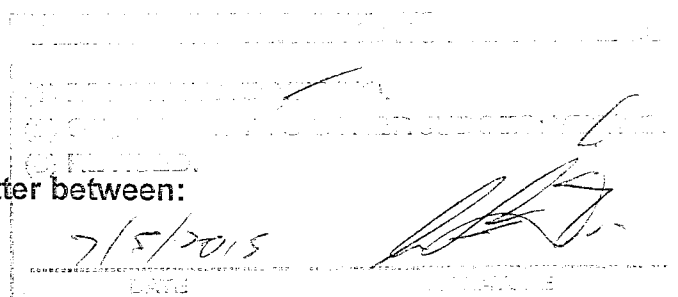


IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT – PRETORIA

8/5/2015

CASE NO.: 16629/12

In the matter between:



HENRY MKHONZA

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

Jordaan J:

This is an action for damages allegedly suffered by plaintiff consequent upon the publication of defamatory words by the defendant's employee (Col. Gouws) in an email communication addressed by him to Col. Mahlahlani, and Col. Cyster and members of the administrative staff of the said addressees. The Defendant is cited in his capacity as the employer of Colonel Gouws – it being alleged that the latter acted in the course and scope of his employment with the defendant when the alleged wrong was committed.

Colonel Gouws, Colonel Mahlahlani, Captain Mkhonza, and the plaintiff were members of the South African Police Service (SAPS) in Piet Retief in the year 2010 with Col. Gouws being the cluster commander of the area.

During March 2010 plaintiff was embroiled in a fracas at the Piet Retief police station with fellow policemen which resulted in charges of defeating the ends of justice, common assault, and later the unlawful possession of ammunition being laid against him.

Plaintiff's arrest on these charges took place on 8 June 2010 and he appeared in court the following day. The case was remanded to a further date with him being held in custody, bail having been refused.

The charges aforesaid were subsequently withdrawn, albeit temporarily, by the Public Prosecutor on 28 April 2011. It is a fact that the charges have not been reinstated since. It is now April 2015.

In the meantime plaintiff had been charged with misconduct by the Police Ministry and had, out of frustration at the perceived bias on the part of police management in the handling of his own complaints against his accusers, resigned from the SAPS on 30 August 2010.

It is not in issue that some time after his resignation, plaintiff was asked by Capt. Mkhonza (his erstwhile unit commander) to assist her in obtaining statements from witnesses in two cases which she had been investigating.

These cases/dockets reached the Senior Public Prosecutor's office in Piet Retief. The prosecutor picked up that some of the statements in the dockets were in the plaintiff's hand writing. prosecutor complained to Colonel Gouws about it.

Colonel Gouws, in response to the prosecutor's complaint, directed the following e-mail urging Colonel Mahlahlani to take disciplinary measures against Capt. Mkhonza. The email reads:

"Subject: STATEMENTS BY EX POLICEMAN AND KNOWN CRIMINAL: MR MIKE MKONZA (My underlining)

a. Lt – Col Mahlahlani

According to a complaint received from the Prosecutors Office an ex Police – Official and known criminal took statements in a murder and another theft case investigated by Capt Mkonza from your office.

She then did the oath on the statements and filed it in the docket.

The member must be paraded to me for a proper explanation by her in the presence of her Branch Commander. The dockets must be obtained and presented also.

b. Col Cyster

Please take note of my instruction to the Branch Commander. If the explanation is not satisfactory the member will be redeployed to the station to work under supervision and departmental steps will be initiated. Progress will be reported."

Reference in the email to plaintiff as a "known criminal" was, according to Col. Gouws, not only reference to the charges which plaintiff faced but to other ongoing

criminal investigations as well which the police's Serious and Violent Crimes Unit had undertaken against plaintiff.

It was correctly pointed out by counsel on behalf of the plaintiff that these further charges were not alleged in the defendant's plea. In the plea mention was only made to the charges the plaintiff had been arrested on, which were subsequently withdrawn.

The plaintiff in some way or other got information of the existence of the e-mail. How he got hold of it is a matter of dispute between him and Capt. Mkhonza. The latter says that plaintiff stole it from among her papers on her desk while plaintiff claims to have been given it by Capt. Mkhonza herself on her own initiative.

The e-mail communication, obtained by the plaintiff, has led to this action.

On behalf of the plaintiff it was pointed out that right to presumed innocent is entrenched in the Bill of Rights, in Section 35(3)(h) of the Constitution of the Republic of South Africa 1996.

It was correctly argued that the adoption of the principle of constitutional supremacy and the entrenchment of the presumption of innocence in Section 35(3)(h) of the Constitution now require that any infringement of the presumption of innocence be justified in terms of the limitations clause of the Constitution.

It was argued that only those persons who have been convicted of crimes qualify to be labelled as criminals. Before conviction one can refer to him or her only as a suspected criminal. Only in a court of law can it be impartially and satisfactorily determined whether the accused satisfies all the requirements of the

alleged crime. The accused can adequately defend him- or herself in the process of the determination of his or her status as a criminal.

Defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation.

The elements of this iniuria are the act (the publication of words or behaviour), an injury to personality (the defamatory effect of the words or behaviour), wrongfulness (the infringement of the personality right to a good name) and the intent (*animus iniuriandi*).

It is not an element of defamation that the defamatory allegation must be false. True defamatory words can also be actionable.

With reference to Law of Delict, Neethling, Potgieter and Visser, Sixth Edition it was argued on behalf of the plaintiff that wrongfulness with regard to defamation lies in the infringement of a person's right to his good name. When determining wrongfulness, the question of whether the good name of the person involved has in fact (factually) been infringed is irrelevant. The only relevant question is whether, in the opinion of the reasonable person with normal intelligence and development, the reputation of the person concerned has been injured (thus an objective approach). If so, the words or behaviour are defamatory to, and in principle (*prima facie*) wrongful as against that person.

On behalf of the plaintiff it was correctly argued that the publication of a defamatory statement is prima facie wrongful. The onus rests on the defendant to dispel this prima facie case. This is a full onus and requires the defendant to allege and prove facts that dispel wrongfulness, such as truth and public interest.

The plaintiff must allege and prove publication and that the defamatory words were published of and concerning the plaintiff. That publication took place and that it concerned the plaintiff was not in issue.

It was further argued that although the plaintiff must allege and that the statement was defamatory, it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames the plaintiff.

Animus Iniuriandi has two elements, namely the intent to defame and knowledge of wrongfulness. Although the plaintiff must allege animus iniuriandi, there is presumption that the publication of a defamatory statement was animus iniuriandi. The defendant bears the onus of alleging and proving the absence of animus iniuriandi.

In this matter the defendant relied on two defences. Fair Comment and privilege.

FAIR COMMENT:

It was conceded that publication of defamatory material which is fair comment upon true facts and which is shown to be in the public interest is justified and therefore lawful. In such instances public policy deems the invasion of the interest to be in accordance with the general criterion of reasonableness.

The requirements for the defence are:

The statement must amount to comment or opinion and not be a statement of fact. This is ascertained by applying the test of the reasonable reader.

The comment must be fair. See *Crawford v Albu* 1917 AD 102 at 113 – 114. It must be a genuine expression of opinion, relevant, free from malice and exaggeration, and a reasonable inference from the facts. It was submitted that the values expressed in the Constitution are particularly relevant in determining whether comment is fair. Free speech is emphasised more than before, especially in the public domain, and society is similarly far more tolerant of criticism. It was submitted that when considering the question of fairness, this value must be one of the factors to be considered.

The facts upon which the comment is based must be substantially true. False statements are not protected.

The facts upon which the comment is based must expressly be stated in the material containing the comment, or clearly indicated or incorporated by reference. Courts have held that a reference may be implied where the facts are well known or easily ascertainable, but the better view would be to acknowledge that the criterion is also satisfied where the facts are known to the audience.

The comment must relate to a matter of public interest. Policy considerations determine what is in the public interest, and this may change according to changing norms in society. The public has a legitimate interest in knowing the extent to which political leaders adhere to their professed standards of morality.

The onus is on the defendant to prove the defence on a balance of probabilities. Malice or improper motive will lead to the forfeiture of the defence, but the onus to show that the defendant was activated by malice lies with the plaintiff.

I will now come to the evidence regarding the defence of fair comment.

Col Gouws testified that he, apart from the charges on which the plaintiff was arrested, knew of alleged investigation in respect of armed robbery. It is clear that the other recipients of the e-mail did not.

The further charges were not relied upon in the defendant's pleadings. It must therefore be accepted that Col Gouws wrote the e-mail with regard to the charges which were withdrawn at the stage he sent the e-mail. It was submitted, and I agree, that this has a bearing on the credibility of Col Gouws when he alleged

that he wrote the e-mail as far as privilege is concerned mindful of alleged further charges to be instituted against the plaintiff, which was until date not instituted.

It was submitted, and I agree, that there was no basis detailed in the e-mail for the insult. The recipients of the e-mail had no duty to receive the information that the Plaintiff was a "known criminal".

Col Gouws did not share the information he allegedly had with the recipients of the email. I agree that objectively viewed he went to far by calling the Plaintiff a known criminal which was gratuitously and an uncalled insult of the Plaintiff.

The uncalled for insult of the plaintiff as a "known criminal" was not a comment but appears to be a statement of fact. Even if it considered to be comment, it was not fair, genuine expression of opinion, relevant or free from malice.

The comment should have been based on facts that are substantially true which in view of the circumstances relating to the charges could not have been regarded as facts that are substantially true. In fact, as said, these charges were withdrawn when the e-mail was sent.

Gouws testified that he, when using the words "known criminal" wanted to emphasise the seriousness of Captain Mkhonza's behaviour and that it warranted disciplinary steps. There were clearly other means by which he could have underlined the seriousness of the matter. In fact I fail to understand how the words "known criminal" was used at all. The fact that a ex policeman was allowed to take statements would have sufficed.

PRIVILEGE:

In *KENNEL UNION OF SOUTHERN AFRICA AND OTHERS v PARK* 1981 (1) SA 714 (C) it was held that defendants cannot shelter behind the privilege unless it is shown that the report was a truthful, accurate and honest report, published bona fide without malice.

This defence is available if the defamatory words were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statement.

It was correctly submitted that privilege is present where a person has a legal, moral or social duty or a legitimate interest in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions. The question of whether such a duty or interest exists causes no problems in the case of a legal duty. The existence of a social or moral duty or interest must, however, be ascertained objectively, by means of the reasonable person test.

It was further correctly submitted that If it is proved that both parties had a corresponding duty or interest (that a privileged occasion existed), the defendant must further prove that he acted within the scope or limits of the privilege. To do this, he must prove that the defamatory assertions were relevant to, or reasonably connected with the discharge of the duty or the furtherance of the

interest. Even when the defendant has proved this, he still only enjoys provisional, in contrast to complete, protection. The plaintiff may still show that the defendant exceeded the limits of the privilege because he acted with an improper motive (malice).

I now turn to the evidence before me regarding privilege.

It was submitted that no privileged occasion existed alternatively it was forfeited in that the recipients of the e-mail was not only Lt Col Mahlahlani and Col Cyster but included also administrative clerks (civilian individuals employed in terms of the Public Service Act). That the e-mail was also directed to these clerks was explained by Col Gouws that he wanted to make sure that Lt Col Mahlahlani and Col Cyster received his message.

It was submitted that the issue at hand was the disciplinary action of the plaintiff which in itself cannot be a privileged occasion. It was not the investigation about a person who allegedly committed an offence.

I agree that ordinary personnel had no duty to receive information that the plaintiff is a known criminal.

Even if it privileged indeed existed, the defendant must also prove that Col Gouws acted within the scope or limits of the privilege. That it is reasonably connected with the discharge of a duty or furtherance of an interest.

The issues at hand was as alleged by Col Gouws were the following:

- that Capt. Mkhonza needed the assistance of somebody else (a member of the public) to assist her with her duties. Clearly reference to the plaintiff or that he is regarded as a “known criminal” was irrelevant to the issue at hand;
- that Capt. Mkhonza received assistance from a “known criminal” and the impact that would have on the image of SAPS. Col Gouws testified that he made up his mind that the plaintiff is a “known criminal” and still holds that opinion, even four years after the charges were withdrawn against the plaintiff. The plaintiff was not a “known criminal”. The charges were withdrawn (after a period of 11 months).

As stated above Col Gouws testified that the use of the words “*Ex Policeman and Known Criminal: Mr Mike Mkhonza*” was used to emphasise the importance of the matter. Lt Col Mahlahlani however testified that he didn’t even take note of the reference to the plaintiff as a “known criminal”, the emphasis that Col Gouws wanted to achieve was without any effect. Neither Col Gouws, Lt Col Mahlahlani nor Capt Mkhonza could inform the Court what the charge in the disciplinary action against her was and whether it related to a member of the public assisting her with her duties.

As stated above Col Gouws could have achieved the same result other means. He could have marked the e-mail as urgent or using the words "urgent" or only referred to the plaintiff by name or an ex policeman.

It was submitted that Col Gouws referred to the plaintiff as a "known criminal" without any regard to the constitutional rights of the plaintiff, contained in the Bill of Rights, amongst other not to be defamed and to be presumed innocent until proven guilty and without having regard to the fact that a criminal in terms of the criminal law is a convicted person. When he sent the e-mail there were no pending criminal charges against the plaintiff and he had no previous convictions. As stated before the defendant, in its pleadings, did not rely on any other charges against the plaintiff that might have been investigated against him at the time.

Col Gouws further testified that he only used police language in the e-mail. He explained that he referred in meetings to persons being investigated as criminals. It was correctly submitted that he however referred to the plaintiff as a "known criminal", which is more serious and carries an extra sting to it that there is more certainty and veracity to the reference of the plaintiff.

It was submitted Col Gouws exceeded the limits of privilege and an inference should be drawn that he acted with malice. I agree. Col Gouws had to make absolutely sure of his facts before publishing that the Plaintiff is a "known criminal".

It was submitted that if the Court sanctions the behaviour of Col Gouws in referring to the plaintiff as a known criminal without any foundation therefor, despite the Bill of Rights entrenched in the Constitution, the Court would thereby and effectively find that the Constitution and application thereof stops at the doors of a Police Station. I agree. In terms of the South African Police Service Act, 68 of 1995, the preamble as well as sections 3(1) and 205(3) every police member is to uphold and enforce the law including *"to uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution"*. Every police member is required to exercise their powers and perform their duties *"subject to the Constitution and with due regard to the fundamental rights of every person"*. See Section 7 of the Constitution.

I agree that the statement was not justified and amounted to an abuse of privilege, if it existed, not deserving protection afforded by law. The statement was not reasonably necessary to protect the interest or discharge the duty which is alleged to have been the foundation of the privilege and it was gratuitous or uncalled for insult.

The merits and quantum were separated. I was only required to adjudicate on the merits.

In my view the following order should be made:

The defendant is held liable to the plaintiff with costs for the defamatory words or statement in question and for the plaintiff's agreed or proven damages.