REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)

Case No.: 22452/12

DATE:04/09/2013

In the matter between:

ISPARTA PLAINTIFF

and

RICHTER FIRST DEFENDANT

OOSTHUIZEN SECOND DEFENDANT

JUDGMENT

THE NATURE OF FACEBOOK

[1] The plaintiff, a senior manager employed by the South African Revenue Service, sued the defendants for defamation arising from the “posting" of certain comments on the First Defendant's "Facebook Wall”.[1]

1 Facebook has its own parlance. I shall in due course explain these terms

[2] There are several Social Networking Services (SNS) websites available on the Internet, of which Facebook is the most popular in South Africa Anneliese Roos has described the Facebook process in an informative article, Privacy in the Facebook Era: A South African Perspective[2]. Willis J referred liberally to this article in Herholdt V Wills[3]. In a footnote, Willis J described Facebook as follows:

“Facebook is a popular free, social-networking website on the internet which enables registered users to send messages to one another, upload photographs and videos, keep in touch with one another and send information about themselves (and others) to other registered users "

According to statistics accessed by Willis J on 17 January 2013, it has 900 million users worldwide, 23% of whom visit their Facebook page more than five times a day. In what follows, I have been guided by the article of Anneliese Roos and the judgment in Herholdt v Wills.

[3] The features of Facebook have been abundantly described by Roos and Willis J and there is no need to repeat them in detail. However, for the purposes of this judgment I shall briefly explain the features that have a bearing on the issues in this matter.

[4] The purpose of Facebook is to provide a platform which allows subscribers to build social networks in which the members of the network can interact with one another. Anyone with a valid e-mail address can join Facebook Members of Facebook subscribe by creating what is known as a “profile”. The user can choose what personal information to disclose, but since the purpose of Facebook is to make contact, or renew contacts and to create a social network, a user needs to give enough information to enable other users to find him or her and to decide whether she or he would like to join that user's network.

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2 (2012) 129 SALJ 375

3 2013 (2) SA 530 (GSJ)

Information that is typically supplied includes the user’s contact details, age, gender, relationship status, education, interests, tastes in music, books and much more. A user builds a social network by adding any other Facebook subscribers as “friends” or “contacts”.

[5] Users interact by “posting” private or public messages on their Facebook “walls”. Users can traverse to the sites of other users in their network of contacts and view messages on other users’ walls. They may react to messages posted by indicating whether they liked the posting or by posting a response Everyone who has been added as a contact by a user can view messages posted on that user's wall

[6] A user's profile is always visible to every Facebook user, but a user can control his or her “visibility’’ by choosing “privacy settings”. Items posted on the user’s wall are only accessible to persons within the scope of the user’s privacy setting. There are three privacy settings, “everyone”, “friends of friends” or “friends only”. The default setting is “everyone”. A “friend” is someone that the user has listed as a “contact".

[7] A user may “tag” another user to any postings placed on his or her wall. The name of the tagged user will then appear at the end of the user's message as “with ... (tagged user’s name)”. The message would also appear on the wall of the tagged person. The tagged person’s consent is not required, but he or she may remove his or her name from the message.

BACKGROUND

[8] The defendants closed their case without leading evidence In relating the salient facts, I only have the plaintiff’s version.

[9] The plaintiff and the second defendant were married to each other, but were divorced after acrimonious litigation. The plaintiff and the second defendant are still engaged in consequent litigation. The plaintiff obtained an order for the committal of the second defendant for contempt of court. She also obtained an interim interdict against him, with a return date in September 2013. The ongoing litigation concerns the second defendant's alleged failure to comply with a settlement agreement entered into between the plaintiff and the second defendant in their divorce proceedings.

[10] The plaintiff has remarried and the first and second defendants have married each other. The plaintiffs husband has a son aged 16, who lives with her and her husband. She also has two children from her marriage with the second defendant. They are a girl, P-A, then aged 6, and a boy, G, aged 4

[11] It is against this background that the issues must be decided THE FACTS

[12] On 13 April 2012 the first defendant posted several comments on her Facebook wall and in each case tagged the second defendant. The plaintiff claims that two of them are defamatory. I shall, however, quote all the postings in order to place them in context.

[13] The first one, which the plaintiff alleges is defamatory, was posted on 13 April 2012 at 13:06: "Liewe L [The plaintiffs first name is Louise]
Gelukkig weet ek jy kry die boodskap aangesien jy my facebook met valk oe dophou (en jy weet di skoen paa!) . en aangesien ek niks het om weg te steek nie moet jy dit tog gemet mteendeel eks bly dat jy my doen en late so interessant vind..maar voor jy weer

aantuigings maak oor dinge waarvan jy duidelik absoluut niks weet ni stel ek voor jy kry jou feite agter mekaar want die keer het jy op- geeindig met n bloedrooi gesig!! - with P O."

Three people reacted by stating that they "liked it". One text response was posted:

"R N LOLM' Goed gese! :)"

A certain J V commented on this post at 13:37 stating:

"Ai, wat he ons gemis. julle moet bietjie kom draai en die nuus deel ons lewers lets gemis hehehe"

The first defendant replied at 13:42:

"Ons sal moet kom kuier voor ons so besig raak met ons populere leefstyl dat ons julle sal moet boek en geld vra ..lol...

Jy weet net m hoeveel presies julle gemis het nie."

[14] Thereafter, at 14:37, the first defendant posted a personal message. In the context of all the messages, this can only have been addressed to her husband, the second defendant. It is as follows:

"Engel ons is soos celebrities, whoohooo.. ons lewens word dopgehou en dan word di vreemste aantuigings daarvan gemaak...hehehe een van di dae is ons in die koerant ook dalk selfs in die ppl magazine... dan word ons tweets ook gepost...lol Lief jou my skat dankie datjy soveel opwinding in my lewe bring., xxx

Ons sal dalk n press release moet doen waar ons onder eed die feite stei mmmh watse skoene sal ek daarvoor aan trek saam watse rokkie??11 Hehehehe:-P"

Read in the context of the first posting, the second defendant seems to ridicule the plaintiff's alleged interest in her private life. As I have said, she did not testify to explain why she found it necessary to deride the plaintiff in a public forum However, certain newspaper reports were published regarding a court order that the first plaintiff had

obtained against the second defendant, interdicting him from coming within 100m of the plaintiff's home. The names of the parties had been omitted in the reports. The first defendant's sarcastic conceit about her and the second defendant's celebrity status probably stems from these reports.

[15] At 15:00. first defendant posted the following:

"Adele gaan jy kom help g en p-a se kamers kom oordoen?"' Ek het die moosite goed bestel. wat nou uiteindelik gekom het!!"

It has not been disclosed who this "Adele" is, probably a personal friend of the first defendant. The relevance of this posting is that it identifies the plaintiffs two children by name.

[16] At 16:38, the first defendant posted the second comment which is alleged to be defamatory:

"Aan alle mammas en pappas...wat dink julle van mense wat stief tiener boeties toelaat om klein sus- sies (6) te bad elke aand . net omdat dit di ma se lewe vergerieflik??? - witn P O"

The following comments were posted in response:

"L-M C Not a chance"

"C Polite Oh hell nee sal dit nooit toelaat me"

[17] The context of the last posting by the second defendant is the following:

After the divorce of the plaintiff and the second defendant, the second defendant worked abroad. The plaintiff said that she wanted to keep the second defendant involved with their children and from time-to-time sent him photographs, informed him of their development and shared poignant moments in their lives with him She submitted a transcript of an electronic chat between her and the second defendant. It started as an amiable discussion

in which the plaintiff told the second defendant how cute the children were and shared little anecdotes with him. The second defendant seemed depressed and said that it was not going “great", but that he would send an e-mail. She forwarded three photographs to him of the children in the bath One photograph shows a white board standing on a clothes basket with simple addition sums in a red marker pen, and the plaintiff’s stepson demonstrating something. Another shows the plaintiffs stepson in the bathroom, apparently being pelted by one of the children with a wet sponge. The plaintiff said to the second defendant regarding the photographs, “Die pampoene (apparently a pet name for the children) het n wiskun- deles in die bad gekry”. This is obviously a jovial domestic moment Only a depraved mind can see impropriety therein. The plaintiff believes that these photographs inspired the first defendant to post the second comment.

THE ISSUES

[13] Counsel for the defendants admitted on their behalf that the comments had been posted on the first defendant’s Facebook wall and that the second defendant had been tagged to the comments.

[14] The plaintiff alleges in her particulars of claim that both the comments, quoted in paragraphs [13] and [16], are defamatory of her. The first one she claims, is disparaging and belittles her. She claims that the second one is malicious and aimed at damaging her reputation by implying that the plaintiff allows inappropriate interaction between her teenaged stepson and her minor daughter and that she is a bad mother.

Do the comments refer to the plaintiff?

[20] A plaintiff in a defamation action must prove that the impugned statements are directed at him or her. If a plaintiff is not directly referred to in the defamatory statement,

the plaintiff must plead the circumstances which would have identified him or her to the addressees.[4] Counsel for the defendants made much of the fact that the plaintiff had not pleaded any such circumstances.

[21] It was put to the plaintiff in cross-examination that the first defendant has three persons by the name of L on her network and that a reasonable reader would not associate the comment with her. The plaintiff replied that she had no knowledge of persons on the second defendant's network that shared her first name, but conceded that it was possible. She testified, however, that many of the persons on the first and second defendants' networks know her and are aware of the issues between her and the second defendant. They would have no difficulty inferring that the comment was addressed to her. She testified that in any event, three people had posted comments, which indicates that they knew to whom the first defendant referred. Had they not known that, they would not have responded, as it would have been meaningless to them.

[22] The second comment does not refer to the plaintiff by name

[23] The test to determine whether defamatory material refers to the plaintiff where the plaintiff is not directly named was set out as follows by Viscount Simon LC in Knupffer v London Express Newspapers Ltd[5]

"There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law - can the article, having regard to its language be regarded as capable of referring to the appellant? The second question is a

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4 *Argus Printing & Publishing Co Ltd v Weichardt* 1940 CPD 453 *Visse v Wallachs' Printing & Publishing* 1946 TPD 441 *Amler s Precedents of Pleadings,* 7th Ed by Harms at 162

5 [1944] 1 All ER 495 (HL) at 497. This two-staged test has found favour in our courts See *Aymac CC v Widgerow* 2009 (6) SA 433 at 445

question of fact namely does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him"? Unless the first question can be answered in favour of the appellant, the second question does not arise ..."

The two questions involved in this case are therefore: (a) can the words be regarded as capable of referring to the plaintiff? and (b) did the words in fact lead reasonable readers who know the plaintiff to the conclusion that they do refer to her? [23] This test found favour with our courts. However, Gautchi AJ in Aymac CC v Widgerow[6] said that separating the questions of law and fact is artificial in the context of a trial. He said:

“The distinction is only relevant in the case of an exception, or where the functions of deciding matters of law and fact are divided, as between judge and jury. On exception there is by definition no evidence. and the court will have before it the alleged defamatory statement, together with whatever special circumstances are pleaded in regard thereto. The court will assume the correctness of the special circumstances pleaded and answer the question, as a legal one, whether the statement is capable of referring to the plaintiff If the court is to apply the two-stage enquiry in a trial it must be astute to ignore the evidence when answering the first question."

He said that it would be more logical, in a trial, to formulate the question as a single one, as was done by three of the other Lords in the Knupffer case, e g as formulated by Lord Atkin:

“The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the plaintiff."

In my view the logic of this approach is unassailable.

[24] The words of the first comment directly refer to the plaintiff and they in fact lead reasonable readers to know that they referred to her. Two of the plaintiffs personal friends

6 2009 (6) SA 433 (WLD) at 446J

(as distinguished from Facebook friends) testified that they knew immediately that the comments referred to the plaintiff. Ms M d K testified that she knew about the litigation between the plaintiff and the second defendant and understood that the first comment was an attack on the plaintiff. She saw the first comment on 16 April 2012 on the second defendant's Facebook wall. She immediately copied it onto her Blackberry cell phone device and forwarded it to the plaintiff.

[25] I find therefore that the first posting refers directly to the plaintiff, even though there might be more than one L. In the circle of friends and acquaintances of the plaintiff and the defendants, everyone knew which L was being addressed. They did not need a surname to identify the plaintiff.

[26] The second comment does not refer to the plaintiff by name, and in isolation, it cannot be said that it refers to her. However, it forms part of an exchange of messages posted on the defendants' walls within a period of a few hours. It is abundantly clear that they are all part of an attack on the plaintiff. Several persons reacted to the postings. As in the case of the first posting, they could not have reacted had they not known to whom it refers because the posting would have been meaningless to them. Ms Angela Heyns, another close friend of the plaintiff, testified that she saw the second comment on the second defendant's Facebook wall and knew that it referred to the plaintiff, firstly because she was aware of the ongoing litigation between the plaintiff and the second defendant, and secondly because the names of the plaintiff's children were mentioned in the posting at 15:00 on 13 April 2012.[7] She did not immediately inform the plaintiff of the posting because she thought there were suggestions of a sex scandal that might be a sensitive issue in which she should not get involved. She contacted the plaintiff only after she had discussed

7 Paragraph [15] above

it with her husband.

[27] Counsel for the defendants argued that, in establishing whether the postings referred to the plaintiff, the court should interpret each posting individually without having regard to the other postings. He referred to Geyser en n Ander v Pont[8] and quoted from the headnote where the following appears:

"... in order to adjudge whether the articles were defamatory and to what extent they referred to the plaintiffs each article had to be dealt with separately."

That part of the headnote is quoted out of context. What appears in the judgment is the following:

"Die gewraakte Kromeke strek oor 'n tydperk van n jaar; die deursnee leser sou ledereen elke maand gedurende daardie tydperk as 'n afsonderlike stuk gelees het, en me die heie reeks soos n boek op een slag me Derhalwe, na my mening, om te oordeel of en hoe hulle lasterlik is en of en tot watter mate hulle na die eiseres verwys, moet elke artikel afsonderlik behandel word

Maar natuurlik beteken dit nie dat die vorige artikels me vir die uitleg van die latere gebruik kan word nie; as iets uit die vorige artikels deur die deursnee leser tydens die lees van latere artikels waarskyn- lik onthou sou word, kan dit vir die uitlegging van laasgenoemde inaggeneem word "

[28] The court held that previous articles may be used for the interpretation of the various articles. In any event, this was a finding on the particular facts of that case. The facts in this case are completely different. The postings followed each other within a period of a few hours. The reasonable Facebook member would have understood that all the postings related to the issues between the plaintiff and the defendants.

8 1968 (4) SA 67 (W)

[29] The plaintiff's two personal friends knew that it referred to her, and other contacts on the defendants' network also knew. I find therefore that whether one adopts the two-stage enquiry set out by Viscount Simon LC in Kupffer on the one hand, or the approach suggested Lord Atkin in Kupffer and Gautchi AJ in Aymac CC v Widge- row on the other hand, the second posting unambiguously refers to the plaintiff.

The second posting is in the form of a question

[30] I must dispose of a further submission made by counsel for the defendants, viz. that the second posting is in the form a question and that a question cannot constitute defamation. It is so that the posting is grammatically in the form a question and it ends with four question marks. However, implicit in the question is a statement. The statement is that the plaintiff allows her teenaged stepson to bathe her 6-year-old daughter every evening because it is convenient to her. The question is not whether the plaintiff allows it, but what the "mammas en pappas" think about it

[31] There is therefore no merit in this submission.

Are the comments individually or individually and collectively, defamatory'?

[32] The first comment is to the effect that the plaintiff is meddlesome and interfering. It is a personal message addressed to the plaintiff. If the first defendant had an issue with the plaintiff, she could have addressed it with her personally However, she chose to publish it on Facebook where all her friends and friends of the plaintiff would read it. Although the first message does not constitute serious defamation, publication thereof on her Facebook wall was gratuitous and with the intention to place the plaintiff in a bad light.

[33] The second impugned posting is scandalous to the extreme It suggests that the plaintiff encourages and tolerates sexual deviation, even paedophilia Some of the defendants' friends lapped it up with relish and added their own snide comments, compounding the damage to the plaintiff's reputation.

[34] I therefore find that both statements are defamatory, individually and collectively.

THE SECOND DEFENDANT

[35] The second defendant is not the author of the postings. However, he knew about them and allowed his name to be coupled with that of the first defendant He is as liable as the first defendant.

DAMAGES

[36] For the purposes of awarding damages, I shall consider the combined effect of the comments on the reputation of the plaintiff.

[37] Nugent JA said in Tsedu and Others v Lekota and Another[9] that monetary compensation for harm of this nature is not capable of being determined by any empirical measure. Awards made in other cases might provide a measure of guidance but only in a generalised form. He did not find it helpful to recite other awards

[38] Mindful of the caution by Nugent JA, I nevertheless sought guidance from previous awards.

[39] Harms JA pointed out in Mogale and Others v Seima[10] that awards in defamation

9 2009 (4) SA 372 (SCA) at [25]
10 2008 (5) SA 637 (SCA) at paras [9] to [12] and [18]

cases do not serve a punitive function and are, generally, not generous. In Mthimunye ve RCP Media and Anotheru [11] R35 000 was awarded to a Municipal Manager about whom a report was published in City Press about alleged sexual harassment of a secretary in his office. City Press had apologised, but Du Plessis J found that the apology had been insufficient. This is the most recent comparable decision that I could find. The facts in Mthimunye can be distinguished in mainly two respects: (a) the plaintiff was a public figure, and (b) the respondent had published an apology.

[40] An apology in the same medium (Facebook) would have gone a long way towards mitigating the plaintiff's damages. In fact, there is much to be said for the proposition that orders for damages for defamation are inappropriate. Nugent JA, in a minority judgment in Media 24 v Taxi Securitisation[12] referred to a 1995 report of the New South Wales Law Commission, referred to by Willis J in Mineworkers Investment Co (Pty) Ltd v Modibaneu[13] which called damages as the sole remedy for defamation "remedially crude". Nugent JA said in para [72]: "As it is. an order that damages are payable implicitly declares that the plaintiff was unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a precondition for having the declaration."
An apology to the plaintiff, or a retraction in writing, in the same forum that the offending statements had been made, also clears the name of the plaintiff

[41] The defendants have not apologised and continued to hold their view, as expressed by the first defendant in an e-mail response to the plaintiffs attorney, that they had been entitled to publish about anybody whatever they liked. The e-mail is as follows:
"Trish. ..facebook is oop vir almal en almal se opimes...nerens is lets op jou klient se wall

11 2012 (1) SA 199 (GNP)
12 2011 (5) SA 329. paras [71] and [72]
13 2001 (6) SA512 para 26

gepost of enige een se identiteit geopenbaar i ... so weereens soos ek in post gese het as die skoen pas trek dit aan..."

Instead of an apology, the defendants raised specious technical defences

[41] Crude as damages for defamation may be, our courts have consistently awarded damages to the victims of defamation, albeit in modest amounts Since the defendants did not apologise or retract their defamatory comments, I believe that an amount of R40 000 is appropriate in the circumstances.

In the result I make the following order:

1. Judgment is granted in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved, in the sum of R40 000.

2. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiff’s costs on the appropriate magistrates court scale, but including the costs of counsel.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date heard: 20 August 2013

Date of judgment: 30 August 2013

Counsel for the plaintiff: Adv. K. Fitzroy

Attorney for the plaintiff: Macrobert Inc, ref. T Da Pre le Roux

Counsel for the defendants: Adv. R. Schoeman

Attorney for the defendants: Van der Hoff