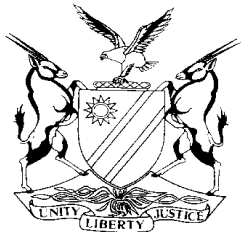

'Not Reportable'

CASE NO.: CA 68/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEXIS PIETERSEN-DIERGAARDT **Appellant**

and

PIETER HENDRICK FISCHER **Respondent**

***CORAM*: DAMASEB JP *et* SILUNGWE AJ**

Heard on: 2009 July 13

Delivered on: 2011 September 14

APPEAL JUDGMENT

SILUNGWE AJ: [1] This is an appeal against a judgment of the Magistrate's Court for the District of Rehoboth by which the presiding magistrate upheld the respondent's claims against the appellant for damages for (a) defamation, and (b) malicious prosecution, totaling N$20 000-00. At the hearing of the appeal, the appellant and the respondent were presented by Messrs Marcus and Obbes, respectively.

[2] A brief background is that when this matter arose in June 2001, the appellant was a Magistrate responsible for the District of Rehoboth, while the respondent was a Chief Legal Clerk and, therefore an administrative head of subordinate members of staff at the Rehoboth Magistrate's Court. In other words the appellant was, at the all material times, the overall head at that Magistrate's station.

[3] The grounds of appeal in relation to the first claim – the "defamation claim" – are that:

(a) the learned magistrate erred in finding that there was publication of the letter dated 13 June 2001 to the Permanent Secretary of the Ministry of Justice, when the evidence led at the trial clearly established that no such publication in fact took place;

(b) the learned magistrate erred in law in holding that the borders of the defence of qualified privilege were exceeded and/or that the appellant abused the occasion.

[4] With regard to the second claim – the "malicious prosecution claim" – the grounds of appeal are mainly, that:

(a) the learned magistrate erred in law in finding that the appellant set the law in motion, i.e. "was active in setting the wheels of justice in motion";

(b) the learned magistrate erred in finding that the appellant was well aware of the fact that she would not be able to prove the charge of theft on the available evidence; and

(c) the learned magistrate erred in finding that the wheels of justice were maliciously set in motion by the appellant in respect of the criminal charge against the respondent.

[5] To begin with, the first claim is predicated on publication of defamatory material. The respondent, who was the plaintiff in the court *a quo*, alleges in his particulars of claim that, on 13th July 2001, the appellant (erstwhile defendant) addressed and published to the Permanent Secretary of the Ministry of Justice, a letter wherein she maliciously made defamatory allegations against him. The words complained of are as follows:

> "The staff members of Rehoboth Magistrate's Court are good and hardworking and disciplined workers, but they cannot uphold this image if they don't have a compent and co-operative administrative head. Mr Fischer is not competent to work with anybody.
>
> I can therefore not see how he can still supervise them. His behavior sometimes is definitely unethical and an embarrassment to the Ministry of Justice."

It is further alleged that the appellant's aforesaid statement is wrongful and defamatory of the respondent and was made with the intention to defame the respondent and injure his reputation; that the statement was understood by the addressee and intended by the appellant to mean that the respondent is incompetent, unethical and unworthy of his position, dishonest, and that his

behaviour is such as requiring serious steps to be taken against him, and that, as a consequence, the respondent was injured in his good name, reputation and *dignitas* and that he suffered damages in the amount of N$25 000-00.

[6] In her plea, the appellant denies that the report was made wrongfully or with intention to injure the plaintiff's reputation. Expounding on the denial, she states that:

(a) as head of the station, she was under a legal and moral duty to publish her findings after an enquiry and at the request of the addressee (of her report);

(b) the addressee, as Permanent Secretary, was under a legal and moral duty or had a legitimate interest to receive the report; and

(c) accordingly, the occasion of the publication of the report was a privileged one.

[7] An important element of defamation is publication of a defamatory matter. Neethling's *Law of Personality*, 2nd ed., declares as follws, at 131:

> "Since the good name, respect or regard that a person enjoys in the community concerns *the esteem in which he is held by others*, and defamation is aimed at the infringement of his good name, it is self-evident that the defamation can occur only if the defamatory statement or behavior is published or made known to a third party. Without such publication, the esteem in which that person is held by other cannot be diminished. Accordingly publication is a requirement for defamation."

> As publication is an important requirement for liability for defamation, the plaintiff must aver and prove expressly that publication of the alleged defamation indeed occurred (*Cramer Tothill* 1945 TPD 365), unless it is admitted.

[8] *In casu*, publication of the letter (also referred to in evidence as "report") to the Permanent Secretary of the Ministry of Justice was not denied by the appellant in the pleadings. However, publication to the addressee – as alleged by the respondent – was put in issue, at the commencement of the trial by the appellant's legal representative and the issue was fully canvassed during the course of the proceedings, although no formal application to amend the plea was made.

[9] It is not in dispute that, during the presentation of oral evidence at the trial, the respondent (then plaintiff) could not say whether the report aforesaid ever reached the addressee. For her part, the appellant testified that, after the Permanent Secretary had requested her in writing to investigate (written) complaints (by some members of staff at the station) against the respondent, she carried out investigations and subsequently compiled a confidential report which was typed by Ms Moller, a typist, under instructions of confidentiality. When the report was ready, the appellant put it on a file which was placed on her office table on 13th June 2001. The appellant then instructed the typist to erase the report from the computer so that no one else could have access to it. The original report remained in the file on the table until 21st June, 2001, as the appellant hoped that a solution to the problem might be found. However, the report disappeared from the file. In her testimony, she was assertive that she never dispatched the report to the addressee.

[10] In the judgment, the subject of this appeal, the trial magistrate disposed of the issue of publication as follows:

> "Now, the court has to deal with the issue of publication first before it can deal with the defense as raised by the Defendant.
>
> It is clear from the pleadings before court that the Defendant did not raise the defense that the document in question was not in fact published and that it never reached the addressee.
>
> The Legal Representative for the Defendant argued in favour of his client that this cannot constitute a fatal error to the defense case since it became clear from the testimonies of the parties that the letter never reached the PS. The Plaintiff said in his testimony that he did not know whether this letter reached the PS or not. The Defendant said it did not. The PS was not called to confirm either of these versions.
>
> The court order that as it is trite law that the parties will be bound by their pleadings the court is not inclined to deviate from this principle, especially in a material aspect such as the defense itself, by oral evidence.
>
> The Defendant will therefore be held by her plea in respect of the publication and the court accepts that there was publication even if the Plaintiff did not call the PS to testify about this."

For the avoidance of doubt, the letters PS are an acronym for the title "Permanent Secretary".

[11] Relying on South African authorities, such as *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 at 433; and *Middleton v Carr* 1949 (2) SA 374 (A) at 385-6, Mr Marcus, for the appellant, submitted that the court *a quo* should, in the circumstances, have determined the issue of publication, having regard to the facts which had emerged during the trial, namely, that there had been no publication to the Permanent Secretary.

[12] But Mr Obbes, representing the respondent, argued that the appellant's entire defence was premised on qualified privilege which, of its very nature, assumes publication, which had not been denied. He then drew attention to Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa* 9th ed., Vol. 11 at 19 – 12, where the following words appear:

> "… whatever is not denied and is not inconsistent with the plea is taken to be admitted, and while an admission stands on the pleadings the defendant cannot contend to the contrary."

He went on to submit that the appellant had not invoked Rule 19(11) of the Magistrates' Courts' Rule to amend the plea; and quoted from Jones and Buckle, supra, at 19 – 25 (see also footnote 5) as follows:

> "A defence must be pleaded as well as proved for the Court sits to try the issues raised by the pleadings. A defendant who has missed his true defence, or who has learned of it only from facts which appeared during the trial, must therefore raise the defence formally and have it placed on record. If no amendment is made to the pleadings, the defence will, as a general rule, not be adjudicated upon."

Also cited in aid of the respondent's contention was the case of *Courtney-Clarke v Bassingthwaighte* 1990 NR 89 (HC) at 103, where O'Linn J stated as follows:

> "… In any case, there is no precedent or principle allowing a Court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings in a case such as the present and giving judgment in favour of a plaintiff on a cause of action never pleaded."

Rounding off his submission in respect of the appellant's first ground of appeal, Mr Obbes stated that, in the present case, the question of publication had been alleged by the respondent and admitted by the appellant, but that, as regards whether publication had been made to the addressee, such was not common-cause between the parties, neither was it clear beyond doubt. He added that the consideration of the question of publication at the hearing of this appeal would undoubtedly cause unfairness to the respondent; and, that the respondent's rights in terms of Article 12 of the Namibian Constitution would be grossly infringed if the appellant were to be allowed to withdraw her admission.

[13] On a proper scrutiny of this matter, two questions impinging on publication arise. The first question is whether there was publication made to the Permanent Secretary of the Ministry of Justice? And the second one is whether publication was made to a third party? Unquestionably, much discourse has been centred around the first question. An explanation for this probably lies in the manner in which the respondent's pleadings in this respect were formulated, namely, that the focal point of publication was the Permanent Secretary in the Ministry of Justice. Although the appellant's pleadings admitted such publication, the factual evidence from both parties pointed in the opposite direction. As the appellant's legal representative raised the issue of such publication at an early stage of the proceedings, he should at that stage, or subsequently when the evidence of the parties seriously put into question whether such publication had in fact been made, have applied for an appropriate amendment of the appellant's plea, but this was not done.

[14] It is trite law that the Court may, at any stage before judgment, grant leave to amend any pleading or document on such terms as to costs or other matters as it deems fit. Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa*, 5th ed., dealing with the question as to when amendments can be made, states (among other things) as follows at 675–676:

> "An amendment may also be allowed on appeal where no prejudice would thereby be occasioned, for instance where the issues sought to be introduced by the amendment have been fully canvassed at the trial.
>
> Even where no amendments have been applied for, both trial courts and the Court of Appeal have adjudicated on issues not raised on the pleadings but fully canvassed at the trial. Thus, in *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) where the Appellant Division found a contract that had not been relied upon in the pleadings to have been established, Centlivres JA, after remarking that the position should have been regularised by an appropriate amendment, went on to say:
>
> > 'This court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial.'
>
> In *Middleton v Carr* Schreiner JA said:
>
> > '[W]here there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the Court. Generally speaking the issue in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleading in their original form an appropriate amendment should be sought.' "

[15] In this case, and regard being had to what will shortly be determined pertaining to the second aspect of publication, it is enough to say that, evidentially, the report did not reach the addressee.

[16] I now turn to the second question of publication. In this regard, Mr Obbes submitted that, in any event, from the appellant's own testimony, it appears that the report was published to Ms Moller (the typist). Not surprisingly, the response of Mr Marcus was not averse to the submission of Mr Obbes on the point. In accepting Mr Obbes' submission in this regard, Mr Marcus stated that although no publication to the Permanent Secretary had taken place, the appellant testified that she gave the letter to her secretary to type which, he submitted, was sufficient to meet the "publication requirement". He continued that publication of the letter took place, albeit on a different basis than that held by the court *a quo*. Mr Marcus added that, on the pleadings, the defamatory nature of the report had not been denied but that, in the appellant's plea, he had raised the defence of qualified privilege. It is thus common cause that publication occurred in relation to the appellant's typist.

[17] The question that must now be settled is whether the appellant can avail himself of the defence of qualified privilege which is relied upon in his plea.

[18] In determining whether the defence of qualified privilege (i.e that publication of a defamatory matter was done on a privileged occasion), Cameron J said in *O v O* 1995 (4) SA 482 (W) at 486B-C:

> "The law relating to qualified privilege as a defence to a claim for defamation is well settled. Innes CJ set it out in *Ehnike v Grunewald* 1921 AD 575 at 581:
>
> > 'The test to apply in a case of this kind is that of mutual interest or duty in the subject-matter of the communication. Where the person publishing the defamatory matter is under a legal, moral or social duty to do so or has a legitimate interest in so doing, and the person to whom it is published has a similar duty or interest to receive it, then the occasion of the publication would be privileged.' "

In a similar vein, O'Linn J said in *Marais v Haulyondjaba* 1993 NR 171 at 175D-F:

> "The only problem on the merits is whether, on the basis of the facts alleged by the plaintiff, the letter was not published by the defendant on a privileged occasion, i.e either communicated in the discharge of a duty or the exercise of a right, or the furtherance of a legitimate interest and communicated to somebody who has a corresponding right or duty or legitimate interest to receive the communication.
>
> If such qualified privilege is established or apparent from the proved facts, then the publication is lawful, notwithstanding that it is defamatory and/or injurious."

[19] In the matter under consideration, the appellant conducted investigations of complaints against the respondent and subsequently compiled the report in question at the behest of the Permanent Secretary of the Ministry of Justice. He pleaded the defence of qualified privilege as reflected in para [6], *supra*:

[20] On the facts of this case, I am persuaded that the appellant acted within the parameters of the test referred to in *O v O*, *supra*, and *Marais v Haulyondjaba*, *supra* and that the said Permanent Secretary was equally under a corresponding

legal duty and had a legitimate interest to receive the report which was the result of the enquiry that the Permanent Secretary had initiated. Indeed, the trial magistrate held that the defendant (i.e the appellant) "was under a legal duty to report to the PS about the complaints which were lodged against the Plaintiff by fellow staff members at the Rehoboth Magistrate's Court ..."

The court a quo proceeded to question whether certain (few) aspects of the report exceeded the borders of the defence of qualified privilege. The court then said:

> "Although the phrase: 'I can therefore not see how he can still supervise them. His behaviour sometimes is definitely unethical and an embarrassment to the Ministry of Justice' can be accepted to be within the borders provided for in respect of the defense raised, irrespective of the truth thereof, the court order that the last sentence of the last paragraph is outside these borders.
>
> The Court order that there was a legal duty upon the Defendant to inform the PS about the state of affairs at her station and that she also had the authority to make a suggestion as to how this problem could be solved.
>
> But to go as far as saying that *the Plaintiff was incompetent to work with ANYBODY* was farfetched and defamatory and was not germane to the occasion the court orders that this occasion was indeed abused by the Defendant.' "

(Emphasis is provided)

[21] The question that arises from the presiding magistrate's finding is whether, by the use of the words underscored, the privileged "occasion was indeed abused by the Defendant" and thereby exceeded the borders of the defence of qualified privilege? The Magistrate went on to elaborate that there could not be any legal duty upon the defendant to publish a statement saying that the plaintiff is

incompetent to work with anybody. This, the magistrate continued, goes to the root of any person's personality and character. It was added that, if "the plaintiff cannot work with some of the staff members of the Rehoboth Magistrate's Court, it cannot mean that he cannot work with anybody for that matter". It is apparent that the magistrate construed the expression that "the plaintiff cannot work with anybody" to mean, not only that the plaintiff could not work with anybody at the Rehoboth Magistrate's Court, but also with anybody at any other Magistrate's Court! On the contrary, it seems to me that the appellant was concerned with the members of staff with whom the respondent worked at the Rehoboth station, as opposed to members of staff elsewhere. In any event, I do not conceive that, in the context that she expressed herself and the circumstances surrounding the episode, she was actuated by malice. In the final analysis, I do not consider that the appellant abused her privileged occasion, or in any way exceeded her privileged occasion.

[22] The only outstanding claim to be considered is the second one, namely, the malicious prosecution claim. The scenario that gave rise to this claim was the disappearance from the appellant's office of her report addressed to the Permanent Secretary of the Ministry of Justice.

[23] The appellant testified that, on 21st June 2001, while she had gone to Nauchas Magistrate's Court to perform her official duties, she received a telephone report from Ms Moller, the typist, that her (the appellant's) office was in disarray; that Mr Fischer (the respondent) had apparently gone into her (the appellant's) office and removed the report addressed to the Permanent Secretary, Ministry of Justice, adding that she should immediately return to the station and attend to the matter. The appellant at once returned to Rehoboth Magistrate's

Court where Ms Moller confirmed her telephone report; however, the appellant was told that Mr Fischer had been seen going into her (the appellant's) office but that Ms Moller could not say what Mr Fischer had done (in the office). After further investigations, the appellant reported to the Namibian Police the crime of theft of the report. Consequently, the respondent was arrested for theft and detained behind a counter at the Police Station. Subsequently, the Prosecutor General declined to prosecute the respondent. According to the appellant's testimony, she confronted the respondent and asked him to please return the report to her but that he responded that he would not do so and that she could do what she wanted. The appellant thereafter reported the matter to the police.

[24] In its judgment, the court *a quo* held, inter alia, that:

> "It is common cause that the Plaintiff in fact made a copy of this document, this is not disputed."

It is apparent that the document referred to in the aforegoing excerpt relates to the report in question. The presiding magistrate's finding shows that the respondent had been, or must have been, in possession of the missing report.

[25] The appellant's defence was, as previously stated, that she was under a legal and moral duty; that she had a legitimate interest and that she acted in the public interest when she reported the matter to the police, based on affidavits of staff witnesses in connection with the disappearance of the report from her office desk; that the only person who could possibly have had any interest in the report was the defendant.

[26] In all the circumstances of this matter, I find that the appellant acted reasonably in reporting the disappearance of the report to the police as a case of theft; and that, in so doing, the appellant was not actuated by malice or any improper motive. Hence, the trial magistrate erred in finding that the respondent's second claim had been established; this equally applies (and for the reasons already given) to the finding in respect of the first claim.

[27] In the result, I make the following order:

1. the appeal is upheld and the order of the Court *a quo* is substituted for the following:

   "The claim is dismissed with costs."

_____

SILUNGWE AJ

I agree.

_____

DAMASEB JP

COUNSEL ON BEHALF OF THE APPELLANT:

Mr N Marcus

Instructed by: Government Attorney

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. Van Vuuren

Instructed by: Lentin, Botma & Van den Heever