



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4449/2010

In the matter between:

WALTER P. BENNETT

Plaintiff

And

ROBERT MAGONGO

Defendant

Neutral Citation: Walter P. Bennett v Robert Magongo 4449/2010) [2012] SZHC 205 (14th September 2012)

Coram: M. Dlamini J.

Heard: 19th April 2012

Delivered: 14th September 2012

Actio curiariarum – slander – words ascribed ordinary daily meaning where no innuendo is alleged.

Summary: The plaintiff has instituted action proceedings claiming that the defendant uttered words that the plaintiff “*was involved in a dirty deal of sale*” involving Swaziland Railways Properties. The defendant has raised an exception.

[1] Plaintiff contends as follows in his particulars of claim;

“4. *On or about January 2010, at or near Ezulwini area, defendant stated, to one Gideon Mahlalela, of and concerning plaintiff that:*

4.1 *The plaintiff was involved in a dirty deal of sale, involving Swaziland Railway Properties.*

5. *The statements were per se defamatory, wrongful, false and devoid of any truth and were made with the intention to defame plaintiff and to injure his reputation, which they did do.*

Or alternatively

6. *The statement in 4.1 above imputes, was intended by defendant to impute, and was understood by the people present to mean, that plaintiff is a corrupt and dishonest person.*

[2] Defendant on the other hand excepts as follows:

- a) *The statement alleged to be defamatory of plaintiff is that, “plaintiff was involved in a dirty deal of sale, involving Swaziland Railway Properties”.*
- b) *The statement complained of is not prima facie defamatory.*
- c) *The alleged defamatory words are not reasonably capable of the interpretation or any of the meanings attributed in paragraph 6 of the plaintiff’s particulars of claim.*
- d) *The words complained of are not reasonably capable of being understood as being defamatory of the plaintiff as alleged in paragraph 6 of the plaintiff’s particulars of claim.*

[3] In his submission defendant argues that this court should accept the words said to be uttered by him verbatim in the absence of any allegation of an *innuendo*. Defendant further submitted that there is nothing in law referred to as *quasi innuendo*. He contends that the phrase: “*involved in a dirty deal*” is capable of diverse interpretation.

[4] This is because the phrase in itself is incomplete in that once pronounced, it begs for further information or enquiry. The enquiry that follows is “*how is he involved*”. In other words, the phrase so uttered calls for the utterer to qualify it by specifying the circumstances under which this phrase was uttered. As the plaintiff did not allege any implied circumstances or *innuendo* as it were, the phrase *per se* is without defamatory characteristics. Alternatively if it has such characteristics, in its primary meaning, it is also capable of an innocent meaning. In the circumstances, defendant contends, the court should consider the meaning which is innocent and rule in favour

of defendant. In brief, the defendant's basis of exception was that plaintiff's particulars of claim disclosed no cause of action.

[5] Plaintiff on the other hand strenuously disputes defendant's submission. He submits that the words are capable of one meaning whose effect is defamatory. Beyond the ordinary meaning of the words uttered a *quasi innuendo* has been alleged. Counsel for plaintiff further submits that procedurally the question of ambiguity in the connotation of the words is a matter to be decided at the end of the trial. At the point of exception, the court is called upon to decide on the question of whether the words *per se* are defamatory in nature.

[6] **R.F.V. Heuston** on "**Salmond of Torts**" **11th Edition** at page **422** writes on defamation:

"A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem."

[7] He expounds at page 424:

"The test of the defamatory nature of a statement is its tendency to excite against plaintiff the adverse opinion or feeling of other persons."

[8] The plaintiff's particulars of claim calls for the court to hold a two stage enquiry. Firstly the court must determine the primary connotation of the statement alleged to have been uttered in the context of a reasonable man

by virtue of the allegations at paragraph 5 of the particulars of claim. Secondly, as envisaged by paragraph 6 of the particulars of claim, the court is duty bound to enquire on the imputation or precisely what the words would convey to an ordinary person hearing same.

- [9] The enquiry at this stage is a question of law. The question of fact is a matter for trial. See **Visse v Pretoria News & Printing Works Ltd. 1946 TPD 445 at 446.**

“The function of the Judge at the exception stage is as ‘a sifting one’ as per Joubert op cit. 232”

- [10] His Lordship **Milne J.** in **Borkum v Cline & Another 1959 (2) N.P.D. 670 at 673** articulates the above stages of enquiry with succinctness as follows:

“Do the words tend to lower the person concerned in the estimation of right – thinking members of society generally. It is the imputation of the words. Before considering the effect of the ennuendo, it is peremptory that one considers the ordinary meaning of the words uttered.”

- [11] Before I embark on the twofold enquiry, it would be wise to attend to the issue on whether our law recognizes “*quasi innuendo*”.

- [12] **Joubert, “The Law of South Africa on Damages, Deeds, Defamation to Defence” Vol. 7, 1995 Butterworths, Durban** ascribes as such:

“Where a statement is defamatory per se, the particular defamatory meaning which the plaintiff wishes the court to attach to the

statement is often set out in the form of a paraphrase of the statement (a “quasi innuendo”) to point the sting of the defamation.”

[13] The learned author proceeds to cite a number of authorities and decided cases where *quasi innuendo* was alleged, **Marais v Steyn at all 1975 (3) S.A. 479** as one of such cases.

[14] **Harms on Armler’s Precedents of Pleadings, 4th Ed 1993, Butterworths** at 107 attest to the same view as **Joubert supra** at page 107 where he states:

“Even where the statement is defamatory per se a plaintiff may attach a particular meaning in the form of a “quasi innuendo” to it and point to its sting.”

[15] The end result of the above cited authorities indicate beyond doubt that *quasi innuendo* is part of our law and therefore the submission that there is nothing in law referred to as “*quasi innuendo*” is without basis.

[16] The first enquiry relates to the primary meaning of the quoted words: “*involved in a dirty deal of sale*”. Are these words *per se* defamatory in nature? Or do these words lower the *dignitas* of the plaintiff as propounded in **Hooper v Jackson 1923 E.D.L. 410** at 412.

[17] **Didcott J. in Demmers v Wyllie and Others 1978 (4) S.A. 619** at 622 eloquently points out in this enquiry:

“The first is that the complainant thereby lodged against the language in question was directed at its “primary” meaning alone ...so as to distinguish the so called “innuendo to point the sting” from the true innuendo. The former is merely a semantic exercise, ...It does not profess to stray beyond their normal connotation, but draws from them and accentuates what are alleged to be the libelous implications already lurking there.” (words underlined, are my emphasis)

[18] **Joubert** *op. cit.* reflects at page 230:

“The primary meaning is the ordinary meaning given to the statement in its context by the reasonable man”.

[19] Explaining who a reasonable man is, on appeal, **Muller J. A. in Demmers v Willie & Others 1980 (1) S.A. 835 at 842 (H)** states:

“...reasonable person” or “reasonable man” referred to in the decision cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.”

[20] The learned Judge citing the court *a quo* and agreeing with it states:

“The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education.”

[21] He further pointed out that **Tindall J. in Gang v Kensely & Others 1940 A.D. 282** stated:

“A member of the audience cannot be said to be a reasonable person of ordinary intelligence if he seizes on certain words and ignores others.”

[22] **Didcott J. in Demmers 1978 (3) S.A. op.cit.** at 624 articulates:

“One must try not to approach this task like a lawyer poring over a contract, a will, or a statute. A “coldly logical cast of mind”, ... would not be a recommended tool, even if one had it. The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education. ...The ordinary reader of an organ like that does not study its contents critically, analyse them astutely, dissect them minutely or search them for nuances and subtle implications. He tends rather to take them at their face value, without much discernment. While sufficiently inquisitive about what he reads to go to the trouble of doing so, he is inclined, moreover, to browse through it once only, and then to pass to whatever catches his eye elsewhere in the newspaper. By and large, it follows, its impact on his mind is immediate and the impression gained from it an overall one. He seldom notices ambiguities or contradictions which are not blatant. When they are present, the most obvious meaning is all that strikes him as a rule.”

[23] Although the **Honourable Judge Didcott J.** quotes refers to a libel, the same standard applies to a slander as *in casu*. In fact on this position **Tindall J. A.** in **Basner v Trigger 1945 A.D. 22** at 36 states:

“The test mentioned above was applied in regard to a written matter, and I think it applies with equal, perhaps with greater force where the words complained of were spoken...”

[24] In determining the present case, I draw an analogy from the allegation in **Demmers op.cit** where the enquiry was whether the words that the plaintiff had “*non undue favour for political reasons*” were defamatory. The court *a quo* found that such words were not defamatory. The appeal court however, applying the standard of a reasonable man held that the words were defamatory in nature.

[26] *In casu* the words are, “*involved in a dirty deal*”. Could a reasonable man hearing such words, strike him as defamatory. It is my considered view, applying the ratio cited in **Demmers** by **Didcott J.** cited herein that in their daily usage, the words are defamatory in nature.

[27] The second leg of the enquiry is as propounded by **Tindall J. A.** in **Basner op.cit.** at 36 where he clarifies:

“The question is whether they are reasonably capable of the secondary meaning assigned to them.”

[28] **Joubert op. cit.** at 231 highlights as follows:

“Where a statement is defamatory per se, the particular defamatory meaning which the plaintiff wishes the court to attach to the statement is often set out in the form of a paraphrase of the statement (a “quasi innuendo”) to point the sting of the defamation.”

[29] **Murray J. in Visse v Pretoria News and Printing Works Ltd. 1946 T.P.D. 441** at 446 on the same subject states:

“...para 6 is in reality merely a paraphrase of the words complained of, pointing out the sting of the defamation by stating more fully what the plaintiff says is the primary meaning of the words.”

[30] *In casu* plaintiff, as a “sting” alleges at para 6:

“6. The statement in 4.1 above imputes, was intended by defendant to impute, and was understood by the people present to mean, that plaintiff is a corrupt and dishonest person.

[31] My duty is to determine whether the words as demonstrated at para 6 of the particulars of claim capable of conveying the alleged meaning.

[32] **Murray J. at 447 in Visse supra** faced with a similar function commented:

“It is the function of the court or a Judge thereof as a question of law, and not as a question of fact to be decided on trial to determine in the first instance whether the words complained of are reasonably capable of a defamatory meaning. If they are not, the allegation of

the meaning of the words must, I think, be considered superfluous and irrelevant and their presence on the pleading must embarrass the defendants in their task of answering the same whether by plea of justification, or of fair comment or by tender.”

[33] **Murray** then expounded on the standard of test to be applied as follows at page 447:

“The test to be applied by the court in determining whether these words are reasonably capable of the alleged defamatory meaning is the effect on the mind of the ordinary newspaper reader, an average reasonable person of ordinary intelligence ...who reads the article with ordinary care, but not as “an astute lawyer or a super critical reader would read the passage...”

[34] I have already found that the primary meaning of the words are defamatory. Without resort to a dictionary I am likewise not persuaded that the words *“involved in a dirty deal”* are not capable of conveying the meaning advanced by plaintiff that plaintiff is *“corrupt and dishonest.”* At any rate *“the allegation of “stings” is merely tautologous and without legal consequences”* as per **Botha J.** in **Marais v Steyn** *op.cit.*

[35] Having decided on the above, I must hasten to point out that by no means do the findings hereof are to be interpreted that this court has held that the plaintiff has been injured or lowered in his repute. This is an enquiry reserved for trial. The decision herein impact on the meaning and imputation of the words alleged only and no further.

[36] I have already alluded that this court was urged to dismiss the plaintiff's action on the basis that the words used are also capable of innocent meaning.

[37] **Melins de Villiers on Injurious** at page 91 as cited by **Tindal J. in Basner op.cit.** case at page 36 stated:

“If doubt exist as to the sense in which the words have been employed, since they allow equally of an innocent and of a defamatory meaning, the presumption of the law is in favour of the former.

[38] In other words, the learned judge's view was that the innocent meaning should be applied.

[39] I agree with the learned author **Melins de Villiers** that the maxim *“semper in dubiis benegmora praeferenda est”* is paramount.

[40] However, **Stanford v West 1959 (1) S.A. 349** at 351 **Bloch J.** held:

“The fact that they are capable of an innocent as well as a defamatory interpretation is no ground for allowing an exception.”

[41] The Honourable Judge continued to highlight that where the words are capable of an innocent and defamatory meaning that is a matter for trial and not exception.

[42] In the above analysis, the exception by defendant is dismissed with costs.

M. DLAMINI
JUDGE

For Plaintiff : **Mr. Z. Shabangu**
For Defendant : **L. R. Mamba and Associates**