REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2007/28863

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES / NO
2. OF INTEREST TO OTHER JUDGES: YES / NO
3. REVISED.

....

DATE **SIGNATURE**

In the matter between:

GOLD REEF CITY THEME PARK (PTY) LTD Plaintiff

and

ELECTRONIC MEDIA NETWORK LIMITED First Respondent

COMBINED ARTISTIC PRODUCTIONS (PTY) LTD

t/a CARTE BLANCHE Second Respondent

In consolidation with :-

CASE NO. 2005/15543

AKANI EGOLI (PTY) LTD Plaintiff

and

ELECTRONIC MEDIA NETWORK LIMITED First Respondent

COMBINED ARTISTIC PRODUCTIONS (PTY) LTD

t/a CARTE BLANCHE Second Respondent

J U D G M E N T

NICHOLLS J

1] This is an action in which the plaintiff companies claim general and special damages on the grounds that the content of a television programme produced by the second defendant and broadcast by the first defendant is defamatory of them.

2] Electronic Media Network Limited (Mnet), the first defendant, is a national television channel which flights a programme entitled 'Carte Blanche' on Sunday evenings at 19H00. The second defendant, Combined Artistic Productions (Pty) Ltd, is an independent production house commissioned by Mnet to compile, produce and present the Carte Blanche programme. Carte

Blanche is a widely respected and highly acclaimed investigative journalism programme aimed at the higher income bracket. It was broadcast to approximately 450,000 people across the country on the Mnet channel. The first and second defendants shall be referred to as "Mnet" and "Carte Blanche" respectively.

3] On 6 March 2005 Carte Blanche anchorman, Derek Watts introduced one of the inserts that make up the programme with the following words: *"When parents take their children to enjoy the fun of an amusement park, they assume the rides are safe. The last thing on their minds is that something may go wrong. In a Carte Blanche investigation we reveal that parents should think twice before heading for the rides".* The insert dealt with fun rides at Gold Reef City, an entertainment complex in Johannesburg which includes a casino, a theme park and an amusement park.

4] Akani Egoli (Pty) Ltd (Akani) owns the entire Gold Reef City complex and runs the casino. Gold Reef City Theme Park (Pty) Ltd (the theme park) operates the theme and amusement park in terms of a lease agreement it has with Akani. Both use the name "Gold Reef City" in the conduct of their respective businesses. Pursuant to the programme Akani and the theme park instituted separate legal actions.

5] On 29 July 2005 Akani sued Mnet and Carte Blanche, alleging that certain statements in the context of the programme were wrongful and defamatory of it in that they were intended to mean that five of the rides it operates were unsafe, alternatively the statements were made wrongfully and intentionally in respect of Akani to whom the defendants owed a duty of care. Akani claimed an amount of R200 000 in respect of general damages and an amount of R3 661 347 in respect of special damages against the defendants jointly and severally.

6] On 15 November 2007 relying on the same facts as set out in the Akani action, the theme park sued the defendants, alleging that these statements were intended to mean, and did mean that the five rides were unsafe. Alternatively, that these statements were false and the defendants knew them to be false and intended the theme park to suffer damages. The theme park claimed general damages in the sum of R200 000 and special damages in the sum of R43 105 092 against the defendants jointly and severally.

7] The plaintiffs in both instances have claimed under the actio iniuriarum for general and special damages. The alternative claims are based on the lex aquila. Akani relies on breach of a duty of care; the theme park on injurious falsehood.

8] In both actions the defendants deny the meaning given to the statements. In the Akani matter they plead that the statements meant that there was reason to be concerned about the safety of the five rides. In the theme park matter they do not plead what meaning they attach to the broadcast. In the event of it being found that the statements are defamatory, the defendants raised two defences; firstly truth and in the public interest and secondly what the defendants refer to as the media or reasonableness defence as articulated in the Bogoshi case[1].

9] In addition to these defences, it was submitted that as a matter of law the plaintiffs, trading corporations ought not to be entitled to sue for defamation. If the plaintiffs can sue, it was submitted that their claim should be limited to general damages. There is the further submission that if the existing common law permits a claim for defamation under the actio

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[1] *National Media Ltd and Others v Bogoshi* 1998(4) SA 1196 (A)

iniuriarum, the law ought to be developed to limit the claim of such damages to non-trading plaintiffs.

10] In terms of an order of court the two actions were consolidated. At the commencement of the trial I granted an application in terms of Rule 33(4) of the uniform rules that separated the issues of merits and quantum. This matter therefore proceeded on the question of liability only.

Background

11] The genesis of the programme was an email sent to Carte Blanche by Paul Boshoff (Boshoff) on 8 February 2005, claiming that the rides currently used at Gold Reef City were severely cracked and unsafe. Boshoff indicated that he had personally worked on three of the rides for the past year and that he was concerned about the safety of the remaining 30 rides. He stated that he believed that the lives of people using the rides were in danger.

12] Boshoff runs a firm called Bostech Engineering Services (Bostech). He is a technician in non-destructive testing (NDT), a method of detecting cracks on steel not yet visible to the naked eye. He had made an unsolicited call to Gold Reef City in 2004 as result of which Bostech was commissioned to test and repair three of the rides - the Crazy Cocopan, the Runaway Train and the Golden Loop. In carrying out the work Boshoff was assisted by another technician, Johannes Barnard (Barnard).

13] It appears that all went smoothly with work on the first two rides but a payment dispute arose over the Golden Loop. Bostech was owed an outstanding amount of R120 669 which Gold Reef City had refused to pay, claiming that Boshoff was incentivised to create defects where none existed.

This they said was evidenced by the fact that he did not itemise each defect in his report. Boshoff accepted R49 300.46 in full and final settlement on 9 February 2005, the day after sending the email to Carte Blanche. Much was made of whether this money was due and owing to Bostech. In my view nothing turns on this dispute except the undeniable existence of bad blood between Boshoff and Gold Reef City.

14] Boshoff, using his own words, felt *"very sour towards Gold Reef City"* and admitted that the email he sent to Carte Blanche *"might have been written in a malicious way"*. While admitting that this was a factor influencing him to send the email, he said the primary motivation was the need to warn the public about the dangers of the amusement park. The plaintiffs argue that the email contained a series of lies and that Boshoff's concerns about safety only started when he did not get paid. The defendants claim these were exaggerations rather than downright lies. There can be no doubt that Boshoff's email was to a large extent actuated by malice.

15] When the email was received by Carte Blanche it was referred to Susan Puren (Puren), a freelance journalist who had produced several inserts for Carte Blanche and had received international recognition, as a top investigative journalist. Puren contacted Boshoff to ascertain whether he had proof of his allegations. She was provided with some photographs from Boshoff, as well as the Bostech reports. The photographs displayed images of rust and severely cracked bogies. This is the structure that attaches the car to the tracks of a ride.

16] An arrangement was made for the following day for Puren to visit the park with Boshoff's assistant, Barnard. During the visit Puren, who has no technical expertise, stated that she observed a general state of bad

maintenance. Much of what had been told to her by Boshoff was confirmed by Barnard.

17] After the visit Puren was authorised by George Mazarakis (Mazarakis), the executive producer of Carte Blanche, to investigate the story and to produce a standard length insert of ten minutes. Soon thereafter Puren learnt of Boshoff's payment dispute with Gold Reef City and questioned him about his motive in sending the email to Carte Blanche. He admitted he had a financial motive but Puren was satisfied that he was genuinely concerned about the safety of the rides. This information was relayed to Mazarakis who saw Boshoff in order to interrogate his motives. Mazarakis does not recall ever meeting Boshoff although both Boshoff and Puren stated that he did so.

18] The day after her visit to the amusement park with Barnard, Puren met with Ms Amanda van der Westhuizen, (Van der Westhuizen) an NDT expert, with whom Puren had worked on a previous programme. Van der Westhuizen, on being shown the photographs said she was shocked but indicated that she was not the appropriate person to comment on the safety aspects. She referred Puren to Dr Roelf Mostert (Mostert) a metallurgical engineer specialising in fatigue cracking who had testified as an expert in other court cases. Puren saw Mostert the same day. He also expressed shock at the photographs he was shown. Puren then arranged for Van der Westhuizen and Mostert to join her for a visit to Gold Reef City.

19] During the visit, described by Mostert as a 'site visit', Van der Westhuizen was concerned about the general state of disrepair and lack of maintenance of the rides. Mostert believed that the overall picture of neglect pointed to an inadequate standard of asset management integrity. He was particularly concerned about the evidence of a cracking process which he identified as fatigue cracking. These he felt should have been eliminated by

the design. Allowing repair work to be done at night while the rides were operational in the day made it possible for cracks to grow to their critical point before they were repaired. Mostert further observed loose bolts, corrosion of paint, and a lateral swaying of the Golden Loop while in motion.

20] Ms Nicole Stubbs (Stubbs), a researcher employed by the second defendant, was assigned to research the story. Given the circumstances surrounding Boshoff's payment dispute with GRC, her brief was to do a thorough investigation in an attempt to corroborate Boshoff's claims. As she put it she attempted "*to try and almost let the story stand alone without him*". She appears to have done a thorough job, managing to find Spencer Erling (Erling), a civil engineer who was the director of the Southern Africa Institute of Steel Construction at the time and Dr Allen Mann (Mann), A UK based structural engineer specialising in amusement park safety. Both expressed concern regarding the safety of the rides on the evidence available to them.

21] On 14 February 2005, Stubbs contacted Gold Reef City and spoke to Dewald Van der Walt (Van der Walt) who was the operations manager at the time. She mentioned that she was from Carte Blanche but did not inform van der Walt that she was taping his conversation. She told him that she was investigating the safety of rides with particular reference to an incident that had occurred at an amusement park in Cape Town. With regard to the safety of the rides at Gold Reef City he told her that:

> "*Once a year on all our rides ... well ... most of the rides depending on the schedule ... we perform non-destructive testing ... what that means is we dismantle the rides all the critical parts and they get tested with ultrasonic tests if need be they get x-rayed to make sure that the critical parts are still safe and in an appropriate fashion*"

22] During the conversation with Stubbs, Van der Walt agreed to be interviewed on camera the following day. He requested to be provided with a

list of questions that would be covered in the interview. At that stage, the programme was intended to be broadcast on Sunday, 20 February 2005.

23] A decision was taken by van der Walt, Steven Cook ("Cook"), the General Manager of the Theme Park, and Dr David Ashby ("Ashby") a structural engineer who Gold Reef City used as a consultant from time to time since 2002, to decline the request for an interview.

24] On 15 February 2005 Cook wrote to Stubbs informing her that the rides had been designed by reputable international firms. He asserted that the rides were compliant with the requirements of the construction regulations under the Occupational Health and Safety Act (OHSA) and that he had documents to confirm regular NDT testing. Cook requested that Carte Blanche show him the evidence indicating that the rides were unsafe so that an immediate investigation could be launched. No mention was made of a possible interview

25] Stubbs responded on the same day and indicated that Carte Blanche was willing to show Gold Reef City the visual evidence on condition that this was in the context of an on-camera interview. She informed Cook that Carte Blanche had visual evidence of serious structural faults on some of the rides. Stubbs requested copies of the documents referred to by Cook which would show that NDT was done on all the rides over the past few years and the contact details of Gold Reef City's metal fatigue specialist so that interview could be set up. Gold Reef City did not respond to these requests. Cook wrote to Stubbs indicating that Gold Reef City would welcome a meeting to view the material in Carte Blanche's possession. They requested that Carte Blanche disclose their source and make the material available immediately. Stubbs proposed the following day for the on-camera interview. She refused to disclose her source.

26] Boshoff had at all times made it clear that he did not want to be identified as the source of the story. This placed Carte Blanche in an invidious position. Boshoff when approached by Gold Reef City, denied that he was the source and said that Carte Blanche had approached him.

27] Before the programme was aired, Boshoff was called to a meeting with Ben Schutte (Schutte), who had manufactured the Golden Loop. Schutte was a director of the Theme Park and holder of the management contract for the Theme Park. Puren when advised of this, suggested that he take his secretary as a witness. According to Boshoff his secretary was sent out by Schutte during the meeting to make photocopies and while she was outside the room, Schutte offered Boshoff a bribe to make the story "go away". After the meeting, Boshoff told Puren about the bribe. In cross-examination of Boshoff the plaintiffs put it to Boshoff that he had misunderstood the nature of Schutte's offer at the meeting. According to the plaintiffs, Schutte was merely trying to act as a "mediator" in the dispute between Gold Reef City and Boshoff.

28] Cook, in a letter to Carte Blanche, declined the interview on the basis that Carte Blanche had not made their information available in advance. Puren proceeded to film the interviews with Mostert and van der Westhuizen.

29] On 17 February 2005, Gold Reef City's lawyers sent a letter to Stubbs recording that Carte Blanche's possession of copies of the Bostech reports was unlawful. They made it clear that they were aware that Carte Blanche had approached the Department of Labour and an ex-employee Philip Malan (Malan). Gold Reef City reiterated that the rides were safe and an invitation was extended to Carte Blanche to identify their consulting engineer so that a discussion could take place with Gold Reef City's engineers. From that time

both Gold Reef City, represented by Cook, and Carte Blanche, represented by Mazarakis, communicated through their lawyers.

30] Carte Blanche persisted with their stance that they would only allow the material to be viewed during an on-camera interview. Gold Reef City continued to request sight of the visual evidence and to reiterate their view that *"the reports of Bostech Engineering Services do not compomrise (sic) current evidence of unsafe rides or structures. This interpretation of the reports was confirmed by our client's specialised technical consultants"*.

31] The refusal to be interviewed created a deadlock as Mazarakis would not allow the insert to be aired without a response from Gold Reef City. After a two week delay Carte Blanche on 1 March 2005 finally handed to Gold Reef City photographs, video footage and a list of questions regarding the safety issues raised concerning the four rides. On 4 March 2005 Gold Reef City gave a detailed response to the photographs and the video footage as well as providing specific responses to the questions.

32] Stubbs had in the meantime conducted a video interview with Mann. She had sent him an email wherein she informed him that the rides had been repaired but enquired whether there could nonetheless still be safety concerns. Mann's response to the email was that cracking was an endemic problem with rides. It was something that had to be monitored very carefully because *"if a crack starts it propagates very rapidly and that's extremely dangerous"*. He further stated that repairing cracks is a short term solution as they will inevitably re-occur. A visual inspection was generally inadequate and all welds have to be tested. Mann stated that in the UK rides were stopped once they have two or three cracks on them. As he stated on the broadcast the fact that such a large number of cracks had been allowed to develop was indicative of an inadequate checking and maintenance regime.

33] Stubbs' research for the insert was extensive. In addition to finding Erling and Mann, she conducted internet research about previous accidents at Gold Reef City and other amusement parks; research on the applicable statutory framework which governed amusement park rides; contact with the Department of Labour; contact with Philip Malan (Malan) a former employee who had been wrongfully dismissed by Gold Reef City after raising safety questions about Shaft 13. (This is a disused mine which is used as a tourist attraction).

34] Puren commenced with preparation of the offline edit as soon as she had interviewed the experts. An offline edit is a version of the insert which has lower resolution and is therefore not as clear as the final product. On 5 March 2005, the day after Gold Reef City's responses had been received, the offline edit was presented to Mazarakis. The viewing took 6 – 8hours and was attended by the attorneys of Carte Blanche as well as Stubbs and Nkweta ,the presenter. Stubbs was called in so that Mazarakis could interrogate the research which had been conducted for the programme and Nkweta was called in to verify the accuracy of what had been selected from the unedited footage by Puren for the offline edit.

35] It appears that this was a laborious process with the edit being stopped every few seconds for revisions. On the advice of the attorney present, Gold Reef City's exact words were used in the broadcast. This necessitated links being filmed that evening to reflect the views of Gold Reef City. As a result Mnet was requested to allocate 20 minutes for the insert instead of the customary 10 minutes. This request was acceded to.

36] After working throughout the night on Saturday 5 March 2005 and into the morning of Sunday 6 March 2006, Carte Blanche felt that the insert was finally ready to be broadcast on the Sunday evening.

The Programme/Insert

37] What the viewers see at the commencement of the programme is a scene of crowds of people moving in Gold Reef City's theme park with shots of the theme park and some of the rides. These views are accompanied by the narrator telling the audience that *"It is a typical Sunday morning in February this year and people are streaming through the gates of one of South Africa's most well known tourist spots. They're here for a day of fun. The last thing on their minds is that something may go wrong…. Gold Reef City in Johannesburg is a replica of an old mining town. It offers more than 30 fun rides and has been open since 1986. In the nineteen years since then, an estimated 25 million people have come here to experience the ultimate thrill. It is a highly successful business- last year profits rose 36 percent to R114 million. But just how safe are these rides and what laws are in place to protect the public? Gold Reef City told us that they adhere to the highest safety standards and prescriptions of the law."*

38] The insert is slick, hard-hitting and fast paced. Mostert and Van der Westhuizen refer to the safety situation at the amusement park as *"a tragedy"*, *"a pending disaster"* where *"the next step is a tragedy"*. In the face of Boshoff's claim that he found thousands of cracks, Erling and Mann are seen saying that cracks on rides are unacceptable. This is juxtaposed with seemingly evasive and implausible comments from Gold Reef City.

39] Viewers are informed that internationally accepted norms for safety of amusement parks are not enforced in South Africa. The relevant legislation in South Africa is the Occupational Health and Safety Act of 2003 and in terms of these regulations Gold Reef City should ensure that that the rides are inspected by a competent person every six months for the first two years and annually thereafter. An official from the Department of Labour responsible for enforcing compliance with these regulations comes across as an incompetent

buffoon. Viewers are told that all 33 rides at the park were visually inspected by the Department of Labour in the course of one day.

40] The plaintiffs set out in their particulars of claim those statements in the programme that they allege to be defamatory. These refer to five of the rides in the following terms:

> *"6. In the programme, the following was said –*
>
> *6.1 of and concerning Gold Reef City's [ride] known as 'Miner's Revenge' :*
>
> *(a) '... one of the pendulums – which appears to be balancing the act – is rusted and cracked';*
>
> *(b) such cracking was visible to the naked eye;*
>
> *(c) the pendulum showed 'serious deterioration';*
>
> *(d) the metal tank which anchors the ride has a base which 'has been badly maintained and is covered in a thick layer of rust and moss, indicating that there is a water leak in the area. In fact, 'a constant stream of water can be seen running down the side of the tank' and if it were to topple over 'the ride is then influenced in such a fashion that the balance is lost – then it could have very bad consequences', and this 'is a cause for concern'.*
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> *6.2 Of and concerning Gold Reef City's [ride] known as 'Crazy Cocopan' that it did not comply 'with structural specifications'.*
>
> *6.3 Of and concerning Gold Reef City's [ride] called 'Raging Rapids' :*
>
> *(a) 'these broken bars and rust are concealed by the water when the ride is operational.'*
>
> *(b) its obvious that certain pieces of metal are missing;*
>
> *6.4 Of and concerning Gold Reef City's [ride] known as the 'Golden Loop' :*
>
> *(a) '... we found cracks on most of the cross-struts connecting the actual track to the structure. We found cracks on the headgear that propels the cars over the track and the actual cars where you sit was rusted completely';*

(b) *photographs 'show new cracks in places that had previously been repaired. These pictures formed part of an inspection report that [Paul's] company submitted to Gold Reef City before he was contracted to do repairs.'*

(c) *'... on the section where the cross-beams actually fits on to – what they call the magnet cable guide – there were in excess of 200 cracks. That's just on that area. The actual parts, cross-struts, that connects the tracks where the wheels actually runs on, each and every one of them was cracked, and I do believe there's in excess of 3000 cracks on those struts, cross-struts'.*

(d) *'... if a structure has got 3000 repairs on it, it has to be related to the fatigue life of the structure';*

(e) *'... the fact that the cracks have been welded and repaired several times make the situation more dangerous'*

(f) *there is concern 'about the remaining life of a structure like this. It cannot do it any good repeatedly repairing cracks, especially in the same place. The granular structure of the steel actually changes from the heat input of the welding and in the long term multiple heat inputs by welding doesn't do parent metal any good'.*

(g) *'Any crack in any weld is unacceptable'.*

(h) *'The probability of a fatigue failure is still very high, and as a result of that you have a high rating both on the probability of failure and on the consequence of failure, and that results in a very high risk.'*

(i) *'The Golden Loop may be well past is sell-by date'.*

(j) *'It shouldn't have been allowed to get in a state where that many cracks were discovered'.*

6.5 *Of and concerning Gold Reef City's [ride] known as 'The Runaway Train' :*

(a) *'the train was allegedly kept in service while being repaired, despite the fact that non-destructive testing had revealed that both the chassis of the carts and the track were riddled with cracks.'*

(b) *There were a thousand cracks 'on that structure, on that track'.*

(c) *People were riding on the tracks while Bostech Engineering was doing its repairs.*

(d) *If a ride had a thousand cracks on it, it is not safe to run it in the interim.*

(e) *The fact of a thousand cracks indicates 'that there isn't a regime of proper checking'".*

41] These statements are made by Boshoff and the defendants' experts – Mostert, Erling, Mann and van der Westhuizen. The aforementioned, with the exception of Dr Mann, all testified as expert witnesses for the defendants.

Trading corporations as defamation plaintiffs

42] The first issue to be determined is whether trading corporations ought to be permitted to sue for defamation. The defendants argued that in the post constitutional era it is incumbent on the courts to develop the common law to ensure that it accords with the spirit, purport and objects of the Bill of Rights.

43] The law of defamation in South Africa is based on the actio iniuriarum in terms of which a person whose personality rights, including reputation or fama, have been intentionally impaired by the unlawful act of another, can claim. Under the actio iniuriarum once the plaintiff proves publication of a defamatory statement it has the benefit of two presumptions namely unlawfulness and intention[2]. On the other hand where a plaintiff brings an action under the lex aquilia it bears the onus of proving not only a false representation but knowledge of falsity, causation and intention. Therefore a defendant sued under the lex aquilia is in a considerably better position as there are no presumptions it has to rebut.

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[2] *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 764C - G; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at 252B - C

44] The defendants contend that a trading corporation is fundamentally different to a human plaintiff in that it cannot have its feelings hurt; it can only be injured in its pocket. It is argued that a trade reputation is not a personality right but a proprietary right. In the result it should have no claim under the actio iniuriarum which is essentially redress for an infringement of personality rights.

45] Human dignity is of paramount importance in our Constitution. It must always take precedent over freedom of expression, which although foundational to democracy, it is not a paramount value. Because the law of defamation vindicates a constitutionally entrenched right to human dignity, it constitutes a reasonable and justifiable limitation to freedom of expression. [3] The defendants argue that this is only applicable to the human plaintiff; a trading corporation cannot rely on any constitutionally entrenched right to limit the media's right to freedom of expression as it is not a bearer of the right to human dignity.

46] It is submitted that apart from *Caxton Ltd and Others v Reeva Forman (Pty) Ltd*[4] and the recent decision of this court in the case of *SA Taxi Securitisation (Pty) Ltd v Media 24 and Others*[5] all the decisions that a trading corporation can claim damages for defamation under the actio iniuriarum are obiter. With regard to the Reeva Forman decision, it is argued that Corbett CJ assumed that a trading corporation has the right to sue for damages and no consideration was given to the fact that for a trading corporation, reputation is an asset and the diminution of reputation lessens patrimony. It was further pointed out that with the exception of the *SA Taxi Securitisation* all these cases were decided pre-constitution.

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[3] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) @ para [25 and [26]; *S v Makwanyane & Another* 1995(3) SA 391 (CC)

[4] 1990(3) SA 547 (A)

[5] Case no 2008/ 19376 South Gauteng High Court

47] The argument is based on the flawed premise that a trading corporation has no reputation to be protected under the actio iniuriarum. For over a century our courts have recognised that trading corporations have a personality right to fama worthy of protection and can sue for defamation.[6] While it may not be identical to that of a human plaintiff, a trading corporation does have a reputation which may be disparaged. I do not accept the defendants' submission that the disparagement would be aimed at the 'rides' and not 'the person behind the rides'.

48] The plaintiff in a defamation action, including a trading corporation, does not only seek to recover economic loss but also reparation for a wrong inflicted. I do not see how a trading corporation's right to sue for defamation under the actio iniuriarum would be inconsistent with the Constitution. In my view the common law requires no development to bring it into harmony with the spirit purport and objects of the Bill of Rights.

Special Damages

49] It was argued that should I find that trading corporations are entitled to sue for defamation then this should be limited to general damages only. A compelling case was made out by the defendants for a trading corporation's claim for loss of profit to be restricted to a claim under the lex aquilia.

50] The defendants suggested that there was authority for this proposition without any constitutional re-invention. Since *Mathews and Others v Young*[7] our courts have distinguished between *"sentimental damages"* which are

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[6] *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Die Spoorbond and Another v South African Railways* 1946 AD 999; *Dlomo v Natal Newspapers (Pty) Ltd* 1989(1) SA 945 (A); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451(A).

[7] 1922 AD 492 at 503

brought under the actio iniuriarum and "*patrimonial damages*" which must be brought under the lex aquilia[8].

51] In respect of loss of profit, the enormity of the awards will certainly have a chilling effect on the freedom of expression. In my view this cannot serve the interests of democracy and the disproportionality may well constitute an unjustifiable limitation to the right of freedom of speech. By limiting such claims to the lex aquilia, the plaintiff is not non-suited but the onus is shifted so as not to burden the defendant with the presumptions of unlawfulness and intention under the actio iniuriarum. There seems to be ample support for this proposition. However, the issue before me is that of liability only. Any argument on special damages must relate to quantum and therefore does not form part of the enquiry before me. I make no finding in this regard.

The Trial

52] The trial was run along the lines of a classic defamation case. Once the plaintiff had proved publication the statement concerning the plaintiffs, the defendants opened their case without conceding that the statements were defamatory.

53] In addition to their experts, Mostert, van der Westhuizen and Erling, the defendants called Boshoff and Barnard to testify on the condition of the rides and the number of cracks found. Puren and Stubbs testified on the making of the insert. Mazarakis, although dealing with the production of the insert, also

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[8] See also: *Van Zyl v African Theatres Limited* 1931 CPD 61; *Minister of Finance and Others v EBN Trading (Pty) Ltd* 1998(2) SA 319 NPD

gave evidence of a more general nature on ethical standards of responsible journalism.

54] In rebuttal the plaintiffs called the operations manager of the theme park at the time, van der Walt and two experts Douglas Dadswell ("Dadswell") and Dr David Ashby ("Ashby"). Dadswell is a structural engineer from the UK and a colleague of Mann. Like Mann his speciality is amusement parks. He, at the request of Gold Reef City, inspected the rides and produced a report in September 2005 dealing with the allegations made in the insert. Ashby is a structural engineer who Gold Reef City has used as a consultant from time to time since 2004 when he was initially called in to advise on the bogeys.

Defamatory Meaning

55] Not only does the meaning of the programme impact on whether the plaintiffs have been defamed but also on what the defendants have to prove as being substantially true in order to succeed on their truth defence. If the meaning of the statements is that the rides were unsafe then it is common cause that Carte Blanche has to prove as a matter of fact that as of 6 March 2005, the rides were unsafe. If the meaning of the statements is that there was reason to be concerned about the safety of the rides, Carte Blanche merely has to show that there is a basis for this concern.

56] There is no dispute that the plaintiffs have the onus to prove the defamatory meaning which they contend for, namely that the rides were unsafe. It is so too, that nothing in the transmission is said to be per se defamatory.

57] It is the plaintiffs' case that in the context of the programme, the impression with which the viewing public would be left, is that the five rides were unsafe. Gold Reef City alleges that only selective comments were displayed on the insert and these in such a manner that their veracity was clearly questionable.

58] To say of an amusement park that its rides are unsafe would constitute defamation. Mazarakis agreed that there could be no allegations more damaging to an amusement park than to say of it that its rides were unsafe. The defendants' argument is that which the programme intended to convey to the reasonable viewer was merely that there was reason to be concerned about the safety of the rides.

59] The plaintiffs do not rely on an innuendo but on the sting of the statements. Accordingly they are bound by the ordinary meaning of the statements and not on a secondary meaning or special circumstances.[9] The meaning is not a question of law but a question fact.[10]

60] Television being a transient medium, the first impression is vitally important. A viewer will take in the commentary and the images displayed without an opportunity to repeat the programme and to apply a critical mind to the contents. In ascertaining the meaning attributed to the programme, the yardstick should be that of the ordinary reasonable viewer in the context of the programme as a whole.[11] It can be assumed that the average viewer of Carte

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[9] *Demmers v Wylie* 1980 (1) SA 835 (AD)at p843-845;

National Union of Distributive Workers v Cleghorn and Harris Ltd 1946 AD 984

[10] *Cozens v Brutus* [1973] AC 854(HL) at p 861C; *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 HL

[11] *Independent Newspapers Holdings Ltd & Others v Suliman* [2004] 3 All SA 137 (SCA) ; *Demmers v Wylie* (supra)

Blanche would be reasonably sophisticated and would have the ability to understand the message that was being conveyed.

61] The offending statements must be seen in the context of the programme as a whole.[12] The programme contains sensational statements such as Van der Westhuizen stating *"Tragedy, that's what's waiting"* and Mostert saying *"the next step is a catastrophe... it could be closer than we think"*. These statements are juxtaposed with visual images of the defects on some of the structures which appear to the untrained eye to be dangerous. The insert is accompanied by the sight and sounds of blue sirens flashing, ambulance lights, and a person on a stretcher being loaded into an ambulance. In addition the tone used by the presenter often expresses sarcasm, irony and disbelief when referring to Gold Reef City's responses. The viewing public can draw little comfort from the Department of Labour's Mr Loubser's apparent ineptitude in enforcing compliance with safety standards.

62] The overall impression on first viewing the programme immediately alerts one to safety problems at Gold Reef City. To tell members of the public who may attend the amusement park that if they use the rides they are at risk because there is reason for them to be concerned about their safety is a clear warning to any prudent person not to use the rides in the amusement park. By way of analogy there is no difference between telling a person that an airline is unsafe, or that by saying that there is reason to be concerned about your safety if he or she uses the airline.

63] In *Skuse v Granada Television*[13] the only issue to be decided was whether the meaning was defamatory. Sir Thomas Bingham MR (as he was then) held that:

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[12] *Tsvangirai v The Special Broadcasting Service* (2002) NSWSC 532

[13] *Skuse v Granada Television Ltd* {1996} E.M.L.R. 276

> "*In the present case we must remind ourselves that this was a factual programme, likely to appeal primarily to a seriously minded section of television viewers, but it was a programme which, even if watched continuously, would have been seen only once by viewers many of whom may have switched on for entertainment. Its audience would not have given it the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article. In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer we are entitled (if not bound) to have regard to the impression it made on us*"

64] In my view the plaintiffs have proved the defamatory meaning on which they rely. There is no dispute that the statements were made 'of and concerning the plaintiff'. A viewing of the insert together with the emotive commentary, only serves to instil fear in the mind of any reasonable viewer. The distinction between the rides being unsafe as opposed to there being concerns about the safety of the rides is a distinction that would be lost on the reasonable viewer. The insert permits only one interpretation, namely that the rides are not safe and that the lives of users were at risk.

65] Having proved the defamatory nature of the published statements, the defendant's animus iniurandi is presumed. Likewise it is presumed that the publication was wrongful and unlawful. In order to escape liability and to rebut the presumption of wrongfulness the defendants must prove on a balance of probabilities that the statements were true and in the public interest, or failing that, that the publication thereof was reasonable.[14]

Truth and public benefit

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[14] *MacKay v Phillip* (1830) 1 Menz. 455 at p463; *Marais v Richard & Ano* 1981 (1) SA 1157 (AD) at p1166 G – H; *National Media Ltd & Others v Bogoshi* (supra) at p1202
Hardaker v Phillips 2005 (4) SA 515 (SCA) at p524F – H (para 14)

66] In order to succeed with this defence, the defendants have to show that the rides were unsafe at the time of airing the insert. There can be no doubt that the issue is of manifest public interest. The question then remains whether the defendants have proved that the statements were true or substantially true.

67] Much of this trial was taken up with expert evidence of a technical nature. Both parties complained of the bias of the other's experts. Gold Reef City asserted that the Carte Blanche experts were biased in that they came to court to defend the views that they had put forward in the programme. Carte Blanche complained that Gold Reef City's main expert, Ashby, was an 'embedded expert' in that he was closely involved with Gold Reef City to the extent that he had been their acting general manager on occasion.

68] All the experts agreed that fatigue cracking in amusement park rides was an endemic problem. A ride displaying cracks does not necessarily have to be scrapped but rather the cracks should be closely monitored. None of the experts in their expert notices, joint minute or in their evidence were able to state that the rides as at 5 March 2005 were unsafe.

69] Ashby and Dadswell both wrote reports some months after the screening of the programme. Jacobs Babtie, an international firm for whom Dadswell worked, was commissioned to do an external inspection. Both Dadswell and Ashby were consistent in their evidence that the rides were safe and that any defect that may exist did not affect the structural integrity of the ride. Ashby testified that he was shown only one crack when he inspected the entire bottom portion of the Golden Loop

70] The most serious allegations are made in respect of the Golden Loop which according to Boshoff had over 3000 cracks. What soon became

apparent was that Boshoff"s claims about the number of cracks were wildly exaggerated and overstated. He conceded that he had *"misspoken"* when he said on the programme that there were in excess of 3000 cross-struts on the Golden Loop and there were cracks in each cross-strut. The evidence of Ashby was that there were approximately 300 cross-struts. Boshoff sought to justify the number of cracks by saying that when he stated he had found 3000 cracks on the Golden Loop, he meant that he had found cracks on every plane of the cross-struts. By 'cracks' he was referring not only to cracks but also to undercut and overlay as well. (Undercut and overlay are manufacturing defects). However Boshoff could not show a single photograph with more than one defect on a cross-strut. There was nothing in his reports that supported his evidence regarding the number of cracks on either the Golden Loop or the Runaway train. Barnard his assistance, testified that there *"lots of cracks"..." in the regions of hundreds".*

71] Of the Miner's Revenge it was said that the pendulum was rusted and the crack was so severe that "*its past non-destructive testing".* In fact the 'crack' in the pendulum was an original weld defect that had been identified and monitored since 2001 and had not grown in size since then. The stabilising towers which Mostert observed being rusted with water seepage which he believed could potentially cause the entire ride to topple over were in fact filled with gravel. The towers had no structural function whatsoever; they had previously been filled with water and used to stabilize the ride when it was a mobile ride but since it had become a permanent structure the towers were in fact nothing more than what was referred to as a "build location".

72] The cracks on the Crazy Cocopan were positioned on a façade which is purely decorative. The cracks under the ride were on a bar which served to retain decorative panels

73] The broken bars and rust on the Raging Rapids were on the underpan which holds the water and therefore posed no structural threat.

74] The allegation that both the track and the car chassis of the Runaway Train *"was riddled with cracks"* having over 1000 cracks, was unsustainable. There were in fact no cracks on the cars, only on the mounting plate for the gearbox and the drive plate. None of these items were structural members, the mounting plates were replaced and the cracks were monitored. The crack on the mountain was of a self-supporting structure that had in any event been repaired by the time the programme was aired.

75] Mostert gave lengthy testimony regarding the inadequacy of the inspection and maintenance regimes of the amusement park. He said that a rigid approach to documentation is required in order to have good asset management. He concluded that the record keeping was poor and fell short of what was required by OHSA. Mostert was of the view that once fatigue cracking is present and large cracks are found, as shown in the photographs, his concerns were confirmed. He believed that there was every likelihood of fatigue cracking being present in a number of rides. Because the integrity management system was so poor these cracks had not been identified. Mostert was, however, unable to say categorically that any of the rides were unsafe.

76] Van der Walt, the operations manager at the theme park had been involved with amusement parks from an early age. He testified that he had five people reporting to him, a mechanical maintenance manager, an electrical manager, a construction manager a parks manager and a security manager. Van der Walt denied that the inspection and maintenance regime was inadequate. He said that during 2004/2005 Gold Reef City was moving towards having NDT testing done once a year on all their rides but had not implemented it due to the prohibitive cost.

77] Van der Westhuizen readily conceded that safety was not her field of expertise which is why she had recommended Mostert to Puren. Erling said the sudden appearance of cracks indicated deficiencies in the inspection regime. He based his finding that the Golden Loop had passed its sell-by date on the information that he had been given that there were 3000 cracks. These witnesses did not, in their evidence, or in their expert notices, express the view that the rides were unsafe. The furthest any of the experts would go was to express concerns regarding maintenance.

78] Despite the derisive comments and tone of the presenter of the insert when dealing with Gold Reef City's written responses, it now appears to have been accepted that the responses insofar as they dealt with safety issues were largely accurate. The defendants did not seriously contend that they had proved that the five rides were unsafe as at 6 March 2005. Instead they sought to prove the meaning contended for by them, namely that there were grounds for concerns regarding the safety of the rides.

79] While the defendants may well have shown that the maintenance regime of Gold Reef City left much to be desired, they certainly did not prove that the rides were unsafe as at 6 March 2005. In the circumstances their defence of truth and public benefit must fail.

Reasonable Publication

80] Since Bogoshi (supra), the media may escape liability for publishing false defamatory statements if they acted reasonably in so doing. This affords the media a degree of protection when reporting matters of public interest.

The defence is in line with many English speaking jurisdictions.[15] Absence of animus inuriandi is insufficient; an absence of negligence is required on the part of the media.

81] The criteria for assessing the reasonableness of a publication are set out in the Bogoshi judgment and developed further in *Mthembi-Mahanyele v Mail and Guardian Ltd*[16]. In the latter case it was held that fault was not an issue if the publication was justifiable taking into consideration all relevant circumstances. The criteria are, inter alia, the interest of the public in being informed; the nature of the information on which the article was based; the reliability of the source; the steps taken to verify the information; the opportunity given to respond; the need to publish before establishing the truth; the manner of the publication and the tone of the article which can provide an unnecessary or additional sting.[17]

82] The defendants argued that in assessing reasonableness, the meaning should be that which was intended by the journalist (that there were concerns about safety) as opposed to that of the reasonable viewer (that the rides were unsafe). It was contended that I should reject "the single meaning rule" as the Privy Council did in *Bonnick v Morris*[18]. As I understand it, the issue to be determined taking into considerations all the facts of the case is whether the journalist or the television channel took all responsible steps before publishing. This would include considering the meaning that the journalists sought to convey and whether they could reasonably have believed that this was the meaning that would be understood by the average ordinary viewer.

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[15] (UK) *Reynolds v Times Newspapers Ltd* (HL(E)) [2001]2 AC; (India) *Rajagopol (R) v State of Tamil Naidu* (1994) 6 SCC 632, 650; (Australia) *Lange v Australian Broadcasting Corpn* (1997) 189 CLR 520; (New Zealand) *Lange v Atkinson* [1998] 3 NZLR 424; (Canada)

[16] *Mthembi-Mahanyele v Mail and Guardian Ltd & Another* 2004(6) SA 329 (SCA)

[17] *Bogoshi* (supra) 1212-1213; *Mthembi-Mahanyele v Mail and Guardian Ltd & Another* (supra)

[18] *Bonnick v Morris* [2003] AC 300 (PC); See also *Armstrong v Times Newspapers* [2005] EMLR 33 and *Flood v Times Newspapers* [2010] ELMR 33.

83] Our courts have cautioned against imposing an unrealistic standard on journalists. A measure of editorial discretion is permitted. A practical and flexible approach should be adopted in assessing whether the press has demonstrated responsible journalism in matters of public interest. Some latitude is allowed for a margin of error bearing in mind the considerable time pressures that journalists often work under. Essentially what responsible journalism avoids is reckless and careless damage to reputations by presenting a fair and balanced programme. [19]

84] The first question that arises is whether Cart Blanche should have been more circumspect in broadcasting the programme knowing the potential reputational damage it could cause. The plaintiffs argue that the defendants were reckless, or at least negligent in respect of the information given to them by Boshoff. Despite knowing that Boshoff was a suspicious source with suspect motives, they nonetheless uncritically accepted the facts that Boshoff gave them. These facts were then passed on to the experts without Carte Blanche properly verifying them.

85] The evidence shows that Carte Blanche was correctly suspicious of Boshoff's motives. They approached a variety of experts to ascertain if Boshoff's allegations were to be taken seriously. But instead of interrogating his claims that there were thousands of cracks, (over 3600 on the Golden Loop and 1000 Runaway Train) they approached experts to confirm the consequences of such cracking. In other words, the experts formed their opinions based on Boshoff's allegations.

86] I do not accept the plaintiff's submission that Carte Blanche was remiss in not including a structural engineer on their team of consulting experts.

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[19] *NM & Others v Smith* [2008] JOL 19615 (CC); *Trusco Group International Ltd & Others v Shikongo* (SA 8/2009) [2010] NASC 6; *Tshabalala-Msimang & Another v Makhanya & Others* 2008(6) SA 102 (W); *Jameel v Wall Street Journal Europe Sprl* [2006] WRL 642

Mann was a structural engineer specialising in amusement parks. His responses to the questions asked made it very clear that there was reason for concern. Erling, too, described himself as a structural engineer.

87] Van der Westhuizen referred Puren to Mostert as an expert in safety matters. He did not indicate that he was not qualified to comment or that this issue was not within his area of expertise, neither did any of the other experts. Stubbs went to great lengths to get experts on metal fatigue. In the words of Mazarakis:

> "*Mostert had established credentials and was used, had been used in court before, and that in itself gave him a high degree of credibility; [Erling] represented an organisation which takes care of this kind of structural engineering, and that was our understanding, but also, as I said earlier, we took it a step further by asking for the international expert [Mann] who had a particular speciality in this area*".

88] Carte Blanche was validly criticised for the untruthful remark that they had managed to "track down" Boshoff thereby creating the impression that there were two different sources corroborating each other when in fact Boshoff was the only source. Puren explained that she was not prepared to reveal her source. However, it is quite clear from the correspondence that well before the insert was aired Gold Reef City was aware that Boshoff was the source and the need to protect him was no longer necessary.

89] The question as to the safety of the rides was undoubtedly of a very technical nature. In such a situation it was imperative that Mostert have as much information as possible at his disposal. He said in his evidence that he had asked Puren for all relevant documentation but was shown only the Bostech reports.

90] Mostert testified that he had not been informed that Boshoff's view was that the three rides tested and repaired by him were now safe. Mazarakis was not aware that the rides dealt with on the programme had been repaired by the time of the programme, let alone that the bogies, photographs of which featured prominently, had been scrapped nine months prior. Mostert indicated that he would have appreciated an opportunity to speak with Gold Reef City's experts before the programme was aired.

91] On the Friday 4 March 2005 Carte Blanche received Gold Reef City's memorandum in response to the questions raised. Here it was specifically stated that there was no structural threat, the bogies had been scrapped and that the water tank was not filled with water but gravel ballast. Nonetheless photographs of these items were included in the insert.

92] In my view there was no justification for not giving Gold Reef City's responses to the experts, particularly Mostert. According to Mazarakis and Puren they believed it was in the public interest that the programme be aired immediately. However, almost a month had passed since the email from Boshoff and the parties' attorneys had been in communication for two weeks. Puren and Mostert could not have seriously believed waiting another week to ensure greater accuracy would unduly compromise public safety.

93] It seems that all Carte Blanche were waiting for was Gold Reef City's response. Once they had obtained this they believed that they were entitled to proceed as they could then present both sides of the story. Puren in her evidence said:

> *"When I do a story or when anybody does a story of this kind, you represent views. I had a view of Dr Mostert, I had a view of Dr Allan Mann and I had a view of Spencer Erling and this is the view of Gold Reef City. I am not conducting a court case. I don't need to have a decision between them, a consensus of what they've seen. I represent their viewpoints."*

94] While this may be true of a programme of a straight factual nature, once there was such heavy reliance on the interpretation of engineering defects by experts, it was, I believe, negligent not to have afforded Mostert and the other experts the opportunity to comment on Gold Reef City's assertions before broadcasting on national television. Mostert conceded that had this happened he may have presented his views somewhat differently. It was a serious shortcoming not to test Gold Reef City's response. The media is not required to be content with having solicited a response. In certain circumstances it is required that the response be tested or verified so that both sides of the story can be fairly presented.

95] This deficiency was exacerbated by the sensationalised tone of the broadcast and the manner in which the explanations of Gold Reef City were presented by juxtaposing them next to visual or aural material deliberately designed to cast doubt on them. Puren became convinced that Gold Reef City had something to hide. This was caused by Schutte's alleged offer of a bribe and Gold Reef City's responses to the proposed programme which seemed to be evasive and defensive. Mazarakis and Puren both said that they were deeply sceptical of Gold Reef City's views. Such scepticism, however, did not exonerate them from fairly presenting these responses. In fact their own suspicions should have made them, if anything, more circumspect

96] It appears that during the course of the making of the programme, Puren's role, instead of being that of a neutral observer, was to expose GRC for what she genuinely believed to be issues of public safety. Having formed this view, it was incumbent upon her as an experienced journalist to ensure that she presented a balanced programme. Mazarakis' concern that a response from Gold Reef City be obtained, was meaningless in light of the manner the responses were portrayed in the programme as implausible, far fetched and dishonest.

97] The importance of the press in a democratic society cannot be over-emphasized. The public increasingly depends on investigative journalism to expose corruption, incompetence and other matters of public interest. But the public should be able to accept that what they are informed by the press is substantially true, alternatively there must be a good reason why they got it wrong. It cannot serve democracy to enable the press to publish falsehoods with impunity, particularly when those very statements have far-reaching and damaging consequences for those to whom they refer.

98] Courts must uphold the delicate balance between freedom of the press and the right to reputation. The Broadcasting Complaints Commission of South Africa has a code of conduct which states that every journalist shall attempt to report news truthfully, accurately and fairly with no intentional or negligent departure from the facts by way of distortion, exaggeration or misrepresentation, material omissions or summarisation.[20]

99] Taking all the above into consideration, I believe Carte Blanche exercised due care in investigating Boshoff's by approaching experts. However, once having received a response to the allegations, the experts should have been afforded an opportunity to consider them. At the very least the responses should have been presented in the insert in such a manner as being worthy of proper consideration. As Mazarakis conceded the programme was flawed and there were certain distortions.

100] Notwithstanding the degree of drama that any successful television programme entails, it was inexcusable to produce a programme that was so blatantly one-sided, especially since most of the statements were found to be untrue. I am in agreement with Mazarakis that the insert did not accord with the high standards that the South African public have come to expect of Carte

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[20] BCCSA Code para 34

Blanche. I find that the manner in which the insert was made was neither reasonable nor justified.

In the result I make the following order:

1] The insert broadcast on 6 March 2005 by the defendants is defamatory of the plaintiffs;

2] The plaintiffs are entitled to such damages as they may in due course prove;

3] The defendants are to pay costs of suit to date, including the qualifying fees of experts.

C.E. HEATON NICHOLLS
JUDGE OF THE SOUTH GAUTENG
HIGH COURT – JOHANNESBURG

Appearances:

Counsel for the plaintiff	:	Adv. A. Redding SC Adv. J. Campell SC Adv. T. Dalrymple
Plaintiff's Attorneys	:	Edward Nathan Sonnenbergs
Counsel for the defendants	:	Adv. P. Louw SC Adv. Hofmeyr

Defendants' Attorneys	:	Bieldermans Inc.
Date of hearing	:	24 August – 17 September 2010; 28, 29 September 2010
Date of Judgment	:	23 February 2011