

SOUTH AFRICA / JUDGMENT

Bassingthwaighte v Kuhlmann (EL 526/06) [2009] ZAECGHC 27 (11 May 2009)

[2009] ZAECGHC 27

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Revelas

CASE / FILE NUMBER

EL 526/06

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FILING SHEET FOR

EASTERN CAPE CIRCUIT COURT EAST LONDON

PARTIES: HC
Bassingthwaighte v CF Kuhlman
Case

Number: EL
526/06 ECD 2426/06
High

Court: East
London Circuit Local Division
DATE

HEARD: 26
September 2008
DATE

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JUDGE(S): REVELAS
J
LEGAL
REPRESENTATIVES –

Appearances: .

for the Applicant(s): Adv
Cole
.

for the Respondent(s):	Adv Nepgen Instructing
attorneys:	
Applicant(s):	Cooper Conroy Bell & Richards Inc
Respondent(s):	Changfoot Van Breda CASE INFORMATION – Motion Court 1.
Nature of proceedings:	Defamation 2.
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Key Words:	IN THE HIGH COURT OF SOUTH AFRICA (EAST LONDON CIRCUIT LOCAL DIVISION) NOT REPORTABLE Case No: EL 526/06 ECD 2426/06
Date Heard:	26/09/08
Date Delivered:	11/05/09 In the matter between HANLIE CHRISTINA BASSINGTHWAIGHTE PLAINTIFF and COLIN KUHLMANN DEFENDANT

JUDGMENT

REVELAS J

- [1] The plaintiff, a high profile estate agent in the East London area, instituted an action for damages against the defendant, also an estate agent, based on alleged defamation. The plaintiff's claim for damages in the amount of R3 000 000.00 (reduced to R1 000 000.00 during argument), emanates from three letters which the defendant admittedly published via the electronic media (e-mail). To this end, the defendant engaged the services of an internet service provider to ensure that the letters reached those institutions and the many individuals he identified as recipients, since his own personal computer could not accommodate the large scale of dissemination he intended and in fact achieved.
- [2] The general import of the three letters was that the plaintiff was an unethical, greedy, dishonest and egotistical person who preyed on the weak and sick (the defendant's wife who suffered from bipolar mood disorder) to gain an unfair business advantage, and that the readers can only expect worse behaviour from her in future. The letters were written after the plaintiff had made certain complaints about the defendant and his wife in their professional capacity and after the publication of a certain article in a local newspaper. The letters were sent to hundreds of people within and associated with the property market and legal profession.
- [3] The plaintiff's case is that the contents of the letters are highly defamatory of her and as a result of their wide publication, she has been injured in her good name, reputation and dignity, and further, that the statements made about her in the three letters impacted on her business, in particular her Premier Estate Agency portfolio, with disruption between herself and her clients, where the client relationship was based upon mutual respect and integrity. The Premier Estate Agency Portfolio entails the sale of very expensive property among the very rich.
- [4] The defendant raised four defences to the plaintiff's claim: firstly, that the words used in the letters were not defamatory of the plaintiff, secondly, if they were found to be, that he was entitled to publish the words in the context of his constitutionally protected right to freedom of speech, thirdly, that the words were in fact true and constituted fair comment and fourthly, if the words were not found to be the truth or fair comment, that they were uttered in anger. The fourth defence is thus *rixa*.
- [5] The defendant counterclaims against the plaintiff in the amount of R100 000.00 for damages suffered when the plaintiff allegedly defamed him to the managing director of the franchise he held, by telling this person (or "the MD") that the defendant was a user of illegal drugs and not a suitable business partner. The plaintiff in her plea admits that she spoke to the MD about the defendant on two occasions, but denies having made defamatory statements and further pleads that any statements made by her, were made on privileged occasions.

- [6] I consider it necessary too first sketch some of the factual background and the events which culminated in the writing of the letters before quoting the contents thereof.

BACKGROUND

- [7] Most of the events which gave rise to the writing of the three letters centred around the defendant's wife. During the trial she was referred to as "Keri" by all the witnesses and I will also refer to her by that name in this judgment.
- [8] Keri was the daughter of a woman who worked with the plaintiff in a sales partnership in the plaintiff's offices and they shared the commission earned on sales concluded under the franchise held by the plaintiff. In 2001, after working together for eight months, Keri's mother told the plaintiff that her daughter was pregnant and in trouble in the United Kingdom. The plaintiff then offered Keri a position in their offices as a personal assistant to the plaintiff and Keri's mother. After the birth of her baby, she returned to work in April 2001, but commenced working as an estate agent in the plaintiff's Beacon Bay offices showing talent as a salesperson. From the onset however, the plaintiff said, it was clear that Keri had several financial difficulties arising from numerous unpaid debts. Summonses were issued against her on a regular basis and there were indications of dishonesty on her part. A cell phone once disappeared from a client's home, as well as the petty cash box from the Beacon Bay office. Reports were made to the plaintiff that only Keri could have been responsible for those thefts. There were also reports of misrepresentations on Keri's part. Despite her success as an estate agent, one of the agents in the plaintiff's Beacon Bay offices insisted that Keri could not be trusted. The plaintiff then moved her to the Berea branch of the franchise. The plaintiff explained that her close relationship with Keri's mother prevented her from terminating Keri's services at that stage. She also added that she was not sufficiently convinced of the reliability of the reports made to her about Keri.
- [9] Later, when further and more serious incidents of dishonesty came to her attention and a report was made to her that Keri had a previous conviction for cheque fraud in East London, the plaintiff made enquiries with the police. These enquiries confirmed the correctness of the report made to her, and the plaintiff then terminated Keri's services. It also came to the light later, that Keri had also been convicted of cheque fraud when she lived in the United Kingdom.
- [10] In 2005, Keri commenced working for the defendant in his offices, selling property. She also married him. They have a daughter called Page but were already divorced when the proceedings commenced before me. More relevant to this matter is that in April 2006, it was reported in the Daily Dispatch newspaper that earlier that year in January, Keri had pleaded guilty to and was convicted of theft from Woolworths. According to the article, this was her third conviction "for shoplifting". The items stolen included women's and babies' clothes (she was pregnant at the time of the theft with Page), brass items, curtains, linen and a plant. The value of the stolen goods was just over R7000.00. The newspaper article stated her full names and age (27 years), and the newspaper reporter also quoted from a written report

compiled by a social worker who had

consulted with Keri and which was before the magistrate for purposes of sentencing her. In this report it was recorded that Keri had admitted to a “lifelong problem with stealing and lying”. The social welfare officer’s report also mentioned that Keri’s husband (the defendant), had stated that his wife had a tendency “to lie and manipulate situations”. The defendant is also reported as having said that his wife’s dishonesty and aggression caused problems in their marriage, but that he was prepared to give her another chance. Apparently he was unaware of her previous convictions until she was arrested for the theft in question.

- [11] The article also specifically reported that a psychiatrist (who was mentioned by name) had diagnosed Keri with bipolar mood disorder and poly-substance abuse, and that it was highly unlikely that she would ever change her behaviour. She was sentenced to three years’ correctional supervision with fifteen months’ community service which was to commence after the birth of her child. According to the plaintiff, the content of the article was a topic of interest and discussion amongst estate agents in East London.
- [12] No particulars were given of the community service which Keri was obliged to do, but there was evidence that she was involved in selling several properties. The defendant disputed that Keri ever acted in her capacity as an estate agent and testified that any work she did was under his supervision or custodianship. In terms of the Estate Agency Affairs Act, no fidelity fund certificate shall be issued to any estate agent, if such an agent “has at any time been convicted of an offence involving an element of dishonesty”. Only some time after her conviction, on 5 September 2006, Keri applied for such a certificate. It was issued on 12 September 2006 but withdrawn on 29 September 2006. It appeared from the evidence led that Keri, a very talented salesperson, was indeed involved in selling properties in the area, irrespective of the fact that she did not have such a certificate, for at least a substantial period.
- [13] The most significant event in this matter, was the publication of another article in the Daily Dispatch newspaper on 11 September 2006. The article was written by the newspaper’s investigations editor, Mr Eddie Botha and titled “In The Agent We Trust”. In the article, mention is made of the Agricultural Procedure Agent’s Council and the strict rules applicable to market agents in order to protect farmers. An example was given of an instance where the agricultural council had acted against one of its agents who was convicted of fraud. The article then went on to chastise (as plaintiff’s counsel referred to it) the Estate Agency Affairs Board for not acting similarly against its estate agents who have been convicted of offences involving dishonesty. The article emphasised that when buying a property (home) most people make the largest single investment of their lives, and for that reason trust between seller and agent is indispensable. The author of the article also refers his readers to the legislation governing the conduct of estate agents reminding them of the particular provision in the legislation which provides that no fidelity fund certificate can be issued to an estate agent who has been “convicted of an offence involving an element of dishonesty”. The article then informs those readers who went “house-hunting” over the

week-end, that they may have “consulted with or visited a show house which had a convicted thief in attendance”. The author tells the readers that he would “refrain from identifying the agent or the national franchise she works for” and continues “Enough to say that she not so long ago had pleaded guilty to shoplifting, following two similar convictions previously”.

[14] The following comment made earlier in April in the report of the social worker used during Keri’s criminal trial, was also quoted in this article: “the accused admitted that she had a lifelong problem with stealing and lying” and the agent’s husband “for whose franchise she works” reported by Botha as having said that his wife “had a tendency to lie and manipulate situations an circumstances to keep herself out of trouble”. Neither Keri nor the defendant’s franchise is mentioned in the article. Mr Botha also expressed his dismay that there was no indication that the agent under discussion was issued with a fidelity fund certificate and added: “But let’s assume that the board is slow to register new applications”. After mentioning that the agent in question had represented her agency at the Board of the Institute of Estate Agents’ annual general meeting, and that no written complaint against her had been lodged with the institute, the article was concluded with the words: “I think it’s time for both the Institute and the Board to act”.

[15] The defendant’s case as pleaded, was that this article infuriated him to the extent that he composed the three letters on which the plaintiff’s defamation claim is premised. His anger or dislike of the plaintiff was also evidenced in court when he testified. In support of his fourth defence (rixa), the defendant pleaded that the plaintiff was the cause of the statements contained in the second Daily Dispatch article titled “In The Agent We Trust” because she had provided Mr Eddie Botha with the information for publication. The defendant further pleaded that the publication of the article angered him in that it was misleading to the reasonable reader, because the author of the article does not inform the readers of Keri’s bipolar mood disorder, for which illness she was receiving medical treatment and counselling, both of which were indeed disclosed to the Estate Agent’s Board when application was made for a Fidelity Fund Certificate. He also pleaded that the article was misleading in that it did not mention that his wife “was

an excellent Estate Agent”. This, I should immediately remark is a rather unusual statement to find its way into a pleading, but that is nonetheless how the defendant viewed matters.

[16] I think it is fair to say that certainly some estate agents, and at least a few of the readers who had read and remembered the article about Keri’s criminal trial in April of 2006, could have concluded that the article written later on 11 September that year, was also about Keri. The defendant said he firmly believed that the plaintiff caused the article to be published. In support of his assumption, the defendant mentioned the fact that the national franchise held by the plaintiff was probably one of the biggest advertisers in the Daily Dispatch. This fact was not disputed and at the commencement of this trial mention was made of the great contribution the plaintiff had made to the sport of tennis in East London, which was also widely published

in the same news paper, as well as her other high social profile activities. The defendant also testified that when he phoned Mr Eddie Botha about the article, the latter hinted that it was the plaintiff who had brought the subject to his attention. Neither party called upon Mr Botha to testify.

THE LETTERS

[17] On 15 September 2006, the defendant wrote the letter which is annexed to the plaintiff's particulars of claim as annexure HB28. It reads as follows:

"TO: ALL OUR COLLEGUES AND REAL ESTATE PROFESSIONS & THE INSTITUTE OF ESTATE AGENTS & PLA

I would like to take this opportunity in thanking all of you for your calls, messages of support and understanding of Keri's condition (Bipolar) and am pleased to informed you that she is making great progress with the help; support and understanding the East London community have shown at large.

Keri is working under my personal custodianship and I will continue to support her unequivocally, unfortunately – however, some real narrow minded, untactful, greedy or shameful agents have resorted to "stooping" where no right minded person would "poop" in using her condition to try and benefit monetarily from this in the market place "propagandizing" buyers and sellers and casting doubt on Keri's ability to sell property successfully as if she should "crawl into a hole somewhere never to work again" – how sick some of us really are?

Those agents continue to do so at their peril.

Those same agents who supposedly have nothing to gain from this, are using the media to further damage Keri and her family's livelihood, which the public are well aware of and when their names are made public, lets see if the public and any other person who suffers from an illness is so forgiving!

Keri has accounted for 15 million rands worth of sales, since her return a month ago with complimenting remarks on service – a clear indication of support and work well done!

Watch the "space".

For those who would like to know more about Bipolar, please see www.bipolar.co.za

For those of you who suffers from the "miss priss: perfectranum-phobia"–all is not lost, go to www.blonde.com or www.lackintelect.com

Warmest regards,

Yours sincerely

Colin Kuhlmann".

The website “www.blonde.com” is apparently a pornographic website and the website “lackintelect.com” is unknown. Although this letter does not refer to the plaintiff by name, the two other letters written by the defendant and quoted below, remove all doubt as to the identity of the estate agent to whom reference is made. The letter is perhaps more insulting than defamatory, but the intention was to malign and to obtain sympathy for his wife.

[18] The letter dated 22 September 2006 was addressed to the local Border Chamber of Business, the National Chamber of Business and “Fellow Members” and “All Attorneys”. The letter reads as follows:

“Dear Members,

It is with great displeasure that I shall share the experience I have had with our local Chairlady – Hanlie Bassingthwaighe, in business, personal and the media. (Please refer to attached correspondence which to date has not been responded to).

Should you not know, my wife was diagnosed with Bipolar in January of this year, she has suffered from this illness and denial of this illness for many years and is subsequently on medication and counselling for which myself and her counsellor can vouch for, have made Keri a different person.

No-other than our Chairperson, has decided to use Keri’s condition not only to ostracize Keri but also to use her illness as a means to discredit me, our family, my business, our agents and employees, in a manner which is not only unethical and shameful but a poor and uncompetitive business practice to gain a greedy advantage.

Not only does she demonstrate a poor understanding of the “Illness – Bipolar” as our very own “Msimang” for “HIV” but has decided on her very own – Keri’s working career or future!

She has not only used this tactic against Chas Everitt but also against other agencies, of which I have proof.

It is not the first time the public of East London have felt her wrath, but I’m sure you all agree this time – her head has gone to far too big.

Should she be capable of this, the question needs to be asked what else is she capable of, only time will tell.

I will not stand by and watch this person destroying my wife, my family and my business. – No matter what. Please watch all media for details.

I wish you and your families well. (And your businesses)

Kind regards,

Colin F Kuhlmann”.

[19] This letter is more demeaning of the plaintiff than the previous one and it mentions the plaintiff by name. The annexure sent with the above letter is the letter written by the defendant on 19 September 2001 addressed and telefaxed to the plaintiff, which reads as follows:

“We have been told by one of our (sole mandate) sellers, who attended your Clifton Park Show house on Sunday 17 September 2006 that Jeni Mager told them “she has a buyer for their property, but will stay as far away as possible from Chas Everitt as Chas Everitt are under investigation.” Please provide us with the details of what investigation and by whom?

You told me telephonically on Monday – “that when Keri worked at Pam Golding, you had numerous complaints from sellers that items were going missing at show houses.” Please provide me with the details of sellers and addresses of these properties so I may investigate these serious allegations, as the principal of Chas Everitt. I would like to protect the public’s interest in this regard.

You stated unilaterally that – “you do not want to do business with Chas Everitt even though this maybe to buyers ‘and sellers’ detriment.”

Does this relate to Keri? myself included? and or Chas Everitt and or our agents?

If so, for what reasons are you saying so?

You have stated that – “Keri has no place selling Real Estate” and this was the reason you phoned Mr Berry Everitt, our CEO, when I was awarded the East London Franchise – to warn him of KERI? or us?

Have you decided when and where and if ever, Keri can work again?

When you say we, do you mean Pam Golding, all agents in East London, the public or the Business Community of East London?

Do you also doubt my morals, ethics and ability to successfully operate a Chas Everitt Franchise? If so, why?

I am sure we can resolve this matter amicably, if I can understand you.

Your response is expected at your soonest convenience, as I view the above in a serious light.

Your’s sincerely,

Colin Kuhlman”.

[20] In this letter the defendants attempts to drag his private differences with the plaintiff on to a public platform. The attachment to this letter is also clearly intended to defame.

OTHER RELEVANT EVENTS

- [21] On 12 September 2006, the day after the article appeared, Keri was issued with a fidelity fund certificate, but, as I have mentioned, it was withdrawn on 29 September 2006, most probably because on the plaintiff on 17 September forwarded a copy of the article (“In the Agent we trust”) to Mr Clive Ashpol of the Estate Agent’s Board with a letter advising him of her experiences with Keri when she had been in her employ, stating that “she stole from us and we suspect from our clients as well”. She specifically made reference to the missing cellphone. The plaintiff said her motive was to protect the integrity of the industry. This letter surely must have angered the defendant.
- [22] The defendant testified that he phoned the plaintiff on 18 September 2006, and asked her if she was responsible for the article but that she gave no answer. He said she also did not reply to the question he put to her in the letter sent on 19 September
2006. According to the plaintiff he also wanted to know why her agency and Sotheby’s did not want to share properties with him. It was not in dispute that the defendant phoned the plaintiff on 18 September 2006 but the plaintiff disputes that the sole purpose of the call was to establish whether she was the cause of Botha’s article. The plaintiff’s said that three aspects dominated the conversation. The first was a remark made by Jeni Mager at a showhouse, concerning the defendant’s franchise. The defendant also mentioned this aspect in his letter to the plaintiff dated 19 September 2006 (the attachment to the first defamatory letter). Secondly, the defendant also wanted to know why she and or the franchise held by her did not want to work with his franchised agency. He also wanted to know why she phoned the MD the previous year about Keri being employed by his agency. According to the plaintiff, she asked him to leave her alone. He however did not. She received the letter (the attachment) the following day and two other faxes on 22 September 2006.
- [23] On 7 August 2006, the defendant wrote to Mr Clive Ashpol of the Estate Agency Affairs Board. In the letter he disclosed Keri’s conviction for theft in January 2006 and advised that she was responding favourably to treatment, that she had returned to work under his control (or custodianship as he would have it) approximately four weeks prior to the letter, and that since her return, she had accounted for about R10 million worth of sales. Her formal application for a Fidelity Fund Certificate was lodged on 5 September 2006.
- [24] On 20 September 2006, a day after the letter to the plaintiff, the defendant wrote a letter to the Public Listing Association (PLA). A month earlier, on 24 August 2006 the PLA refused his application (lodged on 1 August 2006), for his franchise or agency to become a member. When the defendant made application to the PLA Board for membership of his agency, the PLA responded stating that “under present, still ongoing circumstances between yourself and the PLA, we would request that you let us have a strong letter of motivation” as to why he wanted membership for his agency. He was also requested to furnish a copy of his Fidelity Fund Certificate. The evidence revealed that the defendant earlier wrote an article urging agencies not to join the PLA because of its allegedly “ring-fencing” of property prices. It is apparent from this letter that the defendant was still in the process of fighting for

himself and his franchise to be recognised and established in the East London area property market.

- [25] It must be borne in mind, that in the fiercely competitive business in the property market, where competing agents are natural rivals, the plaintiff was critical of inter alia, the defendant's interference with the sole mandates of other estate agents. He on the other hand, blamed the plaintiff and her franchise for most of the problems he experienced in establishing himself as an agent in the East London area. The plaintiff's criticism of the defendant with regard to his sales tactics seems not to be entirely unjustified. During the defendant's cross-examination by Mr Cole, who appeared for the plaintiff, it became apparent that the concept of a "sole mandate" in the parlance of estate agents, was a somewhat nebulous concept, to say the least, in the defendant's mind. The defendant's rather unusual sales tactics included putting up boards advertising his agency, in front of houses which were not for sale, oddly bearing the words "Not For Sale". The defendant believed the plaintiff was not only behind the removal of many of his agency's sales boards, but also for him being reported to the Municipality for putting up advertising boards which were larger than the stipulated legal limit. He also blamed her for not being admitted as a member of the PLA in East London, as well as other similar bodies. He testified that he was generally badmouthed by the plaintiff and the agents who worked with her. Absent from the evidence, however, are facts in support of the veracity of these allegations.
- [26] The defendant also resented the plaintiff for writing a letter in August 2006, wherein she objected to mini-listing and the reduction of the standard percentage for estate agent's commission by some agents. The plaintiff felt she was protecting estate agents. The defendant believed she was simply interfering with the business of other agents. He was also resentful that the plaintiff and Sotheby's had taken a decision not to share properties with him or to have anything to do with his franchise. This also appears from the letters he wrote. In my view, the letters are a clear indication of how much the defendant resented the plaintiff's playing by the rules. He evidently believed in a more flexible attitude: hence his reference to "miss priss" in the first letter.
- [27] The long record of these proceedings abounds with reciprocal recriminations by the parties herein, concerning each others'

business conduct. Most of the accusations emanated from the defendant. I do not think it will serve any purpose to analyse these

allegations and accusations in detail. The defendant repeated himself continuously on these topics. However, the overall inevitable

impression I gained was that purpose of the defamatory letters was to gain a tactical business advantage at the expense of the plaintiff. If one has regard to the nature, wording and tone of the letters, it is doubtful whether the defendant gained any business advantage for himself. Yet he succeeded in maligning the plaintiff to various people. The plaintiff denied that she was the cause of, or had anything to do with the article published on 11 September 2006 in the Daily Dispatch.

APPLICABLE PRINCIPLES

- [28] At common law the delict of defamation can be defined as the wrongful and intentional (in the case of the non-media defendant) publication of a defamatory statement concerning the person who or plaintiff claiming that he or she has been defamed on their reputation has been diminished (See *Khumalo and Others v Holomisa* 2002(8) BCLR 771 (CC) and J Burchell, *Principles of Delict* at 159). A statement is defamatory if a reader of ordinary intelligence might reasonably understand the words published, in their ordinary sense, to have a meaning which reduces the plaintiff in his or her estimation (See *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994
- (2) SA 1 (A) 20E-21B and *Delta Motor Corporation (Pty) Ltd v Van der Merwe* [2004] 4 ALL SA 365 (SCA) 369D-E).
- [29] Publication takes place when the defamatory statement is communicated (also through conduct) to persons other than the person who is the subject of the defamatory imputation. Publication of an e-mail takes place when the e-mail is read, seen or heard and is completed when the receiver understands its content. Potentially e-mails, web-sites and electronic postings to bulletin boards have wide-reaching audiences. An e-mail message sent to another raises a presumption of publication. In the present matter the defendant, having directed the forwarding of the e-mail letters to various recipients, indeed published his letters which contained defamatory statements (See *Cyberlaw, The Law of the Internet in South Africa* Chapter 12, "Freedom of Expression and the Internet" by R Buys 335).
- [30] Defamatory statements include statements which injure the reputation of the person concerned in his or her character, trade, business, profession or office which expose him or her to ridicule or contempt (See *Maruch v Harris* 1943 CPD 15 at 22). The meanings of words vary with the context and decided cases illustrate numerous categories of statements held to be defamatory. Once publication has been proved, the words are presumed to be unlawful and made *animo iniurandi* (See *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977(3) SA 394 (A) 401 and *Khumalo v Holomisa* *supra* at 414).
- [31] Even though much of what is said in the defendant's letters amounted to insults and slurs which the average reader quite clearly would not have taken seriously, most of the statements, in my view do, and appear to be intended to defame the plaintiff.
- [32] The publication of a defamatory statement may be rebutted if it is proved that the statement was published in anger, without pre-meditation, provided that the statement is not persisted in (See *Wood v Branson* 1952 (3) SA 369 T 372). Provocation as a defence will only succeed if

the words were firstly, spoken in immediate retaliation to what the defamed person has said and secondly, proportionately to the injury inflicted and not subsequently persisted in (Cf *Peck v Katz* 1957 (2) SA 567 (T)). In *Peck v Katz* 1957 (2) SA 567 (T) 573 Marais J expressed the view that “Rixa is a good defence to a defamation action if the only person or all the persons to whom the defamation statement was published, took it, on account of the defendant’s palpable anger, to be mere meaningless abuse, not intended to be regarded as a statement of fact, or if, in the opinion of the Court, it could not reasonably have been regarded by them as a statement of fact”.

- [33] Once there has been publication of defamatory words, the presumption arises that they are unlawful and uttered or written *animo iniurandi*, thus with the subjective intention on the part of the defendant to impair the plaintiff’s reputation with knowledge of unlawfulness

(*Suid-Afrikaanse Uitsaaikoporasie v O’Malley* 1977 (3) SA 394 (A) 401). A defamatory statement is presumed to be false and the onus is on the defendant to prove the truth of the statement (See *Schourie v Afrikaanse Pers* 1966 (1) Prentice Hall J1 (W)). In *casu* the defendant did not prove the substantial truth of any of the allegations he has made.

- [34] A successful plaintiff in a defamation action is entitled to an award for general damages to compensate for the plaintiff’s injured feelings and damaged reputation. The court has a wide discretion to determine the awards *ex aequo et bono*, having regard to all the circumstances of the case (*Salzman v Holmes* 1914 AD 471 480). Factors to be taken into account include the nature of the defamatory statements as well as the reputation and the conduct of the plaintiff. A deliberate and unfounded attempt to destroy the plaintiff’s reputation may be a ground for the award of punitive or exemplary damages. Of relevance also is the conduct of the defendant since publication of the statement (See *Buthelezi v Poorter* 1975 (4) SA 608 (W) 614-616).

DISCUSSION

- [35] The lengthy testimony of the defendant can largely be attributed to the many examples and incidents given by him to illustrate his difficulties in being accepted as an estate agent in East London. The golden thread underpinning his tales of woe was the plaintiff’s vengeance to destroy him. His portrayal of the plaintiff in court painted a picture of an estate agent who ran a fiefdom of her own in the East London property market, defending it ruthlessly without tolerating competition from fellow agents. This theme is constantly repeated in the defendant’s letters I have referred to. His attempts to discredit her in this manner he clearly relied upon as justification for taking up his vituperative pen.
- [36] The defendant readily conceded that after the publication of Mr Botha’s article, he hated the plaintiff. The content and tone of his letters most certainly bear witness thereto. There was however no factual basis to justify his perception that the plaintiff was to blame for his woes. Whilst it was constantly raised in cross-examination of the plaintiff, that it was the plaintiff and her agency that would not do business with him, the evidence showed that the PLA (50 agencies) as well as the PPN (18 agencies) also distanced themselves from him. On his own

version “it was mainly the smaller agents who accused us” (of interfering with mandates). The entire drift of the defendant’s evidence was that many agents in town had a less than satisfactory relationship with him. For that, on the evidence before me, the plaintiff cannot be blamed. She alerted the Estate Agent’s Board of Keri performing the work of an estate agent without the required legal clearance. That she was entitled to do and she moreover as the holder of the largest franchised agency was obviously the appropriate person to do so.

The defendant on the other hand, resented any wanted interference with Keri’s ability to sell property. This was clearly

demonstrated in an incident involving Sotheby’s Estate Agency. The evidence was that Keri had obtained a sole mandate to sell a certain house, but experienced some resistance in continuing to do business with the owners because they had been told of Keri’s conviction by an agent from Sotheby’s. The defendant described his intervention in informing the sellers about Keri’s Bipolar condition. He said the sellers then “came out in support of our case” and were “sympathetic” and that Keri continued to hold the sole mandate. The sellers allegedly expressed disgust at the Sotheby’s agent for using Keri’s condition against her. The defendant clearly did not hesitate to exploit his wife’s illness to generate business. As much is also the trend of the letters. The letter of 15 September 2006 shows that he spread the word on his wife’s mental condition quite widely. In the introductory lines he thanked people for their support only thereafter to report to them on her progress. The evidence before me undeniable shows that the defendant was prepared to go a long way for a good business result to result.

[37] Mr Nepgen, who appeared for the defendant, in his argument highlighted those sentences in the letters written by the defendant, which appear to make no sense to the reader, in support of his argument that the letters were written in anger by a man who believed that the

plaintiff was victimizing his sickly wife.

[38] It is indeed so that some portions of the letters hardly make sense. However, the overall impression created by these letters, in my view, is not that they are the illogical rantings of a hurt and angry man. They are essentially an estate agent’s letters, written to garner sympathy for his wife, who also happens to be an estate agent, with the evident purpose of furthering the interests of his agency. Simultaneously, in these self-serving letters, he manages to strike a hard blow at his opposition in the world of selling property, and to take revenge for showing his wife up as a person who was ethically not fit to do business as an estate agent. This impression is fortified when one reads the other letter of 22 September 2006, addressed to the “Chairman and Board of the Institute of Estate Agents”. It reads as follows:

“Dear Colleagues,

RE: OUR INDUSTRY BEING BROUGHT INTO DISREPUTE

In the spirit of our industry and in terms of our code, should any person/agent have a problem, they should speak to the local principal or failing which, the institute.

I have met with our Chairlady, who can elaborate in greater detail, however the actions of certain agents, principals and agencies has (sic) already brought our industry into disrepute. Please see my attached letter to one local principal.

In terms of our Constitution and Code, I would like the Board at their soonest convenience to investigate the following (as a matter of urgency and for the reasons I shall provide).

Is the behaviour of certain agents who have brought up Keri's condition in the media – ethical?

Does the Board have a problem with these agents being named public, or do these agents have the courage to publicly apologise to Keri?

Do you believe the type of conduct expressed in the attached letter is ethical, in terms of our constitution?

What is Chas Everitt under investigation for and by whom?

Who this allegation originates from?

Who had items go missing from show houses? – when and where? – please can we have details, as Keri and Pam Golding staff and agents do not recall this?

Is it ethical for a principal or agent to decide, without consulting a seller, whether they unilaterally will not consider another agencies buyer?

Whether the Board subscribes to the ideas of Mrs. Hanelie Bassingthwaighte – “that Keri has no place selling Real Estate”.

Whether Mrs. Bassingthwaighte has a problem with Keri and/or myself and/or Chas Everitt and/or Chas Everitt's agents? – and if so, why?

Please let Mrs. Bassingthwaighte try to refute our telephone conversation

How does the Institute intend on resolving these matters?

I have a 12 page report which was drafted in terms of a Chas Everitt Head Office investigation which clearly implicates members in all kinds of unsavoury and uncompetitive or desirable business practices, with supporting documentation and affidavits, gathered over the last 12 months.

These practises include the actual interference with Chas Everitt Sole Mandates, taking of offers and mandates during the duration of our sole mandates, to taking cash commissions, to not disclosing a personal interest to a seller when properties was brought by agents and principals, the complaints of buyers and sellers, who have no joy with the EAAB, to the most greedy and nasty behaviour, humanly possible, to make our lives a misery to name a very few.

Our Head Office internally, have uncovered more evidence in their own investigations.

These same people, who are behaving in this manner, have histories which are frightfully far from perfect.

These facts make a mockery of our industry and have caused myself, Keri, Chas Everitt and our agents, financial loss as well as untold unpleasantness and are totally unjustifiable.

Perhaps only by greed, jealousy or feeling threatened.

Unfortunately the manner and lengths these agents have now resorted to is preposterous and outrageous and hence my reaction and the manner in which we shall react.

Hence I request the Institute investigate and resolve this matter, urgently.

Yours sincerely,

Colin Kuhlmann”.

The letter contains the clear implication that his agency is being victimized.

[39] The defendant testified that the letters were also written as a means of ‘damage control’ pursuant to the article. This, quite obviously, assuming it to have been necessary, he could have achieved without defaming the plaintiff.

[40] On 22 September 2006 he wrote a letter to the plaintiff personally, demanding a reply to his queries about his agency being under investigation and issues related thereto. He attached this letter to his letter bearing the same date accusing her of not replying. The evidence shows that she was not given sufficient or hardly any time, for that matter, to respond to his request. What is more, she was not obliged to respond to his questions on this public stage created by the defendant to set her up for trial by her peers.

[41] In the defendant’s view, the plaintiff also did not practise what she preached “when the shoe is on the other foot”, meaning that when the plaintiff could make money with Keri’s formidable talent for selling, she was prepared to turn a blind eye to Keri’s ethical shortcomings, whereas when the opposition (the defendant), made money out of Keri, the plaintiff had a problem with her ethics. This perception is not borne out by the evidence. When Keri’s previous conviction for fraud became known to the plaintiff, her services were terminated. Keri’s mother also played a role in the plaintiff’s perceived tolerance of Keri’s shortcomings. Furthermore the April 2006 article about Keri’s conviction for theft appeared long after she had left the plaintiff’s employ.

[42] The defendant’s defence of rixa or anger, was based on the alleged effect the article of 11 September caused by the plaintiff’s hold on his wife. He said she became “unravelling” after its publication, that she never went outside and eventually became suicidal. He added that his child had to be taken out of her school as a result of the article. This he said hurt him and caused him to write the letters.

- [43] Cross-examination revealed that the school in question was a nursery school and that the child was taken out of school only for a few days when the reference to the theft from Woolworths was made. That fact was mentioned in the media in April 2006 for the first time, and for that the plaintiff can hardly be blamed. It was also established that Keri sold R10 000 00.00 worth of properties during this period (as he informed the Estate Agent's Board). When this apparent inconsistency was pointed out to him, the defendant said that the dates in the schedules listing her sales after 11 September 2006 were not the dates of the sales but the dates of transfer of the properties sold. A deed search proved the contrary. The defendant's evidence was palpably misleading in this regard. It is also significant that the article which appeared in April 2006, and which is far more damaging to Keri personally, surprisingly did not have the devastating effect on her as the September article is alleged to have had. The reporter observed in the April 2006 article how Keri and the defendant had left the court building smiling. Keri is clearly made of sterner stuff. Moreover, the defendant conceded the factual accuracy of each of the allegations contained in the September article. Even though Keri did attempt to commit suicide some time later, it was not because of the article.
- [44] Mr Botha, in his article, deliberately withheld the identity of the defendant's wife as well as the agency she worked for. This attempt at anonymity was voided by the defendant himself in the letters he wrote. If anyone who had read both articles (and even only the later one), was in the dark as to who the convicted agent was, then it was the defendant who shed light on the uncertainty. This convincingly shows that the defendant was prepared to promote his agency at the expense of his wife's personal privacy. If anyone used his wife's condition to gain an unfair advantage, it was the defendant himself, and not the plaintiff. In any event, the defendant admitted that many of the allegations in the letters concerning the plaintiff were factually incorrect. That puts paid to his plea that the words were the truth. The letters moreover cannot in any way be reconciled with reasonableness. I am unable to find any objective or subjective justification for them having been written.
- [45] Even if it were the plaintiff, or the Estate Agent's Board, or some other agent who had shared her business interests, who had caused Mr Botha to write the article on 11 September 2006, that did not entitle the defendant to lash out and malign the plaintiff to such a large audience. Prospective home buyers were entitled to know of estate agents who practised without a fidelity fund certificate, and had been convicted of theft more than once. That Keri suffered from bipolar mood disorder does not detract from these disqualifications. In the absence of any evidence to that effect, dishonesty is neither a symptom nor a side-effect of the illness in question, as the defendant wanted everyone to believe.
- [46] The defamatory letters were not written in immediate retaliation to the article of 11 September 2006. The defendant's response came four days after the article. Neither did he act on the spur of the moment or in a fit of anger. He took his measured time and launched a premeditated attack. No apology was tendered at any stage, nor was there a retraction of the statements made, despite a letter with a request by the plaintiff's attorneys to do so.

- [47] The large audience to whom the defendant sought to, and indeed succeeded in defaming the plaintiff, is indicative of the defendant's malice and is out of all proportion as a response to the plaintiff's legitimate objections to Keri doing business as an estate agent. For the defence of rixa to be successful, genuine anger is required. Misplaced revenge built into a business ploy does not assist the defendant. In my view the defence of rixa therefore falls to be rejected.
- [48] Section 16 of the Constitution also does not avail the defendant. There is a difference between the robust exchange of views which is protected under the right to freedom of speech, and damaging another's reputation (*Bogoshi v National Media Ltd and Others* 1996 (3) 78 (W)). The extent to which the defendant sought to publish his personal defamatory letters which are clearly not in the public interest, can never be protected under the Constitution. This defence raised by the defendant is also groundless.

THE DEFENDANT'S COUNTERCLAIM

- [49] It is common cause that the plaintiff, in July 2005, approached the Managing Director ("the MD") of the international property group of which the defendant held a franchise, (who also testified at the trial) when it came to her knowledge that Keri was working with the defendant. The reason for her telephone call to him, she testified, was to inform him of Keri's nefarious conduct at show houses. Her intention was not to malign the defendant. The plaintiff's evidence was that she also mentioned Keri's previous conviction to him. This was disputed by the MD. The MD testified that the plaintiff is alleged to have said that the defendant financed his franchise with "drug lord" activities in the Eastern Cape. That is a far cry from what was pleaded, namely that he used drugs. The MD said that he in any event regarded her story as "sour grapes". He did not believe it and therefore even on the defendant's version, there can be no defamation. In any event, I have no reason to disbelieve the plaintiff who said the call was made with the purpose of advising him of Keri's conviction. In my view, it is more likely that the plaintiff would have mentioned this fact, rather than omit it, because it was the one relevant piece of evidence she could avail herself of as support for her reason for phoning him in the first place. Her complaint was not taken further. The MD was satisfied that Keri could continue working as an estate agent.
- [50] It is common cause that there were rumours about the defendant's alleged involvement with drugs. The defendant's own version was that he and the MD had a meeting with a certain woman with red hair (also referred to by the plaintiff) concerning these rumours. What is clear is that neither of them regarded the plaintiff as the source. There are two conflicting versions before me. In deciding whose version to accept, it must be taken into account that the MD openly conceded that the events took place a long time ago and that he was not certain as to the details of what was said. The plaintiff however was certain of what was said. I therefore accept that no defamation took place during this confidential conversation.

- [51] It was further common cause that in November 2006, the plaintiff also spoke to the MD about the defendant on the occasion when they were both attending a convention of the National Association of Realtors on a cruise liner in the United States of America. The event was sponsored by Standard Bank. According to the plaintiff, the MD approached her because he had concerns about his franchise in the hands of the defendant in East London. He had apparently received many complaints. According to the MD, who testified for the defendant, it was the plaintiff who wanted to speak to him, and not vice versa. He said that she had made an appointment to see him in private and that they had met at breakfast. It was specifically put to the plaintiff that the MD, would testify, that he approached the plaintiff in November 2006 for a meeting and that he would confirm that he was aware of the drug rumours. They indeed had a private and confidential conversation (the MD's wife was requested by him to leave the two of them alone at the table) and they indeed discussed allegations made by other persons regarding the defendant's alleged involvement in illegal drugs. According to the MD, he launched a police investigation which proved that the defendant was never under investigation for his involvement in drugs, insofar as the police were concerned.
- [52] The second conversation was clearly confidential on the evidence presented. Furthermore, I accept that the plaintiff, being the more reliable witness whose version I find is also more probable, that she was approached by the MD who expected confidential disclosures to be made to him, which were then made in the interests of the standards of the estate agents. There was enough by way of rumours to cause the MD to invoke the assistance of the Police (CID, as he referred to them), to investigate the defendant. The MD accordingly received the information in the circumstances of a qualified privilege.
- [53] In my view, the defendant failed to discharge the onus of proving that the plaintiff had defamed him and his counterclaim falls to be dismissed with costs.

DAMAGES

- [54] In the matter of *Skinner v Shapiro* 1924 (WLD) 157, the court held that the following factors should be taken into account when assessing damages for defamation (at 167):

"The amount of damages is entirely in the discretion of the Court. Such discretion however, is exercised on reasonable and not on arbitrary principles. One is entitled to have regard to the character of the defamatory words, their falseness and the malice displayed by the defendant; the rank and position of the parties in society, the special relationship that existed between them, the persons to whom the defamatory words were published and the place, time and mode of publication; the continuance of the circulation of the defamatory words, the tardiness, inadequacy or entire absence of an apology. The Court is entitled to consider the general conduct of the defendant, from the date of the defamation; and the events leading up to it, down to including his demeanour at the trial and the nature of his defence".

- [55] In *Dercksen v Webb and others* [2008] 2 All SA 68 (W) the appellant was dismissed from his employment after being accused of theft. The appellant sued the respondents for damages based on iniuria and defamation relating to the utterances made against him by the respondents. The court held that damages for defamation in the amount of R20 000.00 was fair and equitable. A distinguishing factor though is that publication of the utterances in that matter was not as widely published as in this matter.
- [56] In *Mouton v Lochner* 2004 JOL 13116 (C), the defendant's son was allegedly molested by a former colleague of the plaintiff, an advocate, who was convicted. After a petition to the Supreme Court of Appeal, the conviction was set aside. The defendant was extremely aggrieved by the judgment. The defendant wrote e-mail letters to various public figures and judicial bodies, in which he repeatedly alleged that the plaintiff's argument to the SCA was "false and misleading". The e-mail was received by some 2850 persons. In addition, the defendant opened a website where he published statements in which he repeated his allegations about the plaintiff. In these circumstances the court granted general damages in the amount of R75 000. In the present matter the serious nature of the allegations, the fact that they were made to deliberately harm the plaintiff, and the defendant's attitude wishing to persist in generating the "debate" of the matter through his website are all factors relevant in the assessment of damages.
- [57] In *MKhize v Media 24 Ltd* [2008] JOL 21651 (N) an article was published by the defendant stating that the plaintiff had been involved in an assassination of a political figure. An amount of R150 000.00 was awarded to the plaintiff.
- [58] In *Dikoko v Mothatla* 2007 (1) BCLR 1 (CC) the Constitutional Court warned that:

"It should be a goal of our law to emphasize, in cases of compensation for defamation, the re-establish of harmony in the relationship

between the parties, rather, than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony,

push the parties apart and even cause the defendant's financial ruin".

- [59] In assessing damages the court may as a guideline consider previous decisions in calculating an appropriate amount (*Pont v Geyser* 1968 (2) SA 545 (A)). However, in *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* [2000] ZASCA 77; 2001 (2) SA 242 (SCA) Smalberger JA, held that:

"Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately, a Court must, as best as it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened

guess”.

- [60] To sum up briefly, the factors to be taken into account in arriving at an appropriate damage award are the status and character of the plaintiff, the nature of the insult, and the likely effect thereof on the plaintiff, the extent of the publication and lastly, the defendant’s subsequent conduct.
- [61] The plaintiff is a well-known figure and estate agent held in esteem by her colleagues. Her considerable contribution to tennis and her charitable activities have often been commended in local newspapers. There can be little doubt that those who knew her (and there are many) would not be influenced in their opinion of her by the defendant’s letters.
- [62] The plaintiff did not attempt to persuade me, that she had lost any particular sale in the market as a result of the letters in question, or that she has suffered any patrimonial loss. Much evidence was led about the high profile of the plaintiff as an estate agent and it was submitted that, on a balance of probabilities, the distribution of so much defamatory material about her, could have dissuaded certain upmarket clients (to whom the material was pertinently distributed) to do business with the plaintiff. The only negative response directed at the plaintiff as a result of the defendant’s letters, was a letter written by a Mr Waldek, a former client, in which he said he would no longer do business with the plaintiff’s estate agency franchise. The wording of the letter is remarkably similar to the defendant’s letters in style, choice of words and the sentiments expressed therein. Significantly, the defendant had a copy of this letter in his possession. It reads as follows:

“Mrs Bassingthwaighe

Your actions, as reported in yesterdays Daily Dispatch, were in my view absolutely disgusting! It smacks of professional jealousy and being underhanded in trying to hurt your business opposition through unfair means.

We all have problems in life, some being more severe than others. I’m sure that you are no exception. I have a friend who also suffers from Bi-Polar disorder and let me tell you that it makes her life a misery at times. My sympathy goes out to Keri after all she has been through and is still going through thanks to you.

To attempt to try and exploit Keri Hart’s condition for professional and financial gain is despicable! Everyone is entitled to their personal views but for you to actually approach the top principal at Chris Everitt is in extremely poor taste and one must question your (and Pam Golding?) ethics.

Please note that I am in no way either professionally or socially connected with Keri Hart or her husband and my views are therefore totally unbiased.

In conclusion, if your intentions were to negatively affect Keri's or her company success, let me tell you that it is my view (and that of many others that I have discussed this situation with) you have had the opposite effect. If the need arises for me to choose between Pam Golding and Chas Everitt in the future, let me assure you that I will not be troubling Pam Golding again!

I wish Keri well in the future and sincerely hope that you have not caused unnecessary damage to her health and career!

Vic Waldek”.

- [63] It has not been shown that the letter has affected the plaintiff's career in any way. The silence of the hundreds of other recipients is an indication that the defendant's letter must have had a minimal impact.
- [64] There is no indication that the letters caused a wealthy property buyer to divert his business elsewhere. The plaintiff was simply too deeply entrenched as an agent in the East London property market, to be toppled by the defendant.
- [65] It was argued, that there was a real potential of damage to her if business people, particular those interested in the plaintiff's high profile portfolio, conducted an internet search on her as an agent, in “googling” her name would have their attention drawn to those letters. The letters may or may not be read, but their contents will pale into insignificance against an overwhelming body of other positive accolades in existence about the plaintiff. If there are those that are prone to be persuaded by the defendant's letters, and I accept that as a possibility, albeit remote, such potential damage would be exactly because of her high profile. It is quite significant that the defamatory material was published to a restricted class of persons in the very field in which her reputation has become well entrenched. This fact has a bifurcated significance. Firstly, that is where the material could possibly cause the most damage. Secondly, since she happens to be so highly esteemed in that area, the damages she will suffer, will be limited.
- [66] Awards based on defamation in our law, tend to be on the conservative side. The plaintiff's claim to an entitlement of R1 million (her original claim being R3 million) or any amount close to that, as damages, in my view cannot be justified on the facts of this matter. No precedent for awarding such an extravagant sum in comparable circumstances has been referred to. The defendant's conduct further requires consideration. He was seemingly not satisfied with publishing the letters from his own computer only. The services of a company were engaged to ensure the widest possible dissemination of his defamatory comments. This is an unequivocal indication of malice. This act alone invites a higher award for damages. Apart from his attempt to ruin the plaintiff's reputation, the defendant clearly maligned her in order for him to gain financially. The defendant never retracted his letters and vigorously continued his vendetta in court. Consequently the plaintiff is entitled to an award for damages which should be on the higher, rather than the lower scale of the award continuum in defamation cases. Having considered all the circumstances the amount of R150 000.00 would appropriately reflect all the aforesaid considerations.

[67] In the result I make the following order:

The defendant is ordered to pay to the plaintiff the amount of R150 000.00 as damages.

The defendant is ordered to pay the plaintiff's costs of suit including the costs of the plaintiff's heads of argument.

The defendant's counterclaim is dismissed with costs.

E REVELAS

JUDGE OF THE HIGH COURT

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