IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 5009/2018

In the matter between:

LUNGISA KHUZA 1st Appellant

KING SABATA DALINDYEBO MUNICIPALITY 2nd Appellant

and

NONTANDABUZO KHANYIWE Respondent

JUDGMENT

JOLWANA J

Introduction

[1] This appeal concerns the vexed issue of a damages claim arising in the context of an employment relationship where an employee has been accused of pilfering in the workplace. Put differently, should an employer be held liable for civil damages where an employee has been investigated on suspicions of theft

during which certain utterances of a defamatory nature were made? The court a quo answered this question in the affirmative. It, however, granted the appellants leave to appeal.

The pleadings.

[2] The respondent pleaded that on 10 February 2017, the first appellant accused her of having stolen refuse plastic bags in the presence of other people. She further alleged that the said accusations were defamatory, wrongful and unlawful. Furthermore, there was also an attempt by the second appellant to bring false disciplinary charges of theft against her which came to nought. This process left her aggrieved, embarrassed, humiliated and heart-broken. As a result, the respondent held the appellants liable for damages she allegedly suffered in the sum of R600 000.00 consequent upon her being falsely accused of stealing the refuse plastic bags.

[3] In their plea, the appellants admitted accusing the respondent of stealing refuse plastic bags. They, however, denied that such accusations were false, defamatory, wrongful or unlawful and were made in the presence and hearing of other people. They further denied that the disciplinary charges that were laid against the respondent were false or that the disciplinary process initiated against her collapsed. They pleaded that the respondent was subjected to a disciplinary process which had not yet been completed and was still pending.

[4] In their rule 37 minute, the parties agreed that as the appellants admitted accusing the respondent of stealing the refuse plastic bags, it would not be necessary to determine that issue. It was agreed that the issues for determination were whether or not the accusations were false, whether they were defamatory, wrongful and unlawful. The second issue was that of publication. In other words, whether there were any other people present when the first appellant made the accusations. It was further agreed that because the appellants admitted accusing the respondent of theft, they had a duty to begin in order to disprove wrongfulness and intention in making the offending utterances.

The proceedings a quo

The appellants' evidence.

[5] The first appellant testified on behalf of both appellants. His evidence was that at the time of the incident, he was employed by the second appellant as a superintendent in the cleansing section. That section is responsible for litter picking, sweeping and cleaning the streets. The litter is placed in refuse plastic bags which are then collected by trucks. All the street sweepers and litter pickers are provided with refuse plastic bags. On 3 October 2016, there was a report that the second appellant's refuse plastic bags were seen at Siyanda Hardware at Oxland Street, Mthatha. The first appellant and two of his colleagues, Mr Gola and Mr Poswa proceeded to Siyanda Hardware.

[6] On entering the said hardware, they saw bales of refuse plastic bags which were emblazoned with the second appellant's name. They requested to see a manager and a Mr Mohammed attended to them. They enquired from him how the refuse plastic bags got to be there as they were not for sale and were accordingly marked as not being for sale. Mr Mohammed told them that they were brought by two employees of the second appellant who came in a municipal vehicle the previous week. The first appellant and his colleagues were given access to the hardware's CCTV footage but they could not clearly identify the municipal vehicle the second appellant's employees used. They then returned to their offices leaving the plastic bags at the hardware.

[7] On arrival at their offices, they convened a meeting of superintendents and supervisors which started at 15:00 on that day. They informed the meeting about the refuse plastic bags they found at Siyanda Hardware. The first appellant asked the supervisors to conduct an investigation after which the meeting adjourned at 17:00. The following day the supervisors asked for a meeting and reported that they came back with 10 bales of the second appellant's refuse plastic bags from Siyanda Hardware. The first appellant further testified that the following day they received information that there were other refuse plastic bags at the China Mall, Mqanduli. The first appellant, Mr Poswa and Mr Gola proceeded to the China Mall in Mqanduli. On arrival there, they found three bales of refuse plastic bags. They requested to see the person in charge at Mqanduli China Mall. A lady who

introduced herself as a supervisor told them that they got those refuse plastic bags from Hillcrest China Mall in Mthatha. They took the three bales of refuse plastic bags and proceeded to Hillcrest China Mall in Mthatha. There, they were attended to by a general manager who told them that the refuse plastic bags were brought to his shop by the second appellant's employees. He also showed them other bales of refuse plastic bags that were there at his shop. However, the general manager did not know the names of the employees who had brought the plastic bags there. He gave them access to the CCTV footage from which they were able to identify one of the second appellant's double cab vehicles which had the second appellant's imprint.

[8] From the footage, they identified the driver as one of the second appellant's cleansing section supervisors, the late Zilindile Mbiza. Mr Mbiza was assisted by one of the second appellant's employees in off-loading the refuse plastic bags. They could also see in the CCTV footage of the said employees being given money. They asked for a copy of the CCTV footage and took it to their offices where they called a meeting of all supervisors. They asked that the supervisors who were responsible for the theft should reveal themselves. On the third day, Mr Poswa reported that Mr Mbiza came to his office and owned up to the theft of the refuse plastic bags. They viewed the CCTV footage and indeed they could see that he was involved. The first appellant received a call that somebody from the cleansing section wanted to see him in his office, and he proceeded to his office.

[9] He found Mr Bimbi and the respondent waiting for him. Mr Bimbi indicated that it was the respondent who actually wanted to see him after which Mr Bimbi left. The respondent told him that she had wanted to see him even the previous day about the issue of the refuse plastic bags. She told him that she had met Mr Mbiza and wanted to give her side of the story. She explained that she received a call from Mr Mjila, a superintendent asking her if she could find him somebody who was willing to buy municipal refuse plastic bags. Mr Mjila said that the said plastic bags would be sent through Mr Mbiza. It is then that the respondent approached Siyanda Hardware as she knew the manager of that hardware. Mr Mbiza met the respondent and they both went to Siyanda Hardware in a municipal vehicle. They left 10 bales of refuse plastic bags there and Mr Mbiza was paid R500.00 for them from which he gave her R100.00. After giving this report, the respondent apologised saying that she was sorry for putting herself in such a situation and left. The first appellant together with Mr Poswa, the superintendent for refuse removal compiled a report for the office of the general manager. They both signed the report and sent it to Mr Mkaba, their regional head.

[10] They then held a meeting where it was decided that the matter should be referred to the head of a department. Mr Mkaba referred the matter to Mr Maka, the Director for Community Services who then referred it to Mr Mdleleni, the Director for Corporate Services. Ultimately, it was decided that the respondent,

the late Mr Mbiza and Mr Sikutshwa should be subjected to a disciplinary process. The respondent was suspended and later disciplinary charges were preferred against her. He testified that a disciplinary hearing was set in motion and he and Mr Poswa attended it in order to give evidence against the respondent. The respondent and the second appellant entered into a plea-bargaining agreement in terms of which the respondent pleaded guilty to the charge of gross dishonesty and was given a final written warning. The charges of theft fraud and corruption were withdrawn in terms of the plea-bargaining agreement.

The respondent's evidence.

[11] The respondent testified that she worked at the cleansing department of the second appellant. The first appellant was a superintendent in the same department. On 6 February 2017, she was working at Nelson Mandela Drive when Mr Gola arrived in a municipal vehicle saying he had come to fetch her. He took her to the offices of the cleansing department. On arrival, she found the first appellant, Mr Boyce and Mr Twenani already there. The first appellant said that she had stolen refuse plastic bags belonging to the municipality and sold them to Siyanda Hardware. These utterances were made in the presence of those persons and Mr Gola. She told them that she did not know about that because she was given one plastic bag and a broom for a street that she was assigned to sweep. She testified that it was not true that she had stolen refuse plastic bags and therefore the statement that she had done so was not true.

[12] She denied having been called to a meeting in which she admitted having stolen plastic bags. She further denied that she confessed that she and Mr Mbiza had taken refuse plastic bags to Siyanda Hardware and therefore the first appellant's evidence in that regard was untrue. She confirmed that there was a disciplinary hearing on 21 December 2020 in which she was represented by Mr Magibi from the South African Municipal Workers Union (SAMWU). She never pleaded guilty to the charges of theft and corruption. In respect of the charge of dishonesty, which was the third charge, her SAMWU representative, Mr Magibi had advised her to plead guilty. She was found guilty of gross dishonesty and given a final warning. Her understanding was that she was admitting to having failed to report seeing Mr Mbiza carrying or being in possession of the second appellant's refuse plastic bags. However, she never saw Mr Mbiza carrying any plastic bags. The guilty plea in that regard was on the advice of Mr Magibi.

The judgment of the court a quo.

[13] The court concluded that the evidence of the respondent could not be untrue. It found that the respondent told the truth and that she was a credible witness whose evidence was reliable. It further found that there was the absence of proof that the respondent had confessed guilty to the alleged theft. Furthermore, the court found that the respondent's evidence had no contradictions and inconsistencies and therefore she had told the truth, and the version of the appellants could not also be true. The court went on to criticise the appellants for

pleading a bald denial of the publication element of the delict. It found that the appellants adduced no evidence to rebut the prima facie case that the utterances were made that the respondent was a thief; that the utterances were made concerning her; and that the utterances were published unlawfully and with an intention to injure her dignity. The court said that the appellants did not raise any of the recognised defences in a defamation case. On the court's finding, Mr Gola, Mr Boyce and Mr Twenani were the people to whom the first appellant made the publication. On these bases, the court found in favour of the respondent and awarded her compensation in the sum of R120 000.00.

Submissions on appeal.

[14] The principal submissions that were made on appeal were the following. On behalf of the appellants, it was submitted that the respondent testified during the trial that the first appellant asked her about her involvement in the sale of the refuse plastic bags to Siyanda Hardware which she denied. It was further submitted that the first appellant never uttered the words that the respondent was a thief. The act of formally conveying the nature of the complaint to an employee by an employer or an official of the employer does not constitute a defamatory act. Even if it does, it is not wrongful. It was submitted that if it were to be considered wrongful, that would discourage employers from informing employees through their supervisors about allegations of misconduct.

[15] It was submitted on behalf of the respondent that the pleaded case of the respondent on the key aspect of the accusation of being a thief was admitted in the appellants' plea. Furthermore, the respondent had established that the first appellant had published the defamatory matter concerning the respondent which invited the presumption of wrongfulness. The appellants had not raised the common defences to ward off a claim of defamation. This was because they had not pleaded that the publication was true and in the public interest; that it constituted fair comment; that it was made on a privileged occasion; or that even if the publication was false and defamatory, it was reasonable to make the publication on the facts of this case.

Analysis.

[16] While the court a quo made credibility findings in favour of the respondent and almost heaped praise on her for the consistency and reliability of her evidence, it is unclear from the judgment why the appellants' version was rejected. This is so because the court merely concluded that the version of the appellants could not be true. After spending a great amount of time summarising the evidence of both parties, the court, however, omitted frontally dealing with the first appellant's evidence. This is save for its pronouncement that it was rejecting it apparently on the basis that it preferred the version of the respondent. This was done without indicating why it rejected the version proffered by the first appellant. It did not give substantive reasons for the negative credibility findings

against the first appellant. The court's justification for the rejection of the appellants' version and the documentary evidence that had been referred to by the first appellant in his evidence remains unclear.

[17] The court a quo appears to have determined the credibility of the first appellant based on its understanding of the appellants' pleaded case only and not on its assessment of the entirety of the evidence. It went on to make a finding that the first appellant gave evidence that was at variance with admissions made in the plea. The appellants' pleaded case was that they admitted accusing the respondent of stealing the refuse plastic bags. The court also appears to have expected the appellants to state where the defamatory statement was made and said that the first appellant had not done so in his evidence. This does not seem to have taken into account the whole sequence of events up to the laying of disciplinary charges and the first appellant's account of what happened at the disciplinary hearing. In its judgment, the court said:

> "[16] In the circumstances of the disputed versions between the oral witnesses the resolution of their evidence requires an assessment of the credibility of the opposing witnesses (the plaintiff and the first defendant's their reliability and probabilities – see: Stellenbosch Farmers' *Winery Group Ltd and Another v Martell Et Cie and Others* 2004 (1) SA 11 (SCA).
>
> [17] In light of the pleading that the defendants admit the fact that the plaintiff was accused of theft the question arising must be where did the first defendant make the statement and/utterance under question. It does not appear that the statement was made

> on the day and place when Mr Bimbi allegedly took the plaintiff to the office of the second defendant. The evidence of the first defendant does not designate the place and occasion when the statement would have been made. On the contrary, the evidence of the plaintiff does reveal that the statement was made by the first defendant in the presence of Mr Gola, Mr Boyce and Mr Twenani, as being the "other persons".

[18] Some of the conclusions of the court were that the first appellant led evidence contradicting its admission that he had accused the respondent of theft which it said tainted his credibility. It cannot be overemphasised that the said admission was made in the plea, it was not the case of the first appellant contradicting himself in his evidence. While the court made reference to *Stellenbosch Farmers' Winery*, it however does not appear to have followed it in its assessment of the evidence. That being said, it is difficult to understand the basis for the negative credibility findings it made about the first appellant as it did not assess his evidence.

[19] In her particulars of claim, the respondent alleged that she was accused of stealing refuse plastic bags. The appellants admitted having accused the respondent of stealing refuse plastic bags. The dictionary[1] meaning of the word "*accused*" is "*charge with a fault; blame*" *or charge with a crime or fault*". The question is whether or not the said accusation was wrongful and if so why. The court once again appears to have accepted that the accusation was made in the

[1] Shorter Oxford Dictionary volume 1 at page 17.

context set out by the respondent based on nothing more than her mere *ipse dixit.* In this regard, the respondent's evidence was that on the day in question, she was performing her normal duties of cleaning the streets at Nelson Mandela Drive when Mr Gola arrived and took her to the cleansing section of the second appellant. She found Mr Boyce, Mr Twenani and the first appellant there. It was in this meeting and therefore to those people that she alleged the accusation was made and the court accepted this without demur.

[20] The uncontested evidence of the first appellant was that he was a superintendent in the cleansing section of the second appellant. The respondent was a member of a cleaning team in that section. On 3 October 2016 the first appellant together with Mr Poswa, the superintendent for refuse removal and Mr Gola, the cleansing section supervisor proceeded to Siyanda Hardware following receipt of information that municipal plastic bags were seen in that hardware. They also received information that other refuse plastic bags were at China Mall in Mqanduli which also led them to Hillcrest China Mall in Mthatha where they found even more refuse plastic bags. Those discoveries led to the compilation of a report by himself and Mr Poswa dated 31 October 2016 which detailed the investigations that were conducted with a recommendation that disciplinary processes be instituted against the respondent and Mr Mbiza. Both Mr Mbiza and the respondent were suspended and at some stage, the respondent was served with disciplinary charges of theft, fraud, corruption and gross dishonesty. That is the

context in which, on common cause facts, the allegations or accusations of stealing the second appellant's refuse plastic bags were made by the first appellant.

[21] In *Khumalo,*[2] the Constitutional Court had occasion to restate the law on some aspects of the law of defamation. It said:

> "Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit, that the publication constituted fair comment and that the publication was made on a privileged occasion."

[22] The court a quo found the respondent to have given evidence that was free of contradictions and consistent throughout as I said before. If the version of the respondent is accepted as being credible and reliable as the court a quo did, it follows that her supervisor, Mr Gola fetched her from Nelson Mandela Drive and brought her to the first appellant, Mr Boyce and Mr Twenani. These individuals are, on common cause facts, all seniors to the respondent. Even though the appellants deny that such a meeting took place, if the respondent's version is accepted which the court a quo did, that gathering was about the refuse plastic

[2] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at 414 A-B.

bags which were found at Siyanda Hardware and at the respective China Malls in which the respondent was implicated. She was so implicated that the matter was referred to the relevant heads of department with a recommendation that disciplinary action against her be taken.

[23] Indeed, disciplinary proceedings were instituted including her being subjected to a formal disciplinary hearing during which she pleaded guilty to one of the three charges. There was an attempt during her evidence to shift the whole blame for the plea-bargaining agreement and therefore the outcome of the disciplinary hearing to her SAMWU representative. This was an overtly disingenuous attempt to explain the guilty plea by blaming Mr Magibi, thus shirking any responsibility for it. It is worth mentioning that the alleged publication predated the plea-bargaining agreement. The fact that the respondent pleaded guilty to one of the charges that emanated from the first appellant's and his colleague's investigation and findings about the sale of the second appellant's refuse plastic bags cannot be ignored. All of this surely must call into question the respondent's credibility and the reliability of her evidence.

[24] Once it is accepted that there was a publication which the court a quo did, the enquiry is whether or not the occasion in which the defamatory utterances were made and therefore the publication, was a privileged occasion. Before that enquiry, it must be established whether the defence of a qualified privilege was in fact pleaded. On the facts of this matter, I have no doubt that it was. In

paragraphs 8 to 10 of their plea, the appellants denied the alleged wrongfulness of the defamatory utterances. They went further to plead that the respondent was subjected to a disciplinary process. Common cause facts established that subsequent to the investigations that were conducted, the respondent did appear in a disciplinary hearing in which she pleaded guilty to the charge of gross dishonesty. While the appellants' plea can justifiably be described as not being a model of clarity, when it is considered together with all the evidence tendered during the trial, the plea did raise what in essence, is the defence of a privileged occasion. I do not understand our jurisprudence to require that the words "*privileged occasion*" must necessarily appear in the plea, failing which the conclusion is that the defence is not pleaded.

[25] The court a quo omitted to conduct the enquiry into publication privilege. There are currently two types of publication privilege. The first is absolute privilege which is enjoyed by parliamentarians nationally and provincially[3]. The second type of privilege is called qualified privilege. In explaining it, I can do no better than refer to Professor Fagan who explains it in the following terms:

[3] 3. Section 58(1) of the Constitution of the Republic of South Africa, 1996 provides for absolute privilege as follows:

(1) Cabinet members, Deputy Ministers and members of the National Assembly –
  (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
  (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –
    (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees, or
    (ii) anything received as a result of anything that they have said in, produced before or submitted to the assembly or any of its committees.

"The textbooks invariably distinguish three instances of qualified privilege:

(1) Statements made in the discharge of a duty or the exercise of a legitimate interest; (2) statements made in the course of judicial or quasi-judicial proceedings; and (3) reports on the proceedings of parliament, the courts and certain public bodies.

…

[T]o presume that *animus iniuriandi* on the part of a defendant is to presume that he had intention to get others to think less of the plaintiff than they ought. If a defendant had a valid reason to speak about some aspect of the plaintiff's character, for example his competence in his job, and confines himself to speaking just about that, the reasonable inference to draw surely is, not that he intended to get them to think less of the plaintiff than they ought, but rather that he intended to get them to think of the plaintiff exactly what they should. The reasonable inference to draw, in other words is that the defendant was simply trying to do what he was obliged or had reason to do, namely accurately to assess the relevant aspects of the plaintiff's character."[4]

[26] There can be no dispute that the first appellant was doing his job when he investigated the allegations of theft with the assistance of two of his colleagues. It was never suggested that the first appellant was on a frolic of his own when he made the offending utterances, unrelated to the investigation of the stolen refuse plastic bags. The occasion in which the publication occurred could only have been, on the respondent's version, a formal meeting attended only by her supervisor and the relevant section superintendents. On either version, the utterances, even if they were made as the respondent alleges, were made on a

[4] Fagan A: Undoing Delict – The South African Law of delict Under the Constitution: Published by Juta Company (Pty) Ltd, 2018, pages 176 to 178.

qualified privileged occasion in which the first appellant was just doing his job in confronting the respondent with the allegations of theft. It follows that that negates any notion of *animus iniuriandi*. Even on the respondent's own version, the common cause facts overwhelmingly established a privileged occasion. Therefore, the appeal must succeed.

Costs

[27] There is no reason why costs should not follow the result. The court a quo had awarded costs which, since the promulgation of rule 67A, are the equivalent of scale A referred to in rule 67A of the Uniform Rules. There is no reason to interfere with that order. The default position set by rule 67A is, indeed, that costs will be recovered on scale A unless there is justification for the application of a higher scale. In as much as the present case was not *per se* unusually complex, it raises important questions on the law of defamation. The nature and circumstances of this matter are such that in the exercise of this Court's discretion, costs should follow the result save that such costs as were incurred on appeal should be on scale B.

[28] In the result I would make the following order:

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following:

2.1 The plaintiff's claim against the defendants is dismissed with costs on scale A referred to in rule 67A of the Uniform Rules of Court.

3. The respondent is ordered to pay costs including the costs of the application for leave to appeal on scale B referred to in rule 67A of the Uniform Rules of Court.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

G.N.Z. MJALI
JUDGE OF THE HIGH COURT

I agree:

L. RUSI
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellants	: Z.Z. Matebese SC
Instructed by	: Zilwa Attorneys
	MTHATHA
For the Respondent	: M. Notununu
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Heard on	: 04 November 2024
Judgment Delivered on	: 04 March 2025