THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no:121/2016

Not reportable

In the matter between:

JACQUES SMALLE	**FIRST APPELLANT**
HEIDI LEE SMITH	**SECOND APPELLANT**

and

SOUTHERN PALACE INVESTMENTS 440 (PTY) LIMITED	**FIRST RESPONDENT**
SOREN BURKAL NIELSEN	**SECOND RESPONDENT**

Neutral Citation: *Smalle v Southern Palace Investments 440 (Pty) Ltd* (121/2016) [2016] ZASCA 189 (1 December 2016)

Coram:	Leach, Tshiqi, Pillay and Mathopo JJA and Nicholls AJA
Heard:	16 November 2016
Delivered	1 December 2016

Summary: Defamation: action for damages for defamation based on innuendos: whether statements made in media release and newspaper article were defamatory of the respondents: respondents failed to plead special circumstances: unable to rely on secondary meaning: respondents failed to prove defamatory meaning: court a quo misdirected: appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel
2. The order of the court a quo is set aside and substituted with the following:

'The plaintiffs' claims are dismissed with costs'

JUDGMENT

Nicholls AJA (Leach, Tshiqi, Pillay and Mathopo JJA concurring):

[1] The issue in this appeal is whether statements contained in a media release and a newspaper article, issued and published by the appellants, were defamatory of the respondents. The statements highlighted the possible abuse of water, one of most valued and scarce national resources. The appeal has its origin in a defamation action instituted by the respondents against the appellants in the Gauteng Division of the High Court, Pretoria

[2] The first appellant is Jacques Smalle (Smalle), the provincial leader of the Democratic Alliance (DA) in Limpopo at the time, who issued the press release. The second appellant is Heidi Lee Smith (Smith), the proprietor, editor and publisher of a local Limpopo newspaper, Kruger2Canyon Newspaper (K2C), in which Smalle's press statement was published. The first respondent is Southern Palace Investments 440 (Pty) Limited (SPI), a shelf company at the heart of the alleged water scandal. The second respondent is Soren Burkal Nielsen (Nielsen), a director of SPI and the developer of the Blyde Wildlife Estate, a luxury golf estate in the area.

[3] The media release, issued by Smalle on behalf of the DA on 24 May 2013, reads as follows:

'It has been discovered that Southern Palace 440, contracted by the Lepelle Northern Water Board (LPW) to render water services, is allegedly hawking water to Hoedspruit farmers at grossly escalated prices.

It is alleged that Southern Palace 440 director, Soren Nielsen from Denmark, entered into a bulk water supply agreement with the water board on 22 May 2012. On that agreement, the board agreed that the company be permitted to sell 10 million cubic metres a year of its water for 30 years out of the Blyde River Dam.

According to the reports, Southern Palace is not a water service provider and the tender process was not followed. Farmers in that area need additional water in order to expand their farms, create jobs and secure their livelihoods.

Southern Palace was also planning to farm 1172 Ha with irrigation farming but they are in a stalemate resulting from Southern Palace waiting for a clear decision from the Department of Water Affairs.

We must applaud the Blue Scorpions with their quick investigation into this saga and we are expecting to see the law take its course. We also expect the Cooperative Governance MEC to investigate how a water board could illegally sub-contracted services illegally to a third party when it should have been providing this service to the public themselves.

Our concern is that in a province where water is scarce the price of corruption to communities needing this basic service is very high. Corrupt contractors and authorities who don't respect the value of water end up causing unnecessary hardship for families and loss of income for businesses.

The DA calls for decisive action to be taken against both the LNW and Southern Palace.'

[4] On 31 May 2013 K2C published the press release, almost verbatim (but edited to correct all patent spelling and grammar mistakes) under the heading 'Estate developer allegedly involved in water corruption'. The only additional information included was that Soren Nielsen is the developer of Blyde Wildlife Estate.

[5] Nielsen, obviously aggrieved by the statements, issued summons out of the court a quo on 3 October 2013, setting out three separate claims for defamation. The first claim is by SPI against Smalle in respect of the press release. The second and third claims are by SPI and Nielsen, respectively, against Smith in respect of the newspaper article. The appellants admit the issuing of the media statement and the publishing thereof in the print media and the internet. The defence put up is that the statements are not defamatory of the SPI and Nielsen, particularly in light of the manner in which the defamation was pleaded. To the extent that they are defamatory, a justification of truth for the public benefit and fair comment based on facts which are substantially true, was pleaded. After finding that the statements were defamatory per se, the court awarded an amount of R40 000 in respect of each claim. This appeal is with the leave of the court a quo.

Background

[6] The statements have their origin in a bulk water supply agreement concluded between SPI and the Lepelle Northern Water Board (LNW) on 22 May 2012. In terms thereof LNW was to supply SPI with 13.6 million cubic metres of water over a 30 year period. The contract arose, not by way of a tender process, but through negotiations between SPI and the Premier of Limpopo Province together with a certain Mr Matukane of the Department of Water Affairs (DWA): Limpopo. From the correspondence in the record it appears that DWA was informed by Nielsen that the water would be used for setting up a greenfield agricultural project resulting in the creation of jobs in the area.

[7] Many anomalies are immediately evident. The involvement of the DWA: Limpopo was in itself unusual as the water was to be drawn from the Blyde River dam, some 80 kilometres away in Mpumalanga, and conveyed by pipeline to Limpopo. The Blyde River dam did not fall under the jurisdiction of DWA: Limpopo but fell under DWA: Mpumalanga with whom the Hoedspruit farmers had always dealt. LNW is one of the water boards established throughout the country in terms of the Water Services Act 108 of 1997 and generally did not contract with individual farmers. Its primary function in terms of the Act is ‘to provide water services to other

water services institutions within its service area'.[1] It supplies water to municipalities for domestic and industrial use, not to individual farmers for irrigation purposes.[2] Significantly, LNW holds a water provider's licence and not a water user's licence. There are no circumstances in which its licence could permit the direct sale of water to SPI. DWA is the only licensing authority for users of agricultural water under the National Water Act 36 of 1998 and would have been the appropriate body from which SPI could have obtained a licence. Nevertheless, although the chief director DWA: Limpopo wrote to Nielsen on 13 October 2011 advising that SPI were obliged to apply for a water use licence in the normal course, there was an about-turn when Mr Matukane of DWA advised SPI less than a year later on 14 August 2012 that 'the water use licence held by LNW is broad enough to include any farming and no further licences need to be obtained from DWA'.

[8] To compound the problem the agreement is a standard contract used by LNW when contracting with service providers, not users of water. It deals with, inter alia, key performance areas, water quality, the reading, testing and maintenance of metres and other various other clauses clearly applicable to municipalities and not to the provision of irrigation water for agricultural purposes. It is recorded that SPI warrants that it shall use the water strictly for the purpose for which it is sought in the terms of the contract but no such purpose is defined. The agreement further provides that SPI may not 'assign, transfer, cede or delegate any of its rights and obligations in terms of this contract without the prior written consent of LNW'.

[9] Clause 30.1 of the water supply agreement makes each party responsible for complying with applicable legislation, including, but not limited to 'applying for the necessary approvals, consents, licences or permits, where required.' Nielsen testified that he read this with clause 30.2 which provides: 'The Water Board guarantees that on the effective date all permits, licences, exemptions, permissions and approvals that may have been required in terms of legislation in respect of providing bulk water supply services were obtained in the required manner.' From this he understood that LPW had obtained the necessary licence to provide SPI with water, which absolved it of having to obtain its own water licence. Under cross

[1] Water Services Act 108 of 1997 section 29.
[2] Water Services Act 108 of 1997 s 30 (2) (d).

examination he eventually conceded that SPI could not be absolved from having to obtain a water user's licence.

[10] Apart from the anomalies in the agreement itself, it became apparent that the water was not intended for use in a greenfield agricultural development as originally proposed. It appears that Nielsen's claim to make 1500 unemployed people breadwinners, was entirely false. Instead Nielsen created several elaborate and profitable schemes, which included the selling of water to farmers in an area where irrigation water was at a premium. While for present purposes it is unnecessary to go into any detail, it is instructive to describe some of Nielsen's dubious dealings.

[11] Two days after the conclusion of the bulk water supply agreement with LNW, Nielsen presented it to a valuator who proceeded to value the farm, Liverpool, at R30 million. Liverpool was owned by Scarlet Ibis Investments 203 (Pty) Ltd (Scarlet Ibis), an entity wholly owned by Nielsen, and had been bought for R11.77 million in March 2011. On 5 October 2012 Liverpool was bought from Nielsen by the Department of Rural Development and Land Reform for the Moletele community pursuant to a land claim. Nielsen was eventually paid R21 million from government coffers. Despite there being no specific mention of the water allocation in the agreement of sale, this transaction garnered a profit of R10 million for Nielsen, at taxpayer's expense, in less than 18 months.

[12] Nielsen then attempted to lease back Liverpool and its water allocation at R25 000 per month. In terms of the draft lease Scarlet Ibis would lease back the farm including the water allocation. The rights under the lease would then be passed to another Nielsen entity, Biz Africa 1661 (Pty) Ltd to farm 1177.2695 hectares. Various versions were proffered but what is clear is that there was no intention that SPI would utilise the water for agricultural purposes. It was nothing more than a shelf company.

[13] Another proposal involved SPI selling shares to farmers who would be given a portion of SPI's water allocation proportionate to their shareholding. One such entity was BJ Vorster (Pty) Ltd trading as BJ Blyde. It was proposed that SPI would sell BJ Blyde between 25 percent and 73 percent of its ordinary shares. This would entitle

BJ Blyde to between 2.15 million cubic metres water per annum (25 percent of SPI's allocation) at a price of R2.15 million up to 8.6 million cubic metres of water per annum (73 percent of SPI's allocation) at a price of R10 million. In addition to this payment, BJ Blyde would also be liable for all the charges levied by LNW to SPI for the water used in terms of the bulk supply agreement. As a result all the costs of the water would be covered by BJ Blyde and any moneys paid would constitute a net profit for SPI.

[14] It is difficult to imagine how SPI's water rights would be made available to BJ Bylde, a shareholder in SPI. Nielsen seemed to believe that shareholders, by purchasing shares in SPI, would, by virtue of their shareholding, acquire the right of a portion of the water allocated to SPI. Although conceding that the scheme envisaged granting shareholders water rights proportionate to their shareholding, Nielsen denied that this amounted to selling water.

[15] When the BJ Blyde deal fell through, for reasons that are not apparent from the record, Nielsen saw 'every single farmer in Hoedspruit [as] a potential investor.' Offers to buy water at inflated prices were sent by sms to farmers in the area. No mention was made of buying shares in the text of the sms, but Nielsen said that this was generally understood to be the case by the farmers.

The Pleadings

[16] It is against this background that the court a quo held the appellants liable for defamation on the grounds that the media release and newspaper article 'would be considered by the reasonable person of ordinary intelligence and development as defamatory…' of the respondents. The court a quo made the following findings:

- 'that it has been discovered that SPI had been contracted by the Lepelle Northern Water Board (LNW) to render water services and that SPI was hawking water to Hoedspruit farmers at grossly exaggerated prices. This implies that SPI, in contravention of its contract with LNW, was not rendering water services but was illegally selling the water, and then at grossly escalated prices, which in turn implies fraud.
- that Nielsen is a director of SPI and has entered into a bulk water supply agreement with LNW in terms whereof SPI was permitted to sell a vast amount of water for a

period of 30 years out of the Blyde River Dam, but that, according to reports (which are not disclosed) SPI was not a water service provider and a tender process was not followed. These allegations suggest some corrupt collision between LPW and SPI as represented by Nielsen.

- that the saga was being investigated by the Blue Scorpions, which implies some implies some criminal conduct on the part of the plaintiffs and LNW.
- that corrupt contractors and and authorities who don't respect the value of water end up causing unnecessary hardship for families and loss of income for businesses. In the context of the manner in which the press release and the newspaper article was complied, the reference to corrupt contractors must include a reference to at least SPI.
- The newspaper article, in addition bears the heading 'Estate developer allegedly involved in water corruption.'

[17] Having regard to the manner in which the defamation was pleaded, it is difficult to reconcile these findings. Claim one was pleaded as an innuendo in which Smalle made public the following facts concerning the SPI:

'(i) The Democratic Alliance discovered that the First Plaintiff was contracted by the Lepelle Northern Water Board to render water services;

(ii) The First Plaintiff was allegedly hawking water to Hoedspruit farmers at grossly escalated prices;

(iii) The Second Plaintiff was the developer of Blyde Wildlife Estate;

(iv) The First Plaintiff was not a water service provider and that the tender process was not followed;

(v) The Water Board agreed that the First Plaintiff be permitted to sell 10 million cubic litres a year of its water for 30 years out of the Blyde River Dam;

(vi) The Blue Scorpions were investigating the "saga" and that the Democratic Alliance expected to see the law take its course;

(vii) The Cooperative Government MEC should investigate how a water board could illegally have sub-contracted services to the First Plaintiff; and

(viii) Corrupt contractors and authorities that do not respect the value of water end up causing unnecessary hardship for families as well as loss of income for business.'

[18] It is alleged that these innuendos were wrongful and defamatory of SPI in that the statements imputed, alternatively intended to impute, and were understood to mean that SPI was:

‘(i) was a questionable organisation intent of abusing local farmers by hawking water at grossly escalated prices;
(ii) an unethical organisation which was involved in questionable business practices;
(iii) was involved in corrupt activities with the local water board;
(iv) was under investigation by law enforcement agencies in respect of the unlawful sub-contracting of services;
(v) was under investigation by law enforcement agencies for failing to abide by tender procedures;
(vi) in this instance acted in a corrupt manner causing unnecessary hardship for families as well as loss of income for business;
(vii) …is a generally corrupt organisation, intent on corrupting other businesses for its own gain; and
(viii) flouted tender procedures at will and who unlawfully took commercial advantage of farmers in the area who were in need of additional water to expand their farms and create jobs.’

[19] The averments in respect of claim two which dealt with the article published in K2C news under the heading ‘Estate developer allegedly involved in water corruption’, are identical to those in claim one with one exception. In claim two, instead of directly pleading an innuendo, it was alleged that all the meanings attributed to the press release in claim one were defamatory of SPI on the basis that this was what they were intended to mean, and were understood to mean by readers.

[20] Claim three deals with the newspaper article which it was said made the following statements of Nielsen, that:
‘(i) The director of the First Plaintiff, Soren Burkal Nielsen, entered into a bulk water supply agreement with the water board on May 22 2012;
(ii) Soren Burkal Nielsen (the Second Plaintiff) is also the developer of the Blyde Wildlife Estate;
(iii) He is allegedly involved in water corruption; and
(iv) Corrupt contractors and authorities that do not respect the value of water end up causing unnecessary hardship for families as well as loss of income for business.’

[21] As in claim two, these statements were said to have intended to mean, and were understood to mean by readers that Nielsen:

'(i) is a questionable developer;
(ii) is an unethical person who is involved in questionable business practices;
(iii) is involved in corrupt activities with the local water board;
(iv) is under investigation by law enforcement agencies in respect of the unlawful sub-contracting of services;
(ix) is under investigation by law enforcement agencies for failing to abide by tender procedures; and
(x) in this instance acted in a corrupt manner causing unnecessary hardship for families as well as loss of income for business.'

[22] Although not directly pleaded as such, claims two and three also rely upon innuendo. It is pleaded that the contents of the article were intended to mean and understood by readers to have very specific meanings which are set out in detail. The meanings contended for in the pleadings were not supported by the witness called by the respondent. Jacobus Malan (Malan) is a game farmer in the Hoedspruit area and chairperson of the body corporate in Nielsen's development, the Blyde Wildlife Estate who testified as to how people reading the article might have understood it. The admissibility of his evidence may be somewhat questionable but nothing turns on this for the purposes of this judgement. As no special circumstances justifying an innuendo were pleaded, as set out hereunder, his views are irrelevant.

Are the statements defamatory?

[23] In order to succeed in a claim for defamation SPI and Nielsen must prove the defamatory matter was published of and concerning themselves and refers to them personally. It is only once this is established that defences which rebut unlawfulness or intention come into play. A statement is defamatory if, on an ordinary reading by a reasonable person, it has the effect of injuring a person's reputation. Statements can have a primary and a secondary meaning.[3] The primary meaning is the ordinary meaning and the test is an objective one, requiring no evidence. A two stage inquiry is required to establish whether a primary statement is defamatory. The first is whether the words are reasonably capable of referring to the plaintiff and the second

[3] *Le Roux & others* v *Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 CC para 87; *Argus Printing & Publishing CO* 1994 (2) SA 1 at 20E-J.

is whether the reasonable person would regard the words as referring to the plaintiff.[4]

[24] The secondary meaning of a statement is an innuendo which implies knowledge of facts, other than those contained in the statements, that render the statement defamatory. In the case of an innuendo, the ordinary or primary meaning of the statement is not defamatory in the absence of knowledge of the particular circumstances. For example to visit a certain address would not be defamatory unless the reader specifically knew it to be a house of ill-repute. In order to rely on an innuendo, a plaintiff must plead the special circumstances from which the meaning was derived. It is not open to a plaintiff to rely on meanings that were never pleaded.[5]

[25] As stated by Coleman J in *Hassen v Post Newspaper (Pty) Ltd & others*[6] and cited with approval in this court in *Molotlegi & another v Mokwalase*[7] *para 15:*

'When a secondary meaning is relied upon, evidence is necessary because the plaintiff must prove the special circumstances by reason whereof the published matter would, to those aware of the special circumstances, bear the secondary meaning relied upon. The plaintiff must prove, further, upon a balance of probabilities, that there were persons, among those to whom the publication was made, who were aware of the special circumstances, and to whom, it can therefore be inferred, the publication is likely to have convey the imputation relied upon.'

[26] No secondary or unusual defamatory meaning is attributed to the statements in these pleadings; no special knowledge of particular circumstances that render the statements defamatory was pleaded. In the light of the manner in which the innuendos were pleaded counsel for the respondents was constrained to disavow any reliance on innuendos. Instead he argued that the statements are defamatory per se. This is not an option open to the respondents but even on this score, they must fail.

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[4] *A Nuemann CC v Beauty Without Cruelty International CC* 1986 (4) SA 675 (C) at 680 C-D; *Le Roux* v *Dey* para 89.
[5] *Le Roux* supra para 87.
[6] 1965 (3) SA 562 at 566G-H.
[7] [2010] 4 All SA 258 (SCA).

[27] A cursory reading of the article will immediately alert the reader that the statements are merely allegations. The press article is headed 'Estate developer *allegedly* involved in water corruption*'* (my emphasis). The very first paragraph states that SPI is 'allegedly' hawking water at grossly escalated prices. In the second and third paragraphs it is stated that SPI 'allegedly' entered into a bulk water supply agreement with LNW in circumstances where 'it appears' that SPI is not a service provider and did not follow a tender process. This court in *Council for Medical Schemes & another v Selfmed & another*[8] found that the use of the word 'ostensibly' in a statement was significant in that it implied that the facts under consideration were apparently true, but not necessarily so. The court, in dismissing a claim for defamation, held that the impugned statements, read in context, would not have led the reasonable reader to the conclusion that it was dealing with an assertion of fact but merely an issue that was still under investigation.

[28] Insofar as reference is made to an investigation by the Blue Scorpions and a call made on the MEC to investigate the contract, it is now settled law[9] that the reasonable reader is well able to discern between being investigated for a crime and having committed a crime, (which may be per se defamatory). Investigation for criminal conduct or even suspicion of criminal conduct does not amount to guilt. It leaves open the possibility of rebuttal.[10]

[29] Not even quasi-innuendos will assist the respondents. As pointed out by Brand AJ writing for the majority in *Le Roux v Dey*[11] when alleging a quasi-innuendo it is not necessary to plead background circumstances, but once having pleaded the meanings of the quasi-innuendo, a plaintiff is bound by that selection. If that meaning is not established he or she cannot then contend for another meaning which is defamatory per se.

[30] In short the respondents having elected to plead innuendos, failed to plead the special circumstances on which they relied for the secondary meaning. That

[8] (561/2010) [2011] ZASCA 207 (25 November 2011) paras 61 and 62.
[9] *Modiri* v *Minister of Safety and Security* & others [2011] ZACSA 153; 2011 (6) SA 370 SCA para 15; *The Citizen* 1978 (Pty) Ltd & others v *McBrid*e (Johnstone & others, Amici Curiae) [2011] ZACC 11; 2011 (4) SA 91 CC para 123.
[10] *Council for Medical Schemes & another v Selfmed* supra para 62.
[11] Paras 87 and 88.

notwithstanding, on both the primary meaning and the secondary meaning of the statements, the respondents must fail. For these reasons it is unnecessary to deal with the defences of truth and fair comment. In any event had this been necessary, the respondents may well have faced an insurmountable obstacle in view of the wide interpretation given by the Constitutional Court[12] as to what constitutes false information under the rubric of fair comment.

[31] In my view the respondents have failed to discharge the onus that rests upon them to prove the defamatory meaning of the media release and newspaper article.

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

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo is set aside and substituted with the following:

'The plaintiffs' claims are dismissed with costs'

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C Nicholls

Acting Judge of Appeal

[12] *Democratic Alliance v African National Congress* 2015 (3) BCLR 298 (CC) para [193]-[206].

APPEARANCES

For Appellant:	J De Waal with S Budlender Instructed by: Minde Schapiro & Smith, Pretoria Symington & De Kok, Bloemfontein
For First to Sixth Respondent:	D B Du Preez SC with P S A J Jacobsz Instructed by: Steyn & Clarke, Pretoria Phatshoane Henney, Bloemfontein