



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 4241/2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... [REDACTED] 27 November 2024
SIGNATURE DATE

In the matter between:

RODGERS NDOBE **PLAINTIFF**

And

GIBELA RAIL CONSORTIUM RF (PTY) LTD **DEFENDANT**

JUDGMENT

WINDELL, J:

Introduction

[1] This is an action for defamation. Mr. Ndobe, the Plaintiff, is seeking R 5 million in damages from the Defendant, Gibela Rail, his former employer.

[2] Mr. Ndobe's claim is predicated on a report entitled 'Rodgers Management of Design Group' (the Report), which was generated by the Defendant and utilised in support of disciplinary proceedings initiated against him for gross negligence in May 2019. The disciplinary proceedings were initiated following Mr. Ndobe's refusal to follow the instruction of his line manager, Mr. Ezra Bambo (Mr Bambo).

[3] Mr. Bambo sought input from Mr. Ndobe's former line managers, Ms. Itumeleng Modiba (Ms. Modiba) and Mr. Frederic de Marcellus (Mr. de Marcellus), to compile evidence regarding Mr. Ndobe's performance during their tenure. Mr. de Marcellus compiled the Report and provided it to Mr. Bambo, as per his testimony. The report was incorporated into the package of documents that Mr. Bambo utilised to present the Defendant's case against Mr. Ndobe at the disciplinary hearing (DC hearing).

[4] Mr. Ndobe was dismissed after being found guilty of the disciplinary charges. He filed an appeal against the results of the DC hearing. On appeal, only the sanction of dismissal was overturned and replaced with a final written warning. Nine months later, in February 2020, Mr. Ndobe instituted action against the Defendant based on the Report. Mr. Ndobe continued to work for the Defendant until he was dismissed for another and unrelated offence at the end of February 2021.

[5] In the amended particulars of claim (POC), Mr. Ndobe avers that the Report was published and distributed amongst the Defendant's management personnel and *'leaked to other employees of the Defendant in a clandestine manner'*. This was done *'unlawfully'* as the Report was confidential, defamatory and contained incorrect information.

[6] Mr. Ndobe also alleges that the Report was discussed by other employees of the Defendant during a protest following the DC hearing, during which the former CEO

of the Defendant was summoned to intervene. It is argued that Mr. Ndobe's integrity and reputation were harmed because of the Report's distribution and publication.

[7] The Defendant denies that any statement contained in the Report was defamatory and maintains that no defamatory material or statement was published to a third party. The Defendant contends that the disciplinary processes, including the preparation of the Report, the charge sheet and the DC hearing are legally sanctioned processes that constitute a privileged event which can never give rise to defamation.

The legal position

[8] Defamation is the *'the unlawful publication, animo iniuriandi, of a statement that has the effect of injuring a person's reputation, that is, lowering it in the estimation of right-thinking members of society.'*¹ Two elements must be proven by the plaintiff: One, the statement was defamatory. Two, it (the defamatory statement) was published. Once it is proven that the defendant has *published* a statement that is *defamatory* to the plaintiff, it is presumed to be intentional, and it is incumbent upon the defendant to prove that it was not unlawful or not intentional.²

[9] 'Publication' means the communication or making known to at least one person other than the plaintiff.³ Proof of the publication has to be through witnesses that have been identified in the pleadings. In *Crots v Pretorius*,⁴ the Supreme Court of Appeal (SCA) summarized it as follows:

¹ *Botha v Marais* 1974 (1) SA 44 (A).

² *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202.

³ *Le Roux v Dey* 2011 (3) SA 274 (CC) at [86].

⁴ *Crots v Pretorius* 2010 (6) SA 512 (SCA) at para [15].

'(15) Publication is an essential requirement of defamation that must be pleaded and proved. The names of the persons to whom the defamatory remarks were made and who were to be called as witnesses have to be pleaded and disclosed during cross-examination. The reasons are apparent. Apart from avoiding surprise the identity of the persons involved is also relevant to enable the Defendant to raise appropriate defenses. For instance, depending on who the person is, the Defendant may rely on privilege.'

[10] When it comes to determining whether a statement is defamatory, the test is an objective question of law for the Court to decide on which no evidence is admissible. It depends upon the proper interpretation of the language used in the document.⁵ In *Le Roux*,⁶ the Constitutional Court explained that a two-stage enquiry must be conducted. In the first stage the ordinary meaning of the statement must be established:

*'In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the Plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied....'*⁷

⁵ *Sutter v Brown* 1926 AD 155 at 163.

⁶ 2011 (3) SA 274 (CC).

⁷ *Ibid* para [89].

*...The reasonable reader or observer is thus a legal construct of an individual utilized by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.*⁸

[11] At the second stage, the Court must establish whether the statement is defamatory. It is trite that a statement is defamatory of a plaintiff *'if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published'*:⁹

"(a) Because we are employing the legal construct of the 'reasonable' 'average' or 'ordinary' person, the question is whether the statement was calculated [in the sense of likelihood] to expose a person to hatred, contempt or ridicule.' Evidence of whether the actual observer actually thought less of the Plaintiff is therefore not admissible. The test is whether it is more likely, that it is more probable than not, that the statement will harm the Plaintiff.

*(b) If it is found that the statement is ambiguous in the sense that it can bear one meaning which is defamatory and others which are not, the courts apply the normal standard of proof in civil cases, that is, a preponderance of probabilities. If the defamatory meaning is more probable than the other, the defamatory nature of the statement has been established as a fact. If, on the other hand, the probabilities are even, the Plaintiff has failed to rebut the onus which he or she bears. Consequently, it is accepted as a fact that the statement is not defamatory.*¹⁰

⁸ Ibid para [90].

⁹ Ibid para [91].

¹⁰ Ibid para [91].

[12] As to the meaning of 'the reasonable person' it postulates '*a person who gives a reasonable meaning to the words used within the context of the document as a whole*'. A selective approach to the document is not acceptable.¹¹ The yardstick by which defamatory matter is assessed is that of the fictitious, normal, balanced, right-thinking and reasonable person who is neither hyper-critical nor over-sensitive.¹²

[13] It is thus imperative to consider the words in their context for the objectives of the present. The Appellate Division has stated expressly that a person '*cannot be said to be a reasonable person of ordinary intelligence if he seizes on certain words and ignores others*'.¹³

[14] Thus, when interpreting the Report, it has now been well established that the starting point is to determine the manifest purpose of the document.¹⁴ The process of determining the purposes of the document involves a unitary exercise of considering the language used in light of ordinary rules of grammar, the context and purpose of the document. This can only be achieved by reading and considering the whole document.

The evidence

[15] Mr. Ndobe testified and called 5 witnesses: Mr. Wilfred Mogudi, who, at the relevant time, was the deputy secretary general of the representative trade union of which Mr. Ndobe was a member and a shop steward at the time. Ms. Modiba, who was a colleague, and his immediate superior prior to him being transferred to a

¹¹ *Council for Medical Schemes and another v Selfmed Medical Scheme and Another* (2011) ZASCA 207 (25 November 2011) at para 61.

¹² *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 408 D-E. *Coulson v Rapport Uitgewers (Edms) Bpk* 1979 (3) SA 286 (A) at 294 H – 295 A.

¹³ *Dammers v Wylie & Others* 1980 (1) SA 835 (A) at 842E.

¹⁴ *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) (2021) ZACC 13; 2021 (8) BCIR 907 (CC); 2021 (6) SA 1 (CC) (11 June 2021).

different department under the supervision of Mr. Bambo. Mr. Lungisa Mama, who was a past colleague and worked with Mr. Ndobe under the supervision of Ms. Modiba. Ms. Tebogo Makgatlha who worked in the Human Resources Department of the Defendant, and Mr. Bambo who was Mr. Ndobe's supervisor at the time of the DC hearing at which the Defendant is alleged to have published the defamatory material. He initiated the DC hearing against Mr. Ndobe on behalf of the Defendant.

[16] The Defendant called no witnesses. The court was informed that it had intended to call Mr. Bambo as its sole witness, but when Mr. Ndobe called Mr. Bambo as his witness, the Defendant had no witness to call.

[17] Mr. Ndobe referenced the Report, which was in the form of a PowerPoint slide. The Report contains only one relevant page, which is as follows:

'RODGERS MANAGEMENT OF DESIGN GROUP

- *A contract was signed with the Supplier in September 2016 for an amount of 11 million Euros, for a turn key CBS line (1st attachment next page)*
- *Rogers Ndobe was the manager of the project in interface with the Company DESign group until Sept 17. Then he decided alone to stop managing the project.*
- *A plan and delivery schedule (2nd attachment next page) was agreed between the parties but was not adhered to*
 - *There was a delay of 3 months from inception of which 2 months was purely as a result of the Supplier. One month of the 3 months delay was as result of the status of the plant (no water, disturbances from Trencon*

etc). The supplier was given milestones and the last milestone was delayed from 27th of September 2017 to 9th of February 2018. (3rd attachment next page)

- *the delay of 2 months which is due to bad management of Design group has an impact in building cars. We lost the targets in terms of deliveries to the customer> cost is 6.8mzar*
- *[There is then a table below the last bullet point which sets out how the R6.8 million is calculated]"*

[18] The Defendant is a rail transport consortium that is committed to black economic empowerment (BEE). In 2013, it was incorporated as a ring-fenced company to oversee the rolling-stock fleet-renewal program of the Passenger Rail Agency of South Africa (Prasa). The purpose of this contract is to furnish PRASA with trainsets, as well as to offer technical support and related services. Mr. Ndobe testified that the Design Group was responsible for the installation of equipment to facilitate the production of 'the cars', which are actually train coaches.

[19] He stated that he was never the Project Manager of the Design Group. Nevertheless, the Report (in his opinion) created the impression that he was managing the Design Group. He stated that the Design Group was managed by Ms. Modiba, Mr. De Marcellus (Ms. Modiba's Manager) and Phillipe Marques. In order to execute the project, they were accountable for strategic decisions, invoice management, project updates, and the placement of necessary material orders. He was recruited solely by Ms. Modiba to provide support for the project, as she was instrumental in its management, along with her other two team members/managers.

[20] Mr. Ndobe testified that he was charged with misconduct for dereliction of duties and that the Report in question was used as evidence in the DC hearing to justify his dismissal. He asserted that Mr. Bambo was the initiator of the DC inquiry and was accountable for the publication and distribution of the Report to the participants of the DC hearing. He verified that the Report was published to all individuals enumerated in paragraph 10 of the POC. He stated that the shop stewards attended the DC hearing on their own accord in support of him and as 'observers', and he did not extend an invitation to them.

[21] The listed participants referred to in the POC were Ms. Makhosazana Nkonyane who was the Chairperson of the DC hearing (the Chairperson), the shop stewards i.e. Modisa Shilakoe, Palesa Jojo, Gracious Mathekga, Sphamandla Dlamini, David Mashimbyi, Sifiso Nzuza and Ricardo Engelbrecht and the Defendant's employees namely Mahlatse Mashiane, Ms. Modiba, Mr. De Marcellus, and Mr. Mogudi.

[22] Mr. Ndobe testified that the Report was disseminated to the participants at the DC hearing on 17 May 2019 in a printed and hard copy format. However, he also suggested that it may have been published and distributed at a previous date. He claimed that the Report contained sensitive information about him and was published to 'other employees' after it was recklessly distributed to all participants in the DC hearing. Ultimately, the striking workers were able to access this information and engage in a discussion regarding the Report, specifically the allegations that he mismanaged a project valued at 11 million Euros. Mr. Ndobe testified that the Defendant failed to safeguard his integrity and permitted all attendees at the DC hearing to take the Report with them.

[23] Mr. Ndobe's second witness, Ms. Modiba, did not take the matter further. She denied being present at the DC hearing and denied any knowledge of the Report. In the same vein, the fourth and fifth witnesses did not advance Mr. Ndobe's case. Ms. Tebogo Makgatlha was not questioned regarding the Report and was not involved in the DC hearing. Conversely, the sole pertinent aspect of Mr. Lungisa Mama's testimony was that the Report was 'discussed' during the strike. He did not attend the DC hearing, and as a result, he did not receive or view the Report. However, he testified that one of the shop stewards entered a meeting with other shop stewards, who may have either attended the DC hearing or had received the Report from their fellow shop steward, Mr. Ndobe. This shop steward then emerged with a piece of paper that she appeared to be reading when she addressed the picketing workers.

[24] Throughout the trial, it was determined that the DC proceedings lasted for a minimum of three days, specifically 19 May, 21 May, and 4 June 2019. Mr. Mogudi, the third witness, stated that he was present at the DC hearing on 4 June 2019 and that Mr. Bomba distributed the Report to all attendees. He expressed his apprehension regarding this matter due to the Report's confidentiality. He was not present at the initial hearing on 17 May 2019 and was unable to provide a response to the averments in the POC that the report was disseminated to the attendees of the DC hearing on 17 May 2019, rather than on 4 June 2019. Although Mr. Ndobe tried to distance himself from the unruly shop stewards who attended the DC hearing, Mr. Mogudi confirmed that the shop stewards had attended to represent and defend Mr. Ndobe.

[25] Mr. Bambo was the final witness. He attended the DC hearing on all three days. He testified that Mr. De Marseilis compiled the Report; however, he was the one who disseminated the packet at the DC hearing. Included in the bundle was the Report.

There were only four (4) copies of the Report. As a result of its confidentiality, he confirmed that the Report was exclusively disseminated to the participants at the DC hearing. He also confirmed the shop stewards' attendance at the DC hearing and asserted that they claimed to have been instructed by Mr. Ndobe to represent him at the hearing. He denied furnishing them with a copy of the Report.

[26] That concluded the evidence on behalf of Mr. Ndobe. The Defendant applied for absolution of the instance which was denied. It subsequently closed its case.

Evaluation

[27] It is not disputed that the Report was authored by the Defendant and that it was distributed to a number of people during the DC hearings. It is also not disputed that the Chairperson's reliance on this Report resulted in Mr. Ndobe's conviction and dismissal. Nevertheless, the Defendant denies that any statement contained in the Report was defamatory and maintains that no defamatory material or statement was published to a third party.

[28] The initial inquiry pertains to whether the Report was defamatory. During cross-examination, Mr. Ndobe did not deny that he was involved in the project. What he disputes is the characterisation of his involvement. He argues that he was not managing the project, but that he was assisting in the project.

[29] He was guided through the Report line-by-line to determine which sections or statements were purportedly directed at him and which sections he was complaining of. He conceded that the heading 'Rodgers Management of Design Group' did not say he was a project manager, but merely referred to his management on behalf of the Defendant of the work that was undertaken by the company called Design Group. He

further acknowledged that he was not the 'Supplier' and that he did not sign an 11 million Euro contract with the 'Supplier'. He also acknowledged that the delays were related to the period from 27 September 2017 to February 2018, after he is said to have ceased managing the project. Consequently, the first and third bullet points on that page did not refer to him. He ultimately recognised that the second bullet point, which pertains to his termination of project management, was the sole instance in which he was mentioned.

[30] I am mindful of the fact that the Report should be read and interpreted as a whole and that the intention of the author of the Report and Mr. Ndobe's understanding of the Report are irrelevant to the enquiry whether the contents is defamatory.

[31] On an objective reading of the whole of the Report, it is clear that the Report conveys the following information to the reasonable reader: A contract was signed with the 'Supplier' in September 2016 for an amount of 11 million Euros, for a turnkey CBS line. Mr. Ndobe managed the project in interface with the Company Design group until 17 September (2017). He then decided alone to stop managing the project. A plan and delivery schedule were agreed between the parties but was not adhered to. **There was a delay of 3 months from inception of which 2 months was purely as a result of the Supplier.** One month of the 3 months delay was as result of the status of the plant (no water, disturbances from Trencon etc). The supplier was given milestones and the last milestone was delayed from 27 September 2017 to 9 February 2018. **The delay of 2 months was due to bad management of Design group which had an impact in building cars. In terms of deliveries the Defendant lost R6,8 million.** (My emphasis)

[32] Firstly, the heading of the Report indicates that the focus of the report is on Mr. Ndobe's management of the Design Group. The Defendant acknowledges that the heading was inaccurate, as Mr. Ndobe was not responsible for managing the project. Secondly, the Report as a whole plainly communicates that the project experienced delays from inception as a consequence of Mr. Ndobe's 'bad management,' resulting in losses of R6.8 million.

[33] Applying the test in *Le Roux*, the reasonable reader would understand the statement in its context and would have had regard not only to what is expressly stated but also to what is implied. Thus, the Report would be understood by a reasonable person of ordinary intelligence to convey a meaning defamatory of Mr. Ndobe and is likely to injure the good esteem in which Mr. Ndobe is held by the reasonable or average person to whom it had been published.

[34] The question is whether there was publication of the Report? It is not disputed that the DC hearing was held over three days: 17 May, 21 May and 4 June 2019. Mr. Ndobe testified that on 17 May 2019, Mr. Bambo distributed the Report to all attendees at the DC hearing, including himself. He did not attend the subsequent sitting on 21 May 2019, and only returned on the final day (possibly 4 June 2019) to receive notification of the DC hearing's outcome. Therefore, on Mr. Ndobe's version, the Report could not have been distributed on 21 May 2019 or 4 June 2019.

[35] Mr. Ndobe is contradicted by Mr. Mogudi regarding this matter. Mr. Mogudi testified that he only attended on the day when the verdict was handed down. He was uncertain as to whether that occurred on 4 June 2019 or 6 June 2019. He is recorded by the chairperson of the DC hearing as having attended solely on 6 June 2019. Mr. Bambo distributed the Report on the day of the hearing, which according to Mr. Mogudi

could have been either 4 June 2019 or 6 June 2019. However, this is impossible as the Report was utilized in evidence on 21 May 2019. Further, according to Mr. Ndobe, the Report was distributed to Mr. Mogudi during the appeal process, which can also not be correct. Mr. Ndobe appealed, and it is reasonable to assume that Mr. Mogudi assisted him in the preparation of his appeal papers. Mr. Ndobe did not present any evidence regarding the appeal process, and there was no indication that the Defendant did so either. Consequently, the sole method by which Mr. Mogudi could have obtained access to the Report is through Mr. Ndobe.

[36] Mr. Bambo (who was called by the plaintiff) testified that he had brought four copies of the Report to the DC hearing. He was unable to recall whether he distributed the copies of the Report on 17 May 2019, when the hearing was halted due to the disruptive behaviour of the shop stewards in attendance, who refused to leave when they were informed that only one could remain and represent Mr. Ndobe, or on the subsequent sitting on 21 May 2019. The four copies of the Report that he brought to the DC hearing were distributed as follows: one copy was given to the chairperson of the hearing, one copy was given to the representative of the Defendant's Human Resources Department in attendance, one copy was given to Mr. Ndobe (which he testified he personally gave to him and not to the shop stewards in attendance), and the last copy was kept for himself. He was very clear on this.

[37] Therefore, Mr. Mogudi was the sole witness presented by Mr. Ndobe to whom the Report was purportedly published. The issue with Mr. Mogudi is that he was not present during the distribution of the Report, and Mr. Bambo was adamant that he only had four copies of the Report. Based on this alone, Mr. Mogudi's testimony can be safely dismissed. As a result, Mr. Ndobe was unable to establish publication.

[38] Additionally, distributing the Report to the participants at the DC hearing does not constitute publication for purposes of Mr Ndobe's defamation claim. I say so for the following reasons. Mr. Ndobe is suing the Defendant vicariously for the actions of its employees or representatives at the DC hearing. The Report was distributed to only four people. Mr. Bambo was the purported publisher; therefore, the retention of a copy for himself does not constitute publication for defamation purposes. The distribution to Mr. Ndobe is not publication for defamation purposes either. Mr. Mashiane represented the Human Resources Department as the custodian of the disciplinary process on behalf of the Defendant. And the chairperson of the DC hearing received the Report in the exercise of powers that are conferred to her by the Labour Relations Act 66 of 1995 (the LRA) on the employer.

[39] In *Ntshangase v MEC for Finance KZN*,¹⁵ the SCA had to determine the role of a chairperson at a disciplinary hearing. It held as follows:

'It is not in dispute that Dorkin [the first respondent] was appointed by the second respondent [the MEC of Education] as chairperson of the disciplinary hearing involving the appellant to preside over it as its (second respondent's) representative. Dorkin was appointed in terms of Resolution 2. In terms of Resolution 2 the second respondent is obliged to execute the decision taken by Dorkin, the chairperson of the disciplinary hearing. To my mind, it follows that Dorkin was acting qua the second respondent and his decision became that of second respondent.'

¹⁵ *Ntshangase v MEC: Finance, KwaZulu Natal and Another* [2010] 2 All SA 150 (SCA); (2009) 30 ILJ 2653 (SCA); [2009] 12 BLLR 1170 (SCA); 2010 (3) SA 201 (SCA) para 13.

[40] A distribution of the Report to another representative of the Defendant on behalf of the Defendant (the chairperson and the HR representative) can thus not be considered publication for the purposes of Mr Ndobe's defamation claim.

[41] The sole alternative method of publication was the allegation in the POC that the Report was leaked in a clandestine manner to other employees. Firstly, no evidence was led on behalf of Mr. Ndobe to establish any leak. Secondly, the other employees are nameless and unknown and could not be called as witnesses. As remarked earlier, proof of the publication has to be through witnesses that have been identified in the pleadings.¹⁶ Accordingly, there was no publication of the Report.

[42] But even if I am wrong in this regard and there was publication, it was done during a privileged occasion and therefore not wrongful. In *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and others*¹⁷ the SCA dealt with a similar set of facts. It held that:

'[17] Our law confers a qualified, albeit a very real, privilege upon a litigant in respect of defamatory statements made during the course of legal proceedings (Joubert v Venter (supra) at 697 I). The privilege extends to such statements if they are relevant. The litigant bears the burden of proving that any such defamatory statement was relevant to an issue in the proceedings (Joubert v Venter (supra) at 700G and 701F–I). Once the respondents are able to discharge such onus the provisional protection of the qualified privilege thus established would be defeated if the appellant could show that the trustees, in making the defamatory statement, were actuated by malice in the

¹⁶ See *Crots v Pretorius* 2010 (6) SA 512 (SCA) at para [15].

¹⁷ 2001 (2) SA 242 (SCA).

sense of an improper or indirect motive, as explained in *Basner v Trigger* 1946 AD 83 at 95 (*Joubert v Venter (supra)* at 702C–D). ...

[22] No attempt has been made to define the concept of relevance, or to formulate a universally applicable test for relevance, within the context of qualified privilege. This is not surprising as relevance, in this sense, is not capable of precise definition. Relevance in relation to the publication of defamatory matter has variously been described as “relevant to the purpose of the occasion” (*Molepo v Achterberg* 1943 AD 85 at 97); “in some measure relevant to the purpose of the occasion” (*Basner v Trigger (supra)* at 97 – see also *Joubert v Venter (supra)* at 705H and *Zwiegelaar v Botha* 1989 (3) SA 351 (C) at 358E); “germane to the matter” being dealt with (*May v Udwin* 1981 (1) SA 1 (A) at 11C–D); “relevant ... tot die onderwerp onder bespreking” (*Herselman NO v Botha* 1994 (1) SA 28 (A) at 35G–H). In essence they are all saying much the same thing; words such as “relevant”, “germane” and “pertinent” (another word used in this context) have the same basic content. To the extent that the above concepts differ, they do so in degree rather than substance.”

[43] The qualified privilege is applicable to legal proceedings that include disciplinary procedures. This was acknowledged in the case of *NEHAWU v Tsatsi*,¹⁸ where the court held as follows:

‘[10] ... the next question for consideration is whether the statements were protected by qualified privilege. When making the assessment it is convenient to deal, first, with the publication of the report at the meeting and, second, with republication outside the meeting. It is not in dispute that the second appellant disseminated the report to the

¹⁸ 2006 (6) SA 327 (SCA). See also *Gwe v De Lange and another* [2020] 1 BLLR 92 (ECP) paras 68 to 72.

members of NEHAWU present at the meeting. To establish privilege the appellants were required to show that the second appellant and NEHAWU members had a reciprocal right and duty to make and receive the report and the defamatory statements were relevant or germane and reasonably appropriate to the occasion. The immunity would be forfeited if it is established that the second appellant acted with an improper motive, but that does not arise here because it was not raised as an issue on the pleadings.

[11] *One of the recognised occasions that enjoys the benefit of the defence is an occasion where the statements were published in the discharge of a duty or exercise of a right. ...*

[12] *The question whether the statements were relevant to the occasion involves essentially a value judgment. ...'*

[44] These principles were reaffirmed in *Byrne v Masters Squash Promotions*,¹⁹ in which the court held that where defamatory statements are made in privileged circumstances then the prima facie wrongfulness of such utterance or publication is justified. The issue of privilege is addressed by determining whether the statements were pertinent to the occasion, which is '*a matter of common sense and reason, having its foundation in the facts, circumstances, and principles governing each particular case.*' It is '*essentially a value judgement*' to evaluate whether a defamatory statement was pertinent to the situation.

[45] In coming to the conclusion that the publication was privileged, Satchwell J held:

¹⁹ *Byrne v Masters Squash Promotions CC and Another* 2010 (1) SA 124 (GSJ) paras 9 to 14.

'[11] I should remark that, if this were not so, every employer who furnished such reasons in writing or through subordinates or to other third parties such as shop stewards or immediate managers would expose themselves to actions for defamation. Further, if this were so, employees who were to be denied reasons for their dismissal by employers who feared such exposure to defamation actions would rightly feel aggrieved.

[12] I have no difficulty in accepting that publication to a typist of the contents of the letter of dismissal which is to be typed is publication in the exercise of a duty to inform the appellant of the reasons for termination of his employment.'

[46] It is common cause that the alleged publication of the Report took place in the DC hearing. It is also common cause that there were only a small number of people who were in attendance. According to Mr. Bambo, even fewer were provided with a copy of the Report. Mr. Ndobe never contested the Defendant's authority as his employer to initiate disciplinary proceedings against him. In any case, the Labour Relations Act²⁰ regulates this matter. Mr. Bambo, one of Mr. Ndobe's witnesses, provided testimony regarding the purpose of the DC hearing, the accusations that Mr. Ndobe was facing, and the purpose of the Report in substantiating those charges. I am thus satisfied that the DC hearing was a privileged occasion, and the Report was pertinent and essential for the purposes of the hearing.

[47] The immunity would only be forfeited if it is established that the Defendant acted with an improper motive.²¹ No evidence was led by Mr. Ndobe to try and establish that the Report was introduced into the disciplinary proceedings because of an

²⁰ Act 66 of 1995.

²¹ See *Nehawu v Tsatsi* supra.

improper motive. Accordingly, the distribution of the Report was protected by qualified privilege.

[48] In the result the following order is made:

1. The action is dismissed with costs on Scale B.


L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 November 2024

APPEARANCES

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Date of hearing:

29 July 2024 to 31 July 2024

(Heads of argument filed on 12 and
17 August 2024)

Date of judgment:

27 November 2024