Reportable/Not reportable

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No:	**2415/18**
Heard On:	**12/05/2021**
Delivered:	**23/07/2021**

In the matter between:

FRANKEL ENGELBRECHT **Applicant**

and

FREDERICK LODEWIKUS VAN DER MERWE **Respondent**

Coram: MOSES AJ

JUDGMENT

MOSES AJ

Introduction

1. The genesis of this action can be traced back, on the voluminous papers at this Court's disposal, to as far back as 2007, when the Defendant's late father and owner of a farm, called Onder Ongeluk, the late Mr van der Merwe, and the latter's wife, also deceased now, drew up a joint will to regulate the distribution of their assets, namely the said farm, upon their death (the deceased couple).

2. The deceased couple had five (5) children altogether, two (2) sons and three (3) daughters. Four of these children turned out to become medical doctors, and

one them, apparently the youngest, became a linguist, having studied languages, according to the oral evidence tendered by Mr Frankel Engelbrecht, the Plaintiff herein, during his testimony in Court on or about 13 May 2021. I return to his evidence in more detail hereunder.

3. The Defendant, Frederick Lodewikus van der Merwe, who is a specialist medical practitioner, a Neurosurgeon, having his main surgery currently at Christiaan Barnard Memorial Hospital in Foreshore, Cape Town, South Africa, is the middle child of these five children. His other siblings are Ian, his younger brother, and also a medical doctor, his sisters Lente van der Merwe, also a medical doctor, and Almerie and Anina.

4. In terms of the will of the deceased as above-stated, a trust must be created (the testamentary trust) to which the said farm, Onder Ongeluk and everything on the farm, including farming equipment, animals and other moveable assets were bequeathed. The will also made provision that the wife, the Defendant's mother would have a usufruct in respect of the said farm, and everything on the farm, for the remainder of her life, where-after, the two brothers, the Defendant and his younger brother, would have a usufruct in respect of the said farm and everything on it, for a period of two (2) years, following the death of their mother.

5. According to the evidence of the Plaintiff herein, the Defendant's father passed away in and around 2007, and following that, the IV van der Merwe Testamentary Trust – the testamentary trust – was created in accordance with the will of the deceased Mr van der Merwe (senior). Finlac Risk and Legal Management (Pty) Ltd, (hereafter Finlac Trust), of which one Mr Nicolas Renier Van Gijsen was the Managing Director at the time, and who assisted and advised the deceased with regards to their will at all relevant times[1],was appointed as Executor and Trustee of the said testamentary trust, in accordance with the said will. One Louise Danielz was subsequently appointed by the executor of the estate of the late Mr van der Merwe, as the nominee of Finlac Trust.

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[1] See Riley AJ unreported Judgment Western Cape High Court Case Nuber 14860/13, para [2], [9] to [12].

6. The Plaintiff testified that in and around December 2012, he was approached by the secretary of one of his partners at their legal firm, Engelsman Magabane Inc., namely Mr van Niekerk, who was appointed subsequently as Trustee of the said testamentary trust, for his assistance to open a bank account for the said trust, as that was needed to register the Trust for income tax, which he did.

7. However, in and around beginning of December 2012, his partner, Mr van Niekerk passed away due to injuries he sustained in a motor vehicle accident, whereupon he, the Plaintiff, then informed the Master of this Court, about that passing and furnished them – the Master's Office, with Mr van Niekerk's death certificate as well as his original letter of appointment as trustee of the said testamentary trust.

8. Later, in January 2013, the Master contacted him (the Plaintiff) and enquired whether he would be willing to accept to be appointed and act as Trustee of the said testamentary trust, because they – the Master's office – were struggling to find willing persons to take up that position. He then agreed to do that and subsequently was formally so appointed by the Master of this Division as Trustee of the said testamentary trust.

9. I interpose to point out, based on the Plaintiff's evidence in Court, that the Defendant's mother passed away in and around 2010. Thus according to the will of the late Mr van der Merwe the usufruct, would then accrue to the Trust and/or the two (2) brothers, namely the Defendant and Dr Ian van der Merwe ("Dr Ian"), which would only be for two (2) years thereafter, i.e. until 2012. So when he, the Plaintiff, was appointed in and around 2013, that usufruct had already lapsed. Finlac Trust, in the meantime had renounced their appointment as executors and trustee due to the quarrels between the Defendant and his brother, Dr Ian, at the time. Thereafter the Master appointed one Mr Henrie Venter of Duncan & Rothman Attorney's, and one Mr Werner Hauptfleish, who was the Managing Director of Price Waterhouse Coopers (PWC) in Kimberley at the time, as executors of the estate.

10. As it turned out, both of them also resigned later because of the quarrels between the two Van der Merwe brothers.

11. Shortly after his appointment as Trustee in 2013, he was contacted by the executors who enquired about the transfer of the assets to the Trust, and when that could happen, because there was a shortfall (in money) in the Trust which had to be paid, before the Trust, and aspects regarding its administration, could be finalised.

12. In the circumstances they, the executors and Trustee, were faced with two options: 1) the Trust must pay the shortfall, which it could not do because it did not have the necessary funds; or 2) that the executors of the estate had to liquidate the assets, to sell it, to use the proceeds thereof to pay the shortfall, and the rest thereof to be distributed to the Trust as heir and beneficiaries of the estate.

13. The executors then applied to the Master for permission and authorisation to sell the assets, because of the continuous quarrels and animosity between the two brothers and, as a result whereof, no meaningful cooperation was forthcoming from either of them. Having received the requested permission from the Master, they – the executors – proceeded to sell the assets of the estate, including the farm with implements and livestock, by public auction. He, the Plaintiff, was not involved in, nor, present at the said public auction, but he later learnt, and as it turned out, the said assets were sold to the Defendant's brother, Dr Ian, who posted the highest bid for the said assets at the auction. Their sister, Dr Lente van der Merwe ("Dr Lente"), was also present at this public auction, with a power of attorney from and on behalf of her brother, the Defendant, to also bid at the said auction.

14. The executors then accepted that highest bid by Dr Ian.

15. However subsequent to this public auction and acceptance of the bid of Dr Ian, by the executors, the Defendant then launched an application in this Court wherein he sought, *inter alia*, the rescission of the deed of sale of the assets to

his brother, Dr Ian, and that his offer which he made in a letter to the executors and/or the auctioneers, which apparently was kept, and presented to them by his sister, Dr Lente, who held his proxy at the time, be accepted as a valid offer. In essence therefore he, the Defendant, challenged the legality and validity of that public auction and the outcome thereof and wanted to have it set aside. He, the Plaintiff, was cited as the Fourth Respondent in that case. This is what became known as the subject matter of the "Olivier Judgment[2]". I return to this judgment briefly hereunder.

16. After the Olivier Judgment, an agreement was reached between the executors and the purchaser of the assets, Dr Ian, along the terms that they would cancel the sale agreements and would have a "new" auction. This new auction was agreed upon and arranged, with his (Plaintiff) consent as well. After a date was set for this auction, he (Plaintiff) informed the Defendant thereof to ensure that he (Defendant) was aware thereof, should he be interested, which he (Plaintiff) had done up to and including the day prior to that auction.

17. On the day of that auction he, the Plaintiff, personally drove to the farm where the auction was held and attended it together with his attorney of record, and to ensure that there were no irregularities regarding the auction.

18. Those present at that auction on that day, included himself together with his attorney, the Defendant's brother Dr Ian, his sister Dr Lente, the auctioneer and his assistant, and three (3) unknown men who were also interested in bidding at the auction, which in this instance was a private auction. The Defendant was not present at the auction, and just before commencement of the bidding, the Defendant's sister, Dr Lente, informed them that she is/was recording the whole proceedings. He (Plaintiff) then asked her whether she had a power of attorney to bid on behalf of Dr Fred, the Defendant, whereupon she answered "No". He (Plaintiff) then requested the said Dr Lente to phone him (the Defendant) so as to enable him (Defendant) to make a bid over the telephone if he so wanted,

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[2] Frederick Lodewikus van der Merwe (Applicant) v Louise Ellen Danielz & five others, Northern Cape Division Case No 1637/2014, which was heard on 12 August 2015, Judgment delivered on 21 August 2015 per Olivier J.

and also because there were so few present. According to the Plaintiff he also did that – encouraging the Defendant's sister to phone him at the time - so as to protect the Defendant's rights and so that the Defendant could not complain afterwards that he was prejudiced by the way in which the auction was conducted at the time. The Defendant's sister, Dr Lente rejected that request of/by the Plaintiff to call her brother, the Defendant, and the auction proceeded.

19. Dr Lente then put in the first bid at the auction of R1.2 million for the assets of the estate. This was followed by a counter and higher bid by her brother, Dr Ian of R1.5 million. Dr Lente did not put in any further bids and there were also no further offers/bids placed in respect of those assets. Before the conclusion of the auction, the auctioneer asked Dr Ian if he would not consider increasing his bid, which he then did, by increasing it to approximately over R2 million.

20. The Plaintiff further pointed out in his evidence that the auction and sale of the assets, were not done by the Trust, that it was a sale by the executors of the estate, and that he (Plaintiff) just attended to ensure that there were no irregularities, of which there were none.

21. After having been informed of the outcome of the auction, the Defendant was not happy, stating, *inter alia*, that the selling price was far below the value of the farm. According to the Plaintiff that was from then onwards that the insults, aimed at him, started by the Defendant, with every email sent by the Defendant to him, and which he received, containing insults and defamatory remarks, which became progressively harsher in its tone and wording as it continued.

22. The Plaintiff testified, *inter alia*: "*There are hundreds and hundreds of emails... I stopped counting.... At some point I stopped reading, printing it ... my colleague, my attorney, would read it... those emails referred to in the particulars of claim, are by far not all the insults hurled at me*". He further testified that he asked the Defendant on numerous occasions to stop his conduct, that his emails (the contents thereof) were defamatory and that it must stop, but the Defendant never stopped.

23. The Plaintiff then caused a letter of demand (in Afrikaans) to be issued and directed to the Defendant dated 20 September 2018.

24. Thereafter, and or about 02 October 2018 the Plaintiff issued and served summons on the Defendant, alleging in his particulars of claim, *inter alia*, the existence and publication of various emails, copies whereof are/were annexed to the said particulars of claim, and that the contents thereof were/are defamatory of the Plaintiff's dignity, character and reputation, and initially sued the Defendant for the total amount of R800,000.00 as, and for damages suffered based on initially two emails dated 13 August 2018 and 22 August 2018. The particulars of claim were subsequently amended, on or about 29 May 2019 to include more emails of a defamatory nature, and increasing the claim to R1 million.

25. The Plaintiff also testified that despite the letter of demand and the summons being issued against the Defendant, the latter persisted with his slanderous and defamatory emails addressed and sent, not only to him, the Plaintiff, but also to various other people, including his brother and sister as afore-stated, members of the Plaintiff's staff, court personnel attached to the Registrar's Office of this Court, and officials of the Master's Office, amongst others. In the circumstances he was driven to apply to the Magistrate's Court, Kimberley for a protection order to be issued against the Defendant herein. That order was subsequently granted by the Magistrate's Court, Kimberley, dated 4 October 2018, and would, by order of that Court, remain in force, against the Defendant herein, for a period of five (5) years from date of issue, i.e. until 4 October 2023, unless it is withdrawn or set aside. The terms of that order are along the following lines:

"Particulars of final protection order

The Respondent is prohibited by this court from-

a) Engaging in or attempting to engage in harassment of:
   (i) The Complainant
b) Enlisting the help of another person to engage in harassment of the complainant and/or
c) Committing any of the following act/s:
   (i) Not to insult and/or to attempt to insult and/or in any way to verbally abuse the complainant;

(ii) Not to contact the complainant physically, telephonically, per email and/or through any social media;
(iii) Not defame the complainant in any way."

26. According to the Plaintiff this order was duly served on the Defendant, and he personally also advised the Defendant of this Court order, and furthermore that he must stop with his emails, and liaise with his (Plaintiff's) attorney if and when necessary. This court order was never anticipated, nor set aside, and therefore still exist and continue to be in force and effect, until 4 October 2023. Despite this protection order having been granted against him, the Defendant persisted with his unlawful conduct in sending him – the Plaintiff, insulting and defamatory emails, which the Defendant also circulated widely and thereby publishing it, in violation of the said court order.

27. Between 29 May 2019 and 24 July 2019, the Plaintiff gave notice of his intention to amend his particulars of claim, which were subsequently filed and served on 24 July 2019. The essence of the amended particulars of claim, signed and dated 29 May 2019, is firstly that it refers to, and includes more emails, the contents whereof are of a defamatory nature, and secondly, it increased the quantum of the claim for damages to R1 million.

<u>The Pleadings</u>

28. On 13 August 2019, the matter was certified as trial ready on Merits and Quantum.

29. The matter was previously set down for hearing on 9 March 2020. The Defendant did not file a notice of intention to defend and/or plea and attended to the hearing "in person". On 9 March 2020, the matter was postponed to 15 and 16 October 2020 by Court Order dated 09 March 2020.

30. On 16 March 2020, the Defendant filed a notice of intention to defend, indicating that he would accept service of all pleadings and notices in these proceedings via email at fredles@iafrica.com in accordance with the provisions of Rule 4A(1).

31. On 15 October 2020, the Defendant did not attend the Court proceedings and the matter was postponed to 12 and 13 May 2021.

32. On 16 October 2020, the Defendant was notified that the matter has been postponed for hearing to 12 and 13 May 2021.

33. On 28 April 2021, the Defendant was reminded by the Plaintiff's attorneys of the fact that the matter is set down for hearing on 12 and 13 May 2021.

34. It is the Plaintiff's case that the Defendant made statements concerning the Plaintiff via emails to third parties as set out in Annexures "A" to "G" annexed to the Plaintiff's Particulars of Claim, in which inter alia the following was stated:

34.1 "*5.* ***U doen weereens 'n verdere wanvoorstelling dat U slegs Tweede Respondent 'gehelp' het, ses jaar terug met Dr Ian se Boedel-Eis wat natuurlik die KONTANTTEKORT geskep HET.***
"6........ maar U gruwelik versuim as "Professionele Trustee", om in die belang van die juridiese Trustbegunstigde/s op te tree. " This is contained in Annexure "A".

34.2 "*.......**were in complicit and maleficent manner ignored and even further an incompetent lawyer was given socalled 'locus standi'.....***

" ...... I confirm that a CRIMINAL, FRAUD + CORRUPTION + MONEY LAUNDERING + RACKETEERING Case has been opened and find proof of SAPS Part 3 as stamped by SAPS and NDPP. " This is contained in Annexure "B".

34.3 "*... **moes dit impliseer dat ons hier die verdere bewys sou en kon aanbied van die grootste KORRUPSIE en GELDWASSERY in die regsgeskiedenis van RSA. Ek sluit die Redakteur van RAPPORT in aangesien my naam ernstig beswadder is in hierdie boedelsaak waarby ernstige BEDROG betrokke is.*** " This is contained in Annexure "C".

34.4 "***It seems that the 4th round "trustees" of this purported "Testamentary Trust (Sham trust) is out of office (again) and it is uncertain whether his excurtious are been paid with 'trust money" possibly received.*** " This is contained in Annexure "D".

34.5 "*... **This is needed to perhaps confirm your competency as a diligent and impartial trustee***." This is contained in Annexure "E".

34.6 "*..**-like Mr Frankel Engelbrecht = i.e. director at same firm but Mr Engelbrecht cannot produce the "SARS TRANSFER CERTIFICATE" (mala fide) and is mind-blowing that this attorney cannot understand the relevance of the GUILTY FINDING BY EAAB of the AUCTIONEER (with Principal listed as FINLAC) and/or as alternative 'pass the buck' back to the FINLAC***". This is contained in Annexure "F".

34.7 ***"Mr Engelbrecht would agree that he is/was never an independent neither an impartial testamentary trustee, even the Master has stated that Mr Engelbrecht acts in the interest of "Finlac Trust". He certainly was NOT recommended by me and most definitely would NOT be my choice as he did NOT even declare his interest/and acted as the attorney for Dr Ian See Attachment from COURT affidavits "FE FOOIE". With all respect Mr Engelbrecht and I put it on record (please see "Betoogshoofde"). The "CARE, SKILL and DILIGENCE" that you have shown are a LEGAL FICTION***." This is contained in Annexure "F".

34.8 "***The amount that Mr Engelbrecht is claiming is absurd for his negligence as a "TRUSTEE" and collusion with "Finlac Trust" (confirmed by Master) and as attorney of Dr Ian****...*" This is contained in Annexure "F".

34.9 "***This 'impartial" trustee DOES NOT apply any 'CARE, SKILL and DILIGENCE***". This is contained in Annexure "F".

34.10 "*... **therefor Mr Engelbrecht is once again caught out red-handed to be lying as NO EFT proof of payment was attached to Dr Ian** ....*" This is contained in Annexure "F".

34.11 "***Mr Engelbrecht has joined the long list of totally untrustworthy, dishonourable and despicable attorneys with NO 'CERTIFICATE OF GOOD STANDING" obtainable from the CAPE LAW SOCIETY***
..." This is contained in Annexure "G".

34.12 "***Mr Engelbrecht has NOT only proven himself as with NO DILIGENCE, with NO SKILL or competency nor CARE but to be a liar by all definitions** ...*" This is contained in Annexure "G".

34.13 "***It has been pointed out already that Mr Engelbrecht is misrepresenting the facts (again) under Point 9 in his letter dated 20 July 2018***...." This is also contained in Annexure "G".

35. It is the Plaintiff's case that these statements were made by the Defendant with the intention to defame the Plaintiff and to injure his reputation as a result of the fact that the statements were understood by the addressees and were intended by the Defendant to mean that:

35.1 The Plaintiff is unfit and incompetent to practice as an attorney;

35.2 The Plaintiff is unfit and incompetent to be appointed and act as a Trustee;

35.3 The Plaintiff had committed a criminal offence;

35.4 The Plaintiff is unfit to act as a director;

35.5 The Plaintiff acted negligently with no skill, no diligence, competency or care;

35.6 The Plaintiff's has no insight, understanding and judgment in acting as an Attorney, Trustee or Director;

35.7 The Plaintiff extort money to enrich himself;

35.8 The Plaintiff has no skill or competency to be an attorney, to act as a Trustee or a Director and is a liar; and

35.9 The Plaintiff colluded with third parties to the detriment of the estate, trust and trust beneficiaries.

35.10 In the circumstances, so it is alleged, these statements made by the Defendant are wrongful and defamatory of the Plaintiff and as a result of the defamation, Plaintiff has been damaged in his reputation and has suffered damages in the sum of R1,000,000.00 (R1 million).

36. The Defendant elected to represent himself and filed a Special Plea and Pleading and Counterclaim in respect of the Plaintiff's claim. The Defendant's Special Plea dated 16 March 2020 and filed 19 March 2020, was set aside on 15 October 2020, by order of this Court.

37. On 8 April 2020 the Defendant filed and served, via email, his "Pleading and Counterclaim", consisting of section A ("Introduction: Questions and Points of Contention:", section B ("Particulars of Claim: signed 28 September 2018"), section C ("Important Material Proof From Court Documents as Indexed and obtained on day of Set Down:"), section D("Amended Particulars of Claim: 24

July 2019") section E ("Plaintiff's Email Letter dated the 05 of April 2020:") section F("Counterclaim") and section G("Prayer TO A COMPETENT AND NON CORRUPT COURT:"))

38. On 19 February 2021, sections B, C, E, F and G of the Defendant's Pleading and Counterclaim dated 8 April 2020 were struck out, by order of this Court.

39. According to section D of the Defendant's Plea he denies that this Court has the necessary jurisdiction to adjudicate this action.

40. The Defendant admits that the emails were sent by him (the Defendant), which is annexed to the Plaintiff's amended Particulars of Claim. He admits that "detailed Email train (started 6 May 2016) was sent by him to, *inter alia*, the Plaintiff.

41. According to paragraph 10 (section D) of the Defendant's Plea, the Defendant admits that he has "**a moral and legal duty to the South African public to have made the statements (based on facts and/or misrepresentation) to report crimes and to protect and raise awareness amongst the public, against the failure of fiduciary duties, contravention of several laws and money laundering and attempts to interference as documented in the SAPS investigation diary**." He specifically pleads the following:

"***Defendant only admit that detailed E MAIL TRAINS (must be seen in context, which is self explanatory), were sent to authorities to report and put PLAINTIFF to proof otherwise and to proof the contents as incorrect.***" (sic)

42. The Defendant denies having any intention to harm the "fama" of the Plaintiff in any way and/or to have cause any injury or damages.

A Brief Summary of the Evidence by the Witnesses

43. At the commencement of the hearing of this matter on 12 May 2021 the Defendant was absent. But a few days before the trial date, on 6 May 2021, he filed and served a voluminous bundle of documents consisting of a five (5) page

"filing notice", a ten (10) page "Urgent Notice" and long "Affidavit" to which various documents were annexed.

44. Having read those additional documents filed by the Defendant and after having heard counsel for the Plaintiff, I gave an *ex tempore* ruling directing that the hearing proceeds and the Plaintiff may present his case as is his right.[3]

45. The Plaintiff tendered the oral evidence of two witnesses and himself.

46. The first witness called on behalf of the Plaintiff was Wayne van Rensburg ("Van Rensburg"). He testified that he is currently employed by the Department of Justice, at the Master's Office in Kimberley, where he had been working for the last 14 years.

47. As the Assistant Master he has to attend to all the core functions, including the Guardian Fund, insolvencies, deceased estates and curatorship matters.

48. He knows the Plaintiff on a professional basis for the last 14 years since he started working at the Master's Office, as an attorney of this Court, as executor, curator and as a liquidator for insolvent estates. There is not a month that passes without him (Van Rensburg) and the Plaintiff corresponding and/or interacting with each other regarding the above-stated work related matters.

49. He also knows the Defendant in this matter, whose late father's estate was registered at their Kimberley Master's Office. He also has knowledge about that estate.

50. He was referred to a long email, a print-out copy whereof is annexed to the Plaintiff's Particulars of Claim, marked annexure "F", and which was/is dated 24 July 2018.

[3] A transcript of this ruling should be available if needed.

51. The email emanated from the Defendant and was addressed and sent to numerous persons and entities, including, *inter alia*, the Plaintiff herein, the Master's Office in Kimberley with email address "Masterkimberley@justice.gov.za:, which he received and read at the time. This email also contains the following email addresses:
elzaan@engelsman.co.za; mariandri@engelsman.co.za;
madeleinvw@engelsman.co.za;
fredles@iafrica.com;
louiseDa@Nedbank.co.za;
jaw@caf.co.za;
itjvv@iafrica.com;
louis@finlac.com;
wc.dpco.provhead.secretary@saps.gov.za
wc.investops@saps.gov.za;
MasterKimberley@justice.gov.za;
WenSithole@justice.gov.za;
contact.central@sars.gov.za;
fkellerman@sars.gov.za;
skabrahams@npa.gov.za,
Ministry@justice.gov.za;
lentevdmerwe@mweb.co.za
almarievdm@gmail.com
anina.duiwelskloof@gmail.com
glemmetjies@justice.gov.za

As is evident from the aforesaid email addresses, the Defendant also copied himself and his sisters, Lente, Almerie and Anina.

52. He explained that the email address included herein namely "Wensithole@justice.gov.za", is that of the Deputy Master at the Pretoria Office. According to him he was not aware of any such indication or allegation as reflected in the said email regarding the Plaintiff which emanated from their Master's Office, or any other office of the Master. No one of their staff, including himself, was ever approached to investigate the actions of the Plaintiff regarding

any irregularities or allegations in the latter's professional dealings and interactions with the Master's Office, for as long as he is/was working at the Masters office. There is also no criminal investigation currently against the Plaintiff regarding anything in their office including the deceased estate of the Defendant's late father or any irregularities being investigated by their office against the Plaintiff.

53. His understanding of these accusations by the Defendant against the Plaintiff is that they are slanderous. It paints a picture of the Plaintiff as being incompetent, incapable and unethical. He also regards the Defendant's reference to, and description of, the judgments of this Court (referring to the "Olivier judgment") as disrespectful. He also understood these slanderous statements by the Defendant to refer directly to the Plaintiff.

54. The other witness who testified was one Mariandri Smit. She is an adult female who knows the Plaintiff herein. She has known him since 2012 when she started to work at the Plaintiff's legal firm in Kimberley as partly a secretary and partly an article clerk. From 2016 onwards she was working directly with and for the Plaintiff in that legal firm, until February 2021, when she relocated to Upington, where she is currently residing and working for Hein Duvenhage Attorneys.

55. She had seen and received the emails in Kimberley at all relevant times, sent by the Defendant to the Plaintiff and other people and entities including herself, all of which were annexed to the Plaintiff's Particulars of Claim, marked "A", dated and sent on 6 June 2016, annexure "B" dated 19 April 2018, annexure "C", dated 12 June 2018, annexure "D" dated 12 July 2018, annexure "E" dated 19 July 2018, annexure "F" dated 24 and 25 July 2018 and annexure "G" dated 13 August 2018. She had personally received all these emails, except the last one, annexure "G", which was not personally addressed and sent to her, but inter alia, to a colleague of hers who worked as the Registrar of the Judge-President of this Division at the time, with email address glemmetjies@justice.gov.za." She had however seen and read this email whilst still residing here in Kimberley and working for the Plaintiff. I return to these annexures and their contents hereunder.

56. Having seen and read all these emails, her understanding thereof was/is that it is directed to the Plaintiff, saying that he is dishonest, fraudulent, corrupt. "*In effect accusing him of being a criminal*".

57. Having worked very closely with the Plaintiff at the time she could see what effect these emails had on him. He was very upset and she saw him sometimes lying down on the couch in the office after having received and read these emails. She had never seen anything like this coming from any client or colleagues since she started to work there.

58. The Plaintiff testified that professionally, he is an attorney of the High Court of South Africa, with his offices situated within this Court's jurisdiction in Kimberley. He is a director of the legal firm Engelsman Magabane Inc. Attorneys. He used to stay in Kimberley, but recently, in 2021, relocated to Boshof, Free State.

59. He started his article clerkship here in Kimberley in 1994 and completed it in 1995. He was admitted as an attorney in 1996 and started to work as such at the legal firm Coetzee & Honiball Attorneys, and he then became a director of the then legal firm known as Engelsman Benade & Van Der Walt Attorneys.

60. In and around 2005 the name of the legal firm changed to Engelsman Magabane Attorneys when a black partner joined the firm, and he has remained a director of the firm. He started the estate department at the firm where he dealt with deceased and insolvent estates, which later expanded to include curator estates. As such he handled large amounts of money for curatorships, involving the Road Accident Fund (RAF), as Trustee, and where insurance companies, had to pay out large amounts of money in respect of minors where there were no wills. All of this was done under the auspices and directives of the Master of the High Court, and not only in Kimberley, but all over the country, including Cape Town, Port Elizabeth, Grahamstown, Pretoria, Gauteng, Mahikeng, Nelspruit, Durban and Pietermaritzburg.

61. His professional duties caused him to travel widely attending to, *inter alia*, patients who were injured, and assisting them where needed. He specialised in this field, namely trusts, curatorships, estates, etc. all of which involve money to be administered on behalf of others – his clients. Sometimes it involved amounts of up to R6 million in respect of one case.

62. As a student, he studied at the University of Stellenbosch(US) after having matriculated in Paarl. At school level he was involved in rugby, and became captain of the Western Province School Team, as well as for the South African Schools Team. At university level he proceeded to play rugby for the Western Province under-20 team and later became the captain of the Maties rugby team (of US), a position he held for three (3) consecutive years.

63. After his law studies at US, having graduated with B.Com and LLB degrees, he moved to Kimberley, where he continued his rugby career, playing for the Griqua rugby team from 1994 to 1998, earning around 68 caps. In 1994 their team reached the C-Division, and in 1996 was elevated to the Currie Cup Division, wherein they beat all the major provincial rugby teams. The only team they could not beat at the time was the All-Blacks from New Zealand, which rugby match ended in a draw. In 1998, as captain of the Griqua rugby team, they beat the Irish rugby team by more than 50 points. He then retired from rugby.

64. After his retirement he started the schools rugby project and was subsequently awarded a coaching contract for the Leopards Rugby Union from 2002 until 2004. After that contract expired, he returned to fulltime legal practice.

65. I have already referred to his testimony regarding the background of this case and his eventual appointment as Trustee of the Testamentary trust hereinabove.

66. I have also referred to the various email correspondence he received from, and exchanged with the Defendant herein; and the steps he – the Plaintiff took in an effort to stop the Defendant from continuing his insulting and slanderous emails directed towards/at the Plaintiff, including a protection order issued by the

Kimberley Magistrate's Court against the Defendant, in October 2018, and which is valid and enforceable for a period of five(5) years from date of issue, which will end in 2023.

67. The Plaintiff also explained his involvement in the "Olivier Judgment" referred to above. He said that he did not, in his capacity as Trustee at the time, seek to oppose the application then brought by the Defendant, as Applicant therein, in this Court. What happened was that that Court (per Olivier J) subsequently requested the parties concerned to deal with and answer certain questions directed by the Court. He was present at Court on that day and he was also requested to file an Affidavit regarding those questions directed by the Court, in his capacity as Trustee, who had been cited as the Fourth Respondent therein. The Master was also similarly requested to file an affidavit. He then duly filed and served his affidavit in his stated capacity, wherein he referred to a letter that he came across in terms whereof he, as Trustee, gave the executors permission for the sale of the assets of the Trust. The other parties also filed their affidavits. Thereafter, and after having heard arguments by and/or on behalf of the parties, that Court gave its judgment (as referred to previously).

68. As it turned out, and the crux of the judgment, that Court found that the Trust was the lawful and only heir, in terms of the will of the deceased (referred to above), and as such could give permission to the executor to sell the assets, lawfully so qua Trustee, and need not the permission of either the Master or the beneficiaries of the Trust, which included the Defendant herein, and his brother Dr Ian, as above stated.

69. In this regard the Plaintiff referred this Court to the judgment of Olivier J as afore-stated and more particularly to paragraph [108] thereof[4] wherein the learned Judge referred to the affidavit and correspondence by the Defendant herein, who was the Applicant in that matter regarding the Plaintiff herein, and admonished and rebuked the Defendant for, *inter alia*, making insulting remarks regarding the Plaintiff, under oath, to the effect that the Plaintiff is incapable to

[4] Which is in Afrikaans.

act as a trustee of a trust whose beneficiaries (i.e. the Defendant and his brother) are possessed of high academic qualifications. In his footnote regarding this statement, the learned Olivier J pointed out that the Defendant's affidavits and correspondence regarding the Plaintiff *"…is oor die algemeen gekenmerk deur venyn, beledigings en ernstige beskuldigings"*.

70. According to the Plaintiff, these findings regarding the Defendant, by that Court were fully justified and correct, but the fact that the Defendant herein totally ignored those findings, and in effect referred to it contemptuously, as he does and continued to do with his insulting and slanderous remarks and statements in his emails to the Plaintiff, despite the judgment, was the proverbial last straw for him. Hence he decided to issue summons against the Defendant and sue him for damages based on these clearly defamatory remarks and statements regarding him (the Plaintiff).

71. I now turn to the evidence by the Plaintiff regarding the specific allegations made by him in the pleadings filed of record, and in particular the annexures referred to above.

72. With regards to Annexure A, the Plaintiff confirmed that it was sent by the Defendant to him, and that he received and read it. It was also sent to his (Plaintiff's)secretary Joan, and to the Defendant's sister, Dr Lente. The effect of these slanderous remarks on the Plaintiff is what he has pleaded in paragraph 14 of the Particulars of Claim.

"In the premise the statements were defamatory per se, alternatively carried the additional sting that:

1. ***The Plaintiff is not fit to be an attorney, trustee, director and or executor;***
2. ***The Plaintiff is not to be trusted with Trust/Estate money, has no insight in the administration of Trusts/Estates and has no understanding of Trusts/Estates;***
3. ***The Plaintiff is untrustworthy and his judgment is affected;***
4. ***The Plaintiff is not fit to hold the office as a Director/Trustee/Executor/Attorney;***
5. ***The Plaintiff is not fit to carry out the functions of a Director/Trustee/Executor/Attorney;***
6. ***The Plaintiff acted negligently with no skill, diligence, competency nor care***

7. ***The Plaintiff colluded with third parties to the detriment of the estate, the trust and trust beneficiaries*".**

73. With regards to Annexure B, the Plaintiff testified that, besides the Defendant referring to the "*corrupt*", "*sou en moes uitspraak handed down by Olivier J*", he (Defendant) explicitly refers to him (Plaintiff) as an "*incompetent lawyer*" who "*was given so called locus standi*". And also that he (Plaintiff) and the executors of the estate are complicit and corrupt, and further that he (Defendant) had laid criminal charges of fraud, corruption, money laundering and racketeering, implying that he (Plaintiff) had committed those offences.

74. With regard to Annexure C, the Plaintiff testified that this email, also directed at him by the Defendant, also refers to one Louise Danielz, who was the person handling the deceased's estate at Finlac Trust, and accused him (Plaintiff) and the said Louise Danielz, of fraud ("bedrog").

75. With regard to Annexure D the Plaintiff testified that this email dated 12 July 2018, was also directed at, and received and read by him, as well as addressed to, and received by their secretary, Madelaine, to whom the email: "matty@engelsman.co.za," refers, and to Elzaan, who is an attorney at Engelsman Magabane Inc., and who is his attorney of record herein. According to the Plaintiff he was overseas, on holiday, at the time of this email, and his secretary would have advised the Defendant accordingly. Hence the statement by the Defendant in this email suggesting that he (Plaintiff) had gone overseas with other peoples' money which he had stolen.

76. With regard to Annexure E sent by the Defendant to the Plaintiff on 19 July 2018, the Plaintiff said that the first sentence of this email, which he had also received and read, meant to him, and he understands it to mean, that he, the Plaintiff, is exploiting people and is corrupt, being part of the "*legal fraternity*". The contents of this email also impacted upon his impartiality, his diligence and competency. According to the Plaintiff the Defendant herein requested documents that had nothing to do with him, but despite that he supplied the Defendant with copies of the tax clearance certificate – which you need if you transfer property – and, which he (Plaintiff) obtained from the executors. What the Defendant stated

herein, according to the Plaintiff is a demand with a threat: "if you don't respond. I will reveal everything". But what the Defendant demanded was not in his (Plaintiff's) possession, all these documents would be with the executors of the estate, who might have sent it already to the Master at the time. The effect of these statements on him, the Plaintiff, is what he has pleaded in paragraph 14.7 of the Particulars of Claim.[5]

77. With regard to Annexure F, the Plaintiff testified that the Defendant sent this email to him on 24 July and 25 July 2018, which was addressed to, received and read by him, as well as all the people and/or entities referred to therein. The Plaintiff confirmed the letter by him to the Defendant which is referred to in this email, and further that he knows the person referred to therein, namely Mr Jonathan Williams, who is also an attorney in Cape Town. What he knows and what was confirmed by the Defendant in the latter's Plea, is that this Defendant is also presently been sued for defamation and damages in the Western Cape High Court, not only by Mr Williams.

78. The Defendant referred to this case under paragraph 3 of his Plea dated 8 April 2020, namely:

a) *"Jansen Van Vuuren, Louis Theunis under case number "1054/2019";*
b) *Pieter Andries Venter Attorney, under case number "23369/2018";*
c) *Jonathan Andrew Williams, an attorney, under case number "21511/2018"; and*
d) *Terence Thomas Matzdorff, an attorney, under case number "23267/2018".*

79. The Plaintiff said that he understood this reference to Mr Williams and himself as meaning *"…that we are acting outside the law and not allowed to practice"*, as attorneys. He further testified, with reference to the word "*escalated*" mentioned in the email, that the email will be sent to as many people as possible, including the media. In this email the Defendant also referred to him as misrepresenting facts, and "*legal racket*" and "*legal racketeers*" which he understood to mean that he, the Plaintiff is/was included therein. The Defendant's complaint, in the email, about the auctioneer, did not/does not

[5] See para 72 above.

concern him as the Plaintiff, because the auctioneer was appointed by the executors of the estate, not by him, the Plaintiff, who was the Trustee at the time. The Defendant's reference to money laundering, fraudulent and corrupt in the email, referred to him, the Plaintiff. With regards to subparagraph (j) of point 3 in email wherein it is stated: "*The "CARE, SKILL AND DILIGENCE" that you have shown === a LEGAL FICTION*", meant to him that whereas the Defendant had initially questioned his capabilities, it has now been reduced further to a "legal fiction".

80. With regards to point 4 of the email, the Defendant implies, according to the Plaintiff that the computer printed documents which was certified by Ms Elzaan Van Wyk of his office, was done so under pressure from him (Plaintiff) on her (Ms Van Wyk).

81. The Defendant is also implying in the email, with reference to an amount of R283,754.22 ("*Boedelregskostes*") that he, the Plaintiff was stealing this money. The Plaintiff explained that the Defendant was, in terms of to the Olivier Judgment, ordered to pay the legal costs attendant upon the application he had brought, and which was dismissed with costs. These parties in whose favour the cost order was granted, then attached a portion of the Defendant's benefit which was in the testamentary trust, because the money that was in the Trust, was the total derived from the auction. This money then had to be divided by two, between the Defendant and his brother Dr Ian, being the only beneficiaries of the trust. He therefore deducted his legal costs, and divided the rest between the two of the beneficiaries equally. According to the Plaintiff he still queried the executors' calculations of the costs due by the Defendant at the time, and was of the opinion that the executors still owed the Defendant some legal costs which must be repaid to him. He advised the Master accordingly. After he had instituted this action against the Defendant, he resigned as Trustee. The Defendant however, refused to give him his banking details to enable him (Plaintiff) to pay the Defendant his benefit, which amounted to approximately R1 million. He, the Plaintiff, therefore had to approach the Master to have that money, the Defendant's benefit, paid into the Guardian's Fund, which he did and which was done. This money therefore is still in the Guardian Fund. His

brother's money was paid out to him by the plaintiff, which the brother, Dr Ian accepted at the time.

82. With regards to the allegations that he allegedly overcharged the Trust, the Plaintiff testified that he charged in accordance with his tariff, which he disclosed to both beneficiaries, and similarly with his full account which he disclosed to both and it was never disputed. If a complaint is laid by any client with the law society, that then is directed to the attorney concerned, who must reply thereto within a certain stipulated time. That reply is then forwarded to the complainant for his/her response, and then, if there is merit in the complaint, it will be investigated by the particular Law Society. According to him he was never informed of any complaint against him by the Law Society, to date hereof. He regarded this complaint by the Defendant in this email as one of overreach, which is absurd, and of negligence and of collusion, on his – the Plaintiff's part.

83. The Plaintiff furthermore explained, with reference to the bank accounts referred to in the email, that, as explained, he opened a bank account for the Trust. Once Dr Ian's money was paid out to him, and the Defendant then refused to take his money as a beneficiary, he closed that bank account and paid that money over into the Trust account of their firm, where it would earn more interest, which would be for the benefit of one's client, which *in casu*, would be the beneficiaries, including the Defendant. So for him, the Plaintiff, this reference to the bank statements reflected that he did not have care, skill and diligence as attorney and Trustee.

84. In this email the Defendant also directly accused him of *mala fide*, lack of impartiality, not acting with any care, skill and diligence and not acting in the interest of the Trust, but in the interest of Finlac Trust, which he, the Plaintiff denies.

The effect of these slanderous and defamatory remarks and statements by the Defendant on him is as set out and pleaded in paragraph 14 to 14.8 of his Particulars of Claim.[6]

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[6] As set out in para 72 above.

85. In the same email the Defendant is also accusing him of being a liar. This was in circumstances where his office (the Plaintiff) omitted, by error, to attach the proof of payment, as was demanded by the Defendant at the time. He explained that after having received this email, and having realised that they have omitted to attach that proof of payment, they immediately sent it via email to the Defendant, although it did not have anything to do with him. There was in any event no query raised in this regard by the Defendant's brother, Dr Ian.

86. The Defendant also in this email, referred to him as a criminal, who has committed serious commercial crimes. According to the Plaintiff, to the best of his knowledge, he is not aware of any criminal investigation, either by the National Prosecuting Authority (NPA) or the Directorate of Special Investigations (the HAWKS) against him with regards to anything that he had done, as an attorney and/or as Trustee of the testamentary trust, to date hereof.

87. With regards to Annexure G, dated 13 August 2018, the Plaintiff testified that, as with the other emails, this was directed by the Defendant, towards him, and similarly also sent to various other people. These emails started off with the suggestion that he, the Plaintiff, had no skill and diligence. Initially it was approximately once a month, but then the frequency of these emails increased, and the tone of its contents became harsher and direct, as can be seen from the contents of this email where every sentence, with reference to him is out rightly defamatory. The Defendant was also clearly not only referring to him (Plaintiff), but also the Judges as "*dishonourable attorneys…and others*".

88. In the circumstances, the Plaintiff testified, the substance and effect of the contents of these emails are as set out and pleaded in paragraphs 11 to 17 inclusive of his particulars of claim, wherein it states:

"11. The statements made by the Defendant were wrongful and defamatory of the Plaintiff.

12. The statements were made by the Defendant with the intention to defame the Plaintiff and to injure his reputation.

13. The statements were understood by the addressees and were intended by the Defendant to mean that:

"13.1. the Plaintiff is unfit and incompetent to practice as an attorney;

13.2. the Plaintiff is unfit and incompetent to be appointed and act as a Trustee;

13.3. the Plaintiff had committed a criminal offence;

13.4 the Plaintiff is unfit to act as a director;

13.5 the Plaintiff acted negligently with no skill, no diligence, competency nor care;

13.6 the Plaintiff has no insight understanding and judgment in acting as an Attorney Trustee or Director;

13.7 the Plaintiff has dyslexia;

13.8 the Plaintiff extort to enrich himself;

13.9. the Plaintiff has no skill or competency to be an attorney, to act as a Trustee or a Director and is a liar;

13.10. the Plaintiff colluded with third parties to the detriment of the estate and trust and trust beneficiaries;

14. In the premise the statements were defamatory per se, alternatively carried the additional sting that:

14.1 The Plaintiff is not fit to be an attorney, trustee, director and or executor;

14.2 The Plaintiff is not to be trusted with Trust/Estate money, has no insight in the administration of Trusts/Estates and has no understanding of Trusts/Estates;

14.3 The Plaintiff is untrustworthy and his judgment is affected;

14.4 The Plaintiff is not fit to hold the office as a Director/Trustee /Executor/Attorney;

14.5 The Plaintiff is not fit to carry out the functions of a Director/Trustee/ Executor/Attorney;

14.6 The Plaintiff acted negligently with no skill, diligence, competency nor care

14.7 The Plaintiff colluded with third parties to the detriment of the estate, the trust and trust beneficiaries".

15. The statements made by the defendant are wrongful and defamatory of the plaintiff.

> ***16. The statements were made with the intention to defame the plaintiff and to injure his reputation.***
>
> ***17. The statements were understood by the addressee and was intended by defendant to mean that plaintiff is dishonest, incompetent and an attorney with no skill".***"

The impact of these statements by the Defendant on the Plaintiff

89. The Plaintiff testified that after he had been sent, and after he received Annexure G, dated 13 August 2018, around 11h29, and saw and read the contents thereof, he had enough of these defamatory remarks by the Defendant. According to him (Plaintiff) whereas initially the Defendant attacked his lack of skill and diligence as a Trustee and an attorney, the tenor of these attacks on his dignity and reputation had increased to the level where he was said and made out to be, "*a dishonourable attorney*".

90. The Plaintiff said he was still having heart palpitations as he was reading and recalling these statements in Court during his testimony. After having shared his sentiments with his partners at their law firm, it was unanimously agreed that he should institute this defamation action for damages against the Defendant, which he subsequently did.

91. Due to the impact of these defamatory statements by the Defendant regarding him, he had since been medically diagnosed with depression, and since then he is on medication for the treatment thereof. He testified that that on any particular day, after having received one of the Defendant's emails, his whole working day would be turned upside down. These statements had a huge impact on him, making him doubt himself, personally and professionally.

92. The Plaintiff testified that the Defendant's statements as reflected in these emails, regarding him also negatively impacted him and his practice. Since he started and built their Estate Department of their legal firm, he would get numerous instructions from smaller attorney firms, but also from big financial entities such as SANLAM and FNB. For the last two (2) years he had not

received any new instructions from attorneys in the Northern Cape, nor from SANLAM and FNB. Prior to 2018 and 2019, the Master of the High Court accepted surety from himself and his colleagues, but since 2019 the Master started to insist on insurance. He however conceded that he cannot directly link it to this case. Subsequently their office provided the Master with bonds of security in respect of wills where security was necessary.

93. This case and his name are also referred to on the social media platforms. Thus if people google his name, they would see these statements about him and the cases wherein his name would appear. He worked with the Master's office all over the country, and did High Court litigation work from other attorneys who would sometimes instruct him directly to act professionally for them, or as corresponding attorney. He also has a business in Zimbabwe which he is operating together with his son and where those business partners know him very well and where his reputation and integrity are well respected. As a result of these statements, which are accessible on some of these social media platforms, people could question his honesty and integrity, since one does not always know what other people think.

94. He testified that in his over 26 years in legal practice, he had not once instituted an action such as this, since it was never necessary to do it. He recalled only one (1) case where he issued summons, but which was based on a contract, where monies were owed, but that matter was settled, soon thereafter.

95. He testified that as a result of certain complaints lodged against him by the Defendant, regarding certain alleged irregularities in his capacity as Trustee of the testamentary trust, with the Table Bay SAPS in Cape Town in and around 2018, he was contacted by the said SAPS and informed about these allegations and that he was required to respond to, either by way of a consultation with the investigator of those complaint and/or the prosecutor assigned to the case by the DPP, Western Cape. They subsequently advised him just to make and submit a statement regarding these allegations, which he did. He subsequently never heard anything from either the SAPS and/or the DPP's office regarding these allegations. He is also not aware of any other criminal charges and/or

allegations being investigated against him by the NPA and/or the Special Investigation Unit (SIU). According to him, to the best of his knowledge and belief, he is/was not criminally implicated in any alleged criminal act by, and/or investigation, against him.

<u>The Defendant's case:</u>

96. I now turn to the Defendant's case as pleaded, to which I have already referred hereinabove, and which I endeavour to summarize hereunder, amidst the voluminous documents filed and submitted by him, as indicated hereinabove.

97. The Defendant elected to represent himself and filed a Special Plea and Pleading and Counterclaim in respect of the Plaintiff's claim. The Defendant's Special Plea dated 16 March 2020 was set aside on 15 October 2020.

98. On 19 February 2020, sections B, C, E, F and G of the Defendant's Pleading and Counterclaim dated 8 April 2020 were struck out.

99. According to section D of the Defendant's Plea he denies this Court has the necessary jurisdiction to adjudicate this action.

100. The Defendant admits that the emails were sent by him, the Defendant, which is annexed to the Plaintiff's amended Particulars of Claim. He admits that "detailed Email train (started 6 May 2016)" was sent by him.

101. According to paragraph 10 (section D) of the Defendant's Plea, the Defendant admits that he has a moral and legal duty to the South African public to have made the statements (based on facts and/or misrepresentation) to report crimes and to protect and raise awareness amongst the public, against the failure of fiduciary duties, contravention of several laws and money laundering and attempts to interference as documented in the SAPS investigation diary. He specifically pleads the following:

> *"Defendant only admit that detailed E MAIL TRAINS (must be seen in context, which is self-explanatory), were sent to authorities to report and put PLAINTIFF to proof otherwise and to proof the contents as incorrect."* (sic)

102. The Defendant denies having any intention to harm the "*fama*" of the Plaintiff in any way and/or to have cause any injury or damages.

Applicable Legal Principles

103. In the matter of Katz v Welz & Another, the unreported Western Cape Division judgment of N Mayosi, AJ (Western Cape High Court Case No: 22440/2014, dated 26 April 2021), the legal principles applicable to defamation, were crisply summarised as follows (Paras 18 – 20 of the judgment):

> "***18. An action for damages is one that seeks to protect one of the personal rights to which every person is entitled, that is the right to a good name, unimpaired reputation and esteem by others. In our new constitutional order, reputation forms part of the concept of human dignity which is a fundamental constitutional value. In the result, the law of defamation lies at the intersection of two fundamental values, both protected by the Constitution, namely the rights to freedom of expression, including freedom of the press and other media, and the protection of reputation or good name.***
>
> ***19. The elements of defamation are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement concerning the plaintiff.***
>
> ***20. The question whether a statement is defamatory in its ordinary meaning, or is per se defamatory involves a two-stage inquiry. The first is to establish the natural or ordinary meaning of the statement. The second is whether that meaning is defamatory.***"

104. With regard to the question as to whether the statements are defamatory per se, the Constitutional Court has indicated it entails a two-stage enquiry as set out in the matter of **Le Roux and Others v Dey**[7] which reads as follows:

> *"[89] Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence*

[7] (Freedom of Expression Institute & another as *amici curiae*) [2011] JOL 27031 (CC): 2011(3) SA 274 [CC].

would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.

[90] The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.

[91] At the second stage, that is whether the meaning thus established is defamatory, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published."

105. Publication must be to a person other than the plaintiff or the plaintiff's spouse. It is not necessary to state the names of all the persons in whose presence the defamatory statement was made, but only those whose identities have been pleaded may be called as witnesses to prove publication. The purpose of this rule is to prevent surprise.[8]

106. Publication of a defamatory statement is prima facie wrongful. The onus rests on the Defendant to dispel this prima facie case. This is a full onus and requires the Defendant to allege and prove facts that dispel wrongfulness, such as truth and public interest.[9]

107. In the context of this case, and as a result of the Defendant's allegations as referred to in paragraph 100 above, the Defendant must allege and prove that:

A. the statements regarding the Plaintiff were true; and
B. its publication was to the benefit of the public.

108. Applying these principles to the facts of this case and the statements made and published by the Defendant regarding the Plaintiff, a few aspects, at least, are clear to me:

[8] See Crots v Pretorius 2010 (6) SA 512 (SCA)[15]).
[9] See National Media Ltd v Bogoshi [1998] 4 ALL SA 347 (A).

108.1 These statements were made and published within the jurisdiction of this Court, and hence this Court has the necessary jurisdiction to adjudicate upon this action.[10]

108.2 It is clear from the contents of paragraphs 34, 41 and 101 above that the statements made by the Defendant regarding the Plaintiff are wrongful in that the statements are defamatory and has a tendency or is calculated to undermine the status, good name and reputation of the Plaintiff.

108.3 It is also clear from the contents of the Defendant's Plea as set out above, that the statements were made intentionally and "published" to third parties, other than the Plaintiff.

108.4 Taking into account the two-stage enquiry referred to and as set out above, that the statements made by the Defendant regarding the Plaintiff as set out in the various emails are defamatory. The statements made by the Defendant regarding the Plaintiff are therefore wrongful, intentional, were published and are defamatory concerning the Plaintiff.

108.5 The Defendant has failed, given his allegations referred to in paragraph 101 above, to discharge the onus of proving a) that the statements regarding the Plaintiff were true; and b) its publication was to the benefit of the public.

109. I find accordingly.

Damages

110. As far as damages are concerned, it is trite that the Plaintiff need not particularise general damages or provide particulars about the Plaintiff's reputation, standing in the community, or character or the extent of the publication.[11]

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[10] See Simmonds v White [1980] (1) SA 755 (C).
[11] See Simmonds v White supra, at 758.

111. In the matter of Katz v Welz[12] the Court indicated that there is no formula for the determination of general damages, and that it flows from the infinite number of varying factors that may come into play such as:

111.1 The nature of the defamatory statements written and published;

111.2 The nature and extent of the publication;

111.3 The reputation, character and conduct of the Plaintiff;

111.4 The motives and conduct of the Defendant.

112. Although the Defendant is not a legal practitioner, he is well aware of the consequences of his action in relation to the publication of defamatory statements.

113. The clear impression gained from a reading of the documents filed on record by the Defendant, voluminous as it was, is that he is a very intelligent man, and as stated above, well qualified in his profession as a neuro-surgeon. He is also not a stranger to litigation in the High Courts of South Africa, as is evident form the judgment of Olivier J to which I have referred to above.

114. I was also referred to the well written Afrikaans judgment of Riley AJ, dated 24 June 2016 in the Western Cape High Court, in the matter of Nicolas Renier Van Gijsen, as Plaintiff versus Fred van der Merwe, as Defendant. As I have endeavoured to indicate above, the genesis of this matter is intricately intertwined with the geneses of that matter, more particularly in that the Plaintiff in that case was also involved in the will of the Defendant's deceased father, and the subsequent developments regarding the said will, similar to the Plaintiff in this action. That Plaintiff, Gijsen, also sued this same Defendant out of that Court for defamation and was awarded eventually R500,000.00 in damages as a result of defamatory statements contained in emails regarding him and sent by the Defendant, Fred van der Merwe, who is the same Defendant herein.

[12] See para 103 above, at paras 205-219 of that judgment.

115. In the course of his evidence in this court, the Plaintiff has also referred me to a protection order which he was driven to apply for and obtained from the Kimberly Magistrate's Court against the Defendant, to protect him, the Plaintiff, from the constant and ongoing defamatory statements in emails emanating from the Defendant. That was a final Protection order in terms of the provisions of the Protection from Harassment Act, 2011 (Act No 17 of 2011) and dated 4 October 2018, in terms whereof the Respondent therein, Frederick van der Merwe (the Defendant herein) was ordered and prohibited by that Court, from committing any of the followings acts regarding the complainant therein (the Plaintiff herein).

> "(i) *Not to insult and/or to attempt to insult and/or in any way to verbally abuse the complainant; (ii) Not to contact the complainant physically, telephonically, per email and/or through any social media;*
>
> ii) *Not defame the complainant in any way."*

In terms of the said order, dated 4 October 2018, it would last until, and expire on 4 October 2023.[13]

116. The summons in this matter was issued on 2 October 2018. After the summons was served on the Defendant, the Defendant made the following statements regarding the Plaintiff in these proceedings:

116.1 In the Defendant's purported opposing/answering affidavit) dated 25 November 2020) to Plaintiff's application in terms of Rule 30(2), the Defendant stated the following regarding the Plaintiff:

> *"PLEASE TAKE NOTICE that PLAINTIFF'S RULE 30(2) APPLICATION, as intended by the PLAINTIFF on Friday, the 27th of November 2020...*
>
> *...*
>
> *Is scandalous and vexatious, brought by a VEXATIOUS LITIGANT as part of "SLAP SUIT"*[14]
>
> *"FAILED to indicate to COURT that PLAINTIFF, a DELINQUENT TRUSTEE and DIRECTOR, has NO DEFENCES in this FRAUDULENT CRIMINAL MATTER and could NOT provide ...*

[13] See paragraph 25 above.

[14] Page 8 of indexed papers of application heard on 19 February 2021 – application dated 16/10/2020

…that PLAINTIFF contravened COVID REGULATIONS in a deliberate and intentional manner, the characteristics of a HABITUAL OFFENDER…"[15]

(The affidavit was emailed (published) to the Chief Registrar and Office of the Judge President, the Office of the Chief Justice of South Africa, The South African Police Services, The Special Investigation Unit and the State Attorney)[16]

116.2 In the Defendant's purported opposing/answering affidavit) dated 14 December 2020) to Plaintiff's application in terms of Rule 30(2), the Defendant stated the following regarding the Plaintiff:

"PLEASE TAKE NOTICE that PLAINTIFF's Rule 30(2) Application ……

… are defective in form and substance and NOT filed timeously ito COURT RULES and demonstrate incompetence and/or negligence and/or mala fide and/or CORRUPT activities…*

…. are wrong in Law (including REGULATIONS 910, TAX etc), involve a FRAUD-in-LAW ……"*[17]

"PLEASE TAKE NOTE OF FAILURES (not all listed) by PLAINTIFF and/or his legal team to act ito UNIFORM RULES OF COURT……

**……..Failed to act timeously and/or intention to 'ambush' Judicial Officers and/or act in corrupt manner to 'uplift' and withhold the FACT-in-LAW, the FRAUD-in-LAW……."*[18]

"….FAILED to indicate to Court that PLAINTIFF, a DELINQUENT TRUSTEE and DIRECTORS, has NO DEFENCES in this FRAUDULENT CRIMINAL MATTER…

.. Furthermore confirm in Plaintiff's own AFFIDAVIT to this HONOURABLE COURT that PLAINTIFF contravened COVID REGULATIONS in a deliberate and intentional manner, the characteristics of a HABITUAL OFFENDER….."*

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[15] Page 10 of indexed papers of application heard on 19 February 2021 - application dated 16/10/2020.
[16] Page 7 of indexed papers of application heard on 19 February 2021 - application dated 16/10/2020
[17] Page 9 of indexed papers of application heard on 19 February 2021 – application dated 8/9/2020
[18] Page 11 of indexed papers of application heard on 19 February 2021 – application dated 8/9/2020

(The affidavit was emailed (published) to the Chief Registrar and Office of the Judge President, the Office of the Chief Justice of South Africa, The South African Police Services, The Special Investigation Unit and the State Attorney)

116.3 In the Defendant's purported opposing/answering affidavit dated 28 September 2020 to Plaintiff's application in terms of Rule 30(2), the Defendant stated the following regarding the Plaintiff:

"......The Plaintiff has failed the Test what the normal reasonable man would have done, when appointed and authorised to act as Trustee of a Testamentary Trust.

Another quote comes to mind: if the litigant "failed to disclose facts that were material to the truth of evidence that he permitted to be placed before the court and without which evidence was misleading" – MISLEADING THE COURT is further serious transgression and should be reported."[19]

(The affidavit was emailed (published) to the Chief Registrar and Office of the Judge President)

117. It is settled law that, republication by the same person of a defamatory statement does not necessarily create a new cause of action but may aggravate damages.[20]

118. As indicated above, the Defendant had the benefit of the caution and rebuke of Olivier J in the latter's judgment dated 21 August 2015. The Defendant nevertheless proceeded with his wrongful conduct and defamatory statements regarding the Plaintiff.

119. The Defendant was also on the receiving end in the defamation action instituted against him by Gijsen in the Western Cape Division of the High Court, referred to above, where he was ordered by Riley AJ, to pay damages in the amount of

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[20] Mograbi v Miller [1956] 4 All SA 220 (T)

R500,000.00 for damages to that Plaintiff, with costs. He narrowly escaped a punitive court order in that case by virtue of his conduct as stated therein.

120. The Defendant had a protection order granted against him as far back as 04 October 2018, by the Kimberley Magistrate's Court, ordering and prohibiting him from, *inter alia*, making any defamatory statements regarding the Plaintiff, who was the complainant in that application for a protection order against the Defendant.

121. The Defendant literally did not give the Plaintiff any other option but to institute this High court action against him, despite the Plaintiff's various requests and admonitions to him to stop his wrongful and defamatory conduct and statements regarding he Plaintiff. Despite that, and even after that summons was filed and served upon the Defendant, he continued his wrongful and defamatory conduct in respect of the Plaintiff, until literally he day before the hearing of this matter was to start in this Court, as indicated above.

122. To date hereof, no apology and/or any apologetic gesture was forthcoming from the Defendant to the Plaintiff for, and in respect of, these defamatory statements regarding him by the Defendant.

123. I consider these factors to be seriously aggravating factors against the Defendant in determining a just and equitable amount of damages to be awarded to the Plaintiff for the injury to his dignity and reputation.

124. I also take into account that there are more cases/actions of a similar nature, where the Defendant *in casu*, is being sued for defamation and damages by at least four (4) other persons, which cases are pending in the Western Cape Division of the High Court.

125. I am also mindful of the fact that the Defendant has access to his benefit in terms of the testamentary trust in access of approximately R1 million as testified by the Plaintiff, which the latter kept in trust for the benefit of the Defendant in the Plaintiff's capacity as erstwhile Trustee of the said trust. After his resignation as

Trustee, and the Defendant's refusal to provide him – the Plaintiff – with the bank account details of the Defendant to transfer the said money to the Defendant, despite many requests to this effect, the sum total of the benefit was paid to the Master into the Guardian's Fund.

THE ORDER

In the result the following order is hereby made:

1. The Defendant is ordered to pay the Plaintiff the amount of R 800 000.00 as and for damages.
2. Interest on the said amount a *tempore morae* from date of judgment until final payment.
3. Costs of the suit.

J.J. MOSES
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

For the Plaintiff: Adv. A. S. Sieberhagen
Instructed by: Engelsman Magabane Inc.

For the Defendant: No appearance