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[3] THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

[4] **JUDGMENT**

[5] Case No: 561/2010

[6] In the matter between:

[7]

[8] THE COUNCIL FOR MEDICAL SCHEMES First Appellant

[9]

[10] THE REGISTRAR OF MEDICAL SCHEMES Second Appellant

[11]

[12] and

[13]

[14] SELFMED MEDICAL SCHEME First Respondent

[15]

[16] LEON BESTER Second Respondent

[17]

[18] Neutral Citation:*Council for Medical Schemes v Selfmed* (561/2010) [2011] ZASCA 207 (25 November 2011)

[19]

[20] Coram: Navsa, Van Heerden, Ponnan, Malan JJA and Petse AJA

[21]

[22] Heard: 7 November 2011

[23]

[24] Delivered: 25 November 2011

[25]

[26] **Summary***:* Defamation – whether words complained of referred to corporate entity as such – whether words complained of defamatory – test of reasonable reader restated

[27]
[28]

[29]

[30] _____

[31] **ORDER**

[32] _____

[33] **On appeal from:** North Gauteng High Court, Pretoria (Rabie J sitting as court of first instance):

[34]

[35] 1. The appeal is upheld with costs.

[36] 2. The order of the court below is replaced with the following order:

[37]

[38] ‘The claims are dismissed with costs.’

[39]

[40] 3. The cross-appeal is dismissed with costs.

[42] _____

[43] **JUDGMENT**

[44] _____

[45] VAN HEERDEN JA (NAVSA, PONNAN, MALAN JJA AND PETSE AJA CONCURRING):

[46] In August 2005, the first appellant, the Council for Medical Schemes (the Council), published its *Annual Report 2004/2005*, as it was obliged to do in terms of s 14 of the Medical Schemes Act 131 of 1998 (the

Act). Both the first and second respondents took exception to two statements contained in a part of the Report headed ‘Registrar’s Review’, contending that these statements were defamatory of them both. The first respondent, Selfmed Medical Scheme (Selfmed), is a medical scheme registered as such in terms of s 24 of the Act. The statements complained of (which I have italicised) are contained in the following passage, in a section dealing with ‘Governance of Medical Schemes’ –

[47] ‘SELFMED

[48] We have questioned several issues concerning governance at Selfmed, including *the manner in which the scheme’s chairperson ostensibly appointed himself the principal officer and CEO*. Also under scrutiny was the approximately R1 million level of remuneration awarded to this part-time post and *other dubious appointments of family members to the scheme’s executive management. This matter has not yet been resolved.’*

[49] The respondents instituted an action claiming damages for defamation against both the Council and the second appellant, the Registrar of Medical Schemes (the Registrar). The North Gauteng High Court (Rabie J) agreed with the respondents and awarded each of them R200 000 in damages (the full amount claimed). The appeal against the judgment on both the merits and the quantum of the claim comes before us with the leave of the court below. Also before us is a cross-appeal on the question whether the high court ought to have made a punitive costs order in favour of the respondents.

[50] The questions in this appeal are (a) whether the allegedly defamatory statements refer to the first respondent at all, and (b) whether they are defamatory of either or both of the respondents.

[51] The litigation in the present appeal was preceded by an extraordinary concatenation of events over a period of about five years involving, inter alia, Selfmed. The second respondent, Mr Leon Bester (Bester), was, at the time the litigation commenced, the chairperson of the Board of Trustees of Selfmed (the board), as well as the Chief Executive Officer of the Scheme (the CEO). The relevant details of what happened appear hereafter.

[52] Bester was a key player in the chain of events. In 1996, Bester was the managing director of Universal Storage Systems (Universal). In that capacity, he appointed Selfmed as the medical scheme for the employees of Universal. This proved to be a bad mistake as Selfmed was at that time in an appalling managerial and administrative state. It had no reserves at all; there was great member dissatisfaction and a very large loss of members. In the space of two years, the scheme went through three administrators and six principal officers. Things got so bad that in 2000 the auditors withheld an opinion and did not furnish even a qualified auditor's report. The following year (2001), the auditors furnished a qualified report.

[53] At the beginning of 1999, Bester was approached to become a trustee of the Selfmed board and, because its precarious position impacted on the employees of Universal, he readily agreed. He was elected onto the board of trustees and, in the second half of 1999, was voted to the position of chairperson of the board. He resigned as chairperson of the board in February 2007 (while the litigation was still proceeding), but stayed on as a trustee.

[54] It soon became clear to the trustees of Selfmed that they would have to rely on their own skills to save the scheme. Bester's business acumen and experience enabled him quickly to grasp the intricacies of the medical scheme industry. He took the definite lead in ensuring that the trustees started to function cohesively as a board. Although his monthly honorarium as a trustee was only R3000, Mr Bester found himself working between 50 to 60 hours per week on Selfmed matters, over and above his work at Universal.

[55] At the end of 2001, there was a highly problematic change in Selfmed's administrator and, in dealing with the ramifications of this change, Bester became more and more involved in Selfmed's affairs in an executive capacity. He was then approached by the other trustees to ascertain whether he would make himself available for a full-time executive position. Nothing came of this immediately but, on 13 August 2002, Bester met with Mr Danie Kolver (Kolver), the head of registration and accreditation of the Council, to discuss various matters. In a subsequent letter to Kolver dated 22 August, Bester stated that –

[56] '[I]t was also discussed that one of the Trustees may be applied in a permanent executive capacity in view of the strenuous demand on the Trustees in fulfilling their duties in the execution of the business of the medical scheme.'

[57] Bester did *not* indicate in this letter that the trustee in question was himself, ie the chairperson of the board. He could not recall whether he had mentioned this to Kolver during their meeting. He did not regard it as important as it was the 'principle of the appointment of a trustee in full-time capacity' that interested him.

[58] In his reply dated 25 September, Kolver confirmed 'the discussions so recorded by you', but also indicated that he had at the meeting –

[59] '[H]ighlighted the need to engage the principal officer as Executive and Accounting Officer of the Scheme in line with the statutory duties imposed on him and more particularly, to give effect to decisions taken by the Board.'[1]

[60] According to Bester, he took this reply from Kolver to mean that, although the scheme had to make more use of their part-time principal officer, Mr Marius Werth (Werth), there was nothing against the appointment of a trustee to a permanent executive position. This is what Bester reported to the board.[2]

[61] At Selfmed's 2002 Annual General Meeting (AGM), held on 11 September 2002, it was noted that –

[62] 'The Chairman advised that it may be necessary to appoint a full-time Trustee in order to manage the Scheme's affairs. It was proposed that PE Corporate Services be

[1] In terms of s 57(4)*(a)* of the Act, the board of trustees is obliged to appoint a principal officer. There is very little in the Act dealing with the role of a principal officer, but it emerged from the testimony of officials representing the second appellant, the Registrar of Medical Schemes (the Registrar) that, in accordance with international best practice, it is the principal officer to whom both regulators and the board of trustees look for accountability.

[2] Bester's advice to the board should be viewed against the background of the fact that, in terms of Selfmed's Rules, the principal officer is disqualified from being a member of the board of trustees. It is also clear from the Rules that the duties of the principal officer are to act as an executive officer of the scheme on the direction and authority of the board of trustees. In the *Explanatory Memorandum* to the *Model Rules for Medical Schemes registered under the Medical Schemes Act, 1988 (Act No. 131 of 1998)*, it is stated that, although not legally disqualified, it is advisable that the principal officer does not become a trustee in view of the fact that the board appoints him or her and there could be a conflict of interest. If provision is made for such appointment, then the principal officer should be an *ex officio* member of the board. Moreover, in the second King Report on Governance in South Africa in 2002 ('King II'), Chapter 2, in dealing with the 'Role and Function of the Chairperson', recommended that there should be a clearly accepted division of responsibilities at the head of the company to ensure a balance of power and authority, so that no one individual has unfettered powers of decision-making. The chairperson of the board should preferably be an independent non-executive director. Given the strategic operational role of the chief executive officer, this function should be separate from that of the chairperson.

consulted to obtain expert opinion on the incumbent's remuneration. The hours worked to be pro-rated according to the salary recommended.'

[63] Bester did not disclose to the AGM that he was in fact the trustee who would possibly be appointed on a full-time basis. The members agreed to this proposal. It is clear that, at this stage, Bester was the primary driver of the process.

[64] Prior to approaching Bester to take up the post of CEO, the trustees had asked Werth to become their full-time principal officer, but he had declined. They had also approached and interviewed a Mr Rust and a Mr de Koker with a view to filling the position of CEO of Selfmed, but to no avail.

[65] From 30 November to 2 December 2002, at a Selfmed strategic planning session ('bosberaad'), attended by, inter alia, the trustees under the chairpersonship of Bester, one of the key objectives identified, with Bester's participation, was the need to employ the chairperson of the board of trustees as CEO of the scheme.

[66] According to Bester, he took up his full-time position as CEO on 1 January 2003. Prior to that, he had arranged with the chairman of Universal to spend more time on Selfmed affairs, although he retained his employment at Universal. (It was only at the end of 2004 that he resigned from Universal.) The contract of employment between Bester and Selfmed is dated 11 April 2003. There are, however, no minutes (nor any other documentation) in existence reflecting a board meeting at which the decision to appoint Bester as the CEO was taken.

[67] Bester testified that he had not informed the Council about his appointment as CEO as he was not accountable to them in this regard. As far as he was concerned, the abovementioned meeting with and letter from Kolver had 'cleared the principle' of a trustee being appointed in a full-time executive capacity. In the Minutes of the 2004 AGM, for the year ended 31 December 2003, under the heading 'Honorariums', it was noted that 'the retainer and daily allowance was waived by the Chairman, as the Board of Trustees had appointed him the CEO of the Scheme'. This was 'proposed' by Bester himself and 'seconded' by one of the members of the scheme. Although this was not voted upon, nobody at the AGM raised any objection. According to Bester, this was 'a ratification' by the members of his appointment. It was done 'in terms of transparency', as the permission of the members was not required for his appointment as CEO.

[68] At the abovementioned strategic session held in November/December 2002, the board had identified as a 'critical success factor' the need to establish its own marketing infrastructure under the scheme's control and separate from the administrator of the scheme. Until 2002, the administrator had conducted the marketing for the scheme, but by the end of 2002, the trustees had negotiated with the new administrator to relinquish this aspect from January 2003. Because of a dispute with the trustees, a certain Mr Tony Warner (Warner), who had been earmarked to be Selfmed's marketing executive, was not appointed to this post. The scheme thus found itself with nobody to take care of marketing.

[69] At that time, there were two persons who formally applied for the advertised marketing position, namely, a certain Mr van Coller and Bester's wife, Ms Marthie Bester. On 14 April 2003, three days after signing his

employment contract with Selfmed, Bester sent a most remarkable e-mail to the trustees regarding the appointment of the marketing executive, urging them to interview his wife as a matter of urgency as she had other offers of employment to consider. He proceeded as follows:

[70] 'In terms of my fiduciary duties I must act in the best interest of the scheme, avoid personal conflict and not pursue personal interest at the cost of the scheme. I also do not wish to be accused and found guilty of nepotism. In my opinion nepotism is unacceptable when a family member is appointed at the cost of a better person. If the family member is however the best and the right person, then surely one must act in the best interest of the scheme. Surely there will be gossip and comments, but at best it can only be classified as negative and destructive and it will have to be addressed accordingly. If one has not done anything wrong one has not to defend anything.

[71] . . . .

[72] During the course of the day I will fax Tony Warner's CV to you. This is a person where we had no problem to offer R700 000 per annum without looking any further. Compare this CV with Marthie's CV and make your own conclusion. The one had a record of non-performance vs. the other's record of success upon success. The one will not be employed by previous employers vs. the other who immediately received a favourable counter offer to stay. You make the decision please.

[73] Although I will not be in the interview room, I wish to be present outside to immediately discuss risks, alternatives and solutions when you have made a decision (positive or negative).'

[74] According to Bester, all he was doing was to stress to the other trustees that the matter had to be dealt with urgently, partly because Ms Bester had other offers of employment, but also because of Selfmed's non-existing marketing department. In testimony in the court below, he stated that he had recused himself from her interview as '[t]o influence

them [the board] to appoint her would be wrong. To influence them to really get the interviews done, that is my duty.'

[75] As regards the reference to Mr Warner, Bester denied that he was clearly trying to advance the appointment of his wife in an improper manner. His (somewhat disengenuous) explanation was that he was merely reacting to a previous question from the trustees regarding the remuneration benchmark for the post and the amount budgeted for in this regard.

[76] Previously, on 1 April 2003, Bester had visited Mr Evan Theys (Theys), the head of compliance at the Office of the Registrar. According to Bester, the purpose of the visit was to 'clear a principle', namely, whether a person who was a family member of a trustee could be appointed to the position of Selfmed's marketing executive provided that such person was the best candidate for the position. In a follow-up letter dated 17 April 2003, addressed to Theys by Bester, the latter stated –

[77] 'The situation now is that a family member of one of the trustees became aware of the vacancy and has formally applied for the position. A comprehensive CV has been submitted. In view of the discrimination grounds incorporated in labour legislation, this application cannot be ignored simply because of the family ties. The person's CV complies and compares favourably with the job specification and there is the possibility that the person could be successful in the filling of the vacancy. So could any other applicant. This will however only be decided during the recruitment process and conducting interviews with various applicants. . .

[78] The problem is should this family member happen to be the best person for the job and it is decided to disqualify the person to avoid nepotism the BOT [Board of Trustees] is failing in its fiduciary duty to act in the best interest of the scheme by not appointing the best person. If the applicant is not appointed although he/she is the best

choice, (to avoid nepotism) this person could have a valid legal recourse backed up by the Labour Relations Act in terms of discrimination and the scheme could be sued.'

[79] It is noteworthy that Bester pointedly did not inform Theys that he and his wife were the persons involved in the problem posed in the letter. According to Bester, he did not deliberately hold back this fact from Theys. He simply wanted to 'clear a principle' and 'if the principle is clear then we feel we have done the necessary transparency'.

[80] Theys handed Bester's letter to Mr Craig Burton-Durham (Burton-Durham), the Council's head of legal services, for him to deal with. Burton-Durham discussed the matter with the Registrar, Mr Patrick Masobe (Masobe) and, on 23 April 2003, addressed a letter to Bester, the relevant parts of which read as follows:

[81] 'During the course of our conversation it was pointed out that although it is in the interests of the scheme that the best candidate be appointed, there are potentially a number of governance concerns where such candidate however is a family member of a trustee. As you are aware, this office pays high regard to the conclusion of agreements and appointments of an arms-length nature, this not only contributes to transparent governance but provides objective certainty from the point of view of outside perception. This office would accordingly advise that the consideration of any such appointment be dealt with circumspectly and with caution.

[82] The decision however falls within the purview of the Board of Trustees which is required to fully apply its mind, having regard to all the factors, which factors must of course take into account recent developments in the sphere of corporate governance.

[83] To the extent that the family-member application is to receive consideration, the trustees are advised to inter alia ensure that:

- The process is an open and transparent one;
- The proceedings are accurately and properly minuted;

- The family member serving on the board properly recuses [himself or herself] from *any of the proceedings around the interview and other processes concerning this matter.'* (Emphasis added.)

[84] Van Coller and Ms Bester were interviewed by the board on 24 April 2003. Although there are brief notes, made by one of the trustees, of the interviews with both candidates, there are no minutes, either of the interview proceedings,[3] or the meeting of the board on 24 April 2003.

[85] Bester did not sit in on his wife's interview by the board, but did sit in on Mr Van Coller's interview and spoke to the trustees immediately after his wife's interview.[4] Three of the trustees, in the absence of Bester, decided that Ms Bester should be appointed as marketing manager. The fourth trustee, Mr Mel Bartlett (Bartlett) abstained from voting because he was concerned about the repercussions from the Council. Werth advised the trustees that they had to inform the Office of the Registrar if they intended to appoint Ms Bester. The trustees resolved to do so.

[86] This resolution prompted apparent dramatic action on the part of Bester and his wife. On 25 April 2003 at 08h13, Bester sent a fax to the other trustees tendering his resignation as trustee with effect from 30 April 2003. Very shortly thereafter, at 08h35, he sent a further fax to the trustees, tendering his resignation as CEO with immediate effect. In the meantime at 08h31, Ms Bester sent an e-mail to Bester's e-mail address, informing the trustees that she wished to withdraw her application for the position of

[3] This despite the fact that Mr Burton-Durham had emphasised, in his abovementioned letter to Bester dated 23 April 2003, that the process of interview should be 'open and transparent' and that the proceedings should be 'accurately and properly minuted'.

[4] This would also seem to be contrary to the guidelines provided by Burton-Durham; it certainly cannot be said that Bester recused himself from 'any proceedings around the interview and other processes concerning the matter'.

Marketing Director. This flurry of correspondence prompted Mr Aubrey Faber (Faber), one of the trustees, to send an e-mail to Bester, calling for an urgent meeting with the trustees to resolve the issues that led to Bester's resignation.

[87] A special meeting of the board was held on 28 April 2003. The minutes reflect that it was the unanimous wish of the trustees that Bester be persuaded to withdraw his resignation, for the good of the scheme. According to the minutes, Bester later joined the meeting and explained that it seemed to him that his integrity was being doubted, that he had lost the confidence of the trustees and that the only honourable course was to resign. The trustees were unanimous that it was not their intention to question Bester's integrity. In hindsight, they regretted their resolution to inform the Registrar of their intention to appoint Ms Bester as Marketing Executive. Bester was eventually persuaded to withdraw his resignation as CEO of the scheme. According to him, he did so because of his fiduciary duty to the members of the scheme. He indicated that he would give further consideration to his resignation as a member of the board of trustees.

[88] After Bester had left the meeting, the remaining trustees unanimously resolved that they would offer Ms Bester the post for which she had applied. There would appear to have been no further talk of informing the Office of the Registrar of their intention to appoint Ms Bester.

[89] On 29 April 2003, Dr Willem Boshoff (Boshoff), one of the trustees, wrote to Bester on behalf of the board, informing him of the decision to appoint Ms Bester. The very next day, 30 April 2003, Bester

withdrew his resignation from the board of trustees and re-assumed his position as chairman.

[90] As stated above, Bester testified that he did not report his appointment as CEO to the Registrar, as he was not accountable in that regard. As regards the knowledge which the appellants had regarding Bester's appointment, reference was made to an e-mail dated 13 May 2004 and sent by Mr Paul Bosch (Bosch), the senior financial analyst of the Council, to Werth. This e-mail concerned the 'Selfmed 2003 returns'. One of the queries posed by Mr Bosch reads as follows –

[91] '[T]rustee remuneration should include remuneration paid to the executive Chairman, in whatever capacity the remuneration is paid. Refer to section 57(8) and Regulation 6(A).'

[92] In response to this query, Bester addressed an e-mail to Bosch dated 3 June 2004, which contained, inter alia, the following statements –

[93] 'The reference to "executive Chairman" is not correct and the trustees would be much obliged to be informed as to how the status was awarded to the scheme by your office. There is a formal employment contract in place and it definitely does not refer to executive chairman. As he is a fulltime employee, he receives no remuneration in his capacity as trustee. Any entitlement he may have had to receive fees in connection with his duties as trustee, was formally waived. This was officially disclosed to the members at the 2003 AGM last year and has been minuted. Please take note of the transparency.'

[94] In this e-mail, Bester also indicated that the board wanted a fairly urgent meeting with the Registrar and 'relevant senior members' to discuss their concerns and queries.

[95] In a further e-mail addressed by Bosch to Werth and Bester, Bosch requested copies of the employment contracts and job descriptions of the Marketing Director and Chief Executive Officer, as also a copy of the latest evaluation/results of the Marketing Department. Bosch indicated that this documentation was requested in view of the proposed meeting and that, once the documentation had been received, a meeting could be arranged.

[96] Selfmed responded to this e-mail with a letter dated 21 July 2004 addressed by its attorney to the Registrar stating, inter alia, that 'prior to the appointment of its chief executive officer and its marketing director, our client discussed their appointment with and obtained approvals from the Registrar's Office'. The attorney also indicated that Selfmed was perturbed about the demand for the documents requested by Bosch as a pre-condition for the meeting requested by Selfmed.

[97] On the next day, 22 July 2004, Theys, on behalf of the Registrar, instructed Selfmed to supply copies of the two employment contracts within 7 days of the date of that letter. This instruction was given in terms of s 44(5)*(b)* of the Act. [5] The two contracts were then provided to the Registrar before the end of July 2004.

[98] Burton-Durham testified that, in about May 2004, rumours started to circulate at the Office of the Registrar to the effect that Mr Bester had been appointed to the post of CEO/Executive Chairperson, and that Ms Bester had been appointed to the position of Marketing Director. Prior to receipt of the contracts of employment, there had been no correspondence

[5] In terms of s 44(5)*(b)*, the Registrar has the power to direct a medical scheme to furnish him or her with documents or information relating to the financial or other affairs of the medical scheme within a specified period.

or communication from Selfmed to the Council or the Registrar's Office which had identified Ms Bester as the person who had been appointed as Marketing Director and Mr Bester as the person who had been appointed as CEO.

[99] On 30 September 2004, Theys sent a letter to Werth, the relevant part of which read as follows –

[100] 'This Office has perused the documents[6] forwarded to it by yourself. Based on the perusal of these documents this Office deems it necessary to invite the trustees of the scheme, *excluding the chairperson*, to discuss the appointment by the Board of Trustees of the chairman to the position of Executive Chair and CEO of the scheme, as well as of the remuneration attaching to such position.

[101] Further, this office also wishes to raise the appointment of the chairperson's wife to the position of Marketing Director of the scheme; what steps were taken to avoid potential conflicts of interest and whether any records were kept of the process.' (Emphasis in original.)

[102] Once again, Selfmed reacted through a very lengthy letter addressed to the Council by their attorney, dated 12 October 2004. The letter stated that the Selfmed board did not have a position of 'executive chairperson'. As regards the position of CEO, the letter stated that the trustees' decision to appoint a CEO was not only put to and approved at the annual general meeting, but was also discussed with the Registrar's Office in advance. The success of the scheme in increasing its reserves from a zero base in 1999 to the current R100 million, the rendering of sound financial statements and other operational successes indicated that the trustees' decision was the correct one. The letter then dealt with the appointment of Ms Bester to the

[6] The contracts of employment sent by Werth to Theys in July 2004.

position of Marketing Director and the steps that had allegedly been taken to avoid a potential conflict of interest.

[103] The proposed meeting took place on 15 October 2004, attended by Burton-Durham, Theys, Bosch and Kolver, representing the Council and the Office of the Registrar, Selfmed trustees Bartlett, Boshoff and Mr Gus Gregory, and Mr J Araujo (Selfmed's attorney). Burton-Durham kept cryptic notes during the course of this meeting, some of which were referred to in evidence. There was a debate concerning the distinction between the role of the board of trustees and the principal officer as the executive officer of the medical scheme. Theys stressed that the principal officer should be the executive officer, that this was a governance model which had been followed all around the world, and that the situation at Selfmed was a departure from this model. Kolver indicated that the rules only provided for a principal officer and not for the position of a CEO.

[104] It is important to note that, at this meeting, Theys, the head of compliance of the Office of the Registrar, once again asked why the minutes of the meetings at which Bester and Ms Bester had been appointed had still not been made available to the Registrar, despite repeated requests.

[105] Burton-Durham testified that the Registrar's Office was not satisfied that the issues raised by Theys[7] had yet been satisfactorily resolved. Although the allegation that Bester had appointed himself as CEO had never been made expressly by anybody at the Office of the Registrar after the meeting of 15 October 2004, there was a definite perception that this is what had occurred. As regards Ms Bester's appointment as

[7] See para 37 above.

Marketing Director, Burton-Durham stated that, had he known that the person being considered for appointment was a wife of one of the trustees, he would have advised that Selfmed desist from continuing to consider such application.

[106] According to Burton-Durham, at the meeting of 15 October 2004 Boshoff undertook to furnish the Office of the Registrar with the outstanding information (particularly the minutes of the relevant meetings of the board). To his knowledge, such information was still outstanding. Burton-Durham was adamant that it could thus not be said that the meeting of 15 October 2004 had resolved the issues raised in Theys' letter dated 30 September 2004. He (Burton-Durham) had briefed the Registrar (Masobe) on what had happened at the meeting and advised the latter accordingly.

[107] On 13 May 2005, Theys addressed another letter to Werth. The letter stated that –

[108] '[T]his Office. . . can find no provision in the rules of the scheme for an executive chairperson. This kind of position also flies in the face of the King Report on governance, which advocates a division of the powers between the chairperson and the principal officer (CEO). As neither the rules nor corporate governance model make provision for the position of an executive chairperson, there is no basis for the scheme to have such a position. The creation of this position is accordingly ultra vires the rules of the scheme.'

[109] Selfmed's response, dated 27 May 2005, was vague and unsatisfactory. Firstly, the board advised Theys that Selfmed had sought a rule amendment to permit a trustee to also be principal officer.[8] The board

[8] This attempt by the board to change the rules of the scheme, was rejected by the Registrar.

noted the Registrar's contention that the position of executive chairperson was ultra vires the rules of the scheme. According to the letter –

[110] 'We are considering addressing this title. We assume that you are not suggesting that it was ultra vires for the scheme to conclude the employment contract with Mr Bester in terms of which he was appointed chief executive.'

[111] Since the board must have known that this was exactly what the Registrar was suggesting, this response appears to be almost deliberately naive.

[112] The Registrar, Patrick Masobe (Masobe), also testified. He had filled the position of Registrar since 2000. Much of his evidence co-incided with that of Burton-Durham. As far as he was concerned, neither the appointment of Bester as CEO, nor the appointment of Ms Bester as Marketing Director, had been resolved to the satisfaction of his Office which was thus engaged in a number of ongoing enquiries in this regard.

[113] In late 2005, the Council published its annual report for the 2004/5 year (the annual report), in terms of s 14 of the Act. Publication of this report was to the relevant Minister and thereafter to the general public, including brokers, consultants, and other medical schemes. In addition, the report appeared on the website of the Council and was further distributed to the public at a press conference as well as at a so-called 'roadshow' held by the Council. The section of the report headed 'Registrar's Review' contained the passage set out in para 1 above.

[114] Selfmed and Bester objected to those portions of the passage highlighted in para 1 above. They responded by instituting a defamation action against the Council and the Registrar. According to the respondents'

particulars of claim, the Registrar had wrongfully defamed each of them by uttering and publicising the abovementioned words which, according to the respondents, had the following meaning –

[115] '6.1 The first plaintiff is corruptly and/or dishonestly administered in that:

[116] (a) The second plaintiff appointed himself as the first plaintiff's "principal officer and CEO";

[117] (b) There have been "dubious appointments of family members to the (first plaintiff's) executive management" and this "matter has not yet been resolved";

[118] 6.2 The second plaintiff is corrupt and/or dishonest in that:

[119] (a) He appointed himself as the first plaintiff's "principal officer and CEO";

[120] (b) He has been party to the "dubious appointments of family members to the scheme's executive management" and this "matter has not yet been resolved";

[121] 6.3 There was corporate misgovernance in the administration of the first plaintiff in that the trustees permitted:

[122] (a) the improper appointment of the chairperson as the CEO and principal officer of the first plaintiff;

[123] (b) the improper appointments of family members of trustees and staff of the first plaintiff to executive management positions in the first plaintiff.

[124] 6.4 The second plaintiff has been party to corporate misgovernance in the administration of the first plaintiff in that:

[125] (a) acting corruptly and without approval, he appointed himself as CEO and principal officer of the first plaintiff;

[126] (b) he permitted the improper appointments of family members to the first plaintiff's executive management. . .'

[127] It was further submitted on behalf of the respondents that, in publishing this extract, the appellants intended to damage the respondents and to injure them in their reputations, and that the respondents had suffered damages as a result, each in the amount of R200 000.

[128] In response, the appellants denied the allegations, in particular the allegation that the extract was wrongful and defamatory of the plaintiffs. The appellants then, inter alia, pleaded specifically as follows: the annual report was published in the discharge of a statutory duty imposed by s 14 of the Act, read with the Act as a whole; it was a public document which is, inter alia, tabled in Parliament; members of the public generally have a right to receive the contents of the annual report; the contents of the annual report relating to the plaintiffs were relevant to the statutory functions performed by the defendants in terms of the Act; the annual report was published in good faith pursuant to the statutory functions performed by the defendants in terms of the Act; and that, in the premises, publication of the annual report occurred on a privileged occasion and the appellants' conduct was not unlawful.[9]

[129] As stated above, the court below held that the words complained of in the extract from the Annual Report were defamatory of both Bester and of Selfmed as an organisation. As regards the latter, Rabie J stated that the reader of the report would form the view that Selfmed was being corruptly and dishonestly administered in doing and/or allowing the actions referred to. The court a quo also held that –

[130] 'That was also clearly the intention of the Registrar when he wrote this report. He started off by saying that they had "questioned" the issues mentioned by him and ended off by saying that the matter "has not yet been resolved". This would enforce the view of any reader to what Selfmed and Mr Bester did was, *inter alia*, dishonest and corrupt and generally improper.'

[9] In the alternative to the plea of privilege, the appellants relied on a limitation of liability contained in s 62 of the Act. It is not necessary to go into this in any further detail.

[131] Rabie J did not uphold either the defence of privilege or the defence of statutory immunity raised by the appellants and, as indicated above, awarded each of the appellants R200 000 as damages for defamation. He also made a negative credibility finding against Masobe, holding that Masobe's evidence was not only inherently contradictory and contradictory to the evidence of Burton-Durham, but also so improbable that it had to be regarded as untrue. I will return to this at a later stage.

[132] The delict of defamation is the unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. The plaintiff must therefore allege and prove that the statement complained of refers to him or her.[10]

[133] The respondents argued that they had pleaded that the extract from the Annual Report was 'of and concerning them' and that the appellants had admitted this. So, it was contended, it did not behove the appellants now to deny that it referred to Selfmed. In order to deal with this submission, it is necessary to consider the pleadings in this regard.

[134] The paragraph in the particulars of claim which the appellants admitted read as follows –

[135] 'The registrar's review contained a section under the heading "Governance of Medical Schemes". This section dealt with "Governance Failure within the Schemes". A number of examples of corporative misgovernance were given. In this section, the defendants published, *of and concerning* the plaintiffs, the following extract. . . .' (Emphasis added.)

[10] FDG Brand 'Defamation' in Joubert (ed) *The Law of Law Africa* (2 ed) vol 7 paras 234 and 243.

[136] It is important to consider the admission on its own and then in the context of the remainder of the relevant parts of the plea. Clearly, what was admitted by the appellants was the simple fact that the passage as a whole had been published and that it referred to Selfmed and Bester. It certainly cannot be taken to mean that the appellants were admitting that the allegedly defamatory parts of the statement related to both respondents. Put differently, the passage as a whole, including the heading, tells the reader that it deals with the Regulator's governance concerns involving, inter alia, the second respondent (who is not named). It does not follow that Selfmed, qua Selfmed, falls within the ambit of the part of the passages complained of, even assuming them to be defamatory. This view of the admission is substantiated by the remaining parts of the plea, which emphatically deny the defamatory nature of the comments in relation to either or both of the respondents.

[137] As regards the question whether the statements complained of referred to Selfmed as such, the following statement by FDR Brand is apposite –

[138] 'The plaintiff must allege and prove that the statement complained of refers to him or her. The test whether the statement refers to the plaintiff is objective: would the ordinary reasonable man to whom the statement is published be likely to understand the statement in its context to refer to the plaintiff?'[11]

[139] The statements complained of by the respondents do *not* in fact refer to Selfmed as such. The statements concern 'the scheme's chairperson' and 'dubious appointments of family members to the scheme's executive management'. Properly construed these statements appear to

[11] Brand op cit para 243.

reflect upon individual officers of Selfmed, but not upon Selfmed as an entity in its own right.

[140] Even if one accepts, for the sake of argument, that the appellants admitted that the extract was 'of and concerning them', the respondents would nevertheless fail in the absence of a finding that the statements complained of were in fact defamatory. The determination of whether a publication is defamatory and therefore prima facie wrongful involves a two-stage enquiry. The first is to determine the meaning of the publication as a matter of interpretation and the second whether that meaning is defamatory.[12]

[141] In answering the first question –

[142] '[A] court has to determine the natural and ordinary meaning of the publication: how would a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning, the court must take account not only of what the publication expressly conveys, but also of what it implies, ie, what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. . .

[143] It may be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise. One must have regard to the nature of the audience.'[13]

[144] In *Tsedu v Lekota* 2009 (4) SA 372 (SCA) para 13, Nugent JA, in examining the assumptions that ought to be made when answering the question of how allegedly defamatory statements would be understood in

[12] Brand op cit para 237.

[13] *Le Roux v Dey* (2010) 4 SA 210 (SCA) paras 6-7.

their context by an ordinary reader, cited the following helpful extract from a judgment of an English court:[14]

[145] 'The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'

[146] In this case, the ordinary reasonable reader would not be just any member of the public. Counsel for both parties agreed that the relatively restricted audience would consist of persons such as brokers, medical scheme administrators, the relevant Minister, members of medical schemes, including Selfmed, and so on. Moreover, Bester is not mentioned by name, so that the group of people who would have known that he was being referred to, would be even smaller. As no secondary meaning is relied upon by the respondents, the question is how a reasonable person of ordinary intelligence forming part of the abovementioned group would construe the statements complained of.

[147] It is also important to look, as the ordinary reader would, at the statements complained of in the context of the extract as a whole. The respondents relied on certain parts of the extract and attempted to show that these particular parts, excised from the extract and standing alone, were

[14] Simon Brown LJ in *Mark v Associated Newspapers Ltd* 2002 EMLR 839 para 11.

defamatory. This kind of selective approach is not acceptable. The extract commences by stating that we (the Registrar) 'have *questioned* several issues concerning governance at Selfmed'. (Emphasis added.) One of such issues was the manner in which the scheme's chairperson ostensibly appointed himself the principal officer and CEO. The word 'ostensibly' is important, in that it means apparently true, but not necessarily so.[15] This is not set out as a statement of fact, rather as one of the issues questioned by the Council during the relevant year. The 'other dubious appointments of family members to the scheme's executive management' was then said to be 'also under scrutiny'. Importantly, it does not state who is responsible for making the dubious appointments. The word dubious is also significant. While its dictionary meaning is (a) hesitating or doubting or (b) not to be relied upon,[16] the reasonable reader of ordinary intelligence would in my view understand this as casting some doubt over the appointment of family members to the scheme's executive management, but not with any finality. Once again, we are not dealing with a statement of fact, but rather with an issue that is still under investigation. This impression is strengthened by the closing words of the extract, namely 'this matter has not yet been resolved'. It leaves open the very real possibility of rebuttal.

[148] In my view, the ordinary reader would have understood the statements, read in the context of the extract as a whole, to mean that the appointment of Selfmed's chairperson as the principal officer and CEO, as well as the somewhat doubtful appointments of family members to Selfmed's executive management, were matters of governance being

[15] *The Concise Oxford English Dictionary* 10 ed (revised).

[16] *The Concise Oxford English Dictionary*.

questioned and investigated by the Council, without any final conclusion having been reached.

[149] A publication is defamatory if it has the 'tendency' or is calculated to undermine the status, good name or reputation of the plaintiff.[17] The question to be asked is whether the statement concerned is likely to lower a plaintiff in the estimation of right-thinking members of society. In my view, the statements complained of by the respondents, read (as they must be) as part of the whole extract indicating an unresolved and ongoing investigation into certain governance issues at Selfmed, cannot be said to have been likely to lower either Selfmed or Bester in the estimation of those right-thinking members of society who would have read the Registrar's annual report. There were references in the annual report to governance issues at other medical schemes of concern to the appellants. The ordinary reasonable reader would have read the extract complained of in that light – a regulator raising concerns for debate, discussion and resolution with the medical scheme concerned. Most importantly, the reasonable reader, whilst not being overly sensitive or unduly critical, would not have read the statements selectively as the respondents did. Read in their entirety, the reasonable reader would not have read the statements complained of as assertions of fact. Nor would he or she have understood them as undermining the status, good name or reputation of Bester and Selfmed.

[150] As indicated above, the court a quo made a negative credibility finding against Masobe. I do not agree with this assessment of Masobe's evidence. However, even if I were entirely to disregard Masobe's evidence,

[17] *Le Roux v Dey* para 8.

this would not alter my view as to the natural and ordinary meaning of the extract and the manner in which a reasonable person of ordinary intelligence would understand the words alleged to be defamatory.

[151] That is the end of the matter as far as the merits are concerned. However, having regard to the common cause facts, the evidence, including the correspondence set out earlier in this judgment, and the Registrar's statutory role, if we had been called upon to decide the question of qualified privilege, I would probably have leaned in favour of the appellants. Bureaucrats in a regulatory role are often criticised for not fulfilling their statutory duties and obligations. In this case, in my view, the bureaucrats concerned acted commendably, albeit not perfectly.

[152] It follows from my conclusion on the appeal that the cross appeal must be dismissed.

[153] In the event, the following order is made:

1. The appeal is upheld with costs.

2. The order of the court below is replaced with the following order:

[154] 'The claims are dismissed with costs'.

[155] 3. The cross-appeal is dismissed with costs.

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[159] **B J VAN HEERDEN**

[160] **JUDGE OF APPEAL**

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[171] APPEARANCES:

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[173] Instructed by Rosin Wright Rosengarten, Johannesburg

[174] Claude Reid Inc, Bloemfontein

[175]

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