



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

REPORTABLE

In the matter between:-

Case No. 3027/2021

PROFESSOR MARGARET CULLEN

Plaintiff

and

DR RANDALL PATRICK JONAS

First Respondent

PROFESSOR CECIL ARNOLDS

Second Respondent

REASONS FOR JUDGMENT

BANDS AJ:

- [1] The plaintiff, who is a professor at the Business School: Faculty of Economic Sciences, Nelson Mandela University, sued the first and second defendants for damages arising out of an alleged defamation. The plaintiff's claim is

based upon a letter, dated 25 November 2020, addressed to her by the first and second defendants, acting in their then capacities as the respective Directors of the Business and Graduate Schools. The letter, “POC1”, called upon the plaintiff to make representations by no later than 27 November 2020, regarding certain ethical complaints relating to her conduct.

[2] The plaintiff, in her particulars of claim, contends that the content of “POC1”, and more particularly, paragraphs 1 to 9 thereof are defamatory of her in their primary meaning; alternatively, that the content thereof is implied and understood by the ordinary reader that the plaintiff, as an academic, is conducting herself in circumstances where her actions amount to unethical behaviour.

[3] The matter raises unusual circumstances regarding the question of publication in that “POC1” was addressed and disseminated only to the plaintiff by the second defendant, on behalf of the first and second defendants. In this regard, the plaintiff pleads that:

“9. *The Defendants, in addressing annexure “POC1” to the Plaintiff, were aware, alternatively should have been aware, that the Plaintiff will seek advice from, amongst others, the National Tertiary Education Union and that the letter would be so published to members of the union, and to other members of the Nelson Mandela University.*”

[4] The defendants deny that the contents of “POC1” are defamatory of the plaintiff in their primary or implied meaning and further deny that what is

pleaded by the plaintiff constitutes publication for the purposes of a claim founded on defamation.

[5] In the alternative, and in the event of a finding in favour of the plaintiff in respect of the aforesaid issues, the defendants plead that publication took place on a privileged occasion and that the letter was published in the discharge of a duty towards the plaintiff who had a duty to receive it. Put simply, the defendants rely on the defence of qualified privilege. The plaintiff in turn contends that any such privileged occasion, which is in any event denied, falls to be forfeited by the defendants in that publication of “POC1” was actuated by improper motive.

[6] Upon completion of cross-examination of the first defendant by the plaintiff's counsel, the matter was postponed, rendering it part heard. In the intervening period, the first and second defendants prepared separate applications in terms of rule 28(10) of the Uniform Rules of Court, seeking amendments to the joint plea filed of record. The amendments sought to substitute the joint plea with independent pleas on behalf of the first and second defendants. The applications were moved unopposed, and, in both instances, I granted the relief sought.

[7] Whilst the essence of the defendants' respective defences remained unchanged, the second defendant, for the first time, raised the following further aspect in his amended plea, to which I return later in this judgment:

“4.1. The Second Defendant admits that on 25 November 2020 he forwarded a letter by email to the Plaintiff, and that the document, annexure “POC1” to the particulars, is a true copy of the letter sent by electronic means as aforesaid.

4.2. To the extent that the Plaintiff has accurately paraphrased the contents thereof, this is admitted but such paraphrase is otherwise denied.

4.3. The Second Defendant pleads further that:

4.3.1. the letter, annexure POC1, was drafted and prepared solely by the First Defendant on the basis of information obtained by him;

4.3.2. the First Defendant sent the aforesaid letter to the Second Defendant by email with his (the First Defendant’s electronic signature appended thereto);

4.3.3. the First Defendant instructed the Second Defendant that given that he was the Plaintiff’s line manager, the letter should be sent to the Plaintiff by him in that capacity and that it was accordingly necessary for him to append his electronic signature to the letter and to send it to the Plaintiff by email;

4.3.4. in accordance with those instructions, the Second Defendant appended his electronic signature to the letter and sent it as pleaded in 4.1 above.”

[8] Following the hearing of oral evidence and argument, I granted judgment in favour of the plaintiff in the following terms:

1. The first and second defendants are jointly and severally liable to pay to the plaintiff the sum of R60,000.00.

2. The first and second defendants are to pay the plaintiff's costs of suit.

- [9] Insofar as I omitted to grant interest on the judgment debt, to which the plaintiff is entitled, a *tempore morae* calculated at the legal rate as from the date of service of summons to date of payment, such omission was inadvertent and came to my attention whilst drafting these reasons. In accordance with Uniform Rule 42(1)(b), the judgment granted by me, on 18 April 2023, is accordingly corrected with the addition of the following words in paragraph 1 thereof, directly after “R60,000.00”:

“together with interest thereon, a tempore morae calculated at the legal rate as from the date of service of summons to date of payment.”

- [10] Having said that, what follows are my reasons for judgment.

- [11] For present purposes, it necessary to quote “POC1” in full:

“Dear Professor Cullen,

Ethics complaint

We have, regrettably, been made aware of an anonymous ethics complaint which is of a serious nature. It is incumbent on us to inform you of such a complaint and provide you with an opportunity to make representations.

Should your submission in response to the allegation be sufficiently full to allow us to dismiss the allegation, we may arrive at a decision that no further investigation is required. However, should it not provide the required clarity, our rights remain reserved to have the allegations formally investigated.

It is alleged inter alia that:

- 1. Students under your supervision for the MBA treaties are/were provided by yourself with questionnaires and the data collected thereon.*

2. *That such data was collected not by the relevant MBA treatise student, but through the efforts of students in the marketing module.*
3. *That such data was processed and/or analysed, not by the relevant MBA treatise student, but by Danie Venter in consultation with yourself.*
4. *That students did not pay for such data processing services.*
5. *That any hypothesis on such data originated from yourself and not the relevant students.*
6. *That a number of MBA treaties under your supervision relies/ relied on the very same data.*
7. *That the questionnaire of such data did not originate from the relevant student, but from yourself.*
8. *That the research of the treatises was conducted prior to the ethics clearance application process of the respective MBA students.*
9. *That, as a consequence of the above, you have conducted yourself in a manner that does not accord with the ethics and values of this institution, either for the benefit of others and/ or for yourself.*

You are required to make full representations in writing on the above allegations for our consideration. Such representation should be submitted to the writers on or before 27 November 2020.

Yours sincerely,

*Professor C Arnolds
Director: Graduate School*

*Dr Randall Jonas
Business School Director"*

- [12] Before dealing with the legal principles relevant to the issues in dispute, I turn to the evidence tendered at trial.

Evidence

- [13] Each of the three parties testified at the hearing of the matter. No further witnesses were called to give evidence on their behalf.

- [14] The plaintiff holds the position of professor at the Business School: Faculty of Economic Sciences, Nelson Mandela University, having been appointed to full professor in 2018. She has been employed at the business school for approximately 17 years. She has published 9 book chapters and 110 peer reviewed accredited research outputs, some of which have attained international recognition, with the plaintiff presenting her papers at international conferences. She has supervised 9 doctorates; 2 full masters qualifications; and 132 MBAs. Amongst her other functions, the plaintiff is a member of the proposal committee, which serves to assist students in the improvement of their proposals for their research projects.
- [15] The plaintiff's standing and reputation was unchallenged by either of the defendants.
- [16] It is common cause that on 25 November 2020 at 13h13, the second defendant, on behalf of the first and second defendants, transmitted "POC1" to the plaintiff via email. The plaintiff, upon being confronted with the content of "POC1", was shocked as to the seriousness of the allegations contained therein and as to the short response time afforded to her, which was little more than 48 hours. Given the severity of the allegations, the plaintiff contacted a colleague, Professor Poisat, to seek direction. She was advised not to respond immediately but to take guidance from her union, which she did that same afternoon.¹ Thereafter, on 26 November 2020, the plaintiff forwarded a

¹ "POC1" was thereafter, on the evidence, circulated amongst a contained number of other union officials.

copy of “POC1” to the Dean of the faculty, Professor Hendrik Lloyd, and the Deputy Dean, Professor Michelle Mey, under cover of an email, which reads as follows:

“Dear Both

I hope you are well. I thought it important to share this with you.

These accusations are serious and unfounded. I am seeking legal advice before responding.

I just want to make you aware of it.

Regards and thanks

Margie.”

[17] Both Professor Lloyd and Professor Mey responded to the plaintiff’s email on the same afternoon, agreeing with the plaintiff’s sentiments that the allegations were of a serious nature. For this reason, Professor Lloyd advised that he was alerting Professor Foxcroft, the deputy vice chancellor of learning and teaching, to the communication, and copied her in on his email. Accordingly, the complaint had, in this manner, been elevated to the top structures of the university.

[18] The plaintiff testified in detail regarding points 1 to 9 of “POC1”. In essence, the difficulty which she faced, was that she had no understanding of where the complaint had emanated from, if such complaint existed at all; and, if viewed in the context of the plaintiff’s duties, she felt that she was being accused of simply doing her job. Accordingly, she struggled to understand the nature of the allegations against her and the sources thereof. Having said that, “POC1”

contained a clear allegation that the plaintiff was conducting herself in an unethical manner, which was said to have damaged the values and ethics of the university. In this regard, the plaintiff testified that:

“That is what I was accused of and as I said, that is what shocked me about the letter in terms of specifically I take an incredible amount of pride in my work. You know, I strive for excellence. I am not a mediocre kind of person. So to make an allegation like that against me was extremely damaging and upsetting more than anything else.”

[19] During the course of the following months, the complaint was circulated amongst various other union and university officials. Despite the plaintiff seeking progress reports and ultimately a resolution to the alleged investigation, neither was forthcoming.

[20] The plaintiff, during cross-examination, admitted that the first defendant, as the director of the graduate school: (i) owed the university a duty of good faith in the exercise of his duties; (ii) had a duty to uphold the academic integrity of the university; and (iii) had a duty to receive any complaints regarding any of his staff employed by the business school. She further admitted that she had a duty/right to receive the complaint. The plaintiff however took umbrage with the process followed by the defendants and the alleged anonymity of the complainants. She was of the view that the first and/or second defendant ought to have approached her to discuss the alleged complaints instead of directing a threatening letter to her; alternatively, that a meeting ought to have been called to address the alleged issues raised.

[21] On behalf of the second defendant, it was put to the plaintiff that he had become aware of the anonymous complaints involving the plaintiff, for the first time, on 15 November 2020 upon receipt of an email from the first defendant, which he received on his Gmail account. Attached to the email was a document, dated 13 November 2020, detailing the alleged anonymous complaints against the plaintiff. It was further put to the plaintiff that the second defendant will testify that: (i) he had no knowledge of the content of the document; (ii) he responded to the first defendant's email on 17 November 2020, by requesting that the students provide names of the treatises and theses to allow for an investigation into the allegations; (iii) at some point a telephone conversation took place between the first and second defendants; and (iv) on 22 November 2020, the second defendant received a draft of the letter "POC1" from the first defendant, which was ultimately the same as the final document, which forms the subject matter of this dispute. It was further put to the plaintiff that the second defendant will testify that "*there was space to investigate*" and whilst he had some initial reservations about "*whether any of this would stand up*" it was only later, following the transmission of "POC1" to the plaintiff, that he properly investigated the allegations at the request of the first defendant.

[22] I am alive to the dispute in the evidence regarding the alleged acrimonious relationship between the plaintiff and the first defendant and the alleged discord in the department due to the first defendant's management style, which is alleged to have existed prior to 25 November 2020. On the probabilities, taking into account the evidence on behalf of all of the parties

led at trial, it is clear that, for whatever reason, there existed an underlying dissonance between the plaintiff and the first defendant, which I accept. Apart from the aforesaid, it is not necessary to resolve these disputes for the purposes of this judgment.

[23] The plaintiff's case was thereafter closed.

[24] The plaintiff came across as an honest witness. Not only was her evidence probable; reliable; and credible, it was also, in many respects, unchallenged. Where appropriate, the plaintiff, readily made concessions.

[25] The first defendant testified that he became aware of the complaints, regarding the alleged unethical conduct of the plaintiff, levelled against her by anonymous complainants. As the allegations involved a member of the graduate school staff, the plaintiff, the first defendant thought it incumbent upon him to make the second defendant aware of the allegations to allow for certainty as to how the alleged conduct of the plaintiff, who reports directly to the second defendant, should be dealt with. He stated that he was the author of "POC1", the purpose of which, according to him, was to apprise the plaintiff of the allegations made by the complainants and to afford her an opportunity to respond thereto. More particularly, he testified that he, in his official capacity, had a duty to receive the complaints from the students and that he had a duty to inform the plaintiff of such complaints.

- [26] Upon receipt of correspondence from the union enquiring as to the status of the investigation, the first defendant intimated to the union that he and the second defendant had not received a response from the plaintiff in respect of “POC1” and that they would have to complete the investigation, after which they would revert. Ultimately, there were delays in the investigation due to the volume of documentation that he sought to be considered; the delay in acquiring the documentation; and the “*abusive and intimidatory*” stance adopted by the union. The first defendant sought the intervention from Professor Lloyd regarding attacks levelled against him by the union and requested that the union desist from personalising a matter in which he was acting in accordance with his responsibilities. He received no response from Professor Lloyd.
- [27] During cross-examination, the first defendant testified that the allegations contained in “POC1” were a *verbatim* recordal of the complaints received from the complainants and that such allegations appear to call the plaintiff’s conduct into question. Contrary to the version put to the plaintiff by the second defendant’s counsel regarding his lack of knowledge of the complaints prior to 15 November 2020, the first defendant testified that the second defendant had become aware of the complaints, first hand, during a meeting which he and the second defendant convened with the complainants during mid-October 2020. Implicit therein is that: (i) the identities of the complainants were known to the first and second defendants at the time that the second defendant dispatched “POC1” to the plaintiff; and (ii) that such complaints were not anonymous as recorded in “POC1” and as pleaded by the defendants. It later

emerged, during cross-examination, that it was the complainants' wish that their identities be withheld. The first defendant conceded that the complainants' insistence in this respect was unfair to the plaintiff. No basis for withholding the complainants' identities was pleaded by the defendants, the pleaded version instead suggesting that the identity of the complainants was unknown to the first and second defendants.

[28] When questioned regarding what had transpired between the period of 13 October 2020 and 25 November 2020, the first defendant testified that it provided him and the second defendant with an opportunity to receive the necessary documentary evidence from the complainants to enable them to compile "POC1". The first defendant conceded that during this period, he and the second defendant had ample time to investigate the veracity of the complaints.

[29] He further conceded that the election to provide the plaintiff with 48 hours to respond to "POC1" was not contained in any formal university documentation; that it had been decided upon by him; and that allowing her 48 hours within which to respond was unreasonable in the circumstances.

[30] Significantly, the first defendant conceded that at the time "POC1" was dispatched to the plaintiff, he understood that it would at the very least land up in the hands of both Professor Lloyd and Professor Mey, given the hierarchical structure within the university. The first defendant further conceded that paragraph 9 of "POC1" constituted a serious finding in respect of the

allegations that were made by the complainants, which finding was based on superficial investigations.

[31] It was put to the first defendant during cross-examination by the second defendant's counsel that prior to the dispatch of "POC1" to the plaintiff, the second defendant had already, at that stage, expressed the view to the first defendant that the complaints were no cause for concern from an ethics perspective. This version is in vast contradiction to that which was put to the plaintiff on behalf of the second defendant, to which I have referred earlier in this judgment. In this regard, the first defendant's evidence vacillated between the following versions: (i) that the second defendant, prior to dispatching "POC1" provided *no* comments to the first defendant in respect of the content thereof; (ii) that the second defendant had indicated that whilst *some* of the complaints could easily be answered by the plaintiff, he had some concerns regarding the remainder of the complaints; and (iii) that the only worrisome aspect of the complaint pertained to the allegation regarding the collection of data prior to the granting of ethics clearance.

[32] In respect of the latter contention, the second defendant's counsel brought to the attention of the first defendant that this aspect had already been addressed with the plaintiff at a GSREC (Graduate School Research and Ethics Committee) meeting on 6 November 2020 and that such conduct does not constitute a wilful act of unethical behaviour worthy of university discipline. Whilst this is so, the first defendant denied that the second defendant addressed him on this issue prior to 25 November 2020. On the probabilities,

it is inconceivable that the second defendant, equipped with this knowledge, would not have brought it to the attention of the first defendant when addressing him on the remainder of the aspects in relation to the alleged unethical conduct.

[33] The first defendant conceded having received various written communications from the second defendant post-25 November 2020, in which the second defendant stood firm in his opinion that the conduct complained of did not constitute unethical behaviour. The first defendant provided no cogent reason as to why, in the face of the information provided to him by the second defendant, he continued with the investigation.

[34] Following the close of the first defendant's case, the second defendant was called to give evidence. In essence, the second defendant's stance is that, at all relevant times, the information pertaining to the alleged complaints had been obtained solely by the first defendant and that in signing "POC1", he was merely acting on the instructions of his superior, the first defendant.

[35] The second defendant contends that he became aware of the allegations against the plaintiff, for the first time, upon receipt of the first defendant's correspondence of 15 November 2020. Thereafter, but prior to 25 November 2020, the second defendant recalls that a meeting took place between himself, the first defendant and one student, during which meeting the second defendant advised the student and the first defendant that the allegations

raised by *that* student did not constitute unethical behaviour. Such complaint being distinct to those referred to in “POC1”.

[36] The second defendant’s version that he heard about the complaints for the first time on 15 November 2020 upon receipt of the first defendant’s email is not only inconsistent with the evidence of the first defendant, but it does not accord with the inherent probabilities. The email, under cover of which the first defendant dispatched the comments to the second defendant, simply reads: “*as discussed*”. This, on its own, presupposes that the email was preceded by some or other form of discussion between the first and second defendant regarding the content of the attached document. Had this not been the case, the first defendant would, on the probabilities, have, at the very least, provided the second defendant with a broad explanation regarding the purpose of his correspondence and the attached document.

[37] Insofar as there was any doubt on this aspect, the following exchange emanated in response to questions from the court:

“COURT: ... You stated earlier on that you decided, or both you and Dr Jonas decided, to utilise the Gmail platform. It provided a more confidential platform to have the communication between the two of you. At what stage was this decided?

PROF ARNOLDS: It was when the students asked us not to divulge names and that kind of thing which we did not want to expose students’ names in, on the general Nelson Mandela platforms. So it was more confidential in that way in the Gmail and our investigation in the matter will be confidential.

COURT: Thank you. I understand that you wanted it to be confidential. That was the evidence. I am just trying to ascertain when that conversation took place that you would utilise the Gmail platform.

PROF ARNOLDS: It was right from the first Gmail – the first, I think it is the Gmail [intervenes]

COURT: It is on page 134.

PROF ARNOLDS: 15 November.

...

COURT: So that was discussed prior to the email being sent by Dr Jonas to you?

PROF ARNOLDS: I do not know whether it was a discussion but we – I received – I think there was a decision between the two of us. Let us discuss rather off the line of NMU and discuss the matter on Gmail.

COURT: So that would have been prior to that email being sent.

PROF ARNOLDS: Ja, it could have been M'Lady.

...

COURT: So are you saying at the time that email was sent, there was a prior discussion between you and Dr Jonas?

PROF ARNOLDS: On the matter, yes. There must be from the discussion there, ja.

COURT: You said that the reason was students asked you not to disclose their names. So was that discussion prior to 15 November 2020?

PROF ARNOLDS: It must – M'Lady when Dr Jonas did those interviews and from after that discussion and that would have also been after the 15th. The 15th, yes, then at the same time that the students report to me and that is why he wrote Student X

and Student Y that we do not want to disclose. So it must have been during that time, even before that time that we are not going to disclose the names of the students.”

[38] Immediately apparent from the aforesaid exchange is that: (i) both the first and second defendant had discussions with the students prior to 13 November 2020, this being the date of the document attached to the first defendant's email; (ii) during the discussions, the students requested anonymity insofar as their identities were concerned; (iii) the first and second defendants engaged in prior discussions regarding the content of the document; and (iv) the first and second defendant made a joint decision to utilise their Gmail accounts for correspondence pertaining to the matter. The reason proffered by the first and second defendants at trial for their decision to use their Gmail accounts, namely, to keep the identities of the complainants confidential, is improbable in light of their decision to make use of the nomenclature, “student X” and “student Y”, which on its own, affords the complainants such anonymity. This aspect was not explored further in cross-examination.

[39] The second defendant's evidence that he had no previous involvement in the matter prior to 15 November 2020, and that he had no prior knowledge regarding the content of the correspondence, falls to be rejected.

[40] The second defendant further testified that he advised the first defendant that, from his perspective, the entirety of the students' allegations did not constitute unethical behaviour. Notwithstanding his advice, he thereafter received “POC1”, to which the first defendant had already appended his signature. The first defendant instructed the second defendant to append his signature to

“POC1” given that the second defendant was the plaintiff’s line manager. The second defendant complied with the first defendant’s request notwithstanding that he knew that the allegations did not constitute unethical conduct. According to the second defendant, as the first defendant’s subordinate, he had to act in accordance with the first defendant’s instructions. Having said that, the second defendant expressed that he was of the view that the plaintiff, upon receipt of “POC1” would have been able to answer the allegations contained therein within a short period of time, as she would usually respond to correspondence in this manner, by simply pointing out that the allegations did not constitute unethical behaviour. This is the course that he had expected. He went as far as to testify that the plaintiff, given that the issues constituted “*light research matters*”, was not entitled to obtain legal representation to assist her in responding to “POC1”. It was only in the event that she was found “*guilty*” that she would be entitled to same.

- [41] The second defendant’s evidence in this regard is nonsensical and was clearly an attempt to deflect from the enormity of the clear wording of “POC1”, which *inter alia* states that: (i) the ethics complaint is of a serious nature; (ii) the plaintiff is required to respond to the allegations in *full*, failing which, the allegations would be formally investigated; (iii) the plaintiff had conducted herself in a manner that does not accord with the ethics and values of the university; and (iv) the plaintiff had conducted herself either for the benefit of others and/or herself.

[42] The second defendant, during cross-examination, consistently referred to the contents of the letter being the views of the students, which views were not shared by him. In light thereof, he was questioned by the plaintiff's counsel if he was a mere conduit for the students. The second defendant responded in the negative and contended that he and the first defendant would arrive at a conclusion based upon their investigation and upon the response received from the plaintiff. This response is illogical if viewed against the second defendant's evidence that he knew the allegations did not constitute unethical conduct and required nothing more than a quick response from the Plaintiff confirming this. Moreover, as to what further investigation was needed, considering his view, was unclear in the circumstances.

[43] Despite having stepped down as the Head of Department on 1 December 2020, the second defendant, at the behest of the first defendant, continued to assist in the investigation relating to the students' allegations of unethical misconduct months thereafter, albeit having advised the first defendant on numerous occasions that they were unmeritorious.

[44] At this point, it is appropriate to record that it is not necessary for me to make credibility findings in respect of the defendants' witnesses, regard being had to the central issues which fall to be determined; the uncontested evidence led at trial; the various concessions made; and the inherent probabilities. Counsel on behalf of both the first and second defendants were aligned in this regard.

Legal framework

[45] A claim for defamation is aimed at compensating the defamed party for any publication that injures his or her good name and reputation, with its main focus being the protection of the Constitutional rights to dignity and privacy.²

[46] The elements of defamation include: (i) the wrongful; and (ii) intentional; (iii) publication of; (iv) a defamatory statement; (v) concerning the plaintiff.³ A plaintiff in a defamation action need not prove each of the aforesaid elements to succeed, once he or she has proven publication of defamatory matter concerning himself or herself, a presumption that the statement was both wrongful and intentional arises.⁴ A defendant who wishes to avoid liability must raise a defence which excludes either wrongfulness or intent. This duty on a defendant constitutes a full onus, which must be discharged on a preponderance of probabilities.⁵

[47] One such defence is that of qualified privilege.

[48] The court in *Yazbek v Seymour*,⁶ in considering the above defence, stated as follows:

²² *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)* [2011] JOL 27031 CC.

³ *Khumalo & Holomisa* 2002 (5) SA 401 (CC).

⁴ *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)* (*supra*).

⁵ *Hardaker v Phillips* 2005 (4) SA 515 (SCA).

Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae) (*supra*).

⁶ [2000] 2 All SA 569 (E).

“A situation of qualified privilege arises when one person publishes a statement in the discharge of a duty of the protection of a legitimate 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 objective, namely that of the reasonable man (De Waal v Ziervogel 1938 AD 112 at 121-3; Borgin v De Villiers 1980 (3) SA 556 (A) at 577E-G). The defence of qualified interest is

“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 (see Monckten v British South Africa Co 1920 AD 324 at 332; Basner v Trigger 1946 AD 83 at 105). But the truthfulness or otherwise of the statements has no bearing on whether they were germane to the occasion or not” (per Corbett JA (as he then was) in Borgin v De Villiers, above, at 578H-579A).

Why this should be the case stems from both the nature of the underlying occasion of privilege itself, as well as from the often practical difficulty of separating statements of fact from expressions of opinion or comment. The first consideration is sometimes expressed in the saying that it is the occasion, not the statement, that is privileged. The rationale is aptly expressed by Lord Nicholls in Reynolds v Times Newspapers, above, at 625h-j:

“There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged.

The second consideration appears in the speech of Lord Hobhouse, in the same case, at 657g-i:

“It can sensibly be asked why society or the law of defamation should tolerate any level of factual inaccuracy. The answer to this question is that any other approach would simply be impractical. Complete factual accuracy may not always be practically achievable; nor may it always be possible definitely to establish what is true and what is not. Truth is not in practice an absolute criterion. Nor are the distinction between what is fact and innuendo and

comment always capable of a delineation which leaves no room for disagreement or mistakes. 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.”

[49] Put simply, the onus in a matter such as the present shifts from the one party to another, depending on the stage of the enquiry. In *casu*, the plaintiff is required to prove the publication of a defamatory statement. Once over this hurdle, the onus shifts to the defendants to prove that publication occurred on a privileged occasion. If successful, the onus once again shifts to the plaintiff, who, in order to be successful, will need to establish that the defendants, in publishing the defamatory statement, were actuated by improper motive.

[50] I now turn to the issue of publication. Publication is the communication or making known of the defamatory statement to a person other than to the plaintiff.⁷ It is common cause that “POC1” was addressed and disseminated only to the plaintiff by the second defendant on behalf of the first and second defendants. This aspect was foreshadowed above. Whilst being mindful of what I have stated regarding publication, what needs to be determined is whether, in the circumstances of this matter, the conduct of the first and second defendants, constitutes publication. As stated, the plaintiff, in order to establish publication, pleads that the defendants, in addressing “POC1” to the plaintiff, were aware; alternatively, should have been aware, that the plaintiff

⁷ *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)* [2011] JOL 27031 CC.

would seek advice from the National Tertiary Education Union and that “POC1” would be published to members of the union and to other members of the Nelson Mandela University. I pause to mention that “POC1” is absent any annotation to the effect that the document is private and confidential or for the plaintiff’s attention only.

- [51] The court in *van Vliet’s Collection Agency v Schreuder*,⁸ in considering the question of whether a defendant is responsible for a statement being read by a third party, and with reference to the test set out in *Hall v Zietsman*⁹ stated that:

“I am of the opinion that there is no onus upon the defendant in a case of this kind. There seems to be no reason why a case of libel and slander should stand on a different footing from any other case where all the ingredients essential for the establishment of the plaintiff’s case must be established by him, so that if the matter is left in doubt at the end of the defendant’s case, the ordinary rule should follow that absolution from the instance should be granted. I think in a case of this description it is essential for the plaintiff both to allege and to prove affirmatively either knowledge or reasonable expectation on the part of the defendant that, in the circumstances, publication would be a likely result of his conduct and of his dealing with the defamatory matter complained of.”

- [52] Put differently, what is required is that the defendants knew that their conduct, in transmitting “POC1” to the plaintiff, would result in the publication thereof; alternatively, that they had a reasonable expectation that publication would be the likely result of their conduct. *Albeit* framed slightly differently, there can be

⁸ 1939 TPD 265.

⁹ 16 SA 213.

no doubt that the aforesaid constitutes the basis for the respective defendants' pleaded cases insofar as publication is concerned.

- [53] Later, in *Vengtas v Nydoo and Others*,¹⁰ the court, in considering the question of republication, stated as follows:

"It seems to me that a person who publishes a defamatory statement is prima facie not liable for damages flowing from its unauthorised and voluntary republication by the person to whom, in the first instance he published it, but there may be exceptional cases in which he is liable. Those exceptional cases are (1) where the person who published the defamatory statement originally authorised or intended that there should be republication to the third person, or (2) where its repetition to the third person was the natural and probable result of its original publication to him who repeated it, or (3) where he to whom the original publication was made was under a moral duty to repeat it to the third person and the original publisher was aware, at the time of the original publication, of the facts and circumstances out of which that duty arose."

- [54] Whilst not entirely on point, the exceptional circumstance enumerated as item (2) in *Vengtas*, to a certain degree, mirrors the test set out in *van Vliet's Collection Agency*. In the present instance, I am called upon to determine whether the publication by the plaintiff to members of her union; Professor Poisat; Professor Hendrik Lloyd; and Professor Michelle Mey falls within the ambit of the test expounded upon in *van Vliet's Collection Agency*. As previously stated, the first defendant conceded that at the time "POC1" was dispatched to the plaintiff, he understood that it would at the very least land up in the hands of both Professor Lloyd and Professor Mey. Whilst such an

¹⁰ 1963 (4) 358 (D & CLD).

express concession was not made by the second defendant, who instead contended that the plaintiff was not entitled to obtain assistance in responding to “POC1”, which aspect I have dealt with previously and which I do not accept, I am satisfied that on the facts of this matter, both defendants, on the probabilities, at the very least had a reasonable expectation, and accordingly were aware, that publication of “POC1” by the plaintiff to the aforesaid persons, or such similar persons, would be the likely result of their conduct. This is particularly so if regard is had to the position held by the plaintiff at the business school; her standing within the academic community; and the seriousness of the allegations contained in “POC1”.

[55] I am accordingly satisfied that the plaintiff has established publication of “POC1”.

[56] To establish that “POC1” constitutes defamatory material, the enquiry as set out in *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)*¹¹ bares repetition:

“[89] Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was

¹¹ (*supra*) at paragraph 89.

published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.

[90] The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.

[91] At the second stage, that is whether the meaning thus established is defamatory, our courts accept that 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 had been published. In the present context this succinct exposition attracts three annotations:

(a) Because we are employing the legal construct of the “reasonable”, “average” or “ordinary” person, the question is whether the statement was “calculated [in the sense of likelihood] to expose a person to hatred, contempt or ridicule”. Evidence of whether the actual observer actually thought less of the plaintiff is therefore not admissible. The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff. The view of Neethling that a mere tendency or propensity – as opposed to a likelihood – of harm would suffice, does not appear to be supported by any authority in our law.

- (b) *If it is found that the statement is ambiguous in the sense that it can bear one meaning which is defamatory and others which are not, the courts apply the normal standard of proof in civil cases, that is, a preponderance of probabilities. If the defamatory meaning is more probable than the other, the defamatory nature of the statement has been established as a fact. If, on the other hand, the non-defamatory meaning is more probable, or where the probabilities are even, the plaintiff has failed to rebut the onus which he or she bears. Consequently it is accepted as a fact that the statement is not defamatory. Or, as stated somewhat more succinctly in Channing v South African Financial Gazette Ltd. and Others:*

“If, upon a preponderance of probabilities, it is found that to those [ordinary] readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails.”

- (c) *Examples of defamatory statements that normally spring to mind are those attributing to the plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct. But defamation is not limited to statements of this kind. It also includes statements which are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd; and which expose the plaintiff to contempt or ridicule that renders the plaintiff less worthy of respect by his or her peers. Everyday experience demonstrates that a caricature or cartoon can be more devastating to the image of the victim than, say, an accusation of dishonesty.”*

[57] In applying the first stage of the objective test as set out in *Le Roux & others*, I am satisfied that the reasonable reader of ordinary intelligence would,

contextually, understand “POC1”, in its ordinary meaning, to mean that the plaintiff, in her position held with the university, was assisting students under her supervision to, *inter alia*, plagiarise, and accordingly, was conducting herself in a manner, which was not only unethical, but which was contrary to the values of the university, such conduct being motivated by personal gain; alternatively, for the benefit of others, without justification.

[58] Having dealt with the first stage of the enquiry, I am required to consider whether the meaning attributed to “POC1” is defamatory of the plaintiff and accordingly whether “POC1” is likely to undermine the good esteem in which she is held by the reasonable or average person to whom it was published. Objectively, I am of the view that the meaning attributed to “POC1” is defamatory and attributes to the plaintiff that she has been guilty of dishonest, immoral, or otherwise dishonourable conduct as contemplated in *Le Roux & others*. Moreover, I am satisfied that the content of “POC1” is likely to injure the good esteem in which the plaintiff is held by the reasonable or average person to whom “POC1” was published, the identities of which I have dealt with previously in this judgment.

[59] Accordingly, the presumption that “POC1” is both wrongful and intentional arises and the onus shifts to the defendants to prove their pleaded defence, namely that of qualified privilege, falling within the category of “*discharge of a duty or furtherance of an interest*”.

[60] Such a category is present “[w]here a person publishing the defamatory matter is under a legal, moral or social duty to do so or has a legitimate interest in so doing, and the person to whom it is published has a similar duty or interest to receive it.”¹² It is worth repetition that it is the occasion that is privileged and not the statement. The test is objective,¹³ which is judged by the standard of the reasonable person, having regard to the relationship between the parties and the relevant surrounding circumstances. Although, it is not to say that the subject matter of the communication is immaterial, it is not, the reason for this is manifest. An occasion which is privileged for communication upon one subject is not privileged for a communication upon another subject not germane to the occasion.¹⁴

[61] It is incumbent upon the defendants to prove both that publication took place during a privileged occasion and that the content of “POC1” was relevant to the matter at hand. Unlike absolute privilege, the defence of qualified privilege, much like its name suggests, offers only provisional or qualified protection to the defendants, which falls away if the plaintiff can prove that the defendants exceeded the bounds of their ground of justification.¹⁵ Without burdening this judgment unnecessarily, and regard being had to the body of evidence, with particular reference to: (i) the respective positions held by the

¹² *Basner v Trigger* 1946 AD 83 at p 93 and 94.

¹³ *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at pp 253 and 254.

See also: *Botha v Mthiyane* 2002 (1) SA 289 (W) at p 325.

¹⁴ *De Waal v Ziervogel* 1938 AD 112 at p 122.

¹⁵ Neethling *et al* Neethling's Law of Personality (2nd Edition) (Lexis Nexis) 2005 at p 145.

parties at the university and their hierarchy; (ii) the subject matter of “POC1”; (iii) the concessions made by the plaintiff during cross-examination regarding the respective duties and rights of the parties; (iv) and the relevant surrounding circumstances, I am satisfied, objectively speaking, that the defendants have discharged the onus on them to establish their pleaded defence, on a preponderance of probabilities.

[62] This, however, is not the final denouement of the matter, with “POC1” only being provisionally protected. It remained open to the plaintiff to establish affirmatively, on the evidence, the presence of an improper motive; that is to say, malice, on the part of the defendants.¹⁶

[63] Given the subjective nature of malice, I am alive to the fact that a plaintiff, in defamation proceedings, will often find it an arduous task to furnish direct evidence thereof, and accordingly its existence must be inferred from other intrinsic or extrinsic facts.

[64] Cobett JA, in dealing with such an inference, observed as follows in *Borgin v De Villiers and Another*.¹⁷

“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.”

¹⁶ *Basner v Trigger* 1946 AD 83.

¹⁷ 1980 (3) SA 556 (A).

[65] I have dealt with the evidence led at trial extensively, and more particularly, the inherent probabilities; the contradictions (including internal contradictions, both in the evidence itself, as well as with reference to the pleadings), inconsistencies and improbabilities. On a consideration thereof, together with the numerous concessions made by the respective defendants, the inference is inescapable that both defendants, at the time of dispatching “POC1” to the plaintiff, did not believe the content thereof to be true. Insofar as the second defendant is concerned, this was expressly conceded. Whilst no such concession was made by the first defendant, and in the event that I am incorrect in my above finding insofar as the inference extends to him, it cannot be gainsaid that he, at the very least, was reckless as to the truth or falsity of the assertions contained in “POC1”.¹⁸ Not only was he expressly advised of their falsity, prior to the transmission of “POC1”, but he conceded that prior to transmission, he and the second defendant had ample time to investigate the veracity of the complaints. Notwithstanding the aforesaid, the first defendant further conceded that the finding contained in paragraph 9 of “POC1” was a serious finding in respect of the plaintiff, which was based on superficial investigations. I have previously referred to the conflict which existed between the first defendant and the plaintiff at the relevant time. The first defendant’s concession that affording the plaintiff 48 hours to respond to “POC1” was unreasonable in the circumstances; and his inability to provide a satisfactory reason as to why he continued with the investigation against the plaintiff is telling. In the absence of any suggestion to the contrary, I am satisfied that the plaintiff discharged the onus of proving that the first defendant

¹⁸ *Vincent v Long* 1988 (3) SA 45 (CPD).

was actuated by malice and accordingly, exceeded the ambit of qualified privilege, forfeiting the protection offered thereby.

[66] I reached the same conclusion in respect of the second defendant, whose version, as highlighted earlier, evolved somewhat, as the proceedings progressed. My aforesaid comments in respect thereof are apposite. Moreover, his attempt to deflect from the seriousness of the wording of “POC1”; and to distance himself from: (i) the concessions made by the first defendant; (ii) any involvement in the matter prior to 15 November 2020; (iii) any prior knowledge regarding the content of the first defendant’s correspondence on such date; (iv) personal dealings with the “anonymous” complainants; and (v) the decision to dispatch “POC1” to the plaintiff, speak for themselves. As stated, the second defendant’s explanation for having utilised the Gmail platform, in light of the nomenclature utilised by the first and second defendants in the correspondence is illogical. Regard being had to the above, I am satisfied, on a balance of probabilities, that the only reasonable inference in the circumstances is that he too was actuated with malice and exceeded the ambit of his pleaded defence.

[67] The first and second defendants’ persistence regarding the so-called “anonymous” complaints; their refusal to disclose the identities of the said complainants, once it became apparent during evidence that their identities were known to the defendants, in circumstances where no material justification existed for such refusal; and their failure to formally inform the

plaintiff that the investigation had been completed,¹⁹ a fact which came out in evidence for the first time, lends further support to my above findings in respect of malice.

[68] Having come to this conclusion, the issue of quantum remained to be determined. An award for damages in proceeding of this nature should compensate the plaintiff for both wounded feelings and reputational damage.²⁰ Such award is not punitive in nature. Whilst the court has a wide discretion in the determination of the award for damages, such discretion being a discretion in the strict sense, I am mindful that the extent of sentimental damages for defamation has implications for the properly mediated connection between dignity and free expression in that overly excessive amounts will deter and foster intolerance to the latter.²¹

[69] In considering a suitable award for damages, I had regard to the nature of the defamatory statement contained in “POC1”; the nature and the extent of the publication; the reputation, character and conduct of the plaintiff; the effect of the statements on the plaintiff; and the motives and conduct of the defendants. All these factors have been dealt with previously in this judgment, save perhaps to add that the extent of the publication was not extensive, nor was there any evidence to suggest that the plaintiff suffered any reputational damage, which of course does not account for her wounded feelings, to which

¹⁹ And had come to naught (unsurprisingly so).

²⁰ *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)* (*supra*).

²¹ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

she testified, and which I accept unreservedly. There was no question of an apology being offered by either of the defendants throughout the proceedings despite being prompted in this regard by the plaintiff's counsel; same only having been tendered on behalf of the second defendant, through his counsel, at the end of the proceedings during argument.

[70] Having regard to all the circumstances of the matter, and the factors highlighted above, viewed against the backdrop of the prevailing attitude in the community, I am of the view that an award in the amount of R60,000.00 is appropriate in the circumstances.

[71] In respect of costs, despite the quantum falling within the jurisdiction of the Magistrates' Court, I am satisfied that in the circumstances of the present matter, costs on a High Court scale are appropriate and should accordingly follow. Whilst not binding on me, I make mention of the fact that counsel for plaintiff as well as for the second defendant, were *ad idem* in this respect.

[72] Having already granted judgment herein, I need make no further order.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Judgment: 18 April 2023

Reasons: 17 May 2023

Appearances:

For the Plaintiff:

Mr Jooste

Instructed by:

Friedman Scheckter

75 Second Avenue

Newton Park

Gqeberha

For the First Defendant:

Mr Lamprechts

Instructed by:

Lawrence Masiza Vorster Inc

214 Cape Road

Mill Park

Gqeberha

For the Second Defendant:

Mr Richards

Instructed by:

Kaplan Blumberg

Block A, 1st Floor

Southern Life Gardens

70 Second Avenue

Gqeberha

Port Elizabeth