IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 10879/2010

In the application between

VAN RENSBURG, HERMAN	**FIRST APPLICANT**
ALLFLIGHT CC	**SECOND APPLICANT**

And

MEYER, ZANDY	**FIRST RESPONDENT**
AIRSPORT INTERNATIONAL	**SECOND RESPONDENT**

JUDGMENT

EF DIPPENAAR AJ

[1] This is an application in terms of which the Applicants seek final interdictory relief against the First Respondent, an individual and the Second Respondent, a party which does not exist in the form in which it was cited and which appears to be a foreign registered entity with no place of business or business activities within the Republic of South Africa.

[2] Both Respondents opposed the application, which was initially instituted as a matter of urgency, but on the date for the hearing of the application, time periods for the filing of further affidavits were agreed upon without any interim relief being granted and the application was postponed.

[3] The Respondents raised, in limine, an objection against this Court's jurisdiction in relation to the relief sought against the Second Respondent which, in my view, was well taken.

[4] It is undisputed that the Second Respondent is incorrectly cited and is in fact a company based in Switzerland with no registered office, place of business or any employees in South Africa. In my view, the Applicant has not proved that this Court has any jurisdiction to entertain this matter in relation to the Second Respondent. Although there was no proper service of process on the Second Respondent, the Second Respondent has apparently received notice of the application and has opposed same. In my view, there is no basis on which the Applicant is entitled to relief against the Second Respondent. I shall accordingly proceed to consider whether the Applicants are entitled to relief against the First Respondent.

[5] As the relief sought by the Applicants is final in nature, they must show the presence of the following three requisites, on a balance of probabilities:

[5.1] a clear right on the part of the Applicants;

[5.2] an injury actually committed or reasonably apprehended; and

[5.3] the absence of any other satisfactory remedy.

[6] The basis for the present application is an anonymous letter which was distributed by the First Respondent to certain members of the pigeon racing fraternity.

[7] The Applicants contend that the anonymous letter is defamatory inasmuch as it refers to them as being dishonest and that they are "*up to their same old cheating ways at Carnival City*".

[8] It is undisputed that the Applicants enjoy a clear right to their good business name and reputation. A right to dignity, as enshrined in the Constitution, includes their right to repudiation. See: **Hardaker v Phillips**, 2005 (4) SA 515 (SCA) at page 525 A-B.

[9] It is not disputed that the reference to "they" is a reference in the said letter to the Applicants as being cheats and/or dishonest which is at least *prima facie* defamatory of them and they are entitled to the protection of their good name and reputation.

[10] The Applicants contend that the distribution of the anonymous letter is causing harm to the good name of the Carnival City pigeon race.

[11] The following facts are common cause between the parties: The Second Respondent carries on business as the organiser of pigeon racing events; the success of a pigeon race is directly proportional to the number of entries in the race and that international participation increases the profitability of the race; the Carnival City race was previously organised by parties other than the Applicants and that the previous organisers failed to pay out promised prize money which brought the said race onto disrepute locally and internationally, with the result that international entrants were reluctant to support the race.

[12] I agree with the Applicants' contention that if potential entrants in the Carnival City race were afraid that the Applicants were dishonest or cheats, the viability of the race would be in question and that the Applicants would suffer an injury in the event of the Respondents publishing the anonymous letter.

[13] The First Respondent admits having distributed the anonymous letter as alleged by the Applicants and admits that he has passed the anonymous letter on to some of those associated with the SCMDPR, and has provided no undertaking that we will not further distribute the said letter. In my view, the Respondents' contention that the harm has already been done and that there is no risk of further harm does not bear scrutiny and there is at least the reasonable risk that the First Respondent will further distribute the letter.

[14] I am satisfied that on these facts, the Applicants are *prima facie* entitled to the relief sought and that no other satisfactory remedy exists whereby the

Applicants' good name and reputation may be protected in the present circumstances.

[15] I turn to deal with the further interdictory relief which the Applicants seek. The publication of defamatory material gives rise to two presumptions: namely that the publication was unlawful; and that the statement was made *animo injuriandi.* See*:* **Hardaker v Phillips**, 2005 (4) SA 515 (SCA) at page 524 E-H and **Joubert and Others v Venter**, 1985 (1) SA 654 (A) at page 696A;

[16] The onus rests on the First Respondent to rebut the presumptions. See: **Mohamed and Another v Jassiem**, 1996 (1) SA 673 (A) at 709 H-I.

[17] The First Respondent contends that the anonymous letter is not defamatory of the Applicants and, even if it is, the remarks made were not unlawful as they constituted fair comment.

[18] From the answering papers it appears that the First Respondent relies on the statements as contained in the anonymous letter as being fair comment rather than a statement of fact.

[19] It is trite that the requirements for a successful reliance on the defence of fair comment are the following:

[19.1] The defamatory statement must amount to comment or opinion as opposed to a statement of fact;

[19.2] The comment must be fair;

[19.3] The facts on which the comment is based must be true and must be expressly stated or clearly indicated in the anonymous letter; and

[19.4] The comment must relate to a matter of public interest.

[20] Despite the so called expert opinions filed by the First Respondent, the issue remains disputed and it is not possible to resolve the issue definitively without resorting to oral evidence. Having regard to the nature of the matter and on the available evidence, I am not convinced that the comments contained in the anonymous letter can reasonably be construed as fair in relation to the Applicants.

[21] The First Respondent did not deem it necessary to refer the matter to SANPOI, of which both the Applicants and the First Respondent are members, and which has a disciplinary code and procedure in place to discipline members who, amongst other things, tamper with time keeping and the like, militating against the First Respondent's assertion that the comment was fair, without resorting to the remedies available to it to establish this as a fact.

[22] I am not convinced that the First Respondent's conduct in summarily publishing the anonymous letter without resorting to SANPO's existing mechanisms constituted reasonable and fair comment.

[23] In its answering affidavit, the First Respondent attempts to justify his decision to publish the anonymous letter by setting out all the facts upon which he bases his opinion, which were not disclosed by the First Respondent at the time of publication.

[24] Even if the Respondents establish that, considered objectively, the anonymous letter contains comments based upon facts which are true and which are stated or indicated relating to matter of public interest, and that the comments are fair, the Respondents cannot rely on a defence of "*fair comment*" because it appears that the anonymous letter was published with an improper motive.

[25] In the circumstances, the First Respondent has not established that the anonymous letter is not defamatory of the Applicants and that a real and substantial risk exists of the Respondents further distributing same, thereby threatening and besmirching the Applicants' good name and placing the future viability of the Carnival City pigeon race in jeopardy. In the circumstances, I am of the view that the Applicants are entitled to the relief sought.

[26] I accordingly make the following order:

[26.1] The First Respondent is interdicted and restrained from directly or indirectly distributing and / or in any other fashion or form publishing a certain letter, a copy of which is annexed to the Applicants' founding affidavit marked "FA3".

[26.2] The First Respondent is interdicted and restrained from defaming the First and Second Applicants.

[26.3] The First Respondent is directed to pay the costs of the application.

[26.4] The application against the Second Respondent is dismissed with costs.

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EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	10 May 2010
Date of judgement	:	24 November 2010
For Applicants	:	Adv D van Niekerk
	:	KGL Attorneys
For Respondents	:	Adv W Davel
		J C Smit Attorneys