




IN THE HIGH OF THE REPUBLIC OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 36077/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
18 JULY 2018	
DATE	SIGNATURE

In the matter between:

MWANELE MANYI

PLAINTIFF

AND

MCEBO FREEDOM DHLAMINI

DEFENDANT

JUDGMENT

MAVUNDLA J.

[1] The plaintiff, instituted a defamation action against the defendant who is an adult male Wits University student, claiming damages totalling an amount of R5 million he allegedly suffered as a result of certain defamatory publications made by the defendant: in respect of claim A in an amount of R3 million and in respect of claim B in an amount of R2 million plus interest at 10.5 % per annum from date of summons to date of payment and costs of suit.

[2] The summons were duly issued and served upon the defendant on 31 July 2017. The defendant filed his notice of intention to defend the action on 16 August 2017. A notice of bar was served on the defendant in terms of Rule 30 on 20 September 2017. The defendant failed to serve his plea and was served with notice in terms of Rule 28 together with amended pages on 5 October 2017. On the 13 November 2017 defendant was once more served with a notice of bar but failed to enter his plea on or before 22 November 2017. In terms of rule 31(2) the plaintiff then set the matter down for default judgment to be granted against the defendant.

BACKGROUND FACTSS

[3] According to the plaintiff, he and the defendant were two of several participants on the 'Open Politics.' "WhatsApp group". On the 20 July 2017 the WhatsApp group discussed "What is 'regime change' to which the plaintiff commented, a copy thereof attached as annexure "MM1". The defendant in response, made defamatory statements, a copy thereof was attached as annexure "MM2", about the applicant in the WhatsApp group conversation. Thereafter on the same WhatsApp group, the defendant made another further threatening statement; a copy thereof was attached as annexure "M3".

[4] According to the plaintiff these statements were widely circulated on numerous other WhatsApp groups and distributed on various media platforms, some of which were attached as Annexure "MM4".

[5] In respect of claim A, of the particulars of claim, the alleged damages: arise from the publication on the 20 July 2017 on "Whatsapp" allegedly made by the defendant in

which he maliciously, wrongfully published the following comments concerning the plaintiff:

“You lame horny old donkey, remember how you came to Wits and you wanted to fuck Nompandolo? Remember how you gave her 40k so that you can harvest her. Lazy, horny stinky Donkey.”

- [6] In respect of claim B the defendant made another statement publication on the 20 July 2017 on “Whatsapp” allegedly made by the defendant in which he maliciously, wrongfully published the following comments concerning the plaintiff:

“you deserve to be necklaced period”;

- [7] The requirements for defamation as stated by Brand AJ in *LE Roux v Dey*¹ are: (a) the wrongful; and (b) intentional; (c) publication of; (d) a defamatory statement; and concerning the plaintiff. Once the plaintiff established publication of the defamatory words, it is presumed that the statement was both wrongful and the publisher acted *animo injuriandi*.² It is for the defendant, who bears the onus, to be discharged on preponderous of probability, to negate or raise a defence. *In casu*, the defendant chose not to come to lock horns with the plaintiff although he was served with the invitation to do so, in the form of the summons.
- [8] According to the plaintiff the alleged first statement, was allegedly understood by the addressee and was intended by the defendant to mean that the plaintiff is dishonest in the following respects: the plaintiff is cheating on his wife; he is sleeping around with students; uses money to induce students in order to sleep with them; is a person of low morals; is a lazy animal and sexually abuses and unduly influence girls with money.
- [9] According to the Oxford Dictionary the word lame means “a person or animal that is unable to walk without difficulty” and “unconvincingly feeble”. According to the dictionary the word lame means “someone who has poor social skills or lacks charisma” and implies that “someone is rude to other people.” The word horny means

¹ 2011 (3) SA 274 (CC) at 304 A-B para [84].

² De Flamingh v Pakendorf en Ander 1979 (3) SA [TPD] at 684 B-H

“feeling or arousing sexual excitement” or “hard and rough” according to oxford dictionary. The word donkey means “a *domesticated hoofed mammal of the horse family with long ears and a braying call, used as a beast of burden; an ass and a stupid or inept person, according the oxford dictionary.*

- [10] According to the oxford dictionary the word fuck is vulgar slang and means “to have sexual intercourse with someone” and “to damage or ruin something”. According to urban dictionary the word fuck is used to modify any words for more compassion and to express disgust.
- [11] According to the oxford dictionary the word “harvest” “a quantity of animals caught or killed for human use” and “catch or kill for human consumption”. According to oxford dictionary the word lazy means “unwilling to work” and “showing a lack of care”
- [12] In respect of the second statement, the plaintiff believed that the defendant can actualise the threat and lives in fear, According to the oxford dictionary the word “stinky means “having a strong and unpleasant smell” and “very disagreeable and unpleasant”.
- [13] Taking all the words referred to herein above, individually and or collectively, I have no doubt in my mind that they have the effect of impaling the plaintiff’s right to dignity and the right to have such dignity respected, in terms of s10 of the Bill of Rights of the Constitution. The effect of the words, in my view, put into question the moral compass of the plaintiff, as a person cheating on his wife, seducing a student employing his financial means, who is being compared to an animal of low intellectual capacity permeating a repulsive or unpleasant smell. It can be accepted that animals do not shower or have a bath; for a person to be referred to as an animal, insinuates that the person himself does not shower or have a bath and is at the lowest rank of animals. The statement also assails the plaintiff’s sexual deportment, his honour and integrity; *vide Farrar v Hay*³. I have no doubt that any reader of these words will interpret them in one way or another to be assailing the plaintiff’s character a already stated herein

³ 1907 TS 194 at 201.

above and see him in a bad light. I find the aforesaid words published to be defamatory. In the matter of *Khumalo v Holomisa*⁴ the Constitutional Court held that the right to dignity enshrined in s 10 of the Constitution, has a wide meaning and encompasses a number of values. Amongst these are a person's right to reputation, right to a sense of self-worth and his right to privacy.

[14] A defamatory statement must be published or made known to a third party or more; *vide Rivett- Carnac v Wiggin*⁵. The defamatory words were published in WhatsApp which is a social media, with wide and broad spectrum readership. The publication was posted electronically on WhatsApp. In this regard the court held in the matter of *Tsichlas v Touch Line Media (Pty) Ltd*⁶ that:

"In effect, my conclusion would mean that, whenever anybody, anywhere in the world, accesses this website and reads and understands the words which are complained of in this matter, there will have been publication to that user at the particular place where the user has accessed the website. Bearing in mind that we are dealing with the Internet and electronic communications, that national or geographic boundaries would not apply and distances are irrelevant, the implications of this conclusion are enormous."

[15] From annexure MM2, it is clear that 'Andile, Bantu, Basetsana and Brian' read the defamatory statement which was thereafter also widely circulated and ultimately made public on several platforms as seen in annexure "MM4".

[16] The second statement is a threat to the plaintiff. It is a notorious fact that in the South African parlance, "necklacing" means summary execution or torture carried by a mob placing on the victim a burning tyre or pouring petrol on him and setting him alight. The threat to be necklaced violates the plaintiff's right as enshrined in section 12. In *R v Sibanyoni* a threat was defined as "a threat of immediate personal violence in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out his threat."

⁴ 2002 (5) SA 401 (CC).

⁵ 1997 (3) SA 80 © at 88.

⁶ 2004 (2) SA 112 (W) at 120-121.

[17] Section 12 of the Constitution⁷, guarantee everyone the right to freedom and security of the person, which includes the right (a) not to be deprived of the freedom arbitrarily or without just cause; or (b) not to be detained without trial.(c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity; which includes the right—

(a) to make a decisions concerning reproduction;

(b) to security in and control over their body; and (c) not to be subjected or scientific experiments without their informed consent.”

[18] Therefore in my conclusion, the aforesaid threat of necklacing, constitutes an injuria as it inflicts psychological harm protection violation.

[19] In the matter of *Waring and Gillow Ltd v Sherbone*; vide also *Minister of Justice v Hofmeyr* and *bester v Commercial Union Versekirringmaatskappy van SA Bpk* It was held that: “There is no authority for holding that the Roman-Dutch Law allowed damages to be awarded for mental suffering unaccomplished by physical injury or illness in an action founded on negligence. It would be different under certain circumstances in an *actio injuriarum* based on a wilful attack upon or violation of feelings of another. In such a case it might be possible to award compensation for outrage to feelings...”

[20] In *Minister of Justice v Hofmer* 1993 (3) SA 131 (A) at 145 the Court held that: “One of the individual’s absolute right to personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several aspects... It comprehends also mental aspect.”

[21] In as much as human body can be infringed in many ways, any conduct which has a detrimental effect on the psyche or sensory feelings can be regarded as an infringement of body integrity; vide *Neethling, Potgieter and Visser* 17-18 245ff; *Neethling* in *Van Maanen* (ed) 165-166. Physical-psychological harm is protected

⁷ Act 108 of 1996

under the action for pain and suffering in South African law, viz pain and suffering, emotional shock, disfigurement, loss of amenities of life and shortened life expectancy. For the court to award damages arising from threat, the plaintiff must place evidence before the court to show the effect such threat has had on him. It is difficult to accept the 'say so' of the plaintiff that he was fearful or scared as the result of the threat. *In casu* the plaintiff claims to be compensated in an amount of R1 500. 000. 00 (one million five hundred thousand rand). The court can however award a reasonable amount for *solatium* under this claim.

[22] In determining quantum in respect of defamation, the Court must have regard to :

- (i) "the seriousness of the defamation."
- (ii) "the nature and extent of publication."
- (iii) the "reputation, character and conduct of the plaintiff."
- (iv) "the motives and conduct of the defendant.;" vide *Muller v SA Associated Newspapers Ltd.*⁸

[23] *In casu*, the words complained of are of a serious and very scandalous nature. The publication must invariably have been very wide and have the potential of reaching beyond our borders, vide paragraph [15] *etc. supra*. The plaintiff is a reputable man of note and a prominent public political figure who enjoys extensive public attention. The defendant did not defend the matter, nor tender any apology to the plaintiff.

[24] In the matter of *Esso Standard SA (Pty) Ltd v Katz*⁹ the Appellate Court held that:

"It has been accepted that in some type of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach."

⁸ 1972 (2) SA 589 © at 595.

⁹ 1981 (1) SA 964 (A).

[25] In *Mogale and others v Seima*¹⁰ in a matter where the plaintiff claimed an amount of R2 million as damages for defamation but , the Supreme Court of South Africa, per Harms JA held that:

“The determination of quantum in respect of sentimental damages is inherently difficult and requires the exercise of discretion, more properly called a value judgment, by the judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is...” The Supreme Court also held that “awards in defamation cases do not serve a punitive function and are, generally, not generous.” In the matter of *Tsedu and Others v Lekota and Another*,¹¹ the Supreme Court held that that monetary compensation for harm of this nature is not capable of being determined by an empirical measure.

[26] In *Mthimunya v RCP Media and Another*,¹² an amount of R35 000. 00 was awarded to a municipal manager about whom a report was published in City Press about alleged sexual harassment of a secretary in his office.

[27] In the matter of *De Flamingh v Pakendorf en Ander*¹³ an amount of R2 500. 00 was awarded to an advocate for defamation by defendant who published libellous report.

[28] Taking into account the facts *in casu* and the authorities cited herein above, in respect of the defamation claim, I am of the view that an award of R50, 000. 00 (fifty thousand rand) would be fair and reasonable. In respect of the claim arising from the threat, I am of the view that an award of R5, 000. 00 (five thousand rand). Would be fair and reasonable solatium.

¹⁰ 2008 (5) SA 637 (SCA) paras [8]-[12].

¹¹ 2009 (4) SA 372 (SCA) at para 25.

¹² 2012 (1) SA 329 (SCA) para 71-72.

¹³ 1979 (3) SA [TPD] at 684 B-H.

[29] In respect of costs, it is trite that costs follow the event. The plaintiff engaged the services of senior counsel and brought the matter before this court. In my view, the issues in this matter were not complex to warrant the services of senior counsel. Besides, the plaintiff's claimed amounts were highly inflated to bring the matter within the jurisdiction of this court. Besides, the total award falls within the jurisdiction of the magistrate court.

[30] In the result, the following order is made:

1. In respect of claim A the defendant is ordered to pay an amount of R50, 000. 00;
2. In respect of claim B the defendant is ordered to pay an amount of R5 000. 00;
3. The defendant is ordered to pay the plaintiff's taxed and allowed costs at the magistrate party and party scale.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 18 / 07 / 2018

APPLICANT'S ADV : ADV. L. Haskins SC

INSTRUCTED BY : K.S. DINAKA ATTORNEYS

RESPONDENTS' ADV : NO APPEARANCE

INSTRUCTED BY : NO APPEARANCE

