**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: **26096/2014**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

9.12.16

**Date:** **WHG VAN DER LINDE**

In the matter between:

Netshandama, Takalani — Plaintiff

and

NEHAWU — First Defendant

Chauke, Matilaya Onica — Second Defendant

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Judgment

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Van der Linde, J:

[1] This is an action for damages for defamation of character. The plaintiff is a regional manager for the Tactical Intervention Unit of the South African Revenue Services, based at the Beit Bridge Border Post. He is also a Traditional Leader in the village of Tshandama, some 100km away from Musina. He alleges in his particulars of claim that he *"... has many subjects of his residing in the Musina area."*

[2] He sues the second defendant, a shop steward of the first defendant, for R1m in damages for having sent a letter on 29 August 2013 to the senior manager of SARS at Musina, in which she requested, on behalf of the first defendant, an investigation into certain alleged misconduct on the part of the plaintiff. At the time she acted in the course and scope of her position as shop steward, and it is not disputed that the letter was written on behalf of the members of the first defendant. The plaintiff therefore sues the first defendant as principal of the second defendant, contending in effect that when the second defendant acted, it was the first defendant who did. The liability of the defendants is alleged to be joint and several.

[3] The plaintiff alleges that the contents of the letter are *per se* defamatory of the plaintiff. When the case was called on 30 November 2016 I raised with the parties, when I was told that the plaintiff planned on calling eight witnesses, whether it would not be advisable to separate, under rule 33(4), the issue of whether the letter is *per se* defamatory and, if so, the issue of qualified privilege pleaded by the defendant, for determination first; and to postpone the remainder of the issues for later determination, if that should be necessary.

[4] After the mid-morning adjournment, the parties informed me that they had so agreed. I consequently made such an order. The matter was then stood down until 1 December 2016 to enable the parties to prepare heads of argument, and it was argued then. I reserved judgment till 9 December 2016.

[5] The order made in terms of rule 33(4) was to separate from the remainder of the issues that arise between the parties on the pleadings, the following issues:

(a) Whether the letter dated 29 August 2013 annexed to the particulars of claim at page 14 of the pleadings bundle is *per se* defamatory of the plaintiff; and, if so

(b) Whether the defence of qualified privilege as pleaded by the defendants at paragraphs 3 to 9 of their plea would, if proved, constitute a defence to the plaintiff's claim.

The remainder of the issues that arise between the parties on the pleadings were postponed for later determination, if necessary.

[6] In paragraph 5 of the plea, it attached as "CM01" the attendance register and extract from the minutes of a meeting held on 21 August 2013. As will appear below, this meeting is the fulcrum of the defence of qualified privilege, the defendats pleading that the contentious letter was written in pursuance of what had been resolved at the meeting. In fact, however, the parties both referred without objection from the other to larger portions of those minutes which were placed before the court as part of the discovery bundles of both parties as exhibits A, B and C. In exhibit C, the defendants' supplementary bundle, the minutes are at pages 25 to 48, and I will below refer to it with reference to those pages. The material on which the separated inssues will be decided thus comprises the pleadings, and exhibit C, pages 25 to 48.

[7] Some background to defamation as an actionable wrong is helpful. One starts off with the rather obvious proposition that words are defamatory of the plaintiff when they, whether according to their primary or secondary meaning, lower the plaintiff in the esteem of a fictitious, normal, right-thinking and reasonable reader who is not hyper-critical or over-sensitive.[1]

[8] As indicated, words may have a primary or secondary meaning for purposes of defamation. The primary meaning is that attributed to them by the average, ordinary reader.[2] The

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[1] Coulson v Rapport Uitgewers (Edms) Bpk, 1979 (3) SA 286 (A) at 294 B – 295 B.

[2] Demmers v Wyllie & Others, 1980 (1) SA 835 (AD) at 840 A – B. For this reason, the primary meaning is often also referred to as the *"ordinary meaning"*.

average, ordinary reader, like the reasonable man/person, does not actually exist. It is a fiction, created by the law to set an objective standard for what words are supposed to mean, and whereby to keep free speech within reasonable, objective bounds.

[9] The secondary meaning of words is not simply an extension of or extrapolation from the primary meaning.[3] The secondary meaning of words is a different, special, non-ordinary meaning which is attributed to words by readers who are specially qualified. It is thus a meaning which the words in their ordinary sense do not bear, but which become their meaning for those specially qualified readers, in the circumstances then and there prevailing.[4]

[10]As will already be appreciated, here one is not dealing with fiction but with fact, but only to this extent: has the plaintiff shown that there are readers who were so specially qualified, and who actually understood the ordinarily innocent word in the alleged special, defamatory, sense?[5]

[11]Words may be defamatory of the plaintiff according to either their primary meaning, or their secondary meaning, or both. Further, words which according to their primary meaning are defamatory may, in view of the special circumstances, be innocent according to their secondary meaning. Conversely, words which according to their primary meaning are innocent may, in view of the circumstances, be defamatory according to their secondary meaning. Finally, for present purposes, words may be defamatory of a plaintiff according to both their primary meaning and their secondary meaning.

[12]With this background now out of the way, one can turn to the submissions by the parties. The plaintiff's submissions fall into broadly two parts. First, the plaintiff argues that the letter is *per se* defamatory of him, having regard to the primary or ordinary meaning of the words used. He refers here to the charges levelled against him of nepotism, of jobs for pals,

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[3] Argus Printing & Publishing Co. Ltd & Others v Esselen's Estate, 1994 (2) SA 1 (A) at 20 F – 21 B.
[4] Wallachs Ltd v Marsh, 1928 TPD 531, at 534. Such a secondary meaning of words is also referred to as an *"innuendo"*.
[5] National Union of Distributive Workers v Cleghorn and Harris, 1946 AD 984, at 993.

and of protection of corrupt individuals by "counselling" them instead of channelling them through the normal disciplinary process.

[13]Second, in anticipation of the defendants' defence of absence of unlawfulness for privileged occasion, the plaintiff submits that although the letter was admittedly written in response to the invitation at the meeting between the second defendant and management on 21 August 2013, the letter went further in two respects. First, although in some instances it prefaced the defamation by stating that "it is alleged that" so and so had occurred, in many instances the defamatory conduct was stated as if it were fact. And second, the letter dealt with topics that were not covered in the invitation, specifically the topics covered in paragraph 6.10 of the minutes of the 21 August 2013 meeting.

[14]Generally, the issue of fact as opposed to opinion in matters defamation becomes relevant when the defense of fair comment is raised. Then the issue is whether the reasonable reader understood the assertions to comprise comment on fact, which itself ought usually to be contained in the article itself, or if not, at least be accessible or known to the likely reader of the allegedly defamatory material.

[15]In the course of making submissions concerning the defence of privilege, the plaintiff's counsel argued too that in any event, the letter was maliciously written, and as a matter of law malice dismembers qualified privilege. I raised with counsel the fact that malice was not pleaded, and queried whether it could therefore be raised.

[16]But I also pointed out that the separation order that I made defined the second issue as being whether, on the facts as pleaded by the defendants, the defence of qualified privilege is, as a matter of pleading, established. The anticipation was precisely that if it should turn out that that defence is not so established, then the defendants would fail on the merits, potentially subject to leave to amend the plea being afforded. But if the defence of qualified privilege is established on the plea, then it was still subject to proof by *viva voce* evidence. In

the course of that hearing, the plaintiff would be able to raise malice, if of course by then malice will have found its way into the pleadings by way of an appropriate replication.

[17]Turning then to deal with the issues argued, one begins with whether the letter is *per se* defamatory of the plaintiff. The test is objective, and as has been pointed out, the question is, bluntly put, whether the fictitious reasonable reader will think less of the plaintiff upon reading the letter. In this context an issue that features is whether the reasonable reader of the letter is to be precognized with knowledge of the prior meeting at which the request for the letter was made. In other words, does one judge whether the letter is defamatory *per se* by reading only the letter, or does one consider the letter against the backdrop of the meeting?

[18]Starting then with "alleged to be": on their own, divorced of context, those words make no difference, in my view. Whether it is published that a person is say corrupt, or whether it is published that a person is say alleged to be corrupt, matters not: in both cases the reasonable reader will think less of the person, for the following reason. In the case where it is stated as a fact that a person is corrupt, the statement is attributed to the author. Where the author purports to attribute the statement to another person, by saying that "it is alleged" that someone is corrupt, the substance of the communication is still the same.

[19]In the first instance, it is the author who states that as a fact the person is corrupt, whereas in the second instance the author is simply stating as a fact that another person or persons states or state that the first person is corrupt. The substance remains the statement that as a fact the plaintiff is corrupt. The plaintiff is still lowered in the esteem of right-thinking individuals, since it matters not who it is that states that the plaintiff is corrupt; the lowering in the esteem is occasioned by the mere fact that there are people who state that as a fact the plaintiff is corrupt.

[20]Thus far it was assumed that to say of a person that s/he is corrupt, will lower that person in the esteem of right-thinking individuals. In the present case the statement was slightly

different. It was not that the plaintiff himself is corrupt, but that the plaintiff shields others who are corrupt; and also that the plaintiff is guilty of nepotism and jobs for pals.

[21]In my view not much debate is needed on this issue. In our country, given the current climate of known widespread corruption and the government's stated mission of fighting it, nepotism and jobs for pals are manifestations of corruption; and shielding corrupt individuals is as bad as being corrupt oneself, just as receiving stolen goods is as bad as theft itself.

[22]But, as pointed out, that is not the end of the enquiry as to whether the letter is *per se* defamatory of the plaintiff, because it may be that the fictitious reasonable reader must be taken to know the backdrop to the letter, being that it was written in pursuance of the meeting of 21 August 2013.

[23]In my view the reasonable reader must be taken to be aware of the backdrop to the letter, for this reason. The letter was published not to the world at large but to a specific individual. The plaintiff asserts that it was published further afield, but that is not common cause. All that is common cause on this part of the trial, is that it was published to a specific senior manager, Mr Colbert Mbuyane, who was in fact present at the meeting of 21 August 2013, at which the letter was called for.

[24]The question is then not whether Mr Mbuyane himself actually considered the letter as being defamatory of the plaintiff, given the backdrop; but whether the fictitious reasonable reader who was present at the meeting of 21 August 2013 would consider the letter as being defamatory of the plaintiff.

[25]In my view that fictitious reasonable reader would not consider the letter as defamatory of the plaintiff, for the following reasons.

[26]What is said of the plaintiff, if the letter were read in isolation, would have been defamatory, as I have indicated above. It lowers a person in the esteem of right-thinking individuals when it is said of that person that s/he is corrupt. But here the prior meeting was told of

allegations that had been raised by the second defendant as shop stewart on behalf of the union, and it resolved that those allegations needed to be referred to the relevant office to be investigated. It did not dismiss them out of hand. It requested the second defendant, as shop steward, to write a letter to the senior manager, to raise the allegations that were being made, so that they could be investigated.

[27]The recipient of the allegedly defamatory letter was present at the meting and thus heard the allegations being made. To be true, not every single allegation in the contentious letter was minuted a shaving been raised at the earlier meeting on 21 August 2013; but most were. Importantly, the plaintiff himself was implicated by name.

[28]The informed fictitious reader of the letter that followed on the meeting would thus read it within that context; that the letter contained the allegations that needed to be investigated. As was held in Johnson,[6] the context is essential for appreciating how the reasonable reader would have understood the letter.

[29]Thus the statements in the letter that "it is alleged" now assume a different meaning from that mentioned above. Now it forms part of the anticipated letter response to the meeting's resolution that the second defendant should pen the allegations that were being made and pass them on so that they could be investigated.

[30]So, at least to the extent that the now informed fictitious reasonable reader would understand those assertions to be a response to the meeting request, they would not in my view lower the plaintiff in the esteem of that reader. That reader would regard the statements being made in the letter as simply the anticipated pass-on of the allegations that had been made and that required to be investigated.

[31]But what about the plaintiff's contention that even (perhaps especially) the informed, fictitious reasonable reader would have appreciated that the letter went further, in terms, than what was mandated at and by the prior meeting? In my view this contention is not

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[6] Johnson v Beckett, 1992 (1) SA 762 (A).

sound. Paragraph 6.10 of the minute contains most of the allegations that found their way into paragraph 2 and its sub-paragraphs of the contentious letter.

[32]It was submitted by the plaintiff that the meeting resolved that those allegations would be dealt with in a particular way, meaning that they should be investigated by the very offices to which the allegations of improper conduct refer, and that this was not the office of the recipient of the letter, Mr Mbuyane.

[33]I am not convinced that one can or should accept that. The minutes expressly implicate the plaintiff in paragraph 6.10; why then resolve that the allegations should be referred to him to resolve them? Moreover, the language used – *"Management responded, resolved, and agreed with NEHAWU that the above state cases should be referred to the relevant office to have investigations conducted"* – is wide enough to include a reference to the office of Mr Mbuyane; or at least to covey to the reasonable reader who had the knowledge of the meeting as backdrop that the language should be so understood.

[34]It follows, as I have said, that the letter, understood in its context, is not *per se* defamatory of the plaintiff. If I am wrong on this score, and if the letter is in fact *per se* defamatory of the plaintiff, I believe that the defence of qualified privilege has been sufficiently asserted in the plea, principally for the reasons that follow.

[35]The meeting made it clear that the union should refer the allegations that had been made to the relevant office for investigation. If the letter tabulated one or two more allegations against the plaintiff that were not actually raised at the meeting, the defendants went no further, in my view, than to include further incidents of the same generic nature of the complaints that had been levelled against the plaintiff.

[36]They had right and a duty to include them in the request for an investigation; and the senior manager who was present at the meeting – where most of these allegations had in any event already been made – had a corresponding right and duty to receive them.

[37]In view of the conclusion to which I have come on the first issue, it is however not necessary that I come to a firm view on this second issue, which arises only if the letter were defamatory *per se* of the plaintiff.

[38]The plaintiff asked that if this were my conclusion, I should direct each party to pay his/its own costs. In my view there is no sufficient reason why costs should not follow the result.

[39]In the result I make the following order:

(a) It is declared that the letter at page 14 of the pleadings bundle, dated 29 August 2013 and addressed to The Senior Manager of South African Revenue Service, Private Bag X 601, Musina, is not defamatory of the plaintiff.

(b) The plaintiff's claims are dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 1 December 2016

Date judgment: 9 December 2016