



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 6215/2016

In the matter between:

**BAINSVLEI LODGES (PTY) LTD T/A BAINS
GAME LODGE**

1st Applicant

SANGIRO LODGE (PTY) LTD

2nd Applicant

BASFOUR 2532 (PTY) LTD

3rd Applicant

MARIUS STRYDOM

4th Applicant

and

CHRIS LESSING

1st Respondent

SIMPLETHNIC CC

2nd Respondent

HEARD ON: 23 DECEMBER 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 JULY 2017

I. INTRODUCTION

- [1] The only issue to be adjudicated at this stage of the proceedings is who to be held liable for the costs incurred as a result of an urgent application brought by the applicants. In order to exercise my discretion pertaining to costs, it is necessary to deal with the evidence presented to me.

II. THE PARTIES

- [2] Four applicants feature in this application, to wit Bainsvlei Lodges (Pty) Ltd t/a Bains Game Lodge, Sangiro Lodge (Pty) Ltd, Basfour 2532 (Pty) Ltd and Marius Strydom ("Strydom"), cited as first to fourth applicants respectively. Strydom is the sole director of first and second applicants and a co-director of third applicant. The Bains Game Lodge is situated on the old Kimberley Road to the west of the Bloemfontein City Centre. Sangiro Lodge is situated to the north of the Bloemfontein City Centre along the extension of Eeufees Road, next to the N1 freeway. Third applicant's principal place of business is at the Bains Game Lodge. Adv AP Berry appeared for applicants, instructed by Rossouws Attorneys.
- [3] Mr Chris Lessing ("Lessing") is cited in his personal capacity as the first respondent and his close corporation, Simplethnic CC, is cited as the second respondent. Adv LA Roux appeared on behalf of the two respondents, instructed by Peyper Buitendag Inc.

III. THE APPLICATION

[4] On 21 December 2016 an application was issued in terms whereof applicants gave notice of their intention to launch an urgent application on 23 December 2016.

[5] Prayer one contains the usual prayer for condonation for non-compliance with the rules of court and prayers two and three read as follows:

“2. That a *RULE NISI* be issued, calling upon the Respondents to show cause (if any) on **Thursday, 09 February 2017 at 09:30**, or as soon as counsel may be heard, why a final order in the following terms should not be granted:

2.1 The 1st Respondent is directed and ordered to remove all references to the 1st, 2nd and 4th Applicants, from his Facebook Page (CHRIS LESSING), the Facebook Group (BLOEMFONTEIN BUSINESS – BAD AND NON PAYERS), the Facebook Group BLOEMFONTEIN – KOOP/RUIL/ADVERTEER, all the other profiles with whom he shared these posts on FACEBOOK, any other social media, webpage, website, and/or any internet based platform;

2.2 The Respondents are interdicted and restrained from publishing or posting any information pertaining to the 1st to 4th Applicants on FACEBOOK, and other social media, webpage, website, and/or any internet based platform;

2.3 The Respondents pay the costs of the Application, the one paying the other to be absolved.

3. The Relief set out in prayers 2.1 and 2.2 shall serve as an interim interdict with immediate effect, pending the finalisation of the matter.”

IV. THE EVENTS ON 23 DECEMBER 2016

[6] On the morning of 23 December 2016 and just before the matter was to be heard, respondents filed an answering affidavit deposed to by Lessing.

[7] Applicants’ counsel indicated that they were prepared to pursue the application without filing replying affidavits.

[8] I entertained counsel’s arguments on behalf of the parties who, due to the urgency of the matter and lack of time did not present me with written heads of argument. I indicated to them during argument that it might be a convenient matter to be settled, bearing in mind that money was apparently due and payable to second respondent where after I adjourned for counsel to obtain instructions.

[9] I was later informed in chambers that the following agreement was reached which could be made an order of court which I did:

- “1. Second respondent shall immediately issue an amended invoice to Silkblaze 11, trading as CSN (Christo Strydom Nutrition).
2. Payment of the invoice shall be made within 24 hours of receipt of the invoice by means of electronic transfer.
3. The posts pertaining to applicants placed by respondents on social media shall be removed immediately.

4. No further posts pertaining to applicants shall be posted by respondents.”

[10] The parties could not reach an agreement in respect of the costs of the application and requested me to adjudicate same, although not on an urgent basis. They undertook to file written heads of argument. I confirm that I have received these heads of argument for which I thank counsel.

V. COMMON CAUSE FACTS

[11] The following facts are common cause:

1. An employee of Sangiro Lodge, Mr JP Kruger, requested a quotation for security guard uniforms from second respondent, represented at all times by Lessing.
2. Second respondent delivered security guard uniforms and other equipment in the amount of R12 271.64 to Sangiro Lodge at its aforesaid business address for which it issued an invoice to Sangiro Lodge on 4 November 2016.
3. Delivery was accepted, but no payment was forthcoming and when the application was heard on 23 December 2016 the amount was still outstanding.
4. On or about 25 November 2016 Lessing placed posts about non-payment of an account by first and second applicants on Facebook, but after a telephonic conversation between him and fourth applicant, the posts were removed.

[12] However, on 29 November 2016 and again on 2 December 2016 further Facebook postings were created by Lessing, also using the

logo of second respondent. These postings were created on the Facebook page of Lessing and Bloemfontein Businesses - Bad and Non-payers. No doubt many people would be able to access the Facebook accounts and take cognisance of what was posted. Several postings by third parties appear on the documents attached by the applicants, e.g. a certain Mac Fourie posted the following:

“Ag nee SIES Bains Lodge!!!! ‘n Prokerower met regskoste te gaan sien oor ‘n paar uniforms. ‘n Groot haan kraai met kronkel stap op sy eie mishoop lyk dit nou. Oijoi! Grootmanskap is ‘n pillose siekte. Betaal broer betaal.”

[13] Portions of the first posts of 29 November 2016 are quoted:

“Ek wil graag dit baie duidelik maak dat Bains Lodge weier om Simplethnic Designs CC te betaal nadat die rekening 30 dae uitstaande is! Hiermee rig e kook (sic) ‘n waarskuwing aan ander om eerder versigtig te wees in die vervolg.

Dit was ‘n eenvoudige order vir 4 stelle uniforms vir Sangiro Lodge wat besig is om op te grader (sic) ...

Ek sal die post SLEGS afhaal sodra ek betaling ontvang!

Tot dan weier ek om enige gesprek met hulle te voer, en los ek die post op Facebook.”

[14] Two untruths appear from the quoted portion. The invoice of second respondent was issued to Sangiro Lodge, a totally different business and legal person from Bains Game Lodge and situated kilometres from the latter and therefor, the suggestion that Bains Game Lodge was bound to pay, but refused, is a lie. Secondly, at

that stage, i.e. on 29 November 2016, payment was not due as a period of thirty days had not expired as the invoice is dated 4 November 2016.

- [15] On 2 December 2016 Lessing posted the following, bearing in mind that several people responded to the posts:

“Ek raai almal aan wie hy (the reference is clearly to Marius Strydom of Bains Lodge) ook nog geld skuld om Pieter Peyper by Peyper en Buitenbach te kontak en die ‘n class action te maak of Rossouw Prokureurs (wie hy tans gebruik) ek verneem hy doen dit as ‘n gewoonte maar mense is te bang om enigiets te doen!”

- [16] Again on 2 December 2016, but a few hours later, Lessing posted the following on his Facebook page:

“Update: Bains Lodge saak - Hulle (Marius Strydom) weier absoluut om betaling te maak, die volgende stap is ‘n dagvaarding en dan sal die Balju maar verder intree om betaling te vorder. WEES GEWAARSKU indien enigiemand steeds van plan is om besigheid met hulle te doen!”

- [17] Applicants’ attorney requested Mr Pieter Peyper, representing respondents, in writing to remove the posts before the end of business on 8 December 2016, failing which the court would be approached. However the posts were removed on Monday 12 December 2016 only and at a stage when Strydom was already consulting with counsel in order to launch an urgent application.

- [18] At 16h33 on Thursday 15 December (after business hours), the day before the long weekend, Lessing again created posts on the

Facebook page of Bloemfontein Business - Bad and Non-payers and I quote:

“BAINS GAME LODGE

(SANGIRO LODGE)

PAYMENT DUE”

Underneath these followed the logo of second respondent. The same evening Lessing changed his profile picture on his Facebook page to display the same message as posted on the Facebook group of Bloemfontein Business - Bad and Non-payers.

- [19] After the long weekend preparations were made for the urgent application referred to *supra*.

VI. RESPONDENTS' RESPONSES

- [20] As mentioned, Lessing deposed to the answering affidavit. He not only ferociously attacked the applicants, but simultaneously sought sympathy from the court and I quote:

“7. I find the actions of the Applicants to be distasteful. I do know that the Applicants, as entities and the Fourth Applicant personally is financially very successful and well off. Their attitude is that to, and I refer to the First, Second and Fourth Respondents (sic), rather abuse the processes of Court to intimidate me with High Court applications than pay the amount of **R12 271.64** due to the Second Respondent. It is facetious and obstructive.

8. The Second Respondent operates its business on a much smaller scale. I am the only employee of the Second Respondent. I can accept that the amount of **R12 271.64** is a negligible amount to the Applicants. It however represents a substantial amount of money to the Second Respondent.

...

10. The security equipment and uniforms as set out in annexure "**BG1**" (that is the invoice issued to Sangiro Lodge) have already been delivered to the First and Second Applicants."

[21] Lessing insisted that the posts were the truth and in the public interest. Also, as a small company and supplier he was under a duty to warn other suppliers in dealing with applicants. He indicated that he would remove the post on receipt of payment and that he would even go so far to state the he had received payment and that the matter between him and applicants had become settled.

[22] Lessing averred that in the past he supplied equipment to Sangiro Lodge and although invoices were issued to Sangiro Lodge, Bains Game Lodge settled those invoices. This version is not denied due to the failure to file a replying affidavit. No doubt, the uniforms and equipment were delivered at the Sangiro Lodge premises and an invoice was issued to Sangiro Lodge. On Lessing's version, which has to be accepted, he was unaware of the entity, Silkblaze 11. He never dealt with Silkblaze 11.

VII. LEGAL PRINCIPLES

- [23] Two different rights contained in the Bill of Rights come into play *in casu*. Firstly, there is the right to human dignity provided for in s 10 of the Constitution which reads as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

The second right, i.e. freedom of expression, is set out in s 16 of the Constitution. Section 16(1)(b), which might be relevant *in casu* provides for “freedom to receive or impart information or ideas.”

- [24] One’s understanding of s 16 can never be unlimited as the rights of other persons must always be considered as well. No one is guaranteed unlimited freedom of speech and/or allowed to speak freely about untruths. In *Khumalo and others v Holomisa* 2002(5) SA 401 (CC) at para [26] the Constitutional Court, whilst quoting with approval from the judgment of Corbett CJ in the *Argus Printing & Publishing* judgment referred to *infra*, considered the constitutional value of human dignity and stated it to be a recognised principle “that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name.” It went further as follows: “Under our new constitutional order, the recognition and protection of human dignity is a foundational constitutional value.”

- [25] Defamation has been defined as the intentional infringement of another person's right to his good name. See: Neethling, Potgieter and Visser, *Law of Delict*, 7th ed at 352. It is also described as the wrongful and intentional publication of defamatory material relating to the complainant. See: Loubser *et al*, *The Law of Delict in South Africa*, 2nd ed at 340.
- [26] It is trite that legal *personae* such as the first and second applicants have a right to their good name and unimpaired reputation and that the *dignitas* of companies can be infringed as well. See: *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (AD) at 455E. It is also trite that the business reputation of businesses such as the first and second applicants should be protected by our courts. See: *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (AD) at 952.
- [27] In a unanimous judgment Corbett CJ stated in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (AD) at 25B-E that freedom of expression is not and cannot be permitted to be totally unrestrained as the law does not allow the unjustified savaging of an individual's reputation. The right of freedom of expression enjoyed by all persons must yield to the individual's right, which is just as important, not to be unlawfully defamed. As mentioned, in *Khumalo v Holomisa supra* the Constitutional Court adopted this approach.
- [28] A defamatory publication which is untrue, or only partly true, can never be in the public interest and there can be no justification for

the publication of untruths. See: *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) at para [22]. See also the judgment of Hefer JA in *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212 H-J.

- [29] Fair comment as a ground of justification which may negate the *prima facie* wrongfulness of a defamatory statement can only be relied upon if the comment is based on true facts. It must be clear that the statement in question was a comment – not a 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. See: *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at paras [12] and [13].

VIII. EVALUATION OF THE EVIDENCE

- [30] After having read the papers I believed that the matter could be solved amicable as it was clear that second respondent delivered equipment to Sangiro Lodge and even if the invoice was issued to the wrong entity, that it should be paid as there was no dispute about the delivery of the equipment and the amount due. Therefore I suggested to the parties during argument to try and settle.
- [31] Although the businesses of first and second applicants are situated far apart as mentioned *supra*, it is clear that Strydom is involved in both these businesses. Strydom's father, Mr Christo Strydom who also conducts a business from the property of Sangiro Lodge, albeit under the name of Silkblaze 11, trading as CSN (Christo

Strydom Nutrition), is involved in the management and operations of both businesses. Whatever Lessing understood and experienced, the fact remains that from a legal perspective the Strydom group of entities cannot be regarded as one legal entity for tax, VAT or other commercial purposes.

- [32] There is no doubt in my mind that respondents, through the actions of first respondent, posted untruths on Facebook. Respondents relied on the truth of facts posted and that this was in the public interest. The issue is thus not whether fair comment was made in respect of true facts. In doing so, Bains Game Lodge, Sangiro Lodge and Strydom's good name and reputation were impaired and their *dignitas* infringed. The defences, which have to be proven by defendants, are not valid and cannot succeed. Wrongfulness in particular, a requirement for a successful action based on defamation, has been proven. Whether or not Bains Game Lodge paid invoices on behalf of Sangiro Lodge in the past is immaterial. The invoice was issued to second respondent's debtor, Sangiro Lodge and Sangiro Lodge had to pay if it was satisfied that the goods were purchased by it and that delivery had taken place. The invoice is an invoice for VAT purposes and second respondent is clearly a vendor for purposes of s 7 of the Value-Added Tax Act, 89 of 1991. It would be extremely difficult, if not impossible, for Bains Game Lodge, if it was registered for VAT purposes, to settle the invoice and claim back the tax paid, or even to claim the expense as a deduction for income tax purposes. There is nothing untoward to insist on a correct invoice.

[33] If the postings are properly considered, respondents had one thing in mind only and that was to extort Bains Game Lodge to pay the amount of just over R12 000. Instead of instituting action in the Small Claims Court, as would have been expected of a creditor with such a small claim, respondents resorted to tactics that have now become fashion. It is just so easy to sit before one's computer or use one's cellphone to create postings within a few minutes that will reach thousands of people within seconds and which may have serious consequences for innocent members of society. People like Lessing must be made aware that such actions cannot be countenanced. An undertaking was given that the postings would be removed immediately on receipt of payment. This amounted to blackmail. If it was really in the public interest to create the postings, there would be no reason to give such an undertaking. No doubt, respondents knew that the wealthy Strydom family (Lessing's perception) and/or their group of companies might have elected to settle the invoice on being made aware of the postings. Obviously this did not happen and applicants eventually decided to approach the court.

[34] Applicants have proven all requirements for a final interdict. As indicated, they proved a clear right. Damages might clearly follow if the defamatory posts were allowed to remain on social media. Applicants had no other satisfactory remedy, but to approach the court. There was no way in which the matter could be solved, although, with the benefit of hindsight, settlement was indeed possible if sanity prevailed as indicated *supra*. The initial postings were removed, but respondents' unlawful actions proceeded thereafter. The latest postings were created by respondents after

business hours and just before the long weekend, well-knowing that it might be very difficult for applicants to obtain the services of lawyers in order to seek urgent relief over the weekend.

- [35] The award of costs is in the discretion of the presiding officer although the general rule is that the successful party is entitled to his/her costs. In exercising my discretion I take cognisance of the fact that applicants and/or their attorneys could have informed respondents that the invoice was incorrectly issued to the wrong party, insisted on a correct invoice and offered to make payment immediately on receipt of the correct invoice. They did not act accordingly, but this is exactly what transpired afterwards upon my intervention. Therefore, applicants should to some extent also be blamed for the costs incurred and they should not be granted their full party and party costs.

IX. ORDER

- [36] I make the following order:

1. First and second respondents shall pay 50% of applicants' costs of the application, jointly and severally, the one to pay, the other to be absolved.

JP DAFFUE, J

On behalf of applicants: Adv AP Berry
Instructed by: Rossouws Attorneys
Bloemfontein

On behalf of respondents: Adv LA Roux
Instructed by: Peyper Buitendag Attorneys
Bloemfontein