

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 2050/2017

ARVESCO 119 (PTY) LTD t/a CARRY CAT MARINE

First Applicant

DAVID HERCULES SCHOLTZ

Second Applicant

And

ISMAIL SONDAY

Respondent

Coram: **Chetty J**

Heard: **26 April 2018**

Delivered: **10 May 2018**

JUDGMENT

Chetty J:

[1] Given its centrality to the legal issues which fall for determination, it is apposite to commence this judgment with the reproduction of Lewis JA's pragmatic

approach, with reference to eminent authority, in determining the defamatoriness of words complained of, to wit¹: -

“[25] The test for determining whether words published are defamatory is to ask whether a ‘reasonable person of ordinary intelligence *might* reasonably understand the words . . . to convey a meaning defamatory of the plaintiff. . . . The test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply’ (per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen’s Estate*²).

[26] One must have regard also, however, to what the ordinary reader of the particular publication would understand from the words complained of. A clear statement of this principle is to be found in *Channing v South African Financial Gazette Ltd*³ a passage relied on by Joffe J in the court below. In *Channing* Colman J said, with reference to the *locus classicus* in point, *Johnson v Rand Daily Mails Ltd*:⁴

‘From these and other authorities it emerges that the ordinary reader is a “reasonable”, “right-thinking” person, of average education and normal intelligence; he is not a man of “morbid and suspicious mind”, nor is he “super-critical” or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read. For that assumption authority is to be found in *Basner v Trigger* 1945 AD 22 at pp 35-6. It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a

¹ Mthembu-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329.

² 1994 (2) SA 1 (A) at 20E-G.

³ 1966 (3) SA 470 (W) at 474A-C.

⁴ 1928 AD 190.

somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this inquiry, the training or the habits of mind of a lawyer.’”

[2] The first applicant is a manufacturer of deep-sea angling boats based in Jeffreys Bay and the second applicant, its shareholder and manager. I shall henceforth refer to them collectively as the applicant. It seeks relief formulated as:-

- “(a) that the Respondent be ordered to remove from the website, [“www.boatfishing.co.za”](http://www.boatfishing.co.za), all postings defamatory of the Applicant’s manufacture of their product “Carry Cat”;
- (b) that Respondent be interdicted and restrained from permitting on the website [“www.boatfishing.co.za”](http://www.boatfishing.co.za), any postings defamatory of the Applicant’s manufacture of their product, “Carry Cat”;
- (c) directing the Respondent as administrator of the website, www.boatfishing.co.za, to fulfil his duties as administrator by refusing to permit the posting of content defamatory in respect of the Applicants’ manufacture of their product “Carry Cat”;
- (d) directing the Respondent to disclose to the Applicants within five (5) days of this order the identities, contact details, email addresses and IP addresses of the following forum members of the “boatfishing” website:

- (i) Pirate Pete;
 - (ii) Backline;
 - (iii) Leerie2;
 - (iv) Veritas;
 - (v) RWD;
 - (vi) Seabass; and
 - (vii) Carrycat;
- (e) that the Respondent be ordered to pay the costs of this application.”

[3] The applicant contends that the myriad postings on the aforementioned website constitute ***“false, derogatory and malicious defamatory statements”*** concerning himself and the first applicant. An objective analysis of the offending posts however ineluctably compels the conclusion that it amounts to no more than robust debate amongst deep-sea angling enthusiasts which no reasonable, ordinary and right thinking internet site reader would consider defamatory. But, on the assumption that it is, does the defence of fair comment, the justification advanced by the respondent, not avail him? The answer thereto requires, in the first instance, an historical overview of the events which precipitated this application.

[4] In 2013 an entity, Butt-Cat Boat Builders (Butt Catt), based in Kenton on Sea, voiced its concerns that the applicant had unlawfully purloined the hull of its

catamaran ski boat to the detriment of their business and called upon it to cease production of what they contended were identical hulls. In the founding affidavit, the applicant adverted to the dispute thereanent and to a meeting held subsequently between himself, his attorney, Butt-Cat, and its attorneys to resolve the matter and narrated its import as : -

- “8. At this inspection Mr John Butt and his attorney inspected the First Applicant’s premises, the mould used by the First Applicant and the hulls manufactured by the First Applicant. During this inspection Burrell made various comments suggesting that First Applicant and I had copied the Butt-Catt design in various respects. I then instructed my attorney to ask Mr Butt’s attorney to request Mr Burrell to withdraw from our meeting and inspection as he was not part of the Butt-Cat delegation. Mr Burrell undertook to remain silent.
9. Mr Butt and his attorney continued with the inspection. Mr Butt inspected a mould and a hull which had recently been taken out of the mould. This was the mould of the Carrycat 670. He did so thoroughly. He then stated in the presence of all those attending that the hull was not the same as the Butt-Cat hull and that I could continue to build the boats, subject to certain conditions. Mr Butt and his attorney were thus satisfied that the First Applicant and I had not copied their design and was not competing unlawfully with them. An oral agreement was reached after the inspection in the following terms (as recorded by my attorney to me in his letter dated 5 November 2013):

- 9.1 that the First Applicant may use the name Carry Cat as a trademark with regard to the boats manufactured by it;
- 9.2 the First Applicant could proceed with the manufacture of its boats using the design of the two hulls which was inspected during the inspection;
- 9.3 that the First Applicant may not use the name Butt-Cat in the manufacture or marketing of its products;
- 9.4 the First Applicant would identify boats manufactured by it with the name Carry-Cat built at Jeffrey Bay.

We all parted amicably after this meeting.”

[5] It is apparent from the respondent’s opposing affidavit that the applicant’s account of this meeting was less than candid. A significant omission was that Butt Cat’s ski boat’s hull mould had been found at the applicant’s premises and had subsequently, at Butt-Catt’s insistence, been destroyed in the presence of all concerned parties on 31 October 2013. Although the applicant had, in his founding affidavit, paraphrased the import of his attorneys’ letter to him dated 5 November 2013, it contained no reference to the destruction of the mould – it lurked amidst the narrative of the annexed letter and only close scrutiny to such appendix would have revealed the true state of affairs. It is apparent from annexure “C” to the founding affidavit that Butt Cats’ attorneys complained that the applicant. ***“used an old Butt Cat hull for the purpose of manufacturing a mould from which he produced catamaran ski boats known as the “Carry Cat.”*** As I shall in due course advert to,

the applicant's surreptitious use of Butt Cat's mould became a matter of public knowledge and informed much of the debate amongst the ski boat fraternity.

[6] The requirements of the defence pleaded, i.e. fair comment, were articulated by Harms AJA,⁵ as: -

- “(i) the statement must be one of comment and not of fact;
- (ii) it must be fair;
- (iii) the facts upon which it is based must be true; and
- (iv) the comment must relate to matters of public interest.”

[7] In similar vein and in a constitutional context, Jones AJA⁶ stated the matter thus, -

“[12] Once the statement about Delta's product is shown to be prima facie defamatory, the onus is on the respondent to show that publication thereof was not wrongful. The respondent seeks to do so by relying on the exercise of his right to freedom of expression. His defence is that of fair comment. There has always been tension between the right to freedom of expression, which is protected inter alia by the defence of fair comment, and rights to dignity, fama, and an unsullied reputation, which are protected by the

⁵ Johnson v Beckett and Another 1992 (1) SA 762 (AD) at 778J-779B

⁶ Delta Motor Corporation (Pty) Ltd v van der Merwe 2004 (6) SA 186 (SCA)

remedies for defamation. The Constitutional Court has held in *Khumalo and others v Holomisa* that the principles of the common law as recently developed in *National Media Limited and others v Bogoshi* are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression. It remains to apply those principles to the facts.

[13] For the defence of fair comment to succeed, the respondent must prove that the statement in question was a comment or opinion and not an allegation of fact; that it was fair; that the allegations of fact commented upon were true and accurately stated; and that the comment was about a matter of public interest (*Marais v Richard en 'n ander*). 'The use of the word "fair" . . . is not very fortunate. It does not imply that the criticism for which protection is sought must necessarily commend itself to the judgment of the Court, nor that it must be impartial or well-balanced. It merely means that such criticism must confine itself within certain prescribed limits'. Those limits are that the comment must be a genuine expression of opinion, it must be relevant, and it may not be expressed maliciously."

[8] Thus, to determine the validity of the submissions advanced by the respondent that the posts were expressions of opinions based upon facts which were substantially true, it is necessary to contextualise the postings on the respondent's, and, kindred websites. It is common cause that deep-sea angling aficionados utilise such websites as discussion fora in matters incidental to their discipline. The offending posts, although delineated as annexures "R1" – "R19" in the founding affidavit, in fact comprise fifteen (15) concatenated postings over the period

4 to 7 February 2017, marked R1, R4, R5, R6, R7, R8, R9, R10, R11, R12, R13, R14, R15, R16 and R17 respectively.

[9] Their *fons et origo*, reproduced hereunder, is a photograph of damage to a boat's transom and commentary thereanent posted by one **Veritas** on R1, the opening salvo post which concluded with the comment, "*would you trust your life and your crews' lives with this type of quality.*"



[10] It triggered a plethora of posts, commencing with R4, a riposte by **Pointrunner**, a boat owner in which he not only bemoans the damage to the boat but extolls the virtues of the first applicant's expertise. It elicited a response, R5, 6 and 7, from the respondent under his *nom de guerre*, **Miles**, wherein he voiced his opinion on the damage with particular emphasis on the boat's age. It in turn educed R8, a posting by **Rwd**, a detailed technical exposition of the boat's shortcomings. **Pointrunner** responded to R5, 6 and 7 in R8 wherein he lambasted the respondent

for his condescending attitude and comment and it, sequentially, elicited comment the following morning from **Seabass** in R9 wherein he expressed his opinion as follows: -

“And this is exactly why you pay a premium for Butt Cats!! If Dawie is a man of integrity and helpful like all the Carrycat owners say he is he will replace the hull (not repair it) and get Poinrunner charters up and running ASAP. The charterers livelihood is at stake due to a poorly built vessel. Miles, the guys from Nautitech and many others on this forum called it right from the beginning saying that the Carrycats were being built inferior and the correct materials and volumes weren't being used. The Carrycat owners argued that this was not the case and that they were being biased towards Buttcat. Pictures don't lie. Turns out that Nautitech weren't bullshittig about the build quality of Carrycats and were stating facts. If I owned a Carrycat I would certainly be a nervous owner and would thoroughly go and check my vessel immediately. Robbie I hope you get this sorted ASAP so you can get back on the water. With poor fishing in Cape Town at the moment this leaves lots of time to discuss this incident at length. Will be interesting to see what the outcome is.”

[11] Shortly thereafter, **Pirate Pete** joined the fray and in R10 waxed lyrically, and concluded his viewpoint with the rejoinder, “*The most important thing is to be safe and have a vessel that in any weather brings you and your crews home to their loved ones after each trip. Tight lines and safe sailing.*” His request that the

respondent repost pictures of the boat, "*Fishtales*", saw the reproduction of R11 on the site and ushered in **Leeries** contribution to the conversation, a repost of **Pirate Pete's** comment on R10 and his own opinion piece. **Pointrunner** and **Pirate Pete** then added their tuppence to the debate (R13), followed by **Mombakkie's** expression of empathy and **Rwd's** viewpoint, (R14).

[12] R14 also records a post by **Backline**, the latter clearly no boating novice as appears from his comments, viz "*I do not profess to be a boatbuilder or for that matter a boat designer, but I KNOW boats both on and off the water. A couple of years ago I was asked to do an appraisal of a NEW Carry Cat on the floor of a Somerset west dealership for a friend who was looking to buy a budget boat. I was alarmed at the flimsiness of the hull and the poor quality of the finishes and advised the potential buyer to steer clear.*

Shortly after pictures of another CC emerged with serious delamination problems. At that stage I voiced concern on this forum and received threatening phone calls from at least 1 CC owner.

I had my 760 Butt revamped with outmounts {hull extensions} and other mods done by Nautitech about the same time. A couple of months later I saw a CC on a slipway and noticed it was almost identical. Virtually everything had been cribbed. I was now gatvol and again voiced concern on the forum about how a system that took at least a year to develop could be cribbed in a matter of weeks. Again more threats, legal this time and I backed off.

For those unfortunate owners of CC I SINCERELY hope that your boats have been built up to standard and that you do NOT suffer the same fate of a least 3 buyers. BUTT you were warned."

[13] In R15, **Thyslouw**, an unsolicited sympathiser for the applicant's cause, takes umbrage at the criticism directed at the applicant and vouchsafes the Carry Cat's integrity. It in turn elicited comments by **Seabass** (R15), **Fully Hooked** and the respondent (R16) and **Rwd** (R19,) reproduced hereunder as follows, respectively: -

"R15

Thys, let's state the facts. Unfortunately the early Carrycats were poorly built. Fact. Not sure if Dawie has changed his ways but hopefully build quality has improved. I personally know of 5 Carrycats that have had fairly serious issues due to poor workmanship and possibly incorrect materials being used. That's 5 that I'm aware of! How many more are giving trouble that we don't know about! I'm not a boatbuilder but I spend more time on a boat than most people so know what is acceptable and what's not. . . Seems the Carrycat owners are always trying to defend the Carrycat brand for some reason and cover up all these mishaps. Maybe you are lucky and your boat was built correctly. Let's hope that the newer Carrycats are being built better and stronger and we don't see more of this happening at it's very unpleasant for the boat owner and builder alike."

"R16

Looks like this week all the carry cat guys will be looking under their hulls, whilst we BUTT cat owners are fishing!!"

"R16

There is an old adage, WE LIVE IN A SMALL WORLD. However, the fishing community is an even smaller one

I spent the morning sorting out some boating stuff and you'll not believe how small our fishing community really is!!

In June 2016, this particular vessel sustained damage to the hull, as well as having an issue with water filling the battery boxes up. It was taken to a prominent boating company here in the Cape and they tried to sort out the water filling up the battery boxes. The join between the top deck and hull was not properly sealed and this is where the water entered the transom!! The boating company here in the Cape advised taking the boat back to the manufacturer, to fix the damage inside the tunnel.

The boat then went back to Carry Cat to fix the issue.

They FIXED the boat, yet a mere few months later, the same area's are damaged/broken

Please correct me if I am wrong so far"

"R17

BFC I'm not making assumptions.

I looked at a carry cat awhile back that's sender units had rusted over and broke off, the petrol went wild underneath the deck. That is the absolute first place to start looking if I owned a one of them. That boat would have probably blown the harbour up.

These guys gave gone insanely thin on the hulls to save weight, there is no debate there. Having a 3mm skin with 0 structural core behind it is madness considering it's above 13 ft, at least use more layers if you going to be using the worst materials. Having 20mm thick gelcoat being painted on which is becoming more structural than the fiberglass is 100% going to tear the shit out of the fibreglass when it cracks, which it will especially glass being so thin. Look at all those boats underneath"

[14] It will be gleaned from the content of the foregoing posts that the underlying substratum of the debate is the photograph reproduced in paragraph [9] above. It is furthermore apparent that each of the contributors, in particular the respondent, are not the run of the mill “*fishermen*” but deep-sea anglers possessed with the requisite skill, competence and knowledge of matters related to their discipline. Although **Seabass** commenced his post with the assertion, “. . . *let's state the facts*”, an holistic appraisal of the entire internet debate establishes that he and the other scribes were merely expressing their opinion, albeit in some instances, firmly. The posts complained about clearly constitute comment which is fair, honest, genuine and in the public interest. The defence of fair comment must consequently succeed. In the result the following order will issue: -

The application is dismissed with costs.

D. CHETTY

JUDGE OF THE HIGH COURT

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