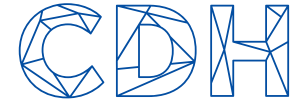


Employment Law

ALERT | 21 January 2025



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SOUTH AFRICA

Investigation reports and disciplinary processes: Employer accountability for defamation

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Investigation reports and disciplinary processes: Employer accountability for defamation

The legal implications of defamation claims arising from disciplinary investigations were brought into focus in the recent case of *Ndobe v Gibela Rail Consortium RF (Pty) Ltd* [2024] ZAGPJHC 1215 (27 November 2024) (*Gibela*). This case examined whether an employer could be held liable for defamation when an investigation report implicated an employee in project mismanagement. The judgment provides valuable insights into the boundaries of employer liability and the principles safeguarding confidentiality and fairness in such proceedings.

Key facts

In *Gibela*, an employer produced a report alleging that an employee was responsible for the mismanagement of a project, resulting in adverse financial consequences. The report served as part of the evidence for disciplinary proceedings against the employee. The disciplinary process concluded with the employee being found guilty and dismissed. However, this dismissal was later overturned on appeal and replaced with a final written warning. Nine months later, the employee initiated legal proceedings, alleging that the report's contents were defamatory and that its dissemination had damaged his reputation and integrity.

Defamation: Legal principles

To establish a claim for defamation, the High Court reiterated that the claimant bears the burden of proving two essential elements:

1. **Defamatory content:** The statement must be defamatory when considered from the perspective of a reasonable person of ordinary intelligence.
2. **Publication:** The statement must be made known or published to at least one other person beyond the claimant.

However, a claim of defamation can be neutralised if the publication occurs during a privileged occasion or within a context that justifies the dissemination of the information.

Court's decision

The court's evaluation focused on two pivotal issues: whether the statements in the report were defamatory and whether their publication could be justified.

The court found that the report contained defamatory elements, as it inaccurately implied that the employee bore responsibility as a project manager for the project's mismanagement. This content was damaging to the employee's reputation.

On the issue of publication, the court determined that the report was used exclusively within the confines of the disciplinary process. Evidence confirmed that the report was distributed only to the disciplinary chairperson; the employer's HR representative; the employee himself; and the witness who compiled the report.

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No evidence suggested that the report was leaked or that its distribution extended beyond these parties. Consequently, the court held that no publication had occurred.

The court further reasoned that even if publication had taken place, it occurred during a privileged occasion. Disciplinary proceedings are recognised as privileged contexts, provided the dissemination of information remains limited to those with a legitimate interest in the process. Since there was no indication of malice or improper motive, the employer's actions were protected by qualified privilege.

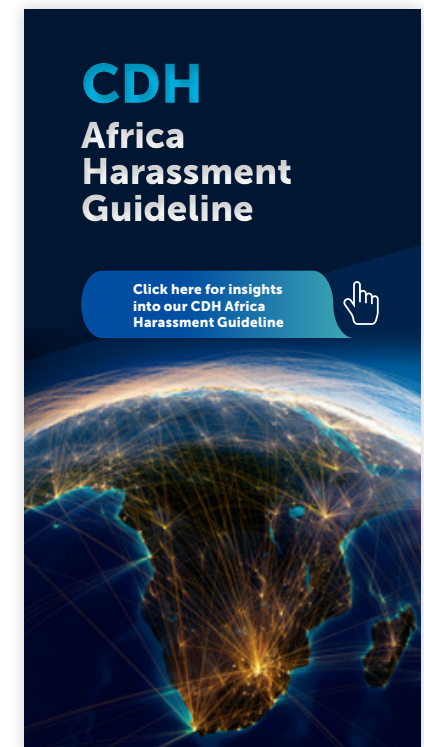
Accordingly, the court dismissed the employee's claim, awarding costs in favour of the employer.

Key takeaways

This case underscores the importance of precision, fairness and confidentiality in the drafting and handling of investigation and evidence reports during disciplinary proceedings. Employers should heed the following considerations:

- Accuracy and fairness: Investigation reports must be factually accurate and avoid imputing unwarranted blame to specific individuals.
- Confidentiality: The distribution of disciplinary evidence should be restricted to personnel directly involved in the process or responsible for decision-making.
- Prejudice: Employers must ensure that their actions remain devoid of malice or improper intent.
- Sensitivity in evidence collection: Conduct investigations with due regard for confidentiality and procedural fairness to minimise reputational risks and legal exposure.

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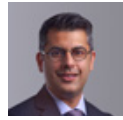
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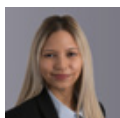
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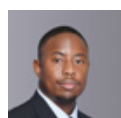
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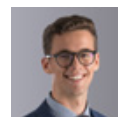
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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