IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 412/2021
Date heard:19 January 2022
Date delivered:08 February 2022
NOT REPORTABLE

In the matter between

PETER MCKENZIE **PLAINTIFF**

and

COLIN JAMES GABRIEL **DEFENDANT**

JUDGMENT

GOVINDJEE, J

Introduction

[1] The plaintiff is an admitted attorney. He alleges that the defendant was responsible for defamatory publications intended to injure his dignity, reputation and standing within the attorney's profession. The plaintiff claims damages from the defendant in the sum of R500 000,00.

[2] The defendant is a former client of the plaintiff. He admits being the author of the correspondence that the plaintiff considers defamatory. That correspondence was addressed, firstly, to Mrs Hanli Glanvill, a senior assistant state attorney, on 15 October 2020 ('the Glanvill e-mail')[1] and, secondly, to the Legal Practice Council (LPC) on 23 November 2020 ('the LPC complaint').[2] The defendant denies any intention to defame or injure the plaintiff's character. He pleads that he merely presented various facts to Glanvill, and that he has a right to lodge a complaint against any legal practitioner to the LPC. The LPC is the statutory body overseeing the conduct of legal practitioners.

[3] The issues raised include the following:

a. Whether the correspondence was defamatory.
b. Whether the correspondence should be protected based on qualified privilege.
c. Whether the correspondence exceeded the bounds of protection and was malicious.
d. If necessary, the quantum to be awarded in respect of damages for defamation and the appropriate order as to costs.

Background

[1] '1. I was not involved in any cost conversations nor did I give any instructions concerning costs. It is my belief that your allegations, amongst other things, with regards to me confirming to costs is malicious.
2. A private meeting was held without my knowledge between your council including yourself and Peter Mckenzie. It is believed that a hand written agreement was drafted.
3. Your allegation of Peter Mckenzie showing me the cost order before court appearance is misleading and untruthful.
4. Discussions after court appearance is not relevant in this matter and your comments is based on assumptions.
Kindly provide proof of your allegations.'

[2] 'Making decisions without consent. Failure to protect confidential documents . . . This is a high-profile case in Nelson Mandela Bay. I have a civil claim of R12 145 847 against the Minister of Police and The National Director of Public Prosecutions for unlawful arrest, detention and malicious prosecution. According to a source, it is believed that "favours" are being discussed between the parties which is delaying the finality of this case . . . In my belief, this handwritten agreement was drafted to mislead the honourable judge / court in believing that I agreed to such costs. Peter Mckenzie, together with the defendants' counsel must have known that their conduct was improper behaviour, fraudulent, unethical tactics, misleading, untruthful and malicious . . . It is hereby respectfully submitted that Peter Mckenzie did not act within the limits of the law and the rules of professional conduct. I humbly ask the Legal Practice Council to investigate accordingly.'

[4] The plaintiff has been practicing as an attorney since 2006, specialising in civil claims against the state. The defendant consulted with him on 7 February 2020 in respect of such a matter, which had already been enrolled for trial on 4 March 2020. The plaintiff advised the defendant that the matter would not be trial ready. The defendant's former legal representative, Chantal du Plessis, had unsuccessfully sought a postponement of the matter without tendering costs. Plaintiff advised the defendant that costs should be tendered and a postponement secured and that those costs could be claimed from Du Plessis based on her late withdrawal. The matter was roll called on 14 February 2020 and a handwritten draft order, prepared by counsel for the state attorney, was made an order of court. That order resulted in the matter being postponed, the defendant to pay the wasted costs. The defendant was present and disputes that he agreed to a costs order in these terms, based on the promise that Du Plessis would be held responsible.

[5] The plaintiff withdrew as the defendant's legal representative during July 2020. The state attorney communicated directly with the defendant regarding the costs issue during October 2020, resulting in the Glanvill email that the plaintiff considers defamatory. The LPC complaint followed a month later. The plaintiff summarises the alleged defamatory portions of the communications as being the following:

'10.1 that Plaintiff secretly held a private meeting with Senior Assistant State Attorney, Mrs Hanli Glanvill, and her Counsel and conspired and colluded with each other to obtain a costs order against the Defendant on the 14th of February 2020, in respect of his claim against the Minister of Police and the National Director of Public Prosecutions;

10.2 that Plaintiff made himself guilty of unprofessional conduct by acting without the Defendant's instructions, in respect of the issue of the tendering of costs pertaining to the trial, which was set down for hearing on the 4th of March 2020 and by failing to protect confidential documents;

10.3 that Plaintiff, together with … Glanvill, and her Counsel … deliberately misled the Honourable Justice Van Zyl DJP in the Port Elizabeth High Court on the 14th of February 2020, in respect of the agreement pertaining to the issue of costs of the postponement of the trial proceedings;

10.4 that Plaintiff, together with Advocates … conduct was improper behaviour, fraudulent, unethical …, misleading, untruthful and malicious; and

10.5 that Plaintiff discussed "favours" with … Glanvill, and her Counsel, to deliberately delay the finality of the Defendant's case.'

Evidence

[6] The plaintiff and defendant were the only witnesses to testify in the matter. The documentation presented to the plaintiff by the defendant at their first consultation was voluminous, so that the plaintiff indicated that he would not be in a position to proceed with the matter on 4 March 2020. For reasons that follow, I accept the plaintiff's evidence that he informed the defendant about this, and that he explained to the defendant that he (the defendant) would have to tender costs which could be recoverable from the defendant's erstwhile attorney. I accept further that the defendant was, at that stage, willing to accept the plaintiff's advice as his chosen legal representative, and that he accepted this advice and gave instructions to tender the wasted costs, on the understanding that these costs would be recoverable from Du Plessis.

[7] This version is supported by the detailed correspondence sent by the plaintiff to Glanvill on 9 February 2020. That correspondence follows the parties' consultation on 7 February 2020 and confirms that:

a. The plaintiff had agreed to represent the defendant;
b. Glanvill's office had previously refused to accede to the defendant's request that the matter should be removed from the trial roll;
c. The plaintiff would not be ready to proceed with the trial on 4 March 2020 given the conduct of the defendant's former attorney;
d. The documentation was voluminous and the plaintiff required time to prepare and to engage counsel;
e. In the circumstances, a removal of the matter from the 4 March 2020 trial roll was required, and 'there is simply no other option to make such request and to tender payment of your clients' wasted party and party costs…'

[8] The plaintiff's recollection of events is further borne out by his response to correspondence received from Glanvill on 12 February 2020, indicating that the matter could be removed if wasted costs were tendered, including the costs of preparation up until 14 February 2020 and the costs of two counsel where so

employed. Instead of instantly agreeing to this, the plaintiff records that he would take instructions from his client in respect of the costs issue and revert to Glanvill at court on the day of the roll call.

[9] The plaintiff explained that he could not consent to Glanvill's conditions without taking instructions, and that he obtained the defendant's consent. As Glanvill's counsel had prepared a draft order including reference to attorney client costs, the plaintiff clarified that this was not what had been tendered. A handwritten order was drafted to correct that issue. There is a dispute of fact as to whether that draft order was shown to the defendant at the back of the courtroom prior to the matter being called in court. That draft was made an order of court by agreement.

[10] The parties discussed what had transpired in a passage outside court after the order had been taken. The plaintiff indicated to the defendant that he had forgotten to add that the costs would not be payable and taxable immediately. Glanvill overheard the conversation and made a remark clarifying the position.

[11] Between February 2020 and July 2020 the defendant repeatedly requested information about whether the state's bill of costs had been received, so that action could be taken against Du Plessis. By July 2020 the plaintiff felt undermined and terminated the brief. He nevertheless continued to engage in correspondence with the defendant, also sending him a copy of the Joint Rules of Practice for the High Courts of the Eastern Cape Province ('Joint Practice Rules).

[12] On 22 July 2020, the defendant drafted an email to the plaintiff, apologising if it appeared as if he had been second-guessing the advice received, explaining that he needed to be updated and seeking to clear the air:

'I am in no way questioning your integrity. I was merely following up if you received the bill from the state attorneys because it was your decision to agree to costs. You mentioned that you were going to claim those costs from Chantal du Plessis attorneys. I was hoping that we start this process as soon as possible to avoid any issues at a later stage…I hope that the above clears any misinterpretation or miscommunication.'

[13] Matters took a turn only once Glanvill provided the defendant with a copy of the (handwritten) court order, a few months later, and indicated that the contents were not in dispute given that the defendant had been in court on the day the terms of the order had been agreed. The defendant responded by indicating that he had been seated at the back of the court gallery, had not been included in any discussions and / or agreements, had been unable to hear what had been said to the presiding judge and, in the circumstances, had not agreed to any payment of costs.

[14] Glanvill's reply reflects that she recalled the plaintiff showing the defendant the draft order before agreeing to its contents. She further recalled the passage discussion between the parties regarding costs, and her comment at the time that costs would be taxed and payable immediately, and that the defendant had not raised the alleged lack of instruction. The allegedly defamatory Glanvill email, and subsequent LPC complaint, followed.

[15] The defendant's version of events, as put to the plaintiff, differed mainly in respect of a subtle point. The costs order agreed to on 14 February 2020 should have reflected the plaintiff's promise that Du Plessis would be held responsible for wasted costs given her late withdrawal from the matter. The plaintiff was obliged to have informed the court of Du Plessis' conduct at the time of the roll call, particularly given Rule 7(c) of the Joint Practice Rules.[3] The plaintiff had never discussed the handwritten draft order with the defendant before the order was granted. The defendant accepted, however, that his payment of costs and subsequent recovery from Du Plessis was discussed after the order had been granted.

[16] An application for absolution from the instance was dismissed at the close of the plaintiff's case.

The legal position and analysis

[3] Rule 7(c): 'As an officer of the court, it is a matter of an attorney's duty not to withdraw at so late a stage that a matter which has been set down for hearing cannot proceed on the allocated date. In the event of the late withdrawal of an attorney occasioning a postponement, the judge may require the attorney concerned to explain on affidavit why he or she did not withdraw earlier and, if no satisfactory explanation is forthcoming, the attorney may be ordered to pay any wasted costs occasioned by the late withdrawal de bonis propriis.'

[17] Defamation is the intentional infringement of another person's right to a good name. The elements are *(a)* the wrongful and *(b)* intentional *(c)* publication of *(d)* a defamatory statement *(e)* concerning the plaintiff.[4]

[18] The plaintiff must prove the publication of defamatory material concerning himself. The defendant accepts that he was the author of the disputed publications, their publication and, for the most part, that they relate to the plaintiff. To prove that the publications constitute defamatory material, the ordinary meaning of the statements in question must be established, before considering whether that meaning is, objectively speaking, defamatory.[5]

[19] In establishing the ordinary meaning of the statement, the court is not concerned with the meaning which the defendant intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, irrespective of whether or not they considered the statements to be true or whether the statements diminished their view of the plaintiff.[6] An objective test must be applied in order to consider the meaning that a reasonable reader of ordinary intelligence would attribute to the statements. A reasonable reader understands statements in their context and would consider any implications of what has been expressly stated.[7]

[20] The Glanvill email must be read in the context of the defendant disputing his liability to the state for the costs of his matter being postponed. It includes the following:

'I was not involved in any cost conversations nor did I give any instructions concerning costs…A private meeting was held without my knowledge between your counsel including yourself and Peter Mckenzie…Your allegation of Peter Mckenzie showing me the cost order before court appearance is misleading and untruthful.'

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[4] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 18.
[5] *Le Roux v Dey* 2011 (3) SA 274 (CC) para 89.
[6] *Ibid*.
[7] *Ibid*. *Chetty v Perumaul* [2021] ZAKZPHC 66 para 12.

Read in context, a reasonable reader of ordinary intelligence would conclude that the plaintiff proceeded in the absence of instructions from his client and entered into an agreement in respect of costs behind his client's back.

[21] The LPC complaint must be read in the context of the defendant's objection to the plaintiff making decisions without his consent, and his failure to protect the defendant's confidential documentation. It includes the following remarks:

'I have a civil claim of R12 145 847 against the Minister of Police and The National Director of Public Prosecutions…According to a source, it is believed that "favours" are being discussed between the parties which is delaying the finality of this case.'

Regarding the costs issue:

'In my belief, this handwritten agreement was drafted to mislead the honourable judge / court in believing that I agreed to such costs. Peter Mckenzie, together with the defendants' counsel must have known that their conduct was improper behaviour, fraudulent, unethical tactics, misleading, untruthful and malicious.'

[22] The meaning that a reasonable reader of ordinary intelligence would attribute to these statements is self-explanatory, namely that the plaintiff was involved in unbecoming conduct, designed even to mislead the presiding judge, broadly labelled as 'improper', 'fraudulent', 'unethical', 'misleading', 'untruthful' and 'malicious'.

[23] Are these statements, and the meanings established, objectively speaking, defamatory? A statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it has been published.[8] Examples of defamatory statements cited in *Le Roux* include those attributing to a plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct.[9] From an objective point of view, both the Glanvill email and the LPC complaint, pointing to unconscionable conduct on the part of the plaintiff and amounting to a slur on his reputation, fit this description and must be

[8] Various principles have emerged in practice with respect to the application of the objective reasonable person test: Neethling, J and Potgieter, JM Law of Delict (7th Ed) (LexisNexis) (2015) 355.
[9] *Le Roux supra* para 91. See *Penn v Fiddel* 1954 (4) SA 498 (C) at 500F-G.

considered to be defamatory, undermining respect for the plaintiff and the esteem in which he is held by other members of his profession.[10]

[24] Given that the plaintiff has successfully proved the publication of defamatory material concerning himself, it is presumed that the statements in question are both wrongful and intentional. This despite the defendant's assertion that he lacked the intention to injure the plaintiff's reputation. It is then for the defendant to raise a defence, to be discharged on a preponderance of probabilities, which excludes either wrongfulness or intent in order to avoid liability.[11] A bare denial by the defendant is insufficient and facts must be pleaded and proved that will be sufficient to establish the defence.[12]

[25] Grounds of justification challenge the wrongfulness of the publication.[13] Publishing a statement on a privileged occasion is one such ground, effectively granting a person the legal right to injure another's good name and in so doing setting aside the prima facie wrongfulness of his conduct if proved.[14] It is accepted that the defendant's case rested solely on this particular ground and that the defendant bears a full onus to establish the justificatory defence relied upon.[15] As part of the analysis to determine whether conduct is adjudged lawful or not, consideration must be given to the balancing of the constitutionally enshrined right of dignity, including as the right to reputation, and the right to freedom of speech, as well as the underpinning constitutional values.[16]

[26] As part of this onus, it is for the defendant to prove, on a balance of probabilities,[17] that both parties had a corresponding duty or interest so that a privileged occasion existed. A situation of qualified privilege arises when one person publishes a statement in the discharge of a duty or the protection of a legitimate

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[10] See *Le Roux supra* para 106. *Chetty supra* para 17.
[11] *Le Roux supra* para 85.
[12] *Ibid*.
[13] See *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 15. A distinction has been drawn between absolute and relative or qualified privilege, and various illustrations of the latter have been recognised: *Dikoko v Mokhatla* [2006] ZACC 10 para 48.
[14] Neethling and Potgieter *supra* 358.
[15] *Chetty supra* para 9.
[16] *Hardaker supra* para 14.
[17] *Le Roux supra* para 85.

interest to another person who has a similar duty or interest to receive it. The test to determine the existence of the reciprocal duties or interests is the objective test of the reasonable person.[18] Plaintiff's counsel conceded, correctly in my view, that the correspondence in question fell within the realm of a (qualified) privileged occasion.[19] It is important that members of the public are entitled, and even encouraged, to raise their concerns to the LPC when they believe that legal practitioners have conducted themselves in an unacceptable manner.[20] This will ultimately assist the LPC in regulating the legal profession and maintaining standards.[21] More specifically, it may be accepted that the defendant had a legitimate interest in addressing the Glanvill email and the LPC complaint in furtherance of his interests in attempting to avoid the costs order and in laying a complaint with the LPC as the appropriate body to deal with the conduct of legal practitioners. Both Glanvill and the LPC had a corresponding duty or interest to learn of his assertions.[22]

[27] The defendant must also show that he acted within the scope or limits of the privilege.[23] To do so, the defendant must demonstrate that the defamatory assertions were relevant to, or reasonably connected with the discharge of the duty or the furtherance of the interest.[24] The question of relevance should be liberally interpreted[25] but objectively evaluated according to the reasonable person criterion, considering 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.[26] This aspect requires a value judgment, giving due weight to all matters which can properly be regarded as bearing upon it.[27]

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[18] *Yazbek v Seymour* 2001 (3) SA 695 (ECD) at 701G-H.
[19] See *Clover SA (Pty) Ltd and Another v Sintwa* [2016] ZAECGHC 77 para 15, 19. See *Chetty supra* paras 28-29. Also see *Yazbek supra* at 702I-J.
[20] See *Vincent v Long* 1988 (3) SA 45 (CPT) at 48B-C and 48H-I.
[21] *Chetty supra* para 27.
[22] *Ibid*.
[23] Neethling and Potgieter *supra* 358-359. Also see *Clover supra* para 15.
[24] *Borgin v De Villiers and Another* 1980 (3) SA 556 (AD) at 578-579. As pointed out by Mbenenge JP in *Clover supra* para 16, the enquiry is somewhat different in the case of defamatory statements made during the course of judicial or quasi-judicial proceedings. There was, correctly, no suggestion on the papers or in argument that the correspondence could possibly have fallen under this ground of justification, or that the applicable enquiry should follow those lines.
[25] *Vincent supra* at 49B-E.
[26] Neethling et al Neethling's Law of Personality (2nd Ed) (LexisNexis) 2005); *Vincent supra* at 49B-E.
[27] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) para 26.

[28] In *Borgin*,[28] Corbett JA held as follows:

'The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice. But the truthfulness or otherwise of the statements has no bearing on whether they were germane to the occasion or not.'

[29] Froneman J explained two core reasons for this approach in *Yazbek v Seymour*.[29] Firstly, it is the occasion, not the statement, that is privileged. There are occasions when the recipient of the statement has a special interest in learning honestly held views of another person, even if those views are defamatory and cannot be proven. When the interest is sufficiently important to outweigh the protection of reputation, the occasion is considered to be privileged.[30] Secondly, complete factual accuracy is difficult to achieve and distinctions between what is fact and innuendo and comment are sometimes difficult to delineate in a way that leaves no room for disagreement or honest.[31]

'The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications. Some degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege.'

[30] The general view of the courts appears to be that untrue statements do not exclude the privilege provided that the defendant had a bona fide belief in the truth thereof, whether or not this belief was based on reasonable grounds.[32] Nevertheless, if it is shown that a statement was made with knowledge of its untruthfulness, the inference that would arise, in the absence of any indication to the contrary, would be that the statement was actuated by malice.[33]

[31] The defendant's plea confirms that his defence is based on a right to lodge a dispute pertaining to a legal practitioner to the LPC. That complaint related to 'making

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[28] *Supra* at 578H-579A.
[29] *Yazbek supra* at 701J-702E.
[30] *Reynolds v Times Newspapers Lt and Others* [1999] 4 All ER 609 (HL) at 615h-j as cited in *Yazbek supra* 702B-C.
[31] *Reynolds supra* at 657g-i as cited in *Yazbek supra* at 702C-E.
[32] Neethling et al *supra* at 149, fn 196.
[33] *Naylor and another v Jansen* [2005] 4 All SA 26 (C) paras 11, 13. Also see *Borgin supra* at 578H.

decisions without my consent that are **not** in my best interests – Bill of Costs' and 'failure to protect the confidentiality of my case files.' Immediately after these matters are listed in the LPC complaint, the defendant added the paragraph, quoted above, suggesting that '"favours" are being discussed between the parties which is delaying the finality of this case'. The defendant confirmed, during cross-examination that this particular remark related to the complainant's erstwhile legal representative, and not to the plaintiff. Yet it appeared under a heading, in bold, referring to 'My complaints against the legal practitioner, Peter Mckenzie, involves the following matters…' The defendant never rectified or clarified this matter in response to the plaintiff's reply to the LPC, failed to plead that the issue of 'favours' did not relate to the plaintiff or to put this issue to the plaintiff during cross-examination.

[32] In these circumstances, I find that the inclusion of the paragraph addressing "favours" was not relevant or germane to the defendant's complaint to the LPC and is not protected by qualified privilege for this reason.[34] The principle underlying this is that, even while open debate and access to complaints mechanisms are to be promoted in society, courts may not be used as a platform for disseminating defamatory matter having no relevance to the actual complaint.[35] The manner in which the complaint has been framed and arranged, when read reasonably by an ordinary reader, links the allegation to the plaintiff and is defamatory.

[33] It is worth considering whether the position would have been different had that paragraph not been included, or perhaps if it had been found to relate clearly to 'parties' other than the plaintiff. This also addresses whether the remaining published material in issue is protected by the qualified privilege. Answering that question requires consideration of possible malice. This is because, as indicated, qualified privilege does not afford absolute immunity. The provisional or conditional protection would be defeated if the plaintiff proves that the defendant exceeded the bounds of the privileged occasion by acting with an improper motive (malice).[36] "Malice" does not mean merely "spite" or "ill-will" in this context.[37] Any motive that does not originate

[34] See *Chetty supra* para 32. Also see *Featherby v Zulu* (8K11) QOD 1 (KZD) para 22.
[35] *Vincent supra* 49B-E.
[36] Neethling and Potgieter *supra* 359.
[37] Neethling *et al supra* at 149.

from “a sense of duty or the desire to protect an interest” gives rise to an improper motive or malice.[38]

[34] Given its subjective nature, it is understood that a plaintiff will struggle to furnish direct evidence of malice. As such, the existence of malice may be inferred from other intrinsic or extrinsic facts.[39] Various examples, usefully summarised by Neethling *et al*, appear in case authority illustrating “malice”.[40] This includes words uttered in a rage, particularly hurtful or vengeful assertions, hostility between the defamer and defamed, or cases where the defendant did not believe in the truth of the assertions concerned or was reckless as to the truth or falsity thereof.

[35] The defendant’s case is based on a bona fide complaint to the LPC. The complaint itself stems from the defendant’s version that the plaintiff proceeded to enter into an agreement in respect of costs without instructions. The proven facts suggest the contrary. The defendant’s conduct immediately after the court proceedings on 14 February 2020, and in the months that followed, fail to support his version of events. The evidence shows that he was assertive in controlling his legal proceedings. He would have immediately taken issue with the plaintiff if costs had been agreed without his consent. Considering the credibility of the witnesses and the probability of their versions, I am unable to accept that the defendant genuinely believed the gravamen of his complaint.[41] He appears, on a balance of probabilities, to have raised this opportunistically as part of an attempt to avoid the payment of the costs and only once his relationship with the plaintiff had soured. Instead of limiting his complaint to a possible misunderstanding in respect of the legal process and the scope of his instructions, he doubled down and proceeded to make serious allegations at the expense of the plaintiff, and with the object of injuring his reputation.[42] By doing so, the complaint grew in magnitude and suggested that the

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[38] *De Waal v Ziervogel* 1938 AD 112 127. See Neethling *et al supra* at 149, fn 200 and the sources cited there.
[39] Neethling *et al supra* at 149.
[40] *Ibid*.
[41] See *Gishen v Babu* unreported case no 2005 / 6018 (WLD) (1 November 2007) para 10, where the court considered as a factor that there was no reason to hold that the statement made by the defendant to the Law Society (concerning alleged deception of the court by the plaintiff) had any foundation in fact. Also see *Vincent supra* at 50B-D.
[42] *Gishen supra* para 32. The defendant admitted, during his evidence, that he had gone so far as to write a letter to the Deputy Judge President indicating that he had not consented to the costs order.

plaintiff was not fit for legal practice at all. It is this demonstration of a lack of 'positive' or 'honest' belief,[43] the inclusion of the paragraph dealing with the erstwhile legal representative and exaggerated description of the plaintiff's conduct that evinces malice, in the absence of an indication to the contrary. As the court explained in *Chetty*:[44]

'That these words were used seems to be nothing more than a malicious attempt to stir up trouble for the respondent and influence the Law Society to look beyond the scope of the original complaint made by the appellant and to find fault, any fault, with the respondent's conduct.'

The plaintiff has accordingly succeeded in demonstrating malice on the part of the defendant on a balance of probabilities. This is a further reason for the defence of qualified privilege failing.[45] I am further of the view that the suggestion that Rule 7(c) of Joint Practice Rules changes the position is without merit. I do not read that rule to have made it obligatory for the plaintiff to inform the presiding judge of the supposedly late withdrawal of Du Plessis, in the context of the defendant having changed his legal representative and accepted that the plaintiff would require a postponement in order to prepare for trial properly. The defendant suggested for the first time during his cross-examination that the plaintiff had told him that he would raise the issue of Du Plessis' withdrawal and responsibility for costs with the presiding judge. That version (which later changed to indicate that the defendant was 'under the impression' that this would occur) was never put to the plaintiff and, on a balance of probabilities, cannot be accepted. I consider that rule to be designed to address a distinguishable kind of situation. In any event, its existence does not, in my view, change the position in respect of the defamatory statements that followed.

Quantum

[36] Various factors are usually considered in determining a suitable award of damages. These factors include: the nature and seriousness of the defamatory

[43] See *Horrocks v Lowe* 1975 AC 135 (HL) at 150.
[44] *Supra* para 39.
[45] See *Chetty supra* para 40.

statement; the nature and extent of the publication; the reputation, character and conduct of the plaintiff; and the motives and conduct of the defendant.

[37] The defamatory material contains statements that question the plaintiff's professional integrity and reputation. The legal profession is stringently regulated and courts have deprecated instances where unethical and dishonest conduct is alleged without foundation.[46] As Holmes AJA held in *Gelb*:[47]

'…it is a grave and ugly thing falsely to say of an attorney that he deliberately deceived the Court…'

[38] I accept that the publication was made to a restricted class of persons, and indeed to a limited number of persons (Glanvill and persons processing complaints at the offices of the LPC).[48] There is no evidence that the plaintiff has been lowered in the esteem of professional clients, colleagues or other people.[49] In fact, it is clear from Glanvill's e-mail response, in particular, that she immediately took the plaintiff's part and questioned the defendant's conduct and attitude, rather than the plaintiff's behaviour. Similarly, the evidence suggested that the LPC complaint has come to nothing. It may nevertheless remain part of the records of the LPC[50] and require disclosure by the plaintiff in future, for example if he was considered for judicial training or appointment. The plaintiff testified to this effect, and was clearly upset by the allegations levelled against him, and had the 'sword of disciplinary proceedings' hanging over him.[51]

[39] While the defendant denied that he had made the statements with the intention to defame the plaintiff, he remained unapologetic.[52] His motive, once the plaintiff had discontinued provision of legal services, was to land the plaintiff in hot water with the LPC and to try to escape payment of the wasted costs tendered.

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[46] See *Gelb v Hawkins* 1960 (3) SA 687 (A).
[47] *Gelb supra* at 693F-G.
[48] *Featherby supra* para 25.
[49] *Gishen supra* para 40; *Van der Berg supra* para 46.
[50] See *Gishen supra* para 39.
[51] *Gishen supra* para 40.
[52] See *Van der Berg supra* para 47.

[40] I am in support of the view that large sums of damages ought not to be awarded in such cases, also because of the effect this may have on freedom of speech and future litigation based on intolerance.[53] The award must depend upon the facts of this case, rather than cases in the past of a roughly similar nature,[54] and this must be viewed against the background of prevailing attitudes in the community.[55] I am also mindful of the remarks of the Supreme Court of Appeal in *Mogale*: '…life is robust and oversensitivity does not require legal protection…'; and in *Van der Berg*:[56]

> '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.'

[41] Ultimately, a court must try to make a realistic assessment of what will be just and fair in all the circumstances, in order to assuage the wounded feelings of the plaintiff in cases where his dignity has been unlawfully impugned.[57] The defendant should not be punished by the award, which should not create a disproportionate burden on him.[58] While the Constitution of the Republic of South Africa, 1996, places a great value on human dignity (including reputation), it also emphasises the right to freedom of expression. In my estimation, and having considered all the applicable factors, an amount of R40 000 is appropriate.

Interest

[42] Counsel for the plaintiff argued that there was no reason to depart from the default position that interest should run from date of demand or date of service of summons. I did not understand the defendant's counsel to suggest otherwise and am of the view that interest should accrue from date of service of summons.

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[53] *Van der Berg supra* para 48; *Mogale and Others v Seima* 2008 (5) SA 637 (SCA) paras 9, 18.
[54] See *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) para 25.
[55] *Van der Berg supra* para 48.
[56] *Van der Berg supra* para 45.
[57] *Ibid*. On the purpose of damages awards, see *Meyer v Basset* [2019] ZAECGHC 27 para 29, and the cases cited.
[58] *Cronje v Minister of Police* (unreported case no. CA 185/2018) (Eastern Cape Division, Grahamstown) para 17.

Costs

[43] It was argued on behalf of the plaintiff that costs should follow the result, and that costs on the High Court scale was warranted, given that the plaintiff's dignity had been impinged. While the parties were in agreement, in their pre-trial minute, that the matter should not be transferred to another court, the matter could well have proceeded in the magistrate's court given the typical damages awards in such matters and the monetary jurisdiction of that court.[59]

[44] The remarks in *Mogale* appear to be apposite. The idea that defamation and other *injuria* claims may, without regard to their monetary value, of right be instituted in the high courts is outdated.[60] It could not have been reasonably expected that an amount in excess of the monetary jurisdiction of the magistrate's court would be awarded, let alone the actual amount claimed. In these circumstances, I am of the view that costs of the action on the magistrate's court scale should be awarded. The plaintiff produced three trial bundles comprising in excess of 250 pages and containing the entire complaint to the LPC and response. As was confirmed during the trial, much of this was unnecessary, and the plaintiff should only be entitled to the costs in respect of a third thereof.

Order

[45] The following order will issue:

1. The defendant is to pay to the plaintiff
    a. R40 000;
    b. Interest *a tempore morae* calculated at the appropriate legal rate of interest as from the date of service of summons to date of payment;
    c. Costs of the action on the Magistrate's Court scale, the costs to include the preparation of a bundle of only 85 pages.

[59] For a contrary view, see *Featherby supra* para 27. See *Meyer supra* para 38.
[60] *Mogale supra* para 19.

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A. GOVINDJEE
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Adv M Du Toit
Instructed by:	Peter Mckenzie Attorneys Gqeberha Email:chantaldp@cdpattorneys.co.za
For the Defendant:	Adv S Nzuzo and Adv MP Mhlanti
Instructed by:	Mbewana Attorneys Gqeberha Email:ntsikimbwn@gmail.com Email:ingambewana-attorneys.co.za