

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A217/11

In the matter between:-

ISAAC VUSI MASIU

Appellant

and

FATIMA DOS RAMOS

Respondent

CORAM: EBRAHIM, J *et* C.J. MUSI, J *et* CLAASEN, AJ

HEARD ON: 6 FEBRUARY 2012

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 26 APRIL 2012

[1] I have read the judgment of Claasen AJ, concurred in by my colleague, C.J. Musi J. I am constrained, for the reasons which follow, to disagree with their reasoning and the conclusions of law reached by them. I do so with respect to both of them.

[2] The issues raised by this appeal and cross-appeal are:

2.1 whether the appellant, as plaintiff in the court *a quo*, had, at the close of his case, proved on a preponderance of probabilities that the letter addressed

by the respondent (defendant in the court *a quo*) on 14 September 2010 to the Regional Manager, Department of Justice, Welkom, contained matter which was defamatory of and concerning the appellant;

2.2 whether the appellant had, on a preponderance of probabilities, proved that there had been publication of the defamatory matter in the letter and that such publication was attributed to the respondent; and

2.3 whether the costs order made by the court *a quo* was correct.

[3] It is common cause that the letter in question was written by the respondent and forwarded to the person who she thought was in direct authority over the appellant, an employee of the Department of Justice in the capacity of Clerk of the Magistrate's Court at Welkom.

It is also common cause that the letter contained a complaint directed at the appellant. For ease of reference, I repeat that portion of the offending letter:

"I have a court order against my ex husband. He should pay the maintenance by the 1st of every month. I am struggling every

month in that I have make phone calls to the clerk (Vussie) of Winburg Magistrate Court to remind him about my maintenance. I assumed that once a court order is issued, that means that the court will assist me in obtaining the maintenance. But I was proven wrong. My ex, has been late every month and out of the blue started to pay only half of the maintenance due for 3 months in a row. Nothing was done by the court about his. Can the clerk of the court allow this?"

- [4] The alleged defamatory portion of the letter is confined to one short paragraph:

"I can't help but think that the clerk is being paid by my ex to allow him to pay late every month and allow him to only pay half of what he is liable to pay."

- [5] The respondent concludes the letter with a plea for assistance:

"I am asking for assistance from you, not only for my sake but for my children's and all the other mothers who struggle every month to get their money from the court.

I hope to hear from you soon."

- [6] 6.1 The test to be applied in deciding whether the

statement alleging payment to the Clerk by the respondent's ex-husband, was defamatory of the appellant, is an objective test involving a two-pronged enquiry. The first is to establish the natural or ordinary meaning of the statement. The second is whether that meaning is defamatory of the appellant. In interpreting the statement, what is of importance is not what meaning the respondent intended to convey by the words she used concerning the appellant nor is the essence of the test the meaning ascribed to the offensive words by the person/persons to whom the letter was published or whether they believed that meaning. See **SINDANI v VAN DER MERWE** 2002 (2) SA 32 SCA at 36C.

- 6.2 In the appellant's particulars of claim it was alleged that the letter was defamatory of the appellant, because it was intended by the respondent to imply to readers of the letter and, in particular, officers of the Department of Justice, that the appellant wilfully neglected his duties as Clerk of the Court; that he was a dishonest and corrupt employee, receiving bribes from the public to allow them to transgress lawful court orders. The appellant did not rely on any innuendo or secondary

meaning. His case was squarely based on the ordinary meaning of the words used, which he said were *per se* defamatory of him.

6.3 In her plea the respondent denied that the statements in the letter pertaining to the appellant were defamatory of him, were made with the intent to injure him in his good name, reputation and feelings. Publication of the alleged defamatory letter was not specifically placed in issue.

[7] 7.1 In accordance with the objective test to be applied, the question is: what meaning would a reasonable reader of ordinary intelligence attribute to the words used concerning the appellant read in the context of the letter as a whole. In applying this test it must be accepted that the reasonable reader will take into account not only what the words expressly say but also what they imply. See **ARGUS PRINTING AND PUBLISHING COMPANY LTD AND OTHERS v ESSELLEN ESTATE** 1994 (2) SA 1 (A) at 20 F – G.

It must be borne in mind that the ordinary meaning of the words under consideration does not necessarily

correspond with their dictionary meaning. (**SINDANI**, *supra*)

- 7.2 It is also true that the ordinary reader has no legal training or other special discipline. He/she is not critical or acutely sensitive or one of morbid or suspicious mind. See **CHANNING v SOUTH AFRICAN FINANCIAL GAZETTE LTD** 1966 (3) SA 470 (W) at 474 A – C and the cases there cited.

But it must be borne in mind that a court, which in applying the objective test, has of necessity, to subject words used in a document under consideration to a close analysis and must guard against the danger of considering itself to be “the ordinary reader” of that letter so that the subconscious temptation to substitute its own views for those of the ordinary reader, is restrained. See **SINDANI** *supra*; **NGCOBO v SHEMBE AND OTHERS** 1983 (4) SA 66 (ECD) at 71 C – D.

- [8] 8.1 Striving to adopt this technique of interpretation, I turn to examine the words which encompass the gravamen of the present appeal. Are the words used by the

respondent of and concerning the appellant in her letter to the Regional Manager of the Department of Justice in Welkom injurious in their plain and ordinary meaning?

Within the limits of my ability, I have decided this question, finding the task a difficult one, due to the sometimes unavoidable and reflex act of assuming the mantle of the “ordinary reader”. I have, however, in my deliberations and in reaching a final conclusion on the ordinary meaning of the words used, guarded against this danger and its attendant risks.

8.2 I disagree with the meaning attributed by Claasen AJ and C.J. Musi J to the words used in respondent’s letter as being defamatory of and concerning the appellant; that it establishes in the mind of the reasonable reader a suspicion that he is corrupt. In my opinion reading the letter as I think the notional reasonable reader of ordinary intelligence and sensibilities would read it, would lead such a reader to conclude that:

(a) The respondent is a divorced woman who has an order in her favour for the monthly payment of

maintenance by her ex-husband, such payment to be made by the 1st of each month.

- (b) She believes that timeous payment of maintenance orders is monitored by the Clerk of the Court.
- (c) She has found this not to be the case since she has received payments late on more than one occasion. In addition, for three consecutive months she has received only half of the amount due to her in terms of the order.
- (d) Her ex-husband has not been called to account for his failure to comply with the court order. Due to his wealth and standing in the community of Winburg and his habit of “paying off” people to do what he wants, she wonders if perhaps the Clerk of the Court at Winburg has also been paid by her ex-husband to prevent him from bringing her ex-husband to book for his failure to pay promptly and fully.
- (e) She is a struggling single parent with two young children of three years and five years who are wholly dependent on her for support.
- (f) She cannot manage financially without a struggle

unless her ex-husband pays her what is due on time each month.

- (g) She requests someone in authority over the Clerk of the Court (the Regional Manager of the Department of Justice) to intervene on her behalf in order to establish what the real reason is for the delay and/or failure to comply fully with the court order, as the Clerk of the Court has done nothing about it.

- [9] 9.1 The letter is accordingly a letter of complaint in which the complainant seeks social justice and social security. Were the letter to be subjected to closer scrutiny, the reader might well conclude that the appellant had actually condoned the non-payment or the late payment for the reasons advanced in paragraph 4 of the appellant's particulars of claim. But that is not the test. The court cannot dive into the mind of the respondent, it can only interpret her language as it would be understood by a reasonable person of ordinary intelligence and experience and she is assumed to have meant what her language thus interpreted conveys. This is so because it is assumed

that those to whom the letter is addressed, viz the Regional Manager, Department of Justice and/or officials of the Department of Justice (in the event that the contents of the letter came to their attention) being persons of ordinary intelligence and sensibilities (ordinary right thinking people) will have understood the statement in its proper sense and would not regard the letter as being defamatory of the appellant in the sense contended for in the particulars of claim.

- 9.2 In reaching this conclusion I have endeavoured to read the respondent's letter as a whole, contextualising the offending paragraphs through the eyes of the ordinary reader. In doing so I have been mindful of the fact that the appellant was singled out for special attention but this in itself does not make the statements which are directly relevant to him defamatory. In this regard I have also borne in mind case authorities to the effect that if the words used might lower the plaintiff in the estimation of a group or section of people, this is not sufficient to constitute the delict of defamation. There must have been a lowering of the esteem of the appellant in the minds of ordinary right thinking persons generally – that is the test. See **BOTHA EN 'N**

ANDER v MARAIS 1974 (1) SA 44 (A) at 49;
CONROY v NICOL AND ANOTHER 1951 (1) SA 653
 (A) at 663; **KING ZWELITHINI OF KWAZULU v**
NERVIS AND ANOTHER 1978 (2) SA 521 (W) at 528
 – 529.

Even if there is room for the defamatory interpretation placed upon respondent's letter by Claasen AJ and C.J. Musi J, the court is not entitled to adopt a defamatory interpretation in preference to a non-defamatory one. In **CHANNING v SOUTH AFRICAN FINANCIAL GAZETTE LTD** 1966 (3) SA 470 (W) Colman J propounded the test as follows at p. 473 C – F:

“Counsel for the defendants, relying, *inter alia*, upon *Conroy v Nicol*, [1951 \(1\) SA 653 \(AD\)](#), and *S.A. Associated Newspapers v. Schoeman*, [1962 \(2\) SA 613 \(AD\)](#), urged upon me the proposition that a Court dealing with a defamation case is not entitled, where the matter complained of is capable of more than one reading, to adopt a defamatory interpretation in preference to a non-defamatory one. If a newspaper article is equally capable of both types of interpretation, he argued, the plaintiff must fail. That proposition is, in my judgment, a sound one,

provided that this qualification or clarification is borne in mind: the test is not whether, to the Court itself, after it has had the benefit of a careful analysis of the article, the article seems to bear one meaning rather than another, or seems equally capable of bearing both meanings. The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action, and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails (see *Gluckman v Holford*, 1940 T.P.D. 336).”

The test laid down in **CHANNING** was expressly approved by the Appellate Division in **DEMMERS v WYLLIE AND OTHERS** 1980 (1) SA 835 (A) at 843 E.

On the facts of the present appeal, the preponderance of probabilities favours a non-defamatory interpretation and for that reason the appellant could not have succeeded with his claim in the court *a quo*.

[10] 10.1 I deal now with the issue of publication. It is common

cause that the respondent's letter found its way to the Regional Manager, identified in evidence by the appellant as Mr. Hlatwayo, who handed the letter to the Office Manager at the Magistrate's Court in Winburg, one Mr. Mafereka, who handed it to the appellant.

This was followed by an investigation. What the terms of reference of that investigation were, who held the investigation and what the ultimate findings of that investigation were, is unknown. It is not surprising therefore that Mr. Groenewald, who appeared for the respondent, both in the appeal and in the court *a quo*, disputed that publication of the contents of the letter had been proved by the appellant.

10.2 There is certainly no evidence on my reading of the record of the proceedings in the court *a quo* of any publication having taken place, at the behest of the respondent, apart from that to the Regional Manager, Mr. Hlatwayo to whom the letter was addressed. It was Mr. Hlatwayo who handed the letter to Mr. Mafereka. There is no evidence whatsoever that Mr. Mafereka read the letter and there is no basis in the

evidence for inferring that he did. But even if I were to assume in the appellant's favour that Mr. Mafereka read the letter and publication did take place, the test is whether such publication would necessarily or ought reasonably to have been foreseen by the respondent.

See **PRETORIUS v NIEHAUS EN 'N ANDER** 1960 (3) SA 109 (O); **SIMPSON v WILLIAMS** 1975 (4) SA 312 (N). The respondent addressed the letter to the Regional Manager and it was he who received the letter, opened it, read it and handed it to Mr. Mafereka. How could the respondent, a lay member of the public writing to complain about service delivery at the Magistrate's Court, be expected to foresee that Mr. Hlatwayo would not deal with the complaint himself, but would hand it over to Mr. Mafereka? On the evidence as it stands, the foresee-ability test does not favour the appellant.

10.3 Publication is an essential element of the delict of defamation for without it the esteem in which a person is held by others cannot be diminished. See **CROTS v PRETORIUS** 2010 (6) SA 512 (SCA). In my view, the evidence of publication in the present appeal is non-existent. The evidence which it is alleged by the

majority court in this appeal ought to be considered is just too vague to support a claim for defamation. See **CROTS v PRETORIUS**, *supra*. Even if I am wrong in this regard, for the reasons already set out in this judgment, there was no defamatory matter to publish. On this ground too therefore, the appellant's claim could not have succeeded.

[11] In granting absolution from the instance, the learned magistrate in the court *a quo*, appears to have "mismanaged" the evidence before him. I say so because of the great difficulty I have in understanding his reasoning. Nevertheless whilst he, quite correctly, granted the application brought by the respondent to absolve her from liability, he failed to grant the appropriate costs order which ought to have followed the result.

[12] Accordingly I would make the following order:

1. The appeal is dismissed with costs, such costs to include the costs of the hearing of 6 February 2012.
2. The cross-appeal is upheld with costs.
3. The order of the court *a quo* is set aside and substituted with the following order:

“The application for absolution from the instance is granted with costs.”

S. EBRAHIM, J

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On behalf of respondent: Adv. W.J. Groenewald
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