IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

Case No. 2002/06

In the matter between :

SHEENA RAGHAVJEE	Plaintiff
and	
HONOURABLE MINISTER OF SAFETY AND SECURITY	First Defendant
NATIONAL COMMISSIONER OF THE SAPS	Second Defendant
ANTON WILLEM BOOYSEN	Third Defendant

J U D G M E N T

KOEN, J.

[1] The plaintiff, at the relevant time a 32 year old female attorney, sues the defendants for damages for defamation claiming an amount of R500 000-00. The first defendant is the Minister of Safety and Security, the second defendant is the National Commissioner of the South African Police Services and the third defendant is Superintendent Anton Willem Booysen ("Booysen").

[2] It is common cause, alternatively not contested, that:

a) during August 2004, the plaintiff was the attorney of and representing one Wasseem Haider Agha ("Agha"), charged with the murder of his wife and child, in a strenuously opposed bail application in the Durban Magistrate's Court;

b) on 25 August 2004, and during his testimony, Booysen stated in open court, *inter alia* that the plaintiff was involved in a "love affair" with and was the "fourth lover" of Agha;

c) Booysen was at all times acting as an employee of the first defendant within the course and scope of his employment alternatively was performing his duties in terms of the South African Police Services Act No. 68 of 1995 and other empowering legislation, in testifying on behalf of the State in opposition to the bail proceedings;

d) the references by Booysen were to plaintiff;

e) the references were *per se* defamatory of the plaintiff;

f) the statements were heard by all in attendance at the bail hearing including *inter alia* the magistrate, prosecutrix, other members of the defence team, the legal team of the deceased's mother and grandmother, Sarina Sukan, members of the press covering the bail proceedings and members of the public present in the

courtroom. The statements were further reported on Radio Lotus and published in newspapers with extensive circulation in the Durban and Pietermaritzburg areas and generally in KwaZulu-Natal;

g) the provisions of Act 40 of 2002 were complied with in respect of the first and second defendants, but not the third defendant. Plaintiff however only persisted with a claim for judgment against first defendant (hereinafter referred to as "defendant").

[3] Apart from being *per se* defamatory, in my view, the statements also carried the additional sting that the plaintiff had acted unprofessionally.

[4] The effect of the admission, in my view correctly made, that the statements were defamatory, is that two presumptions arise:

a) that the publication was unlawful;

b) that the statements were made *animo injuriandi*

see for example Hardaker v Phillips 2005(4) SA 515 (SCA) at paragraph [14].

[5] The onus to rebut one and/or the other presumption, is on the

defendant. It is a full onus to be discharged on a balance of probabilities – see Hardaker v Phillips (supra).

[6] The defendants raised a number of defences, including that the statements were made on a privileged occasion and were relevant and material to the issues raised in the bail application, that Booysen, by reason of the circumstances in which the statements were made, lacked the necessary intention to defame the plaintiff in her reputation, and that the statements were true and/or that Booysen reasonably believed them to be true and made them for the public benefit and/or constituted comment or opinion which was fair on a matter of public interest or public importance and being relevant to the issue at the time. I do not intend analyzing all these defences pleaded in any great detail as the defendants confined and limited their argument, again in my view correctly, to the following relevant issues:

a) whether the statements were relevant at the time;

b) whether Booysen reasonably believed in the truthfulness of the statements;

c) whether Booysen was actuated by malice in making the statements.

[7] A number of witnesses testified. A detailed examination of their evidence is not required, and I accordingly refrain from doing so, save to refer to such aspects of their evidence as may be material to this judgment. I have however had regard to the totality of the evidence adduced.

[8] The defendants stressed that the issue of relevance merely requires that the statements must be germane to the matter dealt with, that relevance is a matter of reason and common sense dependent on a value judgment, and that the privilege also extends to subsidiary issues – see Hardaker v Phillips (supra) paragraphs [16] and [18].__

[9] Applying these principles to the factual matrix, I was urged to have regard to the following:

a) the circumstances under which the statements were made, being bail proceedings of a very adversarial nature;

b) the fact that Booysen would be biased in favour of the State and the desperate extent he would go to, to oppose bail successfully;

c) that Booysen of necessity would at times rely on hearsay

evidence in opposing the bail application;

d) that Booysen's focus was not on the plaintiff but on the accused and that he was trying to show that Agha was not what he (Agha) wanted the court to believe;

e) that Booysen was fed information from time to time and that he relied on that evidence believing it to be true.

[10] The aforesaid considerations were also pleaded in the following terms, namely that:

a) one of the issues which arose in the bail application was whether Agha, who was alleged to have killed his wife, had really loved and/or was faithful to her or not;

b) that Booysen attempted to demonstrate to the court that Agha could not really have loved his wife, nor was he faithful to her as claimed because at the relevant time he was involved in other relationships as well;

c) that Booysen had evidence which *prima facie* established alternatively caused him to entertain a reasonable and *bona fide* suspicion that Agha was also involved in a relationship with the plaintiff;

d) that the purpose for which the evidence was tendered, was to

show that Agha could not have been serious, when he testified, that he loved his wife and would not have killed her. Further that he had a stormy relationship with his wife and had the necessary motive to kill her and in addition that such evidence was also relevant in the bail application to demonstrate the kind of person Agha was and that he was not deserving of bail;

e) that based on statements and information at his disposal Booysen was of the belief that the relationship between Agha and the plaintiff went beyond that of an attorney and client.

[11] The defendant was however constrained to concede that when Booysen uttered the statements, he "probably went a bit too far" and that this was "an indiscretion" on his part. In my view that is, without wanting to be unfair to counsel who was obviously in an invidious position, a euphemistic assessment.

[12] The plain meaning of the words used connote that the plaintiff had a sexual relationship with Agha. The South African Concise Oxford Dictionary defines "affair" as being a love affair. It defines "lover" as being a person having a sexual or romantic relationship with another. The context

in which the statements were made by Booysen also conveyed that the plaintiff had a sexual relationship with Agha, who was a person who had multiple sexual partners and who was married, their relationship therefore being illicit and further that the plaintiff, being Agha's attorney, acted unprofessionally and unethically. The statements made imputed a sexual relationship to the plaintiff with Agha.

[13] Booysen, on his own version said that he did not have any basis to say that Agha and the plaintiff were having a sexual affair, because he did not even have information to that effect. As he stated, he dared not have made reference to a sexual love affair because he "did not have those facts". He had no reason to believe that the plaintiff and Agha had a sexual relationship. There was no basis for him saying or making any allegation that the relationship between the plaintiff and Agha was a sexual one. With all the information fresh in his memory at the time when he gave evidence, his opinion was that such information as he had was not a sufficient basis for concluding that the plaintiff and Agha had a sexual relationship. It would accordingly be wrong and irresponsible to have suggested that or to imply it.

[14] In the light of that evidence, his protestations that he was absolutely not suggesting that the plaintiff and Agha were involved in a sexual relationship and that when he used the words “love affair” a sexual relationship “could not have been something further from his mind”, ring hollow. Employing the words he did could only convey one meaning to the ordinary hearer thereof, and being a senior official and an intelligent man, he cannot expect this Court to believe that he did not intend what the words in their ordinary sense mean.

[15] It must therefore follow that the statements *per se* were not justified and amounted to an abuse of the privilege and not deserving of any protection afforded by law.

[16] Even if I am wrong in that regard and if the statements were expressed on a privileged occasion, the evidence shows that Booysen acted with malice, which would deny the defendants the privilege they might otherwise have enjoyed. Initially Booysen, with reference to the statement by Mungal, testified in the bail proceedings that the plaintiff and Agha were “engaged in a love affair” only “a few days after the murders”. His explanation, when challenged that it was not a “few days”, is

unsatisfactory, if it is an explanation at all. In the bail proceedings, Booysen also said that he did not have any other information with regard to the love affair between the plaintiff and Agha other than the statement of Mungal. However, in evidence before me, he claimed to have other information, being the information derived from his interview with Kriben Dhaver, the "affair" being "common talk" amongst them, information he had received from a Mrs Reynecke from the Westville Private Hospital and his personal observations at the Brighton Beach Police station when Agha allegedly had his hand on the plaintiff's leg on 21 August 2004. His explanation for not referring to these in the bail proceedings because he wished to avoid personal criticism, more especially in the context of his relationship with his two brothers (the younger having acted as an investigator for the Sukan team), leaves much to be desired. When specifically invited in the bail proceedings under oath to state the basis for his belief, one would have expected a full and frank answer. The answer that he gave casts doubt on the veracity of his personal observations, the contents of interviews, and the subsequent alleged "confirmation" received. Dhaver's statement was only dated 4 October 2004 although in his evidence in chief Booysen claimed that by the time he gave evidence in the bail proceedings, namely on 25 August 2004, he had already

interviewed Dhaver. One is unfortunately irresistibly left with the uneasy feeling that Dahver's statement might have been obtained *ex post facto*. Then there are also the contradictions between Booysen's evidence and that of Dhaver.

[16] Booysen also inclined to distort facts. In the bail proceedings he referred to a statement by Govender. In Govender's statement the latter merely referred to a meeting he and Agha had with the plaintiff on 12 July 2004 with regard to the incorporation of a company. Govender's statement records that he gained the impression that Agha and the plaintiff "had been good friends", as they were referring to incidents a week before. However, Booysen testified that Govender had said that the impression that he gained from the meeting was that the plaintiff and Agha had dated for a while. That is something entirely different. There is no suggestion in Govender's statement that the relationship between the plaintiff and Agha was one that they were dating.

[17] In the light of the aforegoing, it also cannot be concluded as a matter of probability, that Booysen reasonably believed in the truthfulness of the statements. His belief of what was meant by the use of the words "love

affair" and "fourth lover" is improbable.

[18] In my view, the defendant failed to discharge the onus and accordingly the plaintiff is entitled to judgment in her favour.

[19] Regarding quantum, the defamation impacted on the plaintiff's personal dignity and reputation, not only as a woman but as an attorney.

[20] The plaintiff's counsel has suggested that there are aggravating factors namely Booysen's persistence and insistence in maintaining that the statements made by him were not defamatory in circumstances where they are patently defamatory and are admitted to be *per se* defamatory, the calculated way in which Booysen made the remarks at the time when he gave his evidence in the bail proceedings, the widespread publication which the statements received in the print media and on radio and the fact that the statements impacted also on the plaintiff's professional life and had immediate and profoundly embarrassing consequences for her. I have taken due note of these considerations without necessarily classifying all or any of them as particularly aggravating features.

[21] I was also urged by both sides to consider their respective contentions in the light of the exchange which took place on the morning of 25 August 2004, prior to the bail proceedings resuming, between the plaintiff and Mr van der Merwe. The latter was acting as Mrs Sukan's attorney. I was very impressed with the demeanor of Mr van der Merwe and if it was a straight credibility contest between the plaintiff and Mr van der Merwe, probably would have preferred his evidence. On the probabilities however, there is much to be said for both sides. Mr van der Merwe stands nothing to gain by the evidence that he gave and testified that he would not have acted in the manner the plaintiff testifies, as it would have compromised him with his client (who clearly would not take kindly to her attorney placing his arm around the attorney – possibly she believed the lover – of the alleged murderer of her child and grandchild). The plaintiff's version of what happened was corroborated by her report to Mrs Maharaj shortly after the events occurred and also by the probability, arising from the evidence of Ms Mungal, that she had been phoned by Mrs Sukan earlier that morning to come and identify the lady seen with Agha at the Sun Coast Casino at court. This information Mrs Sukan probably/possibly would not have kept from her attorney. This issue is however of minor peripheral significance in regard to quantum. Insofar as

it may have relevance, I can on the totality of the evidence, put it no higher than that the probabilities on that issue are evenly balanced.

[22] The plaintiff in my assessment of her, tended to over-dramatise or exaggerate some of the sequelae of the defamation. I am not persuaded by her contention that her entire legal team withdrew because of the alleged conflict which was created by the evidence of Booysen. The objective facts demonstrate and are more consistent with the predominant reason for their withdrawal being a lack of funds.

[23] There also appears to have been some familiarity between the plaintiff and Agha, going beyond a strict attorney/client relationship and extending to her accepting an invitation to the concert at the Sun Coast casino and the function at John Dorys. There is no reason why a young female professional (as opposed to a male counterpart) should have to refuse such an invitation. It certainly is not a licence to immediately classify such interaction as a “love affair”. Unfortunately however, it creates an opportunity which invites comment and speculation. In the interests of strict professionalism such interaction between an attorney and client should be avoided.

[24] The legal arena and the strategies it invites from some participants and witnesses, has been recognized as requiring a certain personality robustness, with verbal knocks (not that it excuses wrongful defamation) – see Jasat v Paruk 1983 (4) SA 728 (N) at 735 and S v Tromp 1966 (1) SA 646 (N) at 655H.

[25] Awards for defamation and also infringement of persons constitutionally entrenched rights to dignity and personal freedom, have more recently increased, no doubt due to the greater recognition these rights enjoy. The plaintiff's counsel has urged me to find that this case calls for an exemplary award of damages. I do not think that the matter is one calling for exemplary damages, for *inter alia* the reasons set out below.

[26] Previous awards of damages are also never of authoritative value, as each case must of necessity depend on its own facts. I was referred *inter alia* to Vermeulen v Minister van Veiligheid en Sekuriteit SECLD Case No. 2526/06 an unreported judgment by Jansen, J. being an action for unlawful arrest and detention and assault where an amount of R70 000 was awarded. In Boshoff v Minister of Safety and Security and Ano., an

unreported judgment of Van Oosten, J. in WLD Case No. 29692/03, an amount of R120 000 was awarded in respect of an unlawful arrest and detention in prison under cruel, inhumane and degrading circumstances for a period of two days of a member of a community where he was well known and respected and having to endure subsequent criminal trial involving charges of fraud which received wide publicity in the press as well as on the radio impacting seriously on his good name and reputation. In Young v Shaikh 2004(3) SA 46 (C), a defamatory statement about the integrity of the plaintiff was made on national television during a program seen by 400 000 to 600 000 people. The plaintiff was awarded an amount of R150 000. The statement was contained in an interview broadcast on two occasions. In Minister of Safety and Security v Seymour 2006(6) SA 320 SCA, an amount of R90 000 was on appeal awarded for an unlawful arrest and detention for a period of five days (the circumstances relating to his detention however not resulting in any great degree of degradation or deprivation).

[27] The defamation was not of the most severity. Clearly, it did reflect on the plaintiff as a female and as an attorney. It was no doubt sensationalised in the media at the time of the broadcast, but the

publication although intense, was short-lived and in the minds of most readers and listeners of cursory and fleeting, if any, interest and by now long forgotten.

[28] Taking into account all the relevant circumstances, it seems to me that an award of R100 000 will be appropriate. Judgment is accordingly granted against the first defendant for payment of the sum of R100 000-00 together with interest thereon at the rate of 15,5% per annum a *tempore morae*. In the light of the quantum of damages awarded by this judgment only being known now, the parties may wish to direct further argument to me regarding the scale and/or extent of the first defendant's liability for costs. In the absence of agreement regarding such costs, either party may set the matter down for a determination of liability for costs.

Date of Hearing : 13 December 2007
Date of Judgment : 24 January 2008

Counsel for Plaintiff	:	C. Hartzenberg SC
Instructed by	:	Jasat & Jasat
Counsel for Defendant	:	R. Seegobin SC
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