


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 24040/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	DELIVERED: 27/1/2011
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
27 Jan 2011	
DATE	SIGNATURE

In the matter between:

PIETERNELLA DIJKHUIZEN

Plaintiff

and

MUKHANYO THEOLOGICAL COLLEGE

Defendant

JUDGMENT

Ismail J:

- [1] The plaintiff, an erstwhile lecturer at the defendant institution, instituted proceedings against the defendant for damages for defamation.

The essence of the plaintiff's claim is that on the 17 October 2007 she was defamed by a member of the board of the

defendant, the Reverend Mogale, at a meeting which he addressed.

- [2] At paragraph 4 of the particulars of claim the plaintiff avers:
"On the 17th October 2007 and at KwaMahlanga the defendant represented by Rev K T Mogale stated to the students and staff and concerning the plaintiff that:

After thorough investigation the Board of Control has concluded that the accusations in Ms Petra's letter of concern are false."

- [3] It was common cause that the plaintiff was known at the defendant as Ms Petra.

- [4] The plaintiff, at paragraph 7 of her particulars of claim, also alleged that the statement made by the Rev. Mogale was understood by the assembly of staff and students that it was intended to mean that the plaintiff was dishonest for the following reasons:

- (i) That the plaintiff made false allegations;
- (ii) That the allegations were unfounded;
- (iii) That there was no merit to the Plaintiff's allegations.

[5] As a consequence of the defamation the plaintiff averred that her reputation had been adversely tarnished and she therefore sought damages against the defendant in the sum of R200 000,00.

Background

[6] The trial lasted for several days. Four witnesses testified before me. For the plaintiff: Mr Phineas Kgatle [Kgatle] , a student and vice chairperson of the students representative council [SRC] at the defendant, as well as the plaintiff, gave evidence. For the defendant: Dr Coetzee and the Rev. Mogale. At the conclusion of the trial the matter was postponed in order for Mr Da Silva SC and Mr Pretorius SC to provide their respective heads of arguments. These heads were provided to me on the last day of the final term in 2010.

[7] Pursuant thereto Mr Da Silva sought an amendment. The amendment related to paragraph 4.1 of the particulars of claim which required the following words to be inserted after the word “ false”, namely

“alternatively, we could not find proof of the things which are mentioned there”.

The plaintiff also sought to substitute the preamble to paragraph 3 of the plaintiff's conditional replication with the following paragraph, in order for the preamble to paragraph 3 to read as follows:

“ With reference to paragraph 5.2 of the defendant's plea and in the event of it being found that the statement made by Rev. K T Mogale, who was mandated by the defendant , and Rev Mogale acting during the course of defendant's business and within the scope of defendant's authority, were made by the defendant in the discharge of a duty, alternatively the exercise of a right, to persons who had a corresponding duty or right to receive the statements, plaintiff then pleads as follows:”

[8] The notice of amendment was served and filed simultaneously with the plaintiff's replying heads of argument on 20 December 2010.

[9] Mr Kgatle testified that at a devotion which was attended by staff and students of the defendant on 17 October 2007, Rev Mogale addressed those present and informed them that:

“ After thorough investigation the Board of Control has concluded that all the accusations in Ms Petra’s letter of concern are false”.

It should be mentioned that Ms Petra was not present at the devotion as she was no longer employed by the defendant at that time.

[10] After the graduation ceremony Mr Kgatle obtained a lift from Ms Petra and on route he informed her of the remarks which the Rev. Mogale made at the devotion. The contents of the report which the Rev. Mogale gave on at the devotion set in motion the train of events which culminated in this action being instituted by the plaintiff.

[11] It is salient to provide the peripheral and background events, which resulted in the announcement made by the Reverend Mogale, in order to gain a proper understanding of the issues.

[12] The plaintiff, a lecturer at the defendant, wrote a letter of concern to the Board of Control and forwarded it to the Executive Council of the defendant on 19 October 2006. This letter appears at pages 65-74 of the bundle. In this letter the plaintiff refers to certain fraud of funds and bookkeeping

irregularities by Mr Pieterse; secondly that approved budgets were disregarded; thirdly to the mismanagement of trust funds, and finally to the question of the post of registrar and Campus manager, more specifically how she was dealt with when she applied for the post.

- [13] The Board agreed to look into the matters raised by Ms Petra and a Commission of Enquiry was appointed to investigate the complaints raised. The commission comprised of the following members:

Br Ben Holthausen (convener); the Rev. Mbethe; the Rev. H H Shoole, the Rev. Tebogo Mogale and Br. C J (Poen) Coetzee.

- [14] The commission of enquiry completed its investigation after it interviewed the relevant persons. It compiled a report which can be seen at pages 136-144 of the bundle.

- [15] The report was forwarded to the Board of Control who held a general meeting on 13 October 2007. At the general meeting it was agreed that :

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" 9.6 Rev. T Mogale, the Vice Chairperson of the Board should convey the summarized version of this decision to the staff and students of MTC after devotion on Wednesday, 17 October 2007. It should also be stressed that it would serve no purpose for anybody to discuss the matter further with Sr. Dijkhuizen or have contact with her and that Sr. Dijkhuizen will in future not have free access to the campus." - Page 150 of bundle.

[16] What needs to be determined by me are the following issues:

- (i) what words were uttered by the Reverend Mogale when he addressed the staff and students at the devotion on 17 October 2007; In this regard the version of the Reverend Mogale and that of Mr Kgatle needs to be examined;
- (ii) whether the occasion when the gathering was addressed was a privileged occasion;
- (iii) whether the words were defamatory; and
- (iv) if so, what damages should be awarded.

[17] Consequently the evidence of the witnesses, being Mr Kgatle and the Reverend Mogale is pivotal to the determination of this matter. Neither Sr Petra nor Dr Coetzee were present at the devotion when the Rev. Mogale addressed the congregation.

Stated differently, the court would have to determine what was actually said by the Reverend Mogale at the devotion, since the protagonists diametrically differ in their accounts of what was said on that day. On this score the court is confronted with two mutually opposed versions.

[18] In this regard the court would have to follow the approach as laid down in *SFW Group Ltd & Another v Martell et Cie & Others* 2003(1) SA 11 at 14I-15E at para [5].

“ On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make a finding on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities..... The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail”

[19] For this reason the court is duty bound to evaluate the evidence tendered by the various witnesses; in this case the evidence of the Rev. Mogale and Mr Kgatle is crucial to the determination of

this matter. Both Mr Da Silva and Mr Pretorius' submitted that the evidence of Dr Coetzee was honest and should be accepted. I agree with their submission in this regard. Dr Coetzee impressed the court as an honest witness who merely came to tell the court what happened without taking sides one way or the other. His evidence is thus accepted by the court. Dr Coetzee was however *not* present at the devotion on the 17 October when the Rev. Mogale addressed the students and staff of the defendant.

[20] The plaintiff gave evidence. She was cross-examined at length. Her evidence must be placed under the microscope since she has a direct interest in the outcome of this matter. Mr Pretorius in his heads of argument levelled several criticisms against the plaintiff's evidence. He *inter alia* alluded to the plaintiff's personal attack on Dr Buys and her evidence that the Rev. Mbethe allegedly stated that the committee was biased. Mr Pretorius submitted that the reference to what the Rev. Mbethe apparently stated should be rejected in the light of Dr Coetzee's unchallenged evidence.

[21] Mr Pretorius criticised the plaintiff's version on the question of payment of monies to Ms Moshiba and her evidence that the

latter was underpaid. The version of the plaintiff on this score was clearly wrong.

[22] Whilst it is true that the plaintiff drew certain conclusions regarding the operation of the college that were not entirely correct, I do not believe that her motive for writing the letter of concern was motivated by anything other than the best interests of the defendant. There is no doubt in my mind that there was some tension between her and Dr Buys, the principal of the college. This tension between them caused the plaintiff to write the letter of concern to the Board. At the time she was also on the management committee of the defendant, whilst Mr Buys was the principal.

[23] I must state that my assessment of the plaintiff was that she was emotional at times during her evidence. She was subjected to crafty and lengthy cross-examination and my final impression of her was that she was a dedicated and diligent staff member of the defendant, who was motivated and concerned and believed that she acted in the best interest of the defendant at all times. Unfortunately she did not get along with the principal, which ultimately resulted in her leaving the defendant, albeit because she did not get the position of registrar of the college.

[24] Her evidence does not help me in determining the issues, which I have to determine as set out in paragraph 16 *supra*.

[25] From the evidence tendered I am of the view that the board had a duty to inform the staff and students of the outcome of its enquiry. For that reason what was stated at the devotion was stated in a setting of qualified privilege. The plaintiff submitted her letter of concern to the board and to the chairman and vice chairman of the SRC. She brought her concern to those persons she felt had an interest in the subject matter of the letter. Similarly when the investigation was completed the board was duty bound to reveal the findings of the commission of enquiry to the staff and students. I am therefore of the view that the announcement of that day falls within the defence of qualified privilege.

The devotion of 17 October 2007.

[26] What was actually said by the Rev. Mogale at the devotion on 17 October 2007 falls to be determined by the opposing evidence of the Rev. Mogale and that of Mr Kgatle. In this

regard the evidence presented of their respective versions becomes of pivotal importance.

[27] The Rev. Mogale was the vice Chairman of the board at that stage. He was entrusted with the task to convey the board's mandate referred to in para [15] *supra*. His evidence was that he, together with Mr De Beer sat down and formulated what he was going to say to those assembled at the devotion. He wrote down what he intended to say and noted it down in three points, namely:

- (i) that the commission could not find any evidence to prove Sr Petra's claims;
- (ii) that it would serve no purpose for the staff or students to discuss the matter any further with Sr Petra or to have contact with her;
- (iii) that the Board found that Sr Petra would no longer have access to the College.

During cross-examination the Rev. Mogale denied that he ever used the word 'refuted' as suggested in paragraph 4.5.3 of the plea, to the effect that:

" 4.5.3 The essence of the findings of the commission is that all the accusations of the plaintiff were refuted."

The plea was dated 15 June 2009. The Reverend Mogale testified that he only spoke to defendant's counsel for the first time about a month prior to the trial.

[28] During cross-examination the Rev. Mogale repeatedly stated words to the effect: "*that I cannot remember*". These words are hardly surprising considering that he had to testify about something he said more than 3 years prior to testifying. In this regard I am alerted to what Nienaber JA in the *Martel* matter, which is referred to *supra*, stated at para [1],

" *Recollection can be fallible. And in business the failure to confirm an event promptly and on paper can be fatal...*"

Or as was stated in another matter: "*memory like a mistress is often unfaithful*".

The Rev. Mogale was asked during cross-examination whether he ever used the word "substantiate" during the devotion. He responded by saying: "I don't remember using that word". Notwithstanding the aforesaid it was put to him by opposing

counsel that when Mr Kgatle gave evidence he (being the Rev. Mogale) had told them that " that there was no evidence to substantiate Sr. Petra's complaint".

[29] Mr Kgatle testified that he was the vice-chairman of the SRC. He graduated at the college and did not receive any books when he graduated; the relevance hereof being that a donor had given the college monies in order to purchase books. These books should have been given to the graduates. One of the complaints in the letter of concern which the plaintiff addressed to the board was the unauthorised utilisation of trust funds in respect of the running of college. This complaint was conceded as being valid by both Dr Coetzee and the Rev. Mogale.

[30] Mr Kgatle stated that the letter of complaint was sent to the SRC. He gave evidence regarding what the Rev. Mogale said at the devotion- see para [9] above. He stated that there were between 25 and 30 people at the devotion which consisted of students and staff. He stated that he was shocked to hear that Sr Petra's accusations were false and wrong.

[31] Mr Kgatle reported what was said at the devotion to Sr Petra subsequent to the graduation held during March 2008. He was requested to depose to an affidavit regarding the devotion and what was said, which he did on the 22 May 2008, seven months after the devotion. This must be contrasted to when the Rev Mogale was requested to revisit the issue; some 3 years later.

[32] Mr Kgatle impressed me as a witness; he was adamant and categorical regarding what was said at the devotion and he gave a clear account of what happened prior to the devotion. The Rev. Mogale on the other hand could not remember many things. Thus, regarding what had been said at the devotion must be examined on the probabilities. In my view the probabilities favour the view presented by Mr Kgatle, as opposed to the view presented by the Rev Mogale. Having said that I must emphasize that I am not suggesting that the Rev. Mogale was not being truthful with the court. In my view it is hardly surprising for a person to recollect with absolute accuracy what he or she said after a three year interval. In my view the Rev. Mogale was paraphrasing what he said when he testified under oath. He did not have the notes that he used at the devotion. Furthermore what was stated in the plea did not accord with his oral evidence.

[33] This raises the question whether the Rev. Mogale deliberately used the words which Mr Kgatle said he used at the devotion. I do not believe that this was done with malice aforethought.

[34] It is incumbent on me to examine the words which Mr Kgatle stated were used at the devotion. I repeat those words which appear at para [9] above, namely:

After a thorough investigation the Board of Control has concluded that all the allegations raised by Sr Petra were false.

The evidence of Dr Coetzee and the Rev. Mogale was to the effect that the complaint regarding trust funds, or “cross funding” as it was referred to, had some merit, as did the complaint relating to the manner in which the registrar was appointed.

[35] In *Borgin v De Villiers* 1980 (3) SA 556 (A) at 578H – 579A Corbett JA stated:

“ The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though

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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... but the truthfulness or otherwise of the statement has no bearing on whether they were germane to the occasion or not .”

[36] I have found that the defendant was entitled to make a statement, as it was duty bound to inform its staff and students of the findings of the board of enquiry. What must be examined is what the message was that was conveyed to the staff and students at the devotion. Mr Pretorius submitted in his heads of arguments that the defendant had not mandated the Rev. Mogale to use the alleged words which Mr Kgatle testified to. It was submitted that the Rev. Mogale may have been remiss. He was however not a party to the dispute. This argument has substance, however the plaintiff sought an amendment after the defendant's heads of argument were filed. – See: para [7] above. The plaintiff thereby sought damages based on vicarious liability.

[37] I must examine the words that were used. In *Sandani v Van der Merwe* [2002] 2 All SA 311 (SCA) where the court stated:

“ That the meaning of the statement under consideration does not necessarily correspond with its dictionary meaning. The test to be applied is an objective one. In accordance with objective test, the question is what the reasonable reader of ordinary intelligence would attribute to the statement in its context ”

See : *Udwin v May* 1981 (1) SA 1 (AD) at 11B

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The words to both staff and students to the objective person such as Mr Kgatle could only mean that the allegations made by the plaintiff was dishonest or untruthful.

[38] In my view those words invariably affected the plaintiff's reputation and good name, and she was accordingly defamed.

[39] This then brings me to the determination of the damages that the plaintiff should be awarded. The plaintiff claimed an amount of R200 000,00 in her particulars of claim. Mr Da Silva in his heads of argument submitted that a proper award would be in the sum of R100 000,00.

Mr Pretorius on the other hand submitted that if any damages were to be awarded an amount of no more than R15 000,00 should be awarded.

[40] I was referred to diverse decisions dealing with the question of quantum. I do not propose to refer to them in this judgment, however this should not be construed to mean that I have not considered these judgments. The awarding of damages in such matters depends on several factors, which include but are not limited to the nature of the defamatory statement, the extent of its publication, the reputation of the plaintiff and the motive of the defendant.

[41] The statement was made to no more than 30 people. It was restricted to merely the staff and students of the defendant. It is not as if the publication was circulated to thousands of readers. I do not believe that the defendant instructed the Rev. Mogale to use the words that were uttered. The plaintiff succeeded in its claim on the grounds of vicarious liability as the statement was made by the chairman of the Board of the defendant.


[42] The plaintiff on the other hand belonged to a theological organization where honesty and integrity are, in my view rightly considered to be the pillars of one's reputation. To that extent the impression created by the statement made was that she was dishonest and could not be believed, to the extent that no

student or staff would henceforth associate with her or would think twice before associating with her and trusting her word. She was proverbially “sent to Coventry”. This is a factor I should consider in the determination of damages. On the other hand the defendant has to this date failed to proffer any apology to the plaintiff.

[43] in my view, having considered the cases in point, I believe the amount which Mr da Silva suggested is too high, whilst on the flip side of the coin the amount recommended by Mr Pretorius is rather conservative. It is my considered opinion in the circumstances that a fair and appropriate award for damages would be R50 000.00.

[44] Accordingly I make the following order:

- (i) The plaintiff's action succeeds;
- (ii) The defendant is ordered to pay the plaintiff an amount of R50 000 as damages;
- (iii) The defendant is ordered to pay the plaintiff's cost of trial on the magistrate's court scale.



Ismail J

Appearances:

For the Plaintiff : Adv Da Silva SC instructed by Scholtz
Attorneys , Hatfield Pretoria.

For the Defendant: Adv Pretorius SC instructed by Jordt
Attorneys, Brooklyn, Pretoria.

Judgment delivered on: 26 January 2011