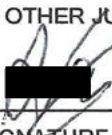


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022-022689

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2025/02/17	
DATE	SIGNATURE

In the matter between:

JW

Applicant

and

BT

Respondent

Summary

Contract – contractual force of undertaking – undertaking binding on respondent – law of defamation – recognised defences applicable to undertaking not to defame applicant but defences not established – application to enforce undertaking granted

JUDGMENT

FRIEDMAN AJ:

- [1] What makes this case unusual, at least to me, is time. It relates to events which took place in early September 2022. It was launched in the ordinary course, but it appears to have been the applicant's intention (as reflected in the founding affidavit) to have the matter heard relatively quickly. For whatever reason, it came before me only in October 2024. It seems relatively obvious to me that, at this stage, it really is simply a fight about costs.

- [2] In 2022, the respondent sent a WhatsApp text, and two pieces of correspondence (one a letter from his attorney, sent on his instructions, and one an email which he wrote himself), which defamed the applicant to his senior colleagues at the law firm where the applicant works as a conveyancer in his capacity as a director of the firm. Because, as I explain later, I have taken steps to conceal the identities of the parties in this public judgment, I shall describe the applicant's law firm simply as "the firm" below.

- [3] The respondent is an estate agent operating in Johannesburg. It seems to be common cause that, for some time, he enjoyed an amicable relationship with the applicant and sent the applicant and the firm a sizeable amount of conveyancing work. Things appeared to have soured when the applicant commenced a relationship with the respondent's now ex-wife ("Ms T"). It is not entirely clear to me from the papers whether the relationship between the respondent and his then wife had already broken down by the time that the applicant and Ms T began their relationship. Nothing much turns on that, because, either way, the respondent was clearly aggrieved by aspects of the relationship, which led him to send the communications described above.

- [4] The main issue in this matter is whether the applicant is entitled to an order for specific performance arising from an undertaking given by the respondent, via his attorney, in correspondence. The founding papers in this matter are, if I may say so, cleverly drawn. Instead of seeking a classic interdict, whether interim or final, on the basis of the respondent's conduct, the cause of action is unequivocally founded in contract. Although the applicant says that his pleaded facts also satisfy the requirements of a final interdict, the focus on the undertaking

helps the applicant avoid the relatively onerous test applicable to interdicting speech in advance (the so-called prior restraint). In 2022, when the tempers were clearly heated and the applicant wanted quick and simple relief, the strategy was particularly inventive. Because of the lag between the various communications, and various other aspects of the case, an urgent application would have been unlikely to succeed. But the specific performance relief reflected a sensible mechanism to obtain what, in substance, is an interdict preventing the respondent from defaming the applicant.

[5] Now, almost three years after the first incident which led to this application, there is nothing in the papers dealing with anything which has happened since 2022. I have to assume – and sincerely hope – that tempers are not quite so frayed after this significant passage of time. This led me to question counsel on both sides about the purpose of ventilating the dispute at this stage.

[6] I raised this issue with counsel because the substantive difference between this application and a classic application for an interdict is subtle. And, in the back of my mind (unduly influenced, perhaps, by the interdict paradigm), I was concerned about the appropriateness of court intervention. In particular, whether the long passage of time diluted the applicant's interest in preventing the respondent from causing ongoing harm.

[7] Counsel on both sides seemed to share the view that it is not for me to speculate about developments not on the papers, and why the applicant persists in this application after all of this time. Despite my initial puzzlement at the circumstances, I agree with them. Even if the only interest which the parties retain in the matter is the issue of costs – and I hope that this is so, because it will mean that the underlying dispute has either been resolved, or become far less important to the protagonists through the passage of time – they are entitled to the resolution of the contractual dispute on the papers as they stand.

The communications and the undertakings

[8] It is necessary to deal with the communications which gave rise to the undertakings, and their aftermath, in some detail.

- [9] It is common cause that, on 10 April 2022, the respondent sent a WhatsApp communication to the managing director of the firm. The WhatsApp message enclosed a photograph of the applicant without his shirt on in what I might describe as a mildly controversial, but certainly not shocking, pose, together with the caption: “[t]his is the man u [sic] have working for u [sic]”. It seems that the respondent also sent the WhatsApp message, or just the photo, to Ms T together with a message informing her that he had sent it to the managing director (who he described as the applicant’s boss) and saying that “karma was coming” for the applicant and Ms T. On the same day, he sent a further text message to Ms T describing her and the applicant as evil, and once again, mentioning karma. (I should note that, although these messages were mentioned for the first time in reply, the respondent did not take any overt steps to dispute the applicant’s entitlement to rely on them. In fact, they also featured in the applicant’s heads of argument and, although the respondent disputed the applicant’s right to rely on the replying affidavit in an entirely different context, there was no suggestion that the reference by counsel to these texts was impermissible, or that the texts were not sent.)
- [10] On 22 April 2022, the applicant’s attorney wrote to the respondent. The letter (“the letter of demand”) is lengthy and there is no need to discuss it in any detail. In summary, it sought undertakings from the respondent in relation to the WhatsApp message, and asserted various rights arising from the Protection of Personal Information Act 4 of 2013.
- [11] In addition to these issues, the letter of demand itemised a series of communications, defamatory of the applicant, which the respondent was said to have despatched to Ms T and various other people in the past. The letter of demand recorded that the list was not exhaustive and accused the respondent of having made an “abundance” of grossly defamatory comments about the applicant. The letter sought an “unequivocal undertaking that you shall not in any manner disseminate any communication and/or material, both written and verbal, which is insulting and/or defamatory and/or untrue and/or malicious toward” the applicant. The letter gave a deadline of about 5 days later, by which the undertaking was demanded, and informed the respondent that the applicant

would approach the High Court for an interdict, if the undertakings were not given.

- [12] Roughly 24 hours after the expiry of the deadline, the respondent's attorney replied to the letter of demand (this was on 28 April 2022). I describe the response as "the 28 April letter" below. The 28 April letter is also lengthy and, as in the case of the letter of demand, it is unnecessary for me to discuss it in granular detail. But there are certain aspects of it which bear emphasis.
- [13] First, it was addressed not only to the applicant's attorney but, once again, to the managing director of the firm.
- [14] Secondly, it was copied to the chairperson of firm, who does not appear to have been party to any of the previous communications.
- [15] Thirdly, the letter referred to the professional relationship enjoyed between the respondent's estate agency and the firm. In essence, the letter sought to link what it described as inappropriate conduct of the applicant to the professional relationship between the estate agency and the firm, by accusing the applicant of various forms of misconduct (such as being drunk at company functions hosted by the estate agency "and possibly under the influence of narcotics"). It went further, and accused the applicant of commencing a romantic relationship with Ms T. The letter accused the applicant of commencing this relationship while the respondent and Ms T were married, but it is not fully clear from the letter whether the respondent and his wife were still in a romantic relationship at that stage, or whether their marriage had already irretrievably broken down. This issue is not addressed in the papers, and I do not address it further.
- [16] What is clear from the letter is that the respondent made various other allegations, through his attorney, which went beyond the topic of the professional relationship between the firm and the respondent's estate agency. He complained about the nature of the romantic relationship between the applicant and Ms T, raising issues which were relevant to the conduct of that relationship outside of the work environment and the implication of that relationship for the respondent's minor children. In short, the respondent accused the applicant and Ms T of behaving inappropriately in relation to their sex life, in a way which was

affecting the minor children negatively. He also accused the applicant of being a risk to his minor children because he was a “dronkie” and “wild on booze”.

[17] Fourthly, the 28 April letter made allegations about the applicant being constantly inebriated and commented on his “lifestyle” in the context of denying that the applicant’s health problems (to which his attorney had referred in the letter of demand) were caused by the respondent’s conduct. The letter implied that the applicant’s unhealthy lifestyle, which included substance abuse, was the cause of his health problems.

[18] Fifthly, having made all of these comments, the 28 April letter said the following:

“Entirely without prejudice to his rights and without admitting liability, our client hereby gives an undertaking that save for the purposes that the law permits, such as giving evidence relating to the complaint, be it at a forum established your firm or the Legal Practice Council or in a court of law, he shall not disseminate any communication and/or material which is defamatory toward your client.”

[19] Other undertakings were given in the 28 April letter. However, because they are not relevant to the cause of action in the present application, I do not mention them further. For the remainder of the judgment, I refer to the undertaking in the singular and intend, in doing so, to refer only to the undertaking reproduced in paragraph [18] above.

[20] On 3 June 2022, the applicant’s attorney responded to the letter of 28 April 2022 which I have just summarised. There is no explanation on the papers as to why the response took so long. In any event, once again I merely provide a brief summary of the salient features of the letter (which I describe as “the 3 June letter” below).

[21] First, the applicant expressed the view that the letter was copied to the managing director and the chairperson of the firm solely to embarrass and humiliate the applicant. Secondly, the letter recorded that the applicant and his legal representatives had conducted a thorough investigation of all of the allegations in the 28 April letter and they were all “demonstrably false”. However, the letter recorded that the applicant sought to de-escalate the matter and had elected not to address those allegations at that stage. Thirdly, the 28 April letter had sought undertakings from the applicant on the basis that the respondent also accused

the applicant of having defamed him in the past. The 3 June letter denied these allegations, but undertook on behalf of the applicant, “solely in the interests of bringing this matter to a close”, not to disseminate in public defamatory and untrue material or statements concerning the respondent.

[22] Fourthly – and this is the most important part – the 3 June letter recorded that, despite the undertaking in the 28 April letter “which undertaking our client notes”, the respondent had “disseminated further untrue and defamatory utterances to third parties”. This was described as unacceptable. For this reason, and because the undertaking in the 28 April letter “do[es] not accord with those demanded per our letter dated 22 April in full”, the respondent was given a “final opportunity” to avoid costly litigation by providing the full undertakings sought in writing. A deadline was given and the formulation of the undertaking sought was annexed to the letter.

[23] Lastly, the 3 June letter concluded by saying that, in the event that the respondent defamed the applicant “in any way in future, or fails to provide the full undertakings demanded above”, the applicant would not hesitate launching proceedings in the High Court.

[24] On 7 June 2022, the respondent responded (via his attorney). In the response, the respondent sought to justify the fact that the 28 April letter had been copied to the managing director and the chairperson of the firm on the basis that the applicant “was at all times representing your firm in his interactions with [the respondent and his estate agency] and thus served as an extension of your firm”. It was said that the applicant’s conduct was of such a serious nature that the respondent believed that it was appropriate to bring the conduct to the attention of the people in charge of the firm.

[25] The most important part of the letter, for present purposes, is that, having disputed the allegations in the 3 June letter, the respondent’s attorney recorded that the “undertakings already furnished are more than sufficient”.

[26] On 30 August 2022, the respondent himself (ie, not via his attorney) addressed an email (“the 30 August email”) to the attorney representing Ms T in the divorce proceedings between the respondent and Ms T which were pending at the time.

The 30 August email was copied to Ms T, the applicant, the managing director and the applicant's attorney of record. I should point out that the attorney representing Ms T was also employed by the firm.

[27] The 30 August email forms the basis of the applicant's cause of action in this case. It would hopefully be helpful, therefore, if I quoted it in full (the reference to Johann being, as I think I have made clear, a reference to Ms T's attorney of record):

"Dear Johann

I believe you are looking for me urgently. I am happy for you to contact me directly with regards to [Ms T's and the applicant]'s behaviour and damage they have done to my kids as well as [the applicant's] family and my business. Please note I am not harassing her. I can assure you that in fact it is the other way around. I have asked to clarify the Parenting coordinator, which she has ignored numerous times. My kids are emotionally distraught with all the upheaval caused by their conduct. In fact my youngest child has asked to see a "head doctor" this [sic] has been totally ignored by [Ms T].

There is clearly a conflict with your company representing [Ms T and the applicant]. I will not be bullied by you, [the applicant] or [the firm] and my rights remain reserved.

[Ms T] has refused for the kids to seek help numerous times. I have begged pleaded and even asked the school to get involved. She has completely ignored this. With this I feel she is not fit to parent my children. She has attempted suicide numerous times, has been admitted for substance abuse and had a full on affair with [the applicant] with all her clothes off in a car in front of my youngest child. Her and [the applicant] were also unable to walk while he dropped her off outside my house and she witnessed this behaviour. [The applicant] drove home after this which is totally against the law. All of this builds my case for her not being fit to be a parent. The "number" of messages trying to find out what we can do to assist the kids and harassment is not true. I have simply asked her for an answer. She has not responded. [The applicant] and her have threatened me with numerous lawyers letters all of which have been empty threats. Once again trying to bully me.

[Ms T] has also promised us that we will get our items back and still has not returned any of them. She ignores our messages and won't even respond to my mother's calls for her sentimental items that belong to her. If she isn't prepared to return our goods what other choice do we have other than report her for theft?

My children also do not like [the applicant] due to his behaviour and drunken escapades including arriving in the middle of the night drunk and screaming outside my kids rooms. They have told me this and [Ms T] refuses to allow us to address this with health care professionals. He is a bad influence on them and they hate that he smokes in front of them. He has been so drunk at times that he hasn't been able to walk in front of them. I have witnessed this myself. This is not in the children's best interest.

If I continue to be harassed by your firm and the clear bullying from [the firm] I will have no choice but to take [the applicant's and the firm's] conduct to the law society and press. We all know that [the applicant and Ms T] have acted in poor faith and I reserve my rights.

I will not be threatened any longer by you, your firm or them. My suggestion is that you get the PC involved asap.”

[28] The present application was launched roughly one week after the respondent sent the 30 August email.

Is the respondent bound by the undertaking?

[29] The respondent's main defence to this application is to say that he is not bound by the undertaking because it reflected an offer (as understood in the law of contract) which was not accepted by the applicant. It is a defence based on the trite proposition that, before consensus (and therefore a binding agreement) could be said to have arisen in the law of contract, there has to have been an offer and that offer has to have been accepted.

[30] The reason why this issue arises is because, when the undertaking was given, the applicant took the view that it was insufficient. The 3 June letter therefore “noted” the undertaking, but then proceeded to express the view that it was inadequate, and to give the respondent a further opportunity to agree to the fuller undertaking sought by the applicant. According to the respondent, this shows that the applicant never accepted the undertaking in the form in which it was given, and that it could not, as a result, be binding on the respondent.

[31] *Mr Bester* and *Ms Bosman*, who appeared for the applicant, referred me to the case of *Be Bop A Lula Manufacturing*.¹ The case concerned the question of compromise in the contractual setting, and not the contractual force of an undertaking. However, the Supreme Court of Appeal (“SCA”) made the point, helpful to our case too, that “[a]lthough, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably

¹ *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA). I can assure the parties that I have not referred to this case only for the pleasure of being able to write its name in a judgment. That is, though, a very happy collateral benefit.

entitled to assume from the words or conduct of the other that they were in agreement.”²

- [32] The facts of that case are also instructive despite dealing with the different topic of compromise. The appellant’s representative had written a letter suggesting a mechanism to settle a dispute about payment for t-shirts of disputed quality. Having done so, he had then actioned the suggestion by sending a cheque marked “in full and final settlement” on it. For any reader of this judgment younger than 45, a cheque was an instrument of payment which essentially constituted a pre-printed small document, issued by the account holder’s bank, which conveyed an instruction by the account holder to transfer the sum recorded on the cheque into the account of the person named on the cheque. There was a time when the use of cheques as a method of payment was a common feature of commerce around the world. Like so much of value, whether real or perceived, they have largely been consigned to the dustbin of history (at least in South Africa, where they were an easy target for fraud).
- [33] One of the respondent’s employees deposited the cheque in the ordinary course of his responsibilities (and without consulting his employer). When the relevant senior representative of the company discovered this, he immediately wrote to the appellant to record that he did not accept the payment on the terms suggested by the appellant. He invited the appellant to stop the cheque, after which the respondent would sue the appellant for what it considered to be owing to it (having rejected the lesser amount unilaterally paid by the appellant). Although the respondent recorded that, in the event that the cheque could not be stopped, the money would be placed in trust pending the finalisation of a future dispute in which the respondent claimed the full sum it said was owing, the money was in fact spent for the benefit of the respondent. The SCA held that, by spending the money, the respondent accepted the compromise and the full and final settlement of the dispute. It was, as a result, precluded from claiming anything further.

[34] Although the facts are superficially different, I find the SCA's treatment of the case apposite here. There is no doubt that the respondent expressly recorded that it did not accept the payment as settlement on the terms offered by the appellant. In that sense, the lack of express consensus was far starker than in our case. While the applicant in our case "noted" the respondent's undertaking, the respondent in *Be Bop A Lula* expressly rejected the offer in writing. This is what led two courts (the trial court, and the full bench on appeal) to conclude that the parties were not in true agreement about the status of the payment. However, the more nuanced approach (with respect) of the SCA focused on the facts as a whole, and the fact that, ultimately, the respondent kept the money. Therefore, although the express interactions between the parties suggested that there was no true agreement, the facts as a whole suggested that there was.

[35] Here too, it is true that the applicant, in responding to the undertaking, did not simply say "yes, thank you, I accept it". However, sight should not be lost of the context in which the undertaking was given in the first place. The undertaking was given in response to a letter from the applicant's attorney in which the applicant took issue with the respondent's first salvo, which took the form of sending the WhatsApp image to the managing director coupled with text intended to diminish the applicant's reputation in the eyes of a senior colleague. Amongst various other issues, including relating to the WhatsApp text and image conveyed with it, the applicant's attorney referred to previous defamatory material disseminated by the respondent about the applicant and Ms T. He then expressly threatened litigation if the respondent did not undertake to desist from defaming the applicant any further.

[36] So, if one cuts away the additional issues raised in the correspondence, what clearly happened was:

- The respondent sent the WhatsApp text and image after, on the applicant's version, previous incidents in which he had defamed the applicant.

- As a result, the applicant sought an undertaking that the respondent would desist from defaming the applicant, failing which litigation would be launched.
- The undertaking (packaged, it has to be said, together with a range of other defamatory allegations) was given.
- No litigation was instituted against the respondent arising from the WhatsApp image and accompanying text. The applicant did, however, request an even better undertaking, and threatened to litigate if it was not given.
- The respondent refused to give the better undertaking, but repeated the original undertaking.
- No litigation was instituted by the applicant against the respondent arising from any communications up to, and including, the communication which repeated the original undertaking and declined to give a better one. It is reasonable to draw the inference that, if the respondent had not sent the 30 August email (or defamed the applicant in any other way), no litigation would ever have been launched.

[37] This series of facts suggests to me that the undertaking was, as a matter of fact, accepted by the applicant. That he wanted further undertakings, does not change this. The difficulty in the respondent's approach, especially in argument, seems to me to be the following: he wishes to carve up the communications into discrete pieces, and argue that there was no consensus on the terms of the undertaking because of a series of offers and counteroffers in respect of which the parties never met one another. In other words, he subjects the correspondence to the same granular analysis which one might expect in the context of complicated commercial negotiations. He then concludes that because there was no precise, and express, agreement on the exact parameters of the undertaking, there was no contractual consensus.

[38] But this does not seem to me what the law, reflected for instance in *Be Bop A Lula*, has in mind in this context. What is required, instead, is to look at the facts

as a whole, and determine what the parties intended. It seems to me that, when it comes to the state of mind of the respondent, the most important consideration is the insistence, in response to the 3 June letter, that the initial undertaking given on 28 April was “sufficient”. The applicant’s state of mind in response to this email is then best demonstrated by his failure to reject the undertaking by launching litigation.

[39] I appreciate, of course, that the facts are rough around the edges. I appreciate that, for instance, the insistence by the applicant on a better undertaking, coupled with a written annexure to the 3 June letter setting out the wording of the demanded better undertaking, is evidence that the applicant was not entirely satisfied by the initial undertaking. If the facts were not debatable, at least to an extent, it would not be necessary for me to address them in this detail. But that is precisely why, in my view, we have to look at the overall picture. A helpful way of looking at it, in my view, is to put oneself in the position of the respondent, having received the 3 June letter, and then having instructed his attorney to send the response of 10 June 2022. One then asks: could the respondent reasonably have believed that, in the light of the contents of the 3 June letter, and then his response, he was entitled to persist in defaming the applicant in conflict with the terms of the “sufficient” undertaking which he had given on 28 April? The answer must clearly be no. And, since this exercise is objective, not subjective, the actual understanding or belief of the respondent when sending the email on 30 August is not decisive (at least on the question of breach).

[40] *Mr Van Nieuwenhuizen*, who appeared for the respondent, referred in argument to cases such as *Consolidated Frame Cotton Corporation*,³ as authority for the proposition that an undertaking must have been made, and accepted, *amino contrahendi* (ie with the intention to create a binding contract) before it is enforceable. In particular, he cited that case (and others) as authority for the proposition that, unless the respondent had signed the written formulation annexed to the 3 June letter, no undertaking (in the form reflected in the 28 April

letter or in the rejected form reflected in the unsigned annexure to the 3 June letter) could be said to have been accepted by the applicant as binding.

[41] With respect, I think this is a misunderstanding of the case law. *Consolidated Frame Cotton*, as pointed out by *Mr Bester*, was mainly concerned (and certainly in the part on which *Mr Van Nieuwenhuizen* relied, was concerned) with the difference between moral and legal obligations.⁴ The court made the point that even if a statement is couched as an undertaking, it might not have been made with the intention of giving rise to a contractual obligation. An example which is a good illustration of this, is an “undertaking” made during the course of political negotiations. A leader of a political party might tell a trade union leader, for example, that “I undertake to introduce legislation to protect workers’ rights as soon as I am elected President, on condition that your union supports my candidacy.” In the ordinary course, one would not expect either party to view such an undertaking as legally binding. Were the party leader to renege it could have moral or political consequences – such as losing the support of the trade union in the future – but would not give rise to a legal cause of action.

[42] In no sense, could the correspondence in this matter be viewed in that way. Self-evidently, the formulation of the undertaking on 28 April was designed to prevent the realisation of the threat of litigation. Almost by definition, it had to be actionable (at least, in principle, and subject to the debate on consensus, which is a different debate) because otherwise it would be meaningless. A “moral” promise not to defame the applicant would not have added any value to the stand-off between the parties. This does not mean that, on ordinary contractual principles, the respondent was precluded from arguing that there was no binding agreement. However, having failed on that score (for the reasons I have given above with reference to *Be Bop A Lula*), the *Consolidated Frame Cotton* line of cases does not assist the respondent.

[43] Before concluding this discussion, I should point out that, as I understand the answering affidavit, the respondent sought to make something of the fact that he gave the undertaking after the expiry of the deadline given in the letter of

demand. It is not entirely clear to me what the respondent wished to make of this state of affairs. It cannot be relevant to the legal status of the undertaking because it was the undertaking which was the offer, and not the letter of demand. Since *Mr Van Nieuwenhuizen* did not seek to make anything of the supposed expiry of the deadline, I need not say anything further about it. I simply mention it as a form of assurance to the respondent that I have had thorough regard to his version in the answering affidavit in reaching the conclusion that he is bound by the undertaking.

The role of defamation, and the defamation defences

[44] The respondent's alternative argument kicks in if I find, as I have, that the undertaking is enforceable. The alternative argument is located in the law of delict. The respondent points out that, in terms of the undertaking, he was permitted to disseminate material which is defamatory of the applicant in circumstances that the law permits. He argues, as a consequence, that he is entitled to raise defences which apply to the law of defamation as a basis of showing that his statements were lawful. In this case, he relies on the defence of qualified privilege.

[45] In my view, the proper interpretation of the scope of the undertaking is not straightforward. There is a decent argument that, when regard is had to the text of the full paragraph reflecting the undertaking, the normal defences available under the law of defamation are not applicable. There is a plausible argument that the references to "the giving of evidence relating to the complaint" and "a forum established by your firm or the Legal Practice Council or in a court of law" serve to contextualise the statement "for the purposes that the law permits". This approach would limit the defence to statements made during the giving of evidence (or similar settings) in one of the contexts in which the respondent might have sought to ventilate his grievances against the applicant.⁵

⁵ This would involve the application of the *eiusdem generis* tool of interpretation in which the phrase "purposes which the law permits" would have to be interpreted as being in the same category as the expressed examples in the text. This is, under our modern approach to interpretation especially, simply an application of the contextual approach to interpretation – see for example *Katha v Pillay* NO 2024 (1) SA 159 (GJ) at paras 13-15.

[46] I might be wrong about this, and most reasonable lawyers might conclude that the approach favoured by the respondent is correct. Either way, it is not something with which I need to grapple any further. *Mr Bester* made it clear, during argument, that the applicant accepts that the respondent is, in principle, correct that he may rely on defences applicable in the law of delict. It is therefore unnecessary for me to consider the alternative interpretation of the undertaking. I proceed from the premise that, in principle, the respondent is entitled to argue that his communications in the 30 August email were subject to the qualified privilege and therefore permitted by law.

[47] So, the question is whether the 30 August email was privileged as understood in the law of defamation. To understand the respondent's version of what made the communication privileged one must read the answering affidavit together with certain annexures to the founding affidavit on which the respondent relies. If I understand the respondent's argument, it is that the managing director had a right to be told, and the respondent had a concomitant obligation to inform him, of the facts discussed in the 30 August email because of the following considerations.

[48] First, the respondent says that, in 2021, the managing director wrote to the respondent, on behalf of the applicant, warning him to desist from defaming the applicant. This issue is not ventilated in detail in the papers, but the annexure to the founding affidavit on which the respondent relies to make this allegation appears to corroborate what he says. I do not, furthermore, understand the applicant to have denied this in the replying affidavit.⁶ The respondent does not explain why he says that the fact that the managing director previously wrote to him on behalf of the applicant is relevant to whether the privilege attaches to the 30 August email. I should perhaps generously infer that his point was that the managing director was part of the applicant's collection of instructing attorneys in the dispute with the respondent.

⁶ The replying affidavit does not follow a paragraph-by-paragraph style of response, so there is no direct denial or admission of the relevant paragraph of the answering affidavit where the respondent made this allegation. However, there is nothing in the replying affidavit disputing this point, unless I have missed it.

[49] Secondly, the respondent relies on the fact that, according to him, there were still conveyancing briefs held by the firm in relation to the estate agency's work at the time when the 30 August email was sent. This factual premise also does not appear to be in dispute. Based on this common-cause fact, the respondent argues that the managing director had an interest in receiving what, in essence, the respondent characterises as a complaint about the professional conduct of the applicant. The respondent suggests in his answering affidavit that the applicant's conduct – in particular, as I understand him, the conduct of attending estate agency events while drunk – had the risk of damaging the respondent's estate agency business. He frames the 30 August email as, in substance, a complaint to the managing director about the conduct of one of his employees.

[50] Thirdly, the respondent says that he had the bona fide belief that the managing director needed to receive the information contained in the 30 August email in order to protect the best interests of the respondent's minor children. It is perhaps best for me to quote the respondent's explanation in full. He says that the managing director is the "managing director of a firm of attorney, officers of the court, the upper guardian of my minor children, and has the ultimate responsibility that his firm, when representing parties in matters where minor children are involved, that the best interests and rights of the minor children are protected and given effect to". He says that he honestly thought that sending the email to the managing director was the right thing to do in the circumstances.

[51] *Mr Van Nieuwenhuizen* did not, in argument, seek to develop the case of qualified privilege in any detail. He repeated, in summary form and with different emphasis, the facts on which the respondent relied in his answering affidavit as the basis for asserting the privilege (ie, those which I have discussed above). He then submitted that these facts constituted a "factual matrix from which a relationship has been established that qualified privilege is permitted in law [sic]". The only authority cited for this proposition was *Botha v Mthiyane*,⁷ in which a series of examples are given by Claassen J of relationships which could give rise to the privilege – ie, in support of his statement that the "relationship in existence between the parties often determines whether a privileged occasion may exist

entitling the defamatory communication to take place". It is not clear to me which one of the examples given by Claassen J is said by the respondent to apply.⁸ Perhaps, in fairness, the answer is none and the respondent, rather, seeks to argue that the nature of the relationship will determine, on the facts of each case, whether communications are privileged.

[52] I accept that, in principle, the relationship between the parties may give rise to the conclusion that certain defamatory communication between them should be treated as privileged. I am also prepared to accept that, in principle, a person in the position of the respondent would be able to communicate concerns relevant to the business relationship between his estate agency and the managing director's firm of attorneys (and the chairperson, for that matter) to ask for intervention to address problems in that relationship. So, had the respondent written to the managing director (and/or the chairperson) only to raise complaints about the applicant's conduct which were relevant to the business relationship, the communication may well have been privileged.

[53] Even then, the conclusion would turn on the way in which the complaint was framed, the way in which the conduct of the applicant was linked to the business relationship and so on. It could also turn on the question whether a superficially reasonable complaint was, in fact, made maliciously. But, certainly in principle, it is not hard to imagine the privilege applying in that context. Furthermore, as I have shown, in the respondent's own correspondence he touches on some issues which *are* relevant to the professional relationship. For example, whether true or false, clearly one can imagine that the applicant arriving at an estate agency function while drunk, could damage the respondent's business. It is true that, even in those cases, one would need more detail. Who was present? Just employees of the estate agency and the firm, or clients too? Who noticed that the applicant was drunk? What were the implications of the applicant being drunk? But one can see how, depending on the way in which they were

⁸ The examples given by Claassen J at para 73 are (a) between a father and daughter concerning the betrothed (b) the relationship between members of a voluntary association concerning the inappropriate conduct of a member (c) the relationship between members of a church council concerning the conduct of a minister (d) the relationship between parents and a school concerning the ability of a teacher and (e) the relationship between members of the public and a public professional body with regard to complaints of professional misconduct.

expressed, the managing director might have had an interest in, and a duty to investigate, allegations of this nature about one of his co-directors.

[54] The problem for the respondent is that his 30 August communication (and those which preceded it, which, while not directly serving as the applicant's cause of action, provide the context in which the 30 August email must be understood) was not framed to focus only on the professional relationship between the firm and the estate agency. On the contrary, the 30 August email was not even addressed to the managing director, and on its own terms its main purpose was to raise issues with Ms T's attorney (albeit that he was from the same firm) about the pending divorce proceedings between the respondent and Ms T. The email contains a series of allegations about the applicant which, like the 28 April letter, focus on his alleged sexual conduct with Ms T, his alleged alcohol abuse, and the implication of these allegations for the respondent's minor children.

[55] The reason why I refer to the prior letter of 28 April is because, in my view, that letter is not only relevant to the scope of the undertaking given by the respondent. It is also relevant to the overall picture conveyed by factual developments starting with the WhatsApp message on 10 April 2022. The entire chain of correspondence and conduct on the part of the respondent, culminating in the email of 30 August, conveys a course of action in which the respondent conflated complaints relevant to his business, complaints relevant to his children, and general complaints relating to the relationship between the applicant and Ms T, in one rolling series of statements. The narrative is that the applicant and Ms T are people who behave inappropriately in relation to sexual conduct (in ways which implicate the well-being of minor children), the applicant has a problem with alcohol which has caused him to behave inappropriately both at work (or work functions, at least) and outside the office, Ms T and possibly the applicant have substance-abuse problems and that both the applicant and Ms T are not a good influence on the minor children.

[56] When one views the communication in this way, which is what the evidence establishes, one sees that this was essentially a scattergun approach, in which the respondent sought to raise all of his complaints against the applicant (and, to a large extent Ms T too, although that is less relevant to this litigation) in one

forum, which took the form of the managing director of the firm (and, on one occasion, the chairperson), in addition to people who had a clearer interest in receiving the communication. Each part of the communication might not have been unlawful (as understood in the law of defamation) if it had been isolated, and sent only to appropriate recipients. So, the email of 30 August might not have been actionable if sent only to Ms T's attorney (although even that is debatable, and I do not intend to enter into that debate here). And the 28 April letter might not have been actionable if it had been sent only to the applicant and his attorney of record. But the scattergun approach of the respondent cannot be protected as privileged, because it was designed to besmirch the applicant in a way which transcended the individual relationships and circumstances (ie, the professional relationship, the relationship between the applicant and the respondent's minor children and so on).

[57] Another way to approach the issue is to ask: why does our law recognise the privilege in the context of relationships in the first place? It is because it is sometimes necessary for person A to defame person B to person C, in order for appropriate action to be taken. If, for example, a person could not tell the headmistress of a school that his daughter had complained of being the subject of sexual harassment by a teacher without fear of being sued for defamation, then there would be inadequate protection for the rights of the daughter. So, of course it may be necessary, in some circumstances, for a client of a law firm to complain to the managing director of the conduct of one of his or her employees. But the way in which the respondent raised his complaints provides a great example of the limits of the privilege. Simply put, the managing director had no legal or professional interest in being told that, on the respondent's version, the applicant has behaved inappropriately in his sexual conduct with Ms T. He also had no legal or professional interest in being told that, on the respondent's version, the applicant engaged in "drunken escapades including arriving in the middle of the night drunk and screaming outside my kids [sic] rooms".

[58] We must be very careful, in my view, to distinguish between a legal interest in receiving information and the term "interest" as it is understood colloquially by the man or woman on the street. It could always be said that an employer has

an “interest” in the conduct of her or his employees. Is it not true that any managing director would be interested (and probably concerned) to hear about an employee’s “escapades” (whether drunken or sexual)? One could even stretch the logic further to say that a managing director, especially of a law firm, has an ever-present interest in being told facts relevant to whether the lawyers employed by his firm are fit and proper persons.

[59] But this would be wrong, certainly as far as the privilege is concerned. The managing director of a law firm does not have a roving power to police the conduct of the attorneys employed by the firm. Armed with the facts set out in the email of 30 August, there was no lawful step which the managing director could take, justifying the need to protect the communication with the privilege. He could not, for instance, legitimately call the applicant into his office and question him (or, in due course, discipline him) about alleged sexual or drunken escapades in the privacy of his own home. He could not lawfully intervene by compelling the applicant to take certain steps in relation to the respondent’s minor children.

[60] I should say, on this topic, that it is somewhat disconcerting to read the answering affidavit and to discover that the respondent’s attorney appears to have emboldened him to suggest that the managing director had some sort of duty, arising from the Children’s Act 38 of 2005, to protect the best interests of the respondent’s minor children. Even the salutary goals of the Children’s Act do not impose such a far-reaching duty on attorneys such as the managing director. A person in the position of the respondent, concerned for the well-being of his children, has a range of ways – arising from that Act, rule 43 of the Uniform Rules, the common law, and other sources – to protect them. Those mechanisms do not include corresponding with the managing director of a law firm, and implying (because this was never expressly said) that he should intervene in some way by interfering in the private life of one of his co-directors, or with the professional relationship between another attorney at the firm and one of his clients (in this case, Ms T).

[61] Simply put, alleged moral misbehaviour of an attorney outside of the narrow scope of the employment relationship is not the proper subject of a complaint to

a managing director of a law firm. Or, to express the principle in way which is useful in the context of this case: a person who wishes to make a complaint about the moral misbehaviour of an employee, unrelated to his or her duties, to his employer may not use that complaint as a vehicle to defame the subject of the complaint. If he or she does that, his or her conduct is actionable and the defence of the privilege will not succeed.

[62] In my view, therefore, the respondent's defence of qualified privilege must fail.

[63] This is not the end of this issue, however, because the respondent argues that, in any event, there is a dispute of fact as to whether he is entitled to rely on the privilege. He says that, based on the respondent's answering affidavit, a factual matrix has been established to support the privilege. The respondent argues that, at the least, there is a dispute of fact on the question whether this factual matrix shows the application of the privilege, which prevents the applicant from succeeding in motion court.

[64] In support of this argument, *Mr Van Nieuwenhuizen* referred to the decision of the SCA in *Tau*.⁹ Although it is not entirely clear to me, it seems that he relies on the decision as authority for the proposition that where a party has established a factual foundation for a ground of justification, it should not be rejected in motion court.¹⁰ That case is, however, distinguishable in two respects. First, the issue in *Tau* was whether a final interdict ought to have been granted in circumstances in which it had the effect of precluding the appellant from raising and proving certain defences in the pending trial. The SCA held, in this context, that it was inappropriate for the court below to have granted a final interdict when, at best, only an interim interdict could competently be granted at that stage. Secondly, in that case, the ground of justification turned on the leading of evidence at the pending trial, because the appellant wished to lead evidence of the political context in which the allegedly defamatory statements were made. So, the decision of the court below had the effect of pre-empting an issue which had to

⁹ *Tau v Mashaba* 2020 (5) SA 135 (SCA).

¹⁰ See *Tau* above n 9 at para 25.

be resolved by the leading of evidence, by making a final finding which would render the leading of that evidence, in the trial in due course, moot.

[65] In this case, the question whether the respondent's statements were privileged does not turn on the facts. It turns on the question whether the respondent was protected by the privilege in raising allegations of sexual impropriety and drunkenness (and related matters) to the managing director of the applicant's firm. That is a legal and not factual matter. To be precise, the legal question is whether, in the light of the factual allegations made by the respondent, the managing director had a legal interest in being told those allegations so that the communication must be treated as privileged.

[66] In other words, we can assume for present purposes that all of the facts set out in the 30 August email are true, and that the email was not sent with malice. Even if we make those assumptions, there is the question whether the respondent was entitled, in law, to make these comments to the managing director. As I have explained above, my finding is that his communication was not privileged because the law does not permit persons in the position of the respondent to communicate defamatory statements in that way. This conclusion applies, even on the respondent's version of the facts. Therefore, in my view there is no dispute of fact in this case, relevant to the defence of qualified privilege.

[67] Before concluding this section, I should note that the applicant's counsel, in their heads of argument, sought to rely on the respondent's malice, in sending the various communications, as a basis for arguing that the privilege did not apply. This is based on the well-accepted principle in the law of defamation that a malicious statement is not protected by the privilege even if it was made in a forum in which, ordinarily, the privilege would apply (for instance, affidavits in court proceedings, or in a complaint by a parent about a teacher to a headmistress).

[68] When I address the issue of costs below, I refer to the facts on which the applicant's counsel rely for the proposition that the respondent behaved maliciously. The assessment of the facts in relation to costs takes a slightly different form, in the light of the discretion vested in me on that topic. The

discretion must be exercised with appreciation of various relevant factors, which includes the conduct of the respondent throughout the relevant period. As part of considering those factors, I am entitled to take the possible malice of the respondent into account when assessing the reasonableness of his conduct, even without making a final finding that the 30 August email was malicious. I can, for instance, consider the question of malice in the context of all of the correspondence, and not just the 30 August email (which reflects the applicant's cause of action here).

- [69] There is no doubt that some of the communications sent by the respondent were malicious (for instance, calling the applicant and Ms T evil). However, when it comes to the assessment of the qualified privilege, I would need to make a finding that, on the balance of probabilities (and taking the *Plascon-Evans* test into account), the respondent's 30 August email, specifically, was malicious. Since I have concluded, on other grounds, that the privilege does not apply, it is not necessary for me to decide that issue.

Specific performance

- [70] The last main issue to address is the question whether I should grant the relief sought in the notice of motion, which takes the form of an order for specific performance. This issue arises, at least in theory, because courts have a discretion to decline to order specific performance as a remedy for contractual breach.¹¹ The classic example in the case law is the situation of an employment contract where the breach arose in the context of a relationship which has broken down. Courts will generally not force an employee to return to work, pursuant to a contractual obligation to do so, when the employment environment has become intolerable. There are, of course, other examples.

- [71] The issue need not detain us at any length here. I agree with *Mr Bester* that a party to a contract who wishes to argue that specific performance is not appropriate must take this point in the pleadings (in this case, the answering

¹¹ See *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378. The Appellate Division made clear (see 378F-G) that the circumstances in which a court will exercise its discretion not to enforce specific performance depend on the facts of each case – ie, there are no rigid rules, and there is no closed list of situations in which specific performance will be declined. *Haynes* has been cited in multiple cases but, because the proposition is now trite, I shall not list them here.

affidavit) and establish a factual basis for the submission.¹² So, for example, in the employment context I mentioned above, the mere existence of an employer-employee relationship would not be sufficient, without more, to justify the exercise by a court of its discretion against enforcing specific performance. One of the parties, at least, would have to put up evidence to show that the relationship was not conducive to such an order.

[72] Here, the respondent did not dispute that specific performance, as a remedy, was appropriate. Of course, he disputed that any contract had been formed in the first place. He also disputes the notion that he breached the contract, by relying on the privilege. But he did not raise, as a separate argument (on the assumption that the court rejected his primary argument that there was no contract) supported by pleaded facts, anything to explain why specific performance was an inappropriate remedy in the event of me finding a breach of contract. In his heads of argument, *Mr Van Nieuwenhuizen* expressly linked his argument that specific performance could not be ordered, to his submission that there was no contract. As the heading of that section of his heads of argument points out, “[s]pecific performance requires a contractual obligation”. He then proceeded to argue, solely, that no contract had arisen in the first place. It follows that, if I am against the respondent on the question whether he breached a contractual obligation (which, as already shown, I am), there is no reason for me to deprive the applicant of the remedy of specific performance.

[73] It follows that, in my view, the application must succeed.

Matters of form

[74] Before concluding by dealing with costs, there are two matters of form which I need to address.

[75] First, I should explain why, in the heading of the judgment and in my discussion above, I have avoided identifying the applicant, respondent, and the respondent’s ex-wife (ie, Ms T). I raised the issue of possible redaction with counsel for both parties, because I was uncomfortable with the idea that the

¹² See *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para 33.

minor children of the respondent and Ms T could either be identified themselves, or could identify their parents (when they become old enough to trawl the internet for themselves or, more likely, with the help of artificial intelligence) by coming across the judgment. *Mr Bester* submitted that redaction would be appropriate, and I did not understand *Mr Van Nieuwenhuizen* to have a difficulty with that. I am mindful of the need for justice to be done in public, but I see no public interest in revealing the identities of the parties in a case such as this. Or, to be precise, I see no public interest strong enough to trump the goal of protecting the minor children.

[76] Secondly, in the order below, I intend to depart slightly from the terms of the notice of motion. In prayer 1 of the notice of motion, the applicant seeks an order directing the respondent to perform “any and all of his obligations under” the undertaking. In prayer 2, the applicant seeks an order preventing the respondent from disseminating any communication which is defamatory towards the applicant.

[77] The latter would, at the conceptual level, make sense because the interdict would, framed in that way, add something to what the law of delict already provides. This relates to something which I debated with counsel – my slight confusion/puzzlement about the fact that an interdict couched in the same language as the 28 April undertaking (at least, on the common interpretation accorded to it by the parties) would, in substance, be no more than an interdict preventing the respondent from committing an actionable delict. Since that is already required by law – ie, without an interdict – I was somewhat puzzled as to the utility of the interdict. To cut a long story (ie, the story of my debate with counsel) short, the applicant accepts that he can get no more than what the undertaking provides in its own terms, but argues that there is still no principle of law which should operate to deprive him of its enforcement. Since, as shown above, I agree with that submission, it is only left for me to tweak the wording of prayer 2. In its current form, it gives the applicant more than that to which he is entitled, by carving out the potential defences which the respondent could raise. I therefore intend to reflect the actual agreement – ie, to order the respondent not to defame the applicant except as permitted by law.

[78] I confess to remaining slightly uneasy about the fact that this formulation is almost designed to invite future litigation about what “permitted by law” means (in the unwelcome event that this entire dispute has not, through the passage of time, now quietened down). But, when balancing that concern, with the concern that I cannot justifiably go further than the terms of the undertaking, the latter must prevail. I would rather mirror the words of the undertaking precisely than to give the applicant more than that to which he is entitled (which I have no jurisdiction to do) or non-suit the applicant entirely (which is not appropriate).

[79] I have already conceded to the need to give an order which has the potential of inviting further litigation, which is why I am prepared to give the applicant the interdict (reflecting specific performance) which he seeks despite it inviting future litigation on whether defamatory communications are protected by some or other defence. However, prayer 1 of the notice of motion goes too far down that road for my taste because it begs the question of the parameters of the respondent’s obligations. At best, as formulated it adds nothing to prayer 2. At worst, it has the potential to open up a new front on the proper interpretation of the phrase “any and all of his obligations under the undertaking”. As far as the first prayer is concerned, it seems preferable to me to issue a declarator that the undertaking is binding.

Costs

[80] It remains for me to address the issue of costs. Both parties seek a punitive costs order to follow the result on the merits.

[81] I have agonised about this part of the case. Part of this might be because I cannot shake the feeling that costs is the only remaining live issue between the parties after all this time. But it is also because it has proven quite difficult for me to decide how exactly to see the case. Depending on one’s perspective, there are at least two ways, diametrically opposed, to view the facts.

[82] Viewed from the perspective¹³ of the applicant, the respondent engaged in a campaign of using email and WhatsApp to try either to gain some advantage in

¹³ In this context, my reference to “perspective” does not mean a reference, necessarily, to an argument made by the applicant (or the respondent, when I address matters from his perspective) on the issue of costs. My

his divorce, or simply as revenge motivated by jealousy. He did so when he knew, or ought reasonably to have known, that he had no right to defame the applicant to the managing director and chairperson of his firm. He intentionally raised issues (especially in relation to sexual conduct and substance abuse) designed to cast the applicant in a bad light to his colleagues. Then, after giving an undertaking not to defame the applicant anymore, he breached the undertaking. Finally, when the applicant launched litigation to enforce the undertaking, the respondent doubled down and tried to escape the consequences of the undertaking by raising technical legal arguments relating to offers and counter-offers, forcing the applicant to persist in this application.

[83] Viewed from the perspective of the respondent, on the other hand, the communications went to what was, essentially, the same very small group of people. Furthermore, since all of the “outsiders” were from the same firm, the defamatory words were communicated to people who, from the outset, were clearly aware of the respondent’s modus operandi and the issues he had repeatedly raised. I only mention this because the applicant referred, with some justification, to the importance of his reputation as a legal practitioner. From the papers it would appear that the respondent did not manage to imperil that reputation to a wider group of people.

[84] All of that said, it is hard to have sympathy for the respondent’s position, when one takes into account text messages which he sent to Ms T, on the same day as sending the WhatsApp message, saying words to the effect of “karma is coming for you” and describing the applicant and Ms T as evil. I have no idea whether any of the respondent’s underlying allegations about the applicant and Ms T are true. They are certainly denied vociferously by the applicant and I have absolutely no way of knowing, nor on the pleadings is it any of my business, if there is only one goody and one baddy in this unseemly saga. It is a regrettable fact of life – which I witnessed for myself when I once sat in the family court – that none of the parties tends to come out with his or her moral compass

focus, rather, is on viewing the facts from a sympathetic vantage point in the case of each party, to show that there are two, equally plausible, ways to see the facts.

unscratched when personal matters relating to minor children and the breakdown of relationships become acrimonious.

[85] What I do know, however, is that the respondent had no right to try to use the applicant's firm as a form of leverage against the applicant and Ms T as part of the acrimony between the respondent and them. Sight must not be lost of the first salvo (at least as addressed in the affidavits before me) in this matter – the sending of the WhatsApp to the applicant's managing director. The nature of the message accompanying the text – which was hardly framed as one would expect when a professional raises a business concern with another professional, but clearly was designed to diminish the applicant's reputation in the eyes of a senior colleague – reveals the respondent's motive in sending it. Nothing in that message, or in the tone of the subsequent correspondence, reflects a serious and prudent attempt to air professional disputes in the appropriate forum. This is substantially exacerbated by the texts about karma sent on the same day to Ms T, because it seems hard to dispute the applicant's interpretation that those text messages demonstrate that the WhatsApp to the managing director was sent purely out of a vengeful attempt to prejudice the applicant. It is hard to resist the conclusion that the version reflected in the 28 April letter, which placed much focus on the perceived threat posed by the applicant to the reputation of the respondent's estate agency, was something of an afterthought designed to sanitise the respondent's conduct on 10 April (taking the form of the text messages to the managing director and Ms T).

[86] It is true that the small group of recipients clearly served to reduce the damage of the communications. However, the first utterance of the respondent to the managing director and the chairperson of allegations about the applicant's private life (whenever that might have been, because there is a hint on the papers that, at least in the case of the managing director, this goes back to 2021) must have been damaging enough. There was a moment in history (at least, on the papers before me) when the managing director and chairperson had no reason to have any thoughts about the applicant's private sex life or his drinking habits. It was the respondent who changed that.

- [87] Even if the respondent had a genuine collection of grievances against the applicant (and Ms T), and even if he had genuine (and therefore laudable) concerns about the interests of his young children, his conduct was unacceptable. He is the owner of what is described in the papers as a well-known estate agency in Johannesburg. He therefore is a businessman who is presumably familiar with the commercial world. It was not reasonable of him to believe that he was entitled to air his grievances in the way that he did.
- [88] Despite this, and with at least some hesitation, I have ultimately decided that a punitive costs order would not be appropriate in the circumstances of this case. *Mr Bester* and *Ms Bosman*, in their heads of argument, placed emphasis on the bad-faith attempt of the respondent to backtrack from the undertaking, which was given on two occasions (the second being, in response to the 3 June letter, the respondent's stance that the first undertaking was sufficient). Their submission was that the applicant should not be left out of pocket when the unreasonable conduct of the respondent, including by digging in and defending this application on technical grounds, forced the applicant into this litigation.
- [89] While I have much sympathy for that perspective, it is noteworthy that the notice of motion sought punitive costs against the respondent, which was not conditional on him opposing the application. Then, in the founding affidavit, no incentive was offered to the respondent not to oppose the matter. The applicant could have, for instance, expressly invited the respondent to abide the decision of the Court, or take some other step to accept, finally, that the undertaking was binding on him. The founding affidavit could have, in essence, challenged the respondent to do the right thing, failing which punitive costs would be sought. In fact, the respondent did something along these lines, by offering the applicant to withdraw the application and pay his party-and-party costs, failing which the respondent would seek a punitive costs order. That stance does not assist the respondent given the conclusion I have reached on the merits, but the applicant could have done something similar. This was not done, and the founding affidavit conveys no hint of a willingness on the part of the applicant to avoid an opposed fight if the respondent were to co-operate.

[90] Bearing in mind that the application was launched roughly a week after the 30 August email was sent, and the founding affidavit certainly pulled no punches, it is hard to criticise the respondent for not simply acquiescing in the order sought from the outset. It is true that a sensible person would not have found himself in this situation in the first place. It is also true that the applicant did not, certainly on anything which I have seen in the papers, retaliate or conduct himself unlawfully at any stage of the process, despite the provocative conduct of the respondent. However, I cannot describe the respondent's legal defence – ie that no binding contract was formed – as unsustainable. And, given the heat that prevailed in early September 2022, I cannot describe the respondent's conduct in defending the application – especially in the absence of some form of tender or inducement from the applicant to incentivise the respondent not to oppose the application – as unreasonable as envisaged in the punitive costs cases such as *Alluvial Creek*.¹⁴

[91] Lastly, I should point out that, on the material which forms part of the papers, it would seem that the respondent engaged in other acts of defamation which are not fully ventilated. No doubt, the applicant and his legal team made a strategic call on what allegations to include, and not to include, in this application, bearing in mind *Plascon-Evans* and what was, I assume, a desire for a speedy resolution to this dispute when the application was launched. The strategy of launching quickly, on largely common-cause facts, may well have paid dividends. It may well be that, notwithstanding the full-blown opposition by the respondent to this application, it had a chilling effect on his defamation and harassment in 2022. In other words, a possible explanation of why the urgency in this dispute appears to have entirely dissipated is that, once the application was launched, the respondent had the good sense to stop sending emails to the applicant's colleagues. The well-drawn, and conservative, papers may well have achieved

¹⁴

In Re Alluvial Creek Ltd 1929 CPD 532 is generally cited as the leading case on the notion that unreasonable conduct may justify a punitive costs order because it is treated as objectively vexatious. The decision was, relatively recently, reaffirmed by the SCA in *N S v J N* 2022 JDR 2646 (SCA) at para 21. Mr Bester and Ms Bosman, in their heads of argument, quite fairly referred to *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 225, which could be interpreted as establishing a more stringent test applicable to punitive costs orders (ie, that they should only be granted where the court intends to be "very punitive" as an indication of "extreme opprobrium"). Given my ultimate conclusion on costs, it is not necessary for me to decide whether the *In Re Alluvial Creek* line of cases is consistent with the law as expressed in *Public Protector v SA Reserve Bank*.

the goal of sending the respondent the message that his conduct had become untenably risky. This is not something on the papers, and so I cannot take the issue further. I only mention all of this to point out this: if the applicant's papers had addressed what seem to have been other examples of the respondent defaming the applicant and had, in doing so, made out a more extensive case of an unreasonable vendetta having been waged by the respondent, I would have had no hesitation in making a punitive costs order. On the facts before me, I consider it appropriate to refrain from doing so.

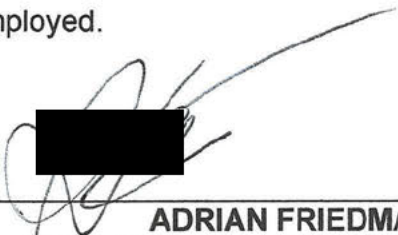
[92] The parties were agreed that costs should follow the result. Both sought punitive costs, but both also took the stance that, if punitive costs were not awarded, Scale C would be appropriate. *Mr Bester*, correctly, with respect, pointed out that I retain a discretion, despite the parties being in agreement on this issue. He argued, though, that the agreement of the parties to apply Scale C justified me making an order to that effect – ie, it was the primary consideration which I should take into account in the exercise of my discretion. I agree. The law on the new scales is only developing, and perhaps the status of parties' agreements on which scale to apply will be determined conclusively by a higher court at some stage. For now, it seems to me appropriate to give effect to an agreement on the appropriate scale unless there is a very compelling reason to depart from it. Parties to any commercial contract may agree that attorney-client costs will, for example, apply to the enforcement of all contractual obligations. Agreements on scale should not, in my view, be treated any differently. Where parties are represented by counsel and have participated fully in a matter, there is nothing unconscionable, in my view, to give effect to an agreement freely made that scale C should apply.

[93] Although it is not indisputable that this case warranted two counsel, there were unusual legal aspects to it, which *Mr Van Nieuwenhuizen* also acknowledged during his oral submissions on behalf of the respondent. I therefore consider it appropriate to grant the costs of two counsel.

[94] I accordingly make the following order.

Order

- (1) It is declared that the respondent is bound by the written undertaking not to defame the applicant save for purposes that the law permits, reflected in paragraph 5.21 of the letter sent on his behalf by his attorney on 28 April 2022.
- (2) The respondent is ordered not to disseminate, to any person, any communication and/or material which is defamatory of the applicant save for purposes that the law permits.
- (3) The respondent is ordered to pay the costs of this application on Scale C, including the costs of two counsel where employed.



ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **17 February 2025**.

Heard: 7 October 2024
Judgment: 17 February 2025

Appearances:

Counsel for the Applicant:	Andy Bester SC and Ross Bosman
Attorneys for the Applicant:	Fairbridges Wertheim Bekker
Counsel for the Respondent:	HP Van Nieuwenhuizen
Attorneys for Respondent:	Tshabalala Attorneys