

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2893/2005

In matter between:

THE UNIVERSITY OF PRETORIA

Applicant

and

**SOUTH AFRICANS FOR THE ABOLITION OF
VIVISECTION**

1st Respondent

**MRS BEATRICE WILTSHIRE, THE EDITOR:
THE “SNOOT” EDITORIAL OFFICE**

2nd Respondent

HEARD ON: 8 June 2006

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 18 August 2006

- [1] The applicant seeks, on notice of motion, the following relief:
- “1. Declaring that the First and Second Respondents, during or about August 2003, published false and defamatory statements about the Applicant and its employees, Prof. Swan, Prof. Bath and Dr. Van Dyk in the 12th issue of “The Snout Magazine”,

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which magazine serves as the official news letter of the First Respondent.

2. Directing the Respondents to issue an unqualified public statement in writing, to be published in the next issue of “The Snout” magazine alternatively in one English and one Afrikaans national newspaper, that they accept that the defamatory statements were false and that they retract it and apologise for it.
3. Directing the Respondents that in the public statements contemplated in prayer 2 above they will inter alia apologise for the factually incorrect facts and simultaneously publish the correct facts as set out in prayers 3.1 to 3.5 below:
 - 3.1 That the Department of Physiology of the University of Pretoria is not involved in pet food, including dog food, testing. The Onderstepoort Nutrition Laboratory formerly, prior to May 1999, formed part of the Department of Ethology, whereafter it formed part of the Department Veterinary Production and Ethology until March 2001, and then it fell under the Department Production Animal Studies, from March to October 2001. This nutrition laboratory however ceased to operate after October 2001 when the Department of Animal & Wildlife Sciences of the Faculty of Natural & Agricultural Sciences took over its assets;
 - 3.2 Urine collection never formed part of food testing from April 1999 to October 2001 and the way in which urine is said to have been collected, was

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never used in the assessment of any diet;

3.3

3.3.1 At the time the Nutrition laboratory of the Applicant formed part of the Department of Ethology, whereafter it formed part of the Department Veterinary Production and Ethology until March 2001, and then it fell under the Department Production Animal Studies, from March to October 2001, no urine collection was done and no invasive techniques of any description were used for food testing including dog food digestibility and palatability tests.

3.3.2 All foods were subjected to a comprehensive array of chemical tests as determined by the client in consultation with staff at the laboratory and no animals were involved in these chemical analyses of the food.

3.3.3 On the requests of clients, dogs and cats may have been fed conventional registered pet foods to establish their digestibility and / or palatability. These animals were weighed, the food was weighed and faeces produced were weighed. Animals were not confined for faecal recovery and urine was not collected for this purpose.

3.3.4 Since the Nutritional Laboratory was incorporated into the laboratories of the Department of Animal & Wildlife Sciences of the Faculty of Natural & Agricultural Sciences during October 2001 the same methods for the testing of pet foods were utilised.

3.4

3.4.1 Neither Dr Ennette van Dyk nor Prof Gareth Bath of Prof G E Swan were ever involved in any cruel pet food testing methods or the abandonment of humane pet food testing.

3.4.2 Prof Bath was transferred to the Department Ethology during April

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1999 as Head of Department of the new Department Veterinary Production and Ethology. During April 1999 and October 2001, when Prof Bath held the position as Head of the Department Veterinary Production and Ethology, urine was never included in digestibility trials and faeces was only collected for digestibility trials, when requested. Prof Bath was also not in direct control of the Laboratory.

3.4.3 Dr van Dyk was never involved in any of the activities of the Nutrition Laboratory.

3.4.4 Neither Prof Bath, nor Dr van Dyk, ever gave any instructions to destroy slanted floor metabolic cages, or authorised or allowed catheterisation of any animals at any time, or gave any instructions or allowed the performance of any form of cruelty to the animals in the Laboratory.

3.4.5 Prof. Swan does not serve on the Applicant's Veterinary Faculty's Ethics Committee and was never involved in the testing of "Vet's Choice" pet food or involved in any "cruel methods" utilised for pet food testing.

3.5 The University of Pretoria and more specifically its

Onderstepoort Veterinary Faculty is not and at no stage

was using inhumane, cruel and invasive tests on animals

for the testing of pet foods.

4. That the First and Second Respondents be ordered to pay the costs of this application, jointly and severally, the one to pay, the other to be absolved.

5. Futher and / or alternative relief."

[2] The applicant is the University of Pretoria, a university established under the provisions of the Higher Education Act, 101 of 1997 as amended (the University). The first respondent is the South Africans for the Abolition of Vivisection, a voluntary association campaigning for the abolition of vivisection, with principle place of business

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situated at Honeydew, Johannesburg, Gauteng (SAVV). The second respondent is Mrs Beatrice Wiltshire, the Editor of “The Snout Magazine” (Snout) which serves as the official newsletter of the first respondent.

[3] During August 2003 the second respondent published the following editorial in the Snout:

“The new IAMS pet food exposè has once more brought to the fore the hidden world of cruel animal tests generally inherent in products seemingly as innocuous as pet foods. Few realise, however, that unnecessarily cruel tests are being conducted right here in South Africa.

In this regard the Onderstepoort Veterinary Faculty of the University of Pretoria) once more has some explaining to do. (Onderstepoort was embroiled in a major scandal in 1999 when it came to light that carcasses of beloved deceased pets who had died there had, instead of the customary incineration, been turned into dog food as a cost saving exercise)

Even at its most humane, the testing of pet foods requires that dogs be confined to kennels for most of their lives. But this is just the start of their nightmare. The mandatory testing of urine and faeces is usually performed by incarcerating the animals in ‘metabolic crates’ where urine is drawn by means of a catheter placed in the bladder, or a transmembranal needle (inserted through their skins and into their bladders in order to draw urine).

The testing of pet foods in South Africa is usually done by the Department of Physiology at Onderstepoort who, which according to

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information at our disposal, used to have an innovative and humane method of collecting urine. A slanted floor caused the urine to run down into a dark bottle whence it was collected twice a day. This method was not only more humane but would have caused the urine-analysis to be more accurate as the dogs did not have to suffer the stress of invasive tests.

Then a curious thing happened. For some inexplicable reason, after 1999, this humane method of testing was suspended when Dr. Enette van Dyk and Prof Gareth Bath allegedly destroyed the innovative slanted floors and reverted to the cruel, invasive method. The testing of our home grown Vet's Choice is said to have been done in this manner. Please phone or fax Prof. G.E. Swan at Onderstepoort and ask to have the humane methods reinstated for the testing of pet foods.

Prof. Swan can be contacted by Fax, No. 012 529 8304 Or e-mail geswan@op.up.ac.za”

[4] As a result of the editorial numerous members of the public and veterinarians wrote abusive e-mails to Prof. Swan who is employed by the first respondent. After correspondence between representatives of the applicant and representatives of second respondent the second respondent agreed to publish an apology to Prof Swan. The said apology reads as follows:

“HI GUYS, PROF. SWAN IS NOT A BAD SORT OF FELLOW

IN Snout 13, under ‘Cruel Pet Food Testing’, we asked readers to ‘phone, fax or e-mail Prof. Swan and ask that the humane method of collection of urine and pet food testing be reinstated.

The reason why we requested readers to contact Prof. Swan

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was because he was obviously a senior member of Onderstepoort. At no stage did we intimate that he himself did experiments on animals. Unfortunately, unknown individuals sent him really abusive e-mails, which was never our intention and a practice we have never condoned. Indeed, our own e-mail to Prof. Swan was most respectful. We had no axe to grind with him.

SAAV has on more than one occasion written to Onderstepoort, asking them to give an indication of who were the members of their animal ethics committee. These reasonable requests were never even acknowledged. SAAV felt that as Onderstepoort was a public institution, funded by the taxpayer, we had a right to know that there was indeed a proper ethics committee looking after the welfare of animals. It was in view of this stony silence that SAAV had to select the name of one of the senior members whom, we thought, would take a reasonable stance in the matter.”

[5] The applicant was not satisfied with this apology and after numerous failed attempts to resolve the problem approached this court for the relief mentioned above.

[6] The first and second respondents oppose the application vehemently. Mr Murphy acting on their behalf advanced numerous arguments as to why the application should be dismissed. Firstly, he argued that the joinder of the first respondent was irregular and that the application should be dismissed because of this

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misjoinder. Secondly, that there are serious disputes of fact and that the application ought therefore be referred to trial. Thirdly, he argued that the statements made in the editorial were neither false nor defamatory. Mr Zietsman on behalf of the applicant argued that the statements are defamatory, false and unreasonable.

[7] Mr Murphy's argument in relation to misjoinder has no merit. SAAV states that Snout is its official newsletter. It is also clear from the apology published in Snout that it is the mouthpiece of SAAV. Snout also states that it is the official newsletter of SAAV. Although the second respondent states that she is no longer a member of SAAV the fact remains that she was a member of SAAV when she wrote the article. The second respondent sent the application papers to the first respondent. The first respondent indicated to her that there is nothing that it could add to the application or in defence thereof. It is clear that SAAV was correctly joined because it has a real and substantial interest. SAAV received the application papers. It had a representative who argued its case. It was not in anyway prejudiced.

[8] The applicant approached this court by way of motion procedure. The manner in which factual disputes in the papers should be resolved was stated by Corbett JA as he then was in **Plascon – Evans Paints v Van Reebeeck Paints** 1984 (3) SA 623 AD at 634 H – 635 C where he said:

“It is correct that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which

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have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire case supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283 E – H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

[9] Contrary to what Mr Murphy suggested I am of the view that

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there are no serious disputes of fact in this matter. In my view a over-fastidious approach whould seriously impede and delay justice in this matter. A respondent should not be allowed to delay or frustrate justice by a bare denial. See **Soffiantini v Mould** 1956 (4) SA 150 E at 154 F – H.

[10] The law of defamation in South Africa is based on the actio injuriarum which affords a person the right to claim damages when his personality rights had been impaired intentionally by the unlawful act of another. Defamation is defined as the wrongful and intentional publication of a defamatory statement concerning the plaintiff. See **Khumalo and Others v Holomisa** 2002 (5) SA 401 CC at 413 G – H. In **Khumalo v Holomisa** *supra* at 414 O’ Regan J stated the following:

“It is not an element of the delict in common law that the statement be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation

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must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion.”

In **National Media Ltd v Bogoshi** 1998 (4) SA 1196 SCA it was stated that the defendant may, in order escape liability, establish that the publication of a defamatory statement was reasonable in all the circumstances. This was accepted in **Khumalo v Holomisa** *supra*.

[11] The second respondent admits that the message conveyed or innuendo created by the editorial is inter alia that:

- “6.1 The applicant, and more specifically its Department of Physiology and Faculty of Veterinary Science situated at Onderstepoort, was using inhumane, cruel and invasive tests on animals for the testing of pet foods, which include, inter alia, the pet food known as “Vet’s Choice”;
- 6.2 The Applicant and more specifically its Department of Physiology and Faculty of Veterinary Science situated at Onderstepoort previously employed a more humane

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method for the collecting of urine necessary for the conducting of the said tests and the Applicant, through its employees, Dr Enette Van Dyk and Prof. Gareth Bath, abolished the more humane method and substituted it for the aforementioned cruel and invasive methods;”

To alledge that a University or a department thereof uses inhumane, cruel and invasive tests on animals is in my view defamatory to the University. Likewise to alledge specific employees of that institution are responsible for the abolishing of a more humane method of testing animals and substituting it by inhumane cruel and invasive methods is defamatory to the reputations and good names of those employees. Dr Enette Van Dyk and Prof. Gareth Bath are academics employed by the applicant. Their reputations and standing in the academic community and society in general will definitely be affected if they use inhumane testing methods on animals in general or dogs in particular. It is also clear from the e-mails that were sent to Prof. Swan as a direct result of the publication of the editorial in Snout that members of the public as well as veterinarians were outraged by the allegations.

[12] The second respondent alleges that according to her information urine was collected as part of food testing at Onderstepoort. She also avers that Dr Enette Van Dyk and Prof. Gareth Bath are indeed responsible, according to her information which she has no reason to doubt, for the changes in urine collecting methods from the humane to the

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inhumane. She is not prepared to disclose her source. She however avers that she has taken every reasonable step to verify the information after it had been provided to her and she remains convinced that it is correct. She does not state how she verified it although she had all the contact details of the persons and institution. A bare statement that she verified the information without stating how she verified it is in my view not enough.

[13] The second respondent's labour of love is indeed landable. It is good that, in a democracy, institutions and the practices at institutions of higher learning especially unsavoury practices should be exposed and subjected to robust criticism. Constant vigilance is a hallmark and necessary companion of a successful democracy. That vigilance is facilitated and stimulated by people like the second respondent. There are however limits to that activity. It must be practiced, responsibly, reasonable and with the necessary care that blatant falsehoods should not be sent into the public domain under the guise of public interest or robust criticism.

[14] In this matter the second respondent had the telephone number and fax number of the the institution. She had Prof. Swan's e-mail number. She never endeavoured to get hold of Dr Van Dyk or Prof. Bath to verify the information that she received from her source. A source, impeccable though he or she may be, can be mistaken or may have an axe to grind. A source who has an ulterior motive can easily destroy an innocent person's reputation by distributing false information about that person to editors or journalists. If the journalist is not circumspect and reasonable with the manner in which that information is handled that may, unwarrantedly, be the end of a person's reputation. It is therefore of the utmost importance that information from sources

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be verified before it is purveyed in public as the truth. It is clear that the second respondent did not verify any of the information that she received from her source. Prof. Bath and Dr Van Dyk were a phone call away. The second respondent did not bother to call them to ask them what the true state of affairs are. The information about them was on a website. Every person that has access to the internet could log on to the website and view the publication. Current and prospective student of the applicant had access to Snout. This might have influenced their choice of university. It is also well known that many research institutions are reliant on donor funding. Information such as this will obviously not go down well with donors. The applicant has all the right to protect its good name and the good name of its employees from defamation.

[15] It is clear that the editorial contained statements that are devoid of any truth. Dr Van Dyk and Prof. Bath were never involved in the inhumane testing of dogs. Likewise the University of Pretoria at its departments at Onderstepoort never utilised the cruel and inhumane testing methods as alledged by the editorial in Snout.

[16] I accept that Prof Swan's particulars were only published – not to indicate that he is involved in the inhumane and cruel treatment of animals but - to give particulars of a senior person attached to Onderstepoort. The ambiguity of the publication however led to the unfortunate and unwarranted barrage of insultative and degrading missives that Prof. Swan received. The apology to Prof. Swan still creates the impression that although he is a good guy these tests were done under his watch. A unambiguous apology is in my view not unreasonable.

[17] In my view the application ought to be granted. There is no reason why the costs should not follow the success. Although the second respondent publishes Snout as a labour of love she was grossly unreasonable to publish such a piece thereby defaming the applicant.

[18] **In the circumstances I make the following order:**

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(a) Prayers 1 to 4 of the notice of motion are granted.

C.J. MUSI, R

Namens die eiser:

Adv. P Zietsman
In opdrag van:
Naudes
BLOEMFONTEIN

Namens die verweerder:

Adv. M Murphy
In opdrag van:
Garlicke & Bousfield Inc.
UMHLANGA ROCKS

/ms