

**HIGH COURT
(BISHO)**

**CASE Nos: 9/2001
and 10/2001**

In the matter between:

A.S. BURWANA

PLAINTIFF

and

MINISTER OF THE DEPARTMENT OF JUSTICE

1ST DEFENDANT

MS NIKA

2ND DEFENDANT

JUDGMENT

EBRAHIM J:

Introduction

1. The plaintiff instituted two separate actions against the first and second defendants for damages arising from defamatory remarks which the second defendant allegedly made of and concerning the plaintiff. In each action the plaintiff claims damages in the sum of R150 000,00. At the commencement of the trial, and by agreement between the parties, the Court ordered a consolidation of the actions and that only the merits be determined while the issue of quantum was to stand over for determination at a later stage. The first and second defendants are contesting both claims and deny that the second defendant uttered the defamatory remarks. However, it is not disputed that the remarks are defamatory.

2. The plaintiff testified in substantiation of the averments in both particulars of claim and adduced the evidence of three witnesses namely, Sithembele Gqontshi, Monwabisi Godfrey Nyishman and the latter's mother, Nopumzile Nyishman. In rebuttal of the plaintiff's averments the defendants tendered the evidence of the second defendant and a witness, Mzuzu Minett Quma.

The plaintiff's case

3. The plaintiff testified that he was a director of a firm of attorneys, A S Burwana and Associates, with offices in Queenstown and Whittlesea. He was admitted as an attorney on 25 March 1999 but prior to commencing practice was the control prosecutor at the Whittlesea Magistrate's Court. He had been transferred from the Masters Office in Grahamstown during 1997 and remained at the Magistrate's Court until he resigned about a year later. The greater part of his evidence concerned his relationship with the chief magistrate, Mr Quma and other individuals as well as the situation which he found upon his arrival at the Whittlesea Magistrate's Court. He found a general lack of efficiency on the part of prosecutors, clerks and other staff members and a magistrate had even come to work while he was drunk. He discussed this state of affairs with Mr Quma but found him unresponsive and then wrote to the Department of Justice. His efforts to improve the levels of efficiency elicited a negative response on the part of magistrates, prosecutors and clerks and he was accused of acting as if he was a '*white man*'. His impression was that they wanted him to be like them. It was also his view that the second defendant, who worked there, supported Mr Quma

and not him. His relationship with Mr Quma and the others was very poor and the situation deteriorated to such an extent that he was close to a nervous breakdown. He decided to leave and, when he did so, the Department accused him of having absconded from his employment.

4. He then commenced practice as an attorney with an office next to the Magistrate's Court in Whittlesea and another in Queenstown. Shortly thereafter he received reports from clients that the prosecutors and clerks at the Whittlesea Magistrate's Court were saying that he was not an attorney. He received reports from two further clients that the second defendant had said that he was embezzling the money of the Legal Aid Board. One client, Mr Gqontshi, informed him that the second defendant had said that he (the plaintiff) had been stopped from working for the Legal Aid Board because he had embezzled money from it. Mr Gqontshi added that the second defendant told him that there were better attorneys than him (the plaintiff), for example, Mr Zeppe. He was also informed by another client, Monwabisi Nyishman, whom he had advised to apply for legal aid assistance, that the second defendant had said that he (the plaintiff) had been prohibited by the Legal Aid Board from receiving instructions as he had embezzled its money. Mr Nyishman said that the second defendant had added that she would provide him with another attorney. He felt very embarrassed by these comments and went to Mr Quma to speak to him about it and a meeting took place in the office of another magistrate, Mr Nyati who was not present though. Those present were Mr Quma, the second defendant, Gqontshi, and

himself. He asked Gqontshi to repeat what the second defendant had said to him and when he did so the second defendant did not respond but remained silent. Mr Quma then instructed the second defendant to change the legal aid instructions so that he, and not Mr Zeppe, could represent Gqontshi. Mr Quma had enquired him if there were any problems between the second defendant and himself but he replied that he could not recall any.

5. Much of what the plaintiff deposed to was disputed during cross-examination. It was claimed that the plaintiff had not painted a true picture of the circumstances that existed at the Whittlesea Magistrate's Court while he was there. His claims of inefficiency on the part of others were denied. He was questioned about a letter dated 26 June 1999 (exhibit 'A'), addressed to Mr Quma, in which he complained that his clients were being told that he would not be paid by the Legal Aid Board and, therefore, could not be granted legal aid assistance. In his letter he disputed that the Legal Aid Board had indicated this and stated, *inter alia*, that he viewed this in a serious manner as it was detrimentally affecting the image of his office. When asked why his main concern, as expressed in the letter, was that his clients were being denied legal aid assistance, he replied that he had written the letter to warn the second defendant that she had to stop defaming him. Although the letter made no direct mention of defamation he said that it was implied in paragraph 1 thereof. The allegation that the Legal Aid Board would not pay his firm was untrue and was, therefore, defamatory. He wrote the letter so that they should stop defaming him as he had received a number of

complaints from clients. Finally he decided that he had to institute action.

6. While his letter to Mr Quma stated that they had personal differences these were not such that he would describe them as '*global problems*' nor did he have any personal differences with anyone else. The second defendant and Mr Quma were both from Middledrift and he had inferred that the second defendant supported Mr Quma. However, he had never quarrelled with her. He considered Mr Quma to be incompetent and incapable of being in charge of affairs at the Magistrate's Court. He was better qualified than Mr Quma who suffered from an inferiority complex and did not have a degree. He regarded it as his responsibility to help Mr Quma to improve the image of the court. He had not undermined Mr Quma's position nor had he refused to obey his instructions. It was because of jealousy that Mr Quma refused him permission to attend a course in business administration in Bisho.
7. From the date of his admission as an attorney on 25 March 1999 until 30 June 1999 he received instructions in a number of legal aid matters but could not say how many. He had referred a number of people to the Legal Aid office but never told them whom they had to choose as their legal representative. Although he did not know what procedure the Whittlesea Legal Aid office applied when granting legal aid assistance he knew that it was not on the basis of a roster system. He was aware that the roster system was applied in Queenstown but this excluded Whittlesea. Although he was the only attorney in Whittlesea he did not expect to be instructed in every legal aid

matter. But, Queenstown was 33km away and the Legal Aid Board was trying to curb travelling expenses. He had not instituted these actions because the legal aid officer had refused to appoint him as the attorney. He had been defamed on a number of occasions previously and after these incidents decided to institute action.

8. Sithembele Gqontshi testified that he appeared in the Magistrate's Court at Whittlesea after his arrest on a criminal charge. He could not remember the date of his arrest nor on which date he appeared in court. But, he could remember the court proceedings. On his first appearance he told the magistrate he required the services of an attorney. On his next appearance, on 29 June 1999, he informed the presiding magistrate that he was to be represented by the plaintiff. At this stage he had already spoken to the plaintiff. He then spoke to the second defendant, in Room 11, about legal aid assistance and she conveyed the following to him in Xhosa:

'Mr Burwana has been forbidden by the Legal Aid Board from receiving legal aid instructions because he embezzles funds from the aforesaid Board. There are better attorneys to whom I can refer you to like Zeppe as Mr Burwana is not a good attorney.'

9. Two weeks later he reported to the plaintiff what had transpired and on the same day they met with Mr Quma. The second defendant was called in and he repeated in her presence what she had previously said to him. The second defendant did not respond but remained silent. The legal aid instructions were then changed so that the plaintiff could represent him and about three weeks later he signed an affidavit (exhibit 'B') to this effect. When the second defendant originally uttered the remarks a prison warder and two

policemen were present in the room. The prison warder heard what the second defendant was saying but he was unsure whether the other two individuals heard the remarks. Because of the second defendant's remarks he was disappointed in the plaintiff and felt that he could not rely on him. He considered the plaintiff to be a criminal as the plaintiff had done something unlawful. In his eyes the plaintiff's standing as a lawyer had diminished but he still wanted the plaintiff to defend him.

10. During cross-examination his version of what transpired when he applied for legal aid assistance was disputed. The same applied in respect of the remarks which he had attributed to the second defendant and the meeting involving the plaintiff, Mr Quma, the second defendant and himself. He, in turn, disputed that the second defendant had explained to him that there was a roster system in respect of the allocation of legal aid instructions to attorneys and that he could not choose which attorney should represent him. The second defendant, he said, had also not told him that the next attorney on the roster was Mr Zeppe and the plaintiff could, therefore, not be instructed to defend him. He was unable to provide the date on which the second defendant had uttered the remarks as he had been distressed at the time because of the criminal charges against him. He had not fabricated what had occurred. The second defendant was lying if she claimed that the meeting with Quma and the plaintiff had not taken place.
11. In response to questions from the Court he said that on the date that he

applied for legal aid assistance he was still in custody. After speaking to the first defendant he remained in custody and was taken to prison. Two weeks later he spoke to the plaintiff at court and related to him what the second defendant had said. They then went to speak to Mr Quma. He was still in custody when this occurred.

12. The testimony of Monwabisi Godfrey Nyishman is that he appeared in the Whittlesea Magistrate's Court on a charge of murder. When he applied for legal aid assistance he was not provided with a legal representative. He approached the second defendant, in Room 11, for the relevant forms and she then asked who would be representing him. He replied that it was the plaintiff and she told him that she did not have any forms and that he should return. He recalls that an interpreter was present. When he returned she was in another office, the one where motor car licences were issued. She again enquired if the plaintiff was his attorney and he confirmed this. She asked if he viewed his case as being difficult and, when he replied that he did, said that she would advise him to take another attorney. She also said, *'Burwana has been stopped from functioning at the Legal Aid as he was embezzling money'*. He could not recall her saying anything else nor if anyone else was present. He then said that four men, whom he knew, had been present but he did not know their names. It was his impression that they heard what the second defendant had said as she had spoken in an audible tone of voice. He was upset and felt that he could not trust the plaintiff. He related what had happened to his friends Bongani Mazwayi and Phindile

Sishuba and told them that he would not get funds for legal aid as the plaintiff had embezzled funds. He also informed his mother and Pumzi Nyishman. His mother had not reacted well and said that they could not trust the plaintiff and should get another attorney. However, after Landani Mlilo had spoken to his mother they decided to retain the services of the plaintiff and borrowed the money to pay his fees.

13. During cross-examination he said that he could not remember on which date he first appeared in the Magistrate's Court - it was either the 11th or 12th May 1999. He could also not recall if he had made application for legal aid assistance on the date of his first appearance or not. He was confused at the time because of the charge of murder and even more confused when he was remanded in custody. When the magistrate informed him that he was entitled to the services of an attorney on the basis of legal aid the plaintiff was already representing him. He spoke to the first defendant about such assistance in an office which had double glass doors. On the first occasion there were three men present, one of whom was a court interpreter. He could not remember if his mother was with. He denied that second defendant told him of a roster system in respect of attorneys. It was on his second visit to the second defendant that she uttered the defamatory remarks. He did not trust the plaintiff thereafter as he had heard over the radio about legal aid funds being embezzled. Finally he paid an amount of R500,00 to the plaintiff to obtain the plaintiff's services. He admitted that the second defendant had at some stage mentioned that Mr Dywili had to sign the forms. He went to the

office several times and was upset that he was not granted legal aid assistance.

14. Replying to the Court's questions he said that he told the persons waiting outside the office what the second defendant had said as he wanted his friend Phindile to know that the plaintiff was embezzling money. Some days later he told the plaintiff of the second defendant's utterances. He did not do so earlier as he did not have money to travel to Queenstown. When asked why he had not gone to the plaintiff's Whittlesea office he said that he had but only found a little girl there. Asked to explain the contradictory answers he said that he had not heard the first question properly and had been confused. Re-examined by Mr Glover he said that he had meant to say that the person in the plaintiff's Whittlesea office was a lady and not a little girl. Also, he went to the Whittlesea office before going to the one in Queenstown.
15. The next witness to testify for the plaintiff was Mrs Nompumzile Nyishman. She was present in court when the magistrate explained to her son, Monwabisi, that he could apply for legal aid assistance to obtain the services of an attorney to represent him. He was not legally represented then. She did not accompany him when he made application for assistance but he informed her afterwards that he was told that there were no forms available. After his second visit to the office he told her that the person issuing the forms had said that he should change his attorney. But, he did not want the plaintiff replaced by another attorney. He also said that he was told that the plaintiff was

embezzling money. She was disappointed and wanted to instruct her own attorneys in Queenstown. But, her son and his friend had insisted that the plaintiff should defend him. She then telephoned her other son in Cape Town to obtain money to pay the plaintiff. Her son, Monwabisi, had gone to the legal aid office five or six times.

16. During cross-examination she said that she was upset by what her son had told her. It meant that he would not be obtaining the services of an attorney and be convicted. She was shocked by the remarks and felt she could not trust the plaintiff as he would misuse the money. Despite this she wanted the plaintiff to represent her son. In reply to the Court's questions she said that her knowledge of what occurred came entirely from what her son told her. The following day she spoke to the plaintiff at his office about the remarks. She went there on her own and her son, Monwabisi, had remained at home. She did not thereafter discuss the issue with the plaintiff again. This concluded the case for the plaintiff.

17. Mr Dukada, who appears for the defendants, applied for absolution from the instance but this was opposed by Mr Glover, who appears for the plaintiff. The application was refused by the Court.

The first and second defendants' case

18. The second defendant then testified. The pertinent details of her evidence are that she was employed as the clerk of the court at the Whittlesea

Magistrate's Court. For a few months during 1999 she attended to applications for legal aid assistance. The procedure initially was that the individual would, when applying, indicate that he/she required the services of a particular legal representative and legal aid was granted on that basis. But, in May 1999 the system was changed as the magistrates were unhappy that only the plaintiff was being instructed to represent accused persons. This resulted in the chief magistrate, Mr Quma, introducing a roster system.

19. On 29 June 1999 Sithembile Gqontshi was brought to her office from court by a prison warder and applied for legal aid assistance. Gqontshi said that he wanted the plaintiff to represent him but she informed him that there was a roster system and Mr Zeppe was the attorney to be instructed. Gqontshi did not indicate any unhappiness with this. During August 1999 Mr Quma called her to his office and informed her that Gqontshi wanted the plaintiff to represent him and not Mr Zeppe. Mr Quma told her to attend to this and Gqontshi had to attest to an affidavit stating that he wanted the change. This was done on the same day and was towards the end of August 1999.
20. She denied being present at a meeting with Mr Quma, the plaintiff and Gqontshi where the latter repeated defamatory remarks that she was alleged to have made concerning the plaintiff. She never uttered any defamatory remarks regarding the plaintiff when she spoke to Gqontshi. She had not made such remarks either to any other people. Her office was Room 11 and she did not speak to either Gqontshi or Nyishman in Room 22.

21. She recalled that Monwabisi Nyishman also applied for legal aid assistance and that it was after Gqontshi did so. But, she could not remember the date on which this occurred. She did not have the relevant forms and told him to return. She informed him of the roster system and asked him if he had an attorney in mind and he replied that it was the plaintiff. On his second visit she informed him that she had requested the plaintiff to bring the forms from Queenstown. On his third visit she told him that the forms were available but she required an order from the magistrate. She did not enquire if the plaintiff was still his attorney nor did she say that his case was difficult and that he should get another attorney. She did not make any defamatory remarks concerning the plaintiff. Nyishman did not return after his third visit.
22. It emerged during cross-examination by Mr Glover that she commenced working at the Whittlesea Magistrate's Court on 28 September 1987. When the plaintiff came there the courts had not been in chaos although they had started late. There had been inefficiency on the part of the prosecutors. There was no indication that the plaintiff tried to improve matters or elevate standards. She did not consider him to be a bully but he was someone who wanted things to be done his way. When Mr Quma refused him permission to attend classes in Bisho he told her that he would still be going. Plaintiff never told her that he was dissatisfied with the competency of Mr Quma. She had not been unhappy with the work of Mr Quma and never heard any adverse comments about his competency. It was untrue that the whole office was against the plaintiff. The staff liked him. She and the plaintiff enjoyed a

good relationship and he had often joked with her. They were on good terms even now.

23. During April to August 1999 she also attended to legal aid matters and kept the relevant forms in her office. Mr Matiwane attended to legal aid matters from August 1999. She did not question Mr Quma's instruction that she should change the legal aid instructions. Mr Quma had probably asked her to attend to the change of attorney as she had originally allocated Mr Zeppe as the attorney. Gqontshi signed the affidavit on the same day that the plaintiff complained to Mr Quma. She denied that the change had been made because she had defamed the plaintiff. She did not know why Nyishman and Gqontshi were claiming that she defamed the plaintiff. When the summons was served on her she sat down to think about their applications and was then able to recall what had occurred.
24. She did not ask Nyishman if plaintiff was his attorney but did tell him that the plaintiff had not brought the forms from Queenstown. She did not explain to either Gqontshi or Nyishman why the roster system had been introduced but did tell them that there was such a system. She did not know why her counsel had put to Nyishman that she explained why the roster system had been introduced, nor did she know why this was stated in the Plea. The last time she had seen Nyishman was in December 1999 when she told him to return in January 2000. Since May 1999 legal aid was only granted if there was a court order to that effect. She admitted that she completed the application on

behalf of Gqontshi without a court order. This had been a mistake. She conceded that it was contrary to the roster system to enquire from an accused which attorney he wanted to represent him.

25. In reply to questions from the Court she said that Mr Quma had not been angry when he told her to change the legal aid instructions. She did not resent the plaintiff approaching Mr Quma, nor was she upset at having to change the instructions. The plaintiff never spoke to her about either Gqontshi or Nyishman wanting the plaintiff to represent them. After August 1999 Nyishman did not return until December 1999. During the period May to August 1999 she furnished legal aid instructions to five other attorneys. She could not recall if instructions were issued to the plaintiff in any other matters after the roster system was introduced.
26. Mzuzu Minett Quma testified for the defendants. He became the chief magistrate at the Whittlesea Magistrate's Court in September 1993. When the plaintiff became a prosecutor there he made everyone aware of his educational qualifications. Although the courts only started between 9:30am to 10:00am they functioned normally otherwise. A state of chaos did not exist. Problems existed in the office of the prosecutors because of a failure to attend to queries. This existed prior to the plaintiff's arrival and continued while he was there. He was not aware of any attempts on the part of plaintiff to improve the position nor had the plaintiff met with him to discuss the situation. He was aware that the plaintiff wrote to the Department of Justice

but the plaintiff had not informed him thereof. He had not received complaints of a poor relationship between the plaintiff and other staff members. When the plaintiff opened his practice most of the legal aid matters were allocated to him. But, in April/May 1999 a roster system was introduced as other attorneys in the Queenstown area wanted to participate. He did not discuss with the plaintiff the letter dated 26 June 1999 (exhibit 'A') which the plaintiff had written to him. However, he did discuss it with the other magistrates. Although he could not recall the date, there was an occasion when he and the plaintiff informally discussed a problem regarding a client who had not been granted legal aid assistance. He told the plaintiff he would assist. The second defendant was not present but he later called her to his office and told her to assist so that the plaintiff could represent the person. He never held a meeting with the plaintiff with the second defendant and Gqontshi present at which Gqontshi repeated defamatory remarks that had allegedly been made by the second defendant.

27. It emerged during cross-examination that the relationship between the plaintiff and himself was poor. The plaintiff acted like a bully and was not prepared to accept instructions from him and was envious of his position. The plaintiff had attended classes in Bisho in spite of him refusing the plaintiff permission to do so. The other staff members had not complained that the plaintiff was rude to them but merely spoke about it amongst themselves. However, the plaintiff was liked by the second defendant. The issue of the plaintiff being the only attorney to receive legal aid instructions was raised by the magistrates.

When he and the plaintiff discussed the changing of the legal aid instructions he had not spoken to the plaintiff's client directly. He told the second defendant to change the instructions but could not remember if he also said that an affidavit had to be signed. Although Mr Matiwane was then attending to applications for legal aid assistance he spoke to the second defendant about Gqontshi's application as she had a better knowledge of the matter.

28. He denied that his version of the meeting with the plaintiff was a fabrication. He did not discuss with the second defendant the letter which the plaintiff had written nor did he reply to it. He also denied that the plaintiff was not instructed in the two legal aid matters and was defamed because of his unpopularity. He disputed that the second defendant made the remarks because of plaintiff's attempts to improve the situation at the courts. The plaintiff had not tried to improve productivity at the court. It was also untrue that he and the second defendant and the rest of the staff had tried to destroy the thriving practice of the plaintiff. He bore no knowledge of this being the reason for the second defendant defaming the plaintiff.
29. Replying to questions from the Court Mr Quma said that he did not influence the second defendant to adopt a negative attitude towards the plaintiff. The second defendant and the plaintiff were on friendly terms and he was not aware of any personal differences between them. The plaintiff and others often sat in the office of the second defendant where they conversed and enjoyed refreshments together. He was unaware of any incident where the

second defendant might have reacted unfavourably towards the plaintiff. The second defendant had not been resentful when he told her to change the instructions. She commenced working at the magistrate's court in 1994. He had not received any complaints about her from her fellow staff members nor any complaints of unprofessional conduct on her part. When the second defendant received the summons she was shocked by the allegations therein. He did not think that it was possible that she could have made those remarks as she and the plaintiff were friends. After the date of the alleged events the plaintiff still supplied refreshments to her. At no stage did he ever instruct the second defendant not to issue any legal aid instructions to the plaintiff. He denied that he would resort to distorting the truth in order to protect the second defendant or his office or himself. This concluded the case for the first and second defendants.

Issues which are common cause or not disputed

30. During the course of the trial numerous issues in regard to certain incidents were disputed by the parties. However, it emerges from all the evidence that has been adduced and the concomitant cross-examination that the following are either common cause or are not disputed:
1. The plaintiff was not present on either of the occasions when the second defendant is alleged to have uttered the defamatory remarks which have given rise to these claims.
 2. On the occasion when the second defendant allegedly made defamatory comments concerning plaintiff to Sithembele Gqontshi

there were at least three other individuals present in the office and within earshot.

3. In regard to the occasion which Monwabisi Godfrey Nyishman had testified about there were four other individuals present in the office and were able to hear the alleged remarks.
4. There had not been any problems in the relationship between the plaintiff and the second defendant both prior to the plaintiff's letter dated 26 June 1999 (exhibit 'A') nor thereafter.
5. The relationship between the plaintiff and the witness M M Quma was of an acrimonious nature.
6. The witness M M Quma did not reply to the plaintiff's letter dated 26 June 1999 (exhibit 'A'), nor did he and the plaintiff ever discuss the issues raised therein.
7. During the period 25 March 1999 to 30 August 1999 the plaintiff was the only attorney practising in Whittlesea.
8. On 11 June 1999, when he appeared in court, Sithembele Gqontshi was informed by the presiding magistrate of his right to legal representation and that he could apply for legal aid assistance to obtain the services of a legal representative. He then informed the court that he was conducting his own defence.
9. On his next appearance in court on 29 June 1999 Sithembele Gqontshi informed the court that the plaintiff was his legal representative.
10. After his appearance in court on 29 June 1999 Sithembele Gqontshi applied for legal aid assistance and the relevant application form was

completed by the second defendant and signed by him.

11. The second defendant was instructed by the witness M M Quma to amend the legal aid instructions so that the plaintiff could represent Sithembele Gqontshi instead of Mr Zeppe. This instruction was issued after the plaintiff had approached Quma to convey to him that his client Sithembele Gqontshi wanted the plaintiff to defend him.
12. On 30 August 1999 Gqontshi signed an affidavit in which he stated that he wanted the plaintiff to defend him and not Mr Zeppe whom the legal aid officer had chosen on 29 June 1999 to be his legal representative.
13. During the period 25 March 1999 to 30 June 1999 the plaintiff received instructions in a number of legal aid matters, the precise number, however, being undetermined.
14. Legal aid assistance was not approved for Monwabisi Godfrey Nyishman as he failed to return to the legal aid office for his application to be finalised.
15. Prior to May 1999 an applicant for legal aid assistance could stipulate that he wanted a particular attorney to be his legal representative and legal aid assistance was then granted on that basis.

Issues in dispute

31. Numerous other issues are in dispute but the majority relate to collateral or peripheral incidents which are not germane to the question to be decided. I do not consider it necessary to determine all these. In my view, in order to determine whether the second defendant in fact uttered the defamatory

remarks it is necessary to decide who the probabilities favour in respect of two other major issues in dispute. These are:

1. Whether the circumstances that prevailed at the Whittlesea Magistrate's Court during the relevant period were as described the plaintiff and, therefore, provided the second defendant with a motive to defame the plaintiff?
2. Did the plaintiff, Sithembele Gqontshi, M M Quma and the second defendant attend a meeting in the office of magistrate Nyati (who was not present) at which Sithembele Gqontshi repeated the defamatory remarks attributed to the second defendant?

The probabilities

32. During the course of his submissions Mr Glover observed that it was difficult to determine which version is to be believed and the Court had, therefore, to consider the probabilities. Understandably, it is his contention that these favour the plaintiff. Needless to say Mr Dukada's contentions are to the contrary. It is necessary to observe, however, that since there are two mutually destructive versions the credibility of the witnesses forms an inextricable part of the consideration of the probabilities.
33. The plaintiff's evidence regarding his relationship with the chief magistrate Mr Quma and the second defendant as well as the other magistrates and staff members was introduced for the purpose of showing that the second defendant had a motive to defame him. It becomes necessary, therefore, to

examine the plaintiff's relationship with them in order to determine whether or not it is probable that the second defendant would have acted out of malice towards the plaintiff. Both the plaintiff and the second defendant testified that they had a good relationship both prior, and subsequent, to August 1999 and even now. This was not disputed by the plaintiff. In view of the nature of their relationship I consider it improbable that the second defendant would have harboured any malice towards the plaintiff.

34. Mr Glover, contended, however, that there was another reason for the second defendant defaming the plaintiff. While there were no personal differences, as he put it, between the plaintiff and the second defendant, she uttered the remarks because of her long association with Quma and her loyalty to him. I find this argument unpersuasive. For her to have been motivated to do so suggests blind loyalty to Quma since there was no obvious benefit to herself to jeopardise her own position in this manner. There is no evidence that suggests she had such unswerving loyalty.
35. The plaintiff's relationship with Quma and the other magistrates and staff members, on the other hand, was of quite a different nature. It is evident from the plaintiff's own description that his relationship with Quma was manifestly acrimonious. Quma confirms that it was indeed so. If anyone had reason to say anything less than complimentary about the plaintiff then it was surely Quma, or even one of the other magistrates or staff members, but certainly not the second defendant. I can find no substantiation in the evidence that it

is probable that the second defendant would have been motivated by a sense of loyalty to Quma to defame the plaintiff.

36. The picture that the plaintiff has painted in his testimony is that the personnel at the Whittlesea Magistrate's Court were involved in a sustained campaign to defame him and to undermine his legal practice. Yet, inexplicably, there is no mention of this in his letter of 26 June 1999 (exhibit 'A') to the chief magistrate. It is quite evident from the plaintiff's letter that his complaint was primarily, if not solely, that his clients were being refused legal aid assistance. There is no indication that he had received reports that prosecutors and clerks were claiming that he was not an attorney. The most likely reason for him not to have mentioned this would have been if he doubted that the reports were there. It is improbable that he would not have brought these reports to the attention of Mr Quma as they were far more damaging to his good name and reputation and the image of his firm than any statements that he would not be paid by the Legal Aid Board.
37. The plaintiff's failure to specify the dates on which any relevant incidents occurred is significant. He could not recall on which date he received instructions from Gqontshi. He also failed to indicate on which date Gqontshi informed him that second defendant had made the defamatory remarks. Further, he was unable to identify on which date the meeting with Quma, at which Gqontshi and second defendant were present, occurred. And, the date on which Nyishman had conveyed to him that second defendant had defamed

him was not provided.

38. The plaintiff is an obviously intelligent individual with a university education. Even though he only commenced practising as an attorney in March 1999 he was by no means inexperienced in the practice of law. He held the post of control prosecutor, an obviously senior position, for at least a year. He also testified that he had been commended for being one of the best prosecutors.
39. It is consequently difficult to comprehend why the plaintiff failed to specify any of these dates. He, more than most other individuals, should have been aware of the necessity to record the dates and surrounding circumstances of the various occurrences. It was a relatively easy task to have noted these down, more particularly since it involved his good name and reputation. It would also not have been difficult to establish the names of those who were present on both occasions as they were either prison warders, policemen, or other court officials. They were potential witnesses and with his experience as a prosecutor he would have been acutely aware of the need to provide direct corroborative evidence. This he has failed to do.
40. I find it improbable that the plaintiff, if he believed that the information which Gqontshi and Nyishman had conveyed to him was reliable and truthful, would not have been aware of the need to record all the pertinent details. These events occurred subsequent to him having received reports, on a number of occasions according to him, of defamatory remarks which

had previously been made about him. The importance of keeping a detailed and accurate record of whatever was relevant could not have escaped him. The fact that he did not do so brings into question the reliability of the allegations which Gqontshi and Nyishman have made against the second defendant as well as the veracity thereof.

41. The plaintiff's evidence that the second defendant made the remarks is manifestly hearsay. He was not present on either of the occasions and obtained the information from Gqontshi and Nyishman. His evidence in this regard cannot be accepted as corroboration that the second defendant uttered the remarks. In both particulars of claim the allegation has been made that the defamatory remarks were made '*to many people applying for Legal Aid assistance*', but the plaintiff has not adduced any evidence in support hereof. During the course of his testimony the plaintiff stated that he had received reports from clients that it was being said by prosecutors and clerks that he was not an attorney. This evidence was also hearsay but again no other evidence was adduced in proof of these assertions. This evidence, instead of lending credence to the plaintiff's version, served only to undermine his own credibility.
42. Both Gqontshi and Nyishman were unable to remember details of other incidents which were of obvious importance to themselves. Gqontshi displayed a selective memory. He could not recall the date of his arrest nor the date on which he first appeared in court. He claims that he told the

presiding magistrate, on his first appearance in court, that he required the services of an attorney but this is contradicted by exhibit 'E' which the plaintiff tendered in evidence. It reveals that he in fact informed the magistrate that he was conducting his own defence. Further, he can recall what the second defendant said about the plaintiff but cannot recall the date on which this occurred. He was, he says, distressed because of the criminal charges against him and because he was taken to prison. This is understandable. But, it is unlikely, if he was distressed, that he would then remember the second defendant's exact words but forget the day on which this occurred. It appears further from exhibit 'E' that on his first appearance in court he was granted bail of R100,00 but on the date of his second appearance this had still not been paid. Since the conversation with the second defendant was on the same day the date should have been reinforced in his memory. Then, his testimony in regard to when he signed the affidavit is directly contradicted by the date on the affidavit. These contradictions and inconsistencies are of a material nature and diminish the reliability of his testimony.

43. Neither Gqontshi nor the plaintiff have specified on what date the meeting with Quma and second defendant took place in the office of magistrate Nyati (during his absence). They have not indicated either why it was held there and not in the office of Quma, which would have been the logical place for the meeting. The plaintiff indicated that it was during the first or second week of July 1999 while Gqontshi said that it was two weeks after his appearance in court on 29 June 1999. If so, it means that the meeting must have taken

place close to 13 July 1999, on which day Quma would also have told the second defendant that she should change the legal aid instructions. But, it is clear from the affidavit (exhibit 'B') that Gqontshi signed it on 30 August 1999 which is some seven weeks later. This is contrary to Gqontshi's claim that he signed the affidavit about three weeks after the meeting with Quma.

44. Gqontshi also claims that the plaintiff's standing as a lawyer had diminished because of the second defendant's remarks. He says that he then regarded the plaintiff as a criminal. If this was the case then it is unlikely that he would have wanted to retain the plaintiff as his legal representative since it conflicted directly with this view. I do not consider him to be a credible witness and I find his evidence to be unreliable.
45. Nyishman's memory also suffered from a lack of consistency. He was unsure if he first appeared in court on 11th or 12th May 1999 and could not recall whether he applied for legal aid assistance then or with his subsequently appearance. His inability to remember, he says, was because he was confused due to the charge of murder. His confusion increased when he had to return to prison. He also claimed that the second defendant's office had double glass doors and that he was alone when he entered. However, he cannot remember if his mother was present. At first he could also not recall who else was in the office but then said that there were four men who were able to hear what was being said.

46. Nyishman also provided an unconvincing explanation for his delay in going to the plaintiff's office to inform him of the second defendant's remarks. Moreover, it is contradicted by his mother's testimony. He also attested that because of the second defendant's remarks he no longer trusted the plaintiff as the plaintiff had embezzled funds. Yet, in despite of this he appears not to have been concerned that his mother was paying an amount of R500,00 to the plaintiff for his legal services. It is unlikely that he would have allowed his mother to do so if he did not trust the plaintiff. He was not a convincing witness. The contradictions and inconsistencies in his version reflect adversely on his credibility and the trustworthiness of his evidence.
47. Nophumzile Nyishman was obviously not present when the remarks were supposedly made by the second defendant. Whatever knowledge she has of the incident was conveyed to her by her son, Monwabisi. Her evidence is consequently not of a corroborative nature and is manifestly hearsay. It does not assist the plaintiff in proving that the second defendant made the remarks. However, her evidence regarding her visit to the plaintiff to discuss the second defendant's remarks contradicts that of her son, Monwabisi, and casts doubt on his version.
48. In his submissions Mr Glover described the defendant as a neutral witness but added that there were two important contradictions in her testimony. The first related to her assertion that legal aid assistance was not granted to an accused without an appropriate order or instruction from a magistrate.

Yet, in the case of Gqontshi she did so without such an order and then claimed that it had been a mistake. I do not agree with Mr Glover that this is a contradiction. She conceded that she had made a mistake and did not attempt to justify her actions or provide a false explanation. In any event, when Gqontshi appeared in court the presiding magistrate informed him of his right to apply for legal aid assistance. This is evident from exhibit 'E' and is common cause. It is in consequence thereof that he was taken to the office of second defendant to make the necessary application for such assistance. But, even if it could be said that she acted contrary to the applicable guidelines I do not consider this to be a contradiction of such a material nature that it makes her story improbable.

49. The second contradiction highlighted by Mr Glover concerns Nyishman's application. In her testimony the second defendant said that when Nyishman visited her the second time she told him that she still required an order from the magistrate. Later she said that this was a mistake and that she conveyed this to him with his third visit. While this is so, it needs to be noted that when this contradiction was put to her during cross-examination she readily admitted that it was a mistake. I accept that she made a mistake since the evidence confirms that she was actually referring to his third visit and not the second one. She had previously testified that with his first visit she told him that she did not have any forms and that with his second visit she told him that she had asked the plaintiff to bring the forms from Queenstown. Later, she stated that Nyishman had come to her office three times and on the last

occasion she told him that she still required the magistrate's order. Moreover, it was confirmed by Nyishman during cross-examination that the second defendant had, at some stage, said that Mr Dywili had to sign the forms. It is abundantly clear, therefore, that such a conversation took place and whether it occurred on the occasion of Nyishman's second or third visit is of little consequence. In any event it is evident that her mistake was a *bona fide* one. Mr Glover's submission that this contradiction of importance is without merit.

50. The second defendant, in contrast to what Gqontshi has asserted, says that the affidavit was signed on the same day that she was asked to change the legal aid instructions and this was towards the end of August 1999. The date on the affidavit supports her version. Although Quma cannot recall the date of his discussion with the plaintiff in this regard he said that he spoke to second defendant later the same day and this is supported by her version therefore I find the second defendant's version more probable than that of Gqontshi and the plaintiff.
51. In regard to M M Quma, Mr Glover submitted that he had lied when he disclaimed that there had not been a meeting as contended by the plaintiff. I can find no substantiation for this. There is no direct or indirect proof that Quma lied nor is such an inference justified. Mr Glover also criticised Quma's conduct during cross-examination when he disputed that such a meeting had taken place. Mr Glover submitted that since Quma had turned his back to him when he answered it indicated that Quma was not telling the truth. This

submission is wholly without foundation. During cross-examination counsel, at one stage, commented that it appeared that the witness was not prepared to look at him when he replied. I then informed counsel that I considered this observation to be unwarranted. I also informed counsel that, if anything, I construed the conduct of the witness to be akin to displaying disdain at the fact that his denial of such a meeting was being treated as being untruthful. The fact that Quma disputed that such a meeting occurred and stated that he only engaged in a casual discussion with the plaintiff regarding a request to change the legal aid instruction does not *per se* justify the conclusion that he has lied. On the contrary, his version does not conflict with the relevant aspects of second defendant's version nor is it in any way improbable. Quma was a credible and honest witness and I am satisfied that his evidence is trustworthy. I accept that he has told the truth.

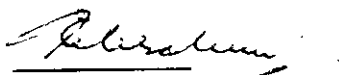
52. The second defendant was not a perfect witness. There are certain inconsistencies and even contradictions in her testimony but these are not of a material nature. Her version of what transpired in respect of Gqontshi is supported in material respects by the testimony of Quma. Moreover, this version and that relating to Nyishman is corroborated in material respects by the versions which Gqontshi and Nyishman themselves have provided. The plaintiff's version on the other hand, is beset with improbabilities, contradictions and inconsistencies. In addition, neither he nor Gqontshi nor Nyishman created a favourable impression when they testified.

Conclusion

53. Mr Dukada has correctly identified the approach which the Court is to adopt in determining whether the plaintiff has discharged the *onus* which rests on him. See *National Employees' General Insurance Co. Ltd v. Jagers* 1984 (4) SA 437 (E) at 440D-G. In my view, the plaintiff has failed to establish on a preponderance of probabilities that his version is true and that the version of the defendants is false. It follows therefore, that the plaintiff's claims fall to be dismissed. In regard to the issue of costs I can see no reason why it should not follow the result nor have Mr Glover or Mr Dukada made any submissions to the contrary.

Order

54. In the result, the plaintiff's claims in terms of the consolidated action (under case nos. 9/2000 and 10/2000) are dismissed with costs.


Y EBRAHIM

JUDGE OF THE HIGH COURT (BISHO)

Date: 27 September 2001

Heard on	:	27/8/2001, 28/8/2001, 29/8/2001, 30/8/2001 & 31/8/2001
Judgment delivered on	:	27 September 2001
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Attorneys for plaintiff	:	Tansti & Associates KING WILLIAM'S TOWN
Counsel for defendants	:	Adv. Dukada
Attorneys for defendants:	:	State Attorney KING WILLIAM'S TOWN