
Onlangse regspraak/Recent case law

J v J 2016 ZAKZDHC 33 (unreported)

Setting the record straight on the general principles for defamation.

1 Introduction

In July 2016, Masipa J of the Durban High Court dismissed a counter-claim for defamation that had arisen from allegations of adultery against the second defendant, one Dr H, in the judgment of J (*J v J* 2016 (ZAKZDHC) 33 (hereafter '*J*'). The court based its ruling on two main reasons. First, the court found that there is no longer an action for delict founded on allegations of adultery against another person (par 88). The court's assertion was based on an earlier judgment of the Constitutional Court in *DE v RH* 2015 5 SA 83 (CC) (hereafter '*DE*'). The high court in the *J* judgment held that in view of the decision of *DE*, 'public opinion no longer considers adultery as tabooed ... a statement to the effect that a person committed adultery can no longer convey a meaning with the propensity to define a person ...' (par 88). Moreover, the court was of the view that the plaintiff had prima facie supported the allegations labelled against Dr H, by means of evidence (par 90). The latter remarks were stated in relation to the question of the costs for the suit (par 90). In its analysis of the law, the high court also held that to succeed with his action, '[the plaintiff] has to prove that [defendant] published words which were *wrongful* and intended to injure his status, good name or reputation.' (par 72). This note takes issue with this reasoning of the court. It will show that this is not the correct reflection of the law of defamation. Further, relying on the case of *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A), the court held that '[the] plaintiff *must show animus iniuriandi* i.e. intention to defame and knowledge of wrongfulness' (par 73, *emphasis added*). Again, this is not the correct reflection of the current position of the law of defamation, as it will be shown in this case note.

Another reason why the court dismissed the claim for damages against SJ was that Dr H had failed to discharge the duty that rested on him to prove that his reputation had indeed been injured as a result of the plaintiff spreading allegations of adultery between his wife and Dr H (par 89). In essence, the assertion of the court was that, as one of the requirements for defamation, the claimant (Dr H in this case) needed to prove the existence of causation. However, I submit that this assertion of the court in the *J* judgment, amounts to a distortion of the law of defamation. Henceforth, the purpose of this case note is to attempt to

correct the misconception that this judgment of *J* creates by its assertions that, to succeed with his action, the plaintiff ought to prove that *wrongful words* were published; the *animus iniuriandi* (intention), and that the publicised remarks had caused the plaintiff's reputation to be injured ('causation'). Immediately after this introduction, the note sets out the factual background to the high court judgment. It then proceeds to address the question of the nature of words that the plaintiff needed to prove to succeed with his action and whether the plaintiff ought to have shown (or proved) *animus iniuriandi*, as the court found. Thereafter, the issue or role of causation in the law of defamation is addressed through reference to authorities, before advancing a conclusion.

2 Facts

In *J*, the plaintiff, SJ, was the husband of one PJ, who was the first plaintiff in the main case. SJ had sued PJ for divorce on the allegations that she had committed adultery with one Dr H who was also their family doctor (paras 1 and 53). In the process of suing for divorce against his wife, SJ also sued for damages against Dr H, who was the second defendant in the case. The action against Dr H was founded on *contumelia* and loss of consortium, owing to the alleged adulterous intimate relationship between SJ's wife and Dr H. However, before the court could deal with SJ's matter, the Constitutional Court ruled in *DE* that adultery was no longer an actionable cause of action for purposes of SJ's claim (par 1). As SJ no longer had a cause of action for his claim, he tendered to withdraw his claim against Dr H (par 1). While Dr H accepted a tender by the husband to withdraw his claim against him, he nevertheless filed a counterclaim for defamation against the husband (par 1). It transpired from the evidence that SJ had told his mother about the alleged adulterous relationship between his wife and Dr H (paras 21, 77 – 79). Meanwhile, SJ's mother informed the nursing assistants in Dr H's surgery about the alleged adultery (paras 23, 55, 57, 63–64, 69). SJ allegedly informed his in-laws about the adultery (par 55). Additionally, when SJ was in the process of suing Dr H for *contumelia* and loss of *consortium*, he had informed the wife of Dr H about the alleged adultery (paras 21 and 80). This was done out of courtesy as the two families were acquaintances (par 81).

In its findings with regard to Dr H's claim, the court ruled that a reference to a person as having been involved in an adulterous relationship is no longer defamatory in the light of the judgment of *DE* (par 88). Whether or not the court was correct to come to the conclusion that is no longer defamation based on insinuations of adultery in the light of the CC judgment of *DE* is beyond the scope of this case note. This view by the high court is debatable, because *DE* never considered the issue of adultery and defamation. It merely dealt with the issue of adultery and *contumelia* and loss of consortium. Therefore, for purposes of this case note, I would not venture into this issue. Suffice is to state that Masipa J the *J* judgment, simply imported the ruling of *DE* that abolished the action for adultery to the law of defamation without proper legal basis for doing

so. In other words, the judge did not support the applicability of DE in defamation with any sound legal arguments. Hence, the high court in the judgment of *J* failed to put this issue to rest (see Buthelezi 'Is there still defamation under SA law based on adultery 2017, 38 (2) *Obiter*'; also Neethling 'Die regspraak bevestig die gedingsvatbaarheid van afrokkeling as iniuria' 2017 (2) *LitNet Akademies*, Scott 'Delictual liability for adultery: a healthy remedy's road to perdition' in Potgieter, Knobel and Jansen (eds) *Essays in honour of / Huldigingsbundel vir Johann Neethling* (2015) 421-438 and Potgieter 'Die reg op die gevoelslewe (en die moontlike relevansie daarvan by 'n aksie weens owerspel? 2016 (3) *TSAR* 397-411). Moreover, the court held that the publication of the allegation by SJ to his mother was in law justified (par 78). I concur that the court was correct in this regard. The defence of truth and public benefit would have justified such publication since SJ's mother had an interest in the marriage of her son (par 78). Further, the high court held that SJ could not be held liable for the publication that his mother made to the nursing assistants of Dr H (par 79). I am also in agreement with the court in this regard. The court was also of the view that the disclosure that SJ made to Dr H's wife did not in law amount to publication (par 82). I concur with the court that communication to a person's spouse is not publication for purposes of defamation, although the constitutionality of this legal view may now be challenged in the light of legal recognition that married spouses are two separate legal subjects.

Most importantly for purposes of this article, the court also held that Dr. H had failed to prove that his reputation had been injured as a result of the allegations by SJ that Dr. H was intimately involved in an adulterous relationship SJ's wife (par 89). In essence, the court was asserting that in order to succeed in an action for defamation the plaintiff needs to prove causation. I take issue with this view, as shown below. However, before I address this reasoning of the court, I will first deal with the court's analysis regarding the nature of the allegations that incur liability for defamation and the issue of *animus iniuriandi* (that is, whether the plaintiff is in law required to prove intention to injure or defame the plaintiff).

3 Critique of the Judgment

3.1 Defamatory Words and *Animus Iniuriandi*

As stated earlier, among other things, the court held that the plaintiff should prove publication of the wrongful words to succeed with his claim for defamation (par 72). However, this is an erroneous statement of the law. I take issue with this take of the court on this element of the law of defamation. As a primary requirement for defamation, the plaintiff must prove that *defamatory* words (*not wrongful*) have been published by the defendant (See for example: *Le Roux v Dey* 2011 3 SA 274 (CC), paras 84 and 85; Also *Khumalo v Holomisa* 2002 5 SA 401 (CC), par 18). Thus quoting *Khumalo*, the majority (Brand AJ) in *Le Roux* reaffirmed that the elements of defamation are: '(a) the wrongful and (b) intentional

(c) publication of (d) a defamatory statement (e) concerning the plaintiff.’ (par 84) Clearly, the high court erred in its analysis of the general principles for defamation when it held that the plaintiff needed to prove that ‘the [defendant] published words which were wrongful ...’ (*J* case, par 72). This assertion distorts the requirement defamatory words in defamation by conflating this element with the element for wrongfulness.

The court also erroneously stated that the plaintiff ought ‘to show *animus iniuriandi*’ (which obviously meant to prove) to succeed with his claim for defamation (par 73). Contrary to what the high court held in *J*, the plaintiff does not have to show *animus iniuriandi* (par 73). It is now trite that to succeed with his claim, the plaintiff only bears the *onus* to prove the publication of a defamatory matter, which referred to him, whereupon the court will presume that the intention to injure (*animus iniuriandi*) the reputation of the plaintiff and wrongfulness are present (*Le Roux*, par 85). This was reaffirmed in *Le Roux* where Brand AJ reiterated the five elements for defamation (without adding causation) (par 84). Then the justice emphatically held:

Yet the plaintiff does not have to establish everyone of the [five] elements. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional ... (par 85)

In other words, intention (*animus iniuriandi*) is one of the two elements of defamation that are presumed to exist – the other one being wrongfulness. The view that the plaintiff must show *animus iniuriandi*, as the high court held in *J*, is incorrect. Perhaps, one reason to account for the latter error is that the court relied on the 1977 decision of *O’Malley* as its authority (see par 73). However, the law of defamation has evolved a great deal since the case of *O’Malley* and, most importantly, the general principles for defamation are now settled, as encapsulated by Brand AJ in *Le Roux* (par 84 – 85). Moreover, one of the two main reasons why the high court in *J* dismissed Dr H’s claim in *J* was that he had not succeeded to show that his reputation had been injured by the allegations of adultery levelled against him by the plaintiff, SJ. The next section explores this issue in detail.

3 2 Causation in Defamation

As has been stated, the high court in *J* held that the plaintiff has to prove causation, in the form of injury to his reputation, before he can succeed with his defamation claim *J* (par 89). It held:

The second defendant had a duty to prove that his reputation was indeed injured as a result of the plaintiff’s conduct. No such evidence was led. The court cannot assume that because words or statements were made an injury occurred. In the absence of evidence regarding injury to the second defendant’s good name, reputation and status, there is no case made out to prove defamation. In any event, society no longer views such conduct with disdain. It can therefore not be said that a statement that someone

committed adultery has the effect to injure the reputation, status and good name of the second defendant.

It is, however, difficult to put in perspective the above remarks of Masipa J regarding the duty that allegedly rested on the plaintiff 'to prove that his reputation was indeed injured as a result of the plaintiff's conduct' as the judge did not correctly encapsulate the elements for defamation. Legal authors are silent on the question of causation among the general elements for defamation. For example, Loubser *et al* do not include causation among the five elements for defamation when they discuss the infringement of reputation (Loubser *et al The Law of Delict in South Africa* (2012) 339 – 358; see also Neethling *et al Neethling – Potgieter – Visser Law of Delict* (2016) 354). It is possible that the remarks were said in relation to the requirement that the plaintiff must prove defamatory statement, as one of the elements for defamation (that is, that the meaning was defamatory). Still, from the words that the court used (namely, 'that his reputation was indeed injured as a result of the plaintiff's conduct'), it would appear that the judge had in mind causation in general. In that case, the court would have misrepresented the South African law position regarding the general principles for defamation. Causation is accepted as part of defamation, but it has remained a dormant element for law of defamation. Even if one were to assume that Masipa J was referring to the second requirement for defamation ('defamatory statement – that is, its meaning), the high court would have gotten it incorrect. The plaintiff does not have to prove that his reputation was injured. As Brand AJ held in *Le Roux*, the question to ask with regard to the second element for defamation is whether the statement 'is likely to injure the good esteem in which [the plaintiff] is held by the reasonable or average person to whom [the statement] has been published ...' (*Le Roux*, par 91). The assessment is an objective one as opposed to being subjective, as Masipa J is in fact asserting in the judgment of *J*. Authors are also in agreement that the approach of assessing impairment of reputation is not subjective, but objective, and that the only relevant question is whether, viewed through eyes of 'a reasonable person of normal intelligence and development the reputation of the plaintiff has been injured' (Neethling 354).

Moreover, case law authorities hold that the court will only become subjective, regarding the effect of the defendant's conduct (publication of defamatory material) on the plaintiff's reputation, when it determines the quantum for the plaintiff's claim. At that stage, the defendant may argue for the reduction of the plaintiff's damages on the basis, for example, that the plaintiff had a very low reputation, in any case (for example, this view was adopted by the court in *Viviers v Kilian* 1972 AD 449). Alternatively, the argument may be that the publication had not dented the image of the plaintiff (such a view was expressed by the Constitutional Court in *Dikoko v Mokhatla* 2006 6 235 (CC), par 78). When the Constitutional Court was determining the quantum in *Dikoko*, for example, it held that the fact that, Mokhatla, the respondent, still got appointed to a position of high public office despite the defamatory

remarks uttered by Dikoko was an important mitigating factor in determining the quantum to award against Dikoko (par 78). However, as is the case in many other cases, nowhere does the court in *Dikoko* allude to the proposition that the plaintiff needed to prove that the impugned defamatory statements had injured his reputation. It is therefore respectfully submitted that the court in *J* case erred when it concluded that the second defendant in the case (Dr H) ‘had a duty to prove that his reputation was indeed injured’ as a result of the publication of the offending allegations. Instead, causation is an inactive (or dormant) element for defamation. Therefore, the assertion to that effect in *J* amounts to a distortion of the law of defamation.

4 Conclusion

The general principles for defamation are now trite in our law, as has the shown in this case note. Hence, the high court in *J* judgment made material errors in its findings regarding the elements for defamation. Chief among these is the assertion that the plaintiff has a duty to prove that his reputation had been injured by the conduct of the defendant. As has been argued in this case note, it is not correct that the plaintiff has to prove publication of wrongful words to succeed with his claim in defamation. Rather, the correct legal position is that the plaintiff has to prove defamatory words that referred to him. It is also incorrect to say that the plaintiff needs to show or prove intention (*animus iniuriandi*) to injure his reputation. Instead, intention as an element for defamation is presumed to exist once the plaintiff has proved the publication of defamatory statement (words), referring to him. Last, it is not the correct position of the law of defamation that the plaintiff needs to prove that the publication of the defamatory words has injured his reputation (causation), as concluded by the high court *in casu*. Contrary to that finding of the court, causation is a dormant sixth element of defamation, which only comes to the fore on calculating the quantum of damages to award to the plaintiff when he has succeeded in his action. Thus, in a sense, it will fall under the elements that are presumed, although it plays no role in determining the liability or otherwise of the defendant for defamation. Should these inaccuracies be left unchallenged, this could distort the law of defamation. In my view, the action should not have stumbled on Dr H’s failure to prove that the publication of the allegations about adultery had injured his reputation. Instead, it would have failed by reason of the availability of a defence to SJ in the form of truth and public benefit.

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