IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

13 APRIL 2022
Date

L RETIEF

CASE NO: **23083/2021**

In the matter between:

NQOBILE PEARL MUNTHALI Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

This matter has been heard via MS Teams and disposed of in terms of the directives of the Judge President of this Division. The order has been handed down via MS Teams and the written Judgment is now distributed electronically.

RETIEF AJ:

INTRODUCTION

[1] This is an opposed application in which the Defendant has raised an exception to the Plaintiff's particulars of claim on the ground that the particulars of claim lack the necessary averments to sustain a cause of action as against the Defendant.

[2] The Plaintiff claims punitive damages framed in delict alternatively constitutional punitive damages, further in the alternative loss of earnings arising from two published statements which, according to the Plaintiff are unlawful and wrongful intending to injure the Plaintiff's dignity and reputation.

[3] The first statement concerns the publication of an internal notice dated the 12 June 2019 ("*internal notice*") and the second statement, the publication of a media statement dated 30 January 2021 ("*media statement*").

[4] The Defendant took exception to the Plaintiff's claim based on both the publications stating that they were not wrongful and defamatory. Both the parties agreed that the Court's enquiry vis-à-vis the publications is confined to the element of wrongfulness as reiterated in **Holomisa.**[1]

[5] The Defendant's Counsel however in his heads of argument and in argument, expanded the complaint and thus the Court's enquiry, to include the publication of the internal notice as the Plaintiff, although referring to the internal

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1 **Khumalo and Others v Holomisa** 2002 (5) SA 1 (CC) at 413G.

notice in the particulars of claim as annexure "C", failed to attach it. The Defendant's exception however failed to deal with it specifically as a ground.

[6] Accepting that an exception is a pleading[2] and that the Defendant is free to frame the exception in any way it chooses, the Defendant is bound by the manner in which the case is made out. The Defendant's Counsel was asked to direct the Court to the distinct cause relating to annexure "C" in its exception. None existed. The Defendant's Counsel did not move for an amendment.

[7] The Plaintiff in turn did attach a copy of annexure "C", being the internal notice itself to its particulars of claim. Admittedly it was a very unclear and poor copy. Nonetheless, the Plaintiff too incorporated the entire content of annexure "C" itself into the body of the particulars. The Defendant's notice of exception did not attack the publication "C" nor the terms of the internal notice. Having regard to all the circumstances I therefore declined to entertain a contention that was not covered by the grounds of the exception[3] and I proceed on the basis of the causes raised in the notice of exception only.

[8] Before dealing with the Defendant's exception it is important to deal saliently with the background facts of the matter.

Background on the pleaded facts

[9] The Plaintiff is a high-ranking employee of the Defendant. She commenced her employment with the Defendant as a Chief Information Officer with effect from

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2 **Haarhoff v Wakefield** 1955 (2) SA 425E.

3 **Inkin v Borehole Drillers** 1994 (2) SA 366 at 373; **Jowell v Bramwell-Jones and Others** 1988 (1) SA 836 (W).

May 2009. Throughout the tenure of the Plaintiff's employment with the Defendant, the Plaintiff occupied various other senior and acting executive positions. With effect from August 2014, the Plaintiff assumed the position of Chief Executive Officer at PRASA Development Foundation. This position was declared extant by the Labour Court of South Africa.

[10] However, on 11 June 2019, the Plaintiff's contract of employment was suspended and on 12 June 2019, the Defendant announced her suspension to approximately 15 000 of her fellow employees by publishing the internal notice. The internal notice announced the following:

> *"The suspension is made with immediate effect. The suspension is in line with the commitment to good corporate governance and the eradication of irregularities with the organisation.*
>
> *PRASA presumes innocence until due process have been completed."*

[11] This is the content of the internal notice being the subject matter referred to in the Defendant's exception.

[12] Subsequent to the immediate suspension in June 2019 no disciplinary proceedings were initiated against the Plaintiff.

[13] On 31 July 2020 the Plaintiff received notification that her suspension had been lifted, that disciplinary charges had been withdrawn and that she was to remain on paid leave pending a resolution between the parties.

[14] The Defendant did not circulate an internal notice of withdrawal of suspension to inform its employees as it had done with the immediate suspension nor was a resolution between the parties forthcoming.

[15] Instead, and on 29 January 2021, the Plaintiff was notified that her employment contract was terminated with immediate effect and as a direct result thereof and on 30 January 2021, the Defendant now issued the media notice.

[16] The Defendant published a media statement to the public as well as its employees announcing, *inter alia* that:

> *"PRASA Board of Control has embarked on a review of contract of executives and other senior managers. Pursuant to the review process, it transpired upon analysis of employment contracts of executors that some of them (executives) ought to have left PRASA years ago."*

[17] The Board also observed that the certain executives had been aware at all material times that their employment contracts were for a term not exceeding 5 (five) years. The Board stated that the executives capitalised on the instability of the Board culminating in their extended and unlawful stay with the Defendant.

[18] The Plaintiff's employment was terminated with immediate effect and the media notice stated further that:

> *"Ms Pearl Munthali, Chief executive Officer of PRASA Foundation, has been on suspension for alleged misconduct* (own emphasis). *Upon perusal of records, it transpired that Ms Munthali's contract ought to have been terminated upon the expiry of a five year term."*

[19] The media statement being the subject matter raised in the Defendant's exception.

[20] Subsequent to the media statement and on 24 February 2021 the Labour Court ordered the Defendant to reinstate the Plaintiff's employment contract retrospectively from 29 January 2021.

Grounds raised in the exception

[21] The thrust of the Defendant's exception was that the Plaintiff's particulars of claim did not disclose a cause of action. On grounds that no cause of action is disclosed the Court must accept that all the averments in the particulars of claim are correct.[4]

[22] Against this backdrop I now deal with the grounds raised by the Defendant in relation to the internal notice.

[23] The Defendant's complaint relating to the internal notice was that the internal notice was merely notifying the Defendant's employees that the Plaintiff had been put on "precautionary" suspension and to announce that the Plaintiff remained innocent until due process had been completed.

[24] The Defendant contends that the Defendant's employees could not have understood from the content of the internal notice that the Plaintiff was guilty of misconduct nor understood by Defendant's employees to defame her.

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4 **Makgae v Sentraboer Kooperatief (Bpk)** 1981 (4) SA 239 (T) at 244H-245C.

[25] In argument, Defendant's Counsel, relying on the test of a reasonable reader, objectively speaking, argued that the reasonable reader could not have understood the words in the internal notice in the ordinary sense or by implication thereof, to be defamatory of the Plaintiff, because at the time, the Plaintiff was indeed facing unverified allegations and had not been found guilty of misconduct yet (i.e., at the time that the internal notice was publicised). Therefore, the argument went, that the reasonable reader could have understood that the Plaintiff was simply placed on precautionary suspension[5] which might have not been understood by the Defendant's employees to undermine, subvert, or impair the Plaintiff's good name, reputation, or esteem.[6]

[26] Conversely, the Plaintiff in paragraph 6 of her Plaintiff's particulars of claim alleges that the internal notice was false, malicious, and defamatory in that at the time of the internal notice the Defendant had no legal or factual foundation for the complaint against the Plaintiff and after the fact took no further steps of disciplinary procedures against the Defendant. In consequence, the announcement without due process was defamatory and wrongful.

[27] In amplification, the Plaintiff deals with a factual foundation and reasons, *supra*, at paragraphs 6.2 to 6.7 of her particulars of claim and relying on the suspension announced in the internal notice of 12 June 2019 being lifted on 31 July 2020 without any disciplinary steps being taken by the Defendant.

[28] I now deal with the enquiry into whether the internal notice is defamatory.

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5 Reason 2.2 of First Ground of Exception, Notice of Exception, Caselines 003-4.

6 Reason 2.7 of First Ground of Exception, Notice of Exception, Caselines 003-4.

[29] It is well established that to determine whether a publication is defamatory and therefore *prima facie* wrongful is a two-stage enquiry. The first enquiry is to determine the meaning of the publication as a matter of interpretation and the second is whether the meaning is defamatory.[7]

[30] To answer the first question the Court must determine the natural and ordinary meaning of the publication:[8] how might[9] a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning the Court must take account not only of what the publication expressly conveys, but also of what it implies, i.e., what a reasonable person may infer from it.

[31] Of importance it may also be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise.[10] In other words, one might have regard to the nature of the audience, and in this case in relation to the internal notice, have regard to the fact that it was an internal notice in which 15 000 other employees, some her subordinates who were informed.

[32] Applying the first stage, the Plaintiff relying on **Le Roux v Dey**[11] stated that because the test is objective and an employee is the legal construct of the "reasonable", "average" or "ordinary" person, the question is whether the statement

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7 FDJ Brandt "Defamation" in 7 *Lawsa* 2Ed, par 237, although on exception – "may be" .

8 **Argus Printing and Publishers Company Limited v Esselen's Estate** [1993] ZSA 205: [194] 2 All SA 160 (SCA); 1994 (2) SA 1 (A) at 20E-21B.

9 The word 'might' is used because we are dealing with an exception. At the trial stage the test is different.

10 **Mthembi-Mahanyele v Mail & Guardian Limited** [2004] ZASCA 64.

11 2011 (3) SA 274 (CC) at para 90-91 (A).

was calculated (in the sense of likelihood) to expose a person to hatred, contempt, or ridicule.

[33] Applying the objective guide in **Le Roux v Dey** and on the proper interpretation of the language used in the **Sutter**[12] matter, the Plaintiff contends as to meaning that because the internal notice uses the word "suspended" and that the use of the word is in line with the Defendant's objective to eradicate "irregularities", the normal meaning of the words[13] charges the Plaintiff with dishonest and improper conduct of such a nature as to warrant suspension.

[34] The Plaintiff contended further the fact that because the words "immediate effect" are used in relation to the suspension, the Defendant by implication conveyed that the suspension was necessary to prevent further harm.

[35] The Defendant in argument did not deal with the meaning of the internal notice as a matter of interpretation by dealing with the ordinary meaning of the words used in context, but:

35.1 rather imported a new word namely "precautionary" before the word suspension, thereby creating its own narrative other than what *de facto* was published. The narrative was used to support the argument that the reasonable person could view the suspension in the light of an anticipated misconduct. However, no qualification to describe the type of suspension is published other than to state that

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12 **Sutter v Brown** 1926 AD 155 at 163.

13 Definitions as defined by Merriam-Webster: "Irregularity" meaning "something that is irregular (such as improper or dishonest"), "suspension" meaning temporarily withhold, as of belief or decision, remove as from office or privileges or suspend.

the suspension is in line with the commitment to good corporate governance and the eradication of irregularities within the organisation. The inference being that the suspension is in line with something improper.

35.2 In argument the Defendant failed to argue that the ordinary meaning contextually assigned to the words "irregularity" and "suspension" could not possess the ordinary meaning assigned to it as argued by the Plaintiff.

[36] Instead, the Defendant relies on its intent when publishing the internal notice to dictate the meaning thereof which is misplaced, as the ordinary meaning of the words in context as contained in the internal notice itself is what determines how it may be interpreted by the reasonable person. I accept the Plaintiff's argument in this regard.

[37] I now turn to the second enquiry of defamation of the publication. In other words, whether it might have "the tendency" or is calculated to undermine the status, good name, or reputation of the Plaintiff.

[38] Neethling explains what this means with the reference to 'authority':[14] "*It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was actually injured, is almost completely ignored in the evaluation of wrongfulness or defamation. In fact, generally*[15] *the witness may not even be asked how to understand the words or behaviour*...". In consequence,

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14 J Burchell '*The Law of Defamation in South Africa*' (1985), pg 136.

15 Unlike an innuendo.

it is the probability of injury rather than actual injury as the issue. Objectively speaking, whether in the opinion of the reasonable man, the esteem which the person enjoyed may be (in the case of an exception) or may have the tendency to adversely affected the person's esteem.

[39] The Defendant essentially contends that because the internal notice was intended to be a precautionary suspension and that the Defendant acted on the presumption of the Plaintiff's innocence until due process had been completed, the internal notice could not have been understood by the Defendant's employees that the Plaintiff was guilty of any misconduct nor understood to defame her.

[40] The Plaintiff however contended that because the internal notice was not publicised in the strictest of confidence, but rather to approximately 15 000 employees over which the Plaintiff exercised a position of authority for a substantial number of years, it was the intention by the Defendant to minimise the Plaintiff's standing with her subordinates. I too, can't imagine that in the circumstances to announce the suspension of a high-ranking official within an organisation, without first verifying the allegations, as contended by the Defendant's Counsel, could serve to the advantage of the Plaintiff.

[41] Furthermore, that because the suspension operated with immediate effect, it inferred that the Plaintiff's conduct was of such a serious nature that the suspension was necessary to prevent further harm.

[42] Having regard to the arguments presented, the internal notice announces to the ordinary employees that, in line with, alternatively in terms of its commitment to corporate governance and the eradication of irregularities, the suspension of a

high-ranking executive with immediate effect objectively viewed might not leave the esteem which the Plaintiff once enjoyed as the executive in the eyes of the reader in a more advantageous position.

[43] In consequence, the internal notice could possess the tendency to undermine the Plaintiff's status, good name and reputation with the organisation.

[44] The Defendant's exception with regard to the internal notice not being defamatory must fail.

[45] I now turn to the media statement applying the exact two-stage enquiry.

[46] The Defendant contends that the content of the media statement is not defamatory and in doing so essentially relies on the three main reasons, namely:

46.1 That the Plaintiff was aware of, drafted, and during her position as Group Executive: Human Capital Management in 2015, was responsible for implementing and monitoring the recruitment and selection policy of 2018 ("*Policy*") adopted by the Defendant's Board. The Policy stated that the appointment of senior and general management and executive positions, was for a fixed term (a period not exceeding 5 (five) years).

46.2 The Board was under the impression that the Plaintiff's contract had lapsed by the operation of law as contemplated in the Policy.

46.3 The statement that the Plaintiff has been on suspension due to allegations of misconduct levelled against her is factually correct.

[47] The first two reasons relied upon by the Defendant in no way advances the Defendant's complaint as the media statement refers to the Board of Control of the Defendant ascertaining knowledge *via* a review of executive and other senior manager's contracts. The media statement makes no reference to the Policy relied upon by the Defendant in its exception. In any event, absent the reference to the Policy, knowledge of a set of facts by the Plaintiff in not the test, but the meaning and/or inferred meaning of media statement and whether the publication might have the tendency to is calculated to undermine the status, good name, or reputation of the Plaintiff.

[48] In dealing with what was published and the ordinary meaning it is imperative to deal with the media statement as a whole. Of significance is that it is headed "PRASA Terminates Contracts of Executives". The heading immediately creates the impression that the media statement deals with the reasons 'why' and 'which' executives' contracts were terminated.

[49] The content of the media statement does not disappoint and contains the 'why' and which' facts. The content deals with the factual position, namely: that all executives of the Defendant are employed for a period not exceeding 5 (five) years. It then deals with the Board's observations as applied to the executives under contract of employment. The Board's observations are recorded, namely: certain executives "unlawfully' overstayed their welcome by "capitalising on the instability of the Board" and inferred that as a direct result thereof the "following executives" employment contracts were terminated with immediate effect (as at 29 January 2021). Following the statement aforesaid, and with the use of a semi colon, as to commence with the a list, three names of executives were named, including the Plaintiff.

[50] The ordinary meaning of the words and the structure of the content of the media statement includes the Plaintiff as one of the executives who knowingly and unlawfully overstayed her welcome. The meaning under the circumstances of and including the reference to her suspension due to alleged misconduct may leave the reasonable reader with a unfavourable view of the Plaintiff. As a consequence it is defamatory.

[51] In the premises the Defendant's second ground of exception must fail.

[52] The inescapable consequence is that the Defendant's exception must fail with costs and I therefore make the following order:

1. The Defendant's exception is dismissed with costs.

L.A. RETIEF
Acting Judge, High Court Pretoria

Appearances:

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Defendant's Ref:	Mt T HLAHLA/QS/P1023
Date of Hearing:	22 February 2022
Date of Judgment:	25 February 2022
Date of Written Judgment:	13 April 2022