

SOUTH AFRICA / JUDGMENT

Bailey and Others v Botshelo Water Board and Another (2554/2009)

[2014] ZANWHC 20 (15 August 2014)

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COURT

North West High Court, Mafikeng

BEFORE

GUTTA

CASE / FILE NUMBER

2554/2009

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 2554/2009

DATE: 15 AUGUST 2014

In the matter between:

MALCOLM DESMOND BAILEY.....1ST PLAINTIFF

SIMON MONNAPULA GABORONE.....2ND PLAINTIFF

GIFT MPATLISANG LOBELO.....3RD PLAINTIFF

SAMUEL OTLA MANGANYI.....4TH PLAINTIFF

GWENDOLINE MOSETSANA MOTHIBA.....5TH PLAINTIFF

JOSEPH MOSIAPITSO KOTLHAI.....6TH PLAINTIFF

RAYMUNDO LAURELES.....7TH PLAINTIFF

And

BOTSHELO WATER BOARD.....1ST DEFENDANT

THE MINISTER FOR WATER AFFAIRS &

ENVIRONMENTAL AFFAIRS.....2ND DEFENDANT

CIVIL JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] Seven plaintiffs issued summons against Botshelo Water and the Minister of Water Affairs and Environmental Affairs, on two claims

and an alternative claim. The first and second claim is for damages arising from a breach of a written agreement while the alternative

claim is damages for defamation of the plaintiffs' reputation and dignity.

[2] At the commencement of the proceedings, an agreement between counsel for the plaintiff, Mr Hitge, and Mr Hitchings, for the first

defendant, was made that the quantum and merits be separated in terms of Rule 33(4) and in accordance with the stated case, as set out in Annexure "A".

[3] The contents of Annexure "A" are repeated herebelow:

"COMMON CAUSE FACTS:

1.1 Paragraphs 1 to 12 of the particulars of claim.

(10 At the times material to this action, the Plaintiffs have been employed by the First Defendant and had been stationed at its head office in Mmabatho or its Regional office in Montshioa.

11 During or about 19th February 2007 the First Defendant issued the Plaintiffs with disciplinary charge sheets pertaining to alleged

misconduct, which First Defendant alleged the Plaintiffs have made themselves guilty of.

12 The charges formulated by the First Defendant against the Plaintiffs included allegations of theft, fraud and negligence.')

1.2 On or about 19 February 2008 the plaintiffs and the first defendant entered into the written agreements attached to the particulars of claim as annexures "A" to "G".

1.3 The material terms of each of the said agreements are, for the purposes hereof, the same.

1.4 The clause in issue is clause 4 which reads as follows:

4 Confidentiality

The parties agreed to keep the terms of this agreement strictly confidential, and agree not to divulge its terms to any third party

without the prior written consent of the other party.

1.5 The first defendant caused the publication of annexure "I" to the particulars of claim in its annual report for the years 2007/2008 at pages 19 thereof. A complete copy of the report is to be found in the Merits bundle at pages 1 to 60. The plaintiff noted that a copy of the said report is at date hereof available on the internet.

1.6 Each of the plaintiffs is listed in the said Annexure “I”.

1.7 The said report was published to the following:

1.7.1 The second defendant;

1.7.2 Parliament of the Republic of South Africa; and

1.7.3 Government officials in the Department of the 2nd defendant responsible for dealing with public entities on behalf of the 2nd defendant.

1.8 The first defendant is not in a position to admit or deny whether such publication was made to the various water services institutions [sic] the Republic of South Africa as referred to in paragraph 23.2 of the particulars of claim.

1.9 The first defendant is a National Government Business Enterprise as set out in Part B of Schedule 3 of the Public Finance Management Act, 1 of 1999.

ISSUES TO BE DETERMINED IN TERMS OF RULE 33(4):

2. In respect of the main claim:

2.1 Whether clause 4 of each of the contracts entered into between each of the respective plaintiffs and the first defendant is enforceable.

2.2 In the event of the above Honourable Court finding that the said clause 4 is enforceable, whether, the plaintiffs are entitled to claim general damages in respect of such breach.

3. In respect of the alternative claim:

3.1 Whether the conduct of the first defendant in publishing the report set out in Annexure “I” was wrongful.

4. In respect of both claims, the question of costs.”

[4] Hence, on the main claim, the two issues for consideration are, firstly, whether clause 4 of the agreement is enforceable as the first defendant contends that the confidentiality clause (clause 4) is not enforceable as it is contrary to section 50(1)(a) read with sections 55(2)(b) and 55(3) of the Public Finance Management Act 1 of 1999 (“the PFMA”), and secondly, whether the plaintiff is entitled to claim general (non-pecuniary) damages in respect of the first defendant’s breach of contract.

[5] It stands to reason that if I find that the plaintiff’s claim for general damages is not recoverable, then the issue whether

claim 4 is enforceable, need not be considered.

[6] For reasons that will become apparent supra, I have first considered the question whether the plaintiff is entitled to claim

general damages in respect of the first defendant's breach of contract.

B. IS THE PLAINTIFF ENTITLED TO CLAIM GENERAL DAMAGES FOR BREACH OF CONTRACT?

[7] Mr Hitchings submitted the following:

7.1 the locus classicus in this regard is the well-known decision of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)*

(Pty) Ltd 1985 (1) SA 475 (A). In the above case, the plaintiff relied on the defendant's breach of its obligation arising out of contract to act with due professional diligence as founding a claim in delict. The court held that the plaintiff was not entitled to rely on a contractual breach to found a delictual claim;

7.2 in the present case, and to the extent that the plaintiffs have framed their main claim as one for general damages sustained as a result of the plaintiff having breached the confidentiality clause, that the damages claim has not been pleaded as one of specific patrimonial loss (that is, special damages), but rather as general damages intended as a solatium. The damages claimed in the alternative claim based on defamation (which is a fortiori, a delictual claim) is the same amount as that claimed in the main claim. This is a clear indication of the nature of the damages claimed by the plaintiffs;

7.3 in the result, if the main claim is one for delictual damages arising out of the breach of a contract, such claim is, in the light of the *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* decision supra, impermissible;

7.4 it has been finally determined in *Administrator, Natal v Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A) that contractual damages are limited to tangible loss flowing from a breach of contract, and only patrimonial loss is therefore recoverable ex contractu (that is, special damages). The corollary hereof is that general damages which are intangible in nature, typically damages for discomfort, pain and suffering and loss of amenities of life, etcetera, are not recoverable ex contractu.

[8] Mr Hitge conceded that a breach of contract per se does not constitute an iniuria and submitted that general damages can be claimed if the breach is accompanied by contumelia. He relied on the cases of *National Media Limited & Another v Jooste* [1996] ZASCA 24; 1996 (3) SA 262 (A); and *Edouard v Administrator, Natal* 1989 (2) SA 368 (D).

[9] He accordingly submitted that in the context of this case and the common cause facts, a contumelia is apart and general damages are claimable.

[10] In the preamble to the *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* case supra, the following bears

repetition:

“If the Aquilian action were generally available for defective performance of contractual obligations, a party’s performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the bonus pater familias, with untenable results. If it were, on the other hand to be argued that the bonus pater familias would always comply with the standards laid down by the contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract, and there is no policy consideration which would justify such a conclusion. If on the other hand, the standard imposed by law differed in theory from the contractual one, the result must be that the partner agreed to be bound by a particular standard of care and thereby excluding any standard other than the contractual one.”

The Court accordingly held that in the light of the above considerations:

“That it would be undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of professional service like the one in issue.”

[11] The principle to be extracted from *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) supra*, was that a delictual claim was only available in a contractual setting if delictual liability could be established independently of a breach of contract. It would therefore be possible to have a concurrence of delictual and contractual actions on the same conduct, provided that the wrongful conduct infringed a right which the plaintiff held independently of contract. However, no delictual action would lie if

the plaintiff had to rely on the breach of contract in order to establish the wrongful conduct for purposes of the delictual action.

See *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA); 2006 Annual Survey of South African Law, General Principle of Contract, Deeksha Bhana.

[12] Mr Hitge is correct in his concession that generally a breach of contract does not constitute an iniuria and that in certain

circumstances a breach may constitute an iniuria. The circumstances are if the breach is accompanied by a contumelia. It would follow then that the plaintiff must allege and prove additional facts that establish the iniuria.

[13] Mr Hitge submitted that the breach of the confidentiality clause in the agreement constitutes an iniuria. Unfortunately, the

plaintiff failed to allege any additional facts in its particulars of claim that establish an iniuria. The cases cited by Mr Hitge do not assist his case and are distinguishable.

[14] Our courts have consistently held that only patrimonial loss could be recovered in contract. See *Administrator, Natal v Edouard*

supra; *Jansen van Vuuren & Another NNO v Kruger* [1993] ZASCA 145; 1993 (4) SA 842 (A).

[15] The plaintiff failed to establish delictual liability independently of the breach of contract. The plaintiff relies solely

on the breach of contract to establish the iniuria and does not claim any patrimonial loss.

[16] Accordingly, the plaintiff's claim for general damages arising from the breach is ill-founded. In the circumstances, it is not necessary for me to consider the issue in the main claim of whether clause 4 of the contract is enforceable.

C. DEFAMATION – WRONGFULNESS

[17] The issue for determination is whether the conduct of the first defendant in publishing the report set out in Annexure "I"

of the annual report was wrongful.

[18] The plaintiff, in its particulars of claim, alleged the following:

"(A) On or about October 2008 and at Mmabatho the First Defendant published, alternatively caused to be published a written

Annual Report of its activities for the 2007 / 2008 financial year wherein the Plaintiffs were identified by name.

(B) The said annual report was widely distributed in the Republic of South Africa, and was widely read by inter alia politicians,

Government officials, Members of Provincial Legislature, parliament and officials in the employment of other Water Services Institutions.

(C) The said report contains express and specific reference to the names of the Plaintiffs contained, and stated of the Plaintiff that:

(i) Plaintiffs were alleged to have committed theft and fraud.

(ii) The Plaintiffs were found guilty of "negligence".

(iii) The Plaintiffs signed and authorised payment requisitions and cheques on behalf of the First Defendant without having perused

the relevant documents, which resulted in the First Defendant having paid higher than the prices quoted by the service providers

concerned.

(iv) The Plaintiffs were being investigated for fraud by the Commercial Crime Unit of the South African Police Services.

(v) The First, Second, Third, Fourth, Fifth and Seventh Plaintiffs had been issued final written warnings valid for six months and the Sixth Plaintiff demoted.

(D) An extract of the relevant portion of the report so distributed, is attached as "I".

(E) The said words, in the context of the portion of the report, are wrongful and defamatory of the Plaintiffs, in that they were

intended and were understood by readers of the report to mean that Plaintiffs are dishonest further or alternatively, that Plaintiffs

have been subjected to formal disciplinary hearings and have been found guilty of having been negligent further or alternatively, that Plaintiffs have committed financial misconduct as contemplated in the Public Finance Management Act 1 of 1999, and further or alternatively that Plaintiffs were unreliable and untrustworthy to employ.

(F) The First Defendant published the said portion of the report in the format complained of, with the intent to injure Plaintiffs in their reputation and dignity.

(G) In the context of the report referring to the Plaintiffs, read as a whole, First Defendant's intention was to convey the

innuendo that Plaintiffs dishonestly altered amounts on quotations, requisitions and invoices, and would or may be prosecuted for theft and fraud.

(H) As a result of the defamation, the Plaintiffs have been damaged in their reputation and dignity and have each suffered contumelia and damages in the amount of R3 million."

[19] The first defendant, in its plea:

19.1 admitted paragraphs (A), (B), (C) and (D) above and averred that it is a peremptory provision of the PFMA for the first defendant

to publish, in terms of section 55(2)(b)(ii), all such relevant information about the disciplinary steps;

19.2 denied paragraphs (E), (F), (G), (H) and (I) above and averred that "the contents of the report were in essence true and made in the public interest. The statement was made within the context of section 55(2)(b) of the PFMA. The statement and/or comment was made without the intention to injure or cause any damage to the plaintiffs save for the first defendant to perform its statutory obligations as contained in the PFMA".

[20] Publication of any words or behaviour that, in the opinion of the reasonable person of ordinary intelligence and development, has the tendency to undermine, subvert or impair a person's good name, reputation, regard or the esteem in which he is held by the community, is defamatory of and in principle wrongful as regards that person. See *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616; *Mineworkers Investment Co. (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 518, 519–520.

[21] Allegations placing a person's moral character or lifestyle in a bad light, for example, that he has been guilty of criminal behaviour, is dishonest, has otherwise acted improperly towards others or is immoral are defamatory. See *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Others* [2000] ZASCA 77; 2001 (2) SA 242 (SCA) at 251–252; *SA Associated Newspapers Ltd & Another v Samuels* 1980 (1) SA 24 (A).

[22] As a general rule, it is accepted that publication of a defamatory statement is *prima facie* wrongful, hence the presumption

of wrongfulness arises and the onus is on the defendant to allege and prove facts to dispel the wrongfulness by proving a ground of justification or establish the absence of an intention to injure the plaintiff. See *Neethling v Du Preez & Others*, *Neethling v Weekly Mail & Others* [1993] ZASCA 203; 1994 (1) SA 708 (A) at 769–780; *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202; *Marais v Groenewald* 2001 (1) SA 634 (T).

[23] In *casu*, the defendant, in my view rightly so, did not deny that the publication was *per se* defamatory. Accordingly, this raised

the presumption that the statement was both wrongful and published with intent to injure. The defendant raised the defence of truth and public interest and that the statement was made within the context of section 55(2)(b) of the PFMA. Hence, the defendant bore the onus to rebut the presumption of wrongfulness on a preponderance of probabilities. See *Hardeker v Philips* 2005 (4) SA 515 (SCA) at para 14.

[24] Truth and public interest are grounds of justification. If the defendant proves that his remarks meet these requirements, the

prima facie wrongfulness of his action falls away.

D. TRUTH & PUBLIC INTEREST

[25] Mr Hitchings, on the element of truthfulness, contended that the information contained in Annexure “I” were true. He submitted further that it is not necessary for the truth of every word used to be proved literally and that it is sufficient for a statement to be substantially true in every material part.

[26] In respect of the public benefit element, Mr Hitchings contended that the question to be asked is “whether making the

statement was reasonable and therefore justifiable’. He referred to certain provisions of the PFMA, which he submitted,

impose certain obligations on the first defendant as the custodian of public funds to publish the statement.

[27] The provisions are repeated herein:

“7.9 The following provisions of the PMFA [sic] accordingly impose certain obligations on the first defendant. These are (inter

alia) in terms of:

7.9.1 Section 50. Fiduciary duties of accounting authorities.—(1) The accounting authority for a public entity must—

- (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;
- (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;
- (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity

is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions

of the executive authority or that legislature; and

- (d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the

state.

7.9.2 Section 55(1)(a) Annual report and financial statements. The accounting authority for a public entity must keep full and proper records of the financial affairs of the public entity.

7.9.3 Sections 55(1)(b), (c) and (d) The accounting authority for a public entity must submit those financial statements within two months after the end of the financial year to the auditors of the public entity for auditing; and if it is a business enterprise to the relevant treasury; and must submit within five months of the end of a financial authority the relevant treasury, to the executive authority responsible for that public entity and, if the Auditor-General did not perform the audit of the financial statements, to the Auditor-General various further reports.

(2) The annual report and financial statements referred to in subsection (1)(d) must—

- (a) fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned;
- (b) include particulars of—
 - (i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred

during the financial year:

(ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful

expenditure;

(iii) any losses recovered or written off;

(iv) any financial assistance received from the state and commitments made by the state on its behalf; and

(v) any other matters that may be prescribed; and

(c) include the financial statements of any subsidiaries.

7.10 In terms of section 85 of the PMFA [sic] the Minister may make regulations on financial misconduct procedures.

7.11 Regulations published in GNR 225 of 15 March 2005 were duly made in terms of section 85 of the PMFA [sic] (“the Regulations”).

7.12 Regulation 4.3 of the Regulations provides for reporting:

4.3 Reporting

4.3.1 The accounting officer must, as soon as the disciplinary proceedings are completed, report to the executive authority, the

Department of Public Service and Administration and the Public Service Commission on the outcome, including—

- (a) the name and rank of the official against whom the proceedings were instituted;
- (b) the charges, indicating the financial misconduct the official is alleged to have committed;
- (c) the findings;
- (d) any sanction imposed on the official; and
- (e) any further action to be taken against the official, including criminal charges or civil proceedings.”

[28] Mr Hitchings contended that the legislature intended the peremptory publication of the details of financial misconduct to certain organs of state and that it is against this backdrop that the objective test of whether or not the publication of annexure “I”

was in the public interest must be measured.

[29] He submitted that the legislature has declared it compulsory to report financial misconduct and that the Courts have held that it is in the public interest for the media to report on, and name, a suspect who has not even been arrested, let alone convicted.

[30] He referred the Court to the case of *Modiri v Minister of Safety & Security & Others* 2011 (6) SA 370 (SCA) at para 21, where he submitted that Brand JA held by implication that it is in the public interest to publish the fact ‘that person has actually been charged in open court’ and that the same sentiment is expressed in *Independent Newspapers Holdings Ltd & Others v Suliman* [2004] 3 All SA 137 (SCA).

[31] He submitted further that because of the corruption in the public sector, it is in the public interest and for the public at

large (although that is not the case pleaded by the plaintiffs as their complaints are restricted to parliament, etc) to be informed of details relating to financial misconduct and the steps that were taken to combat such misconduct and that the question of whether or not publication of the details set out in Annexure “I” was justifiable on the basis that it was in the public interest, should be decided in favour of the first defendant.

[32] Mr Hitge submitted the following:

32.1 Section 55 of the PFMA regulates the content of the annual report of a public entity as opposed to a state department and section 55 does not require the inclusion in the annual report for a public entity of the names of employees who were found to have caused

any losses or fruitless and wasteful expenditure during the financial year to which the annual report relates. Section 55(2)(b) prescribes what particulars should be included in the annual report.

32.2 Regulation 28.2 of the Treasury Regulations 2005 deals with the contents of annual reports of public entities, in terms of section 55 of the PFMA and merely states that material losses through criminal conduct any irregular and fruitless and wasteful expenditure must be disclosed as a note to the annual financial statements of the public entity.

[33] Mr Hitge referred the Court to section 85(1) of the PFMA and section 33.3 of the Treasury Regulations, and stated the following:

33.1 Section 85(1) of the PFMA empowers the Minister for Finance to make regulations prescribing, inter alia:

“a) The manner, form and circumstances in which allegations and disciplinary and criminal charges of finance misconduct must be reported to the Treasury and the Auditor-General including particulars of the alleged financial misconduct and the steps taken

in connection with such financial misconduct.

.

b) The circumstances in which the findings of a Disciplinary Board and any sanctions imposed by the Board must be reported to the

Treasury and the Auditor-General.”

33.2 Treasury Regulation 33.3 requires in respect of the reporting of financial misconduct (in terms of section 85 of the Act) that the Accounting Authority of a public entity must:

"33.3.1 Annually submit to the Executive Authority, to the relevant Treasury and to the Auditor-General a schedule of –

- (a) The outcome of any disciplinary hearings and/or criminal charges;
- (b) The names and ranks of employees involved; and
- (c) The sanctions and any further actions taken against these employees.”

33.3 Regulation 33.3 clearly envisages:

33.3.1 Formal disciplinary hearings having been held.

33.3.2 A separate/independent schedule (not forming part of the Annual Report of the public entity).

[34] He further submitted that to the extent that the First Defendant intends to rely on the abovestated legislation, the Plaintiffs respectfully point out that:

34.1 since the formal disciplinary charges against them had been withdrawn and no disciplinary hearings were held, the present matter

does not fall within the ambit of the abovestated legislation;

34.2 no criminal charges were pursued against the Plaintiffs and no ‘outcomes’ of such criminal charges were reportable;

34.3 the Annual Report in question relates to the 2007/2008 financial year of the First Defendant, whilst the settlement agreements relate to the 2006/2007 financial year. The 2007/2008 financial report ought not to have referred to the Plaintiff;

34.4 the content of Annexure “I” is clearly misleading/incorrect in the following respects:

34.4.1 no mention is made of the fact that the charges against the employees were withdrawn;

34.4.2 the employees were in fact not found guilty of negligence or gross negligence and no hearings took place at all;

34.4.3 no sanction was imposed by a disciplinary tribunal;

34.4.4 the Plaintiffs in fact admitted to a deviation from procurement procedures only, which did not necessarily amount to negligence, whilst the First Defendant alleges them to have been found guilty of such negligence.

34.5 reports on financial misconduct, i.e. where employees had in fact been found guilty after formal proceedings, must be made in a separate schedule and does not form part of the Annual Report of the public entity;

34.6 the abovestated point is illustrated by the fact that on page 28 of index C, the statistics in respect of misconduct cases is

(correctly) reported for purposes of the Annual Report;

34.7 the Annual Report in fact contains no details regarding fruitless and wasteful expenditure attributed to the Plaintiffs or any other person;

34.8 it was ex facie the agreed facts clearly not proven that the Plaintiffs had been found to be negligent, i.e. the common law

defence of truth and public interest cannot be relied on in order to discharge the full onus resting on the First Defendant to dispel the presumption of wrongfulness.

[35] Hence, he submitted that the publishing of the report in its format as set out in Annexure “I” to the Particulars of Claim was wrongful.

E. ANALYSIS

[36] Truth

The defendant must show that the defamatory words are substantially and not literally true, that is, that ‘sting of the charge’ or ‘gist of the defamation’ is true. See *Johnson v Rand Daily Mail* 1928 AD 190 at 205–207; *Kemp v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E) at 264–265; *Independent Newspapers Holding Ltd & Others v Suliman* supra.

[37] The gist or sting of a statement is determined with reference to the legal construct of a reasonable reader. It is the meaning

that the reasonable reader of ordinary intelligence would attribute to the statement. See *Sindani v Van der Merwe & Others* 2002

(2) SA 32 (SCA).

[38] The reasonable person is someone who subscribes to the norms and values of the Constitution, that must inform all law. The

constitutional principles must therefore be the basis upon which the values and views of reasonable members of the community must be determined. See *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 89.

[39] The reaction of the reasonable person is dependent on the circumstances of the particular case. The alleged defamation must

therefore be interpreted in the context in which it is published. See *Johnson v Rand Daily Mail* supra, at 194–204; *Coulson v Rapport Uitgewers (Edms) Bpk* 1979 (3) SA 286 (A) at 294.

[40] It is common cause that the plaintiffs were charged with financial misconduct, abridged theft and fraud, and the plaintiff admitted that during the 2006/2007 financial year they failed to comply with the procurement procedures of the employer, for which

they received a six months final written warning, save for the sixth plaintiff who was demoted.

[41] The agreement concluded between the plaintiffs and the defendant speaks of an informal disciplinary hearing, which connotes

an outcome and a sanction.

[42] A sanction generally precedes a finding. The Oxford Dictionary definition for guilty is ‘culpable or responsible for a specific wrongdoing’. In casu, there is an admission by the plaintiffs and the sanction imposed was based on the admission

that they failed to comply with procurement procedures.

[43] Although the plaintiffs were not formally found guilty of negligence or gross negligence, the admission to a deviation of procurement procedures to a reasonable reader equates to negligence for which a six month final written warning was imposed.

[44] The gist or sting of the statement as understood by a reasonable and intelligent reader is, in my view, substantially and objectively true. As stated supra, the statement need not literally be true.

[45] Public interest

Generally, public interest in a defamatory remark will depend on the circumstances of each case, as well as the convictions of the

community (*boni mores*) at that particular time. See *Neitling Potgieter Verner, Law of Personality*, 2nd Ed p. 154.

[46] An investigation of the time, manner and the occasion of the publication are considerations when determining whether the public

has an interest in the publication of defamatory facts. See *Allie v Foodworld Stores Distribution Centre (Pty) Ltd & Others* 2004 (2) SA 433 (SCA) at 445.

[47] The presumption of wrongfulness relates to a combination of objective facts, and considerations of public and legal policy. See *Le Roux & Others v Dey* 2011 (3) SA 274 (CC) at paras 121–125.

[48] The public interest enquiry in casu calls for a consideration of the PFMA and the Treasury Regulations, the time, manner and

occasion of the publication and the convictions of the community, who received the annual report.

[49] On careful perusal of section 55, which regulates the content of annual reports of a public entity such as the first defendant, it is apparent from section 55(2)(b) that the annual report and financial statement must include particulars of any material losses

through criminal conduct and any irregular expenditure and wasteful expenditure as well as any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure, which in terms of Regulation 28.2 of the Treasury Regulations must be disclosed as a note to the annual financial statements. Section 85 of the PFMA empowers the Minister to make regulations on financial misconduct procedures. Such regulations are found in Regulations 4.3 and 33.3 of the Treasury Regulations. (Own emphasis)

[50] Regulation 33.3 expressly provides for reporting, on an annual basis, to the executive authority, the relevant treasury and

Auditor-General, a schedule of:

50.1 the outcome of any disciplinary hearing and/or criminal charges;

50.2 the names and rank of the employees involved; and

50.3 the sanction and further action taken.

[51] The above regulation must be read with Regulation 4.3, which requires the accounting officer, as soon as the disciplinary proceedings are complete, to report to the executive authority, the Department of Public Service and Administration and the Public Service Commission details pertaining to the name of the official, charges, findings, sanction and any further action.

[52] I am of the view that section 55(2)(b) and section 85(1) of the PFMA, read with Regulation 28.2 and Regulations 4.3 and 33.3 of the Treasury Regulations impose an obligation on the first defendant to provide particulars of any disciplinary steps taken as a consequence of material losses or irregular expenditure or fruitless and wasteful expenditure and to indicate as soon as the disciplinary proceedings are completed, the name of the official against whom the proceedings were instituted, the charges, the findings, the sanction imposed and any further action to be taken against the official.

[53] “Particulars’, in terms of section 55(2)(b) of the PFMA is not defined and when considered objectively, could include the plaintiffs’ particulars. Furthermore, it is common cause that the parties in the settlement agreement agreed that the

formal disciplinary proceedings were withdrawn and that ‘informal disciplinary’ proceedings were appropriate.

[54] Mr Hitge's submission that Regulation 33.3 envisages formal disciplinary hearings and a separate or independent schedule

which does not form part of the annual report and that the proceedings relate to the 2006/2007 financial year, does not assist

the plaintiff in so far as the public interest element is concerned.

[55] I am of the view that the reason for sections 55 and 85, read with the regulations was to expose officials who are found to be involved or allegedly involved in financial misconduct and such publication would be in the public interest.

[56] There can be little doubt that the public has an interest in defamatory remarks which question the integrity or competence of

public officials or figures or which are critical of the management of public or quasi-public institutions. See *Argus Printing & Publishing Co. Ltd v Inkatha Freedom Party* [1992] ZASCA 63; 1992 (3) SA 579 (A) at 589; *Argus Printing & Publishing Co. Ltd & Others v Esselen Estate* 1994 (2) SA 1 (A) at 24–26.

[57] Where someone has committed a crime, "the truth as to the character or conduct of individuals" can also be in the

public interest. See *Kemp v Republican Press (Pty) Ltd supra*, at 265–266.

[58] In the SCA decision of *Modiri v Minister of Safety & Security & Others supra*, the appellant sued for defamation because a newspaper article stated that the appellant was 'allegedly involved in drug dealing, cash in transit heists and car theft'.

The Court a quo found favour in the defence raised of truth and public interest.

[59] The community in casu is not the public at large, but restricted to politicians, government officials, members of the Provincial Legislature and Parliament, who are recipients of the annual report. This Court does take judicial notice of the public outcry against corruption and financial abuse in the public sector. Accordingly, it is my view that it is in the public interest and justifiable that the details set out in Annexure "I" were published in the annexure report and that the first defendant proved that the publication of Annexure "I" was 'true and in the public interest', thereby rebutting the presumption of wrongfulness.

F. ORDER

[60] In the circumstances, I make the following order:

a) The plaintiffs' action is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 19 JUNE 2013

DATE OF JUDGMENT : 15 AUGUST 2013

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(Instructed by WAKS SILENT INC.)

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