



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

|         |                                     |
|---------|-------------------------------------|
| (1)     | REPORTABLE: YES/NO                  |
| (2)     | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)     | REVISED.                            |
| 17/5/17 |                                     |
| DATE    | SIGNATURE                           |

Case No: 55369/2016

In the matter between:

**M VAN WYK**

Plaintiff

and

**M PRETORIUS**

Defendant

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**JUDGMENT**

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**D S FOURIE, J:**

[1] The plaintiff instituted action against the defendant for payment of damage in the amount of R1,5 million pursuant to an alleged defamation. The alleged defamation stems from an email sent by the defendant on 18 November 2015 to certain selected recipients. The defendant has pleaded qualified privilege as a defence and in the alternative, should the defence of qualified privilege be dismissed, it is pleaded that the alleged defamation is the truth, constitutes fair comment, and was of public interest.

## **BACKGROUND**

[2] During November 2015 the Silverlakes Homeowners Association ("HOA") was involved in an election process for the appointment of a new chairman and a director for the environmental portfolio. Dr Stephen Pretorius and Mr Manie Swart competed for the chairman position whilst Ms Cornelia Matthews and Ms Marna Pretorius (the defendant) competed for the environmental portfolio.

[3] Dr Pretorius and Ms Matthews were the incumbent directors who stood for re-election, and Mr Swart and the defendant were the new candidates challenging their positions. New directors for the abovementioned positions would be elected at the HOA's Annual General Meeting (AGM) to be held on 16 November 2015. Ms Van Wyk (the plaintiff) was the chairperson of the Independent Electoral Commission (IEC), together with three other members, namely Mr Derek Wiegand, Ms Laurie Clifton and Mr Donald Gilroy.

[4] Before the commencement of the trial the parties agreed on certain common cause facts. The facts, relevant to the issues, are the following:

- (a) The IEC was tasked, *inter alia*, with overseeing the election process in order to ensure that the election of directors of the HOA was free and fair;
- (b) The contents and authenticity of an email dated 18 November 2015 which contains the alleged defamatory statements;

- (c) The publication of the said email by the defendant to the recipients thereof;
- (d) The recipients of the said email were all involved, *alternatively* had a vested interest in the election process, *alternatively* were directors of the HOA, *alternatively* the corporate governance committee of the HOA at the time of delivery of the said email.

[5] The parties also agreed on a formulation of the issues. They are the following:

- (a) Whether the email was unlawfully published by the defendant;
- (b) The stings alleged by the plaintiff;
- (c) The defences raised by the defendant, i.e. qualified privilege and truth and fair comment; and
- (d) The quantum of the plaintiff's claim.

[6] The impugned email reads as follows:

*"Subject: Re Meetings*

*Good day all,*

*I would like to express my deep disappointment with the unprofessional behaviour of the current Chairman of the HOA and Ms M van Wyk the chosen IEC member.*

*I am standing as a candidate for the environmental portfolio and want to share my experience regarding the process followed by these individuals.*

*Ms Van Wyk made use of HOA facilities to communicate false allegations regarding canvassing by candidates.*

*Due to the fact that I did not solicit any proxies from any of the residents at Silverlakes I went to the HOA office to find out what the situation was and how it concerned me. I telephoned Ms Van Wyk, and was told by her that Mr Visser du Plessis and Mr Manie Swart had been canvassing in contravention of the estate rules and regulations, to secure votes for Mr Swart and for me. I said to Ms Van Wyk that if I were implicated in wrongdoing I would distance myself and retract my candidacy. I also said to her that I would contact Mr Du Plessis before I made any decision.*

*I contacted Mr Du Plessis regarding the matter as I left the HOA office. After explaining the situation and conversation I had with Ms Van Wyk, Mr Du Plessis assured me that it was 100% within the right of any resident to canvass privately and to obtain support, and it is only stipulated that a candidate is not allowed to canvass publicly. (Mr Du Plessis quoted the rule from the official Silverlakes documents.)*

*I realised that Ms Van Wyk had in fact been canvassing publicly by making use of the Silverlakes network, influencing residents to view the new candidates in a negative way. She made false and unsubstantiated allegations stipulated as facts and forwarded numerous emails and SMS's making use of HOA funds to canvass for the current sitting candidates.*

*I have been living in Silverlakes since 1996 and am aware that it is standing operating procedure for residents to hand*

*proxies in to secure their votes instead of attending the HOA AGM and CGM.*

*We already have communication problems in the estate and acquiring proxies from residents is a way to ensure involvement regarding estate matters. I do not think it is prudent for any one person to underestimate the choices residents make regarding free will.*

*When Dr Pretorius cancelled the meeting on Monday 16 November 2015 it was clear to me that Ms Van Wyk was biased and it seemed like she was conspiring with Dr Pretorius to sabotage the voting process. It is highly irregular to preside over a meeting in which the person leading the discussion is also a candidate?*

*I am willing to attend a meeting to discuss the situation."*

## **THE PLEADINGS**

[7] The plaintiff has pleaded that four statements in this email are defamatory of her. They are listed in the particulars of claim from paragraphs 4.1 to 4.4. The plaintiff, after closing her case, abandoned paragraphs 4.1 and 4.4. The remaining statements are the following:

- (a) *"4.2 Ms Van Wyk made use of HOA facilities to communicate false allegations regarding canvassing by candidates."*
- (b) *"4.3 I realised that Ms Van Wyk had in fact canvassing publicly by making use of the Silverlakes network, influencing residents to view the new candidates in a*

*negative way. She made false and unsubstantiated allegations stipulated as facts and forwarded numerous emails and SMS's making use of HOA funds to canvass for the current sitting candidates."*

[8] The plaintiff has also pleaded that the statements in paragraphs 4.2 and 4.3 of the particulars of claim convey certain meanings. The plaintiff relied on the following implied meanings:

- (a) Paragraph 4.2: The plaintiff abused her position as member of the Electoral Committee to make use of HOA facilities contrary to the rules of the HOA and in the process utilised the HOA facilities to communicate false allegations regarding other candidates for election as directors of the HOA;
- (b) Paragraph 4.3: She jeopardized the integrity of the election process by canvassing for the current directors of the HOA and in the process utilising funds and resources of the HOA contrary to the provisions of the rules. She had forsaken her duties as IEC member and was conspiring with the current chairman in order to unfairly influence the election and that she is dishonest.

[9] The defences pleaded by the defendant amount to the following:

- (a) The impugned statements were made at a privileged occasion and the defendant is therefore protected by a qualified

privilege. The content of this email was pertinent and/or germane to the specific issue pertaining to the election process. It was delivered in the discharge of a duty or exercise of a right of a person who had a duty or right to deliver it to the addressees. The addressees were all involved, *alternatively* had a vested interest in the election process, *alternatively* were directors of the HOA or the corporate governance committee at the time of the delivery of the email;

- (b) *In the alternative* to the above, the impugned statements are true, constitutes fair comment, were not statements of fact, were fair in the circumstances and the publication thereof was for the benefit of the public and was of public interest.

[10] No reply was filed to the defendant's plea. The parties agreed, pursuant to the contents of the email being *prima facie* defamatory, that the defendant has the duty to begin.

### **THE EVIDENCE**

[11] Two witnesses testified for the defendant, namely the defendant herself and Mr Wiegand. The plaintiff also testified without calling any witnesses.

## THE DEFENDANT (MS PRETORIUS)

[12] The defendant confirmed that the impugned email dated 18 November 2015 was sent by her because the plaintiff's conduct was unprofessional. She intended to lodge a complaint openly and for that purpose she needed a forum to lodge the complaint. According to her the practice was to obtain proxies as the meetings in the past had always been long and drawn out. Voting is conducted in two ways, by proxy where you may instruct another person to vote for you or by attending the meeting personally and then vote by the show of hands.

[13] She testified that in the week leading up to the AGM she received various SMS's and emails from the plaintiff, stating that the IEC had received complaints concerning door to door canvassing and that such behaviour must stop immediately. Pursuant thereto, she phoned the plaintiff to enquire about this problem. The plaintiff indicated to the defendant that, although her name was on certain of the proxies obtained by Manie Swart and Visser du Plessis, she was not yet implicated. According to her the plaintiff then stated that she could not understand why the defendant was standing for this portfolio as it is hard work and that Corlia Matthews has been doing it for a long time. The defendant understood the plaintiff's comment to convey a suggestion that she should step down as a candidate for this portfolio.

[14] The defendant then telephonically contacted Mr Visser du Plessis. He confirmed that private door to door canvassing for proxies was not prohibited by



the rules. She also read the rules and came to the conclusion that there was no such rule.

[15] On 16 November 2015 the defendant and all of the other members of the HOA received a newsletter. The subject was *"URGENT NOTIFICATION FROM THE INDEPENDENT ELECTORAL COMMITTEE"*. It was sent via the Silverlakes community network to all members. The defendant cited the following issues regarding this letter:

- (a) the email was sent by the plaintiff on behalf of the IEC utilising the HOA community network which is paid for by the members of the HOA;
- (b) the letter refers to the rules as provided for in the Memorandum of Incorporation ("MOI") and states that door to door and other mass canvassing for proxies are for obvious reasons strictly prohibited;
- (c) it urges those who may have unwittingly given proxies in contravention of the rules to urgently revoke such proxies and rather attend meetings in person.

[16] The defendant pointed out that this letter was circulated on the same day the election was scheduled to take place. It came as a surprise to her and she was taken aback by the contents thereof. According to her the newsletter contains false information about rules regarding door to door canvassing for

proxies and that new candidates were cast in a bad light as it was suggested that they were involved in wrongdoing resulting in possible serious irregularities.

[17] During the evening of 16 November 2015 the defendant attended the AGM of the HOA. She thought the election would still take place. When she arrived at the meeting she noticed that the chairperson was Dr Pretorius, who also was a candidate. By agreement between the parties a transcript of a recording of the proceedings was provided to the Court. The defendant pointed out that in terms of the rules Dr Pretorius was not supposed to chair the meeting and that the plaintiff should have been aware thereof. According to the defendant Mr Du Plessis was interrupted by the plaintiff who shouted at him by saying "*Visser, sit seun*". She pointed out that according to the record of proceedings there is a seven second interruption and in the background a female voice can be heard in the recording.

[18] She further testified that it was obvious to her that the plaintiff and Dr Pretorius had a discussion beforehand as he knew how many proxies were collected by individuals. According to her the plaintiff was allowed to count the proxies, but not to divulge any information about the proxies. She was also unhappy about the fact that the plaintiff mentioned that three of the four candidates had complaints about the proxies and that she was not prepared to take advice from the Corporate Governance Committee to continue the meeting by allowing a voting with the show of hands. According to her any possible irregularities could have been investigated afterwards. It was clear to her that the plaintiff had sided with Dr Pretorius to postpone the meeting.

[19] She also testified that the homeowners who attended the meeting were flabbergasted after the meeting was postponed unilaterally by Dr Pretorius. The next day she distributed the impugned statement to communicate her feelings about Dr Pretorius and the plaintiff. She wanted to complain about the conduct of the electoral commission and she also explained the contents of the impugned letter. She believes that her allegations are fair and true.

[20] In cross-examination the contents of Rule 11.1.4 (campaigning by candidates) was debated with the defendant. The defendant indicated that one must differentiate between private and public campaigning. According to her only public campaigning is addressed by the rules and there is no rule prohibiting a person from going door to door and campaigning for proxies.

#### WIEGAND

[21] Mr Wiegand was a member of the IEC. According to him various IEC meetings were held in the weeks leading up to the AGM. During one such meeting the members of the IEC were informed by the plaintiff that certain campaigning procedures for proxies were irregular. He was thinking how the plaintiff would know about the alleged irregularities as proxies are supposed to be kept in a closed box.

[22] At one of the later meetings of the IEC the plaintiff informed the IEC members that one of the candidates, Mr Manie Swart had broken the rules and allegedly had a party where many members of the HOA were present. They discussed the issue but no decision was taken.

[23] During the afternoon of Sunday, 15 November 2015, the plaintiff called an emergency meeting of the IEC. When the witness arrived at the plaintiff's home he found Dr Pretorius as well as the deputy chairman, Mr Eugene Kruger to also be present. Dr Pretorius referred to approximately 200 proxies which were all irregular. The witness thought by himself "*how do all these people know about this?*" as Dr Pretorius and Mr Kruger were not members of the IEC. The plaintiff was then asked to write a letter to members of the estate to inform them that the meeting will be cancelled. Dr Pretorius also indicated that he was not going to attend the meeting "*with all these votes against me, so we have to cancel the meeting*".

[24] The witness then questioned the wisdom of such a letter and requested the plaintiff not to go forward by cancelling the meeting. He was concerned about wasted costs if the meeting was to be cancelled and then decided to leave the meeting. He later sent an email to the plaintiff indicating that if the board were to cancel the meeting, they must do so themselves in which event he will resign as member of the IEC. He was of the view that somebody was passing on information about proxies to the candidates.

[25] In cross-examination it was put to the witness that the HOA liaison officer had a book in which proxies were recorded by members delivering such proxies before the AGM. He confirmed that proxies were supposed to be kept in a sealed box but was unable to confirm or deny the existence of such a book.

## THE PLAINTIFF (MS VAN WYK)

[26] During 2015 she was the chairperson of the IEC. The purpose of this committee was to ensure compliance with the election rules so that a free and fair election can take place. On or about 9 November 2015 she received a complaint from a homeowner about door to door canvassing for proxies. According to her this was not allowed as the rules provide that campaigning is limited to emailing. This emailing is done by the HOA on behalf of all the candidates after their approval was obtained. The plaintiff sent an e-mail to all the candidates informing them about a complaint concerning door to door canvassing.

[27] The plaintiff then received a telephone call from the defendant. She wanted to know whether she was also implicated. The plaintiff replied that she had to remain impartial and that the defendant should contact Mr Swart if she wanted to know what was going on. The defendant indicated to the plaintiff that if she is implicated she will step down, to which the plaintiff replied that it was her choice. The plaintiff admitted having said to the defendant that she does not understand why people would stand for the HOA as this is hard work, but she denied having mentioned the name of Cornelia Matthews.

[28] The plaintiff referred to other complaints also received regarding the campaigning by candidates. During the weekend (Saturday) two of the other candidates asked the plaintiff to investigate irregularities in the process of gathering proxies. Dr Pretorius and Ms Matthews indicated that, according to the homeowners, hundreds of proxies were gathered irregularly. She referred to

people who advised her that some of the proxies were simply written down on paper but was not on the normal printed form.

[29] The plaintiff also referred to the meeting which was held on the Sunday evening. She requested Dr Pretorius and Mr Kruger to attend the meeting to provide advice. According to her there were problems with the proxies "*which could have hijacked the AGM*". Dr Pretorius had to give advice pursuant to his knowledge of the HOA and Mr Kruger was requested to provide legal advice. She also explained that so many proxies were affected that it could influence the approval or rejection of budgets or motions at the AGM. She confirmed that she had not seen any of these proxies. According to her Mr Kruger advised that they had an option to postpone the meeting and that would be the most logical choice. When asked whether Dr Pretorius had complained that he did not have any proxies, she replied that she cannot remember. She also referred to a book which had to be completed when proxies were delivered. They had to investigate the allegations of irregularities with regard to the proxies, but there was not enough time before the meeting to do so.

[30] The next morning (Monday) Mr Kruger contacted her and advised that the meeting could be postponed. He also explained to her what procedure to follow. If the meeting was to be postponed, she should address the meeting and make such a proposal. Later that morning she circulated a letter pursuant to the meeting which they had on Sunday evening. The letter refers to *prima facie* evidence of possible extremely serious irregularities in the manner and number in which proxies had been obtained. It also refers to door to door and other

mass canvassing for proxies which are *"for obvious reasons strictly prohibited"*. It was also requested in this letter that all members who might have unwittingly issued proxies in contravention of the rules to urgently revoke such proxies by informing the association thereof and rather attend the meetings themselves.

[31] When questioned about the fact that Dr Pretorius presided over the meeting whilst also being a candidate she replied that *"this has nothing to do with me"*. The mandate of the IEC was to ensure compliance with the campaign rules and to make certain the election is free and fair. She also elaborated upon her reputation as a businesswoman and the services rendered by her to banks and attorneys.

[32] In cross-examination it was put to the plaintiff that the impugned letter is a complaint directed to the addressees. She replied by pointing out it is *"an invalid complaint"*. Shortly thereafter she denied that it is a complaint at all and added that it was circulated maliciously. She also conceded, with reference to paragraph 5.9.5 of the memorandum of incorporation that the proxy form, as indicated, was only *"preferred"* as it was not a requirement for a proxy to be in a specific form. According to her the rule that no door to door canvassing was allowed is an old rule which they had applied for the last three years. With reference to the interpretation of Rule 11.1.4 (canvassing) she argued that the IEC had a right to impose new rules as they saw fit. When it was put to her that the postponement of the meeting was planned, she replied that she was advised that if the meeting was to be postponed, she must make a proposal to that effect.

It was also put to her that the majority of Mr Wiegand's allegations were not challenged in cross-examination, but she repeated her version that she could not

recall Dr Pretorius' statement that he was not going to attend the AGM as there were approximately 200 votes against him. She repeated that she wanted to investigate the matter regarding the proxies and therefore the meeting had to be postponed. She reiterated that she was independent.

### DISCUSSION

[33] Counsel for the defendant pertinently referred to the plaintiff's demeanour in the witness box. He argued that she was argumentative, made condescending remarks to defendant's counsel, became aggressive and sarcastic in certain instances and could not remember when it seemingly suited her. An assessment in this regard has to take into account the general context, the witness' memory and the ability to express him- or herself properly. One should therefore distinguish between *bona fide* errors and an intentional untruth. Although there may be merit in some of the criticism levelled against the plaintiff, I had the opportunity to observe the demeanour of all the witnesses and to listen carefully to their evidence. I did not get the impression that any of them intentionally tried to mislead the Court or knowingly told an untruth. I also got the impression that the manner in which the plaintiff testified is perhaps part of her personality and one should therefore be careful not to draw adverse inferences pertaining to the credibility of her evidence. The matter should therefore be decided on the evidence before me and the probabilities.

[34] Counsel for the plaintiff submitted that the only issue before Court is whether the statements pleaded in paragraph 4.2 and 4.3 of the particulars of claim are defamatory of the plaintiff, and whether any of the defences pleaded by



the defendant has been proven. My impression is that that counsel for the defendant was of a similar view.

### THE TWO STATEMENTS IN ISSUE

[35] Counsel for the plaintiff contended that the ordinary reader, who reads the impugned statements in context, would conclude that the plaintiff abused her position and the funds of the HOA to campaign for the incumbent candidates by way of SMS's and emails. These two impugned statements, according to him, also suggest that the plaintiff committed a dishonest act by conniving in a clandestine manner to influence members of the HOA to vote for certain people at the election.

[36] Counsel for the defendant argued that the impugned statements were made at a privileged occasion and therefore the defendant is protected by a qualified privilege. He also contended that the plaintiff's failure to properly cross-examine the defendant and Mr Wiegand should be taken into account when considering this defence. In this regard he pointed out that the plaintiff's version of what occurred at the meeting held on the night before the AGM, was never put to Mr Wiegand. Furthermore, so he argued, the plaintiff's reference to "*malice*" on the part of the defendant during cross-examination was never put to the defendant, nor pleaded in the particulars of claim or in replication.

[37] Both counsel were in agreement that the contents of the email in question, more particularly the two statements in issue, are *prima facie* defamatory. I agree with this view. In this instance a presumption of

wrongfulness then arises which places the onus on the defendant to rebut it (Neethling, Potgieter & Visser, Law of Delict, 7<sup>th</sup> Edition, p 357). This is a full onus of proof (and not merely an evidentiary burden) where a defence of qualified privilege can be sustained by nothing less than proof on a balance of probabilities (Neethling v Du Preez, 1994 (1) SA 708 (AD) at 770H-J). The same learned authors (*supra*, p 359) provide the following explanation of this defence (qualified privilege):

*"If it is proved that both parties had a corresponding duty or interest (i.e. that a privileged occasion existed), then the defendant must further prove that he acted within the scope or limits of the privilege. To do this, he must prove that the defamatory assertions were relevant to, or reasonable connected with the discharge of the duty or the furtherance of the interest. However, even when the defendant has proved this, he still only enjoys provisional, in contrast to complete, protection. The plaintiff may still show that the defendant in fact exceeded the limits of the privilege because he acted with an improper motive (malice)."*

[38] The essential elements of this defence are twofold: First, the defamatory statement must have been published in the discharge of a duty or the protection of a right or legitimate interest to someone who has a similar duty or interest to receive it. The duty or right to communicate or receive defamatory matter may be legal, moral or social. The test is an objective one (Law of South Africa, Defamation, Vol 14(2), 3<sup>rd</sup> Edition, par 127). Second, the defence requires prove by the defendant that the defamatory statement was relevant or germane and reasonably appropriate to the occasion. It is the occasion and not the statement that is privileged (Law of South Africa, *supra*, par 127 and the

authorities quoted therein). There are various examples in decided cases where situations were recognised by the Courts to afford a qualified privilege to a defendant. However, these cases are no more than examples which may be of some guidance to a Court. For instance, members of public bodies may have a social duty or right to make defamatory statements to other members at meetings of these bodies (*cf* Lotter v De Villiers 1946 TPD 569 (meeting of school board) and Naude v Whittle 1958 (1) SA 594 (A) where the Court *a quo* regarded, on the evidence before it, a farmers' association as a privileged occasion). Each matter must be decided on its own facts, taking into account the context and surrounding circumstances.

[39] Was this a privileged occasion when the impugned email with the two defamatory statements were published? It is common cause that during November 2015 the HOA was involved in an election process for the appointment of a new chairman and a director for the environmental portfolio. Dr Pretorius and Ms Matthews were the incumbent directors who stood for re-election and Mr Swart and the defendant were the new candidates challenging their positions. New directors for the abovementioned positions would be elected at the HOA's Annual General Meeting to be held on 16 November 2015. The plaintiff was the chairperson of the IEC. The IEC was tasked, *inter alia*, with overseeing the election process in order to ensure that the election of directors of the HOA was free and fair. The parties have agreed that *"the recipients of the said email were all involved, alternatively had a vested interest in the election process, alternatively were directors of the HOA, alternatively the corporate governance committee of the HOA at the time of delivery of the said email"*.

[40] The defendant testified that she, as one of the candidates, sent the impugned email because she was of the view that the plaintiff's conduct was unprofessional. She intended to lodge a complaint and for that purpose she needed a forum to lodge the complaint. When it was put to the plaintiff in cross-examination that the impugned letter is a complaint directed to the addressees, she replied by pointing out that it is "*an invalid complaint*". Shortly thereafter she denied that it is a complaint at all and added that it was circulated maliciously. In the email the defendant stated that she wanted "*to share my experience regarding the process followed*" by the plaintiff and Dr Pretorius. She also indicated, at the end thereof, that she was willing to attend a meeting to discuss the situation. It is not in dispute that the impugned email was not circulated to all members of the HOA or ordinary residents, but only to those individuals who had a vested interest in the election process, alternatively who were directors of the HOA, alternatively the corporate governance committee of the HOA. The impugned letter was addressed to these individuals two days after the election had been postponed.

[41] In short, during November 2015 the HOA was involved in an election process. It is common cause that the recipients of the impugned email all had a vested interest in the election process. The defendant was a candidate who participated in the election process. She therefore at least had a legitimate interest in the election process and the outcome thereof. The IEC was tasked with overseeing the election process in order to ensure that the election of directors of the HOA was free and fair. The plaintiff was the chairperson of the IEC. The defamatory statements relate to the conduct of the plaintiff during the election process. Taking into account the evidence, the surrounding

circumstances and these facts I have to conclude that the defendant was exercising a right or protecting a legitimate interest when the impugned email was published to the recipients thereof and that the recipients had a similar right or interest to receive it. The defamatory statements were therefore published at a privileged occasion.

[42] The next question is whether the defamatory statements were relevant and reasonably appropriate to the occasion? In R v Matthews 1960 (1) SA 752 (A) at 758A-B Schreiner JA pointed out that relevancy "*is based upon a blend of logic and experience lying outside the law*". Put differently, is there a nexus or link between the defamatory statement and the occasion, to such an extent that it can be regarded as reasonably appropriate? This should not be confused with the truthfulness or otherwise of the publication. The defence of qualified privilege is not concerned with the truthfulness of the publication. However, proof that the defendant did not believe that the facts stated were true, may give rise to the inference that she was actuated by malice or an improper motive (Borgin v De Villiers 1980 (3) SA 556 (A) at 578H).

[43] The two defamatory statements are set out in paragraph 7 above. They are essentially that the plaintiff made use of HOA facilities to communicate false allegations regarding canvassing by candidates and that she had made false and unsubstantiated allegations, stipulated as facts, to canvass for the current sitting candidates.

[44] It is not in dispute that two new directors would be elected at the HOA's Annual General Meeting to be held on 16 November 2015. Dr Pretorius

and Ms Matthews were the incumbent directors who stood for the election, and Mr Swart and the defendant were the new candidates challenging their positions. It is common cause that during the afternoon of 15 November 2015 the plaintiff called an emergency meeting of the IEC. Dr Pretorius, one of the candidates, attended this meeting although he was not a member of the IEC. The other candidates were not present. According to the undisputed evidence of Mr Wiegand, Dr Pretorius referred to approximately 200 proxies which were all irregular. He also indicated that he was not going to attend the general meeting *"with all these votes against me, so we have to cancel the meeting"*. No doubt, Mr Wiegand was concerned about this as Dr Pretorius was not a member of the IEC, yet he was invited to attend this meeting and he already had prior knowledge about votes by proxies which were against him. The obvious question is who informed him about this and why?

[45] The next day, 16 November 2015 (before the general meeting that evening) the plaintiff circulated a newsletter to the defendant and other members of the HOA. The subject was *"Urgent Notification from the Independent Electoral Committee"*. It is stated in this newsletter that the IEC has received *"prima facie evidence of possible extremely serious irregularities in the manner and number in which proxies for the various proposed resolutions have been obtained by certain candidate(s) for both CGM and AGM of later today"*. It has also been pointed out that door to door and other mass canvassing for proxies by any candidate or someone on his/her behalf *"are for obvious reasons strictly prohibited"*. Members who have *"unwittingly issued proxies"* in contravention of the rules were then called upon to *"revoke such proxies"* by informing the

association thereof and to attend the meeting themselves. Does this mean that a decision about the validity of these proxies had already been taken?

[46] During the evening of 16 November 2015 the HOA's Annual General Meeting took place. It is not in dispute that Dr Pretorius presided over the meeting as chairman whilst also being a candidate who stood for re-election as chairman. According to the transcript of this meeting Dr Pretorius requested the plaintiff to address the members. The defendant also attended this meeting. The plaintiff then indicated, *inter alia*, that "*voting on all proposed resolutions might have already been predetermined by these proxies*". She then, as chairperson of the IEC, advised the chairman, Dr Pretorius, that the meeting should be postponed until the IEC has been afforded the opportunity to fully investigate the numerous complaints regarding the validity of proxies. A debate then followed whereafter the chairman, Dr Pretorius, ruled that both meetings should be postponed until further notice.

[47] When questioned about the fact that Dr Pretorius presided over the meeting whilst also being a candidate, the plaintiff replied that "*this has nothing to do with me*". Chairman and candidate for the same position, already knowing the result of the proxy votes against him, all to the knowledge of the plaintiff, what inference would in all probability have been drawn by the residents, had they known about this? Does this question not have a bearing on the task of the IEC? These questions are not aimed at Dr Pretorius, but relate to the issues before me. It is not intended to be a finding against Dr Pretorius. He is not even a party to these proceedings. He had no opportunity to testify or to defend himself. It only concerns the question, with regard to the plaintiff and the

defendant, whether the defamatory statements about the plaintiff were relevant and reasonably appropriate to the occasion, without deciding whether or not they are true, and nothing more.

[48] Outstanding features of the two statements in dispute, as alleged by the defendant, are false allegations regarding canvassing by candidates, influencing residents to view the new candidates in a negative way and false and unsubstantiated allegations stipulated as facts to canvass for the current sitting candidates. Having regard to the objective facts referred to above, it appears to me that the impugned allegations all relate to the election process for the appointment of a new chairman and a director for the environmental portfolio. This process includes what transpired prior to and during the Annual General Meeting as well as the fact that it had been postponed until further notice. There is a direct link between these allegations and that process. They all concern the same subject-matter, i.e. the issue about proxies and the election that was supposed to take place. These allegations also relate to the alleged conduct of the plaintiff during this election process with regard to, *inter alia*, the contents of the notification that was circulated on the morning of 16 November 2015 and the perceived support for Dr Pretorius by the plaintiff. Having considered all the facts and circumstances, I conclude that the defamatory statements, whether true or not, are all relevant and reasonably appropriate to the occasion.

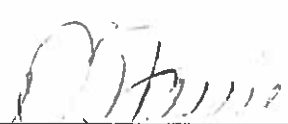
[49] Finally, I have to consider the plaintiff's evidence in cross-examination that the impugned email was circulated maliciously. Save for this allegation, there is no other evidence to indicate, for instance, that the defendant did not believe that the facts stated by her were not true or that these statements were



made recklessly, regardless of whether they are true or not. The defendant testified that she wanted to complain about the conduct of Dr Pretorius and the plaintiff and that she believes her allegations about them to be true. A plaintiff may rebut the defence of qualified privilege by alleging and proving malice, i.e. an indirect or improper motive (Naylor v Jansen 2006 (3) SA 546 (SCA) at 555 par 12). As was pointed out by counsel for the defendant the plaintiff's reference to "*malice*" on the part of the defendant during cross-examination was never put to the defendant, nor pleaded in the particulars of claim or in replication. This is an isolated allegation in cross-examination, which came as a surprise, and which appear to be without any substance. The defence of a qualified privilege is therefore upheld. In view of this finding it is not necessary to also consider the defence pleaded in the alternative.

**ORDER** In the result I grant the following order:

The plaintiff's claim is dismissed with costs.

  
**D S FOURIE**  
**JUDGE OF THE HIGH COURT**  
**PRETORIA** 19/5/17