

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No: A 510/01

In the matter between:

**FOODWORLD STORES DISTRIBUTION  
CENTRE (PTY) LTD  
Appellant**

**First**

**LIYAQAT PARKER**

Second Appellant

**WAZIER PARKER**

Third Appellant

**ILYAS PARKER**

Fourth Appellant

and

**AKBAR ALLIE**

Respondent

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**JUDGMENT: 26 APRIL 2002**

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**VAN ZYL J:**

**INTRODUCTION**

[1] The respondent was the plaintiff in a delictual action for damages brought in the Goodwood Magistrates' Court against six defendants, including the four appellants as, respectively, the first, second, third and sixth defendants. For the sake of convenience I shall refer to the appellants collectively as "the appellants" or "the Parkers" and individually as "Foodworld", "LA Parker", "W Parker" and "I Parker" respectively.

[2] The action consisted of two claims. The first was based on *iniuria* and the second on defamation. Both claims against the fourth and fifth defendants (Iqbal Sayed Abdurahman and Rashied Parker) were dismissed with costs. The second claim against W Parker and I Parker was likewise dismissed with costs. On the first claim, however, judgment was given against all the appellants, jointly and severally, in the

amount of R7 500,00. On the second claim judgment, in the amount of R15 000,00, was given against only Foodworld and LA Parker, once again jointly and severally. The appellants have, to the extent that the aforesaid judgment and orders operate against each of them, lodged an appeal against such judgment and orders. No cross-appeal has been noted.

[3] The first claim was to the effect that, on or about 12 January 1998 (it was in fact 13 January 1998), the appellants, together with the fourth and fifth defendants, acting within the course and scope of their employment with Foodworld, wrongfully and intentionally averred to the respondent that he had stolen goods to the approximate value of R86,00. This infringed upon his dignity and caused him damages in the amount of R20 000,00.

[4] The second claim was that, on a subsequent date during January 1998, the same persons, once again acting within the course and scope of their employment with Foodworld, wrongfully and intentionally made defamatory allegations about the respondent. These allegations, which were made to certain other directors and employees of Foodworld with a view to defaming the respondent and infringing upon his dignity, were to the effect that he was a thief and could not be trusted. As a result the respondent suffered damages in the amount of R80 000,00. Despite being called upon to do so, they refused to tender an apology.

[5] Foodworld raised a special plea that the respondent was precluded from bringing an action against it in that there had been a settlement of the proceedings instituted by the respondent, in the Commission for Conciliation, Mediation and Arbitration (CCMA), for his wrongful dismissal by Foodworld. The agreement of settlement, concluded on 2 March 1998, was to the effect that the “allegations of theft” against the respondent were withdrawn and that Foodworld would pay him the sum of R12 000,00 “in full and final settlement of dispute”. It was signed by the respondent and by LA Parker and W Parker on behalf of Foodworld.

[6] In their main plea to the first claim the appellants denied having averred that the respondent had stolen any goods. In the alternative, if the averment had been made, it was not wrongful in that:

- a) it was true, or substantially true, and in the public interest that it be made, particularly in that it concerned the honesty of the respondent and his suitability for continued employment by Foodworld; or
- b) it was made in the course of an enquiry into the respondent's honesty and

suitability for his continued employment by Foodworld, was germane to such enquiry and was made to a person or persons who had a duty or right to hear such averment; or

- c) it constituted legitimate criticism of the respondent.

It was hence denied that the appellants had caused the respondent any injury to his dignity.

[7] In regard to the second claim the appellants raised virtually the same plea as in respect of the first claim. In addition they admitted having refused to apologise to the respondent. They denied, however, that they were under any obligation to do so. For the rest they denied having defamed the respondent.

#### **THE EVIDENCE**

[8] At the commencement of the trial the court was requested to consider the special plea relating to the settlement of the respondent's claim for wrongful dismissal before the CCMA. Only LA Parker was called to testify in this regard. After considering his evidence and counsel's arguments, the learned magistrate dismissed the special plea. Although the appellants have questioned the correctness of this ruling, it is not necessary, for present purposes, to give it further consideration. Of some relevance, however, is LA Parker's evidence on the merits of the respondent's claims, particularly as elicited during cross-examination. I shall return to it below.

[9] The respondent's brother, Dr Yusuf Allie, was not present on either of the occasions founding the claims of the respondent. He was hence unable to testify as to the alleged *iniuria* or defamation. He did testify, however, that LA Parker had told him, during a private meeting, that the respondent had stolen certain goods from the Elsies River branch of Foodworld, which had been under his management at the

time. He had also marked down the prices of goods bought by him. He had admitted doing so and had asked for forgiveness. To make matters worse, he had previously committed theft while in the employ of the Wynberg branch of Foodworld. Consequently Foodworld no longer wished to retain him in its employ. At a later stage, after the respondent had been dismissed, W Parker confirmed to Dr Allie that the respondent had stolen goods to the value of R70,00 or R80,00. When Dr Allie subsequently discussed these allegations with the respondent, he denied that he had stolen or marked down any goods and likewise denied that he had admitted doing so or that he had asked for forgiveness.

[10] The respondent testified that he was permitted, as manager of the Elsie's River branch of Foodworld, to purchase goods on credit. The procedure was that the items purchased by him were to be recorded under his name in a credit book. This was to be done by another employee, and not by himself. Thereafter the items would be checked by security on his departure from the premises.

[11] On Sunday 4 January 1998 the respondent wished to purchase goods to the value of between R60,00 and R80,00. When he sought to have his personal purchases recorded, the credit book was missing. He therefore recorded them on a loose sheet of paper that he gave to the perishables manager, Mr Naseeb Gafoor, to check and sign. On leaving the store the goods were checked by security. A similar situation arose a few days later, on 10 January 1998. In this case one Mr Hishamudien Sauied, the assistant store manager, stapled the sheet of paper recording the respondent's purchases into the credit book. He thereupon rewrote the record of purchases into the book. At no stage was it suggested to the respondent that he had under-marked or under-priced any items.

[12] On Monday 12 January 1998 the said Sauied informed the respondent that there was “something wrong” with his book. He chose not to disclose the problem, saying that one of the directors would be in touch with him. Subsequently I Parker requested him to attend at LA Parker’s office the next morning. LA Parker, W Parker and I Parker were present. The scene was set for the alleged *iniuria* when LA Parker said to him:

Mr AK, you have been called in because certain allegations has [sic] been made against you that you have taken goods without paying.

When the respondent asked what he had taken, I Parker said it was “the stuff that was taken on the 4<sup>th</sup> of January ... the stuff that Naseeb checked”. The respondent admitted having taken the goods, pointing out that he had given the paper to Naseeb to give to Sauied, who had to enter it in the respondent’s book. When he asked who had made the allegations, they did not disclose their source but requested him to return to the store. They would let him know what was to happen.

[13] At this juncture the respondent’s counsel asked him: “Did they raise the possibility of anything else that you might have stolen?” His reply was that they had asked him about milk. His response had been that he had paid cash for milk for his brother. They were apparently satisfied with this explanation. His counsel then asked: “Did they suggest that you had stolen the milk as well?” To this he responded: “Exactly”.

[14] The respondent denied having broken down and admitting the allegations made against him. He had, however, been “emotional”. He could not say whether the Parkers had accepted his explanation. At this stage his counsel posed the question: “How did you

feel in the meeting being accused of theft?” His response was that he had been “very upset and disturbed”, but only for a short while, because, on his return to the store, LA Parker had called him by telephone and asked him not to mention their discussion. This gave him “some assurance that they must have believed my story”.

[15] The respondent was not present at the meeting at which the alleged defamation against him was committed. He was, however, aware of the meeting, which was followed up by a request, on the following day, that he terminate his employment. He then realised that they had not believed his story, causing him to feel bitter. This prompted him to institute proceedings before the CCMA. He agreed there to settle his claim against Foodworld for wrongful dismissal on the basis, *inter alia*, that the “allegations of theft” against him be withdrawn. When he overheard LA Parker say, however, that “ ’n skelm bly ’n skelm en die wat saam met hom staan is ook skelms”, he decided to institute the present action.

[16] The respondent’s case was closed without further evidence being led on either the *iniuria* or defamation. It would appear that the respondent’s counsel set great store in this regard on the evidence elicited from LA Parker in the course of cross-examination, rendering further evidence unnecessary. I now turn to his evidence.

[17] On the alleged *iniuria* LA Parker testified that the respondent admitted, at the meeting with the Parkers on 13 January 1998, having stolen goods from the store, after

which he started crying and asking for forgiveness (he used the Islamic term *mauf*). They were shocked at this, but wished to keep the matter as quiet as possible and to resolve it amicably, because the respondent was a family member.

[18] At the subsequent managers' meeting where the alleged defamation took place, LA Parker testified that he had asked the meeting whether he could "raise an issue that is a family matter" and test "the feeling of how the managers felt at that time". He referred in this regard to the "incident" at Elsie's River, without mentioning the respondent by name and without referring to the alleged theft of goods. None of the managers asked for any details and he assumed that they already knew what had happened. The main purpose of his raising the issue was to establish whether they would object to his retaining the respondent in the employ of Foodworld until he could find suitable employment elsewhere. Their response was that he should be treated no differently from any of them should they be in the same position. The decision was hence taken to retrench the respondent.

[19] LA Parker was subjected to intensive cross-examination by counsel for the respondent. He made it clear, however, that the purpose of the meeting on 13 January 1998 was to establish the truth and to hear the respondent's version relating to the allegations of theft made against him. He reiterated that the meeting commenced with his saying to the respondent that there were allegations that he had taken goods without paying for them. No value (R86,00 or otherwise) was attached to the goods in question.

He then testified:

We didn't exert any pressure on him, nothing like that, because he's family and we wanted to deal with this matter. My biggest shock was if he had to tell me listen, here's the proof and he would have felt I accused him falsely, and that pain to call my uncle in the office to tell him this was very traumatic for all of us. Nothing was said, we were all quiet and he started crying and he said I'm sorry, I mauf. Mauf means I apologise for what I did. I didn't pay for those goods.

[20] According to LA Parker, I Parker then asked the respondent how long he had been engaged in this kind of conduct. He replied that it had been since December (1997).

I Parker responded that he thought he was lying, and that he had in fact been doing it for a long time. This prompted the following exchange between the respondent's counsel and LA Parker:

Well, you will agree with me Mr Parker that it's a shocking experience to be accused of theft. - - - Yes.  
And that's really what you were doing? - - - Yes, also the fact is, if he had to tell me listen, this is where I wrote it down, the book is at the office, it would have been cleared up. We wouldn't have been here today.

[21] A similar exchange took place in regard to the subsequent meeting of managers. After telling them that he had a family problem he would like to deal with "but without setting a precedent", LA Parker asked for their support for a proposal that he had. The evidence then reads:

Yes? - - - And I said to them, all of them know what happened at Elsie's River.  
By that you were alluding to Mr Allie's conduct as you saw it? - - - Yes, not ...  
(intervention)

And the way you saw it was theft? - - - The way I saw it what he told me was theft.

Yes, all right. Carry on and every one would have known that, everyone at that meeting?

- - - None of them asked me what it was, what it's about and I assumed they knew about everything.

In other words you told everyone in that meeting that you have a problem arising from Akbar Allie's theft. - - - I didn't use his name. I said I had a problem.

But that's what they would have understood? - - - Yes.

[22] A further exchange on the same theme appears a little later in the record:

Now can I suggest to you Mr Parker that once you said that to the 20 people assembled there, the story would spread like wild fire. - - - By their silence to me, they knew already what had happened, because you know in a company, in a family business like this you know there are 50 people working in that store. There's a grapevine that these things could possibly leak out.

Mr Parker, but it's a little different, rumour mongering, here is the chief executive officer of the Foodworld Group saying, conveying quite clearly to those present that I have an employee, manager of Elsie's River who is a thief. - - - I didn't say that.

I know, but they knew it, that's how they understood it. - - - I don't know what they understood by that. They never told me what they understood.

I thought we had already covered that one Mr Parker. You said that it ...  
(intervention) - - - I assumed ...

I assume it as well. Now you will agree with me that it's a very different category. This was normal rumour mongering which happened at a store, have you heard, have you heard. To a meeting formally called by the chief executive officer where unequivocal allegations of theft are made. - - - It wasn't called for, for that, it was a normal manager's

meeting where it was raised.

The question is very different Mr Parker isn't it? You seem reluctant to concede that. - - - I, I presumed that the fact that they didn't ask me any questions they knew about it beforehand.

It's very different, isn't it? - - - What is different?

It's very different having the chief executive officer address the assembled store managers on the issue from your normal rumour mongering and gossiping which happens at store level? Everyone would have left that meeting with the impression that you, the chief executive officer, had concluded that Akbar Allie was guilty of theft and that you had a problem arising from that. - - - I don't know what they would have concluded from there. Each one made up their own mind most probably.

[23] W Parker testified that he had had a close relationship with the respondent, his second cousin. He had in fact arranged for him to be employed by Foodworld. He had first become aware of the allegations against the respondent when LA Parker told him that "certain irregularities" were taking place at the Elsie's River branch. This involved the failure to record or pay for goods purchased by the respondent at the branch. LA Parker asked W Parker, because of his close relationship with the respondent, to inform him that he would be called in the next day to explain what had happened. When W Parker raised the matter with him privately in his office at the Elsie's River branch, the respondent had said in Afrikaans: " Ek weet ek was verkeerd gewees". The situation was upsetting and awkward for W Parker, who then left the premises.

[24] At the meeting with LA, W and I Parker the next day, the respondent had suggested that he had written up the goods in question in another book. He did not, however, have the book. W Parker could not remember that under-pricing had also been discussed, but he confirmed LA Parker's evidence that the respondent, who had become "visibly upset and emotional", appeared to break down and cry. He had admitted being involved in the alleged conduct since the previous month, at which juncture I Parker had said that he was lying, having done so since being previously employed at the Wynberg branch of Foodworld. He then asked for forgiveness, significantly using the Islamic term *mauf*, which is more fundamental and sincere than a simple apology.

[25] W Parker likewise confirmed LA Parker's version of what had happened at the subsequent manager's meeting. The purpose of the meeting was to determine the feeling of the managers regarding the steps to be taken against the respondent as a result of the irregularities at the Elsie's River branch. The respondent's name was not mentioned and nothing was said about what he had allegedly done. The managers made it clear that he should not be given preferential treatment.

[26] Three further witnesses, who had been employees at the Elsie's River branch of Foodworld at the time of the incidents in question, testified as to their perception of the alleged irregularities committed by the respondent. They were Mrs Naseema Banu Parker, an office clerk, Mr Naseeb Gafoor, perishables manager, and Mr Hishamadien

Sauied, assistant store manager. Sauied tendered the significant testimony that, after the respondent's meeting with the Parkers, he had returned to the store and confessed to him (Sauied) that he had been guilty of "changing the prices and taking the goods on the Sunday". For the rest it is not necessary, for present purposes, to consider their evidence.

### **JUDGMENT OF THE COURT *A QUO***

[27] The court *a quo* dealt in general, if not in somewhat sweeping, terms with the evidence. The learned magistrate emphasised the fact that, during the respondent's meeting with the Parkers, I Parker had accused the respondent of stealing from his Wynberg days. He also observed that LA and W Parker had played with words and refused to concede "even the very basic terms of what was said and documented in the meetings". The Parkers, he said, had ensured that all present at the meetings giving rise to the respondent's claims knew that they were referring to the respondent and that "he was indeed caught out for stealing".

[28] Turning to the credibility of the respondent as a witness, the learned magistrate was satisfied that he had made a good impression. In contrast with "a lot" of the witnesses for the appellants, he was "never arrogant or over-confident" and readily conceded points he could not answer or remember. He was not dishonest and did not fabricate evidence. Nor was his version improbable "as the defendants wish it to be".

[29] The learned magistrate was clearly not impressed by the way in which the defence

was presented. He apparently agreed with the suggestion by counsel for the respondent that LA Parker was an arrogant bully with an oppressive style of management. His "absolute dominance of the business and family oozed from his evidence", despite his attempts to conceal it. His dismissal of the respondent had in fact been the cause of a rift in the family. The other defence witnesses were family members with "a very big interest in the case". They were more intent on covering for themselves and saving their own skins than on telling the truth. Their evidence was poor, "not very truthful and lacked credibility". Very little weight could be attributed to it. The court therefore had no difficulty in rejecting it in favour of the respondent's evidence.

[30] The learned magistrate was extremely critical of the conduct of the Parkers directly after the CCMA settlement had been concluded, in that it indicated that their retraction of the allegations of theft against the respondent had not been sincere. LA and W Parker, he said, had "tried their utmost to colour in their wretched hurtful words said at the CCMA". They had played with words and avoided giving direct answers to questions put to them. W Parker was intent on protecting LA Parker and covering up the contradictions in his evidence. His testimony on the retraction at the CCMA was insincere and "barely short of pathetic". In like manner his evidence relating to the managers' meeting was "very clouded and contradictory". Not surprisingly he did not impress the court as a witness.

[31] I do not propose to deal further with the criticism directed by the court *a quo* at

the defence evidence, other than to observe that much of it turned upon the alleged irregularities at the Elsie's River branch of Foodworld and on whether or not the respondent had committed theft. My general impression is that the learned magistrate approached the matter as if it were a criminal trial in which the respondent had been arraigned on a charge of theft. After considering the defence evidence he held that "the defendants could not show that the plaintiff admitted to stealing or that he did in fact steal (be it false record, no record or underpricing)". This was followed, I hasten to point out, by a finding that the defence of truth and public interest in regard to the *iniuria* claim could not succeed.

[32] The defence of privileged occasion on the *iniuria* claim was dispensed with without much discussion. The same applies to the defences of truth and public benefit, on the one hand, and qualified privilege, on the other, in regard to the defamation claim. For present purposes it is not necessary to deal with this aspect of the judgment.

## **RELEVANT LAW**

[33] The law relating to the delict of *iniuria* is well established and recorded in numerous authorities. Its essential elements are:

- a) factually determinable injury to or impairment of a person's subjective feelings of dignity (*dignitas*) or self-respect by means of insulting conduct or behaviour;
- b) wrongfulness of such injury or impairment in the sense that a reasonable person in the position of the plaintiff would, objectively, feel insulted; and

c) the deliberate intention to cause such injury or impairment (*animus iniuriandi*).

The plaintiff bears the *onus* of proving the factual element which, once established, gives rise to an inference of unlawfulness and intent. The defendant may then rebut this inference by adducing evidence justifying his or her action. See in general Jonathan Burchell *Principles of Delict* (1993) 192-211; J Neethling, J M Potgieter and P J Visser *Law of Delict* (4<sup>th</sup> ed 2001) 13-17 and 353-361. In section 10 of the South African Constitution (Act 108 of 1996) the "inherent dignity" of all persons is respected and protected as one of the human rights contained in the Bill of Rights.

[34] The delict of defamation is a form of *iniuria* that has, in the course of time, developed its own rules and principles. It may be defined as the wrongful, intentional publication of words, conduct or behaviour directed at infringing, or otherwise impairing, the right of a person to the good name, status or reputation he or she enjoys in the community or in society in general. This is assessed by the stature attributed to him or her by other right-minded and reasonable members of such community or society. Inasmuch as it relates, therefore, to the opinion others have of him or her, it is required that the defamatory words, conduct or behaviour be published, in the sense of disclosed, to a third person. It follows, then, that the essential elements for a successful defamation action are:

- a) publication or disclosure by the defendant of the defamatory words, conduct or behaviour to a third person, or to more than one person;
- b) wrongfulness, in the sense that the ordinary reasonable person with normal intelligence and development would, objectively, be of the view that the good

- name, status or reputation of the defendant has been infringed or impaired;
- c) the deliberate intention to cause such infringement or impairment (*animus iniuriandi*).

The plaintiff bears the *onus* of proving publication of the alleged defamation by the defendant. Once proven, there is an inference that such publication was wrongful and intentional. The defendant may then rebut this inference by adducing evidence to justify his or her action. See in general the full discussion in Burchell (par 31 above) 152-188. See also Neethling (par 31 above) 337-353 and the authorities cited there. Inasmuch as the respondent does not rely on the secondary meaning of words attributed to the appellants, it is not necessary to deal with the law relating to innuendo.

[35] In both *iniuria* and defamation claims it is necessary to set forth, in the relevant pleadings, the words, conduct or behaviour complained of. In addition substantially the same words as are pleaded must be proved. See *Hairman v Wessels* 1949 (1) SA 431 (O) at 433-435; *International Tobacco Co of S A Ltd v Wollheim and Others* 1953 (2) SA 603 (A) at 613H-614A; L T C Harms (ed) *Amler's Precedents of Pleadings* (5<sup>th</sup> ed 1999) 147.

## **APPLICATION OF THE LAW TO THE FACTS**

[36] The evidence of Dr Yusuf Allie was of little assistance to the respondent in that he was present at neither of the meetings giving rise to the claims in the present matter. If anything, his testimony supported the case of the appellants on whether or not the respondent had admitted guilt and asked for forgiveness at the meeting with the Parkers.

The fact that LA Parker told him that the respondent had committed theft at the Elsie's River branch, and previously at the Wynberg branch, of Foodworld, does not establish, or even support, the contention that he was accused of stealing goods to the value of R86,00 or, for that matter, to any value.

[37] The respondent's own evidence was restricted to his allegation of *iniuria* arising from the meeting with the appellants and the fourth and fifth defendants on 13 January 1998 (par 3 above). It is clear from his evidence that the fourth and fifth defendants (par 2 above) were not even present and that W Parker barely participated in the discussion.

[38] From the respondent's evidence in chief (par 12 above) it appears that LA Parker at no stage accused him of theft, but merely informed him that he had been called in because "certain allegations" had been made against him relating to his taking goods without paying for them. He was clearly not being accused, but was in fact being given an opportunity to tender an explanation. And this he did, after I Parker had told him that goods in question were those taken by him on Sunday 4 January 1998. He then explained that he had taken the goods but had written them down on a piece of paper he had given to Naseeb with the request that he give it to Sauied, who was to record it in his credit book.

[39] It is abundantly clear from this evidence that the respondent had come nowhere near making out a case of *iniuria* based on an accusation that he had stolen goods, let

alone goods to the value of R86,00. None of the Parkers present at the meeting was implicated in any such accusation. This might have prompted his counsel to ask a leading question (par 13 above) as to whether they had raised the possibility of anything else he "might have stolen". At that stage there had been no mention of his having stolen anything. In any event his answer, namely that they had asked him about milk, contained no suggestion that they had accused him of stealing it. On the contrary they had apparently accepted his explanation that he had bought the milk for his brother. His counsel then followed up with another leading question, namely whether they had suggested that he had stolen the milk as well. His answer, "exactly", was incomprehensible and starkly contradictory to what he had just testified.

[40] After the respondent's case had metamorphosed from an accusation that he had stolen goods to the value of R86,00 to an accusation that he had stolen milk of an undisclosed value, one would have thought that the respondent would reconsider his *iniuria* claim. Far from it. His counsel was apparently intent on eliciting the required evidence by asking yet another leading question (par 14) as to how he had felt being accused of theft! This had the effect of placing words in the mouth of the respondent who, up to that point, had never even used the word "theft" or anything related to it. His reply, namely that he had been "very upset and disturbed", was predictable. Quite unpredictable, however, was his further evidence that this emotional state had been of brief duration, because LA Parker had called him soon afterwards and asked him not to discuss the matter. This had created the impression in his mind that his explanation of the

allegations against him had been accepted.

[41] This is clearly not the stuff that *iniuria* is made of. Despite resourceful efforts by his counsel to fill the *lacunae* in his case, the respondent was unable to make out a case of injury to or impairment of his subjective feelings of dignity or self-respect. On his own version of the events leading up to the meeting with the Parkers, he had committed irregularities by not following the correct procedures when making personal purchases from the store under his management. This would clearly have justified a suspicion of theft and called for an explanation. From my reading of the record, he was given all opportunity to put his case and he even gained the impression that he might have persuaded the Parkers that he was not guilty of conduct unbecoming of a store manager. I respectfully agree with the learned magistrate that, had this been a criminal matter, there would not have been sufficient evidence to justify a conviction on a charge of theft. Unfortunately the learned magistrate did not give full consideration to whether or not the respondent had succeeded in proving (the *onus* being on him in this regard) the factual element of *iniuria* (par 33 above).

[42] Mr Kirk-Cohen, for the respondent, attempted to overcome the aforesaid difficulties in the respondent's case by suggesting that his evidence should be supplemented by evidence elicited from LA Parker during cross-examination. The gist of LA Parker's evidence in chief (par 17 above) had been that, at the meeting of 13 January 1998, the respondent had admitted stealing goods from the store and had asked for

forgiveness.

[43] In cross-examination LA Parker reiterated (par 19 above) that he had not accused the respondent of theft, but had apprised him of allegations that had been made against him. The allegations had related to goods he had taken without paying for them. At no stage was any mention made of the value of the goods (R86,00 or otherwise) and at no stage was he placed under any pressure to confess having stolen goods. On the contrary, because the respondent was a member of the family, they had all wished to settle the matter with as little fuss as possible. It is in this context that he testified: " ... if he had to tell me listen, here's the proof and he would have felt I accused him falsely ..." (par 19 above). This cannot be interpreted as an admission or concession that he (LA Parker) had in fact accused the respondent falsely. It was never put to him as such and was clearly never intended to be an admission or concession.

[44] The outburst of I Parker, that the respondent had been engaged in this kind of irregular conduct since the time of his employment at the Wynberg branch of Foodworld, cannot assist the respondent. It was clearly provoked by the respondent's answer to I Parker's preceding question (par 20 above) and was not the basis of the *iniuria* pleaded by the respondent. His case was that he had been accused of stealing goods to the value of R86,00, not that he had engaged in theft or any other nefarious activities over a long period of time.

[45] LA Parker's positive answers to the two subsequent questions put to him by counsel for the respondent (par 20 above) cannot justify an inference that he admitted having accused the respondent of theft. In his answer to the first question, he simply expressed concurrence with the statement that it was "a shocking experience to be accused of theft". Similarly his response to the second question, namely "that's really what you were doing", was not couched as an admission or concession and must be read in its full context. It was never suggested to him that he was admitting the respondent's allegations relating to *iniuria* and I have no doubt that, if this had been put to him, he would inevitably have denied it.

[46] The respondent was not present at and did not testify as to the alleged defamation perpetrated at the managers' meeting later on in January 1998. In this regard it appears that he relied wholly on the evidence elicited from the defence, which helped him not at all. LA Parker's evidence as to what ensued at the said meeting (par 18 above) was never placed in issue by any evidence tendered by or on behalf of the respondent. The purpose of the meeting was clear: we have a family problem we would like to resolve, but we require your input as to what we should do. Their input was unequivocal: do unto the family member as you would do unto us. At no stage was the respondent's name mentioned, nor was there any discussion as to what he had done to create the family problem. The persons present were, it would appear, already fully apprised as to the nature of the problem and realised that they were now simply being pulsed on a policy matter.

[47] The attempt by counsel for the respondent, in his cross-examination of LA Parker, to remedy the ailing defamation claim, was doomed to failure. On being asked whether he had seen the respondent's conduct as theft (par 21 above) his response was that, as he saw it, from what the respondent had told him, it was indeed theft. Once again this was no admission and, in fact, amounted to no more than an opinion. In a last-ditch attempt to elicit a concession or, better still, an admission from LA Parker, the respondent's counsel attempted once again to put words in his mouth. This appears from the exchange (par 21 above) where he suggests that LA Parker told everyone in the meeting that he had "a problem with Akbar Allie's theft". In similar vein it was put to him (par 22 above) that he had conveyed to the assembly that he had an employee, the manager of the Elsie's River branch, "who is a thief". LA Parker's denial of these allegations was clear and unequivocal.

[48] I find it puzzling why so much negative comment should be attributed to the evidence of W Parker, simply because he confirmed LA Parker's evidence in all substantial respects. Why should this be sinister and why should it characterise him as dishonest and no more than a lackey? Of course the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the person best equipped to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the

justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a court on appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.

[49] With this in mind I must respectfully question the validity of the learned magistrate's credibility findings in the present matter. They appear, in general, to have been somewhat subjective and even emotive. It was never the respondent's case that LA Parker had been an arrogant bully with an oppressive style of management, or that he had been an autocrat in business and family affairs (par 28 above). Yet the learned magistrate held that his "absolute dominance" in such affairs "oozed from his evidence". If LA and W Parker were arrogant and over-confident in court, such conduct certainly did not show from the record. The fact that the defence witnesses were in the employ of Foodworld did give them an interest in the case, but that does not mean that their testimony would of necessity be dishonest and biased. Justified criticism might be directed at the conduct of the Parkers directly after the CCMA matter had been settled. This does not, however, mean that their evidence should be rejected *in toto*.

[50] In my respectful view there is no justifiable reason to reject the evidence of LA or W Parker. It was clear throughout that they, and the other members of the family, were extremely upset at what had developed into a full-scale family rift. They were intent on

resolving it in an amicable way, with the least possible damage to the family and their business interests. The respondent was not suddenly confronted with serious allegations that he was unable to consider in the time made available to him. He was in fact forewarned on 12 January that he would be summoned on 13 January 1998 to a meeting with the directors. He was told what it was about and had the opportunity to prepare himself for the meeting.

[51] Eventually it was only LA, W and I Parker who were present at the meeting. W Parker was clearly a very reluctant participant, in view of his lengthy and very close relationship with the respondent. At the very outset the respondent was given an opportunity to explain the allegations made against him. He made use of the opportunity to tender an explanation and to reply to questions ostensibly aimed at clarifying his explanation. At no stage was he pressured into making admissions or concessions. The outburst attributed to I Parker, as to the period during which the respondent had allegedly been committing irregularities, arose only during cross-examination and from the confirmatory evidence of LA and W Parker. It certainly does not appear to have perturbed the respondent. He did not even mention it during his evidence in chief. This does not, of course, mean that the meeting was normal and happy. It was clearly awkward and painful to all the participants.

[52] I am somewhat less impressed than the learned magistrate with the respondent's evidence. Apart from the fact that he tendered no evidence on which either of his claims

could be justified, much of what he said turned upon whether or not he had stolen goods or acted in conflict with prescribed procedures. For the rest he simply denied the allegations against him. On his own version he had acted irregularly and it is probable that he conceded this at the meeting with the Parkers. It is likewise probable that he apologised for his conduct. The fact that both LA and W Parker testified as to his using the word *mauf*, an Islamic term of apology denoting deep and sincere contrition, has the ring of truth about it. This would explain his having become upset and very emotional, as he himself testified. Of course it may well be that he was apologising for having acted in conflict with established procedures and not for having stolen goods. It may also be that the Parkers misunderstood his apology as confirmation of his having stolen goods.

[53] Whether or not the respondent indeed stole goods cannot, as mentioned before, be resolved on the evidence tendered in this matter. Whether or not the Parkers misunderstood the respondent's apology as indicating an admission of theft rather than an admission of committing irregularities in purchasing goods for his own account, need not detain us. Whatever the situation, it is clear that he was never accused of stealing or of being a thief. At most allegations to this effect were made and those were the allegations that were withdrawn (however insincerely) when the CCMA case was settled.

[54] It follows that the respondent did not provide a factual basis for either the *iniuria* or the defamation claim and must hence be held not to have discharged the *onus* of proof resting on him in this regard. In my respectful view the learned magistrate in the court *a quo* failed to apply his mind to this essential aspect of the case. Inasmuch as he might

have been persuaded that the necessary proof had been furnished by the evidence of the respondent as supplemented by that elicited during cross-examination from LA Parker, I must respectfully differ from him for the reasons set forth above.

## CONCLUSION

[55] In the event the appeal must succeed on the basis that the respondent failed to discharge the *onus* resting upon him in regard to both the *iniuria* and defamation claims.

[56] On the issue of costs Mr Rose-Innes, for the appellants, did not suggest that the costs on appeal should include the costs of two counsel, despite his being ably assisted by Mr Fagan. He did, however, request that the order of costs in the court *a quo* should include the costs of one counsel on the Bar Council tariff. Mr Kirk-Cohen, for the respondent, did not oppose this request.

[57] I would hence make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and substituted by the following:  
“The plaintiff’s claims are dismissed with costs, including the costs of one counsel on the Bar Council tariff.”

**D H VAN ZYL**

Judge of the High Court of South Africa

I agree.

**G JOSMAN**

Judge of the High Court of South Africa