**THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA**

**JUDGMENT**

In the matter between:

Case No:222/09

**KGOSI LERUO MOLOTLEGI** **First Appellant**

**ROYAL BAFOKENG ADMINISTRATION** **Second Appellant**

and

**MOSOKO MOKWALASE** **Respondent**

**Neutral citation:** **Molotlegi v Mokwalase (222/09) [2010] ZASCA 59 (1 April 2010)**

**Coram:** Mthiyane, Heher, Bosielo et Shongwe JJA et Seriti AJA

**Heard:** **8 March 2010**

**Delivered:** **1 April 2010**

**Summary:** Defamation – action for damages for defamation based on an innuendo – separation of issues in terms of rule 33(4) – trial court decided that the words are defamatory per se without reference to the innuendo – misdirection justifying the setting aside of its order – matter referred back to the court below for trial.

## ORDER

On appeal from: North West High Court, Mafikeng (Mogoeng JP sitting as court of first instance):

1. The appeal is allowed to this extent:

(a) The order of the court below is set aside.

(b) The appellants are ordered to pay the costs of the hearing of the issues which were separated in terms of rule 33(4), jointly and severally.

2. The matter is referred back to the court below for trial.

3. The appellants are ordered to pay the costs of appeal jointly and severally.

## JUDGMENT

BOSIELO JA (Mthiyane et Shongwe JJA et Seriti AJA concurring)

[1] The first appellant is Kgosi Molotlegi of the Royal Bafokeng Nation, which is situated in the Northwest Province. The second appellant is a legal persona responsible for the administration of the Royal Bafokeng Nation. The respondent was employed as a team leader of the VIP Protection Team of the Royal Bafokeng Nation.

[2] A protocol and security meeting of the second appellant was held on 13 October 2006 where both first appellant and the

respondent were present. At the meeting and in the presence of members of the protocol and security, first appellant uttered the following words or words to the same effect to the respondent:

'Mokwalase, you are fired. I don't want to see you again on my premises. You can excuse yourself'.

Acting thereupon, the respondent left the meeting.

[3] Aggrieved by the first appellant's utterances, the respondent issued summons against the two appellants alleging that the words uttered, given the context of the meeting, the respondent's position at the meeting and the first appellant's behaviour towards the respondent, are wrongful and defamatory.

[4] The appellants applied by notice of motion to the court below for a separation of issues in terms of rule 33(4) of the Uniform Rules in the following terms:

'1. that the meaning of alleged defamatory words set out in paragraph 7 of the Respondent's (Plaintiff's) particulars of claim be determined separately;

2. that in the event that the Honourable Court determines that the words bear a defamatory meaning, whether such meaning accords with the meanings pleaded by the Respondent in paragraph 9 of his particulars;

3. That the other issues in dispute between the parties be postponed *sine die* and the determination thereof be stayed pending the finalisation of the separated issues; and

4. that the respondent in the event that he opposes the relief set out in paragraph 1 and 2 above be ordered to pay the costs of this application.'

[5] The respondent neither opposed the application nor appeared at court when it was heard. As a result the application was granted by the court below (per Matlapeng AJ) on 25 September 2008. The part of the court order which is relevant is the one to the effect that the meaning of the alleged defamatory words as set out in paragraph 7 of the Respondent's (Plaintiff's) particulars of claim be determined

separately.

[6] On 28 November 2008, the court below (per Mogoeng JP), without any evidence having been led about the context in which the alleged words were uttered, found that they were defamatory in nature. The learned judge proceeded further and found that the publication of the words (which was admitted) was wrongful and was published with the requisite *animus iniuriandi,* ie 'with intent to defame and the knowledge of wrongfulness and it caused the plaintiff to suffer damages. A case of defamation, has therefore been proved'. The appellants are appealing against this finding with the leave of the court below.

[7] The appellants have launched a three-pronged attack against the judgment of the court below. This appears clearly from the appellant's Notice of Appeal where the three grounds of appeal are set out as follows:

'1. The Learned Judge, with respect, erred in finding that the statement was wrongful, published with *animus iniuriandi,* and caused the Plaintiff damages and that a case of defamation had been proved, in that the only issue before the Learned Judge, separated in terms of Rule 33(4), was to determine whether or not the words used by the First Defendant were defamatory of the Plaintiff.

2. The Learned Judge, with respect, erred further in finding that the words used by the First Defendant of and concerning the Plaintiff were defamatory of the Plaintiff in that–

2.1 It was common cause that the words used by the First Defendant were: "Mokwalase, you are fired. I don't want to see you again on my premises. You can excuse yourself."

2.2 The Plaintiff limited the meaning of these words to three stings, namely that the words meant that he was:

- "unable to perform his duties in a professional manner; and
- although being a member of the ROYAL BAFOKENG NATION, was deemed an undesired person on the premises of the ROYAL BAFOKENG NATION; and\

- not even worthy of proper disciplinary action and/or the rules of natural justice."

2.3 And the learned Judge ought, with respect, to have found that the words uttered by the First Defendant were not defamatory of the Plaintiff in the senses pleaded and relied upon by the Plaintiff.'

[8] Before us counsel for the appellants confined his submissions to the first ground which he argued was dispositive of the whole appeal. The contention was that the court below erred in finding that the words uttered were defamatory without having heard evidence of the special circumstances surrounding the utterances. He submitted further that the court below erred in going beyond the terms of the court order of 25 September 2008, by, in addition to finding the words uttered to be defamatory *per se,* continuing to find that 'it is wrongful and was published with *animus iniuriandi,* ie with the intent to defame and the knowledge of the wrongfulness and it caused the plaintiff to suffer damages. A case of defamation has, therefore, been proved.'

[9] The respondent had raised the issue of the appealability of the finding by the court below in his heads of argument. The contention is that as the parties still had to return to court to lead evidence on other issues which had been deferred for later determination, it could not be said that the order by the court below had the effect of finally disposing of the issues between the parties. However, counsel for the respondent conceded that the learned Judge President erred in deciding that the words uttered were defamatory without any evidence of the special circumstances under which the words were uttered. He argued further that, given the fact that the respondent relied on the secondary as opposed to the primary meaning of the words uttered, the court below erred in granting separation of the issues in the manner it did as this failed to take account of the

averments regarding the special circumstances and the *innuendo* pleaded by the respondent in para 9 of the particulars of claim.

[10] Notwithstanding the fact that the issue of appealability was not vigorously argued before us, I deem it appropriate to deal with it upfront as it might be dispositive of this appeal. It is clear from the judgment of the court below that it had pronounced itself unequivocally and definitely on the issues of the defamatory nature of the utterances as well as whether the utterances were wrongful and made with the requisite *animus iniuriandi.* It follows that once the court below had so pronounced itself on these issues, it would not be possible for it to correct, alter or set aside its own order. It is only a court of appeal which would be competent to correct, alter or set aside such an order. Self-evidently the order made by the court below finally disposed of a substantial portion of the relief sought by the plaintiff in the main action. Dealing with a similar situation in *Marsay v Dilley* 1992 (3) SA 944 (AD) Corbett CJ stated the following at 962C-D:

'The law relating to the appealability of decisions of a Court of a Provincial or Local Division was re-examined relatively recently by this Court in the case of *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A). As this judgment shows, this Court has over the years adopted an increasingly flexible approach to the question of appealability. The general principle which, I think, may be extracted from the judgment is the following: where a trial Court has under some competent procedure (such as an application under Rule 33(4)) made an order which has the effect of being a final decision (ie one which cannot be corrected or altered or set aside by the trial Judge at a later stage of the trial) and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then this order is a judgment (as understood in s 20(1) of the Supreme Court Act 59 of 1959) and is appealable, despite the fact that the main action has not been concluded.'

Based on the above exposition, I am satisfied that the decision of the court below is appealable. I proceed to deal with the merits of the appeal.

[11] In order to resolve this conundrum, I deem it necessary to quote the relevant parts of the pleadings which reads:

7.

'During the said meeting, the FIRST DEFENDANT, in the presence of members of the said protocol and security meeting, uttered the following and/or words with the same effect and meaning, to PLAINTIFF:

"Mokwalase, you are fired. I don't want to see you again on my premises. You can excuse yourself".'

8.

As a result of the above, PLAINTIFF had to withdraw from the said meeting with immediate effect.

9.

The said words,

- in the context of the meeting; and
- in the context of PLAINTIFF'S position in the meeting; and
- in the context of FIRST DEFENDANT'S behaviour towards PLAINTIFF,

are wrongful and defamatory of PLAINTIFF,

in that they were intended and were understood by PLAINTIFF and members of the said meeting, to mean that PLAINTIFF was:

- unable to perform his duties in a professional manner; and
- although being a member of the ROYAL BAFOKENG NATION, was deemed an undesired person on the premises of the ROYAL BAFOKENG NATION; and
- not even worthy of proper disciplinary action and/or the rules of natural justice.'

[12] In responding to these allegations, the appellants pleaded as follows:

'Save to admit that the First Defendant uttered the following words to the plaintiff: *"Mokwalase you are fired. I don't want to see you again on my premises. You can excuse yourself."* These allegations are denied.'

[13] It is common cause that this matter proceeded to trial on the issue as separated in terms of rule 33(4). No evidence was led at the

trial. Notwithstanding the fact that no evidence regarding the context and the special circumstances surrounding the utterance of these words was led, the court below found the alleged words to be defamatory of the respondent. Furthermore, the court below found the words to be wrongful and to have been uttered with *animus iniuriandi.*

[14] It is necessary to recall that the respondent did not rely on the alleged words as being defamatory *per se*. The respondent averred in paragraph 9 of the particulars of claim that these words were defamatory because of the context of the meeting, his position at the meeting and the manner in which they were uttered. In other words the respondent pleaded special circumstances giving rise to an innuendo. Based on this context, the respondent averred that the alleged words were intended to mean and were understood by him and the members at that meeting to mean that he was:

- unable to perform his duties in a professional manner; and
- although a member of the Royal Bafokeng Nation, was deemed an undesired person on the premises of the Royal Bafokeng Nation; and
- not even worthy of proper disciplinary action and/or the rules of natural justice.

[15] It should be clear from the court order dated 25 September 2008 that the issues for separation in terms of rule 33(4) were restricted to paragraph 7 of the particulars of claim. The appellants' first prayer unduly limited the issue to be separated to the words as set out in paragraph 7 of the particulars of claim. No reference is made to paragraph 9 which sets out the context under which the words were uttered and the innuendo which the respondent attributes to the words uttered. It is clear to me that this was a

mischaracterisation of the issues pleaded by the respondent. Given the issues as pleaded by the respondent, it is not possible to determine if the alleged words uttered about the respondent are capable of bearing the meaning attributed to them in the innuendo without any evidence of the background facts being led. This accords with the *dictum* by Colman J in *Hassen v Post Newspaper (Pty) Ltd & others* 1965 (3) SA 562 at 566G-H where he stated:

'When a secondary meaning is relied upon, evidence is necessary because the plaintiff must prove the special circumstances by reason whereof the published matter would, to those aware of the special circumstances, bear the secondary meaning relied upon. The plaintiff must prove, further, upon a balance of probabilities, that there were persons, among those to whom the publication was made, who were aware of the special circumstances, and to whom, it can therefore be inferred, the publication is likely to have conveyed the imputation relied upon.'

[16] The logical conclusion is that the court below erred in attempting to determine the meaning of the words used without any evidence of the special circumstances being led. It follows that the order of the court below has to be set aside so that the respondent can be afforded the opportunity to lead the necessary evidence regarding the special circumstances and context under which the alleged words were uttered in order to determine whether the meaning attributed to them in the innuendo by the respondent is defamatory or not.

[17] Based on the wording of the order of separation dated 25 September 2008, both counsel are *ad idem* that the learned Judge President went beyond what he was required to decide. Evidently he was not required to determine the issues of wrongfulness and *animus iniuriandi* at that stage. He was only required to determine if the words uttered were defamatory *per se* or not. I agree that the learned Judge President erred in deciding issues which were not before him.

[18] What remains for consideration is the issue of costs. The general rule is that ordinarily costs will follow the result unless there are exceptional circumstances dictating otherwise. However, this rule is not inflexible. It is equally trite that costs are discretionary. Considerations of fairness and justice might, in appropriate circumstances, dictate otherwise.

[19] Given the peculiar circumstances of this case, I am of the view that it would be unfair and unjust to award the appellants costs in this matter. It is common cause that it is the appellants who sought and obtained an order for separation of issues. It is the appellants who settled the terms of that order. The respondent played no role in that application. I have already found that the respondent's case was mischaracterised in the application for separation of issues. This led to the appellants obtaining a wrong order which did not take proper account of the respondent's pleaded case. It is this order which led the court below to decide the matter on the narrow and incorrect basis chosen by the appellants. I do not think that the mere fact that the respondent did not oppose that application is sufficient reason for him to be mulcted with the costs. It is important not to loose sight of the fact that in the application for separation of issues, the appellant had warned the respondent that in the event that he might oppose the application, they would ask for an order of costs against him. Why should the respondent who exercised his option not to oppose the application, probably to avoid attracting a cost order, be made to pay the costs he tried to avoid incurring. Aggrieved by the decision of the court below, the appellants took the matter on appeal to this court. It is clear to me that it is the appellants who determined the course

which this matter took culminating in the appeal before us. To my mind justice and fairness demand that the appellants be ordered to pay all the costs including the costs of appeal.

[20] A court hearing an application for a separation of issues in terms of rule 33(4) has a duty to satisfy itself that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition the court considering an application for separation is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously. The court cannot simply grant such an application because it is unopposed. I regret to say that the court below failed in this respect. See *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

[21] Based on the conclusions made above, I make the following order:

1. The appeal is allowed to this extent:
(a) The order of the court below is set aside.
(b) The appellants are ordered to pay the costs of the hearing of the issues which were separated in terms of rule 33(4), jointly

and severally.

2. The matter is referred back to the court below for trial.

3. The appellants are ordered to pay the costs of appeal jointly and severally.

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L O BOSIELO
JUDGE OF APPEAL

HEHER JA:

[22] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536A-C this Court held that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing off at least a substantial portion of the relief claimed in the main proceedings.

[23] Because I am of the view that, at least, the second and third legs of that dictum apply to the present matter, it follows that I would strike the appeal from the roll with costs. My reasons are, in brief, as follows.

[24] The application under rule 33(4) should neither have been made nor granted. The separation of the issues as formulated was a hypothetical exercise. The plaintiff's case was not dependent on the meaning of the alleged defamatory words construed in isolation. His case was that the words, in the context in which they were spoken and heard, were intended and understood as defamatory of him. That was a perfectly acceptable way of

pleading.[1] The defendant took no exception to it.[2] The proof of the plaintiff's allegation depended on the evidence which he adduced of the 'context', which he identified in his particulars of claim as relating to 'the meeting', the 'plaintiff's position in the meeting' and 'the first defendant's behaviour towards the plaintiff'. Within those limits the plaintiff was free to prove facts which conduced to a defamatory intention and understanding in the words he attributed to the first defendant, the final decision being that of the court.[3]

[25] But the rule 33(4) application attempted to have the case decided without evidence, not as an exception taken at the beginning of the trial, but simply as a preliminary question to be answered. Because of the manner of pleading of the plaintiff's case the answer to

[1] Because the plaintiff, having pleaded ambiguous language, was, in effect relying on a context which lifted his words out of the non-defamatory sense and tinged them with the colour of defamation; and cf *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) at 566F-H.

[2] Indeed he would have been hard-pressed to argue such an exception in the light of the authorities referred to by this Court in *Coulson v Rapport Uitgewers (Edms) Bpk* 1979 (3) SA 286 (A) at 294B-295H.

[3] *Sutter v Brown* 1926 AD 155 at 166 *in fine* – 167.

the question was an irrelevance that carried the trial nowhere. The defendant was wholly responsible for the application and his counsel's submission to us that the plaintiff should have opposed the application does not mitigate his culpability.

[26] The fact that the learned judge erred in arriving at his conclusion by assuming that the context had been proved and was such as to imbue the words with a defamatory meaning, does not mean that his final word has been expressed on the pleaded issues. Once such evidence as the parties may wish to place before the court has been considered and the context, if any, established, a proper appraisal can be undertaken of the real issues.

J A Heher
Judge Of Appeal

APPEARANCES:

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