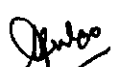




IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ✓	
DATE 28/4/17	SIGNATURE 

CASE NO: 8018/2015

DATE: 5/5/2017

IN THE MATTER BETWEEN

DAVID DABEDE MABUZA

PLAINTIFF

AND

DR MATHEWS PHOSA

DEFENDANT

JUDGMENT

PRINSLOO, J

[1] The plaintiff sues the defendant for damages for alleged defamation. He claims the amount of R10 million in damages with a public apology and costs on a punitive scale. In his counsel's heads of argument, he indicates that he will settle for R1 million plus a public apology and costs on a punitive scale.

[2] The defendant denies that he defamed the plaintiff.

- [3] Before me, Mr Labuschagne SC appeared for the plaintiff and Mr Maritz SC for the defendant.

Brief synopsis

- [4] The plaintiff is the present Premier of the Mpumalanga Province. He is a senior, and, by all accounts, influential member of the African National Congress ("ANC") movement and government.

- [5] The defendant, not to be outdone, is a former Premier of the Mpumalanga Province and a former member of the National Executive of the ANC. Indeed, the defendant served a five year term, from 2007 to 2012, as a member of the "Top 6" of the ANC in the position of its Treasurer-General.

The defendant is also a qualified attorney and holds a B Proc and an LL.B degree. Where he goes by the title of "Doctor", I assume that he also holds an honorary degree.

- [6] On 21 November 2014, the contents of a document ("the Spy Report"), ostensibly prepared by the Security Police of the previous government, were published in the media.

- [7] The Spy Report is a finely printed, undated, four page affair (without an official ending) and it contains an indication that the plaintiff, named in the report but described in the body thereof as "Source", was enlisted as an agent of the Security

Police in 1985 under Security Police Source number PN485. The so-called "handlers" of the Agent David "DD" Mabuza, or "Source", are said to be Warrant Officer Fundama and L T Venter. Agent Mabuza is described as a high level Source "holding senior positions in various structures had high level contact with the leadership of the ANC in exile". His area of operation is stated to be "student, labour and civic movements" and the "period of operation" is said to be 1985 to 1993.

[8] The name of the defendant appears repeatedly in the Spy Report.

An example, for illustrative purposes, is the following extract from "Report 1" which is the first of eight "reports" in the Spy Report:

- "1. Source attended a SACC meeting at Kgotso House, JHB.
2. Present at the meeting were M (I only use the initial to protect the identity of the person named in the Spy Report to cater for the possibility, remote as it may be, that the person named could be prejudiced by this disclosure) and Mathews Phosa and F P, a coloured woman from Port Elizabeth.
3. Source observed that Mathews Phosa must be linking directly with the ANC leadership in exile ..."

There is also an observation, at the end of the report, presumably by the handlers, that "source must monitor the movements of Mathews Phosa, as we suspect he may escape into exile".

[9] The basis of the plaintiff's defamation case is his claim that the defendant was the author of the Spy Report which he disseminated with the intention of injuring the good name of the plaintiff, *inter alia* within the ranks of the ANC. When the contents of the report were published in the media on 21 November 2014, the plaintiff was already the Premier of Mpumalanga.

[10] In his plea and his evidence, the defendant emphatically denied that he authored the Spy Report or had anything to do with the creation thereof. He testified that the Spy document was anonymously delivered in an unmarked envelope at his White River residence during his absence.

[11] It is useful to quote an extract from the defendant's evidence in this regard (I omitted some interruptions by myself where I sought clarification of what had been said in order to keep a proper record):

"Now this case is about the so-called 'Spy Report', which is annexed to the particulars of claim and it is also in the exhibit A trial bundle at p104. --- That is correct.

When you did first see this report? --- Well I saw this report sometime in September 2014.

Describe to the Court what the circumstances were in that regard? --- M'Lord, I have a house in White River and I also have a house in Kiepersol.

That is the farm property? --- The Kiepersol is the farm property. But I do not always live there, I spend most of the time in Johannesburg. So a lot of post ... [intervenes].

Just a moment, the Kiepersol home is in the so-called farm property that

we have heard of and you say that you spend a lot of time in Johannesburg, yes? --- So now and then the people at the two houses tell me when there is post in the house.

Yes? --- Which M'Lord they keep for me when I return.

Yes? --- At that particular time when I found this unmarked envelope ...
[intervenes]

Did you say unmarked? --- It was unmarked M'Lord.

Yes? --- In the normal course I opened it.

MR MARITZ: What residence was that envelope received? --- At the White River residence.

Who handed you the envelope? --- The cook in the house, Mr P M (my note: I again refrain from mentioning the name of the individual).

Do you know who had delivered that envelope? --- I do not know.

MR MARITZ: What was inside the envelope? --- M'Lord what was inside the envelope is what has now become the so-called 'Spy Report' which is before the Court.

Did you read the document? --- Yes M'Lord I did read the document.

What was your reaction? --- I was shocked by the content and worried about the content.

Did you realise that it is related to and concerned but you did not [indistinct] the plaintiff in these proceedings? --- On the face of the document, it refers to the current Premier of the Province of Mpumalanga.

Now it is alleged by the plaintiff in its particulars of claim that you were the author of that document and that you had cooked up that document, or fabricated it? --- The plaintiff's allegation is a serious fabrication against me.

You deny it? --- I deny flatly.

MR MARITZ: What happened further in regard to this document that you have read? --- M'Lord, I decided that the allegations contained in that document are so serious, or such a serious nature that I needed to report them to the highest officials of the African National Congress.

MR MARITZ: Why did you regard the allegations as being serious for the African National Congress? --- Well the allegations contained in this document before you M'Lord, on the face of it if proved true could it negatively and seriously impact on the integrity of the African National Congress, as well as the leadership of the Mpumalanga Province in particular the office of the Premier.

Yes? --- And the integrity of the leadership of the Province, of Mpumalanga Province in particular the office of the Premier, may be in particular the person of the Premier.

MR MARITZ: For what purpose did you decide this would have to be communicated to the ANC leadership? --- I was reasonable expecting the leadership of the ANC having read the document like I did, would investigate each and every allegation in the document.

MR MARITZ: At this time you were still a member of the ANC and you still are today, is that right? --- Yes I was and I am still a member of the African National Congress.

Would it be correct to describe you as a senior in respect of the member of the ANC? --- That would be correct M'Lord.

At this time that we are talking about now, when you took your decision that it report to be communicated to the ANC [indistinct], just explain to the Court, does the ANC have a National Executive? --- Yes M'Lord it does.

Consisting of how many members? --- At the moment of 108 members.

Is that body that national top leadership of the ANC? --- Well the highest leadership structure of the ANC, in terms of the ANC Constitution.

Does this National Executive have a smaller top Executive Committee? --- Yes M'Lord and it is made up of the following positions. A Chairperson, a President, a Deputy President, a Secretary-General, a Deputy Secretary-General and a Treasurer-General.

The last being the position that you occupied at one stage? --- Yes M'Lord.

At the time in September of 2014, who occupied the positions as that described? --- The Chairperson was is still Baleka Mbete.

COURT: Yes? --- Yes and the President is Mr Jacob Zuma.

Yes? --- The Deputy President is Mr Cyril Ramaphosa. The Secretary-General is Mr Gwede Mantashe. The Deputy Secretary-General is J C Duarte.

Yes? --- The Treasurer-General is Doctor Zweli Mkhize.

What steps did you take pursuant to your decision to have this document communicated to the leadership of the ANC? --- I telephoned ... [intervenes]

Yes, I telephoned? --- The Deputy Secretary-General Ms Jessie Duarte and said to her, please may you give me a safe e-mail address, as I wish to send you a sensitive document relating our colleague Mr David Mabuza, the Chairperson of the ANC Mpumalanga Province and I emphasised it was a sensitive document that must be handled sensitively.

MR MARITZ: Did you pursuant thereto provide with such a safe e-mail address? --- She did M'Lord within five minutes.

Yes and what did you then do? --- When I called her, I was busy in a colleague's office Mr Nic Elliot. I said to Mr Elliot, please may you cause this document to be e-mailed or scanned to this e-mail address of Comrade Jessie Duarte.

Was that done? --- That was done.

Why did you send it from his offices and not your law firm? --- Because I was visiting him and I happened to be there when I phoned Comrade Jessie and Nic is a friend [...]

COURT: Just one moment. Because I was visiting him? --- At his office M'Lord.

And? --- He is a friend, a comrade.

I think you also said you were there when you called her? --- Yes I was there M'Lord.

Yes he is a friend. Yes? --- A comrade and a business partner. If I may say M'Lord, his office is very under-populated and I thought it is safe to send the document from there."

[12] On the weight of the evidence, it appears to be accepted that Ms Duarte then distributed the Spy Report, presumably on a confidential basis, to the rest of the Top Six.

The e-mail from Mr Nic Elliot's office sent by his Secretary Ms Ronelda Jordaan on 29 September 2014 to Ms Duarte's confidential e-mail address, reads as follows:

"Dear Sir

Attached please find the confidential document as discussed with Doctor Phosa.

Kind regards"

[13] Counsel Maritz then went on to ask the defendant why he chose Ms Duarte as the addressee in the Top ANC leadership. The defendant explained that on 2 April 2014 Ms Duarte visited his business office for political discussions of a wide range of issues, which she thought were very important to be discussed at a national level. It was in the context of the national elections. The last issue she raised was "She said to me just tell me, explain to me, we want to know as the officials of the ANC who is this David Mabuza exactly?" According to the defendant he explained to her how they used to work together (that is him and the plaintiff) in the underground. As an activist of the ANC at the time underground, with very clear instructions of the ANC leadership in exile, they formed cells in the various parts of the country. In particular the aim was to recruit young students to become members of the ANC. The plaintiff was recruited into one of the many cells across the so-called Eastern Transvaal at the time. The defendant chose Ms Duarte as the addressee of the Spy Report because of the enquiry she had made on 2 April. At that time Ms Duarte was, and still is, the Deputy Secretary-General of the ANC, as such, also a member of the Top 6. When the defendant became the Premier of Mpumalanga in 1994, he appointed the plaintiff as the MEC of Education in the Province.

[14] According to the defendant, the next he heard about the Spy document, was when he was called by a journalist from *Beeld* while he was overseas. Upon his return, he

received the Spy Report from the journalist together with a letter of demand addressed to him on 14 November 2014 by the plaintiff's attorney. This letter of demand, with a second letter from the same attorney dated 17 November 2014, were also delivered to both his residences.

[15] I turn briefly to these two letters addressed to the defendant by the plaintiff's attorneys and dated 14 and 17 November 2014 respectively.

- As I mentioned, the defendant testified that the Spy Report was sent to his office under cover of the letter of 14 November. Thereafter the letter was delivered to both his residences as was the letter of 17 November.

The 14 November letter is a lengthy affair running into more than five pages.

The attorney states that the Spy Report was received from Ms Jessie Duarte, a member of the Top 6 of the ANC at the time. The attorney confirms that he has information that the Spy Report was sent to Ms Duarte by the defendant, and complains about the serious allegations about the plaintiff which appear from the Spy Report. He writes that allegations relating to senior ANC members being apartheid agents are not new, and refers to a few examples where such allegations were made. He says that in November 1997, a well-known opposition politician (I refrain from mentioning her name although it appears in the letter) listed eight names, including that of the defendant, as an alleged apartheid spy. The attorney then writes the following to the defendant:

"Those of us who were then working with you closely were shocked by this disclosure but worked tirelessly to defend your name as the then Chairperson of the ANC Provincial and most significantly to protect the integrity of the office you held as the Premier of the Mpumalanga Province. Ms X's (the opposition politician) allegations about you being an alleged apartheid agent were not new to our client as such allegations were peddled since your student days at the University of the North, leading to your room being allegedly torched.

Further information was provided by some of your detractors to this effect but our client continued to defend you as a senior member of the ANC by restraining the disclosure of such adverse and untested allegations made against you.

Our client finds it disturbing to learn that you have allegedly directly or indirectly contributed to the dissemination of the said so-called dossier containing defamatory and false allegations against him of being an apartheid agent. Our client deems these spurious and senseless allegations in a serious light particularly in circumstances where some may involve your direct or indirect complicity as a senior member of the ANC."

The attorney goes on to say that the plaintiff will be approaching the President of the Republic to expeditiously appoint a Judicial Commission of Enquiry to

investigate and enquire into allegations made against him in the so-called dossier –

"However, as part of the terms of reference, our client will also request the President to direct the Commission to investigate and enquire into the aforesaid allegations linking you as an apartheid agent. Information linking you as an apartheid agent either oral and as per documents will also be collated and forwarded to the Commission if appointed."

The attorney goes on to say that "our client has taken positive steps to have an objective, independent and transparent Judicial Commission appointed" and that the plaintiff will also advocate media coverage (including press and television) of the hearings of the Commission. The letter concludes by stating that a formal request will be made to the President to urgently appoint this Judicial Commission and this will happen without further notice to the defendant.

Strangely, there was no evidence before me about the destiny of this threatened Judicial Commission of Enquiry. There is no evidence about whether the Commission was ever urgently called for by the plaintiff, and, if so, whether it took place. On a general reading of the evidence, it never became a reality. Indeed, the plaintiff saw fit not to give evidence at all before me. I will deal with this subject later.

What does appear to be of particular relevance is the fact that the defendant, in his evidence in chief, indicated that the plaintiff was holding "one press

conference after the other saying I am the author of that document". He complained about this to Ms Duarte when he met her in a restaurant in Johannesburg and she told him that she did not know how the Spy document was leaked from the possession of the Top 6. She distributed copies to the Top 6 on the advice of the President himself.

On a general reading of the evidence of the defendant, he met Ms Duarte even before the 14 and 17 November demands were delivered. He speculated that it was on about 11 November. On this occasion he already told her that the plaintiff was telling the press that he, the defendant, was the author of the Spy document.

The record is somewhat confusing when it comes to determining these dates, but I get the general impression that, at least, the plaintiff, according to the defendant, was announcing that the latter authored the Spy document before it was actually published in the newspapers on 21 November 2014. The exchanges in this regard between the defendant and his counsel are reported as follows in the record:

"MR MARITZ: Now we have heard the evidence of this Spy Report it was published also in November 2014 in the newspapers [indistinct]?"

--- Yes but I did not publish it, it was published by the plaintiff and I said this in the media repeatedly, he kept publishing it in the press conferences ..."

My general impression is that it is the evidence of the defendant that the plaintiff already publically announced that the defendant authored the document before it was published in the newspapers on 21 November 2014. As I indicated, this may even have happened before the letters of demand were delivered because the defendant says he met Jessie Duarte, complaining about this, on 11 November.

The undisputed evidence of the defendant is that the plaintiff also laid a charge of *crimen iniuria* against him with the police. The investigating officer was one General Tsumane who visited the defendant, and after the latter brought certain evidence to his attention, and when the General read the evidence "I saw him sweat a bit and he said there is no case here he did not write this document, so he never charged me".

All this evidence of the defendant is, of course, undisputed.

- The second of the two letters addressed to the defendant by the plaintiff's attorneys, the one of 17 November 2014, is more concise and to the point: it refers to the previous letter of 14 November 2014 and the attorney then says the following to the defendant:

"Our further instructions are that you are the author, publisher and distributor of 'the dossier' referred to in the aforementioned letter and that you continue to distribute it widely with the sole intention to injure our client's reputation, character and good name, meanwhile you know

that the contents thereof are lies and untruthful. A copy of the dossier is attached."

The letter goes on to demand R10 million in damages from the defendant and to threaten with an interdict if the defendant did not refrain from circulating the Spy Report and defaming the plaintiff.

[16] A reasonable inference to be drawn from these two letters addressed to the defendant is that the plaintiff, well before the Spy Report was published in the media on 21 November 2014, already publically expressed the view, and contended, that the defendant was the "author, publisher and distributor" of the Spy Report.

[17] So much for a brief synopsis of the underlying circumstances of the case.

The pleadings

[18] Where this is a defamation action, the type of action which can be something of an unruly horse when it comes, for example, to the requirements for establishing the alleged cause of action and the incidence of *onus*, it is useful to quote extracts from the pleadings.

[19] These are extracts from the amended particulars of claim:

"

3

3.1 On or about 29 September 2014 the defendant caused publication and distribution of a document titled 'Classified: Top Secret! Reports of a

Police Agent' ('the document'), a copy of which is annexed hereto marked 'A'.

3.2 The defendant caused the publication and distribution of the document as follows:

3.2.1 On or about 29 September 2014 the defendant delivered the document to Nic Elliot with instructions to forward it to Ms Duarte;

3.2.2 Mr Elliot provided the document to Ronelda Jordaan for purposes of forwarding same to Ms Duarte;

3.2.3 The defendant caused the aforesaid forwarding of the document to Ms Duarte with the intention of causing its further distribution within the ANC;

3.2.4 On or about 29 September 2014 annexure 'A' hereto was disseminated by Yasmin Duarte by e-mail to Cyril Ramaphosa, Zweli Mkhize and Gwede Mantashe, all being senior officials of the ANC.

3.3 The document, annexure 'A' hereto, contains allegations of and concerning the plaintiff which are *per se* defamatory of the plaintiff. The document contains the following:

3.3.1 On the first page it is stated:" then follows, in paragraphs 3.3.1 to 3.3.9, extensive quotes from the Spy Report. All seven 'reports' contained in the document are touched upon. I have already illustrated details of the nature of the document and quoted extracts, by way of example, from 'Report 1'. I mentioned that I consider it prudent to refrain from

mentioning the names detailed in the report in order to protect those individuals, many of whom are well-known officials in the ANC and in government. As I already briefly mentioned, the Spy Report is a finely printed affair containing an extraordinary amount of detail. The defendant features very prominently in most of the eight 'reports' comprising the document. Here is another example quoted, for illustrative purposes, from the 'comments and observations' of the 'handlers' or, at least, of the author or authors of the document, with regard to 'Report 3':

- "(a) It is clear that Mathews Phosa is becoming a real danger to our strategy of controlling the Eastern Transvaal.
- (b) From the reports and discussions with Source, it is clear that Source cannot handle Mathews Phosa.
- (c) We recommend a state security council order, to permanently remove Mathews Phosa."

Here is another choice example (not one of those quoted in the particulars of claim and, again, I refrain from mentioning the full names although many of the full names are quoted in the extracts listed in the particulars of claim) from Report 4:

- "1. Source reports that he travelled to Swaziland, in a bid to contact ANC people there.

2. Source reports that he also travelled to Mozambique for the same reason.
3. Source reports observing a meeting at Hotel Poliano, between Mathews Phosa and a person he suspects to be JZ.
4. Source reports that, as per an instruction, he met TZ and FM.
5. Source reports that he and Askari BN followed Mathews Phosa on what Source suspects was the day of his escape (Warrant-Officer Fundama and LT Venter were behind them).
6. Source reports that Mathews Phosa's car, a Peugeot, stopped on the roadside, upon which Mathews Phosa got off, apparently to relieve himself.
7. Source reports that close to three hours passed by and Mathews Phosa was nowhere to be seen!"

[20] I make these observations at this point, because, as will be briefly described, the sole witness relied upon by the plaintiff to prove his case that the defendant authored the Spy document, one Jan Venter, a former housekeeper of the defendant, initially (before later disavowing his own evidence) testified that the defendant and Nic Elliot, in March 2014, sat on the defendant's veranda one evening creating the Spy document with the defendant scribbling details on blank paper which he requested Venter to fetch for him. If one considers the nature of the Spy document, some extracts from which I have quoted for illustrative purposes, and the extraordinary amount of detail therein contained and all the names therein mentioned, it will have to be recognised, if it were to be found, on the probabilities, that the defendant, with Nic Elliot, authored and "concocted" the Spy Report under those serene circumstances, that the defendant,

scribbling the details on blank paper, exhibited phenomenal powers of recollection, and an exceptional memory (considering that most of these events are alleged to have occurred many years before March 2014) in order to come up with this product featuring himself as one of the main players. It will have to be accepted, on the probabilities, that the defendant embarked upon this extraordinary exercise on his veranda one evening, despite the fact that he, as a former member of the Top 6 of the ANC, is an extremely well-known and highly respected official of that movement and a respected practising lawyer.

I continue to quote the contents of the amended particulars of claim:

"

4

4.1 The document read as a whole, including the aforesaid statements in the document, are wrongful and defamatory of the plaintiff and were intended and understood by readers thereof to mean that the plaintiff:

4.1.1 was a spy of the South African Police; and/or

4.1.2 was feeding information regarding the activities of the ANC and persons within the ANC to the South African Police; and/or

4.1.3 was disloyal to the ANC; and/or

4.1.4 conducted himself in a traitorous manner by passing on confidential information on persons within the ANC to the police at a time when:

4.1.4.1 the ANC was banned by the former Government or had just been unbanned; and

4.1.4.2 the South African Police was seen within the ANC as a force of oppression of the ANC and the majority of the population.

5

The aforesaid document containing defamatory matter as set out above was published by the defendant with the intent to defame the plaintiff, with knowledge of wrongfulness.

6

As a result of the aforesaid unlawful and defamatory publication, the plaintiff has suffered injury to his reputation.

7

In aggravation of *quantum* the defendant:

- 7.1 authored the document (on a date unknown); and
- 7.2 fabricated its content, knowing same to be false;
- 7.3 distributed, and/or caused the distribution of the document to the Sunday Independent Newspaper for purposes of procuring the publication of the document, or portions thereof, in the print media (my note: the allegations in subparagraph 7.3 were not persisted with during the trial).

8

In the premises the defendant is liable to the plaintiff for:

- 8.1 an apology;
- 8.2 payment of damages in the amount of R10 million (my note: reduced, as I mentioned, to R1 million in closing argument);
- 8.3 costs of suit on a punitive scale.

9

Notwithstanding demand the defendant has failed and/or refused to issue an apology and to pay the aforesaid damages.

Wherefore the plaintiff claims against the defendant an order in the following terms:

1. payment of damages in the amount of R10 000 000,00;
2. the defendant is ordered to tender an unconditional apology published at his costs in the print media, including the Sunday Independent and the Lowvelder;
3. costs of suit on the scale as between attorney and client."

[21] I turn to the plea.

[22] The main thrust of the plea is contained in paragraph 2 thereof (*ad* the allegations in paragraphs 3.1 and 3.2 of the particulars of claim, *supra*).

[23] It is convenient to quote the contents of paragraph 2 of the plea:

- "2.1 During the course of September 2014 an envelope containing the document, annexure 'A' to the particulars of claim, was delivered to defendant's residential address by an unknown person.
- 2.2 After having read the document, defendant on or about 29 September 2014 requested Mr Nic Elliot to forward the document to Jessie Duarte.
- 2.3 Communication of the document aforesaid by defendant was done under circumstances where defendant had a right and/or duty and/or interest in doing so and where the addressee of the document had a corresponding right and/or duty and/or interest to receive such communication.
- 2.4 The corresponding right and/or duty and/or interest arose from:
- 2.4.1 the fact that at all times relevant hereto defendant was – and is – a senior member of the ANC political party and former Treasurer of the ANC Executive Committee;
- 2.4.2 the fact that the said document contained allegations of and concerning the plaintiff who, at all times relevant hereto, was – and is – a prominent member of the ANC;
- 2.4.3 the allegations contained in the said document had potentially serious implications for the ANC as a political party;
- 2.4.4 at all times relevant hereto, the addressee, Jessie Duarte, was the Deputy Secretary-General of the ANC political party and one of the Top 6 executives of the ANC National Executive Committee;
- 2.4.5 in her capacity aforesaid, the said Duarte was the appropriate executive level in the ANC National Executive to be apprised of

the said document and the appropriate person to investigate the allegations contained in the said document and/or deal with the matter in the manner that she saw fit;

2.4.6 after having received the said document, the defendant caused the document to be forwarded to the said Duarte so that she, as Deputy Secretary-General of the ANC, would either investigate the matter or deal with it in a manner that she saw fit.

2.5 The communication of the document aforesaid accordingly constituted a privileged occasion which was not unlawful or wrongful.

2.6 The defendant, in addition, subjectively believed that the communication of the said document to the said addressee constituted part of a privileged occasion and that it was not wrongful to do so on the grounds set out above.

2.7 As a result of such belief, the defendant did not have *animus iniuriandi*.

2.8 Defendant has no knowledge of the alleged dissemination of the document referred to in paragraph 3.2.4 of the Particulars of Claim and does not admit it.

2.9 Save for the foregoing, each and every allegation herein contained is denied as if specifically traversed."

[24] In paragraph 3 of the plea, the defendant admits that the Spy document contains allegations of and concerning the plaintiff.

In the plea, it is also denied that the allegations in the Spy document are *per se* defamatory but, later, the concession was made that these allegations are, indeed, *per se* defamatory.

[25] Other allegations, including those relating to *quantum* are denied in the plea.

[26] I turn to the plaintiff's replication.

[27] The essence of the replication is captured in paragraph 1 thereof, the contents of which I find convenient to quote:

- "1.1 The document, annexure 'A' to the particulars of claim, is a fabrication.
- 1.2 The defendant was the author and/or a party to the creation of the aforesaid fabrication.
- 1.3 The aforesaid document was fabricated and disseminated with an indirect and/or improper motive, constituting malice.
- 1.4 The aforesaid indirect and/or ulterior purpose for the fabrication and dissemination of the report:
 - 1.4.1 was to discredit the plaintiff within the ANC; and/or
 - 1.4.2 was aimed at setting in motion steps within the ANC for having the plaintiff removed as Provincial Leader of the ANC and/or having him removed as Premier of the Province, Mpumalanga.
- 1.5 In the premises, the plaintiff denies that the document was published lawfully within the ANC within the ambit of a qualified privilege."

[28] So much for the pleadings.

The issues

[29] A central issue in this case is the defence of qualified privilege raised by the defendant to the plaintiff's defamation action.

[30] In *Amler's Precedents of Pleadings* 8th edition the learned author Harms, at p163, when considering defences to defamation actions, deals with the essentials of the defence of qualified privilege in the following terms:

"This defence is available if the defamatory words were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statement. A typical case is a statement made in the course of litigation. The test is an objective one and the Court will judge by the standard of the reasonable person, having regard to the relationship between the parties and the surrounding circumstances." (I refrain, for the sake of brevity, from quoting the authorities relied upon by the learned author.)

"The *onus* rests on the defendant.

The defendant must allege and prove (*prima facie*) that the statement was pertinent or germane to the issues.

Qualified privilege – rebuttal: the plaintiff may rebut the defence by alleging (in her or his replication) and proving:

- (a) that the statement did not have some foundation in the evidence or circumstances surrounding the case, that it was not germane; or

(b) malice – that is, an indirect or improper motive." (Again I refrain from recording the authorities relied upon.)

[31] In closing argument before me, counsel for the plaintiff, quite correctly and properly in my view, conceded that the circumstances under which the defendant disseminated the Spy Report could, subject to certain conditions, constitute a privileged occasion. Counsel said the following in his heads of argument:

"The central issue to be determined by the Court is whether the defendant fabricated or participated in the fabrication of the Spy Report with an ulterior motive constituting malice. Publication is common cause as well as the dissemination of the Spy Report within the ANC in circumstances that, but for malice, would constitute a privileged occasion."

Counsel, quite correctly in my view, goes on to say:

"But for the establishment of the defendant being the author of the Spy Report, or being part of the creation of the report, the defence of a privileged occasion would have been established."

[32] In my debate with counsel for the plaintiff during the hearing, he repeated these concessions by submitting that it was not disputed that the circumstances under which the report was disseminated fell inside the ambit of a privileged occasion.

[33] It is also clear that the defendant discharged the *onus* on him to establish that the statement was pertinent or germane to the issues – *Amler's, supra* at p163.

Consequently, the plaintiff did not succeed in rebutting the defence by alleging and proving that the statement did not have some foundation in the evidence or circumstances surrounding the case and that it was not germane. The remaining question is whether the plaintiff managed to rebut the defence by proving malice or indirect or improper motive on the part of the defendant – *Amler's, supra*.

- [34] The upshot of all this is that the sole issue before me, in the end, was whether or not the plaintiff had managed to prove, on a balance of probabilities, that the defendant was the author of the Spy Report or played a part in the creation thereof.

As I already pointed out, counsel for the plaintiff conceded as much in his heads of argument when he stated "but the for establishment of the defendant being the author of the Spy Report, or being part of the creation of the report, the defence of a privileged occasion would have been established".

In his heads of argument, counsel for the defendant puts it as follows:

"The sole issue is whether or not defendant had authored (fabricated) the so-called 'Spy Report' as part of a *mala fide* agenda to discredit plaintiff."

As to *onus*, counsel for the defendant, correctly in my view, states in his heads of argument:

"Plaintiff bears the *onus* to prove that Doctor Phosa had authored/fabricated the document in question and that he was motivated by malice."

- [35] So much for the issues to be decided.

[36] I turn briefly to the evidence.

Brief remarks about the evidence

[37] I will attempt to confine this brief summary to the limited issue which falls to be decided.

(i) **Jan Hendrik Stephanus Venter ("Venter")**

[38] Venter is the sole witness on which the plaintiff relies in his effort to prove that the defendant authored the Spy Report with malicious intent, or played a part in the creation of the document.

It is convenient to sketch a brief summary of Venter's evidence, as I understood it, in very broad terms, before turning to a few more specific features of his evidence.

[39] Venter was employed as a housekeeper by the defendant in the latter's house in the Hazyview area. The defendant also had a house in White River. It seems that Venter was so employed from about the end of 2013.

Some time in March 2014 Mr Nick Elliot ("Elliot") paid a visit to the defendant and the two of them were sitting outside on the veranda. Elliot often visited the defendant. On the defendant's own version, which is undisputed, he and Elliot are close friends and business associates and "comrades".

Venter said that he had to remain in close proximity of the two in case the defendant needed something. "The only reason I had to be in close proximity is in case Doctor Phosa needed anything. Refreshments, or writing paper, or pens, etcetera."

Venter then heard the plaintiff's name mentioned "a couple of times". "... obviously I do not recall how many times, but I heard it a couple of times ... and I heard that Doctor Phosa said he would draft the report and send it to Luthuli House". He said this was the Spy Report and he understood it to be "well, to prove that the Premier Mr D D Mabuza was a spy in the apartheid era". The defendant then asked him, **as he did on numerous occasions**, to go and fetch some blank papers. He would normally, when such a request was made, take blank pieces of paper out of his printer as well as writing accessories. He took the blank papers to the defendant and "I just further heard that there was mention made to Mr Mabuza being a spy in the previous government, and I heard something about secret numbers that were allocated and given to people that were spying". The defendant, while in the company of Elliot, then scribbled some notes on the blank papers. Venter used to get "all the paper work", put it together and give them to the defendant who would put it in his briefcase before leaving for the airport. In this case, he was not allowed to touch the papers that the defendant and Elliot were discussing "and drafting". The defendant collected the papers himself and put them together with his other documents.

In May 2014 Venter had a disagreement with the defendant. It had to do with leave that he needed to visit his ailing father in Pretoria. Venter resigned on the spot. He also had a wife and two children at the time. On his own version, he was upset

about the attitude adopted by the defendant. I add that the defendant has a slightly different version about the disagreement leading to the resignation of Venter.

It is common cause that after he left, Venter remained in possession of some of the property items of the defendant, including a motor vehicle, and Venter was placed on terms to return these assets. It is common cause that the defendant also laid a number of criminal charges against Venter and also proceeded against him with some civil claims.

Venter testified, broadly, that after he left the defendant he was intimidated by the defendant's head of security, Mr Piet van Zyl, and he was also followed while he was travelling and shot at. This evidence was scrutinised during cross-examination and turned out to be something of a damp squib.

In about July 2014 Venter made efforts to contact the plaintiff, in his capacity as the Premier, ostensibly to seek protection from the latter against what he perceived to be efforts by the defendant's staff to intimidate and perhaps injure him and his family. Some of the telephonic requests reached the office of the plaintiff's Chief of Staff, Ms Yasmeen Ally who also gave evidence. The requests for a meeting fell on deaf ears. On 17 July 2014 Venter sent an e-mail to Ms Ally which reads as follows:

"My name is Jan Venter I use to work for Doctor Mathews Phosa, ever sins I left Doctor Phosa's employment it has been an absolute nightmare. And I hope that Mr Mabuza would be able to assist me please I am begging. I know about things that is very dangerous and I am extremely afraid for my family and my life. I have peopke that follows me some times, I have received

treatning phone calls and I am also aware of meetings held that I am sure will be of intrest to Mr Mabuza I think this is why this is hapoening.

There has been false charges kaid against me at the saps.

Please can some one from your office help.

Kind regards

Jan Venter"

This effort also fell on deaf ears.

After the Spy Report was published in the newspapers on 21 November 2014 Venter was contacted by the plaintiff's office on about 24 November 2014. That afternoon he had a meeting with the plaintiff. Also in attendance at the meeting was the plaintiff's attorney, Mr Ian Small-Smith ("Small-Smith").

It seems that Venter then told the plaintiff (on the overwhelming probabilities after being encouraged by the plaintiff to implicate the defendant in the Spy Report) that he overheard the plot between Elliot and the defendant to hatch the Spy Report.

It is common cause that, subsequent to this meeting, Venter received substantial amounts of money channelled to him by Small-Smith through various persons who actually delivered the cash to him. I was left with a strong impression that the money was coming from the plaintiff himself.

Venter also made an affidavit, in February 2015, to the investigating officer in the criminal case flowing from the charge of *crimen iniuria* laid against the defendant by the plaintiff. I have already referred to this case and the fact that it was withdrawn. Subsequently, in October 2015, Venter made another affidavit in which he, by and large disavowed what he had said in the February affidavit. Through the intervention of Venter's mother, reconciliation was also reached between Venter and the defendant. Venter signed an acknowledgement of debt that he would pay some R10 000,00 to the defendant in settlement of all the latter's claims against him and he also received some assistance from the defendant, money wise, *inter alia*, to help him to move his furniture and also to fund litigation against his estranged wife who was suing him for maintenance.

In November 2015, Venter also made a "press statement" at a press conference to which a number of newspaper reporters had been invited and in this document he also watered down any adverse allegations he may have earlier made against the defendant.

During intensive cross-examination of Venter, from which he emerged in a very poor state, it also appeared that Venter is a self-confessed liar.

[40] By way of illustration, I quote a few extracts from the record showing up some of the lies told by the witness:

- "You said in your report, that one of the reasons, I am referring to this morning's evidence, that you stated in the sms, at exhibit A126 (my note: this is the document, which I quoted, sent to Ms Ally on 17 July 2014) that you are afraid for your family and your life, was because of the threats made by Piet

van Zyl to you at the Postnet, when you had that altercation. Recall that? ---
Yes, I recall that. And it was wrong.

COURT: It was right or wrong? --- It was wrong sir.

MR MARITZ: Remember that I asked you whether you were certain about that being one of the reasons? --- Yes, but it was wrong. I answered incorrectly."

- "... in July of 2014, your explanation of you phoning General Ntumani [indistinct] in the presence of Mr Van Zyl within the Postnet would be a lot of nonsense, not so? --- Ya, it would definitely. Because I only spoke to General Mtumani after my appendix operation in January 2015."

- "Did you lie at this press conference? --- Yes, I did.

All of it? --- No, not all of it. But a lot of it.

A lot of it? --- Yes.

Just lies?

Is it your habit to lie?" (Note: the witness attempted to suggest that a business associate of the defendant influenced the contents of the statement the witness himself wrote out for purposes of the press conference. This was emphatically denied by the defendant in his evidence. The only input the defendant had, according to him, was to suggest to the witness that he should also apologise to the State President about all the lies he had told.)

- "Did you lie in the second affidavit? --- The second affidavit ...

The one dated 8 October? --- That was set out by Doctor Phosa's attorney?

Yes? --- No.

So it is 100% truthful and correct?

I asked you earlier whether you can confirm the correctness thereof and you said yes. No I am asking you virtually the same question. --- No.

Is this, according to you, 100% truthful and correct? --- Yes."

(My note: this is the second affidavit following upon the earlier, February 2015, affidavit to the investigating officer in which the witness suggested that the defendant had hatched the Spy Report. The second affidavit, in October, is irreconcilable with the first affidavit and now the witness claims that the second affidavit is 100% truthful and correct.)

- (Dealing with some of the payments received from Small-Smith, to which I have referred and I mentioned my conclusion, on the overwhelming probabilities, that the payments were made at the instance of the plaintiff.)

"Covering tracks. Now is that what you stated, obviously? --- It is what I stated.

Is it correct ... Is it correct? --- It is a lie.

It is a lie? --- Hmm.

So it was a lie in the statement? --- Yes."

- "Yes, after you told him that you need it, you were desperate, you did not have work, you did not have place to stay, you needed money for your kids' custody? --- No, not true at all.

What is not true? --- All of it."

[41] I turn briefly to the two affidavits which are not to be reconciled with one another.

In the first affidavit of 25 February 2015, which Venter made to the investigating officer who, as I have said, later expressed the view that there was no case against the defendant and withdrew the charges, Venter stated that when Nic Elliot visited the defendant at his house in March 2014, the defendant asked Venter to fetch him blank papers "but before he actually called me he indicated to Mr Nic that he will draft the report and send it to Luthuli House (ANC head office in Johannesburg) to prove that the Premier of Mpumalanga, Mr D D Mabuza is indeed a spy".

He stated that after he handed the defendant the blank papers in the company of Elliot, the defendant started to draft something on the blank papers. It took him more or less three hours. Whilst the defendant was scribbling something on the blank papers, mention was made of Mr Mabuza's name and that he was once a spy working for the old order.

Significantly, he also indicates that after having resigned from the defendant's employ in May 2014 (I explained that this did not happen under jovial circumstances and the defendant offered a different version of the occurrence) he then decided to inform the Premier of the allegations made against him as mentioned. Significantly, his communications to Ms Ally are silent on the question of the urge to inform the Premier about these allegations, but more in the form of a cry for help against the intimidation campaign against him.

In the second affidavit, of October 2015, he says that he was expected to keep his distance from the defendant and visitors and "it happened occasionally that I overheard words or phrases of their conversations but never the complete discussions, or even enough to understand what they were talking about, I sometimes made my own assumptions". He also says that it should be noted that during his employment it was common for the defendant to ask him, as the house manager, to provide him with blank papers for the defendant to make notes. He emphasised that he never read any of the defendant's personal documents or notes and he therefore has no knowledge about the contents thereof. He confirmed that he did not read the scribbles he referred to in his earlier affidavit and cannot say what the content of those scribbles was.

Significantly he says when he read about the report in the newspaper "I *bona fide* but mistakenly made assumptions of some words/phrases which I might have overheard whilst in the employment of Doctor Phosa". He learnt later that the newspaper report was based on a typed confidential report, the author unknown to him, which is attached to his affidavit. This is the Spy Report. He learnt that "various individuals" were claiming that the Spy Report flows from the scribbles made by the defendant which he referred to in the earlier affidavit. At the time of his earlier, 25 February 2015, affidavit he had not seen or known about the typed confidential report and cannot link it to the scribbles. He confirms that the scribbles were handwritten and not typed. He concludes by saying that he *bona fide* erred in his 25 February affidavit "in assumptions I made about the scribbles and the report in the newspaper".

- [42] Significantly, it appears from this second affidavit, which the witness testified to be "100% correct" that he first came to the conclusion that the Spy Report may be linked to the scribbles when he read about it in the paper on 21 November 2014 (or later perhaps). He only saw the Premier on 24 November. By then, as I attempted to illustrate when analysing the 14 and 17 November letters of demand, the plaintiff had already been announcing to all and sundry that the defendant was the author of the Spy Report.

Consequently, I am in agreement with the argument by counsel for the defendant that Venter could not have been the source of the plaintiff's information that the defendant authored the Spy Report. Indeed, as counsel argued, the source of this information may well have been the plaintiff himself. In this regard, it should be remembered that in the November 2014 first letter of the plaintiff's attorney to the defendant, the allegations are already made that the defendant himself was a spy for the earlier regime.

- [43] On the same subject, it is useful to refer to what Venter said in his "press statement" released at the press conference later in 2015. The statement is undated. It is true that he testified that some of the observations he made are untrue and that the defendant strongly testified that the statement originated from Venter barring the apology to the State President, as I have mentioned.

In the press statement Venter says the following about the November 2014 meeting with the plaintiff:

"We spoke for a while it felt like ages but it could have been 30 to 45 minutes when another person arrived of whom at this stage was not known to me (my note: this, on the probabilities, would have been Small-Smith).

Before this man arrived I was told how sour the relationship between Doctor Phosa and the Premier Mabuza was. I was asked if I would be willing to state that I overheard a discussion between Doctor Phosa and Mr N Elliot whereby they planned the report themselves. The Premier said that the report was rubbish but that he would need someone from the inside that worked for Doctor Phosa's family to side and witness this, also Premier Mabuza asked me many questions about the Phosa family as I was extremely close to the family. I was employed as everyone knows by their family and I worked in their house 24/7. I was asked or rather told in a way that if I ever overheard any conversations that Doctor Phosa and other high profile persons would bankrolling the EFF, Mr Malema because they were friends. I said I could not recall such a conversation. I was told that I must think clearly because they are sure I must have heard these conversations."

I do not consider it necessary to dwell any further on this document, but it appears, from the extract quoted, that the plaintiff, who by then, as illustrated, already announced that the defendant authored the Spy Report, may well have encouraged Venter to give such evidence for the reasons mentioned in the extract. In this regard, it should be borne in mind that Venter, by his own admission, was angry with the defendant after his May 2014 resignation and in his July 2014 sms to Ms Ally, which

must have been brought to the attention of the plaintiff, he suggested that he had been victimised by the defendant or his employees after the resignation.

[44] I conclude the brief summary of Venter's testimony under cross-examination as it appears from the record:

"You do not disagree with people that you think are dangerous? --- Yes.

So you are prepared to tell many lies should the need arise? --- If I feel threatened, yes.

And you will even tell those lies under oath? If you feel threatened? --- Not under oath, no."

Venter was an extremely poor witness. His demeanour in the witness-box was unimpressive. His voice would often peter out into a whisper, requiring me to ask him to speak up. Above all, he turned out to be a self-confessed liar.

(ii) **Yasmeen Ally**

[45] As I mentioned, she was the Chief of Staff of the plaintiff. I mentioned Venter's efforts to communicate with her with the view to arranging a meeting with the Premier. The contents of the 17 July 2014 sms from Venter have been quoted and discussed. There is nothing in this document to suggest that there is reliable evidence to the effect that the defendant authored the Spy Report.

Cell phone records of Ms Ally were also obtained and tabled as exhibits after she was recalled to give further evidence. There is nothing in these records to suggest that Venter mentioned anything about the Spy Report. In her diary of 15 July 2014,

Ms Ally only noted that Venter called her and said that he used to work for the defendant who then started victimising him and he felt that his life was in danger.

I cannot agree with submissions made by counsel for the plaintiff that there is some corroboration to be found in Ms Ally's evidence for Venter's evidence when it comes to this specific issue of the creation of the Spy Report.

There is nothing in Ms Ally's evidence to advance the plaintiff's case on this issue, which is the sole question for me to decide.

(iii) **Jacobus Daniel Venter ("JD Venter")**

[46] It appears that he was called as a witness because of the reference in the Spy Report to one of the handlers of the plaintiff having been LT Venter.

He works for a filling-station, and has been doing so for the last twenty one years. He matriculated in 1984, a year before the "period of operation" mentioned in the Spy Report. He was recruited for the Security Police from the Uniform Branch of the South African Police in April 1989. When he left in 1994 he was still a sergeant. He is not the person referred to in the Spy Report. He did work with Warrant Officer Fundama from 1989 for about six months.

[47] He gave some evidence about the manner in which classified reports were written and prepared by the Security Police while he was attached to it. His evidence appears to suggest that the lay-out and general presentation of the Spy Report was not in line

with the systems and methods applied by the Security Police while he was attached to that body.

[48] Mr Venter's evidence contained nothing which would advance the case of the plaintiff, neither was that argued to be the case by any of the counsel.

(iv) **Venter recalled**

[49] At his own request, Venter wanted to give some evidence in camera which he felt he could not disclose in open Court. I granted the request.

[50] The evidence had to do with possible links or communications which Venter had with the leader of the EFF. There was nothing in his evidence, such as it was, which could have had a bearing on the dispute forming the subject of this case.

(v) **Nonhlanhla Marcia Khoza**

[51] She was said to be the daughter of a female activist who was evidently captured and killed in Swaziland, according to a sentence appearing in Report 7 of the Spy Report.

[52] The aspect that she was called upon to testify about attracted an objection from counsel for the defendant on the basis that it was inadmissible.

[53] After hearing lengthy argument from both sides I made a ruling upholding the objection.

[54] That also signalled the end of Ms Khoza's evidence.

[55] At this point, the case of the plaintiff was closed.

(vi) **Makedi Mathews Phosa**

[56] The defendant was the only witness who testified in support of his own case.

[57] I have mentioned his qualifications and his senior position in the ANC. I mentioned that he was a previous Premier of Mpumalanga and member of the Top 6 of the ANC.

[58] The defendant emphatically, and with contempt, rejected Venter's evidence about him having hatched the Spy Report as a total lie.

[59] I have mentioned the interaction between the defendant and Jessie Duarte and the manner in which the Spy Report was e-mailed to the latter.

[60] I have dealt with the legal position and the fact that, in the end, the only issue for decision was whether or not the defendant authored the Spy Report or played a role in the creation thereof.

[61] It is useful to add that there was no suggestion, at any stage, of a motive which may have existed for the defendant to create the Spy Report.

[62] I also attempted to illustrate, through analysing the contents and structure of the Spy Report, that the defendant must have exhibited extraordinary powers of recollection to compile such a document with all those details, many years after the

alleged incidents took place (or an exceptionally fertile imagination to dream up such incidents if they never took place), by simply scribbling notes on some blank paper in the serene circumstances of his veranda in the company of Elliot.

[63] Quite apart from the fact that there is no credible evidence to persuade me that the defendant created the Spy Report, I am also of the view, and I find, that it is inherently improbable, for the reasons mentioned, that he could have done so. Moreover, I find nothing improbable about the manner in which, on his evidence, he came into possession of the document.

[64] I have also, by analysing the authorities and the submissions of counsel from both sides, pointed out that it was common cause that the defendant acted in circumstances of qualified privilege in the manner in which he sent the report to Ms Duarte. This concession on behalf of the plaintiff, correctly made as I pointed out, is subject only to a finding that the defendant created the Spy Report which, for the reasons mentioned, I find not to be the case. If he did not create the report, there also could not have been any question of the required malice accompanying such creation.

[65] The defendant was subjected to competent, intensive and lengthy cross-examination. In my view he was not discredited in any way. I considered him to be an impressive and credible witness.

[66] Against this background, I consider it unnecessary to dwell any further on the defendant's evidence.

The plaintiff did not testify

[67] It is difficult to understand why the plaintiff elected not to testify when his testimony on certain issues may have been of assistance to the Court. For example, he may have given more details about his 24 November meeting with Venter and he may have been able to explain why Venter was given substantial amounts of money through the participation of Small-Smith and other carriers who delivered the cash. He may also have been able to explain why he already announced the defendant's involvement in the creation of the Spy Report well before he met Venter.

[68] Small-Smith did not testify either.

[69] The failure of the plaintiff to call key witnesses, including himself, could not have served to advance his case in any manner. I say no more about this subject.

Discharging the *onus* when there are mutually destructive versions

[70] In *National Employers' General Insurance v Jagers* 1984 4 SA 437 (ECD) the following is said at 440D-H:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is

therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of the witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

- See also the later, and often quoted, decision in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 1 SA 11 at 14H-15E.

[71] For the reasons mentioned, I have found that Venter's evidence, on which the plaintiff relies, is of a particularly poor nature and Venter, as a self-confessed liar, has no credibility. The defendant, on the other hand, as I have said, impressed me as a good and credible witness.

As to inherent probabilities, these also favour the defendant for reasons mentioned.

[72] In the result, I have come to the conclusion, and I find, that the plaintiff has failed to discharge the *onus* of proving that the defendant created the Spy Report, so that the action falls to be dismissed.

Costs

[73] Both parties, quite justifiably, employed the services of senior counsel.

[74] Both parties ask for costs on a punitive scale.

[75] As to the scale of the costs to be awarded, counsel for the defendant argued that "most serious and scurrilous allegations" are made against the defendant in the replication. Perhaps the same can be said about allegations made in the letters of demand, particularly the letter of 14 November 2014. It was argued that these "scurrilous accusations" have been widely reported in the media and have seriously tarnished the defendant's good name and reputation. It was argued, correctly on the evidence as I have considered it, that the allegations were unjustified.

[76] I also find it difficult to overlook the uncontested evidence about large sums of money channelled to Venter through Small-Smith.

[77] Both counsel asked for costs flowing from the employment of senior counsel. I reminded counsel of judgments by the Supreme Court of Appeal to the effect that there is no provision for making an order for costs of senior counsel to be paid as this leads to the fettering of the Taxing Master's discretion – see *The City of Johannesburg Metropolitan Municipality v The Chairman of the Valuation Appeal Board for the City of Johannesburg* (282/2013) [2014] ZASCA 5 (12 March 2014) and *Hangar v Robertson* (211/2015) [2016] ZASCA 102 (10 June 2016).

Counsel suggested that I could make such an order if it is by agreement between the parties. I am not persuaded, in the light of the authorities mentioned, that their submission is a sound one. The best I can do, is to repeat that, in my view, the employment of senior counsel, by both sides, was fully justified.

[78] As to the scale of the costs, it seems to me, for the reasons mentioned, and where both sides contended for a punitive scale, that this is a proper case for costs to be ordered on the scale as between attorney and client.

The order

[79] I make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendant's costs on the scale as between attorney and client.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

8018-2015

HEARD ON: 9-13 MAY 2016 AND 30 MARCH 2017
FOR THE PLAINTIFF: E C LABUSCHAGNE SC
INSTRUCTED BY: MCULU INCORPORATED
FOR THE DEFENDANT: M C MARITZ SC
INSTRUCTED BY: COUZYH HERTZOG & HORAK INCORPORATED