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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO : 3592/2016

In the matter between :

FLOCUTT (PTY) LTD Applicant

and

JOACHEM EISENBERG Respondent

CORAM : **MURRAY AJ**

HEARD ON : **1 SEPTEMBER 2016**

JUDGMENT BY : **MURRAY AJ**

DELIVERED ON : **20 OCTOBER 2016**

[1] In an application for an interdict the Applicant asks that the Respondent be directed to remove certain posts, directed at the Applicant's alleged unsavoury business practices, from the Social Media sites *Facebook* , *Hellopeter.com* and *reportacrime.co.za* and that the Respondent be interdicted from publishing on the internet or in the printed media any untrue allegations regarding the Applicant and its business practices.

[2] In three posts on the abovementioned Social Media sites, the Respondent leveled

various allegations at the Applicant, Flocutt (Pty) Ltd **("Flocutt"),** and at its sole director, Ms Belinda de Beer **("Belinda").** Belinda avers that the posts are defamatory and are harming not only her good name but also the reputation of her business and are scaring off potential customers or causing existing customers to cancel their orders.

[3] The Respondent opposes the application, denying that the posts are defamatory, and averring that the *"comments"* are *"reasonable, essentially and materially true and in the public interest",* and therefore justified. The Respondent in fact avers that *"I stated what happened to me* as a *fact. I cannot be blamed if my experience of bad service, creates the impression the Applicant alleges".* He avers furthermore, that *"my experience and statement reflects the truth. The mere fact that the Applicant does not like the truth being published does not make my statements defamatory".* He continues: *"My understanding is that Sec 16 of our Constitution guarantees my rights to freedom of speech. I should surely be allowed to speak freely about bad service and my experience".*

[4] Advocate S Raubenheimer appeared for the Applicant and Mr S de Beer for the Respondent.

[5] Defamation has been defined as the intentional infringement of another person's right to his good name[1], or as a wrongful and intentional publication of defamatory material that refers to the complainant. [2] For defamation to exist, there must have been publication of the posts; their contents must have impaired the Applicant's reputation or good name; they must have wrongfully infringed the Applicant's personality right to reputation; and the Respondent must have had the intention *(animus iniuriandi)* to impair the Applicant's reputation. [3]

[6] It is trite that not only private individuals, but also legal persona, such as the Applicant in this case, have a right to their good name and unimpaired reputation[4] and that the *dignitas*

of companies can also be infringed. It is trite, furthermore, that the business reputation of trading corporations may be protected by courts.[5] Artificial persons, like the Applicant, need not prove actual financial loss or prejudice - only that such loss or prejudice is likely.[6]

[7] Normally an Applicant bears the onus to establish that the publication of defamatory material that refers to the Applicant has infringed his right to his good name or reputation.[7] The Applicant has to prove, furthermore, that the Respondent was responsible for the publication.[8] The Respondent then bears the onus of rebutting two presumptions, namely those of wrongfulness and intention, by establishing a defence. His failure to do so, results in liability.[9]

[8] *In casu* there is neither a dispute about whether the Respondent indeed published posts on *Facebook, Hel/opeter.com* and *repottacrime.co.za,* nor about whether he intended to do so. He admits that he did. What he denies is that the posts were defamatory, wrongful or unjustified.

[9] It is important to note that not only a person from whom a defamatory remark *originated* is in principle responsible for its publication, but also any other person, *who repeats, confirms, or even draws attention to it**[10]**.* That is what the Respondent in effect did in this case by repeating allegations in and by relying on and referring to other people's internet posts regarding Flocutt, and even providing his cell phone number for reference to other posts. It is no excuse to aver that the information was already in the public domain[11] as was the case in **Mthembi-Mahan yele v Mail & Guardian.**

[10] Where internet posts are concerned, not only the person who posted the allegations but also the internet host, the network provider and the service provider[12] may be sued for defamatory posts, as happened in **Tsichlas v Touchline Media (Pty) Ltd[13]** on which Mr De Beer on behalf of the Respondent relied, but which is distinguishable from the present

case precisely because that application was aimed not at the person who made and/or repeated the allegations, but at the person or entity responsible for placing and/or allowing other people's posts. The Broadcasting Act is not applicable to the Respondent who is not a part of the media, but merely a private citizen who took it upon himself to 'warn' others against the Applicant.

[11] Contrary to private citizens, the mass media has an obligation to provide citizens both with information and with the platform for the exchange of ideas. As "primary agents of the dissemination of the information and ideas . . . they have a constitutional duty to act with vigour courage, integrity and responsibility". The media has been cautioned to be scrupulous and reliable in the performance of their constitutional obligations. The Constitution protects *the media* in the performance of their obligations to the broader society principally through the provisions of Section 16.[14]

[12] Section 16(1) of the Constitution provides that :

> "Everyone has the right to freedom of expression, which includes:
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> a. Freedom of the press and other media;
>
> b. Freedom to receive or impart information or ideas;
>
> c. Freedom of artistic creativity; and
>
> d. Academic freedom and freedom of scientific research."

[13] However, although freedom of expression is fundamental *to* our democratic society, it is not a paramount value. It must be construed in the context of other values enshrined in the Constitution [15]. In particular the values of human dignity . .. In that regard, it has long been recognised that the law of defamation lies at the intersection of the freedom of speech and protection of reputation or good name. As **Corbett CJ[16]** said :

"I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an i individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasize the word *"unlawfully"* for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by whatever another says about you, the law has devised a number of defences, such as fair comment, justification (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory." [17] (my emphasis]

[14] In **Solidarity v SABC[18]** the Court stated that, given the breadth of the right to freedom of expression and *"the right of the public to be informed",* it is clear that particular focus should be placed on ensuring that accurate information is broadcast to the public ... To that end, all journalists have ethical and constitutional obligations which they must at least aspire to, which are found in the !CASA Code of Conduct; the BCCSA Code; and the Press Council Code which circumscribes the Ethics and Conduct for South African Print and Online Media. Both the !CASA Code and the BCCSA Code state that *"news must be reported truthfully, accurately and fairly".* They further provide that the news must be

"presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by : distortion, exaggeration, or misinterpretation; material omissions; or summarisation"

[15] These duties have also been ascribed to *journalists* in the Constitutiona Court

judgment ***Khumalo and Others v Holomisa*** [19] The media relies on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression. As **Joffe J** said in ***Government of the Republic of South Africa v Sunday Times Newspaper and Another***[20] :

> "It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal disorhonest ma!- and inept administration..." [my emphasis]

[16] The significant and obvious difference between those cases, on which Mr De Beer for the Respondent relies, and the facts in this case, is that the Respondent is not part of the media. He is not a journalist. He is neither subject to, nor protected by the abovementioned codes of conduct. He is not protected by the Electronic and Communications and Transactions Act, 25 of 2002, either, which Act provides for the protection of so-called *"service providers"* who are regarded as conduits rather than as principles in the dissemination of information. The Respondent *in casu* is not a service provider. On all evidence in the papers before the Court he is the principal creator/repeater of the information in the posts, and is not entitled to the protection afforded by the Act to service providers. He does not have an unfettered right to freedom of speech. It is trite that the s 16 right to freedom of speech is not unlimited.

[17] To determine whether the Respondent's remarks are *prima facie* wrongful an objective two-stage enquiry must be followed. First of all the Court needs to establish the ordinary meaning of the relevant posts, alternatively whether there is an innuendo, in other words whether the posts imply another meaning than what is expressly stated.[21] Secondly, it needs to determine whether that meaning or innuendo is defamatory.

[18] The test is whether in the opinion of the reasonable person with normal intelligence and

development the reputation of the person / business concerned, in this case Belinda and Flocutt, has been injured.[22] If it has, the posts are defamatory[23] and *prime facie* wrongful as against Belinda and Flocutt, unless the Respondent can prove a ground of justification which cancels the wrongfulness. In other word, unless the Respondent rebuts the *prima facie* wrongfulness of the comments by establishing that they were justified.[24]

[19] *In casu* the Respondent attempted to justify his posts by relying on his Constitutional right to freedom of speech and by averring that his posts were the truth and in the public interest. According to **Neethling *et al,*** though, it is not an element of defamation that a defamatory allegation needs to be false[25] since even *true* defamatory words can be actionable. [26] The defence of truth and public benefit operates only in circumstances where a Respondent makes factual allegations (not comments): a statement is either true or not true, irrespective of what it might have been meant to convey. The truth, therefore, is a matter of fact and needs to be proved just like any other factual allegation : by providing evidence *to* that effect.[27] The Applicant avers that his statements are factually correct. He therefore needs to provide reliable proof that they are.

The background:

[20] The Applicant is registered with the Companies and Intellectual Property Commission as a private company with one active director, Belinda de Beer. Allmotive Trading **("AMT")** was a company of which Belinda's sister, Samantha de Beer, was one of the two directors, the other one being their grandmother, Barbara. AMT has been liquidated. Although both companies traded in automotive parts, they did so from two different shops in a retail centre which houses five different shops at 20 Cable Road, Dundee, in KwaZulu-Natal. Belinda and Samantha's father, Malcolm de Beer, used to own a business, Dynamite Diesel, which was once the subject of a *Carte Blanche* investigation.

[21] It is not in dispute that the Respondent has never had any business dealings with Flocutt and that the allegations in the three posts therefore do not stem from his personal experience. The basis for his allegations, rather, is that he ordered a Nissan FE6 cylinder head from AMT during November 2015 for R15,000.00. He paid the full amount prior to delivery. According to him, when he informed AMT that the cylinder head was cracked, returned the unit and requested that it be replaced, Samantha de Beer telephonically undertook to do so, but never did.

[22] From two applications annexed to his opposing affidavit, it appears that the Respondent harassed both Samantha and her sister Belinda to the point that they instituted proceedings against him in the Glencoe Magistrates Court under the Protection of Harassment Act, 2011 in May 2016. Both sisters filed affidavits in support of the said protection proceedings. From Samantha's affidavit it appears that when AMT Components refused to refund Genuine Motors to which the Respondent is connected, because a different cylinder head was returned to them or, alternatively, the head was so badly damaged that it wasn't recognisable as the same one they had sold to Genuine Motors, the Respondent started to complain and defame AMT Components on the website known as *"Hello Peter",* as well as to harass her and her family members on the same website. She stated under oath that the Respondent has, on numerous occasions, contacted her and used foul vulgar and abusive language to express his unhappiness.

[23] She stated that he also threatened to send people to AMT Components to "sort us out". She annexed to her affidavit the posts about AMT which Respondent placed on *hellopeter.com* on 10 May 2016 where he stated : *"This company and Samantha de Beer as well as Belinda and Dewald situated in Dundee <u>will defraud you</u>. You will not receive any items or items is damaged. They will not refund you. Contact me on [0....] prior to*

doing any dealing with these people". On 12 May 2016 he posted on *reportacrime.co.za* regarding AMT a similar post to the one that he has now posted regarding Flocutt. The annexures to his opposing affidavit preceding Samantha's affidavit, namely emails, order forms and letters and which were presumable annexed to prove his allegations against Flocutt, are all with reference to his dealings with AMT and not with Flocutt.

[24] Belinda, as the Applicant's sole director, also filed protection proceedings against the Respondent in the Glencoe Magistrates Court on 13 June 2016, which proceedings are annexed to his opposing affidavit. Belinda also states under oath that the Respondent began to use vulgar language towards her on the telephone and called her a variety of vulgar names. She alleged that he slashed her tyres and scratched her car's body paint before calling her and telling her that that was *'just the beginning* and that *"the tyres could easily be her neck slashed open".*

[25] Since then, apparently, the Respondent has taken it upon himself and has made it his business to *"warn"* people against Flocutt and the De Beer family on the internet. To that end he posted the following comments with reference, not to AMT, but to Flocutt on Social Media, namely :

25.1 "Dynamite Diesels in Dundee, KZN = Automotive Trading = Flocutt .... same address and management. Sarne products and advertising. Do due diligence before transacting". (on Facebook).

25.2 "Flocutt Dundee KZN.

The staff / owners of this company situated in Dundee trade as Flocutt or AMT Components. They advertise on the internet that they have available spare parts such as engines, gearboxes, etc for trucks and other vehicles. They request a deposit or full payment via EFT to 'secure' the item for free delivery countrywide within 3 to 4 days. When money is paid, the items is *[sic}* not delivered or maybe delivered after many requests, phone calls, emails, etc, months later. In the latter case the item delivered is incorrect or damaged maybe to such an extent that it is not usable. When the item is returned for a refund, NO refund is made. They usually find an excuse not to refund you. Read this carefully!!! THEY WILL NEVER REFUND YOU!!!

In cases where the item is not delivered and the deal cancelled by the client no refunds are made! The staff members / owners are Belinda de Beer, Samantha de Beer, Patricia de Beer, Malcolm de Beer and a certain Dewalt. The sister Company and staff was INVESTIGATE [sic] by Carte Blanche in May 2012 under the heading 'Dodgy Diesel' but not followed up. Furthermore AMT Components was liquidated in June 2016 but Flocutt still keep [sic] on trading with their usual tricks. Various complaints has [sic] been lodged on 'Hello Peter' on the internet to warn any prospective buyers. Please contact me on [0....] for further information. Whatever you do, DO NOT DO."

(in reportacrime.co.za) and

25.3 "URGENT WARNING about FLOCUTI in DUNDEE / GLENCOE KZN. Be extremely careful when transacting with this business or its management - Belinda de Beer, Samantha de Beer or Malcolm de Beer. They advertise on large scale that they have for sale engines, gearboxes, etc for heavy vehicle and trucks - these items they do not have. When after weeks the deal is cancelled by the client and a refund requested, they will inform you that it will take 15 days to process - eventually you will not be refunded and all your calls and requests will be ignored. The sister companies of FLOCUTI (AMT Components / Dynamite Diesels) were liquidated causing huge financial loss to many clients. Be sure to check all the listings on *hellopeter.com* *and stopacrime.co.za including Facebook. You will find these people are renowned for non-delivery and no refunds.* If in doubt, please contact me on *********913 for a reference or further information". (in hellopeter.com).

[26] The Applicant regards these remarks as defamatory and as such as detrimental to Flocutt's good name and reputation, and as prejudicial to its business, and seeks an order to not only have the existing posts removed from Social Media, but also for the Respondent to be prohibited from posting any future untrue material regarding the Applicant on Social Media.

[27] The Respondent, on the other hand, avers that he has a right to publish such posts on the internet because, allegedly, his comments are factually and materially correct and in the public interest since the companies are interrelated and connected. He bases his right to comment furthermore on the constitutionally protected right to freedom of expression[28].

[28] The Constitutional Court[29] held that :

> "The Jaw of defamation lies at the intersection of the freedom of speech and the protection of human dignity, both rights protected by the Bill of Rights" and
>
> "The common Jaw accepts that truth is central to the balance between dignity and free expression. It does so by recognising truth as a defence to defamation. It puts the burden of proving truth on the defendant'.

[29] In deciding this application the Court needs to determine, therefore, whether the posts complained of, are indeed defamatory, and, if so, whether the posting is justified in that the Respondent has proved that they are true and in the interest of the general public, and/or fair. The Court can only do so by taking into consideration all the surrounding circumstances, such as the interest of the public in being informed; the manner of

publication; the nature and tone of the published posts; the reliability of the source of the information; the steps taken to verify the truth of the allegations; and whether the person defamed has been given an opportunity to comment on the statements before publication. [30]

[30] One needs to keep in mind in this regard the warning by **Brand JA** in **Modiri v Minister of Safety and Security[31]** that "a *defamatory publication which is untrue or only partly true can never be in the public interest"* which warning echoed that of **Hefer JA in National Media Ltd v Bogoshi[32] ,** namely that *"ultimately there can be no justification for the publication of untruths".* This sentiment is reflected in the various codes of conduct *to* which journalists are bound. Significantly, the Respondent is a private citizen. He does not enjoy media or political privilege and is not, like journalists, news media, or politicians, allowed *to* make reasonable publication of false or untrue defamatory statements. Neither does he have a legal or moral duty to ferret out corruption, dishonesty and graft and expose the perpetrators *to* bring *to* the attention of the general public the type of allegations which he aimed at Belinda and Flocutt in the internet posts, without ascertaining that the facts on which his allegations are based are indeed correct and true.

[31] Fair comment is another ground of justification which may negate the *prima facie* wrongfulness of a defamatory publication and which was referred to in his affidavit. To succeed with that ground of justification, the Respondent would have had to meet four requirements: He would have needed to prove that the defamation formed part of a fair comment on *facts that are true and in the public interest.* [33] (1) The defamation had to amount to *comment* and to the assertion of *an independent fact* (in the eyes of the reasonable person); (2) The comment had to be *fair* (which is usually dependent on the convictions of the community, that is the *boni mores);* and could have been critical, exaggerated, biased, ill-considered or unbalanced *provided that the facts commented on are*

not false[34] and provided that the remarks were not prompted by spite or malice.[35] But even if the comments were relevant and made in the honest belief that they were true, the Applicant could nevertheless prove that the Respondent exceeded the limits of the defence by reason of his improper motives.[36] (3) The facts on which the comment was based must have been true and known to the person to whom publication was made. (4) These facts had to be in the *public interest.*[37]

[32] There is, first of all, no evidence that Flocutt was given an opportunity to comment on any of the allegations before they were posted, which impacts on fairness of the publication. Secondly, the facts upon which the allegations are based, are not proved with reliable evidence but are mostly based on allegations made by other persons. The Respondent annexed to his opposing affidavit, in support of his allegations, for example, a post by "a person (not known to me)" who described his dealings with Flocutt. That post is used as one of the grounds for the Respondent's averments against Flocutt. The other so-called *"proof"* of his allegations against Flocutt are either posts by other people or the annexures regarding his dealings with AMT annexed to his founding affidavit. That is, apart from an affidavit by his aunt, Mrs De Waal, who has according to her, ceded her claim against the Applicant to the Respondent. He did obtain statements from a Mr Govender and a George Graham who averred that they had paid the Applicant for products not received. But these are exactly the type of allegations that should have been presented to the Applicant for comment before publishing the posts.

[33] The *prima facie* wrongfulness of the Respondent's conduct will be cancelled if he proves that the defamatory remarks were *true* and *in the public interest.*[38] A Respondent need only prove that the remarks are substantially (and not literally) true, i.e. that the *"sting"* of the charge is true[39], as the Respondent alleged in his opposing affidavit. But that is the case

only if the allegations do not allege fraudulent conduct, dishonesty or criminal conduct as a fact, as the Respondent does in the instant matter. When such is the nature of the allegations every aspect of such an allegation must be true.[40]

[34] It is clear that not all the facts addressed in the three relevant posts are true. The Respondent, for example, alleged in post 1 *("Dynamite Diesels* .... *= Automotive Trading = Flocutt"* ..... *"same address and same management"* ... .. *"same products");* in post 2 *("The staff I owners of this company [Flocutt] trade as Flocutt or AMT Components"* ..... *"The staff members I owners are Belinda de Beer, Samantha de Beer, Malcolm de Beer and a certain Dewalt");* and in post 3 *("Be extremely careful when transacting with this business [Flocutt] or its management* - *Belinda de Beer, Samantha de Beer or Malcolm de Beer"),* which the Respondent averred was a factually and materially correct averment since it stated that the companies are interrelated and connected. In his own post on *hellopeter.com* on 23 May 2016 he stated that Flocutt is *'a different legal entity from Dynamite Diesels and AMT.* In his post about both AMT and Flocutt on 12 May 2016 in *reportacrime.co.za* he stated *"all of these companies are different legal entities".* Yet in the three posts serving before the court now he represented them as one interrelated entity, now embodied in the Applicant, *"which still keep on trading with their usual tricks".*

[35] However, the Applicant proved, with registration certificates for Flocutt and AMT, that the two were separate companies with different directors. The Respondent even admits in his opposing affidavit that they are two companies. While the Applicant admits that Samantha, a former director of AMT, is now an employee of Flocutt, that does not, without more, make her part of Flocutt's management. Nor does it prove that the two are the same entities if Samantha sometimes answers the phone at Flocutt, and if Belinda sometimes answered the phone at AMT. Neither does the mere fact that Mr Malcolm de Beer on

Belinda's admission sometimes advises her, make him part of Flocutt's management.

[36] Likewise, the Respondent's allegation that the two companies are the same entity because they use the same resources such as telephones, fax and email addresses, was refuted by the Applicant with proof to the contrary. Their "same *physical address",* furthermore was explained with an aerial map of the 800 square meter business complex in the industrial area, annexed to the replying affidavit, which shows that number 20 Cable Road in Dundee houses a retail centre consisting of five different enterprises, in which Flocutt and AMT were but two of five independent lessees situated 300 meters from each other, with Tiger Milling between them.

[37] The Respondent's averment that Belinda's Dundee workshop was not registered to sell second-hand goods, was likewise refuted with a certificate of registration for the shop in Glencoe and an explanation by Belinda that only the Glencoe shop sells second hand goods while the Dundee shop sells new items. It is evident therefore that the allegations made by the Respondent which do amount to allegations of fraudulent conduct and/or dishonesty, are not true in every instance.

[38] What is in the public interest will depend on the convictions of the community (the *boni mores)* and in this regard, *"the time, the manner and the occasion of the publication"* play an important role.[41] To determine this, a Court should look at the nature *(in casu* internet posts in the form of "factual" statements, on the Respondent's own admission); the extent *(in casu* on three different Social Media websites with worldwide reach); and the tone *(in casu* sweeping, accusatory statements) of the allegations; the nature of the information upon which the allegations were based *(in casu* some other disgruntled authors of internet posts and the Respondent's bad experience with another company, AMT); the nature of the mass media used *(in casu* Social Media, which is more far-reaching

than the printed media); the extent of the distribution *(in casu* the posts were placed on the internet where they were freely available to all internet users: the distribution was therefore unlimited); the sector of the public at which the publication is aimed (in the present case anyone interested in crime, or casual users of the Social Media had access to the relevant websites); the reliability of the information (in the present case information was provided by a few disgruntled customers); steps taken to verify the information (in the present case a small number of "complainants" were contacted); the extent to which other materials support the allegations at the time of publication *(in casu* there is no evidence of other materials supporting the allegations, apart from the abovementioned internet posts); the opportunity given to the relevant person to react to the allegations *(in casu* there is no evidence that Belinda was given an opportunity to react to the allegations and specifically the affidavits of three other clients prior to the posting); the necessity or urgency to publish before the truth can be positively verified (there was no urgency in posting the allegations); the possibility that the same objective could be reached in a less harmful way (there were several other ways in which the Respondent could have obtained his relief, especially, for instance, by way of litigation); and the presence of a malicious motive[42] (from the affidavits submitted by Belinda and Samantha it appears that the Respondent harassed and threatened one or both of them to such an extent that they had to obtain protection orders against him. He therefore clearly had a malicious motive in posting the allegations about Belinda and Flocutt especially since on his own admission he never had personal dealings with Flocutt but was angered when he did not receive a refund from AMT.

[39] From the above, it is clear, in my view, that the allegations were unlawful and published with the intention *to* impair Belinda and Flocutt's right *to* a reputation. The posts were

based largely on half-truths or falsehoods and can therefore not be regarded as *"in the public interest".* Neither can comments (reflecting the poster's opinion) be reasonably held and fairly expressed if they are based upon false or distorted facts.[43] Instead of being true factual averments, furthermore, the posts contained generalisations and absolutisms, such as *"when money is paid, the items is [sic} not delivered or maybe delivered after many phone calls, emails, etc, months later. In the latter case the item delivered is incorrect or damaged, maybe to the extent that it is not usable. When the item is returned for* a *refund, NO refund is made". "Read this carefully:* ***THEY WILL NEVER REFUND YOU!!!."***

[40] What other conclusion can the reasonable person reach from the contents of the abovementioned posts, than that he/she is being warned that the Applicant and Belinda are *dishonest* and/or that the business is conducted in a fraudulent way when it is alleged that they accept and retain payment but do not deliver the paid item, or do deliver, months later, an incorrect or damaged item which they then refuse to refund. What the Respondent fails to point out, is that Flocutt has a *"no refund"* policy which is clearly and openly stated in its advertisements and invoices.

[41] In the *hellopeter.com* post the Respondent made similar allegations which the reasonable person cannot see as anything other than a warning against Flocutt's or Belinda's "dishonest" or even "fraudulent" conduct, e.g. *"be extremely careful when transacting with this business or its management* ... *when they are paid for the item the odds are 100% that they will not be delivered "* and *"you will find these people are renowned for non-delivery and no refunds",* and what else is the reasonable person to read into the following remark: *"The sister Company and staff was INVEST/GA TE by Carte Blanche in May 2012 under the heading 'Dodgy Diesel' but not followed up. Furthermore AMT* was liquidated in June 2016 but Flocutt still keep on trading with their usual tricks".

[42] In my view the ordinary reader would have understood the contents of the posts or at least the innuendo to mean that Flocutt and/or Belinda are guilty of corrupt behaviour. The posts therefore are defamatory.

[43] The posts cannot be justified as constituting *"fair comment"* either. The allegations are not posted in the form of comments : they are couched in the form of statements of fact, without any indication of whether they describe one person's subjective perception, or one person's personal experience, or whether they reflect the inevitable outcome or result of all dealings with Belinda and/or Flocutt. The "warnings" are in the form of purported factual statements rather than comments, as the Respondent himself admits in his opposing affidavit. The Respondent can therefore not justify the infringement of Flocutt's and Belinda's reputation and good name ·on the grounds of reasonable and/or fair comment, either.

[44] The posts are not based on strictly true facts, as they have to be if fraudulent and dishonest conduct is alleged; they are not in the interest of the general public; and they are not fair or reasonable comments. The Respondent has no media or political privilege to utter non-truth and defamatory averments; he does have a malicious motive; and he has not complied with the requirement that where fraudulent or dishonest or criminal conduct is alleged, he has the onus of proving every allegation to be true and not merely of proving the "gist" of his averments.[44]

[45] Furthermore, he has used Social Media with its unlimited global reach as a platform to vent his anger at Flocutt with which he, personally, has never had any business dealings. He has, therefore, in my view, overstepped the boundaries of his Constitutional right to freedom of speech. The posts are defamatory and since they allege fraudulent or dishonest conduct the Respondent has not succeeded in proving that they are justified

because they are true and in the public interest or that they are justified because they are fair comment.

[46] The Applicant's prayers for the removal of existing posts and the prohibition of future posting of any untrue material pertaining to the Applicant, has the effect of final interdictory relief.[45] Although the application started out as an urgent application for an interim interdict on 4 August 2016 urgency has since fallen away: The Respondent has filed opposing papers, the Applicant has replied and the matter was postponed by agreement. Because of the final effect of the relief prayed for, the Applicant needs to establish (a) a clear right, (b) that injury is reasonably apprehended; and (c) that no other suitable form of relief is available.

[47] It is indisputable that the Applicant does have a clear right to the interdict: it is a business[46] and as such its profits are directly linked to its reputation and its business dealings and sales. Belinda is its sole director: as such she has a direct interest in its profitability and the extent of its sales which in turn is dependent upon its good name. The Applicant in my view has proved that injury is reasonably apprehended since its reputation has been damaged, which would directly impact on its 'goodwill' and turnover, and negatively affect its profits.

[48] The Applicant has also succeeded in proving that it has no other viable remedy. In this type of case the Applicant would be unable to prove its financial damages in order to use the *lex aquiflia* to claim monetary compensation. An action for damages is therefore not a viable option and cannot be claimed under alternative relief. The way to stop the publications and continued impairment of its reputation is an interdict to remove defamatory posts and prevent publication of untrue allegations.

[49] In **Tsichlas** the court held that future defamatory posts cannot be forbidden because it

might happen that they could still be justified in that they may be true and in public interest. In that case however the court dealt with the conduit or service provider rather than the actual person posting the allegations. In the present case, the prayer is not for future defamatory posts to be prohibited, but for future untrue allegations. As stated, the Respondent is not a reporter or a journalist allowed by media or political privilege to make false statements. He has control over what he publishes and over ascertaining the accuracy of his factual averment. Forbidding him to make future false or untrue allegations would therefore in my view not place an unreasonable limitation on his right to freedom of speech.

[50] In my view the Applicant has therefore succeeded in proving that the posts were defamatory and unlawful and the Respondent has failed to prove that they are justified because they are the truth and in the public interest, or because they are fair and reasonable comment. The application therefore has to succeed.

[51] The Applicant was substantially successful and there is no reason for a cost order to deviate from the normal one that costs follow the outcome.

WHEREFORE THE FOLLOWING ORDER IS MADE :

(1) The Respondent is directed to remove all references to the Applicant from his *Facebook-page,* profile/page on *hel/opeter.com* and his profile/page on *reportacrime.co.za.*

(2) The Respondent is prohibited from publishing on any webpage, website, or in any Social or Printed Media forum any untrue allegations regarding the Applicant and/or its business practices.

(3) The Respondent is ordered to pay the costs of the application.

H MURRAY AJ

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[1] Neethling, Potgieter & Visser : Law of Delict, 7th Edition, at 352

[2] Loubser *et al,* The Law of Delict in South Africa, 2nd Edition at 340

[3] **Neethling, *et al, op*** *cit.;* **Loubser *et al, supra, op cit.***

[4] Universiteit van Pretorius v Tommy Meyer Films (Edms) Bpk 1979 (1) SA 441 (A)

[5] Dhlomo v Natal Newspaper (Pty) Ltd 1989 (1) SA 945 (A) at 952-3

[6] Loubser *et al, supra,* at 342

[7] Loubser *et al, supra,* at 329

[8] Pretorius v Niehaus 1960 (3) SA 109 (0) at 112

[9] Khumalo v Holomisa 2002 (5) SA 401 (CC) at para (26]

[10] Vengtas v Nydoo (5) 1963 (4) SA 358 (D) at 393; NEHA WU v Tsatsi 2006 (6) SA 327 (SCA) at 333

[11] Loubser *et al, supra,* at 344; 2004 (6) SA 329 (SCA)

[12] Loubser et al, supra, at 343

[13] 2004 (2) SA 112 (W) at [25] and [26] at 342 G-I

[14] Khumalo v Holomisa, supra, at [23]; Solidarity v SABC, supra, at [65]

[15] Khumalo v Holomisa, *supra,* at [25] –[26]

[16] Argus Printing & Publishing Co. Ltd and Others v Esselen's Estate 1994 (2) SA 1 (A) at 25 B - E

[17] Khumalo and Others v Holomisa 2002 (5) SA 40 I (CC) at 417 -418 at paras [24] to [26]

[18] 26 July 2016 (Labour Court) at p. 13 at [17]

[19] 2002 (5) SA 401 (CC), *supra*

[20] 1995 (2) SA 221 (T) at 227 I - 228 A

[21] Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994 (2) SA I (A).

[22] Mthembi-Mahanyele v Mail & Guardian Ltd 2004 (6) SA 329 (SCA) at 342 - 343

[23] Tshedu v Lekota 2009 (4) SA 372 (SCA) at 378 - 379

[24] Neethling v The Weekly Mail 1994 (1) SA 708 (A).

[25] Khumalo v Holomisa 2002 (5) SA 401 (CC) at 414; Sayed v Editor, Cape Times 2004 (1) SA 58 (C) at 6 I.

[26] **Neethling, Potgieter & Visser : Neethling's Law of Personality at 131**

[27] Loubser et al, supra, at 360

[28] Section 16 of the Constitution of the Republic of South Africa, Act 108 of 1994

[29] Khumalo v Holomisa, supra, at [26]

[30] Mthembi-Mahanyele v Mail & Guardian Ltd, *supra,* at [68]

[31] 2011 (6) SA 370 (SCA) at 379

[32] 1998 (4) SA 1196 (SCA) at 1212

[33] Johnson v Becket 1992 (1) SA 762 (A) at 778 -779; Delta Motor Corporation (Pty) Ltd v Van der Merwe 2004 (6) SA 185 (SCA) at 193 - 195; Hardaker v Philips 2005 (4) SA 515 (SCA) at 528

[34] Hardaker v Philips, 2005 (4) SA 515 (SCA) at 529 - 530

[35] Marais v Richard 1981 (1) SA 1157 (A) at 1170

[36] **Marais v Richard, *supra, op cit***

[37] The facts must be in the interest of the general public, not just a small section thereof.

[38] Modiri v Minister of Safety and Security, *supra,* at 376 -380; Ketler Investments CC *t/a* Ketler Presentations v Internet Service Providers' Association 2014 (2) SA 569 (GJ) at 583

[39] Neethling *et al, supra,* at 360

[40] Loubser et al, supra, at 360

[41] Modiri v The Minister, *supra,* at 376 - 380 in which the Court emphasized that public interest will depend on the circumstances before the Court, which may vary infinitely, and that Courts should not restrict themselves to **existing rules or guidelines.**

[42] **Neethling *et al, supra,* at 361**

[43] **Loubser** *et al,* ***supra,*** **at 363**

[44] Loubser et al, supra, at 360

[45] Tsichlas v Touchline Media, *supra,* at 124

[46] **Loubser *et al, supra,* at 342**