IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

25/11/14

Case Number: 4586/10

23511/11

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

25/11/14 .....

DATE SIGNATURE

In the matter between:

BYTES TECHNOLOGY GROUP SOUTH AFRICA (PTY) LTD	**FIRST PLAINTIFF**
DEIDRE VANESSA LE HANIE	**SECOND PLAINTIFF**
IZAK STEPHANUS FOURIE VAN DER MERWE	**THIRD PLAINTIFF**

And

MICHAEL YARDAN MICHAEL	**DEFENDANT**

JUDGMENT

Fabricius J,

1.

In this trial I need to decide two questions:

a) Did Defendant defame the Plaintiffs?

b) Is Defendant guilty of contempt of Court?

The two actions were consolidated and I heard evidence for some three weeks. Various lengthy affidavits were made during the course of the proceedings mainly by Second Plaintiff and by Defendant himself. Defendant was unrepresented at the trial, but having been given the necessary assistance by myself and Senior Counsel for the Plaintiffs on numerous occasions, conducted the proceedings with a good measure of insight and expertise. Except where I indicate otherwise, he had good knowledge of First Plaintiff's business and in that context was able to conduct his defence adequately. As a result I am completely satisfied that he had a fair trial and

that assistance was given to him whenever it became necessary. Two days were set aside for argument. Defendant indicated some two Court days beforehand that he was ill/depressed and/or suffered from anxiety attacks. He was told that he need not present written Heads of Argument as previously agreed to. The argument continued in his absence. It was recorded and transcribed and forwarded to Defendant with an opportunity of some three weeks to make whatever submission he wished. There was in my view, taking into account all back-ground facts, and the history of this litigation no prejudice to him is this regard. There was no formal application for a postponement, no affidavit by a medical practitioner, not even a note. From previous experience Defendant knew quite well what was required. He was fully aware of his rights, having previously applied to Tuchten J for a postponement and having drafted the founding affidavit himself. He was also fully aware of a previous order made by myself, which required him to provide satisfactory proof of his medical condition before he, on his own accord, simply absented himself from the on-going proceedings.

See: ***Brian Kahn vs Samudin 2012 (3) SA 310 GSJ at G - tt***

2.

BACKGROUND FACTS:

The facts that I relay herein emanate to a large extent from the various affidavits made in the course of the lengthy proceedings on the one hand, and from the evidence of Second and Third Plaintiffs together with that of Defendant on the other hand. For a proper understanding of the issues before me, it is necessary to refer in some detail to the business conducted by First Plaintiff and Defendant's role during the time of his employment with First Plaintiff, and what his actions were thereafter. The first mentioned is essentially not in dispute, whilst Defendant disputes that he defamed the Plaintiffs and that he is in contempt of a Court Order, details of which I will refer to in due course. The story that I need to tell is a sad one. The First Plaintiff has a division called Bytes Managed Services ("Bytes MS"). The Second Plaintiff is the Managing Director of Bytes MS. The Third Plaintiff at all relevant times was the Operations Director. The unchallenged evidence of Second Plaintiff is that Bytes MS, after some restructuring during the 1980's, was acquired by the Altron group of companies. In November 2004 it emerged in its present form as

Bytes MS. It, and its predecessors in name, were, and still are, synonymous in the industry with integrity and efficient and reliable IT service delivery. This industry is a notoriously competitive industry. It provides comprehensive IT hardware and software maintenance services to many prestigious corporate clients operating in the retail, financial, insurance, industrial and parastatal sectors. It has a customer list in excess of 400 organizations including many blue-chip companies in the financial and retail sector such as the Edcon Group, First National Bank, Nedbank, Pick n Pay, Standard Bank, and of course many others in those sectors. It receives over 150 000 telephone calls per month and an average of 30 000 field work orders. It employs over 1100 personnel operating out of over 95 locations throughout South Africa and neighbouring countries.

3.

It is necessary that I briefly describe the manner in which it effects its IT maintenance and support services. It enters into Service Level Agreements with its clients in terms of which it guarantees the maintenance of minimum service level

standards. In many of its contracts, but not all, it guarantees to meet minimum service level standards of 95% mean time to restore. It has about 500 skilled technicians who are called out by clients to resolve their hardware or software related problems as they arise. The information derived from the calls logged, and dealt with by technicians, form part of a data base against which the minimum service level standards of the clients are measured. It was said that such service level standards relate, to put it broadly, to a "turnaround" within which the problem must be resolved.

If Bytes MS drops below the agreed-upon standard with respect to any client, which is measured on a three month rolling average, it is typically given a month to remedy this, failing which it will be in breach of contract and may even run the risk of losing the contract. In a small number of instances, it may also face effective financial penalties if it delivers below the agreed-upon service level standards.

4.

BYTES' GOOD NAME AND REPUTATION:

In this context also I rely on the undisputed evidence given by Second Plaintiff and the facts that emanated from her evidence in the interdict proceedings against Defendant which is dated 14 December 2009. This evidence was not disputed. Bytes MS' clients, rely on a great deal of trust and faith in its reputation for integrity and bona fides. The effective and efficient running of a client's information technology infrastructure, which is a sensitive, indispensible and crucial aspect of any large modern entity, is entrusted to the support and maintenance of Bytes MS. Accordingly, it is a business imperative for Bytes MS to constantly monitor and, where possible, improve upon its accountable business processes and its reliable and efficient service delivery. Only in this manner can it secure and build upon its major asset, namely its reputation for integrity, reliability and efficient service delivery. The Second Plaintiff testified that this emphasis on integrity, accountability and efficiency when servicing clients is the very life-blood of its business. If this was

undermined in any way, the service-related business would be severely compromised.

5.

THE DEFENDANT:

He was employed in Bytes MS as a Business Development Executive from 2 January 2007 until February 2009. This was a very senior executive position. It required him to be intimately involved in the affairs of First Plaintiff. He had to attend weekly executive committee meetings with Bytes MS and on a monthly basis joint executive meetings of the First Plaintiff including one of its main shareholders, Kagiso Ventures (Pty) Ltd ("Kagiso"). By virtue of his position, he was intimately involved in the running of the affairs of Bytes MS at the highest level and was privy to highly confidential and sensitive information which would include amongst others:

5.1 Executive and other committee meeting minutes;

5.2 Business strategy, marketing and development documents;

5.3 Statistics and data regarding Bytes market share;

5.4 Bytes MS-Business Analysis of its strategies to counter competitors;

5.5 Bytes MS' short, medium and long term business strategies;

5.6 Contact details and names of key persons of its clients;

5.7 The terms and provisions of various service level agreements with its customers;

5.8 Its profit margins in respect of service level agreements with its various customers and

5.9 Raw, and interpreted data from its clients' logged calls.

6.

Because the scope and type of confidential and sensitive documentation and information that Defendant was privy to was extremely wide, he was required to sign various confidentiality undertakings. A number of documents are relevant in this context, but the up stance thereof was that each of them provided for strict far-reaching post-contractual duties of confidentiality. I quote one of the confidentiality clauses which is paragraph 13.2 of the Defendant's standard terms of employment:

"13.2 The employee agrees and undertakes that in order to protect the proprietary interest of the employer and/or the Group in the Group's trade secrets:

13.2.1 He will not during his employment by the employer and/or the Group or at any time thereafter, either or indirectly use or divulge or disclose to anyone (except as required by the terms and nature of his employment hereunder) any of the Group's trade secrets.

13.2.2 Any written instructions, drawings, notes, memoranda of records relating to the Group's trade secrets which are made by the employee of which and of which he is in possession of during the period of his employment by the employer and/or the Group, and all copies thereof, shall be deemed to be the property of the employer and shall be surrendered to the employer and/or the Group on demand and in any event on termination of the employee's employment by the employer and/or Group, and the employee will not retain any copies thereof or extracts therefrom."

7.

There are a number of other clauses to the same effect and Second Plaintiff in the mentioned affidavit, summarized these as follows:

7.1

Confidential information, which is widely defined, plays a vital role in, and is of crucial significance to the business of First Plaintiff.

7.2

To that end, Defendant who was privy to a great deal of confidential information undertook, post-employment:

7.2.1

Not to reveal confidential information;

7.2.2

Not to interfere with or endeavour to entice away from Bytes MS its clients and principles and contracting parties;

7.2.3

Not to "persuade, induce, solicit, encourage or procure" any employee of Bytes MS to terminate their employment with Bytes MS;

7.2.4

Not to use any confidential information to cause injury or loss to Bytes MS and

7.2.5

To surrender all confidential information upon the termination of his employment.

Furthermore Defendant also signed a document confirming that to his best knowledge and belief, having taken reasonable steps to confirm this, no person in his area of operation is involved in any actions which may be in conflict with South African Competition legislation or in any other anti-competitive behaviour.

8.

Defendant was dismissed by First Plaintiff on 19 February 2009 with effect from 20 March 2009 due to insubordination and irretrievable breakdown of the trust relationship. Second Plaintiff's evidence was that Defendant's dismissal resulted

from his failure to follow a frequently repeated and clear (written and oral) instruction in relation to a certain transaction which resulted in a bad debt provision of R3.2 million one month prior to the financial year end of First Plaintiff. It also had a negative impact on the business cash flow, exposed First Plaintiff to uncertainty and risk, and threatened to have a major financial impact on the year-end profitability. 16 March 2009 Defendant referred the matter to the CCMA which proved unsuccessful. The matter was then referred to arbitration. A senior CCMA Commissioner made an award dated 20 June 2009 and found that Defendant was grossly negligent, and had been guilty of a material dereliction of his duties. Further, his defence, which was outlined in his opening statement, was totally irreconcilable with his evidence during the arbitration. He denied any wrong doing and chose to accuse other instances of bribery and of a conspiracy of some sort. On 3 August 2009 Defendant brought an application to the CCMA to rescind the arbitration reward. This application was dismissed on 31 August 2009. I must note that despite this finding Defendant disputed the award of the arbitrator, and alleged that he had sought to take these proceedings on review in the Labour Court. It is

however clear that since 2009 the Labour Court was not approached in accordance with its own Rules of conduct of proceedings. During the trial before me, Defendant persisted in his denial of any wrong doing in this particular context.

9.

I will deal with certain facts which preceded Defendant's further conduct during September 2009 hereunder, but at this stage it is convenient to record that Defendant sought an urgent meeting with Second Plaintiff on 21 September 2009 and stated in an e-mail that such meeting would be of extreme importance to her and was not related to the labour matter between himself and Bytes MS. Second Plaintiff asked him what this was all about and in his reply he stated the following: "As stated in my previous e-mail, this has nothing to do with the labour matter relating to my case. For the record I did give you an opportunity to hear the matter from me first, instead of the authorities and/or the media. I will not pressure you to give me an audience for an off the record meeting. If you do not think it is of importance to you. (sic) my conscience is clear. I am unable to indicate what it is

about on e-mail as it is very sensitive. But I know that this is VERY important and will have SERIOUS impact."

10.

Second Plaintiff stated that on 8 October 2009 she responded to a major client of Bytes MS regarding queries that had been raised with the client by an online news publisher. The queries related inter alia to the following:

10.1

Bytes MS had allegedly been deceiving its major customers for years by perpetuating a series of frauds in relation to its service levels, and

10.2

The Defendant allegedly attempted to expose the fraud, and as a result was dismissed from Bytes MS.

A client expressed specific concerns about the breach of confidentiality: investigative staff of the online news publisher had detailed knowledge of specific management, including names and contact details of senior partners of the client. The client was

especially concerned about its own reputation. The identity of Bytes MS clients, and more particularly the names and contact details of the persons who deal with Bytes MS clients, are confidential matters pre-eminently within the knowledge of the Defendant, so Second Plaintiff said. Alarmingly, these queries to the client occurred shortly after Defendants barely revealed threat made previously to approach "the authorities and/or the media". I must add that the online news publisher did not publish these allegations.

11.

On 16 October 2009 Defendant's then attorney Mr S. Snail, wrote to Plaintiffs' Attorneys in the labour litigation and proposed a "settlement" to the effect that Bytes MS pay Defendant the equal amount of eight months' salary. Furthermore, the dismissal finding had to be withdrawn. In return, the Defendant would not proceed with giving evidence to the National Prosecuting Authority against some of Plaintiffs' executive directors related to "dubious activities that are closely related to our client's dismissal". First Plaintiff and Second Plaintiff regarded this as an attempt at

extortion. Second Plaintiff had testified that First Plaintiff had decided not to lay a charge of extortion against Defendant because of the events that followed, and which pre-occupied First Plaintiff's executives in trying to limit the damage that had been done to it/them. Second Plaintiff also testified that at some stage it had considered a settlement simply because she felt sorry for Defendant, having been aware of his personal circumstances which largely related to a serious illness of his wife. After this ill-disguised threat however she decided that events would have to follow their course, irrespective of how much she and other executives would suffer thereby or be inconvenienced thereby.

12.

DEFENDANT'S E-MAILS TO SENIOR OFFICIALS AT NEDBANK AND FIRST NATIONAL BANK:

These e-mails are almost identical and in them Defendant alleges that while he was employed by Bytes MS, he was involved in an internal investigation sanctioned by himself and conducted with the assistance of 15 other employees to determine if

there were "irregularities in the service delivery" from Bytes MS to its customers. He further stated that "although many of these employees were eventually dismissed or retrenched, the investigation had already resulted in a 1700 page report in which there I believe (sic) there is critical information relating to FNB/Nedbank." He also told the recipients that that matter had been "escalated to the NPA and the Competition Commission".

Also, on 25 November 2009 Defendant sent an e-mail to Kagiso which is a shareholder in the First Plaintiff. This e-mail contains similar allegations as made in the e-mails to Nedbank and First National Bank. Defendant however went one step further, and, according to Plaintiffs, this e-mail contained false, defamatory and injurious allegations concerning her and the Third Plaintiff including that: "Deidre le Hanie and Fourie van der Merwe, knowingly permitted a commercial crime with far reaching impact and consequences (sic), to carry on; and failed to escalate or report it to the authorities";

"Both the MD and the Operations Director not only encouraged such, but also covered it up"; and

"This matter has been escalated to the NPA and the Competition Commission and the law will take its course".

This e-mail to Kagiso was forwarded to First Plaintiff by a senior executive at Kagiso.

13.

As a result Plaintiffs' Attorneys wrote to the Defendant demanding that he desist from publishing any further defamatory allegations concerning the Second and Third Plaintiffs to any party, to provide them with a written apology and a retraction of the defamatory allegations, and to provide them with a list of all persons to whom the defamatory allegations were disseminated. Further correspondence and consultations followed and on 3 December 2009 Defendant's Attorney wrote to Plaintiffs' Attorneys denying that the allegations were false, defamatory and injurious to the Plaintiffs, and admitted at the same time that he was in possession of e-mails, messages, reports and executive committee meeting minutes belonging to First Plaintiff. Defendant's Attorney also stated that he was in possession of a 1770

page unsigned affidavit and report relating to the mentioned so-called illegal activities and that the authorities were awaiting a signed copy of the affidavit. Defendant however did not wish to "go this route" and rather wanted to settle all outstanding matters on an amicable basis without involving the National Prosecuting Authority as well as the Competition Commission.

I may add that Defendant did not deny having sent the mentioned e-mails to the parties that I have mentioned.

14.

DEFENDANT'S E-MAILS OF 10 DECEMBER 2009:

On this day Defendant sent an e-mail containing serious allegations concerning Bytes MS to several of its banking and retail customers. Again, Defendant did not deny that he had sent these e-mails. These clients included Edcon, Pep Stores, Pick n Pay and Nedbank.

I will quote a part of this email: "A case of fraud was opened against Bytes Managed Services (and/or its Executive Management and/or its Directors) concerning

Service Delivery irregularities and several multi-million rand contracts. The contracts in which conclusive findings (that led him to opening a case of fraud) were made are among others [some 15 of First Plaintiff's clients]".

"This matter has been escalated to the NPA and the Competition Commission, however, information included into the case docket regarding a commercial crime alleged to have been committed against your organisation (in your maintenance contract of Bytes Technology Group) is available for your perusal in the docket [case number CAS815/12/2009], or from the sender."

"The SCCU investigating officer, the Advocate from the NPA, and/or officials from the Competition Commission may also wish to speak to you regarding a commercial crime which has been allegedly been committed against your organisation. Therefore, to assist you to determine this to further audit your KING II, Companies Act and Corporate Governance compliance on the above listed contacts, the evidence documents used in the opening of this fraud case are available for your records."

Again an undertaking was sought by First Plaintiff's Attorneys that Respondent/Defendant would desist from this unlawful conduct.

Further correspondence followed and when Defendant did not provide the relevant undertakings required, the Plaintiffs launched an urgent application on 22 December 2009 under case number 76869/09. Pending the outcome of an action or application, the Applicants therein sought urgent interim relief seeking amongst others the return of all confidential information, and a mandatory interdict to the effect that the Respondent therein (the present Defendant) desist from contacting First Plaintiff's clients, and to desist from making any defamatory allegations against the present Plaintiffs. (By way of summary only)

15.

On 23 December 2009 Sapire AJ granted the following order:

"IT IS ORDERED:

Pending the outcome of an action or application to be instituted by the applicants within 35 (thirty five) calendar days from the date of this order, it is hereby ordered that:

1. By 13h00 on Monday 28 December 2009, the respondent must return to the first applicant's attorneys originals and copies of all of Bytes Managed Services' documents (whether in electronic or hardcopy form), which are as of the date of this order within the respondent's possession or under his control including:

   1.2 Minutes of Bytes Managed Services' executive meetings;

   1.3 Documentation relating to Bytes Managed Services' strategy;

   1.4 Bytes Managed Services' business related emails or other correspondence;

   1.5 Minutes relating to customer meetings of Bytes Managed Services;

   1.6 Documentation relating to new opportunity responses (bids, requests for quotes, requests for proposals, requests for responses, opportunity pricing);

1.7 Any Business Services Optimisation report or reports of Bytes Managed Services;

1.8 Any Business Services Optimisation analysis of Bytes Managed Services;

1.9 Any derivate reports of Business Services Optimisation Analysis report of Bytes Managed Services;

1.10 Documents relating to customer, third party and internal projects of Bytes Managed Services;

1.11 All documents related to Bytes Managed Services human resources, including details in respect of the employees of the first applicant;

1.12 All documents related to Bytes Managed Services financial reports, budgets and forecasts;

1.13 Operating procedures and policy documents of Bytes Managed Services;

2. indicate to the applicants' attorneys in writing by 13h00 on Monday 28 December 2009 when and to whom the respondent has provided copies of any of the first applicant's documents since 1 September 2009 to date;

3. indicate to the applicants' attorneys in writing by 13h00 on Monday 28 December 2009 when and to whom the respondent has communicated any of the allegations referred to in paragraph 1.5 to 1.6.4 below;

4. desist from contacting the first applicant's or Bytes Managed Services' clients, agents, suppliers, employees, shareholders, independent contractors or any other person with whom the first applicant or Bytes Managed Services has a business relationship, save for those that he may be required to lawfully contact by his current employer, solely by virtue of his employment relationship;

5. desist from making or publishing any false and/or defamatory allegations against any of the applicants;

6. desist from imputing or implying or stating to the first applicant's or Bytes Managed Services' clients, agents, suppliers, employees, shareholders, independent contractors or any other person with whom the first applicant or Bytes Managed Services has a business relationship, that:

6.1 any or all of the applicants or Bytes Managed Services have committed fraud;

6.2 any or all of the applicants or Bytes Managed Services have committed any other crime;

6.3 any or all of the applicants or Bytes Managed Services are suspected of having committed fraud or any other crime;

6.4 any or all of the applicants or Bytes Managed Services are under investigation by any organ of State including the Special Commercial Crimes Unit, the National Prosecuting Authority, the South African Police Services, or the Competition Commission."

16.

I must add in this context that in the Founding Affidavit the Second Plaintiff stated that a consequence of the Defendant's claims, one of Bytes MS' top 10 clients, a major bank, requested an audit verification of data (which they provided to Bytes MS) of six months. The audit verification process for just one month took nine senior managers (Bytes had 24 senior managers) and 13 middle managers (Bytes had 38 middle managers) a day and a half, working 14 hours a day. Client was satisfied by Bytes MS audit verification process and the result of the exercise indicated that there was a minuscule negligible 0.5 % difference between the analysis of the client's selected data for the logged calls and result of First Plaintiff's analysis of the data. The client was therefore satisfied that there was no basis to any of these claims of the Defendant.

17.

THE "BSO REPORT":

It is common cause that Mr K Yeo drafted an "ITIL Program Strategist Report" dated June 2008 for the attention of the Defendant. This was marked confidential. By a

twist of fate, Defendant's Attorney at the time, Mr Snail, accidentally sent this report to Plaintiff's Attorney. It is also Annexure 17 to the affidavit that Defendant made to National Prosecuting Authority. According to the evidence of, and expert report of Mr D. Myburgh this was seized during the Anton Piller execution. (The relevant order was granted by Rabie J on 23 February 2010). Mr K. Yeo gave evidence in this trial in the context of this report and other investigations that he had made. Defendant himself gave evidence about this report and his affidavit to the National Prosecuting Authority. I will deal with this report again further on in this judgment, but by-and-large it concerns the business requirements of First Plaintiff and the introduction of a new project or system, having regard to its computer requirements, if I can use that colloquial phrase. Even if a layman reads this report, it is clear that it contains confidential information relating to First Plaintiff's activities and its requirements in the future. In the context of the calls made by clients, which are logged, and which relate to the service level agreement process that I have described briefly above, Mr Yeo said "of late this customer has refused to pay large sums of invoices as they felt the incidents were tampered with". During his evidence

Mr Yeo agreed that he had used irresponsible language in this context. It is common cause in these proceedings that certain data of the details of a call by a customer referred to as a "service" were changed by First Plaintiff's personnel to bring it in line with events that had actually occurred. For instance, it may first have been recorded that a customer required item X, which would not be a severe problem, whilst it emanated thereafter that in fact the complaint concerned item Y, which was much more serious and time consuming. It was Plaintiffs' case that these changes were made lawfully so as to reflect the true state of affairs in each given case. It was also Third Plaintiff's evidence that Defendant had no real knowledge of either the relevant process, which was a complicated one, and not easily understood even by experts in the field. Despite that, Defendant said in his affidavit to the National Prosecuting Authority that changes were made which amount to "unauthorised or illegal changes without the knowledge of management, or that management were condoning the changes. If managers were condoning the changes they would be knowingly engaging in a commercial crime to deceive the customers to keep on "PAYING FOR A SERVICE THEY WERE NOT GETTING, retaining a contract by

ENGAGING IN EXCLUSIONARY BEHAVIOUR AND PREVENTING THE INCURRANCE OF PENALTIES or the CANCELLATION OF THE MULTI MILLION RAND CONTRACTS". During cross-examination on this topic, I may add at this stage, Defendant stated that these conclusions were correct, that he abided thereby but, as was obvious, that these conclusions did not appear in the report of Mr Yeo, or anywhere else for that matter.

18.

It was First Plaintiff's case thereafter that Defendant did not comply with the interim order, and as a result an Anton Piller order was sought, granted and executed. The findings of the relevant experts in this context will be dealt with hereunder.

19.

THE PARITALA E-MAILS:

In this context it is convenient to refer to Plaintiffs' Particulars of Claim E, which relates to all three Plaintiffs, and alleges that they were defamed on 3 February

2010 by Defendant causing an e-mail entitled "Data manipulated on the system-affidavit" to be transmitted to Pick n Pay. It is alleged that the first e-mail contained an attachment entitled "Affidavit/SLA Fraud v3.pdf", which was an affidavit authored and signed by Defendant. This affidavit contained amongst others the allegation that a commercial crime had been committed by the Plaintiffs and had been covered up. It stated that the author had made a "professional finding" that Second and Third Plaintiffs had "knowingly appropriated awards to the perpetrators of such a crime, instead of taking steps and measures against them". It was also said that it was "clearly fraudulent to revisit these CM Service Delivery records to align them with contractual obligation in order to bill the customer." The second Paritala e-mail sent on 3 February 2010 contained the following statement "How do you request an audit from the Company, the VERY VERY Company that is defrauding you". Also on 3 February 2010, so it was alleged, Defendant caused a third e-mail message to be sent to Pick n Pay stating amongst others the following "This is an example of how data is manipulated". It was Plaintiffs' case that these transmissions were defamatory, and that the affidavit constituted an unlawful publication with the

intention of injuring the Plaintiffs, and calculated to prejudice First Plaintiff in its trade's reputation. I must just add at this stage, before I deal with the evidence of the relevant experts in this context, and the evidence of Defendant himself, that he denied having sent these e-mails. He did however testify that he had a suspicion as to who had sent them, but that he was not prepared to tell me who in his mind the author had been inasmuch as he wanted to protect that person. He would only disclose the identity of that person if I ordered him to do so, which suggestion I declined. It is clear in any event that no-one could have sent these mails without his active assistance/involvement.

20.

The result of this summary of the background facts (the record before me is contained in some 19 arch lever files) is that Plaintiffs seek compensation from Defendant based on the defamatory allegations made, that a permanent interdict be issued against Defendant to desist from making such allegations in the future, and

that he be committed to prison for 30 days for contempt of Court by failing to comply with the interdict issued by Sapire AJ. They also seek patrimonial damages.

21.

PLAINTIFFS' EVIDENCE:

Mr D. Myburgh of Cyanre Computer Forensic Laboratory gave evidence in the context of his written report 10 February 2010 (the first report) and of 1 July 2010 (the second report). He was informed by Plaintiffs' Attorneys that defamatory e-mails had been sent to various clients of Bytes from a person identifying herself as "Sunita" and which were sent from the following e-mail address sunita paritala cobol koala@yahoo.com". He was also informed that Bytes had obtained a Court order against Defendant prohibiting him from contacting their clients or distributing confidential information concerning them. Due to various facts Bytes MS suspected that Defendant was in fact behind the e-mails either posing as "Sunita" or using "Sunita" as an accomplice in order to bypass the requirements of the Court order against him. He was provided with electronic copies of e-mails which were received

by Plaintiffs' Attorneys and Bytes from Defendant, his legal representative, "Sunita Paritala", or which were received from clients of Bytes who received it from "Sunita Paritala". He also received all the e-mails which were sent from the mentioned e-mail address from Mr Garth Whale from Pick n Pay.

Cyanre was requested to trace the e-mails and establish the origin, analyse all e-mails received from Defendant, his legal representative and "Sunita Paritala", and establish if Defendant was involved in distributing these e-mails, either by supplying the information to or posing as "Sunita Paritala". I have already mentioned that on 28 December 2009 an e-mail was received by Plaintiffs' Attorneys from Mr S. Snail, then the Defendant's legal representative. To this e-mail the mentioned BSO report was attached.

Mr Myburgh analysed the e-mails, extracted certain header information and established an IP address. It is not practical for present purposes to repeat the detailed analysis that was made by Mr Myburgh, and which is fully reflected in the first report. The analysis involved expertise which was not challenged in these

proceedings. It is however necessary for the purposes of this judgment to refer to his conclusions which were the following:

21.1

From the e-mail which was received on 28 December 2009 from the said Mr Snail, it was apparent that Defendant's computer/user profile was "Michael Michael" and that the document attached to that e-mail, being the mentioned BSO report, was created by the *Coral Draw* application. Due to the fact that this information was received from Defendant's legal advisor it was considered to be beyond dispute that it emanated from Defendant;

21.2

The same information was reflected in the e-mails of 3 February 2010 at 5:06 from "Sunita" to Mr Whale as well as the one sent at 4:52 to Mr Whale. These also contained Defendant's affidavit and reflected a received date of 30 December 2009 by the South African Police Service. This was obviously after the date of the relevant interdict against him of 23 December 2009;

21.3

The e-mail sent 4:28 on 3 February 2010 to Mr Whale, having regard to its annexure, shows a creation date of 2 February 2010;

21.4

All these documents reflect that the PDF files were created on 2 February 2010 on a computer/profile named "Michael Michael";

21.5

On 3 February 2010 at 4:33 another e-mail was sent from "Sunita" to Mr Whale. The attachments to this e-mail reflect an author of "M. Michael" and once the attachments were opened it could be seen that the e-mails were printed on a computer/profile name "Michael Michael". The 17 attachments contained the strongest evidence in favour of Defendant's direct involvement in the distribution of e-mails. This was based on the following facts:

21.5.1

The e-mails were originally sent to Defendant and a number of other recipients. This could be seen from the address fields in their e-mails and indicates that Defendant had a copy of all of these e-mails;

21.5.2

These annexures were not printed and then scanned into pdf format;

21.5.3

They were also not forwarded to any other user at any stage prior to 3 February 2010;

21.5.4

These annexures were printed to PDF on a computer/profile named "Michael Michael", consistent with the document received from Defendant's Attorney on 28 December 2009 as well as the e-mail which accompanied Defendant's affidavit which was mailed on 3 February 2010;

21.5.5

From the files' Meta-data it was established that approximately four computers and/or profiles were used to create the PDF's on, namely: Michael Michael, MMichael, btg and yardanm. It was clear that the IP address that e-mail emanated from was from a location in Pretoria;

21.5.6

Whether Defendant gave the documents to a person called "Sunita" or whether he created a fictitious e-mail address in that name could not be conclusively determined at that stage from the computer forensic analysis alone. What could be concluded with certainty was that Defendant's computer or profile was used on 2 February 2010 to create all the documents which were e-mailed as attachments on 3 February 2010.

22.

The second report is dated 1 July 2010, and again Mr D. Myburgh gave evidence in that context. After the first report the mentioned Anton Piller order was sought and

granted. The order was executed on 26 February 2010. The Applicants were also granted permission by the Court on 19 April 2010 to make copies of the electronic evidence which had been in the possession of the Sheriff for purposes of further investigation and analysis. On 7 May 2010 Cyanre received from the Pretoria East Sheriff two computer hard drives and two dvds seized at the residence of Defendant. On 11 May 2010 Cyanre received from the Centurion Sheriff two computer hard drives and a SD storage card seized from the business premises of Defendant. Cyanre was requested to forensically analyse the electronic evidence obtained in accordance with the terms of the Anton Piller order with the aim of establishing if Defendant still had confidential data pertaining Bytes MS in his possession and to establish if Defendant could be linked to the e-mails which were sent from the "Sunita Paritala" e-mail account. Mr D. Myburgh gave evidence as to what he did as an expert, and how he did it, and this evidence again was largely unchallenged by Defendant, except insofar as he put to Mr Myburgh that he was not at work on 3 February 2010 on the one hand, and on the other hand that Mr Myburgh could not say that when the relevant e-mails were sent who was actually "behind the

keyboard" as he put it. Their conclusions arrived at in this report as confirmed by Mr Myburgh were the following:

22.1

He had utilised keywords to locate documents which relate to Bytes and found approximately 39 000 results. These results consisted of documents, spread sheets, internet documents, e-mails etc. and consisted out of various levels of confidentiality. A major part of the documents were saved on the computer on various locations on the computer and was not deleted as per the relevant Court order against Defendant;

22.2

Defendant's user name on his computer was "MMichael" and that one of his e-mail accounts' display names was "Michael Michael";

22.3

He located references to all the attachments which were distributed from the sunita paritala cobol koala@yahoo.com" e-mail account on Defendant's computer of which all creation and modification dates correlate with the dates as per the first report,

thereby confirming that these were indeed the same documents which were distributed;

22.4

He located the original e-mails which were sent to Defendant while he was still employed at Bytes MS, and which were sent as 17 attachments on 3 February 2010 at 4:33 pm from the Sunita e-mail account to Mr Garth Whale of Pick n Pay. According to Mr Myburgh this indicated that Defendant copied out his e-mails and took them with him prior to leaving Bytes. The conclusions arrived at in his first report were accordingly, in his view, now established beyond reasonable doubt;

22.5

He also stated that it was beyond a reasonable doubt that the "sunita paritala cobol koala@yahoo.com" was created and accessed from Defendant's computer indicating that he had a log-on password and that the "only possible assumption is that he used this account as a pseudo e-mail account". He agreed that this was an inference that he had made from the stated facts;

22.6

When searching for other communications where Bytes Technology was discussed with other parties, he found the sender described as "Diligent Citizen". The subject matter of these communications was the alleged fraud committed by Plaintiff against various banks and retailers. Defendant, I must say at this stage, denied that he had been the "Diligent Citizen" but what the probabilities are in this context, I will discuss hereunder.

23.

In his report and his evidence Mr Myburgh came to the following conclusion although he and the other experts agreed, that whether or not this was proven beyond a reasonable doubt, as was his view, was for the Court to decide;

23.1

Defendant was still in possession of confidential information of Bytes at the time of the Anton Piller order;

23.2

Defendant was the person who posed as "Sunita Paritala" and this had been created on his computer on 10 February 2010;

23.3

The person who distributed the e-mails from the "sunita paritala cobol koala@yahoo.com" e-mail account to Pick n Pay on 3 February 2010 was Defendant.

24.

THE JOINT MINUTE OF A MEETING BETWEEN THE PLAINTIFFS' EXPERT WITNESS AND THE DEFENDANT'S EXPERT WITNESS HELD ON 12 FEBRUARY 2013:

This minute was signed by Mr D. Myburgh of Cyanre, Mr Jaco Venter of Shield and Mr N. Khusial of Shield. Mr Jaco Venter also gave evidence. With reference to the first report of Cyanre the following material agreement was recorded: in the context of the data collected during the Anton Piller execution the experts agreed that the

chain of custody had been intact. The integrity of the data collected during the Anton Piller execution was verified by the experts, and they concurred that the integrity of the data was intact. In the context of the second report of Cyanre of 1 July 2010 it was agreed that Defendant's username on the computer which was seized from Defendant's work place (Datacentrix) was MMichael and his e-mail display name "Michael Michael". In the context of the conclusions reached in the second report, it was agreed that there were a large number of documents relating to "Bytes" on Defendant's computer. Most importantly, the experts agreed on the findings of Mr D. Myburgh made in paragraph 3.1 – 3.6 of his second report, the only difference being that they agreed that it was for the Court to decide whether or not there was proof beyond reasonable doubt in this context. They also agreed that the "Paritala" e-mails were not found (either active or deleted) on Defendant's laptop. Defendant's expert stated that they found that there was no activity on Defendant's laptop on 3 February 2010, which indicated that the e-mail was not sent from his laptop. Cyanre also concurred that there was no activity on the laptop on this date. I must add that Mr Myburgh testified that the relevant e-mails could have been sent

on 3 February 2010 from any internet café, by way of example, because they had been copied onto an external hard drive.

25.

LISA ROCHOY (FORMERLY VENTER):

During March/April 2008 she was the Service Manager at Bytes MS and managed about 14 Account Controllers. Her main task was to ensure that the relevant SLA's had been met. She testified that the accounts were checked daily by the Account Controllers, and corrections where necessary, were done on a regular basis. Only three types of corrections were done, namely, checking the relevant contractual details like the serial number of a user, changes in respect of travel allowance where applicable, and a "service verb 109" correction where a mathematical "bug" was discovered in the system, for instance if four plus four added up to 12. Start time and log-out time would not be touched. Until about July 2008 she had no interaction with Defendant but did work with K. Yeo. Mr Yeo never raised any concern to her during this period of any so-called fraudulent alteration of data. After

Defendant had made allegations to customers alleging that fraudulent alterations to accounts had taken place, she and Mr Yeo reviewed extracts of data over a period of four months working full-time. Their findings had been that all amendments that had been made were in line with the particular contractual provisions relating to a particular client. She and Mr Yeo also explained the workings of the particular system to KPMG, whose report I will deal with. To her knowledge, no information was ever unlawfully changed after a call had been signed off. It was never put to her that she had been part of any fraudulent activities, and no details of any conspiracy or names of conspirators were put to her. Mr K. Yeo had also never voiced a concern to her about a possible fraud.

26.

MR K. YEO:

He had worked for Bytes since 2001 in the Customer Relations Division. By August 2007 he was appointed as an ITIL strategist. This meant that he had to ensure that Bytes would comply with the best practices in the IT environment. He also had two

permanent clients under his wings as it were, and had very little time for Itil. Defendant had been his superior. The BSO Report that has been mentioned in a number of instances was a report drafted to look at business solutions so as to present the most optimum choices to Bytes. This was not some secret code name, as Defendant would have it, but was a project aimed at ensuring that Bytes would have all relevant and up-to-date technology at its disposal for the benefit of its customers. What concerned him when he became involved with the so-called D1 System was that the record would show that on the 2nd day of a particular month a SLA minimum had been missed, but that on the 10th of that month it would reflect that the SLA had been achieved. This raised a number of questions in his mind, but at that stage he did not fully understand how or why this was done.

On 10 March 2008 he sent an e-mail to a number of other managers including Defendant and said the following: "I would appreciate it if you can keep this under wraps as I am wanting to ensure that all the data is collected. Attached is a report that highlights the changes to the D1 System from when the call is actually closed

and after the call has been re-visited by CMC. All of these calls had originally fallen out of our MTTR SLA now report that the MTTR SLA was achieved.

There are various reasons why the call was altered and because I do not have the required knowledge of the accounts, I am reliant on the CRM's to advise me if the reasons indicated are valid..."

Some managers responded but no one expressed any surprise. His request to "keep this under wraps" was intended to convey that he needed to get all the relevant facts before alerting anyone. He certainly did not intend to have kept this investigation a secret.

"In a nutshell I am trying to establish that the information (with regards to our MTTR SLA) is true and accurate, and that there is no disconnect..."

On 20 March 2008 Mr Yeo sent another e-mail and said the following: "Please keep this file safe as I have already lost it once today. Managed to recover. It highlights the (pink) the calls that were tampered with". In his evidence he said that "tampered with" had been the wrong choice of words, and what he had actually meant was that the calls had been changed. He said that he had no actual

knowledge of any fraud in this context, just knowledge of the fact that changes had been made. He tried to establish what the reason for the changes had been and in this context he spoke to CMR managers, call centre personnel and account controllers. He wanted to present his finding to the Executive Committee and, at some stage felt that not enough urgency had been shown to establish the reason for the changes.

On 23 April he sent an e-mail to Defendant, referred to his "analysis" that he had done and concluded as follows:

"Based on the analysis that I have done we are:

- not producing quality
- not meeting our customers' expectations
- producing figures and results that are in contrast to the reality, and awarding individuals based on these results.

My question is, what can be said about output that is of very poor quality and based on half-truth. Surely this cannot be considered as "best practice"."

Meetings were held once a week, Defendant attended two or three and

thereafter was not present again. Asked what he meant by the phrase "in contrast to the reality" he testified that calls were initially reflected as having missed the SLA but later indicated that SLA had been achieved. Having regard to his strategist report of June 2008, and the phraseology used therein, he said that initially he had some suspicion whether everything was above-board but he did not believe that a fraud had been committed upon clients, or that figures had been tampered within the negative sense (having regard to the dictionary definition) or for an incorrect reason. He did not share these suspicions with Defendant, but said that activities shown on the data had no explanation as far as he was concerned. He testified that he had an "abrupt" manner of speaking which often caused friction. The new policy that he had suggested was implemented during July 2008 so as to fall in line the best practice suggestions of the International Standard Organisation. In his view changes ought to be made in real time and not after a call had been closed. Contrary to what Defendant's version was namely that his enquiry had caused concerns and that attempts had been made to silence him, he said that he had never been

impeded at all by either the First or Second Plaintiffs during his investigations. He denied Defendant's evidence that he (Yeo) had told Defendant that he knew that Third Plaintiff had instructed people in the call centre to change data. He denied furthermore that he had ever said to Defendant that he had feared for his life as a result of the investigations made.

27.

After Defendant had made public assertions during October 2009 in the context of this alleged fraud, he and Ms Lisa Rochoy analysed calls over a number of months and especially those maintenance calls where the initial indication had been SLA "missed" to SLA "achieved". They had full access to the particular system. They found that no fraud had been committed and from a number of between 5000 to 6000 calls, less than 0.5% had been changed. He later explained his understanding of the system, the method and the relevant changes to KPMG when they did their own independent investigation.

Cross-examination of Mr Yeo:

Defendant was given a lot of reign during his cross-examination of Mr Yeo. his cross-examination was often persistently repetitive, and that is when I intervened. Mr Yeo was referred to many conversations allegedly held during 2009. Most of those he could not re-call and explained that he holds an enormous number of conversations over long periods of time, and relied to a large extent on the notes, minutes of meetings and e-mails. It was not unusual for him to forget his wife's birthday. He was questioned at some length why he used the word "tampered with" in the BSO Report. His reply was that he was not concerned with an Oxford Dictionary definition of that word, but used it in the context of something being done that was wrong. He admitted that during the beginning of 2008 he had suspicion that fraud might have been committed. He also told Defendant that this activity raised suspicion in his mind. It was also probable that he even used "fraud" in that context. He admitted also that he told Defendant that Management was aware of the changes and that it could even have implications for certain individuals. He also admitted giving Defendant two

Dvds which depicted certain "raw data". He did this because he had received an anonymous sms that he ought to provide this data to his direct Manager, which was Defendant. He discussed this with Defendant and even discussed with him whether the technology at the time was sufficiently sophisticated to try to establish the author of this anonymous sms. He also admitted that he did this again after August 2008, and that was in fact after the anonymous sms. He denied that he feared for his life at any particular stage, but handed the data to Defendant because it could be lost or corrupted, as he put it. He had done his work on his laptop and the information was not stored by a server. Apart from the actual BSO Report, the two Dvds obtained the only work that he had done in the particular context. Asked what he meant by using a word such as "manipulate" he replied that he meant that data had been "changed" wrongly. He did not mention the word "fraud" in his report and stated that if a "no" had been changed to a "yes" it would be suspicious because he had no knowledge of why this change had been made. In his view if any change had been made to certain call data, it had to be done during the life of a call and not thereafter. Any

change made thereafter did in his view not comply with the best practice in the industry in the particular context. He also stated that the use of the word "tampered" was as a result of his own assumption from what he knew of the system, and it was probably irresponsible. He in fact did not have any real knowledge of how the D1 System worked. Even after seven months of investigations/inquiries in this context he did not understand the system fully and made the mentioned bold statements based on what he had seen. Third Plaintiff was aware of these changes. As far as the later KPMG Report was concerned, he consulted with them, explained what he knew and what he and Ms Liza Rochoy (Venter) had done.

28.

Mr Yeo's evidence must not be seen in isolation obviously, but contextually having regard to the documentation that he dealt with, his interaction with Defendant, Defendant's own actions during that period, and the evidence of Second and Third Plaintiffs (amongst others). Third Defendant testified that he

was not impressed with the language used by Mr Yeo which he deemed to be irresponsible and not justifiable, and was also not impressed with Mr Yeo's understanding of the relevant system pertaining to the calls made by clients. He however added that they took no steps against Mr Yeo because he showed potential for the future. Second Plaintiff also testified that she and the Management of Bytes deliberately avoided as much contact with persons who would give evidence during the trial, so as to not contaminate their minds, allow them the freedom to say whatever they wished in Court, and because they did not later on wished to be accused of having influenced any person improperly whatsoever. I cannot fault this evidence of Second and Third Plaintiffs on this point and it is clear from the evidence of Mr Yeo as a whole, and my impression of him and of it, that he could say in Court whatever he deemed appropriate having regard to his own abrupt manner of speaking.

29.

MS C. GRUNE:

Ms Grune gave evidence about the KPMG Report of 22 April 2010. She has a B.Sc. degree in Information Technology, a Bachelors of Art degree in Information Management and a Master's degree in Knowledge Management. For that purpose her mandate was to review Bytes' internal audit findings related to the Business Services Optimisation (BSO) reports of 16 customers. The review was performed also for the purpose of assisting the Directors of Bytes to confirm the validity of corrections made to 1428 incidents for the period of January 2008 and February 2008 as reflected in the Bytes internal audit report for each customer, and they analysed a sample extract based on its current clients to evaluate the service level parameters of the SLA measurement table within the Bytes D1 Incident Management System. Their analysis was performed for assisting the Directors of Bytes also to evaluate the correct electronic translation of contractual service entitlements of each sampled client against its SLA.

30.

It is necessary that I briefly deal with the procedure that was followed:

30.1

A complete "walk-through" of Bytes' operation was done; Senior Managers and Directors were consulted including the Second and Third Plaintiffs, Mr Yeo, Ms Liza Rochoy (formerly Venter), Mr Blackstock, the Head of Management Information Systems and Ms Sunita (!) Vallabh, the Service Manager;

30.2

Data records of incidents logged in their most original form from January 2008 and February 2008 were collected;

30.3

Policy documents and procedures that bear relevance on Bytes review were obtained;

30.4

They performed data analysis on data records collected to evaluate the extent of accuracy of corrections made to incident logs;

30.5

KPMG's calculations were compared with Bytes' findings;

30.6

They documented findings and clarified discrepancies between Bytes' findings and KPMG's findings;

30.7

They performed tests to verify completeness of data considered;

30.8

They provided recommendations where relevant.

31.

A table was drawn which reflected the findings from the mentioned procedures and the percentage of incidents in agreement with Bytes' audit results for January 2008 was 98% and for February 2008 99%.

32.

The KPMG Report also sets out certain improvements that were made subsequently. For present purposes it is only necessary to refer to two of these recommendations:

32.1

"Due to the nature of Incident Management, the corrections made in many of the incidents in the scope of the review, resulted from human error and interpretation. In most cases reasons are recorded in the remarks section of D1 that serve as a change log. In some instances, the descriptions are cryptic, incomplete and do not provide substantial justification for corrections made. KPMG recommends that a System Generated Change Log be considered in the Oracle Incident Management System. Corrections should not be allowed by the Incident Management System without prompting the user to provide an adequate description of the reasons for the correction";

32.2

KPMG recommends that Bytes develops a training methodology and hand over processed to new staff on how the MTTR/MTTC is calculated. From the review of the incidents, it was apparent that some Account Controllers may be uncertain of how to calculate these times and therefore calculated incorrectly and in an inconsistent manner."

33.

Ms Grune drafted the report and she confirmed the correctness thereof. They did not rely on any calculations done by Ms Rochoy or Mr Yeo, but did their own calculations and then compared them to their reports. Only four out of 476 incidents were not in agreement. There was no evidence whatsoever of any unauthorised "tampering" of SLA parameters.

34.

During cross-examination by Defendant, it was put to her that he had never suggested that the KPMG Report was a "white-wash". It was his case that data given to it had been sanitized however. In her view the audit done by Mr Yeo and Ms Rochoy had been done with integrity. She had looked at every item and had asked herself why it had been changed and if such change and the remarks pertinent thereto, had made sense. In this context she had used her professional scepticism. She mentioned that she had five years of data analysis experience and four years of forensic analysis experience. She was taught how to question everything. (It seems to me that Albert Einstein would have been proud of this part of her evidence). In her view it was also not correct to suggest, as Defendant had, and Mr Yeo apparently also did, that there was no "audit trail" of changes made. She had looked at pertinent e-mails, and regarded them as the correct audit trail inasmuch as the D1 System sends a report to Management every day. She could, by way of example, compare the data of the 2nd of

January to that of the 3rd of January, to analyse the changes made and the reasons therefor. In her opinion therefore they had an exact change-log.

35.

According to the KPMG Report, and the evidence of Ms Grune, there was no indication at all of any fraud committed by the Plaintiffs or any other unlawful conduct. I cannot find on her evidence, read together with the relevant documentation and the evidence of Mr Yeo, that any data had been "sanitized", as Defendant would have it. As will appear hereunder, Defendant nevertheless persisted with his allegations of unlawful conduct, if I can put it that generally, when he cross-examined Second and Third Plaintiffs.

36.

For the sake of convenience, I may just say at this stage that Plaintiffs' evidence, in the light of the legal position in the context of a claim for defamation and the defence of truth and public interest that Defendant relied upon herein,

that this evidence was led in rebuttal thereof. I may also mention briefly at this stage that it was Defendant's case that he had not sent the "Paritala" e-mails, that he had no knowledge of the wrongfulness of any alleged publication, and that accordingly he had lacked the necessary *animus iniuriandi*. In the alternative it was pleaded that the e-mails were true, alternatively substantially true in every material part, and that their publication was to the benefit of the public. Also, in the alternative, it was pleaded that the relevant statements were comments or opinions, and not a statement of fact, that such comment was fair, that the facts were truly stated and that the matter was of public interest. I will therefore deal with the relevant case law on this topic hereunder.

37.

MS D. LE HANIE:

Ms. le Hanie, the Second Plaintiff, has an impressive work record and has been the Managing Director of First Plaintiff for some 10 years. She has deposed to five affidavits in the context of the history of this trial, a convenient summary of

which appears in an annexure marked 'A'. The first affidavit was the Founding Affidavit in the Urgent Application which resulted in the order made by Sapire AJ. This affidavit is dated 14 December 2009. The last affidavit was made on 21 October 2011. I say this merely at this stage to show how long this particular matter has been dragged through the Court, and the history of the previous applications/litigation will show how and why this was done. Ms le Hanie confirmed the correctness of all the affidavits made by her which she had recently read again. She confirmed that it was not disputed that Defendant had sent the e-mails referred to in Claims A, B and C of the Particulars of Claim, and to her mind the "Paritala" e-mails. She was present in Court throughout the proceedings and had heard all the evidence.

During July 2008 the business of First Plaintiff was restructured and certain portfolios were re-arranged. She referred to a schematic drawing of the old structure of the Business Development Unit which indicated Defendant as being the Head thereof in his capacity as Business Development Executive. The new self-structure reflected Defendant's post as ITIL Strategist, which was part of a

team of seven senior personnel. On 4 July 2008 she sent a letter to all colleagues and I deem it appropriate to quote one sub-paragraph of this particular notification: "We wish Michael Yardan Michael and his team much success for the future, and also take this opportunity to thank him for his valuable support and commitment to Bytes Managed Services." Despite this obviously transparent notification to First Plaintiff's personnel, and the role indicated in the new structure for Defendant, he persisted with his allegation that there had been a conspiracy to remove him from First Plaintiff's Organisation. In the light of the objective facts, and the evidence of Ms le Hanie I find this notion to be totally absurd and without any foundation.

38.

She mentioned that during June 2008 the relevant business decision had been taken, and it was also noticed that Defendant was not coping with his duties and functions, most probably, in her opinion, because he had been concerned about his wife's serious illness. In her view this had impacted on his ability to perform

adequately. She therefore decided to split his portfolio as an act of sympathy, and appointed a Mr Pandor as his Customer Relations Manager. There was nothing sinister about this and she was merely attempting to assist Defendant. At that stage she had trusted him and deemed him to be a man of integrity.

39.

Before I proceed with her evidence I need to say the following: Ms le Hanie was in my view a lady of character, strong-willed and determined to succeed in her chosen career, aspects of which totally relied on trust, honesty and integrity. She had these attributes herself, in my opinion, and as a result of my understanding of all relevant facts surrounding this dispute, she expected them of others as well. She reminded me to some extent, of certain facets of the personality of Margaret Thatcher and, I thought that she was a lady that one ought not too easily trifle with, unless one knew exactly what one was doing. Despite this strong character, and maybe also because of it, Ms. le Hanie was at times tearful when she was confronted with undignified and merciless character

assassination. Fortunately this tearfulness changed to defiance, outrage and daring. In the context of the accusations made against her in the past and persisted in up to the day of her cross-examination, despite the unchallenged evidence of Ms Rochoy and Ms Grune, I could not fault her for displaying these very human character traits while she was on the witness stand.

40.

She remembers that probably during March 2008 Defendant made a "fleeting comment" to the effect that aspects of the Service Level Agreements were not up to scrutiny, as she put it. She told Defendant to interact with the Third Plaintiff and revert back to her. This topic was never discussed with her again. There was an Executive Committee meeting every Monday morning and proper and accurate minutes had been kept. That is where Defendant was expected to have mentioned a problem, if it was one, and if it was so serious as he wanted everyone to believe. He never did so. The BSO Report of Mr Yeo was never handed to her, and she only saw it after the "Paritala" e-mails. The BSO Report

was exactly what it purported to be, and was certainly not an internal investigation into a fraud committed by employees of First Plaintiff. After she became aware that a customer had been informed of Defendant's allegations, the processes they took to mitigate the damage were very challenging, quite apart from the obvious embarrassment that was caused. The internal audit done by Ms Rochoy and Mr Yeo plus others at management level disrupted the business of First Plaintiff substantially.

41.

Ms le Hanie then gave evidence relating to actual damages caused by Defendant's defamatory allegations in the context of expenses actually incurred for travel, accommodation and labour hours. She also gave evidence about the contents of time sheets of managers. She also confirmed the fees paid to KPMG for their investigations and report. She was asked how the defamatory and false allegations had affected her, and she described the impact this had on her personally, in her work environment, her relationship with customers and her own

children, in some detail. It must be remembered that these allegations have been with her for the last six years and she said that they were very difficult to defend, having regard to the complexity of the system that First Plaintiff employed. All the documents that Defendant drafted in this context were in her view very well created. It was obviously difficult for her, as an expert in her field and with all the expertise and knowledge that she had of First Plaintiff's business activities, to explain them to her mother and children, so that they could understand that no unlawful conduct had been committed by her or anyone else to her knowledge. Defendant's conduct, which never ceased and continued right up to the day of her evidence and cross-examination, was therefore very damaging to her. She was also of the opinion that these allegations contributed to her divorce. She did her best to inform her family of the relevant facts in a clinical manner. Because she had trusted Defendant, and deemed him a man of integrity, she was very shocked when she was confronted with these allegations, because she questioned her own ability to judge people. Defendant had been close to her for some two years and she could in her mind not associate him, as she knew him,

with a person who was able to draft and distribute the relevant defamatory allegations.

42.

Since the false allegations were published by Defendant and it was decided to take the necessary steps in a Court of law, she made a decision to distance herself from Ms Lisa Rochoy and Mr Yeo so as not to influence them in any respect whatsoever. It was absurd that Defendant was threatened by her, or by anyone else from First Plaintiff. The relevant authorities found no evidence of any such threats, and obviously no one of Bytes MS was prosecuted for having committed a fraud or any other unlawful act.

43.

The business of First Plaintiff was not a simple business to understand. The relevant investigations that were done as a result of Defendant's conduct involved an enormous period of time, and great effort. The expenses incurred by

the Company as a result of Defendant's unlawful conduct also meant that annual awards to deserving personnel had to be reduced. Legal costs were incurred unnecessarily as a result of the postponements sought by Defendant, and the delays caused by him during the last years. These costs could not be recovered, and were wasted inasmuch as time and again they had to re-prepare for trial. All of this had to be explained to clients and she was grateful that they showed loyalty and understanding, after a relationship of some 30 years with many of them.

44.

DEFENDANT'S CROSS-EXAMINATION OF MS LE HANIE:

I allowed Defendant a lot of leeway during his cross-examination. I appreciated on the one hand that he was not represented, but on the other hand I also knew that he was intelligent and knowledgeable in his particular field with one glaring exception, in that he knew very little about First Plaintiff's operating system in the present context. Defendant's questioning of Ms le Hanie was therefore

unduly repetitive, until ultimately I deemed it fit to intervene, having pointed out repeatedly what the parameters were that one had to deal with, and what the purpose of cross-examination was. In my view it can never be said that Defendant did not know how to cross-examine, what the purpose of cross-examination was and what its limits were.

45.

He put to Ms le Hanie that her evidence about the "fleeting comment" was not true. She insisted that it was true, and she challenged Defendant to point her to any evidence that he may have where he had raised this issue again with her. Meetings were also held on certain Thursdays at which only sales progress reports were discussed and nothing whatsoever about customer relations problems. She challenged Defendant to produce any evidence which would confirm his "concerns" but, I must add, nothing was forthcoming in this context. Despite the absence of any objective facts which would support Defendant's version, he put to Ms le Hanie that whilst she was in Court in her capacity as

Second Plaintiff, she manufactured or crafted the evidence that she was about to give. In saying that, Defendant obviously "forgot" that Ms. le Hanie had made five substantial affidavits many years ago, in which First Plaintiff's and her case had been set out in the greatest possible detail. Defendant obviously also "forgot" at that stage that he himself had drafted very many detailed affidavits, and very adeptly I must add. There is therefore in my view no basis whatsoever for the insulting accusation that she had manufactured her evidence whilst attending Court proceedings. Not content with having made that unfounded accusation, Defendant then accused Ms le Hanie of using too many words whilst formulating her answer to proposals and/or accusations put to her. I mentioned to Defendant on a number of occasions that he himself had made Cicero-like speeches before finally putting some or other question or proposal to Ms le Hanie for her comment. Ms le Hanie also testified that she had explained Defendant's concern that was so fleetingly expressed to the Third Plaintiff and requested him to look at it, as she put, which he did. She told Defendant that he had ample opportunities to raise this topic at a number of *fora* and he never did.

She attended many customer service meetings herself and not once was it mentioned that Defendant had this grave concern about fraud that had been committed. Defendant himself had to manage the relationship with customers, and according to Ms le Hanie it was strange that Defendant never reverted to her if he did in fact have these grave concerns. Ms le Hanie then put to Defendant that he himself did not understand the relevant operating system. The report done by Mr Yeo largely concerned First Plaintiff's desire to align itself with the best practice in the international field. Defendant then put to Ms le Hanie that because of his and Mr Yeo's activities, her and the business had been placed at a disadvantage, and she therefore devised means to remove her from the organisation. This was put to her that despite the explicit finding of a senior arbitrator that Defendant's dismissal had been substantively and procedurally fair and that he had given dishonest evidence during the hearing. It was also put despite the letter of 4 July 2009 that I have referred to, that was distributed to all the staff with an annexed schematic drawing of the new structure which reflected to Defendant's position, and which wished him the best of luck! Ms le

Hanie also told Defendant that in her view, after his dismissal for misconduct, he orchestrated the campaign to destroy the business of First Plaintiff because it would give him personal satisfaction. It was in that context that she added that his conduct had been a huge shock to her because she then doubted her ability to judge character. Defendant's reply was Ms le Hanie worked tirelessly to squash the investigation done by him, and thereafter did everything possible to discredit him. Defendant put to her that she was not defamed but that he had only spoken the truth. Ms le Hanie replied that to Defendant's knowledge there was a formal "whistle-blowing" structure in the organisation, which document Defendant himself had signed, and was obviously aware of it. He however never raised the topic at any stage. She added that KPMG was employed not because they had any doubt about their own internal investigation, but because one of their major clients, as a matter of advice only, had suggested that they obtain the services of an independent third party to do the same type of investigation. All their clients were given the results of this internal audit, and were given the raw data that Defendant himself had submitted. Defendant also told Second Plaintiff

that it was not true that not one client had asked for an external audit but that it was only after the "Paritala" e-mails that one client requested an external investigation apparently. I say this because the relevant e-mail that was in Defendant's mind, was not in the Court bundles.

46.

The above interchange between Second Plaintiff and Defendant is the best summary that I am able to make for purposes of this judgment. What amazed me to a certain extent (if one still can become amazed after decades of litigation), was that despite Defendant's obvious intelligence, he deemed it fit to continue with his defamatory and insulting allegations despite the absence of any objective fact whatsoever at that stage of the trial, let alone at any stage during the last six years. The evidence of Ms Grune on behalf of KPMG could not be more clear than mountain water, and any bona fide litigant would have been forced to realise that there was no foundation whatsoever for suggesting that any fraudulent conduct had been committed by the Plaintiffs. The KPMG Report had

been in Defendant's possession for a considerable period as well. I therefore realised that Defendant was actually intentionally malicious without any pangs of conscience that one would have expected, had he been the man of integrity that Second Plaintiff thought he was many years ago. I found this aspect of the case particularly disturbing when I realised that this quiet intelligent man was in fact someone else completely. Ms le Hanie learned that, and I learned that during the course of this trial.

47.

MR I VAN DER MERWE:

He also gave evidence about how Defendant's crusade had affected him and his family for some five years. Because of the nature of the allegations, which were very difficult to defend because of the complexity of the relevant computer systems, he began doubting his own decisions, became hesitant and suffered a real loss of confidence for a long time, whilst try to keep his family intact and the business secure.

He was of the view that Mr Yeo had never properly understood the particular system that was used for clients' calls. In this context he referred to an e-mail sent by himself on 7 June 2008 to Mr Yeo with the subject matter being "Summary of changes on MTTR Analysis.xis". He said the following: "Thank you for your response, once again this point out (sic) that a real and deep understanding of client requirements is needed before one starts doing analysis. Not everything will always fit the way that we think of MTTR, MTTC or SLA. What is however very clear that one should not try and pass opinion until the full picture is understood for all sides (sic).

Thank you again for your effort, please do not remove this account from your analysis."

Mr Van der Merwe added that if he had committed a fraud, he would obviously not have told Mr Yeo not to remove this particular account from his analysis.

48.

I asked Third Plaintiff about his opinion of the Yeo Report and what he thought of Mr Yeo's understanding of the relevant system. Mr Van der Merwe said that he only received the Yeo Report after the "Paritala" e-mails had been sent. He thought that Mr Yeo had used irresponsible language and that he did not understand the system, or the relevant contracts entered into with clients. In his view he wanted to prove some or other point that was not there to be proven. Mr Van der Merwe also added that he had limited interaction with Defendant during his period of employment and none thereafter. He also conceded that a full understanding of the D1 system was not part of Defendant's job description, but when he made a "professional statement" in the "Paritala" e-mails he must surely first understand the system, and not hide behind what Mr Yeo had supposedly stated. Mr Yeo was retained by First Plaintiff despite the mentioned deficiencies in his performance because he was employed for certain other skills in a separate area, and at the time that he was under the control of Defendant himself; he was badly managed without any proper guidance. Asked to comment

on the diagram of the new structure that I have already referred to, he stated that Defendant had misled the Court because the ITIL Strategic Position had not been moved.

49.

I also regard Mr Van der Merwe as a man of integrity, and there is no reason whatsoever to doubt any aspect of his evidence. It was clear to me that he was deeply affected by Defendant's accusations, and even after living with them for over five years, he had difficulty in controlling his emotions and it was obvious that he had been deeply hurt and affected by Defendant's protracted attacks on his integrity.

The "Paritala" e-mails did the most damage he said. The main reason was, apart from the timing, that Defendant took facts and topics out of context very skilfully, as he did in Court. There was in his view a direct correlation between the "Paritala" e-mails and the previous ones. He was asked what he felt about the fact that Defendant repeated these allegations in Court, and failed to take any

responsibility at all during the last six year period. Mr Van der Merwe answered that Defendant had failed to take "ownership" for anything, and referred to his criticism of Mr Yeo, his erstwhile Attorney Mr Snail, the Labour Court, the CCMA, Second Plaintiff, Ms. Lisa Rochoy, etc. All of them were wrong, and he was right, even where all objective facts indicated otherwise. Mr Van der Merwe summarised the whole traumatic period by saying that his whole life had been put on hold for him and his family for at least five years.

50.

DEFENDANT'S CROSS-EXAMINATION:

Mr Van der Merwe was asked about the average SLA per month and replied that Defendant ought to know that there was no such thing. Every client had a different Service Level Agreement with its own requirements. For instance First National Bank had a level of 85%, which Defendant should know, and it was misleading the Court to say that all clients required a compliance level of 95%.

51.

Defendant referred him to an e-mail sent on 10 April 2008. In this e-mail he referred to a "modification process" which appeared not to be "auditable"...inasmuch as it did not seem "likely can tell who modified what part of the call and for what reason". He also said "other than trusting the guys, is there any measure we have in place to ensure that under pressure to meet SLA they won't be tempted to modify more than they should?" Mr Van der Merwe referred Defendant to his reply of 11 April 2008, which I wish to quote: "I am not too sure what is the cause of the disconnect. I am also not too sure why the clients have raw data that are different. The process being followed by the CMC and Ops is to work through the calls closed on a daily basis to ensure that the calls are closed correctly.

There may be a number of these other calls that the client want to dispute or debate. However when we have the detail of these two accounts and the info that occurred have analysed (sic) we would be able to action, investigate and understand the reasons for the adjustments or corrections by call."

He was asked why he had said nothing about a Business Development Survey in this e-mail. Mr Van der Merwe challenged Defendant to show him one of such inasmuch as he had been told that his e-mail of 10 April said nothing about any such survey at all.

52.

Mr Van der Merwe referred Defendant also to his own e-mail of 18 April 2008 which he had conveniently not mentioned. This e-mail was addressed to Defendant and said the following: "I trust that you are better and that you will recover quickly. On the above matter [SLA Reporting] I have asked Dennis to interface with Kurt, to date I have not interfaced with Kurt in this matter but will schedule some time in the coming weeks to understand the situation." Mr Van der Merwe also pointed out that on 21 April 2008 Defendant himself had written to his secretary Pauline Smith, and said the following: "Please assist by scheduling 30 minutes sometime with Kurt, Dennis, Fourie and myself to discuss D1 SLA reporting." Mr Van der Merwe also referred Defendant to his own e-mail

to Mr Kurt Yeo on 23 April in which he enquired about a "best practice" policy, and said nothing about the so-called "grave" issue that at that stage allegedly was in Defendant's mind. Because he had been asked by Ms Le Hanie the issue that was raised fleetingly by Defendant, he e-mailed Dennis McBride and Kurt Yeo on 20 May 2008 and said the following: "Please advise the date for the review of the process and the allocation of responsibility as discussed in our last review of the matter. The matter is urgent and the deceptions of reality that is created need to be dealt with and corrected urgently." A copy of this was sent to Defendant. It certainly does not indicate to anyone that Third Plaintiff was aware of any fraud, and that he together with Second Plaintiff and First Plaintiff was covering up some unlawful activity by its employees. Mr Van der Merwe also mentioned on a number of occasions that Defendant himself did nothing about the so-called "grave issue" that he had raised. Because it was a client-issue it was in fact his responsibility. He also attended a number of meetings in which he never ever raised the "grave issue". Mr Van der Merwe also said that in his view Mr Yeo had never analysed any account correctly.

It is my view that Mr Van der Merwe was also an innocent victim of Defendant's malicious crusade, and all objective facts support this conclusion. His integrity is beyond doubt.

53.

DEFAMATION: APPLICABLE LEGAL PRINCIPLES

The delict of defamation is the unlawful publication with *animus iniuriandi* of a defamatory statement concerning the Plaintiff. A statement is defamatory if it has the effect of injuring a Plaintiff's reputation.

The Constitutional Court, in ***Khumalo and Others vs Holomisa [2002] JOL 9862*** said the following: "[Par. 17] The Law of Defamation in South Africa is based on the *actio iniuriarum,* a flexible remedy arising from Roman Law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another. One of those personality rights is the right to reputation or *fama*, and it is this aspect of personality rights that was protected by the law of defamation.

[18] At Common Law, the elements of the delict of defamation are:

a) The wrongful;

b) Intentional;

c) Publication of;

d) A defamatory statement;

e) Concerning the Plaintiff.

It is not an element of a delict in Common Law that the statement be false. Once a Plaintiff establishes that a Defendant has published a defamatory statement concerning the Plaintiff, it is presumed that the application was both unlawful and intentional. A Defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion."

54.

As I have said, Defendant admitted that he sent the e-mails of 23 and 25 November 2009 and 10 December 2009. He denied sending the "Paritala" e-mails. The first mentioned group of e-mails, having regard to their ordinary meaning, are in my view defamatory. An objective test is to be applied in this context:

See: ***Crawford vs Albu 1917 AD 102 at 119.***

The test entails determining what meaning the reasonable reader of ordinary intelligence would attribute to the statement in its context. A statement is defamatory if it would "tend to lower the Plaintiff in the estimation of right thinking members of society generally".

See: ***LAWSA, Volume 17 page 237.***

A statement affecting the moral character of a Plaintiff by imputing dishonesty or the commission of a crime has been held to be defamatory.

See: ***SA Associated Newspapers Ltd vs Samuels 1980 (1) SA 24 (A).***

55.

It is clear from the mentioned judgment of the Constitutional Court, which re-stated the Common Law, that a full evidentiary onus of proof rests on the Defendant to rebut the relevant presumptions, i.e. that the publication was wrongful and that he acted *animo iniuriandi.*

See: ***Neethling vs Du Preez, Neethling vs The Weekly Mail 1994 (1) SA 708 (A)*** and ***National Media Ltd vs Bogoshi 1998 (4) all SA 347 (SCA).***

I must add that awareness of wrongfulness is not required.

See: ***Le Roux vs Dey 2010 (4) SA 210 (SCA) at 224 E.***

56.

Where a Defendant raises the defence of truth and public interest, the Plaintiff need not allege or lead evidence that the statement is untrue; the onus is on a Defendant who relies on this defence to prove on a balance of probabilities that the statement is true.

See: ***National Media Ltd vs Bogoshi supra at 1218 E to F.***

As far as the defence of fair comment is concerned, it is lawful to publish a defamatory statement which is fair comment on facts that are true and are matters of public interest.

See: ***Delta Motor Corporation (Pty) Ltd vs Van der Merwe 2004 (6) SA 185 (SCA) at 193 H to 194 V.***

57.

The onus is on a Defendant to establish that the facts on which the comment was based are true: See: ***Crawford vs Albu supra*** but, it has been accepted that the facts only need to be substantially true (at 131).

58.

As far as *animus iniuriandi* is concerned, it is not sufficient for a Defendant merely to deny such *animus.* He must plead and prove the facts by reason of which he alleges that he had no such intention.

See: ***Suid Afrikaanse Uitsaai Ko-operasie vs O'Mailey 1977 (3) SA 394 (A) at 403.***

One must note that this *animus* includes not only *dolus directus* but also *dolus eventualis. Dolus directus* is present when the Defendant's aim is to defame the Plaintiff. Dolus eventualis is present where the defamation of the Plaintiff was not in itself the Defendant's object, but the Defendant subjectively foresaw the possibility that, in the attainment of his object or aim, the Plaintiff might be defamed and the Defendant nevertheless publishes the defamatory statement regardless of the foreseen possibility.

See: ***Suid Afrikaanse Uitsaai Ko-operasie vs O'Mailey supra at 409.***

It is clear from Defendant's cross-examination that at the very least *dolus eventualis* was established.

59.

The e-mails of November and December sent by Defendant are defamatory in that they attack the honesty and integrity of the Plaintiffs, and any reasonable reader

would regard this to be so. Having regard to the evidence of Mr Yeo, Ms Rochoy and Ms Grune read together with the evidence of the Second and Third Plaintiffs and the objective facts here, they are not true. They are not even substantially true. The imputation of dishonesty in that context is also not a reasonable one having regard to the facts.

60.

DID DEFENDANT SEND THE "PARITALA" E-MAILS?

I have referred to the relevant evidence of Mr D. Myburgh of Cyanre. The attachments to those e-mails were all created or modified on 2 February 2010 and sent on 3 February 2010. Defendant had also been in possession of the 17 documents that were attached to the "Paritala" e-mail that was sent to Mr Garth Whale, and these attachments had not been printed or forwarded to anyone else prior to 3 February 2010 but were rather printed to a portable document ("PDF") on a computer/computer profile with the Defendant's name. Mr Myburgh had concluded that the Defendant's computer and computer profile were used on 2

February 2010 to create all the documents which were attached to the "Paritala" e-mails the following day. The "Paritala" e-mail account had been created and accessed from the Defendant's laptop, which had been protected by a password. This evidence was also confirmed by Defendant's own expert, Mr J. Venter of Shield Technologies in the joint minute that I have referred to. Under cross-examination Mr Venter had also adopted the conclusions of Mr Myburgh to which they had previously expressed reservations in the joint minute, that is, Venter stated under cross-examination that he could not dispute that the Defendant was, in all likelihood the person who posed as "Sunita Paritala". He also confirmed that he was not able to give any other reasonable explanation as an alternative to that opinion. Defendant himself, despite having been warned by myself on a number of occasions to put his version in any given context, failed to put any version before me in this regard. Moreover, he did not dispute Mr Myburgh's findings nor did he advance any alternative basis to gainsay this evidence, which was subsequently also adopted by his own expert. Defendant himself conceded that the "Paritala" e-mails expressed the exact same sentiments as the Defendant, and in some cases, whilst using the

exact same wording as the Defendant and his erstwhile Attorney had used in the past. He could also not suggest any single other person who had expressed those views or would have sufficiently close knowledge of the detail to have addressed the e-mails to the relevant recipients. He also admitted that he had the skill and knowledge to set up an e-mail account and to save the documents to PDF. He also admitted that he had the contact details of all the clients to whom these e-mails had been sent. He also admitted that until he was ordered to return all the Plaintiff's documents, he had been in possession of the very documents attached to the "Paritala" e-mails. It was furthermore common cause that during the Anton Piller search and seizure, a notepad and post-it were found in the Defendant's laptop bag. On the post-it was written the names and contact details of the same clients to whom the "Paritala" e-mails were sent. He also did not dispute that when the wording of the "Paritala" e-mails was compared to the hand-written note that the wording was almost exactly the same. It is also clear from the notepad that the Defendant had planned the manner in which he was going to address the "Paritala" e-mails. Although Defendant stated that he was not at work on 3 February 2010 as

he had been ill, there was nothing to suggest that this illness prevented him from doing the simple exercise of sending these e-mails. The relevant files were created to a memory stick.

61.

Whatever standard of proof is applied in this context, I am satisfied that Defendant is the author of these "Paritala" e-mails, had sent them to the recipients, and that they are grossly defamatory in nature. Having regard to all the relevant circumstances no other reasonable reference can be drawn from the facts. Defendant's denial of having been the author and the sender is in my view simply dishonest.

CONFIDENTIAL INFORMATION NOT RETURNED:

I have already mentioned that the attachments to the "Paritala" e-mails were in the Defendant's possession on his computer in breach of the order of Sapire AJ. Mr D. Myburgh had also testified that in addition some 39 000 results consisting of documents, spread sheets, internet documents and e-mails were located on

Defendant's computer subsequent to the Court order. This evidence was also accepted by Defendant's expert Mr Venter. Defendant had also denied sending certain e-mails to IT Web under the pseudonym of "Diligent Citizen". The uncontested evidence of Mr Myburgh was that the e-mails from "Diligent Citizen" to IT Web were located on Defendant's computer. Defendant also admitted the correlation between "Diligent Citizen" sentiments and his own, and he could also not deny that it was uncanny that "Diligent Citizen" had the same grasp of the facts that Defendant had. He also admitted that it was his cell phone number which "Diligent Citizen" had provided to IT Web. It is clear from the relevant correspondence that a meeting between "Diligent Citizen" and IT Web had taken place pursuant to the former having been contacted on Defendant's cell phone.

There is in my view no doubt that it was Defendant who posed as "Diligent Citizen" and made defamatory allegations to IT Web, an identity not disclosed by the Defendant in breach of the Court order.

62.

It is my view that the facts of the matter which were either not disputed or which could not be disputed on any reasonable basis, clearly show Defendant to be a dishonest litigant. If something is laid at his door, he will simply blame someone else for his apparent discomfort. I have also noted the comments of the senior arbitrator in his dismissal proceedings relating to his credibility, and I have also read the judgment by Potterill J dated 20 July 2012 which turned around the question of who ought to pay the costs of the urgent application. In the judgment Potterill J found that Defendant had told a blatant lie under oath in the context of whether or not a Director of the SCCU had contacted him.

Defendant had also recently applied for a postponement of the trial and this application was refused by Tuchten J on 3 April 2014. In the judgment one finds a reference to a "change of versions" by the Defendant. I mention these two examples merely to indicate how unscrupulously Defendant has conducted the litigation.

63.

IS CONTEMPT OF COURT ESTABLISHED?

Civil contempt of Court is the wilful and the *mala fide* refusal to comply with an order issued by the Court.

See: ***Fakie N.O vs CC11 Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at par. 9.***

The essential object of contempt proceedings is to obtain the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order as well as to compel performance in accordance with the order. The proceedings may also be brought for the sole purpose of punishing the Respondent. Civil contempt can only be committed in the case of orders *ad factum praestandum.*

See: ***Jayiya vs MEC for Welfare Eastern Cape and Another 2004 (2) SA 611 (SCA) at par. 15 and 16.*** An Applicant in such a matter bears the normal criminal onus, namely that beyond a reasonable doubt. Before a Respondent can be found guilty of contempt of Court, it must be shown that the disobedience of the order was not only wilful but also *mala fide.*

See: ***Clement vs Clement 1961 (3) SA 861 (T) at 866 A.***

It is not required of an Applicant to lead evidence of the Respondent's state or mind or motive. Once the Applicant proves the three requirements (the Court order, awareness thereof and non-compliance), unless the Respondent provides evidence raising a reasonable doubt where imprisonment is sought, the requisites for contempt will have been established. In that context a Court must look at all the evidence together in order to determine whether proof beyond reasonable doubt has been established.

See: ***S vs Van der Meyden 1999 (1) SACR 447 (W) at 448 f - g.***

The Court must look at all the evidence and weigh up the accumulative effect of all the facts together.

See: ***R vs De Villiers 1944 AD 493 at 508 to 509.***

In this context a Court is not bound to accept, neither must it be concerned with, remote and fantastic probabilities that are made by an accused.

See: ***S vs Sauls and Others 1981 (3) SA 172 (A) at 182.***

The conclusions drawn in the Cyanre reports are condemning. A software program known as CCleaner was found on Defendant's computer. This could be used to

remove information from a computer and Defendant was obviously aware of it. He was found to be in possession, after the order of Sapire AJ (its amendment at a later stage is of no consequence), of both hard and soft copy documents. It is absurd to say that he had "forgotten" to delete the documents as ordered to do so. He also lied when he on two occasions said that he had returned all the documentation. He intentionally did not delete the "BSO Report". There is no doubt whatsoever that Defendant, even on his own evidence, was guilty of contempt of Court. He gave details of his personal circumstances which I considered. In this context the Plaintiff sought an order declaring the Defendant to be in wilful contempt of the Sapire AJ order, and an order imposing a sentence of imprisonment for a period of 30 days, suspended indefinitely on condition that he shall not breach the terms of the order of Sapire AJ and any final interdict granted in terms of this judgment.

63.

I am in agreement that this order is justified on the facts. Defendant's conduct was not only blatant, it was dishonest and this dishonesty was persistent.

COMPENSATION:

As far as damages for defamation is concerned, the Court must consider the nature of the defamatory statement, the nature and extent of the publications, the reputation, character and conduct of the Plaintiffs and the motives and conduct of the Defendant. I have given all relevant details of these considerations. Defendant is a disgruntled ex-employee who had on two occasions unsuccessfully attempted to extort the First Plaintiff. When First Plaintiff did not capitulate to his demands, he embarked upon the campaign to defame the Plaintiffs and he did so very maliciously. He directed his statements to those clients and shareholders where he knew they would cause the Plaintiffs the most damage. He did not make use of the whistle-blowing mechanisms at his disposal, of which he had been aware, but waited several months after his dismissal to make serious defamatory allegations.

He remained non-repentant and was adamant that he would continue with his allegations of fraud against First Plaintiff with the National Prosecuting Authority, notwithstanding that it had declined to prosecute anyone.

Plaintiffs have claimed compensation for the defamation and have also claimed patrimonial damages to compensate them for the expenses actually incurred in attempting to minimize the harm done by Defendant's defamatory e-mails. In respect of claims A, B, which relate to the e-mails on 25 November and 10 December 2008, each Plaintiff claimed R 200 000 as a result of the e-mail of 25 November, and each Plaintiff claimed R 500 000 as a result of the e-mail of 10 December. In respect of claim C which relates to the e-mail of 23 November 2008, First Plaintiff only has claimed R 100 000. In respect of claim E which relates to the "Paritala" e-mails of 3 February 2010 each Plaintiff has claimed R 500 000 as a result of the defamation.

In respect of claim D First Plaintiff only claims patrimonial damages resulting from the actions they took to limit the damage done to them as a result of the facts

contained in claims A, B and C of the Particulars of Claim. I have set out the relevant evidence in this context and the total amount is R 919,318.85. In respect of claim F, which results from claim E, being the "Paritala" e-mails, First Plaintiff claims patrimonial damages in the amount of R 289,928.60.

64.

As far as damages in the context of defamation is concerned, the following dictum of Nugent JA in my view remains apposite: "Monitory compensation for harm of this nature not capable of being determined by any empirical measure. Awards made in other cases might provide a measure of guidance but only in a generalized form and I do not think it would be helpful to recite other rewards."

See: ***Tsedu and Others vs Lekota and Another 2009 (4) SA 372 (SCA) at 381 par. 25.*** In that instance an amount of R100 000 was awarded for a grossly defamatory allegation that a senior ANC member had been an "Apartheid agent". There had also been no retraction or apology until the eve of the trial. The Court found that the

Defendants in that matter (ultimately the Appellants) had done nothing to mitigate the harm that they had caused.

65.

In determining the amount that I intend awarding to the Plaintiffs I have kept in mind a number of particularly aggravating factors:

65.1

All the defamatory allegations were persisted in during the trial despite the existence of objective evidence which indicate that there had been no factual basis whatsoever for Defendant's allegations;

65.2

He had been in possession of the expert opinion-report of KPMG prior to the trial, and despite his expertise in the general field of First Plaintiff's operations, persisted in the wrongful allegations throughout;

65.3

The publications were made to a large number of clients of First Plaintiff, at the worst possible time;

65.4

The content of the publication was such that a reasonable person not being an expert in the particular field could very easily have been misled into accepting the truth thereof;

65.5

The nature of the business of the First Plaintiff is such that absolute integrity is required at all levels of its business and in this context the attack upon the integrity of the Plaintiffs in the manner in which it was done, and with the expertise that it was done and assisted in, is particularly aggravating;

65.6

There was in my view a gross infringement of the Plaintiffs' dignity.

I therefor intend awarding the Plaintiffs an amount that is higher than it would appear to be if one has regard to previous decided cases and awards made. I have kept in mind that previous cases are at best guidelines.

66.

DAMAGES: PATRIMONIAL

In this context it was held in ***Media 24 Ltd and Others vs SA Taxi Securitisation (Pty) Ltd 2011 (5) SA 329 (SCA)***, that a Plaintiff who wishes to recover patrimonial loss arising from a defamatory publication must satisfy the requirements of the *actio legis aquilliae*. The SCA held also (at par. 11 – 16) that public and legal policy require that patrimonial loss can only be awarded in respect of a defamation claim if a Plaintiff satisfies a Court that the allegations made by the Defendant are false.

I have found that the allegations made by the Defendant are false and I have said so on each occasion when I dealt with the evidence of the Plaintiffs' witnesses. I have also however had regard to their evidence seen cumulatively. It is clear that First Plaintiff had to conduct an internal audit to investigate the allegations of fraud

levelled against them but in my view it was also necessary, and First Plaintiff deemed it to be so quite correctly, that the services of an independent body be employed to audit the internal findings made with the view of putting their clients' minds at ease. The Second and Third Plaintiffs had also testified that the relevant expenses incurred which were summarized in annexure H to the Plaintiffs' Particulars of Claim were accurately recorded and were indeed expended. It is of course true that the individuals in respect of whom these expenses were claimed were all employees of First Plaintiff, but I kept in mind, as Second Plaintiff testified, that these individuals were re-directed from their daily duties to focus on an internal audit with the result that in many instances other staff had to carry the workload and work overtime as a result. The Second Plaintiff confirmed that the amounts claimed were based on the individuals' labour cost to the Company multiplied by the number of hours that he or she had to spend on the internal audit. Second Plaintiff confirmed that the decision to use First Plaintiff's personnel instead of hiring external consultants was based on the fact that the business of First Plaintiff is not a simple one to understand. As such, they would have had to expend a large period of time

explaining the business to these consultants before they could be expected to perform an audit. In that context therefore they mitigated their damages. In any event, the hourly rates charged by external consultants would have been far more costly in comparison to Plaintiff's cost to company of using its own employees. Third Plaintiff confirmed that in performing an internal audit it was the most immediate way in the crisis situation. November and December was a busy period for all of First Plaintiff's customers and it was at this critical time that the Plaintiffs had to relocate resources in order to control the damage caused by Defendant. The amount claimed by First Plaintiff in claim F, is the amount charged by KPMG to do the audit, which amount, as Second Plaintiff confirmed, was paid by First Plaintiff. Second Plaintiff also testified that the actual expenses incurred far exceeded those actually claimed for, but it became such an intensive labour process to keep track of what had been spent when, and which resources had been diverted away from the everyday running of First Plaintiff's business to managing the litigation, and controlling the extent of the Defendant's damage, that First Plaintiff eventually took the decision to write off these expenses. In this context I am satisfied that First Plaintiff has proven

the amount claimed under claim D being R 919 318.85. Loss of management time is difficult to prove and "a fairly robust approach" is required.

See: ***AA Alloy Foundry (Pty) Ltd vs Titaco Projects (Pty) Ltd 2000 (1) SA 639 (SCA) at par. 14.***

67.

RETURNING TO THE DAMAGES CLAIMED AS COMPENSATION, THE INTERDICT AND THE APOLOGY:

Compensation for defamation has mostly been rewarded on a conservative basis. In my view it would be appropriate to award an amount in respect of the first three e-mails of 2008, and a separate amount in respect of the e-mails sent on 3 February 2010, i.e. the so-called "Paritala" e-mails inasmuch as it was the unchallenged evidence of the Second and Third Plaintiffs that these caused the most harm to their good name. The requirements for a final interdict have been set out about a century ago in ***Setlogelo vs Setlogelo 1914 AD 221.*** Three essential requisites must be present namely a clear right of the party asserting it, an injury actually committed or

reasonably apprehended, and the absence of any other satisfactory remedy. I have a discretion in this context which must however be judicially exercised.

See: ***Hix Networking Technologies vs System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A) at 399 A and 401 G to 402 F.***

In this regard the Plaintiffs seek to have the Sapire AJ order in its original form made final. It is clear from Defendant's affidavits deposed to in his most recent application for a postponement that he intends to pursue this matter further, with, *inter alia*, the National Prosecuting Authority. Moreover, in every affidavit to which he has deposed in the various proceedings since the order of Sapire AJ was made, Defendant has repeated again and again his defamatory allegations. It is therefore my view, based on the Defendant's own version, that Plaintiffs have an objectively reasonable apprehension of harm that he will continue to do so unless a final order is made. I agree that Plaintiffs have a clear right not to be defamed and a claim for damages in the future, considering the history of this matter, will not offer adequate redress.

As far as an apology is concerned, which Plaintiffs sought on terms acceptable to them, the Constitutional Court held in ***Le Roux and Others vs Dey [2011] JOL 27031 par. 150 and 202,*** that such an order was competent.

I am of the view however that it ought to be an unconditional one, and it would in all probability be counter-productive were I to leave it to the parties (or Plaintiffs) to dictate its terms.

68.

In the premises the following order is made:

1. **In respect of claim A of the Particulars of Claim an amount of R 100 000 for each of the Plaintiffs is awarded;**
2. **In respect of claim B the sum of R 150 000 is awarded in respect of each Plaintiff;**
3. **In respect of claim C First Plaintiff is awarded the sum of R 70 000;**
4. **In respect of claim D First Plaintiff is awarded patrimonial damages in the amount of R 919,318.85;**

5. In respect of claim E all three Plaintiffs are each awarded R 175 000;

6. In respect of claim F First Plaintiff is awarded patrimonial damages in the amount of R 289,928.60;

7.

7.1 In respect of claim I and in respect of all three Plaintiffs the interim interdict made by Sapire AJ in par. 4 and 6 of the order under case number 76869/2009 is made final.

7.2 It is declared that Defendant is in contempt of Court of the order made Sapire AJ referred to above and is ordered to be imprisoned for a period of 30 (thirty) days, which sentence is suspended for 5 (five) years on condition that the Defendant does not repeat his defamatory allegations against the Plaintiffs or otherwise breaches the terms of the final interdict that I have granted.

7.3 Defendant is ordered to provide the three Plaintiffs with an unconditional written apology within seven days from the date of this

order for the injury caused by him as a result of the defamatory claims made as referred to in Plaintiffs' Particulars of Claim.

8. Defendant is to pay the costs of this action on an attorney and client scale including the cost of two Counsel. His dishonest conduct and malice clearly warrants this cenzure.

69.

Mr Whitcutt SC and his junior Adv de Witt submitted very detailed written Heads of Argument for my benefit, but most importantly for the benefit of Defendant. In the same vein this judgment is more detailed than it would otherwise have been the case. I express my gratitude to Plaintiffs' legal team for the high standard that they upheld throughout the trial and all the applications that preceeded it. They all acted in the best tradition of the Bar and the Side-Bar.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case numbers: 4586/10 and 23511/11

Counsel for the Plaintiffs: Adv C. Whitcutt SC

Adv C. De Witt

Instructed by: Webber-Wentzel Attorneys

Defendant appeared in person

Heard on: 14/02/2014 to 20/02/2014; 24/02/2014;

10/03/2014; 18/08/2014 to 28/08/2014; 22/09/2014

to 23/09/2014

Date of Judgment: 25/11/2014 at 10:00

'A'

The plaintiff's urgent application of 14 December 2009.

1. The plaintiffs approached this Court for the first time on 14 December 2009[1] seeking an urgent interdict to prevent the publication of false and defamatory emails, the return of the first plaintiff's confidential information and ancillary relief.
2. An order was obtained by consent on substantially the terms sought in the notice of motion on 23 December 2009[2].
3. The costs of the urgent application were reserved for determination and were ultimately argued before her Ladyship Ms Justice Potterill on 31 October 2010.
4. On 17 November 2011, her Ladyship Ms Justice Potterill ordered the defendant and his erstwhile attorneys (jointly and severally) to pay the reserved costs of the urgent application on a punitive scale.

The defendant's ex parte application of 28 December 2009

5. The defendant launched an urgent *ex parte* application on 28 December 2009 for the return of the BSO Report which his erstwhile had accidently emailed to the plaintiffs'' attorneys. The order sought was dishonestly obtained on the same day and was set aside on 29 December 2009 by his Lordship Mr Justice Prinsloo[3].

The action for defamation

6. On 26 January 2010, the defamation action was instituted.

The plaintiffs' Anton Piller application of 18 February 2010

7. The plaintiffs' launched an Anton Piller application on 18 February 2010[4] and an order, substantially in the terms sought was granted on 24 February 2010.
8. On 19 April 2010, the defendant consented to a confirmation of the rule[5].

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[1] Trial Bundle 1, File 6, p1.

[2] Trial Bundle 1, File 6, p363.

[3] Contempt Bundle 1, File 4, p23 .

[4] Trial Bundle 2, File 7, p381.

[5] Contempt Bundle 1, File 4, p163.

The plaintiffs' application to declare the defendant in contempt of court of 18 April 2011

9. The plaintiffs launched the contempt proceedings on 18 April 2011[6].

10. After the contempt application was served on the defendant he filed a notice to oppose but did not timeously serve an answering affidavit and the plaintiffs accordingly set the matter down on the unopposed roll for 19 August 2011.

11. On 19 August 2011 the plaintiff's counsel attended at court. The defendant also instructed counsel to appear. The parties agreed that the defendant could file a supplementary answering affidavit by 9 September 2011 and this was made an order of court.

The consolidation of the action for defamation and the contempt of court application

12. The action for defamation and the contempt of court proceedings were consolidated, as set out below, on 25 November 2011[7]

The first application for postponement of the trial

13. The trial was first set down for 25 November 2011.

14. On 24 November 2011 the defendant served an application for postponement[8].

15. The plaintiffs opposed the postponement but submitted that, in the event that the court decided to grant a postponement, certain measures should be put in place to ensure that the plaintiffs' interests were protected. These measures were the consolidation of the contempt and defamation proceedings, the appointment of a case manager and an order that the defendant pay the wasted costs on an attorney client scale. Mr Justice Van der Byl ordered on 25 November 2011 that the matter be postponed on the

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[6] Contempt Bundle 1, File 4, p1.

[7] Defamation file 1, File 1, p1.

[8] Postponement application, Interlocutories bundle, p57 - 89.

conditions requested by the plaintiffs, with the defendant to pay the costs of the postponement[9].

The second application postponement of the trial

16. The second date for which the trial was set down was 19 November 2012.

17. On 7 November 2012, the defendant filed an application for postponement.[10]

18. In light of the fact that the defendant had appointed new attorneys, who appeared to be prepared to take the necessary steps to ensure that the matter became ready for trial, the plaintiffs agreed to the postponement subject to certain conditions which were incorporated in a court order handed down by his Lordship Mr Justice Fabricius on 19 November 2012[11].

The third application for postponement of the trial

19. The parties applied for an expedited trial date, which was granted, and the matter was set down for 11 February 2013 for a period of ten days.

20. The defendant served two notices in terms of Rule 35(3) on the plaintiffs on the Thursday and Friday prior to the commencement of the trial, which was scheduled to commence on Monday.[12]

21. The requests made by the defendant resulted in the discovery of over 1 500 pages of documents, which were delivered to the defendant's attorneys on Saturday, 9 February 2013.

22. On 12 February 2013 when the parties arrived at court (the matter having stood down on 11 February) the plaintiffs' attorneys were informed by the defendant's attorneys that a postponement would be sought on the basis that the defendant's experts required more time to analyse the newly discovered data and to file a report in this regard.

23. His Lordship Mr Justice Ledwaba granted the postponement[13] on the basis that any interlocutory application regarding the dispute about calling further experts would use

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[9] Defamation File 1, File 1, Court order bundle, p1.

[10] Defamation File 2, File 2, notices bundle, p159.

[11] Defamation File 1, File 1, Court order bundle, p3.

[12] Defamation File 2, File 2, notices bundle, p288 and 298.

up a number of the ten days allocated for the trial and consequently there was a real risk that the matter would be part heard if it proceeded.

24. The trial was accordingly postponed for the third time and the defendant was ordered to pay the plaintiffs' costs[14].

The fourth application for postponement of the trial

25. The trial was set down for hearing on 10 February 2014. On 6 February 2014, the defendant served his fourth application for a postponement.

26. The application was argued before his Lordship Justice Tuchten on 10 February 2014 and the defendant's application was dismissed with costs.

The trial

27. Thereafter, the plaintiffs afforded the defendant a further three days within which to prepare for the trial. Accordingly, the trial effectively commenced on 14 February 2014.

28. On 20 February 2014, the defendant absented himself from the proceedings on the basis that he was ill and a court order was made providing that the defendant was to provide documentary evidence (supported by an affidavit by the defendant's attending doctor/s) on or before 24 February 2014 of his medical condition.

29. The hearing resumed on 24 February 2014, however, there was no appearance for the defendant who, instead, telefaxed a note by Dr Vishal Maharaj to the Court that morning, stating that the defendant had been booked into the Hibiscus Medical Centre in Port Shepstone on 20 February 2014 but that he had been discharged from the hospital on 24 February 2014.

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[13] Defamation File 1, File 1, Court orders, p5.
[14] Defamation File 1, File 1, Court orders, p3.

30. In light of Dr Maharaj's note, the matter was postponed to 10 March 2014 and a further court order was made.

31. On 10 March 2014, the defendant appeared at court but requested that he be afforded an opportunity to adjust to his new medication. In the result, the matter was postponed sine die.

32. The trial resumed on 18 August 2014 and was finalised on 28 August 2014.