REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29990/2013

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

12/2/2019
DATE

SIGNATURE

In the matter between:

IVO DOS SANTOS CASTELO BRANCO PLAINTIFF

and

COETZEE STUART COLIN DEFENDANT

JUDGMENT

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[1] In this action the Plaintiff, an adult business man, sues the defendant for defamation alternatively impairment of his dignity for the sum of R15000 000.00. The Defendant defended the action by the Plaintiff and in his plea denies the allegations by the Plaintiff and puts the Plaintiff to the proof thereof

[2] The claim emanates from an email which the Defendant sent to the shareholders of Rand Air Port Holdings and Rand Airport Operators.

BACKROUND

[3] What seems to have brought the action into motion is the email written by the defendant and sent to the plaintiff in which he says

"As I cannot associate myself with or condone the recent actions and discussions of the board, I wish to tender resignation from the Rand Operators and Rand Holdings' Board with immediate effect"

[4] This email was sent to the plaintiff and the plaintiff alone.

[5] The plaintiff responded by the email dated the 6th April 2013 which I will quote the first paragraph

"We are in receipt of your resignation, email dated 28 March 2013, and it is with regret that you have taken this decision. However, what I don't understand is "Your statement you cannot associate yourself with or condone the recent actions and decisions by the Board."

[6] This is what caused the defendant to reply by an email at issue. He replied to all the recipients which appeared on the email by the Plaintiff and added two extra recipients.

COMMON CAUSE

[7] The following issues were common cause:

7.1 Defendant is an author of an email dated 4th August 2013 which is alleged to have defamed the Plaintiff.

7.2 At the time of publication of the email, Plaintiff was and still is a commercial pilot.

7.3 At the time of publication of the email the Plaintiff was a director of companies

7.4 At the time of publication of the email plaintiff had been the chairman of Rand (Airport) Operators for over 5 years

7.5 At the time of the publication of the email, the Plaintiff was the sole member of Champ Foods CC, which has been in existence for 36 years and has approximately 400 employees.

7.6 The email was transmitted in no less than 8 times on 8 April 2013;

7.7 The email was transmitted and published to the persons mentioned therein;

7.8 The email was transmitted to no less than 30 persons;

7.9 The persons to whom the email was transmitted were shareholders in Rand (Airport) Operators or their assistants;

7.10 The defendant was the author of the letter on page 171 of the trial bundle – the item to be added to the shareholders' meeting of 29 April 2013, namely the vote of no confidence in the plaintiff as Chairman of Rand (Airport) Operators and that he, inter alia knowingly deceived shareholders;

7.11 The defendant approved most of what transpired at the board meetings.

7 .12 The defendant, Mr Ebersohn and others applied for the position as airport manager. Mr Ebersohn was appointed.

7.13 Ken Jones had, in no less than two previous letters to shareholders, already questioned the plaintiff's sanity, his integrity, whether he had a personal agenda, his inability to chair meetings and the use of proxies.

7.14 One of the shareholders and directors of the Holding company namely Councillor Mahlangu had already questioned the plaintiff's ability to chair meetings (or lack thereof) and referred him to the King III report.

EVIDENCE BY THE PLAINTIFF

[8] In his evidence, the plaintiff explained that when he received the email in question mentioned above, he felt insulted, embarrassed, humiliated and degraded. He stated that he is still in pain even today. He can no longer go to the coffee shop at airport because its patronage are the people the email was sent to.

[9] He testified that he understood the email to mean that he;

(a) Has no understanding of corporate governance.

(b) Is not a fit person and cannot conduct board meetings.

(c) Employed bullying tactics to have resolutions passed at board meetings.

(d) Cannot be trusted because it is alleged that he misled the board and the shareholders of the two companies.

(e) Is incompetent in writing emails, he cannot spell and his grammar is poor.

Cross-examination

[10] Plaintiff testified under cross-examination he is Portuguese. He was schooled in Johannesburg and is supposed to have good command in the English language. He was shown several of emails which had spelling mistakes. He conceded that his grammar was poor and it would have been ideal that he installed spelling checker in his computer.

[11] He was cross-examined at length about the director's meeting which held on the 14 February 2013. He conceded that this is the meeting that proceeded without a quorum. The alternates (proxies) were not supposed to vote, if the directors were present. However, in this meeting they were allowed to vote. It was put to him that this is the bullying tactic, which he would use in order to pass resolutions in his favour. He could not answer that question. He conceded to the submission that it was not only the defendant who was unhappy with his conduct of the meeting, this was out there in the domain of the other shareholders.

[12] It was further put to him that there is nothing wrong when the defendant says he doesn't trust him. He responded by saying he is entitled to his opinion. It emerged that the plaintiff told the shareholder that Chris Ebersohn had impicapable record which turned out not to be true. It was on this issue the defendant felt the plaintiff deceived the shareholders.

Application for absolution

[13] At the close of the plaintiff's case, counsel on behalf of the defendant sought absolution from the instance on the basis that the plaintiff had not made out a prima facie case. The application was premised on the fact that plaintiff conceded under cross examination that publication was not defamatory. There is no need to call the defendant to repeat what the Plaintiff has already told the court which is the publication was not defamatory.

[14] The definitive approach to an absolution application is conveniently set out by Harms JA **in Gordan Lloyd Page and Associates v Rivera and Another 2001 (1) SA 88 (SCA)** at 92E-93:

"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403** (A) at 409G – Hintheseterms:

".....(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

(Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T.)"

[14] **In Gascoyne v Paul and Hunter 1917 TPD 170** at 173 the following was said "Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[15] I did not accede to the application for absolution, the reason being that I was of the view that there was a prima facie case before me. The Defendant needed to take the stand and defend himself.

EVIDENCE BY THE DEFENDANT

[16] Defendant testified that he was a shareholder of both Rand Airport Operations and Rand Airport management. He had never had issues with the plaintiff until the time when the process of appointing Chris Ebersohn was underway. He further testified the things that were mentioned in the in the email were already in the domain of the shareholders. The Plaintiff whilst the chairman allowed the alternate directors to vote even when the directors, they supposed to represent were present. This event took place at the meeting held on the 4th February 2013.According to the rules and the policies of the company they should not have voted.

[17] The Plaintiff further misused the proxy process in allowing proxies to be used in director's meeting when proxies may only be used in shareholder's meetings. He referred to the court to the various meetings on trial bundle which proceeded without the quorum. This was against the company rules and policies. This took place whilst the Plaintiff was the chairman. That the Plaintiff whilst the chairman had his own agenda in hiring Mr Ebersohn.

CROSS-EXAMINATION

[18] Under cross examination he testified that according to his knowledge Mr Ebersohn was hired to be the airport manager. However, it became clear at a later stage that the Plaintiff hired Mr Ebersohn to do a due diligence on the

directors and the shareholders of the board of which the Plaintiff is the chairman.

[19] He said that when he resigned, he sent an email of resignation to the Plaintiff. The Plaintiff, instead of accepting his resignation elected to email the Defendant and copied all the shareholders of Rand Airport Operators an email in which he objected to the contents of the email by the Defendant. In response to the email by the Plaintiff, the Defendant sent the email as "replied to all" including the wife and the professional assistant of the two directors. The reason is that these two directors take time to read their emails. The wife and the professional assistance do assist them with their emails.

[20] He was adamant that the contents of the email were in fact true and represented fair comment. They were an expression of opinion constituting fair comment to fellow shareholders and directors.

THE LAW

[21] It is trite that the Plaintiff bears the onus to prove its case against the Defendant on a balance of probabilities. A finding on a balance of probabilities is also not merely a mechanical balancing of evidence or for that matter, the number of witnesses on each side. In ***Selamolele v Makhado*** *1988 (2) SA 372 (V) at 374J–375B* the approach to the question whether the onus has been discharged was dealt with as follows:

"Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

ARGUMENTS

[22] It was argued on behalf of the plaintiff that the statements or the publication was defamatory.

[23] It was argued on behalf of the plaintiff that if the court would find that on the plain interpretation the statements or publication is not defamatory then the plaintiff relies on the secondary meaning of the publication and the innuendos of the publication or statements. The innuendos render the statement defamatory.

[24] Counsel for the plaintiff spent time in his heads of argument referring to the phrases "lieutenants" and "snakes and suits" and argued that they were defamatory.

REASON FOR THE JUDGMENT

[25] In dealing with defamation one has to inquire about the primary meaning of the words published. The primary meaning is the ordinary meaning and we ask the question whether the words are defamatory per se. We start by establishing whether the publication is reasonably capable of defaming the plaintiff. Secondly whether the reasonable person who hears or reads the publication would regard is as defaming to the plaintiff or shaming the plaintiff's reputation. See **Le Roux and Others v Dey 2011(3) SA 274 (CC)**

[26] In **Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)** at paragraph 43 the court said the following

"In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the

individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.

THE DEFENCE OF FAIR COMMENT

[27] Having said that, therefore I do agree with counsel for the Plaintiff when he argues that the statements were defamatory. However, the plaintiff conceded under cross examination that his grammar is poor. He further conceded that the defendant was justified when he said he deceived the shareholders. The plaintiff also said that the defendant was entitled to his own opinion.

[28] The counsel for the defendant submitted that the plaintiff did assume the position of being a chairman of the board of directors. He must be able to take criticism levelled against him in the way he is running the meetings. He allowed the alternates of the directors to vote for the directors although the directors were present in that meeting. Then the plaintiff complains that he was referred to as using "bullying tactics"; he cannot be seen to complaining when being challenged on this aspect as he has assumed this role and should be able to accept criticism from his colleagues.
Therefore, I am satisfied that the email was a justification of the truth for the shareholder's benefit and a fair comment based on facts which were substantially true. His claim that he was defamed on these issues had to be dismissed.

[29] The interpretation of the secondary meaning of the publication was established in **Le Roux V Dev (freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA274 (CC)** Brand J state as follows
"Statement may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning also referred to as an innuendo, derived from special circumstances which can be attributed to the statements only by someone having knowledge

of the special circumstances. A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with implied meaning of the statement which is regarded as part of its primary or ordinary meaning"

[30] In **Hassen v Post Newspaper (Pty)Ltd and Others** 1965 (3) SA 562 at 566 G-H it was stated as follows:

"When a secondary meaning is relied upon, evidence is necessary because the plaintiff must prove the special circumstances by reason whereof the published matter would, to those aware of the special circumstances, bear the secondary meaning relied upon. The plaintiff must prove, further, upon a balance of probabilities, that there were persons, among those to whom the publication was who were aware of the special circumstances, and to whom, it can therefore be inferred, the publication is likely to have convey the imputation relied upon. The secondary meaning of a statement is an innuendo implies knowledge of facts, other than those contained in the offending statement, that render the statement defamatory" This paragraph was quoted with approval by Bosielo J in **Molotlegi & another v Mokwalase** [2010] 4 All SA 258 (SCA).

[31] In order to rely on an innuendo, a plaintiff must plead the special circumstances or facts from which the meaning is derived. Having perused the particulars of claim, it is clear that no secondary or unusual defamatory meaning can be attributed to the statements in the email in question. No special knowledge of particular circumstances or facts that render the statement defamatory has been established.

[32] It is therefore my firm view that it was not open to the plaintiff to rely on meanings of the publication that were never pleaded. Therefore, plaintiff's submission in so far as innuendos are alleged, cannot be sustained.

[33] The inescapable conclusion is that the plaintiff has failed to prove his case on a balance of probabilities and therefore his claim falls to be dismissed

[34] Counsel for the plaintiff brought an application that the costs that were reserved on the 2nd November 2016 should be awarded to the plaintiff. I am of the view that the costs must follow the result.

ORDER

[35] I therefore make the following order

(a) The plaintiffs' claim is dismissed;

(b) The plaintiff is liable to pay the costs of the action including the costs of the 2nd November 2016.

M MATSEMELA
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARANCE

Date of hearing	:
Date of Judgment	: 12 February 2019
For the plaintiff	: Adv M D Silver
Instructed by	: David Kotzen Attorneys
	: 011 453 1458
For the defendant	: Adv B D Stevens
Instructed by	: Robert H Kanarek Attorneys
	: 011 885 6825