IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Case No. 33/2007**

In the matter between

DASARATH CHETTY **Appellant**

and

JIMI ADESINA **Respondent**

JUDGMENT

Froneman J.

[1] The parties to this dispute are both academics. The appellant is a professor of sociology at the University of Kwa-Zulu-Natal ('UKZN') and the respondent a sociology professor at Rhodes University in Grahamstown. The appellant was president of the South African Sociological Association ('SASA') from 1998 to 2000 and the respondent held that office from 2004 to 2006. They had met professionally through SASA. They met again in court, when the appellant sued the respondent for defamation in the magistrates' court. The action was dismissed, hence this appeal.

[2] The action for defamation arose from an e-mail sent by the respondent to the appellant, as well as to persons on the e-mail distribution lists of SASA and the Africa Sociological Association, and to an individual at the Centre for Civil Society at UKZN on 3 February 2006. The respondent's e-mail was a response to an e-mail sent earlier that day in the name of the appellant to staff members at UKZN, addressed to

'the University Community', which bore the heading "Media queries related to the impending industrial action". This e-mail of the appellant was included at the end of the e-mail sent by the respondent to the various persons or entities referred to above.

[3] The contentious e- mail (including the appellant's e-mail to which it responds) reads as follows:

"Dear Dasarath
I write this open letter to you in my personal capacity as a sociologist not as President of the South African Sociological Association or the Interim Secretary-General of the African Sociological Association. I write it because *the e-mail below, referred to me by an acquaintance,* represents a grave and present danger to the essence of a university as an intellectual project and community –its very raison d'etre. As sociologists we bear unique responsibility to discern, ahead of time, the early stirrings of a virulent dictatorship – whether at the level of the state or civil society, or intermediate institutions such as a university. As university people we bear individual and a collective responsibilties(sic) to "be afraid", "to be very afraid", when we discern the beginnings of such social and political perfidies. It becomes particularly grave and an affront to our collective sense of duty when we ourselves become instruments of casual authoritarianism.
In this case *your e-mail to the staff of UKZN* is a matter of grave concern. If not in your functioning as the Executive Director of Public Affairs and Corporate Communications for the University of KwaZulu Natal at least in your daily functioning as a sociologist and, more gravely for us, in your position as face of our (South African sociological) community as the host association of the World Congress of the International Sociological Association (23-29 July 2006 in Durban) you owe us a duty. You owe the global sociological community. You owe us all a duty of not, willy-nilly, undermining our collective integrity and standing. While you can make your role distinction and claim that *your e-mail was sent as Executive Director*, you are nevertheless the Chair of our Local Organising Committee. Role distinction is not the same as split personality. As one of my predecessors as President of the South African Sociological Association, even such role distinction falls away. To have led our community and then be an agent of such a grave threat to the very essence of an intellectual community put all of us at risk. We bear a duty to point out when your action brings us into disrepute. This, *and the e-mail below*, is one such moment.
The essence of the e-mail (see below) sent to all the staff of UKZN at least in your name, if not drafted by you, is to impose a gag on an intellectual community. The *"would like to request" language* nonetheless, the essence is to lay an axe at the very root of what makes us a community of scholars. And I will come to the issue of language in a moment. What is particularly insidious about such casual imposition of a gag order is that this is a dispute between you (the "Management" of UKZN) and these same people (or at least many of them) over whom you purport to impose this gag. This is a trade dispute and you are basically telling the other party to the dispute that it could not – nay must not - talk to the media about issues that concern them and their social existence. In essence you reserve for yourself, the right to speak to the same media and create a monopoly of voice. As one may expect, members of the staff of UKZN are in danger of being cited for disciplinary action if they flout your gag order. This falls squarely within the tradition of the "corporatisation" of academia, which continues to do enormous damage [to] the university as a fundamentally collegial environment; driven by its essence as an oasis of liberty with regards to thought, research, and teaching. The verbalisation of thought is a continuation of the wholesome package. Debate and contestation are the essence of our community of scholars. You imperil that raison d'etre by this gag order. To deny the staff of UKZN, involved in a trade dispute with you, the right to freely express their opinions on the trade dipute is to put yourself beyond the pale.
Let me end on the note of language and how the root of casual authoritarianism seems to be surviving. I have before me a copy of the ban order that the Government of the Republic of Transkei issued against Clarence Mlamli Makwetu on 7 December 1976; it carried the signature of KW Matanzima. CM Makwetu was asked by Matanzima to "immediately withdraws (sic) together with your wife, children and household effects from the said area in the said district (Tembuland) and proceed to

NYANDENI AREA ....And there to take up residence at a place to be pointed to you by the Magistrate, Libode". All nice and orderly, isn't it? "Proceed", "take up residence" etc. KW Matanzima could argue that he never used the word "ban" or "restriction", as I suspect you would argue that *your e-mail to the staff of UKZN* never used the word "gag" or said that UKZN staff could face disciplinary action if they flout your instruction. You could argue that it is an "injunction", an "advice" not an order or even an instruction. But Matanzima fooled no one; neither will you!
You owe us all in the sociological community not to bring us into disrepute. *The e-mail below* is a grave and present danger not only to UKZN but the global community of scholars.

With warm regards,
Jimi
....

- Original Message –
....
Subject: ...: UKZN staff told not to discuss stike (sic) with the media...

...University Notice 02/03/06 11:15 AM...
To the University Community

Public affairs and Corporate Communications would like to request that all staff who receive any media query related to the impending industrial action refer these calls to Jennene Singh 260 2386 or Bhekani Dlamini 260 7115.
We appreciate your assistance in this regard.

Professor Dasarath Chetty
Executive Director."

(The italics are mine, for ease of reference later in the judgment).

[4] The magistrate dismissed the defamation action on the basis that the e-mail, although defamatory, constituted fair comment. He commented favourably on the integrity and good faith of both the appellant and the respondent, who were the only witnesses called to testify at the trial. The relevance of this will be referred to later in this judgment, when the question of malice is discussed.

[5] If I understood the argument advanced on appeal on behalf of the appellant correctly, it was to the effect that the magistrate erred on three distinct, but interrelated grounds: (1) that the respondent's response in the e-mail amounted to an unwarranted and baseless assertion of fact, and thus did not constitute comment; (2) that if it amounted to comment it was not fair comment; and (3) that, if it passed

muster on (1) and (2), it was nevertheless actuated by malice. Counsel acknowledged that, in some way or another, all these grounds are premised on the submission that the appellant's original e-mail, requesting that any media query relating to the impending industrial action be referred to the university's public affairs and communications division, can not be construed as an attempt to suppress debate. For the reasons that follow I am of the view that the appellant's e-mail may reasonably be read (as a matter of opinion and comment) as an attempt to stifle debate; that the respondent's response to it was clearly such an opinion and comment; and that it was an opinion honestly held.

[6] There was some debate in argument to what extent the respondent was entitled to give evidence about the context in which the e-mails were sent and were thus to be read or interpreted. For the purposes of this judgment I accept that much of his evidence in this regard is inadmissible and that the e-mails should be read only against the background that wage negotiations between university management and trade unions representing university personnel had ended in deadlock and that strike action by members of the trade unions were to commence at the university on 6 February 2006.

[7] The defence of fair comment was authoritatively imported into our law from the English law of libel ninety years ago in *Crawford v Albu* [1]. The requirements for the defence to be successful has been laid down as the following in a number of cases in the Appellate Division and Supreme Court of Appeal: (1) that the statement must constitute comment or opinion; (2) that the comment must be 'fair'; (3) that the

[1] 1917 AD 102.

factual allegations being commented upon must be true; and (4) that the comment must relate to a matter of public interest.[2] Fair comment is a defence that excludes unlawfulness and the assessment of these requirements must now be informed by constitutional values,[3] but the explanation of the defence as one that "rests upon the right of every person to express his real judgment or opinion honestly and fairly upon matters of public interest" by Innes CJ in *Crawford v Albu* [4] resonates comfortably with the constitutional democracy that we now aspire to, as we will see presently.

Fact or comment?

[8] In *Crawford v Albu* [5] Innes CJ dealt with the distinction between comment, which is protected by the defence, and fact, which is not, in the following terms:

"Inasmuch as it is the expression of opinion only which is safeguarded, it follows that the operation of the doctrine must be confined to comment; it cannot protect mere allegations of fact. It is possible, however, for criticism to express itself in the form of an assertion of fact deduced from other clearly indicated facts. In such cases it will still be regarded as comment for the purposes of the defence. The operation of the doctrine will not be ousted by the outward guise of the criticism... Then the superstructure of comment must rest upon a firm foundation, and it must be clearly distinguishable from that foundation. It must relate to a matter of public interest, and it must be based on facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true. And those to whom the criticism is addressed must be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact."

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[2] *Marais v Richard* 1981(1) SA 1157 (A) at 116 F; *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004(6) SA 185 (SCA) at para. [13]; *Hardaker v Phillips* 2005(4) SA 515 (SCA) at para. [26].
[3] *Hardaker v Phillips*, id., at para. [15].
[4] Note 1 above, at 114
[5] Id.

[9] I may be doing the subtlety of the argument of counsel for the appellant a disservice, but the distinction between the 'foundation' upon which the respondent's comment or opinion rests and his comment or opinion thereon is, in my judgment, made very clear, in explicit terms, in the contentious e-mail. The respondent's e-mail makes it clear, right at the start in the second sentence, that the cause for his own writing is the "e-mail below", namely the appellant's own e-mail. This is again repeated in the last sentence of writing – "[t]he e-mail below" is what presents the alleged grave and present danger to the university and the global community of scholars. In the body of the respondent's writing there are no less than five further references to the appellant's e- mail. The respondent does assert that the appellant's e-mail imposes a "gag on an intellectual community", but this is done by explicitly referring to the contents of appellant's e-mail itself, and then developing an argument why its language and effect amounts to the gagging order the respondent contends is its essential meaning. It is difficult to conceive how the respondent could have made it more clear that his criticism, 'in the form of an assertion of fact' (that it is a gagging order), was 'deduced from other clearly indicated facts' (namely the contents of the appellant's own mail, "the e-mail below").

Is the comment 'fair'?

[10] 'Fair' is written deliberately here in quotation marks, because its use in connection with the defence "is not very fortunate", still in the words of Innes CJ in *Crawford v Albu*.[6] Comment should be 'fair', he says, only in the sense that it does not exceed certain limits, and those limits are "that any genuine expression of opinion

[6] Above, note 1, at 114.

is fair if it is relevant, and if it is not such as to disclose in itself actual malice".[7] Once again those requirements are clearly met in the present case.

[11] Freedom of expression, which includes academic freedom as a fundamental right under our Constitution, [8] is of particular importance in university and academic life. Whatever the true nature and reach of freedom of expresssion, and academic freedom as part of it, may be at a university, it would, in my judgment, include an unfettered debate on issues surrounding the autonomy of a university and the roles that managerial and academic staff, respectively, should play in that regard. The so-called 'commercialisation' of universities, in the sense that they are increasingly expected to find their own sources of funding, is part of this debate. The wage structure of academics, whose work is not driven by the profit motive, is also a contentious part of this debate. The appellant's e-mail, requesting staff to refer media queries relating to impending industrial action about staff wages to management, without providing a reason in the e-mail why this was necessary, was in this context obviously a matter of public interest. Comment on it, particularly comment that consisted of a reasoned argument why the request was not as innocent as it may be contended for, with the clear distinction made between the object of the comment and the comment itself, as is the case here, was obviously relevant to the issue raised in the appellant's e-mail. Some may regard the content of the appellant's comment as an eloquent defence of what true academic freedom entails, others might view it as an exaggerated response to an innocent request to handle media queries efficiently and coherently, but I fail to see where in the content of respondent's e-mail actual malice can be read or found.

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[7] Id., at 115. See also *Johnson v Beckett and another* 1992(1) SA 762 (A) at 783B; *Hardaker v Phillips*, above, note 2, paras. [32] and [33].
[8] Section 16(1)(c) of the Constitution.

Malice outside the e-mail

[12] The final point put forward on appeal was that a proper reading of the record showed that the respondent was actuated by actual malice, with reference to passages in the record which, the submission went, showed that the respondent could not substantiate the fairness of his comments in the e-mail. I do not agree that such an inference can be drawn from his evidence. There may be legitimate differences of opinion amongst people about whether his comments were fair, in the more generalised sense of the extent of its reasonableness, or whether it was should have been couched in more temperate language, but what appears clearly from the record is the passionately and genuinely held commitment to free speech and academic freedom by the respondent. This was commented upon by the magistrate in his finding rejecting the argument that respondent was actuated by actual malice – a credibility finding which, on basic principles, a court of appeal will not easily interfere with and for which, in any event, there is ample justification in the record itself.

[13] I would thus dismiss the appeal with costs.

J.C.Froneman

Judge of the High Court.

I agree. The appeal is dismissed with costs.

H.J.Liebenberg

Judge of the High Court. 21/11/07