

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

.....
DATE..... SIGNATURE:.....

Case No: HCA12/2015

In the matter between:

DANIEL CHUENE KOMAPE

APPELLANT

and

SESHUPA BRANSBY LAMOLA

RESPONDENT

CORAM: E.M MAKGOBA JUDGE PRESIDENT AND M MADIMA AJ

JUDGMENT

M MADIMA AJ

- [1] This is an appeal against the whole of the judgment and order of the learned Magistrate, Ms M.O MABOBO sitting at Seshego Magistrates' Court on the 07th day of May 2015.
- [2] The Appellant instituted a civil claim in the court *a quo* for compensation pegged at a hundred thousand rand (R100, 000-00) arising from an alleged delict of defamation. The claim was dismissed on merits, hence this appeal before us.
- [3] Briefly, I refer to the relevant paragraphs in the particulars of claim to illustrate the averments on which the claim is established and relevant paragraphs in the plea to illustrate the defence(s) raised.

Particulars of claim at para 3:

'...Defendant wrote and addressed a letter in North Sotho with an English quote dated 16/02/2011 to the Plaintiff, which letter contains in all its paragraphs save the last paragraph, statements which are defamatory of the Plaintiff...'

Averments continue at para 5:

"The said letter and/or its contents were published by the Defendant to persons who are members of the public."

In his plea to the particulars of claim the Respondent pleaded to *para 3* by admitting that a letter was addressed to the Appellant but denied

that contents of the said letter were defamatory and further stated that he did not write a letter in his personal capacity.

As regards *para 5* the Respondent denied that the statement was published to members of the public.

- [4] I find it convenient to give an overview of the parties and the community in which they are residents.

The Appellant and Respondent (parties) grew up on a farm named Rosentkranz (the community) which was bought by people living in that community but some of them had passed on a while ago. The community is characterised by occurrences of factionalism. Some community members belong to a committee led by Lamola family of which the Defendant is a member while other community members belong to a committee of which the Plaintiff was a chairman.

Because of factionalism related problems, legitimacy of leadership is always challenged and that problem has deepened its roots. Thus some community members do not recognise some leaders as legitimate leaders and *vice versa*.

- [5] The appellant's complaint of alleged defamatory words is based on the written words and such words are as follows:

"FROM: LAMOLA TRIBAL COUNCIL AND THE TRIBE."

"SUBJECT: ENOUGH IS ENOUGH"

"Mr Komape, it is long that you have been stabilizing the community of Lamola. From the year 2007 upto date 2011. You know very well that all of those things that you are doing are contrary to the Constitution of RosenKrantz Farm, which Constitution you were complying with when you were still the chairman."

"1. Ever since you left the tribal court in 2007, until today 2011 you have not shown yourself at the tribal court."

"2. You are using the letterhead of the Lamolas to write letters to people and you sign such letters claiming to be the chairman."

"3. Efforts by the community to discuss with you have failed."

"4. Royal committee wrote you a letter requesting you to meet with it, on 21/12/2010. The letter was delivered to you by the Sheriff, but you undermined that request. "

"In the circumstances, in terms of the Constitution of the community 5.2:

Termination of Residency stipulates that residency of a member can be terminated if:

5.2 (a) He refuses to comply with rules and regulations of the farm and his behavior jeopardizes the maintenance of law and order.

(b) He convenes secret meetings with total disregard of the Chief Lamola's authority (sic) and plots against the Chief Lamola and the Rosenkrants tribe.

(c) He collaborates with the tribes enemies or dissidents against it."

"In the circumstances we as the community of Lamola regret to have resided with a person of your behaviour, you Mr Komape."

“Now the time has arrived for the community to say enough is enough. You are requested to count thirty (30) days from the date on which the Sheriff will deliver a letter to you and to vacate the farm of Lamola after those thirty days.” [SIC]

[6] Freedom of expression is not unlimited, hence *“the law of defamation, both criminal and civil, is designed to protect the reputation of people...”*¹

[7] At common law, a person alleging defamation can only succeed in proving such a claim if the following elements are satisfied, namely:²

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

[8] The Appellant contended in his particulars of claim that all contents of the above letter, except the last paragraph which has the effect of evicting the Appellant from the community, were defamatory. It was only during presentation of arguments before us that Counsel for the Appellant stated that a complaint of defamatory words is constrained to para 2 of the above letter-alleging that Appellant writes letters to people

¹ Hoho v The State (493/05) [2008] ZASCA 98 (17 September 2008) at para 31

² Khumalo and Others v Holomisa 2002(5) SA 401 (CC) at para [18]

using the letterhead of the Lamolas and signs such letters in his capacity as the chairperson whereas he is not.

[9] Common cause facts:

9.1. The Respondent wrote a letter addressing it to the Appellant,

9.2. The letter was served personally on the Appellant by Sheriff, and;

9.3. The Appellant convened a meeting at which he published contents of the letter to members of the public.

[10] Issues in dispute:

10.1. Whether contents of the letter contained defamatory words, and if so;

10.2. Whether there was a publication of the contents of the letter to the public by the Respondent.

[11] In disposing of the first issue in dispute, the courts have employ an objective test by asking the question which in **National Education, Health and Allied Workers Union and another v Tsatsi**³ was posed as follows ‘...Whether the statements complained of tend to lower the plaintiff in the estimation of the ordinary reader of the report.’

³ ([2006]) 1 All SA583(SCA) at para [8])

In **Heroldt v Wills**⁴ the court referred to the judgement in **Jansen van Vuuren and Another NNO v Kruger**⁵ where the SCA affirmed the principle that “...the test, for determining whether the words in respect of which there is a complaint have a defamatory meaning, is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.”

In order to properly adjudicate and give judicially appropriate answers to the issue in dispute I should consider the facts, as rightly and aptly stated by Corbett CJ in **Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another**⁶ when he said “In demarcating the boundary between the lawfulness and unlawfulness in this field [infringement of personal privacy], the Court must have regard to the particular facts of the case and judge them in the light of contemporary boni mores and the general sense of justice of the community as perceived by the Court...”

As I have indicated in para 4 of this judgement that in that community where the parties are residents, some leaders are not given recognition as such by a particular group of members of the community while in the eyes of other members they are recognised as legitimate leaders.

Disputes of this nature are in public domain in that community.

⁴ 2013(2)SA 530(GSJ)

⁵ 1993(4)SA 842(A) ([1993]) 2 All SA 619

⁶ 1993(2) SA 451(A) at 464

Such can be deduced from the evidence of Moabelo Arnold, called as a witness for the Appellant at the court *a quo* when he said “*When I was growing up at our village there was a problem, because people would say this is the headman, he is the headman, referring to different people. It is the problem now, because I cannot even say who the real headman is*”.⁷

Against this factual background, it is only logical to conclude that reference to the Appellant as a person who is ‘...using the letterhead of the Lamolas to write letters to the people andclaiming to be the chairman’ did not have the effect of lowering the Appellant in the estimation of ordinary people in his community. To my mind, the phrase ‘*claiming to be the chairman*’ has the effect of not giving the Appellant recognition, he deems to be due to him, of his leadership and nothing else. I am not persuaded that the statement bears a defamatory meaning.

[12] It also clear from evidence that the Appellant did not appreciate the meaning of the words directed to him and this appears from the following passage:

Question by Appellant’s Attorney: “*The Defendant says these words which are contained in this letter which I went through with you, are not defamatory of him?*”

⁷ Paginated page 45: lines 5-9

Answer by the Appellant: *“They do have a defamatory fact, because when he is saying that I am causing the confusion in the community he must specify as to what I did.”*⁸

Regarding the uncertain meaning of a purported defamatory statement, the court in **Pestana v Du toit**⁹ considered the words of the authors, Neethling, Potgieter, and Visser of the book ‘The Law of Personality’ and more particularly the following: *“If the words have a double or ambiguous meaning-one defamatory and the other non-defamatory-the meaning inferred must be the one most favourable to the defendant in terms of the maxim semper in dubiis benigniora praeferenda est. Therefore there is a presumption that the words are innocent until the plaintiff proves the contrary on a balance of probabilities. If the plaintiff fails, the defendant goes scot-free.”*

The Appellant’s evidence-inviting the Respondent to explain what he meant by the words he (Appellant) complain of lays the basis for my view that the words contained double or ambiguous meaning. Following this the Appellant had a burden to prove on a balance of probabilities that the words were not innocent but defamatory. When he was given a chance to prove that the words were defamatory, Appellant still wanted the Respondent to explain what he meant by those words and he

⁸ (See page 29, paragraphs 9-14 of the record)

⁹ (A 554/2011) [2012] ZAGPPHC 154 (8 August 2012) at [40]

wanted to use the court *a quo* as a forum to get the true meaning of the words from the Respondent. I find that to be unacceptable and his evidence was short of the defamatory meaning of the words, and for that, borrowing the words from Neethling, Potgieter, and Visser; the Respondent goes scot-free.

[13] In disposing of the second issue in dispute relating publication, the evidence proves that the words in the letter were read by the Appellant who later on and of his own accord published it to members of the public for their consumption. The above, coupled with the Appellant Counsel's concession that there was no publication of the contents of the letter to members of the public by the Respondent leads me find that the Appellant failed to prove on a balance of probabilities an act of publication.

[14] It is my considered view that the Appellant's appeal should fail and I, in the circumstances, propose as I hereby do the following:

1. Appeal is dismissed with costs.

**M MADIMA AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, LIMPOPO
DIVISION, POLOKWANE**

I agree and it is so ordered

**E.M MAKGOBA JP
JUDGE PRESIDENT OF THE
HIGH COURT OF SOUTH
AFRICA, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 10 June 2016

Judgment delivered on : 17 June 2016

Counsel for Appellant : D. Mahapa

Instructed by : David Mahapa Attorneys

Counsel for Respondent : T. Meyer

Instructed by : Diamond Hamman & Associates