IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: AR 197/13

In the matter between:

CECIL SHER **First Appellant**

LORRAINE SPENCER **Second Appellant**

And

WILLIAM VERMAAK **Respondent**

Order:

(a) The appeal succeeds.

(b) The order made by the court a quo is set aside and replaced with the following order: 'The defendants are absolved from the instance with costs'.

Judgment

Date: 25 February 2014

Ploos van Amstel J

[1] The respondent instituted an action against the appellants in which he claimed payment of a sum of R150 000 on the basis that the appellants had defamed him. Mokgohloa J found in his favour and ordered the appellants, jointly and severally, to pay him a sum of R 50 000 together with the costs of the action. The appeal before

us is against the order relating to liability and the quantum of the award. There is also a cross appeal in which the respondent seeks interest on the judgment.

[2] The respondent's claim arose out of a letter which was written by the first appellant and distributed by the second appellant, at his request, to members of the athletics section of the Stella Sports Club in Durban, of which all three parties were then members. It was the respondent's case on the pleadings that the letter as a whole was *per se* defamatory of and concerning him, and that certain passages thereof were intended to convey a distinctive defamatory sting, and were so understood by the recipients of it.

[3] The background to the letter is that the respondent had been expelled from the club after a disciplinary hearing which was chaired by the first appellant. It read as follows:

> 'From the pen of Cecil Sher:
>
> In my opinion…
>
> There are many stories and rumors (sic) circulating about the saga with William Vermaak. As it involves me I feel I need to inform club members of my take on this episode. Over time, a number of incidents were brought to my attention and, in the interest of the club and its members, I had to act. Some complaints were verbal; others were written; some from members; and some from the public and an athletic club. The situation was very serious and a disciplinary (sic) was held. It was found that William's behaviour was unbecoming of a gentleman and that he had brought our club into disrepute.
>
> William showed no remorse. He said he was blameless and is not in control of how other people react to his actions.
> In terms of the disciplinary findings, he was asked to resign and failing resignation was expelled.
> To my knowledge, William Vermaak is the first person to have been expelled from Stella Athletic Club.

William never accepted the disciplinary nor did he accept those hearing it. He was arrogant to the point in telling us that our Constitution is old, invalid and superceded by the National Constitution.

He did the correct thing by forming a new club, namely KZN Striders. My reason is that I do not think that any Durban club would have welcomed him to their club.

Consequently he has poached and canvassed a number of our members to join him. They obviously enjoy his training and joined him. They are entitled to choose a club of their choice.

Members need to ask themselves "what they can do for their club" as opposed to using the club for their own ego and end; and especially without due regard to the club, other members and the public.

We welcome another running club in the area. It can only benefit road running in Durban.

Finally, after the shake out, I believe that William's behaviour will manifest itself in the future with other road users.'

[4] The averments in the particulars of claim regarding the 'distinctive defamatory sting' were the following:

a. the words 'to my knowledge, William Vermaak is the first person to have been expelled by Stella Athletic Club' were intended to isolate the plaintiff as the only person in the long history of the club to have been adjudged so unworthy as to warrant expulsion;
b. the words 'he was arrogant to the point in telling us that our constitution is old, invalid and superceded by the National Constitution' were intended to connote that during his disciplinary hearing the plaintiff conducted himself in an overbearing, presumptuous and aggressively haughty manner;
c. the words 'I do not think that any Durban club would have welcomed him to their club' were intended to suggest that such an odious reputation attaches to the plaintiff that not a single club in the greater Durban area would be prepared to admit him to membership;
d. the words 'consequently he has poached and canvassed a number of our members to join him' were intended to convey the impression that the plaintiff solicited persons to join his new club by unfair means and illicit unsportsmanlike methods;
e. the words 'members need to ask themselves "what can they do for their club" as opposed to using the club for their own ego and end; and especially without due regard to the club, other members and the public'

were intended to connote that the plaintiff exploited the Stella Sports Club purely to nourish his own ego and advance his own objectives and in the process have (sic) no regard for the interests of the club or its members or the public;

f. the words 'finally, after the shake out, I believe that William's behaviour will manifest itself in the future with other road users' were intended to connote that:
    i. the Stella Sports Club had finally purged itself of an unworthy member;
    ii. it is inevitable that the plaintiff will engage in future socially unacceptable behaviour to the detriment of runners, motorists and pedestrians.

[5] In their plea the appellants denied that the statement was made wrongfully or with the intention to injure the respondent's reputation as:

a. the statement was in essence true;
b. the publication of the statement to the members of the athletics section of the club was in their interest;
c. the statement was not a statement of fact but a comment concerning a matter of interest to the members of the athletics section of the club with regard to the alleged behaviour of the respondent at the disciplinary hearing;
d. the comment was fair in the circumstances;
e. the facts upon which the comment was based were true.

[6] The basis on which the learned Judge *a quo* held the appellants liable was stated as follows in para 15 of the judgment:

> 'It may be true that the plaintiff was the first person to be expelled from the Club. It may also be fair for the members of the Club to be informed of this. However, the evidence of the defendants failed to show that the plaintiff has failed to show (*sic*) that the plaintiff was arrogant. Indeed, all that the plaintiff insisted on in the disciplinary hearing was to protect his legal right. It cannot be said that he was arrogant. Furthermore, the defendants did not deny that the plaintiff had achieved success with the training of his elite squad and that his manner of training benefited the group. Therefore, it is understandable that when he decides to start his own Club, most

> runners would join him and most existing clubs would certainly welcome him in their club. It can therefore not be said that he poached members to join his club. In my view, the letter written by the defendants carried words and phrases that were intended to injure the plaintiff's reputation among the members of the Stella Club.'

[7] There is no specific finding in the judgment to the effect that any particular statement in the letter was defamatory. It was not argued before us that the whole of the letter was defamatory. It was accepted that some of the statements in it were positive, for example the statement that some members of the club enjoyed the respondent's training and joined him, and that the respondent's new club would benefit road running in Durban. In the paragraph to which I have referred the learned Judge held that the appellants failed to show that the respondent had been arrogant, and that it could not be said that he had poached members to join his club. Then follows the following conclusion: 'In my view, the letter written by the defendants carried words and phrases that were intended to injure the plaintiff's reputation among the members of the Stella Club'. This statement relates to the intention of the appellants. Whether or not the statements were in law defamatory is a different enquiry. If they were not, then the further issues relating to intention and justification do not arise. Counsel submitted that the learned judge by implication held that the statements that the respondent had been arrogant and that he had poached members from the club were defamatory, and that this is why she referred to them in para 15. I think counsel is probably right. This explains why she referred to these statements in the only paragraph in the judgment where she formulated a conclusion on liability. In the very next paragraph she started to deal with the quantum of damages.

[8] These are the only two statements which the learned judge found to be defamatory. There is no such finding in the judgment with regard to any of the other statements complained of. The notice of appeal was also only directed at these two statements. The first ground of appeal is that the learned judge erred in finding that the 'expressed opinions' that the respondent was arrogant and that he had poached runners was defamatory. The remaining grounds of appeal refer to the defences of protected comment, absence of malice and quantum. There is no cross appeal against the findings on liability, with the result that it is not open to us to consider

whether the trial judge should have found that any of the other statements in the letter were also defamatory.

[9] Our first task is to consider whether the learned judge was wrong in finding that the statements relating to arrogance and poaching were defamatory.

[10] In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as* Amici Curiae*)* 2011 (3) SA 274 (CC) the court said in para 84-85 that the elements of defamation are the wrongful and intentional publication of a defamatory statement concerning the plaintiff. Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent.

[11] The first step in determining whether a particular statement is defamatory is to determine its meaning. In *Le Roux,* at para 87, Brand AJ said the following:

> 'Statements 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 statement 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 an implied meaning of the statement which is regarded as part of its primary or ordinary meaning'.

And in para 88:

> 'To add to the confusion that sometimes arises from all this, plaintiffs often wish to point out the sting of a statement which is alleged to be defamatory *per se*. The particular defamatory meaning contended for is then emphasised by a paraphrase of the statement which is referred to as a "quasi-innuendo". "Quasi" because it is not a proper innuendo or secondary meaning. Background circumstances need not be

pleaded. The disadvantage of relying on a quasi-innuendo, as opposed to the contention that the publication is defamatory *per se*, is that the plaintiff is bound by the selection of meanings pleaded'.

[12] Brand AJ explained that where the plaintiff is content to rely on the proposition that the published statement is defamatory *per se*, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have regard not only to what is expressly stated but also to what is implied.

[13] The second stage of the inquiry is to determine whether the meaning of the statement is defamatory. In *Le Roux* the court said in para 91 that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published. Brand AJ added that the question is whether the statement was 'calculated' (in the sense of likelihood) to expose the person to hatred, contempt or ridicule. Evidence of whether the actual observer actually thought less of the plaintiff is therefore not admissible. The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff. He also said that if it is found that the statement is ambiguous in the sense that it can bear one meaning which is defamatory and others which are not, the courts apply the normal standard of proof in civil cases, that is, a preponderance of probabilities. If the defamatory meaning is more probable than the other, the defamatory nature of the statement has been established as a fact. If, on the other hand, the non-defamatory meaning is more probable, or where the probabilities are even, the plaintiff has failed to rebut the onus which he or she bears. Consequently, it is accepted as a fact that the statement is not defamatory.

[14] It seems clear however that it is not every statement which causes people to think less of someone that is defamatory.

[15] Brand AJ said examples of defamatory statements that normally spring to mind are those attributing to the plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct. But defamation is not limited to statements of this kind. It also includes statements which are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd and which expose the plaintiff to contempt or ridicule that renders the plaintiff less worthy of respect by his or her peers.

[16] In the judgment of the SCA in *Le Roux v Dey* 2010 (4) SA 210, Harms DP said in para 8 that a publication is defamatory if it has the tendency or is calculated to undermine the status, good name or reputation of the plaintiff.

[17] It appears from *Botha en 'n Ander v Marais* 1974 (1) SA 44 (AD) that a statement which is critical of a plaintiff or his behaviour is not necessarily defamatory. At 49G to 50A Ogilvie Thompson CJ said the following:

> 'Die gedrag … waarvan respondent verwyt word, mag wel afkeuringswaardig wees, maar respondent moet verder gaan en bewys dat hy belaster is. Selfs bewerings wat 'n persoon by 'n sekere bevolkingsgroep in onguns bring is nie noodwendig lasterlik nie, tensy hulle daardie person se aansien by regdenkende mense in die algemeen verminder…Die gewraakte woorde is wel afkeurend van respondent se gedrag; maar, in die geheel beskou, is hulle, na my mening, nie naamskendend van hom nie. Ek kom dus tot die gevolgtrekking dat respondent nie daarin geslaag het om te bewys dat hy deur die gewraakte woorde belaster is nie'.

[18] In *Conroy v Nicol and Another* 1951 (1) SA 653 (AD) at 662C Van Den Heever JA referred to *Wallachs Ltd v Marsh* 1928 TPD 531 at 545 where Greenberg J said:

> 'It is clear from Fichardt's case…that it is not defamatory to impute to a person conduct which incurs the disapproval of a certain section of the public, and also that a statement is not defamatory merely because it causes real prejudice to the plaintiff. I think that applies to the present case. It may be that an imputation against the plaintiff

> that he had made a political speech at a political meeting, in the eyes of certain people, will unfit him for the duties of a schoolmaster, but that does not make the statement defamatory.'

At 662 F Van Den Heever JA said:

> 'Om van 'n man te sê dat sy gedrag onredelik is, is m.i. nie lasterlik nie. Dit is 'n rekbare oordeel wat gedeeltelik subjektief en gedeeltelik objektief is, want dit gebruik as maatstaf die skrywer se opvatting van redelikheidsnorme en pas dit op die gedrag van 'n ander toe'.

[19] In *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 the court had to consider whether a statement in a newspaper that the plaintiff company was a German business was defamatory. At page 6 Innes CJ said:

> 'The truth is that a mere allegation of German nationality, though it may under present circumstances cause real prejudice, is not in law defamatory. It would be damaging not because it reflected upon the *character or reputation* of the person concerned, but owing to circumstances holy unconnected therewith; because of the present war with Germany and the feeling caused by the manner in which that war was being conducted'. (My emphasis).

[20] *In S.A Association Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) Steyn CJ said at 617A-B:

> 'Ek kan my nie voorstel dat dit lasterlik is om … van 'n lid van 'n Roomskatolieke gemeenskap te sê dat hy na 'n Protestantse kerk oorgegaan het, of van 'n lid van 'n monargistiese beweging dat hy by 'n republikeinse bond aangesluit het. Ander derglike gevalle is geredelik te bedenk'.

[21] In *Law of Delict* 5ed (2006), Neethling, Potgieter and Visser, the learned authors say at 307 that defamation is the intentional infringement of another person's right to his good name. They say it is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation. In FDJ Brand 'Defamation' in *The Law of South Africa* 2ed, volume 7, (2004) para 237, the learned author says that defamatory statements

include statements which injure the reputation of the person concerned in his or her character, trade, business, profession or office or which expose the person to enmity, ridicule or contempt.

[22] It is necessary to look briefly at the particulars of claim which accompanied the summons. Para 5 begins with an allegation that the whole of the letter is *per se* defamatory. The learned Judge *a quo* did not find that this was so nor was it contended on appeal that this was the case. Then follow a number of sub-paragraphs which were alleged to contain a distinctive defamatory sting. It is not stated in para 5, or anywhere else in the particulars of claim, that the sting of the passages referred to was relied on in the alternative to the allegation that they were defamatory *per se*. The approach rather appears to be that the alleged sting explains why each statement is alleged to be defamatory *per se*, as is explained in para 88 of *Le Roux*. There is however no averment in the particulars of claim with regard to the meaning which the reasonable reader of ordinary intelligence would have attributed to the statements. Each of the sub-paragraphs of para 5 contains an averment as to what meaning the makers of the statements intended to convey. Para 7 contains an averment that the letter 'was understood by its recipient readers to be defamatory of the plaintiff and to convey the distinctive defamatory sting described by the plaintiff in para 5'. In para 87 of *Le Roux* Brand AJ said that in establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement.

[23] The statement in the letter to the effect that the respondent was arrogant should be seen in its proper context. It reads as follows:

> 'William never accepted the disciplinary nor did he accept those hearing it. He was arrogant to the point in telling us that our Constitution is old, invalid and superceded by the National Constitution'.

[24] The only complaint with regard to this statement relates to the use of the word "arrogant". The respondent said in his evidence that while the remainder of the statement was factually correct he had a difficulty with the word "arrogant". He said he regarded that to be the first appellant's opinion, but he thought a better word would have been that he was persistent. He agreed under cross-examination that behaviour which one person may regard as arrogant may be regarded by another person as overconfident. The question however is what meaning the fictitious reasonable reader would have ascribed to the statement. In *Neethling's Law of Personality*, 2ed, (2009) at 136, the learned author says in applying the reasonable person test the criterion is the fictitious, normal, balanced, right-thinking and reasonable human being who is neither hypercritical (such as a sharp-witted lawyer) nor over-sensitive, but is someone with normal emotional reactions.

[25] 'Arrogance' is defined in the Shorter Oxford English Dictionary, 1973, as 'the taking of too much upon oneself as one's right; undue assumption of dignity, authority, or knowledge; aggressive conceit, presumption, or haughtiness'. 'Haughty' is defined as 'high in one's own estimation; proud, arrogant, supercilious… of exalted character, style, or rank; eminent; high minded, aspiring; of exalted courage'. 'Arrogant' is defined as 'making or implying unwarrantable claims to dignity, authority, or knowledge; aggressively conceited or haughty, overbearing'.

[26] It must be born in mind that the statement complained of was not that the respondent is an arrogant person. It was that he had behaved in an arrogant fashion at the disciplinary enquiry. I am not persuaded that the ordinary reader would have attributed a defamatory meaning to the statement. Objectively speaking and in the present context it seems to me to convey to the reasonable reader that the respondent displayed a defiant and challenging attitude at the disciplinary enquiry. I do not consider that this statement was likely to injure the good esteem in which the respondent was held by the reasonable reader, in the sense explained by Brand AJ in *Le Roux*. The statement does not seem to me to imply dishonourable conduct and was not likely to humiliate or belittle him or make him look foolish, ridiculous or absurd or expose him to contempt or ridicule or less worthy of respect. The fact that some people may have disapproved of his behaviour as described in the statement does not render the statement defamatory.

[27] The statement regarding poaching members reads as follows:

> 'Consequently he has poached and canvassed a number of our members to join him. They obviously enjoyed his training and joined him. They are entitled to choose a club of their choice'.

In this instance too there is no averment in the particulars of claim as to the meaning which would have been attributed to the statement by the fictitious reasonable reader of ordinary intelligence. The sting which was allegedly intended was that the plaintiff solicited persons to join his new club by unfair means and illicit and unsportsmanlike methods. It was not contended before us that a statement to the effect that the respondent had canvassed or solicited members of the Stella Club to join his new club would have been defamatory. The complaint was directed at the use of the word 'poached'. Counsel submitted that the word implied dishonourable conduct. It is difficult to imagine in the context of this case what such dishonourable conduct could have been. Statements which one sees in the press from time to time to the effect that a trade union was trying to poach members from another union or that a rugby franchise was trying to poach a player from another franchise do not seem to me to imply dishonourable conduct. All it suggests is that attempts were made to persuade a particular member or player to leave his union or club or province and join a different one. In our society where we have freedom of association there is nothing wrong or dishonourable with such canvassing. I fail to see in the context of running clubs how an allegation that members have been poached, in itself and without more, has a dishonourable connotation. It may of course be different if it is accompanied by allegations regarding improper incentives, but that is not the case here. The alleged intended sting that the plaintiff solicited persons to join his new club 'by unfair means and illicit and unsportsmanlike methods' comes from the dictionary meaning of the word 'poach' in relation to the theft of game or fish. Even if it can be said that the word "poached" in the context in which it was used by the first appellant is ambiguous in the sense that it can bear one meaning which is defamatory and another which is not, then in my view the respondent failed to prove that in this case the statement was defamatory.

[28] It follows that in my view the court *a quo* erred in holding that the two statements referred to in para 15 of the judgment were defamatory. The issue

whether there were other statements in the letter which were defamatory is not part of this appeal as the learned Judge *a quo* did not make a finding that they were, and there is no cross appeal in this regard.

[29] In those circumstances the appeal must succeed. The following order is made:

(a) The appeal succeeds.

(b) The order made by the court *a quo* is set aside and replaced with the following order: 'The defendants are absolved from the instance with costs'.

PLOOS VAN AMSTEL J

K PILLAY J I agree.

POYO-DLWATI AJ I agree.

Appearances:

For the Appellants	**:**	Adv. M A Oliff
Instructed by	**:**	Friedman & Associates c/o Austen Smith Pietermaritzburg
For the Respondent	**:**	Adv. C J Pammenter SC
Instructed by	**:**	Mooney Ford Attorneys c/o B J Nicholson Pietermaritzburg
Date of Hearing	**:**	5 February 2014
Date of Judgment	**:**	25 February 2014