

SOUTH AFRICA / JUDGMENT

Moyane and Another v Lackay (35580/15)

[2017] ZAGPPHC 1262 (24 November 2017)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

35580/15

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:35580/15

THOMAS SWAHIBI MOYANE 1ST PLAINTIFF

SOUTH AFRICAN REVENUE SERVICE 2ND PLAINTIFF

and

ADRIAAN MARK LACKAY DEFENDANT

JUDGMENT

KHUMALO J

[1] This is an exception raised in a defamation action jointly instituted by Mr Thomas Swabihi Moyane ("Mr Moyane"), the 1st Plaintiff, and the 2nd Plaintiff, the South African Revenue Services ("SARS"), against Mr Adriaan Mark Lackay ("Mr Lackay"), the Defendant, claiming damages in the amount of R2 000 000.00 and R10 000 000.00 respectively.

[2] Mr Moyane, is a Commissioner at SARS ("the Commissioner"). He is responsible for all decisions in the exercise by SARS of its powers, which inter alia, include the institution and defence of legal proceedings. Exercising his authority as such, Mr Moyane has instituted the action against Mr Lackay in his representative as well as in his personal capacity. He is jointly with SARS referred to as the Plaintiffs. such, Mr Moyane has instituted the action in his representative as well as in his personal capacity. He is jointly with SARS referred to as the Plaintiffs.

[3] Mr Lackay is a former employee and spokesperson at SARS. He tendered his resignation on 19 March 2015 which was accepted by SARS.

[4] The Plaintiffs in their particulars of claim allege that Mr Lackay, with the sole purpose of injuring the good names of the Plaintiffs,

published a letter dated 24 March 2015 penned by him, to the Chairpersons of Parliament's Standing Committee on Finance, Honourable Yunus Carrim and Joint Committee on Intelligence, Honourable Cornelia September and distributed it to the media, such as media 24 with the media publishing an article on the contents of the letter which was read by the general public.

[5] On receipt of a notice of exception, the claim on defamation, which is referred to as Claim B in the particulars was amended to read as follows:

11 "On or about 24 March 2015, a letter dated same was emailed to the Chairperson of the Standing Committee on Finance, Honourable Yunus Carrim and to the Chairperson of the Joint Standing Committee on Intelligence, Honourable Cornelia September and the media such as Media 24 published an article on the contents of the letter which was indeed read by the general public. A copy of the said letter is already attached hereto as annexure (PC4)"

12 The aforesaid letter stated of the Plaintiffs that:

[12.1] During the latter part of 2014 they caused the Defendant to issue public statements to the media which contained false and incorrect information (subparagraph 1.1 of PC4)

[12.2] They deliberately ignored key facts which the Defendant was in possession of, to advance a particular narrative and which were used as the basis to effectively muzzle, frustrate, victimise and suspend key officials at SARS; (paragraph 1.3 of PC4)

[12.3] They effectively muzzled the Defendant Lackay thereby unable to ensure that the public was aware of critical factors regarding the happenings at SARS; (subparagraph 1.4 of PC4)

[12.4] Certain officials at SARS have been advancing a particular narrative which is false and contrived; (paragraph 6 of PC4)

[12.5] The employees of SARS are being and will continue to be victimised and bullied; (paragraph 7 of PC4)

[12.6] The Plaintiffs through the media, deliberately conflate certain issues, confuse or misrepresent material facts and embroider significantly on a unit.

[6] The Plaintiffs further allege that:

[13] The Defendant was aware, or reasonably ought to have known that the aforesaid allegations as contained in this letter were false, defamatory, and injurious to them.

[14] Furthermore, the allegations published aforesaid were wrongful and defamatory of the Plaintiffs in that they were intended and were understood by readers to mean that the Plaintiffs are dishonest, liars, and unprofessional in the following respect:

[14.1] That the Plaintiff issue false public statements;

[14.2] That the Plaintiffs muzzle, frustrate, victimise and unnecessarily suspend, without due course, its employees;

[14.3] That the Plaintiffs, Mr Moyane, in particular, lied to Parliament;

[14.4] That SARS bullies and threatens its employees; and

[14.5] That the Plaintiffs lie about the legality of the so-called "rogue unit"

[15] Furthermore to the above, the allegations are also false and defamatory of the Plaintiffs in that they impute and were intended by the Defendant to impute, and were understood by the persons to whom it was distributed to impute that the Plaintiffs consistently over a period of time failed to uphold the professional standards in which SARS is required to uphold in terms of its statutory mandate and thereby guilty of unconscionable and oppressive conduct unworthy of a reputable state institution such as SARS.

[16] The said allegations were made with an intention to defame the 1st Plaintiff Mr Moyane, and injure his dignity and reputation as well as to injure the reputation of SARS.

[17] The allegations were made by Mr Lackay with full knowledge of their wrongfulness.

[18] Notwithstanding their falsehood, Mr Lackay nevertheless published the allegations which indeed harmed the reputation and good name of the Plaintiffs.

[19] As a result of the defamation thereof and the injurious nature of the allegations the Plaintiffs' dignity and reputation have been damaged.

[20] Mr Moyane as the natural person both in his personal and representative capacity has suffered damages in the sum of R2 Million.

[21] SARS as the juristic person, with the statutory and constitutional responsibility to collect tax revenue on behalf of the state has suffered severe reputational damage which impugned on its statutory obligation.

[22] The second Plaintiff has suffered damage in the sum of R10 Million Rand.

[23] The amounts claimed are a globular figure and cannot be easily quantified.

[7] Mr Lackay had persisted with his exception to the Plaintiffs' particulars on the defamation claim based on three grounds, that he set out briefly as follows:

The first ground

[7.1] The Plaintiffs allege that the 24 March 2015 letter "was further distributed to the media such as Media 24" and that the media published an article on the contents of the letter. It is not alleged which precise members of the "media" published the article or to which specific article reference is made. The particulars attach three (3) different articles by three different media houses and therefore there is no clarity on which "media" or article is referred to.

[7.2] There is no allegation that Mr Lackay was responsible for delivering or publishing the letter to the media referred to in that paragraph or where, when and how such delivery or publication took place.

[7.3] Accordingly the particulars are vague and embarrassing and he will be embarrassed in pleading thereto, alternatively, the particulars do not disclose a cause of action in respect of any publication of the letter by the media to the public.

The second ground

[7.4] The Plaintiffs set out that their reputations have been damaged to the extent of R2 000 000.00 and R10 000 000.00 respectively. The Plaintiffs do not set out how the amounts are calculated. They allege that the amounts are a globular figure and cannot be easily quantified but they have quantified their loss in the amounts of R2 Million and R10 Million, and must have a basis on which they have arrived at those figures.

[7.5] Mr Lackay is in the circumstances not provided with sufficient information to be able to plead to the allegations and therefore the Particulars are vague and embarrassing and he will be prejudiced if he is forced to plead thereto.

The third ground

[7.6] SARS does not have locus standi in iudicio or the right in law to claim damages for defamation. Accordingly the particulars of claim do not disclose a cause of action in so far as SARS' claim for damages for defamation is concerned.

The Fourth ground of Exception

[7.7] The only media articles attached to the particulars on the best reading thereof for the Plaintiffs and when read as a whole and not selectively, do not tend to lower the Plaintiffs in the estimation of right thinking members of society generally. Accordingly the particulars lack averments necessary to sustain the action.

[8] It is important to rearrange the sequence followed in raising the grounds of Exception. I will deal first with the peremptory exception of locus standi as it has got the potential of defeating and disposing the contested claim, unless if the conclusion reached indicate otherwise.

SARS Locus Standi

[9] It has been argued on behalf of Mr Lackay that a government body such as SARS cannot sue for damages for defamatory statements that have allegedly injured its reputation, as it is an organ of state for the purposes of s 239 of the Constitution and part of it as its principle revenue collecting arm. Mr Max du Plessis, acting for Mr Lackay referred to the decision in *Die Spoorbond & Another v South African Railways*, 1946 (AD) 999 in illustrating the point. He quoted extensively from pages 1009 and 1012 -1013. There has been no better way to illustrate the position, which has since been not altered. That is the approach also followed by Traverso DJP in *Bitou Municipality and Another v Booysen and Another* 2011 (5) SA (YVCC) quoting the same passages at par [6] of her judgment. The paragraphs are not repeated here, due to the initial stance taken by the Plaintiffs, however cited later in the judgment as they constitute a kernel of the answer to this issue.

[10] When Mr Mkhari, acting for the Plaintiffs, commenced his argument on the point, I enquired from him if he was able to direct the court to any authorities that beg to differ with the proposition of the aforementioned cases. He acknowledged that SARS is an organ of state, and however argued that it is but an organ of state *sui generis* due to its dependence on the credibility of its services and people, to be able to function properly and efficiently and therefore

deserving of protection of its good standing and reputation. He implored the court to consider developing the common law to the

extent that SARS could be availed a defamation claim to protect its reputation.

[11] Further in his argument, Mr Mkhari highlighted the fact that even Mr Lackay himself in the letter that is the subject of contention had alluded to what he was alleging to be reporting on, as having harmed and continuing to harm SARS as an institution, its public credibility and ultimately the fiscal prospects of the country, to illustrate SARS uniqueness.

[12] Therefore according to Mr Mkhari's argument SARS' *sui generis* status arises from the fact that SARS performs a critical function of collection of revenue for state fiscus, for which its liability to collect sufficiently and adequately would become affected by its reputational damage, thus leading to the reputational damage of the entire government of the Republic, making it difficult for the government to fulfill its Constitutional obligation of delivering services to the people of South Africa.

[13] Mr Mkhari's argument however confirms that SARS is an organ of state that cannot be treated in isolation from the state, with its reputation actually impacting on how the state or government is perceived. Even though Counsel had intended to put emphasis on the hindrance caused to SARS from doing its job efficiently as a result of the supposed damage to its reputation to implore mandating the protection (it being treated differently) of its dignitas. Everybody understands the importance of an efficiently run fiscal operations as nearly half of our population depends on it.

[14] The call to develop the common law to recognise certain organs of state as semi-governmental or as being unique and different to the general standing of the state was not being raised for the first time in our courts. In *Bitou Municipality and Another v Booyesen and Another* 2011 (5) SA (WCC) [15], an argument was raised that a differentiation dependent on whether an organ renders a service at the national or provincial level compared to a local level and on its access to political remedies should be recognized to justify granting or denying an organ a standing to claim for defamation, a differentiation that is not applicable in this matter.

[15] It is illogical to want to regard SARS's standing to be unique to those of other organs of state due to its functions and importance in collecting and controlling the state's fiscus, since it fulfills a public function, exercising all the powers of a government department at a national level. Its functions are therefore in the public

interests. It would inevitably attract scrutiny by the general public as a functionary of government.

[16] Furthermore, the smooth running of its operations is also undeniably imperative as it conducts one of the critical functions of government. It is however, as it is with all functions rendered by all other organs of state, that any of its failure would affect the proper and efficient running of government, nothing is therefore exceptional or distinctive about that. It therefore like any organ of state, does not have a reputation and dignitas, to be isolated from the persons who run it. It is the individuals who make up its reputation. The protection of reputation or fama is a fundamental constitutional value that is rooted on human dignity (wounded feelings). In *Bitou*, Traverso DJP referred again to *Zipood* where its eloquently explained that:

"No one reads the alleged defamatory statements would regard the reputation or good name of the Crown (regarded as a perennially existing legal persona whose function is that of carrying on all the multifarious activities of Government in the Union) as having been lowered or injured by these publications. He knows that, though the railways are vested in the Crown, the Crown is only a legal conception and takes no part in the management of the railways. He might regard the noxious words as reflecting upon the individuals or group of individuals temporarily responsible for the direction or management of the railways on behalf of the Crown but he would not regard them as reflecting upon the good name of the Crown itself."

[17] The basis for the exclusion of the state from the right to sue for defamation to protect its reputation, is on balance the consideration of reasonableness, fairness, morality, policy and the court's perception of legal convictions of the community, which are to be countenanced with the enshrined Constitutional values of human rights and freedoms, specifically the freedom of expression. Schreiner JA in his separate concurring judgment in *Spoorbond* puts it in plain words, stating that:

"...it seems to me that considerations of fairness and convenience are, on balance, distinctively against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against the attacks upon its management of the country's affairs is political action and not litigation, and it would, I think be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State, actions for defamations will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, in which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects' actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.

- [18] What SARS can have in relation to its reputation is not a personality right, as it is with legal persons, but an integral part of its patrimony. The protection of its reputation is in the sense of its goodwill, therefore lies, not in the claim for defamation but in a claim for actual damages which constitute a patrimonial loss for which compensation can be claimed under the *actio legis Aquiliae* and not the *actio iniuriarum*; see *University of Pretoria v Tommie Meyer Films* (Edms) Bpk 1977 (4) SA 376 (T) at 387.
- [19] The Plaintiffs have failed to establish SARS's exceptionality that sets it apart from other ordinary organs of state to justify a disregard of the aforementioned considerations and the validation of the development of the common law for purposes of availing it the common law defamation action. SARS is therefore non-suited for a defamation action and the exception is with merit.

The ground on publication

- [20] The contention is that the averment that "the 24 March 2015 letter was further distributed to the media such as Media 24" and that the "media" published an article on the contents of the letter, is vague and embarrassing and does not disclose the cause of action for the reason that:
- [20.1] It is not alleged which precise members of the "media" published the "article" or to which specific article reference is made. The particulars attach three (3) different articles PC4 (a) to PC4 (c) by three different media houses and therefore there is no clarity on which "media" or article is referred to.
- [20.2] There is no allegation in paragraph 11 that Mr Lackay was responsible for delivering or publishing the letter to the media referred to in that paragraph or where, when and how such delivery or publication took place.

- [21] The particulars do not, as argued on behalf of Mr Moyane, state that the letter was "further distributed to the media. Mr Lackay's contention is however not about the exact words mentioned but with regard to the failure to mention the members of the media who supposedly published the article. Also the fact that it is also not mentioned if Mr Lackay himself was the publisher and how he did it.
- [22] Opposing that contention Mr Mokhari argued that the claim is based on the publication to the Parliamentary Committees and not a defamation claim based on media publication. The latter publication having been pleaded as a secondary issue. The media is not the primary source of dispute.
- [23] It is of importance to first look at what in essence is the rationale of an exception. An exception asserts or implies that the cause of action/claim to which an objection is taken is on the face of it insufficient, going as a whole to the root of the pleading; see *Salzmann v Holmes*, 1914 A. O. 152 pp50 and 61. It therefore is a matter of substance affecting the right of action as brought, assuming, for its purpose that the allegations are true. An exception consequently serves as a means of taking objections to pleadings which are not sufficiently detailed, or otherwise lack lucidity and are thus embarrassing; see *Colonial Industries Limited v Provincial Insurance Co. Ltd* 1920 CPD at p630. In that case the Defendant's obligation to answer or rebut does not arise.
- [24] The test of a valid exception is therefore that it must go to the root of the cause of action or pleading excepted to. Therefore if an exception does not destroy the whole cause or right of action or defence, it is bad. In the instance of a pleading that constitutes only a single cause of action or claim, the whole pleading would be destroyed. see *Naylor v Central News Agency* 1910 W.L.D 90; *Salzmann*; *Kroonstad Westelike Boere Ko-operatiewe Vereeniging Bepk v Rudaitzky* N O 1937 WLD. *Ferreira Deep Ltd v Olver* 1903 T.S. 86.
- [25] In *Farr v The Union Government* 1913 C.P.D. 818 it was held that as a rule an exception to be valid should go to the root of the pleading, but when no objection is taken it is convenient to allow an exception to particular claims only. The exception must then go to the root of the entire claim or defence.
- [26] If a pleading comprises of a multiple causes of action or alternative defences, the destruction of one will of course not result in the destruction of the entire pleading.
- [27] It is trite that where the claim for defamation is joined together in a declaration with another claim whose cause of action is distinct, the two causes must be clearly separated and the conclusions for which the Plaintiff contends should be distinctly and separately drawn. Every claim is therefore required to set out a complete chain of relevant facts relied upon and the omission of any linking fact will break the sequence and obviously render the conclusion false; *Richards v Guardian Assurance Co*, 1906 T.H.205; *Khunou v Minister of Native Affairs* 1908 T.S.

[28] On a claim for defamation, publication of a defamatory statement is prima facie wrongful. The essentials or facts that have to be established in an action for defamation are the following:

[28.1] defamatory statement/s;

[28.2] that have been published or uttered by the Defendant;

[28.3] concerning the Plaintiff;

[28.4] that defames or undermines or has the tendency or calculated to undermine (innuendo) the status, good name or reputation of the Plaintiff; and

[28.5] to whom it was made, if verbal

[29] They are all to be alleged in the particulars of claim. If the name/s of the persons to whom the publication of the statements was made is unknown, it is to be so stated; *Lubbe v Robinsky* 1923 CPD 110 at 111) *Amler's Precedents of Pleadings* 8th Edition by Harms.

[30] If publication takes place in a publicly distributed document, it is not necessary to list the name or names of readers because it is factually presumed that publication took place

[32] The whole document containing the alleged defamation may be included or annexed to the claim without specifying the defamatory passages if the whole document is alleged to be defamatory; see *Vermaak v Van der Merwe* [1981] 1 All SA 432 (N), 1981 (3) SA 78 (N)

[33] If the words are not per se defamatory an innuendo should be laid to attach the meaning of which the plaintiff complains: see *Conroy v Nicol & Another*, 1951 (1) SA 653 (A.D.)

[34] In reading the defamation claim as in the amended particulars of claim, reference is made to the email being sent/published on 24 May 2014 to the two Standing Committees in Parliament and to the media, specifying media 24. Therefore there is no doubt about the publication of the alleged defamatory letter to the three alleged recipients. The entire letter has also been attached to the claim.

[35] The supposedly re-publication by the media constitutes a separate cause of action against the media 24 and does not create a vicarious liability. Therefore the Defendant cannot be held liable for such publication: see *National and Education Health and Allied Workers Union v Tsatsi* [2006] 1 All SA 583 (SCA), 2006 (6) SA 327 (SCA). It therefore follows as well that the naming of the members of the media to whom media 24 has published the letter will be a matter for consideration in an action against the media.

[36] The argument raised that the particulars do not name the Defendant as the person who published the e-mail is not raised in earnest. It is indeed one of the essentials on an action for defamation that constitutes a necessary averment and if absent will render the whole claim excip iable; *Vermaas v PeIser and Others* 1951 (1) S.A. 752 (T).

- [37] However, in paragraph 18 under the defamation claim the allegations made that "Notwithstanding their falsehood, injurious nature, the Defendant nevertheless published the allegations which indeed harmed the reputation and good name of the First and /or Second Defendant." do mention the Defendant as the person responsible for the publication. As a result reading the causa as a whole does give an indication that the Defendant is responsible for the publication. The exception has no merit seeing that adequate details necessary to establish the defamation claim have been pleaded.

The ground on the damages

- [38] The Plaintiffs have set out that their reputations have been damaged to the extent of R2 000 000.00 and R10 000 000.00 respectively. Mr Lackay had argued that the Plaintiffs do not set out how the amounts are calculated instead allege that the amounts are a globular figure and cannot be easily quantified but they have quantified their loss in the amounts of R2 Million and R10 Million, in that instance they must have a basis on which they have arrived at those figures.
- [40] Mr Du Plessis argued that there is no basis laid for the calculation of the amounts claimed, when in terms of Rule 18 of the Uniform Rules of Court any claim for damages must be set out in such a manner as will enable the Defendant reasonably to assess the quantum thereof. He highlighted that since Mr Lackay as the Defendant has a duty to work out what is a reasonable assessment of the damages sustained by the Plaintiff he will be prejudiced if he is to plead to this aspect. *Cete v Standard and General Insurance Co Ltd* 1973 (4) SA 349 (W) at p350; *Thonar v Union and South West Africa Insurance* 1981 (3) SA 545 (W) 548G- 549E.
- [41] The argument is however flawed on a claim for defamation, which is basically in a sense a claim for sentimental damages. In an action for general damages of sentimental connotation, it is not incumbent on Plaintiff to furnish particulars of such general damages. All that a Plaintiff is required to do is to furnish the Defendant with the "ground upon which the claim is based"; see *Simonds v White* 1980 (1) SA 755 (C) on p 758F-G. In the matter of *Cete* that is referred to by the Plaintiff it was further held that "it is expected of a Defendant that he should make his own investigations". The Rule did not contemplate that a Defendant sit back and expect to be supplied with all the information he might require (for whatever reason). The details that Defendant wants the Plaintiff to plead relate to matters of evidence relevant to the quantification of damages. In *Cete* it was stated that the Defendant is not entitled to insist on "an advanced abridged edition" of the Plaintiff's evidence in a case of this kind. He is not entitled to particulars of Plaintiff's standing, reputation or character, nor as to the extent of publication.

[42] Mr Du Plessis has also referred to the matter of Sasol Industries (Pty) Ltd t/a Sasol 1 Electrical Repair Engineering (Pty) Ltd t/a L H Mlrthinusen 1992 (4) SA 466 (W) where it was stated that a bald allegation by a plaintiff as to the quantum of his damages does not amount to compliance with Rule (10) particularly where he does not allege that the damages claimed are an estimate and where it furthermore appears that they were calculated to an exact amount. The matter is different and the damages arose from a breach of contract.

The ground on defamation

[43] The final ground of exception raised against the Plaintiff's particulars is that the only media articles attached to the particulars on the best reading thereof for the Plaintiffs and when read as a whole and not selectively, do not tend to lower the Plaintiffs in the estimation of right thinking members of society

generally. Accordingly the particulars lack averments necessary to sustain the action.

[44] Mr du Plessis argued that the correct approach is to read the publication in context of the article as a whole and ask if it might be understood by a reasonable reader as being defamatory of the statements. He argued that the words were not published in isolation; see Council for Medical Schemes and Another v Selfmed Scheme and Another [2011] ZASCA 207 (25 November 2011) at para 61. Demmers and Wylie and Others 1980 (1) SA 835 (A) at 842E.

[45] He further argued that the publication were not a final conclusion concerning the Plaintiffs but raises Mr Lackay's concerns so that they might be properly interrogated by the Standing Committees.

[46] Mr Moyane on the other hand alleged that the allegations published aforesaid were wrongful and defamatory in that they were intended and were understood by the intended readers to mean that he was dishonest, a liar and unprofessional in the following respect:

[46.1] That he issues false public statements;

[46.2] That he with SARS muzzles, frustrates, victimise and unnecessarily suspend, without due course, SRAS employees;

[46.3] That, he in particular, lied to Parliament;

[46.4] That SARS bullies and threatens its employees; and

[46.5] That he lied about the legality of the so-called "rogue unit"

[47] Furthermore Mr Moyane alleges that the allegations are false and defamatory of the Plaintiffs in that they impute and were intended by Mr Lackay and were understood by the persons to whom it was distributed to impute that the Plaintiffs consistently over a period of time failed to uphold the professional standards in which SARS is required to uphold in terms of its statutory mandate and thereby guilty of unconscionable and oppressive conduct unworthy of a reputable state institution such as SARS. In short that Mr Moyane bullies its employees into lying and himself issues false public statements.

- [48] The question that Mr du Plessis argued the court was to establish is whether there is merit to Mr Moyane's complaint, viewed in the context of the political discourse that was taking place. He argued that in light thereof, the contents of the articles would not be viewed as defamatory but as Mr Lackays' attempt to try and explain what was happening at the time.
- [49] A defamatory statement is a false statement of fact that exposes a person to hatred, ridicule, or contempt, causes him to be shunned, injuring him in his status, good name and reputation or in his business or trade. If a statement or words are not per se defamatory an innuendo should be laid to attach the meaning of which the Plaintiff complains.
- [50] Mr Moyane is entitled to the protection of his dignity, that is his status, good name and reputation as an individual and as Commissioner of SARS as a result of false statements. The publication of anything that is untoward and false in relation to his role or functions as a Commissioner will injure or affect his standing, personally and as a Commissioner. The publication as alleged by him has been made to the standing committee were he was to appear and address their questions. They clearly do not put him in a good light as he pleaded. Mr Lackay denies that the letter was calculated to undermine Mr Moyane's status, good name and reputation of the Respondents. It is also argued that Moyane would have every opportunity to rebut the claims by Mr Lackay.
- [51] Mr Lackay has alleged that Mr Moyane has issued false public statements, which means that he lied and bullied officials including

Mr Lackay to also lie to the public issuing false statements, which Mr Moyane alleges to be untrue. Such statements alleged to be false (as we have to regard particulars to be true) in any reasonable person's view, therefore also to the Parliamentarians before whom he was going to appear and to the media that has been sent the letter as well means that Mr Moyane is a liar and indeed a bully. Hence the publication under the headlines that have been referred to in the articles.

- [52] The caption or headline of the article referred to reads "SARS officials bullied into false claims" and depicts a picture of Mr Moyane and Mr Lackay at the bottom it reads "Adrian Lackay claims Tom Moyane victimised him". How it was read by the public is summarised by what Mr Moyane refers to as a reader's own conclusion in response to the article that "Moyane is a puppet of Zuma and should be charged with obstructing the ends of justice ." Therefore if based on a falsehood as alleged by Mr Moyane in his particulars, the Defendant had an onus to rebut that. The particulars therefore constitute a sustainable cause of action.
- [53] The words or content of the letter alleged to be defamatory are to be understood in their natural and ordinary meaning. Even though context might be relevant, the general rule is that an exception has to be decided by the court on the pleadings themselves without the leading of evidence: see *Dendy v University of the Witwatersrand and Others* 2007 (5) SA 382 (SCA) at paragraph [16] and on assumption that it is the truth.

[54] A further angle of the argument by Mr du Plessis was that Mr Moyane is a political or public figure and that there is a common reluctance to regard utterances about political figures relying on the authority of *Argus Printing and Publishing Limited v Inkatha Freedom Party*

[1992] ZASCA 63; 1992 (3) SA 579 (A) at 578H. He also referred Willis J's comments in the matter of *Buthelezi v BDFM* (2012] (2) ZAGPJHC (18 September 2012) "[9] that:

"As the Afrikaans proverb goes, 'Die hoogste borne kry die meeste wind'. This may be somewhat inelegantly be translated into English as "The taller the tree, the more it is buffeted by the wind."

[55] In the matter of *Holomisa v Fred Khumalo, New Africa Publications & 2 Others* [2002] ZACC 12; 2002 (5) SA 401 (CC) the court had to directly confront that question, raised in an exception, which it interrogated in two forms, that is whether:

"It is inconsistent with s 16 of the Constitution to permit a plaintiff to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to the fitness of a public official for public office, alternatively to the fitness of a politician for public office, in circumstances where that plaintiff does not allege and prove the falsity of the statement in question."

Alternatively whether

It is inconsistent with s 16 of the Constitution to permit a politician, alternatively a public official, to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to his fitness for public office, in circumstances where he does not allege and prove the falsity of the statement in question."

[56] The contrast is that in this matter, Mr Moyane has alleged falsity of the statement. The question was approached in its constitutional

perspective and O'Regan J acknowledged that 'although freedom of expression is fundamental, to our democratic society, it is not a paramount value and must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality which is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. ' see [25] and [35] & [36].

[57] The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. The fact therefore that a person is a politician does not diminish the worth of his individual or public's estimation of his self worth. He is entitled to the protection of his dignity against the publication of falsehood.

[58] Borrowing also from the Canadian authority of *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106 where Cory J observed that:

"False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society."

[59] It is important to however highlight that O Regan also however remarked that similarly, no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation.

[60] The contents of the letter are presumed defamatory per se where they are alleged to falsely impute to Mr Moyane that he is acting incompatible with his profession and position and causing instability at SARS.

[61] Under the circumstances it is ordered that:

[61.1] The Exception in respect of 2nd Plaintiffs claim, that is SARS is upheld

[61.2] The 2nd Plaintiffs claim is dismissed with costs

[61.3] The Exception in respect of 1st Plaintiff claim is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

For the Excipient/Defendant: Adv Max du Plessis

Instructed by:

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C/O Hills Inc- A Engelbrecht

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