REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

CASE NO: A45/15

17/11/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

17/11/2015 .....

DATE SIGNATURE

In the matter between:

F B PROLLIUS Appellant

and

MBOMBELA LOCAL MUNICIPALITY First Respondent

VUSI SIBIYA Second Respondent

JUDGMENT

MOTEPE AJ:

INTRODUCTION

[1] This is an appeal against the judgment of the Magistrate, Ms Serfontein sitting in Nelspruit. The appellant sued the respondents in the Court *a quo* for damages stemming from an alleged defamatory statement made by the respondents and published in a newspaper with circulation in Mpumalanga, namely, The Lowverlder on 22 December 2006.

[2] The grounds of the appeal are to the effect that the Court *a quo* erred in granting absolution from the instance against the appellant.

BRIEF BACKGROUND

[3] The appellant together with two other individuals, Messrs Phiri and Khoza were charged by their employer, the first respondent for various irregularities, the details of which are not relevant for the purpose of this judgment. A disciplinary hearing was constituted and proceeded on 20 and 21 November 2006.[1] It appears from the evidence in the Court *a quo* that the respondents attempted to "*plea bargain*" with the appellant. He refused these advances and the charges against him were withdrawn.[2]

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[1] Appeal record ("*AR*"), Vol 2 at pages 558 and 559
[2] AR, Vol 2 at page 581 line 21 to page 582 line 1

[4] The findings made with regard to the appellant were recorded by the presiding officer as follows:

> *"On 21 November 2006, during the proceedings and while the Employer's witness (Mr I Mogashoa) was testifying, Messrs Prollius and Phiri opted to accept responsibility for the role each of them played with regard to the Botmarc contract and the subsequent rental agreement. In return they would receive counselling".*[3]

[5] In an undated letter, the second respondent in response to an enquiry by a journalist wrote *inter alia* the following:

> *"The three gentlemen, Mr Eddie Prolius, Mr Mcabango Phiri and Mr Patrick Khoza returned to work on the 27th November 2006. But Mr Phiri's contract expired on the 30th of November 2006 and has not been renewed. The charges against the three were withdrawn after council decided not to pursue the case and rather send them to corrective counselling. Further details will be issued after a full report on the matter has been served to council at the end of January 2007.*

[3] AR, Vol 2 at page 559, para 4

The disciplinary hearing discovered that amongst others they acted without authority. No apology or any compensation would be made to them. The disciplinary process will be completed after the corrective counselling had been completed."[4]

[6] On 22 December 2006, an article appeared in the Lowvelder in which the above letter from the second respondent was quoted. The article referred to the disciplinary hearing of the appellant and the other two individuals mentioned above and confirmed that the charges of acting without authority and negligence which were preferred against them were withdrawn. The article *inter alia* stated the following:

"*According to municipal spokesman, Mr Vusi Sibiya, the disciplinary hearing discovered, among others, they acted without authority. He said council, however, decided "not to pursue the case but rather send them for corrective counselling.*[5]"

[7] The appellant in its particulars of claim pleaded *inter alia* that the statement by the second respondent and as quoted in the Lowvelder was defamatory and contained the following *innuendo*:

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[4] AR, Vol 2 page 550
[5] ÄR, Vol 2 page 551

7.1. That the appellant was subjected to a disciplinary hearing due to misconduct;

7.2. That during the hearing it was established, amongst others, that the appellant in the exercise of his employment with the first respondent acted without the necessary authority;

7.3. That he is guilty of misconduct and that the first respondent had decided to refer the appellant for corrective counselling.[6]

[8] In their plea, the respondents denied the *innuendo* alleged by the appellant and further denied that the words were published with *animus iniuriandi*. They pleaded in the alternative that the purpose of the publication of the words was to inform the public of the outcome of a *bona fide* investigation and that the words were true and were published for the public's benefit.[7]

[9] The trial proceeded with the appellant testifying in person and calling witnesses. The appellant duly closed its case whereupon the respondents applied for absolution from the instance. The

[6] AR, Vol 1 at pages 430 to 432 at paras 13 to 16.5 of the particulars of claim
[7] AR, Vol 1 at pages 447 to 449 at paras 14.1 to 14.3.4 of the first defendant's plea; pages 454 to 456 at paras 4.2 to 4.3.4 of the second defendant's plea

Magistrate granted absolution in favour of the respondents. It is against this ruling that the appellant appeals to this Court.

[10] The Magistrate *inter alia* found that the second respondent was not present at the disciplinary hearing but had received lots of enquiries from various people. She could not understand why the plaintiff and his witnesses read *innuendo* into the above statements. Most importantly, for the purpose of this judgment, she found as follows:

> *"Now also the witnesses for the plaintiff testified what they read into these words. But I am of the view that one must not read too much into those words. Look at the charges as it was set out in page 122 and 123. Look at the finding on page 137. The Court put that together and also the Court finds that this statement was not false.*[8]

[11] As stated above, the Learned Magistrate went on to grant absolution form the instance against the appellant.

THE LAW

[12] Absolution is only granted at the end of the plaintiff's case if there is no sufficient evidence upon which a reasonable man could find

[8] AR, Vol 4 at page 796, lines 8 to 13 of the judgment

for him.[9] The then Appellate Division has repeatedly stated that the proper test is whether there was such evidence before the Court, assuming it were true, upon which a reasonable Court might, not should, give judgment against the defendant.[10]

[13] The authors Zeffertt and Paizes[11] contend that the test is phrased better by the Supreme Court of Appeal in **De Klerk v Absa Bank Ltd and Others**[12] as being whether a Court, if no further evidence was led, and after a reasonable application of its mind, might find in favour of the plaintiff.

[14] For the reasons that follow, it is unnecessary to consider whether the evidence adduced by the appellant is enough to avoid absolution or put differently, whether the Court, after a reasonable application of its mind might find in favour of the plaintiff if no further evidence were led. In my view, the incidence of onus is dispositive of the appeal.

[15] The Constitutional Court has affirmed in **Le Roux v Dey**[13] that the onus is on the defendant to allege and prove that a prima facie

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[9] Gascoyne v Paul & Hunter 1917 TPD 170
[10] Levco Investments (Pty) Ltd v Standard Bank of SA Ltd 1983 (4) SA 921 (A); Oosthuizen v Standard General Versekerings Maatskappy BPK 1981 (1) SA 1032 (A)
[11] South African Law of Evidence 2nd Edition at page 178
[12] 2003 (4) SA 315 (SCA)
[13] 2011 (3) SA 274 (CC)

defamatory statement was not wrongful. It had the following to say after stating the essential elements to prove defamation:

> *"Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence*". (own emphasis)[14]

[16] In *casu*, the alleged defamatory statement *inter alia* stated that the disciplinary hearing "discovered" that amongst others that the

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[14] at para 85; See also Joubert and Others v Venter 1985 (1) SA 654 (A) at 696; Argus Printing and Publishing Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) at 590J-591C; Mohamed and Another v Jassiem 1996 (1) SA 673 (A) at 709H-I; Hardaker v Phillips 2005 (4) SA 515 (SCA) at para 14

plaintiff and the two individuals acted without authority. In my view, the statement is prima facie defamatory, in that, it gives an impression that the disciplinary hearing found that the charges against the plaintiff, namely, that he acted without authority, had been proven.

[17] It is up to the defendant to then raise a defence that this statement is truthful and that there was no *animus iniuriandi* for example. He must however not only make such allegations but adduce evidence to prove truthfulness of such a statement. This is so because he bears the onus to rebut the presumption operating against him.

[18] In **Arter v Burt**[15], Innes CJ, as he then was, said the following

"*The onus, it should be remembered, was on the defendant. If he discharged it, he was entitled to judgment; if he failed to discharge it, then the plaintiff was bound to succeed. In either case there was no room for absolution.*"

[19] In **Hirschfeld v Espoch**[16] referred to in **Schoeman v Moller**[17], it was found that there is no room for a judgment of absolution from the instance where the onus is on the defendant. The **Hirschfeld**

[15] 1922 AD 303 at page 306
[16] 1937 TPD 19 at 21
[17] 1949 OPD 949 at 957

and **Arter** decisions were referred to with approval by the AD in the *locus classicus* on the issue of onus, **Pillay v Krishna**.[18]

APPLICATION OF THE LAW

[20] In *casu*, the Magistrate in fact found that the statement was truthful without any evidence being adduced by the defendant whatsoever to prove its truthfulness. This she could not do. While it appears logical that no absolution can be granted where the onus is on the defendant, Mr Roelofse argued otherwise. For this reason, it becomes necessary to briefly restate the applicable legal principles in this regard.

[21] It ought to be emphasised that this judgment does not make any finding as to whether the plaintiff has a strong or a weak case. That is for the trial Court to determine at the end of the defendant's case. All that this judgment finds is that because the onus to prove that the statement was not wrongful was on the defendant, the Learned Magistrate was wrong in granting absolution from the instance.

CONCLUSION

[22] In the premises, I make the following order:

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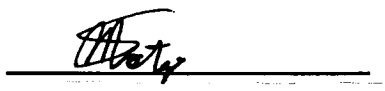
[18] 1946 AD 946 at page 957

1. The appeal is upheld with costs.

2. The order of the Magistrate in the Court *a quo* is set aside and replaced by the following order:

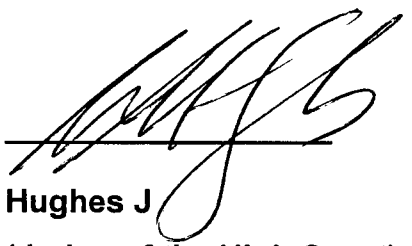
   "*The application for absolution is refused with costs*";

3. The matter is referred back to the Magistrate to proceed with the trial.



Motepe AJ
(Acting Judge of the High Court)

I agree and it so ordered.



Hughes J
(Judge of the High Court)

Matter heard on: .....
Judgment reserved on: .....

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