THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 447/08

MICHAEL TUCH, HEATHER BRENDA EISER
HILTON MYERSON, JONATHAN TUCH NNO — Appellants

and

MYERSON, JEFFREY HAROLD — First Respondent

MYERSON, JEFFREY HAROLD ROPER,
ALASTAIR BRIAN NNO — Second Respondent

MASUREIK, DION BARRY — Third Respondent

Neutral citation:	*Tuch v Myerson* (447/09) [2009] ZASCA 132 (30 September 2009)
Coram:	STREICHER, MHLANTLA JJA and GRIESEL AJA
Heard:	8 SEPTEMBER 2009
Delivered:	30 SEPTEMBER 2009
Summary:	Defamation – defamatory allegations made in civil judicial proceedings – qualified privilege – allegations devoid of merit – ulterior purpose inferred – malice.

ORDER

On appeal from: High Court, Johannesburg (Malan J sitting as court of first instance)

The following order is made:

1 The appeal, in so far as the first and third respondents are concerned, is partially upheld with costs.

2 The appeal, in so far as the second respondent is concerned is dismissed.

3 The order of the court below is set aside and replaced with the following order:

'(a) The first and the third defendants, jointly and severally, are ordered to pay to the plaintiff an amount of R30 000.

(b) The plaintiff's claim against the second defendant is dismissed.

(c) The first and third defendants, jointly and severally, are ordered to pay the plaintiff's costs.'

JUDGMENT

STREICHER JA (MHLANTLA JA and GRIESEL AJA concurring)

[1] The appellants are the executors in the deceased estate of Nathan Myerson ('the deceased') who died on 4 March 2008 after an action for defamation instituted by him against the respondents had been dismissed

by the Johannesburg High Court. Thereafter that court granted leave to the appellants to appeal to this court.

[2] The alleged defamatory statements were made in an affidavit deposed to by the first respondent (Jeffrey Harold Myerson) in application proceedings instituted by the deceased against, amongst others, the first respondent and the third respondent (Dion Barry Masureik). The second respondent, namely Jeffrey Harold Myerson and Alistair Brian Roper, in their capacities as trustees of the Jefferson Business Trust, were subsequently joined as respondents in the application proceedings.

[3] In the application proceedings the deceased claimed from each of the first and third respondents delivery of share certificates reflecting him as the holder of two and a half per cent of the share capital in a company Jazz Spirit 46 (Pty) Ltd ('Jazz Spirit'). In this regard the deceased relied on a written undertaking dated 23 April 2004 and signed by the first and the third respondents, which reads as follows:

'This letter confirms that we (Mr JH Myerson and Mr DB Masureik) are holding in trust 2,5% each of the shares of Jazz Spirit 46 (Proprietary) Limited. You can acquire these shares at no cost, whenever you wish to have these shares transferred into your name, subject to the following conditions: -

1 the shares will be available at any time after the transfer of the land into our name has been finalized;

2 we require 3 working days' verbal notice by you to transfer these shares;

3 these shares are being held specifically for yourself only and may not be sold, pledged or transferred to any other person or entity except to ourselves in which case these shares will be transferred back to ourselves or our nominee at par value to be determined by the auditors of Jazz Spirit 46 (Proprietary) Limited.'

The parties are agreed that the phrase 'into our name' in the first condition should read 'into the name of Jazz Spirit 46 (Pty) Ltd'. The land in question was transferred to Jazz Spirit in July 2004 and in March 2006 the deceased called upon the first and third respondents to transfer the shares referred to in the written undertaking to him. On 30 March 2006 the first and third respondents' attorneys wrote to the deceased's attorneys:

'It is sufficient to state that your client has no right or entitlement whatsoever to the shares nor the financial statements of Jazz Spirit 46 (Pty) Ltd, you refer to.'

They did not disclose the basis upon which it was alleged that the deceased had no entitlement to the shares.

[4] The deceased thereupon launched an application against the first and third respondents for the transfer of the shares. In his answering affidavit the first respondent stated that in so far as the aforesaid undertaking was binding on the third respondent and on him it constituted a donation 'motivated by nothing other than pure liberality and generosity'. Being a donation he stated that it was not valid as, according to him, there had not been compliance with s 5 of the General Law Amendment Act 50 of 1956. He did not say why not. He stated, furthermore, that the document contained no more than an offer and that the offer had not been accepted within a reasonable time. Later in the same answering affidavit he alleged that the undertaking contained in the document was furnished under duress. But still later he again alleged that the transaction was that of a donation and that the third respondent and he 'were entitled to revoke the donation by virtue of inter alia [the deceased's] ingratitude'. The deceased's gross ingratitude was, according to him, evidenced by the following:

’30.3.1 [The deceased] and my father who died in September 2003 were brothers and partners in mainly immovable property.
30.3.2 During about July 2004, I found out that the [deceased] had misappropriated something in the order of R5 to R6 million of my father’s portion of the partnership. I took this up with the auditors, namely Kessel Feinstein, who confirmed that this had indeed occurred. I further established that the [deceased] had transferred all or most of these funds to Ireland via his wife who was Irish. This information was extremely disturbing.’

[5] Yet another defence raised by the first respondent in the answering affidavit was that the third and fourth respondents in the application proceedings were shareholders in Jazz Spirit and that they would not vote in favour of the transfer of the shares to the deceased. He stated that the third and fourth respondents ‘are of the view that should [the deceased] become a shareholder in [Jazz Spirit] he would devote his time and energy to creating as much trouble, unpleasantness and problems as possible’.

[6] The third respondent filed a confirmatory affidavit in which he asked that the first respondent’s affidavit be read as if incorporated into his affidavit.

[7] The statement that the deceased had misappropriated something in the order of R5 to R6 million of the first respondent’s father’s portion of the partnership and the statement that should the deceased become a shareholder in Jazz Spirit, he would devote his time and energy to creating as much trouble, unpleasantness and problems as possible, gave rise to the defamation action which is the subject matter of this appeal.

[8] The respondents in their plea denied that the publication of these statements was wrongful and pleaded that the statements were published in the course of judicial proceedings ie on a privileged occasion. The deceased replicated that the statements were made maliciously.

[9] The court below held that both the aforesaid statements were *per se* defamatory. In respect of the first statement it said that 'any reasonable reader of ordinary intelligence would conclude that the word "misappropriated" means that the [deceased] is called a thief who stole some R5 to R6 million from the [first respondent's] father'. In respect of the second statement it said:

'The ordinary reader would conclude that the plaintiff is a troublemaker, ie a person who would, as a shareholder, not devote his time and energy for the benefit of the company but would disrupt it. The clear implication is that the plaintiff is unfit to have as a (minority) shareholder. This reflects on his reputation as a businessman.'

I am in full agreement with these findings of the court below.

[10] The publication of the defamatory statements gave rise to a presumption of unlawfulness and *animus injuriandi* on the part of the first and third respondents.[1] The presumption of unlawfulness could be rebutted by proving that the publication took place on an occasion of qualified privilege such as during the course of civil judicial proceedings provided the requirements for relevance were satisfied.[2] The court below held that the defamatory statements were indeed relevant to the issues in the application proceedings. It added that the deceased could in the circumstances only succeed if he could show that the respondents acted maliciously and thereby exceeded the bounds of qualified privilege. It

[1] *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 401 *in fine* – 402A.
[2] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 (SCA) par 21.

concluded that the deceased failed to do so and for that reason dismissed the action.

[11] The court below correctly held that the protection afforded by the qualified privilege afforded to a litigant is forfeited if the defamatory statement is published maliciously.[3] In *Basner v Trigger* 1946 AD 83 at 95 Schreiner JA said:

'Privileged occasions are recognised in order to enable persons to achieve certain purposes and when they use the occasion for other purposes they are actuated by improper or indirect motives, that is, by "malice".'

[12] I agree that the defamatory statement that the deceased would cause trouble, unpleasantness and problems, should he become a shareholder in Jazz Spirit was relevant to the deceased's claim in the application proceedings. I also agree that no malice has been shown on the part of the respondents in respect of that statement. I do however not agree that no malice on the part of the first and third respondents had been shown in respect of the allegation that the deceased stole R5 to R6 million from the first respondent's father.

[13] The onus was on the deceased to prove the alleged malice on the part of the respondents. No direct evidence of such malice was adduced by the deceased but, malice being a state of mind, that is hardly surprising. Being subjective in nature malice will often have to be inferred from intrinsic or extrinsic facts.[4]

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[3] *Joubert and others v Venter* 1985 (1) SA 654 (A) at 704D-G; and *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others supra* at para 17.

[4] See Neethling Potgieter and Visser *Neethling's Law of Personality* 2ed (2005) p 149 and the authorities referred to in footnote 201.

[14] The respondents claimed that the alleged theft of R5 to R6m by the deceased from the partnership between the deceased and the first respondent's father constituted ingratitude which entitled them to revoke the alleged donation. However, the first respondent's father died in 2003 whereas the alleged donation was made on 23 April 2004. It is hard to believe that anybody, let alone the first and the third respondents who are property developers, could possibly have thought that something done to a third party before a donation was made could constitute evidence of gross ingratitude on the part of the donee in respect of the donation subsequently made. The allegation is so devoid of any merit that, in the absence of any evidence to the contrary, the inference must be drawn that the first and third respondents used the occasion not to advance their case but for an ulterior purpose namely to besmirch the name and reputation of the deceased. In the circumstances the deceased succeeded in proving malice on the part of the first and the third respondents.

[15] It follows that the appeal in so far as the first and third respondents are concerned should succeed in respect of the allegation that the deceased misappropriated R5 to R6m. The second respondent was joined as a party to the application proceedings because the first respondent had alleged in his answering affidavit that the second respondent was a shareholder of Jazz Spirit and that it should for that reason have been joined as a party. There is no evidence that the second respondent made common cause with the first and third respondents and counsel for the appellant conceded that the action against it could not succeed ie that the appeal in so far as the second respondent is concerned, should be dismissed.

[16] The parties were agreed that in the event of the appeal succeeding the matter should not be referred back to the court below for the determination of the amount of damages to be awarded but that such amount should be determined by this court. In my view the request should be acceded to. The deceased as well as the respondents closed their cases without leading any evidence in regard to the quantum of damages with the result that this court is in as good a position as the trial court to determine the amount. To refer the matter back to the court below will involve the parties in additional costs which they obviously wish to avoid. Moreover, the trial judge is no longer a judge of the court below and the administration of the courts will unnecessarily be disrupted by referring the matter back to the court below. I shall therefore proceed to determine the amount of damages to which the deceased was entitled.

[17] Counsel for the respondents submitted that because no evidence as to the reputation of the deceased had been tendered at the trial, only nominal damages could be awarded. This is tantamount to arguing that a court should assume that a person has a bad reputation or no reputation that can be injured. That is not correct. Every person has a reputation that can be injured. There may of course be aggravating or mitigating circumstances relating to a person's reputation. A plaintiff may therefore adduce evidence of his good reputation and standing in the community[5] and a defendant may adduce evidence of the plaintiff's bad reputation.[6] Should a plaintiff allege that there are aggravating circumstances the onus would be on him to prove such aggravating circumstances. Conversely should the defendant allege that there are mitigating circumstances the onus would be on him to prove such mitigating circumstances.

[5] See eg *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 (SCA) at para 45.
[6] See eg *Black and others v Joseph* 1931 AD 132 at 146.

[18] The allegation that the deceased stole R5 to R6 million from his brother is obviously seriously defamatory of the deceased. The extent of the damage caused thereby would, however, have been restricted by the limited publication thereof to a restricted class of people. The allegation is nevertheless so serious that substantial damages should be awarded. The appellant, referring to the award made in *Naylor and another v Jansen; Jansen v Naylor and others* 2006 (3) SA 546 (SCA) at paras 15 – 17, submitted that R30 000 should be awarded as damages. In that matter it had been alleged that Jansen had stolen money from his employer whereas he had not stolen money but had made himself guilty of misconduct involving dishonesty which misconduct the trial court erroneously did not take into account when determining the quantum of damages. Consequently an award of R30 000 by the trial court was reduced on appeal to R15 000. As was said by Smalberger JA in the *Van der Berg*-case at para 48 comparisons can of course serve a very limited purpose.

[19] A court has a wide discretion to determine an award of general damages which is fair and reasonable having regard to all the circumstances of the case and the prevailing attitudes of the community.[7] Having regard to all the circumstances of the present case it would in my view be fair and reasonable to award damages in an amount of R30 000. The appeal of the appellants should therefore be upheld in so far as the first and the third respondents are concerned. The appellants conceded that no case has been proved against the second appellant and that the appeal in so far as the second appellant is concerned should be dismissed. Counsel for the respondents conceded that the fact that the second

[7] See 7 *Lawsa* 2ed para 260 and the cases therein referred to.

respondent was cited as a respondent in the action and also in the appeal had no real effect on the costs. In the circumstances no costs order will be made in respect of the second respondent.

[20] The following order is made:

1 The appeal, in so far as the first and third respondents are concerned, is partially upheld with costs.

2 The appeal, in so far as the second respondent is concerned, is dismissed.

3 The order of the court below is set aside and replaced with the following order:

'(a) The first and the third defendants, jointly and severally, are ordered to pay to the plaintiff an amount of R30 000.

(b) The plaintiff's claim against the second defendant is dismissed.

(c) The first and third defendants, jointly and severally, are ordered to pay the plaintiff's costs.'

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P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For appellant:	H S Eiser
	Instructed by: Eiser & Kantor, Riviera Matsepes, Bloemfontein
For respondent:	M Basslian
	Instructed by: Myers Inc, Greenside, Gauteng Naudes Inc, Bloemfontein