



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable
Case no: 353/02

In the matter between:

AKBAR ALLIE

Appellant

and

**FOODWORLD STORES DISTRIBUTION
CENTRE (PROPRIETARY) LIMITED**

First Respondent

LIYAQAT PARKER

Second Respondent

WAZIER PARKER

Third Respondent

ILYAS PARKER

Fourth Respondent

Coram: *Navsa, Nugent and Conradie JJA*

Date of hearing: **13 November 2003**

Date of delivery: **2 December 2003**

Summary: Defamation and *iniuria* — whether established on the evidence — defence of truth and public benefit — powers of Court of Appeal to reverse credibility findings.

J U D G M E N T

NAVSA JA:

[1] The appellant, Mr Akbar Allie was formerly employed as a supermarket manager by the first respondent, a company with limited liability. Subsequent to the termination of his services he instituted a delictual action for damages in the Goodwood Magistrates' Court against six defendants, including the four respondents, claiming first, that on Tuesday 13 January 1998 the second to fourth respondents and two other individuals, acting within the course and scope of their employment with the first respondent accused him of theft of R86-00, thereby impairing his dignity and second, that on a subsequent day in January 1998, in the presence of other employees of the first respondent, they called him a thief thereby defaming him and that in these circumstances they and the first respondent were liable to him in amounts of R20 000-00 and R80 000-00 respectively.

[2] In the magistrate's court the first to third respondents were the first to third defendants respectively and the fourth respondent was the sixth defendant.

[3] I will for the sake of convenience refer to the first respondent as the company, the second respondent as LA, the third respondent as Wazier, the fourth respondent as Ilyas and the appellant as Akbar. LA

is the company's chief executive officer and the other respondents are directors who are involved in managing the company's affairs.

[4] The company raised a special plea that Akbar was precluded from bringing the action, in that following on a referral by him to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') in terms of labour legislation, he had, against payment of an amount of R12 000 -00 and the withdrawal of the allegations of theft, settled all claims against it.

[5] In respect of the merits the respondents denied that they had alleged that Akbar was a thief on any one of the two occasions and in the alternative, if they had, denied they acted wrongfully for one or all of the following reasons:

- (i) the allegations were true or substantially so and they were in the public interest, in that they concerned Akbar's honesty and his suitability for continued employment by the company;
- (ii) the allegations were made in the course of an enquiry into Akbar's honesty and his suitability for continued employment and they were made to persons who had a duty or right to hear them;

(iii) the allegations constituted legitimate criticism of Akbar.

[6] The magistrate dismissed the special plea and concluded that Akbar had proved his claims against the respondents as set out in the order made by him and that they had failed to establish any of the justifications pleaded. He made the following order:

- '1. I find that the 2nd, 3rd and 6th defendants are indeed liable in terms of claim 1 and the 2nd defendant in terms of claim 2.
2. As all of them acted in the course and scope of their employment with the first defendant that means that the 1st defendant is also liable on both claims.
3. Against the 4th and 5th defendants both claims are dismissed with costs.
4. Against the 3rd and 6th defendants claim 2 is dismissed with costs.
5. Against the 1st, 2nd, 3rd and 6th defendants the first claim is granted for R7500-00 jointly and severally, the one paying the other to be absolved with costs.
6. Against the 1st and 2nd defendants claim 2 is granted for R15 000-00 jointly and severally, the one to pay and the other absolved with costs. The cost is on the normal party/party scale, but is to include the costs of one junior counsel and his costs is to be on the usual Bar council tariff.
7. The above is granted with interest from date of this judgment.'

[7] On appeal the Cape Provincial Division (Van Zyl and Josman JJ) overturned the magistrate's order and substituted it as follows:

- '1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and substituted by the following:

'The plaintiff's claims are dismissed with costs, including the costs of one counsel on the Bar council tariff.'

[8] Van Zyl J reversed material credibility findings by the magistrate holding that they were emotive and subjective and based mainly on demeanour without proper consideration of the evidence.

[9] Whilst noting that a court of appeal would be slow to interfere with credibility findings, Van Zyl J concluded that it is not bound to accept such findings if on the record they do not appear to be justified.

[10] After a detailed analysis of the evidence Van Zyl J held that the magistrate had wrongly rejected the respondents' witnesses' version of events and that his assessment of their credibility was at odds with the evidence. He was less impressed by Akbar's evidence than was the magistrate.

[11] On the view he took of the evidence the learned judge came to the conclusion that in respect of the first occasion referred to in para [1] above, Akbar had not been called a thief but had been asked to deal with allegations of irregularities reported to LA by other members of staff. Van Zyl J considered that on Akbar's own evidence that he had made use of the opportunity at that meeting to tender an

explanation and to respond to questions, there was no factual basis for the *iniuria* claim.

[12] In respect of the second claim based on communications made at a meeting of the company's managers at which Akbar was not present the learned judge took the view that since Akbar's name was not mentioned nor details supplied of the 'problem' discussed the factual basis for a defamation claim had not been established.

[13] Van Zyl J held that on the available evidence he could not resolve the issue of whether Akbar had stolen goods and did not consider it necessary in the course of his judgment to determine whether Akbar had confessed to theft on Tuesday 13 January 1998 as testified to by LA and Wazier.

[14] Akbar appeals against the judgment and order of the Cape High court, seeking to have the magistrate's order reinstated. The judgment of the Court below is reported as *Foodworld Stores Distribution Centre (Pty) Ltd and Others v Akbar Allie* 2002 (3) All SA 200 (C). The present appeal is with the leave of that Court.

[15] It turns on an evaluation of the evidence. Regrettably, this involves dealing with the background and the evidence in some detail. It will also be necessary in the course of this judgment to

consider the circumstances in which a court of appeal is entitled to upset credibility findings by a trial court.

[16] At material times the company employed the appellant as a manager at a supermarket in Elsies River in the greater Cape Town metropolitan area. The store managed by the appellant is part of a supermarket chain owned and operated by the company. The Elsies River store employed forty-five people and the chain approximately seven hundred.

[17] The incidents that gave rise to the appellant's claims flowed from the company's practice of allowing their supermarket managers to make purchases on credit at a discount within stores they managed. The procedure in terms of which purchases were to be made was well known and at the time of the incidents in question was as follows:

A book personal to the manager was made available in which the purchases were to be written up. The book was kept within the supermarket. A non-purchasing manager or supervisor was required to write up the purchases and to append his signature to indicate that he had checked the items and the prices. The purchases would be rung up at a designated till. The original note recording the purchases

would be removed from the book and would then be handed to the purchasing manager to hand to a security officer who would check the contents of shopping packets against the note and who would, if everything was in order, hand it back after signing to indicate a security clearance. A carbon copy of the note was retained in the book and the totals due by the manager would on a later occasion be calculated and recorded by administrative staff for recovery.

[18] It is convenient at this stage to consider a summary of the respondents' version of events.

[19] On Saturday 10 January 1998 in Akbar's absence LA paid a visit to the Elsie's River store. A supervisor at the store, one Naseema Banu Parker ('Banu') reported to him that Akbar had been taking goods without paying, achieving this by recording goods removed by him from the shop in a 'phantom book', that is, in an unofficial book that was kept from the company so that he was not billed at the end of an accounting period. Banu and another employee, Sakina Parker ('Sakina') also informed LA that when Akbar *did* record purchases in the official book he under priced items. To substantiate their claims they produced the official book, which LA inspected and in which he was shown that items purchased by Akbar on that day had prices

allocated lower than the marked prices of the items on the shelf. LA was informed that the official book did not contain a record of items 'purchased' by Akbar on 4 January 1998.

[20] LA asked Mr Hishamudien Sayed ('Sayed'), the assistant manager for an explanation. Sayed explained that earlier that day, instead of following company procedure as described earlier, Akbar handed him a slip of paper on which he had written the items he intended purchasing and which contained the prices for each item. He did not check them because he trusted Akbar. Sayed wrote the items into the book from the piece of paper. A piece of paper was later found stapled to the book with prices on the paper having been altered.

[21] On Monday 12 January 1998 LA told Wazier about his visit to the Elsie's River store. Wazier was instructed to inform Akbar that he would be called upon to explain the irregularities. Wazier went to the store, conveyed the message and asked Akbar to be honest with him. Akbar responded by stating that he knew he had done wrong.

[22] On Tuesday morning the plaintiff was summoned to a meeting at which the respondents were present. The plaintiff was presented with his book and called upon to explain why the goods purchased on

4 January 1998 had not been written up. Akbar paged through the book and then said he had written his purchases in another book. LA asked for the other book. Akbar became visibly upset and emotional. He looked like he was starting to cry and said that he did not have the other book. He was asked from when he had been doing this. He said from December 1997. Ilyas respondent and said:

‘Moenie lieg nie Akbar, jy doen dit van Wynberg se tyd al.’

This was a reference to Akbar’s prior employment at the company’s Wynberg store. Akbar in response asked for ‘mauf’, a term used by Muslims when asking for forgiveness. Wazier explained that when this term is used it means more than saying one is sorry. It has a greater significance and would be appropriate if one were to ask for forgiveness for having committed theft.

[23] Subsequently, on 21 January 1998 at the monthly managers’ meeting at which all the defendants and others were present, LA told the gathered managers that there had been a problem at the Elsie’s River store and sought their guidance on how to deal with the problem. He did not mention anyone’s name nor did he supply any details. It was apparent that everyone at the meeting already knew

about events at the Elsie's River store. They responded by stating that everyone should be treated equally.

[24] Akbar's services were terminated. He signed a document accepting that he had been retrenched. Later, however, he declared a labour dispute with the company which, as stated earlier was settled at the CCMA. The action for damages by Akbar culminating in the present appeal followed.

[25] LA, Wazier, Banu, Naseeb Gafoor ('Gafoor') and Sayed all testified in support of the respondents' case.

[26] LA testified in respect of the special plea but in his evidence dealt with the merits of Akbar's claim. Wazier testified about events in which he was involved as set out earlier. In the main they corroborated each other.

[27] Banu corroborated LA's evidence that she and Sakina had made the allegations against Akbar. She testified that on 4 January 1998, shortly before Akbar's purchases were rung up at the designated till, she was standing next to him and had seen him write them up in a book similar to the official book. She was emphatic that he had not written them on a loose piece of paper. She saw Gafoor, the perishables manager append his signature to the slip in the book

to acknowledge that he had checked it. Banu testified that on 10 January 1998 Akbar had under priced the goods he purchased. She knew this by later comparing with Sakina what was written up with the shelf prices of the goods.

[28] Gafoor denied that Akbar had handed him a piece of paper to hand to Sayed for writing up in the book. He confirmed Banu's testimony that he had appended his signature to the slip in a book which looked like an official book that had been used before. Gafoor testified that he would have refused to sign a loose piece of paper because it was against company policy.

[29] Sayed testified that on 10 January 1998 when he looked for Akbar's book to transpose the items listed on the piece of paper he had no difficulty locating it. After he wrote up the purchases he handed the top copy of the slip in the book to Akbar who would have required it to get past security. He had no idea who had stapled the piece of paper in the book. Sayed acknowledged that on another occasion on 9 January 1998 in contravention of company policy he had followed the same procedure as was followed on 10 January 1998 in writing up Akbar's purchases. Sayed confirmed that LA confronted him on 10 January 1998 about the procedure followed

when he wrote up Akbar's purchases. According to Sayed, LA asked him if he was 'in cahoots' with Akbar which he denied. Sayed stated for the first time in cross-examination that Akbar had confessed wrongdoing to him.

[30] Akbar and his brother Dr Yusuf Allie testified in support of his case. The latter's evidence did not take matters much further as he was not personally involved in any of the events in question.

[31] Akbar's version of events is different from that of the respondents. He denied that he was guilty of theft and was adamant that he never confessed to it. According to Akbar the security officers would have picked up any breach of security and would have taken it up with a manager at the store. As regards the purchases on 4 January 1998 he testified that because his book was unavailable he wrote the details of his purchases on a piece of paper and handed it to Gafoor with instructions that it be handed to Sayed to transfer into the book. Gafoor checked the goods and placed his signature on the piece of paper. He referred to the occasion on 9 January 1998 when his book was unavailable and the purchases were once again written on a piece of paper which was handed to Sayed who stapled it in the book and recorded the purchases therein.

[32] In respect of events on 13 January 1998 Akbar confirmed that he had been asked to respond to the allegations staff had made against him. He gave the three directors his version of events as set out in the preceding paragraph. He admitted being emotional but denied breaking down. He testified that after a settlement was reached at the CCMA, LA once again, in the presence of Wazier repeated the accusation of theft but in more dramatic language:

‘ ‘n Skelm bly ‘n skelm.’

[33] It is common cause that Akbar did not, during the meeting on 13 January 1998, request LA or any of the others to check his version of events with Gafoor and did not himself approach Gafoor to corroborate his explanation.

[34] Much hostility was generated by the events in question and the litigation that ensued due mainly to the following. LA, Wazier, Ilyas and Akbar are blood relatives and the company is a family business with the result that family members took sides in the dispute causing a family split. Akbar, although younger than LA, is his uncle.

[35] The magistrate’s judgment is a rambling account of events, characterized by an inadequate and misdirected assessment of the evidence presented. As correctly concluded by the Court below the

magistrate's credibility findings appear in the main to be emotive, and based on his perception of the demeanour of witnesses. Furthermore, the magistrate concluded that all of the respondents' witnesses had a common ('very big') interest in the case, without identifying such interest.

[36] The magistrate said the following about LA:

'He . . . portrayed an image bordering on arrogance, no matter how hard he tried to cover it with sincere emotion for the plaintiff. He tried his utmost to divert questions as to his management oppressive style away from him [presenting himself] as this totally helpful and kind businessman. His absolute dominance of the business and family oozed from his evidence, regardless his attempts to hide it.' (*Sic*).

It is this view that coloured the magistrate's assessment of LA's evidence and clearly played an important part in his rejection of the respondents' version of events.

[37] The magistrate dealt with Wazier's evidence in the same manner and concluded that Wazier was all too eager to please and protect LA. He said the following of Wazier:

'He did not make a good impression on the court. His demeanour got worse as his evidence proceeded and his attempts to cover problem areas and refusing to concede the obvious left a big scar on the value of his evidence.'

[38] In dealing with demeanour and credibility in relation to the magistrate's findings Van Zyl J said the following:

'Of course the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.'

[39] In *S v Kelly* 1980 (3) SA 301 (A) at 308B-D this Court said:

'In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour — "that vague and indefinable factor in estimating a witness's credibility". . .can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour [traits the Magistrate held against the witnesses]. As was stated by Wessels JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court: "A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story."

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.’

[40] In *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) Harms JA, after citing the *Kelly* case with approval said the following at 979I-J:

‘The Judge’s failure to decide the case without regard to the wider probabilities is a clear misdirection and entitles us to reassess Mrs Shiloane’s evidence. It was also wrong of the Judge to consider that a non-acceptance of her evidence of necessity requires a finding that she is a deliberate liar and perjurer. . . That is an emotional approach. In a civil trial the question is whether her evidence is, on the probabilities, correct.’

[41] In *President of the RSA and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) the Constitutional Court, after referring to the *Kelly* and *Dumbarton Oaks* cases, said the following at para 79:

‘The advantages which the trial court enjoys should not, therefore, be over-emphasised “lest the appellant’s right of appeal becomes illusory”. The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially the probabilities. . . A further and closely related danger is the implicit assumption, in deferring to the trier of fact’s findings on demeanour, that all triers of fact have

the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.'

[42] Van Zyl J correctly reversed the credibility findings by the magistrate. It is clear from the magistrate's judgment that he did not properly consider the evidence against the probabilities. As appears from cases cited above that is a misdirection that entitles this Court to reassess the evidence.

[43] There is nothing inherently improbable about the evidence of the respondents' witnesses and in respect of core aspects they corroborated each other.

[44] The corollary of accepting Akbar's version of events is that Banu, Sakina, Sayed, Gafoor and the respondents conspired first, to bring unwarranted charges against Akbar and second, to give false evidence in concert against him in court. This would be a conspiracy of major proportions by actors who did not on anyone's version of events have any grudge, common interest or some other reason for acting in this manner. On the contrary, it was unchallenged that Akbar was close to Wazier and his wife, Banu and enjoyed lunch with them after mosque on Fridays.

[45] On Akbar's version of events all that was required when he was asked on 13 January 1998 to respond to the allegations against him, after providing his explanation, was a statement by him that Gafoor would confirm it. It is common cause that Akbar had not requested that LA or anyone else summon Gafoor to confirm his version of events. One would have expected him to readily respond in that fashion.

[46] That LA himself did not question Gafoor is a factor in the respondents' favour, particularly as it is clear that LA wanted to get to the bottom of the allegations made against Akbar. If the explanation testified to by Akbar had been given to the meeting on 13 January 1998 one would have expected LA to take it up with Gafoor. That he did not do so gives credence to the respondents' version of events.

[47] On his own evidence Akbar did not ask Gafoor whether he had complied with his instruction to hand the piece of paper to Sayed. One would have expected him to do so, particularly as he was the manager in charge of the store. Against this failure Gafoor's denial is credible.

[48] On Akbar's version of events he became emotional when confronted with the allegations on 13 January 1998. It should be

borne in mind that according to Akbar he had the simplest explanation, which rendered his emotional state inexplicable. However on the respondents' version of events it is understandable.

[49] An examination of the record shows that Akbar vacillated between stating that when he was confronted on 13 January 1998 with the allegations made by members of staff he was not accused of theft and was unaffected, to stating that he was angry after he was accused of theft. He also testified that LA and the others were satisfied with his explanation, which is at odds with their later conduct that resulted in the termination of his services.

[50] The factors set out in the preceding paragraphs, which the magistrate did not take into account, militate against the veracity of Akbar's version. The probabilities favour the respondents' version of events that Akbar was guilty of and confessed to theft.

[51] Akbar's counsel correctly conceded that in the event that this Court held that Akbar had confessed to theft he would be unable to sustain the *iniuria* claim. The allegation by Ilyas that Akbar had been guilty of theft since the Wynberg days was not part of Akbar's case as pleaded nor was his case conducted on the basis that he was

aggrieved by this statement or that he sought judicial redress for it. The same applies to utterances by Wazier and LA at the CCMA.

[52] Counsel submitted that notwithstanding the confession by Akbar the discussion of the issue at the subsequent managers' meeting by the respondents was defamatory of him and that Van Zyl J erred in holding that since no name or details were supplied by LA the respondents were not liable.

[53] It is unlikely that armed with a confession and the evidence presented by the members of staff that the respondents and in particular LA would not have communicated the theft by Akbar. It is for that very reason that they terminated his services, albeit dressed up as a retrenchment. I accept therefore that Akbar was accused of theft at the managers' meeting and that this was defamatory of him.

[54] The respondents, however, are entitled to rely on a pleaded ground of justification, namely, truth and public interest.

[55] As set out above the respondents established on the evidence that Akbar was guilty of and confessed to theft. The accusation of theft was communicated to managers within the supermarket chain. They must surely have had an interest in having information imparted to them that a co-manager had recently abused the prescribed credit

purchasing procedure towards a dishonest end. In *Mahomed v Kassim* 1973 (2) SA 1 (RAD) the court held that there could be no benefit in informing persons of something of which they were already aware. In the present case LA and Wazier testified that the managers already knew about events at the Elsie's River store. No details were supplied of the extent of that knowledge. In Burchell's *The Law of Defamation in South Africa* at 212-213 the learned author is critical of the restrictive and strained interpretation placed by the court in *Mahomed's* case on the term 'public benefit', arguing that it involves an unwarranted curtailment of freedom of expression. At 214, conceding that the term is a vague concept, the learned author submits that each case has to be treated on its own merits suggesting that the time, manner and the occasion of the publication must be carefully investigated.

[56] I agree that the conclusion reached by the court in the *Mahomed* case is too restrictive and that the question of whether or not a communication is for the public benefit must be assessed on the basis suggested by Burchell.

[57] In the present case it is common cause that there was gossip about events at the Elsie's River store. This led to a family split in

what is essentially a family business. It was important for the respondents and arguably their duty to have the issue out in the open and decisively dealt with. Akbar's co-managers had an interest in the manner in which senior employees conducted themselves and in the consequences flowing from theft of the company's property. In my view the defence of truth and public interest was established by the respondents.

[58] In light of the conclusions reached it is not necessary to consider any of the other defences raised by the respondents. It follows that the order by the Court below arrived at by another route remains unaffected. I make the following order:

1. The appeal is dismissed with costs.

CONCUR:

NUGENT	JA
CONRADIE	JA

MS NAVSA
JUDGE OF APPEAL