REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A3021/2013

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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DATE SIGNATURE

In the matter between

FLUSK PATRICK **FIRST APPELLANT**

EKURHULENI METROPOLITAN MUNICIPALITY **SECOND APPELLANT**

and

BERG IZAK **RESPONDENT**

Coram: WEPENER AND KUBUSHI JJ

Heard: **10 October 2013**

Delivered: **17 October 2013**

J U D G M E N T

WEPENER J:

[1] The appellant, defendant in the court a quo, appeals against the judgment of the magistrate of Germiston, who found in favour of the respondent, plaintiff, in a defamation action and awarded damages in the sum of R50,000.00 (fifty thousand) to the respondent. I refer to the parties herein after as they were referred to in the court below.

[2] The plaintiff instituted the action against the first defendant, who was at all material times the second defendant's municipal or city manager and who, admittedly, acted within the course and scope of his employment with the second defendant, a municipality. Thus the joinder of the second defendant in the matter whose liability is vicarious. This aspect is stated thus in the defendant's plea:

'8.1. The Defendants admit that at all relevant times, and when making the statement as contended for in this plea, the First Defendant was in the employ of the Second Defendant and acted within the course and scope of his employment with the Second Defendant.'

The vicarious liability of the second defendant is consequently common cause despite the curious allegation on appeal that the magistrate erred in the finding that the defendants admitted the vicarious liability of the second defendant.

[3] The defamatory remarks relied upon were that the 'plaintiff is going to jail' and it was pleaded, in the alternative, that the statement imputed and was intended to impute and was understood by the persons to whom it was distributed to impute that the plaintiff was dishonest; had done something which had warranted a jail sentence; abused his position as a counsellor to derail an investigation in a project in which the plaintiff owned property; was

guilty of unconscionable and dishonest conduct unworthy of a town councillor. The words were uttered to persons present at the first defendant's city manager's co-ordination management committee meeting of 3 March 2008 ('the meeting').

[4] The matters raised in the heads of argument were not easily discernable. As a result thereof this court, at the outset of the hearing, invited counsel for the defendants to specifically indicate what the points are that would be argued on behalf of the appellants so that there could be a clear understanding what the basis for each contention on behalf of the appellants is.

[5] Counsel for the appellants then set out the following issues being the matters which the appellants advance on appeal:

5.1 The failure by the magistrate to uphold the special plea taken by the defendants in that the plaintiff had no locus standi to sue the first defendant and, in addition thereto, a reliance on s 176 (1) of the Local Government: Municipal Finance Management Act 56 of 2003 ('Finance Management Act') which, it was argued, affords the first defendant protection;

5.2 The magistrate erred in allowing the witness to refresh his memory from his diary and the minutes of the meeting;

5.3 The impermissible admission of the evidence of the witness, Mr Leibrandt, both provisionally and finally, despite an objection thereto;

5.4 The plaintiff failed to prove any publication of the defamatory matter;

5.5 If publication of the defamatory matter was indeed proved, how this was understood by the witness Mr Leibrandt and others and in addition, whether the publication was of and concerning the plaintiff;

5.6 The evidence of Mr Leibrandt, seen in context, constituted an uncertain situation as regarding the alleged publication;

5.7 The plaintiff failed to show a malicious intent on behalf of the first defendant;

5.8 The weight to be afforded to the evidence favoured the defendants;

5.9 Whether the plaintiff suffered any injury, and if, so what the quantum of the damages should be.

[6] Despite some of the alternative arguments put forward by the defendants, the main issue for determination was whether the words were indeed published.

The first issue - the Special Plea

[7] The first defendant pleaded that 'he is a public official, has at all relevant times hereto been the municipal manager of the second defendant and is incorrectly cited herein in his personal capacity'. The special plea was dismissed by the magistrate on 23 August 2011.

[8] The capacity in which a person acts cannot absolve such a person from an unlawful act performed by him or her. If such a person acts in some or other capacity i.e. in the course and scope of his or her employment, the rule is that the liability may be extended to include the liability of that person's employer, vicariously. It does not absolve the person acting unlawfully from his own actions.

[9] The first defendant does not cease to be delictually liable because of the second defendant's vicarious liability. In *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) Flemming DJP said at 487B-E as follows:

'It was argued that the application against first respondent should be dismissed because he at all times acted only in the course of his employment with second respondent and in the furthering of the interests of second respondent. Similar reasoning has been seriously advanced before me on several occasions in the past year or three. The argument adopts the settled yardsticks for vicarious liability. It then seeks to make inverted use thereof. If first respondent intentionally or negligently causes pecuniary loss while driving a motor vehicle, he is personally liable. That is so even if the relationship between his driving and his employer renders the employer liable. He does not cease to be liable because the employer is liable. The employer is also liable; he is not exclusively liable. The relationship between employer and the activity of his employee is a basis for holding an additional party liable and not a ground for absolving the person who actually committed the delict. Clearly, if

applicants' copyright was infringed, it is the hand and the heart of first respondent who perpetrated the wrong to the first applicant. He can be interdicted even if his behaviour took place in circumstances rendering it permissible also to interdict the second respondent.'

I am of the view, that the special plea, as pleaded, had no merit and was rightly dismissed by the magistrate.

[10] However, the defendant's counsel has, in argument, said that the first defendant relies on the protection afforded by s 176 of the Local Government: Municipal Finance Management Act 56 of 2003 ('Finance Management Act').

[11] The reliance on the privilege afforded by the section is, of course, something quite different from saying that one is not liable because you acted in a particular capacity – the latter which cannot absolve the actor from the consequences of his or her actions. Although the protection contained in s 176 (1) of the Finance Management Act was not pertinently raised in the pleadings, a party may rely on a point of law, even if only on appeal, if it does not require the leading of further evidence and the issue is apparent from the record.

[12] The fact that a legal issue may be determined on appeal despite the absence of particular reference thereto in the trial court has been said to be subject to the fact that it is a legal issue which requires no decision to be made on the facts. *Van Rensburg v Fouriesburg Hotel (Edms) Bpk* 1980 (2) SA 26 (O) at 29G.

[13] Section 176 (1) of the Finance Management Act reads:

'176. Liability of functionaries exercising powers and functions in terms of this Act.—

(1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.'

The first requirement is that the defence can be raised by (a) 'person exercising a power or performing a function in terms of this act…' All that can

be said in this matter is that the words complained of were uttered during a city manager's co-ordination management committee meeting. I can find no indication in the act itself or in the pleadings that the meeting was held whilst the first defendant was exercising a power or performing a function in terms of the Finance Management Act. It would have been incumbent upon the defendant to show that the particular meeting afforded the first defendant the protection contained in s 176 (1) of the Finance Management Act, it being a form of qualified privilege. *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 769H. No evidence was led to place the meeting within the ambit of the section as the special plea was dealt with separately, in initio, and I can find no reason to approach the special plea on appeal other than in the absence of any evidence which would justify a reliance on s 176 (1) of the Finance Management Act.

[14] The section further requires that the official, who relies thereon, should have acted in good faith. This aspect, in my view, would entail the official to admit his actions but explain why he acted in good faith. In the matter under consideration the first defendant pleaded a denial that he uttered the words. No attempt was made prior to the determination of the special plea to show that the first defendant acted in good faith. In the circumstances the first defendant's reliance on s 176 (1) of the Finance Management Act is doomed to failure.

[15] In addition, the dismissal of the special plea was final in effect and disposed of as a self-contained defence. See *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA) at p245B-247B. The defendants did not prosecute an appeal timeously in terms of Magistrates' Court Rule 51(1) and 51(3) and there is no application for condonation for the late filing of the appeal on this point, with the result that no appeal lies against the dismissal of the special plea. The appeal based on this ground is consequently also bad for want of compliance with the rules of the Magistrates' Court.

<u>The second issue - Impermissible evidence: Refreshing of memory</u>

[16] The second issue argued on appeal was that the evidence of the witness Leibrandt was impermissible as he refreshed his memory from his diary as well as from the minutes of the meeting. Reliance was placed on a passage in Schwikkard and Van Der Merwe *Principles of Evidence* 2nd ed, at 409:

'The law of evidence assigns a great importance to the principle of morality in the adjudication of disputes. Witnesses are as a rule required to give independent oral testimony in the sense that they are generally not permitted to rely on, or refer to, a statement, note or document whilst testifying. This general rule creates the impression that preference is given to memory over writing as a means of "preserving evidence". This preference can hardly be reconciled with the simple truth embodied in the saying "Ink does not loose its hold on paper, as facts do on the memory". Be this as it may, the preference for oral evidence is a corner-stone of the common-law evidential system, where cross-examination plays a pivotal role: greater weight is attached to viva voce statements of witnesses than to their earlier recorded statements.'

[17] Whether the evidence of the witness who refers to documents is wholly impermissible or whether the probative value of the evidence is affected, need not be decided.

[18] It is common cause that the witness refreshed his memory from entries in his diary prior to giving evidence and also consulted the minutes of the meeting during his evidence. The prior refreshing of his memory from a diary cannot be in issue. There is no rule which precludes a witness from reading his own statement or notes before giving evidence. See *R v Richardson* [1971] 2 ALL ER 773. In *R v Varacia and Another* 1947 (4) SA 267 (T) it was said at 270:

'As a rule, when the Crown calls a witness who wishes to avail himself of the right to refresh his memory from notes which have been made, it is usual, and in my opinion correct, that the Crown should first of all satisfy the court that the notes in question had been made either by the witness or by somebody acting on his behalf, or that the person giving evidence had seen the notes shortly after they had been made at a time when his recollection of the incidents to which the notes refer were still fresh in his mind. I was not aware that it was necessary for the witness to state that the notes correctly reflected the incidents to which he was testifying; personally, I should have imagined that the fact that the witness wished to refer to them would be a sufficient intimation that he considered that the notes to which he is referring set out the true facts'.

There was no suggestion that the notes in the diary were not made at the time of the meeting by the witness himself.

The thrust of the argument was that the conditions required by the common-law to be met before the tendering of evidence, whilst refreshing his memory, by a witness to be permissible were not shown to be present regarding his reference to the minutes. These requirements are six-fold: firstly, the witness must have personal knowledge of the event. It was common cause that Mr Leibrandt was present at the meeting and this requirement has been satisfied. Secondly, the witness must be unable to recollect fully a matter on which he is being examined. The learned authors, Schwikkard and Van Der Merwe state at 451 that the mere ipse dixit of the witness may be sufficient – in the matter under consideration Mr Leibrandt's assertion that all he did was to make certain that the issues were discussed on that date, was not challenged. What was challenged was his use of the minutes. Thirdly, the document upon which the witness relied must be verified. Insofar as he relied upon the minutes of the meeting, these were accepted by all the parties as the correct minutes and later so proved by Mr Mokoena, called on behalf of the defendants. It is quite permissible to utilise documents and to thereafter prove its authenticity. See *Carpede v Choene NO and Another* 1986 (3) SA 445 (O) at 454I - 455A. Mr Leibrandt consequently relied on documents properly verified. Fourthly, the matters had to be fresh in the memory of the scribe when recorded. There is no dispute that the minutes were written up shortly after the meeting. Fifthly, a use of the original document is required – this aspect was not challenged or referred to during appeal. Sixthly, the document relied upon must be made available to the other parties. As far as the minutes are concerned the defendants did have access thereto. In the circumstances, all the common-law requirements for the admission of evidence by a witness who was refreshing his memory from the minutes were indeed present. Further, it is not clear that the witness indeed refreshed his memory from the minutes. All he did was to look at the minutes to see whether they contained certain entries in order to satisfy himself that the minutes were indeed the minutes of the meeting to which he was referring to.

[19] This ground of appeal was, in my view, faintly raised. The reason may be that it is not contained in the notice of appeal.

[20] In *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815C-E Rabie J (as he then was) said that a notice of appeal requires to precisely set out the issues upon which an appellant relies so that the respondent can know on which points he must prepare an answer so that the court can know which issues require adjudication. This principle was broadened in *Leeuw v First National Bank* Ltd 2010 (3) SA 410 (SCA) at 413 where Snyders JA said:

'In 1987 the Uniform Rules of the High Court were amended to provide, for the first time, for the delivery, prior to the hearing, of 'a concise and succinct statement of the main points . . . which [a party] intends to argue on appeal' - so-called heads of argument…It can be said that since then the object of the notice of appeal to inform the respondent and the court was also achieved by the heads of argument…'

Even by applying this approach, the issue is nowhere referred to in the comprehensive heads of appeal filed on behalf of the defendants.

[21] In the circumstances the issue raised during argument, not being covered either by the notice of appeal or the extensive heads of argument, should not be considered on appeal (*Kilian* at 815E) and counsel for the plaintiff objected to it being dealt with. I have, nevertheless, indicated that there is no merit in the point.

<u>The third issue - Provisional and final admission of evidence</u>

[22] The third issue argued before us was that the court a quo allowed the evidence of Mr Leibrandt despite an objection thereto, both provisionally and finally and coupled with this that the court a quo failed to finally rule on the evidence at the end of the plaintiff's case but only gave her final ruling that the evidence was indeed admissible in her final judgment.

[23] The argument regarding the provisional admission of Mr Leibrandt's evidence was premised on the fact that he could not give evidence regarding the contents of a confidential meeting because it was a city managers co-

ordination management committee meeting. Because it was such a meeting, so it was argued, and because of the confidentiality clause contained in the code of conduct which was binding on the witness, he could not divulge the contents of the meeting. However, counsel for the defendant readily conceded that Mr Leibrandt could divulge the contents of the meeting to a court and that, whatever the confidential nature of the meeting was, his evidence could be received by a court. This being so the argument that the evidence should not have been provisionally admitted, fails. No proper basis existed to exclude the evidence.

[24] The objection of the calling of Mr Leibrandt as a witness is not contained in the record of proceedings, however, in heads of argument the defendants' counsel advanced that such evidence was inadmissible hearsay evidence and that the words were uttered at a closed and confidential meeting resulting in the evidence being inadmissible. The hearsay allegation was not persisted with in argument on appeal. The fact that words were uttered at a closed confidential meeting and thus inadmissible was persisted with. I am of the view that the argument cannot be sustained. The fact that a meeting is closed and confidential may or may not attract a privilege for the person who speaks thereat but the proof that the occasion was privileged lies with the speaker. See *Neethling* at 769 to 780. The issue is not whether the evidence was permissible but whether there was indeed a qualified privilege attached to the occasion. I have dealt with the plea regarding the qualified privilege issue. The result is that the admission of the evidence of what was said by the first defendant at the meeting cannot be faulted.

[25] Reliance was also placed on s 6 of the second schedule of the Local Government: Municipal Systems Act 32 of 2000 ('Municipal Systems Act') which reads:

'6. Unauthorised disclosure of information.—
(1) A staff member of a municipality may not without permission disclose any privileged or confidential information obtained as a staff member of the municipality to an unauthorised person.
(2) For the purpose of this item "privileged or confidential information" includes any information—

(a) determined by the municipal council or any structure or functionary of the municipality to be privileged or confidential;
(b) discussed in closed session by the council or a committee of the council;
(c) disclosure of which would violate a person's right to privacy; or
(d) declared to be privileged, confidential or secret in terms of any law.

(3) This item does not derogate from a person's right of access to information in terms of national legislation.'

This was raised in the argument on the special plea in the court a quo and only in reply in this court. The section prohibits unauthorised disclosure of information. Mr Leibrandt's evidence in a court of law can, in my view, not be categorised as an unauthorised disclosure of information. Counsel for the defendants conceded as much.

[26] Secondly, it has not been shown how the words uttered and not contained in any report which the committee dealt with can be said to be privileged and confidential information. The Municipal Systems Act does not forbid disclosure – it forbids disclosure of privileged and confidential information only. The result is that reliance on the section of the Municipal Systems Act is misplaced.

[27] Counsel for the defendants broadened the objection and relied upon *S v Molimi* 2008 (3) SA 608 (CC) where it was held that the timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is a proper procedural safeguard in a trial. It was argued that the same principle should be applied in civil cases and that the magistrate should have given her reasons for admitting the evidence at the end of the plaintiff's case. The application of the principle, also in civil cases, has been approved by the Supreme Court of Appeal in *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA). Brandt JA said at paras 23-24:

'[23] Under this heading the first question arising results from the appellant's objection against the timing of the court a quo's ruling on admissibility. According to this objection, the court should have considered this ruling only at the end of the case, after hearing all the evidence and not as it did at the end of the appellant's case. I do not think the answer to the question thus raised would make any difference to the outcome of the appeal. Yet, as a matter of principle, it is not entirely insignificant. I shall therefore venture an answer. But in the circumstances, I propose to do so without unnecessary elaboration. In criminal proceedings the issue raised by

the appellant's objection had been answered. That answer appears from the following statement by Cameron JA in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) at paragraph [18]:

> ". . . [A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of [s 3 of the Law of Evidence Amendment Act 45 of 1988], and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces" (see also *S v Molimi* 2008 (2) SACR 76 (CC) [also reported at 2008 (5) BCLR 451 (CC) – Ed] at paragraph [17]).

[24] The court a quo held that the position should be no different in civil proceedings. The appellant's contention was, however, that the court had erred. The difference between the two, so the appellant's argument went, is that in criminal proceedings effect must be given to the constitutional right of an accused person to a fair trial, in particular, the presumption of innocence and the right to challenge evidence (in sections 35(3)(h) and 35(3)(i) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")). But as I see it, the argument loses sight of section 34 of the Constitution which also entitles both parties to civil proceedings to a fair public hearing. That right is given effect to, inter alia, by the Uniform Rules of Court. In terms of rule 39 the defendant is afforded the right, where the plaintiff bears the onus, to apply for absolution from the instance at the end of the plaintiff's case or to close its own case without leading any evidence if the plaintiff has failed to establish a case which requires an answer. As I see it, it is essential for a proper exercise of these rights that the defendant should know whether the court considers the hearsay evidence relied upon by the plaintiff, admissible or not. Stated somewhat differently, in order to decide whether the plaintiff has made out a case to answer, a defendant is entitled to know the constituent elements of that case. It follows that rulings on the admissibility of hearsay evidence in civil proceedings should also be made at the end of the plaintiff's case.'

Having referred counsel for the defendants to the *Giesecke* case the court enquired from counsel whether the matter should be remitted to the magistrate to give a ruling as if at the end of the plaintiff's case and then to order the matter to proceed or whether the issue is a final death blow to the plaintiff's case. Having considered the defendants' position and not being able to advance any prejudice for the defendants, they having elected to give evidence despite an absence of a ruling at the end of the plaintiff's case, counsel for the defendants did not persist with the issue and indeed abandoned it.

<u>The fourth, fifth and six issues - Publication</u>

[28] The fourth, fifth and sixth issues argued on behalf of the defendants were that the plaintiff failed to prove publication of the words complained of and if published that it was not proved how it was understood by Mr Leibrandt and others and thus that such publication was not of and concerning the plaintiff. I am of the view that the sixth issue as to whether there was uncertainty regarding the publication, goes hand in hand with the two other issues referred to. I deal with these three issues collectively and approach it on the basis contained in the heads of argument that the plaintiff did not prove the actual words pleaded. In a case such as this the plaintiff is required to set out the words alleged to have been used by the defendant and must also prove that the words were used. It is, however, not necessary to plead the actual words used although the effect and meaning of the words are matters for the court to decide, the plaintiff must prove the words actually used or bearing a substantially similar meaning – see *International Tobacco Co (SA) Ltd v Wollheim and Others* 1953 (2) SA 603 (A) at 613 - 614. The fact that the words imputed to the plaintiff dishonesty, as alleged in the particulars of claim, was not in contention.

[29] The argument on behalf of the defendants can, however, not be sustained. The plaintiff's witness, Mr Leibrandt, unambiguously testified that the first defendant said of and concerning the plaintiff 'I think I testified clearly that Mr Flusk in the meeting referred to [the] Meyersdal investigation, the Pasco investigation, regarding Meyersdal, indicated that Mr Berg or councillor will be arrested or go to jail'. Another reference includes that '…he did say Berg will go to jail'. There are a few similar references in the evidence of Mr Leibrandt. Mr Leibrandt's evidence that he understood the words to be that crimes were committed by the plaintiff (and others) is clearly set out. In the circumstances the evidence, seen in its proper context, indeed shows that the defendant used the words complained of; that he uttered them to members of the committee and other invitees present at the meeting; that he said it of and concerning the plaintiff; that Mr Lybrandt understood it to mean that the plaintiff was guilty of criminal conduct. In the circumstances the fourth, fifth and sixth points raised in argument must fail.

The seventh issue – Malicious intent

[30] The seventh issue was that the plaintiff failed to prove malicious intent on the part of the first defendant. Insofar as this aspect is raised it was only done in general terms and not based on either of the two elements of animus injuriandi, namely intent to defame and knowledge of wrongfulness. See *Suid-Afrikaanse Uitsaaikorporasie v O' Malley* 1977 (3) SA 394 (A) at 401H – 402A. The argument before us concentrated on the first element and not the second. However, there is a presumption that the publication of the defamatory statement was animo injuriandi. See Naylor and Another v Jansen; Jansen v Naylor and Others 2006 (3) SA 546 (SCA) at para 7:

'[7] Proof that the words were uttered gives rise to two presumptions: first, that the publication was unlawful and, second, that the statement was made with the intention to defame. (See eg *Joubert and Others v Venter* 1985 (1) SA 654 (A) at 696A.) It is now settled that the onus on the defendant to rebut one or other presumption is a full onus; it must be discharged on a balance of probabilities (*Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 709H - I). I might just add, at this stage, that the second defendant's alleged liability was based upon the principles of vicarious responsibility and that it was common cause that, if Naylor were liable to Jansen, so was the second defendant.'

[31] The defendant has the onus of alleging and proving the absence of animo injuriandi. On proof of the plaintiff that the defamatory words were used by the defendant and that they referred to the plaintiff, a rebuttable presumption arises that they were used wilfully and knowingly with the object of defaming the plaintiff. The onus is then on the defendant to establish lawful justification or excuse for the publication or to establish the absence of the intention to injure the plaintiff. *Marais v Groenewald* 2001 (1) SA 634 (T); *National Media Ltd v Bogoshi* [1998] 4 ALL SA 347 (A). There are two answers to the defendants' argument. Firstly, no such allegation can be found in the pleadings of the defendants. This is not surprising as the defendants' version is a denial that the first defendant uttered the words. The presumption that the publication was animo injuriandi remained undisturbed on the pleadings and evidence. In the circumstances the seventh point of appeal must fail. In so far as the defendants relied on the statements having been made on a privileged occasion, if it was such and the plaintiff then had to

prove malicious intention, it was for the defendants to prove that the defamatory statement was relevant or germane and reasonably appropriate to the occasion. *Joubert and Others v Venter* 1985 (1) SA 654 (A); *Herselman NO v Botha 1994* (1) SA 28 (A) at 35. Again, the defendants' denial that the defamatory statement was made, precluded them from pleading such a defence and they did not plead a defence based on the relevance of the statement, nor was it argued on appeal that such defence was shown upon which the defendants could rely. Such a defence would amount to a confession and avoidance and absent the confession, the defendants cannot rely on the defence of qualified privilege and his intention to defame is presumed. See *Neethling* at 769G-H.

The eighth issue – Weight of the evidence

[32] The eighth issue is that it was argued that the weight of the evidence favoured the defendants. This entails no more than an evaluation of the evidence based on the argument that the credibility findings of the magistrate, together with the probabilities, should have been in favour of the defendants.

[33] Significantly, the first defendant's version was hardly put to Mr Leibrandt in cross-examination in order to allow him to react thereto. His evidence was all but denied. Indeed he was advised during cross-examination that it was not suggested that he was lying to the court. His evidence that he recalled the first defendant being very passionate about the topic, that it was a very forceful and emotive statement, made during the introduction of the meeting, remained unchallenged. In *Small v Smith* 1954 (3) SA 434 (SWA) it was held at 438E-H as follows:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party

calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'

This principle was approved in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 61 where it was said:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[34] The magistrate, in her judgment, said:

'With regard to the testimony of Mr Leibrandt, the court was satisfied that the witness testified in a clear and straightforward manner. There were no inherent improbabilities or material contradictions in his testimony…The court was satisfied that the witness was frank and forthright in his responses… Mr Leibrandt did not attempt to embellish or exaggerate evidence against the first defendant…The court is satisfied that it was clear on all material aspects of his testimony and accepts his testimony as being reliable.'

[35] A court of appeal will not readily interfere with a lower court's finding regarding credibility of witnesses. Deference is paid to a trial court's findings on credibility because of the peculiar advantage it has of seeing the witnesses. A trial court has the obvious and important advantage of being steeped in the atmosphere of the trial. These advantages are not possessed by the court of appeal. See *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA) para 24. After a thorough analysis of the evidence of each witness the magistrate accepted the evidence led on behalf of the plaintiff and the first defendant was found by the magistrate to be an unreliable witness.

[36] In the circumstances, the acceptance of the evidence on behalf of the plaintiff cannot be faulted. The criticism by the defendants that the plaintiff

failed to call witnesses to corroborate him, seen against the back ground of the evidence of the plaintiff, which he could assume that, because it was not challenged, to be correct, can be disregarded. There was no need to call witnesses to corroborate the version which was not materially challenged with an opposing version.

[37] The defendants criticised the evidence of the plaintiff as being 'subject to every possible criticism imaginable'. I do not agree, but even if such would be the case, the plaintiff was not present at the meeting and could not contribute to the evidence regarding the uttering of the defamatory remarks. His evidence is to a large extent irrelevant, save in so far as he testified regarding facts which would assist to quantify his damages.

[38] The defendants called Mr Moonsammy – Koopersammy (Mr Koopersammy), a director in the employ of the second defendant to testify on behalf of the defendants. Whether so intended by the defendants or not, Mr Koopersammy said in evidence:

'So, if my memory serves me correctly it is possible that Mr Flusk said that, if, you know, if you give councillors the wrong information then they would end up going to jail and in so saying he may have mentioned Mr Berg's name but merely as an example.'

This evidence, in my view, supplies a substantive measure of corroboration for Mr Leibrandt that the first defendant said that the plaintiff will go to jail.

[39] The first defendant, on the other hand, despite his case not having been put to the plaintiff's witnesses, entered the witness stand to contradict the evidence of Mr Leibrandt and that of Mr Koopersammy.

[40] With reference to examples, the magistrate found that the first defendant 'did not testify in a clear manner' and that some of the inconsistencies and material contradictions in his evidence detracted from his reliability. The first defendant admitted that he used the words 'criminal proceedings will be instituted' and 'jail', although in a different context. On his own version, the plaintiff was one of the councillors implicated in a report that

he had in his possession. His explanation as to why he supported an affidavit which said that he believed in the truth of the utterances made at the meeting and that they were based on the contents of a report, was hollow and unconvincing. Indeed he confirmed in an affidavit that:

'Accordingly, it is my humble submission, that the First Applicant / Defendant had reason to believe in the truth of any utterances made by him during the course of the City Manager's Co-ordination Management meeting as any such utterances were based on the findings contained in the Pasco report, which called upon the First Applicant / Defendant in his capacity as city manager to consider criminal proceedings against Respondent / Plaintiff in this regard. I submit that the first Applicant / Defendant had a duty towards the Second Applicant / Defendant, and the public at large, to act in accordance with the recommendations of the Pasco report'.

The reference is clearly to the plaintiff but first defendant side-stepped the issue during his evidence.

The witness' self-contradiction regarding an example used ie that it was used to warn others not to disclose information to third parties which changed to the fact that it was used to warn parties to give their co-operation in the investigation, was a very material contradiction. It referred to the very circumstance under which the first defendant alleged he uttered the words used by him. I consequently agree with the magistrate's finding regarding the unreliability of the first defendant's evidence.

[41] The scribe, who kept the minutes of the meeting, Mr Mokoena, had to concede that he could not recall all that was said at the meeting. Having regard to the fact that the reference to the plaintiff was during the introduction of the meeting, nothing can be made of the failure by Mr Mokoena to record those remarks in the minutes. Indeed, he failed to record the example allegedly used by the first defendant regarding persons who were confronted with a jail term. He confirmed that the minutes were only summaries of some of the aspects which were discussed and not a complete record. It appears that the full record of the cross-examination of this witness does not form part of the record. However, neither plaintiff nor defendant made any issue of this, I presume as a result of the fact that the witness made the concessions referred to early during his cross-examination.

[42] In essence the magistrate preferred the evidence supplied by the plaintiff and found that the first defendant's version is unreliable. She concluded, rightly in my view, that the plaintiff succeeded in proving on a balance of probabilities that the words were uttered by the first defendant.

The ninth issue – Damages and quantum thereof

[43] The ninth ground of appeal is that the plaintiff failed to prove any damages and that the quantum of the damages was incorrectly arrived at by the magistrate.

[44] The plaintiff gave evidence regarding his reputation and standing in the community. He testified that the offending publication had a huge impact pertaining to his relationship with the people within the second defendant; he further stated that he stopped calling public meetings to inform the public what was happening within the second defendant; he stated that he was affected as community police forum chairman; he further stated that he commenced avoiding council functions and only attended the meetings; that he went into a depression and that he felt that he couldn't serve the community and perform the functions for which he was elected. The plaintiff also experienced that persons within the second defendant formed the view that he was not to be trusted and they often would not associate with him and did not want to be seen with him, especially behind closed doors.

[45] There can be no doubt that the plaintiff supplied sufficient evidence to the court in order to evaluate the injury suffered by him. The defendants failed to offer an apology for the first defendant's conduct but persisted in a denial of uttering the defamatory words. "The successful plaintiff in a defamation action is entitled to an award of general damages to compensate the plaintiff for injured feelings and for the hurt of his or her dignity and reputation." See LAWSA Vol. 7 2nd ed para 260. No specific argument was directed to show that the quantum arrived at by the magistrate was inappropriate or wrong. After the careful analysis of the evidence the magistrate formed the view that

the sum of R50,000.00 would be adequate compensation for the plaintiff. The defendants' reliance on the fact that the plaintiff was a politician and that the court should not encourage litigation involving politicians, is misplaced. The statement of and concerning the plaintiff was not made in a political arena. Indeed, there was no evidence to show that the plaintiff and the first defendant were political opponents. In *Mangope v Asmal and Another* 1997 (4) SA 277 (T) Hartzenberg J said at p 287 I – 288 A:

'I understand the Chief Justice to have said that even politicians can be defamed. They must, however, not be overhasty to complain about slatings against them unless it is really serious. Now it is obvious, in my view, that a distinction must be drawn between an attack against the dignity and reputation of a politician, on the one hand, and an attack upon his political views, policies and conduct, on the other hand. When it comes to the latter, the Courts will be slower to come to the assistance of a politician. But, even if, in that context, a defendant oversteps the bounds of what is permissible, he will be held liable. On the other hand, if there is an unwarranted slating which lowers him in the esteem of his fellow human beings which is not at all necessary in commenting upon his policy and his conduct, a Court will be more readily inclined to protect his dignity and reputation.'

These remarks are appropriate in this matter.

[45] In all the circumstances, I am of the view that the appeal falls to be dismissed with costs.

WEPENER J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

I agree.

KUBUSHI J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

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