IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: 460/2004

In this matter between:

WILLEM MYNHARDT TRAUT Applicant

And

ANNA GABRIELLA FIORINE First Respondent

MR FIORINE Second Respondent

Coram: Yekiso J

Delivered: 24 October 2006

Summary:
Application for a final interdict: requirements for the granting of – principles and requirements for granting of re-stated
Held: on the merits: requirements for the granting of final interdict not satisfied as an alternative claim for damages is available
Right to freedom of expression
Held: even if applicant would have been successful on the merits, the order sought, in the form formulated as to time and its operation, would not

satisfy the threshold requirements set out in the limitation clause – section 36 of the Constitution of the Republic of South Africa, 1996.

JUDGMENT DELIVERED ON 24 OCTOBER 2006

YEKISO, J

[1] By way of Notice of Motion issued out of this Court, the applicant seeks various forms of relief against the first and the second respondent. The first such relief, sought against the first respondent in the form of a general prohibitory interdict, is couched in the following terms:

> "The First Respondent is interdicted and restrained from informing members of the public that the Applicant has misappropriated or stolen the First Respondent's money."

[1.2] The second such relief, sought against both the first and the second respondent, is couched in the following terms:

> "Respondents are interdicted and restrained from displaying any notices, similar to the notice attached hereto and marked Annexure "X", in any place."

I shall refer to the notice referred to in this leg of the relief sought later in this judgment.

[1.3] The last leg of the relief sought, similarly against both the first and the second respondent, reads as follows:

> "The Respondents are interdicted and restrained from placing any notices and/or advertisements in the media similar to the notice which appeared in the Langeberg / Wynland Bulletin of 19 December 2003, a copy of which is annexed hereto marked Annexure "X1" under the heading "Privaat Versoek"."

The copy of the publication referred to in the last leg of the relief sought is similarly attached as annexure "X1" to the Notice of Motion. Similarly, I shall refer to this latter annexure later in the course of this judgment. Both the notices complained of were allegedly published during December and, in particular, during the period preceding 19 December 2003.

[2] Apart from asserting public interest and truthfulness in relation to the statements complained about as the basis of their defence, the respondents resist the relief sought on the basis that if same is granted in the form sought and prayed for, same will grossly curtail the respondents' fundamental right to freedom of expression guaranteed in section 16 of the Constitution of the Republic of South Africa, 1996 ("The Constitution").

[3] The Notice of Motion referred to in paragraph [1] above was issued out of this Court on 26 January 2004. Once the pleadings were closed, the matter was enrolled for hearing. In the event, the matter was argued before me on Wednesday, 2 November 2005. After hearing argument on behalf of the parties I reserved judgment. In the paragraphs which follow is my judgment in the matter. I should at this stage of this judgment convey my gratitude to both *Mr Wesley Vos* and *Mr T A Barnard,* both of the Cape Bar, who appeared for the applicant and the respondents respectively, for the comprehensive heads of argument filed. I venture to say these assisted in no small measure in the determination of the issues in dispute.

THE PARTIES

[4] In his founding affidavit, the applicant describes himself as an adult businessman and financial adviser and, as at the time of deposing the founding affidavit, was resident at No 17 Du Toit Street, Kleinbaai, Gansbaai, Western Cape. He has conducted business as a financial adviser and consultant since 1981. He was employed by the Standard

Bank of South Africa, Swellendam ostensibly as a financial adviser and investment consultant, from 6 January 1986 up until 2001 when, according to this version, he resigned.

[5] The first respondent is an adult female person of Belgian origin, whose ordinary place of residence at the time of deposing her answering affidavit was Zeedijk 127, Oostende, Belgium. She, together with the second respondent, has a holiday home at 7 Cannon Street, Swellendam, Western Cape. The second respondent is the spouse of the first respondent and both are Belgian nationals.

<u>THE APPLICANT'S OCCUPATION AND BUSINESS ACTIVITIES</u>

[6] The applicant alleges in his founding affidavit, that over the years he had built up an excellent name and reputation as a financial adviser and an investment consultant in the Overberg area. The area of his business activities at the time included the agricultural towns of Swellendam, Riversdal, Caledon and the surrounding areas, including Hermanus. The applicant goes on to say that he had, in the course of his business activities, established himself as a reputable financial adviser with an

excellent track record and good name in towns in and around the Overberg area and as well as the surrounding agricultural sector. He had, in the course of time, built up a substantial client base. The substantial client base referred to would obviously be made up of members of the public.

[7] During 2000, and this is according to the applicant's version, he was approached by the first respondent to advise her with regard to certain investments which she wished to make. Arising from this approach, the applicant advised the first respondent with regard to possible investments opportunities which she could make. The applicant thereafter advised the first respondent to invest certain monies with Momentum Life, Old Mutual and the Standard Bank. The applicant goes on to say in his founding affidavit that the first respondent, in total, invested an amount of approximately R220,000-00. The applicant does not state in his founding affidavit whether he himself gave the first respondent an account with regards to the performance of these investments and, if he did not do so, whether the institutions at which such funds were invested gave the first respondent an account with regards to the performance of the investments concerned.

[8] During or about 2000, so the applicant further states in his founding affidavit, the first respondent expressed dissatisfaction with the performance of these investments. The dissatisfaction arose out of a decrease in capital, and accordingly, the value of these investments. The explanation by the applicant that the first respondent did not need to be alarmed by a temporary fluctuation in the value of her investment as she initially took a long term view with regards to the funds she had invested, did not allay the first respondent's fears.

[9] On 5 February 2002, so the applicant goes on to state in his founding affidavit, the first respondent deposed an affidavit (the SAP affidavit) in which she requested the S A Police Service, Swellendam, to investigate and press criminal charges against the applicant, ostensibly for theft or fraud. The matter was investigated under the Swellendam SA Police Service reference number: MAS 39/12/2002. During July 2003 the applicant was informed by the SA Police Service, Swellendam that the Senior State Prosecutor, Swellendam had declined to prosecute.

It appears that the matter of the first respondent's complaint was also referred to the Director of Public Prosecutions who similarly declined to prosecute.

ALLEGED DEFAMATORY CONDUCT: FIRST RESPONDENT

[10] The applicant further states in his founding affidavit that the first respondent, and probably assisted by the second respondent, put up defamatory notices of and concerning the applicant at various prominent places in and around Swellendam. The places whereat such notices were put up included the Spar Supermarket, the Municipal Offices, a hardware store and the Sentraal-Suid Koöperatief Beperk, the latter being the headquarters of the farmers' Co-operative Society.

[11] The content of the notices complained of and to which reference is made in the preceding paragraph, read as follows:

> "Die polisie ondersoek met betrekking tot die praktyke van die voormalige beleggingsagent van Standard Bank, ene Willie Traut, is huidiglik aan die gang. Indien u op enige manier deur hierdie persoon verlies of skade gelei het, moet u my dringend kontak by the volgende nommer: 028 514 2447."

The notices, a sample whereof is annexed as annexure "4" to the applicant's founding affidavit, is the same document referred to as annexure "X" to the Notice of Motion. Depicted in this notice is the face of a pirate who clutches a dagger between his teeth.

[12] At the bottom of the notice there is written several telephone numbers on perforated tearsheets designed to make it easy to tear off from the notice itself and to make contact with the person soliciting a response to such notice. The telephone number 028-514 2447 written on the several tearsheets appended to the notice, is that of the respondents. It is evident that several telephone numbers were torn off and that, probably, the persons who may have torn off such tearsheets, may have made telephonic contact with the respondents.

[13] The applicant thus alleges in his founding affidavit that the aforementioned notice and, in particular, the contents thereof, are defamatory in that the applicant is depicted as a pirate; that on basis of this notice an impression is created that the applicant had caused persons to suffer loss; that the notice creates an impression to the reader that the

applicant was being investigated and that the depiction of a picture of a pirate thereon suggests that the applicant steals from innocent people.

[14] Also annexed to the applicant's affidavit is an affidavit by one Joy Patricia Webber in which she states that she was informed by the first respondent that the applicant had misappropriated her (the first respondent's) money. The affidavit by one Hugo Carstens, an attorney practising in Gansbaai, also annexed to the applicant's founding affidavit, confirms a telephonic conversation Carstens had with the first respondent in which she (the first respondent) informed Carstens that the applicant had indeed stolen her money and that he (the applicant) was being investigated by the police.

[15] On 19 December 2003, there was published, ostensibly by the second respondent, in The Langeberg / Wynland Bulletin, the latter being a newspaper circulating in Swellendam and surrounding areas a notice concerning the applicant. The notice, under the heading "Privaat Versoek", reads as follows:

> "Persone wat met Mnr Willie Traut besigheid gedoen het tydens sy tyd as

> beleggingsagent by Standard Bank, Swellendam, word versoek om dringend met my in verbinding te tree by die volgende nommer:
>
> 028-5142447 (Mnr Fiorine)."

This notice is annexed as annexure "6" to the applicant's founding affidavit and is the same document annexed and referred to as annexure "X1" to the applicant's Notice of Motion.

[16] The applicant similarly complains that the aforementioned advertisement is defamatory in that it creates an impression that the applicant was being investigated, which impression impacts negatively to the applicant's right to dignity, good name and reputation. A letter addressed to the first respondent by the applicant's attorneys dated 21 January 2004 demanding that the first respondent desist from making defamatory statements of and concerning the applicant, coupled with an undertaking to desist from the conduct complained of, did not elicit any response.

[17] There is no evidence to suggest that any further defamatory material was published after 19 December 2003 or that any defamatory statements

were made after 19 December 2003. Indeed, there is no evidence to suggest that any defamatory conduct was committed during the whole of the period leading to the hearing of the matter on 2 November 2005. There does not appear to be evidence to suggest that during the whole of the aforementioned period, to use the words of Kuny AJ in *Tshichlas and Another v Touch Line Media (Pty) Ltd* 2004(3) SA 112 (WLD) at 126H that the applicant was subjected to a continuing and ongoing campaign of vilification and defamation by the respondents.

[18] In paragraph [9] above a reference is made to the SAP affidavit deposed to by the first respondent in which she requests the police, Swellendam, to investigate charges against the applicant. That affidavit, deposed to on 5 December 2002, and not on 5 February 2002 as stated in the applicant's founding affidavit, is annexed as annexure "1" to the applicant's founding affidavit. In paragraph 6 of the SAP affidavit the first respondent states that, at her own initiative, she had the applicant call at her home and that the applicant did in fact call at her home on approximately four separate occasions. The idea was to find out from the applicant with regards to what had become of the funds she had entrusted

to him to invest on her behalf. She states in the aforementioned affidavit that on each such occasion the applicant "was elke slag dronk gewees en het dan net begin sing" so that nothing could eventually be discussed. Neither in the founding affidavit nor in the replying affidavit does the applicant present evidence to gainsay this assertion.

[19] In paragraph 9 of the SAP affidavit, the first respondent alleges that the applicant redirected all correspondence relating to her investments to his own (the applicant's) address without the authority of the first respondent. Further, in paragraph 12 of such affidavit the first respondent states that on several occasions large sums of money were withdrawn from her investment account only to be redeposited later into her investment account without her knowledge. In paragraph 12 of the same affidavit the first respondent states that the manager of Standard Bank, Swellendam did "erken dat hy (the manager, Standard Bank) verantwoordelik voel vir die aangeleentheid aangesien hy (the manager, Standard Bank) die afgelope twee jaar vir Mnr Traut 'gedek' het" and that, as a result Standard Bank had to apply pressure on the applicant to resign as an investment consultant at the Swellendam branch of the Standard Bank.

[20] The applicant does not deny or deal with the aforementioned allegations, serious as they are, in his founding and replying affidavit despite a clear impression being created in the said affidavit that the applicant had made himself guilty of some improper conduct.

THE FIRST RESPONDENT'S ANSWERING AFFIDAVIT

[21] There is no dispute that the notices that the applicant is complaining about were put up at places indicated in the applicant's founding affidavit. The first respondent alleges though in her answering affidavit that she did not put up the notices complained about although she knew about such notices. The first respondent goes so far as to say in her answering affidavit that their friends (the first and the second respondent's friends) who had knowledge of the problem the first respondent had with the applicant, put up the notices.

[22] As to the notice published in the Langebaan / Wynland Bulletin of 19 December 2003, the first respondent states that the second respondent did place the notice in the aforementioned publication. However, she denies

that the notice is defamatory nor that it impairs the applicant's dignity, good name and personality. The second respondent does confirm in his opposing affidavit that he is responsible for placing the notice complained about in the aforementioned publication. He (the second respondent) states in his opposing affidavit that the sole purpose of placing the notice in the publication concerned was to solicit information from the members of the public which would assist him and the first respondent with the investigation they had then launched against the applicant, that such information would assist them with the completion of such investigation which was intended to protect their rights and interests and thus, by implication, the notice was not published with the purpose of impairing the applicant's dignity, good name and personality.

[23] The first respondent makes several allegations in her answering affidavit to which allegations the applicant, in his replying affidavit, either responds by way of a bare denial of such allegation or lack of recollection of events in relation to such allegations without any form of elaboration or substantiation.

[23.1] One of those allegations relates to cheques which the first respondent gave to the applicant. The first respondent alleges in her answering affidavit that the applicant required her, in drawing cheques for the purpose of the proposed investments, to omit details relating to the particulars of the payee and the date on which such cheques ought to have been drawn. The first respondent states that the applicant had explained to her that particulars relating to the payee and the dates on such cheques would be inserted as and when the institution at which such funds would be invested would have become known. The applicant, in response to this allegation, states that he does not recall this arrangement nor does he recall how he dealt with the cheques the first respondent had given to him. It is implicit in the first respondent's answering affidavit that no account was given to her as regards where such funds were invested and also that no account was given to her relating to the performance of such investments.

[23.2] In paragraph 3.5.10 of her answering affidavit, the first respondent states that the total amount given to the applicant for purposes of the proposed investment was in an amount of R 230,000-00. The applicant's response to this allegation is that same is incorrect, once again, without any form of elaboration.

[23.3] On 16 October 2002, the applicant addressed a letter to the first respondent in which it is stated that the total amount invested from the period 1 February 2000, ostensibly up to 16 October 2002, was in an amount of R 100,000-00 and that any withdrawal from the amount so invested would only be possible in February 2005. The letter does not give an account of the rest of the funds entrusted to the applicant, does not give an account of how the rest of the funds were invested and also no account is given of the performance of such investments. A clear impression created on basis of the contents of this letter is that only an amount of R 100,000-00 was entrusted to the applicant for purposes of the investment.

[24] In paragraph 3.7.6 of her answering affidavit, the first respondent further states that she had in the course of her investigation established that several requisitions were made from some of the investment accounts in which some of the funds were withdrawn through forgery of her signature on such requisition forms. Similarly, the applicant does not take issue with

this allegation, except to refer to the decision of the Director of Public Prosecutions in declining to prosecute the applicant. There is no clear indication on basis of the evidence on record as regards the basis for the Senior State Prosecutor and the Director of Public Prosecutions declining to prosecute. I would therefore assume that the Prosecution Authorities may have declined to prosecute on the basis that the State felt it would have difficulty to prove its case beyond reasonable doubt as opposed to the less exacting standard of preponderance of probabilities applicable in matters pertaining to civil litigation.

[25] What appears to have prompted the first respondent to initiate criminal proceedings against the applicant is the letter of 16 October 2002 addressed to the first respondent by the applicant purporting to confirm that only an amount of R 100,000-00 was entrusted to him for the purpose of the proposed investment. I have already made a point elsewhere in this judgment that both the Senior State Prosecutor, Swellendam and the Director of Public Prosecutions declined to prosecute the applicant. It is against the background of the evidence set out in the preceding paragraphs that the notices annexed as annexures “X” and “X1” to the

applicant's Notice of Motion surfaced and which ultimately led the applicant to launch these proceedings for the relief set out in the Notice of Motion.

[26] In summary, the applicant's version in support of the relief sought in terms of the Notice of Motion is that it is the first and the second respondent who are responsible for the publication of the notices marked as annexures "X" and "X1" to the Notice of Motion; that the aforementioned notices are defamatory of the applicant in that the applicant's dignity, good name, reputation as a businessman and personality is grossly impaired by such notices and that the refusal by the first respondent to give an unequivocal undertaking to desist from such conduct, justified a conclusion that the respondents would persist with their conduct complained of. It is for these reasons that the applicant seeks, as against both the respondents, an interdict in its final form on such unqualified terms as contemplated in his Notice of Motion.

[27] The respondents, on the other hand, in an attempt to resist the relief sought, and whilst not denying having had knowledge of the notices complained about, contend that the order which the applicant seeks in

terms of the Notice of Motion, unqualified as it is as to time and operation, will effectively silence the respondents in perpetuity and, as such, the order sought, if granted in the form sought, will significantly curtail their respective rights to freedom of expression enshrined in section 16 of the Constitution. It is further contended on behalf of the respondents that the order sought, in order to fall short of a violation of the respondents' right to freedom of expression, would have to be justified in terms of the limitation clause contained in section 36 of the Constitution, which would require such order to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." The respondents thus contend that the order sought in the form contemplated in the Notice of Motion, falls short of the threshold set out in the limitation clause.

RIGHT TO FREEDOM OF EXPRESSION

[28] It is trite, particularly at this stage of our constitutional democracy, that the right to freedom of expression not only forms an integral part of our law, but also forms part of the fundamental rights contained in numerous international instruments such as the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights, to

name but a few of such international instruments, all of which specifically protect the right to freedom of expression. To the extent that South Africa has acceded to those instruments and to the extent that section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, those international instruments could very well be said to be part of our law.

[29] In any event section 16 of the Constitution, and under the heading "Freedom of Expression" provides as follows:

(1) Everyone has the right to freedom of expression, which includes –

(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.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[30] To the extent that the applicant may wish to rely on section 36 of the Constitution for purposes of seeking to justify a limitation of the respondents' rights to free expression in terms of the orders sought, the *onus* to prove that such limitation is reasonable and justifiable, rests on the applicant (See *Coetzee v Comitis and Others* 2001(1) SA 1254 (C) at 1273 para [40]). What I am required to determine in this regard is whether the respondents' right to freedom of expression are likely to be curtailed by the orders sought and if the effect of the order sought is likely to effectively limit the respondents' right to freedom of expression, whether such limitation is justified in terms of the limitation clause contained in section 36 of the Constitution.

[31] Once the issue of limitation of the respondents' right to freedom of expression is resolved, only then shall I proceed to determine if, on basis of the evidence on record, the applicant has made out a case for a final interdict he seeks in terms of the Notice of Motion.

In order to determine this issue, I will obviously have to look at the evidence on record as a whole, more particularly, the curtailing effect the orders sought would have on the respondents' rights to freedom of expression, and also as to whether such curtailment or limitation would be "reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom".

EVIDENCE IN MOTION PROCEEDINGS

[32] In paragraphs [26] and [27] I have, in a summary form, set out the respective versions of the parties. It is on the basis of those versions that I am required to determine if the applicant has discharged the *onus* resting on him to make out a case for the orders prayed for in the Notice of Motion. Such determination, these being motion proceedings, will have to be made on basis of evidence on affidavit. Various allegations and counter allegations, denials and counter denials are made in the parties' respective affidavits.

[33] There are two versions of evidence on record on basis of which I will have to determine if the applicant has made out a case for the relief sought. Basically, the applicant's version is that the respondents, in a manner defamatory of his good name, personality, reputation and in violation of his

right to dignity, have informed the members of the public that the applicant has misappropriated the first respondent's money, that such statements are untrue, and that the applicant's version of innocence to these allegations is vindicated by both the Senior State Prosecutor, Swellendam and the Director of Public Prosecutions in declining to prosecute the applicant. On the other hand, the respondents' versions amount thereto that the notices complained about were intended to elicit the assistance of the members of the public for purposes of collecting evidence that she might have wished to use in a civil action she had then contemplated instituting against the applicant. The contention by the first respondent in this regard is that whatever statements she may have made that the applicant misappropriated her money, such statements are true and in the public interest in as much as the applicant's occupation and nature of work at the time, involved dealing with the public. It is against the background of these two versions, that I am required to determine if the applicant has made out a case for the relief sought in the Notice of Motion.

[34] In as much as there are disputed facts based on the parties' versions as pointed out in paragraphs [26] and [27] of this judgment, it therefore

follows that the first determination to be made is on whose version should such disputed facts be determined. The approach to be followed in the determination of upon what evidence the relief sought is to be determined is set out in a number of decisions of the High Court and the Supreme Court of Appeal. The leading case in which this approach is formulated is *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 AD. The approach is formulated as follows at 634 E:

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmer's Winery Ltd v Stellenwyl Winter (Pty) Ltd 1957(4) SA 234 C at 235 E-G, to be:
>
> '… where there is a dispute as to the facts a final interdict should only be granted in Notice of Motion proceedings if the facts stated by the respondents together with the admitted facts in applicant's affidavits, justify such an order … where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[35] It is further trite that, in motion proceedings, evidence that is not

denied should be treated as factually correct and as not in dispute. The position is set out as follows in LAWSA, Vol 3(1) (1st Re-issue, paragraph 137):

> "In dealing with the Applicant's allegations of fact, the Respondent should bear in mind that the affidavit is not a pleading and that a statement of lack of knowledge coupled with a challenge to Applicant to prove part of his case does not amount to a denial of the averments of the Applicant. It follows that failure to deal at all with an allegation by the Applicant amounts to an admission of such allegation. It is normally not sufficient for the Respondent to content himself with a bare and unsubstantiated denial."

[36] Based on this approach I shall now proceed to determine which of those facts stated in the applicant's founding affidavit are admitted by the respondents and which of those facts stated in the respondents' answering affidavits are not denied by the applicant. If, notwithstanding the disputed facts, the facts stated by the respondents in their respective answering or opposing affidavits, together with the facts admitted in the applicant's affidavit justify the granting of the order, then the applicant will be entitled to the sought orders in terms of the Notice of Motion provided always that such orders do not fall short of the threshold requirements contained in the

limitation clause.

[37] In paragraph [23] of this judgment I identified certain allegations contained in the first respondent's answering affidavit which the applicant neither denies and, in instances where such allegations are denied, such denials are no more than unsubstantiated denials and those facts which the applicant neither deals with in his founding affidavit nor respond to in his replying affidavit. At the cost of repeating myself the allegations identified are the following:

[37.1] In paragraph 6 of the first respondent's SAP affidavit, the first respondent states that she, approximately on four occasions, had the applicant call at her home with a view to requesting him to account for the monies entrusted to him, to advise her of the institutions whereat such monies were invested and also an account as regards the performance of such investments. On each such occasion, so the first respondent states in the aforementioned affidavit, the applicant "was elke slag dronk gewees en het dan net begin sing". The applicant neither deals with this allegation in his founding affidavit, to which the SAP affidavit is attached, nor in his replying affidavit.

[37.2] In paragraph 9 of the SAP affidavit, the first respondent further states that the applicant re-routed all her mail relating to her investments to his own (applicant's) address without having been authorised to do so.

[37.3] And in paragraph 12 of the SAP affidavit, the first respondent states that the manager of the Standard Bank, ostensibly the Swellendam branch of the Standard Bank, did "erken dat hy verantwoordelik voel vir die aangeleentheid aangesien dat hy (the manager) die afgelope twee jaar vir Mnr Traut 'gedek' het" and that he (the manager) "het ook erken dat hulle (Standard Bank) hom (the applicant) gedruk het om as finansiële makelaar te bedank by Standard Bank, Swellendam".

The implication of this allegation is that the applicant did not resign from the Standard Bank, Swellendam on his own accord as he seeks to portray in his founding affidavit, but that he was forced to resign. As has already been pointed out neither does the applicant deal with this issue in any elaborate form in his founding affidavit nor does he take issue with this allegation in his replying affidavit.

[37.4] Neither does the applicant deny nor deal with the aforementioned evidence which, as has already been pointed out, creates a clear and necessary implication that the applicant had been guilty of some or other improper activities.

[37.5] There are several other allegations contained in the first respondent's answering affidavit which the applicant either barely denies without any elaboration or does not deal with, as for an example, the allegation as regards how the cheques given to the applicant had to be drawn, the total amount entrusted to the applicant to invest, all of which are either met with lack of recollection on the part of the applicant or unsubstantiated denial.

[38] As against those facts, which are either not dealt with or barely denied by the applicant, are the following facts which the first respondent does admit with some qualification, these being the fact that she knew of the notices put up in and around Swellendam but had not put up the notices herself, the conversation she had with Hugo Carstens and Patricia

Webber and the notice published in the Langeberg / Wynland Bulletin of 19 December 2003. The first respondent qualifies such admissions by stating that they are true or that the notices complained about were put up to solicit assistance from the members of the public with a view to gathering evidence for purposes of a contemplated civil action.

[39] Arising from the analysis of the parties' respective versions of events, it seems to me that the version which is more probable is that offered by the first respondent. The first respondent entrusted fairly substantial funds to the applicant to invest on her behalf; the applicant failed to give the first respondent or failed to cause that the first respondent be given a regular account of the performance of the proposed investments and that when the first respondent confronted the applicant, on at least four separate occasions, the applicant still failed to give the first respondent an account of such investment. This, in my view, is what prompted the first respondent to pursue a criminal action.

[40] Once the first respondent became suspicious of the applicant's activities, she lodged a complaint with the prosecution authorities. Once

the first respondent did not derive joy from the prosecution authorities, she sought to pursue alternative methods of protecting her rights by way of a civil action. The applicant chose a career which involves not only dealing with the members of the public but also, so it appears on basis of evidence on record, dealing with funds belonging to the members of the public. When members of the public register dissatisfaction about an unsatisfactory service, the applicant should be slow to complain that the protected terrain of his right to dignity is being violated.

[41] The issues determinable on basis of the evidence are simple and straightforward and these are that the first respondent entrusted an amount of R 230,000-00 to the applicant to invest on her behalf; that the applicant failed to give a proper account to the first respondent of the investment of those funds; that this conduct on the part of the applicant was enough to justify a suspicion that the applicant may have misappropriated the funds entrusted to him and because of such conduct the first respondent was justified in having acted in the manner she did. It is on this basis that I conclude that the applicant has failed, in my view, to establish a clear right which the respondents could have violated.

[42] In his Notice of Motion, the applicant seeks an order restraining the first respondent on the terms as set out in the Notice of Motion. As for the order sought in terms of prayer 1 of the Notice of Motion, and as correctly submitted by *Mr Barnard*, the prohibition sought, unqualified as it is as to time and its operation, would cover all future conversations between the first respondent and the general members of the public, and in my view, would in no doubt constitute an unreasonable and unjustifiable limitation of the first respondent's right to freedom of expression. It is thus my view that the applicant failed to discharge the *onus* resting on him that the effect the limitation would have on the first respondent's right to freedom of expression would be reasonable and justifiable. These observations apply, *mutatis mutandis,* to the orders sought in terms of prayers 2 and 3 of the Notice of Motion.

[43] The law pertaining to the granting of final interdicts was settled as far back as the beginning of the 20th century in *Setlogelo v Setlogelo* 1914 AD 221 at 227 where Innes JA, as he then was, observed:

> "The requisites for the right to claim an interdict are well-known; a clear right,

> injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy."

In order to be afforded a final interdict as a form of relief, the applicant, in terms of this authority, must show and establish a clear right; that he has suffered an injury or there is a reasonable apprehension that an injury would be suffered and that there is no other alternative remedy available to him. In the instance of this matter an alternative action for damages is available to the applicant and this is one of the options which the applicant should have pursued as opposed to the relief he seeks in terms of the Notice of Motion. Furthermore, there is no evidence on record to suggest that the incidents which the applicant is complaining about are being committed on an ongoing basis to justify the kind of relief which the applicant seeks in terms of the Notice of Motion.

[44] In summary, it is my considered view that the applicant, based on evidence on record, failed to make out a case for the relief sought in terms of the Notice of Motion. Even if I am wrong in this conclusion, the orders sought by the applicant, in the form they are currently couched, would have an unreasonably curtailing effect on the respondents' right to freedom of

expression as guaranteed in section 16 of the Constitution and, as has already been pointed out in the preceding paragraph, the applicant had another ordinary remedy available to him which he could pursue.

[45] It is thus my considered view that the applicant failed to make out a case for the relief sought in terms of the Notice of Motion. In the result I make the following order:

[45.1] The application is dismissed.

[45.2] The applicant is ordered to pay first and the second respondents' costs on a party and party scale, duly taxed or as agreed.

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NJ Yekiso, J