

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 62/05

David Dikoko

vs

Thupi Zacharia Mokhatla

Decided on 3 August 2006

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicant, Mr David Dikoko, is seeking leave to appeal against the judgment and order of the Pretoria High Court in which it was found that the applicant had defamed the respondent, Mr Thupi Zacharia Mokhatla. The High Court ordered the applicant to pay the respondent damages in the amount of R110 000. At the time the cause of action arose, the applicant was the Executive Mayor and the respondent was the Chief Executive Officer of the Southern District Municipality incorporating the Southern District Council (the Council).

The Council had a policy under which a basic amount of R300 was payable by it towards the payment of the cell-phone account of each councillor. Any amount exceeding R300 had to be justified by the councillor concerned; if not it was deductible from his or her salary. The amount outstanding on the applicant's account accumulated to R21 000. The respondent had received management letters from the Provincial Auditor-General of the North West Province (the Auditor-General) regarding the applicant's cell-phone account. The respondent had brought this to the applicant's attention on a number of occasions and over a considerable period of time. Eventually the applicant came to an agreement with the Council to write off all but R3 200 of the debt. The Auditor-General was dissatisfied with this and called on the applicant to appear before the North West Provincial Standing Accounts Committee (Standing Committee) to provide an explanation.

During the explanation, the applicant made a statement that his indebtedness was because the respondent had changed the accounting procedures of the Council, providing for periodic as opposed to monthly payments of cell-phone accounts; that he did so deliberately, causing the applicant's indebtedness to the Council to accumulate giving political opponents a basis for an attack on his integrity. The respondent instituted an action for damages against the applicant in the High Court, claiming that the applicant's statement to the Standing Committee was defamatory. In his defence, the applicant entered a special plea claiming that the statement enjoyed privilege under the relevant

legislation. The High Court found that the applicant's statements were defamatory. In coming to its conclusion, the High Court dismissed the applicant's special plea of privilege.

Before this Court, the applicant has argued, firstly, that this Court should interpret sections 161 together with section 28 of the Local Government: Municipal Structures Act 117 of 1998 to allow privilege to extend to municipal councillors performing their functions outside of Council. These provisions provide privilege and immunity from criminal or civil liability to a councillor for anything said in, produced before, or submitted to a Council or one of its Committees. Secondly, that this Court interpret sections 117 of the Constitution together with the relevant provisions of the North West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994 to provide privilege to members of the provincial legislature.

Mokgoro J writing for a unanimous court (Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurring) dismisses the applicant's first argument on the basis that the applicant's explanation of his personal indebtedness to the Council did not constitute the Council's real and legitimate business. She dismisses the applicant's second argument on the basis that the constitutional and legislative provisions extend privilege to members of provincial legislatures only. She therefore finds that the appeal against the High Court's decision denying the applicant privilege should be dismissed.

With regard to the question of quantum, Moseneke DCJ, writing for a majority of the Court (Langa CJ, Madala J, Ngcobo J, O'Regan J, Van der Westhuizen J and Yacoob J concurring), holds that an excessive award of damages will deter free speech and therefore have a chilling effect on freedom of expression. He therefore assumes, without deciding, that the issue of quantum in a defamation suit is a constitutional matter. He finds further that there is no reason why, for the purposes of section 38 of the Constitution, an appropriate award in a defamation case should not include an award of damages. He holds, however, that the general rule is that damages should be left to the determination of the trial court and that an appellate court should only interfere when there are special circumstances which justify interfering with the lower court's award. Moseneke DCJ finds in this regard that it is not possible to conclude that the High Court did not have regard to the factors which Mokgoro J refers to as mitigating. He concludes that, in this case, there are no special circumstances that justify interfering with the High Court's award.

Moseneke DCJ therefore, on behalf of the majority of the Court, orders that the application for leave to appeal is granted, the appeal is dismissed and the applicant is ordered to pay the costs of the respondent, such costs to include the costs of two counsel

On the question of quantum, Mokgoro J, in a minority judgment (Nkabinde J and Sachs J concurring), considers the issue of whether the quantum of damages awarded by the High Court was excessive. She finds that quantum is in itself a constitutional issue and that the amount of damages is generally best left to the discretion of the trial court, but that an

appeal court can replace the trial court's award if it finds that, in the exercise of its discretion, the trial court had been influenced by wrong principles of law or a mistaken view of the facts. She holds that in this case the trial court had not taken all the relevant factors into account, in particular, facts which would have served to mitigate the damages. Mokgoro J therefore concludes that the High Court did not exercise its discretion reasonably and an award of R50 000 would have been more reasonable.

Sachs J, in a separate judgment, proposes that the law of defamation should be developed so as to move away from an almost exclusive preoccupation with monetary awards, which are unsuitable to restoring the damage done to a person's reputation and which often serve to drive parties further apart rather than to reconcile them. He holds that the law of defamation should develop towards an approach that encourages apology, which is better suited to reconciling the parties. The goal of the remedy should be reparation rather than punishment. He holds that this approach would accord more with the constitutional value of *ubuntu-botho*, which is consonant with the notion of restorative justice; the key elements of which he identifies as encounter, reparation, reintegration and participation.

Skweyiya J, dissents on the question of quantum. He ultimately finds, as does Moseneke DCJ, that the appeal against the quantum should be dismissed, but holds that the Court should decide the question of whether the quantum of damages is a constitutional matter. He decides that, in this case, the issue of quantum is not a constitutional issue, on the basis that the applicant is essentially arguing that the High Court did not evaluate the facts correctly and it does not therefore raise a constitutional matter even if constitutional rights are implicated. He holds that this does not mean that a challenge to the amount of damages awarded by a lower court will never raise a constitutional issue, but that it does not do so in this case.