

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT
(GAUTENG DIVISION,



OF SOUTH AFRICA
JOHANNESBURG)

Case No: 28223/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

MMATLOU HELLEN PHALENG - PODILE

Applicant

and

NORANNE DOVEY

Respondent

JUDGMENT

Todd AJ

1. This is an application for leave to appeal the judgment and order that I handed down in this matter on 6 September 2022.
2. The grounds on which the Applicant seeks leave to appeal are set out in an application for leave to appeal delivered on 27 September 2022.
3. Mr Shongwe, who appeared for the Applicant, raised a number of different grounds on which the Applicant contended that another court would come to a different conclusion. In addition

to the grounds raised in the application for leave to appeal Mr Shongwe submitted that I erred by deciding the matter on a basis that had not been pleaded by the Respondent.

4. Mr Shongwe accepted, in his submissions, that the legal position is as set out in *Le Roux v Dey* at paragraphs [91] and [173], and that I was correct in following that approach as summarized in paragraph 32 of my judgment (albeit with a superfluous “more” appearing before the word “likely”). To determine whether the Applicant was defamed the court was required to decide whether it was more probable than not that the offending statement would have harmed the Applicant. A statement calculated or having the tendency or propensity to defame would only be defamatory if it objectively and as a matter of probability was likely to injure the good esteem in which the Applicant was held by the reasonable or average person to whom it was published.
5. The essential question in this application for leave to appeal is whether there is a reasonable prospect that another court would disagree with the conclusion that I reached on that issue, and would find that the Respondent’s statement did in fact harm the Applicant in this sense.
6. It seems to me that the various other grounds on which the Applicant seeks leave to appeal have little merit. Whether or not the Respondent raised good grounds in the pleadings for disputing that the statement was defamatory, it was incumbent on this court to determine whether the delict relied upon by the Applicant had been committed. Mr Shongwe submitted that the fact that the Respondent had labelled the Applicant as racist without any accompanying explanation or context that demonstrated her reasoning was important and supported the contention that the statement was defamatory. This consideration might well have been relevant to any assessment whether a fair comment defence had been established (if available) for a statement that was indeed defamatory. On the prior question, however, which is whether the statement harmed the Applicant in the sense that it was likely to injure the good esteem in which she was held by the reasonable or average person to whom it was published, it seems to me that the point counts against the Applicant rather than in her favour. An arbitrary and unmotivated assertion of this kind, in the particular context,

was less likely in my view to injure the good esteem in which the Applicant was held by reasonable people than a statement carefully explained, whether or not there was merit in the explanation.

7. On the key question, which is whether the statement harmed the Applicant, being likely to injure the esteem in which she was held by right-thinking members of society among those to whom it was published, I remain of the view that it did not, for reasons set out in my judgment, and consequently that the statement was not defamatory. I accept, however, that there is a reasonable prospect that another court might disagree with me on this point and might come to a different conclusion.
8. As a result, I consider that an appeal would have a reasonable prospect of success on this ground, in the sense contemplated in section 17(1)(a)(i) of the Superior Courts Act.

Order

In the circumstances I make the following order:

1. The Applicant is granted leave to appeal;
2. The appeal will be heard by a full court of the division;
3. Costs of this application will be costs in the appeal.

C Todd

Acting Judge of the High Court of South Africa.

For the Applicant: Adv. C Shongwe, instructed by Phaleng-Podile Attorneys

For the Respondent: Mr B Van Tonder, Thomson Wilks attorneys

Judgment reserved: 12 December 2022

Judgment delivered: 13 December 2022