



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1581/2009

In the matter between:

DR. SIFISO BARROW

Plaintiff

and

DR. PRISCILLA DLAMINI

1st Defendant

UNIVERSITY OF SWAZILAND

2nd Defendant

Neutral citation: *Dr. Sifiso Barrow v Dr. Priscilla Dlamini & Another (1581/2009)*
[2014] SZHC 17 (21st February 2014)

Coram: M. Dlamini J.

Heard: 4th July, 2013

Delivered: 21st February 2014

*Defamation – elements thereof – words uttered in a privilege occasion as
defence no matter how crude the phrase -*

Summary: The defendants moved an application for absolution from the instance. Plaintiff by means of action proceedings sued out combined summons against defendants. The claim was for the sum of E250,000.00 arising from defamatory words uttered by 1st defendant at the Result Faculty Board meeting held in June 2005. The defendants in their plea vehemently deny uttering defamatory words against the plaintiff.

Plaintiff's claim

[1] Plaintiff filed an amended particulars of claim which reads as follows:

- “6. On or about June, 2005 in a Results Faculty Board meeting held at the Faculty of Health Sciences, the 1st Defendant maliciously spoke, uttered or made a statement of and concerning the Plaintiff's person and in her profession as a Lecturer, that the Plaintiff was a negligent supervisor to two research students assigned to her to supervise.*
- 7. The above words were spoken made by the 1st Defendant in her capacity as the Dean of the Faculty of Health Sciences and while acting in the course and scope of her employment.*
- 8. At the said meeting, the Plaintiff was, without just cause, severely reprimanded by the 1st Defendant in the presence of thirty (30) members of the academic community from the three (3) campuses of the 2nd Defendant when she uttered these words.*
- 9. The said statement and/or accusation was recorded in the Results Faculty Board meeting in turn carried over to Senate and its committee's report (FHS 48/2005) that was presented to Senate on the 30th August 2005.*

10. *The said statement and/or accusation was made as a result of two students namely Thulile Dlamini and Buyile Dlamini, whose research projects were supervised by the Plaintiff who had initially failed the projects. An external examiner initially awarded one of the students, Thulile Dlamini, 42% grade for the research projects. In a subsequent supplementary category, Plaintiff awarded the same student 38%, a grade which was lower than the initial 42% awarded by an external examiner.*

11. *Reporting to a Senate body in the August 2005 meeting of the 2nd Defendant, the 1st Defendant repeated the statement and/or accusation that Plaintiff's action with the two students showed plaintiff's lack of professionalism when she awarded a student a grade which was lower than that awarded by an external examiner with regards to the research project undertaken by the student.*

12. *The aforesaid statements and/or accusations were in the context of the meetings, wrongful and defamatory of the Plaintiff in that they were intended and were understood by faculty members present in those meetings and to reader of the minutes that the Plaintiff:*
 - 12.1 *Abused her position as supervisor when she remarked and failed the two students in their research projects;*
 - 12.2 *Acted unprofessionally in carrying out her duties with regards to the two students;*

 - 12.3 *Abused her discretion and suppressed the due research guidelines governing research proposals and projects as laid down by the 2nd Defendant.*

13. *In uttering the statements and/or accusations, the 1st Defendant was malicious in that in both accusations, she knew or should have known alternatively, by taking reasonable steps could have established that;*

- 13.1 *Plaintiff had exercised her discretion in terms of the guidelines governing research proposals and projects as laid down by the 2nd Defendant in assessing the two students.*
14. *The statement and/or accusations by the 1st Defendant was incorrect and did not depict the truth.*
15. *The statement and/or accusations by the 1st Defendant had the intention of blemishing Plaintiff's record and reputation in the academic community.*
16. *As a result of the defamatory statements, Plaintiff has been injured in her good name and reputation and has sustained damages in the amount of E250,000-00 (Two Hundred and Fifty Thousand Emalangeni).*
17. *On 15th January 2009, the Plaintiff demanded payment from Defendants but not withstanding such demand, the Defendants have failed to pay the amount claimed and/or publish an apology in respect of the defamatory remarks referred to above."*

Defendants' plea

[2] In opposition, defendants have stated:

"Ad paragraph 6

2. *The contents herein are denied and the Defendants state that at the meeting of the June 2005, the 1st Defendant gave a report to the Faculty Board about the events surrounding the marking of the Research Projects of two students, Thulisile Dlamini and Buyile Dlamini.*

2.1 *The reports were merely a summary of the submissions of the Plaintiff, the HOD [Head of Department], the Court Lecturer and the two students involved.*

2.2 *No statements as alleged by the Plaintiff was made.*

Ad paragraph 7

3. *Save to state that the 1st Defendant did attend the meeting in here capacity as Dean, the remaining allegations are denied.*

Ad paragraph 8

4. *The contents herein are denied and the Defendants refer to the foregoing.*

Ad paragraph 9

5. *The contents herein are denied and Plaintiff is put to strict proof thereof.*

Ad paragraph 10

6. *The Defendants deny that the alleged statement was made as alleged, or at all and state that the background to the meeting of June 2005, was that the Plaintiff in marking the work of the two mentioned students awarded 32% to Thulile Dlamini and 12% to Buyile Dlamini.*

6.1 *Thereafter the Plaintiff, for the reasons best know to herself, retrieved the scripts from the external examiner and reduced the marks awarding 8% Thulile Dlamini and 2% to Buyile Dlamini.*

6.2 *The External Examiner awarded Thulile Dlamini 42% and 38% to Buyile Dlamini.*

6.3 *What was unusual about the circumstances was that the Plaintiff after competing marking the scripts requested the scripts back and awarded a lower mark to each of the students, whereas had she maintained her earlier mark, both students would have passed.*

6.4 *In the event both students were failed in the initial examination.*

Ad paragraph 11

7.

7.1 *The contents herein are denied and the Defendants state that the Senate considered the report and inter alia Senate resolved that the students should be allowed a supplementary grade and resolved that Lecturers in general should act professionally without particularizing the comment to Plaintiff or any other Lecturer in particular.*

7.2 *In the event, the Court finds that the statement was of and concerning the Plaintiff and was defamatory, it was with the 2nd Defendant's prerogative as the employer and was fair comment.*

Ad paragraph 12

8. *and the Applicant was never reprimanded, but all three of the academic personnel concerned were admonished and advised that they ought to have reported the incident to the Dean.*

Ad paragraph 12.1, 12.2, and 12.3

9. *The contents herein are denied.*

Ad paragraph 13 and 13.1

10. *The contents herein are denied.*

Ad paragraph 14

11. *The Defendants deny that any accusations or statements were made as alleged.*

Ad paragraph 15

12. *The contents herein are denied.*

Ad paragraph 16

13. *The contents herein are denied and the Plaintiff is put to strict proof thereof.*

Ad paragraph 17

14. *The contents herein are noted however the Defendants states that no apology was forthcoming due to the fact that no defamatory statements or any statements at all as alleged were made by the 1st Defendant.”*

Viva Voce evidence

[3] Two witnesses presented evidence on behalf of plaintiff viz. plaintiff herself and Dr. Elizabeth Nambewe Maziya.

[4] The plaintiff whose last name is Sithole informed the court that she held *inter alia* a PHD in nursing, specializing in community and family health promotion. She was under the employ of 2nd defendant as a lecturer of maternal child health research since 1988. Her duties entailed, mainly, supervision of students in research work. She was a member of Human

Ethical Research Committee and a focal person for the Faculty of Health under the Ministry of Health.

[5] In the year 2004–2005 the first defendant was the Dean of her Faculty while one Mrs. J. V. Mdluli was the head of the department. During this period, and somehow later than the scheduled period for project research, two students reported to her office. They reported that their course lecturer had referred them to her for their project supervision. This did not augur well with plaintiff as protocol had not been observed. Procedurally, the students who are in their fourth year, each identifies a problematic area. He then writes a title relevant to the problematic area. These titles are submitted to the relevant lecturers together with the corresponding student's name by the students. The lecturers post the same to the head of department who convenes a departmental meeting. In this meeting, each supervisor selects a title relevant to his or her area of supervision. In this way, the students are selected as per relevant topic. It was plaintiff's further evidence that when she was approached by the students viz. Buyile and Thulile who were both Dlamini, she enquired from the course lecturer, Dr. I. T. Zwane as to why the students were excluded from following the laid down procedure. She did not receive any response.

[6] From the onset, the duo who were expected to submit a time-table which would be a guide in monitoring them, failed to do so. Buyile chose a title on epilepsy. She advised Buyile to direct the title on human beings and not buildings. Thulile's choice was on nurses. She advised her to narrow the title by focusing on her work environment. As she was employed at the paediatric department at Raleigh Fitkin Memorial, Thulile agreed to concentrate on children. However, Thulile came back with a new topic being "Women and Gender". She had written up to chapter 3. When she

read her work, she realized that it was not original but sourced from the book “*Whailey and Whong*”. She warned her that she will have to defend her proposal. This student went away and came back to submit a topic on children. However, she had difficulty with this title. Similarly, Buyile changed from epilepsy to anti natroviral therapy. She also struggled to develop her proposal. It became clear to plaintiff that the duo lacked the basics on research. She decided to lecture them on what was expected of them. After this, the two were able to improve on their titles. However, they still had difficulty with the content. By the time they were in their fifth year, they were still struggling to improve on their data collection tool. This led her to give both students Grade “I” representing “incomplete” when she was called to evaluate them at the end. She submitted their grade to the course lecturer who objected and advised her to give a mark. She reluctantly complied.

[7] Plaintiff informed the court that following the two students’ under performance, she wrote to the Head of department who was Mrs. Mkhabela then. The Head of department was to forward the information to the Dean. She doubted whether Mrs. Mkhabela did so. She decided to write again to the Dean through Mrs. Mkhabela about the poor performance of the two students. Following this correspondence plaintiff expected the Head of department to call her to discuss the issue of the two students. However, this was not so.

[8] It was plaintiff’s further evidence that she expected the issue of the two students to be part of the agenda in the departmental meetings usually scheduled before the arrival of external examiners. Although a departmental meeting was called, the two students’ matter was excluded from the agenda. She, however, raised it. She was advised that as the

substantive Head of department was away, the matter should be held in abeyance pending her presence.

[9] The substantive Head of department was available later. She approached her and enquired as to when she would call a meeting in order to discuss about the duo. The response was that no further meetings would be convened. She enquired on the fate of the two students. She was told that the external examiner would make his own assessment on the matter. Procedurally, once an external examiner encounters anything questionable pertaining to marks, he invites the lecturer concerned for discussion. In the present case, she was not invited.

[10] On the 8th June 2005, a day preceding the Faculty Results Board meeting, 1st defendant as the Dean, telephoned her to say that she had been informed that she failed a student after remarking and that she demanded a full report. She complied by writing and submitting the same.

[11] Plaintiff proceeded to inform the court that in respect of Thulile, her project was given to another lecturer to mark. She raised the mark to a supplementary grade. Buyile had done very well in her course work such that when it was combined with the mark she had given Buyile, she received a pass mark. Following this, the Dean called plaintiff to her office and informed her that the students have passed. She responded by saying that even if they passed, their research paper was unsatisfactory. The Dean then advised her to remark and lower the grade to a supplementary grade in order to give the two an opportunity to work on the project. She complied although she was very reluctant.

[12] Subsequently, a Faculty Board meeting whose main agenda was to discuss results was held on the 9th June 2005. This meeting was chaired by 1st defendant as the Dean. All lecturers including those from sister campuses, registrars, heads of departments, dean of students' affairs, dean of curriculum affairs and librarian were present in this meeting. It was her evidence that about thirty members were present at this meeting. When the tutor read the results from plaintiff's department, the Dean informed the meeting that the issue on the two students should be considered as a special agenda to be discussed at the end.

[13] The Dean took over from the tutor as chair and recalled the matter of the two students. The names of the students were read and the Dean stated as follows:-

“The supervisor failed the students because she remarked the projects and did not make a follow up. She did not have a schedule for the students. She neglected her duties of supervising.”

[14] It was plaintiff's evidence that she could not believe her ears. Her heart went “*thumping*”. She asked whether she was hearing correctly in the light of the written report submitted to the Dean prior. She then raised her hand to interject. She stated, as she raised her hand:

“This supervisor you are talking about is me and what you are saying is not true.”

[15] The Dean cautioned her not to interrupt the proceedings as she was on the floor. This fell on deaf ears as she continued to speak. She was admonished to speak only once given the opportunity. Plaintiff informed the court that

following the said utterances, she felt very embarrassed and humiliated. Her dignity reduced in the presence of her colleagues and other professors. As a result she suffered hypertension and had to see a doctor the following day. According to plaintiff, if this matter existed at all, the 1st defendant ought to have discussed it at a departmental meeting and certainly not at such a highly powered delegation meetings. It is in this meeting where she would have given her side of the story.

[16] The plaintiff in her evidence informed the court that the scribe in the meeting of 9th June 2005 was one Mrs. Lindiwe Nhlabatsi, the assistant Registrar. The utterances by 1st defendant were recorded in the minutes of that day which were later presented to 2nd defendant's Senate. She saw Senate's minutes of the meeting held on 30th August 2005 where it reflected that she lacked professionalism in her work as a supervisor. This wording "*lack of professionalism*" finished her off as it was tantamount to defamation. As a result, she approached the Dean (1st defendant) who told her to take the matter up with Kwaluseni campus, the head office.

[17] She approached the Registrar who referred her to the Head of department. The Head of department could not resolve the matter as an intended meeting with the 1st defendant could not materialize. However, a departmental meeting was arranged. Nothing fruitful resulted from that meeting. She then wrote to the Registrar at Kwaluseni, who gave her an audience. The 1st defendant was present. She demanded for an apology to be made in the same forum where the defamatory utterances took place. The Registrar and one Mr. Salebona Simelane declined. It is then that she approached the Vice Chancellor who informed her that he would set up a sub-committee to attend her matter. This sub-committee recommended that an apology be tendered to plaintiff and that the defamatory words reflected

in the minutes taken to Senate be expunged. As a result she received correspondence indicating that she would be invited to a board meeting where the apology would be tendered. Although there were three subsequent board meetings, she was never invited to any.

[18] This witness was referred to a correspondence authored by defendants inviting plaintiff to a board meeting where the apology would be tendered as per sub-committee's resolution. This witness denied ever receiving the said correspondence, although her attention was drawn to this correspondence well after the date of the meeting reflected in the invitation letter.

[19] When she failed to get any response as to the reason she was not invited to any of the board meetings, she then appealed to Council. Council never even acknowledged receipt of her letter. She therefore decided to approach the court.

[20] In justifying her claim for E250,000-00, the witness informed the court that as a result of the defamatory words, she felt very humiliated. Owing to her high qualifications and that the defamatory words were uttered by a person of high standing in the profession in the likes of 1st defendant, she subsequently suffered palpitations and has since then been in constant medication. She was emotionally abused and students generally fear her after the incident.

[21] The second witness on behalf of plaintiff was Dr. Elizabeth Nambawe Maziya who on oath stated as follows:

- (i) She worked with plaintiff and 1st defendant at the 2nd Defendant's institution. Once students have written examination, the instructors mark their scripts and the moderator check the examination papers. Then a departmental meeting is held where students' marks are discussed. The Registrar convenes a meeting which is chaired by the Dean for a further discussion of the students' results and other related matters. When the results are deliberated upon, the Dean hands over the Chair to the faculty Tutor. The Assistant Registrar becomes the scribe. Although previous minutes are read, no minutes are taken away from this meeting and there is no agenda distributed before its sitting.
- (ii) On the 9th June 2005 a Result Faculty Board meeting was held where plaintiff, 1st defendant and herself, were present. The Registrar, Librarian, Heads of departments and Lecturers were present. There were about thirty members of 2nd defendant present in that meeting. This meeting took a strange twist when the faculty Tutor, Mr. Nkambule informed the meeting that there were special cases of viz. Buyile and Thulile Dlamini. The 1st defendant then explained as follows:
- “The students were handled unfairly as they were not given a follow-up meeting schedules and the project that they were inconsistently marked with discrepancies in between external examiners. The lecturer was described as unreasonable and lacked professionalism.”*
- (iii) The witness proceeded to state:

“That caught my mind and I concluded that the lecturer was being unfair to the students.”

- (iv) The Dean explained that the external examiner had given a higher mark than the lecturer.
- (v) It was Dr. Maziya’s evidence that at that juncture she did not know that the 1st defendant was referring to the plaintiff.
- (vi) As the floor was opened, people were raising their hands, including plaintiff. Although plaintiff was seated closer to the executive, she was not given the platform while others were. Plaintiff then interjected and stated:

“You are actually talking about me.”

- (vii) This witness proceeded to state:

“It is then that I put a name and the face.”

- (viii) She stated further:

“To me that was shocking as the painting that had been done was so ugly, I would not have liked to show my face. I would have rather kept quiet. For her to identify herself it gave me another perspective to enquire what was going on.”

- (ix) The chair responded by stating that:

“I have not given you the floor.”

[22] She was never given the opportunity to speak.

[23] Both witnesses were cross-examined at length by learned Counsel for the defendants. I will refer to their cross-examination when dealing with the merits of this matter.

Issue

[24] The issue for determination is crisp: Were the utterances by 1st defendant in the meeting of 9th June 2005 defamatory of the plaintiff? The answer lies in the circumstances of this case viewed in line with the principles of our law governing the legal concept viz. defamation.

Legal Principles

[25] The rationale behind the law on defamation was canvassed by **De Villiers J.**

“In these circumstances people (in defendant’s position) must exercise even greater care that they in no way wrongfully impair a man’s credit worthiness”

(see **Informa Confidential Reports (Pty) Ltd v Abro 1975 (2) S. A. 760 at 763 (B)**)

[26] **De Villiers JP** in **Pitout v Rosenstein 1930 OPD 112** quoted from **Halsbury Law of England Vol. XVIII** paragraph 1,176 as follows:

“A statement is defamatory as being calculated to expose a person to hatred, contempt or ridicule if it tends to lower him in the opinion of men whose

standard of opinion the court can properly recognize or to induce them to entertain an ill opinion of him.

*It must be borne in mind that the word “contempt” as used in the definition of defamation does not mean virulent scorn or” despisal”. It means that men think less of a person, that his reputation suffers, and reputation in this connection is not confined to the reputation for moral character or moral conduct but includes a man’s reputation for all those qualities lacking which he will fall lower in the opinion of his fellow men.” (see also **Marais v Botha and Another 1973 (3) S.A. 952 at 954**)*

[27] From the above definition of defamation, the poser; Were the utterances by 1st defendant defamatory of plaintiff?

[28] It is apposite to regurgitate the defamatory words as contended by the plaintiff and her witness and these are; by plaintiff,

“The supervisor failed the students because she remarked the projects and did not make a follow up. She did not have a schedule for the students. She neglected her duties of supervising.”

[29] And as understood by PW2:

“The students were handled unfairly as they were not given follow up schedules and the project that they were inconsistently marked with discrepancies in between external examiners. The lecturer was described as unreasonable and lacked professionalism.”

[30] From the definition above, it is clear that the libel must be directed to the plaintiff. The plaintiff by asserting that the defamatory statement refers to her establishes the right to sue.

[31] **Innes C. J. in Goodall v Hoogendoorn Ltd 1926 AD – 11 at 15** put the position with precision:

“No man can bring an action for slander unless the words complained of apply to him. It is a personal action for a personal injury. It will not be for words spoken solely of a third person even though the plaintiff alleges that they have indirectly caused him damage. He may possibly have another remedy in such case, but he cannot sue for defamation. On the other hand, words may apply directly to a plaintiff even though they are couched primary against someone else; as where it is said that a company is fraudulently managed – the words may be found to contain a direct slander on the directors as individuals.”

[32] **Jones J. in Argus Printing and Publishing Co. Ltd v Weichardt 1940 CPD 453 at 459** stated:

“The Court of Appeal (i.e. Bruce v Odham’s Press Limited (1936, 1 KB 697) held that the bald allegation in the statement of claim that the article referred to plaintiff was insufficient, and that it was necessary to allege facts and circumstances to show that the article could be reasonably construed as relating to plaintiff. The same principle has been applied in cases in our Courts,”

[33] The enquiry on identification is in two stages viz. as a matter of law and question of fact.

[34] **Lord Simon in Krupffer v London Express 1944 (1) AER 467** enunciated:

“The first is a question of law – can the article having regard to its language, be regarded as capable of referring to the appellant? The second question is a

question of fact, namely does the article in fact lead reasonable people, who know the appellant to the conclusion that it does refer to him. Unless the first question can be answered in favour of the appellant, the second question does not arise.”

[35] Applying this requirement of the law to the present case, the evidence adduced by plaintiff is that when the chair uttered the words under disputes, the plaintiff raised her hand and without being given the floor, informed the meeting as follows:

“This supervisor you are talking about is me.”

[36] From this statement one reads that even on plaintiff’s own understanding, the utterances by 2nd defendant had to be explained to those present at the meeting as to who they were directed to. It could not be inferred that they were directed to the plaintiff even though the names of the students were mentioned.

[37] Plaintiff was cross-examined as follows:

“In the meeting of 9th June 2005 there was no specific mention of your name?”

[38] Plaintiff responded:

Plaintiff: *“Yes, I was the supervisor on one to one not in a team.”*

Mr. Flynn: *“She did not name you?”*

Plaintiff: *“Yes”*

[39] PW2 corroborated plaintiff and pointed out that as soon as plaintiff announced that the utterances were directed to her, she concluded:

“It is then that I put a name and the face.”

[40] This evidence by PW2 who informed the court that plaintiff was her long time acquaintance, clearly shows beyond reasonable doubt that the meeting was at a loss as to who 1st defendant was referring to. It is only when plaintiff informed the gathering that *“the supervisor you are talking about is me”* that those in the meeting were able to identify the person 1st defendant was referring to. What is worse herein is that we do not hear that 1st defendant confirmed that indeed she was referring to plaintiff. In fact the evidence adduced by and on behalf of plaintiff is that 1st defendant chose to ignore plaintiff.

[41] From this evidence and on plaintiff’s own showing, it cannot be said therefore that expression by 1st defendant *“having regard to its language, be regarded as capable of referring to the plaintiff”* (see **Knupffer** case *supra*)

[42] It would be folly of me not to address the question as to whether the words uttered by 1st defendant were defamatory *per se*.

[43] The onus rests upon the plaintiff to establish that the 1st defendant had the necessary *animus injuriandi* when she uttered the statement which impairs the *dignitas* of the plaintiff. **Tindall JA in Young v Keinsley and Others 1940 AD 258 at 277** citing **Innes CJ in Monkten v British South African Company 1920 AD 324** pointed out as follows:

“Animus injuriandi may be established not only by proving actual ill-will towards the plaintiff but showing that the defendant was actuated by an indirect or improper motive, or that he stated what he did not know to be true, reckless whether it was true or false.”

[44] The honourable judge proceeded:

“Our decisions have laid down that the defamatory nature of the words used raises a presumption of animus injuriandi but that if it is shown that the words were spoken on a privileged occasion, the onus is shifted back on to the plaintiff to prove affirmatively the existence of animus injuriandi. As the Court cannot look into the mind of the speaker, it starts with the principle that a man is presumed to intend the natural consequences of his acts and, therefore, that a person who uses defamatory language of another is presumed to intend to injure.”

[45] **Tindall JA** highlights further:

“The variety of circumstances however, under which defamatory words may be spoken shows that in many cases the speaker is not moved to say the objectionable words through animus injuriandi ... Thus the terms “privileged occasion” has been adopted as a comprehensive term for denoting a certain class of cases where the special circumstances in which the words are spoken prima facie negative existence of malice.”

[46] **Rumpff JA in Benson v Robinson & Co. (Pty) Ltd and Another 1967 \ 91) S.A. 420 (AD)** at 426 C-E with precision:

“In Craig’s case this Court held that, if, in reply to a charge of defamation, the defendant proves that the defamatory words were used with an object other than that defaming the plaintiff, and that object is one permitted by law, the defamatory words are considered to have been used without animus injuriandi

and the presumption which arose from the use of the words is rebutted. Whenever defamatory words are proved to have been published in the discharge of a duty or in the exercise of a right, i.e. on a so called privileged occasion, the presumption of animus injuriandi has been rebutted, and the plaintiff will not succeed unless he can prove the animus injuriandi by evidence other than the defamatory words. A defendant who pleads circumstances from which a duty or a right to use defamatory words emerges, relies on the lawfulness of his act and pleads the investitive facts. In the result, when the defendant relies on this type of plea, it is the duty of the Court in each case to determine whether the circumstances in the eye of a reasonable man create a duty or a right which entitled the defendant to speak.”

[47] Now the enquiry is, under what circumstances were the words complained of uttered. Or put directly, were the words uttered under privilege occasion?

[48] In summing up this position **Tindall JA** at **278 supra** stated:

“Mere excess of language does not necessarily prove malice, though it may be evidence of it.”

[49] **Corbett JA** in **Borgin v De Villiers and Another 1980 (3) S.A. 556 (A)** at **577D – G** had the following to say:

“The particular category of privilege which ... would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it... The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? (underlined, my emphasis)

[55] The Town Council of Port Elizabeth experienced rise in liquor drinking by a section of the population. It was then resolved by the Council that it would approach the liquor Board and make presentation through the Magistrate for restriction on purchase of liquor by the said section of the population as was the case in other municipalities. It was during this meeting that appellant was alleged to have stated as follows:

“We have certain duties, and while it would be a great pity that members of the Council will not be able to sit, I don’t think it will make any difference. I think, after all, it is fit that some public expression should take place, because the general opinion is that the Licensing Court is a ‘scream’. Everyone wonders who elects them. The way that the Licensing Court has been constituted is a standing disgrace to Port Elizabeth-it is a standing disgrace to Port Elizabeth. Coming to the liquor restriction we have a very intimate interest in seeing that the licensing laws are so conducted in this town that a section of the people, who can’t look after themselves, are protected. They are not protected to-day. There is an attempt to overwhelm a section of the people by strong drink. It is debouching the people by drink. It is the way which poor people are attacked by the Licensing Board. The court is the puppet of the publicans.” (words underlined complained of)

[56] These utterances were understood in the following manner:

“...That even if members of the said Council, to wit the said Mayor and the said John Joseph Kemsley, were to allow to sit at the meeting of the said Board to which the said recommendation should be submitted, this would have no effect in preventing the rejection of the said recommendation by all the members of the said Board (including plaintiff): that the said Board (including plaintiff) was an object of public ridicule: that the personnel of the said Board (including plaintiff) was a shame and a dishonor to Port Elizabeth: that the said Board (including plaintiff) had not protected the poor people of Port Elizabeth (who

were unable to safeguard themselves) by imposing the restrictions on the supply of intoxicating liquor to them, but that on the contrary by failing to impose such restrictions, it was attempting to demoralise and injuriously affecting their interests by overpowering them with intoxicating liquor: that the members of the said Board (including plaintiff) were not independent, impartial or unbiased, but that each and all of them were in fact the tools and instruments of the licensed victualers: and that the members of the said Board (including plaintiff) had been wholly governed in their conduct as aforesaid in failing to impose the said restrictions, and that in their dealings with the said recommendation when it should come before them they would continue to be governed wholly, by their compulsion as aforesaid, to serve the interest of the said licensed victuallers to the prostitution of their public duty as members of the said Board.”

[57] The defendant concluded before the press:

“I hope my remarks will be given publicity.”

[58] A defence of fair comment was raised. The court analysed the words uttered and held:

“It is unfortunate that a man with as much experience in public life as defendant, even in an impromptu speech, was unable to avoid expressing himself so clumsily, but crude as the sentence may be, it is not defamatory”

[59] The court observed that the words “puppet” were defamatory. However, the court found that the words spoken were germane to the occasion as “*any reasonable man would have conceived it his duty to make his fellow Councillors the communication which he did make*” (see page 278 of Young’s case). It therefore allowed the appeal on the basis that there was no defamation

[60] Turning to the present matter, plaintiff informed the court in her evidence in chief that both students failed to come up with a schedule as expected of them. During the meeting of 9th June 2005, 1st defendant as per plaintiff's own version and PW2, supported by the minutes, repeated this position that there was no schedule for the two students. 1st defendant then stated that the students lacked supervision. This opinion by 1st defendant was not of her own. She was merely regurgitating comments made by external examiner – as evidenced from exhibit B page 14. As correctly canvassed under cross examination on behalf of defendants, the external examiner assesses not only the students' work but that of the supervisor as well. The 1st defendant was therefore justified in accepting the opinion of the external examiner and relaying the same to the meeting of 9th June 2005.

[61] Another aspect refers to the adjustment on marks awarded to Thulile Dlamini. The plaintiff in chief, informed the court that after realizing that this student would pass and on the advice of defendant, she lowered the initial mark. However, the mark was raised by the external examiner. It was PW2's evidence that when 1st defendant reported this to the meeting, coupled with the external examiner's opinion that the students lacked follow up meetings, PW2 who is plaintiff's witness formed the opinion that:

“the lecturer was being unfair to the students.”

[62] In other words, PW2's evidence translate into that from the given set, any right thinking men could conclude in one direction i.e. the *“lecturer was being unfair.”* As pointed out in **Golding v Torch Printing and Publishing Co. (Pty) Ltd and Othes 1949 (4) S.A. 150 at 159** that:

“Not only does the meaning depend on the circumstances in which the words were published, it also depends on the state of public opinion at the time.”
(underlined, my emphasis)

[63] *Fortiori*, the “*public*” in *casu* refers to the meeting and its opinion was advanced by PW2. In the circumstances, the conclusion by 1st defendant that the supervisor lacked professionalism, cannot be held to be defamatory by reason that they were only a reasonable conclusion from the set of facts advanced though “*crude the sentence may be*”, and they were germane to the occasion as “*any reasonable man would conceive as her duty to make her fellow board members the communication which she did make*” to borrow from the wise words of their Lordships in Young’s case *op. cit.*

[64] The defendants prayed for costs on attorney own client scale. I am not inclined to grant such costs. This was a straight forward matter as all the elements of defamatory *viz.* intention and unlawfulness were obviously lacking from plaintiff’s own version. In fact it does not take a prophet to tell that this whole quagmire emanated at the behest of plaintiff from failure to follow protocol and late attendance by the students. This scenario was appreciated by the defendants themselves as demonstrated by their refusal to tender an apology when it was so demanded by plaintiff. When the Registrar called upon 1st defendant to apologise, he did so out of courtesy and in the spirit of maintaining peace within his institution. There was no basis in law for the sub-committee to compel defendants to tender an apology as demonstrated in this judgment.

[65] In the above analysis, the following orders are entered:

1. Application for absolution from the instance is granted;

2. Plaintiff's cause of action is dismissed;
3. Plaintiff is ordered to pay costs of suit.

**M. DLAMINI
JUDGE**

For Plaintiff : Mr. S. Masuku
For 1st & 2nd Defendants : Advocate Flynn – instructed by Currie & Sibandze
Attorneys