REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 28223/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE: 6·9·22

SIGNATURE:

In the matter between:

MMATLOU HELLEN PHALENG - PODILE Applicant

and

NORANNE DOVEY Respondent

JUDGMENT

Todd AJ

Introduction

1. The Applicant and Respondent live in the same residential scheme, known as Ambiance, in Fourways, Johannesburg. The Applicant is a member of the Board of Trustees of the Ambiance body corporate.

2. The Applicant seeks relief on grounds that the Respondent published a defamatory and false statement concerning her on a Whatsapp group established for members of the body corporate. She seeks an award in an amount of R500,000 as a *solatium* for the infringement of her good name and reputation and an apology and ancillary relief.

Summary of relevant facts

3. The facts giving rise to the application took place at the onset of the first Covid lockdown, on 27 March 2020.

4. The Applicant and Respondent are among 42 residents of the Ambiance residential scheme who were, at the time, members of the residents' Whatsapp group.

5. The trouble started when the Applicant posted a message on the Whatsapp group in which she said she was alerting residents to the fact that two people were walking around the scheme as a form of exercise, in breach of the recently announced lockdown regulations.

6. Her message went on to state, among other things that –

> "*...this should be dealt with before they open flood gates otherwise if it does not stop then it is reportable. Please can we try and act responsibly in the interest of the community of Ambiance. We don't take this virus likely.*"

7. The Respondent was for some reason irritated by this message. Her response, directed at the Applicant, was undoubtedly rude and could perhaps also be characterized as provocative:

> "*It is ONLY them. Nobody else is outside. Why don't you do something productive with your time instead of monitoring other ppl out of your window!*"

8. The Applicant responded to this message, hitting back in similar tone:

> "*It's immaterial how many people are outside Norrane. We have to adhere to the national call to avoid chaos. It is reportable if not treated accordingly. I am a professional who has a lot of assignments to do to make my time productive and I don't spend it on the window monitoring people. That's a nonsensical way of thinking and indicative of lawlessness and stupidness.*"

9. The Respondent did not take kindly to the suggestion that her way of thinking was stupid:

> "*So you think we are all stupid? Thank you Helen for taking it upon yourself for baby sitting Ambiance in your professional capacity… I am assuming your services will be attached to our next levies.*"

10. At this juncture another resident intervened with a message critical of the Respondent:

> "*Noranne this is not necessary honestly.*
>
> *Helen as a Trustee was merely sending out a cautionary reminder to all as to how we are to conduct ourselves including our children during this lockdown with an example of a few who are not adhering to the President's call to action.*"

11. Not content with this admonition of the Respondent's stance, the Applicant followed up herself, this time with a more hard-hitting response that directly insulted the Respondent:

> "*Norrane, it's very clear that you are not at my level or any of the majority of owners level of thinking. Something intellectually casts doubt each time you address issues on this platform. You are a real joke, shame.*"

12. The Respondent then responded with the insult that is the subject of this application:

> "*Nice - you racist.*"

13. This led to another intervention by a different resident:

> "*Really people.*
>
> *This is not necessary during this time. Please just stay within your garden and we can all be happy and move on.*"

14. The chairman of the body corporate at the time then also entered the fray. He posted a lengthy message on the group that was directly critical of the Respondent:

> "*Good morning Noranne.*
>
> *Inasmuch as I encourage robust engagement, I will not, as I would hope many of us on this platform, condone rudeness. I think your initial response was uncalled for in its tone.*

Can we engage without personalizing issues? This pandemic is a serious one and the sooner we collectively appreciate our responsibility in preventing its spread, the better for us and our families. It is indeed a reportable issue if certain actions are deemed or seen to compromise the communities in which we live so let's avoid creating acrimony especially in such a small community.

That's my plea to all of us. Let's foster co-existence than point scoring when all our lives are at risk. Sarcasm won't build us up.

Best regards."

15. Although the papers do not contain a full record of the exchanges on the group at the time, after the chairman's intervention other residents posted messages essentially thanking him for his maturity and guidance.

16. In her founding affidavit the Applicant contended that the message labelling her as racist would have been read by many if not all of the approximately 42 participants on the Whatsapp group. The Applicant confirmed that some residents had "condemned" the Respondent for publishing "an irresponsible and unwarranted statement".

The Applicant's contentions

17. The Applicant contends that the publication of the assertion that she was a racist on a Whatsapp group was wrongful and defamatory of her character and reputation. She asserts that the words were clearly understood by readers of the Whasapp group to confirm that she was a racist. Any reasonable person, the Applicant contended, would have regard to the meaning of the term racist in its context "*and as such conclude that my behaviour is that of a racist*".

18. She points to the possibility of some recipients on the Whatsapp group distributing the defamatory statement to additional persons as presenting a risk to her and her reputation, and continues by asserting that persons labelled as racists are generally ostracized in society and are not considered for public office.

19. The Applicant further contends that the publication of the statement infringed her inherent self-worth as a professional, spouse, parent and fellow unit holder within the Ambiance community, and that the Respondent had tarnished her good name and reputation:

> *"I am a reputable women of note, god fearing Christian respected in my Christian community and a prominent social figure who by virtue of my profession and non-executive directorship roles experiences considerable public attention of which being labelled as a racist without any factual basis is extremely scandalous, caused humiliation, hurt my feelings and damaged my reputation in all roles and profoundly continues to be worrisome the kind of potential damages that the defamatory statement carries."*

20. She continues:

> *"In relation to the high esteem in which I am held, it has always been to my advantage to at all times maintain a standard of professionalism, integrity, humility and fairness. Any malicious interference to my reputation that casts doubt to my professionalism and integrity imply severe financial and reputational damage that grossly serve to my detriment, which I clearly will not allow."*

21. In her founding papers the Applicant elaborated further on the harm that the accusation had caused or was likely to cause her, including reputational damage in the eyes of the community, within the Ambiance scheme; reputational damage when she serves in public roles; tarnishing of the name and reputation of the legal practice of which she is the founder; diminishing her good name in the eyes of an objective and reasonable person; diminishing her public esteem; subjectively wounding her or injuring her feelings; causing great hurt to her dignity and reputation; and causing her to feel belittled and humiliated. It would also, she asserted, undermine her legitimacy and authority as a well-respected legal professional, neighbour, mother and wife.

22. On the strength of these assertions the Applicant states that an amount of R500,000 would compensate her for the harm caused to her good name, her wounded feelings and her loss of reputation.

23. The Applicant also sought an interdict that would preclude the Respondent from making similar statements in the future.

24. The Applicant separately pursued a criminal charge of defamation which she laid at the Douglasdale police station. The charge was dismissed without her knowledge and

she sought reasons from the prosecutor assigned to the case as to why this had occurred.

The Respondent's contentions

25. The Respondent's answer to the application was somewhat perplexing. At the outset, when a letter of demand was first sent, her then attorneys referred to the fact that the Applicant had herself launched an unwarranted and defamatory attack on the Respondent's intelligence, but otherwise admitted that the Respondent had referred to the Applicant as a racist, denied that this was defamatory, but offered an apology.

26. This was communicated in a letter from her then attorneys as follows:

> *"Our client admits having referred to your client as being "racist", however, based on our client's instructions such reference occurred without the intention of defaming your client and furthermore without knowledge of it being wrongful. ...however, for the sake of peace and with a view of resolving the matter, our client without admitting liability, hereby extends an apology to your client to the extent that your client perceived our client's response to her unwarranted and a defamatory attack on our client's intelligence as being defamatory of her character."*

27. In her answering papers, after taking a series of technical points about the pleadings, the Respondent pleaded that the statement complained of constituted a comment or opinion and not a statement of fact, and that it would have been understood in that way by a reasonable reader.

28. The Respondent went on to assert that the comment was fair, and she set out details of certain previous interactions with the Applicant which led her to the conclusion that the Applicant could in fact fairly be described as racist.

Summary of applicable legal principles

29. For a statement to defame it must in the eyes of a reasonable observer undermine the status, good name or reputation of that person. Because the standard of proof is probability of injury, the plaintiff must prove that a reasonable person would have thought less of the plaintiff because of the statement.

30. It follows that determining whether or not a statement is defamatory involves a two-stage inquiry. The first stage is to establish the natural ordinary meaning of the statement in its localized factual context. The second is to establish whether that meaning is defamatory.[1]

31. The usual test for determining whether or not the meaning of a statement is defamatory is by asking whether the statement would probably lower the Plaintiff in the estimation of right thinking members of society generally. The applicable principles are explained as follows by the Constitutional Court in *Le Roux v Dey*:[2]

> *"[168] The conventional test for determining whether a statement is defamatory is if it would probably lower the plaintiff in the estimation of right-thinking members of society generally. This test has been widely applied in our courts, subject to the qualification that the reference to "right-thinking persons" is no more than a convenient description of a reasonable person of normal understanding and development, and that the reference to the views of society "generally" includes views held by a substantial section of the community.*
>
> *[169] This test is useful and practically expedient if it is understood properly as an objective test to determine whether the reputation of a person has been objectively infringed, on a balance of probabilities. The Supreme Court of Appeal appears to have taken this test to mean that likelihood is not a requirement, but that it is sufficient if a statement merely has the "tendency" to undermine the status, good name or reputation of a person, to qualify as defamatory. In our view this approach does not take sufficient account of constitutional values and norms, nor the practice in our courts even before the advent of the Constitution.*
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> *[170] The suggestion that a person may be defamed without probable impairment of his right to reputation is inconsistent with the decisions in Botha v Marais and Demmers v Wyllie. These state that the determination of*

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[1] See *le Roux v Dey* 2011 (3) SA 274 (CC) at paragraphs [89] to [91]; *Sindani v van der Merwe and others* 2002 (2) SA 32 (SCA) at paragraph [10] and *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 30 F-G

[2] At paras [168] to [170]; and see *Independent Newspaper Holdings Ltd v Suliman* 2004 (3) ALLSA 137 (SCA) at paras 29 – 30; *Ntembi Mahanyele v Mail and Guardian Limited and another* 2004 (6) SA 329 (SCA) at para 25; *Delta Motor Corporation (Pty) Limited v van der Merwe* 2004 (6) SA 185 (SCA) at para 10.

impairment of the right to reputation should be done objectively and should be proven on a balance of probabilities. It is also inconsistent with the requirement of publication of a defamatory statement and the concomitant requirement that the ordinary or reasonable reader of the published statement must have understood the statement as defamatory."

(footnotes omitted)

32. In summary, the test is whether it is more likely, more probable than not, that the statement will harm the plaintiff. A statement calculated or having the tendency or propensity to defame is only defamatory if it objectively and as a matter of probability causes the impairment of a plaintiff's good name.[3]

Evaluation

33. Turning to the present matter I accept that the statement made by the Respondent was intended to insult and offend the Applicant. The natural and ordinary meaning of the word racist describes a person who unjustifiably and improperly views others through the lens of their race, and applies differential treatment to persons depending on their race.

34. It does not follow, however, that the statement used in the context in which it was used in fact lowered the Applicant in the estimation of right-thinking members of the Whatsapp group, or that its use would probably lower the Applicant in the estimation of right thinking members of society generally.

35. In fact, it seems to me to be very unlikely that reasonable or "right thinking" members of the Whatsapp group or of society generally who read the statement in the context of the Whatsapp group conversation within which it was made would think less of the Applicant in consequence of the statement having been made. Certainly no right-thinking member of society would have reached the conclusion, based on the statement, that the Applicant was in fact a racist.

36. It seems to me that the average reasonable person on the Whatsapp group, and right thinking members of society more generally, would have considered the Respondent to have been entirely unjustified in making the statement, and would have thought less

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[3] *Le Roux v Dey* at paras [91] and [173]

of the Respondent for making it rather than of the Applicant as the person at whom the statement was directed.

37. It is more probable, in my view, that the Applicant's own insulting statements, which she directed at the Respondent immediately beforehand, would have lowered her in the estimation of right thinking members of society than that the Respondent's insult would have had that effect.

38. The average reasonable person reading the statement would read it in the context in which it was made. That context includes the statements that immediately preceded it and also the further statements that followed. These including statements by other members of the group and the chairman of the body corporate that were critical of the Respondent. The chairman reprimanded the Respondent in very clear terms for her approach.

39. The average reasonable person would not have read or given consideration to the Respondent's statement in isolation, would have read the exchange as a whole, and would not have taken one statement in isolation out of that context.

40. In summary – the statement that a person is a racist has a meaning that is capable of defaming; but the statement made by the Respondent in the particular context in which it was made would not, on the probabilities, have served to lower the Applicant in the estimation of right thinking members of society.

41. It would have been available to the Applicant to plead, as an alternative to the defamation cause of action, an *iniuria* arising from the insult. In *Le Roux v Dey* (supra) the court set out the applicable legal principles in the following passages:

> *"[141] Traditional learning generally defines iniuria as the wrongful and intentional impairment of a person's physical integrity (corpus), dignity (dignitas), or reputation (fama). Academic authors are in agreement, however, that although the time-honoured three-fold distinction is a useful classificatory device to highlight the different interests involved, these interests often overlap. Thus, for example, although assault is classified as an infringement of physical integrity it will also often infringe the victim's sense of dignity; malicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity or both while the infringement of reputation*

will almost always be accompanied by an affront to dignity." (footnotes omitted)

...

"[154] Our common law recognises that people have different claims for injuries to their reputation (fama) and to their own sense of self-worth (dignitas). Both are affronts to the rights of personality, and although the Bill of Rights does not always draw sharp lines between the two, the distinction is important to our new constitutional order. It illuminates the tolerance and respect for other people's dignity expected of us by the Constitution in our public and private encounters with one another. We may be deeply hurt and insulted by the actions of others, in calling or portraying us as what we have chosen, freely, not to be, or to keep private, even though we are not defamed. It may be that the personal insult or injury may not be considered, in the public eye, as something that harmed our reputation. But within limits our common law, and the Constitution, still value and protect our subjective feelings about our dignity."[4] *(footnotes omitted)*

42. A claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct.[5]

43. A claim of this kind must, however, be pleaded. It was not pleaded by the Applicant nor advanced in argument.

44. Had such a claim been pleaded, it seems to me that there may have been sufficient evidence on the papers to establish both the subjective and objective elements referred to above. Although the Applicant's assertions about the degree of hurt that she had experienced from the insult appeared in certain respects to be exaggerated, and her assertions in the founding papers suggested that she may have been

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[4] Referring also to *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 27.

[5] Le Roux v Dey at para [143], referring to *Delange v Costa* 1989 (2) SA 857 (A) at 862A-I .

somewhat oversensitive, I would have accepted that a reasonable person would feel insulted by being labelled a racist.

45. Having said that, the quantum of damages that I might have been inclined to award in the circumstances, in particular in the context of an exchange in which the Applicant herself had clearly insulted the Respondent as well, would have been minimal. In *Le Roux v Dey* the Constitutional Court ordered the payment of compensation in an amount of R25,000 and that an apology be issued. Had I been presented with a pleaded case for *injuria* the damages likely to have been awarded would have been significantly less than that amount, and perhaps nominal only.

46. The Applicant also sought an interdict. The underlying cause of action relied upon in seeking that relief appears, from the formulation of the Applicant's case, to have been defamation, which I have found not to have occurred. Even if this finding were not correct, or if I were at liberty to consider granting an interdict on grounds that the offending words constituted *iniuria*, I am not satisfied that any grounds exist on which to grant an interdict of the kind sought. As explained in Prest[6], one of the requisites for the grant of a final interdict is that the injury should be a continuing one. A court will not grant an interdict restraining an act already committed, because it is not a remedy for a past invasions of rights. A past infringement of rights may constitute evidence from which a court implies an intention to continue along the same course, but no case of this kind has been made out in the present matter. In addition, I would not have granted an interdict in circumstances in which a claim for damages would produce adequate redress for any future infringement.

47. If follows from what I have stated above that the application stands to be dismissed. On the question of costs, both parties sought an order for costs if they were successful. On behalf of the Respondent it was submitted that even if the application was successful no costs should be awarded. In my view the Respondent's conduct in the course of the events that triggered the litigation, and the manner in which she conducted her defence, do her no credit. She should expect, if she casts similar insults in the future, that she might face more severe adverse consequences in law. At the same time the Applicant has been unsuccessful in this litigation and her own conduct, in the course of the initial Whatsapp exchange and in seeking unrealistic compensation

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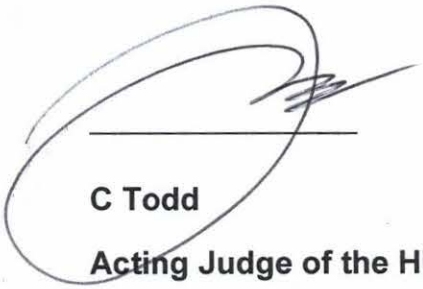
[6] The Law and Practice of Interdicts, Juta, 1996 at p44

for exaggerated harm, does her little credit either. In the circumstances, this seems to me to be a case in which it is appropriate to make no order for costs.

Order

48. In the circumstances, the application is dismissed. There is no order as to costs.



C Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Applicant:	Adv. Collin Shongwe
Instructed by:	Phaleng-Podile Attorneys
For the Respondent:	Adv. M Mudimeli
Instructed by:	Benjamin Schmulian Attorneys
Judgment reserved:	18 August 2022
Judgment delivered:	6 September 2022