REPORTABLE

Case number: 466/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

J VAN DER BERG	**APPELLANT**
and	
COOPERS & LYBRAND TRUST (PTY) LTD	**1st RESPONDENT**
JAMES LANE TRUSTEES (PTY) LTD	
t/a REPUBLIC TRUSTEES	**2nd RESPONDENT**
EILEEN MARGARET FEY	**3rd RESPONDENT**
MICHAEL JOHN LANE	**4th RESPONDENT**

CORAM: **SMALBERGER, GROSSKOPF JJA, MELUNSKY, MPATI and MTHIYANE AJJA**

DATE OF HEARING: **1 NOVEMBER 2000**

DELIVERY DATE: **29 NOVEMBER 2000**

Defamation - of advocate in course of legal proceedings - privileged occasion - relevance - vicarious liability - quantum.

JUDGMENT

SMALBERGER JA

SMALBERGER JA:

[1] The appellant is a senior advocate practising as such in Cape Town. The third respondent, Mrs Eileen Fey ("Fey"), and the fourth respondent, Mr Michael Lane ("Lane"), are the joint trustees in the insolvent estate of Mr Jurgen Harksen ("Harksen"). Together I shall refer to them as "the trustees". Fey is an employee of the first respondent ("Coopers & Lybrand") and Lane is a director of the second respondent ("Republic Trustees"). Where appropriate I shall refer to the four respondents collectively as "the respondents".

[2] The appellant instituted an action for damages against the respondents in the Cape of Good Hope Provincial Division arising out of an admittedly defamatory statement made of and concerning him by Lane in a condonation application in civil judicial proceedings between the trustees, on the one hand, and a number of respondents, including five firms of attorneys, on the other. Fey associated herself with Lane's affidavit containing the defamatory statement. Coopers & Lybrand and Republic Trustees were joined in the action on the basis that they were vicariously liable for the conduct of Fey and Lane respectively.

[3] In the court *a quo* Cleaver J upheld the respondents' defence that the defamatory statement had been published on a privileged occasion and had been relevant to the matter at hand. He did so after hearing evidence from the appellant and the trustees' attorney, Mr Fischer ("Fischer"), who gave evidence on behalf of the defendants (respondents). Neither of the trustees testified. The learned judge accordingly non-suited the appellant but subsequently granted him leave to appeal to this Court. The judgment of the court *a quo* is reported as *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 1998(4) SA 890 (C).

[4] In order to determine the issues on appeal before us it is necessary to place the defamatory statement in its proper perspective. This in turn involves an appreciation of the relevant events which preceded its making. These are set out accurately, succinctly and lucidly in the heads of argument filed on behalf of Lane and Republic Trustees. In recounting the history of the matter I propose to borrow extensively from them.

[5] Harksen's estate was finally sequestrated on 16 October 1995. The trustees, in their then capacity as provisional trustees, experienced difficulty in obtaining

any co-operation from Harksen in relation to his financial affairs. On 11 November 1995 the trustees launched an *ex parte* application which had as its object the preservation of assets thought to belong to Harksen as well as the preservation of documents which it was believed might throw light on his financial affairs and dealings ("the main application"). 3

[6] In essence, the case in the founding papers was that Harksen, while claiming to have no assets of significance, was in truth the owner of substantial assets to which he had access through various front entities ("the Harksen entities"), and that he used the services of various firms of attorneys to enable him to lead an affluent lifestyle on funds available to him through such entities. These entities were alleged to include certain of the respondents in the main application (the fifth and tenth to thirteenth respondents). The Harksen entities which featured as respondents and Harksen's spouse were, in terms of an *ex parte* order of 15 November 1995, provisionally interdicted from parting with any assets except in terms of a court order obtained on notice to the trustees.

[7] The first to fourth respondents and the fifteenth respondent in the main application were firms of attorneys who were alleged to have acted for Harksen and/or the Harksen entities ("the attorneys"). In terms of paragraphs 3.1 and 3.10 of the *ex parte* order of 15 November 1995, the attorneys were provisionally interdicted from dealing with, paying out or transferring any funds or assets held by them on behalf of the Harksen entities alleged by the trustees to be front companies for Harksen, and from parting with any documents or computer discs relating to the affairs of Harksen and the said entities. The remaining respondents (the sixth to ninth respondents) were banks, and they were interdicted from parting with funds held in the name of any of the alleged Harksen entities, except in terms of a court order.

[8] The attorneys all filed opposing affidavits during November-December 1995 in which they sought the discharge of the interdict and a costs order against the trustees *de bonis propriis* on the attorney/own client scale. With one exception the Harksen entities which were respondents also opposed the application, and sought the discharge of the interdict with costs. One of the banks (ABSA) filed a notice of opposition but did not file an opposing affidavit, and the banks did not play any further part in the subsequent proceedings.

[9] In terms of an order made by agreement on 14 December 1995 the trustees were to file their replying affidavits by 30 December 1995. They failed to do so and had not yet done so by 22 April 1996 (nearly four months later) on which date they launched their application for condonation ("the condonation application"). It was in Lane's founding affidavit made in support of the condonation application that the defamatory statement appeared.

[10] Paragraphs 1 and 2 of the notice of motion in the condonation application

sought condonation for the trustees' failure timeously to file their replying affidavits, and leave to file them "at this stage". In paragraphs 3 and 4 of the notice of motion, the trustees sought an order that a decision on the costs of the main application be postponed until after the completion of the insolvency interrogation, which was under way, and leave to file supplementary replying affidavits in relation to costs after the representatives of the attorneys who had been involved with Harksen's affairs had complied with their subpoenas to appear and after the interrogation of all witnesses at the insolvency enquiry. 4

[11] With regard to paragraphs 1 and 2 of the notice of motion, one of the matters which the trustees were required to canvass in their founding papers was the reason for their delay in filing the required affidavits. In summary, the explanation advanced for such delay was as follows:

(1) The trustees initially intended to file their replying papers by 30 December 1995, and their legal representatives reserved time to do so. However, the creditor who had been funding the litigation withdrew the funding, and work had to stop until the creditors had been consulted.

(2) The trustees met with the creditors in Hamburg over the period 29 January-2 February 1996. Although not expressly so stated in the founding papers, it appears that funding for the trustees must have been forthcoming pursuant to these meetings.

(3) During the period 6 February-14 February 1996 the trustees' attention was diverted by an urgent application launched by Harksen in which he sought to interdict the commencement of the insolvency enquiry.

(4) Harksen's urgent application was dismissed and the insolvency enquiry began on 15 February 1996. Attorney Kulenkampff (of the second respondent) ("Kulenkampff") and Mrs Jeanette Harksen were subpoenaed to attend on 22-23 February 1996. Both witnesses objected to testifying, Kulenkampff on the grounds of professional privilege. The presiding officer reserved his decision on these objections, and eventually only gave his ruling on 1 April 1996 (which

was to the effect that Kulenkampff should testify and raise privilege as and when appropriate).

(5) In the meanwhile, Harksen himself had been interrogated. He was (according to the trustees) extremely evasive, produced no significant documents, and generally said that requests for documents should be directed to his attorneys or to Mr Siegwart, the deponent for certain of the Harksen entities.

(6) By 18 March 1996 the trustees had apparently come to the view that the attorneys were in possession of documents and information which would be highly pertinent to the main application. Although these documents and information might constitute new matter in the context of the main application, the trustees submitted in their condonation application that a court would probably allow them to introduce such matter in their replying affidavits. The documents and information which the trustees had in mind would appear to have been documents and information which would assist to show that the various Harksen entities were merely fronts for Harksen. In other words, the additional information was likely to be relevant in assisting the trustees to maintain the interdict against the Harksen entities.

(7) This view of the matter (namely, the relevance of the insolvency enquiry to the finalisation of the trustees' replying papers) was expressed in a letter addressed by Fischer on 18 March 1996 to the respondents opposing the main application and they were asked to consent to its postponement. They refused.

(8) On 28 March 1996 attorney Katzeff (of the first respondent) ("Katzeff") was subpoenaed to produce documents at the resumed interrogation scheduled for 1 April 1996. He

requested and was granted an extension by Fischer, and he undertook that his files (excluding privileged matter) would be handed over by not later than 12 April 1996. Also, in a letter from Fischer dated 26 March 1996 Katzeff was asked for information concerning a cheque of R7 749 000 which Harksen had claimed to have handed to Katzeff in January/February 1994.

(9) On 28 March 1996 a subpoena was also issued and served on Kulenkampff. The latter promised to make, or to endeavour to make, all his non-privileged documents available by 18 April 1996 at the latest.

(10)At the enquiry on 2 April 1996, the appellant (representing Harksen), objected to Harksen being interrogated prior to the determination of an application which Harksen intended to launch for a declaratory order concerning the meaning of the presiding officer's ruling that Harksen's interrogation be conducted *in camera*. The appellant also informed the presiding officer that he represented four of the attorneys and two of the Harksen entities.

(11)Despite their undertakings, Katzeff and Kulenkampff had not produced the promised documents by 19 April 1996 when the interrogation resumed. Both attorneys in fact reneged on their undertakings to provide the promised documents to Fischer. Katzeff also reneged on his undertaking to provide information concerning the cheque of R7 749 000, and in this regard informed Fischer that he had been advised by the appellant not to provide the information.

(12)At the resumed interrogation on 19 April 1996 the appellant represented the subpoenaed attorneys (Katzeff, Kulenkampff and attorney Mallach of the fourth respondent). He told the presiding officer that Katzeff and Kulenkampff would not provide the promised documents, and he asked that their

interrogation stand down until after the main application had been determined. Mrs Harksen's counsel asked for a similar order. The trustees' counsel resisted the ruling which the appellant sought. However, the presiding officer ruled in favour of the appellant's clients. 7

(13)The effect of the ruling was that the trustees were not able to have access to the documents in the possession of the attorneys concerned for purposes of preparing their further affidavits in the main application. With this possibility now closed to them, they proceeded forthwith to apply for condonation, apparently accepting that on the merits the main application would have to be decided without reference to the documents in the attorneys' possession. However, in paragraphs 3 and 4 of the notice of motion they sought to protect themselves against the costs orders which the respondents were claiming by having the question of costs deferred until after compliance by the attorneys with their subpoenas and after the completion of the interrogation.

[12] It was in the context of what had occurred on 19 April 1996 that Lane said the following in paragraph 9.33.3 of his founding affidavit in the condonation application:

"During his address, our Counsel expressed our regret that the attorneys in question had taken up this stance and urged them to reconsider and rather to give us their full co-operation. He also expressed concern that they were being represented and advised by Counsel for the

> insolvent [Harksen]. On analysis, their interests were very different to those of the insolvent. **It was, and remains our belief, that the attorneys in question were being manipulated by the insolvent's Counsel to take up an attitude which favoured the insolvent, but was wholly inappropriate, given their duties as officers of the Court**".

(The portion in bold constitutes the defamatory statement. It is common cause that the reference to "the insolvent's counsel" was a reference to the appellant.)

[13] Earlier, in paragraph 9.28, with reference to Katzeff's undertaking to make available non-privileged documentation in his possession, Lane stated:

> "Attorney Katzeff has also unfortunately had a change of heart since giving this undertaking and has since reneged on this agreement. According to him this was on the advice of the insolvent's advocate [the appellant]."

That Katzeff had acted on the advice of the appellant had been confirmed in a letter to him from Fischer dated 12 April 1996 in which the latter stated, *inter alia*,

> "You . . . advised writer that although you had prepared the documentation and information as promised to us, you had been advised by senior councel, Adv J van der Berg, not to hand the documentation and information to us."

[14] Also of significance in my view in the determination of the appeal are

paragraphs 9.34.4 to 7 of Lane's affidavit. They read as follows:

> "9.34.4 In the premises the insolvent most certainly has an interest in this application being decided against us and it is in the premises not surprising that his legal representatives are doing all in their power in order to engineer a situation which reduces our prospects of success to the greatest extent possible.
>
> 9.34.5 No doubt the insolvent and his legal representatives realise that without all of the relevant documents and information, we will have a more difficult task in this matter.
>
> 9.34.6 We believe that it is this strategy that has resulted in the insolvent's Counsel persuading the 1st, 2nd and 4th Respondents not to furnish us with any of the documents in their possession and which led to the application to the Presiding Officer on 19 April 1996 to prevent them from being interrogated.
>
> 9.34.7 Of course, insofar as they still represent the insolvent, the attorneys in question may believe that they have no alternative, but to act in this application in such a manner as to best favour their client's interests. I do not know whether or not this is the motivation for the stance taken up by them."

[15] Cleaver J came to the conclusion (at 895 G-J of the judgment) that the

defamatory statement, when properly considered,

> "was clearly defamatory of the plaintiff [appellant] in that it was intended, and understood by persons to whom it was published, to convey one or more of the meanings set out in the plaintiff's particulars of claim, namely that the plaintiff:
>
> . was guilty of grossly improper and unprofessional conduct;
>
> . by artful connivance or insidious means and to his own advantage influenced the attorneys referred to to fail in their duties as officers of the Court;
>
> . failed in his duty as a senior counsel in his professional conduct;
>
> . failed in his duty as an officer of the Court and sought to practise a deception upon it."

This finding is not challenged on appeal.

[16] Two presumptions arose upon the publication of the defamatory statement:

(a) that the publication was unlawful and (b) that the statements were made *animo injuriandi* (*Joubert and Others v Venter* 1985(1) SA 654 (A) at 696 A). It was open to the respondents (in particular Fey and Lane) to rebut these presumptions by establishing that the defamatory statement was made on a privileged occasion. The respondents accepted that the *onus* upon them in this regard was a full *onus* - *Mohamed and Another v Jassiem* 1996(1) SA 673 (A) at 709 H - I.

[17] Our law confers a qualified, albeit a very real, privilege upon a litigant in respect of defamatory statements made during the course of legal proceedings (*Joubert v Venter supra* at 697 I). The privilege extends to such statements if they are relevant. The litigant bears the burden of proving that any such defamatory statement was relevant to an issue in the proceedings (*Joubert v Venter supra* at

700 G and 701 F-I). Once the respondents are able to discharge such *onus* the provisional protection of the qualified privilege thus established would be defeated if the appellant could show that the trustees, in making the defamatory statement, were actuated by malice in the sense of an improper or indirect motive, as explained in *Basner v Trigger* 1946 AD 83 at 95 (*Joubert v Venter supra* at 702 C-D). The appellant, however, never set out to prove that. 11

[18] Coopers & Lybrand accepted on the pleadings that it would be vicariously liable for any damages for which Fey might be held liable to the appellant in respect of the defamatory statement. Not so Republic Trustees, who denied any vicarious liability for Lane's conduct in this regard.

[19] At the conclusion of the trial the issues which fell to be determined were:

(a) Whether the respondents' defence of qualified privilege had been proved;

(b) If not, whether Republic Trustees were vicariously liable for the defamatory statement published by Lane;

(c) The *quantum* of the appellant's damages.

[20] The same issues arose on appeal before us. The court *a quo*, having found for the respondents on issue (a), was not called upon to resolve the remaining issues. Should the appellant succeed on appeal in respect of issue (a) we would be required to deal with issue (b), and have also been requested to deal with issue (c). Insofar as it may be necessary to do so I shall deal with each issue in turn.

THE DEFENCE OF QUALIFIED PRIVILEGE.

[21] As appears from what has gone before, the defamatory statement, having been published in the course of civil judicial proceedings, is privileged provided it satisfies the requirements for relevance. In this respect it was incumbent upon the respondents to show that it was relevant to an issue arising in or in connection with the condonation application.

[22] No attempt has been made to define the concept of relevance, or to formulate a universally applicable test for relevance, within the context of qualified privilege. This is not surprising as relevance, in this sense, is not capable of precise definition. Relevance in relation to the publication of defamatory matter has variously been described as "relevant to the purpose of the occasion" (*Molepo v Achterberg* 1943 AD 85 at 97); "in some measure relevant to the purpose of the occasion" (*Basner v Trigger supra* at 97 - see also *Joubert v Venter supra* at 705H and *Zwiegelaar v Botha* 1989(3) SA 351 (C) at 358E); "germane to the matter" being dealt with (*May v Udwin* 1981(1) SA 1 (A) at 11C-D); "relevant . . . tot die onderwerp onder bespreking" (*Herselman NO v Botha* 1994(1) SA 28 (A) at 35G-H). In essence they are all saying much the same thing; words such as "relevant", "germane" and "pertinent" (another word used in this context) have the same basic content. To the extent that the above concepts differ, they do so in degree rather than substance. 12

[23] In *National Media Ltd and Others v Bogoshi* 1998(4) SA 1196 (SCA) at 1207D Hefer JA stated:

> "It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other".

He went on to observe (at 1207E) that

> "[i]t would be wrong to regard either of the rival interests with which we are concerned as more important than the other",

a matter on which he then proceeded to elaborate. This is particularly so where the Constitution in terms seeks to protect both the dignity of the individual and freedom of speech (see ss 10 and 16(1) of the Constitution of the Republic of South Africa, Act 108 of 1996).

[24] While the public interest undoubtedly requires that the approach to relevance in relation to privilege should not be too strict or rigid lest witnesses or deponents

to affidavits be unduly restricted or fettered in their testimony or depositions, thereby detracting from their right to freedom of speech (*cf Zwiegelaar v Botha supra* at 358E-F), too liberal or wide an approach to relevance could effectively undermine or negate a defamed person's right to the protection of his or her dignity. An allied consideration is that a more generous approach to relevance may be justified in the case of a witness who makes a defamatory statement while giving *viva voce* evidence than where that is done by a deponent to an affidavit, bearing in mind that the latter situation would normally allow opportunity for reflection and advice (*cf Zwiegelaar v Botha supra* at 357F-H).

[25] Relevance in the context of qualified privilege is not to be equated to relevance in the strict evidential sense. The law of evidence distinguishes between evidence which is logically relevant and legally relevant. What is logically relevant may not necessarily be legally relevant because it may be too remote to have any probative or persuasive value, in other words, it may not be sufficiently relevant for the law's purposes. What may be relevant and admissible in the strict evidential sense may not necessarily be regarded as relevant in the present context and *vice versa*, for there are different considerations which apply to each situation.

[26] Ultimately, the concept of relevance under discussion is, in my view, essentially a matter of reason and common sense having its foundation in the facts, circumstances and principles governing each particular case. The words of Schreiner JA in *R v Matthews and Others* 1960(1) SA 752 (A) at 758 A that "[r]elevancy is based upon a blend of logic and experience lying outside the law" have particular application in a matter such as the present even though they were said in the context of evidential relevance (cf Hoffmann and Zeffertt: *The South African Law of Evidence*, 4th ed, p 21). The assessment of whether a defamatory statement was relevant to the occasion to which it relates is therefore essentially a value judgment in respect of which there are guiding principles but which is not

governed by hard and fast rules. And in arriving at that judgment due weight must be given to all matters which can properly be regarded as bearing upon it.

[27] This Court has not yet determined whether the test for relevance is 14
subjective or objective - see the discussion in *Herselman NO v Botha supra* at 36 A-J. Reliance on the remarks of Lord Atkinson in *Adam v Ward* [1917] AC 309 (HL)at 339 as propounding a subjective test for relevance is subject to certain important qualifications. His remarks were made in the context of the English law of libel and slander which differs from our own law of defamation in certain fundamental respects. The context in which the remarks were made suggest that Lord Atkinson may not have been dealing with relevance as our law perceives it in relation to qualified privilege. Furthermore, to the extent that he did support a subjective test his view appears to have been a minority one. Strictly speaking, a subjective test would be satisfied if a litigant or witness honestly thought that what he or she said was relevant - no matter how misguided or unreasonable such belief. It is doubtful that the law could countenance that. An objective test would in my view be more in keeping with developments in our law - see *National Media Ltd v Bogoshi supra* at 1204 D - E. It is, however, not necessary to decide the point. Counsel were prepared to accept for the purposes of the appeal that the test for relevance was objective, or essentially objective, and argued the matter on that basis. The court *a quo* had in any event held (see the judgment at 903 G - H) that the subjective test for relevance applied by it had not been satisfied. This finding was not challenged on appeal.

[28] The accepted simple objective test for relevance is whether the defamatory matter could fairly be regarded as reasonably necessary to protect the interest or discharge the duty which was the foundation of the privilege (*Molepo v Achterberg supra* at 97; *Rhodes University College v Field* 1947(3) SA 437 (A) at 464; *Blumenthal v Shore* 1948(3) SA 671 (A) at 682). Mr Wallis, who appeared for Coopers & Lybrand and Fey, suggested that the test in a matter such as the present should be “whether a reasonable person in the position of the deponent might have regarded the defamatory material as necessary for the advancement of his case”. While this formulation is attractive, to the extent that it may be an adaptation of the simple objective test formulated above, I would prefer to apply the latter although ultimately it would make no difference which of the formulations is applied.

[29] A court has a wide discretion to grant condonation for the failure to comply with the time limits laid down (or agreed upon) for filing affidavits (in the present instance, the trustees’ replying affidavits). It has to be satisfied that sufficient cause exists for the grant of the indulgence sought. This requires a consideration of all relevant facts and circumstances that bear on the matter - see *Mbutuma v Xhosa Development Corporation Ltd* 1978(1) SA 681 (A) at 682 D - H. Included amongst these (and in many cases, the most important) is the length of the delay in

bringing the application for condonation and the explanation therefor.

[30] When the trustees launched their application for condonation on 22 April 1996 they had been in default of filing their replying affidavits since 30 December 1995. The defamatory statement was made in the context of the events of 19 April 1996 and the immediately preceding period; it went no way to explaining the earlier delay of more than three months which was perhaps the more important period to cover.

[31] I am mindful of the fact that the trustees were also seeking a further indulgence - a postponement of any decision on the costs of the main application and leave to file supplementary replying affidavits in relation to costs once the interrogation process had been completed. A court also has a wide discretion in relation to costs. It was necessary for the trustees to place facts before the court in support of the relief sought in this regard. The conduct of the attorneys subsequent to filing their answering affidavits, in particular their seeming lack of co-operation, no doubt had relevance to the costs order sought by them. In the circumstances it can be assumed, in favour of the trustees, that it was necessary for them, at least in opposing the costs order, to set out the history of what had transpired with regard to the Harksen estate between the main application and the condonation application, and the problems experienced by them in relation thereto.

[32] It can also be assumed in favour of the trustees that it was relevant to their ultimate prospects of success both in relation to the main application and the costs issue to deal with:

(a) The undertakings given by the attorneys (in particular Katzeff and Kulenkampff) to produce documents in their possession relating to the extended affairs of Harksen;

(b) Their failure to honour their undertakings; and

(c) The reason for their reneging on their undertakings.

[33] As appears from the facts that I have set out, Katzeff informed Fischer on 12 April 1996 that he had reneged on his undertaking on the advice of the appellant. The same was probably true of Kulenkampff. As the events leading up to and

including 19 April 1996 unfolded it was increasingly apparent that the attorneys' refusal to hand over any documentation until the main application had been disposed of was based on advice given to them by the appellant. At that time the appellant was acting both on their behalf and on behalf of Harksen, inherent in which situation was a potential conflict of interest. It was probably unwise for the appellant to have acted for the attorneys and Harksen at the same time. Be that as it may, the representatives of the attorneys concerned were all senior practitioners capable of looking after their respective interests, aware of their legal responsibilities and obviously free to accept or reject any advice given by the appellant. 16

[34] In my view, the fact that the attorneys had reneged on their undertakings on the advice, or perhaps even the insistence, of the appellant was all that the trustees reasonably needed to draw attention to for the purposes of the condonation application and the concomitant relief sought. There was simply no need for them to have gone further than that. They were not called upon to speculate (for their expressed belief in the defamatory statement was no more than that) on what the precise nature of the advice was or what the appellant's purpose or motive was in giving it. The appellant was not a party to the main application. The trustees' case against the attorneys, or their defence to the latter's claim for punitive costs, could not reasonably have been furthered by allegations against the appellant. The trustees were concerned with the conduct of the attorneys and why they had reneged on their undertakings. There has never been any suggestion that whatever ulterior motive the appellant might have had was also ascribable to the attorneys. The appellant's motives could therefore not have been a factor in any issue between the trustees and the attorneys, and could not have realistically or reasonably furthered the former's prospects in the condonation application. If the defamatory statement had been omitted from Lane's affidavit the trustees' case

would not have been affected one way or the other by such omission. In other words, the defamatory statement was not reasonably necessary for the purpose, main or ancillary, of the condonation application. Applying a realistic and common sense approach it has not, in my view, been shown to have been relevant to the occasion. It amounts to no more than a gratuitous, uncalled for insult. 17

[35] A further consideration is that on the trustees' own showing the defamatory statement was purely speculative. This follows from a proper reading of paragraph 9.34.4 to 7 of Lane's affidavit quoted in **[14]** above. What is set out there makes it clear, in my view, that Lane was uncertain as to what the underlying reason was for the attorneys' volte-face. Being speculative, the defamatory statement for that reason too lacked relevance. Even if it was ultimately found to be true, that could not alter its speculative nature at the time it was made. In any event, the truth or otherwise of a defamatory statement has no bearing on whether it was relevant to the occasion or not (*Borgin v De Villiers and Another* 1980(3) SA 556 (A) at 579 A).

[36] In my view the respondents have failed to discharge the *onus* of proving that the defamatory statement was relevant to the occasion on which it was published, and thus privileged, and that the court *a quo* erred in finding to the contrary. It follows that the appellant was entitled to succeed in his action in the court below against those in law responsible for such publication. It is common cause that Lane, Fey and Coopers & Lybrand fall into that category.

VICARIOUS LIABILITY OF REPUBLIC TRUSTEES

[37] As pointed out previously, although Coopers & Lybrand accepted that they were vicariously liable for Fey's publication of the defamatory statement, no such admission was made by Republic Trustees in respect of Lane, despite the fact that the underlying factual situation is identical, or virtually identical, in both instances. Republic Trustees admitted in their plea that:

(a) Lane and a certain Ernest James were directors of Republic Trustees;

(b) Their directors and employees accepted appointments as trustees of

insolvent estates and as liquidators of companies being wound up;

(c) They provided administrative and secretarial support to their directors and employees in the performance of their functions as trustees and liquidators; and

(d) The fees earned by their directors and employees in their capacities as trustees and liquidators are paid by them to Republic Trustees.

[38] It was pleaded, however, that in the performance of their functions as trustees and liquidators, the aforesaid directors and employees are not subject to the control or supervision of Republic Trustees. This, too, was the submission of Mr Rogers, who appeared on their behalf. He argued that even if it was established that Lane was an employee - and not only a director - of Republic Trustees, he performed statutory duties which were imposed on him personally by the Insolvency Act 24 of 1936 ("the Act"); that he was ultimately subject to a measure of control by creditors of the insolvent estate and the Master; that the very nature of his statutory duties and functions as trustee deprived Republic Trustees of the power to direct and control his activities; and that he could not be regarded *pro hac vice* as their servant.

[39] In terms of s 55(h) of the Act a body corporate cannot be appointed as a trustee. It is, however, not uncommon to appoint in that capacity an individual

who is employed by a company or firm which carries on business as insolvency practitioners. As long ago as 1884 Barry JP remarked:

> "It is useful to appoint persons who are officers of a public company, because by doing so the company guarantees the due performance of the trust, as they get the remuneration and pay their officers a salary, but the Court also looks to the individual to whom the trust is in form confided." 19

(See *Re Estate McKenny* IV EDC 41 at 42.) In terms of s 63(2) of the Act the employer of a trustee is not entitled to any remuneration "out of" the insolvent estate. The manner in which a trustee deals with the remuneration once it has been received is outside the regulation of the Act. He may therefore divert it to his employer in terms of an agreement between them (*Meskin*: Insolvency Law, 4 - 30). The admission by Republic Trustees that the fees earned by their directors and employees as trustees are paid to them (Republic Trustees) presupposes an agreement between them to that effect.

[40] Mr Rogers's argument was based on a long line of cases in which this Court has had to grapple with the liability of the State for the unlawful acts of policemen while carrying out statutory duties of arrest and detention. The leading authorities were considered and reviewed by this Court in *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) at 566D-568C (per Corbett JA). The principle that arises in regard to the liability of the State for the delictual acts of a policeman cannot be applied mechanically to the present matter. The relationship between a policeman and his employer or superiors is largely, if not entirely, governed by statute. (See, in this respect, *Mhlongo v Minister of Police* at 568H-570C.) The cases on which Mr Rogers relied essentially applied the conventional control test for vicarious liability. In *Midway Two Engineering & Construction Services v Transnet Bpk* 1998(3) SA 17 (SCA) this Court indicated a preference for a broader, multi-faceted test that took into account all relevant factors, including

questions of policy and fairness, to determine issues of vicarious liability (at 23 H - J). There is therefore no uniform or universal principle that governs each and every case involving vicarious liability, although the element of control remains an important factor.

[41] In the present appeal the relationship between Lane and Republic Trustees is purely contractual. No evidence was led to reveal to what extent, if any, Republic Trustees controlled Lane's actions or, indeed, whether Lane, by virtue of his position as a director, was himself the guiding force of the former. To the extent that Lane's remuneration as a trustee is by agreement paid into the coffers of Republic Trustees, he is no different from any other employee. Moreover Republic Trustees provide all the infrastructure to enable Lane to perform his duties as a trustee and it is unlikely that they do not remunerate him for doing so although his remuneration may be partially related to his duties as a director. In the absence of evidence to the contrary it is reasonable to infer that Republic Trustees employed Lane. It is probable, in fact, that as a director Lane also exercises control over Republic Trustees.

[42] At all material times Lane was not only engaged in carrying out his duties as a trustee, he was also engaged in carrying out functions on behalf of Republic Trustees and for their benefit. The mere fact that Lane exercised a discretion is not sufficient to exempt the latter from liability (*Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979(4) SA 759 (A) at 767E). *Prima facie*, therefore, Lane, while exercising his functions as a trustee, was also engaged in carrying out his duties on behalf of Republic Trustees. In principle there seems to be no difference between the vicarious liability of an employer whose employee, while acting in the course of his employment as a trustee, misappropriates the assets of an insolvent estate (in which case the employer would clearly be liable) and the liability of Republic Trustees for Lane's conduct in this case.

[43] It is also necessary to mention the question of control. Once it is accepted that Republic Trustees are *prima facie* liable on the basis that Lane was carrying out his functions as a trustee, which he was employed to do - see *Minister van Polisie v Gamble* (*supra*) at 765 H - it is for the former to show that the nature of the duty was such that it took Lane out of the category of employee for the time being (see *Union Government (Minister of Justice) v Thorne* 1930 AD 47 at 51 and *Mhlongo v Minister of Police* (*supra*) at 567E-G). Not only did Republic Trustees fail to do so, it is legitimate to infer, in my view, that they were unable to do so. It is unlikely, given their relationship, that Republic Trustees were unaware of Lane's application for condonation or that they did not acquiesce therein. There is nothing to indicate that, as a private company, they have more than two directors who are its "directing mind and will", to use the phraseology of Viscount Haldane LC in *Lennard's Carrying Company, Limited v Asiatic Petroleum Company,*

Limited [1915] AC 705 (HL) at 713. One of their directors, Lane, is the very person who is delictually liable to the appellant for his actions while carrying out his duties on their behalf. In the circumstances it is simply not open to Republic Trustees to contend that the delict was committed outside the course or scope of Lane's employment and that they are not vicariously liable for the defamatory statement published by him.

21

QUANTUM OF DAMAGES

[44] As a general rule the determination of damages is a function peculiarly within the province of the trial court. There are, however, circumstances in which it would be appropriate, and the interests of justice and convenience would best be served, were an appellate tribunal to determine the damages (*Neethling v Du Preez and Others* 1995(1) SA 292 (A) at 301 B - 302 D). As all the parties were agreed that, in the event of the appeal being successful, we should fulfil that function and as there are circumstances present, upon which I need not elaborate, which make it convenient and in the interests of justice for us to do so, I proceed to a consideration of the appellant's damages.

[45] The appellant's evidence with regard to his seniority, good standing and reputation as an advocate was not challenged in cross-examination. It was conceded that the defamation was serious. It ascribes highly improper conduct to the appellant in the proper performance of his duties as a legal practitioner and officer of the Court. The word "manipulate" in its context implies a deliberate perversion of the course of justice. The fact that the appellant, as an experienced trial lawyer who is used to the rough and tumble of litigation and can give as good as he gets, may be able to bear the defamation more readily than someone perhaps more sensitive than he is does not detract from the sting of the accusation.

[46] There was limited publication to a restricted class of persons. The publication, however, was made in the very field in which the appellant's

reputation rests. The defamatory statement forms part of a permanent public record, albeit one to which only a limited number of persons will seek access, and appears to have been raised in open court by the presiding judge dealing with the matter, an event clearly foreseeable. There is, however, no evidence that the defamatory statement was believed, or that the appellant has in fact been lowered in the esteem of legal colleagues or others, or that he has suffered any consequence of note as a result of the defamation apart from the personal affront to his dignity. 22

[47] It is correct, as contended by the respondents, that the appellant made no attempt to seek an apology from them before issuing summons. In the light of their subsequent attitude no purpose would have been served by his doing so. The fact is that no apology or retraction has ever been forthcoming from them. Nothing precluded them from doing so had they so wished - the choice whether to do so or not to do so (whether for tactical or other reasons) was theirs.

[48] We were referred to a number of cases reported over a period of years which were claimed to be comparable or roughly comparable to the present. An inflation factor was applied to some of them to indicate what the current value would be of the amounts awarded. Amongst the cases referred to were *Black and Others v Joseph* 1931 AD 132; *Gelb v Hawkins* 1960(3) SA 687 (A); *South African Associated Newspapers Ltd and Another v Yutar* 1969(2) SA 442 (A); *De Flamingh v Pakendorf en 'n Ander* 1979(3) SA 676 (T); *Mohamed and Another v Jassiem supra*. Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings.

[49] Weighing up all the circumstances to which regard may properly be had I am of the view that an appropriate award of damages would be R30 000,00. The appellant has asked for an order that the award carry interest at the legal rate from the date of the service of the summons (*David Trust and Others v Aegis Insurance Co Ltd and Others* 2000(3) SA 289 (SCA) at 303 I - 304 D). I did not understand the respondents to contend that such an order would be inappropriate.

[50] The following order is made:

1. The appeal is allowed with costs, including the costs of two counsel.

2. The following order is substituted for that of the court *a quo*:

> "(a) Judgment is granted against the defendants jointly and severally, the one paying the others to be absolved, in the sum of R30 000,00; together with
>
> (1) Interest *a tempore morae* calculated at the appropriate legal rate of interest as from the date of service of summons to date of payment; and
>
> (2) Costs, including the costs of two counsel."

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J W SMALBERGER
JUDGE OF APPEAL

GROSSKOPF JA)Concur
MELUNSKY AJA)
MPATI AJA)
MTHIYANE AJA)