



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <u>YES</u> / NO.	
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO.	
(3) REVISED.	
<u>3/8/12</u>	<u>[Signature]</u>
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: A554/2011

DATE: 8/8/2012

IN THE MATTER BETWEEN

YVONNE PESTANA

APPELLANT

AND

RUDOLPH JOHAN DU TOIT

RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an appeal against the judgment handed down by the learned magistrate for the district of Wonderboom in the Pretoria North magistrate's court on 26 August 2010.

- [2] In the court below, the respondent sued the appellant for damages flowing from an incident which took place on 25 October 2009 when the appellant allegedly defamed the respondent. The amount claimed by the respondent was R100 000,00.
- [3] In her concise judgment, the learned magistrate held that the appellant did defame the respondent, and awarded damages in the amount of R7 000,00.
- [4] The appellant launched this appeal against both the merits of the finding of defamation and the *quantum* of the award.

The respondent launched a cross-appeal against the *quantum*, on the basis that the award was inadequate.

- [5] Before the commencement of the proceedings before us, the cross-appeal was abandoned and the appellant also abandoned her attack on the *quantum* of the award. What was left before us, was to decide whether or not defamation had taken place.
- [6] At the commencement of the proceedings, we also had to decide and pronounce upon two condonation applications: the appellant launched a substantive application for condonation for the failure to comply with the requirements of Transvaal Rule 6 in that there was a late application for a date of hearing. The

respondent applied for condonation for the late filing of his heads of argument. Neither application was opposed. We granted both the applications for condonation and ruled that the costs flowing from those applications would be costs in the appeal.

The pleadings

[7] It is convenient to quote the contents of the particulars of claim for illustrative purposes:

- "1. Op 25 Oktober (no year was mentioned but it was 2009) en te die Strydfontein restaurant, President Steynstraat, Pretoria Noord het die Verweerderes luidrugtig en in 'n aggressiewe stemtoon die Eiser, wat in die gemelde restaurant saam met mnr Oelofse, 'n sakekennis van hom was, aangesê om die restaurant te verlaat.
2. Op die Eiser se vraag na die rede waarom hy die perseel moet verlaat, het die Verweerderes hom luid toegevoeg: '... want die polisie soek jou'.
3. Die gebeure wat in paragrawe 1 en 2 uiteengesit is, het in teenwoordigheid en ten aanhore van personeel van die Verweerderes, waaronder me Naomi Kruger, en ander gaste in die restaurant, wie se name nie aan die Eiser bekend is nie, plaasgevind.

4. Die Verweerderes se opdrag aan die Eiser om die restaurant te verlaat en die stelling dat die polisie hom soek, is wederregtelik en lasterlik.
5. Die bovermelde gedrag van die Verweerderes en die woorde wat sy die Eiser toegevoeg het, het opsetlik geskied en dui daarop dat die Eiser die een of ander misdaad of misdade gepleeg het wat so ernstig van aard is dat die polisie hom soek en sy teenwoordigheid in die Strydfontein restaurant derhalwe nie geduld kan word nie.
6. Die Eiser het skade gely deurdat sy aansien, goeie naam, waardigheid en reputasie deur die optrede van die Verweerderes geskend is.
7. Die skade en/of nadeel wat die Eiser gely het as gevolg van die lasterlike bewerings wat deur die Verweerderes aangaande hom geuiter is, beloop R100 000,00.
8. Die Verweerderes weier en/of versuim, ten spyte van 'n aanmaning om die Eiser vir sy skade of nadeel te vergoed."

There was a prayer for judgment in the amount of R100 000,00, costs and interest *a tempore morae* at 15,5% per annum.

- [8] In her plea, the appellant admitted that she asked the respondent to leave the restaurant but denied that she did so in an aggressive manner or in a loud voice.

She admitted having uttered the words "want die polisie soek jou" and then offers the following in paragraph 2.2 of her plea:

"Die verweerderes ontken egter dat sy enige opset gehad het om die eiser te belaster. Die verweerderes sal aanvoer dat sy slegs die rede verskaf het soos deur eiser versoek was."

The appellant, in her plea, also admitted that the words she uttered were heard by her employee, Naomi Kruger. She pleaded that it was Naomi Kruger ("Naomi") who told her that the respondent had supplied her brother (the brother of Naomi) with drugs.

- [9] In her plea, the appellant also denied that her conduct was unlawful and defamatory. Moreover, she denied that she had the intention to defame the respondent and, at the commencement of the proceedings before us, applied to amend paragraph 5 of her plea (containing the denial of intent to defame) by adding the following: "verweerderes ontken voorts dat haar optrede onregmatig was". This application for an amendment was not opposed, and granted. In my view the amendment was superfluous and unnecessary, because in paragraph 4 of the plea the allegation of unlawfulness was expressly denied. That allegation was made, as will appear from the quote, in paragraph 4 of the particulars of claim.

The appellant also denied that her conduct adversely affected the good name, dignity and reputation of the respondent, she denied that the respondent had

suffered damages, and placed the *quantum* of the claim in issue. Demand for payment was admitted but any liability to make payment was denied.

- [10] In the evidence, reference was made to what appears to be requests for particulars for trial and answers thereto, but these pleadings were not placed before us as part of the record. Nothing turns on this.

Brief synopsis

- [11] In my view, what follows is a fair summary of the weight of the evidence and the important features thereof.

- [12] The appellant is a 49 year old widow who owns the Strydfontein restaurant and a small superette adjoining the restaurant. She grew up in Pretoria North. She spends most of her time in the superette, and allows some of her employees, including Naomi, to run the bar and restaurant. Naomi has been with her for some time and she considers Naomi to be a reliable and trustworthy employee.

- [13] The respondent is a businessman operating in the Pretoria North area. His main business consists of the letting of storage facilities. In addition, he manages a guest house and his brother is his partner in both businesses. Finally, he is a philatelist, and markets his stamps commercially, in the sense that he buys stamps and sells them at a profit.

- [14] The respondent visited the appellant's restaurant from time to time. In the process, he got to know Naomi. Naomi also referred to him as "Rudi".
- [15] There was an incident when the respondent was telephoned by Naomi's youngest brother, Juan, from a shopping mall to say that he was not feeling well. This emerges from the respondent's evidence in chief. The respondent advised him to walk to a nearby hospital where the respondent joined him and also paid the account for his admission and treatment. It is common cause that the medical advice was that Juan had taken an overdose of drugs. The respondent also knows Naomi's family because he testified that he had the telephone number of the parents on his cell phone.
- [16] In the period leading up to the events of 25 October, the respondent, according to Naomi, conducted himself badly on a number of occasions when visiting the restaurant. The appellant did not witness these incidents. In her evidence, Naomi described these incidents as follows: on one occasion the respondent, accompanied by three friends, ordered four Black Label beers. The beers were opened and presented to the respondent and his guests. When Naomi asked for payment, the respondent said that they were not going to pay for the beers which had not been consumed at that stage. The respondent also told Naomi that the beers could not be re-sold because he had spat therein. The beers had to be disposed of. On another occasion, the respondent placed a chair on top of a table and stood or sat on the chair, claiming that he wanted to be the king or queen of

the gathering. There was some uncertainty in the evidence as to whether or not the respondent had expressed this wish himself, or whether Naomi was told by the respondent's friend, Oelofse, who also testified, that the respondent wanted to be the king or the queen of the gathering. Naomi had to ask the respondent to get off the table. The respondent also made a nuisance of himself by improperly approaching some of the male guests and kissing them in the neck. The guests were upset and some of them left.

When the respondent was reprimanded by Naomi, he insisted on seeing the owner, which is the appellant. The appellant had left by then.

[17] It is common cause that before the incident of 25 October, the appellant did not know the respondent. The respondent only knew her from a distance. It was never disputed that the respondent knew that the appellant was the owner of the restaurant and the supermarket. The reason why the appellant did not know the respondent, was because she worked in the superette and not in the restaurant and the bar.

[18] As to the overdose of drugs taken by Juan, Naomi testified that her parents reported to her that it was the respondent who had supplied the drugs to Juan, which led to him taking the overdose. This is why he paid the hospital account. Naomi also testified that Juan had laid a charge against the respondent with regard to the supply of drugs with the Pretoria North police. The information that Naomi

had was that the police were busy investigating the case and she testified that she told the appellant that the police were looking for the respondent.

[19] It is not in dispute that Naomi reported to the appellant, as her employer, about all the incidents of misbehaviour on the part of the respondent in the bar and restaurant and also, about the alleged supply of drugs by the respondent to Juan and the subsequent overdose and hospital treatment.

[20] When the respondent was confronted in cross-examination with his alleged improper behaviour in the restaurant, he simply denied having behaved as alleged. He offered no more than a bare and, in my view, feeble, denial. He testified that he had never had any difficulties with Naomi and the only reason he could offer for her fabricating such evidence, was that she may have been protecting her employer. I consider this evidence to be unconvincing. The learned magistrate did not analyse the evidence. In my view it is improbable that Naomi would have fabricated evidence about such conduct, in such detail, describing some rather unusual behaviour, if the incidents did not take place. On the probabilities, I am persuaded that the evidence of Naomi in these respects ought to prevail.

The appellant, in her testimony, also confirmed that Naomi reported these details to her before the incident took place. At that stage, there was no question of Naomi having to "protect her employer". This corroborates the evidence of Naomi.

[21] As to the issue of the alleged drug supply by the respondent to Juan, the respondent, in cross-examination, confirmed that he went to the hospital and paid the account, but said that he simply did so as a gesture of goodwill. I find this inherently improbable. What is clear, is that the respondent was well acquainted with Juan, his parents and the rest of the siblings, including Naomi.

[22] Importantly, when the respondent was cross-examined about this alleged drug issue, there was an objection on the ground that the evidence put to the respondent was based on hearsay. The learned magistrate asked the cross-examiner whether Juan would be called as a witness which the cross-examiner confirmed. Later, and after the appellant and Naomi had testified, the attorney of the appellant asked for a postponement in order to present the testimony of Juan. The appellant (as defendant) tendered to pay the wasted costs flowing from such a postponement. It was the first time that the matter was on trial so that it would have been a first postponement. The application for postponement was opposed, on the ground that Juan should have been subpoenaed timeously. The appellant's attorney explained that Juan had recently taken a new job so that it was not anticipated that he would not be able to attend. The learned magistrate refused the postponement and the appellant had to close her case. I consider this decision of the learned magistrate to have been unreasonable, and not in the interests of justice. While it can be argued that Juan's evidence that the respondent supplied him with the drugs (this much was conveyed to the court by the appellant's

attorney with regard to what his evidence would be) would not have been directly relevant to the pure issues flowing from the defamation action, it is fair to assume that Juan's evidence may well have seriously impacted on the credibility of the respondent.

[23] Turning to the incident of 25 October, both Naomi and the appellant testified that Naomi reported to the appellant that the respondent and his friend Oelofse had arrived at the restaurant. It is clear from the general tenure of Naomi's evidence, that she wanted the appellant to take steps against the respondent. The appellant also testified that Naomi reported to her that the respondent was there and that he was not welcome because of previous incidents that had happened.

[24] Naomi then related the events as follows:

"Toe hy nou gevra was om die perseel te verlaat? --- Toe ek vir Yvonne gaan roep het?

Ja. --- Rudi en die outjie wat nou nou net hierso was.

Mnr Oelofse? --- Ja. Hulle het in die bar ingestap, ek het nie met hulle gepraat om te hoor wat hulle wil drink of iets nie. Ek het direk na Yvonne toe gestap. Sy was besig by die lotto gewees. Toe sê ek vir Yvonne, 'Die ou wat moeilikheid maak is by die bar. Hulle is hierso by die bar.'

Net so bietjie? --- Toe sê Yvonne ja sy is nou daar. Toe loop ek en sy saam na Rudi daar. Toe staan Rudi en die ou by die bar.

Watter ou, Oelofse? Oelofse getuig dat hy was daardie stadium in die toilet gewees? --- Nee hulle altwee was daar by die bar gewees. Hulle altwee was by die bar gewees. Rudi het aan die regter kant gestaan en hy het aan die linker kant gestaan by die bar. In die hoek. Ek het daar gestaan en toe sê Yvonne vir hom asseblief gaan uit. Twee keer. Toe wou hy nou die rede hê hoekom Yvonne vir hom sê hy moet gaan. Toe sê sy, 'die polisie soek jou'. Toe loop hy. Toe loop Yvonne terug lotto toe."

[25] Naomi denied that the appellant spoke to the respondent in a loud or aggressive tone.

"Yvonne ken hom nie eers nie. Dit is die eerste keer wat sy hom gesien het. Ek het vir haar gewys hoor hier dit is die ou.

Hoekom sê jy, hoekom het sy vir hom gesê die polisie soek hom? --- Oor my boetie wat 'n saak teen hom het. ...

Vertel vir die hof wat jy gesê het vir haar? --- Ek het na Yvonne toe gestap en toe sê ek vir haar, 'Yvonne die ou wat hier is, Rudi, my boetie het 'n O.D. gekry oor hom'.

Wat is 'n O.D? --- O.D. is 'n overdose.

Op wat? --- My pa het gesê moon flower.

Drugs? --- Drugs ja drugs. Hy het 'n O.D. gekry daar, my ma het my gebel en gehuil ..."

[26] Naomi also testified

"So jy het vir Yvonne gesê hy het jou broer 'n O.D. gegee en die polisie soek hom? --- Ja hulle is besig met hom."

[27] In essence, this evidence was corroborated by the appellant. The evidence of the appellant goes like this:

"Naomi came to call me, to tell me that Mr ...

Du Toit? --- was not welcome because of previous incidents that happened. So I came to the bar and I said to him, sir will you please leave. I have repeated myself twice, sir will you please leave. Then he said he wants a reason. So I said because the cops are looking for you. He still flashed R100,00 and he said he wants to buy something. I said no I don't want your money. Go buy somewhere else. I don't want you here. ..."

[28] On the question of whether the appellant intended to defame the respondent (the question of *animus iniuriandi*) her testimony goes as follows:

"Now when you uttered those words, the cops are looking for you, what was your intention by using those words? --- I just said that, you are not welcome. Not only, I don't want you in here. The cops are looking for you but I have no other intention. I mean he is a customer.

You have heard the evidence this morning that he said that it was your intention to defame him? --- Not at all. Why? What would I gain out of that?

And you damaged his reputation and his dignity? --- None at all. I tried to protect my restaurant.

Was it ever your intention to do him some harm? --- No I don't know Mr Du Toit and I am always in the supermarket side and I don't know him personally. So why would I want to do anything against him personally.

It is common cause that he asked you a reason and you gave him the reason? --- The reason, because the cops are looking for you because I mean he drugged Naomi's brother. Obviously the cops are looking for him."

The appellant said she spoke in both languages but thought the "polisie soek jou" was in Afrikaans instead of "the cops are looking for you". In my view nothing turns on this for present purposes.

[29] The appellant testified repeatedly that she wanted to protect her restaurant. It is a family restaurant visited by children in the company of their parents where liquor is served during the meal. The police warned her that restaurants are places where drugs are peddled. She wanted to protect her family restaurant.

[30] In my view, she stuck to her guns in the face of intensive cross-examination. It was argued on behalf of the respondent that at one point the appellant admitted that she defamed the respondent. I do not agree with this interpretation of her evidence. It appears on p67 of the record. She insisted that she did not intend to

personally harm the respondent but she wanted to protect her other customers. In any event, she would not have appreciated the legal implications and technicalities of the rather vexed subject of defamation. On her evidence as a whole, she persisted with her version that she did not have the intention to harm or defame the respondent: she was requested by her trusted employee of many years, in the face of a series of complaints about the respondent's conduct, to ask him to leave. She did not know him before that. She did what she considered to be her duty as the owner. Her admission in cross-examination that a request for someone to leave because the police was looking for him, would amount to a suggestion that the person had committed a crime otherwise the police would not be looking for him, should be seen against the background of the circumstances as I have attempted to describe them.

[31] It is clear that at least Naomi and Oelofse heard the appellant uttering the words "die polisie soek jou". The required publication has therefore been established.

[32] I am not persuaded, on the evidence, that the appellant acted in a loud or aggressive manner. Her evidence in this regard is corroborated by Naomi. Oelofse, who said that he was approaching the scene when he heard this particular utterance, said nothing about aggression or a loud voice. He did, however, say that the impression on the appellant's face indicated to him that "daar is probleme". He said "Al wat ek gehoor het is 'die polisie soek jou'."

[33] It is common cause that the respondent and Oelofse then left the restaurant.

A few more remarks about the evidence

[34] It appears from the respondent's evidence that he made use of extensive notes "Dit is my papiere om my getuienis te help waar my geheue my sou in die steek laat." In cross-examination he was asked to refrain from doing so. He admitted that he read from these notes extensively when giving evidence in chief "Maar ek sien u het die heelyd daar afgelees nie waar nie? --- Dit is korrek." It is clear that, in his evidence in chief, he made use of these notes to express his feelings and the alleged impairment of his dignity as a result of the alleged defamatory utterances of the appellant. He made allegations about his constitutional rights which had been infringed. All this appears to have been prepared notes which he extensively used during his evidence in chief.

[35] What is significant, in my view, is that it clearly appears from the evidence of the respondent in cross-examination that he felt insulted because he was asked to leave the restaurant rather than because of the alleged defamatory words.

"As ek u getuienis reg verstaan meneer dan gaan dit eintlik vir u hierso oordat u voel gekrenk en u voel nou seergemaak oor die feit dat sy vir u gesê het dat sy vir u sê jy moet haar perseel verlaat? --- Absoluut edelagbare.

En dit is eintlik die rede hoekom ons vandag hier in die hof staan. Is omdat sy vir jou gesê het verlaat, jy voel dit is jou grondwet is daardeur, grondwetlike regte is daardeur geskaad? --- Absoluut edelagbare.

U voel sy was onbillik teenoor u gewees. Dit is wat u netnou vir ons gesê het hierso, om vir u te sê u moet die perseel verlaat? --- Dit is hoe ek voel ja edelagbare.

U voel deur vir u te sê verlaat die perseel het sy u disrespekvol hanteer? --- Die manier hoe sy dit gesê het edelagbare was disrespekvol.

U sê ook sy tree partydig op om vir u te sê u moet die perseel verlaat? --- Absoluut edelagbare.

En u sê ook om vir u te sê verlaat die perseel is u vryheid u ontnem? --- My vryheid van beweging."

In re-examination, an attempt was made to rectify this state of affairs but it was not convincing. It seems to me that the main thrust of the evidence of the respondent was not aimed at the alleged defamatory words, as pleaded, but at the fact that he was asked to leave the premises for, allegedly, unfounded reasons.

[36] It emerged from the cross-examination of the respondent that he could not demonstrate any tangible consequences, adverse to him, flowing from the alleged defamatory statement: his businesses were not affected, his good friends remained good friends and he could only assume that some of those present in the bar who may have heard the utterances of the appellant may have held negative views of

him as a result thereof. It is true that Oelofse said that a proposed business deal between him and the respondent was discontinued by Oelofse when he heard from the appellant that the police were looking for the respondent. This involved the proposed purchase of a foreign registered truck stored by the respondent with the view to using the truck for transport services, with Oelofse being the driver. Oelofse said that when he heard about the police possibly looking for the respondent he felt there may have been irregularities with the registration of the truck. There is no clear evidence of any tangible prejudice flowing from this alleged cancellation of the deal for the respondent. Moreover, Oelofse and the respondent had been friends for many years and, when they testified, they were still good friends. It is doubtful whether the evidence of Oelofse can be seen as objective under these circumstances.

[37] The learned magistrate did not deal with any of these aspects neither did she analyse the evidence in any detail.

Brief remarks about the legal position

[38] I consider it convenient to briefly refer to a few remarks by the author Kinghorn on *Defamation* in LAWSA vol 7, 2nd ed, paragraphs 232 and further.

In paragraph 234, the following definition of defamation is offered:

"The delict of defamation is the unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. A statement is

defamatory if it has the effect of injuring a plaintiff's reputation. A plaintiff's reputation is injured if the statement tends to lower the plaintiff in the estimation of right thinking members of society. The elements of the delict can therefore be summarised as the unlawful or wrongful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. ... Once a plaintiff establishes that a defendant has published a defamatory statement concerning him or herself, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts either unlawfulness or intention."

- [39] The first issue for decision is whether the respondent had established and proved that the words "die polisie soek jou" were defamatory in these circumstances.

It is doubtful whether the words lowered the plaintiff in the estimation of Naomi and Oelofse. Naomi already had a bad impression of the plaintiff (the respondent) and this utterance was made at Naomi's instance so that it could not have any effect of lowering the plaintiff in her estimation. Indeed, she herself told the appellant that the police were looking for the respondent. As far as Oelofse is concerned, he had been a good friend of the respondent for many years before this incident and remained so up to the time when he testified. It is doubtful, on the probabilities, whether these words would have lowered the plaintiff in his estimation, although he made some attempts to suggest that this was the case

when he testified. There is no clear evidence that any other people present heard the utterances or that they caused the plaintiff to be lowered in their estimation. One JP, to whom the respondent said he was speaking before the appellant spoke to him, asked Naomi afterwards what the appellant had said. This evidence is undisputed.

[40] I also consider the following words of the authors Neethling, Potgieter and Visser *The Law of Personality* on p149 to be of relevance for purposes of the present enquiry:

"If the words have a double or ambiguous meaning – one defamatory and the other non-defamatory – the meaning inferred must be the one most favourable to the defendant in terms of the maxim *semper in dubiis benigniora praeferenda est*. Therefore there is a presumption that the words are innocent until the plaintiff proves the contrary on a balance of probabilities. If the plaintiff fails, the defendant goes scot-free."

- See the authorities quoted in footnote 89 on p149.

It was argued by Mr Brand on behalf of the appellant that the words "die polisie soek jou" are not *per se* defamatory. It can mean, for example, that the police want to contact the individual for investigation purposes or to get a statement from him. As it was put in *Minister of Justice v SA Associated Newspapers Ltd* 1979 3 SA 466 (C) at 474, quoted by the learned authors in footnote 89,

"For the words to be defamatory ... the implication must be one that must inevitably be drawn and be the only one that can reasonably be drawn by the ordinary reasonable reader."

For these reasons, it appears to me that the words are ambiguous and, where there is a presumption that the words are innocent until the contrary is proved by the plaintiff, it seems to me fair to conclude that the appellant, in these particular circumstances, ought to receive the benefit of the doubt. I am not persuaded that the plaintiff discharged the *onus*, on a balance of probabilities under these circumstances.

- [41] In addition, Mr Brand offered another argument altogether: he argued that where the alleged defamatory statement was made at the insistence of the respondent himself, where the respondent demanded a reason for the appellant's decision to ask him to leave and where the respondent must have anticipated that such a reason could not have been flattering or favourable towards him, he consented to being prejudiced by the utterance which may follow and, in the circumstances, it is not open to him to proceed with this damages action. It is a case of *volenti non fit iniuria*. In support of his argument, Mr Brand relied on the case of *Jordaan v Delarey* 1958 1 SA 638 (TPD). The facts in that case may be slightly distinguishable. The plaintiff insisted that the defendant should repeat the insult in front of the police, which he did at her request. He also did so at the request of the police before the plaintiff, having summoned the police, was present. The
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learned judge found that the defendant only complied with the plaintiff's request and the alleged *injuria* took place with the assent of the plaintiff and the learned judge granted absolution from the instance after finding that the maxim *volenti non fit iniuria* applied – at 639A-C.

In my view, there is much to be said for the argument of Mr Brand on the basis that the respondent was requested twice to leave the restaurant and insisted on an explanation before doing so. I agree with the argument that the respondent must have anticipated that the reply or the reason, when given, would not be flattering and may well be derogatory or insulting. Moreover, for the reasons mentioned, there was no evidence to show, on the probabilities, that any of those within earshot would have considered these words to have lowered the reputation of the respondent in their estimation.

In the circumstances, I have come to the conclusion that the plaintiff (respondent) failed to discharge the *onus* of having to establish a defamatory statement.

[42] On the assumption that I may be wrong in this conclusion, I turn to the question whether the appellant managed to avoid liability for defamation by raising a defence "which rebuts either unlawfulness or intention" – as per *Kinghorn, supra*, at para 234 p231.

[43] As to the question of unlawfulness, Mr Brand referred us to the judgment of *Le Roux v Dey* 2011 3 SA 274 (CC) where the following was said at 315A-D:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict:

- (a) the criterion of unlawfulness ultimately depends on a judicial determination of whether – assuming all other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and
- (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms."

In *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (AD) the following was said at 588H-I:

"As defences excluding lawfulness, their boundaries are determined by applying a general criterion of reasonableness... The criterion of reasonableness necessarily introduces considerations of public and legal policy."

In *Le Roux v Dey, supra*, at 315D-F, it was also held that the more recent approach of our courts is that there is no *numerus clausus* of justification grounds when it comes to the question of unlawfulness.

In the present case, we are dealing with a 49 year old widow, the owner of a restaurant and superette, approached for guidance and assistance by a trusted employee telling her that the "troublemaker" was not welcome in the restaurant, reporting in detail about the conduct of the respondent including the fact that he had allegedly caused the employee's brother to suffer an overdose, and, acting on that request, doing her duty to politely ask the "troublemaker" to leave the restaurant, as she was entitled to do. She also said repeatedly that she wanted to protect her restaurant particularly from the point of view of the child patrons. She had been warned by the police that drugs are pedaled in restaurants.

In my view, "considerations of public and legal policy", in this instance, as per *Le Roux v Dey*, would dictate that the conduct of the appellant was not wrongful.

[44] For this reason, also, the action of the respondent in the court *a quo* should have failed.

[45] Turning briefly to the question of whether or not the appellant had managed to rebut the presumption of intention (*animus*) in order to escape liability as intended by the legal requirements spelt out by *Kinghorn, supra*, I have dealt in some detail with the evidence of the appellant in this regard. For practical purposes, this evidence was undisputed. She did not even know the respondent. She had no intention of defaming him or causing him prejudice. She said so repeatedly, even in cross-examination. She was only doing her duty by her employee and

protecting her patrons and her restaurant. In my view she succeeded in discharging the burden resting upon her in this regard in order to avoid liability.

Conclusion

[46] In all the circumstances, and for the reasons mentioned, I am of the opinion that the plaintiff's (respondent's) action in the court *a quo* should have failed. I am of the view that the learned magistrate erred in finding that a defamatory statement had been proved, and, if I am wrong in that regard, I am of the view that the learned magistrate misdirected herself by finding that the actions of the appellant were unlawful and that she acted *animo iniuriandi*.

The order

[47] I make the following order:

1. The appeal is upheld with costs.
2. The order of the learned magistrate *a quo* is set aside and replaced with the following: "The action is dismissed with costs."



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

A554-2011

I agree



M J TEEFO
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 15/6/2012
FOR THE APPELLANT: C F J BRAND
INSTRUCTED BY: ANDRE GROBLER ATTORNEYS
FOR THE RESPONDENT: A VAN NIEKERK
INSTRUCTED BY: NIC PRETORIUS ATTORNEYS