IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A3017/2007

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 19/10/2007 SIGNATURE

In the matter between:

DERCKSEN RJ Appellant/Plaintiff

and

WEBB BN First Respondent/First Defendant

FOURIE A Second Respondent/Second Defendant

CABLETECH EXTRUSIONS (PTY) LTD Third Respondent/ Third Defendant

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JUDGMENT

MASIPA J:

Introduction

[1] The appellant, Rudolf Johannes Dercksen, was employed by the third respondent as a supervisor in its workshop in Alrode Alberton.

[2] During 2002 certain machinery, equipment and tools belonging to the third respondent were reported missing. Soon thereafter the third respondent sought the services of OF & A Consulting (Pty) Ltd (OF & A) to investigate. The investigator was the second respondent ("Fourie") an employee of OF & A. The first respondent ("Webb") was the managing director of the third respondent. He initiated the investigation.

[3] As part of the investigation Fourie interviewed a number of employees. Among those interviewed was the appellant who met Fourie on Friday 31 May 2002 and on Monday 3 June 2002.

[4] The appellant alleged that on Friday 31 May 2002 he was approached by Webb who told him that company machinery valued at R3 million had been stolen and his name was on top of

the list of suspects. He then took him to the boardroom where he was introduced to Fourie.

[5] During this interview he was accused of being a thief several times by both Webb and Fourie. The exact words used were *"If it not theft it's attempted theft"*.

[6] On Monday 3 June 2002 Fourie approached him intending to ask him more questions regarding the *"missing"* property. The Appellant alleges that when he told Fourie that he was no longer prepared to answer any questions and that he should talk to his lawyer Fourie told him that he had approached a lawyer because he knew he was guilty. In any event, he told him, there was evidence that he was guilty of theft as there were witnesses and a camera to prove it.

[7] Following the investigations the appellant was summoned to attend a disciplinary hearing. He did not attend the hearing and his services were terminated soon thereafter.

[8] The appellant then sued for damages of R20 000-00 in respect of Claim A - *inuria* and R80 000,00 in respect of Claim B – defamation.

[9] The first and second respondents were cited in their personal capacities as well as in their capacities as employees of the third respondent.

[10] The Magistrates' Court in Alberton dismissed both claims with costs.

[11] This is an appeal against that decision.

[12] For convenience I shall refer to the first respondent as Webb, to the second respondent as Fourie and to both Webb and Fourie collectively as the respondents.

The Pleadings

Claim A

[13] The appellant alleged that, on or about 31 May 2002, at his place of employment being 32 Potgieter Street, Alrode, Alberton Webb and/or Fourie said of and concerning him and in his presence the following words:

"6.1.1 I need to speak to you because there is approximately R3 million worth of machinery stolen, and your name (meaning the plaintiff) is at the top of the suspect list."

"6.1.2 Webb said: You had placed it outside, why at the cooling tower, if you were going to put it back in the storeroom."

"6.1.3 If it is not theft, it is attempted theft"

"6.1.4 Four printers were missing which had been next to the machine", by implication that the plaintiff has taken same

"6.1.5 A pallet full of Mandrells was also next to the machine and is missing", by implication that the plaintiff has taken same.

"6.1.6 Also a pallet full of callibrators was missing", by implication that the plaintiff has taken same.

"6.1.7 An electric motor is missing as well, and an electric panel has gone missing", by implication again, that the plaintiff has taken same."

[14] The appellant claimed that he was humiliated, hurt, angered and degraded by the words and allegations set out in paragraphs 6.1.1 to 6.1.7 above and had suffered damages amounting to R20 000,00.

[15] There was confusion in the pleadings that were presented to the Court in the appeal record. The paragraphs in the plaintiff's summons and in the defendant's plea did not appear to correctly correspond with each other. Counsel for the respondent very

properly conceded that the defences pleaded in paragraph 7 of the plea, appertained only to the Claim B (i.e. the claim for defamation) and not to Claim A.

[16] During the course of argument the respondent moved to amend its plea to raise the defence of privilege to Claim A. The appellant did not oppose this amendment.

Claim B

[17] The appellant alleged that on or about 3 June 2002 at the same place mentioned above in paragraph 6 and in the presence of several fellow employees Fourie uttered the following words:

> "7.1.1 "why did you go to a lawyer? Is it because you know you are guilty of theft."
>
> 7.1.2 'we know you are guilty of theft. We have witnesses and a camera to prove it".

[18] The appellant further alleged that the said words, in context, were wrongful and defamatory of the plaintiff. Further that the words were intended to convey and were understood by the persons

present that the plaintiff was a thief; that he could not be trusted and had breached his relation of trust with his employer.

[19] The plaintiff alleged that the defamatory statements were made with the intention to defame him and to injure his good name.

[20] The plaintiff alleged further that as a result of the statements he suffered damages as he could no longer work for the third defendant. Furthermore the statement "could have serious repercussions for prospective future employment".

[21] Although the second respondent filed a separate plea from that of the other respondents the defence for all three respondents was similar. All three parties were represented throughout the proceedings by the same attorneys and counsel.

[22] In summary, it was denied that the words were uttered; alternatively and in the event they were found to have been uttered it was denied that they were defamatory, further alternatively if they were found both to have been uttered and

defamatory then it was denied that whoever uttered them had the intention to defame, more particularly:

(1) as there was a process of investigating a theft of machinery and equipment by employees of the third respondent and plaintiff was one of several people interviewed.

(2) the said words were, therefore, in the context, reasonable and the words were not uttered recklessly and negligently.

[23] Further alternatively, it was denied that the said publication was unlawful more particularly in the context of the investigation. Furthermore the said words were true and in the public interest.

[24] Also denied was that any damages had been suffered as a result of the words uttered.

Common cause facts

[25] In the year 2002 the appellant was employed by the third respondent which operated from its premises in Alrode,

Alberton. Webb was the managing director of several companies including the third respondent.

[26] During or about May 2002, Webb became aware that certain machinery and equipment on the premises could not be accounted for. The items included an extruder, a pump, printers and various other items.

[27] It transpired that the appellant had given instructions to a co-employee to break the locks on the doors of a storeroom where certain machinery and equipment were stored. An extruder and allegedly a pump were removed and placed elsewhere. The explanation given by the appellant when asked by Webb was that he had given instructions that the extruder be removed to get to a pump that needed refurbishing. The aim was to return the extruder once the pump had been taken out of the storeroom. This, however had not been done.

[28] Soon after the discovery of the *"missing"* items Webb consulted with a private investigator in the person of Fourie, an employee of OF & A. According to Webb, the mandate given to Fourie was

simply to ask questions and establish the facts behind the missing items.

[29] On 31 May 2002, and again on 3 June 2002, Fourie conducted an interview with the appellant as part of the investigation. The appellant alleges that it was during these two encounters with the second respondent that certain utterances were made suggesting that he was a thief.

The issue

[30] The issue was:

[30.1] whether the utterances as set out in the pleadings were made; and

[30.2] whether in (A) they amounted to *inuria* and (B) they were defamatory.

[31] The appellant gave evidence on Claim A and Claim B. On Claim B he called one witness to support his version.

[32] The appellant's evidence was briefly to the following effect:

[33] On 31 May 2002, he was approached by Webb who told him that there was an insurance claim of R3m. for machinery which had been stolen and his name (i.e. the appellant's) name was on top of the list of suspects. He then took him to the boardroom where he introduced him to Fourie, a private investigator.

[34] His interview, which was referred to by his counsel as an *"interrogation"*, lasted three hours during which he was asked a number of questions pertaining to the removal of an extruder and other missing items.

[35] He was also repeatedly accused of having stolen or attempted to steal the items by both Webb and Fourie. The exact words used were *"If it's not theft it's attempted theft"*.

[36] He co-operated by showing them where the machinery and other equipment were. He could not show them all the items that were allegedly missing as such items were not properly described to him.

[37] On Monday morning 3 June 2002 he went to show Fourie more items. In the afternoon he was approached by Fourie while he was in the company of several of his co- employees. Fourie told him he wanted to ask him more questions. When he refused and told Fourie to talk to his lawyer the latter became angry and shouted:

> "Why did you go to a lawyer? Is it because you know you are guilty"
>
> "We know you are guilty because we have five witnesses and cameras to prove it"

[38] He called Mostert as a witness who confirmed that Fourie came to the appellant while the workers at the workshop were about to go to lunch. He heard Fourie scream the words:

> "We know you are guilty we have witnesses and a camera to prove it".

[39] He left immediately thereafter as he did not want to get involved. He had known the appellant for about 13 years. Initially he did not want to believe that the appellant was a thief, but when the services of the appellant were terminated he thought that the allegations that the appellant was a thief must be true and he lost his respect for him.

[40] Both Webb and Fourie denied the allegations. Webb denied having been in control of the investigation. He stated that he had employed an independent expert to do the investigations precisely because he did not want to do it himself.

[41] On 31 May he was in and out of the boardroom. He may have asked a few questions to clarify things but most of the times he was not in the boardroom. He doubted that the appellant could have been in the boardroom for 3 hours as there were other people interviewed that day. He denied having accused the appellant of theft. He stated that he was careful not to do so and had taken pains to explain to Fernando, one of the employees, that no one was accusing him of anything when he saw that Fernando was getting angry. As for the appellant he was very co-operative and did not appear upset. He later heard, however, from Fourie that appellant had changed his mind about undergoing the polygraph test that he had initially agreed to.

[42] Fourie's version was that the interview was about 1 hour 30 minutes and although the words "*If it is not theft it is attempted theft*" were used during the interview the context in

which they were used was completely different from the interpretation by the appellant.

[43] The version of Fourie in this regard seems the most preferable version considering the circumstances of the case. Fourie was called in because an extruder had been moved in suspicious circumstances and several other items could not be accounted for. The mandate to Fourie was, therefore, clearly that he should investigate theft, not necessarily against anyone in particular as is clear from the following extract on page 363 lines 2-10 of the record which was the examination in chief of Fourie.

> "What were you referring to specifically? ...well the movement of the extruder. You know the fact that it had been moved from one area to another under apparently suspicious circumstances. This was my understanding that locks had been cut and there appeared to be no good reason for this extruder to be moved from one area to the next".
>
> "Were you accusing him of theft? ...Not at all".
>
> "Did you imply that it was him that was attempting to steal this machine? ... Certainly not".

[44] Under cross examination Fourie confirmed that his mandate was to investigate theft or attempted theft.

[45] I quote from page 399 line 7 onwards:

> "You stated the matter of fact that he is a thieve (sic). It is a fact … I did not say that he was a thieve (sic)
>
> You know that he is the one who moved it? – Well by that stage yes I knew that he had moved it
>
> And you say it is theft – I said that we may have well said that it was theft or attempted theft. I did not say: Mr Dercksen you stole it. You are the subject of the theft, you stole it that it is attempted theft"
>
> But that is the clear inference not so?- No I disagree
>
> Not? … No no I was there to investigate that was suspected theft or attempted theft."

[46] Webb's evidence that he was in and out of the boardroom during the appellant's interview is corroborated by the appellant as well. The probabilities are also that Webb would not accuse anyone of theft as he had called in an investigator to precisely find out if the machinery had been stolen and if yes who was responsible.

[47] In any event the success of the investigation was dependent, to a large extent on the co-operation of those being interviewed. It is therefore, improbable that the respondents would at the outset, in the process of collecting information, accuse those being interviewed of theft.

[48] The appellant also took umbrage at the alleged suggestion by Webb that he was a suspect in respect of the missing machinery and equipment. The exact words used are in dispute. However accepting that Webb uttered words to that effect, the question is whether the uttering of these words amounted to *inuria* in the circumstances of this case.

[49] In *Delange v Costa* **1989 (2) SA 857 (A) at 860I – 861A** the court discussed three essential requisites to establish an action of *injuria* as set out in Melius de Villiers The Roman and Roman-Dutch Law of Injuries at 27. They are:

> "i. An intention on the part of the offender to produce the effect of his act;
>
> ii. An overt act which the person doing it is not legally competent to do; and which at the same time is
>
> iii. An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other".

[50] In *Dendy v University of the Witwatersrand* **[2007] SCA 30 (RSA)** the court analysed the decision in *Delange supra*, and dealt extensively with what is the hybrid test i.e. the subjective and objective test. At paragraph 28 it was stated:

> "It (the court in *Delange*) accepted that an entirely subjective test of dignity had the potential for opening the flood gates to successful actions by hypersensitive persons who felt insulted by statements or conduct which would not insult a person of ordinary sensibilities. And so it fashioned what is in effect a hybrid test, one that is both subjective and objective in nature. To be considered a wrongful infringement of dignity, the objectionable behaviour must be insulting from both a subjective and objective point of view, that is, not only must the plaintiff feel subjectively insulted by the behaviour, seen objectively, but must also be of an insulting nature. In the assessment of the latter, the legal convictions of the community (*boni mores*) or the rational understanding and reaction of a person of ordinary intelligence and sensibilities are of importance [*Neethling's Law of Pesonality* at 194-5]".

[51] Once it is determined that the words are subjectively and objectively insulting in nature, wrongfulness is *prima facie* proved. However, that is not the end of the inquiry. In determining unlawfulness, it is also necessary to consider the defence of justification, if it has been raised by the defendant. **Neethling's Law of Personality at p214** states:

> "As regards grounds of justification, in principle the grounds of justification available in the case of defamation (that is privilege, truth and public interest and fair comment) should apply *mutatis mutandis* to insulting statements."

[52] At **p155** the learned authors state with regard to the defence of privilege in a defamation action that:

> "Privilege exists where someone has the right or duty to make or an interest in making specific defamatory assertions and the person or people to whom your assertions are published have a corresponding right or duty to learn of or interest in learning of such assertions. Thus privilege authorizes the defendant to publish the defamatory words or behaviour (grants him the legal right to injure another's good name) and thereby sets aside the prima facie wrongfulness of his conduct."

[53] In applying these principles, *mutatis mutandis*, to a claim based upon *injuria*, the question arises whether the allegedly insulting words were uttered in circumstances in which Fourie or Webb had a right or a duty to utter them.

[54] *In casu* it may be that the appellant felt *"humiliated, hurt, angered and degraded"* when he was told that his name was on top of the suspect list. Subjectively the appellant's dignity may have been impaired. That, however, does not necessarily mean that the conduct of the respondents is actionable. It could be that the appellant is a *"hypersensitive"* person by nature. The character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby (See *De Lange v Costa* **1989 (2) SA 857 at 862 E.**) An objective test of reasonableness is also applied.

[55] In any event whether certain utterances or conduct are actionable or not will also depend on the circumstances of each case.

[56] We are here dealing with an employer and employee relationship. As a matter of policy an employer must be able to call in an employee and question him/her about *"missing"* or *"stolen"* items if the employee can reasonably shed light onto the matter.

[57] *In casu* it is common cause that the appellant was the one who gave instructions that the locks on the doors of the storeroom be cut and that the extruder be removed. There was a dispute as to the circumstances surrounding the removal of the extruder. In addition there were several other items missing. It was, therefore, understandable and reasonable that his employer and/or the investigator would want an explanation and find it necessary to interview the appellant.

[58] In my view, it would be untenable if an employee were to be dragged to a disciplinary hearing without having had an opportunity to defend himself first. As it turns out it was

precisely because of the interview that some of the missing items were recovered.

[59] Accordingly, I find that Fourie's alleged conduct was not in the circumstances objectively insulting.

[60] In any event, even if Fourie's conduct were *prima facie* wrongful, it is clearly justified in the circumstances. In my opinion, this was a privileged occasion, because Fourie had a right and/or a duty to conduct an inquiry on behalf of the third respondent.

[61] In my view the appellant failed to make out a case on this claim. The appeal in respect of Claim A, therefore, cannot succeed.

Claim B

[62] It is common cause that Webb was not present on the occasion when the appellant was allegedly defamed.

[63] This claim is therefore, in respect of Fourie and the third respondent only.

[64] The appellant's version is that Fourie approached him on the afternoon of 3 June 2002 while he was in the workshop and in the presence of fellow employees told him that he wanted to ask him more questions.

[65] When he told Fourie that he was not prepared to answer any more questions and that he should talk to his lawyer instead Fourie became upset and uttered the following words:

> "Why did you go and see a lawyer is it because you know you are guilty of theft? We know you are guilty of theft. I have got five witnesses and we have got cameras to prove that you are guilty".

[66] In his reasons for judgment the learned magistrate stated the following on page 482 of the record:

> "14. The plaintiff is a single witness relating to the incident of 31 May 2002, but as to the events of 3 June 2002 his evidence is corroborated by the evidence of Mr Mostert;
>
> 15. The evidence of Mr Mostert should however be considered with caution as is it placed on record that he is a friend of the plaintiff;"

[67] The learned magistrate was clearly mistaken about the relationship between the plaintiff and Mostert. Nowhere on the

record is there any evidence or suggestion that the two are friends. The only evidence on record is that Mostert has known the appellant for about 13 years. Nothing turns on this, in my view.

[68] Counsel for respondent argued that it was precisely because of this that the evidence of Mostert had to be approached with caution. I am unable to agree with this submission. There has been no suggestion at all that Mostert was biased in his evidence in favour of the appellant or that he had any motive to lie.

[69] A further submission was that it seemed a strange coincidence that Mostert would hear only part of the conversation, which part was exactly what was pleaded by the appellant, while the latter's evidence differed from what was actually pleaded.

[70] While it is true that the versions of the appellant and Mostert differ I think these discrepancies are minor and immaterial. The criticism relating to why Mostert heard only part of the utterances by Fourie is not warranted, in my view, as Fourie stated in his evidence that he had no interest in what was going

on. He walked away as soon as he had heard the offending words. He did not ask Fourie or the appellant what this was all about because it was none of his business. In any event he was not cross examined on the *"strange coincidence"*. Neither was it suggested to him that he was lying or even that he had a reason to lie.

[71] The cross examination of Mostert on the events of 3 June 2002 failed to have any dent on his evidence. In the circumstances I find that the probabilities are overwhelmingly in favour of the appellant for the following reasons:

1. The appellant's version is corroborated by the evidence of an independent witness, Mostert, who appeared to have no axe to grind.

2. The version of Fourie was never put to the appellant and his witness. The appellant and Mostert, therefore, did not have the opportunity to deal with Fourie's evidence.

3. The manner in which the respondents pleaded shows inconsistency. Following a denial the respondents relied in the further alternative on truth and public interest neither of which was proved.

4. Fourie's version is that when the appellant told him that he should go and talk to his (i.e. appellant's) lawyer he, i.e. Fourie asked the appellant who had accused him. This does not ring true because it does not seem he would say that when he knew all along that the appellant was a suspect.

5. On the other hand it is highly probable that Fourie would get angry and utter the words he is alleged to have uttered for this reason:

The investigation appeared to be running smoothly as the appellant co-operated by showing

> Fourie a number of *"missing"* items and had even agreed to undergo a polygraph test.
>
> The probabilities are that when Fourie heard that the appellant was no longer prepared to co-operate in the investigation he lost his temper and uttered the offending words.

[72] I find that the words as alleged by the appellant were uttered by Fourie. The words complained of are defamatory *per se*, in my view.

[73] The *onus* was, therefore, on the respondents to prove their further alternative defence i.e. that the words are true and in the public interest. Since no such evidence was led on behalf of the respondent it follows that the appellant must succeed on Claim B.

Vicarious Liability

[74] Generally a person is not liable for damages caused by the conduct of another. An exception to this general rule is that an employer is sometimes held vicariously liable for the wrongful

conduct of its employee. This exception was extended to analogous relationships such as principal and agent or employer and independent contractor.

[75] The question is whether Fourie was an employee of the third respondent, and if so whether the latter is vicariously liable for the defamation of the appellant.

[76] From the evidence it has clearly been established that Fourie was an employee of OF & A and not of the third respondent. OF & A appointed Fourie to conduct the investigations after OF & A had been approached by the third respondent.

[77] The manner of Fourie's appointment and the manner in which he went about his investigation suggests that he was an independent contractor.

[78] This was confirmed by the evidence of Webb who stated that the mandate given to Fourie was *"to establish the facts. How he did it was entirely his choice"*. (See **p348 lines 6-9** of the record).

[79] When it was suggested to Webb during cross examination that he approved of Fourie's methods of investigation as he did not ask him why he wanted to subject some employees to a polygraph test he stated: *"Because I left it to him to conduct his investigations as he saw fit".*

[80] From the above it is clear that Fourie was not an employee of the third respondent but an independent contractor.

[81] The question then is whether an employer can be held liable for the negligence or the wrongdoing of an independent contractor employed by him.

[82] The general rule of our law is that an employer is not responsible for the negligence or wrongdoing of an independent contractor employed by him. (*Colonial Mutual Life Assurance Society Ltd v McDonald* **1931 A 412** and especially at **428, 431 – 2**; *Dukes v Marthinusen* **1937 AD 12 at 17**).

[83] The correct approach to the liability of an employer for the negligence of an independent contractor is set out in *Langley Fox*

Building Partnership (Pty) Ltd v De Valence **1991 (1) SA 1 (A) 12H-J** per Goldstone AJA.

[84] In that case it was said that whether an employer could be held liable for a delict of an independent contractor would depend on the degree of care the circumstances demanded from the employer in relation to the oversight of the contractor's work.

[85] Whether the circumstances demanded the exercise of care would depend upon proof that the employer owed the plaintiff a duty of care to prevent the damage done by the independent contractor. In this regard the following questions would arise:

> "(1) Would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so
>
> (2) would a reasonable man have taken steps to guard against the danger? If so
>
> (3) were such steps duly taken in the case in question."

(Langley Fox at p**121H)**

[86] Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure of which can form the basis of liability.

[87] In *Eksteen v Van Schalkwyk en 'n ander* **1991 (2) SA 39 (T)**, the Court considered whether a client could be liable for a defamation published by his attorney. Although the case was decided a few months prior to the decision of the Appellate Division in *Langley-Fox*, it follows roughly the approach adopted by the Appellate Division in its subsequent judgment.

[88] In *Eksteen*, Van Zyl J. held that the client could not be liable for the delict committed by his attorney unless he had instructed the attorney to commit the delict, or had been negligent in failing to foresee that the attorney would commit the delict or in failing to take adequate precautions to prevent it. After holding that the client had not instructed the attorney to publish the delict to third parties, the Court held (at **p46**) that:

> "Die volgende vraag is of die verweerder nie in ieder geval nalatig was nie deurdat hy rederlikerwys moes voorsien het dat Grové sou optree soos hy inderdaad gedoen het. In hierdie verband spreek ten duidelikste uit die getuienis dat sowel die verweerder as sy eggenote leke was met geen regskennis of –ervaring nie. Al wat

> hulle geweet het, is dat 'n brief van kansellasie ooreenkomstig hulle instruksies aan die eiser gestuur sou word. Dit kon kennelik nie van hulle verwag word om te voorsien dat Grové afskrifte van die brief aan ander persone sou stuur nie. Dit sou alle perke van redelikheid oorskry. Voorts het dit sonder twyfel buite Grové se opdrag geval en het hy dit, soos hy self getuig het, bloot uit eie inisiatief gedoen, wat ook al sy redes of motief daarvoor was. Daar kan dus geen aanspreeklikheid aan die kant van die verweerder vir Grové se deliktuele optrede wees nie."

[89] *In casu,* Fourie had conducted interviews on 31 May 2002 during the course of his investigations. To Webb's knowledge these were conducted professionally and without incident. Webb attended a portion of at least one interview. At the time the appellant co-operated with the investigator and even agreed to undergo a polygraph test. Webb was entitled to assume that the investigation would continue to run smoothly. There was nothing to suggest at the time that the investigator needed any monitoring. In any event the nature of the wrongdoing by Fourie is not inherent in the work done by an investigator.

[90] Webb, therefore, could not have reasonably foreseen that Fourie would later become upset, lose his temper and accuse the plaintiff of theft in the presence of other employees. There was a boardroom which had been provided on Monday 31 May 2002

for the purpose of conducting interviews in private. It is not clear why Fourie did not use the boardroom but chose to confront the appellant in full view of his co-workers. Whatever his reasons, Fourie's conduct cannot be blamed on the third respondent. In my view a reasonable man in the position of Webb or the third respondent could not have foreseen Fourie's conduct or taken steps to guard against it.

[91] It follows, therefore, that the third respondent cannot be held vicariously liable for the conduct of Fourie. Claim B against the third respondent can, therefore, not succeed.

Quantum

[92] An award will depend upon the facts of a particular case seen against the background of prevailing attitudes in the community [See *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* **2001 2 SA 242 (SCA) 260**]. To arrive at a realistic assessment of damages the court must look at *inter alia*, the nature of the defamation, the recklessness or irresponsible conduct on the part of the respondent, the extent of the publication, the position and

the esteem of the plaintiff and the respondent's perseverance in denying liability.

[93] The defamation in this case is serious, it having been made in the presence of fellow workers. Although only one co-employee gave evidence it was established that the offending words were said in the presence of more than one person. Mostert testified that at first he did not want to believe the accusations but, following the appellant's dismissal, he thought the accusations that the appellant was a thief must be true. It has, therefore, been established that the defamation had an effect of lowering the image of the appellant in the eyes of his fellow workers. What also has to be borne in mind is that, although the appellant had not worked for the third respondent for long enough to build a reputation, he occupied a fairly senior position as a supervisor, which position necessarily commanded some degree of respect.

[94] What I find more aggravating, however, is that the respondents denied having made the offending statement. In addition they pleaded that if it was found that the statement had been made then it was true and in the pubic interest. No attempts were made

to lead evidence in this regard. I regard the failure to produce evidence that the allegations were true as extremely aggravating.

[95] A mitigating factor is that the utterances were made in the heat of the moment and were not pre-planned by Fourie.

[96] Although the appellant had claimed R80 000,00, counsel for the appellant suggested an award of between R35 000,00 to R50 000,00. Counsel for the respondent on the other hand suggested R5 000,00. I am of the view that having regard to the circumstances in this case a fair and reasonable award is R20 000,00.

Costs

[97] Generally costs follow the event. However the court is entitled to exercise a discretion.

[98] Although the appellant failed to make out a case on Claim A it would not be appropriate to grant costs against him in respect of Webb for the following reasons:

[98.1] Webb was going to be called as a witness anyway, even if there had been no Claim A.

[98.2] An amendment by respondents to include privilege as a defence in respect of both claims was allowed late at the appeal stage without any objection from the appellant.

[98.3] Webb was at all times represented by the same legal team as Fourie and the third respondent.

[99] With regard to Claim B, although the finding was that the third respondent was not vicariously liable this court is entitled to exercise its discretion with regard to costs. Having regard to the circumstances of the case (including the fact that Fourie had in fact been engaged by the third respondent) and the fact that the appellant has been substantially successful this court shall not make any costs order against the appellant in favour of the third respondent.

Interest

[100] The appellant claimed an amount of R80 000 in his original summons. He also claimed interest on that amounts.

[101] We do not know on what date the summons was served on the respondents. However, we do know that by 21 July 2003 all of the respondents/defendants had pleaded accordingly. Fourie would have been aware of the demand prior to that date. It is therefore appropriate to grant *mora* interest on the amount awarded to the Plaintiff from 21 July 2003.

[102] In the result I would grant the following order:

1. The appeal is partially upheld.

2. The order of the Magistrates' Court is set aside.

3. The second respondent is to pay the appellant's costs of appeal.

4. There shall be no costs order made against the appellant in respect of the first or third respondents in respect of the appeal and they will not pay the appellant's costs on appeal.

5.

5.1 In respect of Claim A the order of the Magistrate is replaced with the following:

5.1.1 Claim A is dismissed.

5.1.2 There shall be no costs order.

5.2 In respect of Claim B the order of the Magistrate is replaced with the following:

5.2.1 The claim against the first and the third defendants is dismissed.

5.2.2 Judgment is granted in favour of the plaintiff against the second defendant only in an amount of R20 000.

5.2.3 The second defendant shall pay the plaintiff's costs in connection with Claim B

5.3 There shall be no costs order made against the plaintiff in respect of the first or third defendant in respect of the action and they will not pay the plaintiff's costs in connection with the action.

MASIPA, J
JUDGE OF THE HIGH COURT

I agree

P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant:	J W Kloek
Instructed by:	Senekal Attorneys Inc.
Counsel for the Respondent:	R W M Kujawa
Instructed by:	Reon Marais Attorneys c/o Blakes Maphanga Inc.
Date of Hearing:	16 August 2007
Date of Judgment:	19 October 2007

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A301/2007

In the matter between:

DERCKESEN RJ	Appellant
and	
WEBB BN	First Respondent
FOURIE A	Second Respondent
CABLETECH EXTRUSIONS (PTY) LTD	Third Respondent

Legal Brief

Inuria - what constitutes inuria - permissible realms of questioning an employee regarding stolen or missing property belonging to an employer.

Inuaria - whether or not certain utterances or conduct are actionable will depend on the circumstances of each case.

Employer and employee relationship -

As a matter of policy an employer must be able to question an employee about "missing" or "stolen " items if the employee can reasonably shed light onto the matter.

Defamation - Vicarious liability - when an employer can be held vicariously liable for defamation by an independent contractor he has employed. Test - the degree of care circumstances demand form the employer in relation to the oversight of the contractor's work.
Whether the circumstances demand the exercise of care will depend upon proof that the employer owed the plaintiff a duty of care to prevent the

damage done by the independent contractor. If a reasonable man would have foreseen the risk or danger in consequence of the work he employed the contractor to perform and would have taken steps to guard against such danger and such steps were not taken by the employer then the employer is liable. When nothing suggests that the independent contractor needs monitoring or when the wrongdoing in not inherent in the work done by the independent contractor the employer cannot be liable.