THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 62/05

Reportable

In the matter between:

NATIONAL EDUCATION, HEALTH AND ALLIED

WORKERS UNION 1st Appellant

ISAAC MOITHERI MATHYE 2nd Appellant

and

KEGOMODITSWE EUPHODIA TSATSI Respondent

Coram**:** **HARMS, CAMERON, NUGENT, JAFTA JJA and NKABINDE AJA**

Heard: 14 November 2005

Delivered: 1 December 2005

Summary: ***Defamation – whether words in report that respondent 'embraces fraudsters' and 'unleashes unprecedented harassment' against staff is defamatory –***

Defences – qualified privilege – whether available to the appellants – whether appellants vicariously liable for re-publication of report.

JUDGMENT

NKABINDE AJA:

[1] The respondent (plaintiff) instituted an action against the appellants in the Johannesburg High Court claiming damages for defamation in the sum of R250 000. The court *a quo* (Joffe J) found the statements forming the basis of the claim to be defamatory in two respects, and awarded damages in the sum of R50 000.

[2] The first appellant is the National Education, Health and Allied Workers Union ('NEHAWU'), a registered trade union. It has members who are employed at the Johannesburg Magistrates' Court. It was sued on the basis that it was vicariously liable for defamatory statements made by its branch secretary, the second appellant, a senior interpreter at that court. The respondent is an advocate employed there as the manageress. Her duties entailed, among other things, dealing with labour matters. She had had various clashes with NEHAWU from the time of her appointment in February 2002.

[3] On 28 June 2002 NEHAWU held a general meeting of its members at the court. The second appellant prepared a report which was distributed to members in attendance at the meeting. Later on certain staff members who were not members of NEHAWU (including the plaintiff and one Mr Molefe) received copies of the report. For the most part the report dealt with matters relating to labour relations (eg outstanding disciplinary matters, training issues, unilateral management decisions). These had formed the subject of protracted and intense exchanges and negotiations between management and NEHAWU. Even though the statements were found to be defamatory in only two respects, it is useful to set out the full text of the portions against which complaint was made:

(a) 'The management headed by Ms Tsatsi is refusing to give us their plan, saying that it is privilege[d] information and it cannot be given to us. How strange ?'

(b) ‘Empty promises under the leadership of Ms Tsatsi has been made in order to expedite the training process or else to have an independent person to come and tell the management that their kind of practice is cleft as “Residual Unfair Labour Practice” we declared also another dispute in this regard; the administration of the office is in bad shape than that in the era of Mr Bashe. If you compare the present dispensation with that of Mr Bashe, one can safely say Mr Bashe was doing very well in rooting out corrupt officials instead of *embracing them (fraudsters)*.

(c) ‘There is *unprecedented harassment unleashed* against General Assistants, Casual Interpreters, Permanent Interpreters, Stenographers and Administration. Literally the whole office is under siege since the arrival of the new office manager.’

(Emphasis added.)

[4] The plaintiff contended that the report was widely distributed by the second appellant, that the statements italicised were defamatory of her in that they imputed, and were intended by the appellants to impute and were

understood by persons to whom they were distributed to mean that she is a liar, fraudster who connives with fraudsters, is corrupt, without moral fibre, is dishonest, and intimidated and harassed employees at the court. She pleaded further that the statements also carried the additional sting that she is manipulative, vindictive and abused her power.

[5] The appellants denied that the statements were defamatory and, pleaded, alternatively, that they were protected by qualified privilege.

[6] Apart from the quantum, the issues at the hearing narrowed down to the following:

(a) whether the statements were defamatory ;

(b) if so, whether they were protected by qualified privilege ; and

(c) whether the appellants were liable for the re-publication of the report outside NEHAWU's general meeting.

[7] The learned judge *a quo* held that the statements were defamatory. He concluded that qualified privilege did not cover the publication to individuals who were not members of NEHAWU, and that the appellants were liable as they had failed to take steps to preclude the further publication of the report. With the leave of this court the appellants appeal against that order.

I deal with the issues in turn.

[8] The test whether the statements are defamatory is an objective one - whether the statements complained of tend to lower the plaintiff in the estimation of the ordinary reader of the report. As was stated in *Johnson v Beckett and another* 1992 (1) SA 762 (A) at 773C-E a court,-

‘construes the words in their context, and considers what meaning they would convey to ordinary reasonable persons, having regard to the sort of people to whom the words were or were likely to be published . . . “the average ordinary reader of that newspaper”;. . . . The kind and quality of the readership is relevant, since it is as much part of the context in which the alleged defamation occurs as the other words contained in the article are.’

[9] The words that the plaintiff ‘embraces fraudsters’ and ‘unleashes unprecedented harassment’ against staff members are, it would seem, used not only figuratively but also in hyperbole. To say of a person that she embraces fraudsters suggests, in my view, that she colludes with and/or condones fraudsters’ activities which in itself tarnishes the person and discredits her in her social and professional standing. Whether the same may be said of the accusation that a person, in a managerial position as is the plaintiff, ‘harasses’ staff is questionable. I would however add that,

given the content and the tone of the report, any such defamation was slight.

[10] Having so found, the next question for consideration is whether the statements were protected by qualified privilege. When making the assessment it is convenient to deal, first, with the publication of the report at the meeting and, second, with re-publication outside the meeting. It is not in dispute that the second appellant disseminated the report to the members of NEHAWU present at the meeting. To establish privilege the appellants were required to show that the second appellant and NEHAWU members had a reciprocal right and duty to make and receive the report and the defamatory statements were relevant or germane and reasonably appropriate to the occasion.[1] The immunity would be forfeited if it is established that the second appellant acted with an improper motive,

[1]See the authorities cited in FDJ Brand '*Defamation*' 7 Lawsa 2 ed para 250.

but that does not arise here because it was not raised as an issue on the pleadings.

[11] One of the recognised occasions that enjoys the benefit of the defence is an occasion where the statements were published in the discharge of a duty or exercise of a right. The facts in this case illuminate the instrumental function of freedom of expression in labour relations. O'Regan J[2] has pointed out, regarding trade unions, that '[t]he Constitution recognises that

[2] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at 477 para [7].

See too s 23 of the Constitution. See also *Thomas v Collins* 323 US 516 (1945) about the instrumental function of freedom of expression in labour relations. In that case Justice Rudledge, delivering the opinion of the Court stated (at 532) that 'in the circumstances of our times the dissemination of information concerning facts of labor disputes must be regarded as within that area of free discussion that is guaranteed by the Constitution. … Free discussion concerning conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent destiny of modern industrial society.' McLachlin CJC and Lebel J in *Pepsi-Cola Canada Beverages (West) Ltd. v R.W.D.S.U., Local* 558, (2002) 208 D.L.R. (4th) 386 remarked at para [33] that '[f]ree expression is particularly critical in the labour context. … For employees, freedom of expression becomes not only an important but an essential component of labour relations'. I consider that these remarks similarly apply in the circumstances of our times in our country.

individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters'. She stated[3] that-

'As Mokgoro J observed in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) … in para [27], freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require

[3] At 477 para [8].

approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular view.'

[12] The question whether the statements were relevant to the occasion involves essentially a value judgment. The correct approach is set out by Smalberger JA in *Van der Berg v Coopers & Lybrandt Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA). He stated[4] that:

'the concept of relevance under discussion is, …essentially a matter of reason and common sense, having its foundation in the facts, circumstances and principles governing each particular case. The words of Schreiner JA in *R v Matthews and Others* 1960 (1) SA 752 (A) at 758A that "relevancy is based upon a blend of logic and experience lying outside the law" have particular application in a matter such as the present, even though they were said in the context of evidential relevance (cf Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 21). The assessment of whether a defamatory statement was relevant to the occasion to which it relates is therefore

[4]at 254 para [26].

essentially a value judgment in respect of which there are guiding principles but which is not governed by hard and fast rules. And in arriving at that judgment due weight must be given to all matters which can properly be regarded as bearing upon it.'

[13] Here, the second appellant**,** as the branch secretary of NEHAWU**,** had a right to make allegations and impart the information concerned to NEHAWU members and that the latter had a reciprocal right to receive it. That right is underlined by the provisions of s 23[5] of the Constitution.

[14] The appellants contended that the statements were relevant to the labour matters in respect of which they had the right and duty to report to their members. It was contended on behalf of the plaintiff that the statements were untruthful and not relevant to the issues discussed at the meeting 'to advance any of their objective goals'. Their relevance cannot

[5] Which entitles, inter alia, a trade union to determine its own administration, programmes and activities, to organise and engage in collective bargaining and the worker to form, join and participate in the trade union activities and programmes.

be disputed. In any event as Corbett JA[6] has stated, the truthfulness or otherwise of the statements has no bearing on whether they were germane to the occasion or not.

[15] As I have already indicated, the court *a quo* rejected the defence of privilege on the basis that the publication was not limited to NEHAWU members thereby finding that the appellants re-published the statements to non members. There is however no proof that the second appellant or any of the employees of NEHAWU was directly responsible for such re-publication.

[16] As to whether the appellants were liable for the re-publication, there can be no doubt that one or more of NEHAWU members present at the meeting might have re-published the report to non-members (including the plaintiff and Mr Molefe). There is however no evidence to show that the

[6]In *Borgin De Villiers & Another* 1980 (3) SA 556 (A) at 578H-579A.

appellants authorised or were otherwise responsible for the re-publication of the report. On that basis they cannot be held liable for the wrongs committed by their members without their authorisation. The court *a quo* found, however, that the appellants should have taken steps to preclude the re-publication, thereby implying, first, that they acted negligently in failing to take steps to prevent such re-publication. It bears note that the plaintiffs claim was not based on negligence. Moreover, the plaintiff has not shown what steps the appellants ought to have taken or second, that they were vicariously liable for the conduct of those who might have disseminated the statements – there is no evidence to suggest that a relationship of an employer – employee or principal – agent existed for the appellants to be held so liable. The finding by the court a quo is therefore, with respect, without legal basis and places an undue burden on the appellants. For these reasons the plaintiff's claim ought to have been dismissed with costs.

[17] In the result the following order is made:

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and replaced with the following:

"The plaintiff's claim is dismissed with costs."

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NKABINDE AJA

CONCUR:

HARMS JA

CAMERON JA

NUGENT JA

JAFTA