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

CASE NO: 27518/2021

HEARD: 14 – 15 MARCH, 27 OCTOBER 2023, 23 JANUARY, 07 OCTOBER & 26 NOVEMBER 2024
DECIDED:12 MARCH 2025

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

12 March 2025

In the matter between:

SELLO ISAAC MAKHAFOLA Identity Number: 7[…]	Plaintiff
And	
ESCHEL HEIN WIESE	First Defendant
WIESE & WIESE ATTORNEYS & COST CONSULTANTS	Second Defendant

TRANSUNION ITC Third Defendant

EXPERIAN INFORMATION SOLUTIONS INC. Fourth Defendant

This judgement has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 12 March 2025.

ORDER

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1. The plaintiff's case is dismissed;
2. Each party pays their own costs.

JUDGMENT

BAM J

Introduction

1. This is a claim for damages arising from a publication of an alleged defamatory matter. The plaintiff, an attorney and officer of this court, alleges that the first to the fourth defendants, unlawfully and intentionally published false and malicious information to the effect that he was indebted to the first and second defendants in the amount of R11 467. As a consequence of the defendants' conduct of publishing his name in the various credit bureaus, the plaintiff claims

his good name has been injured, his reputation was violated, and so were his rights to dignity, trade, occupation, property and housing. He seeks damages in the amount of R 6 712 000.00 (Six Million Seven Hundred and Twelve Thousand Rand) from the first to the third defendants, in respect of the alleged injury caused to his name, loss of rentals arising from a contract of sale that fell through, and constitutional damages.

2. The defendants deny liability. The first and second defendants, whom I shall for convenience refer to as W&W, deny acting unlawfully with malicious intent. They deny publishing any information about the plaintiff. They say that the judgment they obtained against Stoltz Inc. cannot reasonably be construed as a judgment against a natural person, much less a judgment against the plaintiff. W&W further submit that the plaintiff failed to lead evidence of the alleged injury to his name and further failed to establish the causal link between their conduct and the alleged listing. The third defendant denies publishing any defamatory matter or statement about the plaintiff. They deny having acted wrongfully with malicious intent. The third defendant says, bar the common cause fact that the judgement was listed on the plaintiff's profile between 18 March 2018 to 10 July 2019, the plaintiff has simply failed to make a case to sustain his cause of action and failed to lead any evidence regarding his damages. The fourth defendant took no part in these proceedings.

Parties

3. The plaintiff, Mr Sello Isaac Makhafola, is a male legal practitioner and an officer of this court. He practices for his own cause under the name and style, Makhafola & Verster Incorporated. His address is recorded in the papers as Francis Baard, Pretoria.

4. The first defendant is Eschel Hein Wiese, a male legal practitioner and an officer of this court. He practices under the name and style Wiese and Wiese Attorneys and Cost Consultants. His address is recorded as Stanza Bopape,

Hatfield, Pretoria. The second defendant is Wiese and Wiese Attorneys and Cost Consultants with the same address as the first defendant.

5. The third defendant is Transunion Credit Bureau (Pty) Ltd, a private company duly incorporated in terms of South African laws with its principal place of business located at Wanderers Office, Collet Drive, Illovo. The third defendant is a registered credit bureau as envisaged in section 43(1) of the National Credit Act[1] (NCA). I refer to the first and second defendants collectively as W&W and specify where necessary. The plaintiff testified in his own case. The first and second defendants called Mr Wiese, while the third defendant led Ms Joline Diana Rahim, a data compliance officer who has been in the employ of the third defendant for nineteen years and deals with disputes relating to consumer credit profiles.

Background

6. Evidence led during the trial established that sometime during 30 May 2018, in the course of conducting his annual credit check by way of a telephone call, with the third defendant, the plaintiff learnt of a judgment granted against him in favour of W&W for the amount of R11 467. Upon his request, he was furnished with copies of the summons, return of service, and request for default judgment pertaining to the listing. At that very point, the plaintiff and the person who was assisting him, a lady by the name Muriel, in the employ of the third defendant, realised the bungling up that had led to the listing of the judgment against his name. The details for present purposes may be summarised thus:

> 6.1 During 2017, in the process of preparing a summons against two individuals, Stoltz Incorporated Attorneys, (Stoltz Inc.) and a certain Johan Stoltz, in a lawsuit that had no connection with the plaintiff, a candidate attorney at W&W, using a template of a summons with the plaintiff's name and identity number, inadvertently failed to remove the

[1] Act 34 of 2005.

plaintiff's identity number, resulting in Johan Stoltz being cited with the plaintiff's identity number. As to how W&W came to be in possession of the plaintiff's identity number, it was common cause that W&W had once issued a summons to be issued against the plaintiff, in 2015, in respect of an unpaid debt that was due to them. This matter was eventually resolved between the plaintiff and W&W during 2017.

6.2 Following a request for default judgment against Stoltz Inc. and Johan Stoltz, the court authorised judgment only against Stoltz Inc during February 2018. The court was not satisfied of the effectiveness of service against Johan Stoltz.

6.3 There occured a further error in the process of capturing the judgment details from the court file, for purposes of uploading on a portal accessed by credit bureaus. That error, it was common cause, occured by the hand of a third party by the name of e4 Strategic, whom is not connected to any of the parties presently before this court. As a result of that error, the judgment which should have been recorded against Stoltz Inc., was recorded against the person of Johan Stoltz. As the plaintiff's identity number was included in the summons as the identity number of Johan Stoltz, the judgment featured in the plaintiff's profile as a judgment against him.

7. During their conversation, Muriel offered to transfer the plaintiff to the department that deals with consumer complaints known as JudgeConfirm. It would appear that the plaintiff did not take up the offer. However, upon receipt of the information relating to the judgment[2], the plaintiff immediately caused a letter to be issued to W&W asking for the very same information. After much confusion[3], the plaintiff ended up furnishing W&W with the details of the

[2] Copies of the summons, return of service and request for default judgment.

[3] W&W, not realising the error pertaining to the plaintiff's ID, initially maintained they had taken judgment against the plaintiff only in case number 36833/15 (This was a judgment pertaining to

judgment. With the necessary information in hand, W&W took up the matter with Transunion, making repeated phone calls to resolve the matter. They were informed by Transunion that the judgment had been removed from the plaintiff's profile, on 10 July 2019. What further became clear is that while the plaintiff exchanged correspondence with W&W complaining about the judgment, he was alive to the listing of two further judgments in his profile, in favour of Massmart in the amount of R115 000, and a further judgment in favour of SAB.

Applicable legal principles

8. The elements of a claim founded on defamation were espoused by the Constitutional Court in *Le Roux and Others* v *Dey* as:

> '(a) the wrongful and
> (b) intentional
> (c) publication of
> (d) a defamatory statement
> (e) concerning the plaintiff.'[4]

9. The court in *LeRoux* further noted that the plaintiff need prove only the publication of a defamatory matter concerning themselves. Once the plaintiff has succeeded in proving publication, it is presumed that the statement was both wrongful and intentional. In order for the defendant to avoid liability, he must first plead and prove facts that are sufficient to establish his defence which must exclude either wrongfulness or intent. The onus placed on the defendant is a full onus which must be discharged on a preponderance of probabilities[5].

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interests and costs and it was resolved. At the time of receiving the plaintiff's letter, W&W were not aware of their mistake in the Stoltz Inc. and Stoltz case, case number 23516/17.

[4] (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) (8 March 2011), paragraph 84.

[5] Id, paragraph 85.

Publication is described as the act of 'communication or making known to at least one person other than the plaintiff. It may take many forms.'[6]

Establishing the meaning of the statement

10. The question whether a statement or article is defamatory in its ordinary meaning, involves a two-stage enquiry[7]. 'The first is to establish the natural or ordinary meaning of the article. The second is whether that meaning is defamatory.'[8] In order to establish the meaning, the court applies the standard of a reasonable reader of ordinary intelligence and asks what meaning such reader would ascribe to the statement[9]. The reasonable reader, it is accepted, would read such statement with the context and would have regard to not only what is expressly stated but what is implied[10]. The second stage is concerned with whether the meaning established through stage one is defamatory. In this regard, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which they are held by a reasonable person to whom it is published. In this regard, the following falls to be noted:

> '(a) Because we are employing the legal construct of the "reasonable", person, the question is whether the statement was "calculated [in the sense of likelihood] to expose a person to hatred, contempt or ridicule". The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff.
>
> (b) If it is found that the statement is ambiguous in the sense that it can bear one meaning which is defamatory and others which are not, the courts apply the normal standard of proof in civil cases, that is, a preponderance of probabilities. If the non-defamatory meaning is more

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[6] Id, paragraph 86.

[7] *Sindani v Van Der Merwe and Others* (212/2000) [2001] ZASCA 130; [2002] 1 All SA 311 (A); 2002 (2) SA 32 (SCA) (27 November 2001), paragraph 10.

[8] ..

[9] Footnote 5, paragraph 89.

[10] ..

probable, or where the probabilities are even, the plaintiff has failed to rebut the onus which he or she bears. Consequently it is accepted as a fact that the statement is not defamatory.'[11]

Wrongfulness

11. The enquiry into wrongfulness, as said by the court in *Loureiro and Others* v *iMvula Quality Protection (Pty) Ltd*,

> '[I]s determined by weighing competing norms and competing interests. Since the landmark Ewels judgment, whether conduct is wrongful is tested against the legal convictions of the community. These now take on constitutional contours: the convictions of the community are by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution[12]…'

12. As regards malicious intent, the court in *Tuch and Others* v *Myerson and Others* reasoned that malice is a state of mind, subjective in nature, and often has to be inferred from intrinsic or extrinsic facts[13].

13. Finally, a plaintiff who seeks to recover special damages arising from a defamatory matter must allege and prove the elements of liability under an aquilian action. This the court affirmed in *Media 24 Ltd and Others* v *SA Taxi Securitisation (Pty) Ltd*:

> '[T]he rule of our law, in principle, is that patrimonial damages must be claimed under the actio legis Aquiliae, while the actio iniuriarum and its derivative actions, including the action for defamation, are only available for sentimental damages. In theory, the person injured by a defamatory publication would therefore have to institute two actions: a defamation action for general damages and the actio legis Aquiliae for special

[11] Footnote 5, paragraph 91.

[12] [2014] ZACC 4, paragraph 34.

[13] *Tuch and Others v Myerson and Others* (447/08) [2009] ZASCA 132; 2010 (2) SA 462 (SCA) ; [2010] 2 All SA 48 (SCA) (30 September 2009), paragraph 13.

damages… [9] …What this means, of course, is that a plaintiff who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the Aquilian action.'[14]

Absolution from the instance and the legal principles

14. The principle is captured in the Supreme Court of Appeal case of *De Klerk* v *Absa Bank Ltd and Others* and it states:

'"...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'…absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'[15]

15. At the end of the plaintiff's case, the defence counsel applied for absolution from the instance. That application was refused. I had undertaken to provide reasons at the end of the matter and I do so now. The question that must guide the court in determining whether to grant absolution from the instance is whether the plaintiff had made a *prima facie* case on which the court could, not would, find for the plaintiff. This question must be answered with the interests of justice in mind. Given the facts conceded in the defendant's pleas and the evidence tendered by the plaintiff, the court was of the view that a *prima facie* case had been met. On that basis, the application was refused.

The meaning of the publication

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[14] (437/2010) [2011] ZASCA 117; 2011 (5) SA 329 (SCA); [2011] 4 All SA 9 (SCA) (5 July 2011), paragraph 8-9.

[15] (176/2002) [2003] ZASCA 6; [2003] 1 All SA 651 (SCA); 2003 (4) SA 315 (SCA) (6 March 2003), paragraph 10.

16. In this analysis, it will be demonstrated that the plaintiff failed to prove that W&W published the judgment against him. For present purposes, I shall assume in favour of the plaintiff that the act of filing for default judgment amounts to publication. During cross examination, the plaintiff accepted that judgment was granted against Stoltz Inc. He further conceded that a reasonable reader would in all likelihood not understand the judgment as referring to the person of Johan Stoltz, much less the plaintiff. To these concessions must be added the concession that as early as 30 May 2019, the plaintiff was aware that the error in capturing the judgment as referring to the person of Johan Stolz (whereas the judgment was granted against Stolz Inc.) was made by e4 Strategic, a person not cited in the present proceedings. On these concessions, the allegations in the particulars of claim that the published matter of default judgment against Stoltz Inc. conveys that the plaintiff is indebted to W&W, is unable to pay his debts, and not worthy of credit, must consequently fail.

Whether the publication is defamatory of the plaintiff

17. Despite having conceded that the default judgment was granted against Stoltz Inc, the question must still be asked whether the publication of the default judgment against Stoltz Inc. was calculated to expose the plaintiff to ridicule, contempt or hatred. I emphasise here that the test is whether it is more likely (in the sense of more probable than not)[16] that the publication of the default judgment would harm the plaintiff. In the event the court finds the publication to be ambiguous, then the civil standard of proof, i.e the preponderance of probabilities must be applied. In that event, the plaintiff would have failed to prove that the article/statement/default judgment as it stood at the time, is more likely to harm him.

18. Here we have a request for default judgment sought against two individuals but ultimately granted against one, the firm Stoltz Inc. Through the

[16] Footnote 11.

error that has been canvassed elsewhere in this judgment, the judgment was erroneously recorded against the plaintiff. Both W&W and Transunion pointed out that the plaintiff had deliberately disregarded the fact that there were, even at the time of discovering the W&W judgment, always three judgments, namely, the judgment in favour of W&W, that of Massmart and SAB. The plaintiff testified that where a person lists another on the credit bureau, the effect is to render the listed person uncredited worthy as would be credit granters would see the person listed as a risk.

19. When asked why the Massmart judgment, which was rescinded as far back as 30 April in 2020, and SAB judgment of 2016, which has never been paid, which continue to show randomly in his profile, posed less risk as opposed to W&W judgment, his response was that a judgment taken four years ago would pose less risk than a freshly listed judgment. This is incorrect. The plaintiff's own testimony showed that the institutions he had contacted enquiring about credit facilities referred to all three judgments as an impediment to granting credit facilities. To this end, FNB (in March 2020), Nedbank (in August 2021) and Vox (in November 2021), all three institutions referred to **judgments** listed against the plaintiff's name and not merely the judgment concerning W&W.

20. In summation, the Massmart judgment, notwithstanding the rescission, featured in the plaintiff's profile, at exactly the same time he began querying the W&W judgment. The plaintiff further conceded that the SAB judgment, relating to a matter in which he stood suretyship, had never been paid. I accordingly conclude in these circumstances that the plaintiff failed to prove that the judgment aimed at Stoltz Inc. which was erroneously captured against his name, caused him harm.

21. I need add on the question of the allegation that the defendants acted with malicious intent that the evidence led by all three defendants and accepted by this court negates the conclusion that they acted with malicious intent. I commence with the evidence led by the third defendant through Ms Rahim. Ms

Rahim was taken through the plaintiff's profile which recorded his interactions with the third defendant as of 30 May 2019.

22. Ms Rahim, using documented evidence of screen grabs, testified about the plaintiff's interactions from 30 May. The system showed that each of the interactions the plaintiff had with Transunion were documented. That is not all, she further demonstrated that as of 10 July 2019 the judgment was no longer listed on the third defendant's screens. Moreover, other than the enquiries made by the plaintiff himself and the intervention of W&W resolving the erroneous judgment, no one had made enquiries regarding the plaintiff in a period of 24 months, calculated up to the date of the hearing in 2024. There was no record of any of the credit providers mentioned in paragraph 19 of this judgment making enquiries regarding the plaintiff.

23. Ms Rahim's evidence was not disturbed during cross examination. Consequently, this court accepts her evidence. To conclude on the question of the alleged malicious intent, the promptitude with which the third respondent acted as soon as the error was brought to its attention, undermines the claim that it had maliciously intended to harm the plaintiff.

24. W&W stand on the same footing as the third defendant on the question of the alleged *animus injuriandi*. From the plain meaning of the papers they had prepared in pursuit of the action against different parties and to their prompt and active participation in ensuring that the error was addressed without delay to their constant relaying of information regarding their interactions with the third defendant to the plaintiff, there is simply no evidence of malicious intent.

Special damages claimed by the plaintiff

25. Not only did the plaintiff fail to plead the elements necessary to found liability on an aquillian action, he led no such evidence. This closed the door to the plaintiff seeking any special damages in these proceedings.

Constitutional damages

26. Having made no attempt to satisfactorily prove its case for sentimental damages and damages founded on an aquillian action, the question is whether the plaintiff can realistically claim constitutional damages. The short answer must be 'No'. Also, when considering constitutional damages, two overarching considerations come to the fore. They are, whether an alternative remedy exists to compensate the plaintiff for the alleged transgressions of his rights and whether such remedy is adequate or appropriate given the circumstances of the case[17]. These questions do not arise in the circumstances of this case.

Conclusion

27. The conclusion I reach is that the plaintiff has failed to prove his case in its entirety. There remains the question of costs. Evidence led during the trial demonstrated adequately that the plaintiff acted with frivolity in bringing this lawsuit. This is so because right from the onset, the plaintiff knew what had happened. He received co-operation from all the defendants. Indeed, Experian, against whom the plaintiff seeks no relief, did more than the three defendants. The third defendant had offered to refer the matter to JudgeConfirm from the onset in order to resolve it as the papers furnished to the plaintiff demonstrated overwhelmingly that an error had occured. It is not clear what the plaintiff did to pursue this avenue. What is clear, and based on his conversations with Muriel of the third defendant, the plaintiff saw this action as means to achieve his quest of making money out of the error caused by e4Strategic. But he failed to cite the very person who had caused the error.

28. The plaintiff conceded during cross examination that had he not withheld the necessary information from W&W, the matter could have been resolved

[17] *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* (CCT 136/20) [2021] ZACC 37; 2022 (1) BCLR 46 (CC); 2023 (1) SACR 14 (CC); 2023 (3) SA 329 (CC) (22 October 2021), paragraph 103.

within the blink of an eyelid. He conceded that with his background and familiarity in navigating the territory of credit bureaus, he was better placed to resolve the matter on his own. The plaintiff's conduct must be deprecated. This does not mean that the plaintiff is liable for the defendants' costs as each of the defendants had on their own version played some role in this mess.

29. As a start, the third respondent is charged, in terms of section 70(2)(c), with the duty to take reasonable steps to verify information reported to it. What could be more reasonable in the circumstances of this case than read the relevant information in the hands of the third defendant. This is the summons, the request for default judgment and the order finally granted by the Magistrates Court. It would not have occasioned any cost on the part of the defendant to read the documents in its possession. Had this been done, it would have been clear as day that there had been an error in capturing the judgment.

30. W&W used a previous template of a summons and sent it off to court without checking that the identity number ascribed to Johan Stoltz was the correct one. On their own version, W&W played a role in the plaintiff's predicament. I conclude that the interests of justice would be served with each party paying their own costs.

Order

1. The plaintiff's case is dismissed;
2. Each party pays their own costs.

N.N BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: **14 – 15 March , 27 October 2023, 23 January, 07 October & 26 November 2024**

Date of Judgment: **12 March 2025**

Appearances:

Counsel for the Plaintiff:	**Adv M.R Maphutha with him Adv A Seshoka**
Instructed	Makhafola and Verster Inc. Attorneys
Hatfield, Pretoria	
Counsel for First and Second Defendants:	**Adv S Davies**
Instructed by:	Wiese and Wiese Attorneys and Costs Consultants Lynwood, Pretoria
Counsel for Third Defendant:	**Adv M Tromp**
Instructed by:	Schüler Heerschob Pienaar Attorneys Highveld, Centurion Pretoria