



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 920/2019

In the matter between:

OSCAR NKAMBULE

Plaintiff

And

CIVIL SERVICE COMMISSION

1st Defendant

THE PRINCIPAL SECRETARY MINISTRY

OF PUBLIC WORKS & TRANSPORT

2nd Defendant

**THE UNDER SECRETARY - MINISTRY OF PUBLIC
WORKS AND TRANSPORT**

3rd Defendant

**THE PRINCIPAL SECRETARY MINISTRY
OF PUBLIC SERVICE**

4th Defendant

THE ATTORNEY GENERAL

5th Defendant

Neutral Citation: Oscar Nkambule v Civil Service Commission and 4 Others (920/19) [2021] SZHC 167 (28 September 2021)

Coram : **MABUZA PJ**

Delivered : **28 September 2021**

SUMMARY

Law of delict: *Plaintiff sues Defendants for damages arising out of defamatory utterances.*

Civil Procedure: *Defendants raise exception that the particulars of claim do not disclose a cause of action in that not all the requirements of defamation have been alleged in particular that of vicarious liability.*

Held - *Exception upheld and the Plaintiff's Combined Summons dismissed with costs*

JUDGMENT

MABUZA PJ

- [1] The Plaintiff is OSCAR NKAMBULE an adult Liswati male of Nkhaba, civil servant of Mbabane under the District of Hhohho.
- [2] The Respondents are the Civil Service Commission (1st Defendant); the Principal Secretary, Ministry of Public Works and Transport (2nd Defendant); the Under-Secretary, Ministry of Public Works and Transport (3rd Defendant), the Principal Secretary, Ministry of Public Service (4th Defendant) and the Attorney General (5th Defendant) (hereinafter called the Defendants)
- [3] The Plaintiff sued the Defendants for payment of the sum of E5 000 000-00 (Five Million Emalangeneni) in lieu of damages suffered as a

result of certain defamatory words uttered by the 2nd Defendant in the presence of third parties.

[4] The claim is against the Defendants one paying the other to be absolved.

[5] The Plaintiff also seeks costs at an attorney and own client scale; and further and or alternative relief.

[6] The action is defended by the Defendants.

[7] The complaint is directed at Ms. Naniki Mnisi the then Under Secretary in the Ministry of Public Works and Transport herein the 2nd Defendant. She is alleged to have uttered on a mobile phone the following words about the Plaintiff in response to a letter of complaint that the Plaintiff had written:

*“8.1.1 That **“utikakele”** and **“uyakaka”** in the letter which he formally wrote to 3rd Defendant;*

*8.1.2 That **“ulikwerekwere”** (a foreigner) lelililima lelifikele kutodzelela emaSwati lakaNgwane;*

8.1.3 That he is a devious evil snake’

8.1.4 That he is one of the most cursed and or doomed individual on earth.

8.1.5 *That he will never be promoted whilst she Naniki Mnisi was still occupying the position of the Chairperson of the promotions board at the Ministry.”*

[8] It is alleged that she was overheard by two of Plaintiff’s colleagues.

[9] It is further alleged that the parties who overheard her understood her words to mean:-

“10.1 That Plaintiff either is unclean or he has an unpleasant odour which smells like human waste;

10.2 That Plaintiff is devious in nature, is into witchcraft practices and is into devious works such that he is likened not only to a snake but an evil snake, meaning he is an extreme hazard to humans;

10.3 That Plaintiff is nothing and will never amount to anything on earth, since 3rd Defendant declared that Plaintiff is the most cursed individual.”

[10] In response the Defendants have raised an exception as follows:

“LACK OF SUFFICIENT AVERMENTS

1. The Plaintiff’s claims as pleaded is for defamation.

2. In an action for defamation a Plaintiff must allege:

2.1 That the Defendant made a statement that is considered defamatory to the Plaintiff.

2.2 That the statement was published.

2.3 That the statement caused injury to the image or reputation of the Plaintiff.

2.4 That the statement is false.

2.5 That the statement is not privileged.”

[11] The Defendants conclude by praying for an order upholding the exception with costs. The Defendants have also pleaded over into the merits.

[12] In terms of Rule 23 (1) and exception is taken:-

“where any Pleading is vague and embarrassing or lacks the necessary averments which are necessary to sustain a cause of action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6(14).”

The Plaintiff’s arguments

[13] **In the Judgment of Times of Swaziland and Another v Albert Shabangu Civil Appeal Case No. 30/2006 (Unreported) and at**

page 10, where an extract from Burchell's, *The Law of Defamation in South Africa* at page 35 is quoted and instructive in this regard;

"Defamation is in law the unlawful intentional publication of a defamatory matter (by words or conduct) referring to the Plaintiff which causes his reputation to be impaired."

[14] **AMLAR'S PRECEDENTS OF PLEADING STATES AT PAGES 107-110** the elements of defamation as follows:

- *The Plaintiff must allege and prove that the Defendant made a statement that is considered defamatory to the Plaintiff;*
- *That the statement caused injury to the image or reputation of the Plaintiff;*
- *That the statement is not privileged;*
- *That the defamatory statement is wrongful;*
- *That the defamatory statement was published to a person other than the Plaintiff or his spouse;*
- *That the defamatory words were published of and concerning him;*
- *That even where the words used are not defamatory per se, but are on their face innocent, the Plaintiff must set out the defamatory sense which he attributes to them, and that they were so understood by those to whom they were published.*

[15] Plaintiff understood the words uttered by the Defendant to mean he was unclean, cursed and smelled like human waste. Defendant went further to state that the Applicant is devious in nature, is a devious snake and that she practiced witchcraft as indicated in Paragraph 10.1 of his particulars of claim. Plaintiff submits before this honourable Court that inclusion of these defamatory words in the Plaintiff's particulars qualifies as an element for defamation.

[16] It is Plaintiff's submission moreover that, the defamatory statements made by 3rd Defendant were uttered in the presence of other colleagues in the workplace who overheard the conversation and such utterances were interpreted and understood by both Plaintiff and third parties to be defamatory. Utterance of such words in the presence of third parties qualifies as publication of defamatory statements.

[17] Subsequent to publication of the defamatory words, Plaintiff has been adversely affected at work in that, pursuant to the utterances of 3rd Defendant, Plaintiff's leadership at union level was withdrawn and colleagues who overheard the words uttered against Plaintiff have disassociated themselves from him. Prior to such occurrence, Plaintiff was viewed in high esteem as a union leader in the workers union. Plaintiff has made these submissions on paragraph 11 presenting that

the defamatory words were published and that they have caused injury to his image or reputation.

[18] In the above premise, it is Plaintiff's humble submission that its' particulars have all the necessary averments to sustain the cause of action.

The Defendants' arguments

[19] The issue to be determined by this Honourable Court is whether the defendants/excipients herein are vicariously liable to be sued for defamation in this case wherein the particulars of claim that the Plaintiff/Respondent rely upon does not allege all the requirements of defamation.

[20] The Court must further determine whether the particulars of claim disclose a cause of action or not.

[21] It is trite law in our jurisdiction that in an action for defamation the Plaintiff is supposed to allege the following: that the Defendant made a statement that is considered defamatory to the Plaintiff; that the

statement was published; that the statement caused injury to the image or reputation of the Plaintiff; that the statement is false; and or; that the statement is not privileged.

Vicarious Liability in terms of our law

[22] It is trite law that there was no causal link to the alleged defamatory statement and the Ministry of Works.

[23] In terms of the law, the burden of proving that the wrongdoer was the servant of the Defendant acting within the course of his employment and not on a frolic of her own lies with the Plaintiff whose assertion to that effect grounds the vicarious liability of the Defendant.

[24] It is trite law that for the imposition of vicarious liability, the master-servant or principal/agent relationship has to be established. Emphasizing on the key requirement of the employment relationship for vicarious liability, the Court in the case of **James Tsabedze v Carlos Maphandzeni Civil Case No. 3241/05, at page 11**, illustrated the position as follows:

“The Principles of vicarious liability where a master-servant or principal/agent relationship is established are trite. But even where such relationship is not proven but a man’s chattel is used in an act

that causes damage to another, it is settled law that that owner may be held vicariously liable where it is established that not only did he retain a right to control the use of his property, but that he had an interest in the purpose for which the wrongdoer used it. Such a situation has been described as a situation analogous to employment, see: Messina Associated Carries v Kheinhans 2001 (3) SA 868 (SCA)."

[25] The Court similarly stressed on the importance of the establishment of the employment relationship in the case of **Albertina Mthupha N.O. and 4 Others v Phineas Malinga and 5 Others Case No. 4437/08, at paragraph 13** where the position on vicarious liability was illustrated as follows:

*"...In essence, it was being alleged that the 1st Defendant was vicariously liable for its aforesaid servant's negligence. For a claim such as the present to hold against an employer, it is necessary that clear and proper averrals are made. According to the learned author and Judge, Harms, Aimer's Precedents of Pleadings, 6th ed, Lexis Nexis, 2003 at p 348, **a claimant must allege and prove that the person who committed the delict was (i) an employee of the Defendant; (ii) he performed the delictual act in the course and scope of his or her employment; and (iii) what the employees duties were at***

the relevant time. See also the authorities therein referred to. Nothing less than that would suffice.' (Emphasis added)

[26] The particulars of claim of the Plaintiff shows that there was no link between the alleged defamatory words and the said ministries. There was no connection to justify the imputation of vicarious liability.

[27] In this regard, it is apparent from a careful consideration of the Exception that the Defendant pertinently denied that the alleged defamatory words were said by the employee in the scope of her employment. The lack of a connection or nexus to impute vicarious liability is consistent with the fact that the employee was out of her work.

[28] The recognized principle of law for the establishment of vicarious liability was illustrated in the case of **Protea Coin Security Company (Pty) Ltd v Christina Nomkhosi Mpaka and 5 Others Case No. 269/11**, the Supreme Court at paragraph 11 illustrated the position as follows:-

"It is a well-recognized principle of law that in order to establish vicarious liability of a party for the negligent conduct of another, two

elements must be proved namely (a) a relationship of employment and (b) that the employee acted in the course and scope of his or her employment. Absent proof on a balance of probabilities of either or both of these elements a plaintiff's claim must fail.” (Emphasis added)

[29] It is submitted therefore in casu that the Plaintiff bore the onus throughout. The Defendants clearly and unambiguously placed the existence of an employment relationship in issue.

[30] It is submitted that there is no evidence from the particulars of claim linking the alleged defamation with the Government to establish an employment relationship. In the circumstances, the Plaintiff's Application in Court cannot be sustained. The Plaintiff did not discharge the onus to establish the requisite elements for vicarious liability on the part of Government.

[31] In the **Protea Coin Security Company Case**, *supra*, upholding an almost similar ground of appeal premised on the failure to establish an employment relationship to impute vicarious liability, the Court at paragraph 12 held as follows:

“In this instance the respondent bore the onus throughout. The appellant clearly and unambiguously placed the existence of an employment relationship in issue. Its evidence, which was uncontradicted... the effect of this evidence was to establish on the probabilities that the alleged wrongdoer was not an employee of the appellant. The trial Court found that the “impression” that would have been created in the mind of a member of the public was that the alleged wrongdoer was an employee of the appellant, by reason of the insignia on the vehicle and uniforms. That is not sufficient to establish as a matter of fact that the wrongdoer was an employee. In the circumstances the trial Court’s finding that the wrongdoer was an employee of the appellant cannot be sustained. It follows from this that the respondent did not discharge the onus to establish the requisite elements for vicarious liability on the part of the appellant.”

[32] The appropriate finding for this Honourable Court to make therefore is that there is no link to establish that the Defendants are vicariously liable to the Plaintiff.

[33] The Court cannot in the circumstances find that the Government was vicariously liable, it can only find that the employee had deviated from

her scope and course of employment, if however, it was proved that she was involved in the uttering of the defamatory words.

[34] The Under Secretary's act was not connected with her employment that it would be fair and just to hold the employer vicariously liable. The wrong-doing in question is not legally characterized as occurring in the course of employment. An employer is not responsible for unauthorized and unwarranted acts.

[35] It is submitted that the alleged defamation was not connected with her purported employment, rendering it unfair and unjust for the Court to hold the Defendants/Excipients vicariously liable. The test is whether the act was so closely connected with the acts the employee was authorized to do, for the purpose of liability.

[36] It is submitted therefore that the defamation proceeded from a private spite between the 3rd Defendant and the Plaintiff, or from some other cause quite unconnected with occupation or employment with the Government.

[37] The alleged defamatory words were said neither in furtherance of the master's interest nor under his express or implied authority not as an incident to or in consequence of anything were the purported employee employed to do.

[38] In the case of **Aliki Enterprise (Proprietary) v Punky Mhlongo (1983/10) [2012] SZHC 82**, case, the Court at paragraph 62 further stated as follows:

“Now, even though there is uncontroverted evidence that the 1st Defendant is an employee of the 2nd Defendant... however, the evidence tendered by the Plaintiff fell short of establishing that the 1st Defendant was in the course of her employment, when the collision occurred. It was not enough for the Plaintiff to allege vicarious liability in his pleadings. The Plaintiff was mandatorily required by law to adduce cogent and convincing evidence in proof of the facts pleaded. He failed to do so. The Plaintiff thus failed to prove that the 2nd Defendant is vicariously liable for the negligence of the 1st Defendant.”

[39] Further, on the issue of vicarious liability in the case of **Aliki Enterprises (Proprietary) v Punky Mhlongo (1983/10) [2012] SZHC 82**, the Court at paragraph 61 stated as follows:

“It is trite law that a master is liable only for his servant or agent for tortious acts performed in the course of his employment. That means for instance, that when the servant is in a frolic of his own, his misfeasance cannot in law be imputed to the master.”

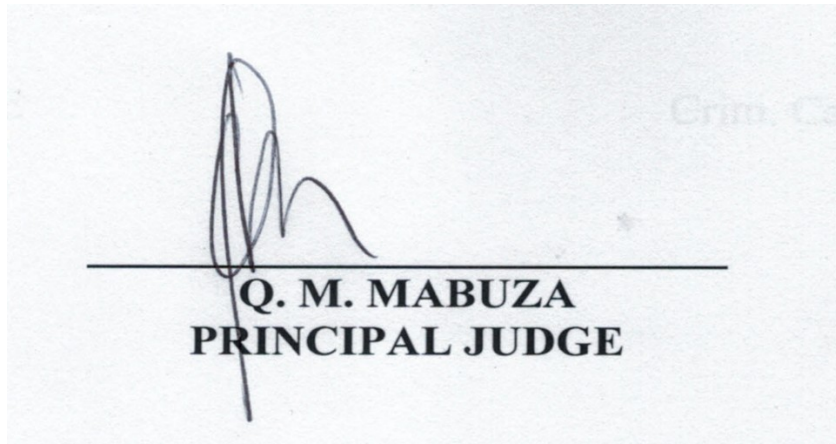
[40] It is submitted therefore that the activities on that day were unrelated to any employment relationship with the government, and were not undertaken to further or benefit the employer’s business.

[41] Wherefore Defendants pray that Plaintiff’s Combined Summons in terms of rule 17 (1) be dismissed with costs.

Conclusion

[42] I am persuaded by the Defendants’ arguments in light of the principle of vicarious liability for which they have made out a sterling case with which I totally agree.

[43] In the event I uphold the Defendants’ Exception and hereby dismiss the Plaintiff’s Combined Summons with costs.



For the Plaintiff: M.L.K. Ndlangamandla

For the Defendants: M.M. Dlamini