



**IN THE NORTH WEST HIGH COURT
MAHIKENG**

CASE NO.: 898/2014

In the matter between:

THEUNS G. PELSER

Plaintiff

And

O.C. MIRUKA

Defendant

CIVIL MATTER

KGOELE J

DATE OF HEARING : 11 AUGUST 2015

DATE OF JUDGMENT : 29 OCTOBER 2015

FOR THE PLAINTIFF : Adv. G. Maree

FOR THE DEFENDANT : In Person

JUDGMENT

KGOELE J:

A. INTRODUCTION

- [1] The plaintiff, an erstwhile lecturer at the University of the North-West Mahikeng Campus, (the University), instituted proceedings against his former colleague, the defendant, for damages for defamation. The essence of the plaintiff's claim is that on the 23rd March 2014 the defendant caused an e-mail message to be sent to Professor Swanepoel and approximately 83 other persons which message contains statements made by the defendant which are wrongful and defamatory of the plaintiff.
- [2] As a consequence of the defamation the plaintiff averred that his reputation had been adversely tarnished and therefore sought damages in the amount of R500 000-00 against the defendant.
- [3] The contents of the said e-mail were couched as follows:-

“Dear Professor Swanepoel,

I have now had time to consult with other academics and various other people more knowledgeable than me in these issues and I am sorry to report that I find your response extremely disturbing. If the happening was a once-off incidence, then perhaps I would have left it to rest. But now, I will give an instant where your advice is unlikely to be useful and that would send many academics in my position completely helpless.

Take the case of my dear brother leader Prof. Theuns G. Pelsler. He decides to publish parts of a PhD dissertation that was mostly undertaken prior to his joining the Graduate School. Now, he does not even have the courtesy of including the name of the actual supervisor in his ‘new’ supposed publication. Not only that, the parts of the same dissertation had previously been published four times (see attachment) thereby also implicating him in an apparent plagiarism. But the good Director would not stop at that! He also proceeds to prepare parts of the very same thesis, for a conference

presentation abroad (see attached outputs attributed to Professor Theuns Gertz Pelser). Now this baffles me even more given that the same dissertation or parts thereof had been presented at four previous conferences by the real supervisor and the candidate. A senior colleague at the Graduate School knowledgeable in research matters recently informed us during a School board meeting that these kinds of academic shenanigans are referred to as 'slicing the salami'. What is your idea of increased research output?

Now as you will recall, my previous attempts to discuss with the formidable Director aspects of what to my mind are unfair labour and unethical practices at the School under his watch were met with outright verbal abuse as in him telling me that 'I am full of shit' and 'speak a lot of shit'. Of course, his use of such language has not decreased and he has, both in my presence and in other people's hearing, referred to another senior black colleague (probably old enough to be his father) as 'full of shit and doing a lot of shit work'! Now this is the language of the man your instructions appear to direct me to chat with to solve this problem:-

I will deal with issues of abuse of office and unfair labour practices later. But would you kindly tell us, as Faculty of Commerce & Administration, what constitutes research in your best imagination and how we could move forward given that the same gentleman is not only a Director of a School but also an FHDRC member. And not only that, but I was recently surprised to see the selfsame fellow leading a PhD colloquium!

Regards"

[4] The defendant in his plea admitted that he sent the e-mail to the people mentioned in the plaintiff's claim and the contents of the e-mail. The defence he raised is that;-

- When he forwarded the e-mail, he had done so only after confirming that indeed the plaintiff had presented a publication as though it was his own work and failed to credit the author of certain parts of the publication;
- The statements is true and of interest to the persons whom it was forwarded to;

- The plaintiff was included amongst the persons the e-mail was forwarded to as the defendant felt that the contents of the e-mail are true and needed to be resolved between the plaintiff, defendant and other member of staff.

B. THE FACTS

- [5] The plaintiff, a Professor testified that he was previously employed by the University from January 2011 until March 2015 as a lecturer. He was a line manager of the defendant during that time. He and the defendant had a good working relationship until at the time of this e-mail.
- [6] He further testified that the e-mail was sent to him, Prof Swanepoel who was his line Manager and a Dean of the Faculty of Commerce, the Rector of the University, and the rest of the Faculty of Graduate School of Business including their secretaries and support staff.
- [7] He further explained that their profession is like the medical one, you only get recognised because of your expertise, research done and the journals you published especially if they are accredited. As a result, it was important for all of them at the University to produce and publicise. At some stage during his tenure at the University, he was requested by another colleague to assist him to co-publish some of his work. He agreed as he thought that the University will score some points from this work. They completed this work and it was accepted by the Journal.

[8] He testified further that the allegations in this e-mail were also investigated by the University. The outcome thereof by the University Legal Advisor was that there was no plagiarism that he committed. The outcome of the investigation was sent on the 3rd September 2014.

[9] Plaintiff indicated that plagiarism is regarded as a serious offence because like fraud, it means you steal somebody's work. He added that the statement was understood by the addressees and was intended by the defendant to mean that the plaintiff is dishonest and not of good moral fibre, *inter alia* in the following respects:-

- That he commits plagiarism;
- That he acts fraudulently;
- That he commits verbal abuse;
- That he commits acts of racism and discrimination;
- That he conducts himself in an unethical manner and subjects himself to unethical principles.

[10] As a result of the aforementioned statements, the plaintiff testified that the publication of same and the defamation caused thereby injured his dignity and damaged his reputation. He substantiated this fact by adding that industries of the nature like the University he was employed at mainly focus on the standing of a person and his academic record for recognition. If a person's reputation is damaged, your seniors including juniors will not respect you any longer.

[11] According to the plaintiff the defendant continued with other e-mails even after the outcome of the University's investigations which were also done to undermine his authority and to name and shame him. He

was even called by his employer to put an end to this. The people at the University did not want to listen to his side of the story to such an extent that he felt isolated and victimised. He experienced psychological problems as a result and undergone psychiatric treatment. It also affected his family in that his family life was disrupted because he had to go and look for another employment far from where he lived. He has now relocated to Kwa-Zulu Natal Province.

[12] He testified that he felt also angry because:-

- He remained a victim because even the University did not protect him or say anything to him nor did he receive any apology from anyone including the University itself;
- His peers no longer trusted him and could not even work with him;
- He started doubting himself;
- He lost being promoted in 2014 as the allegations were still being investigated.

[13] The defendant testified and mainly indicated that plaintiff confuses a discussion about plagiarism and plagiarism itself, as what he wrote in the e-mail was just discussions of plagiarism only amongst the colleagues. He further indicated that he did not mean to convey the imputations as claimed by the plaintiff. According to him he was doing his duties as a colleague in terms of the University Rules.

[14] In his written submissions he reiterated the fact that the statement was obviously the truth. He had the necessary information and had attached same in the e-mail that was sent to all these people. The

remarks were made *bona fide* and were sent to the relevant authority and the University body and no publication other than this took place. According to him his action cannot be wrongful, and the content of the e-mail can at best be seen as deliberative. He added that the statements complained of are not defamatory of the plaintiff and the reasonable reader would not understand these words as defamatory of the plaintiff. Further that, it has not been shown by the plaintiff that the defendant manufactured falsehoods calculated to harm him. At worst, the defendant submitted that the emails reveal that there might have been malpractices in the manner in which his line manager, the plaintiff, handled the research process. Indeed, so said the defendant, the University considered the issues that were raised serious enough to institute an investigation.

[15] He lastly submitted that his actions constituted “fair comment” given that his statements were based on facts and proper materials which were objectively fair and honest. He reiterated that his *modus operandi* was entirely peaceful and took place within the context of a statutory body prescribed by the North West University.

C. ANALYSIS

[16] I have already indicated above that the defendant admits that he sent the e-mail to the people mentioned in the summons, hence the only issue in dispute and for this Court to decide is whether the statement is defamatory of the plaintiff, and if so, the *quantum* of damages.

[17] It is trite law that whether the statement complained of is defamatory *per se* is a question of law and the Court must determine whether the

words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames the plaintiff. See: **Sindane v Van der Merwe 2002 (2) SA 32 (SCA); Mohammed v Jassiem 1996 (1) SA 673 (A).**

[18] What the Court must determine is the meaning which the reasonable man would give the passage in its contents and whether the meaning is defamatory, See: **SA Association Newspaper Ltd v Schoeman 1962 (2) SA 613 (A) at 616; Botha v Marais 1974 (1) SA 44 (A) at 48.**

[19] A person's reputation is injured if the statement tends to lower him in the estimation of right-thinking members of society generally or if it tends to diminish the esteem with which he is held by others. See: **Conroy v Steward Printing Co. Ltd 1946 AD 1015 at 1018.**

I must therefore examine the words that were used and determine whether in their ordinary sense are capable of having a defamatory meaning.

[20] The submission by the defendant that the statements complained of are not defamatory of the plaintiff is in my view a bald statement which is not even substantiated. The meaning of the word "*Plagiarism*" is clear and in the academic world as the plaintiff correctly stated, is a very serious allegation that denotes that plaintiff acts fraudulently by imputing other people's work as his and therefore conducts himself in an unethical manner. In my view, the statement in its ordinary construction is capable of conveying to the reasonable reader a defamatory meaning which tends to lower or diminish the esteem with which he is held by others. The plaintiff therefore discharged this onus.

[21] As a general rule, it can be accepted that publication of a defamatory statement is *prima facie* wrongful. The onus rests on the defendant to dispel the *prima facie* case. This is a full onus and requires the defendant to allege and prove the facts that dispel wrongfulness such as truth and public interest. See: **Amler's Precedents of Pleadings: 7th Edition, Harms, LexisNexis, Durban, page 162** where the discussion of the word "*Defamation*" is made and the cases referred to.

[22] The defendant relied on the truthfulness of the defamatory statement, and that he had the necessary information to that effect and had attached same in the e-mail that was sent to all these people. But to my surprise, the defendant did not attach in his papers nor disclose all these information to this Court or such facts and or version in support of this defence.

[23] In addition, it is clear from the e-mail of the Legal Advisor of the University that she went through all the documents and Annexures submitted to her in support of the allegation of plagiarism of the plaintiff and concluded that "*met die bronne tot ons beskikking, daar nie geplagieer is nie. Indien enige vedere beweringe indie verband gemaak word, gesubstansieer kan word met meer volledige inligting, sal n' verdure ondersoek gedoen word*". [My emphasis]

[24] It is therefore clear that the available documents at the time of the making of the defamatory statement, contrary to what the defendant alleges, could not establish plagiarism". As proof of this the said report reveals "*Die verwysde document verwys nie na die oorspronklike bron waarvandaan daar na bewering geplagieer is nie. In al die verwysde*

dokumente blyk dit dat Prof Pelsers saam met n' mede-outeur gewerk (Macharia)''..... [My emphasis]

[25] In my view, the defendant failed to discharge the onus of establishing either some lawful justification or excuse or the absence of *animus iniurandi* on his part. The fact that he was supposed to have reported the matter to the University in terms of the University Rules cannot assist him also because the allegations were baseless. The same applies to the belated argument raised in his written submissions that it was an active discussion amongst colleagues about plagiarism including the fact that he pointed out that there might have been malpractices in the manner his line manager, the plaintiff, went about in conducting his research.

[26] The submission that the statement were not calculated to injure the plaintiff's reputation but rather a fair comment to promote Good Scientific Practice within the Faculty and further that it was sent to the relevant authority and the University body and no publication other than that took place does not hold water as well. It was not disputed that the e-mail was sent to 83 people and that amongst other Faculty members were the support staff component of the Faculty itself. As to why these sensitive allegations were also sent to so many people including its support staff has not been explained. Surely, the University as a large institution as it is undoubtedly has proper channels and procedures that are available where these kind of sensitive and serious issues are to be channelled through. The following words used in the e-mails are equally telling and strengthen the fact that it was meant to be read by the whole faculty: "*But would you kindly tell us, as Faculty of Commerce and Administration*". This simply

means the message is all embracing and that other members of the Faculty, and most probably those that are not in the Faculty Board also received this information which in my view warranted an investigation and report first to the relevant structure before it could be disseminated to so many people in the Faculty.

[27] In my view, the words in the e-mail affected the plaintiff's reputation and good name, and he was accordingly defamed.

D. DAMAGES

[28] The facts to be considered by a Court determining *quantum* in defamation matters are:

- (a) The seriousness of the defamation;
- (b) The nature and extent of the publication;
- (c) Character and conduct of the plaintiff;
- (d) Motive and conduct by the defendant;
- (e) Any other circumstances relevant to the matter in question.

[29] There is no doubt that the defamation was very serious. Not only is it seen, as testified by the plaintiff, as a possible career ender, but in the academic field it is regarded as a big taboo. The nature of the defamatory statement is evident from the contents of the e-mail. The extent thereof was widespread in that it was published to 83 people including high ranking employees of the North West University. The defamatory statement had the further effect that the plaintiff's health suffered acute depression stress disorder and he had to relocate

causing him and his family undue distress. He also had to endure an inquiry as to the allegations made by the defendant.

[30] The plaintiff is of very good character. He is a professor and has many academic publications. The plaintiff's conduct with reference to the publication of the defamatory statement was of no concern. He assisted the defendant in certain areas of his work and generally regarded his relationship with the defendant as good. It is evident that the defendant had ulterior motives when publishing the defamatory statement. He continued with further statements even after the issuing of summons. It is evident that the defendant is vindictive and *mala fide*. The defamatory statement had wide spread consequences pertaining to the plaintiff, his health, his family and employment.

[31] The plaintiff's Counsel referred me to the following case law which were very helpful in the determination of *quantum* in this case:

**Dijkhuizen v Mukhanyo Theological College (24040/2009)
ZAGPPHC 10(27 January 2011);**

In this matter a defamatory statement was made by a member of the board of the defendant in respect of the plaintiff, who was a lecturer at the defendant; The statement was made to no more than 30 people; The North Gauteng High Court awarded the Plaintiff R 50 000.00 in damages (2011)

Wolmarans v Motsi (78/2009) [2011] ZANWHC 93 (7 July 2011);

In this matter the plaintiff, in his capacity as Executive Mayor, claimed damages against the defendant who made a defamatory statement on air (Radio Motsweding) against the plaintiff; The North West High Court awarded the plaintiff R 80 000.00 in damages (2011).

Schoeman v Rustenburg Local Municipality (1404/2005) [2011] ZANWHC 97 (13 October 2011)

In this matter the plaintiff claimed damages against the defendant who caused a defamatory statement to be published in a news letter called Newslink; The North West High Court awarded the plaintiff R 60 000.00 in damages (2011)

[32] The Court was furthermore referred to the e-mail from the defendant to the attorney of the plaintiff dated 4 August 2015 wherein it stated:-
“..... *I would worry more about Mr Pelsler [Plaintiff] and salivate in anticipation of a half a million rand bounty me dear attorney.....*”

Taking all of the above factors into consideration, together with the continued conduct of the defendant to this end, and the recklessness of the publication, I am of the view that an amount of R100 000-00 is appropriate in the circumstances of this matter. Accordingly, there is no reason why the costs should not follow the result.

E. ORDER

[33] Consequently the following order is made:-

33.1 The plaintiff's action succeeds;

33.2 The defendant is ordered to pay the plaintiff an amount of R100 000-00 as damages;

33.3 Interest on the amount of R100 000-00 at a prescribed rate of 9% per annum *a tempera morae*;

33.4 Costs of suit.

**A M KGOELE
JUDGE OF THE HIGH COURT**

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