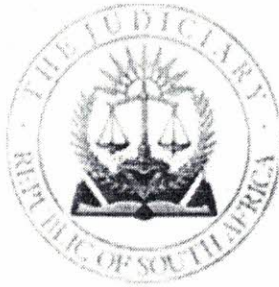


IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 63889/2013

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

Signature

Date

24/10/2018

SEKITLE WESLEY MASHEDI

PLAINTIFF

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

1<sup>ST</sup> DEFENDANT

DIRECTOR GENERAL OF THE DEPARTMENT  
OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

2<sup>ND</sup> DEFENDANT

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JUDGMENT

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KHUMALO J

INTRODUCTION

[1] Suspicion is what it is, a "suspicion" and therefore does not and should not impute guilt, however does it? On 8 October 2013 the Plaintiff instituted an action against his employer, the 2<sup>nd</sup> Defendant, the Department of Justice and Constitutional Development ("the Department"), and its Ministry as the 1<sup>st</sup> Defendant, claiming damages for defamation,

a tarnished dignity and reputation and the resultant trauma in an amount of R1 000 000.00 (One Million Rand).

[2] a Mr Paul Nel ("Mr Nel"), cited in his official capacity, as the Director General of the Department of Justice, who is the 2<sup>nd</sup> Defendant, is alleged by the Plaintiff to have unlawfully accused him of misconduct, upon which Plaintiff was on 18 May 2012 arrested at work and his computer, printer and cellphone confiscated by the members of the South African Police Services (SAPS) which he alleges to have been at the instance of the 2<sup>nd</sup> Defendant.

[3] Plaintiff alleges that as a result of the accusation and his subsequent arrest by the SAPS in front of his co-workers, his dignity and reputation at work was tarnished and he suffered trauma and post-traumatic stress.

[4] It is common cause that Plaintiff subsequently received a letter dated 18 February 2013 withdrawing the accusation of unlawful conduct, emanating from the office of the Director Human Resources written by the acting director at the time, Mr C Zana.

#### BACKGROUND FACTS

[5] The common cause facts are that Plaintiff was suspected of having ordered 14 iPads valued at R138 000.00 using the Department's letterheads. On the day of the alleged arrest a supplier arrived at the Department's reception to deliver a parcel that contained the 14 iPads. The order was placed by one Mnisi or Jacob Mohale, purportedly from the Department. Both Mnisi and Mohale were unknown to the Department, seemingly it was a fraudulent order. The Plaintiff was suspected of being involved in some manner. As a result the police were called to the premises and they took him to the police station to obtain a statement. They thereafter let him go home.

[6] Plaintiff alleges that Mr Nel, the alleged accuser and Zana were at all relevant times acting within the course and scope of their employment with the Department and accordingly holds the Department vicariously liable for their conduct and therefore claims damages for the following:

[6.1] his tarnished dignity and reputation at work	R500 000.00
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[6.2] for the trauma and post-traumatic stress	R500 000.00
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<b>Total Damages</b>	<b>R1 000 000.00</b>
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[7] Plaintiff's particulars of claim were later amended to include a further claim for past medical expenses in the amount of R100 000.00 and future medical expenses in the amount of R53 770.00. He also added a claim for future loss of earnings in the sum of R445 350.00. The total amount of his claim was R 1 599 120.00.

[8] Except for admitting to the citation of the parties and the demand, the Defendants in their Plea denied all the allegations in the Plaintiff's particulars of claim including any liability towards the Plaintiff that is alleged to have resulted from the alleged unlawful accusation by Nel and putting the Plaintiff to the proof thereof.

[9] The Defendants subsequently amended their Plea still denying that Plaintiff was



unlawfully accused by Nel, added that Nel was not at work on 18 May 2012 the day of the alleged incident. Further that the Plaintiff had arrived at the reception while the supplier who was in the company of the departmental official was still there. He moved around the reception and went back to his office. The forensic department was informed of the incident. The departmental officials and the member of the forensic department went next to the Plaintiff's office and dialled the number obtained from the supplier. The Plaintiff picked up the phone without uttering a word. Alleging that Plaintiff was acting behaving suspiciously.

[10] Regarding the letter the Defendants admitted that the letter the Plaintiff received was written by Mr Zana however denied that he did so acting within the scope of his employment with the Department.

[11] The amendments of both the Particulars of claim and the Plea were effected in May 2017, 2 and a half weeks before the trial, notwithstanding the action having been instituted in October 2013. The Plaintiff did not replication to the Defendant's amended particulars.

[12] In terms of the parties' final pre-trial minutes the parties agreed that the Plaintiff has the duty to begin and carries the onus of proof.

[13] At the commencement of the trial the parties agreed that the issue of merits be separated from that of quantum. The court made the order accordingly and the issue of quantum postponed *sine die*.

[14] The issues that were to be determined relate to:

[14.1] Wrongfulness; that was to be proven. Whether the accusations of misconduct were unlawful

In the context of this case it is, whether the Defendant (through its employees) had acted unreasonably (without justification) when the Plaintiff was accused of the fraudulent order and when the members of the SAPS were called (Was there a reasonable suspicion?) and if so, if a reasonable suspicion can be a defence against a claim for *inuiria* and trauma.

[14.2] *Animus iniuriandi*; an intention to injure was also to be proven. The presence of fault in the form of *animus iniuriandi*

#### EVIDENCE

[15] The Plaintiff, Mr Wesley Mashedi ("Mashedi"), who has since 2004 been in the employ of the 2<sup>nd</sup> Defendant and now a Human Resource Officer testified that: On 18 May 2012 he arrived at work at 8h00, reported for duty and then proceeded with his duties. At about 13h00 the police came to his work and arrested him. He could not remember what he did the rest of the day before he was arrested. He took a break for lunch at 12h00. He was arrested at his office and told that he had ordered iPads through the Department. He works in an open plan office and therefore his colleagues witnessed the arrest. Elmarie Fouche who is the head of Department called him to the boardroom where there was a lot of people, including members from the South African Police Service ("SAPS") and the forensic department officials. He recognised Martha James, Paul Nel's secretary from Forensic as



well as Tselane. There were other male persons that he could not recognise. When he walked into the boardroom, the police showed him their badges. They read him his rights, in relation to his choice to remain silent and that if he chooses to say something it may be used against him in the court of law. They told him he was being arrested in the presence of the forensic guys. This was not in front of Martha at the time she has left him and was talking to the people who were standing in the passage. He was not handcuffed.

[16] At the time he had already made a statement with the forensic. He told forensic that he did not know anything about the orders. They confiscated his 2 personal phones, searched him and went to the big office where he executes his duties and searched the cabinets and the phones. He was then taken by the police officials, grabbing him to the police station. They grabbed him when he was in his office and all of his colleagues were there including Mr Mahobola. They took the printer and the computer he uses in his office. From the people who were in the boardroom he knew two people. The people from forensic investigates and try people who have committed offences at work. Mr Paul Nel is in charge of the Department. He was not in but his secretary, Martha James and Tselane and two guys who are unknown to him were there.

[17] The police took him to the police car that was outside and drove to the Central Police station in Pretoria. At the police station he was asked to make a statement. He told them that he did not know anything about the order or those things. He was at the police station until 17h30. He thereafter received a letter of precautionary suspension from Martha James which he signed, and the police told him to go home. He was told not to be far away as they might need him anytime. The incident happened on a Friday. In the boardroom the phones were taken by the forensic officials. They never gave them back to him. They also did not discuss the letter of suspension with him. When he wanted to, he was told that if he does not want to sign he must say so. He signed the letter, kept the original and gave Martha a copy. After that nobody has ever updated him about the case.

[18] He reported to work the following Monday. When he arrived he found that his entrance card has been blocked. He phoned Elmarie Fouche who came and took him to the Labour Relations Office where he made another statement that he does not know anything about the orders. The LRO gave them reasons why they are not supposed to suspend him. On Monday he did not perform his duties. He went back to Fouche and she referred him to the EA Section, the Wellness Section of the Department, for counselling. He was, after counselling booked for Psychiatry treatment and evaluation for 2 weeks. He told her them that he has not slept since Friday tormented and troubled in his mind as he wonders what is happening. He was back to the same work after three weeks. Since they had taken the computer he went in everyday and sat there on the table. He was given his access card back after a month. Fouche used to fetch him every day from the entrance, during lunch as well and when he knocks off. He still worked with the same people. They looked at him without accepting him to come closer. They did not allow him near their computers.

[19] No one ever discussed anything with him regarding this case. They never brought back his computer, instead he was given a different one. They still have not returned the phones including his personal ones instead the office borrowed him their phone. He was never subjected to a disciplinary hearing. The charges were withdrawn when he was given a letter dated 18 Feb 2013. Fouche gave him the letter as the Head of his section. He



understood that they were withdrawing the charges against him. Subsequent to the letter he never heard anything. They never gave him his phone back. He forwarded his seniors e-mails wanting to know the status of his case and asking for his phone back. Forensic denied that they have the phones and sent him to Labour Relations which communicated with the police stations but they said they did not have his phones.

[20] Under cross examination he confirmed that he knows Mr Paul Nel very well and he was not there during this whole incident. He said he was making these accusations against him because the forensic people, Martha James and Tselane are led by him. Martha James is Nel's secretary, that is how he came to be involved even though he was not there during his arrest attending a meeting in Durban. Nel as the Director of the Forensic Department was responsible for any action that was done by the three coming from forensics even though he was not at the scene. All of these things were done by the police and people from forensic. Nel was therefore responsible since the three were working in the forensic section. It was put to him that the person who called the police is Dionne O' Kelly ("Dionne"), a consultant in Chain management who will testify that on 18 May 2014, she was called by Sophie Modibeng ("Sophie") from reception when the supplier arrived there to deliver the iPads. Sophie had told her that she suspects that it was a fraudulent order. Dionne informed her boss Ishmael Assam. They went to reception and met with Beatrice from Ekuphumelele Trading Enterprise (the supplier/delivery lady) who had come to deliver the 14. Dionne checked and realised that they did not come directly from supplier and that the recipient was nearby since Beatrice was communicating with supplier by phone. Whilst they were still at the reception, with Asmail, the delivery lady, receptionist and O Kelly, he (Mashedi) went to the reception walked around and went down the stairs. She therefore decided to go to the forensic office. She met Martha and Tselane but unluckily and the delivery person. They told the forensic officers about Mashedi's movements because he heard that he works under Fouches offices. Martha asked for the numbers of the person who called the delivery person, she then phoned the number and saw the Mashedi pick up the phone without talking.

[21] Mashedi's response was that he never answered any phone at work and he had given them his numbers which he was using and told them to phone it, they were different to what they were talking about. They nevertheless summoned the police. He confirmed that the orders were not correct but fraudulent and not the ones they used. He was told that he cannot blame Dionne since she was seized with the forms & confronted with the things that were being delivered, the 14 iPads, suggesting fraud, whilst they were there at reception with the person who was delivering the iPads. He said still he was still blaming them because they accused him. He said he was not aware of their procedure of reporting a case. It was put to him that he said he did not go to his office or answer any phone calls, but they had information from the delivery person that the person who is supposed to accept the order was in the vicinity as she spoke to the person when she arrived and he answered the phone. He said he blamed that person because he is not certain that it is that person who committed the offence. It was put to him that Ms Fouche will come and tell the court that immediately forensic people left, he also left and came back carrying a bag. He confirmed that he left after talking to the forensic and came back carrying a bag but it was before they went to lunch. They searched his office after he moved out of it. He was told that the witness will say it was after the forensic asked him questions. He denied that forensic asked him questions. He said the only time they questioned him it was at the time



he was with the police in the boardroom. He said he never got a letter that suspended him, it was written precautionary suspension. It was put to him that when they looked at what Dionne told them before, it was within her right to report the matter to the police and with no intention to defame or injure him.

[22] On re-examination he agreed that the order on P 2 & 3 was not the Department's correct order form and in the office they always asked him to order stationery now and then that is how he got to know about the manual requisition. On the date of the incident ordering stationery was part of his duties but the last time he ordered was in 2011. In the process there is a portion that he signs and gives it to his boss. He has never ordered iPads. He did not sign the forms shown to him. It was for the first time in his employment that he was talking to the forensic guys.

[23] The next witness was Jammin Junior Makgobola, Mashedi's co-worker. He was employed by the Department on 6 February 2012 when he was introduced to all his colleagues including the Plaintiff. Nel Maree, who introduced him told him that Mashedi is going to assist him with orientation and he is the one who helped him to get his work computer. On 18 May 2012 he was at work and remembers the incident that took place on that day. They were coming back from lunch time and sitting at his table where he works. Emarie Fouche came to the office and went out with Mashedi. When Fouche came back she came back with the police. They searched Mashedi's work station. They took a computer with a printer whilst holding Mashedi. Other employees, colleagues were also there who work in the same space on other tables. He was taken aback by what was happening. He just thought of Mashedi to be this person who is a thief. After the incident when he came to work he did not want to be close to him, still tainted or scarred. If they had continued to associate with him they would be taken to be the same as him.

[24] They are still sharing the same space. Plaintiff sits about 3 to 4 meters away from him and can see what is happening on his table. In 2013 he came around to them and told them that the matter has been finalised. Since it was verbal they still did not trust him. The manager did not tell them about this matter up until the Plaintiff came and showed them the letter and he read it, it indicated that the charges were dropped. It was still not easy for him to trust him.

[25] The Plaintiff closed its case.

[26] The first witness on behalf of the Defendant was Ms Dionne O'Kelly, the assistant director who manages the Department's store that procures stationery. She is the head of the Distribution Centre and Deliveries, the custodian of Annual and Interim consumables. On the 18 of May 2012 at about 8 o'clock in the morning she was at her desk busy with her normal duties when she received a telephone call from Sophie the receptionist. A supplier with a purchase order to deliver 14 iPads had arrived at the reception and she was trying but could not find the people on the purchase order and the Department on the form. She said she could not find the names of the officials on the Department's address book. Sophie phoned her as she was the head of Distribution at the National centre for the store. She told Sophie that she was coming to the reception. She phoned Ishmael Massin who sits in the West Tower to accompany her. They met each other at the reception where they met the supplier Ms Beatrice Dube. The supplier showed them the purchase order, the letter from the Department and the delivery items, the 14 iPads. She looked at both order and letter



and told her that it was a fraudulent order and she must not give it to anybody and the Department was not going to pay. The supplier denied that it is fraudulent saying she just spoke to the person who said he is there, so the guy must be there. She realised that they have to see who is in the vicinity. It was very quiet because it was at about 8h00 – 8h20, suddenly a person came walking slowly looking at them, very suspiciously. She did not know the name of this person. That is when they decided that they take the case up with forensic auditors. She phoned Paul Nel, and he said he was not in the office but attending a meeting in Durban. He told her to go to Tselane or Martha. She was with Ismail and the supplier.

[27] At the forensic, they explained to forensic what they saw. They all went back to the Department's security building Martha, Ishmael, and Mrs Beatrice Dube to look at the footage to see the surroundings. The cameras did not work. So she then explained to forensic auditors that she saw Mr Mashedi who works at HR. She took the supplier to the store. Martha and her went to Ms Fouche's office. Martha took the number from the supplier and the intermediate reception where they were telling her where to drop the goods. Martha phoned the number and Mashedi answered the phone. Martha and Ms Fouche watched Mashedi for some time. They took it from there. She then had to go back to her office. Martha then contacted the police and she at that time had to live. She pointed out that Mashedi decided that he will come to the foyer and move around. He came in very slowly looking at her and Asmal. She walked nearer to look through the window so she could see clearly with her contact lenses when he later picked the phone. She opened the door and Mashedi answered the phone like this, demonstrating. She got the shock of his life.

[28] Under cross examination she testified that she was told about the delivery that came in at 8h00. She went to check with the supplier and realised that the orders were indeed fraudulent. Their forms are generated from their JHY system that is different from the purchase order form that was handed in by the supplier. She thought she must go to the foyer. She then informed Ishmail, the Deputy Director so that he must not think she was late. She told him that she is going to see if indeed the order is fraudulent because she could not find the person. The names did not appear on the order. Sophie had already told her that she tried to find the names of Mohale and she could not. She was sitting in another building. Sophie is the head of the telephone, phoned her and said to her "you are working with those things and the best person who can deal with it. She confirmed that when she arrived at the reception it was quite and that is when Mashedi came in slowly looking at them acting suspiciously. That was the basis of her suspicion about which she told the forensic auditors. Everyone is allowed to pass the reception but she reported it because he looked suspicious. He came in looking at them walking very slowly and looking around. Beatrice had however told them that she spoke to the guy he was in the vicinity. She told Beatrice not to give the order to anybody otherwise they will not get their money. She confirmed that she is the one who formulated the suspicion that the order was fraudulent and called the forensic. Dube had not believed the order was fraudulent saying because she spoke to someone over the phone. The person's names on the fraudulent purchase order were Mohale and Mnisi.

[29] She said she phoned Nel who told her to speak to the supplier and take the supplier to the forensics. She went there because of instruction from Mr Nel who is the head of the Department. She saw the supplier put the number and the phone rang and Mr Mashedi picked up the phone. That is why they dialled it twice and again Mashedi answered. That is



what she saw. She also knows that they have done something with the phone but she was not there. What was suspicious was what he was doing, answering the phone and his actions coming to the reception moving slowly looking at them. She confirmed that she could not hear him but saw him answering the phone. She was the manager and she was trying to be fair and can only testify to what she saw. She explained that in the procurement of goods system 3 signatures are supposed to be captured JYP. To be verified by two officials. There must be 3 quotations 80/90% principle applicable. The order was totally fraudulent.

[30] Ms Elmarie Fouche testified that she was still employed by the Forensic Department of Justice and on 12 May 2012 she was at work when Dionne, Visser and Martha James came to her office and closed the door. They explained to her that they suspect that Mashedi was the person in the same vicinity whom the supplier was trying to phone as the person who had ordered iPads. Also that Sophie called Ms Dionne to come and see what was going on because she suspected the order to be fraudulent. They were going to check the person who ordered the iPads. They opened the office door which is a glass door, so when the door is open one can see everybody in the open plan. The forensic auditor, Martha phoned the number and stepped out of her office and saw Mashedi answering the phone. She came into her office and they phoned the same number again. She also went out of her office to go and look at Mashedi who ran in the office next to her. Afterwards Martha indicated that the police have been called and the Director Chief to come and see what was going on and they were to meet in the vicinity which is an open place. She saw Mashedi leave the office taking his backpack and does not know where he went to. Sometime lapsed after that. He was out of the open plan for a while. She could not say for how long and what time. The police asked Mashedi about where he went. They took his backpack and at the time he was not at his work station. They opened it, he does not know what happened thereafter and what was going on with the police. In so far as that incident was concerned she does not know about any charges that were levelled at Mashedi.

[31] Under cross examination she confirmed that Mashedi does not report directly to her but indirectly to her for supervision. However as a section head at Deputy Director Level she knows Mashedi and has worked with him. His work comes to him through his supervisor. They informed her that they were going to dial the number that was given to the supplier in the order, and she saw Mashedi answering the phone and knew the phone he was answering to. When the forensic people had a discussion with Moshedi for the 1<sup>st</sup> time she was not part of it. About the letter from Zana, he recognised the letter at Page 14. The understanding was that the matter was withdrawn and to be revisited if anything else comes out. She confirmed that her testimony was that she was not aware of any allegations except that they took a fax machine, 3 cellphones and were given back to him at the end of last year. He was also not aware of any disciplinary proceedings that took place.

[32] Mr Zana testified that he was employed by the Defendant and was acting director on 18 February 2013. He confirmed that the letter on Page 14 bore his signature. According to him he signed the letter, on the advise of Mr Sehoana who has misled him. Sehoana advised him that Mashedi had been arrested. He did not have a full picture about the Mashedi's case. He was acting director when the incident took place. He understood the letter to be a temporary withdrawal and signed the letter on the advise of Sehoana. Sehoana did not give him enough information. He was not privy to the investigations. He realised three years



thereafter in 2016 that the information on the letter was not correct but did not try to correct it. He was not aware of the arrest.

### Issues in dispute

[33] Moshedi's arrest and him being taken to the station to make a statement being common cause, the issue that still remains at the end of the enquiry was whether a reasonable suspicion existed (there was a suspicion reasonable enough) that justified the accusation and the calling of the police. The Plaintiff argued that the evidence did not prove the existence of a reasonable suspicion stating that there is no evidence before court to appreciate that 2<sup>nd</sup> Defendant Plaintiff was a suspect. Whilst the Defendant argued that it has proven justification and that it had no intention to injure. Plaintiff has not proven any intention to injure.

[34] The issue that was to be determined relates to:

[34.1] whether the accusations of misconduct were unlawful

Wrongfulness to be Proven : in the context of this case it is, whether the Defendant had acted unreasonably (without justification) when the Plaintiff was accused of the fraudulent order and when the members of the SAPS were called (Was there a reasonable suspicion?) and if so, if a reasonable suspicion can be a defence against a claim for *inuria* and trauma.

[34.2] Also whether an intention to injure was proven. The presence of fault in the form of *animus iniuriandi*;

### LEGAL FRAMEWORK

[35] Defamation is the wrongful, intentional publication of words or behaviour concerning another person, which has the effect of injuring his/her status, good name and reputation. Publication of a defamatory statement is *prima facie* wrongful. Publication is defamatory if it has the tendency or is calculated to undermine the status, goodname or reputation of the Plaintiff; see *Le Roux v Dey* [2010] 3 All SA 497 SCA; *Le Roux v Dey* 2011 (6) BCLR 577 (CC). The onus is upon the Defendant to dispel this *prima facie* presumption. The onus requires the Defendant to allege and prove facts that dispel wrongfulness, such as truth and public interest: see *Neethling v Du Preeze*; *Neethling v The Weekly Mail* [1994] 3 All SA 479 (A, 1994 (1) SA708 (A) pp769-780), alternatively reasonableness; *National Media Limited v Bogoshi* SA 347 [1998] 4 All SA 347 (A), 1998 (4) SA 1196 (SCA); *Khumalo v Holomisa* 2002 (SA) 401 par 43.

[36] The *actio iniuriarum* protects the dignity of a person. The plaintiff may attach to words alleged to have been said or conduct, such a particular meaning in the form of a quasi –innuendo and point to its sting, whilst he does need to allege a sting but however if alleged she or he is bound to that sting and may not rely on any other: *Marias v Steyn* [1975] 3 All SA 401 (T), 1975 (3) SA 479 (T) p486; *Times Media Ltd v Niselow* [2004] ZASCA 134, [2005] 1 All 567 (SCA) par 21.

[37] On the question of reasonableness, the Defendant must allege and prove that he or she (1) had reason to believe in the truth of the statement, (2) took reasonable steps to verify its correctness and that (3) publication of the statement was reasonable in all the circumstances of the case; *Hardaker v Phillips* [2005] ZASCA 28, 2005 (4) SA 515 (SCA)

[38] *In casu* the Defendant must prove that the accusation of criminality were not wrongful (having reason to believe in it). That there was justification for having brought about the accusation; *Argus printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A); *Neethling v Du Preeze* p769-780; *National Media Ltd v Bogoshi*

[39] On the question of *animus inuiriandi*, although the plaintiff is required to allege and intention to injure, such an intention is presumed and therefore it is for the Defendant to disprove (prove absence of) such an intention. The onus being on the Defendant he is required to establish some lawful justification or excuse for the publication or to establish the absence of an intention to injure the Plaintiff; *National Media Ltd v Bogoshi* [1998] 4 All SA (A). *Marais v Groenewald* [2000] 2 All SA 578 (T), 2001 (1) SA 634 (T).

[40] In comparison with the facts and the approach of the different law lords who participated in the hearing of *Lewis and Another v Daily Telegraph Ltd and Associated Newspapers Ltd* [1963] 2 All ER 151 (HL) Lord Hodson said, at 167H, which was very instructive, that: **'It may be defamatory to say that someone is suspected of an offence, but it does not carry with it that, that person has committed the offence, for this must surely offend against the ideas of justice, which reasonable persons are supposed to entertain.** The majority of the learned law lords held that **the statement was not capable of conveying that the plaintiff was guilty of fraud or dishonesty but that** suspicion could be inferred from the fact of the inquiry being held. The issue was whether publication of a statement that officers of the City of London Fraud Squad were 'inquiring into the affairs of the [R. Co.] and its subsidiary companies' was libellous. The plaintiff (the chairman of the R. Co.) pleaded that the statement meant that he had been guilty of fraud or was suspected by the police of having been guilty of fraud or dishonesty in connection with R. Co's affairs.

[41] Lord Reid, at 155F in *Lewis* had on the other hand after remarking that some people are unusually suspicious and some are unusually naïve and that one has to try to envisage people between those two extremes and see what is the most damaging meaning that they would put upon the words in question, stated that:

'What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot.'

[42] Lord Devlin at 173 I-174A expressed a different view and was at pains to emphasise that while it is not correct to say as a matter of law that a statement of suspicion imputes guilt, it can be said as a matter of practice that it very often does so because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis.

[43] At 173H, he said that 'implicit in this is that there can be no rule of law about this and that it is a question of fact whether the statement conveys more than a mere suspicion.



He also said: 'When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to the judge that he ought to dissect the statement before he submits it to the jury. But if, on the other hand, the *distinction clearly emerges from the words used, it cannot be ignored*. [My emphasis] He too held that the statement complained of was not capable of meaning that the plaintiff had been guilty of fraud or dishonesty. Lord Jenkins concurred with Lord Reid at 157C.

[44] It is true that in South Africa there is a constitutionally entrenched presumption of innocence until the contrary is proved. However, the harsh reality of the situation is that even mere suspicion, to put it at its lowest, raises doubts in the mind of those to whom it is communicated as to whether the hitherto unsullied reputation which the person enjoyed continues to be deserved or whether it should now be regarded as undeserved. To say that which imperils the continued existence of a person's good reputation and causes people generally to doubt the integrity of that person even though they may not be certain the doubt is justified, is to adversely affect to at least some degree his or her reputation. That the doubt may be temporary and ultimately transient because of the subsequently established innocence of the person concerned cannot cure the loss of esteem which that person endures pending the establishment of his or her innocence. Sight should not be lost of the fact that such a reader is not entitled to assume that the grounds upon which a suspect has been held by the police for questioning are so strong that an inference of guilt is justified.

#### ANALYSIS

[45] On the question of reasonableness, the Defendant must allege and prove that he or she (1) had reason to believe in the truth of the statement, (2) took reasonable steps to verify its correctness and that (3) acted reasonably when reporting the matter to the police or publication of the statement was reasonable in all the circumstances of the case.

[46] As indicated the publication or allegation of a suspicion of a criminal offence is defamatory, **as a result the onus is upon the Defendant to prove justification**. The evidence that has been led by the Defendant is that there was proof of a fraudulent order that was purportedly made by the Department of 14 iPads to the value of R138 000.00 and its delivery arrived at the reception on that day. Although it was an order purportedly from the Department, the names of the officials responsible from the Department were unknown. That evidence was uncontested even when it was put to the Plaintiff who actually confirmed that the order was suspect and or fraudulent, and not in line with orders issued by the Department. It was further the Defendant's evidence through Dionne that whilst still trying to ascertain who might be involved as the names that were put on the order form were fictitious names, certain occurrences at that time led her to suspect that the person who might have ordered those goods was nearby, especially because Beatrice from the supplier was also insisting that the person should be around there. Beatrice told her that she believed the person to be close by since she had communicated with that person not long ago. Against that background Dionne alleges that at that time Mashedi came to the reception walking slowly and suspiciously looking at them, loitering or lingering around which raised their eyebrows, before he left. They did not understand why he was doing that



but it raised suspicion that he may be involved upon which they decided to test the possibility of their suspicion being genuine. They phoned the number of the person that Beatrice has been communicating with on the order and observed Mr Mashedi picking up the phone, law and behold not only once but twice. In both instances he did not answer, raising a strong suspicion that indeed he might be involved.

[47] Following that occurrence Dionne believed there was a genuine suspicion that Mashedi was involved and that there was reason for the forensic people to investigate and verify the reliability or substance of the suspicion evoked by these occurrences. She says she therefore reported her suspicion to them, which was a reasonable act since as testified they are tasked with investigation of such matters. Mashedi confirmed the task of the Forensic personnel that they investigate and try people who have committed offences at work. He also did not contest the allegation that he went to the reception at the time or that he did loiter or walk slowly and looked at the people at the reception suspiciously. He also did not address that evidence when it was put to him in cross examination. Instead it was argued on his behalf that he actually could be at the reception, just as everybody else is allowed to be there. He only addressed the questions relating to the calls he allegedly received. What followed next was according to Dionne to check the security surveillance which unfortunately did not assist them.

[48] Dionne says she was shocked when she saw what Mashedi did when that number was called. She had after that left the issue with the forensic people who also happened to bear witness to Plaintiff's answering of the phone. There is no criticism that can be levelled to Dionne's evidence. She was consistent and her evidence straight forward. She had contacted Mr Nel and at his advice also contacted the people at the forensic department. The steps she took under the circumstances were reasonable and do find her suspicion to have been genuine and reasonable. It is also through Mr Nels authority as the Head that she was taking further action.

[49] The question is whether it was reasonable or justified to call the police under the circumstances. Fouche who was now left with the responsibility to attend to the matter testified and corroborated Dionne's evidence that whilst they were with Martha and Tselane all from forensic, Mashedi did pick up the phone and did not talk. She also testified that afterwards Mashedi was seen leaving the office carrying a tog bag. He was gone for a while which incident he was also asked about and prompted Martha to proceed and call the police. The SAPS members were in the boardroom where he was taken on his arrival back at the office. Nothing further is alleged to have been observed or done to verify the suspicious behaviour, except for what is alleged by the Plaintiff that he was questioned about the telephone calls he is alleged to have received and were not found on his phone. However taking into consideration factors prevailing at the time, that is, the fact that Plaintiff admitted that on the date of the incident he was the person responsible and part of his duties to order or procure the stationery, a process that required him and his boss to co-sign, that after the forensic auditors were in his office he did go out with a tog bag, another suspicious act, in addition to the strange behaviour that initially evoked suspicion of him being involved, and that he failed to respond to the averments made in the Defendant's amended Plea on his strange conduct, in the context of all these factors added together, the suspicion was genuine and appropriately and reasonably held to justify the matter being handed over to the police for further investigation.



[50] The forensic Department had, according to Mashedi taken a statement from him in the boardroom after he was read his rights and they are the ones who confiscated his phones and searched his office. The police are said to have then intervened after the statement. Subsequent thereto he was taken to the police station where he was questioned and asked to make a statement as the person suspected of having placed the order and not that there was evidence to prove his guilt which is not a necessary requirement for investigation by the police.

[51] In countering the Defendant's contention of a justifiable suspicion, the Plaintiff raised the question of the letter by Zana that withdrew the accusations. According to the Plaintiff that was an admission that there was no sufficient evidence for the accusations or a prosecution. It was argued for the Defendant that the accusations were withdrawn not as a sign of an unjustifiable suspicion, but by a person who did not even understand the circumstances under which the accusation were made against Mashedi. Zana could not actually explain why he issued out the letter and on whose authority. It is important however to note that the letter indicated that the matter might be revisited if anything else comes out. The Plaintiff's argument might be sustainable in so far as prosecution is concerned which nevertheless did not materialise but for the purpose of questioning it is unsustainable. In *Independent Newspapers Holdings and Others* at [77] Nugent J citing the English text in *Jones v Skeleton* [1963] 3 All ER 952 clearly established that "The grounds for arrest for questioning as a suspect are often less cogent than grounds for a successful prosecution and a reasonably well-informed reader should be alive to the distinction." . There was a justifiable suspicion against the Plaintiff that needed further investigation by the police.

[52] Plaintiff's has also averred in his particulars of claim that as a result of the accusation and his subsequent arrest by the SAPS in front of his co-workers, his dignity and reputation at work was tarnished and he suffered trauma and post-traumatic stress. I found his testimony in that regard to be long-winded, muddled and inconsistent. He initially in his evidence in chief testified that he was arrested at his office which is an open plan office and told that he had ordered iPads through the Department. Therefore his colleagues witnessed the arrest as he was arrested in front of them. He subsequently then testified that Fouche who is the head of Department called him and they went into the boardroom where he found a lot of people, including members of the SAPS and the forensic department officials. He recognised Martha James, Paul Nel's secretary from Forensic as well as Tselane. There were other male persons that he could not recognise. The police showed him their badges when he walked into the boardroom. They told him the rules, read him his rights, regarding his choice to remain silence and that if he chooses to say something it may be used against him in the court of law. They then told him that he was being arrested in the presence of the forensic guys. This was not in front of Martha since at the time she has left him and was talking to the people who were standing in the passage. He was not handcuffed.

[53] Consequently, in other words the boardroom was occupied by only 2 guys from forensic, Tselane and the police when he was told that he was being arrested. Neither of the two guys from forensic was his colleague as he said they were unknown to him. He said he was read his rights, Martha who was said to have been in the boardroom at the time had



stepped out and was outside talking to the people who were standing in the passage. Thereafter he was taken to the police station where he was asked to make a statement and thereafter let go at 17h30. He was also not handcuffed. The arrest therefore in front of his colleagues in the open plan office is illusory.

[54] His friend Mokgobela also could not corroborate these allegations, his evidence was that when they came back from lunch time Elmarie Fouche came to the office and went out with Mashedi, which we now know was to the boardroom. When Fouche came back, she came back with the police and searched Mashedi's working station. He did not say that Fouche and Mashedi came back with the police but only mentioned Fouche and the police who then took a computer with a printer and suddenly adding that whilst holding him. He says other employees, colleagues were also there who work in the same space on other tables. On the other hand, according to the Plaintiff he made a statement with the forensic in the boardroom and told them that he did not know anything about the orders. It is the forensic persons who confiscated his 2 personal phones, searched him and went to the big office where he executes his duties and searched the cabinets and the phones. He does not say that the forensic together with the police went and searched his cabinets but that the police officials, whilst holding or grabbing him, took him to the police station. When they grabbed him he was suddenly in his office and all of his colleagues were there including Mokgobela. He does not indicate when he and the police left the boardroom and went into his office, where the police were now alleged to have effected the arrest. The searches as well, according to them, seem to have taken place a couple of times by the forensic and the police. The evidence of the Plaintiff and his witness on the alleged arrest in front of his co-workers is not only totally unreliable but on a balance of probability unlikely. Part of it seem to have been tailor-made it in order to fit with the allegations of a public arrest. However the whole evidence points at Plaintiff having been interrogated in the boardroom and taken in for questioning to the police station, on a reasonable suspicion that he was involved in placing the fraudulent order. He was released after making the statement.

[55] It was clearly stated in *Damon v Gretermans Stores Ltd and Another* 1984 (4) SA 143 (W) that:

"What is of considerable importance is that it is in the interests of an arrested person himself that he should not be charged without being given the opportunity of offering any explanation or making any representation to a responsible officer. It is his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number of persons present."

[56] **According to Fouche, the police questioned Mashedi about where he went. They took his backpack and at the time he was not at his work station. They opened it, he does not know what happened thereafter and what was going on with the police. In so far as that incident was concerned she was not aware of any charges that were levelled at Mashedi. It therefore could not be proven that the police effected an arrest which was done in front of Mashedi's colleagues in a libellous or defamatory manner.**

[57] In the South African context we know that such an offence happens in the midst of the scale of corruption that engulfs and happens with impunity in the public sector and institutions as proven by the frequency of cases that involve such kind of corruption. It is not surprising that conduct that resembles such will be acted upon swiftly and investigated with



the vigour that the seriousness of the situation requires. As long as in enforcing or compliance with the law the citizenry and authorities act within the realm of the law, especially, that of the Constitution. Mashedi was taken in for questioning, on the basis of a reasonable suspicion. As a result there was a reasonable cause for the suspicion and the subsequent reporting of the matter to the police that resulted in Mashedi being taken to the police station for questioning.

[58] Mokgobela has testified that on Plaintiff's arrest he was taken aback by what was happening. He just thought of Mashedi as being this person who is a thief. After the incident when he came to work, which was the following Monday, he did not want to be close to him, still tainted or scarred. If they had continued to associate with him they would be taken to be the same as him.

[59] In *Independent Newspapers Holdings and Others v Suliman* (49/2003) [2004] ZASCA 57; [2004] 3 All SA 137 (SCA) (28 May 2004) at [77]. Nugent J citing the English text in *Jones v Skeleton* [1963] 3 All ER 952 stated that; "the inference that a reasonable person would draw from a statement that a person has been arrested in connection with an offence will necessarily depend upon the context in which it is made. Such a statement, without more, does not ordinarily carry the imputation that the arrested person is guilty of the offence." A report which does no more than state that a person has been arrested and has been charged with a criminal offence is incapable of bearing the imputation that he is guilty or probably guilty of that offence..... "

[60] The ordinary reasonable person should and is mindful of the principle that a person charged with a crime is presumed innocent until proven guilty, whilst also aware that guilt or innocence is a question to be determined by a court. So a person apprehended as a suspect cannot be presumed to be guilty, worse off a person that has been taken in only for questioning, to impute any guilt upon him would be contrary to the actions of a reasonable person; see at 77 Nugent JA referring to what Colman J said in *Hassen v Post Newspapers (Pty) Ltd & Others* 1965 (3) SA 562 (W) 562 at 565D-E that:


'In my view the reasonable, normally intelligent, right thinking member of society, when he hears that a man known to him has been charged with a crime, will withhold final judgment on that man. But, temporarily at any rate, the news will tend to lower that man in his estimation, and diminish his willingness to associate with him.' But to say of a person that he or she has been arrested in connection with an offence is in my view also more damaging than to say merely that the police questioned him or her in connection with the offence because they believed that he or she might possibly be implicated, for no doubt the police question many people when they are investigating the commission of an offence. It is all a question of degree.'

[61] Furthermore since there was a reasonable suspicion that Mashedi was involved in the fraudulent order, the conduct of the Defendant's employees was justified, therefore neither wrongful nor made with any intention to injure; See Damon and Susman. Also, the Plaintiff has not alleged that the Defendant's employees had any intention to injure him in his dignity or reputation to him or that it had an effect that imputes an intention to injure him.



[62] Under the circumstances, the following order is made:

1. The Plaintiff's claim is dismissed with costs

  
N V KHUMALO J  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

For the Plaintiff

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