IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO: 212/2000

In the matter between:

BANELE SINDANI **Appellant**

and

JP VAN DER MERWE **First Respondent**
THE EDITOR OF RAPPORT **Second Respondent**
JOHAN VAN WYK **Third Respondent**

CORAM: **Hefer ACJ, Cameron JA, Cloete, Brand and Froneman AJJA**

Hearing date: **19 November 2001**

Delivered: **27 November 2001**

Whether the imputation in a newspaper article that the appellant abused the first respondent as 'white trash' is defamatory of the appellant.

J U D G M E N T

BRAND AJA

BRAND AJA

[1] Is it defamatory of a black man to impute to him that he abused a white man by calling him "white trash"? That is the question raised by this appeal.

[2] The appellant is the chief executive officer of Athletics South Africa, the body that controls and administers the sport of athletics in this country. He brought an action for damages for defamation in the Witwatersrand Local Division against the three respondents.

[3] The first respondent is a teacher and the coach of a prominent athlete, Mr Hezekiel Sepeng ("Sepeng"), who won a silver medal at the 1996 Olympic Games. The second respondent is the editor of the *Rapport* newspaper while the third respondent is employed by that newspaper as a journalist.

[4] The action arose from an article ("the article") written by the third respondent and published in the *Rapport* of Sunday 28 September 1997 in Afrikaans under the headline "Sepeng se breier glo as rassis uitgekryt" or, freely translated, "Sepeng's coach said to be reviled as a racist".

[5] According to the article, the first respondent had criticised Athletics South Africa in a letter to the press for not providing sufficient financial support to prominent athletes like Sepeng. After this letter was published in a daily newspaper the appellant telephoned the first respondent. During the ensuing conversation, so the article informed its readers, the appellant proceeded to vilify the first respondent as a racist and to abuse him as 'white trash' who 'should rather have left the country with his white pals' ('wit maatjies').

[6] In the appellant's particulars of claim it was alleged that the article was defamatory of the appellant in that it would be understood by its readers

to mean, in essence, that the appellant was a racist who conducted himself in a reprehensible manner. The respondents denied that the article was defamatory. In the alternative they pleaded a number of defences that would apply only if it were found that the article was in fact defamatory. One of the defences raised was that the imputations made in the article were true and that they were published in the public interest.

[7] At the commencement of the trial, the Court *a quo* (Boruchowitz J) of his own accord ordered, as he was entitled under rule 33 (4) of the Uniform Rules of Court, that the question whether the article was defamatory of the appellant be decided before and separately from any other issue or question. The appellant proceeded to call one witness with reference to this issue. The respondents called no witnesses but relied on the contents of certain documents and newspaper publications that were admitted by agreement. In its judgment the Court *a quo* found that very little if any of the evidence

presented was admissible and that, in any event, such evidence did not assist in the determination of the separated issue. Since I agree with the latter view I find it unnecessary to dwell on the admissibility of the evidence.

[8] In the event the Court *a quo* held that the article was not defamatory of the appellant. Consequently, his claim for damages was dismissed with costs; whereupon the appellant sought and obtained the leave of the Court *a quo* for the present appeal to this Court.

[9] The appellant does not rely on any innuendo or secondary defamatory meaning which would be attributed to the article only by a reader with knowledge of special circumstances. His case is that the ordinary meaning of the article, and particularly the imputation that he used the expression "white trash", is *per se* defamatory of him.

[10] The question whether the article is defamatory in its ordinary meaning, involves a two-stage enquiry. The first is to establish the natural

or ordinary meaning of the article. The second is whether that meaning is defamatory. (See e g *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A) 30 F-G.)

[11] The ordinary meaning of the words under consideration does not necessarily correspond with their dictionary meaning. The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply (see e g *Argus Printing & Publishing Co v Esselen's Estate* 1994 (2) SA 1 (A) 20 F-G). It must also be borne in mind that the ordinary reader has no legal training or other special discipline and that

> 'if he read the article at all would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to

> read this article, nor does he have to base any practical decision on what he reads there'

(per Lord Pearson in *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156 at 1184). Consequently, a court that has of necessity subjected a newspaper article under consideration to a close analysis must guard against the danger of considering itself to be "the ordinary reader" of that article (see also *Ngcobo v Shembe and others* 1983(4) SA 66 (D) 71 C-D).

[12] It was submitted on behalf of the respondents that although the ordinary reader would regard the expression "white trash" as abusive language, he or she would not attach any racial connotation to it. Support for this submission was primarily found in the dictionary meaning of the expression. I do not agree with this submission. As indicated, it is an accepted principle that ordinary readers do not necessarily attach dictionary meanings to words used in newspaper articles. "Trash" is clearly

derogatory and abusive. When it is coupled with the word "white" and used with reference to a white person, it becomes racially charged. In addition the reference in the article to the first respondent's "white pals" who should supposedly have left the country makes the racial connotation even more evident. Consequently, the words attributed in the article to the appellant would in my view, be understood by the ordinary reader as racially derogatory language.

[13] It follows that the conduct imputed to the appellant in the article was that he used racially derogatory language. This was also the finding of the Court *a quo*. Despite this finding the Court concluded, however, that upon a reading of the article as a whole, the reasonable reader would not look upon appellant's conduct as unacceptable and that, consequently, the article was not defamatory. The Court's reasoning in support of this finding appears from the following:

'I do not consider that a reasonable reader would have apprehended that the plaintiff made the statement because he was antagonistic or prejudiced towards whites, as is suggested. The plaintiff's antagonism appears to stem not from the fact that first defendant is white but because he considered the first defendant to be a racist. This is evident from the head note and from what is stated in the passages to which I have referred. The abusive and derogatory remarks imputed to the plaintiff appears to have been made in order to express his contempt for the first defendant who he considered to be a white racist. What the plaintiff was saying in effect was that the first defendant was a white racist who was worthless and has no place in South Africa. Put differently, I view the remarks attributed to the plaintiff as the retort of a non racist expressing his contempt in an abusive fashion for some one who he perceived to be a racist'.

[14] An essential element of the Court's reasoning is an appreciation on the part of the reasonable reader that the appellant had some reason for regarding the first respondent as a racist. On my reading of the article, however, the very element that is lacking is any suggested basis for accusing the first respondent of racism. All that is said in the headline as well as in the body of the article is that the appellant accused the first respondent of

being a racist. I do not believe that the mere accusation of racism by the appellant himself, without any suggested reason for such accusation, would make the appellant's use of racially derogatory language any more acceptable in the eyes of the reasonable reader. What the Court *a quo* appears to ascribe to the reasonable reader - at least by implication - is the conclusion, after mature consideration, that the first respondent would not have called the appellant a racist without any reason for doing so. I do not believe however that such mature consideration can justifiably be ascribed to the reasonable reader. On the contrary, I believe the exact opposite approach, is dictated by both precedent and human nature. On a single perfunctory reading of the article the reasonable reader would understand from it that the appellant was using the racially derogatory language not as a shield but as a sword and without any apparent justification for doing so. According to the article the appellant's response was triggered by the first

respondent's complaint, in his capacity as an athletics coach, that Athletics South Africa had failed to render financial support to prominent athletes, both black and white. The first respondent's own race was of no apparent relevance to his complaint. The response by the appellant as the chief executive officer of Athletics South Africa, to this complaint, so the article informed its readers, was to revile the first respondent as a racist and to address him in racially derogatory language. That, in my view, is how the reasonable reader would understand the article.

[15] So understood I have no doubt that the answer to the second enquiry, namely whether the article is defamatory of the appellant, must be a positive one. What the article attributes to the appellant is the gratuitous use of racially derogatory language and racial vilification. Such conduct is regarded by right minded members of South African society not only as conduct that is reprehensible but as something which must, in accordance

with constitutional imperatives, be eradicated. It follows that the imputation of such conduct to another must be defamatory. In the result, the appeal against the Court *a quo's* decision to the contrary and the consequent dismissal of the appellant's claim with costs, must succeed.

[16] What remains to be considered is the question of costs. The finding in favour of the appellant that the article is defamatory is not the end of the matter in the Court *a quo*. It means that that Court must now consider the validity of the other defences raised by the respondents. Although the appellant has won this battle, he may still loose the war. Consequently, the appropriate costs order in the Court *a quo* would have been that the costs occasioned by the adjudication of the separate issue regarding the defamatory nature of the article must stand over for later determination.

[17] As to the costs of appeal, the approach would ordinarily be that, following the appellant's success, these cost are to be awarded in his favour.

It is apparent, however, that the appellant denies having uttered the objectionable words ascribed to him in the article and that this denial is central to his case. It means that if the respondents' defence of truth and public benefit is eventually upheld it may very well be found that the appellant acted unconscionably in bringing and pursuing a defamation action on the basis of a deliberate falsehood. In that event this Court may want to mark its disapproval by depriving the appellant of his costs of the successful appeal. In these circumstances it was rightly conceded on behalf of the appellant that an appropriate costs order would be that for which there is precedent in *Quadrangle Investment Ltd v Witind Holdings Ltd* 1975 (1) SA 572 (A) 582 H-583 A. That is therefore the order I propose to make.

[18] In the result the following orders are made:

1(a) The appeal is upheld with costs.

(b) The appellant shall not be entitled to tax the costs of appeal until the trial action between the parties has finally been determined by judgment or otherwise.

(c) The respondents are granted leave to apply to this Court for an order setting aside or altering the order for costs in (a), provided the application for such an order is filed with the registrar of this Court within 21 days of the determination of the trial action in the Court *a quo* by judgment or otherwise.

2. The orders or the Court *a quo* are set aside and the following orders are substituted:

"The separate issue regarding the defamatory nature of the article is determined in favour of the plaintiff and the article is declared to be defamatory of him. The trial will proceed on the remaining issues between the parties. The costs occasioned by

the adjudication of the separate issue are to stand over for later determination ."

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FDJ BRAND
ACTING JUDGE OF APPEAL

CONCUR:

Hefer ACJ
Cameron JA
Cloete AJA
Brand AJA
Froneman AJA