

REPUBLIC OF SOUTH AFRICA

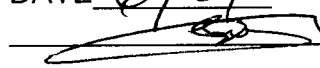


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 6/8/15


SIGNATURE

6/8/15

CASE NUMBER 87880/14

In the matter between:

MZILIKAZI ENOS MAZIBUKO

EXCIPIENT

AND

EBENEZER MARAIS

RESPONDENT

JUDGMENT

TOKOTA AJ

- [1] In this matter the plaintiff, Mr Marais, issued summons out of this court claiming damages from the defendant, Mr Mazibuko, for defamation in the amount of R1million.
- [2] The defendant has taken an exception to the plaintiff's particulars of claim on the grounds thereof that the plaintiff's particulars of claim do not disclose a cause of action in that they lack averments to sustain a cause of action.
- [3] There are two claims. The first claim relates to defamation. The second claim relates to injuria and reputation. Both claims are based on a letter written by the defendant addressed to van der Wal Slade Ramabulana Inc. The passages complained of are the following:

Paragraph 4.1 of the letter reads:

"One is tempted to believe that this conduct on the part of your client is being formed by racist tendencies which client neither has time nor stamina to live with."

Paragraph 5 reads:

"Your client's instructions that 'Mr Marais was contacted by a gentleman, purportedly the attorney of record for the Applicant' cannot be allowed to go unchallenged. Writer wishes to draw your client's attention that the foregoing is the continued display of your client's belligerent and racist attitude where, in his world, a black man cannot progress professionally beyond the level of being a petrol attendant."

- [4] Mr Minnaar who appeared for the plaintiff, argued that the plaintiff has pleaded all the elements of the delict in question and therefore it cannot be said that the particulars of claim do not disclose a cause of action. The exception, so it was argued, should be dismissed.
- [5] On the other hand, Mr Rip, on behalf of the defendant, excipient, argued that one of the elements of defamation is that the statement must refer to plaintiff and in this case the words complained of are not capable, in the eyes of a reasonable reader, of referring to the plaintiff.

[6] I agree with Mr Minnaar that the elements of defamation have been pleaded. However, the only question to be determined is whether the defamatory matter complained of can be reasonably read as referring to the plaintiff. In doing so I must apply the test on exception as to whether the words are reasonably capable of conveying to the reasonable reader, having average intelligence and knowledge , (which must include knowledge of facts relating to the case to which a plea was referring to in the letter), that criticism in question refers to the plaintiff.

[7] During oral argument I debated with both Counsel my concern that to me it appeared as if the real cause of complaint is that the reference to a person allegedly defamed is vague and embarrassing. I was of this opinion for the following reasons:

- (a) It appears from the letter which contained the alleged defamatory matter that attorneys were exchanging correspondence in respect of a claim between one G Julius Nkosi (plaintiff in that matter) and Eastern Blue Investments 178 CC (the defendant in that matter).
- (b) The writer of the letter was the plaintiff's attorney writing the letter in his capacity as such;
- (c) The letter was addressed to an attorney for the defendant, Eastern Blue Investments 178 CC;
- (d) The letter was apparently discussing the contents of the defendant's plea.
- (e) It is not clear in the letter what Mr Marais had to do with matter.

[8] The paragraph which says *"Your client's instructions that "Mr Marais was contacted by gentleman, purportedly the attorney of record for the Applicant" cannot be allowed to go un-challenged* is more confusing especially if it is read in conjunction with paragraph 6 of the letter.

[9] For convenience I deem it expedient to quote paragraph 6 of the letter hereunder.

"AD PARAGRAPHS 34 AND 35 THEREOF:

Writer rejects this assertion with the contempt that it deserves.

After the initial call, writer made three successive calls and on each occasion, Mr Maris slammed the phone down.

6.1

With regard to him having lost the cellular phone signal, writer once again rejects this with the contempt it deserves.

6.2

On each occasion the writer called him, his cellphone number remained on his phone screen.

If he was anxious to follow up with the telephone contact until we managed to find one another, he would have returned the call.

6.3.

Over and above the foregoing, he was already in receipt of the letter to "Eben Marais" with all the details of the gentleman who purported to be the Attorney of record for the Applicant."

- [10] Obviously the reference to the defendant as "*him*" in paragraph 4.1 of the letter cannot be reconciled with the fact that the defendant was a juristic person. Therefore if the letter is read as a whole, as it should be, the reference to the plaintiff becomes more obscure and vague. One can speculate that Mr Marais must have been the client referred to in the letter giving instructions on behalf of the close corporation.
- [11] Mr Rip was constrained to somewhat faintly persist that the particulars of claim did not disclose a cause of action especially when I raised with him whether he should not have given notice in terms of Rule 23(1) of the Uniform Rules of Court. Mr Minnaar for the plaintiff was adamant that all the elements of defamation have been pleaded.
- [12] The elements of defamation are trite. They are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.¹

¹ See eg *Khumalo v Holomisa* 2002 8 BCLR 771 (CC); 2002 (5) SA 401 (CC) para 18

- [13] The above elements have been pleaded by the plaintiff. It is only the last element that we are concerned with in this exception. The plaintiff must allege and prove that the statement complained of refers to him. The test whether the statement refers to the plaintiff is objective: would the ordinary reasonable man to whom the statement was published be likely to understand the statement in its context to refer to the plaintiff?
- [14] The statement complained of may refer directly to the plaintiff by name, or in such a way that the plaintiff is readily identifiable. Where it does not, the plaintiff must allege and prove, as in the case of an innuendo, that there are special circumstances which make the statement applicable to him.²
- [15] Where the defamatory matter is capable of referring to a class, such as, in the present case, the Eastern Blue Investments and the plaintiff, there are no special rules applicable to the defamation of that kind. Where an individual member of a class institutes an action for defamation grounded on such defamatory statement the member must allege and prove that the words concerned him personally. The mere fact that the person belongs to the class referred to is not enough. Similarly, where a statement is capable of referring in terms to a person other than the plaintiff, the plaintiff will only succeed if he can establish that it refers also to him.
- [16] Bearing in mind that the case that was under discussion between the lawyers in the letter involved close corporation, one would expect that particulars of claim would be pleaded in such a manner as to establish special circumstances which make the statement applicable to the plaintiff.
- [17] I agree with Mr Rip that the question whether a statement is reasonably capable of referring to the plaintiff either in its terms or by reason of the special circumstances alleged, may be determined on exception.

² Pike v Wesson 1938 EDL 373 377; Argus Printing & Publishing Co Ltd v Weichardt 1940 CPD 453 459; Visse v Wallachs' Printing & Publishing Co Ltd, Visse v Pretoria News & Printing Works Ltd 1946 TPD 441 446.

[18] Regard being had to the publication as a whole and the particulars of claim it is not clear to me whether the statement complained of refers to the plaintiff. It may be that he is the sole member of the defendant in the case referred to in the letter or that there are special circumstances which justify the inference that the person defamed therein is him.

[19] In my opinion the plaintiff's particulars of claim with reference to whether the statement concerned him are vague and embarrassing. It follows therefore, in my view, that the plaintiff should have been given a notice in terms of Rule 23(1) of the Uniform Rules of court. This has an impact on costs.

[20] I am therefore of the view that the exception should succeed but in the exercise of my discretion, costs should not follow the event. In the result I make the following order.

1. The exception is upheld;
2. The plaintiff is afforded twenty days from the date of this order within which to amend his particulars of claim;
3. Each party is to pay its own costs.



TOKOTA B R
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA

For the Excipient Adv C M Rip

Instructed by Loubser van der Walt Inc.

For the plaintiff/Respondent Adv J R Minnaar

Instructed by van der Wal Slade Ramabulana Inc.