REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 0597 / 2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted]

DATE 2 May 2025 SIGNATURE

In the matter between:

MALOSE REGINALD MAKGETA Plaintiff

and

INDUSTRIAL DEVELOPMENT CORPORATION First Defendant

KGAMPI JACK BAPELA Second Defendant

JUDGMENT

SALOOJEE, AJ

Introduction

1. This is an action in which the plaintiff claims payment for defamation, damage to reputation and dignity, malicious proceedings, a loss of income claim and, in the alternative, a malicious prosecution claim.

2. The plaintiff was employed by the first defendant ("**IDC**") as its Regional Officer for the Limpopo Province and second defendant ("**Bapela**"), the Regional Manager, was the plaintiff's supervisor.

3. During 2017, the plaintiff was charged with misconduct for which he was found to be guilty of all charges at a disciplinary hearing and dismissed.

4. The plaintiff then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") which found that the plaintiff was guilty of some of the acts of misconduct and not guilty of others.

5. The plaintiff's case against the IDC is that the allegations of misconduct contained the Charge Sheet were incorrect, defamatory and malicious. The case against Bapela is that he was the author of the Charge Sheet and acted in concert with the IDC.

The amended particulars of claim

6. The amended particulars of claim contains four claims for defamation, four claims for damage to reputation and dignity, four claims for malicious proceedings, a loss of income claim and, in the alternative, a malicious prosecution claim.

7. The claims for defamation, damage to reputation and dignity and malicious proceedings are based on the not guilty findings at the CCMA.

8. The first charge of conduct unbecoming of an employee in the position of the plaintiff contained three occasions on which the plaintiff failed to attend company events. Plaintiff was found to be not guilty by the CCMA arbitrator on one of the acts of misconduct contained in this charge.

9. The plaintiff did not pursue a claim on the second charge of unethical or disrespectful behaviour towards the IDC’s clients as he was found to be guilty of this charge at the CCMA.

10. The plaintiff was found to be not guilty on third to fifth charges of insubordination, poor work performance and gross dishonesty, respectively.

11. The defamation claims are that the charges on which the plaintiff was found to be not guilty were wrongful and defamatory, and intended to be understood by readers of the Charge Sheet, who were part of the IDC’s management and the Chairperson of the disciplinary hearing, to mean that the plaintiff did not perform his duties at the required standard and the defamatory allegations were made with the intention to injure the plaintiff's reputation.

12. The damage to reputation and dignity claims are that the IDC made a false representation to others, knowing that the charges were false and causing the plaintiff to suffer loss from being unable to find gainful employment and psychological trauma.

13. The malicious proceedings claims are that the plaintiff was falsely charged by the IDC and Bapela who had no reasonable or probable cause for doing so, nor reasonable belief in the truth of the information given. The plaintiff's loss arose from being unable to find gainful employment, psychological trauma, the costs of counselling expenses for attending to the disciplinary hearing the CCMA hearing.

14. The loss income claim is that the allegations contained in the Charge Sheet influenced the plaintiff's future employability as a registered chartered accountant and the disclosure of these charges to a potential employer would render the plaintiff unemployable.

15. The alternative claim for malicious prosecution is that the IDC and Bapela had no reasonable or probable cause or reasonable belief in the truth of the information given amounting to a malicious prosecution. These allegations influenced the plaintiff's future employability as a registered chartered accountant and the disclosure of these charges to a potential employer would render the plaintiff unemployable.

The defendants' plea

16. The defence to the defamation claims is that the that the publication is true, alternatively substantially true, and was made in the public interest. Further, Bapela was acting in the course and scope of his employment at the time that he authored and issued the Charge Sheet and discharged his duty to the IDC or exercised the IDC's right by publishing the charge to people who had a duty or right to receive the information that was relevant to the disciplinary hearing.

17. The defence to the damage to reputation and dignity claims is a denial that; the publication is wrongful; the plaintiff can no longer find employment or the cause of the plaintiff's failure to gain employment and that the publication caused the plaintiff to suffer psychological trauma. Further, Bapela was acting in the course and scope of his employment at the time that he authored and issued the Charge Sheet.

18. The defence to the malicious proceedings claims is that is a denial that the publication is wrongful or malicious, that the plaintiff can no longer find employment or the cause of the plaintiff's failure to gain employment. The plaintiff was awarded compensation at the CCMA for the charges on which he was found not guilty.

19. The defence to the loss of income claim is a denial that the publication influenced the plaintiff’s employability or its effects or is the cause of the plaintiff's employability.

20. The defence to the for malicious prosecution claim is a denial that the publication influenced the plaintiff’s employability or its effects or is the cause of the plaintiff's employability.

The plaintiff’s evidence

21. The plaintiff’s evidence is that he is a Chartered Accountant and is currently employed unemployed. He was employed by the IDC and his employment ended in 2018. He challenged his dismissal at the CCMA which found that his dismissal was substantively unfair and awarded the plaintiff compensation.

22. The plaintiff compared the findings of the disciplinary chairperson to that of the CCMA arbitrator.

23. On Charge 1, which contained three events, he was found to be not guilty on one of the events contained in this Charge 1 by the CCMA arbitrator. He claimed that the Bapela fabricated the evidence on the other events.

24. On Charge 2, he was found guilty by the disciplinary chairperson and the CCMA arbitrator and there is no claim on this charge.

25. On Charge 3, the plaintiff stated that he was found guilty of this charge by the Chairperson and found not guilty by the CCMA arbitrator.

26. On Charge 4, the plaintiff stated that Bapela lied on this charge as the plaintiff received a rating of 3.2 above the threshold for non-performance.

27. The plaintiff was found guilty at the disciplinary hearing but was found not guilty at the CCMA. The plaintiff claimed that Bapela lied on this charge that the plaintiff received a score of under 3 and that Bapela was intentional in misleading his performance rating. As a result, the IDC's Employee Relations Department required the plaintiff to conclude a performance improvement plan.

28. On Charge 5, the plaintiff stated that a charge of dishonesty affected him immensely. The plaintiff stated that he became a director of the companies after he had made a written declaration and there was no need to provide a further declaration.

29. The plaintiff believes that the charge was fabricated, and that the plaintiff must live with the consequences of this fabrication for the rest of his life as he will have to disclose this charge each time he applies for employment.

30. The amended Charge Sheet was distributed by e-mail to the IDC's legal representative and the Chairperson. The Chairperson did not have the right to receive the Charge Sheet as the IDC had to give the plaintiff a list of arbitrators and follow due process.

31. Bapela acted with malice as he knew that the plaintiff would be harmed by false charges and that the Charge Sheet was shared with internal staff. Further, the plaintiff’s dismissal from the IDC's employment was widely shared.

32. The plaintiff indicated that despite Bapela promoting the plaintiff in the previous year, Bapela did not take this into account in his most recent performance assessment. Plaintiff believes that Bapela wanted to harm him.

33. Plaintiff gave evidence of his mental well-being stating that he became frustrated and paranoid as he had to disclose the charges brought against him with any potential employer. However, plaintiff only applied at one organisation for employment and then embarked into entrepreneurship.

34. On the plaintiff’s loss, he is the evidence was that he earned a gross salary of R 107 737.80 and lost R 1.2M but provided no justification for the loss.

35. The plaintiff summarized his evidence that charge 1(d), charge 3 and charge 5 were unfair and that these charges were factually incorrect.

Plaintiff's cross-examination

36. The defendants Counsel commenced cross-examination by relying on the employer's authority to institute disciplinary processes against employees.

37. The plaintiff agreed that Bapela was his line manager and that Bapela had Counselled him together with the Employee Relations Department.

38. The plaintiff also agreed that the people to whom the Charge Sheet was made available were necessary as these people were required to have regard to the Charge Sheet in terms of their job functions.

39. On charge one, the plaintiff's claim is based on the events in Charge 1D. Charge 1 contains three events for which the plaintiff was found guilty on 2 by the disciplinary chairperson and at the CCMA. Despite the findings of guilt, the plaintiff stated that he should have been subjected to progressive discipline.

40. On Charge 2, the plaintiff agreed that he did not bring a claim on this charge despite this charge being one of conducting himself unethically and disrespectfully. Plaintiff agreed that this is a serious charge.

41. On Charge 3, the plaintiff stated that his conflict with Bapela started with his first performance review and thereafter Bapela reduced the plaintiff's workload. Plaintiff agreed that Bapela's conduct did not indicate motive.

42. The plaintiff agreed that on Charge 4 he was initially rated with a performance rating of 2.9 which was amended by the moderating committee to a

performance rating of 3.1. Plaintiff could not dispute that Bapela motivated for the higher rating at the moderating committee.

43. Plaintiff also agreed that he's performance ratings for the previous years showed a history of deteriorating performance ratings. The plaintiff agreed that Bapela's motivation to the moderating committee cannot be reconciled with motive.

44. On charge 5, the plaintiff stated that he registered shelf companies with the intention to trade once these companies had reached a certain maturity.

45. The plaintiff also stated that he was not turned down from any employment because of the charges contained in the amended Charge Sheet.

46. The plaintiff accused the chairperson of being a hired gun without providing any evidence, therefore.

Plaintiff's re-examination

47. In re-examination, the plaintiff reiterated his examination-in-chief.

Defendant's examination-in-chief

48. Bapela gave evidence for the defendants. He confirmed that he signed the amended Charge Sheet as a line manager. The Charge Sheet was published after Bapela pieced together a sequence of events that was shared with the IDC's Senior Employee Relations specialist. Bapela prepared the charges but that these were finalised by the Senior Employee Relations specialist. These

charges were vetted, tested and checked by the IDC a Line Manager cannot send out a Charge Sheet without the involvement of the Employee Relations Department.

49. Bapela stated that those persons who were privy to the Charge Sheet were all involved in some way or the other in employee relations and necessary to the disciplinary hearing.

50. On Charge 1, Bapela explained that the employee displayed a pattern of deteriorating behaviour. The IDC's Limpopo office is a small office and was not performing optimally. The IDC's Chief Executive Officer visit to the Limpopo office was an important event and required all employees to be present.

51. The plaintiff was a senior member of the team and as the IDC's Chief Executive Officer knew the employees at the Limpopo office by name, it was important for the plaintiff to be present at the meeting. The plaintiff was absent for the visit by the IDC's Chief Executive Officer and another event which was unacceptable.

52. On Charge 2, the IDC is a funding organisation with rules for screening and credit checks. It is important to communicate with clients however, the plaintiff told a client that he was delinquent, and that the plaintiff was informed that the client was involved in illicit dealings. The plaintiff exposed the IDC to potential litigation and tarnished the name of the organisation.

53. On Charge 3, the plaintiff was reluctant to conduct a due diligence exercise. The plaintiff was charged with misconduct as he took leave in the middle of a due diligence exercise and sent an e-mail to that effect to Bapela.

54. The plaintiff's e-mail was sent to the Employee Relations Department for the advice and the decision was made to charge the plaintiff with misconduct. Further, due to the plaintiff's reluctance to assist in the due diligence exercise a junior colleague had to take up the plaintiff's duties.

55. On Charge 4, the plaintiff agreed that he obtained a performance rating of 2.9 which was increased after moderation to 3.1. Bapela confirmed that he motivated in favour of the plaintiff before the moderating committee. The motivation for adjusting the plaintiffs scoring was because the plaintiff worked on complex transactions.

56. The reason that the plaintiff was charged for this misconduct is that he consistently performed badly, and a pattern was emerging of deteriorating behaviour and scoring. Further, juniors in the workplace were scoring higher than the plaintiff who seemed unmotivated to work.

57. On Charge 5, Bapela stated that employees must update their declaration forms and inform the employer that employees are conducting outside business. The reason that the plaintiff was charged with this misconduct is that the plaintiff boasted to coworkers that despite not receiving a performance bonus, he would not be affected due to his additional earnings from other companies.

58. Bapela maintained that the content of the charges was factually correct, and that the IDC followed the prescripts of labour legislation. Bapela did not want the plaintiff to be dismissed and maintained the disciplinary chairperson was not a hired gun.

Bapela's cross-examination

59. On Charge 1, Bapela confirmed that the plaintiff was not present for the meeting with the IDC's Chief Executive Officer. Bapela confirmed that the plaintiff displayed a pattern of behaviour that constituted misconduct and that Bapela counselled the plaintiff on this issue.

60. On Charge 3, Bapela confirmed that the plaintiff refused to get a carry out an instruction and do the work assigned to him.

61. On charge 4, Bapela confirmed that he motivated for the plaintiff before the moderation committee and that over a three-year period, the plaintiff's performance rating deteriorated. Bapela maintained that the plaintiff's factual score under 3 was sufficient to charge the plaintiff and that the final adjusted score of 3.1 came about after he motivated in favour of the plaintiff.

62. On charge 5, Bapela accepted that the declaration form was completed before the companies displayed on the Charge Sheet were registered. However, employees are duty bound to make annual declarations.

63. Bapela denied that the charges were not an accurate reflection of the facts but admitted that the Charge Sheet could have reflected the facts better.

Analysis

64. In **Argus Printing and Publishing Co Ltd and Others v Esselen's Estate**,[1] the Appellate Court held that:

> "… the test as to whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff (see at 767E-F). This is unquestionably the correct approach and, as this formulation indicates, the test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also G of what they imply…"

65. The plaintiff's claim is that the mere publication of the Charge Sheet is defamatory as the charges on which he was found not guilty at the CCMA were based on incorrect facts.

66. There is no disagreement that there was a publication but that the publication was qualified as was considered in **Clover SA (Pty) Ltd and another v Sintwa**,[2] where the court held:

> "[13] It is trite law that publication of defamatory material in privileged circumstances is justified and, therefore, lawful.
>
> [14] As this case concerns qualified (as against absolute) privilege, it becomes necessary to draw a distinction between "discharge of a duty

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1 1994 (2) SA 1 (A) at 20 E-G

2 [2016] 12 BLLR 1265 (ECG) at para. 13 to 21

or furtherance of an interest" and "judicial and quasi-judicial proceedings" as part of the few categories of qualified privilege that have developed in our law. For reasons that will become clearer shortly, the distinction is not without significance.

[15] "Discharge of a duty or furtherance of an interest" is present where a person has a legal, moral or social duty or a legitimate interest in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions. Consequently, the key question is whether such a duty or interest is present in the case of both the defamer and the bystander. In the event of it being proved (by means of the reasonable man test) that both parties had a corresponding duty or interest, the defendant must prove that he acted within the scope or limits of the privilege. This is done by proving that the defamatory assertions were relevant to, or reasonably connected with, the discharge of the duty or furtherance of the interest.

[16] In an instance of defamatory statements made during the course of judicial or quasi-judicial proceedings, however, the position is slightly (but significantly) different. To enjoy provisional protection, the defendant need only prove that the statements were relevant to the matter at issue. Once that is achieved a duty is cast on the plaintiff to prove that, notwithstanding the statements' relevance, the statements were not supported by reasonable grounds. The onus resting on the defendant to establish that the statements were relevant has been held to be a full onus, as opposed to an evidentiary burden, and the required quantum of satisfaction is therefore on a balance of probabilities.

[17] In both categories of qualified privilege dealt with above, the plaintiff may, even if the defendant establishes provisional protection, show that the

defendant exceeded the limits of the privilege because he acted with an improper motive (malice).

[18] Because the line of distinction between these categories of privilege subject to discussion may sometimes be blurred or hard to draw, the risk of conflating the applicable principles is always high.

[19] In sum, therefore, a litigant relying on qualified privilege, which is what the instant case is about, must establish the following requisites:

(a) that the occasion is privileged; and

(b) that the defamatory statements complained of were relevant to the purpose of the occasion. Once it is accepted that the statement fell within the bounds of a qualified privilege the onus shifts to the plaintiff to prove that the defendant was malicious.

[20] In Zwiegelaar v Botha the plaintiff sued the defendant for defamation arising out of a statement made by the defendant while testifying under oath at a meeting of creditors of a close corporation which was in the process of being wound up. In upholding the defence of qualified privilege the court held:

> 'Generally, a witness enjoys a qualified immunity or privilege in respect of defamatory statements made during the course of legal proceedings. This qualified immunity applies not only to proceedings in a court of law but also to proceedings before certain quasi-judicial bodies, including, for instance, a judicial commission of enquiry (Basner v Trigger 1946 AD 83, and apparently any tribunal recognised by law (see Burchell The law of Defamation in South Africa at 254). It

was not disputed that this qualified immunity will generally extend to inquiries of the kind at which the defendant testified and made the statement forming the subject-matter of the present proceedings (cf Allardice v Dowdle 1965 (1) SA 433 (D) at 436 C). The qualified nature of the immunity is such, however, that once the circumstances giving rise to the immunity are established, the plaintiff is entitled to 'destroy' or 'defeat' the immunity or privilege by showing, inter alia that the defendant, in making the defamatory statement, was actuated by malice in the sense of an improper or indirect motive, as explained in Basner v Trigger (supra at 94-5) (see Joubert and others v Venter (supra at 699)).'

[21] Even though the CCMA is not part of the judiciary and thus an administrative tribunal, its proceedings are quasi-judicial in nature. The functions performed by the CCMA have been held to be "substantially similar in form and substance to those performed by a court of law", even though the CCMA is not a court of law."

67. Plaintiff and the defendants agreed that the resolution of this matter is based on the above test and that qualified privilege should be considered.

68. The enquiry is then objective and based on reasonableness, firstly, whether the wording of the charges on which the plaintiff was found not guilty at the CCMA were unreasonable and objectively defamatory. Secondly, the defendant should prove that the wording of the charges was relevant to disciplining the plaintiff and if that is achieved, then thirdly, the duty is on the plaintiff to prove that the wording of the charges was not supported by reasonable grounds.

69. There is no disagreement that reasonableness requires that the context of the Charge Sheet should be considered. The publication of the Charge Sheet should be viewed within its context in the employment relationship to discipline employees.

70. A Charge Sheet is issued by an employer to commence disciplinary proceedings against an employee and contains allegations of misconduct that the employer will rely on to discipline an employee. The employee has the right to respond to the charges and present evidence in defence at a disciplinary hearing.

71. The plaintiff's evidence relied on the incorrectness of the charges that he was found not guilty at the CCMA. In **OEH Abantu v (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others**,[3] the Labour Appeal Court favoured reasonableness as the standard of care that an employer should take in drafting charges:

> "[15] One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge, or add new charges, after the commencement of the hearing

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3 [2019] 12 BLLR 1304 (LAC) at para. 15-16

where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.

[16] Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards."

72. Further, the plaintiff did not claim defamation on the charge that he was found to be unethical. It is inconceivable that the plaintiff could then claim defamation or relief on the remaining claims.

73. Bapela's evidence was that the charges against the plaintiff were reasonable, and he was not challenged on the wording, the relevance or the reasonableness of the charges.

74. Bapela, the plaintiff's supervisor, noticed the plaintiff's workplace misconduct and reported it to the IDC's Employee Relations department to formulate the charges against the plaintiff. The plaintiff did not challenge the reasonableness of the charges and wrongly focussed on the correctness of the charges.

75. Further, in cross-examination, the plaintiff conceded on material issues that; he did not challenge the CCMA finding that he was unethical, Bapela's conduct did not demonstrate motive, Bapela motivated for a higher scoring before the Moderation Committee, the plaintiff had applied for one job offer and that the plaintiff also was not turned down from any employment because of the charges contained in the amended Charge Sheet.

76. The plaintiff's concessions demonstrate that there are no defamatory statements contained in the charges that he was found not guilty at the CCMA.

77. Consequently, the plaintiff cannot succeed on the defamation claims.

78. On the claims for damage to reputation and dignity claims the plaintiff relies on the false representation made by the IDC to others. The plaintiff again relied on correctness over reasonableness. The plaintiff did not prove that the representations made in the Charge Sheet were false or unreasonable, apart from broad statements that Bapela had lied. Further, the plaintiff's claims rely

on the CCMA findings that found him not guilty, but the plaintiff led no evidence on issue that he was not reinstated by the CCMA.

79. Despite tendering evidence of his mental state after his dismissal, the plaintiff provided no expert evidence to support his claim.

80. Consequently, the plaintiff cannot succeed on the claims for damage to reputation and dignity.

81. On the claims for malicious proceedings and malicious prosecution, the plaintiff must prove that the disciplinary hearing was brought with the object to injure the plaintiff and an impairment of the relevant aspects of his personality to succeed in the claims for malicious proceedings. These claims cannot succeed after the plaintiff conceded in cross-examination that the Bapela's conduct did not demonstrate motive.

82. The loss income claim is a claim in delict that requires the plaintiff demonstrates a nexus between the wrongful act and the loss, and the loss should be assessed by making the best use it can of the evidence before it.[4]

83. The loss of income and malicious proceedings claims was not seriously pursued by the plaintiff in evidence. The plaintiff's evidence lacked material information to support the claim apart from the plaintiff's statement that he was now unemployable after he applied for one job offer and that he was not turned

4 See: Everson v Allianz Insurance Ltd. 1989 (2) SA 173 (C) at 174 I to 175 F

down from employment because of the charges contained in the Charge Sheet. No expert evidence was led to justify the claimed loss.

84. Consequently, the following order is made:

84.1 The plaintiff's claims are dismissed.

84.2 The plaintiff is ordered to pay the costs of two Counsel.

[redacted]

YF SALOOJEE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the plaintiff:
L Msomi instructed by MVC Inc. Attorney and Conveyancer

For the defendants:
T Manchu SC and S Lindazwe instructed by Werksmans Attorneys

Date of Trial: 13 February 2025
Date of Judgment: 02 May 2025