

17 APRIL 2019

DISPUTE RESOLUTION ALERT

IN THIS ISSUE >

Unusual or suspicious transactions: What are the reporting obligations of Registered Auditors?

The proverbial "who will guard the guards?" comes to mind when one talks about the auditing profession.

The politics of defamation

The events that unfolded in the case of *Herman Mashaba v Parks Tau and others* [case number 38409/2016] in the judgment delivered on 8 February 2019, took place prior to the previous local elections when Herman Mashaba ousted Parks Tau as the Mayor of Johannesburg.

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CLIFFE DEKKER HOFMEYR

Unusual or suspicious transactions: What are the reporting obligations of Registered Auditors?

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The proverbial “*who will guard the guards?*” comes to mind when one talks about the auditing profession. s45(1) of the Auditing Profession Act, 2005 (APA) provides an answer to that question by imposing an obligation upon a registered auditor of an entity who knows or has reason to believe that a reportable irregularity has occurred or is occurring in that entity to report it to the regulator, the Independent Regulatory Board for Auditors (IRBA), without delay.

Section 45 of APA is one of many pieces of legislation aimed at combating fraud and corruption perpetrated by companies through their management (and sometimes with the assistance of its auditors), which often goes undetected in the company’s annual financial statements. These pieces of legislation place an obligation on all persons who hold positions of authority such as registered auditors, or accountable institutions such as banks, who know or suspect, or ought reasonably to have known or suspected, that any fraudulent acts (such as unusual or suspicious transactions) have been committed by management to report them to the relevant authorities. Such other pieces of legislation include *inter alia* the:

- *Section 4 of the Prevention of Organised Crime Act, 1998 (POCA)*, which provides “for the prohibition of money laundering and for an obligation to report certain information”;

- *Section 29 of the Financial Intelligence Centre Act, 2001 (FICA)*, which imposes “certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities”; and
- *Section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA)*, which places “a duty on certain persons holding a position of authority to report certain corrupt transactions.”

A reportable irregularity is defined in s1 of APA as an unlawful act or omission perpetrated by any person responsible for the management of an entity. It must be material. Irregularities that may cause or have caused financial loss or that amount to a breach of fiduciary duties are reportable only if they are regarded as material. If the irregularity amounts to fraud or theft, it must be reported even if no financial loss was or could have been suffered by any party. The report must furnish the IRBA with particulars of the irregularity in question and be accompanied by any other information that the auditor may consider appropriate.

In the recent matter of IRBA v Jacques Wessels prosecuted by CDH, the disciplinary committee presiding over the matter found the Respondent guilty of



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Unusual or suspicious transactions: What are the reporting obligations of Registered Auditors?...continued

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numerous transgressions of the Auditing Standards on the grounds *inter alia* that:

- i. he had failed to apply his mind or to document any considerations regarding unusual transactions relating to revenue and the loan account of the audit client;
- ii. he reflected a lack of understanding and compliance with the laws and regulations governing money laundering and terrorist financing, namely s45 of the APA, POCA, FICA and PRECCA, amongst others; and
- iii. by attempting to cover up for misconduct which the IRBA sought to investigate, he was dishonest when called upon to account for his conduct in correspondence with the IRBA.

On 1 March 2019, the disciplinary committee ordered that the registration of the Respondent as a registered auditor be cancelled permanently and that his name be removed from the IRBA register of auditors.

The Commissions of Inquiry currently underway come at a time when fraud and corruption eat at the very fabric of the South African economy. It is against this background that the findings of the disciplinary committee serve as a reminder to all persons holding positions of authority, including accountable institutions, of the reporting obligations imposed on them by the legislation referred to in this article, amongst others. A failure to report such unlawful activities is a serious offence which may attract grave penalties by the relevant authorities.

*Thabile Fuhrmann and
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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



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Mr Mashaba viewed the statements by Mr Tau as defamatory and sought relief from the Gauteng Local Division of the High Court.

The politics of defamation

The events that unfolded in the case of *Herman Mashaba v Parks Tau and others* [case number 38409/2016] in the judgment delivered on 8 February 2019, took place prior to the previous local elections when Herman Mashaba ousted Parks Tau as the Mayor of Johannesburg.

In the run up to the election, Mr Mashaba made the following statement: *"If the wrong people are in the wrong positions, they are going to be purged. I am not apologetic about that. The days when they allowed their girlfriends to run State institutions are over"*.

He was further quoted as saying: *"I am really intrigued that in South Africa today, I am still regarded as a black person. The notion of empowering previous disadvantaged blacks is a noble ideal, noble, but racist"*.

Mr Tau, sometime after he was ousted as Mayor, made the following statement of and concerning Mr Mashaba after he became Mayor: *"The City of Johannesburg is today led by a man that believes that the women who are Senior Executives in the City of Johannesburg prostituted themselves to be in the jobs they are in. He says that in fact for them to earn the positions that they are in they had to sleep with the leadership."* He further stated, *"We have heard views from the Mayor, Herman Mashaba, who says that in fact if it were up to him, he would not want to be black"*.

Mr Mashaba viewed the statements by Mr Tau as defamatory and sought relief from the Gauteng Local Division of the High Court in the form of a retraction of the defamatory statements and an interdict preventing a repeat of the statements.

Our courts have held that defamation consists of the wrongful intentional publication of a defamatory statement concerning, Mr Mashaba, in this discussion. In proving defamation, Mr Mashaba had to prove at the outset that there was publication of a defamatory matter concerning himself. Once a defamatory statement is established, it is then presumed that the defamatory statement was both wrongful and intentional. Mr Tau, in order to avoid liability for defamation had to raise a defence which excludes either wrongfulness or intent. A bare denial by Mr Tau would not be enough as the onus resting on him to succeed with a defence which excludes either wrongfulness or intent needs to be discharged on a preponderance of probabilities.

A statement is defamatory when the statement lowers the plaintiff in the esteem of right-thinking individuals. In the context of discussing the statement, the court mentioned that words are said to have both a primary (ordinary) and a secondary meaning. A primary meaning is that which is attributed to them by the average hearer and/or reader. This primary meaning is unrelated to what is actually understood by the person hearing or reading the words. The secondary meaning is not simply an extension of the primary meaning; it is the meaning that is attributed thereto by the readers and/or the hearers of the words and who are especially qualified. In other words, people hearing or reading the words have knowledge of special circumstances in which, when innocent words are used within the setting of the special circumstances,

In consideration of the political landscape of the country, it has previously been held by the courts that political debate should, as a general rule, be unfettered in order not to induce fear of being subjected to claims for defamation in politicians.

The politics of defamation...*continued*

it results in the otherwise innocent words acquiring a defamatory meaning. This secondary meaning is also referred to as an innuendo.

There are various defences available to rebut the unlawfulness of defamatory statements. These defences are fair comment, truth for public benefit or the fact that the statement was made during a privileged occasion. In this matter, Mr Tau raised the defence of fair comment. The defence of fair comment is rooted in the principle of freedom of speech and the right that every person has to express his or her opinion is constitutionally protected. For the defence of fair comment to succeed, it must be clear that the defamatory statement amounted to an expression of opinion meaning that it was in fact comment and not a statement of fact. A further requirement is that the comment must be on a matter of public interest.

Lastly, it must be shown that the facts on which the statement is based are in fact true.

In light of the statement made by Mr. Mashaba regarding the senior executives of the City of Johannesburg, upon which one of the defamatory statements was based, the court held that notwithstanding the political arena in which the defamatory statement was made, this statement lowered Mr. Mashaba in the esteem of right-thinking individuals, regardless of his capacity. Mr. Tau's defence of fair

comment could not be sustained because the degrading aspect of the statement was so egregious and surpassed the accusation of nepotism made by Mr. Mashaba.

Further, the defamatory statement made by Mr. Tau with reference to Mr. Mashaba denying his "blackness" could not pass the threshold of fair comment owing to the fact that the statement on which it was based was not a denial of his blackness nor was it a betrayal of the shared suffering of the black community; which would persistently lower his person in the esteem of right-thinking people, but it was an emphasis on model non-racialism. Mr. Tau was therefore interdicted and restrained from repeating these defamatory statements or statements to the same effect.

In consideration of the political landscape of the country, it has previously been held by the courts that political debate should, as a general rule, be unfettered in order not to induce fear of being subjected to claims for defamation in politicians. However, it was held in this case that in spite of the climate in political debate wherein politicians have leeway to discuss political matters in forthright terms, a distinction should be drawn between an attack against the dignity and reputation of a politician and an attack upon his political views, politics and conduct. The Constitution cannot be said to legalise character assassination of individuals merely because they are politicians.

*Eugene Bester and
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