IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A121/2014

19/12/2016

In the matter between:

MOLEFE RALEIGH MAESELA **APPELLANT**

(Plaintiff in Court *a quo*)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

19/12/16 DATE ..... SIGNATURE

and

LESIBA JOHANNES MADISHA **FIRST RESPONDENT**

(Defendant in Court *a quo*)

SOUTH AFRICAN BLACK TECHNICAL AND ALLIED CAREERS ORGANIZATION **SECOND RESPONDENT**

(Third Party in Court *a quo*)

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal against the whole of the judgment of Legodi J which

dismissed with costs the appellant's claim for damages suffered as a result of the first respondent's alleged defamatory statements. The application for condonation for the late filing of the respondent's heads of argument was not opposed. Condonation is therefore granted.

[2] The following issues were dealt with by the court *a quo:*

> "3.1 Whether the statement(s) are defamatory?
>
> 3.2 Whether the contents of the statement(s) is/are true?
>
> 3.3 And if so, whether the publication thereof were in the public interest."
>
> and further as prompted by counsel for the defendant during the hearing, and couched as follows:
>
> "Is the plaintiff's cause of action based on the defamatory statement(s) per se or on innuendo statement distinguishable from statement(s) having defamatory meaning in the ordinary sense?"

BACKGROUND

[3] The appellant and first respondent were members of the South African Black Technical and Allied Careers Organization("SABTACO") and they served in its National Executive Committee, the appellant as National President and the first respondent as National Treasurer. The second respondentwas joined as third party by the first respondenton grounds that he was entitled to indemnity as set out in clause 20 of the SABTACO Constitution which reads:

> "*The office bearers, employees and committee members of SABTACO are*

indemnified by SABTACO against all proceedings, whether civil or criminal and costs and expenses incurred by reason of any act or omission, done in good faith and in accordance with this constitution in performance of their duties on behalf of SABTACO and they are not personally liable to any of the debts of SABTACO"

[4] The following factsare common cause:

4.1 the alleged defamatory statements werecontained in the two documents annexed to the particulars of claim as "A" and "B", dated 20 September 2011 and 30 September 2011;

4.2 annexure "A" was delivered to the 'addressees in their official capacities as specified',

4.3 the first respondent as the author of both documents

4.4 annexure "B" was tabled at a meeting of the National Executive Committee on 30 September 2011and the document was distributed to all who attended;

4.5 publication was not in dispute;

[5] Mr Griessel for the appellant in his Heads of Argumentaddresses the following excerpts from Annexure A and B to the particulars of claim as constituting the defamatory nature of the statements published by the first respondent which read as follows:

Annexure A

(a) *Appointment of Kedi as CEO for 6 months*

(v) The Treasurer clearly advised that the financial situation at SABTACO cannot afford such ill advised process as pushed by the President and Paul which has been hatched outside SABTACO and rammed through NEXCO despite the wise advice of the Treasurer against such a financial bankrupt move.

(vii) The above advice given by the Treasurer is the real financial situation of SABTACO that is to be implemented and the treasurer will not allow any other activity of ill advised maladministration of the SABTACO finances. The Treasurer will stop any decision that is of corrupt nature and maladministration of the SABTACO funds as long as having elected in that position and to be the custodian of the SABTACO finance.

(viii) It is also worthwhile to mentioned that I have advised the President accordingly, but the President said that with his group he is going to make sure that Kedi is appointed regardless. I have advised him that he must be careful with some people's money to maladministrate like that because some people are not pawns to allow peoples money spent recklessly and thus kill SABTACO.

(ix) The bottom line is that the process to employ Kedi as CEO for six months and paid by SABTACO existing money is not viable the situation can be saved if KEDI is employed as CEO to raise money for SABTACO and used the money raised by KEDI to pay his salary and also his commission; but please let us not embezzle SABTACO

people's money.

(c) Serious concerns regarding SABTACO President: Mr Raleigh Maesela.

(v) Using SABTACO for self gain which is a matter need to be opened which happened in the past.

(vii) Why as blacks and black organisation not only allow this unprofessional conducts but allow ourselves to be dictated that we should misappropriate SABTACO funds against the advice of the Treasurer.

Annexure B

SERIOUS CONCERNS REGARDING SABTACO PRESIDENT, MR RALEIGH MAESELA

COMPREHENSIVE REPORT BY THE SENIOR FOUNDING MEMBER, NEXCO MEMBER,NATIONAL TREASURER AND GAUTENG CHAIRPERSON OF SABTACO MR L.JOEMADISHA DATED SEPTEMBER 2011

1. *MR MAESELA INACTIVE AS THE PRESIDENT AND NON COMPLIANT WITH SABTACO CONSTITUTION*

1.1 *The President became not active on SABTACO issues about two(2) after elected President in 2007 until advised by Joe Madisha to visit the Head Office and be compliant with the SABTACO Constitution. After heeding the*

advice, the President instead adopted a destructive attitude on SABTACO and a fighting style towards Joe Madisha which is regretted.

2. *NON COMPLIANT OF LIMPOPO SABTACO BRANCH AT THE DOOR STEP OF THE PRESIDENT*

2.4 The Past President Mr Paul Kgole ran away from Gauteng SABTACO Branch to Limpopo SABTACO branch to reinforced Non-Compliant

Paul as Past President ran away from Gauteng branch after the usual persistent questions by Joe Madisha as to why SABTACO is not compliant in terms of administration and financial managements.

Paul is now teaming up with the President and Limpopo to reinforce the process of non-compliance.

3 THE PRESIDENT FAILURE TO FACILITATE RECRUITMENT OF THE CEO ABOUT TWO(2) YEARS AGO

3.2Attempt to Employ Mr Paul Kgole proposed by the CEO Limpopo at what was called SABTACO Council

In what was called Council meeting which per Constitution, the President could have not permitted Kedi to participate in the discussion, Kedi proposed that Paul be appointed CEO of SABTACO. The President

*promoted this illegal suggested until Joe Madisha warned and advised about the fact that the process is not only illegal, but fraudulent and should be abandoned. With disgrace the President and his Friends abandoned such a fraudulent*activity.

7 USING SABTACO TO GET OWN PERSONAL PROJECT WITH COLLEAGUES

7.1 Work marketed and acquired through and on SABTACO name with three other colleagues (one has passed away) and one such project was in Mpumalanga

7.2 The matter got discussed by Limpopo Branch and the four or so shared the spoils.

7.3 Joe was told that the matter was resolved, but Joe was not happy.

[6] In *the particulars of claim the appellant pleaded:*

" *4.*

On or about 20 September 2011 the defendant, in an email stated of and concerning the plaintiff that:

4.1 The plaintiff "rammed" an "ill-advised" process that was "hatched outside" SABTACO through the National Executive Committee .....which process constituted a "financial bankrupt move"

4.2 The plaintiff used SABTACO for self gain;

4.3 The plaintiff is guilty of unprofessional conduct and misappropriation of SABTACO funds.

6.

The statements by the defendant detailed in par 4 above were wrongful and defamatory of the plaintiff;

7.

The aforesaid statements were made by the defendant with the intention to defame the plaintiff and to injure his reputation.

8.

The aforesaid statements were understood by the addressees and were intended by the defendant to mean that the plaintiff is dishonest and incompetent and does not act in the best interests of SABTACO in the following respects:

8.1 *The plaintiff abuses his position as National President....to force decisions on SABATACO which decisions form part of a clandestinely plotted, undisclosed agenda and which would ruin SABTACO financially;*

8.2 *The plaintiff abuses his position within SABTACO for personal financial gain;*

8.3 *The plaintiff unlawfully misappropriates funds of SABTACO;*

8.4 *The plaintiff's conduct in managing the affairs of SABTACO is unprofessional;*

9.

The content of the email referred to in par 4 above...as a whole and more specifically para (a) (vii) and (viii) thereof are false and defamatory of the plaintiff in that itimputes, was intended by the defendant to impute, and was understood by the persons to whom it was distributed to impute, that the plaintiff:

9.1 was guilty of maladministration of SABTACO's finances;

9.2 was guilty of corruption;

9.3 dealt recklessly with SABTACO's funds; and

9.4 embezzled SABTACO's money;

10.

On or about 30 September 2011, in a document tabled at a meeting of the National Executive Committee of SABTACO, the defendant stated to the members of the National Executive Committee of SABTACO of and concerning the plaintiff that:

10.1 The plaintiff adopts a destructive attitude towards SABTACO;

10.2 The plaintiff, in his capacity as Chairperson of the Finance Committee of SABTACO, on two occasions misused the Finance Committee meeting;

10.3 The plaintiff, in collusion with Mr Paul Kgole, is involved in a "process of non-compliance" with the norms of administration and financial

management;

10.4 The plaintiff frustrated and manipulated the process of appointing a Chief Executive Officer for SABTACO;

10.5 The plaintiff promoted an illegal and fraudulent process;

10.6 The plaintiff "and his friends abandoned such fraudulent activity" (referring to the process mentioned in par 10.5 above) disgracefully after being warned and advised "that the process is not only illegal, but is fraudulent and should be abandoned"

10.7 The plaintiff, in collusion with other colleagues, acquired work through SABTACO and the plaintiff and his aforesaid colleagues shared the "spoils" thereof.

A copy of the aforesaid document is attached as annexure "B".

13.

The statements referred to in par 10 above were understood by the addressees andwere intended by the defendant to mean that the plaintiff is dishonest, acted improperly in his capacity as National President...and breached his fiduciary duty to SABTACO in the following respects:

13.1 The plaintiff intends to destroy SABTACO;

13.2 The plaintiff abuses his position as National President ....and as Chairperson of the Finance Committee;

13.3 The plaintiff, in his capacity as National President.....does not comply

with the prescribed, alternatively acceptable, norms of administration and financial management

13.4 The plaintiff acted improperly and unprofessionally by unduly manipulating and frustrating the process of appointing a Chief Executive Officer

13.5 The plaintiff was involved in an illegal and fraudulent scheme which had to be abandoned after the scheme was exposed;

13.6 The plaintiff acted improperly by securing contracts.....for his own personal benefit and gain;"

[7] The first respondent denied the allegations and contended that the statements contained in Annexures A and B "were true and in the public interest or benefit"

ISSUES ON APPEAL

[8] The following are the issues on appeal as dealt with by Mr Griessel and I shall deal with them as addressed in the judgement of the court *a quo:*

7.1 Whether statements the appellant relied upon were defamatory *per se*, or whether the appellant relied on *innuendo;*

7.2 Whether the statements in annexures A and B to the particulars of claim are defamatory *per se,* more particularly the statements in:
Annexure A: paras (a)(v); (a)(vii); (a)(viii); (a)(ix); (c)(vii);
Annexure B: paras 1.1; 2.4; 3.2 and 7.1 to 7.3

7.3 Whether the aforesaid statements were true and in the public interest.

THE LAW

[9] The common law elements of defamation are:

(a) The wrongful, and

(b) Intentional

(c) Publication of

(d) A defamatory statement

(e) Concerning the plaintiff

[10] It is trite that the court utilises the objective test in order to establish whether a statement so published is defamatory *per se*. The court relies on the meaning of the words so published as accorded to the statement by the reasonable reader. Where the plaintiff relies solely on the contention that the statement is defamatory *per se,* then the objective test has to satisfy a two stage enquiry. The first, is to establish the ordinary meaning of the statements and secondly whether they are defamatory *per se*. In establishing the ordinary meaning the court is not interested in the meaning the writer wished to convey to the readers or the meaning given by the individuals to whom it was published. The test is purely an objective one and evidence on the meaning of the words is inadmissible. The defendant who wishes to escape liability must raise a defence which excludes wrongfulness or intent. *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA274(CC) para 85, 89 and 90.

[11] Consequently what followsis the presumption that such statements were published with *animus iniuriandi*; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at 414 A-B. The first respondent in his plea denied liability and raised defences

that the statements were true and in the public interest or benefit.

[12] The reasonable reader is the standard utilised by our courts to establish the meaning of words published. The Court *a quo* having examined the content of the statements mentioned in paragraph 5 above concluded that the objective tests had been satisfied , in that the *"statements and words complained of are defamatory per se and are capable of conveying to the reasonable reader a meaning which defames the plaintiff in the ordinary sense".*

DEFAMATORY STATEMENTS *PER SE* OR INNUENDO STATEMENTS

[13] Mr Griessel for the appellant submitted that a cause of action which is based on words which are defamatory per se, does not cease to exist or disappear where 'the allegation in the particulars of claim meant something more'. Mr Mpofu on the other hand submitted that the question to be answered was whether the appellant had pleaded the words uttered which were defamatory p*er se* or whether he had pleaded i*nnuendo*. He argued that the appellant had not pleaded the objective meaning of the words relied upon as being defamatory *per se,* but that what was pleaded was "the subjective interpretation of the of the actual recipients' of annexures A and B, it being *innuendo*; this was ' the only basis upon which the court should determine whether the statements were defamatory or not.

[14] Mr Griessel relied on the finding of the court in *New Age Press Limited and Another v O'Keefe* 1947 (1) (SA) 311 (W) at page 317. In response to a request for further particulars for purposes of pleading a copy of the whole article so complained about was furnished to the defendant. The whole article was looked at

*"as if it formed part of the declaration"*and the court was also dealing with an exception where the defendant had excepted to the declaration as*(a)disclosing no cause of action in that then'it was not alleged that the words were defamatoryper se';(b) that the words in their ordinary sense were incapable of bearing a defamatory meaning;(c) in that the words were incapable of bearing the meaning assigned to them in the innuendo contained in para 9".*

[15] The above subject is dealt with in paragraphs 11 to 24 of the judgement where the trite principles of pleadings were detailed. My understanding of the judgement in New Age Press *supra* was that it was decided during the era where further particulars for pleading were permissible and where such particulars when given formed part of pleadings. In that matter they formed part of the declaration. Hence, it was from such declaration which contained *innuendo,* supplemented with the particulars so provided that the court determined that a cause of action had been disclosed.

[16] The court *a quo* endorsed the principle in New Age Press *supra*as confirmed In *Rogaly v General Imports (Pty) Limited* 1948 (1) SA 1216(C) at page1218. At paragraph 16 the court *a quo* had the following to say:

> *"If the words complained of are capable of having a defamatory meaning in their ordinary sense, a cause of action is disclosed even when the pleader in paraphrasing the words, adds something in excess of their ordinary meaning."*

[17] Concerning the pleadings the court *a quo* found that the appellant had introduced elements of *innuendo* in paragraphs 8, 9 and 13, (mentioned in paragraph 6 above), without having pleaded in the alternative such words as setting

out the ordinary defamatory meaning as attributed to them.

[18] In Le Roux *supra* Brand AJ stated at paragraph [87]:

> *"Statements may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as an innuendo, derived from special circumstances which can be attributed to the statement only by someone having knowledge of the special circumstances. A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with implied meaning of the statement which is regarded as part of its primary or ordinary meaning"*

at paragraph [88]

> *"To add to the confusion that sometimes arises from all this, plaintiffs often wish to point out the sting of a statement which is alleged to be defamatory per se. The particular defamatory meaning contended for is then emphasised by a paraphrase of the statement which is referred to as a "quasi innuendo". "Quasi" because it is not a proper innuendo or secondary meaning. Background circumstances need not be pleaded. The disadvantage of relying on a quasi-innuendo as opposed to the contention that the publication is defamatory per se, is that the plaintiff is bound by the selection of meanings pleaded. In this regard reference was made with approval in Demmers v Wylie and Others (1980(1) SA 835 (A) at 845 E-G in HRH King Zwelithini of*

Kwa Zulu v Mervis and Another (1978 (2) SA 521 (W)

at 524G)

"Once a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear per se, unless he has pleaded the selected meaning as an alternative to a general allegation that the words are defamatory per se"(my underlining)

[19] In paragraph 21.1 of his heads of argument Mr Driessel does concede that the meaning of the statements as contained in paragraphs 8, 9 and 13 of the particulars of claim were merely a paraphrase of the statements, however he argued that the court *a quo* had erred in finding that innuendo had been pleaded and in not finding that the appellant had in the content of paragraphs 6, "*The statements by the defendant detailed in paragraph 4 above were wrongful and defamatory of the plaintiff*" and 11 " "*The statements by the defendant in para 10 above were wrongful and defamatory of the plaintiff*", pleaded that the statements were defamatory *per se*. Mr Mpofu argued that "not even the most strenuous reading of these paragraphs can avoid the conclusion that reference was to the addressees. The court *a quo* stated in paragraph 23:

".....The fact that in a defamatory statement per se, the test is objective, that is, whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames the plaintiff, cannot be a justification to plead innuendo, unless the latter is intended to be relied upon.

It is inadmissible to call witnesses to prove the test. Therefore, it should not be pleaded where the cause of action is based on defamatory statement per se."

[20] Mr Griessel's argument cannot be sustained because paragraphs 8, 9 and 13 cannot be disregarded, or read in isolation, neither can paragraphs 6 and 11 stand alone in view of what is said in 8, 9 and 13. The first respondent was entitled to be told in the particulars off claim what constituted the defamatory statements per se, hence the finding that these had not been pleaded in the alternative in the paragraphs identified as those where only *innuendo* was pleaded.

[21] In distinguishing between implied meaning and *innuendo*, the implied meaning refers to the primary / ordinary *per se* meaning and not an *innuendo*. The implied meaning must in my view be subjected to the same objective test, that of the reasonable reader. *Innuendo* on the other hand refers to a secondary meaning which gives an explanation to the words complained about and is tested subjectively. As I see it only i*nnuendo* is pleaded in that it is the subjective element that comes to the fore, the meaning which the appellant states in the particulars of claim that the defendant intended to convey and the meaning of those statements as was understood by the addressees or as was meant to be understood by them:

paragraphs 8:" *The aforesaid statements were understood by the addressees and were intended by the defendant to mean.....;"*

paragraph 9 "*The content of the email referred to in para 4 above (annexure A hereto) as a whole and more specifically para (a)(vii) and (viii) are false and defamatory in that it impute, was intended by the defendant to impute and was understood by the persons to impute....."*

"Paragraph13 of the particulars of claim refers to how the 'addressees' understood the meaning of the content in paragraph 10 of the particulars of claim and what was intended by the respondent.

[22] I am in agreement with the court *a quo* that the first respondent should have alleged and pleaded the facts he relied upon as being defamatory *per se* in the alternative or probably excepted to the pleadings. *Le Roux supra* which cited with approval the decision in *Demmers,* states that where the plaintiff has pleaded an innuendo to point to the sting of the statements that are *prima facie* defamatory, the plaintiff cannot revert to the primary meaning if he fails to prove the innuendo unless it is pleaded in the alternative. In my view the finding that the appellant had pleaded innuendo cannot be faulted.

WERE THE STATEMENTS IN ANNEXURES A AND B DEFAMATORY PER SE: UNLAWFULNESS AND INTENTION (ANIMUS INIURIANDI)

[23] Mr Griessel submitted that the respondent's plea was a bare denial, that he had failed to prove the facts to show that he had no animus *iniuriandi*. Further that no defence was raised in the pleadings, or in his version that was put to the appellant during cross-examination. I am not certain what the version of the first respondent was supposed to be because he did not deny being the author of the statement, so that was his version and the questions put in cross examination sought answers to the allegations in the statement which the first respondent maintained were true and in the public interest.

[24] In pleading to paragraphs 6, 7, 8, and 9 (Annexure A) and 11,12 13 and 14 (Annexure B) the first respondent denies the allegations in the particulars of claim. He does not end there, he admits to publishing, however he raised a defence to avoid liability where he states in his plea that '*in amplification of the denial the defendant avers that the statements contained in annexure A and B to the particulars of claim were true and in the public interest*".

[25] The court *a quo* had already pronounced that in its view the statements were *prima facie* defamatory. It is for the court in my view to determine the meaning of the words complained about, by having regard to the evidence as a whole. The appellant in his plea had extracted from the statement certain words and in some selected particular paragraphs to which the alleged defamatory meaning was attributed. In dealing with annexure A the court *a quo* took into consideration the entire document under headings described as (a) to (c). The entire document related to one Mr Kedi Mabotja and his 'appointment as CEO of SABTACO National' and the court stated that the statement had to be read in context.

[26] In his evidence in chief the appellant testified that he had knowledge of the intention to appoint Mr Mabotja, and that at the time, despite the first respondent's objection, the finances of SABTACO were healthy, however he had never insisted on the appointment and Mr Mabotja was not appointed in such position because there was an agreement to await the first respondent's input on the matter and not because the proposition was abandoned. During cross examination he denied the calculations which were given to show that it was not viable to appoint Mr Mabotja. According to him when the executive committee of which he was a member had taken a decision, such decision could not be overruled by any one holding a position in NESCO. He was taken through the statements complained about in Annexures A

and B, he testified that he did not know what they meant.' He denied being involved in unprofessional conduct, and he had never dictated what resolutions should be taken by the executive committee. He testified that he was not privy to any activities that were of a corrupt nature. In essence he denied all the allegations made against him in the statements.

Annexure A

[27] (a)(v) (a)(vii) (a)(viii)(a)(ix): the court *a quo* in dealing with the meaning of the extracted words in paragraph 4.1 of the particulars of claim found that the words so extracted were not prima facie defamatory. In as far as the meaning attributed to the words in counsels heads of argument in paragraph 42 of the judgment is concerned, the court *a quo* stated that the statement as a whole had to be read in context.

The evidence shows that there had been discussions between the appellant and the first respondent regarding the affordability to pay Mr Mabotja. The attitude of the appellant was that once a decision had been made by the executive it could not be overruled. In cross examination the appellant denied the ailing financial situation despite the figures pointed out in paragraph (vi) of the statement. The court *a quo* accepted the explanation by the first respondent that he had to use strong language in order to convey the message properly of the ailing financial difficulties of SABTACO at the time. The discontent by the first respondent was that despite warnings by him, the appellant had decided to use monies allocated for the provinces. The court *a quo* found that the appellant failed to deal with the truthfulness of the statement.

In as far as statement (a)(ix) was concerned the court understood the term

"embezzlement" and, having regard to the evidence of the first respondent, to mean there being no budget for Mr Mabotja and that the use of funds earmarked for the Provinces amounted 'to what the defendant referred to as embezzlement'

[28] (c)(i) The court *a quo* found that the appellant did not deny that he was at the 'forefront in ensuring Mr Mabotja' is appointed as national CEO of SABTACO. I find no fault in the conclusion that there was nothing wrong in the first respondent communicating what he believed to be maladministration on the part of the appellant, especially where the appellant was informed that there was a lack of funds to support the appointment.

(c)(v) This related to the alleged fraudulent conduct of the late Mr Morodu. A company had been registered to benefit SABTACO and the appellant was appointed as one of the directors. The appellant in his testimony alleged that a fraudulent bank account was opened using his forged signature. The issue was around how the appellant justified personally receiving a benefit out of this fraudulent transaction and his alleged uncooperative attitude which the first respondent wished to investigate. The benefit he concluded amounted to 'self-gain'. The appellant did not deem it necessary to disclose the negotiations and acceptance of payment out of these funds to SABTACO until raised by the respondent.

Mr Griessel argued that the first respondent adduces no factual evidence from which the court *a quo* could determine whether the statements were true or not. It is in the consideration of the evidence of both witness, their cross examination, that the court made factual findings and one of them was that the truthfulness of the statements in annexure A had not been refuted, and I do not find fault with such conclusion.

Annexure B

[29] The appellant testified that the meeting of 30 September 2011 was convened by him in order to address the concerns raised by the first respondent in annexure A. He however left it to the first respondent to come up with the agenda which was distributed at the meeting in the form of annexure B. In my view it is not as if the first respondent on his own decided to make the statement. A meeting was convened by the appellant and the only reasonable conclusion is that he was given permission to draft the agenda as author of annexure A. So, what transpired on this date was a sequel to the allegations in annexure A at the instance of the appellant and other allegations were added. In as far as paragraph 3.2 was concerned the conduct of the appellant, Mr Mabotja and Mr Paul Kgole who were all members of SABTACO in that province was considered and it related to the 'illegal' participation in a Council meeting of him Mr Mabotja in a process of appointing him to the position of CEO National and to seek to use 'funds meant for the provinces" to pay his salary.

Paragraphs 7.1 to 7.3 were dealt with under (c)(v) above. This related to the fraudulent activities of the late Mr Morodu, where an amount of R1 500 000.00 was deposited into the bank account of SABTACO Limpopo and how the appellant had personally benefited in the amount of R49 000.00, despite SABTACO having distanced itself from the transaction.

Animus Iniuriandi

[30] It is trite that where statements are defamatory *per se*, there is animus *iniuriandi* which may be rebutted by defences raised by a defendant. The

respondent therefore bore the onus to prove absence of *animus inuriandi.* The court *a quo* found that the statements were made by the respondent in his official capacity as treasurer and having first interacted with the appellant and that the appellant had not been forthcoming in giving information. It was from the evidence as a whole that the court *a quo* found that he had succeeded in rebutting the intention to defame.

[31] In my view it was reasonably justified for the first respondent as treasurer to interrogate the conduct of members and this included the appellant. The members of SABTACO had a right to know especially where the appellant failed to give his cooperation when the issues complained about were raised with him personally. The first respondent testified that Annexures A and B referred to the appellant in his official capacity. When the respondent took over the position as national treasurer the books of SABTACO were in disarray and that there was a general non-compliance with good financial practices within the organization. He had to go to great lengths to ensure that accounting procedures were in place and that the books were audited.

[32] He had to deal with the preparation of the filing of outstanding reporting to the South African Revenue Services (SARS) . Furthermore, SABTACO as a voluntary association and member of the Engineering Council had to be fully compliant with SARS. As a result he resolved to heed warnings given to him personally by SARS and the engineering council about SABTACO's non compliance. He also sat on the project adjudicating committee at the Department of Trade and Industry and that his appointment was subject to him coming from an organization which was SARS compliant. I therefore have no reason, given this background to find fault with the finding that there was justification to use of strong words in the statements and that the first respondent had discharged his onus.

CASE AGAINST THE THIRD PARTY (SECOND RESPONDENT)

[33] The SABTACO Constitution indemnifies any one of its members 'from any civil liability in the due performance of their duties as members of the organization.' The court *a quo* found that the first respondent 'would ordinarily have been entitled to be indemnified by the second respondent in light of the circumstances of the case, its judgment a*nd* the order it was about to give, being that of dismissing the action with costs. Not only did the court *a quo* find that the issues raised by the first respondent were within the scope of his duties as treasurer, Annexure A which contains emails of the 19 and 20 September 2011 pertained to issues that had been raised with Council and Exco before Annexure A and B were published. Annexure B was an agenda penned by the first respondent after the appellant had convened a meeting to discuss Annexure A.

[34] It is common cause that the appellant did not take up the issue on appeal and Mr Mpofu argued that the finding by the court *a quo* had not been challenged by the second respondent in a cross appeal, being that the first respondent would be entitled to be indemnified by SABTACO and that such finding still stood. I agree with this submission.

[34] In the result the following order is given:

1. The appeal is dismissed with costs.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

PRINSLOO ~~W C R~~ W R C

(JUDGE OF THE HIGH COURT)

I agree,

VILAKAZI T

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**14 OCTOBER 2015**
JUDGMENT RESERVED ON	:	**14 OCTOBER 2015**
ATTORNEYS FOR THE APPELLANT	:	**CORRILE NEL ATT.**
ATTORNEYS FOR THE RESPONDENTS MAKUME	:	**MALULEKE SERITI** **MATLALA INC.**