IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: A462/2014

In the appeal between:

CLIVE MULLER	Applicant
and	
INDEPENDENT NEWSPAPERS (PTY) LTD	First Respondent (1st Def *a quo*)
ALLIED MEDIA DISTRIBUTORS (PTY) LTD	Second Defendant *a quo*
KARL BROPHY	Second Respondent (3rd Def *a quo*)

JUDGMENT: WEDNESDAY 4 MAY 2016

SCHIPPERS J:

[1] This is an appeal, with leave from the trial court, against its order in terms of which it dismissed with costs a claim by the appellant ("the plaintiff") for R1 000 000 for defamation. The plaintiff is a warrant officer in the South African Police Service (SAPS). At the time of the incident he was an inspector.

The claim arises from the publication on 19 January 2007 of an article in the "DAILY VOICE" newspaper ("the newspaper"), owned and published by the first respondent ("the defendant"). The second respondent is the former editor of the newspaper. The action against the third respondent was withdrawn pursuant to an exception that the plaintiff's particulars of claim were vague and embarrassing in relation to the third respondent.

[2] The article, written by Ms Lauren Kansley ("the reporter"), is printed across two pages of the newspaper under the caption, "EXCLUSIVE: ANGRY CAPE BAR OWNER CLAIMS SMOOR DRONK OFFICERS BARGED IN AND BULLIED STAFF". The main heading, which appears in the centre of the article in a much larger font than the caption, reads: "LAW AND DISORDER - Drunk cops crash Flats party plek". The article describes what happened when police officers called at an establishment known as the Chilli Bar ("the bar") in Southfield, Western Cape. It states that they were drunk and looking for a fight; and that the owners of the bar were ignored when they lodged a complaint about the officers' conduct at Dieprivier police station.

[3] The plaintiff's case is that the content of the article is untrue and defamatory. He alleges that it contains photographs clearly depicting his face; and that these photographs refer to him as the cop in uniform getting out of hand. The particulars of claim list 14 statements in the article which the plaintiff says concern him and are libellous. These include the following: that drunk cops came into the bar, bullied staff and the "*smoor dronk*" cops did not have a warrant; that "the two cops are in hot water for behaving like *dronkgat* party animals"; that "the cops were looking for a fight … looking for booze"; that "both policeman looked drunk … They must have had a nip of something in the van and came looking for more"; and that "the drunk cops eventually arrived back at the cop shop".

[4] The plaintiff says that when read in the context of the article as a whole and with reference to the photographs of him, the statements are *per se* defamatory. Alternatively, they were intended and understood by the readers of the article to mean that the plaintiff is dishonest and corrupt, inter alia, in the following respects: he was disorderly whilst in police uniform; he consumed alcohol and was intoxicated whilst on duty; he unlawfully used force on members of the public and has no regard for the law, although employed to uphold the law; he abused his authority; and he wanted to obtain alcohol unlawfully.

[5] The defendant sought to justify publication of the article on the grounds that the plaintiff was not identified in it nor the photographs which form part of it; the article was true and in the public interest; and the publication of the article was reasonable in the circumstances.

Background

[6] The events giving rise to this action took place at the bar on 17 January 2007 at about 2:30 am. The basic facts are largely common ground or not disputed.

[7] The plaintiff testified that he and Constable Njele ("Njele") were on patrol in a police vehicle in the Southfield area when he noticed a white Nissan Sentra parked illegally and which looked suspicious, near the bar. He stopped behind the Sentra and upon investigation discovered that its licence had expired. He asked the occupants of the Sentra who the driver was. They said he was in a dilapidated building known as the Southern Lodge. The plaintiff went to the Southern Lodge. Nobody was there. He returned to the Sentra and asked Njele to remain with its occupants. The plaintiff then went to the bar, which was still

open, to find out how long the Sentra had been parked outside and who had driven it.

[8] The plaintiff, in full uniform, entered the bar through a side door which was ajar. He had never been to the bar before. The manager, Mr Marlon Naicker ("Naicker"), saw the plaintiff and said "djy"! The plaintiff said that he was deeply offended by this and told Naicker that that was not the way to address a police officer. Naicker abruptly asked what he wanted and said that the plaintiff could not enter through the side door. The plaintiff replied that he was a police official and wanted to gather information. He said that Naicker came up to him in an aggressive manner, at which the plaintiff put his foot over the threshold. At that point Naicker was joined by others. They started pushing the plaintiff around, one of them fiercely. The plaintiff told the person who pushed him that he had assaulted a police officer and would be arrested. That person ran into the bar. Njele saw the commotion and went to the plaintiff who asked him to call for backup.

[9] Subsequently numerous other members of the SAPS, including officers in uniform, arrived on the scene and went into the bar. None of these police officers were drunk. The plaintiff testified that he did not enter the bar; he and Njele remained outside. The plaintiff said that he tried to speak to the owner of the bar, Mr Sonny Naidoo ("Naidoo"), who had arrived later, but he swore at the plaintiff and was totally hostile.

[10] The plaintiff also said that he did not drink during the course of his shift. Indeed, the plaintiff does not consume alcohol at all.

[11] After the incident at the bar, the owner of the Sentra arrived. The plaintiff gave him a stern warning and told him to go home and park the vehicle,

but did not allow him to transport its occupants in an unlicensed vehicle. The plaintiff and Njele took them to Ottery where they live. They returned to Dieprivier police station where Naidoo, his mother and Naicker were speaking to Warrant Officer Van Der Walt ("Van Der Walt"). They alleged that the plaintiff was drunk and that Van Der Walt should take him to a district surgeon for a blood sample. The plaintiff was willing to do this. Captain Eugenia Jacobs was then called at home to come to the police station. When she arrived Captain Jacobs inspected the plaintiff, and spoke to Naidoo, his mother and Naicker. She also spoke to the district surgeon, Dr Theron, who apparently refused to come to the police station because it is not procedure for blood to be drawn from an officer on duty, unless he is involved in drunken driving. The plaintiff said that he waited at the police station because Naidoo was going to get his own doctor to take a blood sample, to which the plaintiff had agreed. That however did not happen. After waiting for 1½ hours the plaintiff left, after completing a shift of 13½ hours. Naidoo also lodged a complaint of intimidation against the plaintiff.

[12] The next day, i.e. 20 January 2007, one of the plaintiff's colleagues (whom he could not remember) told him that photographs of him were in the newspaper. He bought the newspaper and said that when he saw the photographs he was both sad and livid. He consulted his ex-branch commander, Captain Le Roux ("Le Roux"), a friend and confidant. The plaintiff said he cried as he showed Le Roux the photographs.

[13] Van Der Walt a police officer of some 22 years' standing, and the shift commander on 17 January 2007, testified that Victoria Road, where the club is located, is a hotspot - there is a high occurrence of crime in that vicinity.

[14] Van Der Walt confirmed the plaintiff's version as to what happened at the police station when Naidoo, his mother and Naicker made a complaint. They alleged that the police officers were drunk and wanted them to be breathalysed. Van Der Walt testified that he does not drink at all and would notice if somebody around him did. He said that the plaintiff does not consume alcohol and that he had never detected alcohol on him. He was adamant that there were no grounds to open a case of drunken driving against the plaintiff. He confirmed that he had contacted the district surgeon who informed him that blood was drawn only in drunken driving cases. He also contacted Legal Services of the SAPS and was informed that police officers could not be forced to have their blood drawn. He confirmed that Captain Jacobs spoke to the plaintiff, Naidoo and Njele, in close proximity to them; and that the plaintiff left his shift at 6:05 am. Van Der Walt said that he took down Naidoo's statement regarding the intimidation complaint. Although he did not believe that the case would go anywhere, he accepted the complaint because he was of the view that the police had nothing to hide. The intimidation charge was subsequently withdrawn.

[15] Van Der Walt testified that on 17 January 2007 at 2 am and again at 3 am, he and the plaintiff had inspected the cells; that the plaintiff had not been drinking; and that the occurrence book shows that at 4 am the plaintiff and Njele had inspected the cells. He said that Njele's condition was the same as when he had passed Njele to go out on inspection - he did not detect any liquor. He said that he may not have seen Njele's boots untied, but would not have looked at his boots again after the first inspection. Van Der Walt said that if Njele's shirt was unbuttoned or his belt unbuckled, he would definitely have picked that up.

[16] Van Der Walt said that he read the article when it was published. It stunned and shocked him. The reference to the plaintiff being drunk and

disorderly was hard to swallow and totally out of character: that is not the person he knows, given the plaintiff's involvement with victims of domestic violence, and his training of students and personnel. On this score his evidence was neither challenged nor contradicted.

[17] The plaintiff's wife testified that they were married for 22 years and that they have three children, two adult sons and a daughter who at the time, was 10 years old and in grade 4. She said that the plaintiff is a devoted police officer whose first priority is his work. She confirmed that the plaintiff does not drink and that there is no alcohol in their home. She said that what was stated in the article was not true because her husband does not drink. She described her reaction to the article as follows:

> "My reaksie was ek was baie kwaad en hartseer omdat iemand so iets van my man kan skryf in die koerant en hulle ken hom nie eers nie."

The trial court's findings

[18] The trial court held that the following issues had to be decided. First, whether the article was defamatory of, or concerned the plaintiff. Second, if so, whether the article was true or substantially true and for the public benefit. And third, in the event of the article not being true and for the public benefit, whether its publication was reasonable in the circumstances.

[19] The trial court decided only the first issue against the plaintiff. Its findings may be summarised as follows. The article contained two strips of five photographs each under the caption, "SMOOR DRONK OFFICERS BARGED IN AND BULLIED STAFF". Although the plaintiff's face appears in four of the photographs, they are deeply faded and the plaintiff cannot be identified "without scrutiny". The article refers to "policemen" and not a single police

officer. The police officer is not identified by name, race, rank or police station. Further, the plaintiff is not identified in the article. The court found that only a member of the public with "particular and special knowledge" that the plaintiff was one of the two officers initially present at the bar, would have been able to identify him. It held that no member of the public could reasonably associate any of the remarks made about any individual police officer in the article with the plaintiff. The plaintiff failed to provide a witness who, independently and without being pre-cognized by the plaintiff, had seen the article and was able to identify him from the photographs and associate the plaintiff with the conduct complained of in the article.

[20] The court concluded that the only inference that could be drawn was that the reasonable reader would regard the article as condemnation of the conduct of several police officers during the incident in question. The reader would not draw the inference that the individual complained of in the article is the plaintiff. The court held that the plaintiff failed to show that he had been defamed in the article. The court considered it unnecessary to deal with the other defences raised.

[21] Defamation is the unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff.[1]

[22] The first question then is whether the trial court was correct in holding that the article was not of and concerning the plaintiff. Put differently, was there publication of a defamatory statement about the plaintiff?

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1 WA Joubert *et al* (eds) The Law of South Africa (2nd ed 2005) Vol 7 p 230 para 234.

Publication

[23] Defamation is aimed at the protection of a person's reputation i.e. the public estimation of the worth or value of a person as opposed to the individual's personal sense of self-worth or self-esteem. Therefore an essential element of the delict is that the defamatory statement must be published to some person or persons other than the one defamed. The editor and publisher of a newspaper circulated generally may be liable for defamatory statements appearing in it. In *Bogoshi* the principle that the media are strictly liable was overruled.[2] The SCA however held that media defendants will be held liable unless they were not negligent in the circumstances of the case.[3] Once publication is established, the plaintiff must prove that the publication can be attributed to the defendant. Publication will be attributed to the defendant if it knew and or could reasonably have expected that an outsider would take cognisance of the defamation.[4]

[24] There is no question that the defendant published the article. It is common ground that the newspaper is widely distributed in South Africa, more specifically in the Western Cape; and broadly read by the general public, including the plaintiff's employers and fellow employees. The evidence also shows that the newspaper is read by the plaintiff's friends and family.

[25] The next question is whether the article is defamatory.

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2 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1214F-I.
3 *Ibid*.
4 See LAWSA *op cit* n 1 p 233 para 236 and the authorities there collected.

Is the article defamatory?

[26] The question whether a statement in its ordinary meaning or *per se* is defamatory, involves a two-stage inquiry. The first is to establish the natural or ordinary meaning of the statement; and the second, whether that meaning is defamatory.[5]

[27] The plaintiff contends that statements in the article, including those made with reference to the photographs, are defamatory of him, as set out above.

[28] In my view, the article when read as a whole, is *per se* defamatory. A reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the police officers referred to in the article. The article portrays police officers as being drunk, disorderly and dishonest whilst on duty, with no regard for the law or the rights of citizens. It assails the moral character of law enforcement officers. The defamatory statements in the article would generally lower the police officers in the estimation of right-thinking members of society.

[29] The next issue is whether the words complained of and the photographs in the article apply to the plaintiff.

Does the article refer to the plaintiff?

[30] In every case a plaintiff must allege that the words complained of (and in this case that the photographs showing a uniformed cop getting out of hand) apply to him personally.[6]

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5 See LAWSA *op cit* n 4 p 235 para 237.
6 *Goodall v Hoogendoorn Ltd* 1929 AD 11 at 15, per Innes CJ.

[31] The test whether a statement refers to the plaintiff is objective: would the ordinary reasonable man to whom the statement was published be likely to understand the statement in its context to refer to the plaintiff?[7]

[32] The reference to the plaintiff either by name or distinguished by specific individual indications must be clearly established, and where the plaintiff is not referred to by name the averment in the declaration must sufficiently set out the basis upon which it is claimed that he is referred to in the alleged defamatory statement.[8] However the matter of proof cannot be excluded merely because the plaintiff was not mentioned by name. If the words are defamatory, it is competent for the plaintiff to prove that in the circumstances in which they were uttered, they were intended by the speaker, and must have been understood by those who heard and read them, to apply to the plaintiff.[9]

[33] The plaintiff pleaded that the article contains photographs of him (2 strips of five photographs, 10 in total) in which his face is clearly depicted and contains the following caption between the 2 strips: "CAUGHT OUT: The footage shows a uniformed cop getting out of hand". The person in the photograph is in uniform.

[34] The defendant argued that the plaintiff could be identified only from 10 grainy photographs (of which seven are blurred) showing a person wearing a police uniform. However, the person's face is blurred and in partial darkness. It contends that there is nothing striking or distinctive about the person in the photographs and that they could potentially depict many persons.

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7 See LAWSA *op cit* n 4 p 240 para 243.
8 *Spendiff v East London Daily Dispatch, Ltd* 1929 EDL 113 at 132.
9 *Hertzog v Ward* 1912 AD 62 at 70.

[35] The defendant is mistaken. At least three of the photographs clearly show the plaintiff. Apart from this, Van der Walt and Le Roux testified that the photographs depict the plaintiff. In addition the evidence is that the plaintiff had a distinctive "Jonah Lomu" hairstyle, as the photographs show. Further, a reasonable reader would undoubtedly associate the person in the photographs as being one of: (a) the "*smoordronk* officers" who "barged in and bullied staff"; (b) the "uniformed cop getting out of hand"; or (c) one of the drunk cops who crashed the bar. The reasonable reader would also associate the police officer in the photographs as one of the persons who behaved "like *dronkgat* party animals", and who was drunk and disorderly whilst on duty, referred to in the article.

[36] For the above reasons, it is beyond question that the article is about the plaintiff and how he behaved at the bar. In my respectful opinion, the trial court erred in holding that the reasonable reader would not conclude that the individual complained of in the article is the plaintiff.

[37] The next issue is whether the defence of truth in the public interest is sustainable.

Truth and Public Benefit

[38] It is lawful to publish a defamatory statement which is true, provided that the publication is for the public benefit.[10] As a general principle, it is for the public benefit that the truth about the character or conduct of individuals should be known.[11] A defendant who relies on this defence must plead and prove that the defamatory statement is substantially true. The gist of the defamation or the

[10] See LAWSA *op cit* n 4 p 245 para 247.
[11] See LAWSA *op cit* n 4 p 245 para 247.

"sting of the charge" - that the plaintiff was drunk and disorderly whilst on duty, with no regard for the law - must be proved.[12] The fact that there is some exaggeration in the language used does not deprive the defence of its effect.[13]

[39] The public have a legitimate interest in the manner in which police officers carry out their duties. Indeed, the Constitution requires the police to prevent, combat and investigate crime; maintain public order; protect and secure the inhabitants of the Republic and their property; and uphold and enforce the law.[14] Similarly, the South African Police Service Act 68 of 1995 states that the functions of the police include ensuring the safety and security of all persons and property in the national territory; and upholding and safeguarding the fundamental rights of every person.

[40] For these reasons, the defendant submitted that the public had a legitimate interest in the publication of an article which truthfully detailed drunken and disorderly conduct on the part of uniformed police officers on duty. The allegations, it says, are claims made by the bar staff and owner as truth and thus it was entitled to convey this in the public interest, and publish an article about the police failing to fulfil their duties.

[41] These submissions cannot be accepted. They are insupportable on the evidence.

[42] To begin with, there is simply no evidence showing that the plaintiff or any other officer was drunk, let alone "*smoordronk*", to the contrary. The

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12 *Johnson v Rand Daily Mail* 1928 AD 190 at 205-207.; See also LAWSA P 245 para 247 and the authorities collected in footnote 3.

13 *Johnson* n 12 *ibid; Independent Newspaper Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) at 154e-155e.

14 Section 205 (3) of Act 108 of 1996.

"HAT Verklarende Handwoordeboek van die Afrikaanse Taal" [15] defines "*smoordronk*" as "*baie dronk*" or "*papdronk*". Put differently, the article states that the police officers were as drunk as lords. The uncontroverted evidence is that the plaintiff does not consume any alcohol; that in 1995 he decided to stop drinking alcohol after his close friend was shot and killed at a shebeen; and that he does not, and never had, a problem with alcohol, neither is he a reformed alcoholic.

[43] The plaintiff was subjected to rigorous cross-examination on this aspect. It was even put to him - quite wrongly - that the article suggests that he had gone back to a situation where he might have had a drink or two with friends. Instead, the article conveys the message and was understood by the reasonable reader to mean that the plaintiff was drunk and disorderly whilst on duty, that he had no regard for the law or the rights of citizens, that he bullied staff at the bar and that he had alcohol in the police van and came looking for more. It states in terms, that "the two cops are now in hot water for behaving like *dronkgat* party animals."

[44] The evidence however demonstrates that the plaintiff was not drunk on duty and that the article was defamatory, as appears from the plaintiff's denial that he had gone back to drinking with friends:

> Defendant's counsel: "Mr Muller, if you wish this court to believe that one of the bases upon which you are so traumatically aggrieved about the article is that the article - in fact, one of the bases upon which you've claimed a million rand from the Daily Voice on the basis of the alleged defamation is that the article suggests that you've gone back to a situation where you might have a drink or two with a couple of mates. With respect that is an unbelievable proposition, Mr Muller. Nobody could possibly be offended or feel that they are defamed by an allegation or an imputation that one has returned to a situation where one simply sits around and has a couple of drinks with people. What is your comment on that? --- Judge, the report itself, the

[15] FF Odendal and RH Gouws (eds) 4th ed 2000 p 1029.

> content says "drunk cop bullies staff". They depict me as a drunkard, as unruly, as a person who have (sic) no respect or regard for the law and that is quite the opposite. That is what I have a grieve (sic) for and the fact that they also compare me to a corrupt drunk policeman … punished for his crimes and was found guilty of an offence. That is what I am aggrieved about and also the fact that … there is liquor involved. As the advocate says, my friends and family who know me, including my godparents, would believe that … which was contrary to the values they taught me."
> …
> Mr Muller, your wasting of an hour was very convenient if you are under the influence of alcohol at the time and if you wanted to avoid a test of your blood. --- I was not drinking when I came on duty. I did not drink while executing my duties. Never in that whole shift's time that I was working did I consume one drop of alcohol."

[45] The plaintiff's evidence that he was not drunk on duty was confirmed by Van der Walt. He testified that he inspected the plaintiff and Njele before they commenced duty on the night in question. There was no sign that either the plaintiff or Njele had been drinking. The inspection was recorded in the Occurrence Book held at the police station. Upon his return to the station, Van der Walt also did a cell inspection together with the plaintiff. He said that the plaintiff's condition was exactly the same as earlier that evening, and that he did not detect any sign of liquor. As to the suggestion that Njele was drunk on duty because his bootlaces were untied, and his shirt was unbuttoned and his belt unbuckled, Van der Walt testified that he would definitely have picked that up. He said that Njele's pants would not have remained in place with his firearm hanging on it if his belt had been unbuckled.

[46] Then there is the incident at the police station when Naidoo and his mother claimed that the police officers were drunk and wanted them to be breathalysed and their blood drawn. Van der Walt contacted the district surgeon and was informed that blood was drawn only in cases of drunken driving. It was put to Van der Walt that he should have informed the district surgeon that somebody had driven the police vehicle to the station. He

responded that there were no signs that either the plaintiff or Njele were drunk to justify their blood being drawn. Despite this, the plaintiff was willing to have his blood drawn by the district surgeon. He even waited for 1½ hours for Naidoo to get his own doctor to draw the plaintiff's blood. That is not the reaction of a drunk officer on duty. Further, Captain Jacobs, the commanding officer who was called to the police station, spoke to the plaintiff and Njele whilst in close proximity of them. If they "both reeked of alcohol", as the article states, it is highly unlikely that she would not have any taken steps to institute disciplinary proceedings against them.

[47] Brown's evidence that the police officers were drunk has no logical or evidentiary basis. Indeed, he said that he could not smell alcohol on the plaintiff's breath, although they were nearly face to face. Aside from this, the factors referred to by Brown and Naicker, such as the plaintiff's insistence upon entering the premises, taking offence at Naicker's disrespectful tone, and being argumentative, uncooperative and provocative, are not in the circumstances any indication of drunken or disorderly behaviour. Naicker too, said that he could not smell any alcohol on the plaintiff's breath. Indeed, he testified that he did not inform the reporter that the police officers "reeked of alcohol". And the video recording which Brown had made of the events did not show drunken and disorderly behaviour on the part of the police officers.

[48] Moreover, both Brown and Naicker denied having told the reporter that the police officers behaved "like *dronkgat* party animals" or were "*smoordronk*". Naicker also denied having said that "they must have had a nip of something in the van and came looking for more". In fact, both of them deny the essence of the defamatory statements published in the article.

[49] What all of this shows is that the article was substantially untrue: none of the police officers who attended the bar were drunk; neither did they behave in a drunken or disorderly way. They certainly did not "crash [a] party" venue or behave like "*dronkgat* party animals". Consequently, publication of the article was not in the public interest.

[50] The defendant has thus failed to establish the defence of truth and public benefit.

[51] The defendant's plea of fair comment may be dealt with briefly.

Fair comment

[52] It is lawful to publish a defamatory statement which is fair comment on facts that are true and matters of public interest.[16] The requirements for the defence of fair comment are these: the defamatory statement must amount to comment or opinion as opposed to a statement of fact; the facts on which the comment is based must be true and clearly indicated in the document containing the defamatory statement; and the comment must relate to a matter of public interest and be fair.[17]

[53] The defence of fair comment cannot succeed in this case because the facts upon which the comment is based are in substance untrue.[18] The failure to prove any essential element of the defence is fatal, however "fair" in the ordinary sense the language might be.[19]

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16 See LAWSA *op cit* n 4 p 253 para 253.
17 See LAWSA *op cit* n 4 p 253 para 253.
18 *Crawford* n 18 above at 114.
19 *Crawford* n 18 above at 114.

[54] Finally, the defendant pleaded that publication of the article was objectively reasonable.

Reasonableness

[55] In *Bogoshi* the SCA accepted that publication in the press of a defamatory statement may be lawful if, considering all the circumstances of the case, it was reasonable to publish the particular facts in the particular way and at the particular time.[20] In considering the reasonableness of the publication, the nature, extent and tone of the allegations must be taken into account. So too, the nature of the information on which the allegations were based, the reliability of their source, the steps taken to verify the information, the opportunity given to the person concerned to respond and the need to publish before establishing the truth in a positive manner. The list is not exhaustive.[21]

[56] The SCA however made it clear that there can be no justification for the publication of untruths, and members of the press may not lower the standards of care which must be observed before defamatory matter is published in a newspaper. A high degree of cautiousness is expected of editors and editorial staff on account of the nature of their occupation, particularly in light of the powerful position of the press and the credibility it enjoys amongst large sections of the community.[22]

[57] The Constitutional Court confirmed this approach in *Khumalo,*[23] holding that the defence of reasonableness strikes a balance between the constitutional interests of plaintiffs and defendants. O'Regan J said:

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20 *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212G.
21 *Bogoshi* n 20 at 1212H-I; 1213B-C.
22 *Bogoshi* n 20 at 1212J-1213B.
23 *Khumalo v Holomisa and Others* 2002 (5) SA 401 (CC) para 43.

> "[T]he defence of reasonableness … permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable. In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course the right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids, therefore, a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so."[24]

[58] The defendant contends that the information given to the reporter related to a matter of public interest, namely abuse of police authority which affected the local community. The newspaper, so it was submitted, had an obligation to provide the community with information such as police excesses; the information came from persons who had direct knowledge of the incident and video footage to substantiate their allegations; the reporter took steps to verify and establish the reliability of her information by interviewing Naicker, Naidoo and his mother, and Brown. Then it was submitted that the article made it clear that its contents were not being presented as facts verified by the newspaper, but as allegations which were being made by the bar owner and staff against the police; and that the police were afforded an opportunity to respond and confirmed the allegation that a charge had been laid.

[59] These submissions however do not bear scrutiny.

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[24] *Bogoshi* n 20 at 1213

[60] The sting of the defamation contained in the article when read as a whole is not the abuse of police authority, but drunk and disorderly cops behaving badly, with no regard for the law or the rights of citizens. That much is clear from the main caption "LAW AND DISORDER" and the reference in the article to "*smoordronk*" officers barging in and bullying staff; "drunk cops" crashing the bar and behaving "like *dronkgat* party animals"; the caption which states "CAUGHT OUT: The footage shows a uniformed cop getting out of hand"; that both police officers "reeked of alcohol" and that they "must have had a nip of something in the van and came looking for more".

[61] In my view, the publication of the article was unreasonable in the circumstances. Whilst it is true that a newspaper has an obligation to inform the community of police excesses, in this case the article impugned the character, competence and integrity of the plaintiff himself, and consequently, infringed his right to dignity. This is particularly so having regard to the fact that it was established in evidence that the plaintiff does not drink alcohol at all; the nature, extent and tone of the allegations; and the fact that the plaintiff was not given an opportunity to respond to the claim that he was one of the officers alleged to be "*smoordronk*" and behaving like a "*dronkgat*" party animal.

[62] The submission that the article was not presented as facts verified by the newspaper, but as allegations made by the bar owner and staff of the police, is insupportable on the evidence. Both Brown and Naicker denied having told the reporter that "*smoordronk*" officers had barged in and bullied staff. They also testified that they were not responsible for the main caption; the heading, "Drunk cops crash Flats party plek"; or the statements that the cops had behaved like "*dronkgat*" party animals, had alcohol in the police van and came looking for more, and both officers reeked of alcohol. Naicker also denied having told the reporter about "the cops' rowdy behaviour".

[63] Finally, the claim that the police were given an opportunity to respond has no evidentiary basis. The reporter interviewed Naidoo and his mother. Therefore she knew or must have known of the events that took place at the police station, more specifically that both Van der Walt and the plaintiff were adamant that the plaintiff was not drunk, and that he was willing to have his blood drawn. She would have established this, had she simply contacted them. The inference is irresistible that the reporter did not contact the plaintiff or Van der Walt, or for that matter Captain Jacobs, because it would have destroyed the sting of the article. It is therefore not surprising that neither Naidoo nor his mother were called to testify on behalf of the defendant, despite the fact that in August 2007, securing their attendance was the reason advanced for a postponement of the trial.

[64] It follows that the defence of reasonableness of the publication must fail.

Damages

[65] The successful plaintiff in a defamation action is entitled to an award of general damages to compensate for injured feelings and for the hurt to his or her dignity and reputation.[25] The factors the court may take into account include the nature of the defamatory statement; the reputation, character and conduct of the plaintiff; the nature and extent of the publication; and the motives and conduct of the defendant.[26]

[66] As already stated, the article depicts the plaintiff as a drunk and disorderly police officer with scant regard for the law or the rights of citizens.

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[25] See LAWSA *op cit* n 4 p 260 para 260.
[26] See LAWSA *op cit* n 4 p 260 para 260 and the authorities there collected.

[67] To most people, their good reputation is to be valued and safeguarded above all. A good reputation is closely related to the innate worth and dignity of the individual.

[68] The evidence discloses that the plaintiff's career and reputation mean everything to him. His attainment of the rank of Warrant Officer in the police force did not come easily. His family abandoned him when he was 4 years old. He lived on the streets in Elsies River until he was 10, when he was adopted by a pastor and his wife. The plaintiff testified that from the day his foster parents had taken him in, he decided that he was going to make them proud and not do anything to disappoint them. He said that they knew about the article but in the interim both had passed away without knowing the real truth about it.

[69] The plaintiff fortunately rose above his historical disadvantage and adverse circumstances. He matriculated in 1986 and joined the police force. At the time of the trial he had 25 years' service. He received numerous awards and citations. For example, in September 1999 the plaintiff received a certificate of appreciation for unselfish dedication and sacrifice in promoting the ideals of the Area Board West Metropole of the SAPS. In December 1999 he received the SAPS medal for 10 years of faithful service and exemplary conduct from the State President. In 1999 and for a period of five years thereafter, the plaintiff served as a trainer and mentor for students coming directly from the police college to police stations. In 2003 he received a certificate of achievement as the best achiever on the Community Service Centre (CSC) course. In 2008 the plaintiff was awarded a certificate for his dedication and commitment to serving the community of Dieprivier, by the Community Police Forum and the Station Commissioner, after he led the investigation and made a breakthrough in taking down a housebreaking syndicate plaguing the Southern Suburbs in Cape Town.

[70] The plaintiff testified that when he saw the article, he was both sad and livid and all kinds of thoughts went through his mind. He considered going after the person who had taken the photographs, but said that his love for his career and, as he put it, the consequences of doing something foolish, prevented him from acting impulsively. He decided to discuss the article with Captain Le Roux, his former branch commander.

[71] Le Roux described the plaintiff as a very positive person, eager to learn. He said that he had never seen the plaintiff consume alcohol. When he saw the article, he recognised the plaintiff in the photographs. As to the reference in the article that the plaintiff (one of the officers), was allegedly drunk on duty, barged into the bar and bullied patrons, Le Roux said that he could not believe it. He had nominated the plaintiff for the award of detective of the year for the Western Cape, because of the plaintiff's eagerness to learn, his work ethic and the hours he put in. Le Roux's nomination was accepted: the plaintiff was awarded a certificate as the most deserving Crime Investigation Officer in the Western Province, which includes the West and East Metropoles.

[72] As regards the extent of the publication, the newspaper was widely distributed. The defendants have admitted that 68 270 copies were sold on the day in question, 1000 of which were sold in George and the remainder on the Cape Flats in the Western Cape. For all practical purposes, the newspaper was sold in or near the area in which the plaintiff grew up and served as a police officer.

[73] As to the defendant's conduct and motives, it failed to establish the truth of the allegations which were published of and concerning the plaintiff. Far from being a "gossip item", the article was presented as a clear indictment of the plaintiff in his capacity as a police officer. The article attributed serious

professional misconduct to him and brought him into public scandal. Even the last sentence was in keeping with the thrust of the article - drunk cops behaving badly. It states that according to a police spokesman, a case of intimidation was being investigated. That charge was later withdrawn. The defendants did not tender any evidence of attempts to obtain the plaintiff's version of events or the true facts from the police, in particular, from Van der Walt. In this regard the dictum of Cory J in *Hill*[27] is instructive:

> "The law of defamation is essentially aimed at the prohibition of the publication of injurous false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish? The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility."[28]

[74] A further factor which should be taken into account in the assessment of damages, in my view, is the conduct of the defendant. At no time did the defendant tender an apology or offer a retraction, although an apology or a retraction cannot completely undo the harm done or the hurt caused. It refused to make any concession when it was obvious that it should do so. It refused to acknowledge that the plaintiff was identifiable by the photographs in the article. The reporter obviously must have known this after her interviews with Brown, Naicker, Naidoo and his mother. In its argument on damages it persisted in its stance that only persons close to the appellant would have been aware that he was one of the policeman implicated in the incident at the bar. Its stance is that the plaintiff "is not entitled to the reputation of an honest man", simply because

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27 *Hill* [1995] 2 SCR 1130.
28 Para 137

his evidence was inconsistent in one immaterial aspect relating to his entrance into the bar.

[75] The SCA in *Mogale*[29] noted that awards in defamation cases do not serve a punitive function and generally are not substantial. However, the amount of damages depends on the facts of the specific case and, in my view, in the particular circumstances of this case, there is little to be gained from a comparison of awards in defamation cases.

[76] The plaintiff asks for damages in the sum of R 250 000. In all the circumstances, having regard to the seriousness of the defamation and its impact on the plaintiff, I consider that an award of damages in an amount of R 70 000 is appropriate.

[77] What remains is the question of costs. The trial court did not make an order that costs should be paid on the Magistrate's Court scale. The defendants certainly did not ask for such an order and they cannot now argue that costs should be on that scale. In addition, the cases say that in a defamation suit the court must have a greater discretion as to the scale of costs, because at the issue of summons, the plaintiff does not have precise materials for estimating the case, as a plaintiff in other cases. The true test as to whether High Court costs or Magistrate's Court costs should be given is how the case appeared to the plaintiff at the issue of summons. Factors which should be taken into account when deciding whether the plaintiff was justified in bringing the action in the High Court include the following. Individual reasonable men may hold different views as to the extent of the injury suffered and thus fairly wide allowance should be made for this. When summons is issued, the individual plaintiff to some extent is the judge in his own cause as regards the extent of his

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[29] *Mogale and Others v Seima* 2008 (5) SA 637 (SCA) at paras 9-12, 18.

injury. The plaintiff often does not know the nature of the defence at the issue of summons. A defence pleaded eg privilege, may raise difficult questions of law and such cases have gone right up to the Appellate Division.[30]

[78] In this case the defamation was serious and I do not think that when summons was issued, the plaintiff was unreasonable in assessing his damages in excess of the jurisdiction of the Magistrate's Court. Aside from this, the case involved issues of law of considerable difficulty.[31]

[79] For these reasons costs should be awarded on the High Court scale.

[80] I would make the following order:

(a) The appeal is upheld with costs.

(b) The order of the trial court is set aside and replaced with the following order:

"Judgment is granted in favour of the plaintiff for R 70 000 and costs on the High Court scale."

SCHIPPERS J

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30 *Van der Merwe v Schraader* 1953 (2) SA 339 (EDLD) at 342A-343E, approved in *Greeff v Raubenheimer en 'n Ander* 1976 (3) SA 37 (A) at 44F.

31 *Hassen v Post Newspapers (Pty) Ltd and Others* 1965 (3) SA 562 (WLD) at 577H; *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) para 50; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* Amici Curiae*)* 2011 (3) SA 274 (CC) para 204.

DESAI J:

[81] I agree. It is so ordered.

DESAI J

NDITA J:

[82] I agree.

NDITA J