IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NUMBER: A3024/05

In the matter between: -

ERROL BYRNE Appellant/Plaintiff

and

MASTERS SQUASH PROMOTIONS CC First Respondent/Defendant

R A MALLAC Second Respondent/Defendant

JUDGMENT

SATCHWELL J:

1. This appeal has raised the intriguing issue whether or not the contents of a letter from an employer advising an employee of the reasons for his dismissal can found an action for defamation or *injuria.* The issue of privilege is discussed.

2. The appellant (Mr. Errol Byrne) was dismissed from his employment with first respondent (Masters Squash Promotions CC) at the instance of a member thereof , the second respondent (R A Mallac). He contends that the letter dismissing him from his employment[1] is *prima facie* defamatory of himself or carries certain innuendos alternately that he was humiliated and degraded by the contents thereof. He further contends that these defamatory contents were published to the typist who produced the letter of dismissal and that the *injuria* was suffered on receipt of the letter. Appellant therefore instituted an action against the respondents in the Randburg Magistrates Court for damages in the amount of

[1] Annexure "A" to the summons

fifty thousand rand (R50 000.00). He now appeals the dismissal of his claims with costs [2].

3. The appellant was concurrently employed by the first respondent and a competitive institution, the Damelin Squash Centre. A client of the first respondent reported to the second respondent that the appellant had attempted to solicit his patronage and that of a squash team away from the first respondent to the Damelin Squash Centre.

4. Acting upon such information, the second respondent caused the contentious letter to be sent on behalf of the first respondent, the relevant portions reading as follows;

> "Although we were aware of your involvement with the Squash Connection at the Damelin campus at the time that the alternative offer of employment was made to you, we were of the opinion that there would be no conflict of interests.
>
> It has come to our attention, however, that following your appointment as Manager at the centre you have been soliciting business from our client base which is a total violation of the trust which we believed would be respected in our mutual interest.
>
> Under the circumstances we have no option but to invoke the 24 hour notice period with immediate effect. Would you please, therefore, ensure that all your personal belongings are removed form the premises forthwith and keys in your possession handed to reception.
>
> It must be clearly understood that, in terms of what has transpired, we are not prepared to debate this issue under any circumstances whatsoever."

3. It is common cause at the dictation to the typist of this letter constituted publication to her. For purposes of this judgment it can be accepted that the contents of this letter are *prima facie* defamatory of the appellant.

4. The only issue for decision at trial and in this appeal is whether or not such publication was justified in the circumstances in which it was published.

5. Appellant has testified regarding his shock at his dismissal, distress at his

[2] Appellant had legal representation at the trial in the court a quo. He represents himself at the hearing of this appeal.

unemployment, concern at what he perceived as an "unfair dismissal". However, it was not required of the trial court nor is it necessary for this appeal court to determine any substantive or procedural issues pertaining to the dismissal of the appellant. Any complaints which the appellant may or may not have with regard to his dismissal are not for determination by the trial court or this appeal court . This is an action for damages based upon alleged defamation or *injuria* and not the hearing of a labour dispute.

6. The evidence of Mr Dean Milbank is that he made a report to second respondent that appellant had attempted to solicit business away from first respondent to a competitor. Second respondent (as a member of the employer close corporation) and first respondent (as employer) perceived the appropriate response to be immediate termination of the part time employment of the appellant. This they did in the letter of which the appellant complains.

7. It is well established that where defamatory statements are made in privileged circumstances then the *prima facie* wrongfulness of such utterance or publication is justified (see Herselman NO v Botha 1994 (1) SA 28 (A)). The issue of privilege is approached by considering whether or not "the statements were relevant to the occasion "[3] , relevance being essentially "a matter of reason and common sense, having its foundation in the facts, circumstances and principles governing each particular case"[4]. Assessment of whether a defamatory statement was relevant to the occasion is "essentially a value judgment"[5].

8. It is trite that an employee is entitled to know the basis upon which any disciplinary action is taken against him and particularly the sanction of dismissal.[6] An employee who is dismissed with no knowledge as to the reason for such action would usually and understandably feel most aggrieved. An employer who fails to inform an employee of the reasons for his dismissal could possibly expose itself to a complaint of unfair dismissal on that ground alone.

9. It is my view that appellants' employer and manager had both a moral and social duty as well as a legal duty to communicate to the appellant the reasons for his dismissal from their employment. (see De Waal v Ziervogel 1938 AD 112). Considerations of morality and social harmony suggest that persons must know why actions to their prejudice are taken against them. Failing such courtesy and absent such information, employees would feel unjustly treated and aggrieved and these feelings could lead to various forms of labour unrest. Further, failure to furnish reasons for dismissal would prejudice a former

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[3] See National Education Health and Allied Workers Union v Tsati 2006 (6) SA 327 (SCA) at para 12 .
[4] Van der Berg v Coopers & Lybrrandt Trust (Pty) Ltd and Others 2001(2) SA 242 SCA at para 26.
[5] Van der Berg supra at 26.
[6] See The Code of Good Practice attached to the Labour Relations Act 66 of 1995 , Item 4 dealing with 'Fair Procedure' and sub 3 "If the employee is dismissed, the employee should be given the reasons for dismissal…"

employee who wishes to challenge or appeal such dismissal. Finally, the Code attached to the Labour Relations Act *inter alia* requires such reasons to be given.

10. I therefore find that the publication of the contents of the letter of dismissal to the typist by the second respondent on behalf of the first respondent was, in these circumstances, privileged.

11. I should remark that, if this were not so, every employer who furnished such reasons in writing or through subordinates or to other third parties such as shop stewards or immediate managers would expose themselves to actions for defamation. Further, if this were so, employees who were to be denied reasons for their dismissal by employers who feared such exposure to defamation actions would rightly feel aggrieved.

12. I have no difficulty in accepting that publication to a typist of the contents of the letter of dismissal which is to be typed is publication in the exercise of a duty to inform the appellant of the reasons for termination of his employment. However, appellant now raises in his supplementary heads of argument that "it is common knowledge" that the second respondent and the typist communicated these allegations to other persons. This was not evidence at the trial, the second respondent has not had the opportunity to deal with such averments, the typist was not called as a witness. It is trite that an appeal court is bound to the record of the proceedings in the court a quo. It is only in exceptional circumstances that further evidence could be received on appeal[7]. No such basis has been laid for the admission of such new information into 'evidence' at this appeal.

13. In the result this appeal is dismissed with costs.

DATED AT JOHANNEBURG 3RD AUGUST 2009

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Satchwell J

I agree

[7] S v Marx 1989(1) SA 222 A; see alsothe requirements for such admission in S v De Jager 1965(2) SA 612 A.

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Beckerling AJ

Date of hearing: 3rd August 2009
Date of Judgment 3rd August 2009

For the Appellant: In person
For Respondent: W B Pye
Instructed by Bowes & Turner Inc