

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4946/2010

In the matter between:-

DAN ANDREW MOKHUOE KGOZHULE

Plaintiff

And

DARLINGTON MAJONGA

1st Defendant

LETLAKA COMMUNICATIONS

AND MARKETING

2nd Defendant

HEARD ON:

28 & 29 JULY 2015

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

10 SEPTEMBER 2015

I Introduction

- [1] The plaintiff, who was Member of the Executive Council of the Free State Province responsible for the Department of Sport, Arts, Culture and Recreation from September 2007 until May 2014, claims to have been defamed in an article written by Sphiwe Mboyane in The Weekly, a newspaper circulating in the Free State and published during the week of 5-12 August 2010. At the time Mboyane was editor of The

Weekly. He died in October 2014. Summons was issued against Sphiwe Mboyane as first defendant in his capacity as editor of The Weekly and Letlaka Communications and Marketing in its capacity as owner, printer, distributor or publisher of The Weekly. After the death of Mr Mboyane in October 2014 the parties agreed that he be substituted with Darlington Majonga, the current editor of The Weekly. The parties also agreed that the second defendant is now 2 Dimensions Writing CC trading as Lethaka Communications and Marketing.

- [2] The article appears at pages 1 and 2 of the 5-12 August 2010 edition of The Weekly under the heading “Magashule ‘aces’ first year in office”, “By: Sphiwe Mboyane”. The article comments favourably on the work of the Premier. Three paragraphs comment negatively on the Department of Health, saying that the political leadership in that department has not risen to the occasion. The last column of the article comments on the Department of Sport, Arts and Culture:

“There are also genuine public concerns about the department of sport, arts and culture.

Constant complains about arts institutions such as Pacofs not adequately serving artists in the province cannot be ignored.

The constant complaints by institutions such as Mmabana Cultural Centre and other arts institutions that they are not receiving adequate support from the

department needs to be addressed if we are to build a vibrant arts sector in the province.

There are also problems that continue to surround the hosting of our well-known Macufe festival. If it is not budget overruns, then it service providers who are not paid on time leading to public complaints about the department, which impacts negatively on the provincial. Poor marketing and advertising of the event has not helped matters as it robs the province of the opportunity to raise the much need tourism revenue yet nothing is being done to remedy the situation.

Many senior managers in the department have also attributed the shortcoming of the department to the deteriorating and frosty relationship between themselves and the MEC.

In the past several months The Weekly has been inundated with several departmental and public complaints of the MEC's lack of commitment to his public engagements by arriving late and the continuing failure to honour his appearance at the Free State Legislature.

This has led to the portfolio committee of Sport, Arts and Culture publicly rebuking the MEC for undermining it.

Several public complaints on how he undermines and addresses members of the community have come to the fore."

- [3] After publication of the article plaintiff's attorney on 1 September 2010 wrote a letter to the editor of The Weekly:

“DA M KHOTHULE – THE WEEKLY 5-12 AUGUST 2010

We have been instructed by Mr Kgotule to address this letter to you in response to the reference to our client in the article, titled “Magashule “Aces” First Year in Office” that appeared in your Newspaper of 5 – 12 August 2010.

Please take notice that our clients view is that the reference to him as that:

1. “he lacks commitment”,
2. that he is arriving late at meetings and,
3. “his continuous failure to honour his appearance at the Free State Legislature”,

was clearly an endeavour to belittle him in the eyes of the public. It is our instructions that evidence will proof the exact opposite.

Our instructions are to demand that a similar article should be placed in your Newspaper of equal prominence stating the correct facts and apologizing for the misstatements and further to demand an undertaking that your Newspaper will refrain from publishing similar false allegations regarding our client in future, within the next 10 days.

Take further notice that our client will, depending upon your replying actions, deliberate whether or not to bring an action for defamation.

We await your urgent response.”

- [4] The editor responded as follows in a letter dated 10 September 2010:

“10 September 2010

Dear Sir

DA M KGOTHULE – THE WEEKLY 5-12 AUGUST 2010

Your letter dated 01/09/2010 bears reference.

The contents of the article entitled “Magashule – Ace’s First Year in Office” with regard to Mr. Kgothule in his capacity as the MEC of Sports, Arts and Culture in the Free State are accurate based on evidence, interviews, and information available to the newspaper. The comments made in the article relates to Mr. Kgothule in his capacity as an elected public representative. As you know all public representatives are accountable to the public with regard to the execution of their duties. Mr Kgothule is therefore not an exception. Our contention in the above-mentioned article, based on information at our disposal, confirms that he arrived late at several public meetings and that his department had been castigated by the Free State Legislature for failing to honour certain appearances. We are convinced, therefore, that the suggestion that your client’s actions demonstrate lack of commitment to his public duty constitutes fair comment.

Contrary to your contention that our article was an endeavour to “belittle” your client, we saw it as part of our responsibility as a newspaper to hold public representatives, such as your client, accountable on behalf of the public they are elected to serve.

May we also take the liberty to inform you that your client was not the only MEC whose commitment to his task was questioned.

This demonstrates that neither malice nor personal vendetta was behind our reporting about your client. We however wish to state that this statement does not preclude our newspaper from placing in the public domain any other information about your client as an individual MEC in relation to his responsibilities.

We would be failing in our duty as a newspaper if we give your client an undertaking to refrain from publishing any information about him in the future. If the information we publish about him in the future turns out to be false, your client has many avenues to seek relief. They include approaching the Press Ombudsman and/or instituting a civil claim against the newspaper in a court of law. Giving an undertaking not to publish allegations against your client amounts to self-censorship. We would be betraying the founding principle of our existence, the freedom of the press and free speech if we make such an undertaking.

Lastly, we are baffled by your client's threat to bring a defamation claim against our newspaper. There is nothing in the article, in our view, that is defamatory to your client in his capacity as the MEC. We are convinced that any third party, including the courts, would view our comments about your clients as fair and the facts contained in the article as accurate.

We, therefore, in response to your instruction wish to place on record the following:

1. We will not place a similar article in our newspaper of equal prominence as we believe that our facts are correct;

2. We will not apologise for the so-called “misstatements” made in the article, as we deem the statements made in the article to be fair and accurate; and
3. We will not give your client an undertaking not to publish any allegations about him in the future.

We also wish to place it on record that your client is at liberty to bring a defamation claim against our newspaper. Our lawyers will be readily available to defend such a claim.

Hope you find above in order

Kind regards,

S. W Mboyane

The Editor”

- [5] The plaintiff in a pre-trial conference held on 22 July 2015 accepted that he had the duty to begin and that he bears the onus of proof. The plaintiff called four witnesses:
- (i) The plaintiff
 - (ii) Ms Tsoneli, now a Member of Parliament, Member of the Executive Committee and Chair of the Portfolio Committee for Arts, Culture, Education during the period 2008 to May 2009.
 - (iii) Daniel Maleko, now a self-employed theatre practitioner. During August 2010 he was a Director in the Department of Sport, Arts and Culture and Recreation responsible for the performing and community arts.

- (iv) Jacobus Stephanus Kellerman, who has been the Chief Financial Officer of the Department of Sport, Arts and Culture in the Free State since June 2009.

II The Law

- [6] Defamation is the wrongful intentional publication of a defamatory statement concerning the plaintiff (**Khumalo and Others v Holomisa** 2002 (5) SA 401 (CC) par [18]). Once the plaintiff establishes these aspects it is presumed that the statement was unlawful and intentional, and the defendant must rebut unlawfulness and intention. The defendant can raise the defence that the publication constituted fair comment, as was done here. Another defence rebutting unlawfulness has been adopted by our courts when dealing with the press, namely that upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular manner at the time in question (**National Media Ltd and Others v Bogoshi** 1998 (4) SA 1196 (SCA) at 1212G-1213A, adopted by the Constitutional Court in **Khumalo and Others v Holomisa** 2002 (5) SA 401 (CC) pars [18]-[20]).
- [7] The primary meaning of a statement is the ordinary meaning given to the statement in its context by a reasonable person. The second meaning is an innuendo (**Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)** 2011 (3) SA 274 (CC)). In this case the plaintiff relies on the primary meaning. In the two-stage enquiry the first step is to establish the ordinary

meaning of the statement. The second enquiry is whether that meaning is defamatory (**SA Associated Newspapers Ltd en 'n Ander v Samuels** 1980 (1) SA 24 (A) at 30F-G). The ordinary meaning is established by determining what meaning the reasonable reader of ordinary intelligence would attribute to the words (**Le Roux and Others v Dey** (*supra*) par [89]).

The evidence has to be considered in relation to the article and the witnesses. I proceed to deal with the specific content of the article and what the witnesses said in relation to each of the components.

III **Content of Article**

A) **"Constant complaints about arts institutions such as PACOFS not adequately serving artists in the province cannot be ignored"**

[8] The plaintiff's case, supported by all his witnesses, is that PACOFS falls under the National Department of Arts and Culture, not under the Free State Province. Ms Tsoneli did say that the Free State Department of Sport, Arts and Culture transferred R2 million to PACOFS because PACOFS had to be assisted. She said the Department requested the Portfolio Committee to transfer the money to PACOFS. She said that when they went to PACOFS to exercise their oversight role the PACOFS leadership told them that they did not have an oversight role. Although the money had been transferred, Ms Tsoneli said they then decided that the Department should no longer assist PACOFS until PACOFS

agreed. It thus appeared that during the period in question in this case, the plaintiff's Department did transfer R2 million to PACOFS. In that manner, at the very least, the plaintiff assumed involvement in PACOFS. The plaintiff cannot blame the editor, Mr Mboyane, to assume that he had some control over PACOFS. Such belief of Mr Mboyane was reasonable and not negligent. In cross-examination the plaintiff said after members of the trade union had complained to the minister, he and his Department realised there were shortcomings with PACOFS, that is why they created the Free State Arts and Culture Association; they had learned from the PACOFS mistakes.

B) “Constant complaints by Mmabana Culture Centre and other arts institutions”

[9] Plaintiff testified that before he become MEC the Mmabana Cultural Centre was down-scaled, this happened before 2007. Plaintiff said he lobbied people from outside to give money to the centre. The centre now has a fashion design unit and makes clothes. The Mmabana Centre was under the control of Tshilo Mtsabi, who reported directly to the Director of Arts and Culture, being Daniel Maleko, who also testified in this trial. Asked about the Mmabane Centre, Ms Tsoneli said plaintiff was innovative and dedicated in his work. Capital works took place and representation in Grahamstown was arranged.

[10] Daniel Maleko testified that the head of the Mmabana Cultural Centre reported to him. There were monthly and

quarterly reporting sessions. According to him the only challenge was that there were vacancies that could not be filled due to the moratorium on the filling of vacancies in the province. He conceded that the CEO of the Mmabana Cultural Centre was suspended, around late 2009. He denied that there was turmoil at the Centre and said there was disruption, which he conceded could give rise to complaints.

C) The Macufe festival:

(i) Budget overruns

(ii) Service providers not paid on time

[11] Plaintiff testified that the annual Macufe festival draws 150 000 people in the Free State. International artists are used as draw-cards. 75% of the artists who perform are from the Free State. Money for Macufe comes from the Executive Council, not the Department. The Macufe festival was managed by the PSS Consortium, appointed as the service provider by the Provincial Executive Council. The plaintiff's Department had no control over the service provider. During the years 2007-2008 the Macufe festival was managed by Free State Tourism, and when plaintiff was MEC he had to see to it that Macufe got better. In cross-examination it was put to the plaintiff that he had intimate involvement with Macufe. He conceded that he called in the consortium from time to time to see whether they did what they were supposed to do. As to the budget overruns plaintiff explained that an adjustment to the budget was made at a later stage. He appeared to be saying that the full

cost was known at the outset, but that the final part of the costs would come out of a later budget.

[12] Mr Daniel Moleko testified that he was not aware of budget overruns for Macufe in 2009 and 2010, but he acknowledged that the Department did receive complaints from service providers who said they were not paid on time. In cross-examination he agreed that there was a view that there was a budget overrun, yet he did not want to concede that it is not unreasonable for an outsider to say that there was a budget overrun. When Mr Kellerman was asked whether some service providers were not paid, he said he could not give a direct answer but conceded that he did hear some complaints which were not directed at him. In cross-examination Kellerman said Macufe was not adequately budgeted. There were decisions taken at a higher level that more funds had to be given for Macufe. Asked whether he accepted that people prefer to complain to the media rather than to go through the channels of the Department, Kellerman responded that that happens every day. Asked whether there were budget overruns Ms Tsoneli said you cannot hold the Department responsible without looking at what happened.

[13] On the evidence it is clear that there were budget overruns and some service providers did complain for not being paid on time.

D) Poor marketing and Advertising of Macufe

[14] Plaintiff testified that the PSS Consortium was responsible for marketing and advertising the Macufe festival. According to him advertising on radio and in newspapers was always done properly. Daniel Maleko and plaintiff solicited a sponsorship from Absa of R2 million to do a benefit analysis of Macufe. The report done by the University of the Free State showed that the Macufe festival yielded an economic benefit to the Free State Province. Plaintiff testified that he saw billboards and advertisements and in his view Macufe was “Highly” marketed.

[15] It appears that marketing and advertising was the responsibility of the PSS Consortium, not the Department. It is clear however that the Department retained an oversight role and cannot pass all its responsibility to the consortium.

E) Frosty relationship between Senior Managers and the MEC:

[16] Plaintiff testified that the Department was at its highest peak during the time he was MEC. There were never disagreements with senior managers. Ms Tsoneli said if senior management had a problem with the plaintiff they should have alerted the Portfolio Committee. Asked about the alleged frosty relationship, Daniel Maleko said that he was satisfied with his relationship with the plaintiff and he was not aware of other senior managers who were dissatisfied with the plaintiff. Asked about the management style of the plaintiff, Maleko responded that the plaintiff used to make surprise visits. Asked whether there could have

been a frosty relationship between plaintiff and a senior manager, Maleko responded that there could be, but he did not recall any such case. Kellerman said his relationship with the plaintiff was not frosty and he said the relationship of some other senior managers was not significantly frosty, never to the extent that there was a break-down of communication. There were differences of opinion which were dealt with. Kellerman described the management style of the plaintiff as being a driver, if he wanted something done, he made sure it was done. He became impatient like many managers.

[17] From the evidence it appears that the management style of the plaintiff did not endear himself at all. He was a driver who wanted things done. There were probably managers who did not have a good relationship with him.

[18] The comment in the newspaper that the plaintiff had a frosty relationship with many senior managers was not negligently made and was reasonable.

F) Complaints about:

- (i) Arriving late at public engagements, and
- (ii) Continuous failure to appear in the legislature.

[19] Plaintiff testified that he was never late at any event. He described the report that he was late as “just lies”. As to the reference to the meeting of 20 April 2010 where the chairperson told the meeting that the representatives of the Department of Sport, Arts and Culture and Recreation were

not present, having informally wanted to apologise, which apology she did not accept, plaintiff testified that he was not expected to attend that meeting. He said not a single MEC was at that meeting. No political office-bearer was expected to attend that meeting. Plaintiff said he was never rebuked by the chairperson of any committee.

[20] In cross-examination plaintiff said for the first time that the editor appeared before the Portfolio Committee and admitted lies. Asked why he had not said so earlier, plaintiff responded that he was never asked. Plaintiff said he told his lawyers about the apology of the editor to the Portfolio Committee only the week of the trial, being five years later (2015), because, he said, there was no reason to tell them earlier. Asked why no reference to the meeting of the editor with the Portfolio was made after the plea was filed in May 2011, plaintiff responded that it could be that at that time the editor had not met the Portfolio Committee.

[21] The evidence of Ms Tsoneli, who was the chairperson of the Portfolio Committee was that she does not read newspapers because newspapers are always not accurate in the school she comes from. In the school she comes from newspapers are not always biased against the government. One of the officials showed her the article in The Weekly and she called a meeting with the editor. He told her that a lady had written the article. This is strange, because at the top of the article is stated: "By: Sphiwe Mboyane" immediately below the heading, in bold letters in tram lines. According to Ms

Tsoneli the editor agreed that he would retract the statements about the meeting. This evidence differs from what the plaintiff said in cross-examination, namely that the editor appeared before the Portfolio Committee and admitted writing lies. Plaintiff did not say that the editor said a lady had written the article. The evidence of the plaintiff and Ms Tsoneli casts doubt on their credibility. Asked when she met the late editor Ms Tsoneli agreed that it was after 12 August 2010. She was not aware of the editor's response dated 10 September 2010 to the letter of demand. She also did not recall if the meeting with the editor was shortly after 12 August 2010. The meeting of 20 April 2010 concerned the Soccer World Cup and the municipality. At that meeting the chairperson said that it is a known fact that there is no relationship between the Municipal Manager and the Department of Sport, Arts, Culture and Recreation.

- [22] There is not much evidence as to the attendance by the plaintiff of events, or arriving late. The editor who wrote the article is now deceased. The main thrust of the evidence concerned the alleged rebuking of the plaintiff by the chairperson. The evidence by the plaintiff and Ms Tsoneli clouds this issue and it is difficult to make a finding in favour of the plaintiff about these allegations. The allegations go to the commitment of the plaintiff. The report of the Auditor General shows that there was poor financial oversight, although it did apparently improve towards the end of the 2010 year.

G) Complaints on how the plaintiff undermines and address members of the community

[23] This paragraph refers to general complaints. The witnesses cannot deny that complaints were received. Ms Tsoneli said people should have followed the proper channels and complain to the Portfolio Committee. Mr Kellerman agreed that many people choose to approach the press instead. These are allegations, not facts. There can be no cause for complaint by the plaintiff about this statement.

IV The witnesses generally

[24] The Plaintiff and Ms Tsoneli were loquacious and at pains to give reasons why the plaintiff did good work as an MEC. They seemed to overlook the fact that this case is not about the fitness of the plaintiff to hold office, but whether the article written by Sphiwe Mboyane was defamatory.

[25] The plaintiff only near the end of cross-examination said that the editor had apologised about the article. Ms Tsoneli gave evidence that she called Mboyane in to come to see her, and he apologised. The fact that this evidence was given at such a late stage, and is in conflict with the stance adopted by Mboyane in his letter responding to the letter of demand, casts doubt on the credibility of the plaintiff and Ms Tsoneli.

[26] Ms Tsoneli maintained that she is not a public servant, but a public office bearer. She said she is paid by the state not the taxpayer. Ms Tsoneli accepted that in the legislature as political structure, the MEC has to take responsibility. The

MEC is the political overseer whose duty it is to ensure that programmes are put in place.

- [27] Daniel Maleko, in contrast to Ms Tsoneli, said he reads newspapers regularly. He agreed that people make outrageous comments in newspapers. He accepted that people are entitled to speak their mind. Mr Kellerman accepted that some people prefer to complain to the media rather than using the official channels.

V Conclusion:

- [28] Mr Knoetze, for plaintiff, contends that the article conveys to the reasonable, ordinary reader the message that the plaintiff neglected his duties as a public official. He says the article would probably lower the plaintiff in the esteem of the right-thinking members of society. It is an objective test to determine whether the reputation of the plaintiff has been infringed on a balance of probabilities (**Le Roux and Others v Dey** (*supra*) pars [168]-[169]). In the case of political office-bearers more latitude is allowed to the press, as long as dishonourable conduct is not imputed to them (**Minister of Justice v SA Associated Newspapers Ltd and Another** 1979 (3) SA 466 (C) at 475B-F). There is no licence to publish untrue statements about politicians. Politicians also have the right to protect their dignity and reputations (**Mthembi-Mahanyele v Mail and Guardian Ltd and Another** 2004 (6) SA 329 (SCA) pars [47]-[50]).

- [29] Mr Arendse, for the defendants points out that **Le Roux and Others v Dey** did not involve the media, but the publication of alleged defamatory material at a school. Mr Arendse stresses the importance of the defence open to media defendants that the publication (even if it was false) was nevertheless reasonable in all the circumstances (**Khumalo and Others v Holomisa** (*supra*) par [19]).
- [30] As to the defence of fair comment, Mr Arendse refers to **The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)** 2011 (4) SA 191 (CC) pars [79]-[86] where Cameron J pointed out that an important rationale for the defence of fair comment is to ensure that divergent views are aired in public and subject to scrutiny and debate. Cameron J prefers to refer to “protected” comments, rather than “fair”. Discussion of matters of public interest should be protected in the constitutional dispensation.
- [31] Mr Arendse contends that objectively viewed, the reasonable reader of ordinary intelligence would not attribute a defamatory meaning to the article. The article is a “report card” and raises complaints and concerns. The test is whether the article is defamatory of the plaintiff, and whether the article is likely to injure the good esteem in which he is held by the reasonable or average person reading it (**Le Roux and Others v Dey** (*supra*) par [91]). Mr Arendse says the article will not expose the plaintiff to hatred, contempt or ridicule (with reference to **Le Roux and Others v Dey** (*supra*) par [91]). The test is whether it is more probable

than not that the statement will harm the plaintiff. Mr Arendse submits that the plaintiff failed to discharge the onus that the article was defamatory. Therefore the presumption of wrongfulness does not arise. He further says the article contained fair and protected comment as contemplated in **McBride** (*supra*). He further submits that having regard to the evidence it appears on a balance of probability that the publication was reasonable on the basis set out in **Bogoshi**.

- [32] The material complained forms part of a report on the first year in office of the premier. The performance of the plaintiff's department as dealt with in the report was one of the areas where there is room for improvement. From the evidence it appeared that there were a number of problems with regard to arts and culture in the province. It is clear that all artists were not paid timeously for their Macufe performances. The PSS Consortium was responsible for payment, but the plaintiff's Department retained its oversight role. As to PACOFS, there were problems, to such an extent that the province gave it R2 million. The public was entitled to believe that the plaintiff in his capacity as head of the Department in the legislature failed them. The article does not constitute an unreasonable and unfounded attack on the plaintiff. The editor, as appears from his letter in response to the Demand, acted as a responsible journalist, pointing out complaints and allegations. It is not in dispute that there were complaints. From the cross-examination and reference to the Report of the Auditor General it appears that there were problems.

[33] In my view the reasonable right-thinking reader would not read the article to convey the message that the plaintiff was not fit to hold office. The proof thereof is that the premier did not see fit to remove the plaintiff as MEC after the article was published. The plaintiff remained in office as MEC until 2014. The defendants established on a balance of probabilities that the editor acted reasonably and not negligently in writing the article, and this constitutes a defence. Politicians must realize that high trees catch more wind. The public is entitled to have views aired that politicians may not agree with. Journalists should not have to look over their shoulder every time they write articles to ensure that they do not offend politicians. Robust debate is essential to a democracy. The publication of the article was reasonable and the plaintiff has no reason to complain.

ORDER

Plaintiff's claim is dismissed with costs.

A. KRUGER, J

On behalf of Plaintiff:

Adv B Knoetze SC

Instructed by:

Stander & Partners

BLOEMFONTEIN

On behalf of Defendants:

Adv N Arendse SC

Instructed by:

Honey Attorneys

BLOEMFONTEIN

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