CASE NO.: (P) I 2210/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NICOLAAS GODFRIED HEYNS	**FIRST PLAINTIFF**
ALIDA HEYNS	**SECOND PLAINTIFF**

and

JOHANNES STEPHANUS MALAN	**DEFENDANT**

CORAM: **MARCUS AJ**

Heard on: **10 February 2009**

Delivered on: **27 March 2009**

JUDGMENT

MARCUS AJ.: [1] When this matter came before Court on 2 October 2007, the parties agreed to have the matter adjudicated as a special case in terms of rule 33. The Court was asked to determine, whether the passages contained in paragraph 4 and

9 of the particulars of claim are defamatory. The issue was, by agreement, to be determined as if it had been raised by way of an exception.

[2] The Court in its judgement dated 16 October 2007, found that paragraphs 4.4, to 4.7 and paragraph 9.1, 9.2, 9.5, 9.7 and 9.8 were defamatory, while paragraphs 4.1 to 4.3; 4.8; 9.3; 9.4 and 9.6 were not. No appeal was noted against the judgement by either party, which meant that the Court's findings, concerning the defamatory and non-defamatory nature of the passages listed in the particulars of claim, remained undisturbed.

[3] Upon return of this matter to Court on 11 February 2009, the question that still had to be decided was whether, defendant could successfully invoke the defences, raised in his plea, in respect of the passages that the Court found to be defamatory. Before considering this question I wish to, shortly, refer to the relevant facts that gave rise to this action.

[4] This suit is essentially a family dispute that, regrettably, has ended up in litigation. Litigation, which often is a zero sum game, rarely lends itself to amicable resolutions of disputes. On the contrary, it often tends to aggravate the animosity that already exists between the parties. It is only in rare cases that a Court can, through an order, attempt to narrow the rift between the parties and hopefully set them on the path of reconciliation. As rare as that opportunity might be, once it does present itself, Courts should, in my view, not be paralysed by dogma, whose established methods may be inadequate or inappropriate to deal with the special facts of a case. It then becomes the duty of the Court to embark on 'the road less travelled by' in order 'to do

(simple) justice between people according to the circumstances that may arise' (See: *Mcitiki and Another v Maweni 1913 CPD 684 at 686*). I believe that the present case does present such rare opportunity.

THE FACTS

[5] First and second plaintiffs, who are husband and wife, lodged two claims for defamation against defendant. Defendant is the brother of second plaintiff and thus first plaintiff's brother in law. The two claims arise out of letters that defendant wrote to one Carlos Jose-Medeiros ("Carlos") on 17 May 2004 ("first letter") and on 28 May 2004 ("second letter"). In the particulars of claim plaintiffs allege that defendant made defamatory statements concerning them in the letters to Carlos. The latter is married to defendant's sister and is thus both first plaintiff's and defendant's brother in law. Plaintiffs are suing for damages in the sum of N$100 000.00 for the alleged defamatory statements. Each party is claiming N$25 000.00 in respect of claim 1 and N$25 000.00 in respect of claim 2.

[6] Defendant mainly aggrieved by what he perceived to be an improper management of the affairs of TAFMAF Farming (Pty) Ltd ("the company"), of which he was an 18% shareholder, wrote to Carlos on 17 May 2004. This letter forms the subject matter of claim 1. The relevant parts of the letter, translated from the Afrikaans to the English language, read as follows.

> **"The lease agreement with G.W. Bergh was up to this time refused to me, until I could read it by means of a warrant. Now I know why it was with held from me, because it was falsified and does not adhere to meeting decisions. How do they get it right to enter into a**

contract on 15 May 03, making "alterations" to it five months afterwards, but the alterations are already (contained) in the agreement (not annexure) that was signed on 15 May 03 already. Nico, Alida and some of their workers did everything themselves on the farm and signed, this is not what the agreement specifies under point 18 Costs. Something had to be covered.

Nico and Alida have sole signing power on the company's account. Isn't this somewhat dangerous?

Carlos, ironically, I merely own 18% of the shares, but what I am fighting for is for the benefit of all shareholders. I just have to take all the beatings. Isn't it clear that there is more behind all this?

If the rumours about Nico's bakkie are correct, then I am worried, because he is my director, is basically in control on the farm, has signing power for the bank account, "power of attorney" to enter into lease agreements etc. etc. Someone who can commit insurance fraud will succeed with anything. Ironically, the company goes to the wall, but the business of Nico and Alida is flourishing. As I said Arno, we have to wake up.

Carlos, this is but the tip of the iceberg, many surprises await us at the next meeting. I will then substantiate every assumption that I made in the past with concrete evidence.

You may think, if you want to, that these are merely reproaches and unfounded accusations (as Arno says), but I am looking forward to the meeting and I have no problem if you want to be present, maybe to help us with solutions. I haven't got anything to hide and reply to any questions put to me."

[7] The following passages of the letter were found to be defamatory by the Court:

"7.1 Nico, Alida and some of their workers did everything themselves on the farm and signed. Something had to be covered.

7.2 Nico and Alida have sole signing powers on the company's account. Isn't this somewhat dangerous?

7.3 If the rumours about Nico's bakkie are correct, then I am worried, because he is my director, is basically in control on the farm, has signing powers for the bank account, "power of attorney" to enter into lease agreements etc. etc. Someone who can commit insurance fraud will succeed with anything.

7.4 Ironically, the company goes to the wall, but the business of Nico and Alida is flourishing."

[8] The letter dated 28 May 2004 forms the subject matter of the second claim. Plaintiff's particulars of claim state that certain passages contained in the letter are defamatory. The Court agreed and found the following to be defamatory:

"8.1 ± N$35 000.00 disappeared at Wimpie's garage. Another N$35 000.00 disappeared from Wimpie's home. Every time Nico or Alida had 'access' to money.

8.2 Very much money and other stuff disappear from Gert Bergh, during the time that Nico does truck-driving for Gert.

8.3 There are furthermore questions marks about the oil plug of Nico's bakkie that fell out. The insurance does not yet want to pay (out) the bakkie that burned out. Do they after all suspect anomalies?

8.4 Carlos, I acknowledge I am a real sinner and I have many mistakes, but 2 things that I detest are lies and fraud. Did you know that Nico's nickname is Nico-lies. I myself said it to him.

8.5 I already know Alida's modus operandi and I won't be surprised if she is behind the problems between myself and my mother."

[9] The reference to "Nico and Alida" in the letters is to first and second plaintiff. Publication to Carlos is not disputed. Defendant raised two defences with regard to the claims by plaintiffs. In respect of the first claim defendant pleaded the defence of fair comment. As regards the second claim defendant pleaded the defence of truth and public benefit, and although not expressly pleaded in the alternative (it must by necessary implication be taken to have been pleaded in the alternative) the defence of fair comment.

[10] At the hearing of this matter defendant appeared in person unrepresented by a legal practitioner. He was the only person who testified. After the conclusion of his testimony, counsel acting on behalf of plaintiffs decided not to conduct any cross-examination and closed plaintiffs' case without leading any evidence. The effect of the failure to cross-examine defendant is that defendant's testimony has to be accepted as correct, unless of course it is so 'manifestly absurd, fantastic, or of so romancing a character that no reasonable person can attach any credence to it whatsoever.' (See: *Small v Smith* 1954 (3) SA 434 SWA at 438E-H)

[11] Defendant testified that Carlos had encouraged him to discuss the problems relating to the management of the company with him. He therefore decided to write the letters to Carlos, whom he perceived to be the most respected, and neutral person in the family and who he thought could assist in resolving their problems. Defendant said that he had to furnish Carlos with background information in the letters to enable him to assist. Defendant testified that he wrote the letters to Carlos in order to resolve the problems in the company. This, he said, would eventually be to the benefit of all shareholders and ultimately their children.

[12] In dealing with the defamatory allegations contained in the first letter defendant testified that plaintiffs prepared and entered into a lease agreement with one Bergh. Defendant said that this was contrary to the agreement which stipulated that the company lawyers had to prepare it. This fact, coupled with the fact that plaintiffs refused to provide him with a copy of the agreement led him to believe that plaintiffs intended to cover up something.

[13] Defendant further testified that he also questioned why plaintiffs who were husband and wife had sole signing power. He commented that this was dangerous as such a situation could easily lend itself to abuse. Defendant also testified that he had seen from the minutes of the meeting that the company's balance was 'in the red' while on the other hand plaintiffs' business was doing well.

[14] In dealing with the allegations contained in paragraph 7.3 defendant pointed out that the word the he used in his original letter was "reports" and not "rumours" and that the words rumours was an improper translation from the Afrikaans language. I do not think that anything turns on whether defendant used the word reports or rumours. It is immaterial whether the word "reports" or "rumour" was used by defendant to describe the information. What matters, when transmitting information to third parties, is that the subject matter that forms the basis of the reports or rumours can be justified if challenged.

[15] Defendant testified that he merely informed Carlos about the reports he received to the effect that first plaintiff had committed acts which, if true, amounted to

insurance fraud. This, defendant said, was not an accusation by him that first plaintiff had in fact committed insurance fraud. He justified making the statement by saying that as a shareholder he was worried about the reports, given the various powers first plaintiff had in the company.

[16] With regard to the second letter defendant testified that he received the reports relating to the disappearance of the money from the affected parties, who included Wimpies garage, Gert Berg and Santam (the insurance company). The information that the insurance company did not want to pay out for Nico's bakkie that had burned out had likewise been communicated to him.

[17] Defendant stressed in evidence that, he specifically stated in his second letter that he did not have concrete evidence, and that it could all just be pure coincidence that every time money disappeared plaintiffs were at the scene. Defendant also referred to various incidents involving second plaintiff, to show that he was justified in believing that second plaintiff was the main reason behind the problems he had with his mother.

THE LAW

[18] Since the plaintiffs proved the defamatory statements, two rebuttable presumptions of law arose against the defendant. First, that the statements were unlawful and second, that they were made *animus injuriandi*, i.e. a deliberate intention to inflict injury. The presumptions cast a full onus on the defendant, to prove on a balance of probability that he did not have the necessary *mens rea* (guilty mind)

to commit the delict and to prove one of the defences negating unlawfulness. (See: *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC) at p 45 Para 24 and p 49 Para 31).

[19] The defences raised by defendant are fair comment and truth and public benefit. When it comes to oral or written statements a distinction is made between matters of comment or opinion and statements of fact. While both are capable of being defamatory, the distinction that is drawn between them is important for the kind of defence of justification that may be raised. The defence of truth in the public benefit is only available for defamatory allegations of fact, while the defence of fair comment, as the name suggests, is available for expressions of comment or opinion on facts. A comment or opinion will necessarily involve a value judgement, the truth of which is not susceptible of proof. The test in this regard is, whether the comment or opinion made is a fair one. The facts in respect of both defences must however be true and no protection lies for false statements or statements which have not been proved to be true. (*Yazbek v Seymour* 2001 (3) SA 695 (E) at 701 D-F); *Crawford v Albu* 1917 AD 102 at 114)

[20] The requirements for the defence of fair comment can thus be summarised to be:

a) the statement must be one of comment and not fact;
b) it must be fair;
c) the facts upon which it is based must be true; and
d) the comment must relate to matters of public interest.

(*Johnson v Becket and Another* 1992 (1) SA 762 (A) at 778J-779 A-B)

[21] In relation to the defence of truth in the public benefit the defendant must prove that:

a) the statement was true; and
b) its publication was to the benefit of the public.

[22] Whether a comment is fair or not is a matter of judicial interpretation. A statement will be fair if it is an opinion which a person, however extreme his views may be, might honestly have, even if the views are prejudiced. The statement must, objectively speaking, qualify as a genuine expression of opinion, must be relevant and not 'disclose in itself actual malice'. (*Crawford v Albu supra* at 115)

CLAIM 1

[23] If one analyses the defamatory passages contained in paragraph 7.1 and 7.2, it appears to me that the defence of fair comment can be sustained. Defendant testified that plaintiffs prepared the lease agreement with one Bergh on the farm and signed it. He stated that ordinarily the agreement had to be prepared by lawyers. These facts were not disputed, as plaintiffs did not testify. They thus have to be accepted as correct. His comment that plaintiffs, in drawing up the lease agreement, intended to cover up something is relevant, as it relates to the alleged improper manner in which plaintiffs had drawn up the lease agreement. As such it constitutes, in my opinion, a fair comment on those facts.

[24] Likewise the allegation of fact, contained in the letter, that plaintiffs have sole signing power on the company's account was also not disputed in evidence by

plaintiffs. It must thus be accepted as being true. Again the remark, "Isn't this somewhat dangerous" is relevant to those facts and not an unreasonable one to pose given the proximity of first and second plaintiff. I am of the opinion that it too constitutes a fair comment on the facts stated. I am also satisfied that the comments pertain to matters that either directly or indirectly relate to the management of the company and as such constitute matters of public interest (*Burchell, The Law of Defamation in South Africa* p 230).

[25] The statement contained in paragraph 7.3 however stands altogether on a different footing to the ones just considered. It refers to rumours involving first plaintiff's bakkie. Although the nature of the rumour is not explicitly referred to, it is clear, from a reading of the passage that, it relates to alleged insurance fraud that first plaintiff is said to have committed with regard to the bakkie. The sentence, "Ironically the company goes to the wall, but the business of Nico and Alida is flourishing", immediately follows the allegation of insurance fraud and forms part of this paragraph. It must in my view be interpreted in that context. A reasonable person reading this sentence would think that plaintiffs' business is flourishing, due to the fraudulent or dishonest tendencies of first plaintiff. I do not think that this paragraph in any way implicates second plaintiff in the allegations of dishonesty, as the only reference to second plaintiff is in connection with the ownership of the business and not to the insurance fraud.

[26] As stated above, to succeed with the defence of fair comment defendant had to prove the facts on which the comment of insurance fraud is based. It is also not sufficient to say, as was done in the pleadings, that defendant had no knowledge that

the facts stated were false. He had to prove that they were true. Defendant failed to prove the alleged facts by any admissible evidence. He relied on reports and information, but failed lead any evidence as to the truthfulness thereof.

[27] Defendant's answer to claim 1 was basically that he did not accuse first plaintiff of insurance fraud, but merely communicated the report to Carlos without expressing any belief in the report, by expressly qualifying his statement in the letter. The fact that defendant qualified his statement considerably, may be a relevant consideration, in determining whether he acted with malice and thus whether the comment is fair. It may also be relevant to the issue damages, which I shall consider at a later stage. However the answer given by defendant does not assist him in establishing the defence of fair comment. A consideration of the authorities will help to further illustrate this point.

[28] In *Hassen v Post Newspapers (Pty) Ltd and Others* 1965 (3) SA 562 (W) at 564-5 with reference to *Farrar v Madley* 1913 CPD 888, the Court said the following:

> ***"It is well established that a publication can be defamatory and actionable even if the defendant has made it clear that he is merely repeating the averment of another, and he himself cannot vouch for its accuracy…"***

(See also: *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC) at 331 D-E

[29] In the English case of *Associated Press Newspapers Ltd and Others v Dingle* (1962) 2 ALL E.R at 754 F-G dealing with the effect of previous publications on the amount of damages payable said:

> ***"At one point in time it was permissible to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long ceased to be allowed, and for a good reason. <u>Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided its circulation. He must answer for it just as if he had started it himself.</u>" (emphasis mine)***

[30] In *Farrar v Madeley supra* the following statement was written concerning the plaintiff:

> ***"The mineowners are not British subjects, but we are. Yes, we are the country, and soldiers are not going to shoot down you and me at the behest of Sir George Farrar. You may ask, why Sir George Farrar? But I heard from a reliable source that the great Sir George was in the Market-square instructing Colonel Truter what to do with the troops. If that were true then no greater crime had ever been committed in this country…"***

[31] The Court in the *Farrar* case after holding that the words were defamatory had this to say:

> ***"The uttering of defamatory words of and concerning the plaintiff whether the defendant did so upon information from others or whether he invented or suggested the words, must render him liable in an action for damages at the suit of the plaintiff, and it is no answer for the defendant to say that he did so without malice, and that he had no intention whatever of injuring the plaintiff. If the words are defamatory, then the law presumes malice, in other words, an animus injuriandi, and this presumption has in the present instance in no way been rebutted".***

[32] Except for the fact that the Court seems to equate malice with *animus injuriandi* which, the purists would argue, are not one and the same thing, this statement cannot be faulted.

[33] Having found that defendant failed to establish the defence of fair comment with regard to the statements, it falls to be considered whether defendant established that he acted without the necessary *animus injuriandi*. Defendant in his pleadings and evidence stated that he did not intent to defame any of the plaintiffs. He stated that if he had intended to defame plaintiffs he would not have qualified his statements.

[34] To a similar defence the Court in Farrar said the following:

> ***"Defendant has further expressly pleaded that he did not intend to convey the impression that he personally believed that the plaintiff was guilty of causing murder to be committed by others, but it cannot for a moment be presumed that when he spoke the defamatory words complained of by the plaintiff, he did not wish those whom he had addressed to think otherwise than that Sir George Farrar had been guilty of committing and procuring the shooting down of defenceless men, women and children, without any lawful cause or excuse. That is the natural conclusion to which any person, an ordinary man, would naturally come upon hearing these words or reading them in a newspaper; and that was the intention of the defendant."***

[35] I am of the opinion that a reading of the passage contained in paragraph 7.3 shows that defendant wanted Carlos to think that first plaintiff was dishonest and capable of using his powers to the detriment of the company. There is also the intimation that, first plaintiff might have used dishonest means to cause the company to "go to the wall" and his own business to flourish. This I think is the natural conclusion that a reasonable person would reach upon reading the passage and that

must have been the intention of defendant. The defence of fair comment in relation to paragraph 7.3 and 7.4 fails.

CLAIM 2

[36] Paragraphs 8.1 to 8.5 of the letter dated 28 May 2004 were held to be defamatory. It is correct that the paragraph do not directly accuse plaintiffs of theft or fraud. But in determining the meaning of the words complained of, the Court must take account not only of what is expressly said, but also what is implied. (See: *Argus Printing and Publishing Co Ltd And others v Esselen's Estate* 1994 (2) SA 1 (A) at 21 G-H)

[37] In my view the only reasonable inference that can be drawn from paragraph 8.1 to 8.3 read in the context of the letter as a whole is that, plaintiffs were somehow responsible for the disappearance of the money and that first plaintiff might have committed insurance fraud. The imputations of dishonesty were in my view rightly held to be defamatory.

[38] The defences advanced in relation to those paragraphs are those of truth in the public benefit and (alternatively) the defence of fair comment. As shown above, in order to succeed with the defence of truth in the public benefit and fair comment defendant has to prove that the facts alleged are true. The statements contained in paragraph 8.1 and 8.2 qualify as statements of fact, and the only defence available in this regard is that of truth in the public benefit.

[39] Defendant did not lead any admissible evidence at the trial to prove the truth of the statements. The failure by defendant to lead evidence to prove the truth of the statements is fatal to the defence of truth in the public benefit. Even if the statement in paragraph 8.2 were to qualify as a comment, it would suffer from the defect that the facts on which it is based have not been proved to be true.

[40] The sentence in paragraph 8.3, whether "they" (insurance company) suspect anomalies, constitutes a comment. Defendant did not prove the truth of the statements on which the comment is based and can thus not rely on the defence of fair comment. The statement in paragraph 8.4 imputes fraudulent conduct to first plaintiff and suffers from the same defects as paragraph 8.3, in that defendant failed to prove the truth thereof. Although this Court found paragraph 8.4 to be defamatory, it said it was not 'a strong instance of defamation'. Whether the statement qualifies as a statement of fact or comment it is difficult to see how, the making of it could qualify to be in the public interest or benefit. I thus find that defendant failed to justify paragraph 8.1 to 8.5 hereof.

[41] I am also not satisfied that defendant succeeded in displacing the presumption of *animus injuriandi* with regard to these passages. The necessary inference of a person reading these paragraphs (except paragraph 8.5) would be that first plaintiff committed theft and fraud and second plaintiff theft. This is what defendant, in my view, intended to convey when he wrote to Carlos.

DAMAGES

[42] I now turn to consider the question of damages, since defendant failed to prove the defences with regard to the defamatory statements in claim 1 against first plaintiff and claim 2 against both plaintiffs. When it comes to the question of the quantum of damages it is important to bear in mind what the defamation action is essentially about. It is an action in which the defamed party seeks to vindicate his reputation by claiming compensation from the defamer. The objective of the law is thus to assuage the wounded feelings of the defamed party and not to penalise the defendant for his or her wrongdoing (See: *Mogale and Another v Seima* 2008 (5) SA 637 (SCA) at 641 H - J. Traditionally the practice has been to grant the defamed party, if successful, damages to serve as his vindication in the eyes of the public and as conciliation to him or her for the wrong that was done.

[43] The award of damages has given rise to problems in the assessment thereof, given the intrinsic difficulty of attaching a monetary value to amorphous concepts such as honour, dignity and reputation. (See: *Dikoko v Mokhatla 2006 (6) SA (CC)* at 271 – 272 B*)* Due to the fact that litigants often frame the relief in the form of monetary compensation, Courts have generally restricted their task to assessing the quantum of damages, once defamation was proved. This approach by the Courts should in my view not be taken to imply that monetary payment is the only remedy available, or that a Court is restricted to award monetary compensation in any given case.

[44] Plaintiffs claim is for a combined value of N$100 000.00. I must at once point out that I find these claims highly excessive, if regard is had to the facts of this matter

and the circumstances under which the defamatory statements were made. It is true that to accuse a person of having committed insurance fraud or theft is a serious and damaging allegation to a person's reputation. This is what defendant did when, relying on rumours or reports, he imputed to first plaintiff insurance fraud and to both plaintiffs theft. Had these been the only facts available, my order would have differed substantially from the one that I intend to make. But there are other facts that meliorate against treating this matter as a run of the mill case and to simply award damages.

[45] It is common ground that the content of the two letters only came to the attention of Carlos. As such there was extremely limited publication of the defamatory matter. It only reached one person. I also regard it as significant that Carlos is married to defendant's sister and is thus a member of the family. As such he would have been aware of the problems that defendant had with plaintiffs, concerning the running of the company and other family issues. He would thus take any allegations that defendant made with a pinch of salt. I also consider it to be relevant that the letters, as testified by defendant, did not have a negative impact on Carlos' relationship with plaintiffs.

[46] I also find in mitigation that defendant was not the originator of the defamatory material but merely the transmitter thereof. It is also important that the statements were qualified, by stating "that if the rumours are true…" and in the second letter expressly stating that he does not have concrete evidence and that the facts alluded to could all be pure coincidence. This to me shows that, although defendant must have foreseen the real possibility of injuring plaintiffs' reputation, I

do not think that it can be said that he had the direct intention to do so, or that he was acting maliciously when he wrote the letters. The letter dated 17 May 2004 clearly expresses a genuine concern for the affairs of the company of which he was a shareholder. It is in that context that the defamatory statement, expressing concerns about first plaintiff's position in the company must be viewed.

[47] Defendant testified that he had to give Carlos background information to understand the issues/problems better. This he probably tried to do in the second letter, in which he referred to a lot of facts that do not directly bear on the affairs of the company.

[48] Since the plaintiffs did not testify, there was no testimony on the personal circumstances of the plaintiffs and their standing in the community and what effect if any the defamatory statements had on their reputation. The only information which can be gleaned from the pleadings is that plaintiffs are husband and wife and live on the farm. Since publication was only made to Carlos one must assume, in the absence of any contrary evidence, that plaintiffs' standing in the community was not in the least affected by the defamatory paragraphs.

[49] The point was raised by Mr Barnard who appeared on behalf of plaintiffs that the fact that defendant did not offer an apology should be taken into account as an aggravating factor when computing the damages. It is correct that defendant did not offer an unconditional apology. However this does not in my view tell the entire story. Defendant testified that at one meeting of the company he had offered a general apology for any part he might have played in the "misunderstanding", which I take to

be a reference to the current dispute. In evidence he explained that he could not apologise for the content of the two letters, because of the legal dispute that was then underway. He stated that apologising would have been tantamount to an admission of liability, which he was not willing to do. In the *South African Constitutional* case of *Dikoko* Sachs J referred to the dilemma the defamer might find himself in, who wishes to apologise but runs the risk of paying (heavy) damages should the apology not be accepted (See*: Dikoko v Mokhatla supra* at 275 Para 119).

[50] Although defendant did not offer an unconditional apology, I did gain the impression that he was genuinely sorry about the current dispute of the family. This was evidenced at the end of defendant's testimony, when he extended an olive branch to plaintiffs. He asked this Court not to award costs against plaintiffs, for the sake of the peace of the family, in the event that this Court were to dismiss plaintiffs' case. I consider this to be relevant with regard to the order I intend to make.

[51] I am mindful of the fact that defendant did not offer an apology at an earlier stage and that he continued his plea of justification until the trial was concluded, without calling any witnesses to prove the statements he made. Having pleaded that the statements were true he needed to justify them. To continue with the defence, when witnesses were either unavailable or unwilling to testify would normally serve as an aggravating factor. It is however significant in my view that, when this matter was called, defendant was unrepresented and conducted his own defence. Clearly not skilled in matters of law and evidence, he was ill equipped to appreciate the requirements of proof needed to succeed with his defence. Although armed with the conviction in the justness of his cause, he was completely helpless when it came to setting up his defences. Had he been legally represented, he might have been advised

to adopt the course of the defendant in the *Mogale* matter to graciously surrender all defences and tender an apology and retraction. Not legally represented his case was lost before it had even started.

[52] Defendant testified that it took plaintiffs almost 16 months from the date the letters were written until summons was issued. Defendant submitted that a separate incident, unrelated to the defamation, triggered this suit and that plaintiffs did not initially feel aggrieved or defamed by the letters. The allegation of a delay of (almost) 16 months is correct when one looks at the date the letters were written (17 and 28 May 2004) and the date summons was issued(3 September 2005). Since plaintiffs did not testify to explain the delay, the Court is only left with defendant's version. Defendant also testified that the letters reflected how the family used to talk to and about each other. Considering all this I am inclined to accept that, whatever hurt plaintiffs felt as a result of the letters was not severe and that a separate incident might have triggered this action.

APPROPRIATE ORDER

[53] I now wish to consider what order would in the circumstances of this case do justice between the parties. Taking into account the fact that this matter is essentially a family dispute, involving a brother and sister and the latter's husband, I do not think justice would be served if I were not, through this judgment, to attempt to narrow the rift between the parties and to simply award damages. I am of the view that this is an appropriate case to apply the old Roman Dutch remedy of *amende honorable* and only in the alternative to order the payment of damages.

[54] The historical origins of this remedy have been sufficiently detailed in the *South African case of Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 523 to 525 and it is therefore not necessary to repeat them. The *amende honorable* is essentially an apology which takes two forms. Firstly it can be in the form of a retraction, which involves a declaration by the person who uttered or published the defamatory words stating that he withdraws such words or expressions as being untrue and is applied when such words or expressions are in fact untrue.

[55] Secondly it is in the form of an apology proper, which is an acknowledgement by the person who uttered or published the matter which if untrue would be defamatory, or who committed a real injury, that he has done wrong and a prayer that he may be forgiven. The Court found after analysing its origins that the remedy although hardly used had not been abrogated by disuse but was 'a little forgotten treasure, lost in a nook of our legal history'. Willis J concluded that the remedy was still part of South African law. Since we share the same Roman Dutch history with South Africa and in the absence of contrary authority, the statement that the remedy still forms part of the law would equally apply to Namibia.

[56] The remedy was recently considered in the unreported decision of *Shikongo v Trustco Group International Limited and Others* by Muller J. The learned judge in that case, took the absence of an apology into account in the determination of the quantum of the damages. The absence or presence of an apology has always been a factor that has been taken into account as aggravating or mitigating the damages. The Court did thus not differ from previous authorities in this regard. What the Court in

Shikongo v Trustco Group International Limited did not consider was whether, in appropriate cases, a party to a suit should be given an opportunity to make an apology instead of paying damages.

[57] As stated above, in light of the overarching purpose of the action for defamation, to vindicate a victim's reputation and dignity, a Court is not restricted to awarding pecuniary damages, even if demanded by a plaintiff, if it is of the opinion that an alternative remedy is more appropriate. This Court has the power to entertain any claim or give any order which at common law it would be entitled to entertain and give. This is commonly referred to as the inherent power of the Supreme Court. With regard to this inherent power the following has been stated:

> ***"The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given stage."***

(See: *Ex Parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585 H).

(58) Thus even if the *amende honorable* was not available, this Court would be entitled, in the exercise of its inherent jurisdiction (and absent contrary statutory law), to order the defamer, in appropriate circumstances, to apologise in lieu of paying damages.

[59] The Court seized with a defamation claim will have to decide in each case whether those appropriate circumstances exist. In a situation where parties operate at arms length, have no future relationship, or the relationship is of a purely commercial

nature the *amende honorable* may not be appropriate and payment of damages may serve more to repair the damaged reputation of the victim (See: *Young v Shaikh* 2004 (3) SA 46 (C)).

[60] In a situation, such as the instant case, where the parties have close family ties and ordinarily would enjoy close interaction, future relationships may be irreparably ruptured by the award of damages. In such as case it would be just and equitable for the Court to attempt to assist in the repair of the broken relationship, by affording a defendant the opportunity to tender a genuine apology for his conduct.

[61] Delivering a separate judgement Sachs J in the *Dikoko*, commented that monetary compensation alone is often not appropriate relief for defamation. He said the following:

> ***"[111] The notion that the value of a person's reputation has to be expressed in rands in fact carries the risk of undermining the very thing the law is seeking to vindicate, namely, the intangible, socially constructed and intensely meaningful good name of the injured person. The specific nature of the injury at issue requires a sensitive judicial response that goes beyond the ordinary alertness that courts should be expected to display to encourage settlement between litigants. As the law is currently applied, defamation proceedings tend to unfold in a way that exacerbates the ruptured relationship between the parties, driving them further apart rather than bringing them closer together. For the one to win, the other must lose, the scorecard being measured in a surplus of rands for the victor.***
>
> ***[112] What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings. In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the***

patrimonial dimensions of the problem. The principal goal should be repair rather than punishment." (paragraph 111 and 112 p 272)"

[62] Mokgoro J in his minority judgement in the same case had this to say:

> ***"It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant". (at para 68 p 260-261).***

[63] I am in respectful agreement with the sentiments expressed by the two learned judges in the *Dikoko* matter. Defendant in this matter has made serious imputations to plaintiffs' character, imputing to them the commission of criminal offences (fraud and theft). He has failed to justify those imputations by proving the truth of the facts. As such the defences raised must fail and are hereby rejected. Although the imputations against plaintiffs are serious, I find that the damages claimed by plaintiffs to be excessive in light of all the facts. I am of the view that to order defendant to apologise to plaintiffs is the appropriate remedy. This could start the process of reconciliation and cause the parties to move on to a more peaceful and harmonious relationship.

[64] I hope plaintiffs, whose reputation and dignity is restored and names are cleared by this judgement, will generously accept the apology in the spirit of reconciliation and take this judgement as an opportunity to begin a new chapter in their family's history. Defendant on the other hand should take this judgement as a warning and constant reminder that this Court will not countenance the spreading of

reports and rumours about other persons, the purpose of which can only be to lower a person in the estimation of others. In appropriate circumstances this Court will not shy away from awarding damages, in order to compensate the victims for the harm caused. I hope that defendant will take the opportunity of tendering an apology with both hands, by sincerely and genuinely expressing remorse for his conduct and thereby do his part in repairing the fractured family relationship.

[65] I therefore make the following orders:

1. Defendant is ordered to pay first plaintiff the sum of N$3 000.00 in respect of claim 1 and the sum of N$4 500.00 in respect of claim 2, with interest at the rate of 20% per annum from the date of judgement to date of payment respectively;

2. Defendant is ordered to pay second plaintiff the sum of N$4 500.00 in respect of claim 2, with interest at the rate of 20% per annum from the date of judgement to date of payment;

3. Second plaintiff's claim 1 is dismissed;

4. Defendant is ordered to pay the cost of suit;

5. The orders in paragraph 1 and 2 hereof shall only take effect in the event that defendant fails to publish, in a letter addressed to plaintiffs and Carlos Jose-Medeiros, and personally delivered, within **seven days** of the date of this order the following apology:

‘Apology and retraction to Nicolaas Godfried Heyns and Alida Heyns

I hereby wish to extend my unreserved apology, to my brother in law Nicolaas Godfried Heyns and my sister Alida Heyns for the defamatory statements made in my letters to Carlos Jose-Medeiros on 17 May 2004 and 28 May 2004, imputing fraudulent and dishonest conduct on their part. I unequivocally retract all such imputations and hereby tender my sincere apology for any inconvenience and pain that these statements may have caused to you and hope that this apology will present a new start in our family relationship.

Johannes Stephanus Malan’

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MARCUS AJ

ON BEHALF OF THE PLAINTIFFS: ADV P BARNARD

Instructed By: Du Toit Associates

ON BEHALF OF THE DEFENDANT: IN PERSON

Instructed By: