IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 1225/2002

In the matter between

NEWTON GLEN BOUWER	**1st Plaintiff**
NEWTON GLEN BOUWER N.O.	**2nd Plaintiff**
DENISE BOUWER N.O.	**3rd Plaintiff**
MORRIS DU PLESSIS N.O.	**4th Plaintiff**
LEE-ANNE STEPHENSON	**5th Plaintiff**

vs

TEA & COFFEE DISTRIBUTORS EP CC	
REG NO: CK 1988/32853/23	**1st Defendant**
GREG MILES	**2nd Defendant**

JUDGMENT

PICKERING J:

There are, in this action, two claims. In respect of claim one the second, third and fourth plaintiffs, namely Mr. Newton Glen Bouwer, Mrs. Denise Bouwer and Mr. Morris Du Plessis, in their respective capacities as trustees of the Basie Bouwer Family Trust ("the Trust"), seek a final interdict restraining the two defendants from, *inter alia*, unlawfully competing with the Trust by publishing defamatory statements of and concerning the Trust, in particular, to suppliers of products in which both the Trust and the first defendant traded. It is common cause that the Trust trades as G&B Enterprises.

First defendant is Tea and Coffee Distributors EP CC, a duly registered close corporation. Second defendant is Mr. Greg Miles, the sole member of the first defendant.

In the second claim the first plaintiff, Mr. Newton Glen Bouwer, and fifth plaintiff, Mrs. Lee-Anne Stephenson, claim, in their personal capacities, damages from

both defendants in the sum of R75 000,00 each, arising out of the publication of allegedly defamatory statements of and concerning them by the two defendants.

Before setting out the allegedly defamatory statements which gave rise to these proceedings it will be convenient to deal with the evidence relating to the events which led up to the publication thereof, such publication having occurred on 20 May 2002.

In this regard the second defendant, Greg Miles, testified that the first defendant, which has been operating for 14 years, is foremost in its field in the Eastern Cape as a supplier of tea and coffee products, with a turnover in excess of R1 million per month.

At various times first defendant had employed the services of one Mark Stephenson and of Lee-Anne Stephenson, the fifth plaintiff. According to second defendant Mark Stephenson and fifth plaintiff had a somewhat stormy relationship, having been married, then divorced, then at various times thereafter reunited with each other. At some stage Mark Stephenson had left defendant's employ and had joined one of the companies operating in competition to first defendant before opening his own business known as Koff-Chem. He had later attempted to sell this business to first defendant but in doing so had acted "*under false pretences*" as second defendant put it. According to second defendant he was aware that Mark Stephenson had indulged in and was continuing to indulge in dishonest practices and that he owed various creditors in excess of R200 000,00. It is further common cause that at the time of publication of the allegedly defamatory statements on 20 May 2002 Mark Stephenson was being investigated by the Police on various fraud and theft charges and that he was thereafter convicted on numerous counts of fraud as well as of certain offences under the Insolvency Act no 24 of 1936.

The fifth plaintiff, however, remained in the employ of first defendant as a

salesperson for a further two to three years after Mark Stephenson had departed before herself leaving such employ approximately two to three weeks prior to 20 May 2002. According to second defendant the fifth plaintiff had been at work on a Friday only for him to discover the following Monday that she had left over the weekend without having giving notice of her intention to do so and that she had, in the process, stolen first defendant's customer lists as well as other confidential information relating, *inter alia*, to first defendant's product costing structure and formulas.

Shortly after fifth plaintiff had left first defendant's employ second defendant was advised by certain of first defendant's customers that they had received quotations, in respect of products similar to those distributed by first defendant, from a business known as G&B Enterprises, such quotations being in each case a few cents cheaper than those of first defendant. According to second defendant he had not previously heard of G&B Enterprises but was appalled to discover, on seeing the quotations, that Mark Stephenson and fifth plaintiff had been involved in the preparation thereof on behalf of G&B Enterprises. He discovered that the telefax number from which these quotations had been telefaxed belonged to a company known as Federal Mogul. He ascertained that Mr. Newton Glen Bouwer was involved in the running of G&B Enterprises and that his wife, Mrs. Denise Bouwer (the third plaintiff) was the sole proprietor of a business known as Federal Mogul Canteen. He eventually managed to speak to Mr. Bouwer on the telephone on 14 May 2002. His reason for contacting Mr. Bouwer was to warn him specifically about Mark Stephenson. He was, so he testified, not concerned that G&B Enterprises posed any threat in the normal course of events to first defendant's business but was concerned about the fact that it was using confidential information stolen from first defendant in order to compete unfairly with first defendant.

After Mr. Bouwer had confirmed that Mark Stephenson and fifth plaintiff were indeed in the employ of G&B Enterprises second defendant warned him that

Mark Stephenson was untrustworthy and dishonest and that there were a number of fraud cases being investigated against him. According to second defendant Mr. Bouwer stated that he would investigate the matter and that he would come back to second defendant. According to Mr. Bouwer, who testified on behalf of the plaintiffs, it had been agreed that he would meet second defendant during the week commencing Monday 20 May 2002. Nothing, however, turns on this dispute.

Second defendant stated further that when Mr. Bouwer did not revert to him as agreed he attempted unsuccessfully to contact him during the course of the week. When he got to work on Monday 20 May of the following week he discovered that a number of further quotations which had obviously also utilised first defendant's confidential information had been sent out by G&B Enterprises to customers of first defendant. He then telephoned the wife of Mr. Bouwer in an effort to speak to him. She said, however, that she could not get hold of him. Second defendant stated that he gained the impression that Mr. Bouwer was avoiding him. I pause to mention that his impression in this regard was in fact justified as Mr. Bouwer, in his evidence, stated that after the telephone conversation on 14 May 2002 he had decided not to contact second defendant. Second defendant stated that he was extremely angry at what was going on and, having thought about the matter, he decided that the only course of conduct open to him would be to send a letter to each of first defendant's suppliers advising them of the situation and warning them of the conduct of the Stephensons. He accordingly drafted a letter which he considered would meet the exigencies of the situation. It is this letter which has given rise to this action. He drafted as well a covering letter for the attention of Mr. Bouwer and caused the covering letter together with the draft letter to be telefaxed at 09h14 to the telefax number of Federal Mogul, such being the only contact number for Mr. Bouwer of which he was in possession. The purpose of sending the letter was, according to him, to get Mr. Bouwer to contact him in order to sort out the problem.

The covering letter (annexure GM1 to the defendant's plea) reads as follows:

> "ATTENTION: GLEN BOUWER
>
> Below is a basic idea of a letter we will be sending to all suppliers, wholesalers, customers, etc. Please discuss these details with your staff and let us know if anything is untrue, as we would not like to be accused of spreading lies. We will also be sending a story to the newspapers, as we feel that it is only fair to warn people of what is going on.
>
> GREG MILES"

The letter referred to (annexure A to the particulars of plaintiff's claim) is written on first defendant's letterhead and reads as follows:

> "ATTENTION: ALL SUPPLIERS/CUSTOMERS
>
> RE: MARK & LEE-ANNE STEPHENSON/"KOFF-CHEM"
>
> It has come to our attention that above individuals have started trading again. It appears this time they are "hiding" behind the names G.B. Enterprises or Glen Bouwer, or Federal Mogul Canteen. We suggest you screen all new business very carefully, as these guys are extremely sneaky and will go to any lengths to commit fraud.
>
> 1. In the last couple of years, they have been opening accounts with various supplies (sic) around the country supplying goods to customers at rock bottom prices, and not paying there (sic) creditors or issuing bad cheques.
> 2. They have also defrauded various people along the way who have lent him money or signed security and been conned out of there (sic) money. He has in this way run up debts of hundreds of thousands of rands (this is what we know about)
> 3. After running out of people who would supply him, he closes his business, collects all his debtors' money and hides away.
> 4. They seem to some how be avoiding arrest, as there are numerous fraud and theft charges against them.
> 5. Lee-Anne who worked at Tea & Coffee Distributors until recently has stolen all our customer lists, formulas, etc and they have started operating again. We are not quite sure how they are managing to aquire (sic) stock, but are pretty sure they are conning someone, as this has always been there (sic) way.
> 6. We know that the law must take its course and sort them out, but we urge you

not to assist their criminal activities by supporting them.

7. We have included a list of know (sic) creditors, and would urge you to contact them to confirm above details.

GREG MILES"

In his evidence first plaintiff, Mr. Bouwer, testified that fifth plaintiff had been working for G&B Enterprises for approximately 6 weeks prior to 20 May 2002. He denied that Mark Stephenson had ever been similarly so employed. He stated that on 20 May 2002 he received a telephone call from his wife advising him of the receipt of the above two telefaxes. He was shocked and horrified on reading the letter (annexure A) and immediately contacted his attorney, Mr. Bester. A letter (exhibit B1) written by Mr. Bester was delivered to the defendants at 13h25 on 20 May 2002. In this letter Mr. Bester stated that the letter (annexure A) was defamatory of both first and fifth plaintiffs for whom he acted, and also constituted "*a form of unlawful competition*" in respect of G&B Enterprises. The following demands were then made:

"1. That Tea and Coffee Distributors EP CC and Greg Miles jointly and severally confirm within two hours from the time of delivery of this letter to yourselves, that the letter addressed to suppliers and/or customers will not be sent or distributed in any form or manner whatsoever.
2. That all allegations of dishonesty, fraud, theft and criminal activities be immediately withdrawn in writing.
3. That Tea and Coffee Distributors EP CC and Greg Miles jointly and/or severally immediately pay the amount of R250 000 to Mr. Glen Bouwer and Mrs. Lee-Anne Stephenson each in view of the defamatory allegations contained in your letter.
4. To refrain from intervening in clients' business and/or competing with our clients unlawfully; and
5. To refrain from spreading any defamatory remarks about our clients."

It was now second defendant's turn to be shocked. He testified that on receipt of this letter he "*got a big fright*" more especially as he had never intended to cause harm to either first plaintiff or G&B Enterprises. He immediately telephoned Mr.

Bester and, according to him, gave Mr. Bester an "*unequivocal undertaking*" that the letter would not henceforth be sent or distributed in any form or manner to any suppliers or customers. Mr. Bester asked him whether it had already been sent to which he replied "*not as far as I know*." He testified, however, that this reply was false inasmuch as at that time he already knew that the letter had been telefaxed on his instructions to at least 10 suppliers and customers, such telefaxes having commenced at 09h57 after first plaintiff had failed to immediately contact him. He had lied to Mr. Bester because he was frightened now that lawyers had become involved and wished to consult first with his own attorney.

Whether the second defendant did in fact give Mr. Bester the unequivocal undertaking referred to above is in dispute, although no evidence was led on behalf of the plaintiffs in this regard other than a hearsay allegation by Mr. Bouwer to the effect that Mr. Bester had informed him that second defendant had refused to give any such undertaking. Mr. Bouwer's evidence in this regard was, however, contradictory and at one stage he stated that he had been told by Mr. Bester that such an undertaking had indeed been given. Be that as it may, the five plaintiffs then launched an application in the South Eastern Cape Local Division under case no 1009/02 as a matter of urgency on 21 May 2002 for certain relief against both defendants. The application came before Jansen J on 22 May 2002 on which date all the parties were legally represented. The following order was granted by Jansen J:

> "1. Dat Eerste en Tweede Respondente verbied word om op onregmatige wyse in kompetisie te tree met Applikante deur die verspreiding van lasterlike bewerings, wat insluit mondelingse mededelings aan die publiek in die algemeen en in die besonder aan enige gebruikers van daardie produkte waarin die Trust sowel as Eerste Respondent handel dryf;
>
> 2. Dat Eerste en Tweede Respondente verbied word om skriftelike publikasie te laat geskied van lasterlike en ander onregmatige publikasies aan die publiek in die algemeen en in die besonder aan daardie gebruikers van die produkte waarin die Trust en Eerste Respondent handel dryf;

3. Dat die koste van die aansoek sal koste in die aksie wees wat die Applikante beoog om in te stel soos in paragraaf 4 infra.
4. Dat Applikante 'n aksie instel teen Eerste en Tweede Respondente binne twintig dae na datum van hierdie bevel, by gebreke waarvan die bevel ipso facto sal verval en Respondent geregtig sal wees om die Hof te nader vir 'n gepaste kostebevel."

It thereafter came to the attention of the first plaintiff that publication of the letter to certain suppliers had in fact already occurred at the time that the above order was granted. Mr. Bester accordingly addressed a letter (exhibit B3) to defendant's attorney, Mr. Fred Stemmett, stating, *inter alia*, as follows:

> "Dit spreek vanself dat die regshulp wat aangevrae was gemik was op die voorkoming van die publikasie sonder dat dit reeds plaasgevind het. In die lig van voormelde is ons kliënt nou genoop om hom weer na die Hooggeregshof te wend om ten eerste 'n mandamus teen u kliënt aan te vra om volle besonderhede te verskaf aan wie die dokumente en/verklarings gepubliseer is en die tyd daarvan.
>
> In die omstandighede word u hiermee versoek om onmiddelik en voor 17h00 vandag volledige besonderhede te verskaf ten opsigte van:
> 1. Die persone aan wie publikasie gemaak is, in welke vorm ookal;
> 2. Die tyd van publikasie aan gemelde persone;
> 3. Die vorm en/of wyse van publikasie;
> 4. Die oorsprong van publikasie;
> 5. 'n Skriftelike onderneming van u kliënt tesame met stawende dokumentasie as bewys dat al die persone aan wie reeds kennis gegee is meegedeel word dat 'n Hofbevel ter verbieding van die gedrag bestaan;
> 6. Die kennisgewing, soos hierin vantenvore vermeld, moet ook die onwaarheid van die bewerings bevestig;
> 7. Die kennisgewing moet 'n ongekwalifiseerde apologie bevat;
> 8. Name en adresse van alle persone betrokke by die publikasie daarvan, hetsy in diens van die Eerste Respondent en/of wie se optrede in opdrag van en/of medewete van die Tweede Respondent opgetree het."

Defendant's attorney, Mr. Stemmett, responded hereto furnishing all the requisite information sought. He included in the correspondence a draft letter for the

"*consideration and approval*" of Mr. Bester. This draft letter, (exhibit B9) was intended for onward transmission to those suppliers who had already received the letter (annexure A). It reads as follows:

> "We act on behalf of Mr. Greg Miles the managing member of Tea and Coffee Distributors EP CC.
>
> We have been instructed to place the following on record:
>
> i) that on 20/05/02 a telefax was forwarded to your goodselves concerning Mark and Lee-Anne Stephenson/Koff-Chem;
>
> ii) this fax is now the subject matter of a defamatory action to be instituted by Mr. Newton Glen Bouwer both in his personal capacity and in his capacity as Trustee of the Basie Bouwer Family Trust, which trades as G.B. Enterprises;
>
> iii) the said Mr. Bouwer upon learning of the said document, felt aggrieved thereby and immediately obtained a Court Order, a copy of which is annexed hereto;
>
> iv) our instructions are to unequivocally and categorically apologise to Mr. Bouwer on behalf of our client for any embarrassment and inconvenience caused by the said document and its publication, and hereby do so;
>
> v) it is our instructions further, that our client has no dispute with Mr. Bouwer and/ or his business and that it was never his intention to bring Mr. Bouwer or his business into disrepute;
>
> vi) We furthermore hereby wish to unreservedly withdraw on behalf of our client as untrue any allegation in the said fax which may be construed at (sic) pertaining to the said Mr. Bouwer and/or his business."

Mr. Bester replied by letter dated 28 May 2002 (exhibit B18) stating that he was taking instructions as to the contents of the draft letter of apology and would revert to Mr. Stemmett. For some reason, never explained, this letter was only delivered by hand to Mr. Stemmett's offices on 18 June 2002. It is common cause that Mr. Bester did not at any time thereafter revert to Mr. Stemmett concerning the draft letter of apology and that particular matter has remained in abeyance ever since.

Thereafter on 19 June 2002, action was instituted by the five plaintiffs in compliance with paragraph 4 of the Order of Court dated 20 May 2002.

CLAIM ONE

In his argument before me Mr. Jooste, who appeared for all five plaintiffs, submitted that the publication by the defendants of the letter (annexure A) to the suppliers was unlawful and constituted unfair competition. He referred in this regard to Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty) Ltd 2002 (2) SA 268 (E) where the following was stated by Nepgen J at 279 B – C:

> "As was pointed out in Schultz v Butt 1986 (3) SA 667 (A) at 678 F – G every person is, as a general rule, entitled to carry on his business in competition with his rivals, but such competition must remain in lawful bounds. A litigant who seeks relief from competition which he contends is unfair must establish, *inter alia*, that his opponent has committed a wrongful act. The unlawfulness which must be proved is not limited to unlawfulness falling into a category of clearly recognised illegality. Fairness and honesty in competition are criteria that have been emphasised in many of the decided cases."

In the view which I take of this matter it is not necessary to decide this issue. I shall assume, without deciding, that publication of the letter to the suppliers did constitute unlawful conduct as envisaged in the Woodlands Dairy case, *supra* which would, provided the other requisites were met, justify the granting of a final interdict.

The requisites for a final interdict are well known, being a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.

Assuming, as I have, that the plaintiffs have established a clear right, it is necessary to consider the second requisite, namely that an injury has actually been committed or is reasonably apprehended. In this regard what was stated in Francis v Roberts 1973 (1) SA 507 (RAD) at 512 H – 513 B is apposite. In that matter Beadle CJ, with whom MacDonald JP concurred, referred with approval to the following statement in Performing Right Society Ltd v Berman and Another

1966 (2) SA 355 (R) at 375 A where Lewis J stated:

> "It seems to me that the statement of the learned authors that the plaintiff must show positively that the defendant is likely to continue his infringement, refers to the type of case where the *prima facie* position is that the infringement has occurred once and for all, and is finished and done with; and if, in addition, the defendant has given a *bona fide* undertaking not to repeat the infringement, that is an important factor which will influence the Court in refusing an interdict. See, for example, the case of Condè Nast Publications Ltd v Jaffe 1951 (1) SA 81 (O)."

At 513 C – D Beadle CJ continued:

> "The injury with which this case is concerned is not the sort of injury which can be described as an injury which 'has occurred once and for all'. It is the type of injury which is quite capable of repeating itself time and again. The defendant also has not, even today, given an unequivocal undertaking that she will refrain from allowing the infringement to occur again. Furthermore, from the manner in which the defendant has defied the plaintiff's rights in the past, it cannot be said with any confidence that the plaintiff's fear that she will infringe his rights again are groundless. I do not think that this is a case where there is any obligation on the plaintiff to show, on a balance of probabilities, that if he is not granted an interdict the defendant will again infringe his rights."

In my view, the present is indeed the type of case where the infringement by the defendants which has occurred has occurred once and for all and is finished and done with. It is not in dispute that prior to institution of this action the defendants complied with each and every demand made by the plaintiffs in respect of this claim. The draft letter prepared by Mr. Stemmett on behalf of the defendants amounts to a grovelling apology which defendants were prepared to convey to whomsoever the letter (annexure A) had been published. Although not couched in the form of an unequivocal undertaking not to repeat the publication it is clear that such was its effect.

In my view, therefore, it was clear as far back as 24 May 2002 that there was no

likelihood that the injury which had been inflicted in the past would be repeated in the future. Mr. Bester's letter of 28 May 2002, stating that he would take instructions from plaintiffs as to the letter of apology, was only delivered to Mr. Stemmett on 18 June 2002. It appears therefore that neither Mr. Bester nor the plaintiffs had applied their minds to the issue in the interim. Had they done so they would, in my view, immediately have appreciated that the need, and indeed the basis, for a final interdict had fallen away.

In all the circumstances I am satisfied that the second third and fourth plaintiffs have not made out a case for a final interdict and that judgment must be entered for defendants on this claim.

That leaves the question of costs, including the costs of the application for the interdict *pendente lite*. Mr. Scott, who appeared for the defendants correctly did not seek to contend that the plaintiffs had not been justified in bringing the application for an interdict *pendente lite,* regard being had to the circumstances pertaining at the time. There can be no doubt that plaintiffs are entitled to the costs of that application. It seems to me also that plaintiffs were entitled to a *spatium deliberandi* within which to consider the draft letter of apology and their position in the light thereof. I am therefore of the view, in the exercise of my discretion in this regard, that defendants should pay the costs of the application and of the action up to and including 18 June 2002. The costs thereafter will be borne by the second, third and fourth plaintiffs.

CLAIM TWO

This claim was formulated solely on the basis that the letter (annexure A) was *per se* defamatory of first and fifth plaintiffs, no secondary meaning or innuendo being pleaded. That being so, plaintiffs stood to stand or fall by the *ipsissima verba* relied on.

On the defendant's plea, as eventually amended at the commencement of the trial, defendants' denied that the letter (annexure A) was *per se* defamatory of either first or fifth plaintiffs but pleaded further, in the case of the fifth plaintiff, that in the event of it being found that the letter was *per se* defamatory of her, the contents thereof were true and publication thereof was in the public interest.

I will deal first with the case of first plaintiff.

That it is defamatory *per se* to impute to a person fraudulent conduct admits of no doubt. So too is it defamatory to allege that a person is "*conning*" another as stated in the letter. In Jasat and Another v Paruk 1983 (4) SA 724 (N) Law J stated at 732 H – 733 A:

> "The words "con artist" mean the same as the words "confidence trickster". Both terms describe a person who is dishonest in a devious or cunning way; who manages to trick others by inspiring in them confidence in his honesty. There is no doubt in my mind that it is *per se* defamatory to call a person a con artist."

The issue with regard to first plaintiff is whether the averments contained in the letter contain any imputation against first plaintiff's moral character such as to lower him in the estimation of ordinary or reasonable members of society. (Compare: Mahomed v Jassiem 1996 (1) SA 673 (SCA)).

It is clear from the relevant decisions that in a matter such as the present the Court has to determine the ordinary meaning of the words used in the letter, such being the meaning which an ordinary, reasonable person of average intelligence and education would attribute to the words. In Demmers v Wyllie and Others 1980 (1) SA 835 (AD) the following was stated at 842 H:

> "[T]he words 'reasonable person' or 'reasonable man' referred to in the decisions cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those

words which cannot reasonably be attributed thereto."

In Argus Printing and Publishing Co Ltd v Esselen's Estate 1994 (2) SA 1 (AD) Corbett CJ stated as follows at 20 G:

> "In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply."

At 20 I – 21 B Corbett CJ continued:

> "And in Jones v Skelton [1963] 3 All ER 952 (PC) Lord Morris of Borth-y-Gest, citing Lewis's case, stated (at 958 F – G):
>
> > 'The ordinary and natural meaning of words may be either the literal meaning or may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning that is capable of being detected in the language used can be a part of the ordinary and natural meaning of words…'
>
> (See also Gatley on Libel and Slander 8th ed paras 86, 93, 97; Duncan and Neill on Defamation 2nd ed paras 4.05 and 4.06; Burchell The Law of Defamation in South Africa at 85; cf Sauls and Others v Hendrickse 1992 (3) SA 912 (A) at 919 E). And I must emphasise that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be attributed to the words used only by the hearer having knowledge of special circumstances."

See too: Jonathan Burchell: Personality Rights and Freedom of Expression at 187 et seq.

Mr. Jooste submitted that the ordinary, reasonable reader of average intelligence would understand from the letter that Mark and Lee-Anne Stephenson were deceiving or "conning" the public with the assistance and connivance of Glen Bouwer and would read the letter as implying that Glen Bouwer was part and

parcel of the nefarious activities conducted by the Stephensons and was colluding with them in order to defraud members of the public.

In this regard he referred in particular to the sentence "we suggest you screen all new business as '*these guys* are extremely sneaky and will go to any lengths to commit fraud'" (My emphasis). He submitted that the words "*these guys"* following immediately upon the names "G.B. Enterprises or Glen Bouwer or Federal Mogul Canteen" behind which the Stephensons were allegedly hiding would be understood by the ordinary reader as including those latter names. So too, he submitted, would the ordinary reader understand the references to "*they*" and "*them*" contained in paragraphs 5 and 6 of the letter.

It is, however, necessary to have regard to the context of the letter as a whole in order to ascertain the natural and ordinary meaning thereof. In this regard, in my view, the heading of the letter is of critical importance. This heading, in bold capitals, makes it clear at the outset that the letter is concerned with Mark and Lee-Anne Stephenson and Koff-Chem. No mention is made therein of Glen Bouwer. The very first line of the body of the letter then refers to the "above individuals", meaning only the Stephensons. The numbered paragraphs 1 to 7 also clearly refer only to Mark and Lee-Anne Stephenson and, in my view, the ordinary reader thereof would not understand the references to "*they*" and "*them*" in paragraph 5 and 6 as being references to any other person. In my view therefore the ordinary reader would understand the letter as meaning that the Stephensons, who were "*extremely sneaky*" and prepared to "*go to any lengths to commit fraud*" were "*hiding*" behind Glen Bouwer. The allegation that they were "*hiding*" behind him would not, in my view, convey to such a reader that first plaintiff was himself guilty of amoral and fraudulent conduct. All that the statement would convey or imply, in my view, is that the dishonest Stephensons were using the name of first plaintiff as a front or cover for their own fraudulent activities.

In my view therefore the ordinary reader would find no express or implied imputation of dishonesty against first plaintiff in the letter.

If I were to be wrong in my finding that the letter is not *per se* defamatory of first plaintiff then I am in any event of the view that the averments contained therein are, at best for first plaintiff, ambiguous. As to the test to be applied in such circumstances the Appellate Division in Demmers v Wyllie and others *supra* at 843 A – E approved of the following dictum of Colman J in Channing v South African Financial Gazette Ltd and Others 1966 (3) SA 470 (W) at 473 E:

> "The inquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even if there is room for a non-defamatory interpretation. If not, the plaintiff fails (See Gluckman v Holford 1940 TPD 336)."

In Burchell: The Law of Defamation in South Africa this approach was explained in the following terms at pages 89 – 90:

> "Where there is an equal possibility of an innocent and a defamatory meaning as seen through the eyes of the ordinary reader the innocent meaning should be preferred. Or, to put it in another way, the plaintiff will not have proved the defamatory meaning on a balance of probabilities. If, however, there is a possibility of an innocent meaning, but the defamatory meaning is more probable, the defamatory meaning should be favoured."

In my view, if the letter is indeed ambiguous, then, at best for first plaintiff, there is an equal possibility of an innocent and a defamatory meaning as seen through the eyes of the ordinary reader, and, this being the case, the innocent meaning must be preferred.

I should perhaps mention that throughout his evidence second defendant was at

pains to disavow any intention to defame first plaintiff. The defendants' plea, however, was a bare denial that the letter was *per se* defamatory of first plaintiff and contained no denial of *animus injuriandi* and in the circumstances defendants could not rely upon any such absence of *animus injuriandi.* In these circumstances, what was stated in National Media Ltd and others v Bogoshi 1998 (4) SA 1196 (SCA) at 1202 G – H is relevant:

> "In considering the validity of the third defence it is useful to bear in mind that liability for defamation postulates an objective element of unlawfulness and a subjective element of fault (*animus injuriandi* – the deliberate intention to injure). Although the presence of both elements is presumed once the publication of defamatory material is admitted or proved, the plaintiff is required to allege that the defendant acted unlawfully and *animo injuriandi*, and it is for the defendant to either to admit or deny these allegations. A bare denial, however, is not enough; the defendant is required to plead facts which legally justify his denial of unlawfulness or *animus injuriandi* as the case may be."

In all the circumstances the claim of first plaintiff must fail and judgment must be entered for the defendants. There is no reason in the circumstances of this case why the costs should not follow the result. Defendants are accordingly entitled to their costs in respect of this claim.

FIFTH PLAINTIFF

The letter is clearly *per se* defamatory of fifth plaintiff. She did not herself testify. In his evidence, second defendant averred that first plaintiff was indeed a dishonest person of bad character. He averred that she was an unrehabilitated insolvent who, without disclosing such status, had contracted with other parties and had opened accounts with them, the implication accordingly being that she had committed either fraud or offences under the provisions of the Insolvency Act No 24 of 1936. She had, he said, a number of unsatisfied judgments against her resulting in garnishee orders being issued, the existence of which she had hidden from him, thus nearly resulting in his arrest for his failure to give effect

thereto. It would appear that second defendant was here referring to emolument attachment orders in terms of s 65 J of the Magistrates' Court Act no 32 of 1944. She had left the employ of first defendant without notice whilst being indebted to it in the sum of R4 000,00, a debt which remained unpaid. She had, as set out above, also stolen first defendant's customer lists as well as other confidential information relating to its business activities. In the absence of an explanation by her the only inference to be drawn from the fact that customers of first defendant thereafter received quotations prepared by her and Mark Stephenson, undercutting first defendant's quotations by a few cents, is that she dishonestly utilised this stolen confidential information to the detriment of first defendant's business.

Second defendant was a good witness who was, despite his earlier admitted prevarication to Mr. Bester, patently honest in his testimony. I accept his evidence in regard to the above averments none of which were in any event disputed under cross-examination. These averments, however, do not go as far as the allegations contained in the letter (annexure A) .

A comparison of the allegations contained in the letter with those averments made by second defendant in his evidence reveals that the averments in the letter are only partly true. Second defendant did not attempt to suggest in his evidence that fifth plaintiff would go to "*any lengths*" to commit fraud; that she had opened accounts "*with various suppliers around the country supplying goods to customers at rock bottom prices and not paying there (sic) creditors or issuing bad cheques*"; or that she has "*numerous fraud and theft charges against her*". These averments, second defendant conceded, should only have been directed at Mark Stephenson.

The letter (annexure A) is therefore inaccurate to the extent that it imputes to fifth plaintiff a greater degree of dishonesty than that which defendants have proved to be the case. In other words, although fifth plaintiff has been shown to have

been dishonest, and of bad character, she has not been shown to be dishonest to the extent alleged in the letter (annexure A) and the letter is, to that limited extent, defamatory of her.

In Iyman v Natal Witness Printing and Publishing Co (Pty) Ltd 1991 (4) SA 677 (N) Page J stated at 686 A – B:

> "The publication of defamatory matter which is only partly true can, of course, never be in the public interest. It is, however, of importance in the determination of the *quantum* of damages suffered to decide whether the publication of the matter which was shown to have been the truth, was in the public interest."

That publication of those allegations by the defendants which were the truth was in the public interest was not disputed by Mr. Jooste.

I turn then to consider the quantum of damages to be awarded to fifth plaintiff.

In this regard Mr. Scott submitted that fifth plaintiff should be awarded no more than a nominal amount. In my view there is merit in this submission.

An early reported case in which a plaintiff was awarded merely nominal damages is that of Williams v Shaw (1884) 4 EDC 105. This case, a *cause celebrè* in the Eastern Districts during the latter years of the 19th century, involved as plaintiff the Dean of Grahamstown, who claimed from the defendant the sum of £1 000 as damages for defamation in consequence of the defendant having, on the 8 June 1883, stated of plaintiff "*that he had been guilty of infidelity to his wife, and was a liar, a thief, and an atheist*." The trial came before a Full Bench of the Eastern Districts Court, namely Barry JP, Shippard and Buchanan JJ. The following appears from the judgment of Barry JP at 141:

> "The defendant has charged the plaintiff with practical disbelief in a special providence, with lying, theft and being unfaithful to his wife. As public interests justify the imputation

> of such charges where truthfully made concerning one standing in the position of Minister of St. George's, the plea of justification if proved would have entitled the defendant to a verdict with costs. The plaintiff having been convicted of lying, of misappropriating to his own use charities, and of immoral conduct (which may, however, be consistent with the absence of adultery), may be entitled to a judgment, but with so much proved and so much proof of probable cause, we can only award nominal damages. The damage done to the plaintiff in excess of what he has caused to himself by his own words and deeds, is estimated at one shilling."

At 176 – 177 Buchanan J stated as follows:

> "As the defendant has failed to establish a justification covering the whole case, judgment must go against him… In assessing damages in a case like this, it is obvious that a person cannot suffer any loss for an injury to that which he does not or ought not to possess. And it would be contrary to principles of public policy to permit a man to make a gain of the loss of that reputation and character in society which he had justly forfeited by his misconduct… When a plaintiff is really guilty of the offence imputed, he does not offer himself to the Court as a blameless party seeking a remedy for a malicious mischief; his original misbehaviour taints the whole transaction with which he is connected and precludes him from recovering that compensation to which an innocent person would be entitled. The plaintiff in this case is far from coming out of this enquiry scatheless. His character has not been altogether cleared from the imputations cast upon it. This is not a case of the slander of a pure and high-principled minister of the Gospel, who would be entitled to exemplary damages against the malicious utterer of virulent defamation. True there has been an excess of language on the part of the defendant over what he has been able to substantiate; but that excess alone, looking to what has been established, can be compensated for by damages merely nominal in amount."

Modern Newpapers (Pty) Ltd and Another v Bill 1978 (4) SA 149 (C) was a matter where a weekly local newspaper had reported that the plaintiff had appeared in a Regional Magistrate's Court on several counts of fraud and theft on a particular date whereas he had only been charged on counts of fraud and had appeared on a different date. An appeal by the owner and editor of the newspaper against an award by the Magistrate's Court of damages to plaintiff in the amount of R500,00 was successful, Broeksma J, with whom Van Zijl JP

concurred, finding that the extent of the additional injury caused to the plaintiff by the reference to several theft charges could not have been otherwise than slight. A nominal award of R30 coupled with no order as to costs was made.

Compare too Zillie v Johnson and Another 1984 (2) SA 186 (W) where Coetzee J stated at 197 G – H that had plaintiff's action succeeded he would have "awarded very nominal damages, something of the order of R10 with costs on the appropriate magistrate's court scale; further that the plaintiff should pay so much of the defendants' costs as were incurred by them by being sued in the Supreme Court instead of the magistrate's court."

In the present matter the fifth plaintiff has chosen not to testify. Whilst one may speculate as to the reasons therefor the upshot of such failure is that I have been left entirely in the dark as to the personal circumstances of the fifth plaintiff; the effect, if any of the unproven allegations upon her; and the extent to which her reputation may have been lowered in the estimation of ordinary or reasonable members of society.

Having regard to all the circumstances I am of the view that a nominal award of damages of R100,00 would be appropriate. There will be no order as to costs.

CONCLUSION

The following order will therefore issue:

CLAIM ONE

1. The plaintiffs' claim is dismissed.
2. Defendants are ordered to pay plaintiffs' costs jointly and severally, the one paying the other to be absolved up to and including 18 June 2002.
3. Plaintiffs are ordered to pay defendants' costs jointly and severally, the

one paying the others to be absolved from 19 June 2002.

CLAIM TWO

1. First plaintiff's claim is dismissed with costs.

2.1 Defendants are ordered to pay to the fifth plaintiff jointly and severally, the one paying the other to be absolved damages in the sum of R100,00.

2.2 The fifth plaintiff and the defendants will each pay their own costs.

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J.D. PICKERING
JUDGE OF THE HIGH COURT