IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A 3102/2011

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE: **10 June 2015**

....
SIGNATURE SIGNATURE

PIETERSE, ESTHER SUSANNA Appellant

And

CLICKS GROUP LTD t/a CLICK STORES First Respondent

MELLO, TRACY Second Respondent/

JUDGMENT

SPILG, J:

BACKGROUND

1. The appeal is against the dismissal with costs of the appellant's claims based on defamation and *iniuria* against the second respondent and her employer, Clicks Stores ('*Clicks')*. Clicks is the first respondent. The cost order was awarded on the attorney and client scale.

2. It is common cause that during the morning of 20 April 2010 the appellant purchased a number of items at a Clicks store situated in the Woodbridge Shopping Centre, Kempton Park. Either while the appellant was paying at the till point operated by the second respondent, or as she was leaving the counter, an incident occurred immediately upon which the appellant became distraught and insisted that the teller summon her superior. The second respondent did so and avers that she apologised immediately for the incident. However the appellant claims that an apology was made after the manager arrived and only after the appellant said that she would institute legal proceedings.

3. The most critical divergence in the evidence of the respective parties relates to the incident itself:

   The appellant claimed that after she had paid and left the till point with her parcels, but before exiting the store, the following took place:

   The second respondent said to her; *"Ma'am your bag"*

   The appellant believed that the second respondent was admiring her bag and lifted it up for the second appellant to see.

   The second respondent said: "*No Ma'am I saw you put something in your bag*"

   The appellant then placed the bag in front of the second respondent who proceeded to open the side pocket and search it. The main compartment was not searched.

   By contrast the second respondent's version of events is that the incident occurred as she was ringing up the purchases, or immediately after doing so. It was at this point that she noticed the appellant, who was then directly in front of her at the till position, put something in her handbag.

The second respondent claims that she politely asked *"What did you put in your handbag?"*

The appellant responded by shouting at her and insisted that the second respondent call the manager. At no stage did the second respondent search any compartment of the bag.

THE PLEADINGS

4. The appellant alleged in her summons that the words and conduct of the second respondent were wrongful, that they were intended to mean, and were so understood by members of the public and employees of the first respondent to mean, that the appellant had stolen items, was a thief , a criminal and was dishonest. She averred that the alleged words used and the physical searching of her handbag was witnessed by members of the public and other Click's employees.

   The appellant claimed an amount of R50 000 for injury to her reputation.

5. The second claim was for *iniuria* and relied on the second respondent's words and conduct being intended to insult, humiliate and embarrass the appellant. An additional sum of R50 000 was claimed under this head.

   During the appeal it was properly conceded that the alleged *iniuria* was to be treated as an alternative claim to the defamation. See *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 at paras 142 and 143.

6. The first respondent was sued vicariously as the second respondent had been acting in the course and scope of her employment.

Both the defamation and *iniuria* were pleaded on the basis that the appellant was confronted by the second respondent who, wrongfully and with intent to injure, said that she had seen the appellant "*put something in her handbag"* and proceeded to search it.

7. In their plea the respondents alleged that while ringing up the appellant's items at the till the second respondent saw the appellant putting something in her hand bag and reasonably suspected that the appellant had not paid for it. It was for this reason that the second respondent claimed to have politely enquired, to quote from her testimony; "*what it is that she is putting in her handbag*".

   The respondents disputed that the appellant's handbag was searched and also denied that the alleged words and conduct were wrongful or were made with the intention to injure the appellant's reputation. They specifically pleaded that the second respondent's enquiry was fair and justified in the circumstances.

THE ISSUES

8. The factual and legal issues are:

   a. Whether the incident occurred while the appellant was still standing at the second respondent's till point or only after the appellant had proceeded from the counter with her parcels;

   b. Where, according to the second respondent, was the appellant standing when she allegedly put something in her handbag and can this evidence be accepted?

      It is necessary to frame the issue in this fashion since one of the magistrate's key findings related to where the second respondent claimed to have seen this occur.

c. Whether the second respondent uttered the words attributed to her by the appellant and whether the appellant's handbag was partially searched;

d. Whether the words used and any accompanying conduct are defamatory in their primary or secondary meaning;

e. Whether anyone witnessed the exchange;

f. Whether the second respondent's words constituted a fair and justified enquiry in the circumstances

g. Whether the second respondent intended to insult, humiliate or embarrass the appellant and if not, whether lack of intent constitutes a competent defence in the present type of defamation case or a defendant in this type of defamation suit must show that he or she was not negligent when making the statement.

MAGISTRATE'S FINDINGS ON CREDIBILITY

9. The magistrate delivered judgment on 22 September 2011 and a month later amplified her reasons in response to a request under rule 51 of the Magistrates' Court Rules.

   The trial had commenced in March of that year and it is evident that the court did not have the benefit of a record either at the time judgment was handed down some six months later or when the additional reasons were furnished.

10. The first important feature is that the magistrate did not consider the appellant or the second respondent to be entirely credible witnesses and added, in the supplementary reasons, that they both *"gave evidence to such an extent on certain aspects that the court cannot accept the whole of their evidence to be the truth"*

11. Unfortunately the reasons for this view are not readily discernable.

In regard to the appellant: The court mentioned that she had insisted on remaining in full public view when complaining to the second respondent's superior about the incident and this, said the court, demonstrated that the appellant could not have been embarrassed by the incident as claimed. The finding constitutes with respect an overly subjective view which fails to take into account individual personality traits; some persons may well insist on an unequivocal public retraction in order to still any lingering suspicion of wrongdoing.

The appellant was also critisised in the following terms:

> *"It is beyond the court's understanding why plaintiff initially indicated in her pleading that she was confronted at the exit of the store"*

However, it was defence counsel who put to the appellant that the second respondent had enquired about the handbag "*as you were leaving the store or upon your departure from the store"*. The appellant responded that the incident occurred upon her departure from the counter when she had already picked up her handbag and parcels.

There was only a short distance between the end of the counter in question and the exit. It therefore appears that loose terminology was used in the pleadings to describe the precise point where the appellant claimed the incident had occurred, as nothing much turned on it at the time. Deviations from the pleadings are always a factor to be considered. However their materiality or otherwise and whether they are readily explicable as loose drafting should also not be overlooked.

12. No illustrations were given to indicate why the trial court found the second respondent's testimony to be unsatisfactory in part.

13. This court cannot therefore accept without demur the magistrate's findings regarding the credibility of the appellant or the second respondent.

In *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) the trial court had preferred the plaintiff's version but failed to support it with any specific finding. On appeal the failure to explain the basis for accepting one of the mutually irreconcilable versions led Mthiyane JA (at the time) to state[1]:

> *"I do not think this is a case where, sitting as a Court of appeal, we should defer to the trial Court's findings of credibility because of the peculiar advantages it had of seeing and hearing the witnesses. Even if such findings were in fact made by the trial Court, I do not think that we are precluded from dealing with findings of fact which do not in essence depend on personal impressions made by a witness in giving evidence, but are rather based predominantly upon inferences from the facts and upon the probabilities. In Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another 2 this Court, per Zulman JA, said:*
>
> > *'Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts."*

14. The SCA also indicated that in such a case the appeal court should evaluate and assess the credibility and reliability of the witnesses and also the probabilities before concluding that one version is to be preferred above another.

15. The circumstances of the present case indicate that one may in addition have regard to the uncontradicted evidence led and also consider any inconsistencies

[1] *Louwrens* at para 14

in the testimony of the individual witness concerned; this would have regard to the pleadings and, where applicable, deviations from the version put by counsel.

THE FINDINGS OF FACT

16. Unfortunately the trial court failed to consider the most crucial factual issue; namely, whether the second respondent believed that the appellant might have put an item in her handbag with the intention of not paying for it. If this had been appreciated then the court would have been confronted by the glaring inconsistencies in the respondents' version regarding where she claimed the appellant was positioned when the object (whatever it might have been) was placed in the handbag.

17. While the question of how close the appellant was to the exit is not material, of significance in this case is whether the appellant was walking in the aisles still doing her shopping or whether she was actually standing alongside the till point when the second respondent claims to have seen something being put in the bag.

18. The court found that:

> *"It is common cause that while she* (ie. the appellant) *was between the aisles that she had put something in the side compartment of her handbag, which later according to her evidence and that of Ms Mello (*the second respondent) *seemed to be her cellphone …*
>
> *Plaintiff herself admitted that she had put her cellphone into her handbag after she had phoned her husband ….*
>
> *It is evident that out of the evidence before the court that 2nd defendant must have noticed the plaintiff while she was moving between the aisles, she also noticed that complainant had put something in her*

handbag. That caused 2nd defendant to suspect that plaintiff had something inside her handbag for which she had not paid.
In the circumstances the court cannot find that the suspicion of 2nd defendant was not reasonable."

19. The defence's case, as already mentioned, relied throughout on the second respondent believing that the appellant had put something in her handbag while she was standing at the till: It was never the respondents' version that this occurred at any time prior to the appellant reaching the till point.

Despite this, according to the trial court the evidence of both parties was to the effect that the second respondent observed the appellant putting something in her handbag while walking between the aisles. The finding is clearly incorrect and amounts to a misdirection. This will be dealt with in greater detail when considering the court's finding that the second respondent had reasonable grounds for suspecting that the appellant was shoplifting.

20. The magistrate's findings can be summarised as follows:

a. The appellant testified that while walking along the aisles she took her cellphone out from the handbag, contacted her husband to enquire whether he needed anything in the store, then put the phone back while she was still in the aisles;

b. This evidence was consistent with that presented by the respondents as they contended that the appellant had in fact put something into the side compartment of her handbag while walking along the aisles in the store.

I have pointed out earlier that this finding is clearly wrong;

c. The second respondent observed this and drew the reasonable conclusion that the appellant had taken something off the shelves and concealed it in her handbag.

This finding was also wrong;

d. The second respondent only said to the appellant "*Ma'am your bag".*

In this regard the magistrate overlooked the second respondent's testimony that she had followed this up by saying to the appellant; "*What is it that you were putting inside your bag"*;

e. The second respondent in fact searched the side pocket of the handbag where the cell phone had been placed by the appellant. The magistrate considered that this was the object that the second respondent must have observed being placed in the handbag;

f. Only one cashier's point was open when the incident occurred;

g. There was insufficient evidence to show that the incident occurred in full view of any other customer;

h. There was no intention on the part of the second respondent to act either wrongfully or to intentionally prejudice or injure the appellant as she was acting in accordance with instructions she had received from her employer;

i. The court case could have been avoided if the appellant had not overreacted when confronted by the second respondent.

21. The magistrate concluded her judgment as follows:

"*I know that she might have felt a bit embarrassed say by the fact that they wanted to have a look into her handbag, but I cannot find that that as such brings to the court, and constitutes that her dignity indeed was impaired by the*

actions of (the second respondent) … *I am of the opinion that if (*the appellant) *acted calmly and if she had nothing to hide, if she knew she had done nothing wrong, and in the manner in which she was approached, it is not out of the normal spectrum of behaviour inside stores in South Africa. If I … go to a number of stores inside Kempton Park there are a lot of places where you go outside the shop, or when you leave the shop you are asked for a till slip, and that the till slip is compared to the items that you have in your possession. If you have to sue each and every of these people, or feel embarrassed when they do it, you are never going to enter a shop"*

REASONABLE SUSPICION

22. In accordance *Louwrens* it is necessary to consider the evidence in more detail. While the first set of findings by the trial court reflects the evidence of the appellant when asked about what was put in her bag, it is a far cry from the defence's version that the appellant had placed something in her handbag while standing at the till.

23. Several exchanges between the appellant and the respondent's counsel are illuminating. They demonstrate that the respondents disavowed any reliance on the appellant placing an item in her handbag while still walking through the aisles.

24. The first exchange took place when the appellant disputed that she had placed something in her handbag after the second respondent had rung up the purchases. It proceeded as follows:

Q: "*. What were you putting into your handbag at the time when she saw you?"- "I was not putting anything, except my purse, in my bag at the time of the transaction. In the aisle, or actually she could see me at one stage, I am now thinking this. I was busy on my phone and I placed my phone in my side pocket."*

Q: "Ma'am you say you were busy on your cell phone. Were you engaging in a cell phone conversation while your purchases were being rung up?"- "No."

INTERJECTION BY APPELLANT'S COUNSEL: "Your Worship the witness said whilst she was in the aisle she was on her phone."

COURT: "That's correct."

Q: "As the court pleases. I apologise your worship, I retract that question. Ma'am so you were busy on your cell phone at what point?"- "As I was approaching the aisle of the vitamins, I phoned my husband to ask him whether he needs anything."

Q: "Ma'am we are not talking about your shopping in the aisle. Coming back to your position at Mrs Mello's till point, were you busy on your cell phone when you were at the till?"- No.

Q: "Okay. So when Mrs Mello looked at you, what were you putting into your handbag? - After the transaction I placed my purse in my bag, and that is it."

(emphasis added)

25. The second exchange occurred after the appellant was asked whether it was possible that the second respondent saw her put something into the handbag which was not a store item, to which she replied that it was not possible because she had only put back her purse:

"Q: *Precisely ma'am. You were not putting anything except your purse- Yes*

Q: *Is it possible that Mrs Mello had seen you put your purse into your handbag and had thought that your purse was an item that belonged to the store, which was not paid for? Is that a possibility? - Not possible*

Q: Why again?- Because she did not open the main compartment of my handbag. She opened the side pocket."

And then a short while later;

"Q: *Apart from your purse, was there anything else that you were putting into your handbag* (while you were at the till point)- *Nothing, nothing, nothing."*

26. The exchanges have been set out in detail because it demonstrates that the respondents' version was never that the appellant had put the cellphone back in

her handbag while still walking along the aisles. Moreover, despite the appellant expressly stating that she had put the cellphone in her handbag while walking along the aisles respondents' counsel persisted with the version that the appellant had only placed something in the handbag while standing at the till; not earlier.

27. Despite this clear line of cross-examination the second respondent's first piece of evidence when led in-chief was that after the appellant had paid she asked:

> "*What are you putting inside your bag?", she said 'It is a phone'. I asked her forgiveness. She was angry"*.

28. The respondents' counsel had not put this version to the appellant. As the earlier extracts of the appellant's cross-examination reveal there was ample opportunity to have done so if this had been the respondents' instructions. It is evident that the second respondent's evidence was an afterthought.

29. The second respondent's change of version however creates its own difficulties: If the exchange between the second respondent and the appellant had occurred in the fashion she described then there would have been no reason for the appellant to display the degree of anger as testified to by the second respondent. The second respondent was hard pressed to provide an explanation when the anomaly was put to her.

In this regard the cross-examination of the second respondent on how she could have believed that the appellant had put something in her bag while at the till is also revealing:

> *Q: "On your version you and Mrs Pieterse are facing each other. At precisely the moment you are facing each other you ask her 'what is it that you are putting in your handbag?' the question is very simple, if you are facing each other, how is it possible that you do not see what she is putting in her handbag? Do you not have an answer ma'am, because you are just keeping quiet?"- "Please repeat it."*

> *Q: "If you are facing the plaintiff, at that precise point in time that you're facing each other, how is it possible that you do not see what she is putting into her handbag?"- "I actually do not look at the customer. I only look at the items that she is about to pay for. In the meantime I am facing downwards, I do not look as to what (inaudible) his or her. I do not look and check what he or she is holding in his or her hand."*
>
> *Q: "So you do not care what you see or what you do not see, you simply enquire from the customer 'what is in your handbag'- At that stage I had finished putting her items on the side, then I realised that she was putting something in her handbag."*

It will be observed that at no stage during the exchange did the second respondent suggest that the incident may well have occurred prior to the appellant reaching the till.

30. The evidence is clear. The appellant had only taken out her purse while at the till and replaced it after paying. Nothing else was put in her bag at that stage.

    The defence was based on the second respondent reasonably suspecting that while at the till point the appellant had put some item of merchandise in her handbag without paying for it. The cross-examination proceeded on that basis and the reaction to the appellant's answers did not indicate that the respondents were relying on any prior act of concealment or that the appellant had put her phone in her handbag while at the till.

31. On the contrary it was the appellant who surmised that the second respondent must have had some line of sight as she, the appellant, was replacing the cellphone in her handbag while still walking along the aisles.

    Moreover the second respondents' version precluded this possibility because she said, when asked if she could see other customers in the store at the time of the incident: *" Because our aisles are high I cannot see those people who are behind the aisles"*.

32. The respondents bear the onus to demonstrate the basis for the reasonable suspicion. They are not able to get past the starting blocks because they cannot

show, on a balance of probabilities, that their version of how the suspicion came to be formed ought to be accepted.

The defence of reasonable suspicion to negative wrongfulness therefore fails. This leaves for consideration whether there was an *iniuria*, the issue of publication and whether the requirement of fault was satisfied.

INIURIA BY WORD OR CONDUCT

33. Since the magistrate erred in failing to find that on the second respondent's own version she could not see the appellant while the latter was walking between the aisles and since the magistrate did not accept the respondents' version that something was placed in the handbag at the till, it is necessary to determine whether the second respondent uttered the words complained of and searched the appellant's handbag in the manner alleged.

34. The magistrate only mentioned that the second respondent had said "*Ma'am your handbag"* and found that this did not amount to an intention to embarrass.

However the magistrate erred in failing to find that the second respondent had followed up with the words; *"*"*What is it that you were putting inside your bag?"*.

These words are not much different to the appellant's version; namely, that after the second respondent had said *"Ma'am your bag"* she then said "*No Ma'am I saw you put something in your bag*".

35. Apropos to the search: The trial court accepted the appellant's version that the second respondent had searched the side pocket of the handbag. There was no cross-appeal on this finding. In my view correctly so, considering the overwhelming probabilities.

36. On applying *Louwrens* it appears sufficient to accept the second respondent's version of what she said coupled with the trial court's finding that the second respondent proceeded to search the side pocket of the appellant's handbag

37. According to both parties the exchange could not have occurred at any time prior to the appellant's purchases being scanned by the second respondent at her till point.

    That being so, the words and actions of the second respondent were intended to mean that the appellant had placed something in her handbag at the till that had not been put on the counter for scanning and that it was something other than her purse since she had already taken it out in order to pay. In their context the words uttered could not have amounted to an innocuous enquiry as they were coloured by the second respondent proceeding to inspect a side pocket of the appellant's bag.

    If one disregards the appellant's evidence that the second respondent said the words in an accusing tone, then at the least they meant that the appellant was suspected of shoplifting. The appellant's immediate anger when this occurred was confirmed by the second respondent and demonstrates that the words were certainly understood by the appellant to have this secondary meaning. See *Sutter v Brown* 1926 AD 155 at 166 in respect of a defamation claim and *Ciliza v Minister of Police* 1976 (4) SA 243 (N) for *iniuria*.

PUBLICATION

38. The appellant's claim of being embarrassed when confronted by the second respondent lends some credence to her testimony that there was at least one other person in the immediate vicinity who witnessed the incident. The appellant also indicated during evidence, but in another context, that a male staff member had been working in the vicinity.

    There were also a number of contradictions in the evidence tendered by the respondents as to whether more than one teller was serving customers when the

store opened. Furthermore the store manager conceded that she was unsighted and could not say if other customers might have been in the store at the time.

39. Nonetheless the appellant bears the onus of proving that there was publication.

    Unlike the previous issues which are resolved by accepting the second respondent's testimony there remain two conflicting versions as to whether anyone witnessed the incident.

40. Despite the contradictions and other aspects mentioned earlier, in applying *Louwrens* it is not possible, sitting on appeal, to conclude that the probabilities favour the appellant's version. The magistrate's finding that the appellant failed to prove publication therefore stands.

INTENTION TO INJURE (*ANIMUS INIURIANDI*)

41. The respondents pleaded in general terms a lack of intention to injure and also relied on a genuine but mistaken belief that the appellant had committed, or may have committed, a criminal act in their presence. The defence was put on the basis that the second respondent was doing her job based on what she had seen; she was simply "*following instructions and is merely a human being who is open to making mistakes"*

42. Earlier, when dealing with the element of wrongfulness, I set out the reasons for rejecting (on the facts) the defence of reasonable mistake. However, the defence as formulated also relies on lack of *animus iniuriandi* (an intention to injure) and raises the question of whether our law requires subjective intent for purposes of satisfying the fault element in the present type of defamation case. It is recognised that subjective intent can take the form of *dolus directus* ,*dolus indirectus* or *dolus eventualis*. See *Moaki v Reckitt and Coleman (Africa) Ltd* 1968(3) SA 98 (A) at 104) and *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402H.

43. Traditionally a genuine mistake rebuts *animus iniuriandi.* See *Nydoo v Vengtas* 1965 (1) SA at 15. However if the mistake was made recklessly (in the loose sense of that term when applied to *dolus eventualis*), then as put by Neethling *et*

al in *Neethling's Law of Personality*(2nd); *"If the defendant's mistake can be attributed to such recklessness the defence must fail, because consciousness of wrongfulness is not absent in such a case"*.

44. In the present case the respondents' evidence through its store manager, Ms Mbalati, was that should a member of staff " *see customers maybe putting something in their bag, certain items in their bags, they should ask the customer what that was"* .

However she made it clear that staff were not allowed to conduct bag searches. During cross examination Ms Mbalati conceded that a staff member who searched a customer's handbag might be subject to disciplinary action for transgressing store policy.

45. In my view this evidence and the second respondents' denial that she had searched the side pocket of the appellant's handbag are sufficient to show that the second respondent knew that the consequence of searching the handbag would be regarded by the company as wrongful. On the basis of *dolus eventualis,* the second respondent may therefore be found to have the necessary intent to injure. However such a finding would be limited to that part of the *iniuria* attributable to the search; it would not extend to the words uttered.

If a strict subjective approach is applied, then a store that directs its staff to search a person on suspicion of shoplifting would be able to raise lack of intent irrespective of whether there were any reasonable grounds for conducting the search.

46. The question arises whether, in a suitable case, negligence ought to satisfy the requirement of fault.

In this regard a number of cases require consideration.

47. The starting point is *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210 to 1211 where the court rejected the established common law position of absolute liability in cases involving defamation by the media but balanced it by reducing the fault element from intention to negligence.

Subsequently in *Marais v Groenewald* 2001(1) SA 634 (T) at 645E-647B van Dijkhorst J considered that negligence should suffice in all other defamation cases.

48. More recently in *Le Roux v Dey* 2010 (4) SA 210 (SCA) Harms DP said the following at para 18;

> *"van Dijkhorst J* (in *Marais*) *not surprisingly, sought to develop the common law in this regard by holding that a lack of coloured intent could not be a defence if it were due to negligence, a view similar to that of FP van den Heever J (Kriek v Gunter 1940 OPD 136 ,) Colman J(Hassen v Post Newspapers (Pty) Ltd and Others 1965 (3) SA 562 (W)at 570G - H), PQR Boberg (Animus injuriandi and mistake' (1971) 88 SALJ 57) and Burchell (Burchell I at 166 – 7)*.

However on appeal to the Constitutional Court Brand AJ expressly left the issue open. See *Le Roux* (ConCourt) at paras 136 and 137

49. There are a number of specific exceptions in the law of defamation where negligence is sufficient to attract liability in a defamation suit. These include defamation by the media, false imprisonment and the wrongful attachment of goods (see Boberg *The Law of Delict (vol1)* at 272 and *Neethling's Law of Personality* at 166 para 2.2.3.2.

Moreover a negligent statement is actionable provided it causes patrimonial loss. See *Hershel v Mrupe* 1954(3) SA 464 (A) at 494-495.

50. In the present matter there appears to be an additional feature that arises when a customer suspected of shoplifting is approached, a feature which is not ordinarily associated with the usual defamation or *iniuria* type of case. It is that the injurious words or actions effectively result, however briefly, in a deprivation of liberty. A suspect also runs the risk of being physically restrained if he or she simply walks away or otherwise fails to respond. The request may also be followed by a body search or, as in this case, a bag search.

51. Whatever words are used by a staff member or security guard to stop a person and enquire whether he or she might have taken merchandise from the store

there remains the risk of the suspect being expected to submit to a body or bag search failing which he or she may be required to wait for a search warrant or face arrest on suspicion of theft.

52. The practical effect would ordinarily be that someone other than a police officer who asserts an entitlement to question a customer on suspicion of shoplifting will effectively constrain the suspect from walking away. This would amount not only to an invasion of privacy but also a *de facto* deprivation of liberty, even though short of an actual arrest.

53. A number of cases in the United States involving the stopping and searching of customers appear to apply the test of whether a reasonable person in the circumstances would feel free to decline the request made to stop or to otherwise end the encounter. The mere fact that someone acquiesces does not necessarily make the search lawful. Duress or other forms of coercion such as harassment or an implicit threat may negative consent. See generally *Corpus Juris Secundum* ('*CJS*') *(Vol 79) Searches* para 25.

    The issue appears to resolve itself as to whether the person under suspicion exercised free will; although it is unclear whether the test is objective or subjective and whether it excludes the situation where the suspect knows that incriminating evidence will be found[2].

54. In the present case it is evident that the second respondent was not entitled to conduct a search of the customer's personal items, however cursory. This was not store policy and she had been informed as much by her superiors.

55. I turn to deal in greater detail with the defence raised of lack of *animus iniuriandi.*

    The requirement for *animus iniuriandi* involves both an intention to injure and knowledge of wrongfulness.

56. While lack of *animus iniuriandi* is pleaded, the defence contended that the actions taken were not wrongful because the second respondent reasonably suspected that the appellant had stolen an item of merchandise from the store.

---

[2] *CJS ibid* at paras 25 and 26

The first question is whether the test for fault should be relaxed in defamation cases where lack of negligence is relied on to negative wrongfulness. For present purposes an *iniuria* is included, since the principles applicable to this aspect of the enquiry are common to both.

57. The starting point in the enquiry is that while reasonableness, within the context of holding a reasonable suspicion, might exclude a genuine mistake it does not exclude negligence. For mistake to create liability based on negligence the error must be unreasonable[3].

    The test for negligence is premised on a deviation from the acts of a reasonable person (the *diligens paterfamilias*), which in turn is informed by our constitutional values. See *Cape Town Municipality v Paine* 1923 AD 207 at 216 and its application to negligent statements in *Hershel v Mrupe* 1954(3) SA 464 (A) at 494-495. See *Carmichele v Minister of Safety and Security and another* 2001(4) SA 938 (CC) at paras 35, and 54-58 and *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) per O'Regan J especially at paras 86-88 regarding the application of constitutional norms to the common law test of reasonableness.

58. If negligence is extended to the *actio iniuriarum* the dividing line between defamation and a negligent statement (being by contrast a claim under the *lex Aquilia*) becomes on the one hand blurred, but on the other more readily comprehendible, bearing in mind that dignity is one of the most cherished of our constitutional rights. See *S v Makwanyane & Another,* 1995 (3) SA 391(CC) at para 327[4]

59. In the case of defamation the element of wrongfulness is *prima facie* established and there are generally recognised defences negating wrongfulness based on justification, such as truth and public interest, fair comment and privileged

---

[3] Compare Boberg *The Law of Delict* at 272

[4] In *Makwanyane at para 327, O'Regan J said that:*

"The right to life was entwined with the right to dignity. The right to life was more than existence, it was a right to be treated as a human being with dignity, without dignity human life was substantially diminished, without life there could be no dignity."

See also its application to damages in wrongful arrest and detention cases in *Takawira v Minister of Police* [2013] ZAGPJHC 138, 2013 JOL 30554 at paras 38 to 43.

occasion. While the Aquilian action also requires wrongfulness the defences are generally based on lack of negligence, foreseeability and remoteness rather than justification. Of course, unlike the *actio iniuriarum*, an Aquilian action is only supported if there is proof of actual patrimonial loss.

60. There appears to be no practical impediment to align the requirement for fault in the *actio iniuriarum* with the *Lex Aquilia* more closely in cases where a person purporting to exercise authority at a shop accuses a customer of shoplifting, irrespective of whether or not this is followed by a request to search. The concern remains whether it is advisable, having regard to its ramifications, to extend liability in the present type of case to acts of negligence.

61. There are a number of considerations in favour of extending the scope of liability to negligent acts in defamation cases where a customer is accused of actual theft or suspicion of theft by a shop-owner or someone purporting to protect his interests.

    They may be summarised as;

    a. the acceptance of reasonable suspicion as a ground that will negative wrongfulness requires a consequential tempering of the fault requirement in order to maintain a fair balance between the competing interests that underpin defamation law;

    b. alignment with constitutionally protected rights;

    c. alignment with statutory provisions regarding a private citizen's entitlement to arrest, detain or search under the Criminal Procedure Act 51 of 1977 (*'the CPA'*).

62. There are also a number of militating factors. The first is the standard of reasonable care to be expected, bearing in mind that the person sought to be held liable may range from large national chain stores employing private security guards to the sole proprietor of a small spaza shop. The second is that everyone has a right to take reasonable measures to protect property.

63. Before engaging these issues it is advisable to consider the only two cases I was able to find concerning a claim against a store by a plaintiff who was accused of shoplifting.

64. In *Susman v Mr Price Ltd* [2011] ZAGPJHC 90 the court was required to consider claims for unlawful detention and defamation arising from an incident where the plaintiff had been approached by a security guard before exiting a shop and was requested to provide receipts for her purchases. After verifying the items she was carrying against the receipts he asked her to produce a receipt for the shoes she was wearing. The shoes still bore the "Mr Price" price tag. The plaintiff said that she had purchased the shoes at another branch on the previous day. The guard then accused her of stealing the shoes. The court found that the guard had acted reasonably in the circumstances of the case[5].

    The plaintiff had also been taken to the privacy of a back office in the store and after contacting her husband waited for him to bring a receipt for the shoes. Salduker J (at the time) considered that this was part and parcel of the investigation carried out to determine whether the plaintiff had in fact been wearing the shoes when she entered the store. The learned judge then said at para 40:

    > "*In my view, in these circumstances, the defendant's employees and security guard had a valid basis for stopping the plaintiff at the door after monitoring her movement's, and were justified in carrying out their investigation to verify the plaintiff's claims. In my view the procedure they followed in questioning her, was reasonable in the circumstances. Significantly, the defendant's witnesses testified that the plaintiff was not regarded as a thief or a shop lifter. This is not improbable as plaintiff was not arrested or detained at the management centre holding cell, which was the normal procedure in the case of theft or shoplifting."*

    Of importance for present purposes is that on these facts the court considered whether the plaintiff had been defamed. It applied the test of whether the

[5] At para 38

defendant's staff or contracted security service personnel had acted reasonably when suspecting the plaintiff of shoplifting[6].

65. The court did not give reasons for applying this test and it appears that the parties simply assumed it to be the law, presumably based on their understanding of *Damon v Greatermans Stores Ltd and another* 1984(4) SA 143 (WLD). Since there is no *ratio* on the point *Susman* is not be authority for the proposition that intention has been replaced by negligence in this category of defamation case. Nonetheless the case reflects a judicial leaning.

66. *Damon* appears to be the only other locally reported case within the last thirty or so years where the staff of a private company either accused someone of shoplifting or actually arrested and detained the suspect.

In that case the claims were based on unlawful arrest and detention, the use of insulting and disparaging language and the invasion of privacy. The plea alleged that the arrest and detention were lawful since the defendant's employee, acting under the *bona fide* belief that the plaintiff had stolen articles of clothing from the store, requested the latter to accompany him to an inside office for questioning and after asking the plaintiff about the contents of the carrier bag the staff member proceeded to search it. The plea also alleged that the plaintiff had consented to the search.

Boshoff JP found on the facts that the first defendant's employee "*had reasonable grounds for believing that the plaintiff had stolen some property from the store*"[7]. The court also found that the events which occurred in the office were consistent with the type of investigation one would expect in the circumstances in order to determine whether the plaintiff had stolen any items[8].

In considering whether there was a claim for damages, the court held on the facts that the defendants were justified in arresting the plaintiff without a warrant by reason of the provisions of section 42(1)(a) of the CPA. The section permits a

[6] At paras 50 and 51
[7] At 147D
[8] At 147H

private citizen to effect a lawful arrest without a warrant provided he or she reasonably suspects the person arrested of having committed a Schedule 1 offence (which includes theft).

67. The court in *Damon* also referred to sections 39 (1) and (2) read with section 50(1) of the CPA which allow the person effecting an arrest to forcibly confine a suspect if the latter does not submit to custody provided that the person arrested must, as soon as possible after the arrest, not only be informed of the reason for the arrest but also be brought to a police station.

    The court furthermore pointed out that in terms of section 39(3) the arrested person remains in lawful custody and is to be detained until he or she is lawfully discharged or released. See generally *Damon* at p148B-I.

68. Boshoff JP considered in some detail the private citizen's rights when apprehending a suspect to take him back into the store and with reasonable expedition question him and afford the suspect an opportunity to provide an explanation or make representations in the privacy of an office with the minimum number of persons present before taking him to a police station[9].

    The judge concluded that in the circumstances of the case the store's employee was justified in arresting the plaintiff, in using the degree of force which brought the plaintiff under compulsion and to detain him until he was released when nothing belonging to the store was found[10].

    On analysis, the court considered the claim by reference to the lawfulness of the arrest and not on the basis of a defamation action.

ACCEPTANCE OF REASONABLE SUSPICION AS A DEFENCE

69. The defence of '*reasonable suspicion'* is not one of the established defences to a defamation or *iniuria.* Although the courts have never questioned its legitimacy, it remains a special defence based on the absence of negligence. Allowing a

[9] *Damon* at 148I-149C and comparing the House of Lords decision of *John Lewis & Co Ltd v Tims* [1952] 1 All ER 1203 (HL).
[10] At 149F

defence of reasonably suspicion in such cases must by its nature involve both the elements of wrongfulness (negated by justification) and of fault.

70. It would be anomalous to allow a reasonable suspicion that the plaintiff was shoplifting to satisfy the requirement of justification while still retaining lack of conscious intent in respect of the fault element as a basis for permitting the defendant to escape liability.

In order to maintain a fair balance between the competing rights and interests affected in this category of defamation case, allowing want of negligence to negative wrongfulness appears to require consistency of application by replacing *animus iniuriandi* with negligence (in the form of a failure to demonstrate that the suspicion was reasonably held) as sufficient to satisfy the fault element.

71. In my respectful view, the line of reasoning adopted would be in parity with that applied in *National Media Ltd v Bogoshi 1998 (4) SA 1196* (SCA) which held that in media cases strict liability yields to freedom of expression as an acceptable justification negating wrongfulness provided it is balanced by replacing *animus iniuriandi* with negligence[11].

LAW ENFORCEMENT BY PRIVATE CITIZENS

72. The case of *Damon* demonstrates the synergies that exist between, on the one hand, a private citizen effecting a lawful arrest or search and on the other, the same person being able to raise a successful defence to a defamation action founded on the same incident.

73. An integrated approach will avoid anomalies that would otherwise arise bearing in mind the narrow line between a shop-owner stopping a person suspected of shoplifting and depriving a person of his liberty, however momentarily. The line becomes more indistinct when the suspect is not arrested but is asked or implicitly required to submit to a search. This was traversed earlier.

[11] *Bogoshi* at 1203D-1204A and 1209H-1212G

74. In all these instances there is an unexpressed requirement that the suspect complies, failing which more embarrassing consequences of arrest, detention and search are likely to follow. Why should the consequences to an accuser who purports to arrest the suspect be any different to one who purports to arrest if there was no reasonable suspicion that the customer had been guilty of pilfering? In both cases the suspect's freedom of movement is curtailed by someone who claims to exercise legitimate authority.

    The remedy of wrongful arrest, detention and search would be available if the individual insisted on his rights; but why should he insist on being formally arrested when he has already been insulted or has otherwise suffered a loss of dignity or been humiliated because the accusation or request to search was not reasonable in the first place?

    To suggest that the loss of self-esteem might have otherwise been insignificant would diminish the store we place on the right to dignity. And jurisprudentially, it would not provide a remedy to someone who, in front of say his children or friends, was accused of shoplifting without there being reasonable grounds for suspicion; more so if he is asked to then accompany the accuser to an office.

    Since a person who is stopped at a store on suspicion of shoplifting will have a claim based on negligent statement if patrimonial loss can be demonstrated (and the damages sustained are not too remote) there appears to be no reason why an insult with its attendant invasion on an individual's right to dignity should be subject to a higher yardstick.

    It would also appear that on policy grounds subtle coercion without proper cause should not be sanctioned. A failure to provide a remedy where a reasonable suspicion is absent may allow arbitrary profiling on constitutionally unacceptable grounds, such as race, religion, ethnicity or class to masquerade under the guise of mistake.

75. Anomalies may also arise in cases where it is difficult to prove an actual arrest or detention despite the suspect being effectively required to answer questions or provide proof despite there being no basis for a reasonable suspicion.

In *Susman* the court found that the plaintiff had not been arrested even though she had waited in a private office in the store until her husband brought proof that the shoes had been bought previously. It appears that if the suspicion of shoplifting had not been reasonable the court would have found for the plaintiff.

76. There is a further consideration: It may be argued that the statutory requirement of reasonable suspicion should also inform the common law test in defamation cases where an individual claiming authority approaches another whom he or she suspects of shoplifting and effectively requires that person to submit to some form of search.

If that proposition is accepted then a private individual's entitlement to conduct a lawful search or to detain a suspect is also circumscribed by the CPA.

Section 39(3) of the CPA was mentioned earlier in relation to an arrest having the effect of placing the suspect in lawful custody until lawfully discharged or released. So too section 50(1), which requires the arrestor to bring the suspect to a police station as soon as possible (as explained in *Damon*).

However there is no provision in the CPA entitling a private individual to search the person or property of another *unless* he has effected an arrest under section 42; and then he may only do so in terms of the provisions of section 23 (1)(b) as read with section 20 and section 23(2) of the CPA.

77. In order to contextualise an individual's limited right to arrest, detain and search another person it is necessary to consider section 23 as a whole as read with section 20:

23 Search of arrested person and seizure of article

(1) On the arrest of any person, the person making the arrest may-

(a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or

(b) if he is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to himself or others.

20 State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

78. The effect of these provisions is that;

a. a private individual cannot search another person without a warrant unless that person has been arrested or voluntarily submits to a search;

b. the arrest itself could only have been effected if the arrestor had reasonable grounds for believing that an offence had been or was being committed.

The upshot is that an arrest or search will only be lawful if there was a reasonable suspicion that the person apprehended had committed or was in the process of committing an offence.

79. It follows that the element of fault in defamation cases of this nature should be informed by those provisions of the CPA which determine the lawfulness of an arrest, detention or search.

ALLIGNMENT WITH THE CONSTITUTION

80. A person who accuses a customer of shoplifting assumes the right to approach, question and if need be detain or subsequently search the suspect. These actions would impact in varying degrees on the constitutional right to:

    a. Dignity (section10);

    b. Freedom and security of the person, which includes the right "*not to be deprived of freedom arbitrarily or without just cause"* and "*not to be detained without trial*" (sections 12(1)(a) and (b) respectively);

    c. Privacy; which includes "*the right not to have their person searched, their property searched or their possessions seized*" (section14(a)-(c))[12];

    d. Freedom of movement (section 21(1)).

81. Against these are the competing rights of an individual not to be deprived of property save under law (see section 25(1)) and to freedom of expression (section 16).

82. Naturally all the affected rights are subject to the limitation provisions of section 36 which allow an infraction of the protected right provided it is reasonable and justifiable in an open and democratic society.

83. It also appears that the right under section 12(1)(a) not to be deprived of freedom "*arbitrarily and without just cause*" would have little content if a person is stopped and effectively required to submit to questioning and a search in the absence of a reasonable suspicion of shoplifting. Just cause in the form of reasonable

[12] Section 14 of the Constitution

Privacy

Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized;

suspicion is a prerequisite for establishing the lawful entitlement of a person to act in a way that effectively deprives another of his or her liberty, or which entails a search of an individual or of possessions.

SUMMARY

84. The analysis contained in the previous sections has attempted to consider the issue from a number of key perspectives and each appears to support replacing intent with negligence for the purpose of satisfying the fault requirement.

85. A court is required to have regard to the caution expressed in *Carmichele* at paras 33 to 58 when taking a decision which may result in the development of the common law as envisaged by section 39(2) of the Constitution.

86. While negligence is regarded as sufficient in certain categories of defamation it remains necessary to consider the extent to which the law of defamation would be affected and whether there are adequate safeguards to avoid the net being cast too wide. The first is dealt with in the next topic; the second under the heading " *Limitations"*

THE ELEMENTS OF WRONFULNESS AND *ANIMUS INIURIANDI*

87. As already indicated in order for a statement or conduct to constitute defamatory matter (or an *iniuria*) it must *inter alia* be wrongful and be made *animo iniuriandi*.

88. The element of wrongfulness is established if, in the opinion of a reasonable person of ordinary intelligence and development, the publication has the "*tendency to undermine, subvert or impair a person's good name, reputation, regard or the esteem of which he is held by the community*" (see Neethling at page 135).

89. It will however not be wrongful if the defendant can demonstrate a valid ground of justification, since the well-established grounds mentioned earlier do not

constitute a closed group[13]. The courts in *Damon* and *Susman* have accepted (albeit inferentially) that an accusation of shoplifting and any subsequent search or detention will be justified if there were reasonable grounds for suspecting that the person had stolen items from the shop.

90. Moreover lack of knowledge of the existence of a particular delict does not negative wrongfulness, unless the defendant is *culpa incapax* or otherwise lacks accountability (a remote possibility in the case of a staff member or security guard). In *Le Roux* (ConCourt) Brand AJ said at para 137;

> *"I do not believe that knowledge of wrongfulness requires familiarity with the existence of a particular delict. Just as much as it will be no defence in a criminal trial to plead ignorance of a crime called crimen iniuria, ignorance of the name of the particular delict is simply no answer to delictual liability."*

91. Accordingly there appears to be no need to develop the element of wrongfulness in relation to the present category of defamation as it falls neatly within the existing common law framework. Perhaps most importantly, and as demonstrated earlier, wrongfulness for the purposes of this type of defamation would properly include actions that are unlawful in relation to a private arrest, detention or subsequent search by reason of statute.

92. I turn to the requirement of *animus iniuriandi*. It comprises two elements;

    a. an intention by the defendant to injure the plaintiff's reputation; and

    b. knowledge by the defendant that the intended result is unlawful. [14]

93. It is unlikely that allowing a defamation claim based on negligence will impact adversely on the intention to injure. The mere fact that a defendant believes that protection is afforded because he suspects the plaintiff of committing a crime does not mean that however laudable the motive, he did not foresee the

---

[13] *National Media and others v Bogoshi* 1998(4) SA 1196 (A) at 1204D-F

[14] See: *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403; *Pakendorf en andere v De Flaming* 1983 (3) SA 146 A at 157 and LAWSA (2ed) vol 7 para 258

possibility that the words used or conduct adopted might be defamatory. See *Le Roux* (ConCourt) at paras 131 to 133.

94. However, applying a test based on negligence in a case of this nature would result in most, if not all, defendants being adversely affected: An employee who accuses a customer of shoplifting is unlikely to consider the intended result as unlawful. Quite the contrary, since the employee is likely to believe that the apprehension of a suspected thief is a sanctioned and lawful objective.

95. Nonetheless, if negligence suffices in this type of case, a shop-owner or an employee would still be able to avoid liability if he or she can demonstrate that there were reasonable grounds for suspecting the customer of shoplifting. And a genuine mistake will suffice as it will not constitute negligence in delict; it will only do so if there is a failure of reasonable care (eg; *Margalit v Standard Bank of South Africa Ltd and another* 2013 (2) SA 466 (SCA) at para 23

96. In the case of *Le Roux v Dey* 2010 (4) SA 210 (SCA) at para 39 Harms DP said in a defamation case which did not concern the media;

> *The effect of this is that mistake or bona fides might in appropriate circumstances justify a defamatory statement (ie if it were reasonable to have been made) and that it is accordingly not necessary to require coloured intent. I therefore conclude, especially in view of precedent and the constitutional emphasis on the protection of personality rights, that the animus injuriandi requirement generally does not require consciousness of wrongfulness (wederregtelikheidsbewussyn).*

However Brand AJ *in Le Roux* (ConCourt) at para 137 considered that the issue of whether conscious wrongfulness was still a requirement for *animus iniuriandi* did not have to be considered and expressly kept the issue open.

97. If conscious wrongfulness is supplanted with negligence as a requirement for defamation in cases of this nature greater care will be taken in respecting the dignity of others. Tested another way; it would be an anathema to our society's

norms, informed as they are by our constitutional values, if a defendant can be heard to say that he or she did not know that the intended result is unlawful because the plaintiff had raised in the former's mind a suspicions of criminal conduct, even if it might have been based purely on subjective racial, religious, ethnic or other stereotyping**.**

This again suggests that policy considerations lean towards providing for liability in the absence of reasonable suspicion in order to preclude profiling based on prejudice or other constitutionally unacceptable grounds.

LIMITATIONS

98. The test for fault on the basis of negligence in the present type of case appears to embody adequate safeguards.

In this regard a defence of mistake will still succeed provided there is reasonable suspicion[15]. Nor is the equilibrium between the competing rights and interests disturbed because a plaintiff could rely, in the claim or by way of replication, on a failure by the proprietor of the store to take reasonable steps to ensure that staff or security guards are adequately trained or that in all the circumstances. The handling of the incident may also be unreasonable having regard to factors such as the manner in which the plaintiff was approached and questioned and whether the incident was handled with relative discretion and sensitivity or in an unduly excessive manner[16]. By way of illustration, in both *Daman* and *Susman* the court found that due regard was had to the privacy of the suspect.

99. It should be accepted that by extending liability for defamation to negligent acts an employer who fails to take adequate steps in ensuring that employees or security guards engaged on its premises are adequately trained will open itself up to liability for defamation.

This in turn may be interpreted as providing scope for liability in relation to the way in which random searches are conducted, or when an individual is removed

[15] See *Damon* and *Susman*

[16] Compare *Bogoshi* at 1212H-J

from a store or shopping mall that may effectively be opened up to the public at large even though the right of admission is reserved[17]. That is not the intention, since there are other complexities which arise in such cases.

100. The facts of this case do not require a finding that a search without a prior arrest as required by the CPA will itself amount to an actionable *iniuria* irrespective of the circumstances. Even if the failure to arrest renders the search wrongful, it does not conclude the enquiry in relation to the element of fault, dependent as it is on the particular circumstances.

In this regard *Damon* is again apposite. In determining whether the defendant may have acted outside the prescripts of the CPA, Boshoff JP's made the following observations at 148I to 149B:

> *"In the case of suspected shoplifting it is not practicable to arrest the suspected person until he has left the premises without paying for goods which he has taken. It will not be practicable for the person in charge of security to decide whether a charge should be made unless subordinate or other employees are entitled to take an arrested person back to the premises before he is handed over to the police. What is of considerable importance is that it is in the interests of an arrested person himself that he should not be charged without being given an opportunity of offering any explanation or making any representation to a responsible officer. It is to his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number of persons present. If all these steps are therefore taken with reasonable expedition and an arrested person is only thereafter brought to a police station, it cannot be contended that he was not brought to a police station as soon as possible within the meaning of the phrase in the section; cf John Lewis & Co Ltd v Tims [1952] 1 All ER 1203 (HL).*

[17] See *Corpus Juris Secundum (Vol 16A) Constitutional Law* paras 669and 670 citing *City of Chicago v Rosser* 47 Ill. 2d 10, 264 N.E. 2d 158 (1970) and *Handen v People of City of Colorado, Springs,* 186 Colo. 284, 526 P.2d 1310 (1974. The cases were concerned with the First Amendment protection in relation to the right to peaceably assemble.

Although this was said in the context of a claim based on wrongful detention, it has a bearing on defences that a court may accept in the present category of cases where there has not been a formal arrest.

101. In the present case the issue does not arise because there was no arrest alleged and in any event there was neither a reasonable basis for the suspicion nor did Clicks permit its staff to search customers.

102. The underlying principle remains that the suspicion of shoplifting or pilfering and the reasonable steps that should be taken to guard against the accusation being untrue is to be found in balancing the constitutional rights set out earlier and the shop owner's rights to protect his or her property from theft and by necessary extension the right to freedom of speech in such circumstances. The reasonableness of the steps would obviously vary by reference to the means and size of the business.

103. This case is specifically limited to a person who, in the employ of a store or shopping mall, or whose employer is contracted to supply security services, approaches someone on the basis of being suspected of shoplifting[18]. In such a case there is no practical reason for exempting liability if the statement is not based on a reasonable suspicion.

The magistrate considered the situation in the present case analogous to conducting a random search[19]. I disagree. By definition a random search is not preceded by the person who asserts authority forming a suspicion regarding the particular customer in question; and this would be understood by the affected customers. Accordingly, unless constitutionally objectionable profiling is also present, random searches will be addressed at the stage of enquiring whether the actions constituted an insult. It therefore cannot assist in the fault leg of the enquiry, which presupposes a finding that the words or actions do constitute defamatory matter.

---

[18] In Administrator, Transvaal v Traub 1989 (4) SA 731 (A) a 761D-G the then Appellate Division court recognised that on occasion the law may develop incrementally on a case by case basis.

[19] See the extract from the judgment cited at para 21 *supra*

This decision therefore does not have to deal with the various competing rights arising from privately conducted random searches and their lawfulness.

APPLICATION TO THE CASE

104. In the present case the admitted statements together with the search of a compartment of the appellant's handbag amounted to an insult.

105. The second respondent failed to prove the factual basis upon which she could have formed a reasonable suspicion that the plaintiff was shoplifting.

Furthermore she exceeded the bounds of her authority and acted against express company policy by commencing a search of the plaintiff handbag. In this regard it has already been demonstrated that by reason of section 23(1) (b) of the CPA the second respondent could not have conducted a lawful search without first arresting the appellant[20].

Accordingly the respondents failed to provide a defence of justification which could negative the element of wrongfulness.

106. I have set out the reasons why negligence will satisfy the requirement of fault in the present type of case. I have also attempted to explain why the second respondent's evidence that she believed that the item had been concealed while the appellant was at the till point is to be rejected, as it was by the magistrate on a proper reading of her judgment.

The finding that the alleged observation of the appellant putting something in her handbag that was not paid for did not occur at the till point as contended for by the respondents precludes the defence from relying on a genuine mistake. The second respondent was also negligent in searching a compartment of the appellant's handbag since the actions were unreasonably invasive in the circumstances. This is borne out by the respondents disavowing that any search had been conducted.

[20] A case which held this is *Alex Cartage (Pty) Ltd v Minister of Transport* 1986 (2) SA 838 (E) at 845F and 857D

107. Accordingly the defence should not have succeeded and the appellant is entitled to its claim based on *iniuria*.

That leaves only the question of quantum for determination.

QUANTUM

108. A number of cases have been considered. I have borne in mind that in some there was actual publication.

109. The first is *Le Roux* where the Constitutional Court was concerned with schoolchildren who had created and published a computer image of the deputy principal superimposed on an image of two naked men sitting in a sexually suggestive posture. The SCA had awarded damages in the sum of R45 000. The Constitutional court reduced the amount to R25 000 and ordered the children to tender an unconditional apology.

110. In *Tuch and others NNO v Myerson and others NNO* 2010 (2) SA 462 (SCA) the defamation consisted of an allegation that the person had stolen between R5million to R6 million from his brother. The court held that the extent of the damage caused was confined by the limited publication but that the allegation was sufficiently serious to justify an award of substantial damages. The SCA awarded R30 000. The court referred to the case of Naylor *and Another v Jansen; Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) at paras 15 - 17, where the defendant had wrongly alleged that the plaintiff had stolen money from his employer. However the plaintiff had been found guilty of misconduct involving dishonesty and the trial court considered that this factor should have been taken into account which resulted in it reducing the award of R30 000 to R15 000.

111. Finally in *Crots v Pretorius* 2010 (6) SA 512 (SCA) the SCA overturned a full bench decision that the magistrate had correctly found the defendant liable in regard to an accusation made of stock theft. The report indicates that the full bench had supported an award of damages of R20 000.

112. In the present case the appellant was a regular customer at the store, had her own shop and was falsely accused in a public place (albeit that no one might

have witnessed the incident) and suffered the further indignity of a pocket of her handbag being opened and search. The evidence of the second respondent and the store manager confirmed that the appellant was very upset. It is evident that the *iniuria* impacted on her dignity and self-esteem.

113. An ameliorating factor is that an apology was tendered by the manager while the appellant was still in the store.

114. Cases can be envisaged where the damages awarded against the employee may be less than that against the employer. For instance an employee may have genuinely but incorrectly believed that her employer required her to apprehend a suspected shoplifter in a particularly invasive fashion. By contrast a higher award against the employer may be justified where it had failed to ensure that staff was adequately trained although they were instructed to apprehend suspects.

115. There are no features in the present case that would warrant deviating from the ordinary basis of holding the employer vicariously liable for the conduct of its employee. Even though Clicks' policy does not permit its staff to do so, the search was conducted for its benefit by the employee.

116. In all the circumstances it appears that an amount of R25 000 is appropriate and that costs should follow the result.

ORDER

117. The court orders that :

1. The appeal is upheld in respect of claim 2 based on iniuria;

2. The order of the court a quo is substituted with the following order;

The first and second defendants are jointly and severally liable to pay to the plaintiff, the one paying the other to be absolved;

i. The sum of R25 000;

ii. Costs of suit on the Magistrates' Court party and party scale

3. The first and second respondents are similarly liable to pay to the plaintiff the costs of the appeal on the High Court party and party scale

I agree

_____

MLONZI, AJ

It is so ordered

_____

SPILG, J

DATE OF ORDER	25 March 2015
DATE OF JUDGMENT:	10 June 2015
LEGAL REPRESENTATIVES:	
FOR APPLICANT:	Adv HP. West
	Willie Pieterse Attorneys
FOR RESPONDENT:	Adv EJ. Ferreira
	Botha and Sutherland Attorneys