

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 28/11/2023
SIGNATURE: BARIT AJ

CASE NO: A234/22

In the matter between:

THE BODY CORPORATE OF SUNNYSIDE GARDENS

Appellant

and

EDUARDO PERREIRA

Respondent

JUDGMENT

BARIT AJ (Cowen J concurring):

Introduction

1. This is an appeal against an order and judgment, in a defamation action, delivered by Magistrate J Rodrigues of the District of Tshwane Central Magistrates Court on 3 May 2022. The appellant is the Body Corporate of Sunnyside Gardens (the Body Corporate or the appellant), a body corporate established in terms of section 36 of the Sectional Titles Act 95 of 1986 (the Act). The respondent, Mr Eduardo Perreira, is the plaintiff in the defamation action. He is the owner of Unit 16 in Sunnyside Gardens Sectional Title Scheme (Sunnyside Gardens).
2. At the centre of the case is a letter written by attorneys Kleynhans & Swanepoel from the Body Corporate to Perreira (the letter) concerning Perreira's conduct at Sunnyside Gardens. Specifically, that Perreira was using his garage for an impermissible purpose – a carpentry business – and in doing so, he was illegitimately using the electricity of the common property and causing a nuisance to his neighbours.
3. The magistrate found that the letter, which was dated 17 November 2015 and which was sent to all members of the Board of Trustees of Sunnyside Gardens and its managing agent, was defamatory of the plaintiff and awarded R50 000 in damages with interest and costs. The appellant asks that the magistrate's order be set aside with costs and replaced with an order that the defamation action be dismissed with costs. Perreira defends the judgment and order.
4. It is well established that to succeed in a claim for defamation, a plaintiff must allege and prove publication of a defamatory statement. Publication of a defamatory

statement is *prima facie* wrongful and it is for the defendant to allege and prove facts which dispel wrongfulness. *Animus iniuriandi* is presumed, meaning that there was an intent to defame and knowledge of wrongfulness.

General factual background

5. Perreira is a 67-year old retiree and has lived in Sunnyside Gardens for the past fifteen years. He is a religious man – a Catholic – and happily married with two adult children. He was a police reservist for fifteen years and involved in community security and training, including teaching primary school children to act responsibly at traffic lights and adhere to laws. He is a member of the Body Corporate and was formerly on its Board of Trustees (elected in November 2014) responsible for security and maintenance.
6. The events in this matter date back to 17 November 2015 when the Body Corporate's attorneys, Kleynhans & Swanepoel, sent the letter to Perreira – on behalf of the Body Corporate - alleging that complaints had been received that:
 - 6.1. Perreira was causing a nuisance to other residents of the building.
 - 6.2. He is running a carpentry business from his garage.
 - 6.3. He is illegitimately utilizing the common property electricity to sustain such business.
 - 6.4. He is not utilizing the garage for the purpose it should be used.
7. After reminding Perreira of the duties of owners of units in Sunnyside Gardens, the letter demands that Perreira comply and is advised that the Trustees will no longer

tolerate any nuisance from him failing which they would approach a Court for relief.

Per the letter Perreira was instructed immediately to:

7.1. Stop being a nuisance to other owners – occupants.

7.2. Cease running his business from his garage.

7.3. Cease using the electricity of the common property to sustain such business.

8. The letter was received by Perreira via e-mail on 18 November 2015. He believed it to be slanderous and he was disgusted at the accusations against him. He further felt threatened by it. Perreira addressed a letter to the firm of Kleynhans & Swanepoel, denying the allegations and requesting an apology. Perreira received no reply. The chairperson of the Board of Trustees, Mr Krog, is an employee of Kleynhans & Swanepoel.

9. A couple of days later, a neighbour alerted Perreira to a letter, addressed to Perreira, that was posted in the foyer of the complex. Perreira went and saw that it was the same letter he had received on e-mail and removed it. Perreira consulted his attorney who addressed letters to Kleynhans & Swanepoel which were not replied to.

10. At that stage, Perreira was a member of the Board of Trustees of Sunnyside Gardens. He testified that he was neither consulted nor aware of the instruction to the attorneys to send him the letter. There was no resolution of the Board of Trustees authorising the letter and further, Mr Krog was not authorised to make such a decision on his own, which in effect bound the Body Corporate. However, no Trustee objected to the letter, which was sent in the name of the Body

Corporate. The letter was also sent to the managing agent of Sunnyside Gardens, Praetor, and to the members of the Board of Trustees.

11. After the proceedings were instituted, the letter was apparently circulated to all members of the Body Corporate as an attachment to the summons, which was part of the pack for the Annual General Meeting, ostensibly to notify members of the litigation against the Body Corporate.

The magistrate's decision

12. Magistrate Rodrigues commenced her decision by detailing the evidence. Perreira testified on his own behalf and two witnesses testified for the appellant: a Ms Less and a Mr Krog, both members of the Board of Trustees at the time. After setting out legal principles applicable to defamation actions, the Magistrate proceeded to evaluate the evidence in light thereof. Her evaluation led her to the following conclusions.

- 12.1. The plaintiff was consistent in his testimony, whereas the appellant's witnesses were at times unreliable, with aspects of their testimony being nonsensical or improbable. It was evident, moreover, that there was a history of conflict between the plaintiff and the appellant's witnesses. Less made no secret of how she feels about the plaintiff and Krog admitted he saw him as a nuisance.

- 12.2. There was publication of the letter when sent to the trustees and the managing agent, Praetor. There was, however, no evidence to support the plaintiff's version that the letter was placed on the notice board for all to see. Little store was placed on the subsequent circulation to members of the

Body Corporate save that the Magistrate had regard to the fact that the ensuing litigation was disclosed to the members of the Body Corporate at an AGM.

- 12.3. The letter was defamatory of the plaintiff. In its use of the words 'you are causing ...' and 'you must stop / immediately cease', the letter clearly indicates that Perreira was both accused and found guilty of wrongdoing. The letter conveyed that he is a nuisance, does not abide the rules and is untruthful and dishonest in his misuse of the electricity of the common property to sustain his own business from his garage. The letter did not merely inform Perreira of complaints that have been received and provide an opportunity to respond thereto.
- 12.4. The inference can be drawn on the evidence that the intention of the responsible members of the Board of Trustees was to defame the plaintiff and injure his reputation amongst the members of the Body Corporate. Both witnesses for the appellant disliked the plaintiff and made no attempt to hide it.
- 12.5. The defendant failed to rebut the presumption of unlawfulness and wrongfulness by failing to allege and prove on a balance of probabilities any justification including truth and public benefit or qualified privilege. There was no evidence (as conceded) that the plaintiff had indeed contravened the conduct rules as alleged in the letter. One factor is that the evidence of witness Less was that there was no plug point from which Perreira could have drawn electricity. It was not denied that the plaintiff was not given any opportunity to address the complaints before the letter was issued. Moreover, there was no investigation conducted when complaints were

allegedly received. Indeed, there was no evidence that the complaints had been received as those who allegedly complained were not called as witnesses. One alleged complainant was deceased, but there were no incident reports reflecting any complaints.

- 12.6. Although R100 000 was claimed in damages, the Magistrate awarded R50 000 in circumstances where the plaintiff had been elected to a position of trust on the Board and one of its sub-committees (dealing with rules) and the plaintiff felt insulted, hurt, slandered and embarrassed, he still wept about the incident and people still look at him in meetings. The defendant provided no mitigating evidence, and, on the contrary, the matter concerned conduct of members of Board of Trustees, who are duty bound to act in good faith and cannot advance their personal agendas as had ensued. The Magistrate was mindful that any damages would be paid by all members of the Body Corporate.

The grounds of appeal and appellant's submissions

13. It is necessary in this judgment to deal with the following main grounds of appeal and submissions.

14. First, the Magistrate is said to have erred in concluding that there was publication of the letter when it was forwarded to the managing agent, Praetor, and the members of the Board of Trustees. The Magistrate is said to have failed to appreciate that the plaintiff had the onus to prove publication and failed to do so in respect of the two incidents of publication relied upon, being publication on the notice board at the complex and a reading of the letter at an AGM on 25 February

2016, which did not occur. The appellant claims that the plaintiff did not rely on any publication to the managing agent and the members of the Board of Trustees. In context, moreover, the communication was no more than feedback from an attorney to its client that its lawful mandate had been complied with. Viewed as such it is not a publication to a third party. Rather, it is properly classified as a privileged communication between attorney and client.

15. Secondly, the Magistrate failed to appreciate the distinction between the Body Corporate, the Trustees of the Board, individual trustees and the managing agent. This error is said to have contributed to the erroneous conclusion that publication took place when the attorneys, Kleynhans and Swanepoel Inc sent the letter to the managing agent and then to the Board of Trustees.

16. Thirdly, the Magistrate erred in concluding that the plaintiff was a consistent witness without addressing his credibility. In this regard, the plaintiff confused the position of a member of the Body Corporate with a member of the Board of Trustees.

17. Fourthly, the Magistrate erred in finding that the defence conceded there was no evidence that the plaintiff contravened the conduct rules.

18. Fifthly, the Magistrate erred in finding that the letter is defamatory as, properly understood, it would have been interpreted merely as informing the plaintiff that there were complaints against him and that he was requested to stop the behaviour.

19. Sixthly, if the Court nevertheless concludes there was a defamation, the Magistrate is said to have erred in awarding an amount of R50 000. This is said to be

excessive in circumstances where the plaintiff failed to prove the two alleged incidents of publication, and led no evidence of damage to reputation. The appellant submits that the award was excessive having regard, amongst other things, to the limited extent of publication and that the five trustees and managing agent were already aware of the allegations. Moreover, the plaintiff is not in the public eye, any defamation was not in the media or on social media. The impact on the plaintiff's reputation is thus limited to his immediate community such as his neighbours, with limited resultant harm. An amount of R5000.00 was said to be a reasonable award. On quantum, the Court is enjoined to have regard to the principles set out in *Media 24 Ltd t/a Daily Sun and another v Du Plessis*.¹

Legal principles regarding appeals

20. The appeal before us emanates from the judgment of a trial court. As such, certain legal principles apply.

21. In the case of *R v Dhlumayo and another*,² the then Appellate Division stated:

“The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanour, but also their appearances and whole personality. This should not be overlooked”.

22. In *A M and Another v MEC Health, Western Cape*,³ Wallis J A reiterated that an appeal court is reluctant to disturb findings of fact and credibility made by a trial

¹ [2017] ZASCA 33.

² *R v Dhlumayo and another* (1948) (2) SA 677 (A) at 705.

³ *A M and Another v MEC for Health, Western Cape* [2020] ZASCA 89; 2021 (3) SA 337 (SCA) at para 8.

judge, 'who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses.' Such findings, Wallis JA continued, are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. The Court emphasised that this has consistently been the approach of both the Supreme Court of Appeal and the Constitutional Court, referring to the following passage from *ST v CT*⁴:

*'In Makate v Vodacom (Pty) Ltd the Constitutional Court, in reaffirming the trite principles outlined in Dhlumayo, quoted the following dictum of Lord Wright in Powell & Wife v Streatham Nursing Home:*⁵

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case." (Citations omitted.)

23. In the Supreme Court of Appeal in the matter of *S v Kebana*,⁶ it was held:

'It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'

24. From the above it can be seen that an appeal court must be careful in making decisions on facts, which are purely based on paper and representations in court without the presence of the parties in the trial. The appeal court can be seen to be loath to overturn factual findings of a trial court. A reason is simply that the appeal

⁴ [2018] ZASCA 73.

⁵ This is a reference to *Powell and Wife v Streatham Nursing Home* 1935 AC 243 at 265.

⁶ *S v Kebana* [2010] 1 All SA 310 (SCA) para 12.

court is removed from the tone and mood of the sitting trial court. The demure of witnesses, general reactions and being able to watch and hear witnesses is absent. The phrase often used is that the “appeal court is not steeped in the atmosphere of the trial court”. Simply stated, the written words and arguments by legal representatives can never replace what took place in the trial court.

The witnesses and elements of their testimony

25. The above principles must be kept front of mind when considering the evidence which is detailed briefly below. Before doing so, however, it is helpful to highlight various features of the evidence. First, there is an apparent history of conflict and confrontation between Krog and Less on the one hand and Perreira on the other. Secondly, where Krog and Less (as Board members) accuse Perreira of illegitimately using his garage and the electricity of the common property, this is denied emphatically by Perreira. Thirdly, it is clear from the evidence that the letter was sent to Perreira by Kleynhans & Swanepoel on the instruction of the Board of Trustees and the letter thereafter was circulated to the managing agent and all members of the Board of Trustees. Fourthly, Perreira understood the letter as an accusation that he is being called a thief, stealing from the Body Corporate.

26. **Perreira:** The first witness was the plaintiff, Perreira. Perreira was in the police for twelve years and had been a manager with knowledge of labour relations and procedure. In this respect, Perreira believed that should he have transgressed any of the rules – of which he was aware of no evidence - the correct approach would have been an inspection and should he have been proved to be “guilty”, a warning

should have followed. Perreira felt that he “can’t walk tall in the complex”. He explained the impact on him and his sense that his integrity had been questioned.

27. He testified that he had been nominated to the Board of Trustees in November, which he accepted. He further testified that a member of the Board must be trustworthy and honest. Decisions by the Board are made collectively and if there are disagreements the decision by the majority is implemented.

28. At the time of the letter, Krog - who was not a unit owner - was the elected Chairperson of the Board of Trustees. Perreira testified that neither Krog nor Less – also a member of the Board of Trustees – responded to his complaints regardless of sending two or three e-mails per month about things that needed to be done. Krog frequently missed meetings but was nonchalant about it when Perreira raised concerns.

29. Perreira received the letter on 18 November 2015 by e-mail. He believed it to be slanderous. He felt disgusted that he was being accused of things he did not do and felt threatened. A neighbour alerted him to a letter addressed to him posted in the foyer of the complex. He went to see it. It was the same letter he had received on e-mail and removed it. He then went to see his attorney who addressed letters which were not replied to. He further testified that as a member of the Board he was not consulted nor aware of any instruction to attorneys to send him the letter.

30. Perreira understood the accusation of “illegitimately utilizing the electricity of the common property” to be calling him a thief – stealing from the Body Corporate. He confirmed that he issued summons as a result of the letter, which he regarded as

defamatory. Before doing so, he had asked that the letter be withdrawn and an apology tendered, but there was no response. Perreira believed that anyone who read the letter would get the impression he is a transgressor of rules and a thief, using electricity of the common property.

31. Perreira confirmed that he knows that Less objected to his re-election to the Board of Trustees at the 2016 Annual General Meeting because of an alleged conflict of interests arising from the fact that he issued summons against the Body Corporate.

32. **Less:** Less was the appellant's first witness. She confirmed that she was, until recently, a member of the Board of Trustees, and was a member when the letter was sent. She confirmed that garages are exclusive use areas and can only lawfully be used to park motor vehicles and store things related to motor vehicles. Compliance is important for insurance purposes, she explained.

33. Less confirmed that the Board would usually send a notification letter to a non-complying owner via the managing agent so the owner can respond to the Board. Trustees do not engage owners directly to avoid argument. In Perreira's case, the Board decided to ask attorneys to address the letter because he had been a member of the Board and they did not want to appear to have a conflict of interests.

34. Under cross-examination Less explained that she owns two units and one garage which she bought in 2003 in the Scheme. But she does not live there. She testified that the Board received a report that Perreira was using the garage for woodwork and she assumed that the electricity was from a plug point in the common area. However, she confirmed that she has no knowledge of any plug-point and upon investigation it was established that there was no evidence of any woodworking

equipment and no plug point was found. She could not explain why Perreira's attorneys' letters were not answered by the appellant's attorneys for the Body Corporate. She further accepted that the plaintiff was not given the opportunity to respond to the alleged complaints.

35. Less testified that the plaintiff was an unreasonable person, annoying, a nuisance and would interrupt meetings and interferes with and impedes the Board in its functions. However, she could not refer to any minute of a meeting where it was recorded that the plaintiff was a nuisance.

36. She accepted that the plaintiff had previously been elected by the owners to the Board indicating a vote of confidence in him. She confirmed that she objected to his being a trustee after summons on the basis that he had a conflict of interests.

37. She sought to deny that the letter contained any findings of fact claiming that it only contained allegations.

38. **Krog:** Krog was the second witness called by the appellant. Krog worked as a debt collector at the Kleynhans & Swanepoel. He does not own a unit at Sunnyside Gardens but was a member of its Board of Trustees at the material times. He further explained that Kleynhans & Swanepoel did not receive payment for this matter from the Body Corporate. He testified that the letter was a standard letter that was used. He testified about the source of the complaints against Perreira and stated that Perreira knew of them in advance and that they had been investigated. He said he had called Perreira before the letter was sent in an attempt to resolve the matter (which Perreira had denied when put to him).

39. Krog testified to the effect that he felt Perreira was a troublemaker at the Annual General Meetings and that no one liked Perreira. However, he confirmed that members of the Body Corporate nominated and elected him as a Trustee. He testified that Less informed him that Perreira was unreasonably argumentative and disruptive at meetings.

40. Krog testified that he never inspected Perreira's garage. However, during a water leak (weeks or months before the letter was sent) he climbed on bricks and looked into the garage and saw the work benches. He also testified that he never told the Kleynhans & Swanepoel that he had observed the transgression, as he felt that he did not need to tell them. He testified that the Board was aware of the facts. It was put to Krog that it is not possible to look into the garage. This he answered by suggesting that one can go and look at the set up.

The first issue: did the plaintiff prove publication?

41. The first issue for consideration on appeal is whether the Magistrate was correct to conclude that there was publication of the letter when it was circulated to the managing agent and the members of the Board of Trustees. First, contrary to the suggestion of the appellant, publication to the trustees was expressly pleaded,⁷ and in fact admitted.⁸ It was admitted on the basis that the trustees have the obligations and entitlements set out in paragraph 4.2.2 of the plea which concern investigation and enforcement of provisions of the Act and the scheme rules.

⁷ See para 6 of the particulars of claim.

⁸ See para 5 of the plea.

42. The submission that the communication is privileged cannot be sustained: the communication was generated as a communication to the plaintiff himself and was so sent. The submission that there was no third party communication can also not be sustained, as there was communication to all members of the Board of Trustees, comprising several persons, both to mandate the letter and when receiving copies once generated and sent. The submission presupposes that a corporate body is somehow immunised from liability for defamation perpetrated within its own ranks, or at least within the ranks of its governing body, which is plainly incorrect. Publication to Praetor, the managing agent, is not expressly pleaded, but it is the agent of the Board of Trustees and there is no dispute that Praetor received the communication in that capacity. This ground of appeal, and the related grounds, must accordingly fail.

The second issue: was the letter defamatory of the plaintiff

43. The second issue is whether the letter, properly understood, was defamatory of the plaintiff. The appellant contends that the letter was not defamatory and amounted only to what was termed a conduct letter, requesting Perreira to stop any conduct in breach of the rules of the Body Corporate should he be contravening them.

44. For items written, or words spoken to be defamatory, certain requirements have to be met. In *Hix Network Technologies CC, v System Publishers (Pty) Limited And Another*,⁹ the SCA regarded as trite that a defamatory statement is:

⁹ *Hix Network Technologies CC v System Publishers (Pty) Limited and another* [1996] ZASCA 107; 1997 (1) SA 391 (SCA); [1996] 4 All SA 675 (A).

*‘[o]ne which injures the person to whom it refers by lowering him in the estimation of the ordinary intelligence of right-thinking members of society generally as that phrase has been explained by this Court in Mohammed v Jassiem ...’.*¹⁰

45. In the case of *Le Roux and Others v Dey*,¹¹ the SCA referred to the above test and stated as follows:

‘.... It is well established that the determination of whether a publication is defamatory and therefore prima facie wrongful involves a two-stage enquiry. The first is to determine the meaning of the publication as a matter of interpretation and second whether that meaning is defamatory.

To answer the first question the court has to determine the natural ordinary meaning of the publication: - how would – an ordinary person of reasonable intelligence understood it? The test is objective. In determining its meaning the court has taken to account not only of what the publication expressly conveys but also of what it implies, i.e., what a reasonable person maybe infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning which flows from knowledge of special circumstances. Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words.

It may be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise. – One must have regard to the nature of the audience.

A publication is defamatory if it has a tendency or is calculated to undermine the status, good name or reputation of the plaintiff. – It is necessary to emphasize this because it is an aspect that is neglected...”

46. The Magistrate’s evaluation of the evidence in light of these requirements cannot be faulted. An ordinary person of reasonable intelligence would have understood

¹⁰ [1995] ZASCA 115; 1996 (1) SA 673 (A) at 703G-704D. The passage referred to in Mohammed’s case deals with the application of the test in the context of South Africa’s diversity.

¹¹ *Le Roux and Others v Dey* [2010] (4) SA 210 (SCA) para 5-8.

the letter to convey that Perreira was not merely accused of wrongdoing based on complaints received but was guilty of wrongdoing. The letter was defamatory both on its plain meaning, and because it implied squarely, that Perreira does not abide the rules and misuses the common property electricity for his personal use, effectively by stealing it. Contrary to the submission of the appellant, and as the Magistrate found, the letter as framed did not merely inform Perreira of complaints that have been received and provide an opportunity to respond thereto. The letter as framed, squarely concluded, not least implied, that Perreira was guilty of the conduct.

The third issue: various factual findings

47. The appeal Court is invited, under several of the grounds, or sub-grounds, of appeal to interfere in the factual findings of court *a quo*. On the principles set out above, this Court is unable to find a basis for such interference.

48. It is correct that there was some confusion in Perreira's testimony, regarding the correct use of the term 'trustee' in context of a body corporate of a sectional title scheme, and this confusion, at a couple of points, appears to have informed terminology used by the Magistrate. However, the confused terminology is ultimately immaterial to the findings and the evaluation of the evidence.

The fourth issue: quantum

49. An award of damages for defamation is not punitive, but compensatory, remedying harm to reputation and dignity, which is constitutionally protected. There is no reason to interfere with the quantum of damages awarded by the Magistrate. The Magistrate's discretion to award damages is a 'true' or strict discretion, in which an

appeal Court can only interfere in narrow circumstances.¹² In *Dikoko v Mokhatla*, a majority of the Constitutional Court described these circumstances, in context of a defamation award, to be when high or low damages are awarded on a wrong principles where when, in the opinion of the appellate court *'the award is so unreasonable as to be grossly out of proportion to the injury inflicted.'*¹³ Moseneke DCJ continued: *'In other words, the mere preference of a court with appellate power is not sufficient to upset a damages award. The standard at issue is not whether or not the trial court is correct but whether there is a glaring disproportionality between the amount awarded and the injury to be assuaged. Ultimately, the test is whether in all the circumstances of the case the compensation is a reasonable and just measure of the harm.'*¹⁴

50. In the same judgment, Mokgoro J held:

*'When assessing damages for defamation, courts have in the past considered a range of factors arising from the circumstances and facts of the case: the nature and gravity of the defamatory words; falseness of the statement; malice on the part of the defendant; rank or social status of the parties; the absence or nature of an apology; the nature and extent of the publication and the general conduct of the defendant. The court must therefore have regard to all the circumstances of a case where the assessment is always context specific. The list is non-exhaustive. Although earlier cases of a similar nature give guidance, they must always be applied with the necessary circumspection.'*¹⁵

51. The majority, however, emphasised:

'[T]he approach of the trial court to fixing damages should not be evaluated by the discussion in the judgment of the quantum of the compensation only. It must be

¹² *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC) at para 60 and 93.

¹³ At para 95.

¹⁴ *Id.*

¹⁵ *Supra* para 71. Footnotes omitted. Although this passage appears in the minority judgment on the issue of quantum, the passage is not disputed by the majority and is consistent with its reasoning.

gathered from the judgment read as a whole. One has to read the judgment, inclusive of the discussion on the merits and quantum, as a whole. The mere fact that certain considerations relevant quantum are mentioned in the discussion on the merits only should not lead to the inference that they were not in the mind of the trial court when it determined the extent of the damages.'

52. It must be remembered that Perreira sought R100 000 and R50 000 was awarded.

The atmosphere which the Magistrate experienced evidently played a role in this determination, specifically as regards the history of conflict, the context of the defamation and the views held of Perreira by Less and Krog, and their intentions. The Magistrate was cognisance of the absence of an apology and the absence of any proof of the wrongdoing or even an opportunity to respond. The appellant's suggestion that the extent of the publication was minimal cannot be sustained given the context and factors personal to Perreira, of which the Magistrate, in applying her mind to the eventual award, was clearly aware. A retiree living in a small community and being humiliated therein, losing trust of his community. His whole world was thereby affected by an accusation of being a person who steals electricity from the common property and is a nuisance to his neighbours. Further, it was wholly predictable that the body corporate would ultimately have learnt what had been done in its name, not least after the threat of litigation and the failure to respond to the invitation to apologise. What happened would have harmed the reputation of anyone, but especially a retired person living in the complex which to Perreira, was his community.

Other matters

53. In argument, and in response to questions from the bench, the appellant sought to submit that the Magistrate should have upheld a defence of qualified privilege.¹⁶ This is not a ground of appeal, but in any event it is not squarely pleaded in the plea,¹⁷ in which the appellant relies on the truth and public interest defence.

Conclusion

54. The Magistrate, in a well-balanced and substantial judgment, weighed up both sides of the conflict. I find no reason to interfere with the judgment and order of the magistrate in the trial court. Hence the following order:

- (i) The appeal is dismissed with costs.
- (ii) The judgment and order, including the award of R50,000 as given by the trial magistrate, is upheld.



L BARIT

Acting Judge of the High Court, Pretoria

I agree, and it is so ordered.



SJ COWEN

Judge of the High Court, Pretoria

¹⁶ Our law recognizes three (non-exhaustive) categories of occasions that enjoy qualified privilege. These are: (a) statements published in the discharge of a duty or the exercise of a right; (b) statements published in the course of judicial or quasi-judicial proceedings and (c) reports or proceedings of courts, Parliament or public bodies. See *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC) at para 48

¹⁷ See generally *Herselman NO v Botha* [1994] 1 All SA 420 (A); 1994(1) SA 28 (A).

Appearances

For the Applicant: W.S. Oudegeest (Attorney with right of appearance)
Instructed by Diederiks Oudegeest Attorneys Inc.

For the Respondent: T. Pillay (Attorney with right of appearance)
Instructed by Pillay Thesigan Inc.

Date of hearing: 6 June 2023

Date of judgment: 28 November 2023