



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 1359/2010

In the matter between:

**BITOU MUNICIPALITY
LONWABO NGOQO**

**1st Plaintiff / 1st Respondent
2nd Plaintiff / 2nd Respondent**

and

**MEMORY BOOYSEN
PAUL JORDAAN**

**1st Defendant / 1st Excipient
2nd Defendant / 2nd Excipient**

JUDGMENT : 24 MARCH 2011

TRAVERSO, DJP :

[1] The Bitou Municipality ("*Bitou*") is a local municipality with its principal place of administration in Plettenberg Bay. For the sake of convenience I will refer to the parties as plaintiffs and defendants respectively. Bitou, as the first plaintiff, and Mr. Ngoqo, as the second plaintiff, have sued the defendants for alleged damage to their reputations arising from certain defamatory statements made in an affidavit opposing an application for rescission of a judgment obtained by defendants.

[2] The defendants have raised an exception against Bitou's claim, contending that the law does not afford an organ of State the right to sue for defamation, in this instance a municipality. The exception is also based on the contention that an artificial person cannot sue for damages premised on an injury to its reputation, but can only sue for financial loss occasioned by the

alleged defamatory statements. In view of the conclusion to which I have come it is not necessary to decide this issue.

[3] The plaintiffs' claims are for general damages. The defamatory statements were, as mentioned above, contained in an affidavit, heads of argument and oral argument opposing an application brought by Bitou to have a judgment obtained by the first defendant ("*Booyesen*") set aside. The second defendant ("*Jordaan*") is the attorney who was acting for Booyesen at all relevant times.

[4] In short, the allegations complained of were that the municipality had deliberately attempted to deceive the Court by making statements which it knew to be untrue or misleading; by omitting reference to a certain letter; and that the municipality had made reckless and irresponsible allegations which bordered on fraud and perjury.

[5] It was not disputed that these allegations were in fact defamatory. The essence of this case is therefore the question whether a municipality can sue for defamation.

[6] The excipients in this matter rely, *inter alia*, on the decision of Die Spoorbond & Another v. South African Railways; Van Heerden & Others v. South African Railways, 1946 (AD) 999 at 1009, where Watermeyer, CJ, writing for the majority, said :

"... The Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages, such as the railways or the Post Office; it is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature. No one who reads the alleged defamatory statements would regard the reputation or good name of the Crown (regarded as a perennially existing

legal persona whose function is that of carrying on all the multifarious activities of Government in the Union) as having been lowered or injured by these publications. He knows that, though the railways are vested in the Crown, the Crown is only a legal conception and takes no part in the management of the railways. He might regard the noxious words as reflecting upon the individuals or group of individuals temporarily responsible for the direction or management of the railways on behalf of the Crown but he would not regard them as reflecting upon the good name of the Crown itself."

Reference was also made to the separate concurring judgment of Schreiner, JA at page 1012 – 1013, who said:

"... it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State, actions for defamations will lie at their

suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects' actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. ..." (My emphasis)

[7] It is therefore clear that the common law denies standing to the Crown (or in this case the State) to sue for defamation. Mr. Breitenbach, who appeared for the plaintiffs, accepted that the Crown cannot sue for defamation. He however argued that in respect of a municipality other considerations – with which I will deal in more detail later – apply.

[8] The first question to decide is whether a municipality is part of the State or government for purposes of the common law of defamation.

[9] In my view the provisions of the Constitution (Act No. 108 of 1966) make this clear.¹ In Posts & Telecommunications Corporation v. Modus Publications² McNally JA set out certain criteria which are helpful in deciding whether a corporation forms part of the State. These include, *inter alia*, the following:

9.1 Whether the functions of the corporation are government functions.

9.2 Whether, if a body is not a statutory trading corporation, it performs governmental functions either at a local or national level.

¹ Section 40 read with sections 152 and 153.

² 1998 (3) SA 1114 (ZSC) at 1123 B-E.

In my view it is self-evident that a municipality falls squarely within these criteria.

[10] In the Spoorbond case the question whether a municipality can sue for defamation was raised but not decided by Schreiner, JA. He said at 1014:

"But it is unnecessary, in my view, to express any opinion on the question whether in any circumstances a local government authority could bring an action for defamation. Nor need the possibility be examined that such an action might be available to a foreign state that had been defamed in South Africa. Nor, finally, is it necessary to decide whether the Crown could sue a subject in an action for injurious falsehood, that is, for a false and malicious statement causing actual loss. ... It is sufficient, in my view, for the decision of these appeals to say that an action for defamation has not in the past been accorded to a sovereign against its subjects and that there are good practical reasons why such an action should not now be recognised in South Africa." (My emphasis)

[11] Mr. Breitenbach submitted that this *dictum* is indicative of the fact that Schreiner, JA did not consider local government to be part of the Crown, the State or the Government for purposes of his decision in denying the State the right to sue for defamation.

[12] I disagree. Schreiner, JA said in terms that it is not necessary to decide the point, and one cannot read any more than that into the statement. And, contrary to what Mr. Breitenbach submitted, Schreiner JA stated in terms that there are good practical reasons why an action for defamation by the State should not be recognised in South Africa.

[13] Since the Spoorbond case the question whether a municipality can sue for defamation has not arisen again in any reported judgment in South Africa. This is therefore an open question in our law. Elsewhere, however, Courts have held that a

municipality cannot sue for defamation.³ The underlying *ratio* in all these decisions (and the authorities cited therein) remains constant, namely that it will be contrary to public policy or public interest for organs of government, whether central or local, to have the right to sue for defamation, as it would impact on a citizen's right to freedom of speech. As pointed out by Lord Keith of Kinkel, in the Derbyshire County Council case at 1017 j:

"It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism."

[14] I was however invited by Mr. Breitenbach to develop the common law and draw a distinction between central and provincial government on the one hand, and local government on the other. He submitted that the Constitution, the Western Cape Constitution, the Local Government: Municipal Systems Act⁴, all

³ Derbyshire County Council v. Times Newspapers Ltd, [1993] 1 All ER at 1011.

Post & Telecommunications Corporation v. Modus Publications (PVT) Ltd, 1988(3) SA 1114 (ZSC) at 1118 D; 1120 C.

Rajagopal & Another v. State of Tamil Nadu [1995] 3 LRC 566 (SC).

⁴ Act No. 32 of 2000.

recognise that organs of State in the local sphere are still in the process of being developed, they are in need of support and they are not as robust as organs of State in the national and provincial spheres, which are better resourced. The Constitution and the Local Government: Municipal Structures Act⁵ also recognise the asymmetry between municipalities falling in different categories being local, district and metropolitan municipalities. It is common cause that the first plaintiff is a local municipality – the smallest type contemplated by the Constitution and the Structures Act.

[15] He further developed his argument to say that many of the political remedies available to the State, which justify denying its standing to claim for defamation, do not avail municipalities.

[16] He relied, *inter alia*, on Argus Printing & Publishing Company Limited v. Inkatha Freedom Party⁶ to illustrate that a

⁵ Act No. 117 of 1998.

⁶ 1992 (3) SA 579 (A).

municipality is a different form of government. That case, in my view, does not assist him. What Grosskopff, JA was considering was whether political parties or political bodies are, or should be, deprived of the right to protect their reputations. In considering the issue he pointed to the differences between the State and political bodies. These differences cannot, in my view, be extended to municipalities. To do so would be tantamount to ignoring the following *dictum* of Schreiner, JA in the Spoorbond case at 1011 – 1012:

"For the above reasons it seems to me to be clear that great care should be exercised in arguing the analogy from the rights of one person to the rights of another whose qualities are not identical with those of the first. It is no doubt convenient for certain purposes to treat the Crown as a corporation or artificial person. But it is obviously a very different kind of person from the rest of the persons, natural and artificial, that make up the community. In many respects its relationship to those other persons is unique and there is no reason in common sense or logic for concluding that wherever a subject would have a right of action there the Crown must have one too. That the law employs analogy to extend the scope of remedies is, of course,

true, and when judiciously used the method produces beneficent results. But it would be dangerous to proceed upon the assumption that wherever a substantial measure of similarity between persons is discoverable the rights of those persons must be the same. While the law does at times generalise it does so with caution; as frequently, it prefers to act selectively according to the requirements of the particular situation."

[17] In my view there is a vast difference between a political party, on the one hand, and the Crown or State on the other. To use the principles applied in deciding whether political parties should have a right to sue for defamation to an organ of State would be falling in the trap against which Schreiner, JA wisely warned.

[18] A political party may be represented in Government but its functions are not, for example, to provide services. That is a function of the Government – of which a political party may or may not be a component – at times a small and insignificant component.

[19] I therefore, respectfully, disagree with the argument that the fact that the common law has been developed to permit political parties the right to sue for defamation, can be used in ones reasoning in deciding whether that right should be extended to municipalities.

[20] The *ratio* for not according an action for defamation to a sovereign against its subjects remains the same, and should apply with equal force to local authorities. Municipalities are charged with an obligation to provide basic municipal services. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa.⁷ Municipalities are obliged to provide

⁷ Joseph & Others v. City of Johannesburg & Others, 2010 (4) SA 55 (CC) at 68.

Mkontwana v. Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v. Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v. MEC, Local Government & Housing, Gauteng & Others (Kwa-Zulu Natal Law Society & Mandunzi Municipality as *Amicus Curiae*) 2005 (1) SA 530 (CC).

services to citizens as a public duty. These obligations are sourced by both the Constitution and the legislation.⁸

[21] These provisions, in my view, are strong indicators that municipalities are part of the State, performs governmental functions at local level and obliged to provide basic services.

[22] I agree with the statement by McNally, JA in the Posts & Telecommunications case, *supra* at 1123 f:

“6. Whether, if the body concerned is, at least largely or effectively, a monopoly, providing what are generally regarded as essential services traditionally provided by government, it would be contrary to public policy to muzzle criticism of it.”

The argument that because municipalities depend for their viability on revenue they generate from their local communities by means of, *inter alia*, rates and taxes, that defamatory allegations

⁸ Sections 152 and 153 of the Constitution; The Municipal Systems Act, No. 32 of 2000 and in particular section 4(2)(f).
The Housing Act, No. 107 of 1997.

about their honesty may have an adverse effect on people paying their rates and taxes, does not take the matter any further. Even if this were so, I fail to see how this differs from the effects of persistent allegations of Government corruption on, for example, foreign investment in the country. Whatever the distinctions are that one may make between central and provincial and local government – it does not detract from the fact that a local municipality fulfills the governing functions to which reference has already been made.

[23] None of the other considerations that Mr. Breitenbach alluded to can affect the underlying *ratio*, namely that any subject must be free to express his opinion about the management of the local affairs without fear of legal consequences. I have not been persuaded by the interesting and innovative argument put forward by him. He has failed to persuade me that a municipality would fall outside of the realm of the fundamental principle underlying


the authorities referred to above. In the circumstances I decline the invitation to develop the common law to extend the right to sue for defamation to municipalities.

[24] In view of the above it is not necessary to decide whether artificial legal persons enjoy a claim for injury to dignity.

[25] I therefore make the following order:

25.1 The exception in respect of the plaintiffs' claim against the first defendant is upheld with costs;

25.2 The first plaintiff is ordered to pay such costs as the second defendant had incurred in respect of the exception prior to its withdrawal.


JHM TRAVERSO
Deputy Judge President