

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

4/9/13

In the matter between:

CASE NO. : A370/11

(1) REPORTABLE: NO.

2) OF INTEREST TO
OTHER JUDGES: NO.

(3) REVISED.

2/9/13 *[Signature]*
DATE SIGNATURE

MUKHANYO THEOLOGICAL COLLEGE

Appellant

and

PIETERNELLA DIJKHUIZEN

Respondent

JUDGMENT

PRELLER J:

This appeal is directed against the whole of the judgment and order awarding R 50 000 to respondent as damages for defamation, handed down by Ismail J in this court on 27 January 2011.

The respondent was a lecturer at the appellant college. Her claim arises from what was said by the Rev K T Mogale at a meeting of staff and students on 17 October 2007. At the meeting he announced the outcome of an investigation by a commission of inquiry into certain complaints made by her in a "letter of concern" dated 19 October 2006 written by her to the Board of Control of the appellant. In the letter she made various serious allegations of inter alia mismanagement, fraud, power abuse and poor handling of staff matters against the principal of the college.

The Students' Representative Council is also represented on the Board and the appellant was of the view that because the respondent's complaints had been disclosed to the students as well as the staff, all of them had a right to be informed of the outcome of the investigation and that the appellant had a corresponding obligation. It was accordingly resolved by the Board that the outcome of the investigation should be announced to the assembled staff and students after the weekly prayer meeting on the day in question. Before us, as in the court *a quo*, the parties were agreed that the words were uttered at a qualifiedly privileged occasion.

According to the respondent the Rev Mogale stated at the meeting that:

1. After an investigation the Board of Control had concluded that all the accusations made in her letter of concern were false;
2. Students were no longer to make contact with the respondent, and
3. She was no longer allowed on the campus or to have any business with the college.

(Unless in inverted commas, all excerpts from pleadings and other documents have been paraphrased by me.)

The appellant pleaded that the Board of Control had resolved to:

1. Inform the respondent that no evidence could be found to substantiate her allegations
2. Inform donors that she was no longer associated with the appellant
3. Inform the staff and students that no evidence of gross negligence could be found and that, since she had left, there would be no purpose in having any further contact with her;
4. She would in future no longer have free access to the campus.

I shall return to the recorded minutes of the meeting of the Board anon.

It was further pleaded that, what had been said at the meeting was:

1. That after an in-depth investigation the Board had unanimously accepted the findings of the Commission;
2. The essence of the findings of the commission was that all the accusations of the respondent had been refuted;
3. It would serve no purpose for anybody to discuss the matter any further with the respondent or to have any contact with her as she is no longer a staff member and would have no further access to the campus.

The appellant relied on four grounds of appeal:

1. The trial court erred by impliedly finding that the qualified privilege was forfeited;
2. The trial court erred in finding that the Rev Mogale had used the words alleged by the respondent;
3. That if it be found that the words alleged by the respondent had been used, the appellant cannot be held liable since the Rev Mogale had been instructed to convey the summarised version of the decision of the Board of Control to the meeting;
4. The damages awarded to the respondent was excessive.

A court of appeal considers an appeal in accordance with the time-honoured approach laid down as long ago as 1948 in R. v. Dhlumayo & Anor., 1948(2) SA 677 AD at 705/6: A court of appeal will interfere with a trial court's findings of fact only where the trial court misdirected itself. If so, the court of appeal is at large to consider the evidence afresh and make its own findings.

It would make more sense to deal with the second ground raised by Mr. Pretorius SC for the appellant in his argument first. (The respondent appeared before us in person. At the trial she was represented by senior counsel.) The ground concerns the court's finding that the version of the words used by the Rev Mogale, deposed to by one P B Kgatle who testified for the respondent, is to be preferred to the version of the Rev Mogale himself.

In paragraph [36] of the judgment the court started by reiterating its finding that the appellant had been entitled to report the outcome of the enquiry to the staff and students. It then continued:

"What must be examined is what the message was that was conveyed to the staff and students at the devotion. Mr. Pretorius submitted in his heads of argument that the defendant had not mandated the Rev Mogale to use the alleged words which Mr. Kgatle testified to. It was submitted that the Rev Mogale may have been remiss. He was however not a party to the dispute. This argument has substance; however the plaintiff sought an amendment..... The plaintiff thereby sought damages based on vicarious liability."

It seems with respect that the court had started to deal with the question of what words exactly had been used in conveying the message, but then changed horses to deal with vicarious liability, which I shall consider later in this judgment.

In his written heads and also in oral argument, Mr. Pretorius submitted that the trial court had stated in paragraph [36] of the judgment that there was substance in the argument that Mogale had not been mandated to use the words as testified by Kgatle, and then continued to deal with the respondent's abortive attempt to amend her replication in order to rely on vicarious liability, without knowing that the amendment had been withdrawn. It seems that this is intended as an example of a misdirection by the trial court.

Mr. Pretorius relied on five other alleged misdirections by the court *a quo*. The first one was that Kgatle, despite his alleged shock at hearing what the Rev Mogale had to say, only reported it to the respondent some five months later. This, he submitted, is inherently improbable. That, however, is no more than an improbability that the court should have considered and is not the kind of misdirection that was contemplated in the case of **Dhlumayo** referred to above. There is no need to deal in any detail with the other four instances, which are likewise no more than improbabilities that the court should have considered and do not remotely amount to misdirections.

The court *a quo* weighed the version of events deposed to by the Rev Mogale against that of Kgatle and preferred the latter. It considered the probabilities and the merits of the two witnesses, remarking on the fact that the Rev Mogale was only called upon to recall what he had said at the meeting three years after the time, while he had no reason to particularly remember the words that he had used. It is not surprising that the witness had a very limited recollection of virtually every other incident at the meeting, apart from the words that he had, according to him, used to convey the message. The learned judge was alert to the fallibility of memory, quoting the well-known statement that **"memory, like a mistress, is often unfaithful."** Apart from respectfully pointing out that in these days of political correctness it might be wise to insert the words **"or a lover"** after **"mistress"** in the quotation, I can find no fault with his reasoning and I respectfully agree with the conclusion at which he arrived. I can find no reason to interfere with this factual finding by the court *a quo*.

I may also point out in passing that after considering the report and recommendation of the commission of inquiry, the General Meeting of the Board of Control noted certain unanimous conclusions on 13 October 2007. The first relevant one is in paragraph 9.2 of the minutes according to which it was resolved that the respondent be informed by letter that the **“.....investigation has been completed and that no evidence could be found of gross negligence.”** (My underlining). Secondly paragraph 9.6 records that it was unanimously agreed that the Rev Mogale **“should convey the summarised version of this decision to the staff and students”** after the devotion at the next meeting. The words “false” and “refuted” that were used in the pleadings and hotly debated in cross-examination do not occur anywhere in the said unanimous conclusions. Whether he said that the allegations had been refuted or were found to be false is of little practical consequence – both clearly imply that the respondent had been dishonest in her complaint. There is, however, a difference in principle between either of the two expressions on the one hand and the words from the unanimous conclusions that I have underlined above. I may add that the allegations in paragraph 4.3 of the Plea do not correctly reflect the resolution of the Board, in that it was not resolved that no evidence could be found to substantiate her allegations, nothing was resolved about further contact with her and no resolution was passed to prevent her from having free access to the campus.

The first and third grounds of appeal are closely linked and I find it convenient to deal with the third ground first, being the authority of the Rev Mogale to make the statement complained of. The ground is that if it were to be found that the words had indeed been used, the Rev Mogale did so without the authority of the Board and was, as it were, on a frolic of his own. In my view a court should consider the situation with care before finding that a tortfeasor acted without the authority of his principal, because it is unlikely that the latter will ever admit having authorised the agent to commit the deed complained of. In this case there can be no doubt that when making the announcement, the Rev Mogale was, as the respondent put it in her written heads, **“acting within the sphere of responsibility assigned to him and in the furtherance of the affairs”** of the appellant. He was speaking at a function of the appellant and was there for no reason other than to further the affairs of the appellant. In paragraph 9.6

of the minutes of the meeting, the Board had agreed that the responsibility of making a summary of the decision and conveying it to the assembly be left to the discretion of the Rev Mogale.

Apart from the facts, it was common cause on the pleadings that it had been the appellant (i.e. the college) that was acting and not the Rev Mogale in his personal capacity: in paragraph 4 of the Particulars of Claim it is stated that on the day in question **“....the Defendant represented by the Rev K T Mogale stated to the students and staff.....”**. The answer in paragraph 4.4 of the Plea reads: **“.....the defendant, represented by Reverend T Mogale, and pursuant to the decision of the Board of Control, made an announcement to all the staff and students concerning the report of the Investigating Committee and the Board’s decision.”** In paragraph 4.5 the appellant then pleads its version of the words used.

I am satisfied that the appellant, being a legal persona, was acting through the Rev Mogale and is vicariously, if not directly, liable for his actions.

The first ground of appeal is concerned with the defence of qualified privilege and the forfeiture thereof. The legal position as set out in the cases referred to by Mr. Pretorius in his heads¹ is clear enough. Because it was common cause that the utterance had been made at a privileged occasion, I am only required to decide whether the respondent has shown malice on the part of the appellant, either in the form of an improper motive or that the words complained of did not have some foundation in the evidence and were not germane to the issue.

Unfortunately there was a long history of antagonism between the respondent and in particular the principal of the college, Dr. Buys, and which probably has a bearing on the treatment that she received from the college. The history starts with an Enquiry Report from 2004 which was

¹ May v Udwin 1981(1)SA 1 (A); Joubert & Ors v. Venter, 1985(1) SA 654 (A); Basner v Trigger 1946 AD 83

included at page 32a of the trial bundle. I should mention that in terms of paragraph 13.3 of the pre-trial minutes, the documents in the trial bundle were accepted as being what they purport to be, unless challenged on prior notice. Although not dealt with in any detail in evidence, it appears from the report that the respondent had on 26 February 2004 at a meeting of the Management Committee proposed a motion of no confidence in the principal. That resulted in the appointment of a committee of inquiry into her motion. The conclusion to which the committee came included a recommendation to both protagonists to commit themselves in writing to an attitude of forgiveness and co-operation with the other within the management structures of the college. If the recommendation had the desired effect, it did not last very long, because a little more than two years later the respondent wrote her "Letter of Concern" which resulted in the appointment of the present commission of inquiry.

Although probably motivated by genuine concern about the best interests of the institution where she worked and probably driven by her frustration about what she perceived to be wrong, she certainly did not pull her punches with the terms in which she couched her concerns in the letter. Not unexpectedly, that rose the hackles of the objects of her criticism and probably also of the members of the Commission. That is apparent from the sometimes exaggerated language of the report. The following are but a few examples:

- At paragraph 6.3.1 it is reported that the respondent **"....falsely implies/states that Mr. Pieterse by himself entered into a contract with me Moshaba."** A more neutral observer might have realised that she simply did not have all the facts at her disposal and might have described her statement as mistaken or incorrect;
- The same applies to the statement in the next paragraph that **"It is a lie to state...."**
- Her concern for and possibly genuine effort to help the said ms Moshaba is described in paragraph 6.4.1 as **"....fabricating a lie to the detriment of another colleague."**

- In paragraph 7.1.2 it is reported that she “...stated this is/was a blatant lie..” whereas the words used by her (p.485 of the bundle) was no worse than saying that it was “...simply not true...”.
- An example of how counterproductive the antagonism was, is to be found in paragraphs 5.3.3 and 5.4.1. She had complained that the auditors’ reports had been of little value to the college because of their failure to notice and investigate a payment of R12 000 that the previous registrar had made to himself and which may well have been a case of theft. According to the witness Coezee (record p. 374) the principal never asked him to refund the money which, according to him, was necessary to do. Rather than to recommend that this question be referred back to the auditors for further investigation she was reprimanded for making an unsubstantiated and irresponsible statement such as that the auditors’ report was of little value to the college. Despite the costs of a forensic audit being prohibitive and despite the latter reprimand, the Commission nevertheless recommends that the Board “consider the implications of a forensic audit”.

The parties could have saved themselves a lot of trouble, inconvenience and costs, had they considered the wise words of King Solomon in Proverbs 15:1 that a soft answer turneth away wrath. Unfortunately it seems that their strong personal feelings got the better of them.

In their report the commission grouped the respondent’s somewhat incoherent complaints together under five headings and dealt separately with each. After the report was completed the convener, Mr. Ben Hotzhausen, drew up a condensed version thereof. He did this on his own and the other members did not have the opportunity to approve it. The attitude of the commission, or at least of its convener, is illustrated by the following:

- Although “Power Abuse” was one of the five groups of complaints identified by the Commission in its report, the report did not deal with the topic at all. The Condensed

Report nevertheless stated that the Commission “refutes this allegation”, adding that they could not trace any evidence that the principal had abused the power of his position and that the respondent had “merely expressed her opinion of a man that is firm about his beliefs.”

- The following paragraph is contained in the Condensed Report under the heading “Conclusion”:

“It is suspected that she is working to have Dr Buys removed from MTC (i.e. the college) to obtain a better position for herself at MTC. She is not a South African citizen and her chances for permanent residence could be improved substantially if she found good long term employment.”

There is nothing remotely to that effect in the report.

- The respondent said in her evidence that her first interview with the Commission was conducted in a friendly atmosphere and because it would seem inappropriate, she preferred not to have a recording made of what was said. The Commission made nothing of this in its report, but in the summary it is stated that she:

“....refused to have the interview recorded, which made the Commission doubtful to trust her integrity.”

Again there is no basis for that view in the report.

- Dr. Coetzee, who was the only member of the Commission to testify, said in his evidence that he was not aware of the contents of the summary before the general meeting of the Board and, had he been given the opportunity, he would have objected to each one of the four statements made in the first paragraph of the conclusion. The last of those four statements is to the effect that her latest legal action against the college through the CCMA demonstrates that her personal interests were to her more important than those of the college. I could not find any reference to the CCMA in the report at all.

- Although at least two of her complaints were found by the Commission to have been substantiated, not a word about that appears in the summary.
- The summary concludes with a list of recommendations to the Board, of which the following are relevant:

- “1.) A motion of full confidence in Dr. Buys is restored with immediate effect**
 - 2.) MTC and associated organisations break all ties with Ms Dijkhuizen**
 - 3.) MTC applies its right to reserve admission to its campus and prohibits Ms Dijkhuizen to enter the premises of MTC**
 - 4.) Donors and supporting organisations are forewarned about Ms Dijkhuizen’s conduct to “badmouth” MTC and its associated people**
 - 5.) The B.O.C. replies to Ms Dijkhuizen’s letter of concern stating the following:**
 - a.) That the investigating committee could not find any evidence to substantiate the allegations she made against the principal**
 - b.) To cease any discussions regarding MTC, MCDC and all associated people with immediate effect and failing so, legal action will be taken against her**
-”**

Not a single one of these recommendations can be found in the report of the Commission, of which this document purports to be a condensed version.

I am not expressing any view on the fairness or otherwise of the condensed version of the report as a reflection of the general purport of the full version, but to give out that the statements to which I have referred (and certain others) and which the convenor simply sucked from his thumb represent the findings of the Commission is nothing but untrue. In doing so he

was clearly acting with actual malice and had those words been published to the meeting, there can be no doubt that they would have been defamatory.

The full meeting of the Board at its meeting on 13 October 2007 noted some unanimous conclusions, of which the following are relevant for present purposes:

- The respondent would be informed by letter that the Commission has completed its investigation and that no evidence of gross negligence could be found;
- That all donors be informed by letter that the respondent was no longer employed by or associated with the appellant;
- That the Rev. Mogale shall convey “the summarised version of this decision” to the meeting of staff and students on 17 October.

Although fairly innocuous, the first two points listed above bear little or no resemblance to any of the actual findings or recommendations of the Commission contained in either its full or the purported condensed version of its report.

The only real dispute between the parties about the contents of the message delivered to the meeting by the Rev Mogale is whether the respondent’s allegations were merely refuted or found to be false. As indicated above I do not think that the difference between the two is of any real significance, but what is clear is that the findings of the commission (in its actual or purported condensed version), the unanimous conclusion of the Board and the message delivered to the assembly are three completely different things. The Rev Mogale had been a member of the Commission of Inquiry and had the announcement at the meeting been made in the same form by a neutral outsider, it may have been said that he was on an irrational frolic of his own. As it is, he could only have invented the announcement that he did make from his recollection of the evidence that he had heard on the Commission or from its full report. In so far as he was off on a frolic, it was not of his own, but a frolic of the Commission, which was still the appellant in one of its several guises. What was said is still not a fair reflection of the

findings of the commission and apart from malice with which I have dealt above, it was not true to say that, according to the findings of the Commission, all her accusations had been either refuted or were false, that students are not to make contact with her or that she would no longer be allowed access to the campus. To use the terminology of the written heads of Mr. Pretorius, the words complained of "did not have some foundation in the evidence or circumstances and were not germane to the issue."

The court *a quo* did not in its judgment deal at any length with the question of forfeiture of the protection of the privileged occasion but it is implicit from its conclusion that it did make a finding that it had been forfeited. As motivated above, that finding cannot be faulted.

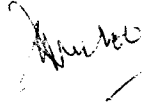
Mr. Pretorius referred us in his written heads to several examples of awards that have been made for defamation in other cases in support of his submission that the award made by the court *a quo* is excessive. It is trite that previous awards are of very limited use and can be nothing more than of persuasive value. The question is not whether this court would have made a different award had it been the trial court, but whether the award is wrong. I am not persuaded of that the amount is excessive and can see no reason to interfere.

My conclusion is that the appeal should be dismissed with costs and that is the order that I propose.



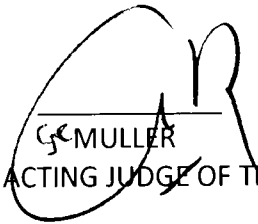
F G PRELLER
JUDGE OF THE HIGH COURT

I agree.



W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree.



G S MULLER
ACTING JUDGE OF THE HIGH COURT

It is so ordered.