REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 08/10/14

CASE NO: 38297/2011

(1)	REPORTABLE: NO/~~YES~~
(2)	OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3)	REVISED.
(4)	Signature 8/10/2014 Date

HERBERT WILLIFRED MANDLBAUR **PLAINTIFF**

and

RUBEN PAPENFUS **DEFENDANT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an action instituted by a 71 year old businessman ("the plaintiff") for defamation, *contumelia*, (an injury to his reputation and person) and financial loss that he allegedly suffered as a result of statements and false evidence made by the Defendant to the South African Police Service ("SAPS") which resulted in his arrest, incarceration and criminal prosecution.

[2] He runs hospitality outlet businesses and is an owner of a number of properties in Berea, including property in a Sectional Title Scheme known as Crestview. The Defendant was an estate manager in the employ of a company called Chambord Investments (Pty) Ltd ("Chambord"), managing Chambord's property, a block of flats/units in Crestview.

[3] On 12 October 2009 Defendant laid a complaint at the Hillbrow police station against the Plaintiff for trespassing at Crestview and malicious damage to property. On the same day Plaintiff was arrested at the Hillbrow police station and charged with the offences. He was subsequently prosecuted and acquitted on both charges.

PLEADINGS

[4] Consequently Plaintiff instituted this action alleging in his particulars of claim that:

[4.1] the Defendant made the statement either in his person or on behalf of Chambord, falsely, filing the complaint with the purpose to cause him serious harm and inconvenience.

[4.2] as a result he was held in jail overnight and prosecuted on the false statement, but ultimately discharged as the court found that the property that he was alleged to have maliciously damaged belonged to him, a fact which was at all relevant times known to the Defendant.

[4.3] he was defamed as the allegations were published to the police, court officials and all members of the public in court and suffered *contumelia* as he was injured in his person when he was arrested, handcuffed and kept in prison. He also alleges to have suffered financial loss for defending himself in a case resultant directly from the statement and false evidence and to have been further deprived of his freedom and privacy by being held in the police cells overnight.

[5] He accordingly claims damages as follows:

[5.1]	For deformation or *contemilia*	R100 000.00
[5.2]	For financial loss	R171 500.00
[5.3]	For deprivation of freedom	R150 000.00
	TOTAL	R421 500.00

It is apparent that the use of the words "deformation" and *"contemilia"* is a typographical error. The words are supposed to read "defamation" and *"contumelia"* respectively. No amendment was effected to the particulars of claim nonetheless.

6] In response, the Defendant raised a Special Plea to the particulars of claim, that on Plaintiff's own version the proximate and the direct cause of any damages he may have suffered were the actions and or omissions of the SAPS. The Plaintiff has failed to join the SAPS as a necessary party that has a direct and substantial interest in the outcome thereof.

[7] Also that the criminal charges laid against the Plaintiff were at the behest of the Body Corporate of the Sectional Title Scheme known as Crestview ("Body Corporate") to the knowledge of the Plaintiff. In the premises any damages suffered by the Plaintiff (which are denied) were directly or indirectly caused by the Body Corporate. The Plaintiff has failed to join the Body Corporate as a necessary party to the proceedings that has a direct and substantial interest in the outcome thereof.

[8] Defendant further pleaded that, in case the Special Plea is not upheld:

[8.1] at all material times he was acting within the course and scope of his employment with Chambord.

[8.2] denied that the statement was made falsely or with any intention to cause the Plaintiff any form of harm or inconvenience.

[8.3] that the statement was made by him in the course and scope of his employment with Chambord, the former owner of certain sectional title

units in Crestview, in a scheme situated at Erf 1513 Berea, and charges laid by him on behalf of Crestview Body Corporate ("Body Corporate") and not Chambord.

[8.4] The Plaintiff had intentionally and maliciously caused damage to property belonging to the Body Corporate namely, a security gate and the motor. The charges laid against the Plaintiff were therefore well founded and justified.

[8.6] denied that Plaintiff was ever arrested by the SAPS but allege that Plaintiff handed himself over to the SAPS without being arrested.

[8.7] denied that Plaintiff spent a night in the police cell and admitted that Plaintiff was discharged and found not guilty and denied that it is for the reasons as stated by the Plaintiff.

[8.8] Also denied that the property damaged belonged to the Plaintiff and alleged that to the best of his knowledge and belief it belongs to the Body Corporate. As a result no prejudice or damage was suffered by the Plaintiff, if any suffered it was caused solely as a result of his own actions by the Plaintiff.

There was no exception raised against the Defendant's Plea notwithstanding the ambiguity created by the references made to Chambord and the Body Corporate interchangeably. Particularly as referred to in paragraph 8.1 and 8.3

ISSUES TO BE DETERMINED

[9] Whether the Body Corporate and the SAPS necessary parties to the action? The onus lies with the Defendant to prove that the joinder is necessary.

[10] As the making and publication of the statement was common cause, the issue is whether or not the statement was defamatory of the Plaintiff and caused injury to his personality? If so, was it wrongful and unlawful (without reasonable cause or any justification?) and made with an intention to injure? A presumption to be rebutted by the Defendant.

[11] Whether or not Plaintiff's deprivation of liberty was as a result of Defendant's statement? (Was it wrongful?)

[12] The damages to be awarded.

[13] The trial proceeded on both merits and quantum. According to the parties' minutes of the pre-trial conference held on 11 February 2014, it was agreed that the duty to begin and onus of proof was on the Plaintiff. Proper procedure was but for the Defendant to begin in rebuttal of the presumption due to the common cause facts of the publication of the statement. The Special Plea was to be argued during the trial.

EVIDENCE

PLAINTIFFS

[14] Plaintiff testified that in Berea he owns units 44, 47, 28 and 48 situated at no 3365 or 481 Soper Road and his Close Corporation Jabula Ebusuku Properties Joel Road CC ("Jabula") purchased a flat, section 14 unit 204 in the Sectional Title Scheme called Crestview and real rights to exclusive use areas, parking bays/garages no 22 to 41 from Affordable Housing Company (Pty) Ltd ("Afcon") on 2 July 1999. The purchase price was paid off in 2004. Afcon then again in 2004 re-sold and caused the same property to be registered in the name of Chambord. On 4 June 2009 Plaintiff being the sole member of Jabula obtained an order from the Gauteng Division High Court in Johannesburg from Spilg J setting aside the sale and the registration of property transfer to Chambord. The order also declared the agreement of sale between Jabula and Afcon binding. Since then he has been attempting to get the transfer of the property to Jabula to be registered without success. He had to go to court to force the registration of transfer. He has however been in possession of the property since 1999.

[15] He met the Defendant in 2008 at a meeting he was invited to by Legae Laruna, a security type organisation. Brian Miller who owns Chambord, the Defendant, who is Miller's right hand man and no 1 manager and various people from the Municipality Council were there. As owner of the unit and garages he has never attended the Body Corporate Meetings. Although he did receive the agendas he could not recall seeing his name appearing in any of those agendas. Defendant however, knew that he was the owner. He had made Brian Miller and Defendant aware that he owned the unit and the 20 parking lots in the building. Crestview has three floors of parking. He, as a sole member of Jabula owns the middle floor. The flat is on the second floor of the 9 storey building. There are 2 gate entries to the parking with security personnel on each, manning the gate. On entering the gates there is a way that leads to the one parking that is underground and the other one goes behind to the first floor which is his parking.

[16] Sometimes in October 2009 he was told that the parking has been hijacked and his garages were full of cars. So he went to inspect the place and realised that the lock was damaged. The main door was open, also the sliding door and swing gate. The lock on the left hand side of the swing gate had a remote that was broken down. In terms of the sale agreement he as the owner was liable to repair the remote if broken. The lock on the main gate was removed but the small gate was locked. It is a half a metre gate and if it's pushed it is possible to go in through the left hand side of the gate. He checked the remote and realised that there was a new motor and a new system fitted, which is why his **1999 remote** did not work, the only access for the cars to the garage. He phoned the security guards and told them to allow the cars parked in his garages to drive out but not allow any in because they were not his cars. His hotel is situated nearby so the parking was used by his clients at night as it was secured, as Hillbrow was a dangerous place. After he left the property, Anthony whom he left there called him and told him that a policeman, a Senior Superintendent Van Rhyn wants to see him urgently, it seemed there were numerous problems. Half an hour later Anthony called again and told him to take proof of his ownership of the garages to the police station as a charge of damage to property and trespassing was going to be laid. Andrea Du Toit and Anthony were there when he left the unit. So, he made a copy of the Deed of sale and asked Dollie Incorporated to write him a letter confirming that he owns the garages and that the sale agreement confirms that the motor will be fixed by the purchaser.

[17] On his way to the police station at about 16h00, he picked up his son, John Mandlbaur. He went to avoid harassment. At the station they found an officer Mr Ward "Ward" who was not interested in looking at his papers. His son tried to speak to Ward as well but he was not interested. Ward told him about the trespassing and malicious damage to property charges that were laid against him by the Defendant and was only interested in locking him up. Ward took him behind the desk where he was sitting with 2 police women. They kept him there for more than 2 hours and for a considerable time lecturing him. He was put in the cell only at nearly midnight. At between 4 and 6 o' clock in the morning, he was let off and warned to appear in court the same day on 13 October 2009 on charges of malicious damage to property and trespassing. The matter was postponed and a letter sent to the Senior Prosecutor for his decision. The charge on exhibit A said the gate motor damaged, the penalty of R60 000 to be imposed. The damages to the motor are said to amount to R900 and the Defendant is stated to be the owner or lawful possessor of the property. Annexure B is for trespassing. It says Plaintiff does not own the building or parking bay. On the Subpoena, the Defendant is the witness.

[18] He indicated that even though the gate was his responsibility the Body Corporate did not tell him when and why his padlocks were removed. Mr Buys the attorney who handled the case told him that the Defendant laid the charges against him. He attended court as per bill of costs from his attorneys and was present at all three occasions of postponement. Defendant was also always in court. The court instructed them to contact Superintendent van Rhyn and other members to be present but Mr Miller called only the Defendant as a witness. He was discharged without having testified, the reason being that they failed to prove any case against him. For every attendance he was charged and an account rendered. He paid about R28 688 to Couzyn and Hertzog Attorneys through his CC, Jabula Ebusuku. At the time of his arrest he was 67 years old and had nearly 100 employees to whom his arrest was common knowledge. He was aggrieved and embarrassed. Defendant never spoke to him or offered him any apology.

[19] Under cross examination he confirmed that the National Director of Public Prosecutions ("the NDPP") first refused to prosecute Defendant's case, making a *'nolle prosequi'* decision. The police then reissued the summons even though they were initially not keen to prosecute as well. The prosecutor again refused to prosecute. He felt that by reviving the summons, where he was eventually prosecuted, he was being intimidated. He agreed that at the time he was also being harassed by the police in his hospitality businesses. He had laid a complaint about the arrest of 60 customers with no charges being brought against them and were released after being held for the whole night. On his arrest there were no formal papers that he was asked to complete whilst being there and it took hours before he was charged with malicious damage to property. When he got to the cells they took everything. He endured about 12 hours of arrest. Exhibit A" says he was placed under arrest at 16h00 but he was actually put in the cells at midnight. In his action against the police, they were ordered to pay him damages for R150 000 for his malicious prosecution and incarceration.

[20] He could not say how the legal costs for R171 500 were constituted or if they were grossly inflated or overstated. He confirmed that the docket at the police station referred to Defendant being the complainant. Defendant never alleged to be acting on behalf of the Body Corporate. Instead Defendant testified in court that he called the police and told them

that someone damaged his gate, went and laid the charges, giving the police information. **There was a continuous problem with the motor that is why in the contract it said the owner must service it. The gate was bent a little bit and the fixed motor was different.** The electronic button and locks on the small gate to the property were cut off and a new motor and lock installed without making him aware. He only found out when his remote did not work. **He left in the same way as when he went in without causing any more damage to the gate.** Nobody told him that somebody was now controlling the gate. **At the time he came nobody was there at the gate and he wanted to fix it. The steel gate is the only entrance to the garage to the specific parking bay and separate from the other bays.** He had people renting his unit at that time and don't know if Defendant was aware.

[21] Plaintiff's son John Mandlbaur, only remembered going to the police station with his father ('the Plaintiff") as a result of a warrant or arrest warning that was issued. He thought Plaintiff phoned him and told him about it. He would have picked Plaintiff from his hotel across the road at Crestview but not so sure. He anyhow went with the Plaintiff to the police station, not in a police van. It was late in the afternoon. Once there they saw a Captain Ward. Plaintiff had some paperwork with him to prove ownership of the garages. Ward refused to look at the documents and told them that he was going to arrest the Plaintiff. He left after a lawyer arrived at the police station. A warrant of arrest was only then issued against Plaintiff who then was inside the police station whilst he remained outside. He did walk in with him but then remained outside the charge office.

[22] Plaintiff closed its case.

[23] Mr Bank for the Defendant applied for absolution from the instance on the basis that no case was proven against the Defendant. He argued that the Plaintiff has failed to prove that Defendant was acting on his own volition but for and on behalf of Chambord. He was also a trustee of the Body Corporate whilst the Plaintiff up to the date of trial has not attended to the transfer of ownership. He submitted that the gate and the motor to the garages are the property of the Body Corporate and it attended to fixing it, Plaintiff was aware of that. Therefore he argued that the Body Corporate had the right to call the police and that the reissuing of the summons after the prosecutor declined to prosecute cannot be blamed on the Defendant but the police. He also argued that there was no evidence of malice and that conjecture and the slightest probability are not enough, even if Defendant's evidence remains, he had no case to answer. As a result submitted that Plaintiff failed to show that there was no reasonable cause for the Defendant's statement.

[24] In assessing the evidence led so far, as outlined in the ruling I delivered thereafter , I found that there was evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff, which became clear when I applied my mind in consideration of the admissible evidence in relation to the pleadings and the requirement of the law applicable to the particular instance (for example, the presumption germane to the issues) that such evidence had at least the potential for a finding in favour of the plaintiff. Counsel for Defendant's argued that the plaintiff had to make out a prima facie case. Plaintiff does not have to go that far to escape absolution. If a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court "might" find for the plaintiff, then absolution from the instance must be refused.' *Swanee's Broedery (Edms)*

Bpk (in liq) v Trust Bank of Africa Ltd 1986 (2) SA 850 (A) at 862F-G. I therefore refused the Application.

DEFENDANTS EVIDENCE

[25] Defendant confirmed that he was employed by Chambord since 1987, not as a director but as an employee, a portfolio manager of various block of flats in Sectional Title Schemes owned by Chambord, including Crestview since 2005 or 2006. According to him Chambord purchased the property from Afcon that consisted of 65 to 85 flats. There was a dispute about the parking area that Chambord bought from Afcon. It came to light that some parking bays that were exclusive use areas of various owners were already sold by Afcon to Plaintiff and his company. Every unit was supposed to be allocated a parking bay that is registered at the Deeds office to that unit. Afcon had then sold to Chambord the same parking as an exclusive use area which was then registered in Chambord's name. **However at all material times Chambord had known that notwithstanding the registration Plaintiff was the owner not itself. It was also common cause that Plaintiff had the use of the parking bays and could use them anytime he wants. Their security will open the gate and give him and his visitors access.**

[26] **There is a steel gate that gives access to the parking area which was in dispute.** It is a swing gate that opens from the right hand side (with hinges on right hand side). There is the motor gate where the security is based for 24 hours. **Chambord** on behalf of the managing agent Adcorp **employed individual guards for security.** One security guard was involved on a 12hr shift at the gate. **The steel gate is the only entrance to the garage to the specific parking bay and separate from the other bays.** Others have self-contained parking bays. The turnstyle had the body corporate's lock and chain. **The key to the lock was held by Chambord.** That is the lock they wanted to cut. **Plaintiffs business is opposite the parking bays.** Plaintiff used the parking bays very seldom parking his vehicle, it was usually empty. **The parking was used by his customers in the evenings** and the security will have a record of every car that parked in the garage taken by security at the steel gate on a sheet recording the date, time and registration number. He denied that Plaintiff could have been in possession of a remote control or used it regularly because it was only with building manager and security. He said Plaintiff's clients were seldom refused entry and they always open for them when accompanied by someone. Mr Raphael Phasha was the building manager. Plaintiff's unit was vacant until a year before the incident.

[27] On the incident on 12 October 2009, he testified that **Phasha came to him in his office and reported that the German ("meaning the Plaintiff") damaged the motor on the gate to the parking by using force to push the gate open.** He went with Phasha to look at the gate and found Plaintiff's security there. As they approached security took out a bolt cutter. Mr Ngubane their guard was at the scene all the time. The Plaintiff was not there. The plaintiff's security took the noose and the chain out of the bakkie. They said they were waiting for the old man to give them further instructions to cut the locks and replace them with his locks, meaning the body corporate's lock on the turnstyle. **Chombard's tenants would not have been able to walk through the turnstyles if they wanted to get inside they would have to get Chambord to open. After Plaintiff's security expressed their intention, he warned them that if they damage any property he will lay a charge. He himself did not own any property or a sectional title in the building,** but **represented the Body Corporate**

as a trustee. He then phoned Badboys security contracted by Legae Larona to patrol the city and the precinct with 24 hours monitor cameras in the guardroom for Legae. Kokie from Badboy who was around the corner, **arrived with Senior Superintendent Van Rhyn from Hillbrow Police Station**. He did not phone Van Rhyn only Badboys. The arm of the motor was bent into a banana shape. Phasha tested the gate with a remote it did not work. The motor was working but could not do anything with the bent arm of the gate to an extent could not work. **The steel was good quality and good for the purpose**. The gate had a gap between a meter and a half. One could easily walk through. It was not possible to use it by hand now as the arm was bent. **They had to repair the motor the next day**. Plaintiff's security remained on the scene for a short period of time. When they told Kokie and Van Rhyn that they were there to cut the lock, Louise told them that if they do that he will lay a charge of trespassing. The security then phoned a guy by the name of Tony and gave the phone to Defendant so that he can speak to Tony. Defendant told Tony that the property does not belong to the Plaintiff and if the security dare destroy the property he will lay the necessary charge. The security then left the premises and Van Rhyn told him to go to the police station at Hillbrow and lay charges of malicious damage to property referring to the motor of the gate and trespassing. He agreed that **Plaintiff was the owner of the property talking about the garages on page 53. He also understood that in terms of the agreement from Afcon Plaintiff was responsible for mending the gate and remote. However prior to the incident** 5 months before the incident **a new motor was replaced by the Body Corporate**. It was part of the building,. **He said the reason was because it broke and they were not able to fix it. It also was for better control to the building**.

[28] On the day of the incident he went to Hillbrow police station after lunch with Phasha and Ngubane. There he had a problem with a constable who could not take a proper statement and asked for somebody else. **Nobody was ready they were all busy and he phoned Superintendent Van Rhyn** and **told him that the police were reluctant to do any paper work**. Van Rhyn came to the police station immediately and spoke to the policeman who then took the statement from Ngubane, Phasha and himself. He indicated the amount that the Body Corporate paid for repairing the motor that were done on the same day for security reasons. In the statement he said Plaintiff broke "my gate" saying that as the trustee, it is not his gate but that of the Body Corporate. **He also complained that Plaintiff was inviting criminals with his mirrors that he kept in the garage.**

[29] They heard that the case was thrown out of court after the court proceedings on 13 October 2009. Then later on, the police came to his office for another statement. They told him that the other statement did not apply anymore because it was thrown out of court the first time, so they were going to open another case. That statement says nothing about the property belonging to the Body Corporate or the Trustees. It instead refers to the incident on 12 October 2009 concerning what he referred to again as "his gate" and the Plaintiff. **Whilst at the police station he saw the Plaintiff arriving at the reception area with another gentleman. They were taken to the charge office by Captain Ward. When he left Plaintiff was still behind the counter with Ward. Later he heard from Superintendent Van Rhyn that Plaintiff was arrested and in the cells.** Their lawyer then established that the matter was thrown out of court as on the day he did not appear. The first attorney withdrew and another had flu. In the second matter that was on 29 July 2011, he attended court twice and gave evidence. He denied that the statement he made when filing the claim was false, he was a trustee at the time. He alleged not to have crossed swords with the Plaintiff and to

have had no reason to get him into trouble. **He denied laying a charge of trespassing against Plaintiff. He agreed that the damaged property belonged to Plaintiff.**

[30] **Under cross examination he testified that when the police were reluctant to take his statement, he, on his own accord phoned Senior Superintendent Van Rhyn. He knows Van Rhyn and had his cell number having met him before 2009 since they moved into the area. He sat with him in certain meetings of the Community Police Forum ("CPF") in Hillbrow.**, He knew and understood what it meant to make a statement under oath and confirmed his signature and that the constable wrote what he told him. **He made the statement the same day with everything contained therein being correct. He did not mention either Chombard or Crestview in it.** He knew and had worked for Brian Miller as owner of various properties at that time also as owner of Chambord Investments. He has been at the same time a trustee of the Body Corporate since the first transfer of the property to Chambord and their 1st general meeting that was attended by the members, building manager, Brian Miller, himself with not less than 7 owners. As a trustee he had the duty to ensure that levies are paid and parking bays. He **would also know the owners and when they take possession of a unit.** He said in his statement he did not give anybody a right or permission to break "my gate" and Plaintiff was trespassing and caused malicious damage to his property. He **knew before the arrest and before laying the complaint with the police that since 1999 Plaintiff has had access to the property and was never charged with trespassing when he entered into the parking as he owns it. His statement where he said "his gate" was also wrong as it was not his gate. He did refer to himself as the complainant as well. He agreed that if Plaintiff damaged the motor it would be Plaintiff's responsibility to fix it. Plaintiff was also entitled to enter the exclusive use area and had done so since 2004.** According to him he did not act on his own as the Body Corporate functions with certain rules and unless he was authorized at some meeting he could not act alone. **There were no minutes to indicate if the Body Corporate held a meeting about the malicious damage to property and trespassing charges. He did not see the Plaintiff push the gate but Phasha did and made a statement to the police.** Adcorp the managing agents supplied employees to Chambord to secure the property and the Body Corporate paid them The company was liquidated a year before trial. **He agreed that the statement that he did not need to break "his gate" came from him.**

[31] According to Raphael Phasha Marwale ("Phasha"), the building manager, he has managed for the Body Corporate since 2008 and stopped in 2011. He recognized the Plaintiff and met him several times at Crestview. The first time they met they were talking about the parking and Plaintiff told him that it belonged to him. Two guards were mending the entrance to the building at the time, one at the back and one in front. **Both worked for the Body Corporate.** Since the time Plaintiff told him about his parking, he only saw a Nissan being parked there by a guy who claimed to work for the Plaintiff. No other cars were using those parking bays. Plaintiff only had in there covers, covering mirrors that he one time said were lost.

[32] He described the procedure at Crestview then, to have been that with **all tenants** who drove in, they would check the registration number of the car whether it is the right car to park in or not. Everyone with a car registration is listed. **Plaintiff had a separate garage underneath and he** listed with him the registration numbers of about 15 cars but only a

Nissan bakkie used the parking. Plaintiff would ask them to open the gate all the time when he comes there. If he was not there, the security will be there. They will then open for him and check his licence to see if it's him. Only the security on duty and himself as the building manager had the remote. Before the date of the incident, Plaintiff came driving a Mercedes Benz and asked him to open the gate. He then drove in and **went to the back of the gate of the parking.** There was a covered mirror that Plaintiff kept behind a black thing next to the steel arm of the motor behind the column. Plaintiff told them that the mirror was missing in the basement. He went to speak to the lady who works for Plaintiff and the lady said the mirrors were there. He did not see Plaintiff since that day.

[33] **He heard about the gate incident. On that day Plaintiff was said to have come from across the road,** went straight to the gate and pushed it open. He held the gate, shook it hard and moved back. The guard who was in the hut went to Plaintiff and greeted him. Plaintiff did not answer. **Plaintiff pushed the gate open a bit backwards**. He then asked the security guard to press the remote but the gate did not move. The security asked Plaintiff if he can help, Plaintiff just walked away. Plaintiff **was very angry even though he did not say anything to the security. He** sometimes would go and check on the guards if they are doing their work, and for many other reasons as well. That day it was because of the sound. Plaintiff just went off without saying anything. **By shaking the gate like that Plaintiff committed an offence to open it by force. The gate was working before that, including the motors.** The sound came from the swinging gate, with the metal arm bent. **It was not working after Plaintiff pulled the metal and left the gate open.** At the time the Defendant was in his office. He went to call the Defendant. **He also called the police. 3 police vans with a flying squad from Hillbrow came and did not speak to any particular person.** Defendant explained to them the situation **and they told them to go and lay a complaint. Defendant then went to fetch Ngubane who was staying at Room no 3 Crestview** and they together went to Hillbrow police station. On arrival at the station they found **Plaintiff, who** *drove with the police to the station,* **already there behind the counter.** He was there with his son. He did not talk to the Plaintiff. *They* were there for an hour and 30 minutes and with Defendant all the time. They left together in Defendant's car. The Plaintiff was still at the same place where they found him when they arrived there.

[34] He got his instructions from the Body Corporate, <u>the Defendant was his manager</u>. On 12 October 2009 he did not inspect the gate before the incident. On the 11 October 2009 before 8 o'clock he saw the bakkie in the garage. **He checked to see if the cars parked were of the tenants.** Plaintiff did not have a remote, they always opened the gate for him. **On 12 October 2012, Plaintiff did not ask anybody to open for him and he was not driving. The rules say that no pedestrians are allowed at the gate for the parking. The incident lasted 3 to 4 minutes. Plaintiff shook the gate and then left.** They tried to close the gate with the remote it did not work. **Plaintiff had several times used the parking bays and not charged with trespassing.** After Plaintiff left for his building he was then at Crestview seen at the back with the police who took him to the police station. He **went in the bakkie with the police**. They were the first to arrive at the police station. It was the officer on duty who told them that if the Plaintiff just pushed the gate then it is malicious damage to property. **The only people who saw the incident was him and the security. He did not mention trespassing**. His job almost every time before he starts duty was to check the Occurrence

Book. He did not see anything in it about the gate not working that day. The Defendant closed its case.

SPECIAL PLEA

[35] As it is common cause that Defendant made the statement to the police wherefore its publication taking place and that it instigated the charges against the Plaintiff and his arrest (accused of the two offences that the Defendant made the statement about), during argument Defendant's Counsel made a submission along the terms of the Special Plea, calling for the claim to be dismissed with costs on a punitive scale, on the basis that still it has not been proven that Defendant was acting on his own volition when making the statement but on behalf of Chambord and/or Crestview. He claimed that Defendant must be regarded as a "corporate representative", the Body Corporate being the party to be sued or necessary to be joined. He insisted that the evidence led by the Defendant established that, at the time of making the statement Defendant was acting within the course and scope of his employment with Chambord and that the property that was damaged belonged to the Body Corporate of Crestview and he, being the trustee, made the statement on their behalf as owners of the property.

[36] This was an attempt to invalidate the Plaintiff's claim as against the Defendant, by advancing a Plea in abatement, which does not in any way tend to deal with the right of action itself but merely seeks to avoid the action by revealing grounds to quash Plaintiff's claim. However, an employee does not cease to be delictually liable because of his employers vicarious liability; see *Harnischfeger Corporation v Appleton* 1993 (3) SA (W) 487. Likewise, the fact that the Plaintiff may have a right of relief against the Body Corporate as employer or whoever else it deems does not non-suit the Defendant as he is the wrongdoer. The Plaintiff has a right of action against him. The court in appropriate circumstances will, in the case of a successful contention, stay the proceedings until the necessary party has been joined; see CF Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A.D.) However if the action is unsustainable because the party not joined is the wrongdoer, the party whose conduct has given rise to the Plaintiff's cause of action, then the claim can be dismissed right away for failure to join the necessary party.

[37] A 'Necessary Party' is therefore a party, in the absence of whom no effective decree can be passed by the court. This party's presence would as a result be required for the court to grant the relief or pass an order otherwise it may suffer prejudice. Ordinarily, the fact that Plaintiff has got a right of action against 2 or more parties in respect of the issues involved, does not make them necessary parties in an action against the one or the other. If the court can adjudicate in an effective manner upon rights and liabilities of the cited parties without the non-cited party, he or she is not a necessary party. Plaintiff can then sue or claim relief against one party at a time if he so desires, if complete and effective decree can be obtained from one party without the absent party being affected thereby; see *Hornby v Arthur* 1917 A.D. 471. Necessary parties are essentially those parties from whom the plaintiff has claimed relief, not those parties from whom he **may** claim relief.

[38] The nature of the relief claimed, the extent and the manner in which it may affect the interests of third parties is therefore important in deciding whether or not all necessary

parties have been joined. See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657. The test is then whether or not a party has a **direct** and substantial interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. See *Judicial Services Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176H-I. A mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea as illustrated in JSC case *supra* at 176I – 177A and also a mere financial interest may not require a joinder of a person having such an interest. Corbett J in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 at 415H described the position as follows:

> "What is required is a legal interest in the subject- matter of the action which could be prejudicially affected by the judgment of the court"

[39] The rule is therefore that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party. Erasmus *'Superior Court Practice'* B1-95. Defendant must as a result prove that a party that it deems to be necessary to this action, that is the Body Corporate has a direct and substantial legal interest in the subject matter of the action that might be prejudicially affected by the order so made or that such order may not be brought into effect or be sustained without prejudicing the Body Coprorate. *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012) SA 294 (SCA) at 317A.

[40] In *casu,* the Counsel has argued for the dismissal of the action. That can only happen if the person whose act/conduct is alleged to have given rise to the Plaintiff's cause of action is not cited such that complete relief cannot be accorded amongst those already cited without prejudice to the non-cited party, which is not the case in this instance. The relief or order sought by the Plaintiff is only against the Defendant whose conduct has according to the Plaintiff given rise to its cause of action. The ventilation and final resolution of the issues between the parties in the action and the making of an effective order by the court will not be impeded by the absence of the Body Corporate. The Defendant has not shown if the sustenance or carrying into effect of the order that the court might make will be prejudicial to any interest of the Body Corporate.

[41] Furthermore Defendant never mentioned that he was acting on somebody else's behalf nor the name of the Body Corporate in his statement to the police. Defendant stated that Plaintiff damaged "his gate" and he did not give anybody permission to damage his gate and enter the building without his permission. During his evidence, Defendant then confirmed that it was his decision not of the Body Corporate to call security and for the police to be at the premises. Also to go and lay a charge against the Defendant. He also confirmed that he did not mention either Chambord or Crestview and that there were no minutes to indicate if the Body Corporate held a meeting on the malicious damage to property and trespassing charges. He agreed that he referred to himself as the complainant in the statement and at the time he knew the property belonged to the Plaintiff. He also stated that in his statement where he says "his gate" is also wrong as it is not his gate. So he is regarded by the Plaintiff in the capacity that he held himself at the time. He held himself to be acting in his personal capacity and is therefore being sued in that capacity. Plaintiff's claim is founded on Defendant's conduct at the time and as a result brought only against him. The Body Corporate will not be prejudiced by the making of any decision by the court

as the order or relief is only against the Defendant and may only be carried out as against the Defendant. Defendant's Plea for the dismissal of the Plaintiff's claim for failure to join the Body Corporate as the necessary party in the action therefore lacks any validity.

[42] Furthermore, the fact that the Body Corporate may be vicariously liable as an additional party to be sued does not make it a necessary party in the action against the Defendant. By citing the Body Corporate the Plaintiff could have just increased the number of people against whom the judgment could have been enforced, but the delict and the wrongdoer stays the same whether or not the Body Corporate is joined.

[43] The contention for the SAPS to be joined as a necessary party was not canvassed further. However it came to the fore that Plaintiff successfully sued the SAPS separately for malicious prosecution and detention.

ON DEFAMATION, CONTUMELIA AND DEPRIVATION OF PRIVACY

APPLICABLE LAW

[44] Defamation is generally defined as 'the unlawful, intentional, publication of defamatory matter (by words or conduct) referring to the Plaintiff, which causes his reputation to be impaired' in Burchell and Hunt '*The Law of Defamation in South Africa* at 35. The Plaintiff is required to establish two basic elements namely: that viewed fairly by a reasonable man:

(a) The statement refers to him; and

(b) that it is defamatory of him and caused injury to his personality as well).

[45] A defamatory statement is said to be one which lowers the person to whom it refers in the estimation of ordinary, right thinking persons, generally. Whether if construed in their secondary or primary meaning, the words or statement complained of are reasonably capable of conveying to a reasonable reader a meaning defamatory of the Plaintiff (eg, insulting, offensive, derogatory, libellous or contemptuous). See Burchell on *'Defamation'* (*op city* at 95). It echoes that objective interests outside human feelings have been infringed. Things like privacy, reputation and dignity. To succeed Plaintiff does not have to prove that the statement was false or known by the Defendant to be false; see *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1218; Instead it is presumed that there was no reasonable cause for the statement (it being wrongful); and that it was made with an intention to injure (impair the Plaintiff of his dignity).

[46] The Defendant must have published or caused these defamatory statements to be published by his conduct or words for the presumptions to arise upon the publication of the defamatory statements (i) that the publication was unlawful and (ii) that the statements were made *animo iniuhandi, see Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* **[2000] ZASCA 77**; **2001 (2) SA 242** (SCA) at para. **[16]**. The Defendant has the onus to rebut these presumptions. So he must prove that the publication was lawful (justification) and that he had no intention to injure the Plaintiff.

[47] *Contumelia* on the other hand is said to relate to conduct that infringes the Plaintiff's sense of self-worth, that amounts to an impairment of personality that also include feelings of dignity and repute, in essence referring to the injury suffered by the Plaintiff. Compensation is for the impairment of the plaintiff's dignity, that is of that valued and serene condition (of a person) in his social or individual life which is violated when he is publicly or privately subjected by another to offensive or degrading treatment or when he is exposed to ill-will, ridicule or contempt."

[48] Deprivation of liberty– on this occasion the right protected is the right to liberty - being protected from any limitation of freedom of movement or action including total deprivation of liberty. There must have been a physical means of obstruction or subjection to physical control even if verbally; see *Sievers v Bonthuys* 1911 EDL 525 531 -532. *Masawi v Chabata* 1991 (4) SA 764 (ZH) 770- 771; See also Burchell Delict 202-203. It must have been committed *animo iniuriandi.* A distinction is made between wrongful deprivation of liberty (constituted by false imprisonment or wrongful arrest) and **malicious deprivation of liberty** (malicious imprisonment or **malicious arrest**)

[49] The Plaintiff must prove that the Defendant himself, or a person acting as his agent or servant, deprived him of his liberty. **The Defendant could have supplied the policeman with information on the strength of which the policeman decides to arrest the Plaintiff**; See *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) 377 -378. The Defendant will not be liable on the ground of wrongful deprivation of liberty, unless if his actions were influenced by improper motives. **Such a motive is present if the arrest was executed with a purpose other than bringing the arrested person properly to trial.** See *Tsotse v Minister of Justice* 1951 3 SA 10 (A) 17; *Duncan v Minister of Law & Order* 1986 2 SA 805 (A) 820.

[50] The arrest of the Plaintiff should have followed directly from the statement or information placed with the police and on the charges or complaint as lodged by the Defendant and not resulting from an outcome of an investigation. See *Lederman v Moharal Investments (Pty) Ltd* [1969] All SA 481 (A) 492. If the arrest resulted in a prosecution Plaintiff will have to prove that the prosecution failed. From a procedural and onus point of view, it was held in *Minister of Law and Order and Others v Hurley and Another* **1986 (3) SA 568** (A) at 589E – F that:

> 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

ANALYSIS OF THE EVIDENCE

[51] Plaintiff's account of events was very simple, sincere and straightforward, with one or two minor facts varying with his son's testimony which after being considered against all evidence I found immaterial and insignificant. Generally, to me Plaintiff's evidence was credible and reliable. The court could however make out the underlying frustration with the protracted issues between him and the owners of Chambord. The evidence established is that it was well known that he owns the garages or parking bays at Crestview situated in the middle floor of the three storey garage floors, with its own entrance demarcated by a steel gate to access his parking. Also that, the garages are an exclusive use area that he as the

owner was to enjoy exclusively to the exclusion of the others. He was also as owner supposedly responsible for the maintenance and repair of the area, the gate and motor as part of the property. However the functioning of the remote was changed, the motor replaced and the locks on the gate to Plaintiff's parking also interfered with, Chambord keeping the keys to the locks allegedly for effective control, without him being notified, a fact admitted by everybody including the Defendant. Now with the full knowledge of his ownership of the exclusive use of the parking bays and that in accordance with the sale agreement he is fully responsible for the maintenance and repair of the property that includes the gate and the motor, Defendant's making of a statement laying a complaint against Plaintiff for malicious damage and trespassing of his own property is, certainly, as correctly pointed out by the Plaintiff to any reasonable person defamatory of him and primarily without a reasonable cause. The fact that Defendant went further and falsely stated in his statement that the property belongs to him, points to an improper motive not only to harm and inconvenience the Plaintiff. He could have discussed his concerns with the Plaintiff.

[52] Plaintiff went to inspect the entrance to the garages that he owns because he heard of the unauthorized parking of vehicles in his parking and the problem with the gate. Defendant does not deny that they changed the motor 3 or 4 months before and put in the locks on the steel gate or turnstyle so that Chambord can have effective control, peculiarly to Plaintiff's property. This was done during the time when the order of Spilg J was made, a few months earlier confirming Plaintiff's ownership of the property. So effectively there was an underlying problem when Plaintiff went to inspect the gates to his property. He was not advised of the changes as owner and the holder of the exclusive right to the area. He had a right to inspect and be in the premises or property. There was therefore no reasonable cause for the Defendant to lay a charge of trespassing and malicious damage to property. The only inference to be drawn from Defendant conduct is that he was motivated Defendant by malice.

[53] The false statement was defamatory, Plaintiff alleged that his dignity was impaired and reputation as a businessman injured by such statement to the police, court officials as well as the 100 employees in his businesses who came to know about it. He was being accused of a criminal conduct, which is libelous and can be detrimental to his business and viewed negatively by clients and fellow businessman. A fact that was not disputed by the Defendant. Plaintiff fully established that Defendant's statement was not only defamatory made with improper motive but that it was also malicious and made to ensure that the Plaintiff indeed is arrested and deprived of his liberty. Plaintiff alleges this was done in cohorts with the policemen, which allegation the court finds not to be far-fetched, as shown by the evidence. Defendant called Badboy security, instead they arrived with the Senior Superintendent of the Hillbrow Police Station, Van Rhyn, a friend of the Defendant, strange that the Superintendent would respond to a petty complaint about the alleged pushing or forcing open a gate. Defendant alleges not to have phoned Van Rhyn but that Van Rhyn

advised him to lay a charge anyway, even though Plaintiff's security for whose presence at the gate they were called for, left without doing anything after their threat to them to charge them with malicious damage to property and trespassing. Defendant proceeded to lay the charges, despite also that in fact he could not lay such charges of either trespassing or malicious damage to property as the property belonged to the Plaintiff who was liable to its repair and maintenance anyway. So without divulging this to the police, he falsely allege that the property belongs to him. That can only strengthen the presumption of malice in , instigation the charges, the arrest and the deprivation of Plaintiff's liberty.

[54] Indicative of further malice, is Defendant's conduct when at the police station and the police were refusing to take his statement. Determined to lay the false charges so that Plaintiff can be arrested, he again called on Van Rhyn the Superintendent, who came to the police station immediately and directed the constables to take the Defendant's statements. Van Rhyn was to make sure that the complaint is laid and the Plaintiff is indeed arrested. So, Plaintiff did not stand a chance with his papers to prove ownership. After Ward put Plaintiff in the cell at midnight, officially arresting him, Van Rhyn personally reported to the Defendant at that late hour of the night that Plaintiff has finally been arrested on his statement. As a result, Plaintiff suffered the indignity of arrest and was deprived of his liberty, clearly maliciously orchestrated by Defendant's making of the false statement and Van Rhyn. In addition, as a direct result of the Defendant's statement, Plaintiff was exposed to ill-will and ridicule and infringement of his privacy and personal freedom.

[55] The Defendant attempted to justify his statement to quell the presumption of wrongfulness by alleging that when he was called by Phasha they found Plaintiff's security people at the gate with a cutter and a bolt about to cut the locks and the gate, just waiting for instructions from their boss. However these people on arrival of the police left without doing anything. He alleged that Plaintiff damaged his gate, when he neither saw him doing so nor was he aware of the state of the gate before the Plaintiff and when his security arrived, save for Phasha's hearsay account of what Ngubane (who did not testify) allegedly told him about the Plaintiff. Besides, because of Plaintiff's ownership of the property and his responsibility to fix it, the laying of the charges or making of the statement under the circumstances was still indefensible. Plaintiff has had access to the premises since 1999 and when the gate was not functioning and opened it physically without being charged with trespassing since 2004. The Defendant therefore failed to discharge or rebut the presumption that the making of the statement was unlawful and that it was made *animo iniuhandi,* taking into consideration also what took place at the police station.

[56] Phasha's testimony could not be relied upon in any form. He was not very impressive and most of it was hearsay evidence. His direct evidence was contradicted the Defendant's evidence. To illustrating a few examples; he did not mention finding Plaintiff's security persons at the gate of the Plaintiff's parking when they were coming from the Defendant's office. He also did not mention the security that Defendant called but said he called the

police and 3 flying squad cars arrived from Hillbrow Police Station, whilst Defendant insists that the police or Van Rhyn were not called except Badboy security. He also did not mention Van Rhyn in his evidence. Phasha testified that Plaintiff was taken to Hillbrow Police Station by a police car and they found them at the station, contrary to Defendant's version who said he did see the Plaintiff on the date of the incident, he and another gentleman arrived at the reception area of the Hillbrow police station whilst they were already there. Phasha on the other hand said when they came to the Hillbrow police station, **Plaintiff was already there behind the counter at the police station** with his son. They were taken to the charge office by Captain Ward. Phasha could not be right because according to the Defendant they went to the police station after lunch whilst Plaintiff says it was around 16h00 when they went through. He also told the court what he said he heard from Ngubane and later alleged to have seen the Plaintiff shaking the gate, when he initially said he heard about it from Ngubane. It seems he was just eager to please and say whatever was expected of him by his manager.

[57] The same cannot be said with the evidence of the Defendant. He was not outright untruthful in his evidence, although sometimes he struggled to justify his incongruous behavior as I said that one could sense the tension resultant from the situation and in his case an underlying antipathy against the Plaintiff for owning the garages or parking bays. It came out by referring to him as the German and watching his property like a hog . He was aware of the wrong that he was perpetuating but believed the Plaintiff deserved it. It is therefore the reason why he would seem to contradict himself. Like the fact that he would testify agreeing to the truth that Plaintiff owns the property and is responsible to repair the gate yet again turn around and say the Body Corporate owns or controls it without substantiating why the Body Corporate would now be the owner, control or be responsible to repair or maintain it. He also made the complaint knowing that Plaintiff owns the property but alleged that he was trespassing and it is his gate. It is due to the conundrum that he had to face due to resistance to accept that the Plaintiff owns the property and the exclusive use of the garages. The property is not common property to be shared or equally controlled but he or Chambord was very involved under the guise of the Body Corporate as he would sometimes allege. His evidence was dealt with under that sense. I found that he certainly was downright motivated by malice when he went out and made the false statement to the police defaming the Plaintiff, hurting his feelings, impairing him of his dignity and repute as a businessman, exposing him to ill-will and ridicule by Ward upon which he was contemptuously deprived of his liberty (being arrested).

[58] I therefore find that the Defendant is consequently liable to compensate the Plaintiff for the damages he suffered as a result. He had separated his claim for deprivation of liberty resultant from malicious arrest from one for malicious prosecution and had successfully brought the claim for malicious prosecution against the police, after his acquittal. He is therefore as against the Defendant only claiming compensation for defamation, *contumelia* malicious arrest or deprivation of liberty as well as legal costs incurred.

[59] The legal costs are those he incurred as a result of the criminal proceedings that were instituted against him on the basis of Defendant's statement of complaint. The Plaintiff seeks to recover the money from the Defendant as repayment of the costs

associated with having to defend the baseless and malicious charges. The money was paid by Jabula to the attorneys. It has not been motivated on what basis the Defendant is to recover the amount in his personal capacity. The court is also not in a possession to determine if the costs are reasonable, as there is no information as to how the items have been computed or if it has been taxed. I am therefore not amenable to granting the order sought on this aspect.

[60] The approach to be followed in the determination of what is fair and adequate compensation for the injured party for the *sequelae* fo his or her injuries has been explained as follows by Bosielo AJA in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at paragraph 26, that :

> "the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed *solatium* for his or her injured feelings"

Whilst Nugent JA in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph [17] stated that:

> "the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of the case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that"

[61] At the end of the day due regard of what is fair and adequate is in the discretion of the court; see J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2ed. I have compared the awards made in the authorities that the court has been referred to by the parties against the factors normally to be taken into consideration in determining the amount, that is, age, sex, designation and social standing of the Plaintiff. Also, the falsity of the statement, improperness of the motive and the nature of the arrest regarded as seriously impacting on the ultimate award to be made.

[62] I have noted that the Plaintiff has asked for a single amount for the two injurious acts of defamation and *contumelia*. The court recognises the closeness of the injury to Plaintiff's personality in *contumelia* caused by the injurious laying of criminal charges to the defamation attendant thereto. They are in essence incidences of each other and the external effect of each on the Plaintiff virtually indistinguishable. I have also taken that factor into consideration in determining what is fair and a reasonable.

[63] The Plaintiff was 67 years of age at the time, a businessman in the hospitality industry that is well known in the area with +- 100 employees, the statement by the Defendant was falsely made with improper motive. His arrest or deprivation of liberty was not only *indignitas,* embarrassing and hurting to his personality but cruel and a serious infringement of his basic rights, in a constitutional democracy where personal freedom is highly prized. It is encouraged that once a right is said to be jealously guarded and has been afforded constitutional protection, it is expected that the instigation of an unlawful infringement of that right is not only frowned upon, but proper measures should be employed to correct the infringement and ensure that future infringements do not occur. In

Thandani v Minister of Law and Order **1991 (1) SA 702** at 707A – B, for example, it was held that:

> 'In considering quantum, sight must not be lost of the fact that liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on courts to preserve this right against infringement.
> the quantum of damages where this right has been infringed must, as a matter of course, reflect the importance afforded to it'

[64] Under the circumstances, I therefore make the following order:

[64.1] The Defendants Special Plea is dismissed.

[64.2] The Defendants are directed to pay an amount of R50 000.00 damages for defamation and *contumelia*

[64.3] The Defendant is directed to pay an amount of R75 000 for damages deprivation of liberty

[64.4] Interest at the rate of 15.5% per annum payable 14 days from date of judgment to date of payment

[64.5] Costs of suit.

:

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

For the Plaintiff:	Adv Wilgemoed
Instructed by:	Couzyn Hertzog & Horak
	(012) 460 5090
For the Defendant:	Adv B Banks (& Masombuka)
Instructed by:	Nochumsohn & Teper
	(011) 550 4520