

IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

Case No 15946/2006

In the matter between:

LARIO VAN DER WALT t/a LARIO TRANSPORT 1st Applicant

DANIEL JOHANNES GERHARD NAUDE 2nd Applicant

And

ABSA BANK LIMITED Respondent

JUDGMENT

THE PARTIES

1. The first applicant is Lario van der Walt, a major businesswoman of 79 Voortrekker Street, Polokwane, Limpopo Province. She is the sole proprietor of Lario Transport, a business that deals in motor vehicles.
2. The second applicant is Daniel Johannes Gerhardus Naude, known in the motor trade as Danie Naude. He works in first applicant's business, having apparently earlier been associated with a business known as Supreme Cars.
3. The respondent is Absa Bank Limited, an authorized financial services provider, duly incorporated and registered in accordance with the South African companies and banking legislation, with registered head office at 160 Main Street, Johannesburg.

THE BACKGROUND

4. The respondent, as an authorized financial services provider, is involved in the financing of the purchase and lease of motor vehicles.
5. As a motor vehicle dealer, the first applicant is dependent upon obtaining finance for her own operations, but as dealer her

business also depends upon the willingness of financial institutions to enter into financing transactions for the purchase and lease of motor vehicles with its clients.

6. The times South Africans live in being what they are, financial institutions must be ever vigilant against fraud and deception perpetrated upon them in applications for vehicle finance.
7. For this purpose, financing houses apparently circulate the names of dealers, purchasers and other individuals in the motor trade who have allegedly been involved in untoward business among their staff and offices.
8. These notices are allegedly also circulated to other financial services providers, warning them of dealers and individuals who have been less than honest in their dealings with one or more of these institutions.
9. On or about the 12th September 2006, the respondent admittedly published a circular, called a “Fraud Cautionary Notice”, to its employees dealing with vehicle finance in which it warned them against three motor dealers who were allegedly guilty of fraud in their commercial transactions.
10. The applicants were mentioned in this circular.
11. One of the recipients, a certain Du Preez, sent the circular to one Ben Niemandt, an outsider involved in the motor trade, who sent the notice to other acquaintances who also deal in new or second hand cars.
12. The dissemination of this note spread like a wildfire in the motor trade. According to the applicants, several of their trading partners, suppliers and clients have refused to do business with them since the publication of the note.
13. All three dealers mentioned in the notice protested vigorously and demanded a retraction and an apology from the respondent.
14. Respondent published a retraction of the allegations against the other two traders, but refused to do the same in respect of the allegation against the applicants.
15. Applicants’ attorneys addressed a letter to the respondent demanding a retraction and an apology published as prominently as the defamatory allegation had been, together with an undertaking not to repeat the slander.
16. The respondent replied, after some prevarication, that the offending circular had been intended only as a confidential internal document disseminated to the Absa employees working in the field.
17. Respondent, while asserting that the dissemination of the circular to outsider was against its policies, denied

responsibility for Du Preez' actions, claiming that he was not acting in the course and scope of his employment when the e-mail was sent.

18. Applicants launched the present urgent application. Because the respondent was given little more than twenty-four hours notice, the parties agreed upon dates for the exchange of answering and replying affidavits while respondent gave a without prejudice undertaking not to disseminate the offending publication pending the finalization of the proceedings.

THE RELIEF SOUGHT

19. Applicants seek an interdict prohibiting the respondent from disseminating the offending e-mail, or any document containing the same or similar allegations in any fashion whatever.
20. They also demand an order that compels the respondent to publish a retraction of the contents of the "Fraud Cautionary Notice" which must be sent to all recipients of the said notice, as well as costs on the attorney and client scale.
21. At the end of the argument, counsel for the applicants handed in a draft order in substantially these terms.

THE RESPONDENT'S DEFENCE

22. The respondent, through one Du Toit, a risk management officer, denied that the applicants were entitled to any interdict against future dissemination of the offending matter as the respondent did not intend to publish these allegations in any manner or fashion in the future.
23. Respondent also repeated the denial that it was responsible for Du Preez's actions as he had disseminated the e-mail contrary to the respondent's policies.
24. This defence was barely persisted in when argument commenced.
25. Mr Eyles on behalf of the respondent maintained stoutly, however, that the applicants were not entitled to an order enforcing a retraction by the respondent, as such an order would amount to final relief without an alternative claim for damages.
26. The claim for a retraction is founded upon the "*amende honorable*" of the Roman Dutch law, so counsel submitted, which relief has fallen into disuse and could in any event not be enforced without civil imprisonment if the offender were to refuse to retract or apologize. He argued that a court cannot

order a retraction because civil imprisonment has been declared unconstitutional.

THE LAW

27. It is common cause that the contents of the “Fraud Cautionary Notice” are defamatory of the applicants. Respondent has not suggested that the contents thereof are true and has not raised the defence that the publication to persons outside the circle of motor vehicle finance operators was lawful because the allegations are true and publication thereof in the public interest. On the contrary, respondent has disavowed any intention to disseminate the notice to outsiders.
28. It is also common cause that the circulation of the notice among respondent’s employees and the respondent’s associates in the motor vehicle finance trade was privileged as long as the publication was restricted to those individuals who had a duty to take note of its contents in the execution of their tasks dealing with motor vehicle finance.
29. The publication of the notice by Du Preez to outsiders is not covered by this privilege and constitutes a defamation of the applicants. Apart from advancing the untenable suggestion that it is not responsible for its employee’s actions, respondent has not argued otherwise.
30. The applicants have therefore been defamed.
31. The applicants have claimed an interdict against further publication of the defamatory matter.
32. Such interdict should only be granted if there is a real threat that the respondent will continue to disseminate the offending notice: *Lieberthal v Primedia Broadcasting (Pty) Ltd* 2003 (5) SA 39 (W).
33. The respondent has undertaken not to publish the notice any further.
34. There is nothing to suggest that this undertaking is not genuine and that the respondent will not abide thereby.
35. The applicants are therefore not entitled to an interdict.
36. This leaves the question whether the respondent can be ordered to publish a retraction and apology.
37. In arguing that the power to grant the so-called “*amende honorable*” had become obsolete and was in any event unenforceable by means that were constitutionally compatible, Mr Eyles relied principally upon authorities *Van Niekerk and*

another v Radebe and another Case No 00/21813 (W) (unreported).

38. With reference to the seminal decision of Willis J in *Mineworkers Investment Co Ltd v Modibane* 2002 (6) 512 (W), counsel furthermore submitted that, even if the “*amende honorable*” did exist in South African law, it could only be decreed as an alternative to an order awarding monetary damages in the event of the retraction not being published in accordance with the trial Court’s directive.
39. As the applicants had chosen to approach the court by way of motion proceedings, this alternative was not available to the applicants because damages, being in their nature illiquid until quantified by the court, can only be awarded in trial proceedings.
40. Although venerable authority supports the approach adopted by Willis J – see i.a. *Room Hire Co. Pty Ltd. v Jeppe Street Mansions Pty Ltd* 1949 (3) SA 1155(T) at 1161 and the *Van Niekerk* decision *supra* – I am not at all certain that the need to develop effective remedies to redress the hurt and damage done to the feelings, character and reputation of the victim of a defamatory publication or utterance, may not in time to come require a reassessment of this approach to procedural law. If the evidence of the nature and extent of a defamation can be established in motion proceedings, there appears to be little other than the traditional approach to this procedure standing in the way of awarding damages to the applicant as an alternative to a retraction and apology which the perpetrator refuses to publish.
41. As the issue does not arise squarely in the present matter, however, it is unnecessary to investigate this aspect further.
42. The Constitutional Court has recently considered defamation in the matter of *Dikoko v Mokhatla* CCT 62/05 (not yet reported). The issues that arose for decision were the limits of immunity from civil liability granted to municipal councillors in respect of defamatory utterances made by them in the execution of their functions; the question whether damages awarded to the victim of a defamation could be regarded as a constitutional issue (which the majority judgment left open); and the question whether an award sounding in money as damages for a defamation should be interfered with or not (the majority judgment held that, assuming in favour of the appellant that the issue of the quantum of damages was a constitutional matter because it reflected the trial court’s approach to the balancing of

the constitutional right to dignity against the right of freedom of expression; the award should not be interfered with.).

43. In two minority judgments by Mokgoro J and Sachs J, the question was discussed whether monetary compensation could and should in all instances be regarded as the appropriate relief for defamation, and whether the indigenous values of *ubuntu* or *botho* could not be explored to provide new and creative alternatives, which could and should be linked to the application of restorative justice.
44. The majority of the court held that the issue of alternative remedies had not arisen before the trial court and was therefore not properly before the Constitutional Court.
45. This does not, with respect, detract from the persuasiveness of the discussion of alternative remedies to monetary awards for defamation by the minority judgments in deciding the very question that has arisen squarely in this application.
46. After discussing the decision in *Mineworkers Investment Co, supra*, and referring to *Young v Shaikh* 2004 (3) SA 46 (C), (in which the *amende honorable* was held to be inadequate and therefore inapplicable in the circumstances of that case, even if it did form part of South African law), Mokgoro J. continued at par [68]:

“In our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of the harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases for 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 damage and not to punish a defendant. A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful

actions, similar to the emerging idea of restorative justice in our sentencing laws.

[69] The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that our courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the amende honorable is part of our law or not, our law in this area should be developed in the light of the values of ubuntu emphasizing restorative rather than retributive justice....courts should be pro-active encouraging apology and mutual understanding wherever possible."

47. To these observation Sachs J adds at [109] and further:

"There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike business, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur...The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one...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 seeks to vindicate, namely the intangible, socially-constructed and intensely meaningful good name of the injured person...What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings...Ubunthu-botho is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of

restorative justice have been identified as encounter, reparation, reintegration and participation.”

48. Applying this approach to the present matter creates the opportunity to combine an order that reflects the foundational values of the Constitution in that it restores the applicants' dignity and reputation, with a commercially desirable result as it opens the door to a restoration of the relationship the parties seem to have enjoyed prior to the defamation.
49. It is obvious that the applicants have no desire to confront the respondent, a mighty multinational financial institution, in protracted litigation to win a monetary award. In resources and the ability to fund expensive legal proceedings, applicants would find themselves playing the role of David challenging Goliath, running the risk of financial ruin in the process. They would much rather see their restoration to the status of a dealership the respondent and its associates are prepared to do business with. At the very least, they require the court to pronounce the unwarranted slur upon their reputation as unlawful and see a retraction thereof published in the same manner and to the same persons and institutions that received the original “fraud cautionary notice”.
50. The respondent, on the other hand, should have no difficulty in publishing an appropriate retraction with minimal expense and inconvenience. Once this step has been taken, a mutually rewarding relationship may be re-established in which both parties reap commercial benefit from doing business with one another.
51. The fact that no award of damages can be granted in these proceedings should the respondent fail to publish the retraction it has been ordered to disseminate by this court, should not stand in the way of ensuring that the object of this judgment is achieved. Should the respondent fail to publish the retraction within seven days from the date of delivery hereof, the applicants will be entitled to publish this judgment in its entirety as a full page advertisement in two national Sunday newspapers, or two other print publications of a similar nature, at the respondent's cost. Should the respondent fail to pay the costs of such publication upon demand, the deputy sheriff for the district of Johannesburg is hereby authorized and ordered to attach as much of the respondent's assets as may be required to fund the publication of such advertisements.

52. This appears to be an effective remedy to support an order that does not decree the payment of money as an alternative which is certainly constitutionally compatible.
53. The court trusts, however, that the parties will adopt the spirit of this judgment and act in accordance therewith.

THE COSTS

54. The applicants are clearly entitled to their costs. These costs should include the costs of two counsel.
55. The applicants seek costs on the scale of attorney and own client, which the respondent submits would be unwarranted.
56. While I agree that the opprobrium suffered by a party against whom an award of costs on the scale of attorney and own client has been made is unwarranted in this instance, the respondent finds itself in the fortunate position that the applicants did not seek a monetary award against it. Seen in this light, an award of costs on the attorney and client scale is fair and equitable.
57. It would be unfair to expect the applicants to be out of pocket because they took steps to restore their reputation and to remove a slur that was cast upon their character.

THE ORDER

58. The draft presented by the applicants requires some amendment.
59. The following order is made:
 1. The respondent is ordered forthwith, upon granting of this order, furnish the applicants with a written retraction of the **“fraud cautionary notice”** as contained in annexure “B” hereto;
 2. The respondent is ordered to address the written retraction, annexure “B”, to all parties listed as the recipients in annexure “A” hereto of the **“fraud cautionary notice”**, including Mr Ben Niemandt, who is requested to pass it on to every person he sent the **“fraud cautionary notice”** to. (It must be emphasized that Mr Niemandt is not ordered to do so as he is not a party to these proceedings);
 3. Should respondent fail to publish the retraction within seven days of this order, the applicants are entitled to publish this judgment in its entirety as a full page advertisement in two Sunday newspapers or two similar print publications;

4. The respondent is in such event ordered to pay the costs of such advertisements upon demand, whether before or after the advertisement has been published;
5. Should respondent fail to pay the costs of the said advertisement, the deputy sheriff for the district of Johannesburg is ordered and authorized to attach as many of the respondent's assets as may be required to fund the publication thereof;
6. Respondent is ordered to pay the applicants' costs on the scale of attorney and client; including the costs reserved on the 28th September 2006; the 5th October 2006 and the 6th October 2006. The costs are to include the costs of two counsel.

Signed at Pretoria on this 17th October 2006.

E BERTELSMANN
Judge of the High Court