

SOUTH AFRICA / JUDGMENT

Gwe v De Lange and Another (3532/09) [2019] ZAECPHC 65; [2020] 1 BLLR 92 (ECP) ; (2020) 41 ILJ 341 (ECP) (17 September 2019) [2019] ZAECPHC 65

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Swanepoel AJ

CASE / FILE NUMBER

3532/09

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

Case

No: 3532/09

RICHARD MALIBONGWE

GWE Plaintiff

v

HENRIËTTA DE

LANGE

First

Defendant

MEMBER OF THE

EXECUTIVE COUNCIL

FOR HEALTH, PROVINCE

OF THE EASTERN CAPE

Second Defendant

Neutral citation:

Coram:

Swanepoel AJ

Heard:

2,
3 and 4 September 2019
Judgment
delivered: 17
September 2019

JUDGMENT

- [1] Mortuaries are for dead people where dissections on bodies are performed by pathologists. Not so at the Mount Road mortuary in Port Elizabeth, where a plot unravelled involving alleged sexual undercurrents, perceived preferential treatment and a conspiracy theory, flavoured with that everyday South African spice of racism. The matter involves neither a health contravention nor malpractice on the part of any dissecting pathologist. The roleplayers involved are

also not the walking dead. Even more unlikely is the cause of action which finds itself on the dissecting table of a court of law. It is that Roman fossil, the *actio iniuriarum*.

- [2] The plaintiff, one Gwe, is a 53 year old senior forensic pathology officer employed by the Department of Health of the Eastern Cape

Province (hereinafter referred to as “the Department”). He was employed as a senior forensic pathology officer at the Gelvandale mortuary in Port Elizabeth. However, the incident occurred at the Mount Road mortuary in Port Elizabeth. At some stage, the Gelvandale mortuary was gutted by fire. Autopsies were then performed at the Mount Road mortuary where an alleged salacious incident occurred as long ago as 3 April 2009. The alleged incident gave rise to an enduring action, commencing many years ago and only meeting its final fate[1] in this year of 2019.

- [3] The first defendant, one De Lange, is the regional manageress responsible for forensic pathology services in the Port Elizabeth region. The second defendant is the Member of the Executive Council responsible for Health of the Eastern Cape Province. He is cited in a capacity not disclosed in the pleading embroiling him, presumably in his official representative capacity, in this suit.

- [4] Plaintiff’s amended particulars of claim which contains various errors, challenging the dispassionate reader’s interpretive skills, in its actual, unedited format, reads as follows:

“1. The Plaintiff is Malibongwe Richard Gwe, adult married male having born on the 11 December 1965, employed as a Forensic Pathology Officer by the Department of Health, Province of the Eastern Cape, New Brighton Mortuary, Mati Road, New Brighton, Port Elizabeth. The plaintiff is a member of National Health and Allied Workers Union, and was its shop steward at the Galvandale Mortuary, at all material times herein;

2. On the 25th of March 2009 the Plaintiff received a letter from the first defendant, and was unlawfully suspended from his employment with the second defendant. On the 3rd April 2009, the plaintiff received a further letter from Mr Vincent Chetty, an employee of the second defendant, of the Galvandale (sic) Mortuary. The further letter contained an allegation that the plaintiff had been involved in unbecoming behavior (sic) of a sexual nature, it stated that the complaint of sexual harassment has been filed by Ms M Vermaak “Vermaak”, who was also an employee of the second defendant, regarding an incident that occurred at Mount Road Mortuary on the 4th of March 2009 in the ladies bathroom.

3. The said incident as pleaded in paragraph 5 hereof (sic, this being an obvious error) followed a meeting in which the plaintiff together with one Lelethu, who is a colleague of the plaintiff, had arranged a meeting to discuss on the reason, Vermaak was allowed was allowed to remain in Galvendale Mortuary (when it was closed for renovation and when the rest of the staff of Galvendale Mortuary had been instructed to report for duty at Mount Road Mortuary upon the Galvendale Mortuary being closed for renovations) upon it being butted (sic) by fire.
4. The suspension, unlawful transfer and/or allegations contained in the said letters (of the 25th of March 2009 and 3rd April 2019) were made in public, as the said letters in which they were contained and the suspension and unlawful transfer was witnessed by other employees of the second defendant, the allegations further were brought to the attention of the union representative

representing the plaintiff and also to (sic) attention of the attention of the plaintiff's wife, who was employed within the same premises in which the alleged incident took place (Mount Road Mortuary situated at Mount Road Police Station, where plaintiff was employed)

5. The said allegations, unlawful transfer and suspension were made by the employees of the second defendant, who were duty bound to first confidentially investigate the allegations that had allegedly been made against the plaintiff by Vermaak before taking action to suspend and unlawfully transfer and institute disciplinary proceedings against the plaintiff as pleaded in paragraphs 4 to 5 hereof; (this is again an erroneous paragraph reference)
6. the said employees of the plaintiff failed, and/or neglected to properly investigate the said complaint, that had been laid against the plaintiff by Vermaak, and suspended the plaintiff on the basis of unsubstantiated allegations that had been made by Vermaak against him, especially in view of the fact that;

6.1 Vermaak was stationed at the Galvendale Motuary (sic) at the date of the incident, and was not at Mount Road Police Station on the day of the alleged incident on the 4th of March 2009, which is the date in (sic) which the alleged incident took place

6.2 no post mortems were conducted at Mount Road Mortuary on the 4th of March 2009, Galvendale Mortuary was closed because it was burnt down and was under renovation, and accordingly there was no reason for any of the employees of the second defendant including the plaintiff and Vermaak to be in the changing rooms of Mount Road Mortuary / alternatively Galvendale Mortuary to prepare for an autopsy as alleged by Ms Vermaak;

7. Had the employees of the second defendant conducted proper investigations of the allegations made by Vermaak as pleaded in paragraph 9 above (sic) before publishing the allegations against the plaintiff they would have realised that there was no basis for the allegations made by Vermaak against the Plaintiff for the reasons inter alia, pleaded in 9.1 and 9.2 above (sic) and were only made in order to victimize and/or intimidate the plaintiff from conducting its (sic) union duties as pleaded in paragraph 6 above (sic, again the

reference to paragraph 6 is clearly incorrect).

8. On the 2nd of April 2009 the suspension was lifted by the first defendant and despite the upliftment of the suspension on the 2nd April 2009, on the 5th of April 2009 the Plaintiff was unlawfully transferred from Galvendale Mortuary to New Brighton Mortuary by the Second Defendant.
9. On the 30th of June 2010 a Disciplinary Enquiry was held by the Second Defendant against the Plaintiff, and the Plaintiff was found not guilty of the charge of sexual harassment, and despite the said finding, plaintiff decided from that date to remain in (sic) New Brighton Mortuary as he did not trust any of his colleagues in Galvendale Mortuary as a result of the incident
10. The actions of the Defendants as aforesaid, and the words contained in the said letter were, in the above context, wrongful and defamatory of the Plaintiff, in that they were intended and were understood by the readers and persons who had witnessed them (sic) that the Plaintiff was without moral fiber (sic), and is not a law abiding citizen and was promiscuous.
11. As a result of the action of the defendant's (sic) employees as pleaded above, plaintiff's reputation has been damaged, and he has suffered damages amounting to R500 000.00.
12. At all relevant times the defendants (sic) acted within their scope of their employment with the second defendant who is the executing authority in charge of the Department of Health in the Province of the Eastern Cape
13. The plaintiff has complied with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State, 2002 (Act No. 40 of 2002), to the extent that there has been non-compliance with the provisions of the said Act, such compliance has since been condoned).

WHEREFORE the Plaintiff claims against the defendants jointly and severally the one paying the one paying (sic) the other to be absolved for:

1. the payment of the amount of R500 000.00;
2. Costs of suit;
3. Further and/or alternative relief".

[5] Quite a mouthful. No exception was taken to these "amended" particulars of claim. Consequently, the Court was confronted with the difficulty of attempting to fathom which specific act or conduct purportedly constituted the defamatory act which was being sued upon. It was a daunting pursuit.

[6] During plaintiff's counsel's opening argument, he emphasised that the plaintiff relied on one collective act of defamation, made up of three separate components, comprising the two letters; the subsequent suspension and the so-called "unlawful transfer".

- [7] That these letters were written, and that the subsequent suspension and transfer occurred on different dates and over a period of time, was of no moment, the court was assured. That the very nature of the acts differed markedly, also posed no stumbling block according to plaintiff's counsel. According to counsel, one defamatory act had occurred, of a collective nature.
- [8] As challenging as it was to responsibly and judicially reflect on this clarification of the plaintiff's case, it was then conveyed, during opening address, that the letter of 25 March 2009 was not defamatory. However, "some aspects" of the later letter of 3 April 2009 were apparently defamatory. But the defamatory passages were not pointed out. It was asserted that the act of suspension and the act of the plaintiff's transfer, pending the investigation of the complaint received, were further defamatory events or behaviour.
- [9] Upon requesting the plaintiff's counsel whether the plaintiff nonetheless assumed the onus and the duty to begin, plaintiff's counsel recorded that he had agreed with defendant's counsel, that the substantive onus and the duty to begin rested on the plaintiff, having regard to the content of the pleadings.
- [10] Despite the errors in the amended particulars of claim, such as the absence of a description of the defendants and the capacities in which they were being sued; the incorrect reference to paragraph numbers; the lack of particularity regarding the alleged instances of publication or acts of defamation (save for the sweeping reference to "the suspension, unlawful transfer and/or allegations contained in the said letters (of the 25th March 2009 and 3rd April 2009)"), the defendants did not except to the particulars of claim. It appears that they were seeking to euthanise the plaintiff's persistent claim at all costs.
- [11] The plaintiff did not attach the two letters of 25 March 2009 and 3 April 2009 or specifically plead the particular passages of relevance. As a matter of pleading, it was the duty of the plaintiff to have pleaded with specificity the particular passage or content of the letter or statement relied upon which purportedly embodied the defamatory act or acts. Although it is not necessary to plead the actual words used insofar as a reference is made to a statement which is not published, the plaintiff may allege that the words set out were "more or less the words used".[2]
- [12] As a matter of pleading, it would be the duty of the court to then decide upon the effect and meaning of such words, but the plaintiff must still prove the publication which is supposedly defamatory. *International Tobacco Co of SA Ltd v Wollheim* 1953 (2) SA 603 (A) at page 613 to 614.

- [13] Instead, the defendants pleaded in broad terms to the plaintiff's amended particulars of claim, responding to the allegation of an "unlawful" transfer and denying that the content of the correspondence had been conveyed to the plaintiff's spouse.[3] In response to paragraph 4 of the particulars, defendant further pleaded that the allegations were indeed brought to the attention of the National Education, Health and Allied Workers Union to which the plaintiff belonged and in which the plaintiff served as a shop steward.
- [14] With respect to the vague content of paragraph 5 relating to "employees of the Second Defendant" who, according to the plaintiff, "were duty-bound to first confidentially investigate the allegations", the defendants pleaded that "the Plaintiff was placed on precautionary suspension as evidenced from the correspondence in such circumstances as the Defendant(s) were entitled to whereas there was a reciprocal right and duty for the Defendant(s) to issue same and the Plaintiff to receive the correspondence".
- [15] Plaintiff could presumably have incorporated the letters of 25 March 2009 and 3 April 2009, without specifying the defamatory passages. The question would then have been whether the relevant letters (as a whole) were defamatory or not. This would have been a matter of interpretation. Compare: *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) at paragraphs [14] to [15]; *Times Media Ltd v Niselow*
- [2005] 1 All SA 567 (SCA) at paragraph [18].
- [16] It appears that the reference to the complaint from Vermaak which related to "unbecoming behaviour of a sexual nature", was the relevant portion of the letter of 3 April 2009 which the plaintiff regarded as having been defamatory. But this passage of the letter of 3 April 2009 was not specifically identified and pleaded, but just formed part of an imprecise, overbroad claim.
- [17] That the failure to specify defamatory passages may render a pleading vague and embarrassing, is uncontroversial - compare: *Deedat v Muslim Digest* 1980 (2) SA 922 (D&CLD) at page 928; *Kruger v Johnnic Publishing (Pty) Ltd* 2004 (4) SA 306 (T) at 309 F to J.
- [18] Effectively, the parties had disregarded the very purpose of pleadings in the first place, which are especially important in a defamation action. The object of pleading is to define the issues so as to enable not only the other party, but also the court, to know what case has to be met (vide: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 C to E; *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at 223 G to H). It enables or allows a crystallisation of the actual issues. Storytelling is certainly not the aim. But a story about sexual misconduct in a mortuary giving rise to a complaint of one kind by the victim, and of another kind by the alleged culprit-turned victim, was before me.
- [19] The plaintiff's attempt to lump the letters together with subsequent events such as the suspension and the alleged "unlawful transfer", ought to have elicited an exception, at the very least on the basis that the pleading was vague and embarrassing. Plaintiff's counsel was requested whether this overbroad attack was indeed the basis on which the plaintiff sought

to present his case. The court was promised that there was authority for such an approach. During argument, after the evidential process, and when the dissection began during argument, no such authority could be provided to the court. This came as no surprise.

- [20] As a result of the state of the pleadings and the failure on the part of the defendants to have procedurally challenged the adequacy of the averments made by the plaintiff and the material facts on which the averments purportedly rested, the essential components which must be established in order to succeed with the *actio iniuriarum*, were not properly examined prior to the trial. The need for the plaintiff to have alleged and then to prove, publication of a

specific defamatory statement received inadequate attention. But, as it turned out, the events at the mortuary would evidentially and legally lead the plaintiff to a dead end in any event.

- [21] This matter was the first matter on the roll in this court, scheduled to commence on Monday, 2 September 2019. Even after trial readiness had been certified and as late as 26 August 2019, the plaintiff purported to provide more particulars of the alleged acts of defamation in a belated “Reply to issues raised in the Minute of 23rd August 2019”. This was a novel way of identifying acts of defamation by way of a reply in a pre-trial minute delivered three court days before a High Court action was due to commence. Nonetheless, defendants’ counsel intimated that the defendants were intent on proceeding to trial and had no objection to this belated clarification of the alleged acts of defamation. That the matter relates to events which occurred in 2009, ten years ago, presumably played a role in the adoption of this overly benevolent approach.
- [22] These belated pre-trial responses, in broad terms, purported to clarify the circumstances surrounding the unlawful suspension and temporary transfer. The plaintiff contended in this belated pre-trial response, that the circumstances under which he was informed of his suspension had resulted in defamation, or constituted the publication of defamatory conduct or behaviour. One of the reasons given, is that he had to return a cellphone when he was placed on precautionary suspension, belonging to the State, which “obviously occasioned curiosity on the part of the colleagues, and the Plaintiff had to inform the colleagues that he had been suspended”. The plaintiff further complained, after an initial letter of suspension had been withdrawn, that he was called in by one Mr Chetty, the manager of the Gelvandale Mortuary, at the time that he was handed the second letter of 3 April 2009. This letter was never incorporated into the plaintiff’s particulars, as mentioned previously, but was identified in the pre-trial response as the “second act of defamation”.
- [23] According to the plaintiff, he was informed by Mr Chetty that “the second suspension letter was coming from Bhisho (Mr Badiwe) which contained the allegations that had been made by Ms Vermaak against the Plaintiff and the Plaintiff was afforded an opportunity to make written representation (sic) why he should not be suspended by 15h00 on the same day. Such representations were made by Plaintiff’s union and instead of being transferred, the Plaintiff was suspended”. As perplexing as these explanations already were, particularly in the

context of a defamation action, more was to follow.

- [24] In paragraph 4 of the aforementioned reply, which, according to the parties “clarify” the plaintiff’s particulars of claim, it was stated as follows:

“4. The Defendant’s employees communicated both suspensions to the Plaintiff’s union representatives, as the Plaintiff was a shop steward and both the transfer of the 25th, as pointed out above, and the subsequent transfer on the 4th were done in the presence of Plaintiff’s colleagues. The transfer of the 4th was done in front of Plaintiff’s colleagues at Gelvandale Police Station”.

- [25] The court was accordingly called upon to adjudicate on a defamation claim premised on such pleadings, purportedly supplemented by a last minute reply to a pre-trial minute. This is a situation which shall hopefully not befall others.
- [26] As part of an agreed bundle, the status of which was subsequently explained on the basis that the court was entitled to have regard to the documents contained therein as “being what they purport to be”, was a letter from one Monique Vermaak (“Vermaak”) addressed to the “Regional Manager, Ms H De Lange, Forensic Pathology Services, Port Elizabeth”. This letter from Vermaak, the complainant, had been addressed to the first defendant, the responsible regional manageress. Unsurprisingly, the first defendant, who was a sound, to-the-point witness, was alarmed by the nature of the complaint, and contacted her departmental superiors at the provincial head office.
- [27] The complaint letter dated 23 March 2009 reflecting the residential address of the said Vermaak, reads as follows:

“REPORT OF INCIDENT:

As I recall on the 4th of March 2009 around 09h00 I went to Mount Road Mortuary to assist a Medical Officer. I was alone in the ladies bath room (sic) where I changed into my work clothes. I was standing with my back towards the door, busy undressing and heard the door open. As I turned around to tell the person to leave since I was standing without my clothes, only in my underwear on, I saw Mr Gwe standing by the door. I thought that he would leave since I did ask him to leave, but he did not.

He came into the room, walked towards me and took hold of my shoulder with his hand. When he put his hand on my shoulder I told him to please remove his hand and leave. I pulled away and at that time it sounded like a door opening or closing in the passage and he turned around and left immediately.

I was in the state of shock, but continued to carry out the duties that were allocated to me, but I could not wait to leave that mortuary. After the Post Mortems, I left Mount Road to go to Gelvandale Mortuary. And I went straight into the toilet as I became scared and felt sick and also not knowing how to deal with this situation. As I was crying I spent most of the time in the toilet as I did not want anyone to see my face.

When I eventually came out, the Mortuary Manager, Mr Chetty asked me what is wrong and why I have been crying. I did not answer and just kept quiet. I tried to put this behind me, but I became sick emotionally. On 2009-03-09 I went to see my doctor, Cilliers Swart, who booked me off sick for depression and prescribed anti-depressants. I did not confide in Dr Swart as to the reason of my emotional state. I did tell him that I was under stress at work.

Dr Swart phoned my mother as he was worried about my depressed state. Upon the questioning by my mother on why I was depressed I broke down and confided in her on what took place at Mount Road at that date and time.

Mr Gwe is a colleague of mine that works with me at Gelvandale Mortuary. He is also a higher level FPO than me and a union assistant shop steward. I did not give anyone permission to touch me and I feel violated. I have always maintained a professional working relationship with all my colleagues and did not give anyone the impression that I am open for anything but a professional working relationship. I request this matter be investigated and all departmental steps to be taken to resolve the matter as soon as possible. I am very uncomfortable at work and cannot bear to be in the same building as Mr Gwe”.

[28] That this complaint letter was received, became common cause, but only on the second day of the hearing. This enlightening moment only arose after extensive, but largely irrelevant, cross-examination about the layout of the Mount Road mortuary. Interjections by the court about relevance, left both parties undaunted in their strive to somehow explain or deny in which particular room at the mortuary the incident did or might have occurred. Its bathrooms, nooks and crannies were explored, but the relevance of such evidence and cross-examination[4] still escapes me.

[29] Plaintiff testified first. The first defendant was also called after the plaintiff closed his case. Prior to the first defendant being called to the witness box, it had become clear to all, at last, that the trial was being unduly delayed by cross-examination on irrelevant or collateral issues. But then, the court had implored counsel to seek agreement on common cause facts, which ought to have occurred at properly held pre-trial conferences.

[30] On the second day of the hearing, the court was furnished with the following written admissions, signed by attorneys:

“1. The Plaintiff is an employee of the Second Defendant and at all material times herein was employed as a Senior Forensic Pathologist at Gelvandale Mortuary. The Plaintiff was also a shop steward of Nehawu.

2. The First Defendant is also an employee of the Second Defendant, employed as a Regional Manager at Second Defendant’s regional offices situated at Newton Park, Port Elizabeth at all material times relevant hereto.
3. The Second Defendant is vicariously liable for the actions of the First Defendant.

4. The direct supervisor of the Plaintiff and Monique Vermaak were Mr Vincent Chetty at all material times.
 5. All the Forensic Pathology Officers, including the Plaintiff, were employed at the Gelvandale Mortuary including Monique Vermaak, who was also a Forensic Pathology Officer (sic) were seconded to Mount Road Mortuary when Gelvandale Mortuary was under renovation.
 6. The Plaintiff does not dispute that a complaint was lodged to the First Defendant by Vermaak in terms of the letter appearing on page 2 of the Supplementary Trial Bundle”.
- [31] With respect to the concluding “admission” in paragraph 6 above, this paragraph referred to the complaint letter of Vermaak dated 23 March 2009 quoted above.
- [32] The trial bundle also contained the two letters of 25 March 2009 and 3 April 2009, referred to in the pleadings, but not annexed thereto. By reason of the obvious relevance of these letters, their content is quoted below. The letter of 25 March 2009, which was addressed to the plaintiff (describing him as the “Chief” instead of “Senior” Forensic Pathology Officer) and containing his incorrect PERSAL number, reads as follows:

“Dear Mr R M Gwe

PRECAUTIONARY SUSPENSION FROM DUTY

I am presently conducting an investigating / having an investigation conducted with regard to allegations of misconduct involving you. Due to the seriousness of the allegations, I am implementing a precautionary suspension. You were hereby relieved from performing your duties until further notice. You are hereby requested not to contact any of your colleagues, except for your direct Acting Manager, Esbach, and your Regional Manager, Mrs De Lange. No other contact will be allowed. You also have to refrain from visiting any of the mortuaries and offices of FPS until requested to do so. You will be informed of the outcome of the investigation as soon as it is available”.

The first defendant signed this letter in her capacity as a regional manageress. Plaintiff’s counsel disavowed reliance on this letter as having been defamatory.

- [33] When this letter was handed to the plaintiff - according to the first defendant in confidential circumstances - the plaintiff refused to acknowledge receipt by signing the letter.
- [34] At the trial, the unchallenged evidence of the first defendant was that she had contacted her superiors in Bhisho before delivering the abovementioned letter, as well as the Human Relations Manager (one Van der Merwe) at her provincial head office of the Department. A pro forma letter, or draft, was then e-mailed to her from Bhisho, which she then printed and adapted before handing same to plaintiff. She admitted that the said letter of 25 March 2009 was not on an official letterhead of the Department. This was evidently important

to the plaintiff, when he testified. She also emphasised during her oral testimony, that she was “following instructions” to provide a letter in such format to the plaintiff.

[35] As previously mentioned, the plaintiff's counsel disavowed any reliance on this first letter of 25 March 2009 as having constituted

a defamatory publication in itself. During the plaintiff's testimony, his main complaints regarding this particular letter

centered around the fact that it was not on an official letterhead from the Department; that his position was incorrectly described

therein;[5] that his PERSAL number was incorrect, and lastly, that he had not been given an opportunity to make representations regarding the envisaged implementation of his precautionary suspension.

[36] The plaintiff testified that he personally took the letter to his union, NEHAWU. NEHAWU promptly formulated a response on his behalf on 25 March 2009.[6] This NEHAWU response, formulated on his behalf, was addressed to the first defendant in her capacity as Regional Manageress: Forensic Pathology Services. This letter is also relevant to an assessment of the facts. Its content reads as follows:

"IRREGULAR SUSPENSION MR GWE / UNION SHOP STEWARD

This serves to inform your office that the above mentioned (sic) Trade Union Organisation has been approached by the above mentioned (sic) employee in relation to the above mentioned (sic) subject matter. Firstly we would like to draw your attention to the letter received from your office on the 23rd March 2009 indicating that you intend to investigate an alleged misconduct against the above mentioned (sic) employee who is a Union Shop Steward. Our understanding of your letter date (sic) 23rd March 2009 was that you were informing the Union as directed by the terms of Schedule 8 of the (Code of Good Practice) as amended by section 57 of Act Nr 42 of 1996 and section 56 of Act Nr 12 which requires that a discipline against a Trade Union representative or an employee who is an officer bearer or official of a recognised Trade Union should not be instituted before informing and consulting with the Trade Union concerned.

In your letter dated 23rd March 2009 you indicated that an incident of an alleged misconduct against Mr Gwe was made to you on the 22nd March 2009. You did not indicate the nature of the alleged misconduct you are referring to. You further in your letter to the Union dated 23rd March 2009 did not indicate whether (sic) you were informing that Union as directed by the above stated legislation. As a surprise you served Mr Gwe with a suspension letter on the 25th March 2009 and the Union established the following reservation in the content of (sic) your letter of suspension:

1. That your letter is not in (sic) the letter heads of the Department of Health and therefore its authenticity is questionable;
2. That the suspension letter does not indicate whether (sic) or not Mr Gwe is suspended with or without pay;

3. You further denied Mr Gwe an opportunity to understand the nature of allegations levelled against him and an opportunity to make representations as to why he can not be suspended including the seriousness of the alleged defence.
4. As far as the Union understands that as a Regional Manager at Level 10 you do not have a delegated authority to suspend the employees, if you do the Union requests that you furnish the Union with such written delegations. In view of all the above the Union views the suspension of Mr Gwe as both irregular and unprocedural. Be further informed that the Union has serious reservation in your way of handling HR matters as a Manager. We therefore propose that you lift the suspension as a matter of urgency and apply your mind in all the legal and procedural aspects indicated in this communique. We hope

that you will treat this letter with both the sensitivity and urgency it deserves. We further hope that you will find the above as in order. Hoping to hear from you soon.

Regards,

MM Gobana

Regional Organiser

cc: Mrs M Mekuto: Acting Director Specialised Services

Mr Badiwe ASD”.

- [37] This NEHAWU response was copied by the regional organiser of NEHAWU, Mr Gobana, to Mrs Mekuto and Mr Badiwe, who were both based at the provincial head office of the Department in Bhisho.
- [38] Obviously valid points were made on behalf of the plaintiff therein. Schedule 8 (Code of Good Practice: Dismissal) to the Labour Relations Act 66 of 1995 (“the LRA”), item 4, makes it clear that any dismissal should be preceded by an investigation, which does not require a formal enquiry. However, the employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee is entitled to a reasonable time to prepare his or her response, and is entitled to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken and preferably furnish the employee with written notification of that decision.

- [39] Item 4(2) of Schedule 8 of the LRA further provides:

“Discipline against a trade union representative or an employee who is an officer-bearer or official of a trade union should not be instituted without first informing and consulting the trade union”.[7]

These provisions are clear and are relevant, and I shall revert thereto below.

[40] Some of these points made in the letter on behalf of the plaintiff by NEHAWU were accordingly valid. The complaints regarding the failure to indicate whether Mr Gwe was being suspended with or without pay and the absence of any particulars of the nature of the charge which was being investigated against him, were all deserving of consideration, especially from a labour law perspective. The first defendant's superiors, in particular the human relations manager, Van der Merwe, seemingly agreed that there was merit in NEHAWU's contentions.

[41] On the 2nd of April 2009, the plaintiff's "precautionary suspension" was lifted. He was requested to report to the Gelvandale mortuary on the 2nd of April 2009. The evidence established that the plaintiff did not report back for duty on that day, as he had booked off sick for that day. Another notification was looming, hence an enquiry about his whereabouts. Same was to be delivered when the plaintiff did report for duty on the 3rd of April 2009.

[42] He then received the letter of 3 April 2009, which reads as follows:

"INTENDED SUSPENSION FROM SERVICE AS A PRECAUTIONARY MEASURE

It has been brought under management's attention that you have allegedly been involved in unbecoming behaviour of a sexual nature. A complaint of sexual harassment has been filled (sic) by Ms M Vermaak regarding an incident that occurred at Mount Road Mortuary on 2009-03-04 in the Ladies bathroom.

Consideration will be given into enforcing a precautionary suspension in terms of clause 7.2 of the Disciplinary Code and Procedure with immediate effect. This precautionary measure will be with full pay.

You are hereby afforded an opportunity to submit written reasons before 15:00 of today, 2009-04-03 if you are of the opinion that you should not be suspended from duty. You are reminded of your right to the assistance of a co-employee, trade union official or union representative. Please be also aware that your response is to the intended suspension and not to the allegation that was made.

If you fail to respond within the time limit provided, the matter will continue to be considered in the absence of your response. Your response can be handed into this office. It will be forwarded to the appropriate delegated person for consideration.

You are requested to immediately acknowledge receipt of this letter".

[43] As mentioned previously, it had become common cause that the incident referred in Vermaak's complaint of 23 March 2009, related to an incident which had allegedly occurred on 4 March 2009.

- [44] It should be mentioned at this stage, that Vermaak, the alleged victim of the “unbecoming behaviour of a sexual nature” but the plaintiff’s accuser, who by way of her complaint had initiated the investigation against him, was never sued by the plaintiff. She was also not a party to the proceedings before court.[8]
- [45] The relevance of employer / employee relationship, as well as the potential applicability of the LRA, was taken up with the legal representatives of the parties during argument. The parties were requested to address the court during argument on the relevance of the Public Service Disciplinary Code (“the Disciplinary Code”) which was expressly referred to in the letter of 3 April 2009 and also with regard to the applicable provisions of the LRA and its Schedules.
- [46] The plaintiff, through his legal representative, scuffed at these potential legal hurdles, suggesting that such statutory provisions “did not have to be followed” and were not really relevant to the plaintiff’s claim(s). It was confidently contended that these statutory provisions do not constitute any legal obstacles whatsoever to the plaintiff’s composite claim of defamation.
- [47] However, both the Disciplinary Code applicable to State employees, which was pertinently referred to in the letter of 3 April 2009, as well as Schedule 8 of the LRA, were evidently relevant to the issues before court, both from a factual and legal perspective.
- [48] Clause 7.2 of the Disciplinary Code provides as follows:
- “7.2 Precautionary suspension*
- a. The employer may suspend an employee on full pay or transfer the employee if
 - i. the employee is alleged to have committed a serious offence; and
 - ii. the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being of any person or state property.
 - b. A suspension of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.
 - c. If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement”.
- [49] That the complaint amounted to an alleged serious offence, was reticently, but eventually responsibly conceded, but only during argument.

- [50] Furthermore, item 4.2 of Schedule 8 to the LRA provides that no disciplinary action may be instituted against a member of a union, specifically against an official such as a shop steward (which was the plaintiff's position) before NEHAWU was notified by the relevant employer. These facts and circumstances must now be analysed against the legal principles.
- [51] Defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation: *Le Roux v Dey* 2011 (3) SA 274 (CC) at 304.
- [52] The following passages from the judgment of Froneman J and Cameron J in *Le Roux* are enlightening:

"[168] The conventional test for determining whether a statement is defamatory is if it would probably lower the plaintiff in the estimation of right-thinking members of society generally. This test has been widely applied in our courts, subject to the qualification that the reference to "right-thinking persons" is no more than a convenient description of a reasonable person of normal understanding and development, and that the reference to the views of society "generally" includes views held by a substantial section of the community.

- [169] This test is useful and practically expedient if it is understood properly as an objective test to determine whether the reputation of a person has been objectively infringed, on a balance of probabilities. The Supreme Court of Appeal appears to have taken this test to mean that likelihood is not a requirement, but that it is sufficient if a statement merely has the "tendency" to undermine the status, good name or reputation of a person, to qualify as defamatory. In our view this approach does not take sufficient account of constitutional values and norms, nor the practice in our courts even

before the advent of the Constitution.[9]

- [170] The suggestion that a person may be defamed without probable impairment of his right to reputation is inconsistent with the decisions in *Botha v Marais* and *Demmers v Wyllie*. These state that the determination of impairment of the right to reputation should be done objectively and should be proven on a balance of probabilities.[10] It is also inconsistent with the requirement of publication of a defamatory statement and the concomitant requirement that the

ordinary or reasonable reader of the published statement must have understood the statement as defamatory.

- [171] Defamation law involves the consideration and weighing up of competing fundamental constitutional rights against each other, normally those of freedom of expression against those of dignity and privacy. Once a defamatory statement is proven to have been published our law presumes that its publication was unlawful and done intentionally, and the onus is then on a defendant to prove otherwise. The normal constitutional practice and requirement is that the onus is on a plaintiff to prove the infringement of a fundamental right and for the defendant to justify that infringement".

- [53] In casu, the plaintiff avers that his reputation has been harmed. The plaintiff has to prove all the elements to succeed with the *actio iniuriarum* (in which regard, see Neethling, Potgieter & Erasmus: Law of Delict, Seventh Edition, page 352), namely:
1. the publication of words or behaviour, constituting the defamatory act;
 2. an injury to personality, i.e. the defamatory effect of the words or behaviour;
 3. wrongfulness;
 4. *animus iniuriandi*.
- [54] As a shop steward of NEHAWU, plaintiff acknowledged during cross-examination that the first defendant in her position as regional manageress, had a duty to inform the plaintiff's union of the complaint of alleged sexual misconduct made against him by Vermaak. In fact, this was one of the reasons proffered during plaintiff's oral testimony for his dissatisfaction with the content of the first letter. He was satisfied that he was given an opportunity in the second letter to consult his union in order to make representations.
- [55] The second letter of the 3rd of April 2009, in which the plaintiff was informed of "his precautionary suspension in terms of clause 7.2 of the Disciplinary Code and Procedure", was regarded as correct or acceptable by the plaintiff himself. No evidence was given by the plaintiff himself during his oral testimony that the mere fact that he was notified of the investigation, *per se* undermined his reputation. To the contrary, he confirmed that such notification complied with procedures which he, as a shop steward had expected to be complied with.[11]
- [56] He also took the letter of 3 April 2009 to his union himself, which had requested an extension of the period within which to respond, which was then granted until the 7th of April 2009. Despite the emphasis in the letter that a response was invited in respect of the contemplated "precautionary" suspension only, NEHAWU submitted a lengthy undated response on behalf of the plaintiff in which the alleged "sexual misconduct" incident also received some attention.
- [57] Unfortunately, the perception on the part of the plaintiff, and seemingly of the NEHAWU official responsible for drafting the letter, that the complainant Vermaak had been receiving preferential treatment by reason of her skin colour, because she had been allowed to continue to perform her work at the administrative section of the Gelvandale mortuary (which had apparently not been burnt down in its entirety) contributed to an intemperate written response.
- [58] The NEHAWU response was permeated with race-laden accusations. The supposed representation was nothing but an aggressive rebuke, instead of a representation in respect of the contemplated precautionary suspension in terms of the applicable Disciplinary Code.

- [59] The investigation should have centered around racism, according to the plaintiff and his union representative, and should not have concerned the alleged incident of sexual misconduct of the plaintiff. Deflection was the obvious but misplaced strategy. The plaintiff's military experience, his virtues and his character were emphasised. It was further suggested that the complaint formed part of nothing other than a racist conspiracy against the plaintiff. According to him, he was the victim, not Vermaak. He was simply being targeted by reason of his role as a shop steward in having aired a complaint of perceived favouritism of Vermaak, who was allowed to still report at the Gelvandale mortuary, whilst the other pathologists had to report at the Mount Road mortuary. This emotive document glaringly failed to address the real issue concerning plaintiff's contemplated suspension.
- [60] During his evidence, the plaintiff himself revealed that Vermaak had de facto been employed as "a scribe" by her line manager, Mr Chetty. According to him, she did indeed continue to fulfil administrative work for Chetty, who was responsible for over-arching administrative duties. The plaintiff himself testified that when Vermaak did arrive at the Mount Road mortuary where autopsies were being carried out, she would primarily keep notes for the pathologist performing the autopsy. This evidently plausible explanation for Vermaak's continued employment at the administrative wing at Gelvandale mortuary, did not stand in the way of the unbridled salvo that was fired off in the written NEHAWU representation[12] formulated by the plaintiff and his trade union representative.
- [61] Instead of giving evidence that the second letter of 3 April 2009 had humiliated him, the plaintiff gave evidence with the exact opposite effect. According to him this letter was an improvement or "correction" of the first letter. He gave no evidence whatsoever that he had felt insulted by its content, or by the format of the second letter itself. He therefore did not feel subjectively insulted, on his own testimony. But his own subjective feelings are in any event not decisive. The alleged insulting or defamatory act must also be objectively assessed. The wrongfulness criterion incorporates the objective criterion of reasonableness, and renders the norms of society relevant.
- [62] That a disciplinary code applied in respect of the plaintiff's alleged precautionary suspension, was conceded by the plaintiff during cross-examination. Not only was there a pertinent reference to clause 7.2 of the Disciplinary Code and Procedure in the letter itself, but the plaintiff's union representative had correctly alluded to the applicability of Schedule 8 of the LRA, albeit somewhat inaccurately, in the "representation" preceding the plaintiff's precautionary suspension.
- [63] Unsurprisingly, defendants' counsel specifically cross-examined the plaintiff about the content of paragraph 8 of the plaintiff's

NEHAWU-formulated "representation". This paragraph[13] reads:

“8. As far as Mr Gwe can remember finding himself in close contact with Ms Vermaak, was one of the mornings which he is not sure of the date, he was on duty, run about 09:00 he arrived a little bit late at the dissecting room. While other FPO’s were undressing the corpses about six bodies, he asked Mr Swanepoel,[14] where can he get the gown and he told him to get it at the laundry room. He proceeded to the laundry room where the gowns are usually

there together with other equipments. The door was half closed and he pushed the door. He saw Ms Vermaak and because he was not in speaking terms with Ms Vermaak for obvious reasons he decided not to enter and looked for an alternative gown. He got the used gown hanging at the dissecting room. All the FPO’s present on that day in question can bare testimony to the above. The FPO’s referred to are as follows.”

- [64] That an incident had occurred as between Vermaak and the plaintiff, was therefore clear, on the plaintiff’s own version. His attempt, through his counsel, to suggest that this version as recorded in the NEHAWU “representation” was not an interpretation of his actual instructions, was opportunistic and reckless. That the Department, as the employer, had justifiably regarded the complaint of Vermaak, who allegedly required professional support after the incident, as constituting a complaint concerning an alleged “serious offence”, was understandable.
- [65] It therefore became evident that the plaintiff had to establish the elements required for the actio iniuriarum in a factual setting influenced by an employer / employee relationship and by the applicable statutory framework.
- [66] The applicable legal framework, including the Code of Conduct specifically referred to in the letter of 3 April 2009, as well as the LRA (in particular Schedule 8 thereof) required the Department and its responsible officials to inform the plaintiff and his chosen union of the nature of the complaint against him prior to his precautionary suspension and of his right to make representations prior to such suspension.
- [67] This was required in the light of the agreed, common cause fact that a formal complaint had been received by the Department from a co-employee, the said Vermaak, relating to an incident of alleged sexual misconduct. Even if the reference in a formal letter, to a charge of alleged sexual misconduct might have been defamatory (such as the relevant paragraph contained in the second letter of 3 April 2009), it is evident that such a reference to an alleged charge in the formal departmental letter was legally justified. The applicable Code of Conduct further required the Department, in its interaction with employees, to indiscriminately apply the provisions of the Code.
- [68] Insofar as publication of the alleged sexual misconduct charged occurred, in particular by way of the letter of 3 April 2009, such publication of a clearly circumscribed nature, was in any event protected by qualified privilege. NEHAWU was informed of the discharge by first defendant (and the Department for that matter) in the discharge of a duty, or in the exercise of a right. Compare: *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA) at 331 to 332.

- [69] The letter(s) or notification(s) were relevant to the occasion. The Department and the responsible regional manageress (the first defendant) had a right to record the complaint of Vermaak and to inform the plaintiff, as well as his union NEHAWU, of the complaint that had been received from Vermaak, which had to be investigated.
- [70] The complaint did amount to a complaint of alleged sexual misconduct. The plaintiff had a right to receive such information. Section 23[15] of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") underlines and underscores this. See: NEHAWU v Tsatsi, *supra*, at 332 E to 333 A.
- [71] From a contractual and employer/employee relationship perspective, an employee against whom such a grievance or complaint was lodged, tacitly consented to the applicability of the Code and its provisions. Unfortunately, the plaintiff's letter of employment was not placed before Court. It may well have been relevant to see whether the plaintiff's letter of appointment did not also expressly refer to the applicability of the Disciplinary Code applicable to State employees, or to the LRA. In any event, it cannot be disputed and was conceded, that the Disciplinary Code does apply to State servants such as the plaintiff.
- [72] Plaintiff's counsel further conceded that the LRA was legally relevant to the relationship between the plaintiff and the Department.[16] Formally conveying the nature of the complaint to the plaintiff officially, did not in my view constitute a defamatory act. Even if it did, neither the notification, nor the contemporaneous explanation of the contemplated procedural step of precautionary suspension, were wrongful.[17]
- [73] Viewed from a different perspective, there are other examples in our law where legislative provisions limit an individual's rights to privacy, dignity and related personal rights: see *inter alia* Neethling's Law of Personality, Butterworths, Chapter 3, paragraph 3.2.4 and also Jonathan Burchell: Principles of Delict, First Publication, page 198.
- [74] That an individual's rights to privacy, dignity, a good name and reputation are protected in sections 9, 10, 11, 12 of the Constitution, as well as his or her right to freedom of trade, occupation and profession (section 22), are well-established. But an Act such as the LRA is a law of general application which does limit such fundamental rights in a reasonable, justifiable and lawful manner, as contemplated by section 36 of the Constitution. Moreover, the LRA is legislation as contemplated by section 23 of the Constitution.
- [75] The court further finds that that the required intent which must be established, namely the *animus iniuriandi*, was not established and was absent, for the reasons already outlined above. Neither of the letters were published or written with injurious intent by either the first or second defendants.
- [76] For the plaintiff to have arrived at all sorts of conspiracy theories was not only unfortunate, but in any event irrelevant, especially in the absence of a pertinent allegation of malice on the pleadings, whether in the particulars of claim or in a replication. No such replication was delivered on behalf of the plaintiff in which ulterior motive or malicious intent were

pertinently raised in a rebuttal to the defendants' plea. In any event, no malice whatsoever was proved on the part of either the defendants. To the contrary, De Lange's demeanour, testimony and version cannot be faulted. She simply did her job and clearly had no ulterior motive or malicious intentions whatsoever. I accept her evidence without hesitation.

[77] With respect to the fact that Mr Gobane of NEHAWU had been informed of the complaint and its nature, it should be mentioned that not only did the Department and its officials have to do so in terms of the applicable Code and in terms of the applicable legislative framework, but the plaintiff also did so himself. His communication of the alleged complaint to NEHAWU did not constitute an act of defamation published in the legally required sense, nor was it wrongful. The evidence moreover established that the plaintiff himself had taken the letters of 25 March 2009 and 3 April 2009 to NEHAWU, his union, in his capacity as a shop steward. During his evidence in this court, the plaintiff testified that he had to do so and had no qualms with such form of "publication". He was correct, but his court action nonetheless misguided.

[78] The plaintiff further testified that he personally informed his wife about Vermaak's complaint against him. This also did not constitute publication in the sense envisaged by the *actio iniuriarum*. [18] Such a communication also did not amount to a defamatory publication in the legal sense. He was merely informing his spouse that a complaint against him was being investigated. The defendants are simply not liable to the plaintiff for such re-publication (assuming

that it was) by the plaintiff himself to his wife. [19]

[79] The plaintiff's attempt to hold the political head of the Department liable for damages allegedly derived from the *actio iniuriarum* having to be applied on the basis of vicarious liability in such circumstances, was doomed to failure from the outset.

[80] The facts in *Byrne v Masters Squash Promotions CC and Another* 2010

(1) SA 124 (GSJ) are informative, and related to a matter in which the employer had informed an employee by way of a letter that he (Byrne) was dismissed. Byrne also sought to claim damages by way of a defamation action. The action failed, the court holding that publication of the content of the dismissal letter to a typist was in the circumstances privileged. Similar sentiments apply to this matter. With respect to the plaintiff's reliance on his precautionary suspension and transfer, his complaints in this regard might possibly have given rise to public law remedies, if justified, but not to a private law remedy in the form of a claim for damages

under the *actio iniuriarum*. His employer, the Department, could have been taken to task under the LRA, whether on the basis of an unfair labour practice or otherwise, if his claim was sound.

[81] The plaintiff could also have followed departmental grievance procedures, to have his grievance (or grievances) relating to the perceived preferential treatment of Vermaak, resolved. His dissatisfaction with his temporary transfer was evidently a further matter

which could and should have been resolved in terms of the available labour-related dispute resolution mechanisms. The Supreme Court of Appeal lucidly nuanced the differences between public and private law remedies in a matter concerning a decidedly unhappy magistrate, in *President of South Africa & Others v Reinecke* 2014 (3) SA 205 (SCA). Reinecke did not succeed with his damages claim, save for seemingly evoking some sympathy from the Supreme Court of Appeal.

- [82] The implications of private law damages being awarded against a public law employer in such a setting, would be far-reaching. From a policy point of view, and especially from an already heavily burdened taxpayer's point of view, this ought not to be countenanced. In this regard, the sentiments expressed by Satchell J in *Byrne v Masters Squash Promotions CC*, supra, at paragraph [13] on page 127 are sound and persuasive. This court shares such sentiments.
- [83] Plaintiff's counsel's contention that the first defendant and the Department should, seemingly in terms of some opaque discretion, not have followed the Disciplinary Code and should have ignored Schedule 8 of the LRA, are without substance. The two decisions proffered in support of this bold proposition, namely *Ncbawu v Masinga & Others* [2000] 2 BLLR 171 (LC) and *Jerry's Security Services CC v CCMA & Others* [2001] 7 BLLR 751 (LC) offer no support to the plaintiff, given the factual and legal setting before this court.
- [84] In the firstmentioned decision of *Ncbawu*, it was held that departures from procedural guidelines laid down by the Code of Good Conduct did not necessarily render a dismissal per se unfair. In paragraph [15] of *Ncbawu*, the Labour Court referred with approval to a decision in which the importance of compliance with disciplinary codes, was emphasised. *Ncbawu* offers no support to the plaintiff.
- [85] In *Jerry's Security Services*, supra, Franklin AJ held that "the applicant's initial failure to comply with item 4(2) [of Schedule 8 to the LRA] was cured at the appeal hearing". *Jerry's Security Services* offer support for the exact opposite of the proposition advanced on behalf of the plaintiff. If anything, the relevance and importance of compliance with Schedule 8 of the LRA was emphasised by this decision of the Labour Court.
- [86] This court's autopsy of the merits reflects a case which suffered from a fatal, incurable infliction from the outset. It was still-born, and now mercifully deserves to be buried.
- [87] The plaintiff's action is dismissed with costs.[20]

Swanepoel AJ

14 September 2019

APPEARANCES:

FOR THE PLAINTIFF: Adv M W Nobatana, instructed by Lulama Prince

and Associates

FOR THE DEFENDANTS: Adv I Dala, instructed by the State Attorneys

- [1] Hopefully, and as deserved as it might be.
- [2] Harms: Amler's Precedents of Pleadings, Ninth Edition, LexisNexis, page 153, and authorities cited op cit.
- [3] As evidence was given, it turned out that it was the plaintiff himself who had informed his wife about the complaint made against him.
- [4] Which caused the court to repeatedly enquire about relevance and at some stage, had to disallow further examination.
- [5] He was described as a "Chief" instead of "Senior" forensic pathology officer.
- [6] This response is contained on pages 10 and 11 of the trial bundle.
- [7] Emphasis added.
- [8] During argument, the plaintiff's counsel was asked why the plaintiff had not sued Vermaak. A rather startling response was elicited, namely "what if she says that she did not sign the letter?". Upon pointing out to the plaintiff's counsel that this was in conflict with the formal admission that had been made by the plaintiff's attorney, to the effect that such a complaint was indeed received by the Department, the plaintiff's counsel did not take this point further.
- [9] Emphasis added.
- [10] Emphasis added.
- [11] Given a military background, his standpoint was understandable.
- [12] More aptly described as a rebuke.
- [13] Unedited.
- [14] Definitely not a relative.
- [15] Which reads: "Labour relations 23. (1) Everyone has the right to fair labour practices.
(2) Every worker has the right- (a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right- (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right-
(a) to determine its own administration, programmes and activities;

- (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)".

[16] It should be added that the court did query the citation of the second defendant

instead of the head of the Department, or the designated official who would have been the contracting party in respect of the letter of employment. Either by reason of a lack of oversight or a failure to anticipate this point, the contract of appointment was never produced, but, by reason of the decision this court has arrived at, it is unnecessary to analyse this point further.

[17] See generally on the wrongfulness element: Loubser and Others: The Law of Delict in South Africa, Oxford University Press, Second Impression 2018, page 382. According to Loubser et al: The Law of Delict, the position is thus, (at page 382): "[I]n essence, not only must the feelings have been violated subjectively, but society should consider the invasion of the interest to be unreasonable to such an extent that the defendant should be held liable for assuaging the wounded feelings". The authors add that "persons are expected to show some resilience and tolerance towards offensive behaviour, and courts will not impose liability unless society's sense of justice (boni mores) would point to the situation being offensive, degrading and trivial".

[18] See generally: Neethling, Potgieter & Erasmus: Law of Delict, supra, paragraph 3.2.2.1 on pages 352 to 354.

[19] See also Burchell: Principles of Delict, supra, at page 161.

[20] Consideration was given to only award costs of an opposed exception, but the limitations of exception proceedings where the wrongfulness criterion is at play, persuaded me upon reflection, not to limit the successful defendant's costs.

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