

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- 1) REPORTABLE: YES/NO
 2) OF INTEREST TO OTHER JUDGES: YES/NO
 3) REVISED.

CASE NUMBER: 41317/2011

DATE

SIGNATURE

In the matter between:

RONALD JOHN NEL

PLAINTIFF

and

GILBERT PHEENA PHALAFALA

DEFENDANT

JUDGMENT

Windell J:

Introduction

[1] This is an action for damages suffered as a result of defamation. The plaintiff (Nel) claims an amount of R 5 million from the defendant (Phalafala). During December 2010 Nel and Phalafala were on the same board of directors at Miranda Mineral Holdings (Pty) Ltd. Miranda is a mining and exploration company listed on the Johannesburg Stock Exchange. It held shares in various subsidiaries which in turn held prospecting rights. It had been founded by the plaintiff.

[2] Mr Nel alleged in his particulars of claim that Mr Phalafala defamed him in September 2011 by orally stating to Mr Garth Simpson, Mr Clive Simpson and Mr Andrew Johnson that:

"the sum of R5 million which had been put into Miranda Mineral Holdings had just disappeared, with the plaintiff there, and that someone will be going to jail for this."

[3] Mr Nel further stated in his particulars of claim that the pleaded statement is per se defamatory of him in that the statement was intended and understood to mean that he had stolen R5 million from Miranda Mineral Holdings. In the alternative the statement carries certain quasi- innuendoes or stings, essentially to the effect that it means that he had committed the crime of theft or fraud and that he would be sentenced to imprisonment. In the further alternative, Nel stated that the pleaded statement was intended and understood to mean that he is a person unfit to manage a company and that as a result of his actions Miranda Mineral Holdings Ltd had lost R5 million and that he cannot be trusted generally and specifically with regard to the running of a company. These innuendoes are alleged to arise from the fact that he is the former CEO of

Miranda, that he is a highly respected businessman especially in the field of mining and mineral exploration and that he had been instrumental in founding Miranda and other businesses over a long period of time.

The pleaded defamatory statement

[4] Mr Phalafala denied that the words in the pleaded statement were uttered, or that the statement is *per se* defamatory, or bears any of the meanings or innuendoes alleged. Mr Nel bears the onus to prove that the defamatory words or words with substantially the same meaning were spoken.

[5] Mr Nel testified that during the evening of the 14th or 15th of September 2011 he was telephoned by Mr Garth Simpson (Garth). It is common cause that he had been negotiating with the Simpsons brothers whom he now regards as his friends. He had concluded a joint venture agreement with them in terms of which Miranda would acquire mining rights or access to coal deposits underlying the farms which belong to the Simpsons. Garth told him that Mr Phalafala had made the pleaded statement during a lunch meeting between him, his brother Clive and Mr Andrew Johnson.

[6] Garth told him that Phalafala said the exact words in the pleaded statement. He assumed that the "*someone*" that that was going to jail was a reference to him as he was the person in charge of the company and the money was taken under his control. He stated that because you cannot put a company in jail, it must be the guy that headed the company. Mr Nel testified that although he was not told, he assumed that the R 5 million that was mentioned was an amount put in by Jakani, Mr Phalafala's company.

[7] The Simpson brothers were called to prove the pleaded statement. Garth Simpson testified that the words that were uttered by Mr Phalafala during the lunch meeting were:

"Mr Nel had taken R5 million, there was an investigation, and that he would be going to jail for it".

[8] He embellished his statement by stating that Mr Phalafala also said that the R 5 million that was taken were put in by Yakani and that there had been an audit.

[9] He phoned Mr Nel during the morning of the 16th of September 2011 to tell him what was said by Mr Phalafala. He however decided to water down the punch. He told Nel that Phalafala said that *"funds had been missing"*. He then confirmed that he told Mr Nel the words in the pleaded statement (*"the sum of R5 million which had been put into Miranda Mineral Holdings had just disappeared, with the plaintiff there, and that someone will be going to jail for this."*)

[10] He testified that he told Mr Nel that Mr Phalafala had also spoken about an audit. Mr Nel's response to the allegations during their telephone call was that he said that he was going to sue and that the audit had already been started. Although he first explained to the Court that he was too embarrassed to tell Mr Nel the exact words, he later testified that he did indeed tell Mr Nel that Mr Phalafala said that he, Mr Nel, had taken the R 5 million and that he, Mr Nel, will go to jail for it. He testified that he was phoned by Mr Nel's attorney soon after the telephone call to confirm what was said. The pleaded statement was then

read to him and he agreed that that was indeed the words that were spoken by Mr Phalafala.

[11] Mr Clive Simpson testified that Phalafala said:

"there was R5 million missing and that Ron Nel would go to jail for that."

[12] He testified that there was a meeting with the plaintiff's attorney weeks before the commencement of the trial where both he and his brother were present and where they discussed what their evidence would be and they discussed the discrepancy between that which was initially conveyed to the plaintiff and their present evidence. That concluded the evidence for the plaintiff.

[13] Mr Phalafala denied that he uttered any defamatory words. He testified that he might have said something about R 5 million but he was referring to the R5 million that came in through Global around 31 March 2011. A part of the R5 million was not spent in accordance with its intended purpose. Some of it was spent on acquiring the shares of a Mr Malevu. He testified that it was common cause that Mr Nel played no role in the expenditure of the R5 million. On 13 March 2011 Mr Nel was replaced by Glen Poff as CEO of Miranda. Mr Nel was only a non-executive director and he was not empowered, or able, to make any decision as to the expenditure of funds by Miranda. Such decisions would have to be taken by Poff or Kobboon or an executive committee of which the plaintiff was not part. He further testified that the forensic audit had been completed by 2 September 2011 (before the lunch meeting) and there was no suggestion or evidence that Mr Nel had stolen R5 million or any other amount. He knew that the Simpsons and Mr Nel were friends.

[14] Mr Johnson was present at the lunch meeting when the alleged defamatory statement was made. Johnson became the CEO of Miranda on 1 August 2011. He was employed by Global and thereafter seconded to Miranda. He left Miranda in December 2012 and is now employed at RSV Enco, a firm of consulting engineers. He denied that the pleaded statement was made or that words with a similar meaning were uttered. He stated that he would definitely have remembered if someone spoke of money that had gone missing and that a person would go to jail for it. If Mr Phahalafa had spoken words to that effect he would have challenged him on it because it was contrary to the findings of the forensic audit. As the new CEO of Miranda he would also have discussed it with Mr Phahalafa during the 4 hours that they drove back to Gauteng from Dundee. He was in any event not aware of an allegation that R5 million had been stolen or taken from Miranda and that Mr Nel was responsible for it. That concluded the evidence on behalf of the defendant.

[15] There is nothing in the pleaded statement which identifies Mr Nel as the person responsible for the disappearance of the money or that he was the person that would be going to jail. Prior to the summons being issued, Mr Nel's attorney phoned Mr Garth Simpson, and asked him to confirm that which the defendant had said. The summons was then prepared on that basis.

[16] The Simpson brothers are in agreement that the pleaded statement was not made. The defendant, Mr Phahalafa, denied uttering the pleaded statement or words to that effect. Mr Johnson also denied that the pleaded statement was uttered. There is accordingly no evidence, at all, to support a finding that the pleaded statement was made. I agree with counsel for the plaintiff in her contention that as the plaintiff has not proven the pleaded statement, the

remaining issues raised in terms of the pleadings, namely whether the pleaded statement is in fact defamatory of the plaintiff and if so, whether it was justified and made without *animus iniuriandi*, do not arise for consideration.

Has the plaintiff proven an alternative defamatory statement?

[17] Counsel for plaintiff submitted that the words which were set out in the particulars of claim were only slightly different from those lead by the Simpsons. I cannot agree. In the context of the facts of this case there is a vast difference between what Garth Simpson told Mr Nel shortly after the lunch meeting, and his subsequent evidence. The evidence of Mr Garth Simpson and his brother Clive is contrary to the pleadings. A different defamatory statement to that stated in the pleadings only arose when the Simpson brothers testified.

[18] It is difficult to comprehend why Garth felt compelled to contact Mr Nel about the defamatory allegation and then not tell him the exact words that were spoken. In his attempts to explain this, he changed his initial evidence and testified that he did in fact tell Mr Nel that Phalafala had said that Ron Nel would be going to jail.

[19] The question now is: If he indeed told Mr Nel that Mr Phalafala said that Nel stole the money and that Nel would be going to jail for it, why would the plaintiff allege in the particulars of claim that the statement was that "someone" would be going to jail and why would he then testify that the "someone" should be interpreted as him because he was in charge of the company?

[20] Garth Simpson explanation as to why when contacted by the Mr Nel's attorney he did not tell him the truth, is unsatisfactorily. I also find it improbable that the plaintiff's attorney and Mr Nel knew about the discrepancy but failed to act on it before the trial started. It appeared to me that counsel for the defendant was not the only person surprised by the changed version. If not, why did the attorney for the plaintiff only then considered amending the plaintiff's pleadings?

[21] Counsel for plaintiff submitted that both Simpson brothers had regular contact with Mr Nel after the 14th of September 2011. If Mr Phalafala had indeed said that Mr Nel would go to jail they would have mentioned this to him on any of these occasions. I am in agreement with this contention

[22] The predicament Garth faces to try and explain the difference in his testimony is not only limited to the alleged defamatory words. Garth testified that he had also told Nel that Phalafala had said that an audit was going on and that Phalafala had said that the R5 million had been put in by Yakani. This was contradicted by both Clive Simpson and the Mr Nel.

[23] There are also material differences between Garth and Clive Simpson as to what the issues were that was discussed between the parties at the meeting. For example Garth testified that no mention was made of the Sesikhona project and that this project was a priority. This is in contrast to what Clive testified. The Sesikhona issue was quite important to the Simpson brothers because the only mining right which was held by any of the Miranda subsidiaries was a mining right vested in a company called Sesikhona Kliprand Colliery (Pty) Ltd which was majority owned by Miranda Coal. The Uithoek project related to land owned by

the Simpson brothers. The Uithoek project was put on hold because of the Sesikhona project.

Legal position

[24] The court is faced with two mutually destructive versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 SCA , Nienaber JA stated the following on p14-15:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

[25] Andrew Johnson was the only completely unbiased witness. He has no ties with Miranda, Yakani, Global or the defendant. His evidence was straightforward and logical. The same however cannot be said of the Simpson's brothers, especially Mr Garth Simpson. He was an extremely poor witness that changed his version as the trial proceeded. His evidence is rejected as false.

[26] The probabilities also support the defendant's version. It is inherently improbable that Mr Phalafala would have made an accusation that Mr Nel had stolen R5 million in the presence of Nel's friends and the CEO of the company when it is accepted by all concerned that Nel never had any control over, or role in, the expenditure of this money.

[27] It is undisputed that in all the litigation arising between Nel and Miranda there has never been an allegation of theft. Such an allegation also did not arise in the forensic audit or in his removal as a director.

[28] The plaintiff must prove the defamatory words relied upon, or words with substantially the same meaning, on a balance of probabilities. See *De Villiers v Schutte 2001 (3) SA 834 (K)*. It has been said that recollection can be fallible and in business the failure to confirm an event promptly and on paper can be fatal.

[29] I am in agreement with counsel for the defendant that the probabilities are that Mr Phalafala said something at the meeting which offended or alarmed the Simpsons. However given the marked difference between the pleaded statement and the Simpson's evidence, I find that the plaintiff was unable to prove the pleaded statement or words with a similar meaning on a balance of probabilities.

[30] In the result the claim is dismissed with cost.



L. Windell

Judge of the South Gauteng High Court

Counsel for applicant	: Mr B Whitter
Counsel for respondent	: Adv. A. De Kok
Date of hearing	: 2 December 2013
Date of judgment	: 28 February 2014