REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/10831

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

BHEKI HAMILTON CELE Plaintiff

and

AVUSA MEDIA LIMITED Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The plaintiff, Mr Bheki Cele, sues the defendant Avusa Media Ltd[1] for damages in the amount of R200 000 for defamation, and in the alternative infringement of his dignity, arising from the publication of two articles together with a digitally altered photograph of the plaintiff ("the altered photo image") which were published by the *Sowetan* on 6 July 2007 and 16 July 2007, respectively.

[2] The defendant is the owner and publisher of the *Sowetan*. At the time that the articles which form the basis of the claim were published, the plaintiff was a Member of the Executive Council in Kwazulu Natal responsible for Transport, Community Safety and Liaison. He was subsequently appointed National Police Commissioner in July 2009, a position which he held until he was removed from office, by President Jacob Zuma, on 12 June 2012.

Pursuing defamation and dignity in the alternative

[3] Although the plaintiff bases his claim on defamation as well as on an infringement of his dignity, his particulars of claim are largely unclear in relation to which aspects relate to the defamation claim and which to the 'dignity' claim. The two claims have also not been pleaded in the alternative. The particulars of claim, furthermore, do not contain a prayer for relief in respect of infringement of dignity. On the contrary, the relief sought appears to be limited to the defamation claim. The defendant raised this at the second pre-trial conference suggesting that the plaintiff amend his particulars of claim. The plaintiff failed to do so. Consequently, on the first day of the trial, the Court directed the parties to prepare a joint statement setting out which aspects of the particulars of claim relate to the defamation claim and which to the dignity claim, as well as the defences raised in respect of each claim. Pursuant to the Court's direction, the parties prepared a "Statement of Plaintiff's Claim and Defendant's Defence" ("the joint statement"), which was

[1] The plaintiff originally sued New Africa Publications Ltd, the erstwhile owner and publisher of the *Sowetan* newspaper. Subsequent to the issuing of the summons, New Africa Publications had been wound up and the *Sowetan* is currently owned and published by Avusa Media Limited. There has been a substitution of New Africa Publication by Avusa Media Limited. (notice of substitution, dated 21 August 2012)

handed up to the Court. The joint statement reveals that the plaintiff's defamation claim is set out at paragraphs 15 to 20 of the particulars of claim, his dignity claim is set out at paragraphs 12 to 14 of the particulars of claim, and that the two claims are pursued in the alternative. The joint statement also makes it clear that the defamation claim is based on the altered photo image read together with the articles of 6 July 2007 and 16 July 2007, respectively and that the dignity claim is based solely on the altered photo image.

[4] The articles of 6 July 2007 and 16 July 2007, which were published in the *Sowetan*, were written by Mhlaba Memela ("Memela"), a reporter employed by the defendant. The article of 6 July 2007 reads:

" ***'AIM FOR THE HEAD'***

Mhlaba Memela

Black business people in KwaZulu- Natal have been told in no uncertain terms that they should stop "moaning about crime while they fail to wage a war against evil crime in society"

This comment from Bheki Cele, KwaZulu- Natal MEC for transport, community safety and liaison, follows an outcry from black businessmen, who attended the Nafcoc prayer meeting at the Umlazi Cinema, south of Durban yesterday.

Cele also lashed out at criminals, saying police in the province "will shoot to kill".

His comments came day after crime statistics showed that KwaZulu- Natal is heading for the shameful number one position as the most dangerous province.

Nafcoc members in the province were in Umlazi as part of the project to revamp businesses that were destroyed by political violence.

The provincial Nafcoc leadership will press ahead with the project despite its national leadership saying the provincial president of the federation was not a senior office bearer of the organisation.

Businessmen in the township complained that they had now become victims of crime in their place of work.

Previously they were victims of political violence.

The businessmen said they had experienced more deaths of fellow businessmen in the past few months than ever before.

"Crime needs a joint effort from government and the community".

"Anger will always fail to find the path to the right solution. Police need to shoot and kill criminals".

"Police must aim for the Head"

"What criminals are doing is brutality not crime", said Cele.

Local Entrepreneur Musa Hlongwane said businessmen in Umlazi were dying in the townships because of increased crime.

"We work hard with the police in the area but everyday businesses are being robbed here. Our owners are killed".

In his speech, ANC deputy president Jacob Zuma called on local church leaders to help restore humanity within society"

The front page of the 6 July 2007 edition of the *Sowetan* carried an altered photo image of the plaintiff (which is described later in the judgment) with the caption "POLICE MUST AIM FOR THE HEAD". The altered photo image was created by Mzi Oliphant, an employee of the defendant.

[5] The article of 16 July 2007 reads:

" ***Eight dead in 10 days of crime war***

Mhlaba Memela

Police in KwaZulu- Natal have killed eight people in less than 10 days after Bheki Cele, MEC for transport, community safety and liaison, told them not to hesitate and shoot to kill all criminals.

Less than two weeks after Cele's call, police have shot dead eight suspects in separate incidents in the province.

Cele lashed out at criminals, saying police in the province would shoot to kill.
"We cannot allow police to be killed by criminals. Once criminals pull their guns, police should aim for the head", he told a prayer meeting at Umlazi Cinema in Durban two weeks ago.

Barely a week later, four hijackers were shot dead in Effingham. Two ATM bombers were killed last week, a taxi hitman was killed and an alleged murder and robbery kingpin, Rasta Msisi, 43, linked to the St Tropez Restaurant attack, was shot dead.
However, the province's "crime war" also claimed the lives of four policemen, who were shot dead by criminals while on duty.

An alleged taxi hitman known as "Inkabi" was killed in shoot- out with police near Hammersdale in Durban.

He was travelling with a man wanted in connection with murdering taxi owner Bonginkosi Dladla, 40, his brother Mbeki Ngobese, 24, six- year- old toddler SN, her mother Amanda Ndawonde 26, and grandmother Nokuthula Ndwawonde, 52, in Umlazi south of Durban.

Police spokesman Superintendent Vincent Mdunge said the police's mandate was to create a safe environment for all citizens.

"It's not our mandate or vision to kill. But there are situations which force police to use extra power when criminals shoot at us", he said.

Mdunge confirmed that in the past few weeks police had dealt harshly with criminals, but he denied it was a response to Cele's call.

He said police had a right to protect themselves against criminals, even if it meant shooting to kill.
Mdunge said police had exchanged fire with taxi hitmen on the N3 near Hammersdale and two suspects had been arrested.

"Police are investigating many cases of taxi killings and we cannot confirm that they are linked to any of the recent killings", he said."

The front page of the 16 July 2007 edition of the *Sowetan* carried the same altered photo image of the plaintiff, which appeared on the front page of the 6 July 2007 edition of the *Sowetan*, with the caption:

"POLICE PULL THE TRIGGER
…SHOOT AND INJURE EIGHT CRIME SUSPECTS IN 10 DAYS
Thanks to KwaZulu-Natal community safety and liason MEC Bheki Cele's 'shoot them' order"

The plaintiff's defamation claim

[6] The joint statement indicates that the plaintiff's defamation claim is set out in paragraphs 15 to 20 of the particulars of claim. The plaintiff does not identify the specific passages from each of the two articles that are alleged to be defamatory. Instead the plaintiff pleads that the entire content of both articles as well as the altered image are defamatory per se; alternatively, were intended and understood by those members of the public who read and saw them, to mean that:

(a) the death and killing of the persons mentioned in the article are as a result of the statements attributable to the plaintiff;

(b) That the plaintiff is "a person with murderous intent"; and

(c) That the members of the police acted in the manner described in the articles at the instance of the plaintiff.

As contended for by the defendant, logically the meanings pleaded by the plaintiff in paragraphs (a) and (c)[2] above can only arise from the article of 16 July 2007 and not from the article of 6 July 2007, which plainly does not make reference to any deaths.

[7] The plaintiff furthermore pleads that the articles and the altered photo image are false, that the falsity was known or ought reasonably to have been known to the defendant, and that the defendant had no reasonable grounds for believing the statements or implications conveyed by the articles and the altered photo image were true. The plaintiff also pleads that the defendant acted unreasonably in publishing the two articles and the altered photo image of the plaintiff. These allegations, in my view, are irrelevant as they do not form part of the essential elements that a plaintiff is required to allege and prove in a defamation claim.[3] I will accordingly disregard them as they are superfluous and meaningless in law for purposes of assessing the plaintiff's defamation claim.

The defences raised

[8] The defendant denies that the articles of 6 July 2007 and 16 July 2007 and the altered image are *per se* defamatory of the plaintiff or harmful to his dignity. In the alternative, and in the event that the Court finds that the articles of 6 July 2007 and 16 July 2007 are defamatory, the defendant pleads fair comment and reasonable publication in relation to the article of 16 July 2007, and reasonable publication in relation to the article of 6 July only[4]. In the event that the Court finds that the altered image is defamatory, the defendant pleads fair comment and reasonable publication, and in the event that the court finds that the altered image harmed the plaintiff's dignity, the defendant pleads fair comment and reasonable publication.

[9] The law of defamation requires the balancing of two constitutional rights, neither of which can be regarded as being of greater *a priori* significance: the right to reputation, which forms part of the right to dignity,

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[2] Paragraphs 16(a) and 16(c) of the plaintiff's particulars of claim

[3] Neethling, Potgieter and Visser, *Neethling's Law of Personality* 2nd ed, 2005 at 131

[4] The defendant withdrew its defence of jest at the hearing of argument, as well as the defence of fair comment in relation to the 6 July 2007 article.

and the right to freedom of expression.[5] In *Khumalo v Holomisa*[6], which dealt in some detail with the balance to be struck between the rights to human dignity and freedom of expression, the Constitutional Court posed the question in the following manner:

"The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other."

As restated by the Constitutional Court in *Khumalo v Holomisa*[7], the elements of an action for defamation are the wrongful and intentional publication of a defamatory statement concerning the plaintiff. The plaintiff is, however, not required to establish every one of these elements in order to succeed[8]. If the plaintiff is able to prove at the outset that there has been publication of defamatory matter concerning him or her, it is then incumbent upon the defendant to raise a defence that excludes either wrongfulness or intent. The onus on the defendant to rebut these presumptions is a full onus that must be discharged on a preponderance of probabilities.[9]

[10] In a case where the plaintiff pleads that the publication is defamatory *per se*, as in the present matter, a two-stage enquiry must be followed. This enquiry was set out in *Le Roux v Dey* as follows:

"Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the

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[5] Milo *et al Freedom of Expression* in Woolman *et al* Constitutional Law of South Africa at OS 06 08,Chapter 42 at 85
[6] 2002(8) BCLR 771 (CC) at para 28
[7] *Khumalo v Holomisa* at para 18
[8] *Le Roux and Others v Dey* 2011 (6) BCLR 577 (CC)
[9] *Hardaker v Philips* 2005(4) SA 515 (SCA) at 14

meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.
The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question."[10]

[11] Thus, in determining whether a statement is defamatory, the court must first determine the meaning of the words complained of. This is a question of construction and not of evidence. The enquiry is an objective one conducted through the lens of the ordinary reasonable reader of the particular publication. The attributes of an ordinary reader as first enunciated in *Basner v Trigger*[11] were reiterated in *Channing v South African Financial Gazette Ltd*[12], as follows:

"From these and other authorities it emerges that the ordinary reader is a 'reasonable', 'right-thinking' person, of average education and normal intelligence; he is not a man of 'morbid and suspicious mind', nor is he 'super-critical' or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read."[13]

[12] Once the meaning of the words has been established, the second stage of the test is to determine whether the meaning conveyed is defamatory of the plaintiff. The basic test is an objective one of whether a reasonable person of ordinary intelligence might reasonably understand the words to convey a meaning that tends to lower the plaintiff in the estimation of

[10] *Le Roux* at para 89-91
[11] 1945 AD 22
[12] 1996 (3) SA 470 (W)
[13] *Channing* at 474A-C. Quoted with approval in *Mthembi-Mahanyela* at para 26

members of the community. Again, the test to be applied is that of the ordinary reasonable reader.

[13] The context in which the publication occurred is also of critical importance in determining whether the content of the publication is defamatory. In *Golding v Torch Printing and Publishing*[14] the court held that:

"The circumstances in which the writing was published' do not seem to me to be capable of exact definition. Each case must be decided on its own facts. The alleged defamatory words must not be considered as it were in vacuo but as part and parcel of the whole. …"

Our courts have accepted that cartoons, caricatures and sketches may be defamatory, and that in assessing whether a cartoon, caricature or sketch is defamatory the same two-stage test set out above is applicable.[15] I am of the view that the same test will also apply to the digitally altered photo image of the plaintiff, in issue, in this matter − which for all intents and purposes is a parodic representation or caricature of the plaintiff.

The 6 July article

[14] The article of 6 July 2007 is a news report published under the headline "Aim for the Head". The article states that the plaintiff attended a NAFCOC prayer meeting at Umlazi Cinema in Durban at which he addressed black businessmen from Umlazi. The article quotes the plaintiff as having, *inter alia*, made the following comments during his speech at the meeting:

(a) Black business people in Kwa Zulu Natal have been told in no uncertain terms (by the plaintiff) that they should stop "moaning about crime while they fail to wage a war against evil crime in society."

(b) "The plaintiff lashed out at criminals saying police in the province 'will shoot to kill' ";

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[14] 1949 (4) SA 150 (C) at 159

[15] *Le Roux v Dey* at para 104

(c) "Crime needs a joint effort from government and the community. Anger will always fail to find the path to the right solution. Police need to shoot and kill all criminals. Police must aim for the head. What criminals are doing is brutality not crime".

It emerged during the testimony of the plaintiff that he takes issue only with the use of the statements “shoot to kill”, and that “police need to shoot and kill all criminals” which the writer of the article had attributed to him. There is therefore a factual dispute between the parties as to whether the said statements quoted in the article are correct. The plaintiff denies that he used the words "shoot to kill". He has also denied stating that "police need to shoot and kill all criminals". He, however, accepts having made the following two statements: "aim for the head" and “use deadly force” which were directed at “violent criminals”. He also accepts that the sting in the statements was that it should be the suspect that is buried and not the policeman.

[15] Memela, the reporter who wrote the article, testified that he personally attended the NAFCOC meeting at Umlazi Cinema in Durban and that the plaintiff uttered the statements quoted in the article during his speech. The meeting ended at approximately 15h30 and Memela wrote and submitted the article for publication in the *Sowetan* on the same day. The defendant argues that the accuracy of the quotation is supported by the fact that Memela took contemporaneous notes during the plaintiff’s speech that were used as a basis for the article, and that the use of these notes renders it more probable than not that the content of the speech was accurately recorded in the article. In addition, it argues that since the article was written on the same day that Memela attended the event, he would have had a reasonably clear recollection of the statements made by the plaintiff.

[16] Memela, however, testified that he was unable to produce a copy of the notes for discovery because his notes were lost and could not be found. The plaintiff contends that Memela’s testimony regarding the notes is untruthful and should be rejected by the Court. The defendant, no doubt, contends that that Memela's version should be accepted as true as there is no credible

reason for him to lie on this issue. It contends, in this regard, that Memela explained the circumstances in which the notes were lost, and there is no admissible evidence on record to gainsay his explanation, save for unavailing attempts by the plaintiff to discredit him under cross-examination.

[17] Memela testified that his notes went missing during an office move that took place in 2010, and that the reason for not making an effort to secure the notes prior to 2010, was that he only consulted with the defendant's attorneys for the first time in 2010. He said that it was only at this stage that he became aware of the exact nature of the claim, and that his notes were required for purposes of the trial. During cross examination, Memela repeatedly emphasised, and did not deviate from the fact, that he only consulted with the defendant's attorneys for the first time in 2010. He stated that prior to 2010 he was aware that the plaintiff was suing the *Sowetan* - a fact that was conveyed to him by the Bureau Chief of the *Sowetan* in Durban, Mary Pappaya ("Pappaya") – but he was not informed of the details of the claim. At that stage he was under the impression that the plaintiff's main complaint related to the altered photo image, which had not been created by him. He also testified that he was not asked by Pappaya, at that stage, to make a copy of his notes available.

[18] Memela's version that he only consulted with the defendant's attorneys in 2010, and that it was only at that stage that he was asked to hand over a copy of his notes, is also supported by the fact that the defendant's discovery affidavit was only deposed to on 1 September 2010. I am of the view that the probabilities, therefore, favour the conclusion that it was only at the stage when the discovery affidavit was being prepared that Memela was asked to provide a copy of his notes. There is again no admissible evidence on record to contradict this. I am accordingly of the view that Memela's evidence, in this regard, has not been gainsaid by any evidence adduced by the plaintiff. Memela's testimony that he only consulted with the defendant's attorneys in 2010, and it was only at that stage that he became aware that his notes were required, is also uncontested. His failure to preserve the notes at an earlier stage when he became aware (without knowing the substance of the

allegations) that the plaintiff was taking legal action, does not, in my view, mean that the notes were deliberately concealed or destroyed. At best, this demonstrates a lack of adequate caution in preserving evidence. Accordingly, I am of the view that Memela's version was truthful and reliable, and I find no reason to reject his evidence.

[19] The plaintiff has admitted to making numerous other statements that are the equivalent of “shoot to kill” or which were reasonably understood by reporters to mean “shoot to kill”. He has also admitted to making numerous statements in support of the police using “deadly force” when confronting criminals. These admissions appear from “Plaintiff’s Reply to Defendant’s Request for Admissions”:

(a) he is correctly quoted in the article as having stated *"We cannot allow police to be killed by criminals. Once criminals pull their guns police must aim for the head"* (He also admitted saying this under cross examination);

(b) he said that *"you have to defend yourself you cannot die with a gun in your hand";*

(c) he said that *"if someone who is carrying a camera wants to shoot a picture of you, respond with a smile. But if he is carrying a gun and threatens to shoot you then you must respond in a similar manner"*;

(d) he said that *"when a criminal points a gun at a police officer and then cocks it there is only one thing he will do next and that is to fire it"*;

(e) he said that Police must *"not die with guns in their pockets"*;

(f) he said that *"you can't be soft and you can't be moving around kissing crime. You need to be tough, because you are dealing with tough guys"*;

(g) he said that *"criminals are comfortable with R5s and when they pull the trigger it does not produce photos"…"The only choice that police have is to answer with the same thing that criminals are using. The only thing that an R5 understands is R5"*;

(h) he said that *"if police see a suspect with a gun in his hand, they must not shout"*;

(i) that he said that *"no policeman must smile on a thug that has a gun in his hand"*;

(j) he said that *"if you are facing a criminal with a gun and he is threatening your life, someone has to survive. Saying 'I have a gun put yours down does not work'"*;

(k) he said that *"my instruction to my officers is that they should not die with their guns in their hands"*;

(l) he said that "*anybody who has a gun in hand and is threatening you with a gun, you must use yours"*;

(m) he used words to the effect that people who rape and kill innocent people should not be granted any human rights;

(n) he said that *"it has been said that I say 'shoot to kill'. I have never used that term. But I have told the police they must use deadly force"*;

(o) he said that *"no police officer must die with a gun in their hand. The police should not be trigger happy but any criminal with a gun in the hand should not shoot at the police. We are not training you to open new graves but do not let criminals prevail over you"*;

(p) he said that *"we must show them that they cannot just take money that they did not work for. No one here will die in the hands of thugs anymore because of you. You are here for a reason – quick and decisive response – and we will show them that either dead or alive, it is the end of the road for them."*

[20] It is clear from the abovementioned statements that the plaintiff has admitted to making other statements, *inter alia* "aim for the head" and "use deadly force" which are the equivalent of "shoot to kill", meaning that the police must use deadly force when dealing with criminals. This certainly makes it more probable than not that the plaintiff made the statement "shoot to kill". Indeed, the plaintiff conceded under cross-examination, when questioned about his use of the term “deadly force” that "deadly means dead".

Although the plaintiff sought to distinguish the occasions on which he had used similar language and to justify the use of such language, his explanation was a mere exercise in semantics. Whether one uses the terms “aim for the head”, “use deadly force” or “shoot to kill” their meaning and import is the same. The uncontested evidence demonstrates that the plaintiff had, on numerous occasions including during the same speech on 5 July 2007, used language with the same import as "shoot to kill". Having regard to these admissions, the plaintiff’s denial that he used the words "shoot to kill", or words reasonably understood in this way, is implausible.

[21] The plaintiff, furthermore, relies solely on his memory of a speech that was given off the cuff more than five years before the trial. During cross-examination, he admitted that he did not have any record of his speech from which to refresh his memory. The plaintiff has sought to rely on the fact that other newspapers that were present at the meeting on 5 July 2007, i.e. the *Daily News* and *The Citizen*, did not report the statements made by him as support for his contention that he did not make those statements. This argument, in my view, is ill-conceived. Firstly, neither the *Daily News* nor *The Citizen* published articles on 6 July 2007 regarding the NAFCOC meeting. Their failure to do so could be based on a whole host of reasons. It is mere speculation to suggest that they did not report on the meeting because the plaintiff had not made any controversial statements that were worth reporting. Secondly, as pointed out by the defendant, the *Daily News* articles relied upon by the plaintiff are not reports of the events that took place on 5 July 2007 at the NAFOC meeting at Umlazi cinema. On the contrary, the article published by the *Daily News* on 5 July 2007 was a report of a different event, i.e. the provincial police awards in Amanzimtoti. In addition, the follow-up article, published by the *Daily News* on 23 July 2007, also referred to the provincial police awards in Amanzimtoti. Thirdly, aside from the article published by the defendant, the only other article that reported on the the NAFCOC meeting, which was held at Umlazi on 5 July 2007, was the article published by *The Citizen* on 23 July 2007. Significantly, the article reads in relevant part as follows:

"A shoot to kill call by a top South African law enforcement officer has fuelled a debate on how far police can go to defend themselves"[16]*.*

[22] It is, therefore, apparent that the only other newspaper, namely *The Citizen*, that reported on the meeting at Umlazi on 5 July 2007 also reports that the plaintiff made a call for the police to "shoot to kill". It is improbable that *The Citizen* would have made the same 'mistake' that Memela is alleged to have made − thus signifying that Memela was not mistaken. The plaintiff has, however, not taken any action against *The Citizen* for reporting this statement and attributing it to him. His explanation that he did not pursue newspapers that, in his view, reported on him in a balanced way is yet again implausible. In the circumstances, I find on a balance of probabilities that the plaintiff made the statements "shoot to kill" and "police must shoot and kill all criminals" during his speech on 5 July 2007, referring to “violent criminals”.

The meaning of the 6 July article and the altered photo image

[23] The plaintiff's defamation claim regarding the article of 6 July 2007 relies "on the cumulative import" of the altered image and the content of the article. The plaintiff contends that the altered image portrays the plaintiff as a "gun touting man". This contention is, however, inconsistent with the plaintiff’s evidence which demonstrates that being portrayed as a “gun touting” law enforcement officer (or official) was not the essence of the plaintiff’s complaint. His actual complaint was that the altered photo image “mixes” him or manipulated a likeness of him. What hurt him, he complains, is “to mix me”− and it portrayed him as a “movie star” or actor. It is, however, abundantly clear from the plaintiff’s testimony that he had no objection to being portrayed carrying guns or armed, depending on the context. Ultimately, the plaintiff complains that the altered photo image is attired differently from how he would normally present himself; and is carrying a type of gun he would not carry. I am of the view that this is not a complaint that deserves the protection of the law, especially in the case of a public figure who courted public attention and controversy as consistently as the plaintiff did on an

[16] Own emphasis

important public interest issue such as violent crime, and what the police's appropriate response should be. The law requires of such public figures, politicians and public officers (by virtue of their chosen professions) to be robust and thick-skinned in relation to comments made against them.

[24] It is well established in our law that public figures, including politicians, are required to withstand greater scrutiny and criticism. In *Delange v Costa*[17] the Court observed that:

"[b]usinessmen who engage in competition (like politicians who take part in public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual."

Similarly, in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party*[18] the Court held that:

"the law's reluctance to regard political utterances as defamatory no doubt stems in part from the recognition that right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him..."

Although politicians are not expected to endure every infringement of their personality rights, they must expect to be criticised[19] and *"they do have to be more resilient to slings and arrows than non-political, private mortals."*[20] In *Pienaar v Argus Printing and Publishing Co Ltd*[21], the Court held that:

"I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and

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[17] 1989(2) SA 857 (A) at 861-862

[18] 1992(3) SA 579(A) at 588F

[19] *Crawford v Albu* 1917 AD 102 at 105

[20] *Mthembi v Mahanyele* 2004 (6) SA 329 (SCA) at para 67

[21] *Pienaar v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (T) at 322*

expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses! Some support for this view is to be found in a passage in Gatley on Libel and Slander, 3rd ed. p. 468. It reads:

> *'In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them.'"*

[25] Since the plaintiff relies specifically on the altered photo image read together with the content of the article, it is necessary to determine the meaning of the altered photo image, the meaning of the words in the article read as a whole, and the meaning of the altered photo image read with the article. It is common cause that the altered photo image is a composite image, which consists of a photograph of the plaintiff's head superimposed onto the body of another person. The identity of the person to whom the body belonged is not known. The photograph of the plaintiff's head depicts him wearing a wide brimmed hat. The body is that of a man dressed in clothing that is reminiscent of a sheriff wearing a shirt, tie, waistcoat, long overcoat, trousers, boots, a belt with a large buckle and a gun holster attached to the belt. The figure is also carrying a gun. The altered photo image is a parodic representation or caricature (using elements of satire) of the plaintiff as a law enforcement officer or sheriff, playfully, perhaps, from the Wild West. It must not, therefore, be interpreted to be a portrayal or representation of real life.

[26] When it was put to the plaintiff, during cross examination by counsel for the defendant, that the altered image of the plaintiff depicted a law enforcement officer or official taking a tough stance against violent crime, he responded by stating that it was not the way he viewed the altered photo image, nor the way that the people who first alerted him to the altered photo image viewed it. It is important to bear in mind that for purposes of a defamation claim, it is irrelevant how the plaintiff subjectively viewed the altered image or how people, who spoke to him, viewed it subjectively.

[27] As contended for by the defendant, a reasonable person would understand the altered image in the context of the statements made in the

articles in which the altered image was carried – to portray officialdom represented by the plaintiff taking a no nonsense stance on violent crime − consistent with the statements attributed to him on this issue. I agree. It would have been clear to readers that the altered photo image was not a real photograph of the plaintiff because the clothing, as well as the gun holster worn on the belt, are clearly not modern and in keeping with current trends. It is not the style of clothing that people (especially the plaintiff on his own evidence) would wear in the modern context. It is important to recognise, in this regard, that the plaintiff was a public figure at the time, and the press was replete with images of him. The attire in which the plaintiff regularly presented himself, in public, did not at all resemble the ensemble worn by the figure in the altered photo image. In my view, the altered photo image would certainly have been understood by reasonable readers in the context of the caption that appears beneath it, which reads "police must aim for the head", as well as the article which followed on page 6 of the *Sowetan,* which reports on the statements made by the plaintiff concerning the use of force by the police.

[28] A further element of context, which the Court must give consideration to, is the political position held by the plaintiff as well as his history of involvement in law enforcement. At the time that the article was published, the plaintiff was the MEC for Community Safety and Liaison in KwaZulu-Natal, which made him the highest political office bearer dealing with safety and security in the province. The plaintiff testified that prior to the 1994 elections he was involved in attempts to solve the problems relating to political violence in KwaZulu-Natal and that, in this context, he worked with the police and communities. After the 1994 elections he was appointed as member of the provincial parliament in KwaZulu-Natal and held the portfolio of Safety and Security. These facts, in my view, would have been known to the average readers of the *Sowetan* at the time, and would have formed part of the context in which they interpreted the altered photo image. The altered image, in my view, is a depiction of the plaintiff as a law enforcer or sheriff from the Wild West, and it would have been understood as such by reasonable readers of *Sowetan*. The altered photo image taken together with the caption and the contents of the article would have been understood to mean that the plaintiff

was taking a tough stance on crime and that, like a sheriff from the Wild West, he wanted criminals to be harshly dealt with by the police and brought to justice, either dead or alive.

[29] In *Golding*[22] the Court made it is clear that with respect to the meaning to be derived from the content of the article, such meaning must be ascertained having full regard to the context of the article. Accordingly, the article must be read as a whole and individual words such as "shoot to kill" must not be singled out and interpreted out of context. With respect to context, the article is a news report regarding a meeting of businessmen at which the main topic of discussion was revamping businesses that had been destroyed by political violence. One of the topics under discussion was the concern expressed by the businessmen that they were under attack by violent criminals. Memela testified that the businessmen were angry due to the perceived failure of the police to address the crime situation in Umlazi, and that the plaintiff accordingly addressed them on this issue. The article also states that, at the time that the comments were made, KwaZulu-Natal was headed for the position of most dangerous province in the country. A reasonable reader would have read the plaintiff's statements and given meaning to them within this context, which appears from the article. As alluded to above, reasonable readers of the *Sowetan* would also have been aware of the plaintiff's political position at the time, and his history of involvement in matters relating to safety and security.

[30] I am therefore of the view that a reasonable reader of the article would have understood the article to mean that the plaintiff was taking a tough stance on crime and that he was strongly advocating the use of deadly force by the police against criminals. There is no suggestion in the article that the plaintiff advocated indiscriminate use of force against members of the public by the police. On the contrary, the context is very clear - the plaintiff was talking about the need for police to take action against violent criminals. The plaintiff conceded this under cross-examination.

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[22] *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* 1949 (4) SA 150 (C) at 167

The 6 July article and the altered photo image are not defamatory

[31] I therefore remain of the view that the meaning of the 6 July article and the altered image are not defamatory of the plaintiff. A reasonable reader of the *Sowetan*, taking into account the context mentioned above, would know that the plaintiff was a high ranking politician charged with ensuring safety and security of the public in the province of KwaZulu-Natal; that he had a well-known history of involvement in matters relating to safety and security; and that the statements attributed to him, as well as the altered photo image were reported in the context of a meeting at which one of the primary topics of discussion was violent criminal activity which was affecting businesses in Umlazi township − where crime was reportedly on the increase. The reasonable reader would not “think less” of the plaintiff for taking a tough stance on crime; for calling on the police to deal harshly with criminals; and for encouraging them to use deadly force when dealing with criminals. As is apparent from the numerous articles contained in the trial bundle, there were varied responses to the stance that the plaintiff took on violent crime and criminals. Some even lauded his stance. I am accordingly of the view that the plaintiff's claim, based on the article of 6 July 2007 read together with the altered photo image, is without merit because neither the content of the article nor the altered photo image published is defamatory of the plaintiff.

The meaning of the 16 July article and the altered photo image

[32] The plaintiff contends that the contents of the article of 16 July 2007 read with the altered photo image are per se defamatory, alternatively, would have been understood to bear the following meanings which are defamatory:

(a) That the death and killing of the individuals mentioned in the article are as a result of the statements attributable to the plaintiff;

(b) That the plaintiff is "a person with murderous intent";

(c) That the members of the police acted in the manner described in the articles at the instance of the plaintiff.

[33] I discussed in detail the meaning which, in my view, the reasonable reader would attribute to the altered photo image which was published together with the article of 6 July 2007. I am of the view that the same meaning is conveyed by the altered photo image that was published with the article of 16 July 2007 − which is that the plaintiff took a tough, no nonsense, stance against violent crime. In relation to the headline, ordinary reasonable readers of newspapers understand that headlines, by their very nature, draw attention to an article by paraphrasing and highlighting its contents through the use of a few well-chosen words or phrases. The headline does not, and is not meant to, reflect the full content or context of the article. It would, therefore, have been clear to reasonable readers of the *Sowetan* that the plaintiff did not give a specific 'order' to the police to shoot criminals as alluded to in the front page headline. The headline was merely a paraphrase of the plaintiff's statements, which were then elaborated upon in the text of the article.

[34] The plaintiff interprets the article to mean that he specifically ordered the killing of the eight suspects. This interpretation, in my view, is contrived and unreasonable, and does not accord with how the reasonable reader would have understood the article. I accordingly reject the plaintiff's interpretation of the article. The plaintiff's subjective understanding of the article is, in any event, irrelevant to the determination of whether the article is defamatory of the plaintiff. What the Court must give consideration to, in determining whether the article is defamatory of the plaintiff, is whether a reasonable reader of ordinary intelligence might reasonably understand the words of the article to convey a meaning that tends to lower the plaintiff in the estimation of the members of the community.[23]

[23] *Channing* at 476A-C

[35] As indicated, in my view the article would have been understood by reasonable readers to mean that the “use of deadly force” by the police was to be understood in the context of the tough stance which the plaintiff took against violent crime. This much is apparent from the article and, in particular, the calls which the plaintiff made to the police to, amongst other things, “aim for the head” and/or “use deadly force”. The article would, in all certainly, not have been understood by reasonable readers to mean that the plaintiff had specifically ordered the killing of the eight suspects in question or that he was in any way culpable for the deaths of these suspected criminals. Reasonable readers would furthermore not have understood this to be a statement of fact but rather an expression of opinion by the defendant, in similar vein to the opinions which other newspapers and commentators expressed in consequence of the police killings of suspects, during this period in the province of KwaZulu Natal, which the plaintiff took no objection to. As contended for by the defendant, it would have been clear to readers that, without conducting interviews with the police-officers involved in the incidents, the defendant could not have been in a position to assess the state of mind of each police officer, in the province, for purposes of concluding whether their actions were motivated by the plaintiff’s statements. Consequently, the conclusions drawn by the plaintiff in this regard are speculative and without foundation.

[36] The article could also not have been understood by the ordinary reasonable reader to mean that the plaintiff had "murderous intent". Murder is the unlawful killing of another human being. It is clear from the article that the plaintiff’s statements were made in the context of the police response to violent criminals and did not seek to encourage indiscriminate killing. The article includes the plaintiff’s statement that the *“police must not be killed by criminals”* and that *“once criminals pull out their guns the police must aim for the head”*. Given the context of the article, reasonable readers would not jump to the conclusion that the plaintiff wanted the police to indiscriminately commit murder or kill the particular eight suspects mentioned in the article and the headline. Predictably, the plaintiff conceded that his statements were understood as directed at “violent criminals” only.

The article is not defamatory

[37] The article is not defamatory of the plaintiff as reasonable readers would not "think less" of the plaintiff for encouraging the police to take a tough stance against criminals. The articles in the trial bundle show that certain members of the media and the community applauded his tough stance and calls to the police. The article would have been read and understood in its full context. In this regard, it is notable that the article reports that the plaintiff stated, at the meeting, that he did not want the police to be killed by criminals and that the individuals who were killed by the police were alleged to be hijackers, ATM bombers, a taxi hit man and a murder and robbery kingpin − all violent criminals. It would, therefore, have been reasonable to conclude that they probably resisted arrest thus resulting in their deaths. The article also includes a statement that the province of KwaZulu Natal was engaged in a "crime war" which had also resulted in the deaths of four police officers while on duty and includes a comment from police spokesperson Vincent Mdunge in which he explains that:

"It is not our mandate or vision to kill. But there are situations which force police to use extra powers when criminals shoot at us," he said
Mdunge confirmed that in the past few weeks police had dealt harshly with police but he denied that it was a response to Cele's call.
He said police had a right to protect themselves against criminals even if it meant shooting to kill."

[38] Having regard to this context, the ordinary reader of the *Sowetan* would not have thought less of the plaintiff even if they accepted that his comments had led or contributed to the deaths of the individuals mentioned in the article. Views may differ on whether the plaintiff's call for the police to use deadly force was a courageous and necessary stance against crime or whether it was an imprudent position to adopt. Having regard to the content and meaning of the article, both these views are equally probable. It is settled law, in this regard, that where words or conduct are capable of more than one meaning, the courts apply the normal standard of proof in civil cases i.e. a

balance of probabilities. Where an allegedly defamatory statement is equally capable of bearing more than one meaning, one that is innocent and another that is defamatory, the court must adopt the non-defamatory meaning. This principle was highlighted in *Channing* where the Court held that:

"Counsel for the defendants, relying, inter alia, upon Conroy v Nicol, 1951 (1) SA 653 (AD), and S.A. Associated Newspapers v. Schoeman, 1962 (2) SA 613 (AD), urged upon me the proposition that a Court dealing with a defamation case is not entitled, where the matter complained of is capable of more than one reading, to adopt a defamatory interpretation in preference to a non-defamatory one. If a newspaper article is equally capable of both types of interpretation, he argued, the plaintiff must fail. That proposition is, in my judgment, a sound one, provided that this qualification or clarification is borne in mind: the test is not whether, to the Court itself, after it has had the benefit of a careful analysis of the article, the article seems to bear one meaning rather than another, or seems equally capable of bearing both meanings. The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action, and who are sometimes referred to as the 'ordinary readers'."[24]

In these circumstances, I am compelled to accept the non-defamatory meaning of the article. Accordingly, the plaintiff's claim in relation to the defamatory nature of the article of 16 July 2007 must fail because the content of the article published is not defamatory of the plaintiff

The plaintiff's dignity claim

[39] As per the joint statement, the plaintiff's dignity claim is set out in paragraphs 12 to 14 of the particulars of claim and is limited to the altered image that was published by the defendant on 6 July 2007 and 16 July 2007, respectively. It does not include the content of the articles published on 6 July 2007 and 16 July 2007. The exact nature of the plaintiff's dignity claim is unclear. The particulars of claim make no specific reference to an infringement of plaintiff’s dignity. The claim appears to be based on "public falsification of the personality image of the plaintiff" and "portrayal of the

[24] *Channing* at 473C-E

plaintiff's image or likeness in a false light". The plaintiff does, however, allege that he was humiliated and degraded by the image.

[40] The confusion regarding the plaintiff's cause of action became even more apparent during argument, when the plaintiff failed to rely on any case authority relating to infringement of his right to dignity by way of humiliation or degradation, despite the fact that degrading behaviour, particularly where it evidences contempt for a person, may infringe a person's dignity.[25] On the contrary, the case law relied upon by the plaintiff related solely to the unlawful use of an individual's image in a context different from the present. The plaintiff appears, in my view, to have conflated two claims that are, in law, separate and distinct – one founded on an infringement of dignity *per se* and the other on the publication of the plaintiff's image without his consent.

[41] The plaintiff contends that the altered photo image infringes upon his right to dignity. Since dignity embraces a person's subjective feelings of dignity or self-respect, an infringement of one's right to dignity would involve insulting that person. Thus when enquiring into whether a person's right to dignity has been infringed, an important consideration is that it is the person's opinion of himself, and not the opinion of others, with which the court is concerned. A claim based on an infringement of dignity is for this reason distinguishable from a defamation claim. In order to succeed in a claim based on an infringement of the right to dignity, the plaintiff must prove that the conduct concerned is wrongful. However, for the conduct to be regarded as a wrongful infringement of dignity, it must not only infringe the subjective feelings of dignity, but also be objectively unreasonable, and in conflict with the legal convictions of the community.[26] In other words, the conduct complained of must be tested against the prevailing norms of society. In *Delange v Costa* the Court articulated the test as follows:

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[25] See *Innes v Visser* 1936 WLD 44; *Tiffen v Cilliers* 1925 OPD 23 at 31; *Jacobs v Waks* 1992 (1) SA 521 (A) at 541-542; *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A)

[26] Neethling, Potgieter and Visser, *Law of Personality,* 2nd edition, Durban, at 195

"Because proof that the subjective feelings of an individual have been wounded, and his dignitas thereby impaired, is necessary before an action for injuria can succeed, the concept of dignitas is a subjective one. But before that stage is reached it is necessary to establish that there was a wrongful act… In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness - the "algemene redelikheids maatstaf"… This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria.[27]"

[42] It follows that although it is the subjective feelings of the plaintiff in a claim for infringement of dignity that must be considered, the court must also undertake an objective test of reasonableness. While the subjective element requires that the plaintiff must feel insulted or hurt, the objective element requires that a reasonable person would feel insulted or hurt by the same conduct and in the same circumstances. With regards to the violation of a norm that is required for wrongfulness, the "notional understanding and reaction of a person of ordinary intelligence and sensibilities" is also very important. Due to the importance of the right to freedom of expression in the South African context, it is essential to ensure that the correct balance is struck between the right to freedom of expression and the right to human dignity, with neither one being given greater importance as a general rule. Each case must depend upon its own circumstances and courts must ensure that they effect the appropriate balance between these two rights.[28] If the plaintiff is successful in establishing that he or she was hurt, a presumption of wrongfulness arises, which the defendant may rebut by way of a ground of justification[29].

[43] In line with this approach, I am of the view that the appropriate test in this case is whether a reasonable politician holding high public office would be

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[27] *Delange* at 862

[28] *Khumalo v Holomisa* at para 27-28

[29] Neethling, Potgieter & Visser (2010) *Law of Delict* 6th edition, Durban, at 347

hurt by the publication of the altered image. The plaintiff testified as follows in respect of his dignity claim: The altered image was brought to his attention by a number of people (he does not say how many) who phoned him while he was travelling overseas and informed him that they had seen a photograph of him in the newspaper carrying a firearm. He was hurt by the publication because it made him look like a “movie star” or actor. The altered image interfered with his work because, at the time, he was involved in a campaign to reduce the use of firearms amongst the youth and after the publication of the altered image, some of the youth, with whom he was working, told him that they had seen him carrying a firearm and that they too would start to carry firearms. He felt that his dignity had been lowered because "*I was not depicted as the way in which I operated, but it was the opposite*". He stated that certain people told him that the body used to create the altered photo image was the body of a famous actor, and that they could no longer take him seriously. He said that this made him feel that although he was trying to do a serious job, it was being "degenerated" as playful.

[44] The plaintiff’s testimony that the altered photo image harmed his subjective feelings of dignity, because it “mixed” him, is open to serious doubt. Firstly, the reasons that the plaintiff provides to substantiate this claim are questionable at best. It is unclear why any person would feel insulted by being depicted as a movie star or as someone who is 'playful'. The plaintiff’s claim, that the altered photo image interfered with his work and resulted in him not being taken seriously, is equally baseless, as it is highly unlikely that the mere publication of the altered image could have this effect.

[45] Secondly, when counsel for the defendant, in cross examination, drew the plaintiff’s attention to the numerous cartoons and caricatures published in other newspapers, which depict him armed, and which are accompanied by the words "shoot to kill" and other similar statements, the plaintiff categorically remarked that he had “no problem” with those cartoons. In the face of this concession, his insistence that the altered image was hurtful is disingenuous. The plaintiff, nevertheless, sought to distinguish the altered photo image from the cartoons on the basis that the altered image purports to be a photograph

of him or “mixes me”. This distinction, in my view, is without merit as it would have been clear to any normal reasonable person, including the plaintiff, that the altered photo image was a manipulated image or caricature and not a real photograph of the plaintiff. In my view, an altered photo image or caricature that relies on a combination of real images is no different from a cartoon that might even combine one real feature and the others fanciful; the objective behind both types of visual depictions are essentially the same − only the medium used is different.

[46] Accordingly, it is senseless for the plaintiff to find inoffensive the numerous cartoons that convey the same message as the altered photo image, while simultaneously insisting that the altered photo image offended him. It is notable that some of the cartons published in other newspapers conveyed a more damaging message than the altered photo image, yet the plaintiff did not deem it necessary to sue the owners of those publications. In the circumstances, I find it hard to believe that the plaintiff, a seasoned public figure and politician, who was trained as a MK soldier and plainly of strong character, was subjectively hurt by the publication of the altered photo image. In the circumstances, the correct enquiry is whether a reasonable politician with many years of experience and a long history of involvement in law enforcement would have felt hurt by the publication of the altered photo image. I am of the view that a reasonable person, in the position of the plaintiff, would not have been similarly offended, particularly as the evidence shows that he had not been offended by the portrayal of him or his likeness as a “macho” law enforcement officer or sheriff, in the form of a cartoon, brandishing a gun. It makes little difference, in my view, whether he was portrayed in this way by a cartoon or an altered photographic image (caricature), as in this case. The same test applies.

[47] As discussed, the altered photo image is a parodic representation or caricature of the plaintiff using satirical elements. Satire is a form of artistic expression and social commentary. Therefore, in assessing whether the plaintiff’s dignity has been infringed by the publication of the altered photo image the court must also give consideration to the protection that our

Constitution affords to artistic expression in the form of cartoons, caricatures and the like, which contribute to the exchange of ideas and opinions, and which is essential for a democracy such as ours. The right to freedom of expression in s 16 of the Constitution expressly includes the freedom of artistic creativity[30], which is generally regarded as worthy of special protection because it is a means of individual self-fulfilment and self-expression, and it generates ideas and information that contributes to the ascertainment of truth for the individual and society[31]. The altered photo image of the plaintiff was created by Mzi Oliphant, an employee of the *Sowetan*. It is a form of satire that would, in my view, be considered to be artistic expression as recognised by our law. It is therefore deserving of protection. In Müller *v Switzerland*[32], the European Court of Human Rights observed that:

"Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence, the obligation on the state not to encroach unduly on their freedom of expression."

[48] Similarly, the United States Supreme Court emphasised the value of the visual arts as a medium of political and social commentary in *Hustler Magazine and Another v Falwell*[33]*,* when it stated as follows:

"[F]rom the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate…From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them."

Closer to home, in *Laugh it Off Promotions,*[34] Sachs J observed that:

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[30] S 16(1)(c) of the Constitution

[31] P Kearns 'The Neglected Minority: The Penurious Human Rights of Artists' in R Banaker (ed), *Rights in Context: Law and Justice in Late Modern Society* (UK: Ashgate, 2010) 83 at 95

[32] *Müller and Others v Switzerland* (1991) 13 E.H.R.R. 212 at para 33. See also *Vereinigung Bildende Kunstler v Austria*, ECHR (Application number 68354/01, 25 January 2007) at para 26 and 33

[33] 485 U.S. 46, 108 S.Ct. 876 at para 16

"parodic illustrations in satirical columns, or editorial cartoons in newspapers or magazines, or a satirical programme on TV, are likely in any open society to enjoy a large measure of protection."

[49] Balanced against these important socio-political considerations which a caricature, such as the one in issue, serves in a democracy such as ours, plaintiff's dignity claim in relation to the publication of the altered photo image in the *Sowetan* pales in significance, more particularly because the plaintiff has failed to demonstrate that he was hurt or insulted in the sense contemplated by the law. Accordingly, the plaintiff's dignity claim falls to be dismissed.

The unlawful publication of the plaintiff's image

[50] This then brings me to the remaining question of the publication of the plaintiff's image without his consent or permission. The defendant accepts that the superimposed image of the plaintiff was published without his consent. In appropriate circumstances, the publication of a person's photograph without permission is capable of constituting an infringement of the right to dignity, and actionable under the *actio injuriarum.* The essential elements of an *iniuria* are that the act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights related to personality.[35] This requires the Court to make a value judgment taking into account public policy considerations. In *O'Keeffe v Argus Printing and Publishing Co Ltd and Another*[36], which was an action for damages based upon a violation of the plaintiff's *dignitas* where the defendants (an owner of a newspaper, and a company respectively) had used the plaintiff's name and photograph without her consent, the Court observed that:

"Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought

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[34] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at para 87

[35] *R v Umfaan* 1908 TS 62 at 66

[36] 1954 (3) SA 244 (C) at 248

prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society, and the question must therefore to a great extent be left to the discretion of the Court where an action on account of the alleged injury is brought. It will be seen that some acts which were considered injurious amongst the Romans were peculiar to their manners and modes of thought, and would hardly be considered as such at the present day."

[51] I am of the view that the mere unauthorised publication of plaintiff's image or likeness in the circumstances under consideration, i.e. where a politician's image has been used to create a caricature for purposes of commenting on his or her public statements on issues that are in the public interest, and not for commercial purposes, would not be considered wrongful. Having regard to the importance of striking the correct balance between the right to freedom of expression and the right to dignity, public policy dictates that in these circumstances the defendant should not be held liable for publishing the photographic image (albeit altered) of the plaintiff.

[52] At the time that the picture was published, plaintiff was a well-known public figure and politician, who was regularly photographed by the press. As indicated earlier, the media was replete with images of the plaintiff. Public figures, politicians and celebrities, such as the plaintiff, knowingly lay themselves open to public scrutiny and forthright criticism by journalists and the public at large. They must consequently display a greater degree of tolerance to criticism than ordinary individuals. Where a picture of a public figure, such as the plaintiff, accompanies an article that is of public interest as it relates to the use of "deadly force" in curbing violent crime in the province of KwaZulu Natal, it can hardly be argued that the publication of the photograph without the consent of the public figure is unlawful. It is important, in this regard, to bear in mind the difference between the publication of a photographic image, such as in this matter, and the publication of the photographic image, in issue, in *O'Keeffe*[37], which is relied upon by the plaintiff. In *O'Keeffe*, the plaintiff complained that her photograph had been used in an advert without her consent. Whilst the court held that this was an

[37] *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954(3) SA 244 (C) at 247F and 249A

aggression against the plaintiff's *dignitas*, it made this finding in the specific context of the photograph being used for advertising purposes. The plaintiff's reliance upon *O'Keefe* is accordingly misplaced. So too is its reliance on the decision of *Wells v Atoll Media (Pty) Limited and Another*[38], which concerned the publication of a photograph of a 12-year-old girl wearing a bikini with the caption "*only 100% pure filth*" written over the picture. The image of the 12-year-old girl was described as being a "*pinup photo*" which was "*provocatively taken and used apparently 'to spice up' the magazine.*"[39] Although the court commented *obiter* that "*the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned*"[40], the matter was in fact decided under the law of defamation, and it was not necessary to consider whether any other personality right had been infringed.[41] Significantly, the photograph was used for commercial purposes, which is distinguishable from the current matter.

[53] *O'Keeffe* and *Wells* required there to be a commercial interest at play, which is not so in the present matter. Moreover, neither *O' Keefe* nor *Wells* dealt with a situation where a photographic image was altered before publication. Furthermore, neither of these cases considered the way in which the position may be affected in instances where the subject is a public figure and politician, such as the plaintiff. In this regard, the *dictum* in *O'Keeffe* is apposite:

"[N]ot necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like.[42]*"*

[38] 2010 JDR 0041 (WCC); [2010] 4 All SA 548 (WCC)
[39] *Wells* at para 47
[40] *Wells* at para 49
[41] *Wells* at para 46
[42] *O'Keeffe* at 249D

Viewed against the background that the plaintiff was a seasoned politician and public figure who regularly courted public attention and controversy on important public interest issues such as violent crime and the appropriate response of the police to such crime, and that he has failed to prove that any of his personality rights have been violated, the publication by the defendant of the plaintiff's image (albeit altered) in the *Sowetan* without his consent was not unlawful.

Conclusion

[54] For the reasons stated above, the plaintiff's defamation claim falls to be dismissed. The altered photo image and the articles published on 6 July 2007 and 16 July 2007 are not defamatory of the plaintiff. Similarly, the plaintiff's alternative claim based on dignity falls to be dismissed. The plaintiff has failed to make out a case that his right to dignity has been infringed by the publication of the altered photo image of himself.

[55] In the result, I make the following order:

(1) The plaintiff's claim is dismissed.

(2) The plaintiff is ordered to pay the defendant's costs.

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F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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Dates of hearing:	1, 3, 6 and 10 February 2012 and 10 October 2012
Date of Judgment	14 February 2013