question of quantum. In determining quantum the Court must have regard to:

- (i) all circumstances of the case;
- (ii) the seriousness of the defamation;
- (iii) the character and status of the plaintiff;
- (iv) the nature of the words used, the effect that they are calculated to have;
- (v) the extent of the publication, the motives and the subsequent conduct of the defendant.⁵

[24] Mr Matyumza, for the plaintiffs submitted that the amount of R3 million that has been claimed by each plaintiff is excessive and it is within the discretion of the Court to assess what is a reasonable award that will ameliorate the damage suffered by the plaintiffs. He further referred me in this regard to the cases of *S.A. Associated Newspapers*⁶ and *Buthelezi*.⁷ His main reason for referring to these cases was to invite the Court to consider the awards that were given then and to juxtapose them using the comparable table of damages in order for the Court to arrive at a fair and a comparable amount in today's monetary value.

⁴ *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 88.

⁵ *Muller v S.A. Associated Newspapers Ltd and Others* 1972 (2) SA 589 (CPD) at 595.

⁶ *S.A. Associated Newspapers Ltd & Another v Samuels* 1980 (1) SA 24 (AD) (*S.A. Associated Newspapers*).

⁷ *Buthelezi v Poorter & Others* 1975 (4) SA 608 (W) (*Buthelezi*).

[25] The words of Innes CJ over a century ago in *Botha v Pretoria Printing Works*⁸ cited in *Buthelezi* are in my view still very apt when the learned judge said at 617:

““The public acts of public men are, of course, matters of public interest, and criticism upon them does a great deal of good provided corrupt motives are not imputed. But the character of a public man is not only a possession precious to himself, but is, in a very real sense, a public asset. If any person knows anything against the character of a public man which makes him unfit for the position which he occupies, such person is not only justified, but bound, to inform the public of the facts, and to substantiate them for the public benefit if necessary. But if he makes attacks without verifying his facts, and is not prepared to justify them, he incurs a liability for substantial damages. There are elementary truths which are apt to be overlooked. We are entering upon a period when there may be great public excitement, and much public criticism; and I think the Court should, by its attitude, impress upon all concerned that attacks upon the private character of public men are not to be lightly made, and that if they are made, apart from privilege, they must be justified.””

[26] Whilst I am mindful of what was said by Nugent JA in *Tsedu*⁹ I have nevertheless sought guidance from previous awards which have been made by our courts. A few examples are illustrated in the cases that follow.

[27] In *De Flamingh v Pakendorf*¹⁰ an advocate who was defamed by the defendant in publishing a libellous report was awarded R2500.00 (Two Thousand Five Hundred Rand).

[28] In *Mthimunye v RCP Media and Another*¹¹, a municipal manager about whom a report was published in the City Press about an alleged sexual harassment of a secretary in his office was awarded R35 000.00 (thirty five thousand rand) pursuant an apology by City Press which the court found to be insufficient.

[29] In *Isparta v Richter and Another*¹² an amount of R40 000.00 (forty thousand rand) was awarded to a plaintiff who was alleged in a publication on Facebook that the plaintiff encouraged and tolerated sexual deviation, even *paedophilia*.

[30] In *casu* both plaintiffs are employees of the first defendant. It does not appear to me that they hold senior positions or managerial positions. This is borne out in

⁸ *Botha v Pretoria Printing Works Ltd.* 1906 T.S. 710.

⁹ *Tsedu and Others v Lekota and Another* [2009] ZASCA 11; 2009 (4) SA 372 (SCA); [2009] 3 All SA 46 (SCA) (*Tsedu*).

¹⁰ *De Flamingh v Pakebdorf en n Ander, De Flamingh v Lake en n Ander* 1979 (3) SA 676 (TPD) at 684 B-H.

¹¹ *Mthimunye v RCP Media and Another* 2012 (1) SA 199 (TPD) at para 29.

¹² *Isparta v Richter and Another* 2013 (6) SA 529 (GNP).

their administrative duties and the fact that they are working under the suspension of Mr Adonis who is responsible for overseeing the student debt section. They also hold no other senior positions externally save that the first plaintiff is a member of a church which she has since backslided from, and the second plaintiff is an elder in her church. This does not in any manner detract from the damaging effect the publication may have had on their reputation.

[31] However, taking into account the facts in *casu* and the previous awards which are considered relevant to this matter and the fact that the defendants have not apologised, I am of the view that an award of R50 000.00 (fifty thousand rand) would be fair and reasonable for each of the plaintiffs. In the result I make the following order:

1. Judgment is granted in favour of the plaintiffs against the defendants jointly and severally, the one paying the other to be absolved, in the sum of R50 000.00 for each plaintiff.
2. The defendants are ordered to jointly and severally, the one paying the other to be absolved, to pay the plaintiffs' costs in the appropriate magistrates' court scale, but including the costs of Counsel.

V. NQUMSE

ACTING JUDGE OF THE HIGH COURT

Appearances: No appearance for the Defendants.

Counsel for the Plaintiff:

Adv Matyumza

Instructed by:

Messrs K. B. Mabanga

Attorney for Plaintiff

137 York Road

MTHATHA

Held On:

20 May 2019

Delivered:

25 June 2019