

SOUTH AFRICA / JUDGMENT

Clifford v Erinvale Country Estate Home Owners Association (A 363/2009) [2012] ZAWCHC 28 (17 April 2012)

[2012] ZAWCHC 28

COURT

Western Cape High Court, Cape Town

BEFORE

M I Samela, J I Cloete

CASE / FILE NUMBER

A 363/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

Case

no: A 363/2009

PETER

CLIFFORD

.....Appellant

v

THE

ERINVALE COUNTRY ESTATE HOME OWNERS ASSOCIATION

.....Respondent

Court:

Judge M I Samela ef
Acting Judge J I Cloete
Heard:

13 April 2012

Delivered:

17 April 2012

JUDGMENT

CLOETE AJ:

INTRODUCTION

- [1] The only matter before us is the respondent's cross appeal against the decision of the magistrate at Somerset West on 1 April 2009.
- [2] The grounds advanced in the cross appeal are essentially twofold. The first ground is that the magistrate erred in finding that the appellant was defamed by the publication of a letter dated 8 May 2001 addressed by the respondent to all six of the appellant's clients at the time, resulting in the magistrate awarding the appellant non-patrimonial damages of

R20

000. The second ground relates to the award of costs against the respondent, both in respect of its application for absolution from the instance at the close of the appellant's case and in the main action.

BACKGROUND

- [3] The appellant is an architectural designer who at all material times resided (in a property owned by his family trust) and generated his primary source of income from the construction of new residences (and to a much lesser extent, the renovation of existing residences) at a residential golf estate known as Erinvale Country Estate in Somerset West ('the estate'). The respondent is a body corporate established in accordance with s29 of the Land Use Planning Ordinance No 15 of 1985 ('LUPO'). Section 29(2)(b) of LUPO stipulates that a body corporate established in terms thereof shall have a constitution which inter alia has as its object the control over and the maintenance of buildings, services and amenities relating to the property estate in question.
- [4] The respondent's constitution provides that its main object shall be to promote the communal interests of its members (it is obligatory in terms of s 29(2)(c) of LUPO for all owners of land at the estate to be members). The communal interests include the formulation and enforcement of aesthetic and environmental standards and architectural guidelines. Clause 3.5.7.4 stipulates that no member shall be entitled, without the prior written approval of the respondent's trustee committee, to make any alterations to any building or unit erven or to do anything that will affect the architectural style or aesthetic appearance of the buildings at the estate. Clause 3.5.7.6 stipulates that every member shall be obliged to submit any building plan, whether such plan is for new construction, renovation, alteration and/or addition, to the trustee committee for examination and approval prior to submission thereof to the local authority. To this end the constitution also provides for the establishment of an architectural review committee.

- [5] The respondent's constitution further provides (at clause 3.6.1) that members, their guests and tenants and any person entering the estate shall be subject to all relevant regulations. These regulations govern inter alia the execution of building works within the estate and the code of conduct required of builders, other contractors and owners wishing to execute work within the estate.
- [6] During 1994 the appellant's family trust purchased a plot at the estate. The appellant designed and built the residence thereon. The appellant was invited to serve on the architectural review committee and during 1996 acted in this capacity for about a year. It was during the period that he designed and built his residence that the appellant was initially approached and appointed as an architectural designer by others who wished to build at the estate. Further contracts followed.
- [7] In August 1999 the appellant submitted plans to the architectural review committee for the erection of a pergola or trellis above a boundary wall at his residence, apparently for reasons of privacy and safety from errant golfballs. It appears however that he subsequently decided rather to increase the height of his boundary wall. It is common cause that the appellant in increasing the height of his boundary wall did not comply with the aforementioned plans submitted by him to the architectural review committee, nor did he obtain approval therefor. It is also common cause that by increasing the height of his boundary wall he exceeded the stipulated height restriction. This it seems was the start of the dispute between the parties, and gave rise to a number of communications between them. It is noted that as early as 21 October 1999 the appellant had written to the respondent, accusing it of enforcing its rules in a haphazard manner resulting in offending home owners 'feeling victimized and prejudiced'; of being guilty of 'a myriad of transgressions'; and of being 'somewhat discriminatory'. Various meetings and other communications also took place to try to resolve the impasse concerning the appellant's wall and other disputes which subsequently arose, including a carport erected at the property of another home owner which had also been designed by the appellant. The parties were unable to resolve their impasse.
- [8] Almost a year later, on 1 September 2000, the appellant addressed yet another letter to the respondent's chairman. In that letter he made what can only be described as derogatory comments concerning the trustee committee and in particular Mr Haarhoff, the then chairman of the architectural review committee. I quote the relevant passages:

'The timing of the offence [referring to the increasing of the height of the boundary wall], / am led to believe, is all important in the world according to Mr Haarhoff. If we stop to analyse his thinking, there are two distinct

classes of owners at Erinvale; those transgressions that happened prior to his reign and those that came after. In his decree he has afforded amnesty to all the previous classes of transgressor ... but has spared no mercy, applied no reason or rationale in his relentless persecution, and condemnation of all others under his authoritarian rule. There has been no

respite in his zest for conquest, and more than this his blatant bias and prejudice. He now condemns the ... carport on the grounds of a mysterious self-bestowed discretionary power. Nowhere in our constitution, has the Committee or any Trustee Member the right to such a draconian power, and God help us all if there is ... Many other transgressions under his rule of law that have also mysteriously evaporated and on the evidence, we are surely dealing with the most blatant example of hypocrisy [sic] and double standards imaginable...

Without wishing to deny you your rights and concerns, and short of becoming revengeful, or tit for tat in this issue, it would be interesting to know whether you have received similar treatment from all the conquering powers within your committee and received a letter of similar High Court Action for your disobedience. In truth, the process of such High Court Action might just prove the right respite and remedy for those control freaks within your committee...

It is for these reasons that I (along with other home owners) can justifiably make my claims of discrimination and inequality of

treatment by certain individuals of the Committee. They are reformed sinners, who live in glass houses, and yet unashamedly cast the first stone. They have a distorted perception of equality and balance and in their zest for persecution of others, thrive on wielding their power, taking some form of sordid delight in conquests over their fellows. Some friendly overdue advice to those, who still cling to the vestiges [sic] of past corporate power, is that they go back to their careers where they can play out their control games and fantasies of bravado,

alternatively they could surely find some other form of hobby or pursuit that might quell their appetite for domination over others,

and allow them to thaw out and gracefully ease into retirement...

Having served on the Committee at the time, I brought the illegal roof ridge height of Mr Haarhoffs house to his notice at the time of construction. Some or other hollow excuse and pleading came forth from him, and in all honesty it was taken no further at the time, by a newly formed Committee who chose to adopt a balanced and friendlier approach to such infractions. I personally went along with this thinking, and apart from the other reasoning, to avoid confrontation and ill feeling with my new neighbour. Alas, this same person who has chosen this hypocritical agenda and to point his finger at condemnation at his fellow neighbours. The adage 'do as I say, not as I do' most aptly springs to mind with this individual.'

[9] In a separate letter of the same date which was also addressed by the appellant to the respondent's chairman, the appellant made remarks such as 7 am forced, yet again, to restore some semblance of rationality to the illogical state of mind that pervades your committee ... There

appears to be no end in sight to the iniquity, and the blatant incapability of your Review Committee custodians to understand,

interpret and abide to [sic] the guidelines which govern this Estate. They are blinded in their frenzy for confrontation and proscription, to the proper and appropriate implementation of the laws.' The letter to which I have just referred relates to the carport dispute. It should be mentioned that the local authority had independently

objected to the appellant's plans for the carport on the basis that the structure would encroach across the homeowner's building line. The homeowner had been advised thereof by the local authority.

[10] On 15 September 2000 the respondent replied in two letters to the appellant, one in his capacity as a member of the respondent and the other in his professional capacity as an architectural designer. The letter addressed to the appellant in his professional capacity recorded that the appellant's professional rights did not extend to abusing the respondent's trustee committee and architectural review committee; that the terms used by the appellant in his correspondence of 1 September 2000 were 'insulting, intimidatory, defamatory, untrue and uncalled for'; and that the appellant was required to issue a written retraction and apology to the satisfaction of the trustee committee within seven days, failing which further action, including legal action, would be considered. The appellant was also advised that due to his record of not submitting plans of alterations for approval before commencement of such alterations and of failing to suspend work when requested, which was a contravention of estate regulations, was not acceptable. It had accordingly been decided that in order to protect members the trustee committee would no longer deal directly with the appellant in his professional capacity but only with the members concerned.

[11] During cross-examination Mr Haarhoff explained the reason for the apology sought to be as follows:

'Your Worship, can I just say, there's absolutely no problem, would have been no problem, if Mr Clifford had disputed what went on. It is the manner in which it is done. It is not a letter saying, I dispute this. It's a letter with hyperboles, insults. That is what we were aggrieved about. It wasn't the fact that he was contesting what we were doing. It was the manner in which he was contesting. Many contractors have contested - I was on the Architectural Committee; they would come and contest it. But they would come in a civil manner. They would not write us letters accusing us of all sorts of things. That was why we wanted the apologies - for being so vitriolic about what's happening here, when we're all volunteers, we're doing our thing. You've got every right to complain, but you don't have to complain in that manner.'

[12] It is common cause that no such apology or retraction was forthcoming from the appellant. Thereafter and at a meeting of the respondent's trustees on 26 September 2000 it was discussed and resolved that the trustee and architectural review committees as well as Home Owners Association staff would no longer deal directly with the appellant but with the home owner concerned, and that the appellant would be advised thereof.

[13] Before the appellant could be advised he wrote another letter to the respondent on 27 September 2000. In that letter he accused the respondent of nepotism and of having acted in a highly discriminatory manner against him. Mr Haarhoff was accused of being unrelenting and one-sided with 'his personal grudges and condemnation of my rights throughout the saga'.

[14] Importantly, in the same letter, the appellant made it very clear to the respondent that none of his clients were in need of the type of "protection" which the trustee committee had in mind. He wrote:

'Your protection of... [one of his clients] regarding the pergola [or carport] has been non-existent and quite to the contrary, you have unjustly condemned the structure without just cause. My clients ... remain fully supportive of my continued involvement and my stand against the incoherent and flawed reasoning of the Architectural Review Committee. They have therefore gracefully and quite understandably declined your charitable offer.'

[15] In the same letter the appellant made other derogatory remarks about the trustee committee, including that they considered themselves to be 'the Judge, the Jury and the Executioners without shame or conscience' and that they were guilty of high-handedness and bombastic behaviour. The letter concluded with the appellant advising that he saw no reason to apologise for his behaviour.

[16] The respondent then addressed a letter to the appellant on 2 November 2000, the relevant portion of which reads as follows:

'Due to the collapse of the relationship between the Trustee Committee, Architectural Review Committee and the Home Owners Association and yourself, as is apparent from your letters ... which has led to an impasse between yourself and the mentioned groups, we feel that it will be counter productive to deal with you in your capacity as designer in future.

The Trustee Committee has therefore decided that neither it, nor the Architectural Review Committee and Home Owners Association staff will in future have any dealings directly with you in your capacity as designer. All communications will be only with the home owner member concerned.

All members who make use of your design services will be advised accordingly.'

[17] The appellant then approached his attorney (who had previously had some involvement in attempting to resolve the dispute). Yet more correspondence followed, the thrust of which is not strictly relevant to this cross appeal, save to state that the respondent agreed to suspend the implementation of its resolution pending further discussions between the parties and representations to be made by the appellant.

[18] In January 2001 and while implementation of the trustees' decision was suspended the appellant procured another client by the name of Constancon at the estate and commenced preparing plans for submission to the architectural review committee on her behalf.

- [19] On 7 March 2001 the respondent's attorney wrote to the appellant's attorney, referring to an earlier letter of 25 January 2001 in which the appellant had been requested to address the issues of his boundary wall and the apology sought. The appellant was advised to respond satisfactorily thereto by 16 March 2001, failing which the decision contained in the respondent's letter to the appellant of 2 November 2000 would be implemented and measures would be taken to have the appellant's boundary wall altered to comply with the respondent's regulations.
- [20] The appellant responded through his attorney on 15 March 2001. In essence the appellant re-applied for permission to retain the wall in its existing form, and refused to tender the apology sought by the respondent. Clearly this communication did not satisfactorily address the issues raised by the respondent in its attorney's letter of 25 January 2001, since the next communication was a letter dated 22 March 2001 from the appellant's attorney to the respondent's attorney accusing the respondent of refusing to accept plans drawn by the appellant from him personally, and threatening an interdict. This threat resulted in the respondent again on 29 March 2001 suspending its decision to have no direct dealings with the appellant.
- [21] The matter did not end there. Another dispute arose between the appellant and the respondent relating to the plans submitted by the former in respect of the client Constancon. The respondent was not prepared to approve the plans on the basis that the proposed

completed building would exceed the limit of 40% coverage on the plot by some 28 square metres. The appellant took issue with the

respondent's calculation as to the erf coverage and matters, yet again, escalated from there. The appellant strongly disputed the

respondent's right to impose certain building and architectural conditions. This apparently took place during communications between

the appellant and the respondent's estate manager on 5, 6 and 11 April 2001.

- [22] On 11 April 2001 the appellant wrote to Constancon and informed her *inter alia* that:

sadly I must report to you as follows: As Erinvale Home Owners, I must tell you we have a highly dictatorial, overly controlling bunch of Trustees serving on the Association at present. Without going into too much detail in this communication, I have had many altercations and disputes with them in my capacity as Architectural Designer, and they do not take kindly to anyone standing up to their flawed, irrational and hypocritical decision making and dictates. Their non-approval of your plans is based on the building coverage criteria on the Estate ... without due consideration to the original coverage percentage as stipulated in the original development scheme and Title Deeds of the Estate, the Trustees have inexplicably reduced this to a 40% coverage factor at the stroke of a pen.'

[23] On the same date the respondent's estate manager wrote to the appellant, informing him that he had no right to attempt to dictate

to the respondent what should or should not form part of its regulations. The appellant was further advised that in view of the

previous problems which the respondent had experienced in relation to the appellant's attitude towards it, the decision contained in the letter of 2 November 2000 would be implemented immediately.

[24] During the trial the appellant testified that upon receipt of this letter he came to the conclusion that he was being singled out and that 'by maliciously banning me there wouldn't be further investigations into some of the indiscretions and other misdemeanours of the Home Owners Committee and the infractions they themselves had made and were sweeping under the carpet'. He went on to testify that in his view the respondent must have known that its decision would have a devastating effect on his ability to earn an income.

[25] On 18 April 2001 the appellant's attorney again threatened to approach court for urgent relief on the basis that the respondent's

conduct was apparently wrongful and unlawful. The respondent's trustee committee met on 24 April 2001 and discussed and resolved

that the decision to implement the resolution conveyed in the letter of 2 November 2000 would remain in place. On the same date and by letter from the respondent's attorney to the appellant's attorney it was recorded that the communications between the appellant and the respondent's estate manager relating to the latest dispute concerning the client Constancon had been characterised on the part of the appellant by derogatory remarks concerning members of the respondent's trustee and architectural review committees and in particular the trustee committee member Mr Haarhoff. The appellant's attorney was also advised that 'your client's recent outrageous conduct precludes further such accommodation. As a matter of fact all members of our client's trustee and architectural review committees find it impossible to deal with your client in a reasonable and businesslike manner...'

[26] On 8 May 2001 the respondent addressed a letter to all six of the appellant's clients at the estate. This was despatched on 10 May 2001 and is the letter which constituted the basis for the appellant's action for defamation instituted in the court below. It reads as follows:

ARCHITECTURAL DESIGNER-PETER CLIFFORD

Our records show that the above person is employed by you as a designer.

Due to the collapse of the relationship between the Trustee Committee, Architectural Review Committee and Home Owner's Association and Mr Clifford which has led to an impasse between the abovementioned groups and Mr Clifford, we feel that it would be counter productive to deal with Mr Clifford in his capacity as designer in future.

We therefore have to inform you that this Association is no longer prepared to deal directly with Mr Clifford in his capacity as

designer. We ask for your kind co-operation in ensuring that all communications to us regarding your construction including the

submission of plans and documentation are from you and not from Mr Clifford. This will avoid delays having such matters attended to promptly.

Should you not be in a position to attend to the above yourself, we ask that you appoint some other party, independent of Mr Clifford to act on your behalf. In this case we ask that you let us know who the person is and confirm his/her authority.

We are sorry to have to put you [sic] this inconvenience.

Yours faithfully'

[27] The appellant claimed that the respondent addressed the aforementioned letter to his clients wrongfully and with the intention to injure him; that he was humiliated and degraded thereby; and that the contents were defamatory of the appellant in that they

were intended and were understood by readers of the letter to mean that the appellant was not a fit, proper and/or qualified person to represent them.

[28] It should be mentioned at this juncture that the appellant also relied in the court a quo on a communication allegedly made by Mr Haarhoff at a meeting of the respondent's members on 7 May 2001. The appellant was unsuccessful in the court a quo in his reliance thereon, the magistrate having found that the appellant's pleading was insufficient to sustain a cause of action.

The appellant has not appealed against that finding and it is thus not necessary for this court to have regard thereto, save to state the following.

[29] It was elicited in the appellant's cross-examination that the minutes of the meeting of 7 May 2001 in fact reflect that it was the appellant himself (and not Mr Haarhoff) who raised the respondent's decision not to deal with him. Further, in his follow-up letter of complaint to the respondent dated 14 May 2001, the appellant made no mention at all of Mr Haarhoff's alleged public announcement but took the respondent to task on his complaints concerning other issues. The evidence of Mr Arthur, Mr Ford and Mr Haarhoff supported the version reflected in the minutes. It is thus accepted that the appellant's version as reflected in his pleading could not in any event have been sustained; and to the extent that the appellant's problems with the Home Owners Association became public at that meeting, he only had himself to blame.

WHETHER THE APPELLANT WAS DEFAMED

[30] In *Khumalo and Others v Holomisa* 2002

(8) BCLR 771 (CC) at 778E-G, O'Regan J stated that the elements of the delict of defamation are:
(a) the wrongful and; (b) intentional;

(c) publication of; (d) a defamatory statement; (e) concerning the plaintiff.

[31] In *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011

(6) BCLR 577 (CC) at 606D-G Brand AJ said:

'Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities.' [Emphasis supplied.]

[32] Accordingly, in order to leave the starting blocks, the appellant has to prove (a) the publication; (b) of defamatory matter; (c) concerning himself. There is no dispute that the respondent published matter concerning the appellant. What is in dispute is whether the matter so published was defamatory.

[33] In *HRH King Zwelithini of KwaZulu v Mervis and Another* 1978

(2) SA 521 (W) at 524G McEwan J, referring to certain cases relied upon by counsel in the matter said: 'Those cases indicate that, once a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear per se, unless he has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory per se'.

[Cited with approval in *Demmers v Wyllie and Others* 1980

(1) SA 835 (A) at 845E-G.]

[34] In casu the meaning selected by the appellant in relation to the contents of the letter of 8 May 2001 is that they were intended and were understood by readers thereof to mean that the appellant was not a fit, proper and / or qualified person to represent them. The appellant is accordingly bound by that selection.

[35] Although the appellant's pleadings are of no assistance in this regard, to the extent that he claimed damages on the basis that he was humiliated and degraded by the contents of the letter of 8 May 2001, he cannot succeed in separate claims for both defamation and infringement of dignity arising from the same facts: *Le Roux (supra)* at 621H-622D.

[36] I now turn to consider the ordinary meaning of the statement contained in the letter of 8 May 2001 in order to establish whether

it bears the meaning attributed to it by the appellant. As was said by Brand AJ in *Le Roux* at 608A-B:

'In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.

The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.'

[37] In his judgment the magistrate correctly said that the test at this stage of the enquiry is an objective one. However his reasoning in reaching the conclusions which he did indicates that he applied subjective considerations to what is an objective enquiry. Firstly,

he said that in considering the contents of the offending letter he had regard to the fact that it had come to being within the context of an environment of hostility between the appellant and the respondent's representatives. Secondly, he had regard to his

impression formed during Mr Haarhoffs testimony that 'mala intentions' might have been a factor in the decisions taken in respect of the appellant. Thirdly, he referred to the appellant's (inadmissible, hearsay) testimony that one of his clients, in response to the letter, called him and enquired about his ability and qualifications.

[38] These considerations appear to have influenced the magistrate to conclude that: (a) the reference in the letter to the collapse of the relationship and the impasse reached conveyed more than was necessary to inform the recipients thereof that problems existed between the parties, and that as a result there would be no future interaction between them; (b) the use of the words 'we feel that it would be counter productive to deal with Mr Clifford in his capacity as designer in future' cast a cloud of suspicion over the underlying abilities of the appellant in the eyes of the reasonable reader; and (c) the request to appoint an independent representative if the recipient was unable to deal personally with the respondent directly tarnished the appellant's reputation.

[39] I respectfully disagree with the magistrate's reasoning and conclusions. That the letter conveyed that there had been a collapse

in the relationship and an impasse reached does not cast any aspersion on the appellant's ability as an architectural designer.

Nor does it convey that the appellant was not a fit, proper and / or qualified person to represent the recipients of the letter. In my view, a letter merely stating (as the magistrate suggested in his judgment) that problems existed between the parties and that there would be no further interaction between them may well have given rise to a negative impression of the appellant's professional

capabilities. On the other hand, the use of the words 'collapse' and 'impasse' do not objectively convey that the cause thereof was the appellant.

[40] This view is supported by the appellant himself. In cross-examination he admitted that the relationship between himself and the respondent had collapsed; that in the letter of 8 May 2001 the respondent did not place the blame on any particular party and that the letter did not state who was responsible for the collapse in the relationship. The appellant also conceded that the word 'impasse' simply meant that the parties could no longer communicate. It was thus nothing more than a factual conclusion that it would be counter-productive for the respondent to continue to deal with the appellant directly.

[41] The letter also does not mean that the appellant was prevented from continuing to provide architectural design services to his clients. Nor does it mean that the appellant was not permitted to suggest and / or advise any client on the independent third party proposed by the respondent. And the appellant's own evidence showed that in the case of five of his six clients he in fact completed his contracts and was paid for his services, despite one of them having communicated with the respondent through an intermediary, being his South African attorney.

[42] As to the appellant's testimony that the respondent must have known that its decision would have a devastating effect on his ability to earn an income, the following is of relevance. There was simply no evidence before the trial court that the offending letter reached anyone other than the intended six clients or that it was publicised in any other manner. Further, during cross-examination the appellant conceded that it would be pure speculation on his part to claim that he did not secure contracts in respect of the only three remaining undeveloped erven at the estate at the time because of the contents of the offending letter. The appellant also conceded that after the letter had been sent he in fact secured further work at the estate.

[43] Turning now to the sixth client who was the recipient of the offending letter, namely Constancon. The appellant claimed during the trial that this particular client had undergone a change of heart after receiving the letter. However an email dated 3 June 2001 from Ms Constancon to the appellant she stated in terms that she was 'not interested' in the appellant's difficulties with the respondent. The correspondence between the appellant and Constancon around this time also shows that the contract between these two parties was terminated at the client's instance for other reasons. And in cross-examination the appellant

finally conceded that in taking issue with Ms Constancon he had made no mention of his view that the reason for the termination of their contractual relationship was the respondent's letter of 8 May 2001.

- [44] None of the factors which I have mentioned constitute evidence of the sense in which the letter was understood by the recipients thereof. All that these factors support is what meaning the reasonable reader of ordinary intelligence would have attributed to the letter, in its context, not only with regard to what was expressly stated but also to what was implied.
- [45] It is against this background that I find that the ordinary meaning of the words contained in the respondent's letter of 8 May 2001 did not convey that the appellant was not a fit, proper and / or qualified person to represent the recipients thereof. It follows that the appellant's claim should have been dismissed by the trial court.

COSTS

- [46] It is trite that the question of costs rests in the discretion of the court and that in the exercising thereof the court should attempt as far as possible to dispense justice and fairness to all the parties: *Rautenbach v Symington* 1995
- (4) SA 583 (OPD) at 587J-588A. In the exercise of my discretion I find that there is no reason why costs should not follow the result, including the costs of the respondent's application for absolution from the instance at the close of the appellant's case.

CONCLUSION

- [47] I accordingly propose that the cross-appeal is allowed with costs and the magistrate's order is altered to read:

'The plaintiff's claim is dismissed with costs, such costs to include the defendant's application for absolution from the instance at the close of the plaintiff's case.'

J I CLOETE

SAMELA J

I agree and it is so ordered

M I SAMELA

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