

Not reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

Case No: 1134/05

In the matter between:

BARRY GRANT BURCHELL

Plaintiff

AND

SCOTT ANGLIN

Defendant

Coram: **Crouse, AJ**

Heard: **6-8 May 2013**

Supplementary Heads of Argument received 7 June 2013

Delivered: **26 September 2013**

Summary: **Damages – Plaintiff awarded R60 000.00 damages under action iniuriarum and R10 334 945.16 under Actio Legis Aquilla for pure economic loss for defamation.**

JUDGMENT

Crouse AJ:

Introduction:

1. After having heard evidence previously I gave judgment in April 2009 which disposed of the Plaintiff's Claims 1 to 4 and the Defendant's Counterclaim and I decided the choice of law-issue of the Plaintiff's Claim 5.

2. Claim 5 is a defamation claim, wherein the Plaintiff alleged in his Particulars of Claim that:

"9. At all times material hereto the Plaintiff, trading as Frontier Safaris, had, to the Defendant's knowledge, an ongoing business relationship with Cabela's Incorporated, a hunting, fishing and outdoor enterprise carrying on business, *inter alia*, in Sydney, Nebraska, United States of America.

10.1 During or about January/February 2005 the Defendant published or uttered to one Paul Strickland, an individual who purports to be a detective of the Criminal Investigation Division, City of Daytona Beach Shores, Florida, United States of America, of and concerning the Plaintiff words to the effect that the Plaintiff was a dishonest, violent, abusive and disreputable individual guilty of a number of criminal activities including fraud, tampering with a witness, grand theft, solicitation to commit fraud, coercion and money laundering.

10.2 The aforesaid statement was published and/or uttered to the said Strickland in South Africa, alternatively in the United States of America.

10.3 The aforesaid statement was published and/or uttered to Strickland by the Defendant for the specific purpose, alternatively with full knowledge, that such information would in turn be published to Cabela's Inc.

10.4 The aforesaid statement was and is defamatory of the Plaintiff and was so published and uttered with the specific purpose of destroying the ongoing working relationship which existed between the Plaintiff's enterprise and Cabela's Inc.

10.5 Details of the statement so published and uttered by or on behalf of the Defendant are contained in a copy of a letter dated February 7, 2005, purportedly addressed by the said Strickland to Cabela's Inc, which is annexed hereto marked 'POC 5'.

11.1 During or about May/June 2005 the Defendant approached Cabela's Inc., and senior employees and/or directors thereof and published or uttered statements of and concerning the Plaintiff.

11.2 Such statements were to the following effect:

11.2.1 The Plaintiff is notoriously abusive towards his employees both verbally and physically;

11.2.2 The Plaintiff is unethical in his hunting practices;

11.2.3 The Plaintiff does not pay his bills;

11.2.4 The Plaintiff does not conduct his business in a reputable manner;

11.2.5 The Plaintiff violates South African law in the manner in which he reports and pays taxes;

11.2.6 The Plaintiff is guilty of criminal activity.

11.3 The aforesaid statements were and are false and defamatory of the Plaintiff and were designed and intended by the Defendant to irreparably harm or destroy the business relationship which existed between the Plaintiff and Cabela's Inc.

11.4 The Defendant furthermore sought to induce Cabela's Inc. to cease its business relationship with the Plaintiff.

11.5 Details of the aforesaid statements published and uttered by the Defendant are contained in a letter address by Cabela's Inc. to the Plaintiff dated June 6, 2005, a copy of which is annexed hereto marked 'POC 6'.

12 As a result of the aforesaid publication of defamatory statements by the Defendant of and concerning the Plaintiff, the Plaintiff has been damaged in his reputation and has suffered general damages in the amount of R 1 500 000.00

13 In addition hereto and as a result of the aforesaid publication of defamatory statements by the Defendant of and concerning the Plaintiff in his business, Frontier Safaris:

13.1 The Plaintiff's standing and reputation as a provider of hunting services to, inter alia, American hunters was undermined and/or seriously damaged hereby;

13.2 Cabela's Outdoor Adventures Incorporated immediately suspended the placing of further bookings for hunting trips for Cabelas's clients with the Plaintiff resulting in a direct loss of business and profits by the Plaintiff.

14 As a result of the foregoing:

14.1 Only 43 Cabela's clients were booked for hunting trips in the 2005 hunting seasons; and
14.2 only 30 Cabela's clients were booked for hunting trips in 2006 hunting season.

15 But for the publication of the defamatory statements by the Defendant of and concerning the Plaintiff to Cabela's, Cabela's would have placed at least 113 clients for hunting trips to be provided by the Plaintiff in each of the 2005 and 2006 hunting seasons.

16 Accordingly, the Plaintiff suffered a loss of clients in each of 2005 and 2006 hunting seasons, to wit:

16.1 At least 70 clients in the 2005 hunting season and
16.2 At least 83 clients in the 2006 hunting season

17 In consequence of the aforesaid loss of clients, the Plaintiff suffered a loss of profits in each of the respective hunting seasons, which loss of profit is calculated on the basis of the average contribution to profits made by the Plaintiff's clients in the said respective hunting seasons. As the result the Plaintiff has suffered special damages by reasons of loss of profits, as follows:

17.1 2005 Hunting season: 70 clients x R59 120.89 (average loss of contribution to profits per client) = R 4 138 462.30
17.2 2006 Hunting season: 83 clients x R74 656.42 (average loss of the contribution to profits per client) = R6 196 482.86

This totals an amount of R 10 334 945.16

18 In the result the Plaintiff has suffered damages in the total sum of R11 834 945.16."

3. My decision was that the *lex causae* for the just disposal of claim 5 is the law of Nebraska, subject thereto that it passes our constitutional threshold. I made no decision which law was applicable in the quantification of damages, as this issue was not addressed before me.

4. The matter continued in May 2013. This judgment deals with the adjudication of Claim 5 and must be read together with my judgment of April 2009, as I do not particularly deal with the factual issues set out therein which I consider relevant in reaching my conclusion herein.
5. At the commencement of the hearing Mr Brody, who acted for the Defendant, informed me that although the Defendant has been fully aware of the trial date since August 2012, Mr Brody did not receive instructions to proceed with the trial. This despite the fact that on 22 April 2013 the Defendant provided trial particulars to the Plaintiff's request. Mr Brody accordingly withdrew as the representative of the Defendant. The Defendant was not at Court.
6. The trial thereafter continued as contemplated in Rule 39(1) of the Uniform Rules of Court.

The evidence:

7. Gary Brian Klinkradt and the Plaintiff testified on behalf of the Plaintiff. Mr Klinkradt is a Chartered Accountant, who also compiled reports which were used as the basis of his evidence for proving the Plaintiff's special damages. I will deal with the evidence of Mr Klinkradt more fully under the heading "special damages."
8. The Plaintiff is the sole proprietor of Frontier Safaris. He generates income from hunting safaris for overseas visitors and related activities. Cabela's, based in Nebraska, is one of the Plaintiff's booking agents. Most of the Plaintiff's clients originate from the USA through Cabela's and, since 2000, Cabela's has played a

vital role in the Plaintiff's business success. This business relationship is particularly visible at the Safari Club International Conventions where all role-players interact yearly. Prior to the Defendant's defamatory allegations to Cabela's in February 2005, the relationship between Cabela's and the Plaintiff was very good. Thereafter a dramatic decrease in business occurred as Cabela's placed no new bookings with the Plaintiff from 2005 to 2008. In August 2008 Cabela's started booking hunts with the Plaintiff again, but in 2010 all business between the Plaintiff and Cabela's stopped. At that time (2010) the Defendant sued both the Plaintiff and Cabela's in Nebraska in a later abandoned action and Cabela's informed the Plaintiff that the cost of doing business with him was just too high. The Plaintiff is only seeking damages for loss suffered by him in 2005 and 2006.

9. The Plaintiff testified that the statements made against him by the Defendant, as set out in the Particulars of Claim and embodied in the two letters, were "a lot of non-sense". They made him look bad and it was hurtful to him. The Plaintiff denied each negative allegation referring to him as set out in the said letters and testified that each such negative allegation was untruthful. He was never criminally charged with any offence. Although he was, at the behest of the Defendant, investigated by the Receiver of Revenue, no negative findings were made against him. Mr Klinkradt testified that all of the Plaintiff's bookkeeping processes were in accordance with standard practice.
10. Even after summons was issued the Defendant continued to publically defame the Plaintiff. This resulted in harmful articles in the press, caused the Plaintiff's affairs to be investigated by law enforcement agencies and Safari Club

International suspended his membership without a hearing and published this suspension in a publication to their members. Safari Club International's decision was reversed after a formal hearing and allegations against the Plaintiff were dismissed. None of the investigations into the affairs of the Plaintiff yielded any negative finding of which the Plaintiff is aware.

11. The Plaintiff also handed in a number of emails containing abusive mail to him and his wife over the period December 2009 to about April 2010. These emails were purportedly written by different persons, but curiously all contain similar spelling and grammatical errors, which errors are also reflected in the Defendant's emails that Mr Brody handed in at the beginning of the trial. The Plaintiff further testified that the Defendant had on many occasions telephoned him and asked why the emails were not answered. One of the writers of these emails purports to be one Ben Ford. The Plaintiff's counsel has a similar name. Mr Ford, who together with Ms Beard, appeared for the Plaintiff submitted that I should accept these emails as emanating from the Defendant on a balance of probability, especially as the Defendant in earlier evidence testified that he was dyslectic, and because of the context of the emails and the matching time line of contact between the Plaintiff and Defendant. It is also the Plaintiff's evidence that he is not aware of any other person with a vendetta against him. I have carefully considered the argument and accept that the Defendant was the author of the emails. I accept, as has been argued by Mr Ford, that these abusive emails reflect malice of the worst kind. It not only refers to the Plaintiff and his wife in extremely derogatory terms, but also is intended to break their marriage relationship and to threaten their sense of security and their privacy. I am not going to repeat the contents of these emails in this judgment.

Damages:

12. Despite my decision that the law of Nebraska applies in the determination whether the Plaintiff should succeed in his defamation claim, no evidence was presented on what that law is and I am therefore assuming, as I am entitled to do, that it is similar to South African law. *Rogaly v General Imports (Pty) Ltd* 1948 (1) SA 1216 (C) at 1227-8.
13. In the pleadings and the further particulars respectively the Defendant admitted publication of the remarks and that the remarks are defamatory of the Plaintiff. Once the Plaintiff establishes that the Defendant has published defamatory statements concerning the Plaintiff, then it is presumed that the publication was both unlawful and intentional. *LAWSA volume 7 paragraph 234*.
14. Having proved all the elements of a defamation claim in the absence of any rebuttal by the Defendant, the Plaintiff is entitled to general damages to compensate him for injured feelings and for the hurt to his dignity and reputation.
15. I find that the said publications took place with the specific purpose of destroying the on-going working relationship between Cabela's and the Plaintiff. The defamatory statements also damaged the Plaintiff's personal reputation and his reputation as an outfitter.

16. In awarding damages I take into consideration all the circumstances of this case, especially the seriousness of the unfounded allegations of criminality levelled against the Plaintiff in his personal and professional capacity; that the publication extended beyond Plaintiff's business associates; that prior to the publication the Plaintiff enjoyed a good reputation; that the Defendant's motive was to destroy the working relationship between Cabela's and the Plaintiff; to cripple the Plaintiff financially and that the Defendant's conduct, even after the initial defamation, further escalated to cause the Plaintiff severe emotional and financial harm.

17. I now proceed to deal separately with the claim for general and special damages as it is now trite that special damages as a result of a defamatory statement cannot be claimed by utilising the *actio injuriarum*, but that the *actio legis Aquilia* must be used. *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as amici curiae)* 2011 (5) SA 329 (SCA).

General damages:

18. The Plaintiff claimed R1 500 000 for general damages in his personal capacity in his claim under the *actio iniuriarum*. Mr Ford had very properly submitted that this quantum is too high in the light that special damages are also sought in terms of the *actio legis Aquilia*.

19. The Plaintiff made a bold unsubstantiated statement during his testimony on claim 5 that the Defendant is a "convicted criminal in a killer-for-hire-situation". An allegation of the Defendant being a convicted criminal was also placed on record during the previous hearing as something that the Plaintiff would have said at the

Fulani trial. The Defendant during the previous hearing refuted it as an untruth. By repeating this statement in the absence of the Defendant and adding "killer for hire" when such an allegation is not necessary to prove any element of the delict or his quantum, the Plaintiff created the impression that the Plaintiff was not as vigilant to protect the dignity of others in the same way as he wanted to protect his own dignity.

20. In the exercise of my discretion as to the amount of damages to award under general damages, I have had regard to a number of reported and unreported decisions. I had particular regard also to the Constitutional Court's judgments in *Le Roux and others v Dey (Freedom Of Expression Institute And Restorative Justice Centre as amici curiae)* 2011 (3) SA 274 (CC) and *The Citizen 1978 (Pty) Ltd and others v Mcbride (Johnstone and Others, amici curiae)* 2011 (4) SA 191 (CC). None of the decisions were on the same facts as this matter, but I will allow myself to be lead by the principles therein.

21. I also take into consideration that the Plaintiff's pure economic damages will be compensated under his claim for special damages. It is always a value judgment to determine what the amount of general damages should be. I also take into account that general damages should not be punitive and has never been generous in our law. (See *Mogale and others v Seima* 2008 (5) SA 637 (SCA))

22. Having carefully considered the issues above, I am of the opinion that an amount of R60 000.00 would be an appropriate award in the circumstances of this case.

Special damages:

23. I am satisfied that the Plaintiff proved all the elements for a claim in terms of the *actio legis Aquiliae* for pure economic loss as was also pleaded by him. I am likewise satisfied that it would be reasonable to impose liability on a defendant for the damages flowing from his purposeful conduct.
24. As stated previously, the claim is only for damages suffered in 2005 and 2006, although the damages which the Plaintiff suffered extended beyond those years. The award will only deal with the proven damages for 2005 and 2006 and subsequent damages are not taken into consideration.
25. Mr Klinkradt's report is based on the premise that had there been no negative allegations made to Cabela's they would have booked at least 113 hunts with Frontier Safaris. His calculations were conservative. The sum of 113 represents the number of hunts booked with Plaintiff in the year prior to the allegations by the Defendant. Prior to that year there was a constant yearly growth in Cabela's bookings. After the defamation no further hunts were booked through Cabela's with the Plaintiff. At the time of the defamation there were already 43 hunts booked for 2005 and 30 for 2006. Therefore in 2005 and 2006 there were respectively 70 and 83 fewer hunts booked through Cabela's than in 2004. Mr Klinkradt calculated what the average contribution per Cabela's hunter made to the Plaintiff's profit in 2005 and 2006. He multiplied these amounts with the shortfall on the hunt in each of the respective years. In his expert opinion this resulted in losses of R4 138 462.30 and R6 196 482.86 for 2005 and 2006 respectively. Mr Klinkradt also examined the hunts booked through other agents and arrived at the conclusion that the Plaintiff's loss was not mitigated by an increase in hunters not booked through Cabela's.

26. I must therefore find that mathematically the Plaintiff has proven his pure economic loss for 2005 and 2006 as R10 334 945.16 and is therefore entitled to be compensated therefore in that the other elements of the *actio legis Acquilia* were satisfied.

27. The Plaintiff also claims interest on his damages from the date of the summons. In terms of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975, as amended, such interest is permissible. However, the claim for pure economic loss was not claimed in the original summons. It was only later that the summons was amended to include the claim for pure economic loss. I therefore propose to deal separately with the interest on general damages and special damages.

Conclusion:

28. In the circumstances, I make the following order

28.1. That the Defendant pay to the Plaintiff the sum of R60 000.00 as general damages together with interest thereon at the prevailing prescribed legal rate from the date of the service of the summons to date of payment thereof.

28.2. That the Defendant pay to the Plaintiff the sum of R10 334 945.16 as special damages together with interest thereon at the prevailing prescribed legal rate from the date of the amendment of the summons to include the claim for pure economic loss to the date of payment thereof.

28.3. Cost of suit, including the cost of two counsel and the costs of the expert Mr Klinkardt together with interest thereon at the prevailing prescribed legal rate from a date 14 days after taxation to date of payment thereof.


for E. Crouse AJ

26 September 2013

Appearances

Adv Ford SC and Beard- Advocates for the Plaintiff

No appearance- for the Defendant