

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 67069/15

In the matter between:

JACOBUS CLAASSENS

26/5/2017  
Plaintiff

And

ENGELA SWART

Defendant

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JUDGMENT

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BAM J

Appearances:

For Plaintiff: Adv. D du Plessis SC

For Defendant: Adv. R Arcangeli.

1. The plaintiff issued summons against the defendant claiming damages in the amount of R500 000, 00 for defamation. During the trial Mr du Plessis successfully applied for an amendment of plaintiff's particulars of claim by substituting the initial amount claimed, with R50 000, 00 and, adding a prayer that defendant should be ordered to apologise to the plaintiff. The amendment was not opposed.
2. In his particulars of claim the plaintiff alleged that on 26 June 2015, in the presence of two other people, Mr Jan Nel and Mr Russel Lee, the defendant made statements concerning the plaintiff in that the plaintiff is dishonest, a thief, steals other people's money, and that defendant would "take him out".

3. The defendant, on the other hand, pleaded that on the day of the incident, she was confronted by the plaintiff in a very aggressive way, that a conversation took place, which *"more or less"* went as follows:

*" Plaintiff:                Wie is jy, ek ken jou nie?*

*Defendant:                Ek is jou buurvrou van Nicolson Straat waar jy oornag borde opslaan.*

*Plaintiff:                 Jy is mal jy weet nie waarvan jy praat nie.*

*Defendant:                Jy weet goed genoeg, jou skelm geslepe boef."*

4. It was common cause that the parties were neighbours, and that plaintiff, at the time of the incident, rezoned his property, which is adjacent to that of the defendant, with the intention to develop it by building several other units on it. It was further common cause that the defendant, when she learnt of the development, was aggrieved by the conduct of the plaintiff.
5. The plaintiff testified and called three witnesses in support. The defendant was the only witness.
6. The plaintiff formerly practiced as an attorney, but, after leaving the practice, he became involved in several other business ventures. At the time of the incident he was, amongst others, a property developer. One of the properties he intended to develop was his private property, adjacent to that of the defendant. A few days before the incident, one of the other neighbours informed him that the defendant, whom he knew, was very much aggrieved by his intended development. On the day of the incident, at another property development site of the plaintiff, in Kirkness Steet, Pretoria, opposite Loftus Versveld, he was in the company of two business associates, his advisor and auditor for many years, Mr Nel, and his project manager, Mr Lee. Whilst still inside a

building, on the first floor, the plaintiff noticed the defendant driving past, then turned about further on in the street and returning to the building where he was. He and his two companions then went down to the street level. According to the plaintiff he anticipated that the defendant was looking for him. On the side walk in front of the site, he was confronted by the defendant. She was very emotional. Whilst poking her finger at his face she accused him of being dishonest, that the world should know about it, and that she was going to take him out. He felt very embarrassed about what she said and even considered whether he should hit her, and did not know what to say. Her ranting went on for a minute or so and she then walked away. His two companions did not know what it was all about. He said he thought that they were shocked. Afterwards he had to explain to them what the confrontation was all about. He could not say whether the two other men laughed in the face of the defendant. He was shocked by the incident, more so because it was in front of his auditor. He testified that he was very humiliated and wanted to lay a criminal charge against the defendant.

He referred to his letter of demand, dated 29 June 2015, directed to the defendant by his attorneys and the defendant's response thereto. In this response the defendant tendered R2000 for the defamatory words and R3000 for costs. Plaintiff rejected the offer made by the defendant.

He testified that he wanted to defend his name and that the defendant did not tender any apology.

It appeared from his evidence that the plaintiff was mostly aggrieved by the lack of any apology by the defendant. I will later, in some detail, again refer to these two documents.

During cross examination by Mr Arcangeli, he conceded that the proposed development of the property adjacent to that of the defendant would have caused the defendant's property value to diminish. He denied that he was even in Pretoria when the notice boards of the development were erected at his property. He conceded that the defendant was emotional at the time of the incident.

In respect of the defendant's version he said he did ask her who she thought she was to confront him in such a manner. He said that if somebody did laugh at the defendant, it would have been because the whole incident was humiliating. He again repeated that what he wanted was an apology to him and his colleagues.

7. Mr Russell Lee, the plaintiff's project manager, confirmed that he was present during the incident. The plaintiff and his family are well known to him for the past 24 years. He stated that the defendant pointed her finger at the plaintiff's face and said he is a "*skelm*" in planning to erect a monstrosity close to her premises. He knew about the planned erection of the building. It was clear to him that she was very unhappy about the situation. She also added that she would take him out and that she would report him to SARS. He said what the defendant actually did was to speak close to the plaintiff's ear and that he did not hear everything. He did not laugh though, it was actually shocking.
  
8. Mr DS van Vuuren is a neighbour to both parties. Defendant was very upset by the plaintiff's intended development. He said he appreciated that because the defendant's home is directly behind that of the plaintiff. He said he was also unhappy with the situation. He phoned the plaintiff and told him that defendant was upset before the incident.
  
9. Mr Jan Nel, the plaintiff's auditor, stated that he knows the plaintiff very well, for about 30 years and that he is the plaintiff's auditor for the past 10 years. He stated that the plaintiff was an attorney before and that he is an honest and reliable person. On the day of the incident he was surprised when the defendant confronted the plaintiff "*met redelike sterk taal.*" The defendant said the plaintiff was a "*groot dief – jy rig borde in die nag op.*" He said if he remembered correctly, the plaintiff tried to calm her down, but the defendant was angry. Mr Nel did not know what this was all about. She was rude and also said that she would take him out.

During cross examination he conceded that he could have laughed, but added that it would then have been a nervous or embarrassed laugh. Afterwards plaintiff explained to him that the confrontation was all about the development at his premises.

He understood that the defendant meant that the plaintiff was "*skelm*" because the plaintiff erected the notice boards of the intended development during the night.

10. The plaintiff's letter of demand, to which I have referred to above, appears on pages 43 and 44 of plaintiff's bundle. The contents speak for itself, and I deem it expedient to refer to but a few relevant paragraphs.

Paragraph 4:

*"Wat betref die kwessie dat u, u vinger in ons kliënt se gesig gedruk het is ons van mening dat u deur daardie handeling ons kliënt aangerand het met die doel om ernstig te beseer, 'n optrede wat 'n kriminele daad daarstel. Ons het ons kliënt geadviseer dat hy 'n klagte by die Polisie aanhangig moet maak sodat die Polisie die klagte kan ondersoek."*

Paragraph 5:

*"Ons het egter instruksies van ons kliënt dat hy nie die Polisie by die aangeleentheid sal betrek tensy u skriftelik onderneem om hom nie aan te rand, waarookal u hom sien nie, en skriftelik omverskoning aanbied oor u onredelike optrede."*

Paragraphs 6 and 7 deal with the alleged defamation and the demand that the defendant should in any event pay damages to the plaintiff in the amount of R500 000, 00.

Par 8 addresses the so called intimidation by the defendant which resulted in advice by the plaintiff's attorney that he should, in that respect, also lay a criminal charge against the defendant for intimidation. This paragraph further mentions that the plaintiff considers

to safeguard himself and his family against "*moontlike aanvalle wat u teen hom mag loods.*"

11.The defendant's reply to the demand is of importance. In this response, a letter written by defendant's attorney dated 3 September 2015, page 45 of the bundle, without making any admissions, an all-in amount of R5000,00 was tendered to the plaintiff, in full and final settlement of the matter, and in order to avoid further costs. This offer was rejected by the plaintiff and summons was issued in the High Court.

12.The defendant's version differs somewhat from that of the plaintiff. She admitted that she was upset when she noticed that the plaintiff has erected the notices of the intended development at his premises next to her home. The proposed development would have included the erection of a three story building. This would have materially, and negatively, affected the value of her property. Her enquiries to the City Council came to nothing. On the day of the incident she went to the site in Kirkness Street, where she knew the plaintiff was erecting a similar building than the one he intended to build on his own premises, in order to photograph the building. She did not know that the plaintiff would be present, but she saw him in the company of two other men. The plaintiff bumped into her and a confrontation ensued. She admitted that she called him a "*skelm en 'n geslepe boef*" and that she added that she would take him out at SARS. The reason why she insulted him was because one of the men was laughing at her and that she was humiliated.

During cross examination she apologised to the plaintiff (who was present in court.) She said what she meant when she said the plaintiff was "*skelm*" is that it must be seen in the context that he erected the notices of the intended development during the night. She denied that

she screamed in the plaintiff's ear and that she poked her finger into his face.

13. During argument Mr du Plessis submitted that defendant clearly, even on her own version, by publishing the admitted offending words, deliberately defamed the plaintiff. Mr Arcangeli argued that defendant did not have the required intent to defame the plaintiff. I agree with Mr du Plessis' submission, the defendant indeed acted wrongfully and defamatory. The defamatory words were indeed published. The fact that the offending words were uttered in the presence of only the plaintiff's associates, Mr Nel and Mr Lee, whose estimation of the plaintiff was clearly not affected at all, surely affects the quantum. (The evidence that there were labours in the area at the time, moving about, is of no consequence.) However, in my view, taking into consideration all the circumstances, what happened in any event only marginally passes the requirements of the delict of defamation. See *PRINCIPLES OF DELICT*; Jonathan Burchell, p164.

14. In respect of *quantum* both counsel referred to a number of decisions of which I did take notice. However, as I have pointed out to counsel, in matters of this nature, it is more important that each case should be considered on its own merits.

15. In my view the following aspects play a major role:

The plaintiff is an experienced business man, who has previously practised as an attorney. Although it is unacceptable that plaintiff should have been accused in the presence of other people to be dishonest and a scoundrel, it must be kept in mind, that the defendant acted in anger and was emotional at the time. It is further significant that even Mr van Vuuren, the plaintiff's third witness, testified that he appreciated that the defendant could have been upset by the circumstances and that he himself was upset. What is also of importance is that the other two

witnesses of plaintiff, Mr Lee and Mr Nel, did not testify that the defendant's remarks influenced their estimation of the plaintiff's character and that his reputation was injured at all. The plaintiff also anticipated the confrontation. On the day of the incident he appreciated that the defendant was seeking a confrontation and could have avoided it. What is further remarkable is that the plaintiff, primarily, sought an apology from the defendant.

The plaintiff was clearly affronted by defendant's conduct, but, in my view he over-reacted. This is of major concern. According to the defendant, and this has the ring of truth, the plaintiff, at the time of the incident, remarked that she was mad. This, *per se*, was defamatory. (In remarking about these words I do not intend to convey that I believed everything the defendant said.) What followed thereafter is further a matter of concern. The letter of demand informed the defendant that the plaintiff was advised to lay a criminal charge against her for assault to do grievous bodily harm. Taking into account that the plaintiff is a qualified attorney, this threat, to say the least, was ridiculous and could have been nothing else but an attempt to intimidate the defendant, and to cause her unjustified trouble.

The plaintiff, complaining of defamation clearly retaliated in kind.

There was further no need for the plaintiff to even consider protecting himself or his family from any contemplated violence by the defendant. The attitude of the plaintiff in that regard was, to say the least, as referred to above, an over re-action and not justified.

What is also disconcerting is the demand for payment of half a million Rand. Mr du Plessis was unable to explain why this claim was instituted in the High Court and not in the Magistrate's Court. It was therefore not surprising that the particulars of claim were amended. Instituting a claim of this nature, taking into consideration the objective facts and the plaintiff's own version, did not demand the attention of the High Court.


Finally it has to be taken into account that despite the defendant's attempt to settle the matter, in an amount that seems to have been reasonable in the circumstances, the plaintiff, instead, elected to drag the defendant to the High Court.

16. In conclusion, although the plaintiff has to succeed with his claim, concerning the amount of damages, I am of the view that an award of R2 000, 00 will suffice. The defendant has already apologised in court, and no order in that regard is called for.

17. The issue of costs brings me to issues and considerations already referred to, why this claim, which seemed to be not much more than a storm in a tea cup, deserved the attention of the High Court. Why the claim was not instituted in the Magistrate's Court and why it was necessary to force the defendant to incur unjustified costs in the High Court, is a major concern, and seems to be an absolute abuse of procedure. I will pronounce this court's displeasure in that regard in the following order.

#### ORDER

1. Plaintiff succeeds with his claim for damages.
2. Plaintiff is awarded the amount of R2 000, 00.
3. Plaintiff is ordered to pay the defendant's taxed costs, incurred by being represented by counsel in the High Court on the date of trial, 22 May 2017.



A J BAM JUDGE OF THE HIGH COURT

26 May 2017