

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A103/09

In the matter between:

P C VOGES

Appellant

and

T J VICENTE

Respondent

CORAM:

RAMPAL, J *et* MOLEMELA, J

JUDGMENT BY:

MOLEMELA, J

DELIVERED ON:

4 MARCH 2010

[1] This is an appeal against an order of absolution from the instance granted in favour of the respondent (defendant) by the Sasolburg Magistrate's court. The appellant, an attorney, sued the respondent, (his former client) for damages he allegedly suffered as a result of defamatory statements made by the respondent of and concerning the appellant. The respondent denied the allegations.

[2] It was common cause that the appellant had in the past handled a third party claim for the respondent and her husband. The defamatory statement referred to above was captured as follows in the particulars of claim:

“On a number of occasions, and at Sasolburg, the Defendant stated, *inter alia* to Mr. Aardt Jansen van Vuuren of, and concerning the Plaintiff the following:

- (i) That the Plaintiff failed to account to her and her husband in respect of the damages paid by the Road Accidents Fund;
- (ii) That the Plaintiff failed to account to the Defendant and her husband in respect of the party and party costs he recovered from the Road Accidents Fund;
- (iii) That the Plaintiff appropriated the Defendant and her husband's damages for himself and that he refuses to account to them;
- (iv) Plaintiff has issued false statements of accounts, and arranged for moneys deposited in the Defendant's husband's account to be withdrawn from that account and paid to the Plaintiff.The statement was understood by

the addressee and was intended by the Defendant to mean that the plaintiff is dishonest in the following respects:

- (i) that he is a thief;
- (ii) that he is an unscrupulous attorney;
- (iii) that he is not trustworthy;
- (iv) that he is not a law-abiding citizen;
- (v) that he is without moral fibre.”

[3] The appellant did not testify but tendered the evidence of two witnesses *viz* Mr. Aardt Jansen van Vuuren (“Mr van Vuuren”), the respondent’s son-in-law, as well as Mr. Vicente, the respondent’s estranged husband.

[4] At the closure of the appellant’s case the respondent successfully applied for an order of absolution from the instance. The court *a quo*, apparently relied, *inter alia*, on the case of **GASCOYNE v PAUL AND HUNTER** 1917 TPD 170 at 173 where it was stated that at the closure of the plaintiff’s case, the court “must consider whether there is evidence upon which a reasonable man might find for the plaintiff...” In the same case it was held that questions of credibility should not normally be

investigated at this stage of the proceedings, except “where the witnesses have palpably broken down, and where it is clear that what they have stated is not true.”

- [5] The court *a quo* criticised the evidence of both witnesses that testified on behalf of the appellant. It alluded to the fact that whereas Mr. van Vuuren was, according to the particulars of claim, the person to whom certain defamatory statements were made on a number of occasions concerning the plaintiff, his own testimony was that the alleged defamatory statements were not made to him at all, but he had on one occasion overheard an argument between his parents-in-law, during which his mother-in-law (the respondent) stated that “die derde party het die geld gevat om skelms soos Mnr. Voges uit te vang.” The court *a quo* also considered the credibility of the two witnesses.

- [6] Under cross-examination Mr. van Vuuren testified that when he over-heard the statement, he was standing on the porch approximately 100 metres from his parents-in-law. At some stage Mr. van Vuuren testified that he did not even know the plaintiff at the time that statement was made, that he had only

met him once, that one occasion being after the defamatory statement was allegedly made and that at no stage did he communicate with the plaintiff regarding the statement made by the respondent. The court *a quo* had difficulty with the fact that Mr. van Vuuren's evidence was at variance with the particulars of claim and, secondly, that Mr. van Vuuren conceded that he heard only a fraction of the argument and did not understand the context in which the words were uttered.

- [7] The court *a quo* also had difficulty with the second witness for the plaintiff, viz Mr. Vicente. His evidence was described as "very poor and incoherent evidence at times." I agree with that finding. Mr Vicente contradicted himself and eventually conceded to suffering from "amnesia" or some "mental block" to such an extent that he could not even recall what he had eaten the previous day. Critically Mr. Vicente could not even remember the conversations with his estranged wife and apparently stated that he considered himself to be mad.

[8] It was argued on behalf of the appellant that even though Mr. van Vuuren had conceded to not having heard the entire conversation or argument between his parents-in-law, he had testified that he had heard the respondent stating that the Road Accident Fund had taken money to catch out crooks like Mr. Voges, who stole money. It was argued that the words he had heard were in their ordinary sense defamatory and therefore the appellant did not have to prove the element of *animus iniuriandi* prior to closure of its case. It was further argued that the fact that there was no evidence as to how the alleged defamatory words came to the plaintiff's knowledge was inconsequential, under the circumstances.

[9] The test for absolution from the instance applicable at the closure of a plaintiff's case was laid out as follows in the case **GORDON LLOYD PAGE & ASSOCIATES v RIVERA AND ANOTHER** 2001 (1) SA 88 (SCA) at 92 E – 92 G:

“The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

‘. . . (W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)’

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff....”

This test was reiterated in the case of **DE KLERK v ABSA BANK LTD AND OTHERS** 2003 (4) SA 315 (SCA).

[10] In the case of **RUTO FLOUR MILLS (PTY) LTD v ADELSON** (2) 1958 (4) SA 307 (T) at 309 the court stated as follows:

“If the evidence tendered by the Plaintiff is not only not convincing ... or, if it be a fact that it is too vague and contradictory to serve as proof of the question in issue ... then it would be evidence on which a reasonable man would not find, and the Court would be perfectly justified in granting absolution from the instance at the close of the case of the Plaintiff.”

[11] Mr. Snellenburg, on behalf of the appellant, conceded that Mr Vicente’s evidence did not take the appellant’s case any further. He submitted that his evidence ought to be disregarded on account of his mental impairment. He contended that on Mr. van Vuuren’s evidence alone, the appellant had exceeded the minimum threshold of evidence that is required to establish a *prima facie* case.

[12] I deem it apt to refer to certain extracts of Mr. van Vuuren’s evidence under cross-examination:

”Verstaan ek u getuienis reg dat u self niks vir Mnr Voges vertel het van die argument tussen u skoonpa en u skoonma gedurende drie weke na Maart 2007 nie?

Dit is doodreg daar meneer.

So u het niks vir hom vertel nie?

Dit is doodreg.

Nou u kind is gebore 21 Maart 2007 en u sê ongeveer drie weke daarna is u buite by die woning, u rook 'n sigaret en u hoor daar is 'n gestryery?

Oor die geld.

Oor die geld, u hoor nie mooi presies waarom dit gaan nie?

Nee.

Hoe ver was u van hulle af gewees?

Ek dink 100 meter.

100 meter toe hulle nou so gestry het?

Ja.

En volgens u getuienis u hoor net 'n stukkie, hulle gaan aan maar u hoor nie eers wat hulle sê in verband, in watter konteks dit gesê word nie, is dit korrek?

Ja.

U kan nie vandag vir die Hof sê wat u weet van Mnr Voges nie u het hom vir 'n uur ontmoet en u het net tolk werk gedoen met u skoonpa?

Ja.

U weet nie watse tipe mens is hy of hy beledig sal voel of nie, u kan nie rerig vir die Hof enigiets sê nie, nie waar nie.

Ja.

Stem u saam?

Ja.

Hoekom het u net 'n fraksie van daardie argument gehoor, Mnr van Vuuren?

Ek het net die fraksie gehoor, want ek was bang met die gerasery gaan my vrou weer wakker word end my vrou het daardie tyd depressie gehad na haar swangerskap.

Ja, kan die Hof aanvaar dat u kan nie vir die Hof 'n akkurate weergawe van die, wat daar presies gesê is in die argument tussen u skoonpa en skoonma op die dag waarvan u praat nie, want u het maar met so 'n halwe oor gehoor, sal u toegee?

Ja.

So, u kan glad nie vir die Hof presies sê wat daar gesê is in watter konteks, wie het eerste gesê en wie het daarna gereageer of wat die geval is nie?

Ja, ek kan dit nie sê wie ek het buite gesit.

Inteendeel dit is moontlik dat u totaal 'n fout kan maak presies oor wat daar gesê is, u skud u kop sê u ja?

Ek het gehoor van, net al wat ek gehoor het was daardie storie van die tjek is teruggevat, die derde party het die tjek teruggevat want hulle mense soos Mnr Voges uitvang wat nie die geld betaal nie, dit het ek gehoor maar verder (tussenbeide).

So, dit is al wat u gehoor het die derde partye (tussenbeide)?

Ek weet nie wie het eerste die bakleiery begin nie.

So, u sê u het gehoor Me Vicente sê op 'n stadion, u skoonma die derde party het die geld teruggevat want hulle wil mense vang soos Mnr Voges wat nie die geld uitbetaal nie?

Ja.

Dit is al?

Dit is wat ek gehoor het, duidelik gehoor het.

Niks anders nie?

Verder wil ek my nie daar ingemeng het nie, want toe begin hy te vloek in sy Portugese manier.

Maar dit is al wat u gehoor het dit is belangrik?

Ja.

Niks ander nie, die Hof kan dit maar aanvaar?

Ja.

So, ek wil dit aan u stel daar kon nie eers 'n argument op daardie stadion gewees het nie, want hulle het nog nie eers geweet wat is die posisie wie moet wat kry nie en daar is nog geen afrekening of geen betalings is gedoen nie, verstaan u wat ek vir u sê?

Ja.

Met ander woorde dit wat u sê die onderwerp van die argument was kon nie plaasgevind het nie, want daardie gebeurtenis het nog nie gerialiseer nie en verder wil ek dit aan u stel as u 100 meter van daardie gesprek af was het u nie 'n woord gehoor wat hulle gesê

het nie, want geen mens kan hoor wat ander mense praat op 'n afstand van 100 meter nie, sal u dit so aanvaar?

Ek sal dit so aanvaar.

U sal dit so aanvaar, want Me Vicente die verweerder ontken dat sy enige bewerings hoegenaamd wat lasterlik is geuiter het teenoor Mnr Voges? – (Geen antwoord.)

U moet iets sê.

U antwoord?

Daar daardie dag het ek dit gehoor.

Ja, op 'n afstand van 100 meter?

Ja, ek het dit gehoor.

Ek wil dit aan u stel dat dit totaal en al onwaarskynlik is?

Dit is reg.

En u weet nie eers wat hulle gepraat het nie, want u het nie gehoor nie?

Dit is reg.

So, u aanvaar dit so?

Ja.

Dankie Edlagbare, geen verdere vrae nie.

[13] The extract quoted above in my view demonstrates just how unreliable and contradictory Mr. van Vuuren's evidence was. He admitted that he could not precisely inform the court about

what was stated and the context in which it was said because he was not paying attention (“het met ‘n halwe oor gehoor”). When it was put to him that the argument could not have been in respect of the third party money because by then no statement or account had been prepared yet and no payments had been made, his response was that he would accept it like that. When it was put to him that it was impossible for anyone to overhear a conversation from a distance of 100 metres, he once again conceded. Having previously stated that he did overhear the respondent making the defamatory statement, he contradicted himself by conceding that he did not know what they were talking about because he had not heard them. (p. 47, line 20 – 22 of the transcribed record).

- [14] Due to the aforementioned contradictions I cannot agree with Mr. Snellenburg that Mr. van Vuuren’s evidence cannot be criticised. In my view, that evidence was, at best, vague. As for Mr. Vicente’s evidence, Mr. Snellenburg conceded that it was unreliable. Considering that under cross-examination Mr Vicente ended up stating that he could not remember whether

the defamatory statement was made or not, ascribing this to his ailing mental condition, I consider Mr Snellenburg's concession to have been properly made. I am of the view that the evidence tendered on behalf of the appellant was of such a poor quality that no reliance can be attached to it. In my view, the court *a quo* was under those circumstances entitled to make credibility findings at the closure of the appellant's case. Furthermore, I agree with Mr. Joubert that the witnesses for the appellant contradicted themselves and each other especially in relation to the alleged publication relied on by the plaintiff and that their evidence does not constitute a *prima facie* case in support of the relief claimed by the plaintiff. See **RUTO FLOUR MILLS (PTY) LTD v ADELSON**, *supra*, at 309. Indeed the appellant failed to prove all the elements of the delict of defamation. The court *a quo* thus correctly granted an order for absolution from the instance. See **GORDON LLOYD PAGE & ASSOCIATES v RIVERA AND ANOTHER**, *supra*. The quality of the evidence of the appellant's witnesses falls short of crossing the low threshold of proof set out in the case of **DE KLERK v ABSA BANK LTD AND OTHERS**, *supra*, at p. 320.

- [15] With regards to the discrepancy between the particulars of claim and the evidence tendered by Mr. van Vuuren, Mr. Snellenburg contended that “it is a policy of courts not to take a too strict view of pleadings in the Magistrate’s Court and as a rule a stricter view is taken of a plea than of a summons”. As authority for his proposition he relied on the following cases: **GENERAL COMMERCIAL AND INDUSTRIAL FINANCE CORP LTD v PRETORIA PORTLAND CEMENT Co LTD** (“General Commercial case”) 1944 AD 444; **FALCH v WESSELS** 1983 (4) SA 172 (T); **NEUGEBAUER & CO LTD v BODIKER & CO (SA)** (“Neugebauer case”) 1925 AD 316 at 321.
- [16] I do not agree with this contention for two reasons. Firstly, the **Neugebauer** case (supra) and the **General Commercial** case (supra) were in relation to exceptions. Secondly, the remarks made by the judges in those cases were quoted out of context as such remarks were qualified (see page 321 of the **Neugebauer** case and p 453 of the **General Commercial** case). I therefore do not consider the aforementioned cases to be in support of Mr Snellenburg’s contention, as the

discrepancy between the particulars of claim and the evidence tendered in this case was of a material nature.

[17] With regards to the case of **FALCH v WESSELS** (supra) I need only mention that reference to the **NEUGEBAUER**-case, *supra*, was of a cursory nature and not contextual. I therefore do not find the case of **FALCH v WESSELS**, *supra*, to be of persuasive value.

[19] Mr. Joubert, on behalf of the respondent, argued that given Mr. van Vuuren's evidence, another defence available to the respondent was that of "marital privilege" was available. As authority for his contention he relied on **LAWSA**, Volume 7, p. 236 and the case of **WHITTINGTON V BOWLES 1934 EDL 142** at 145. Mr. Snellenburg argued that such a defence could not be considered as it was not pleaded. Indeed such a defence was neither pleaded nor included in his heads of argument. I will therefore not address myself to this defence in this judgment, save to mention that it is not inconceivable that such a plea could have been filed had the averments in the particulars of claim matched the evidence of Mr van Vuuren.

This constitutes another reason why the discrepancy should not be underplayed.

[20] In my view, there was simply no evidence upon which it could reasonably be found that the respondent had uttered the defamatory statements that support the averments made in paragraphs 5, 6 & 7 of appellant's particulars of claim or that such utterances were made in the first place. As there is no misdirection on the part of the court *a quo*, there is no reason for this court to tamper with its finding. I would therefore dismiss the appeal.

[21] In the result, the following order is made:

The appeal is dismissed with costs.

M.B. MOLEMELA, J

I concur.

M.H. RAMPAL, J

On behalf of appellant:

Adv. N. Snellenburg
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of respondent:

Adv. D.J. Joubert
Instructed by:
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