



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, (MBOMBELA MAIN SEAT)

Case No.: 896/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
12/8/2025 DATE	SIGNATURE

In the matter between:

SINENHLANHLA MANQELE

PLAINTIFF

And

BALOYI MASANGO INC ATTORNEYS

1ST DEFENDANT

JIMMY BALOYI

2ND DEFENDANT

THABA CHWEU LOCAL MUNICIPALITY

3RD DEFENDANT

JUDGMENT

VUKEYA J

- [1] This is a delictual claim for defamation of character. The action was instituted by the plaintiff against the first and second defendants on allegations based on an investigative report written at the behest of the third defendant and authored by the first and second defendants. The plaintiff alleges that the report contained false, wrongful, unlawful, and defamatory statements directed at him both personally and in his professional capacity. The claim is predicated on the contention that the contents of the report were intended to tarnish his reputation.
- [2] The plaintiff therefore seeks an order for judgement against first and second defendant for payment in the amount of R2 000 000-00 (Two Million Rand), interest on the amount of R2 000 000-00 (Two Million Rand) a *tempore mora* at the prescribed rate of 10,25 % per annum calculated from 14 days after date of judgement, to date of settlement. He also prays that the first and second defendants be ordered and directed to retract the statements and publish an apology to the plaintiff in a prominent position in each of the offices of the municipality; and costs of suit.
- [3] The first and second defendants defend the action on the basis that the document was privileged and that the plaintiff did not make out a case for defamation of character.
- [4] It is common cause that the first and second defendants were engaged by the third defendant to undertake an investigation into the causes of sewer spillage occurring in the Thaba Chweu Local Municipality and to compile a report. The first and second defendant's investigative report would have to provide answers on the following questions:
 - 4.1. What led to the criminal guilty finding of the Municipality that also necessitated the Municipal Manager to sign an admission of guilt and be found guilty of transgression of the NEMWA Act;
 - 4.2. To investigate whether the Municipality could have avoided the transgression;

- 4.3. Whether there was any sort of negligence by any of the Municipal employees;
- 4.4. Whether there is proper accountability in relation to workflow of the relevant departments that are necessarily in charge of compliance with the above act; and
- 4.5. To reflect on the criminal case brought against the Municipality and demonstrate the complexities and seriousness of the problem surrounding unlawful municipal sewage discharge.

[5] The first and second defendants conducted the investigation and interviewed the necessary employees from 1 to 12 August 2022 where after they compiled a report dated 19 August 2022. The aforesaid report signed by the second defendant, was tabled at the Council sitting of the third defendant on or about 23 August 2022. It was presented to 28 Councillors. The relevant parts of the report can be quoted as follows below:

- "1. There is an emergency in the technical department that has not been recognized as such by the technical services director end technical services management team;*
- 2. There is a lack of knowledge skills from the people that ought to be managing the department;*
- 3. Whether this is a result of a lack of basic approach to employment or not, there is a lack of will when it comes to applying oneself in the position that one is employed in from the technical director down to the plumber in the command chain.*
- 4. We were unable to interview the technical director as he had taken a stand against this by involving an attorney who indicated that we cannot have a conversation with the technical director without the attorney involved. This on its own indicated that the technical director knows what exactly is happening in the department.*
- 5. The technical director my so refusing to have a consultation with us also by so refusing to give his input as to how to resolve this issue, directly insinuated that he refused to take an instruction from council. This in terms of the labour laws amount to*

insubordination and conduct unbecoming of an employee that is being employed to offer a service and get paid for that service.

6. *The municipality has been operating on disaster mode for a period in excess of two years. The director technical services has not attended to this and the manager technical services says his hands are tight there is no budget for that.*
7. *The technical director has in the past two years caused an expenditure of more than 9 million Rand on projects within the waste water treatment plants that did not make both economic and common sense.*
8. *We have peruse the services of both the technical director and manager And all the other relevant employees within the department. For status the technical director is an electrician by profession. Surely the position that he is occupying needs someone with experience in environmental affairs. Human resource management, water purification end waste management as well as the technical running and management of water treatment plants.*
9. *The technical director in this regard he has no skills to occupy the position he is occupying that is the reason why he does not comprehend the severity of the impact of the pollution of the sewer spillages around and within the municipal boundaries.*
10. *The technical director does not even comprehend The emergency and urgency that this issue had to be addressed in.*
11. *The sewer Treatment plant has not been functional for over 2 years, This is unacceptable weather even by lower standards of a grade 12 student, that should had also dictated that it needed emergency repairs but for the fact that this has been ongoing for far more than two years, this shows that the technical director's position has been vacant while he is occupying scene for far too long."*

[6] The plaintiff avers in hi particulars of claim and also when he gave his viva voce evidence that the report intentionally and maliciously makes false, wrongful, unlawful and defamatory statements against him as follows:

- 6.1. That he, as the Technical Director refused to attend any interview with the first and second defendants and that he also refused to take part in the investigation conducted by the first and second defendants;
- 6.2. That from the onset, his attitude was not to assist the first and second defendants without his attorney present. The said attorney never assisted in this regard. The first and second defendants had no other option but to deduce that he knows exactly what the fault in the system is and as such he declined to address or to give attention to the said fault;
- 6.3. That there was an emergency in the Technical Department that was not been recognised as such by the Technical Director;
- 6.4. That he lacked the knowledge/skills as the Technical Director who was supposed to be managing that section;
- 6.5. Whether this came as a result of lack of basic approach to employment or not, according to the first and second respondents, there was a lack of will on his part when it comes to applying himself in the position that he was employed in;
- 6.6. That his acts of refusing to have a consultation with the first and second defendants and refusing to give his input as to how to resolve the issue, directly insinuated that he was refusing to take an instruction from Council and that this amounts to insubordination and conduct unbecoming of an employee, who is employed to offer service and get paid for that service;
- 6.7. That the municipality has been operating on disaster mode for a period of more than 2 years while he neglected to attend to the problem;
- 6.8. That he has in the past two years caused an expenditure of more than R9 million Rand on projects within the waste water treatment plants, that did not make both economic and common sense;
- 6.9. That he has no skills to occupy the position he is occupying, that is the reason why he does not comprehend the severity of the impact of the pollution of the sewer spillages around and within the Municipality;

- 6.10. That he does not even comprehend the emergency and urgency that the issue had to be addressed in;
 - 6.11. That the sewer treatment plant has not been functional for over 2 years, and that even by lower standards of a grade 12 student, that was unacceptable. The plant needed emergency repairs, but for the fact that this has been ongoing for far more than 2 years, it shows that his position has been vacant while he was occupying same for far too long; and
 - 6.12. That both he and the manager: technical services be put on precautionary suspension and that disciplinary process be considered against them for them to account for the total collapse of the department as well as to account for the expenditure referred to above.
- [7] The plaintiff in his particulars of claim further states that the members of the Council as well as the readers of the report understood the above to mean that he is incompetent, unethical and unprofessional; that he is unqualified and occupies the position of a Technical Director through a dubious appointment; that he lacks skills and knowledge in the portfolio of Technical Director; and that he is corrupt, insolent and engages in unlawful activities in the Municipality;
- [8] The following is common cause between the parties:
- 8.1. That the report was drafted on instruction of the third defendant to the first and second defendants. The reason for the drafting of the report is also common cause between the parties.
 - 8.2. After the finalization of the investigative report, it became the property of the third defendant;
 - 8.3. The meeting held by the council members where this report was tabled was a special meeting;
 - 8.4. The investigative report was received from the Security Manager who was part of the meeting held on 23 August 2022.
- [9] The issues for determination in this matter are very crisp and they are:

- 9.1. Whether the report constitutes a privileged document;
- 9.2. Whether it amounts to defamation of the plaintiff's character;
- 9.3. Whether it was published to a third party other than the Plaintiff; and
- 9.4. Whether the first and second defendants are liable for payment of damages to the plaintiff;

[10] In a case for defamation of character the plaintiff is required to prove the publication of the defamatory statement about which he complains, and the defendant has a full onus to establish the defences it relies upon. Once the plaintiff has shown that the defamatory statement has been published the onus shifts to the defendants to prove that the statement was not defamatory, alternatively was published on a privileged occasion. If the plaintiff wishes to overcome any privilege that might be attached to the publication, he has to prove that the defendants were actuated by malice¹.

[11] In *Khumalo and Others v Holomisa*² the Constitutional Court in paragraph 18 held that:

"At common law the elements of the delict of defamation are:

- (a) the wrongful and*
- (b) intentional*
- (c) publication of*
- (d) a defamatory statement*
- (e) concerning the plaintiff."*

[12] In order to succeed the Plaintiff only has to prove the publication of the defamatory matter concerning himself³. Once the plaintiff accomplishes this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either

¹ *Yazbek v Seymour* 2001 (3) SA 695 (E)

² 2002 (5) SA 402 (CC)

³ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at 414 A-B.

wrongfulness or intent. A bare denial by the defendant will not suffice. Facts must be pleaded and proved that will be sufficient to establish a defence⁴, for example the publication was true and in the public benefit or that the publication was made on a privileged occasion.

- [13] A fourth defense to rebut unlawfulness was adopted by the Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*⁵. In this matter, Hefer JA, held that:

"... the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations.

What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a license to lower the standards of care which must be observed before defamatory matter is published in a newspaper." (at 1212G - 1213A)."

- [14] This fourth defense for rebutting unlawfulness, allows the defendant to establish that the publication of a defamatory statement, was nevertheless reasonable in all the circumstances. In *Bogoshi* (supra), Hefer JA articulated a three-stage test to determine whether a particular occasion qualifies as one of privilege. The test comprises the following components:

⁴ Booysen v Farrar 2013 JDR 0821 (GNP) at para 13 where quoted from *Le Roux and Others v Day* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) at para 85.

⁵ *National Media Ltd and Others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); 1999 (1) BCLR 1 (SCA).

14.1. *The Duty Test:*

Whether there existed a legal, moral, or social duty on the part of the communicator to convey the information to the recipient;

14.2. *The Interest Test:*

Whether the recipients of the communication had a legitimate interest in receiving the information;

14.3. *The Circumstantial Test:*

Whether the nature, status, and source of the material were such that the communication warranted protection from liability for publication.

- [15] The first and second defendants were under a legal duty, arising from instructions issued by the third defendant, to compile a report. In fulfilling this mandate, they complied with the internal procedural framework, which the plaintiff declined to participate in, citing the absence of legal representation. Accordingly, there existed a legal, moral, and social obligation on the part of the first and second defendants to furnish the report to the Council. Furthermore, the third defendant had a legitimate interest in receiving the contents of the report. Lastly, the nature, status, and origin of the material were such that it was confidential and intended solely for the attention of the Council and as a result, the report was made on a privileged occasion.
- [16] Where qualified privilege is raised as a defence, such privilege does not afford absolute immunity to the publisher of a defamatory statement. The protection conferred by this defence is provisional and the publication will be wrongful if the publisher acted with an improper motive. The rationale behind this is that there can be no legal, moral or social duty to publish matters for malicious reasons⁶.
- [17] Seeing that the report is only provisionally protected, it is now open to the plaintiff to establish affirmatively on the evidence, the presence of an improper motive, that is to

⁶ *Katz v Welz and another* 22440/2014 (2021) ZAWCHC 76 (26 April 2021)

say malice on the part of the first and second defendants. Given that malice is inherently subjective, I am mindful that in defamation cases, it is often difficult for a plaintiff to provide direct proof of it. As a result, malice must usually be inferred from surrounding circumstances or other internal or external evidence.

- [18] Corbett JA, in dealing with such an inference, observed as follows in *Borgin v De Villiers and Another*:¹⁷

"The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice."

- [19] As was stated in the case of *Katz v Welz and Another*⁷, the question whether a statement is defamatory in its ordinary meaning, or is per se defamatory involves a two-stage inquiry. The first is to establish the natural or ordinary meaning of the statement and the second is whether that meaning is defamatory⁸. The test that should be applied is based on objectivity. The court does not look at what the person who made the statement meant to say, or how the audience understood it, or whether they believed it, instead, the focus is on how a reasonable person with average intelligence would interpret the statement, considering the context in which it was made. This includes both what was said outright and what was implied.

- [20] Upon a careful examination of the particulars of claim and the contents of the report and the *viva voce* evidence of the plaintiff, it is evident that the plaintiff deliberately omitted certain material facts so as to create the impression that the report was

⁷ *supra*

⁸ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) para [85]

directed at him personally, rather than addressing the actual issue at hand. For example:

20.1. There is an emergency in the technical department that has not been recognised as such by the technical services director "and technical services management team". [my underlining]

20.2. Whether this is a result of lack of basic approach to employment or not, there is a lack of will when it comes to applying oneself in the position that one is employed in from technical director "down to the plumber in the command chain."

[21] This report was not only about his personal or professional *persona*, it also involved other employees of his department. The issue was also raised by the defendants during argument, namely that the plaintiff had deliberately omitted certain averments contained in specific paragraphs of the report. A plain reading of the report reveals that it was compiled pursuant to an investigation into the cause of the sewer spillage in the Thaba Chweu Local Municipality area, including the individuals and factors that may have contributed to the incident. From the outset, it is clear that the plaintiff was afforded an opportunity to present his account of events concerning his department but elected not to do so. The Plaintiff had the opportunity to provide an explanation regarding the origin of the problem, its causes, and the circumstances surrounding the expenditure of R9 million, which he declined to offer. Moreover, the report does not implicate the plaintiff alone; it refers to him as the Technical Director, Technical Services Management Team which includes plumbers and other employees.

[22] With regard to the alleged publication of the document, the plaintiff erroneously contends that the mere fact that the report was tabled before a Council comprising more than 28 members constitutes clear evidence of publication. However, the fact that the report was prepared pursuant to a directive of the Council and classified as a

privileged document does not, in law, amount to publication. Furthermore, in his evidence the plaintiff could not provide any tangible evidence regarding how this privileged report was leaked to other employees. His evidence was that it was shown to him, at his request, by the Security Manager who has since passed away. On his own evidence, he is the only person outside of the Council Meeting who saw the report.

[23] As was stated in the case of *Ndobe v Gibela Rail Consortium Pty Ltd*⁹ Windell J held:

*"Publication" means the communication or making known to at least one person other than the plaintiff*¹⁰.

Proof of the publication has to be through witnesses that have been identified in the pleadings. In *Crots v Pretorius*¹¹, the Supreme Court of Appeal (SCA) summarized it as follows:

'(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.'

[24] If the document in question was indeed privileged, as previously asserted, the only conceivable alternative method of publication would be through an unlawful disclosure of the report to other employees. In this regard, the onus rests upon the plaintiff to establish, on a balance of probabilities, that such a leak occurred. In his testimony, the Plaintiff stated that the Security Manager was lawfully in possession of the report, as he had been one of the members at the closed meeting. The Security Manager

⁹ 4241/2020 (2024) ZAGPJHC 1215

¹⁰ *Le Roux v Dey* 2011 (3) SA 274 (CC) at [86].

¹¹ *Crots v Pretorius* 2010 (6) SA 512 (SCA) at para [15].

presented the report to him who, upon noticing that his name appeared therein, requested a copy of the document. There is no evidence before this Court to suggest that the Security Manager disclosed or disseminated the report to any individual other than the Plaintiff himself.

- [25] In order for a document to be published it should have been brought to the attention of a third party other than the Plaintiff. The Plaintiff did not provide any names of persons who have the report. He only says it is out there and did not call any witnesses to corroborate his version.
- [26] There can be no dispute that the first and second defendants were complying with their instructions to investigate and file a report. It was never suggested that the first and second defendants were on a frolic of their own when they made their findings and gave their opinion. The occasion in which the publication occurred could only have been, on the plaintiff's own version, a formal meeting attended only by the 28 Councillors. The report was made on a qualified privileged occasion in which the first and second defendants were doing their job in compiling a report and gave their opinion on their findings. It follows that this negates any notion of *animus iniuriandi*.
- [27] The Plaintiff did not prove publication which was not made on a privileged occasion and further that the first and second defendants had the necessary intent or malice to publish a report that was defamatory to the plaintiff and therefore the first and second defendants are not liable to pay any damages to the plaintiff.
- [28] Awarding of costs is at the discretion of the court which must be exercised judicially. There is no reason why costs should not follow the course.

ORDER

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

29.1. Plaintiff's claim is dismissed, with costs.



LD VUKEYA
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff: Adv MG Skhosana

Instructed by: Ndlovu Lindiwe Attorneys

For the First and Second Defendants: Ms.P Madonsela

Instructed by: Baloi Attorneys

Reserved on: 27 May 2025

Delivered on: 12 August 2025