

SOUTH AFRICA / JUDGMENT

Du Toit v Becket and Another (8687/2023) [2024] ZAWCHC 56 (21 February 2024)

[2024] ZAWCHC 56**COURT**

Western Cape High Court, Cape Town

BEFORE

Holderness AJ

CASE / FILE NUMBER

8687/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case****number: 8687/2023****In**

the application of:

DERICK
DU TOIT
Applicant
And
SIMON
BECKET
First
Respondent
CERES
GOLF ESTATE DEVELOPMENT
COMPANY
(PTY) LTD
Second
Respondent

JUDGMENT

DELIVERED ELECTRONICALLY ON 21 FEBRUARY 2024

HOLDERNESS AJ

Introduction

[1] The applicant seeks an order:

1.1 Interdicting the respondents from making or publishing statements or publishing statements that are defamatory of the applicant, including but not limited to:

- (i) any statement to the effect that the applicant has acted in a manner against the interests of the Ceres Golf Estate ('CGE'), operated by the second respondent, of which the first respondent is the managing director;
- (ii) any statement to the effect that the applicant has orchestrated threats against CGE;
- (iii) any statement to the effect that the applicant tried to block access to CGE and / or remove its fences and / or its infrastructure;
- (iv) any statement to the effect that the applicant is under investigation about his alleged participation in corruption against the state in relation to a concept known as 'Ghost Trains'; and
- (v) any statement to the effect that the applicant is involved in fraud and / or corruption.

1.2 that the respondents retract the statements in the penultimate and final paragraphs of the Circular issued by CGE dated 24 May 2023 ('the Circular');

1.3 that the respondents be ordered to furnish a full and unconditional apology for the publication of the defamatory statements made against the applicant contained and set out in the penultimate paragraphs of the Circular; and

1.4 that the respondents be ordered to pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

[2] The aforementioned relief was initially cast as urgent interim relief in the form of a rule nisi. The relief now sought is final, but in the same terms.

[3] The urgent interim relief was premised on the applicant's belief that the respondents would further defame him at the CGE Annual General Meeting ('AGM') which was scheduled for 18h00 on 21 May 2023.

[4] On 30 May 2023 the respondents' attorney, Mr Brendon Hess of Cluver Markotter Inc ('Mr. Hess') tendered the following undertaking:

‘As discussed, and without admitting any liability or wrongdoing, our client hereby irrevocably undertakes not to make any defamatory

statements about your client at tomorrow’s AGM meeting.’

[5] This undertaking was incorporated into an order by agreement, granted by Francis J on 31 May 2023. A rule nisi was issued calling the respondents to show cause on 21 November 2023 why an order should not be granted in the terms set out in paragraph 1 above. The costs of 31 May 2023 stood over for later determination.

The issues for adjudication

[6] Should the Court find that the statements published by the respondents were per se defamatory, the issues which the Court is called upon to determine are:

6.1 Whether the statements were published with the intention to injure the applicant; and

6.2 If they were published animus inuriendi, have the respondents discharged the onus of proving that such defamatory statements are true, and the publication thereof was for the public benefit and / or whether the statements amount to fair comment in accordance with the well-established legal principles in this regard.

The published statements

[7] On 24 May 2023, CGE, under the hand of the first respondent, published the Circular to members of the Ceres Golf Estate Homeowner’s (‘the HOA’) in which inter alia the following statements, which the applicant alleges are defamatory of him, were made:

7.1 ‘Ceres Golf Estate got off to a rocky start. Due primarily to the untoward actions of the former Managing Director.’

(‘the first statement’)

7.2 ‘Ironically this can be traced back to litigation against Derick du Toit, who orchestrated numerous threats against Ceres Golf Estate...including trying to block access to the estate, remove its fences and security infrastructure.’

(‘the second statement’)

7.3 ‘As I write, investigation is under way about his alleged participation in corruption against the state with a concept known as “Ghost Trains.”’

(‘the third statement’)

7.4 ‘If being vindictive against fraud and corruption is being ‘vindictive’ then as a society we are not being vindictive above.’

(‘the fourth statement’)

(collectively referred to hereafter as the ‘the statements’)

- [8] The applicant contends that, on a plain reading and based on their ordinary meaning, these words are clearly defamatory of him.
- [9] The applicant seeks to finally interdict the respondents from making or publishing such defamatory statements in the future, and further seeks an order directing them to retract and apologise for the statements made in the Circular.
- [10] The applicant does not seek damages, but rather seeks to ‘protect his good name and reputation by means of interdictory relief.’

The respondents’ defences

- [11] The respondents deny that any of the statements made are defamatory and contend that even if untrue, the first and second statements are not defamatory of the applicant.
- [12] The respondents further contend that the only statement which could be construed as being defamatory is the third statement.
- [13] The respondents allege firstly that the applicant has failed to establish a clear right. The further factual bases for the respondents’ defences are based on:

13.1 truth and public interest;

13.2 qualified privilege; and

13.3 fair comment.

The law of defamation

- [14] It is well-established in our law that once a court makes a finding that published statements are per se defamatory of an applicant, the presumption arises that these statements were both:

14.1 wrongful; and

14.2 published with the intention to injure (*animus iniuriandi*).

- [15] In *Modiri v Minister of Safety and Security and Others*[1] (‘Modiri’) Brand JA elucidated the distinction between these two presumptions, as follows:

‘Though both the presumption of intent and that of wrongfulness arise from a single event, that is, the publication of a defamatory statement, the two presumptions are essentially different in character. The presumption of intent to injure relates to the defendant's subjective state of mind. By contrast, the presumption of wrongfulness relates to a combination of objective fact, on the one hand, and considerations of public and legal policy, on the other.[2]

Generally speaking, a rebuttal of the presumption relating to the subjective state of mind of those who acted on behalf of the defendant will therefore require some evidence to be led on the defendant's behalf. By contrast, the objective nature of the enquiry into wrongfulness signifies that the subjective beliefs of the defendant are of no consequence. Thus understood, it becomes

apparent, with reference to the defence of truth and public benefit, for example, that both elements of this defence can in principle be established on the basis of facts not deriving from the defendant's own witnesses.'

- [16] Once these presumptions arise, the respondents (or defendants) bear a full onus of establishing a defence, on a preponderance of probabilities (should the relief be final in nature), which excludes both wrongfulness and intent.[3]
- [17] Should the respondent fail to adduce evidence to rebut the former presumption, intent to injure must be established.
- [18] If an intention to injure has been established, the matter will turn exclusively on the issue of wrongfulness, and the only issue will be whether the respondent has successfully established any one of the grounds of justification upon which they rely.[4]
- [19] In adjudicating whether conduct is lawful, the Court is required to balance the constitutionally protected right of dignity, which includes the right to reputation, and the right to freedom of speech or expression.[5]
- [20] In these proceedings, the respondents rely on a number of recognised defences or grounds of justification, including truth and public benefit, fair comment, and qualified privilege.
- [21] It became apparent during the course of the hearing and from the written heads of argument filed on their behalf, that the respondents were not persisting with the defence of qualified privilege. It is therefore only necessary to determine whether the statements are true and for the public's benefit and / or amount to fair comment.
- [22] Any one of these would, if established, serve to exclude wrongfulness. If any of these defences are upheld, that would be the end of the matter.[6]
- [23] In *Modiri* the Court emphasised that[7]:
- '...(i)t is a matter of settled law that the defendant is not required to prove that the defamatory statement was true in every detail. What the defence requires is proof that the gravamen or the sting of the statement was true. The gist or sting of a statement is determined with reference to the legal construct of a reasonable reader. It is the meaning that the reasonable reader of ordinary intelligence would attribute to the statement.[8] The test is thus an objective one. Evidence of how the plaintiff or, for that matter, any actual reader of the article understood the statement is of no consequence.'
- [24] The defence of truth and public benefit is engaged only where the published statement is substantially true. However, the law recognises that it is not always in the public interest to publish a fact merely because it is likely to be of interest to the public.[9]

- [25] It is partly for these reasons that our courts have long held that whether the publication of a defamatory statement is for the public benefit depends critically on the content of the statement, and the time, manner and occasion of its publication. The question is whether there was an overall public benefit to the publication of the statement in the way it was published, when it was published.[10]
- [26] The defence of fair comment was imported into our law in 1917 from the English law of libel in *Crawford v Albu*. [11] Innes CJ explained that the defence rests upon the right of every person to express his real judgment or opinion upon matters of public interest.
- [27] In *Marais v Richard en 'n Ander*, [12] the SCA summarised the requirements for a defence of fair comment as follows:
- 27.1 The statement must constitute comment or opinion;
 - 27.2 it must be 'fair';
 - 27.3 the factual allegations being commented upon must be true;
 - 27.4 the comment must relate to a matter of public interest; and
 - 27.5 the comment must be based upon facts expressly stated or clearly indicated in the document or speech which contains the defamatory words. [13]
- [28] In *Hardarker supra* Cameron JA emphasised that one of the hallmarks of a comment is that it is 'connected to and derives from discernible fact.' [14]
- [29] There can accordingly be no fair comment on facts which are not true. [15] As with the defence of truth for the public benefit, the respondents must establish the truth of the statements which they contend amount to fair comment.
- [30] In *Crawford supra* Innes CJ found that 'fair' in this context means only that the opinion expressed must be one that a 'fair man, however extreme his views may be, might honestly have...'. He further observed that the defendant must justify the facts, but he need not justify the comment. [16]
- [31] Generally it is necessary that the facts on which the comment is made be incorporated in the publication containing the comment, even if by reference. [17]
- [32] In one of the earliest statements in this regards, Chief Justice Innes in the matter of *Roos v Stentand Pretoria Printing Worksheld*, [18] found as follows:

‘(t)here must surely be a placing before the reader of the facts commented upon, before a plea of fair comment can operate at all. I do not want to be misunderstood upon this point; I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the article which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's own authority.’

Final interdictory relief in defamation matters

[33] An applicant seeking final relief must establish:

33.1 A clear right;

33.2 an injury actually committed or reasonably apprehended; and

33.3 the absence of similar protection by any other ordinary remedy.

[34] In *Economic Freedom Fighters and Others v Manuel*[19] (‘Manuel’) the Supreme Court of Appeal confirmed the well-known principle that persons may seek interdicts, interim or final, by way of motion proceedings against the publication of defamatory statements.[20]

[35] The approach in *Manuel* was confirmed by the Supreme Court of Appeal in *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd (NBC Holdings)*:[21]

‘.... However, the entitlement to proceed in that way is constrained by the fact that in motion proceedings, where the issue is whether the defendant has a defence to a claim based on defamation, it cannot be decided on motion if there is a dispute as to the applicant's right to that relief. As Greenberg J said:

‘... if the injury which is sought to be restrained is defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence.’

[36] The general rule is that motion proceedings are appropriate for deciding questions of law on undisputed facts.[22]

[37] A litigant who institutes a claim on motion but who ought to have known that a dispute of fact would arise runs the risk that their application will be dismissed.

[38] In *Ndlozi*[23] Wilson J, after referring to the relevant authorities, observed that where the quantum of damages is linked to the nature and likely effect of an apology, oral evidence of the reach and impact of the defamatory statements must generally be placed alongside the likely ameliorative effect of the apology.

[39] In the present matter the retraction and apology are not linked to a claim for damages. The applicant seeks:

39.1 backward looking relief in the form of an apology and retraction (and has not claimed any damages); and

39.2 forward looking relief in the form of an interdict prohibiting the respondents from further defaming him.

[40] In *Tau v Mashaba and Others*[24] Schippers JA expressed the view that the following passage in *Herbal Zone (Pty) Limited v Infitech Technologies (Pty) Limited*[25] provides a complete answer to the alleged absence of an adequate remedy:

‘[A]n interdict to prevent the publication of defamatory matter ... is directed at preventing the party interdicted from making statements in the future. If granted it impinges upon that party’s constitutionally protected right to freedom of speech. For that reason such an interdict is only infrequently granted, the party claiming that they will be injured by such speech ordinarily being left to their remedy of a claim for damages in due course.’

[41] It is clear from the *Herbal Zone* judgment *supra* that:

‘What is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent. It is not sufficient to simply state that at a trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual foundation therefor.’

[42] In the present matter the publication and contents of the impugned statements are not in dispute.

[43] Moreover, the meaning of the statements does not appear to be in dispute. In accordance with the objective test, the question is what meaning the reasonable reader of ordinary intelligence would attribute to the statement in its context. In applying this test, it is accepted that the reasonable reader would understand the statements in the context of the Circular and that he or she would have had regard not only to what is expressly stated but also to what is implied.[26]

[44] If the publications are found to be defamatory, they may nevertheless be lawful if the respondents can establish that they did not intend to injure the applicant, or if they can establish that the statements were not made wrongfully.

[45] The respondents have not shown, nor does it appear have even attempted to show, that the statements were not made with the intent to injure the applicant.

[46] Accordingly the issue which remains for determination is whether the publication of the impugned statements was wrongful. In particular whether, if the statements turn out to be true, they were made for the public benefit, and / or amount to fair comment. These are primarily questions of legal policy, which do not normally entail the resolution of factual disputes.[27]

[47] In light of these established principles and on the facts before me, it appears that the central question of whether the applicant was in fact unlawfully defamed can easily be decided on the papers before me, applying the well-known Plascon-Evans rule.

(i) The first and second statements

[48] The first and second statements are as follows:

48.1 'Ceres Golf Estate got off to a rocky start. Due primarily to the untoward actions of the former Managing Director.'

48.2 'Ironically this can be traced back to litigation against Derick du Toit, who orchestrated numerous threats against Ceres Golf Estate...including trying to block access to the estate, remove its fences and security infrastructure.'

[49] The meaning of these statements is plain. The respondents are accordingly required to show that:

49.1 the second respondent experienced difficulties or 'got off to a rocky start'.

49.2 the applicant acted in an untoward manner; and

49.2 the second respondent's difficulties were due to the (untoward) actions of the applicant.

[50] As the Circular was published on 24 May 2023, the ordinary meaning of 'rocky start' would presumably relate to events which transpired in early 2023.

[51] At my request, Mr Gordon, counsel for the applicant, prepared a joint chronology of the events pertinent to these proceedings, commencing in 2010.

[52] The only events included in the chronology for 2023 are the following:

52.1 26 April 2023: Du Toit was approached by Mr. Ron Ross ('Mr. Ross') and a copy of the Steyn J judgment provided to Ross; and

52.2 1 May 2023: Ross files an objection in the town planning participation process in which he refers to the first respondent as being 'intentionally vindictive.'

[53] In amplification of the above, the first respondent's evidence was that Mr. Ross and a Mr. Neels Coetzer lodged objections to a minor change to the layout of the estate in the way of making existing plots slightly larger.

[54] The respondents aver that the origin of the threats referred to in the second statement was 'the applicant's desire to swap his shareholding in the second respondent for the Ceres Rail Company (Pty) Ltd ('CRC') shareholding and debt.'

- [55] It is necessary to set out certain background facts to determine whether it is clear from the respondent's evidence, that such a threat was indeed made. This of course will be determinative of whether the defences of truth and public benefit, and/or fair comment would be upheld.
- [56] The respondents set out a detailed history of the relationship between the parties, dating back to 2010, much of which is irrelevant to the present proceedings. Suffice it to say that the parties' business dealings have a long and torturous history, that by all accounts, after various court applications, came to an end in 2020.
- [57] It appears that in 2013, CRC became a subsidiary of the second respondent, to operate a railway branch line, owned by Transnet. The second respondent thereafter sold its shareholding in CRC to various parties at nominal value.
- [58] The respondents deal at length with the financial difficulties experienced by CRC and aver that the applicant was 'central' to these financial difficulties. In light of the significant time which has elapsed since these events took place, the relevance of these detailed allegations against the applicant is difficult to discern.
- [59] In December 2018 the first respondent instituted business rescue proceedings against CRC. The initial opposition of the application was withdrawn, and CRC was placed in business rescue on 2 March 2020.
- [60] In December 2019, the Beckett Family Trust ('the Trust'), in its capacity as a shareholder of CRC (having acquired its shares from the second respondent), brought an application seeking an order declaring two of the directors of CRC, one of which was the applicant, to be delinquent as envisaged in Section 162(2) of the Companies Act 71 of 2008 ('the delinquency application').
- [61] The basis for this relief was that the applicant, in his capacity as a director of CRC, had incurred debt in excess of R25 million when he knew, or ought to have known, that there was no reasonable prospect of such debt being repaid.
- [62] The delinquency application was dismissed by Steyn J, who, according to the applicant, dealt at length in her judgment with the allegations set forth in the answering affidavit in the present matter.
- [63] The respondents set out in great detail the allegations made by a certain Mr. Johan Klopper ('Mr. Klopper'), a business rescue practitioner, dealing primarily with the allegedly parlous financial position of CRC, and the applicant's role in creating the state of affairs. The respondents emphasise that the allegations in Mr Klopper's affidavit remain unanswered by the applicant.
- [64] The applicant pertinently pointed out that what the respondents omitted to include was the following observation made by Steyn J, on a conspectus of all the evidence before her:

‘...My overall impression is that three out of four directors did their utmost, under difficult circumstances, including their perception of being unreasonably obstructed by a creditor and/or another director (Mr Beckett). Du Toit, supported by other directors, aimed at achieving an objective to ensure the continued successful existence of CRC, a business he believed in.’

[65] The applicant’s stance is that to the extent that CRC was financially constrained, this was due to the decision of the first respondent to transfer all of its assets to the second respondent, whilst leaving CRC with all ongoing operating costs.

[66] According to the applicant the first respondent’s steadfast refusal to transfer the rolling stock assets to CRC adversely impacted its ability to secure funding, which culminated in the threatened business rescue application brought by the first respondent, (which was opposed), liquidation proceedings being brought against the so-called Beckett entities and finally business rescue proceedings from which CRC emerged in October 2020.

[67] The applicant was opposed to the business rescue plan. He resigned and in due course CRC was restructured and he lost his shareholding in the company.

[68] The applicant’s version is that due to the actions of the first respondent, he was effectively ousted from the second respondent, the HOA and CRC, projects which he claims, ‘were his brainchild and were close to his heart.’

[69] The respondents contend that when the applicant realised that he had no equity in the second respondent to exchange, he threatened the second respondent ‘in the hope that it would force the Trust’s hand’, and that Riversands Farm Properties (Pty) Ltd (‘Riversands’), the first respondent’s family business, which loaned R22 million to second respondent in 2011, would waive the debt owed to it by CRC.[28]

[70] The respondents further allege that when various attempts by the parties’ legal representatives to settle failed, the applicant made inter alia the following threats:

70.1 that access to the second respondent would be blocked;

70.2 that the second respondent’s security infrastructure would be removed;

70.3 that the second respondent would be liquidated;

70.4 that legal action would be instituted against the second respondent’s board of directors to force it to use its majority to vote at the AGM in November 2018 to object to a proposed amendment to the second respondent’s constitution; and

70.5 that he ‘intimated’ to Transnet that the second respondent had illegally installed the gates over railway lines on Transnet land intending to block trains.

The written communications

[71] In substantiation of the aforesaid allegations, the respondents rely on two written communications, an email from the applicant to the first respondent dated 1 November 2018 ('the first communication') and a letter from CRC to Transnet dated 28 March 2019 ('the second communication.')

The first communication

[72] It is helpful to recite the full contents of the first communication, as the alleged threat needs to be considered in the full context of what was recorded by the applicant in the email addressed to the first respondent and to his father, Rowley Beckett ('Mr Beckett Snr'):

'Dear Rowley / Simon

Gert van der Merwe called me to inform me that you instructed him to stop all work done by the employees of Ceres Rail Company (CRC) in the Ceres Golf Estate (CGE) workshop. I can only assume that you have given such instructions in your capacity as director of CGE and in this regard I wish to point out that you had no authority to do so. Your actions are concerning as the cancellation of this working relationship with CRC was not discussed with me as representative of Orange Tree Development (in its capacity as a shareholder) or as director of CGE. I have not and certainly would not have agreed to this step as it impedes and sabotages the operations of CRC with whom CGE has a working relationship and who owes CGE a considerable amount of money (the final amount still to be determined). Further, your actions constitute unlawful deprivation by CGE of CRC's possession in respect of the workshop.

Your unilateral unauthorised action could also jeopardise the working relationship of CGE with CRC and Transnet and which relate to inter alia the following:

1. CGE storing its trucks and trailers, under cover and guarded on CRC's premises at no charge at this stage.
2. And of the woodworking machines by mutual agreement and understanding in the workshop at CGE for its use.
3. Transnet could terminate CGE access over its property used by CGE for access roads, fences, and security if it finds out about your unilateral actions that amounts in my view to impeding and sabotaging actions.
4. CRC may decide to terminate its agreement with CGE regarding these short haul of containers and other related agreements.

I accordingly urge you to immediately reverse your instruction to Gert van der Merwe and allow CRC to continue to use the workshop as has been the case prior to your instructions. CGE can hardly afford to get in a war with CRC, Transnet and the Witzenburg municipality at the stage which will in all likelihood have a negative impact on our working relationships. If you however choose to ignore my request and persist with your unauthorised actions, I will cause that CGE will hold you liable for such damages as CG may suffer as a result of your actions.'

SIMON Please advise urgently whether you approve of Rowley's actions, alternatively, confirm that you support my request that rarely

immediately reverse his unauthorised actions.'

[73] The email response from the first respondent to the first communication, dated 1 November 2018, is instructive:

'Derick

You gave an instruction, without consultation, on 15 October that all CRC equipment and materials were to be moved from the CGE workshop to the CRC freight terminal, making space for all CGE equipment to be moved back to the CEO workshop. You know however your e-mail below suggests otherwise, as the CGE workshop will continue to be utilised by Ceres Rail...

That said, I am in support of whatever actions are to the benefit of each company, provided that those actions don't negate from the finances of the other company.

It's good of you to realize that CRC owes CGE a considerable amount of money. This figure is increasing monthly as CRC is not paying CGE for use of the Reach Stacker. How can we expect this to be rectified? It is worth noting that your MTN debit order is still coming off the CGE bank account.

Thanks

Simon'

[74] Nowhere in this email reply from the first respondent does he suggest that the applicant's email was construed by him as a threat which would impact CGE and/or members of the HOA.

[75] I agree with the applicant that:

75.1 the first communication appears to be an exhortation to Mr Beckett Snr to conduct himself in a reasonable

manner, as his actions had the potential of jeopardising the relationship between all the parties and Transnet; and

75.2 if anything, the first communication, rather than constituting a threat, records the concerns of the applicant that their relationship with Transnet should not be jeopardised, and indicates that the applicant does not want access to be blocked or security infrastructure and fencing to be impacted.

- [76] Even if one accepts the version of the respondent, as the Plascon-Evans enjoins the Court to do, it is not clear how the first communication could be construed as ‘an orchestrated threat to block access to the estate and to remove its fences and security infrastructure’, nor is it explained in the answering papers how this construction could possibly be placed on such statement.
- [78] Moreover, a period of more than five years has elapsed since these emails were exchanged, which begs the question why, if it was necessary to publish the alleged ‘threat’ by the applicant, the respondents waited half a decade to do so.
- [79] Furthermore, the respondents’ contention that the applicant providing one of the homeowners with a copy of a judgment in litigation between the parties was the catalyst for the publications of these statements does not pass muster.
- [80] In my view the respondents have failed to show that the first statement, which on the face of it is defamatory of the applicant, is true and / or in the public interest, or more specifically, in the interest of the members of the HOA to whom the Circular was circulated.

The second communication

- [81] The second communication is a letter dated 28 March 2019, from the applicant, in his capacity as a director of CRC, to Mr Ali Motala, the Acting Chief Operating Officer of Transnet Freight Rail, informing him:

81.1 of the application by Riversands firstly to place CRC in business rescue, and its subsequent decision to have CRC placed in liquidation;

81.2 that Riversands had resolved to place CGE in business rescue;

81.3 of the possible impact of the pending liquidation of CRC on Transnet, including the following:

81.3.1 that CRC could not guarantee that freight to and from Ceres would continue after the liquidation under the current operating model;

81.3.2 the securing of the Transnet property and land as intended as the concession area in and around the De Meter station and other stations between Wolseley and Prince Alfred Hamlet;

81.3.3 the access of trains through the tunnel and over the Ceres golf course, which access is currently controlled by CRC;

81.3.4 the placement of the fence as well as gates over the railway line both at the tunnel and on the series side of the De Meter station; and

81.3.5 the three locomotives and the Union Limited train carriages previously sold to CRC and earmarked for use by CRC, had not been transferred from CGE despite several board resolutions to effect such transfer.

- [82] The applicant's description of the second communication as a letter from a director of a company in financial distress informing an interested party of the potential effect which the placing in business rescue or winding up of CRC may have on such entity, is, in my view, accurate.
- [83] There is no indication, on an ordinary reading of this letter, that it can reasonably be construed as an 'orchestrated threat to block access to the estate and remove its fences and security infrastructure.'
- [84] The delay in informing the members of the HOA of such a perceived threat, were these communications genuinely construed as such by the respondents, is equally apposite to the second communication.
- [85] There is clearly a factual dispute regarding who was responsible for the initial financial travails of CGE, however it is common cause that the applicant's involvement with the HOA and CGE ended more than four years ago, at a similar time to when CGE recovered from such financial distress.
- [86] It is self-evident that irrespective of who was responsible for CGE's historical financial difficulties, this history is of neither interest nor benefit to the present members of the HOA to whom the Circular was sent.
- [87] The respondents argued that the applicant's contentions in this regard lose sight of the connecting factor, namely Mr. Ross, whom the applicant provided with the judgment of Steyn J in the delinquency application, and who in turn provided the applicant with the Circular.
- [88] The respondents assert that 'they are correct when they insinuate that Mr. Ross is being utilised as a conduit to spread disinformation at the insistence of the applicant.' The sole allegation by the first respondent in this regard is that:
- 'The fact that Mr Ross provided the applicant with a copy of the Circular, is indicative of my suspicions that the applicant is seeking to influence homeowners against me so as to serve his own interests and agendas.'
- [89] The respondent's choice of the word 'insinuate' suggests that they accept that this conclusion is based solely on their suspicions, which do not appear to be grounded either in logic or in fact.
- [90] It is not unreasonable for the applicant to have sent a copy of the judgment in terms of which he was effectively exonerated to one of the homeowners whom he may have a friendly or business relationship with, and for Mr. Ross in turn to send the applicant the Circular, which included potentially defamatory statements about him.
- [91] In my view, it is not reasonable to conclude from the foregoing that the applicant is seeking to influence homeowners against him so as to serve his own interests and agendas.

[92] There is no evidence of what such agenda may be, as it is common cause that the applicant's interests in the second respondent and CRC terminated four years ago.

[93] I therefore find that the respondents have similarly failed to discharge the onus of proving that the second defamatory statement, which on the face of it is defamatory of the applicant, is true and / or in the public interest, or more specifically, in the interest of the members of the HOA to whom the Circular was circulated.

The third and fourth statements

[94] According to the respondents:

94.1 Transnet had no records of the train movements in relation to CRC's services to Elgin;

94.2 No invoices were generated by Transnet for this service; and

94.3 No payments were made by CRC to it during the periods from December 2018 to February 2020.

[95] Based on the foregoing, the respondents concluded that the applicant was involved in an 'improper' relationship with one or more persons at Transnet, with the result that Transnet provided services to CRC 'off the books.'

[96] The applicant countered these allegations, which it avers are demonstrably false, stating that:

96.1 CRC had a signed access agreement with Transnet;

96.2 an appendix to the agreement in which the rates which would be charged to CRC had not been finalised; and

96.3 until Transnet provided CRC with invoices after the rates schedule had been finalised, CRC would (and did) keep a detailed record of all the special notices issued by Transnet to ensure that they would not overcharge CRC.

[97] The applicant provided a full list of trips which it undertook on Transnet's network during the period from September 2019 to February 2020, under cover of an email to Transnet enclosing the aforesaid list.

[98] According to the applicant, when these same facts were raised by the first respondent in the delinquency application, a senior official from Transnet deposed to an affidavit confirming the above.

[99] The bald allegation by the respondents in this regard is that the aforementioned allegations 'constitute all the characteristics of the phenomenon which has recently been termed "ghost trains."'

[100] To discharge the onus of proving that these allegations are both true and in the public interest, or amount to fair comment, the respondents are required to adduce evidence to show that:

100.1 there is an investigation underway against the applicant;

100.2 that the investigation relates to his alleged participation in corruption against the State; and

100.3 that the particular corruption against the State in relation to which he is alleged to have been involved, and in relation to which there is an investigation is with a concept known as 'Ghost Trains.'

[101] The sole allegation by the respondents in regard to 'Ghost Trains' is the comment by the first respondent that: 'There has been extensive media coverage in the first quarter of 2023 about 'Ghost Trains' and that 'these are trains which have not been authorised to operate on Transnet's rail lines.'

[102] The respondents do not rely on nor annex any news articles regarding this alleged phenomenon in corroboration of the allegation that there has been 'extensive media coverage' thereof, nor do they detail what the media in fact covered regarding 'Ghost Trains.'

[103] The applicant annexed an article to his replying affidavit relating to the 'ghost train phenomenon', from which it appears that 'ghost trains' refers to instances in which syndicates add more trains to legitimate orders paid for by mining companies to collect coal heading for to the Richards Bay Coal Terminal, which trains are then diverted through middlemen to other customers who purchase the coal at reduced rates.

[104] There is no evidence before me to suggest that the applicant is involved in fraudulent or corrupt activities in his dealings with Transnet, or in the so-called 'Ghost Train' phenomenon.

[105] To the contrary, in an email sent to Transnet in February 2020, the applicant documented every rail trip conducted by CRC on Transnet's rail network in an accompanying spreadsheet.

[106] The respondents have accordingly failed to discharge the onus of showing that the statement regarding applicant's alleged involvement in corrupt activities, including the 'Ghost Train' phenomenon are true or in the public benefit.

[107] Moreover, even if the impugned statements constitute comments or opinion and not a statement of fact, in my view that they were not fair to the applicant.

[108] It is patently clear that the applicant's reputation was tarnished as a result of the publication of these statements.

[109] The right to freedom of speech is of course not absolute. Recognising that an action for damages is likely to be protracted and costly, an interdict in appropriate cases may well be justified.

[110] The statements made by the respondents are ostensibly made for the benefit of the members of the HOA, however they are clearly written in spiteful and pernicious terms.

[111] The statements are couched as factual averment and not comment. There is no reference in the Circular to the facts upon which the comments are based. Moreover, the actions of the applicant which led to the finalised litigation dating back four years ago is of no interest to the homeowners.

[112] In any event in my view the facts averred by the respondents do not justify the imputation that the applicant is tainted, corrupt or has threatened the respondents or any related parties.

Has a case been made out for a final interdict?

[113] As quoted with approval in *Minister of Law and Order, Bophuthatswana, and Another v Committee of the Church Summit of Bophuthatswana and Others*:^[29]

‘An underlying reason for the granting of a final interdict has been stated with admirable brevity by William Williamson Kerr^[30] as follows:

‘. . . After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course

to a perpetual injunction to prevent the recurrence of the wrong . . . The jurisdiction to grant a perpetual injunction is founded on the equity of relieving a party from the necessity of bringing action after action at law for every violation of a common law right, and of finally quieting the right, after a case has received such full decision as entitles a person to be protected against further trials of the right. . . .’

[114] Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which prove that he has a clear or definite right in terms of substantive law.^[31]

[114] I am satisfied that on a conspectus of the evidence the applicant has proven such a right.

[115] Regarding the second requirement, an injury actually committed or reasonably apprehended, the applicant’s evidence is that he believes that if the respondents are not interdicted from making further defamatory statements about him, they will continue to do so.

[116] When considering:

116.1 the extremely limited ambit and duration of the undertaking given by the respondents not to defame the applicant at the AGM meeting only;

116.2 the broad breadth of and the force with which the respondents have advanced their allegations; and

116.3 the litigious history between the parties and the rebuke of the first respondent by Steyn J; and the fact that the respondents clearly have an ongoing issue with the applicant and somehow have formed the view that he is operating in the background to subvert CGE the belief of the applicant that absent an interdict the respondents will continue to defame him is reasonable and well founded, and in my view the requirements for interdictory protection against future defamation.[32]

[117] Regarding the availability of an alternative remedy, I am of the view that in the circumstances of this case a claim for damages is not a satisfactory alternative remedy. I do not believe that it would be reasonable for the applicant, who has explicitly stated that he does not wish to pursue a claim for damages and seeks only the interdicting of future defamatory conduct, together with a retraction and apology, to pursue such a costly and time consuming remedy.

Can the relief be sought in motion proceedings?

[118] With regard to the nature of the relief sought, to the extent that the Court in *Hartland Lifestyle Estate (Pty) Ltd and another v APC Marketing (Pty) Ltd*[33] differed from this approach in refusing to order a retraction and an apology on motion on the basis of the decision of the SCA in *Manuel*, I respectfully differ.

[119] This matter is clearly distinguishable from *Manuel*, where the applicant sought an order for a retraction and an apology in conjunction with a claim for damages. The SCA held that it was inappropriate to adjudicate a claim for damages in motion proceedings as oral evidence would be need to be led to establish damages, and the issue of a retraction and apology in casu was inextricably bound up with the question of damages.[34]

[120] In this case the applicant specifically disavows himself of any intention to pursue a claim for monetary damages and expressly contents himself with an apology and a retraction.

[121] I am accordingly satisfied that the interdictory relief sought, together with the order for a retraction and apology, can properly be granted on motion.

[122] I am however not prepared to grant an interdict in the unduly broad terms sought specifically in paragraph 2.1 of the Notice of Motion, namely that the respondents be interdicted from making statements that are defamatory of the applicant, including but not limited to the statements as set out thereunder.

[123] In *Halewood International South Africa (Pty) Ltd v Van Zyl and Another*[35] *Moorcroft AJ* observed that:

‘The courts do not interdict future defamation in broad terms. It is not possible to interdict a respondent in broad and general terms from defaming an applicant in the future. Rather, a court may interdict specific acts of defamation, for example, it may interdict the respondent from repeating an allegation that the applicant stole money from his employer.’

[124] I find myself in agreement with the view expressed in *Halewood International supra* and am inclined therefore to grant an interdict, albeit in somewhat narrower terms than those sought by the applicant.

[125] The applicant has of course been substantially successful and there is no reason to depart from the usual rule that costs should follow the event. In my view no basis has been laid for a punitive costs order, nor was such an order seriously pursued at the hearing.

Order

[126] In the circumstances the following order shall issue:

(a) The respondents are interdicted from making or publishing:

(vi) any statement to the effect that the applicant has acted in a manner against the interests of the Ceres Golf Estate, operated by the second respondent (‘the Ceres Golf Estate’), or any defamatory statement in similar terms;

(vii) any statement to the effect that the applicant has orchestrated threats against the Ceres Golf Estate, or any defamatory statement in similar terms;

(viii) any statement to the effect that the applicant tried to block access to the Ceres Golf Estate and / or remove its fences and/or its infrastructure, or any defamatory statement in similar terms;

(ix) any statement to the effect that the applicant is under investigation about his alleged participation in corruption against the state in relation to a concept known as ‘Ghost Trains’, or any defamatory statement in similar terms; and

(x) any statement to the effect that the applicant is involved in fraud and/or corruption, or any defamatory statement in similar terms.

(b) The respondents are directed to retract the statements in the penultimate and final paragraphs of the Circular issued by the second respondent dated 24 May 2023 (‘the Circular’) within thirty (30) days of the date of the granting of this order;

(c) The respondents are directed to furnish a full and unconditional apology for the publication of the defamatory statements made against the applicant contained and set out in the penultimate paragraphs of the Circular, within thirty (30) days of the date of the granting of this order; and

(d) The respondents are to pay the costs of this application, including all reserved costs, jointly and severally, the one paying the other to be absolved.

HOLDERNESS, AJ

APPEARANCES For the Applicant: Adv RDE Gordon Cronje's Attorneys (Mr. Frans Cronje) For the Respondent: Adv R Steyn Cluver Markotter (Mr. Brendon Hess)

[1] 2011

(6) SA 370 (SCA) at para 11.

[2] See e.g. Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others [1993] ZASCA 203; 1994

(1) SA 708 (A) at 768I – 769A; Le Roux v Dey 2011

(3) SA 274 (CC) paras 121 – 125.

[3] Modiri v Minister of Safety and Security and Others 2011

(6) SA 370 (SCA) at para 10; see Hardaker v Phillips 2005

(4) SA 515 (SCA) para 14; Le Roux and Others v Dey D (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011

(3) SA 274 (CC) para 85.

[4]Modiri supra at para 10.

[5]Hardaker v Phillips 2005

(4) SA 515 (SCA) at para 15, and the cases there cited.

[6] Id at para 11.

[7] Id at para 13.

[8] See e.g. Basner v Trigger 1945 AD 22 at 32; Sindani v Van der Merwe and Others 2002

(2) SA 32 (SCA) ([2002] 1 All SA 311) para 11.

[9] Ndlozi v Media 24 T/A Daily Sun And Others 2024 (1) SA 215 (GJ) at para 55.

[10]Ndlozi at para 57; Modiri paras 23 – 25 and the cases referred to there.

[11] Crawford v Albu 1917 AD 102.

[12] 1981

(1) SA 1157(A) at 1167F, per Jansen JA, applied in Delta Motor Corporation (Pty) Ltd v Van der Merwe 2004 (6) SA 185 (SCA) at 13 - 15

[13]Katz v Welz and Another (22440/2014)

[2021] ZAWCHC 76 (26 April 2021) LAWSA Defamation Vol 14(2) - Third Edition, para 130

[13]Katz v Welz and Another (22440/2014)

[2021] ZAWCHC 76 (26 April 2021)

LAWSA Defamation Vol 14(2) - Third Edition, para 130

[14] Hardarker supra at para 27.

[15] Crawford v Albu 1917 AD 102.

[16] At 114.

[17] Johnson v Beckett [1991] ZASCA 175; 1992

(1) SA 762 (A) at p 774.

[18] 1909 TS 988 at 999 - 100

[19] 2021

(3) SA 425 (SCA) at para 111.

[20] 2021

(3) SA 425 (SCA) para 111; In Malema v Rawula [2021] ZASCA 88 (23 June 2021) the Supreme Court of Appeal affirmed that an interdict in restraint of unlawful defamation may be granted on motion.

[21] (299/2020) 2021 ZASCA 136 (6 October 2021) paras 29 & 30.

[22] (National Director of Public Prosecutions v Zuma 2009

(2) SA 277 (SCA) (2009

(1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243; [2009] ZASCA

1) para 26).

[23] At para 30

[24] 2020 (5) SA 135 (SCA) at para 28.

[25] Fn 16 para 36.

[26] Le Roux and Others v Dey 2011

(3) SA 274 (CC) para [85]

[27] Ndlozi supra at para 28.

[28]According to the respondents, Riversands and CGE loaned an amount of R10 million to CRC in terms of a formal loan agreement concluded on 18 November 2018.

[29] 1994

[3] SA 89 (BG) at p 97-98.

[30] A Treatise on the Law and Practice of Injunctions 6th ed (London, 1927) at 30, 32

[31] Minister of Law and Order, Bophuthatswana above at p 98 and the authorities there cited

[32] See Minister of Law and Order, Bophuthatswana at p 98 – 99 and the cases there cited - For a final interdict an applicant need not establish that injury will arise or ensue as a result of the infringement of a right, but need only prove a reasonable apprehension of injury of such a nature which a reasonable man might consider and conceive of being confronted by the facts. See Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961

(2) SA 505 (W) at 515-8. This well-grounded apprehension of irreparable loss or infringement of rights must be proved as an objective fact based on substantial grounds.

[32] See Minister of Law and Order, Bophuthatswana at p 98 – 99 and the cases there cited -

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(2) SA 505 (W) at 515-8. This well-grounded apprehension of irreparable loss or infringement of rights must be proved as an objective fact based on substantial grounds.

[33] 2023 JDR 2166 (WCC)

[34] See Manuel supra at para 130.

[35] 2023/019330) [2023] ZAGPJHC 292 (31 March 2023) at para 29, and the cases cited there

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