

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case number: **859/2018**

In the matter between:

ROY JANKIELSOHN

Plaintiff

and

REAGAN BOOYSEN

1st Defendant

SELLO PIETERSEN

2nd Defendant

THABO MEEKO

3rd Defendant

THE AFRICAN NATIONAL CONGRESS

YOUTH LEAGUE

4th Defendant

CORAM: DAFFUE, J

HEARD ON: 13 & 14 AUGUST 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 11 NOVEMBER 2019

- [6] 2nd defendant is Mr Sello Pietersen, the provincial spokesperson of the ANC Youth League of the Free State Province.
- [7] 3rd defendant is Mr Thabo Meeko, a member of the Free State Provincial Legislature.
- [8] 4th defendant is the ANC Youth League, a duly constituted voluntary organisation with legal personality, deriving its existence from its constitution. Adv IAM Semanya SC appeared for the defendants together with Adv M Ramaili.

III THE PLEADINGS

The plaintiff's case

- [9] Plaintiff pleaded in paragraph 7 of the particulars of claim that 1st and 2nd defendants acted not only in their respective capacities as office-bearers of the ANC Youth League in the Free State, but also in their personal capacities.
- [10] Plaintiff pleaded in paragraph 8 that on 5 October 2017 1st and 2nd defendants jointly issued a statement on behalf of 4th defendant, attached as annexure "A". On the same date 3rd defendant shared and published the statement on Facebook, being a social media platform, widely distributed across the world. The publication is attached as annexure "B".

admitted. It is also admitted that 1st and 2nd defendants not only acted as office bearers of 4th defendant, but in their personal capacities as well. The ANC Youth League's *locus standi* as an organisation is also admitted.

- [16] In sub-paragraphs 2.1 – 2.5 of the amended plea it is averred that plaintiff had defamed the Premier of the Free State, Dr Ace Magashule, and that the statement of 5 October 2017 was published “in order to correct the politically unfounded allegations made by the Plaintiff.” The media statement of 26 January 2018 was published “in response to the lawsuit against the Defendant and the defamatory statement against there then Premier Dr Ace Magashule, secondly by the journalist seeking clarity in relation to the lawsuit by the Plaintiff.”
- [17] In sub-paragraph 2.7 it is pleaded in the alternative that “the utterances complained about were made within the defendant's constitutionally protected rights and freedoms, namely the freedom of expression contemplated in section 16 of the Constitution as well as the political rights within the meaning of Section 19 of the Constitution.”

Sub-paragraph 2.7 was inserted when the plea was amended.

- [18] Defendants plead in paragraph 3 of the amended plea to paragraphs 11 -15 of the particulars of claim, averring that “the statements were in essence true and those statements both in the newspaper and on facebook were done in the public interest.”
- They further aver that as the parties were politicians and plaintiff used the DA's website to attack and defame the Premier, they reacted and therefore their statements were made “during the political

V THE RULING ON THE DUTY TO BEGIN

[21] Ms Peterson submitted that the defendants should start with the leading of evidence. She relied on the averments in the amended plea. I put it to her that the parties agreed in their rule 37 minutes that plaintiff bears the duty to begin and that he will begin. Mr Semenya confirmed that he accepted his brief for the trial based on such agreement. A week before the start of the trial I requested my secretary to communicate with the parties via e-mail in order to ensure that they properly comply with the new rule 37A(10). I was informed that the rule 37 minutes complied with the new rule. Defendants were never requested to revisit the agreement reached. Consequently, I did not deem it fair to make a ruling contrary to an agreement reached between the parties. Furthermore, although new defences are raised in the amended plea, defendants denied in the original plea that the statements were made wrongfully and with the intent to defame plaintiff.

VI THE EVIDENCE

Roy Jankielsohn

[22] Mr Jankielsohn was the only witness that testified in plaintiff's case. He testified that he is the leader of the Democratic Alliance ("DA") in the Free State Provincial Legislature. He was leader of the official opposition in the Legislature between 2006 and 2009 and from 2014 to date. He is a member of the Federal Council of the DA. He also holds numerous other positions. Five degrees were conferred upon him, to wit a BA, BA Honours in Political Science, MA in International Relations, BA Honours in English and a Ph.D

had been paid to several countries, *inter alia* to Turkey in 2014/15 – R7.75m, in 2016/2017 - R32.6m and in 2017/18 - R11.9m. Students were sent by the Province to the particular university and the amounts were apparently utilized for air tickets, tuition, accommodation and the like.

[26] Plaintiff testified about the reaction of the defendants. The publications are not in dispute. The initial statement⁴ dated 5 October 2017 was issued by 2nd defendant and placed on the ANC Youth League's Facebook page. 1st Defendant is referred to as the person to whom enquiries should be directed. This statement contains all the words quoted in the particulars of claim which plaintiff alleges are defamatory. On the same day 3rd defendant shared the article which was released on Facebook,⁵ causing a wider distribution thereof. On 28 January 2018 the Weekly newspaper published an article based on allegations made by 2nd defendant wherein several of the alleged defamatory remarks were repeated.⁶

[27] According to the plaintiff he was also incorrectly accused of objecting to black students studying abroad. To the best of his knowledge no report was ever issued denying the correctness of the allegations in his report. Defendants did not try to defend Mr Magashule by indicating that plaintiff's report was false, but elected to attack him by defaming his person. He referred to the words used in this regard, but testified that to call a white politician a racist is the biggest insult imaginable. It is criminal to be racist. He also

⁴ Exhibit A, p 5

⁵ Exhibit A, p 4

⁶ Pleadings bundle, p 20

- [30] Mr Semenya's reasoning that the ANC Youth League became involved because of the fact that plaintiff had queried the studying of black students abroad, was met with a response that his report had nothing to do with that: studying abroad was not a consideration. That concluded plaintiff's case.

Thabo Piet Meeko

- [31] Defendants called only one witness, to wit Mr Meeko, the 3rd defendant. He is the current spokesperson of the ANC in the Free State and a Member of Parliament. He testified about his political career. The ANC Youth League has been established to ensure that the ANC is rooted in the masses and especially the youth. He has known the plaintiff since 2014. The witness was called upon to explain how he defines political contestation and it became clear that he believes that robustness is common while heated debates occur in the National Assembly and the Provincial Legislature of provinces. According to him, although members are protected for what they say inside Parliament, all politicians have the right to speak outside Parliament.
- [32] The witness confirmed that the statement of 5 October 2017 was released and that he "retweeted" it. It is his view that it is not uncommon for politicians to call others "racists." He is of the opinion that the DA wants to install the "apartheid legacy" and that has been the case since 1994. Therefore plaintiff is a racist. Anyone or any party that disagree with the ANC or oppose its views, reflects racism and the idea that apartheid must be "maintained."

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Freedom of expression

- 16.1 Everyone has the right to freedom of expression, which includes-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

- 16.2 The right in subsection (1) does not extend to-

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Political rights

- 19.1 Every citizen is free to make political choices, which includes the right-

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party; and
- (c) to campaign for a political party or cause.

- 19.2 Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

- 19.3 Every adult citizen has the right-

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office."

VII RELEVANT LEGAL PRINCIPLES

- [36] Defamation is the wrongful and intentional publication of a defamatory statement concerning the plaintiff. Once the plaintiff establishes these elements, a presumption is created that the statement was unlawful and intentional and it is for the defendant

Under our new constitutional order, the recognition and protection of human dignity is a foundational constitutional value. As this Court held in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at para [35]:

'The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.'

- [27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn

the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

This judgment is distinguishable from the matter at hand although the SCA discarded the Equality Act and decided to deal with s 16(2) of the Constitution. An application for leave to appeal the SCA judgment has been filed at the Constitutional Court which court will, as informed, hear the application in due course.

[39] In *Hotz and Others v University of Cape Town*¹¹ the court held:

“A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity.”

[40] In *SAHRC v Khumalo*¹² Sutherland J in dealing with the Equality Act commented as follows:

“[102] In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism.”

The learned judge found that the question whether harm could be incited by the effect of the speech on the reasonable reader or audience and not whether the intention of the speaker was to incite harm. He added that the standard of the reasonable person, applied to s 10(1) (of the Equality Act) means, therefore whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they

¹¹ 2017 (2) SA 485 (SCA) at para 68

¹² 2019 (1) SA 289 (GJ)

[43] An objective test is applied to determine whether the reputation of the plaintiff has been infringed on a balance of probabilities.¹⁹

[44] It is apposite to consider the views of the CC in *Le Roux v Dey*.²⁰

“[138] In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her right to a sense of self-worth. But under our common law 'dignity' has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common-law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation.

[139].....

[140] I find myself in respectful agreement with the principle that the same conduct should not render a defendant liable by dint of more than one *actio iniuriarum*. I say that for the reasons that follow.

[141] Traditional learning generally defines *iniuria* as the wrongful and intentional impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*).....

[142] In view of this constant overlapping of manifestations of *iniuria*, duplication of *actiones* would therefore have been expected as a matter of common occurrence, if it were allowed in principle. Yet, like Harms DP, I am unaware of a single case where two actions

¹⁹ *Le Roux and others v Dey* loc cit at paras 168 - 169

²⁰ *Ibid* at paras 138 -144

speech. Also, every person is afforded the legitimate protection of his/her dignity, including their reputation.²³

VIII ANALYSIS OF THE FACTS AND THE CONTEXT IN WHICH PUBLICATION TOOK PLACE

- [47] The publication of the statement by defendants is not in dispute. It was published for immediate release onto the ANC Youth League's Facebook page and the same day shared by 3rd defendant on his Facebook page. Several of the words used in the statement to describe plaintiff are hurtful and offensive, but in my view acceptable in a political context. However the words "racist" and "white supremacist" fall in a totally different category. In *Masuku*²⁴ the SCA stated that an offending term such as "racists" does not "connote religion or ethnicity." We do not deal here with either religion or ethnicity, but with race –based speech.
- [48] It must from the onset be pointed out that although defendants aver in paragraph 3.1 of their amended plea that the "statements were in essence true" and "done for the public interest," Mr Semanya was adamant in his written and oral submissions that this case is not about the usual common law defences such as truth and public interest and fair comment. He did not try to lay a basis for any of the common law defences during the plaintiff's cross-examination. He unconditionally relied on the defendants' alleged protected rights of freedom of expression contemplated in s 16 and their political rights within the meaning of s 19 of the Constitution.

²³ McBride loc cit at paras 99 & 100

²⁴ Loc cit at para 26

- [52] The defendants' statement kicks off with the allegation that plaintiff's attacks on the Premier were of a racist nature. This is factually incorrect. I accept that the defendants' statement tries to convey that the Premier was indeed deserving of an honorary doctorate degree. The uncontested evidence of plaintiff reveals that millions of Rands have been paid to Turkey to provide for the costs of South African students and that the amount increased to a staggering R32m in the 2016/17 financial year which coincides with the conferral of the honorary doctorate degree. Payments to Turkey dropped the next financial year to just less than R12m. However, even if the defendants' statement was published in order to correct incorrect allegations, the question still remains whether defendants were entitled to make *prima facie* defamatory remarks towards plaintiff.
- [53] Plaintiff is referred to four times as a "racist" and even an "inherent racist" in the document and once as an "irrelevant white supremacist." The repeated use of the word "racist" is, to borrow from Cameron J in *McBride*,²⁵ vengeful and distasteful. No steps have been taken against plaintiff by his political party based on the allegations against him. If these were factually true, I have little doubt that a non-racial political party like the DA would have acted immediately by instituting disciplinary steps against plaintiff. The party insiders, consisting of white and black leaders, would have done their party a disservice if they allowed a racist to represent them as leader of the Free State Legislature.

²⁵ Loc cit at para 102

Constitution and the society we aspire to” as Brand AJ said in *Dey*.²⁷ He continued to state that “respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity, our aim to create a better society may come to nought.”

[56] There is no justification for the publication of untruths. The statement was published recklessly and with indifference as to whether it was true or false. They were actuated by malice and the sole purpose was a personal attack on the plaintiff. In his evidence Mr Meeko made use of generalisations and placed emphasis on the DA’s programme since 1994 to allegedly return to apartheid in order to justify their attack. Plaintiff is labelled and even stigmatised as a racist and white supremacist and it is highly probable that some people might have been incited to cause him and/or his family harm. We experience this on a regular basis in this country. The harm inflicted on foreigners based on rumours, or distorted facts being published, is just one example. I reiterate what Sutherland J said in *SAHRC v Khumalo*.²⁸ Mr Meeko was vague during cross-examination. I understand that context is important, but his failure to respond meaningfully to questions put to him as to what their reaction would be to similar comments by plaintiff at the time he testified, speaks volumes. His attempts to distinguish between plaintiff’s comments and their reaction thereto did not bear fruit. Mr Meeko’s subjective belief that defendants’ reaction could or did not constitute incitement to cause harm is irrelevant. The matter must be considered objectively. Plaintiff, on the other hand, made concessions when necessary and I find that

²⁷ *Le Roux v Dey*, loc cit at para 202

²⁸ Loc cit at para 89

cannot be justified.” The purpose of granting compensation is twofold: firstly to vindicate the plaintiff’s reputation in the eyes of the public, and secondly, to serve as conciliation to him/her.³⁰

[59] Plaintiff claims R1m, but the reasonableness of the claim must be considered in the light of all the circumstances. A court is entitled to refer to other cases in order to consider a *solatium*, but such cases should merely be used to guide the trial judge. In *Tsedu and others v Lekota and another*³¹ R100 000.00 was awarded on appeal to each of the two plaintiffs, the holders of high office in Government, who were accused of having supplied confidential party information to a third party. The present day value of the award is R170 200.00.³² Nugent JA, writing for a unanimous bench, held³³ that “monetary compensation for harm of this nature (defamation *in casu*) is not capable of being determined by empirical measure” and that “it would not be helpful to recite other awards.” I respectfully agree with this *dictum* and find that there is no substance in Mr Semenya’s argument that plaintiff failed to prove his entitlement to compensation.

[60] Notwithstanding the remarks of the SCA quoted in the previous paragraph, I considered three other cases. In the most recent judgment R500 000.00 was awarded to Mr Manuel, a former Minister in the National Government.³⁴ The statement about him was held to be understood by the reasonable reader that he was *inter alia* corrupt and nepotistic. I am of the view that plaintiff is not

³⁰ *Esselen v Argus Printing & Publishing CO Ltd* 1992 (3) SA 764 (TPD) at 771F-I

³¹ 2009 (4) SA 372 (SCA)

³² *Quantum of Damages: Quick Guide*, 2019 ed at p 232

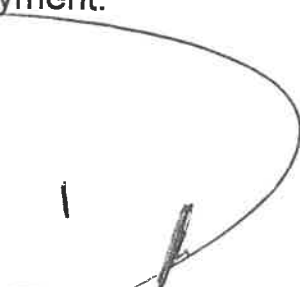
³³ *Ibid* at para 25

³⁴ *Manual v Economic Freedom Fighters and others* [2019] 3 All SA 584 (GJ)

XI THE ORDERS

[65] Judgment is granted against 1st, 2nd and 3rd defendants, jointly and severally, the one to pay, the others to be absolved as follows:

- (1) Payment in the amount of R300 000.00.
- (2) Interest *a tempore morae* on the amount of R300 000.00 from date of judgment to date of payment.
- (3) Costs of suit.



J P DAFFUE, J

On behalf of Plaintiff : Adv KN Peterson
Instructed by : Horn & van Rensburg
BLOEMFONTEIN

On behalf of Defendants : Adv IAM Semanya (SC) and Adv M Ramaili
Instructed by : Moroka Attorneys
BLOEMFONTEIN