/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 28/9/2005
CASE NO: 22161/2003

UNREPPORTABLE

In the matter between:

RICHARD MICHAEL MOBERLY YOUNG PLAINTIFF

And

SELBY ALAN MASIBONGE BOQWA DEFENDANT

JUDGMENT

SMIT, J

Plaintiff is a professional electronics engineer and managing director of a company CC11 Systems (Pty) Limited, also kwon as C212, who holds a Master's degree in electronics engineering and a doctorate in engineering. The area of plaintiff's speciality is combat systems for naval combat ships in naval systems and employ a variety of distributed systems, subsystems, sensors and effectors such as weapons and computers to correlate the data.

The defendant was at all relevant times South Africa's Public Protector appointed as such pursuant to the provisions of chapter 9 of the Constitution of the Republic of South Africa, Act 108 of 1996, and in that

capacity was one of three members of the Joint Investigation Team into the so-called strategic defence packages.

The defendant presided over the public phase of the investigation at which the plaintiff testified on 27, 28 and 29 August 2001. The plaintiff was unaware at the time when his evidence commenced that witnesses would be called immediately after him in an endeavour to rebut his evidence. Plaintiff had only been required when he was initially notified to appear before the defendant, to keep himself available for three days. Plaintiff only learnt of the intention to call two witnesses to deal with his evidence during the afternoon tea-break on 28 August. The intention to call these two witnesses was placed on record on the morning of 29 August.

Plaintiff was represented at the hearing by senior counsel, Mr Owen Rogers, who was initially not available on 30 and 31 August but it subsequently transpired that he then became available for 30 August. There was in any event, then, insufficient time to prepare for cross-examination of the two witnesses who was to be called to deal with plaintiff's evidence and there was insufficient time to complete the evidence of both these witnesses before the second of them, Rear Admiral Kamerman, was to return to Germany. Plaintiff was further hampered by

the fact that, unlike in the case of his own evidence, he received only a brief summary of the evidence to be presented by one of these witnesses, and that only very belatedly.

Defendant curtailed Mr Rogers' ability to cross-examine one of these witnesses, Vice Admiral Simpson Anderson and after the completion of Simpson Anderson's evidence plaintiff and his legal team excused themselves from further participation and left the proceedings. Before leaving, Rogers explained to defendant why they would be departing before Kamerman commenced giving evidence. He informed defendant that plaintiff and his legal representatives had not been aware that they "would be meeting witnesses of whom statements had not been given for cross-examination immediately after (the plaintiff's) evidence" and that although Mr Rogers became available unexpectedly, for the hearing on 30 August, he would certainly not be available on 31 August. Plaintiff, in his evidence in the present trial added that no purpose would have been served by him sitting there listening to the evidence of Kamerman, when he could have read a transcript of the evidence in due course.

Upon leaving the hearing, plaintiff spoke to Mr Guy Oliver of e-TV. He told Mr Oliver that he and his legal team had "felt a little bit

constrained in being able to test their (ie the two witnesses') evidence". Plaintiff's attorney, Mr Adam Pitman, told Mr Oliver that "[t]here was constraint by the rulings of the [defendant]", but that "on the whole" he could say that he believed "that there was a fair procedure".

Defendant, on the same day, instructed his spokesperson to tell the media that the withdrawal of the plaintiff (from further participation in the hearing) in all the circumstances could be seen as cowardly. The defendant's spokesperson complied with the instruction and the statement was further published in Die Burger of 31 August 2001 and on the Nasionale Pers website on the same date.

Presently plaintiff sues defendant for defamation alleging that defendant, through his spokesperson, made the following statements of and concerning the plaintiff:

> "4.1 Baqwa het deur 'n woordvoerder gesê die optrede (the plaintiff excusing himself from further participation in the public hearings of the Joint Investigation Team into the Strategic Defence Packages) kan gesien word as lafhartig.

4.2 Young het ’n lang monoloog gevoer, maar die oomblik toe daar sterk argumente teen hom kom, loop hy uit.

4.3 Young het vooraf insae in Kamerman se getuienis gehad en geweet wat kom, maar is nie bereid om dit te weerlê nie.“

I interrupt at this stage, to indicate, that defendant denied having instructed his spokesperson to make the alleged second and third statement set out above. Plaintiff accepted that there is no evidence before the court to counter the defendant’s denial that he instructed his spokesperson to do so. I will consequently, in this judgment, not concern myself with the second and third statement, allegedly made.

The defendant in his plea admits that “he authorised the JIT spokesperson to comment that the withdrawal of the plaintiff in all the circumstances could be seen as cowardly”. Defendant further pleaded two defences to the claim. The first is that his comments concerning the conduct of the plaintiff constituted fair comment on facts as they had occurred in the public hearing and concerning a matter in the public interest. Defendant’s second defence is that in terms of section 5(3), read

with section 8(1) of the Public Protector Act, 23 of 1994, he is not liable for any damages claimed by the plaintiff in this action.

In view of the fact that defendant admits that he authorised the issuing of the first statement set out above on the terms set out in his plea, Mr Moerane, on behalf of the defendant, submitted that the issue to be determined are:

Whether or not the admitted statement is defamatory of the plaintiff, if so, whether or not the said admitted statement amounts to fair comment; if the admitted statement is defamatory of the plaintiff, whether or not the defendant is nevertheless exonerated from liability by virtue of the provisions of section 5(3) read with section 8(1) of Act 23 of 1994; and if the defendant is liable in damages, what the quantum thereof should be.

I agree with the submission that these are the main issues to be considered and I will hereinafter consider them seriatim.

Was the statement defamatory of plaintiff?

The test for defamation is whether the statement would tend to impair the plaintiff's reputation in the eyes of reasonable persons. The

test is an objective one to prevent actions by hypersensitive persons who felt insulted by statements which could not insult a person of ordinary sensibilities. (See; *Delange v Costa* 1989 2 SA 857 (AD) 862A-G)

Plaintiff pleaded the defamation as follows in his particulars of claim:

> "6. The said statement(s), read in the context of the report, are in their ordinary meaning defamatory of the plaintiff, alternatively and in any event were intended to mean, and were understood by readers of Die Burger report and of the report on the Nasionale Pers website to mean that –
>
> 6.1 the plaintiff is a coward;
>
> 6.2 the plaintiff is dishonest and only interested in personal gain."

In deciding whether the statement is per se defamatory regard must be had to the normal ordinary meaning of the words used in the statement. Mr Fagan, on behalf of the plaintiff, in a well-considered

argument, submitted that the statement would tend to impair the plaintiff's reputation in the eyes of reasonable persons and the mere fact that the statement was framed in the subjunctive does not change its sense. A close analogy, so the argument went, is the liability of a defendant who merely repeats, confirms or directs attention to a defamatory statement made by someone else, as is very often the case with media defendants. In my view, the analogy relied on by Mr Fagan is unfounded. *In casu* the defendant did not repeat, confirm or direct attention to a defamatory statement of another. The defendant expressed a view that plaintiff's withdrawal from the proceedings could be seen by others as being cowardly.

It is inexplicable why defendant made this ill-considered statement at a most inopportune moment during the proceedings but that does not make the statement defamatory. The mere fact that defendant said some people may regard plaintiff's behaviour as cowardly does not convey to reasonable people on impairment of plaintiff's reputation. The statement may also indicate that as many people may hold the view that his action in withdrawing from the proceedings is well-founded.

In my view it is most unfortunate that the Public Protector made uncalled for remarks of the plaintiff during proceedings at a stage when

he was not even qualified or justified to make a credibility finding on any of the witnesses but that does not make the remarks defamatory. I am not persuaded that the statement made by defendant was in fact defamatory of plaintiff. Nor am I satisfied that the statement made by defendant proves the innuendo pleaded by plaintiff.

In view of this conclusion to which I have come it is unnecessary to consider the other issues set out above. In conclusion, I would merely add, that in my view this is not a matter where I should allow the costs consequent upon the employment of two counsel appearing on behalf of the defendant.

The plaintiff's claim is dismissed with costs.

J M C SMIT
JUDGE OF THE HIGH COURT

22161/2003

Heard on: 15 September 2005
For the Plaintiff: Adv E Fagan
Instructed by: Findlay & Miemeyer
For the Defendant: Adv M T K Moerane SC
Adv G Mabinde
Instructed by: The State Attorney
Date of Judgment: 28 September 2005