



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
KWAZULU-NATAL
HELD AT DURBAN**

Case no:KZN/DBN/RC

2844/2017

In the matter between:

FORTUNATE NOMBUYISELO NKUNZI

Plaintiff/Respondent

and

ETHEKWINI MUNICIPALITY

Defendant/Applicant

Judgment delivered: 24 October 2019

Introduction

[1] The Plaintiff's claim against the Defendant is for damages arising from wrongful, malicious and vexatious disciplinary proceedings having been instituted by the defendant on or about 28 October 2016. Mr NT Nkosi appeared for the Plaintiff and Ms N Ramataboe appeared on behalf of the Defendant.

The Evidence

[2] Only the *viva voce* evidence of the Plaintiff, Ms Fortunate Nombuyiselo Nkuzi (hereinafter referred to as Ms Nkunzi), was led; after which, the Plaintiff's case was closed. After the Defendant's application for absolution from the instance was refused, the Defendant called two witnesses, namely, Ms Mpontso Matee and Ms Adele Seheri.

Summary of the evidence

[3] Ms Nkunzi testified that she has been in the employ of the Ethekwini Municipality since August 2009 where she holds the position of executive secretary for the special programmes department. She was reporting directly to her senior manager Mr Daniel Govender (hereinafter referred to as Mr Govender). She explicated that her duties entailed *inter alia*, keeping the diary, office admin, typing, filing, scheduling appointments, receiving visitors for the department and taking minutes for departmental meetings.

[4] Ms Nkunzi narrated that she was instructed, by Mr Govender to type an advert and place it on the notice board for the service providers.¹ She explained that Mr Govender wrote the content of the advert on a paper which she was asked to type. Ms Nkunzi explicated that after she completed typing the advert, she returned the typed document together with the handwritten draft to Mr Govender for proof reading. Ms Nkunzi further recounted that Mr Govender thereafter instructed her to put the typed advert up on the notice board which she did. She also placed the tender box in front of

¹ Exhibit A, page 8.

the reception area at the City Hall as per the instructions of Mr Govender. Ms Nkunzi, denied that she prepared any tender documents.

[5] A few months later, Ms Nkunzi, was called to a disciplinary hearing for having fraudulently preparing a tender document. It came to light that two notices were served on Ms Nkunzi, the first hearing date being 1 November 2016 and the other on 16 February 2016.

[6] Ms Nkunzi, stated that she was contacted by Mr Themba Shabalala (hereinafter referred to as Mr Shabalala) who informed her that he wanted to ask her some questions. Mr Shabalala spoke to Ms Nkunzi at her office and enquired about the advert that she had typed. Ms Nkunzi expounded to Mr Shabalala that the advert was typed on the instructions that she was given by Mr Govender. Ms Nkunzi further expounded that

Mr Shabalala and his colleague took a statement from her.² It came to light that she had made two statements, one of which was handwritten by Mr Shabalala's colleague.

[7] Ms Nkuzi was referred to a document where she '*...stated that the specification for catering services was prepared and advertised by her...*'³ She did not know who prepared the document and reiterated that she only typed the advert and did not prepare it. Ms Nkuzi was asked whether she had left out or taken out crucial information from the advert as alleged⁴, which she denied. She was unable to comment on what information the report was referring to. She denied being involved in any way with tender adverts or anything involving tenders. She confirmed that she was simply performing her duties and following an instruction.

² Exhibit A, page 29

'I Fortunate Nkunzi, employed by eThekweni Municipality as a Secretary:

My duties are to manage my manager's diary, set up appointments and provide the administration support to him. On Monday, 19 August 2013, my manager, Mr Daniel Govender asked me to type the public notice for the Mayoral Civic Reception which was to be held on the 7th of October 2013 for the suppliers to submit quotations to render services that was requested.

I typed the advert based on what I was given by Mr Govender and he suggested that I must put my name as an enquiry person on the advert. I typed the advert as requested and pasted it on the notice board which is situated at the city hall entrance (West Street) and I placed the box behind the security desk for service providers to drop off their quotations.

On the closing date of the advert Mr. Govender asked me to remove the advert from the notice board and remove the box as well to his office of which I did and I handed them both over to him. He opened the box and there were 3 sealed envelopes inside the box and he opened those envelopes and he asked me to take the envelopes to Lorna Matee at Moyor's Office 2nd floor of City hall.

I took the envelopes to Lorna as per instruction from Mr. Govender. He then requested me to set up the meeting for him with Sweetynu4u as she was the one who was awarded the job.

That's all I wish to say...'

³ Exhibit A, page 9, para 5.5.1

⁴ Exhibit A, page 9, para 5.5.2

[8] Ms Nkunzi testified that she was found not guilty at the disciplinary hearing. She explicated that she felt humiliated and in her words, “*very small*”. She expressed that she felt “*very undermined*” because she was doing her job and following an instruction. She also stated that she was embarrassed and let down by whoever initiated the disciplinary hearing. She elucidated that “*they made me feel like I committed a crime...I was a scapegoat. They needed to hold someone accountable. I felt they used me as a scapegoat for this.*”

[9] It came to light that Mr Govender resigned during the time when the investigations were happening. In fact it came to light that it was Ms Nkunzi who had typed Mr Govender’s letter wherein he tendered his resignation on 8 April 2014. Ms Nkunzi herself did not have a service break and was still employed with the municipality.

[10] **The Plaintiff’s case was thereafter closed.**

Summary of evidence for the Defendant

[11] **Mpontso Matee** testified that she is employed at Ethekeweni Municipality as a functions co-ordinator since 2005. She described her duties and the step by step procedures and considerations which are followed when an application for a Mayoral function is requested. Ms Matee, orated that she reported to her Manager, Mr Roy Mkumla and he in turn reported to Daniel Govender. She explicated that she is usually responsible to prepare the notice unless she is told not to do so. Ms Matee was

referred to the advert⁵ central to this case whereupon she confirmed that she did not prepare same, neither did she know who had prepared it.

[12] She did however state that it mirrored the type of document she would prepare as it contained the salient information such as, function, date, venue and number of people. Ms Matee testified that her superior could have asked anyone to prepare the document.

[13] Ms Mattee confirmed that she knew the Plaintiff who was the personal assistant to Daniel Govender. She stated that she did not find it unusual for Ms Nkuzi to type the document as her superior would have asked her to do it and she could not defy him. Ms Matee confirmed that she was partly involved as she did the invites and attended the function on the day. She stated that she only became involved after the quotations had been sourced.

[14] Ms Mattee was referred to the statement that she had attested to.⁶ She indicated that the catering request as it appears on the advert, was non-specific as the notice called for “complete catering”. She deduced therefrom that this meant that the catering would have included the beverages as well. To her recollection, there were beverages at the function which was supplied by Nomoli Trading and another service provider supplied the food. She stated that usually beverages are supplied by the municipality which is a different supplier to the food.

⁵ Trial Bundle – Exhibit A – page 8.

⁶ Trial Bundle – Exhibit A – page 65.

[15] Ms Mattee assumed that Mr Govender looked at the quotations by himself and could not recall that she had dealt with the quotation. Usually, she would sit down with Mr Govender to decide who the supplier would be, but this time, he brought her the quotation from Regent Business School for her to do an order number. She could not recall whether her superior Roy Mkumla was involved as he should have been consulted from the beginning to the end as he would have reported everything to Mr Govender.

[16] **Adele Seheri**, testified that she was appointed as the head of City Administration based at Durban City Hall since 2015. She confirmed that the Plaintiff is known to her as an Executive Secretary within the City Administration Unit, which she heads. Ms Seheri confirmed that she was aware of the report from the City's Investigation Unit and informed that she directed the people responsible for actioning the report. She stated that she based her decision to institute disciplinary proceedings on the investigation report that was given to her. She confirmed that she made the appointments for disciplinary hearing.

[17] She explicated that Mr Mkumla did not from part of the irregularities and based on the information to hand, he was not implicated. Ms Seheri further testified that each head of department had the responsibility to charge their own employees. She stated that Mr Govender and Ms Nkuzi were the main role-players in preparing the tender.

[18] She was referred to Mr Govender's statement and indicated that his statement did not mention that he informed Ms Nkuzi to complete a detailed pro forma

order. She also confirmed that Mr Govender did not seem to indicate that Ms Thuli Mchunu was involved in the tender process. It appeared that her involvement was to obtain an order number after the procurement process. She confirmed that no disciplinary proceedings were instituted against Ms Mchunu and neither did the City Investigating Unit recommend Roy Mkumla to be charged relating to the tender process. Ms Seheri stated that Ms Matee was not liable to be charged as she was approached after the procurement process had been concluded.

[19] Ms Seheri stated that she did not know about the allegation pertaining to the defamatory email that was sent to the boss of Bonny Nzuzo. She explained the circumstances under which emails would be exchanged. Requests for updates are sent and the head of department is required to provide updates which are usually circulated by email. The Auditor General monitors implementation of investigations.

[20] She confirmed that she would have charged Daniel Govender, had he still been part of the organisation. She confirmed that her role ended after the disciplinary process was established and was not privy to the proceedings at the disciplinary hearing. She was only informed of the outcome.

[21] During re-examination it was highlighted that the advert contained no logo. She stated that under normal circumstances there should be a logo to indicate that it comes from the municipality.

[22] **The Defendant's case was thereafter closed.**

Principle Submission made by the Parties

On behalf of the Plaintiff

[23] It was argued that there was no reasonable cause to charge the Plaintiff with the charges levelled against her as the charges suggested that the Plaintiff unduly benefited in some way from the way she executed her superior's instruction. It was further submitted that the disciplinary proceedings were instituted against the Plaintiff following the recommendations of the investigation team, despite there being no evidence of any wrongdoing on the part of the Plaintiff. Additionally, it was argued that the Plaintiff's role was small if compared to the other role players.

[24] Furthermore, it was argued that as a result of the malicious proceedings, Plaintiff is to be awarded damages for contumelia as well as special damages and the costs expended in defending malicious proceedings

On behalf of the Defendant

[25] On behalf of the Defendant, it was contended that the Plaintiff is not entitled to any damages as she failed to prove her case on a balance of probabilities.

[26] Ms Ramataboe, argued that that there was neither wrongfulness nor malice in the Defendant instituting disciplinary hearing against the Plaintiff. Furthermore, it was submitted there was no defamation against the Plaintiff.

Issues for determination

[27] The crisp issue for determination is whether the Plaintiff has made out a case for damages arising from wrongful, malicious and vexatious disciplinary proceedings having been instituted by the Defendant against her on or about 28 October 2016.

Legal Principals

[28] It is trite that the elements of a delict are the following:

- (a) an act,
- (b) wrongfulness,
- (c) fault (either intent or negligence),
- (d) causation and
- (e) damages

[29] The requirements for malicious prosecution was set out in ***Woji v Minister of Police***⁷ as follows:

- '(a) Set the law in motion (instituted or instigated the proceedings)*
- (b) Acted without reasonable and probable cause*
- (c) Acted with malice (animo injuriandi) and*
- (d) the prosecution failed.'*⁸

⁷ [2015] 1 All SA 68 (SCA) at [33].

⁸ See also *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at para 8.

[30] It would be apposite to determine whether the nature of the proceedings instituted against the Plaintiff can be regarded as “prosecution” within the context stated above. A passage in Van der Keessel 48.2.1 *Praelectiones ad Jus Criminale* (translation by Beinart and Van Warmelo vol II at 545) contains the statement:

'In this respect a prosecution differs from a civil action in which we claim what belongs to us or is owed to us, and in which accordingly we act to our own advantage, whereas in a prosecution we perform an act of public retribution and demand that punishment be inflicted on the accused as an example to the public.'

[31] The Latin word for “prosecution” in this passage is *accusatio*, while it will be seen that under para 2 the following statement appears:

'An indictment is a written declaration of the prosecutor, in which he states that he is reporting someone in terms of some law concerning public crime, and that the accused will be prosecuted by him.'

[32] The Latin word used here for indictment is *inscriptio*. While it is true that the word *accusatio* is sometimes used in the sense of the English word 'accusation', it is more commonly used to refer to prosecution of the charge in its entirety - see, for example, *Van der Keessel* 48.2.3 (251):

'Quoniam ex potestate accusandi cuilibet apud Romanos competente metus oriebatur, ne quis temerarius accusator per calumniam ad accusandum reum prositiret, . . .'

[33] This passage is translated at 547 by Professors *Beinart* and *Van Warmelo* as:

'Since from the fact that among the Romans the power to prosecute was available to any person whatsoever, the fear arose that some reckless accuser would vexatiously rush to prosecute an accused . . .'

[34] In ***Mandela v Amsterdam***⁹ it was held that an action for malicious prosecution lies under the *actio iniuriarum* and the element of *animus iniuriandi* is therefore a requirement which has to be alleged and established. The usage of the word “defame” was wrong but its inclusion could not and does not alter the quintessential character of the appellant’s cause of action which, as adumbrated hereinbefore, was one for malicious proceedings. Such an action encompasses the infringement of a person’s personality rights which includes bodily integrity, reputation and dignity and the plaintiff’s cause of action was clearly predicated thereupon.¹⁰

[35] The writers of in a publication of the *De Jure*¹¹ analysed the relevant legal principles and case authorities as follows:

'A person’s fama or good name is the respect and status he enjoys in society (see Neethling, Potgieter & Visser Law of Personality (2005) 129). A person’s right to his good name or fama is recognised and protected as an independent personality right (see Neethling & Potgieter Law of Delict (2015) 351).

It is trite law that defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his or her status, good name or reputation (see Neethling & Potgieter 352). Although some individuals are more easily insulted or offended than others, it is not the subjective feeling of being injured that entitles a person to a claim based on defamation...The question of whether the reputation of the person concerned

⁹ (CA 102/2010) [2010] ZAECGHC 72 (23 August 2010).

¹⁰ **2016 De Jure R CHAUHAN** (University of Johannesburg) **S HUNEBERG** (University of Johannesburg)

¹¹ *Onlangse regspraak/Recent case law* 339.

has been infringed is a factual one, based on whether the reasonable person sees it as such (Neethling & Potgieter 354).

The issue of factual infringement of the reputation of a person is particularly evident from the recent decision in Cecil Sher and Another v Vermaak ((AR 197/13) [2014] ZAKZPHC 8 (25 February 2014) concern themselves with social phenomena or group dynamics.

We need to remind ourselves that Vermaak had to prove that the poison-pen letter from Sher, and Spencer's distribution thereof, constituted defamation because it constituted the wrongful and intentional publication of words that had the effect of injuring his status, good name or reputation (see Neethling & Potgieter 352). Publication is the disclosure of the defamatory statement or behaviour to a third person (see Neethling & Potgieter 353; and Lubbe v Robinsky 1923 CPD 110 111). In this particular case, publication was clearly not an issue. Apart from publication, the court needed to consider the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring that person's status, good name or reputation (see Neethling & Potgieter 352). Vermaak had to prove that the words were wrongful by showing that in the eyes of the 'reasonable person with normal intelligence and development, the reputation of the person concerned has been injured (thus also an objective approach)' (Neethling & Potgieter 354).

It is also very important to remember that the defamation complained of must have the effect of reducing the injured person's status in the community. Therefore, it is possible that the injured person may feel aggrieved by such statements. This is not a requirement for defamation, but rather a possible consequence which may follow. The statements made about him must have had the effect of lowering his status in the eyes of the community (Neethling & Potgieter 354). This test is clearly objective....

Wrongfulness in the context of defamation is a complicated matter. The test for wrongfulness in these cases is based on the reasonable person test. This test states that whether, in the opinion of the reasonable person with normal intelligence and development, the reputation of the plaintiff has been injured...

the application of the reasonable person test is complicated, there are a number of factors which must be taken into account. First, the judge should have considered that the reasonable person is a fictional, normal, well-balanced and right-thinking person who is neither hypercritical nor oversensitive. The judge should look at whether such a person would find a statement to injure a person's reputation or not (see Neethling & Potgieter 355-356). Second, this reasonable person is someone who subscribes to the norms and values of the Constitution. This person is very much aware of the principles of the Constitution and would use these principles as underlying values to judge situations (Neethling & Potgieter 355). Third, he is a member of society in general and not only of a certain group. Therefore, the statement concerned would offend or harm all persons in society and not just those of one specific group (Neethling & Potgieter 355). Fourth, the reaction of the reasonable person is dependent on the circumstances of the particular case. The manner in which it is conveyed of each publicised statement should be looked at separately as this would affect the reaction of the reasonable person (Neethling & Potgieter 356). Fifth, verbal abuse is in most cases not defamatory because it does not normally have the effect of injuring a person's good name. Therefore, even a statement that amounts to verbal abuse, may not necessarily amount to defamation (Neethling & Potgieter 356). The sixth point is that words can prima facie, or according to their primary meaning, be defamatory but words can also be defamatory according to their secondary meaning. In such a case, the plaintiff would have to prove that the secondary meaning (or innuendo) is defamatory (Neethling & Potgieter 356). The last point to be taken into consideration is that if words have an ambiguous meaning, the one defamatory and the other not, then the meaning most favourable to the defendant must be followed...

The plaintiff who proves that the publication is defamatory and that it refers to him, provides only prima facie proof of wrongfulness (see Neethling & Potgieter 357). A presumption of wrongfulness then arises, which places the onus on the defendant to rebut it (Neethling & Potgieter 357). If a defendant can prove that a statement made by him or her is justified according to a relevant defence, then the defendant can escape liability based on a ground of justification for example,

privilege, truth and public interest, and fair comment (see Neethling & Potgieter 357)...

Privilege exists where someone has a right, duty or interest to make specific defamatory assertions and the people to whom the assertions are published have a right or duty to learn of such assertions (Neethling & Potgieter 358). This will then allow a person to injure another's good name and, in so doing, his conduct will not be regarded as wrongful. However, if the plaintiff proves that the defendant exceeded the bounds of this privileged occasion, then this protection will fall away (Neethling & Potgieter 358). Neethling and Potgieter distinguish between absolute and relative privilege (see Neethling & Potgieter 358). The defendants' communication is generally privileged. Absolute privilege means that a person making the statement has an absolute right to make that statement at that time, even if it is defamatory. In other words, the person making the defamatory statements is immune from liability for defamation. For example, it exempts persons from liability for potentially defamatory statements made during judicial or parliamentary proceedings. Relative privilege means that a defendant making the allegedly defamatory statement may have had some right to make the statement. If relative privilege applies to a statement it means that the plaintiff must prove that the defendant exceeded the bounds of privileged occasion (Neethling & Potgieter 358)...

Sher and Spencer, as members of the Stella Club, wrote the letter on behalf of its club members with regard to the alleged misconduct of Vermaak. The defence is available if the defamatory words were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statement (Mkhonza v Minister of Police (16629/12) [2015] ZAGPPHC 266 (8 May 2015)). Due to the relationship that existed between the parties in casu and if it is proven that both parties had a corresponding duty or interest (that a privileged occasion existed), the defendant must further prove that he acted within the scope and limits of the privilege. The defendants would have had to prove that the defamatory assertions were related to the discharge of their duties or the furtherance of the interests of the Club. However, the plaintiff may still show that the defendants exceeded the boundaries of privilege because they acted with

malice. In *Kennel Union of South Africa and Others v Park* (1981 1 SA 714 (C)), it was held that the defendants cannot shelter behind the privilege unless it is shown that the report was a truthful, accurate and honest report, published bona fide without malice.

The prima facie wrongfulness of the defendant's conduct will also be cancelled if he proves that the defamatory remarks were true and in the public interest (see *Neethling & Potgieter* 360). *Sher and Spencer* raised this defence by stating that the statements made by them were true and in the interest of the members of their club (i.e. public interest) (par 5). Therefore, if the defendants in a defamation matter can prove that the statements made were true and in the public interest, then they can escape liability (see *Neethling & Potgieter* 357). Every element of a delict must be proven in order to succeed with a delictual action. The elements of a delict are the following: an act, wrongfulness, fault (either intent or negligence), causation and damages (*Neethling et al* 4). With that being said, in order to prove defamation, every requirement of defamation must also be proven in order to succeed with a claim for defamation (*Neethling & Potgieter* 352). The second element to prove defamation is intent or *animus iniuriandi*, which means that '[a]n accountable person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct' (*Neethling et al* 132). If there is no direction of the will or conscious wrongfulness, then there cannot be intent (*Neethling et al* 132)...

...The appeal court judgment stated that, when one is dealing with 'defamatory statements', the statement complained of should be seen as defamatory to the reasonable reader and if it is objectively scrutinised, then one would find it to be defamatory (par 26)¹²

... *Ploos van Amstel J* was not convinced that a reasonable reader would find this statement to be defamatory, if objectively scrutinised (par 26). He could not find that the statement complained of would 'injure the good esteem in which the respondent was held by the reasonable reader' (par 27). The judge looked at the wrongfulness element (parr 26 & 27) and came to the conclusion that the

¹² 342 2016 De Jure '2 4 Judgment of the Appeal Court'

objective test for wrongfulness had not been proven (par 27). The fact that the first element of defamation, namely wrongfulness, could not be proven is sufficient basis to conclude that the statements concerned could not amount to defamation...'

[36] The writers (*supra*) also referred to **Kennel Union of Southern Africa and Others v Park**¹³

'Mr Park, the respondent in the Constitutional Court and plaintiff in the court below (the Magistrate's Court, Cape Town) is married to Susanna Magdalena Park who is a breeder of dogs in Salisbury, Rhodesia. Both the Parks are members of the Kennel Union of Southern Africa. This is a voluntary association comprising a large number of affiliated clubs and members who are natural persons controlled by a Federal Council consisting of 12 members from 12 centres' (Kennel Union of Southern Africa and Others v Park supra at 716D). The Federal Council has certain disciplinary powers over members (art 33 of the Kennel Union Constitution read with the disciplinary rules, schedule 1, made under arts 3 (5), (18) & (19)). Pursuant to powers similar to these in force after 1 September 1975 (when the present constitution came into force), the Kennel Union had, in 1973, suspended Mrs Park for four years from taking part in any of the affairs of the Union (716H). This meant, inter alia, that she was debarred from exhibiting dogs at shows – a serious penalty for a breeder. Her suspension was to run from 18 October 1973 to 11 October 1977. During this time, Mr Park did a transfer of registration for a few of the dogs owned by Mrs Park so that these dogs could take part in certain exhibitions (716H). One of the dogs taking part in an exhibition was still registered in his wife's name and therefore, the Union took disciplinary action against Mr Park and suspended him (717H). They further decided that any awards received from the show by Mr Park should be cancelled. A while after, it was then decided by the Union that this suspension be withdrawn. However, the suspension of Mr Park was already published in the Kennel Union Gazette. The action by Mr Park arose out of this publication by the first defendant in the Kennel Union Gazette, of which the

¹³ 1981 1 SA 714 (C) Onlangse regspraak/Recent case law 343.

second defendant was the editor and third defendant the printer, of a report that the plaintiff had been suspended until further notice in terms of certain rules of the first defendant (719A). These rules authorised suspension for conduct which was 'improper, disgraceful or discreditable... or prejudicial or injurious to the interests of canine affairs' (719D). The alleged conduct for which the first defendant had suspended the plaintiff was that he had entered a dog in a dog show and had signed the entry form as owner of the dog when, according to the first defendant's records, the dog was owned by his wife, who had some time previously been suspended by the first defendant. In fact, the plaintiff was the owner of the dog in question, he having purchased it from his wife, and the entry form which he had signed was regular in terms of first defendant's rules as the plaintiff had applied to the first defendant for the transfer of registration of ownership of the dog to his own name. It further appeared that the suspension followed a complaint by the secretary of the first defendant, but that no copy of the written complaint had been sent to the plaintiff as required by the first defendant's rules and, in breach of the first defendant's constitution, he had had no opportunity to answer the complaint or otherwise defend himself. The decision to suspend him was accordingly improperly reached and invalid. It was alleged that this publication was *animo iniuriandi* (720(G)), in consequence whereof the plaintiff suffered R750 as damages to his good name and reputation (720(G)). In the alternative, Mr Park pleaded the following: Alternatively, and only in the event of this Honourable Court's finding that the pleaded words of Defendants were not defamatory in their plain and ordinary meaning, plaintiff, pleads that the said words constitute an innuendo of dishonesty on Plaintiff's part, the words being intended to convey and in fact conveying to readers of the said Kennel Union Gazette that Plaintiff is a dishonest person and that he would and did dishonestly enter a dog in a show without being entitled to do so. The innuendo that Plaintiff was not the registered owner of the dog, Exhibit 318, as at 13th/14th March 1976 and had therefore dishonestly signed as owner of all three dogs is clear, was factually incorrect, and was published and printed with the intention of injuring Plaintiff in his good name and reputation. As a result thereof Plaintiff suffered damages to his good name and reputation in the sum of R750,00 (720H). As to the innuendo pleaded by the plaintiff, the defendants denied that the words were intended to convey or did convey to readers of the Gazette that the plaintiff was

dishonest and had dishonestly entered a dog for a show without being entitled to do so (721H). The parties then went on to deny the: alleged innuendo that the plaintiff had been guilty of improper, disgraceful or discreditable conduct or conduct prejudicial or injurious to the interests of canine affairs or persons concerned or connected therewith; and denied that anyone understood the report in that way; and in the result denied that the plaintiff had suffered any damages at all (722D). Nine months later, the defendants amended their plea by pleading privilege. They averred that the occasion of the publication was privileged because (722F):

(i) The plaintiff was at all material times a member of the Kennel Union and as such was bound by the constitution; or alternatively was at all material times bound by the constitution.

(ii) The defendants respectively publish, edit and print the Gazette which is the official organ of the Federal Council of the Kennel Union of Southern Africa.

(iii) The Gazette is published only to members of the Union who are persons having an interest in the affairs of the Union and in affairs relating to dogs generally,

(iv) In terms of Rule 14 in Schedule 1 to the Constitution the Council is empowered to publish in the Gazette full details of any complaint, the decision of the Disciplinary Committee and the decision of the Council thereon.

(v) The defendants accordingly had a duty to publish the words concerning plaintiff which they did publish and the members of the Union had an interest in receiving such publication,

(vi) The words about plaintiff accurately reflected the decision of the Federal Council.

(viii) In publishing those words defendants acted without malice or impropriety and in the bona fide belief that the words were true (722F - 723B).

On these pleadings, the case went to trial and it was held by the court that based on the facts of the case it had not been ascertained that the alleged improper exhibition of the dog by Mr Park had not been

adjudicated upon: when the report was published, the defendants had stated something which they had not known to be true, regardless of its truth or falsity, the inference of an improper motive arose and the defence of privilege was defeated (731A). The appeal was accordingly dismissed (733A).'

[37]

[38] **Discussion**

[39] *Section 34 of the Constitution of the Republic of South Africa, 1996 provides as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The legal principles relating to defamation are fairly consistent and have occasioned a great deal of assurance over time.*

[40] A pivotal consideration would be whether the Defendant instituted the disciplinary enquiry against the Plaintiff without reasonable or probable cause.

[41] During cross-examination, Ms Nkunzi confirmed that she signed the statement written by Mr Shabalala confirming that it is her statement. Of crucial importance is that the disciplinary hearing was instituted on the basis of a report compiled pursuant to an investigation which included the statement made and signed by Ms Nkunzi. The report encapsulated the following information:

'5.5.1 Fortunate Nkunzi ('Nkunzi') stated that the specification for catering services was prepared and advertised by her. She stated that she was instructed

by Daniel Govender ('Govender') to prepare an advertisement which she posted onto a public notice board situated at the City Hall entrance...

5.5.2 Investigation revealed that the advert made by Nkunzi lacked crucial information such as the Municipality's Logo/dome, name of the Unit that needs catering services, tender conditions, and menu/specification. The advert stated that only companies which are on the database will be considered...'¹⁴

[42] It bears mentioning that the Plaintiff, notwithstanding that the information in the statement was incorrect, proceeded to sign same. Ms Nkunzi testified that she was informed that it was a formality and did not think that she would end up being formally charged and that there would be a disciplinary hearing. On the Plaintiff's own version, she recognised that the information contained in the report was inaccurate and was afforded an opportunity to prepare another statement to correct the purported inaccurate wording. According to Ms Nkunzi's evidence, the statement was corrected to reflect that she did not prepare the advert, she just typed the advert. It is apposite to mention that by this time, the disciplinary proceedings were already instituted against the Plaintiff and that the correction was made during the disciplinary hearing. It thus follows that the second statement made by the Plaintiff was made after she was served with the notice to attend the disciplinary hearing.

[43] From the version of the Plaintiff, it is evident that she was given a fair hearing in that the Defendant followed the required procedural steps in conducting the disciplinary proceedings. During cross-examination, Ms Nkunzi confirmed that she was not hampered or prevented by the Defendant from presenting her evidence at the

¹⁴ Exhibit A, page 9.

disciplinary hearing. Ms Nkunzi orated that she had no complainant as to how the disciplinary hearing was conducted.

[44] I had regard to the finding of the Presiding Officer's Decision at the Disciplinary hearing together with the attached notes.¹⁵ It is evident that the finding was based on the evidence presented at the hearing of three other witnesses besides Ms Nkunzi. Ms Nkunzi also had a representative from HR present. Pellucid is the fact that the Plaintiff was exonerated; notwithstanding reservations expressed by the Presiding Officer that Ms Nkunzi should have known the department procurement protocol. It is also evident that there were other considerations at play at the disciplinary hearing as per Exhibit "B" and the outcome seemingly did not only turn on whether or not the advert was prepared by Ms Nkunzi, or just typed by her and placed on the notice board. The Presiding Officer's finding was cemented on the grounds that the allegation against Ms Nkunzi was not sufficiently proved. This, in my view, is indicative that the Defendant's actions were not underpinned by malicious or vexatious intentions against the Plaintiff. In fact, Ms Nkunzi, during cross-examination conceded that there was no malice by the Defendant when disciplinary proceedings were instituted against her. Ms Nkunzi furthermore conceded that the disciplinary hearing which was instituted was the only and proper process established by law by which the Defendant could fairly and properly determine the allegations levelled against her if they were to be fair to her.

[45] I am in agreement with the submission made by the Defendant that it would not have known at the time of instituting the disciplinary proceedings that the Plaintiff would be reneging from her version as encapsulated in the report or that the

¹⁵ Exhibit "B".

report contained certain inaccuracies. In my view, the Defendant, on the strength of the investigative report had reasonable or probable cause to institute disciplinary proceedings against the Plaintiff.

[46] The Plaintiff's cause of action is based on damages suffered as a result of the conduct of the Defendant for *contumelia*, defamation, humiliation, embarrassment and inconvenience for malicious and vexatious treatment by the Defendant, and as such, the Plaintiff bears the onus

[47] The Defendant submitted that the Plaintiff failed to prove that she suffered damages set out in in her action. It was further mooted that Plaintiff adduced no evidence to prove *contumelia* and that no wrongfulness in the conduct of the Defendant was established as the Defendant's actions were reasonable. During her evidence Ms Nkunzi stated that she felt like she was the scapegoat. When probed about what she meant by this she stated that the proceeding were conducted to hold somebody "accountable for that fraud (sic)".¹⁶ Ms Nkunzi testified that her complainant emanates from the stigma attached to her being accused of "frauding documents(sic)". When asked during cross-examination who had informed her about the stigma, Mr Nkunzi's response that it was the office gossip in the corridors. She could not confirm that it was the Defendant who generated the gossip. She was unable to confirm that the Defendant published the charge sheet of the disciplinary proceedings save to say that she was given a call by one of the secretaries enquiring about the disciplinary hearing against

¹⁶ Exhibit "A" - page 5 "...you fraudulently prepared a tender document for advertisement,...without complying and completing the assignment or project thereof.'

her. Ms Nkunzi explicated during cross-examination that she was embarrassed and defamed by the Defendant as her reputation was tarnished. Furthermore Ms Nkunzi stated that the hearing caused her emotional stress.

[48] It was argued by the Defendant that wrongfulness should be assessed in accordance with reasonableness. An *inuiria* is defined as the wrongful intentional infringement of or contempt for a person's *corpus, fama* or *dignitas*.¹⁷

[49] It is trite that defamation is the intentional infringement of another person's right to his good name.¹⁸ Similarly, a person's *fama* or good name is said to be *'the respect and status he enjoys in society. Any action which has the effect of reducing his status in the community (that is defamatory to him), consequently infringes his fama and is in principle an iniuria, A distinction is made between defamation in general as iniuria, and those forms of infringement of good name which have in practice already crystallised into specific forms of iniuria under different names...'*

[50] As rightfully pointed out by the Defendant, it is apparent that the Plaintiff did not plead defamation and its elements in the particulars of claim. Furthermore, the Plaintiff failed to adduce the evidence by calling her fellow employee who called her to corroborate her version or explain what prompted her to enquire about the disciplinary hearing. Ms Nkunzi was unable to state whether the Defendant asked the secretary to call her or whether the secretary was acting on behalf of the Defendant at the time or simply out of her own curiosity.

¹⁷ Neethling et al 'Law of Delict' 5th Ed (LexisNexis) page 14.

¹⁸ Ibid page 307.

[51] In this regard Act 45 of 1988 provides:

“3. Hearsay evidence

Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–

. . .

(c) the court, having regard to–

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.’

[52] Plaintiff’s version in relation to the telephone call stands uncorroborated and remains hearsay evidence and no reliance can be placed on it as there is nothing on record to prove the origin and authenticity of the information, despite Ms Nkunzi stating that the secretary received this information via an e-mail which she received from her boss. Furthermore, the extent to which the institution of disciplinary proceedings was published is unknown. The Defendant argued that this fact vitiates any argument or allegation that the Defendant acted *animo iniuriandi*.

[53] It however behoves the court to place the legal position on record in this regard. It is trite that *'although the plaintiff must expressly aver the existence of animus iniuriandi in his pleadings, he need not prove intent on the part of the defendant. If it is certain that the publication is defamatory and that it relates to the plaintiff, there is, apart from the presumption of wrongfulness, also a presumption that the defamation was committed intentionally. Thus the burden of rebutting the presumption is place on the defendant.'*¹⁹

[54] Ms Seheri testified that email was essentially an internal notification. Consequently, if regard is had to the established legal principles that if the defendants in a defamation matter can prove that the statements made were true and in the public interest, then they can escape liability.

[55] Also, in light of the earlier concessions mentioned by Ms Nkunzi, there is nothing tangible on record that there was in effect a publication and / or that such a publication was defamatory and as such the presumptions referred to do not, in my view, find relevance.

[56] If regard is to be had to the ordinary meaning of the words and the nature of the email as well as the objective and reasonable person test, it follows that the contents of the email are not defamatory. The publication of the email may have caused the plaintiff a bit of embarrassment but there is nothing to suggest that the plaintiff suffered any real prejudice and as such cannot amount to defamation.

¹⁹ Law of Delict, ibid, page 316.

[57] I am therefore of the view, that there was no intent to defame through the dissemination of the email if regard is to be had to the intended recipients and the purpose for which it was disseminated.

[58]

[59] **Conclusion**

[60] Ms Seheri reiterated that she was the person who engineered or started the disciplinary. Her decision was based on the recommendation of the city investigation unit. During cross-examination she confirmed that Ms Nkuzi provided support to her senior manager. She confirmed that Ms Nkuzi would not be doing anything wrong if she acted on the instruction of Mr Govender if he told her to type something and if she did not do so it would be regarded as insubordination.

[61] She stated that she established the disciplinary process as it is the vehicle to test the allegations levelled against the Plaintiff in the report. She further orated that she is required to account and would be held accountable if she did not deal with the matter appropriately as it is a requirement to monitor implementation of the recommendations made by the city investigation unit. She indicated that the forum to test the veracity of the allegations and that it was not her role to test the report. The persons dealing with the disciplinary procedure would craft the charges based on the information in the report; she does not formulate the charges.

[62] Ms Seheri was asked whether she was aware of the two statements made by Ms Nukuzi and whether she knew what the differences in the statements were and the circumstances under which the statement was corrected. She was unable to comment on the believability of the statement, as the report had to be looked at in its

entirety. She was asked to give her comment on whether the conduct or actions of the Plaintiff amounted to the allegations asserted in the charge, to which she responded that she could not make that conclusion without testing it against what was contained in the report. She reiterated that her function is not to evaluate and make a decision around what is contained in the report hence the reason why the disciplinary process is put into motion.

[63] She emphasised that the other role-players mentioned became involved after the procurement process and that the report related to the procurement process. It was about the supplier that was appointed. She stated that the other role-players were not involved in the procurement process.

[64] She stated that the report pointed to both Mr Govender and Ms Nkunzi and even though Mr Mkumla also reported to Mr Govender, Mr Govender was the most senior. Referring to the various statements it was highlighted that there were more fingerprints of others' involvement than the involvement of the Plaintiff to which the witness stated that she was not in a position to agree or to disagree. She conceded that if the Plaintiff was given an instruction by Mr Govender to do something within the course and scope of her employment, that the Plaintiff would have been obliged to do so provided it was a lawful instruction.

[65] It is trite that every element of a delict must be proven in order to succeed with a delictual action. As previously stated, in order to prove defamation, every

requirement of defamation must also be proven in order to succeed with a claim for defamation which included *animus iniuriandi*.

[66] In *Minister of Justice and Constitutional Development v Moleko*²⁰ the Supreme Court of Appeal held that there had to have been an honest belief in the guilt of the Plaintiff held on reasonable grounds to prove reasonable and probable cause.

[67] The charge against her was couched in the following terms:

*'It is alleged that you misconducted yourself in terms of Clause 9 of the Code of Conduct for Municipal Staff Members, Municipal Systems Act, which states that a staff member may not use, take, acquire or benefit from any property or asset owned, controlled or managed by the Municipality to which that staff member has no right, in that on the 19th of August 2013 while you were on duty, you fraudulently prepared a tender document for advertisement, whose order number is: PO 1291704 OL without complying and completing the assignment or project thereof'*²¹

[68] After carefully considering the Plaintiff's case, the evidence on record and applicable legal principals I am of the view that the Plaintiff has failed to provide sufficient evidence to establish a *prima facie* case that the Defendant has wrongfully, maliciously and vexatious instituted disciplinary proceedings against her and that she had suffered *contumelia* by the actions of the Defendant.

²⁰ At para 20.

²¹ Exhibit A, page 1.

[69] Turning now to the issue of costs. It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event, which is a starting point. The guiding principle is that '*...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be,. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.*'²²

[70] It is also an accepted legal principle that cost is in the discretion of the court.²³ The basic rules were stated as follows by the Constitutional Court in **Ferreira v Levin NO and Others**²⁴:

'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first...'

²² Cilliers AC 'Law of Costs' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *In re: Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

²³ *Ibid* page 2-16(1); *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) '[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

²⁴ 1996 (2) SA 621 (CC) at 624B—C (par [3]).

Order

[71] In the result, the following order is made:

(a) The application for absolution from the instance in the main trial is granted

(b) The Respondent/Plaintiff shall bear the costs of this application and the main trial.

[REDACTED]

[REDACTED]

P ANDREWS

Regional Magistrate: Durban