

108/96

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CASE NUMBER: 222/95

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

HIX NETWORKING TECHNOLOGIES CC

Appellant

and

SYSTEM PUBLISHERS (PTY) LIMITED

First Respondent

HENDLERS (PTY) LIMITED

Second Respondent

CORAM: CORBETT CJ, E M GROSSKOPF, HARMS, SCHUTZ

et PLEWMAN JJA

HEARD ON: 15 AUGUST 1996

DELIVERED ON: 25 SEPTEMBER 1996

JUDGMENT

PLEWMAN JA

This is an appeal, with leave of the Court *a quo*, against an order dismissing with costs an application for an interim interdict restraining the publication of an article entitled "Novell moves on grey market", in a weekly trade journal ComputerWeek.

The appellant, a close corporation, Hix Networking Technologies CC ("Hix"), is controlled by one Mazabow. It is engaged in the importation and sale of computer hardware and software. The respondents are, respectively, System Publishers (Proprietary) Limited ("System"), first respondent, and Hendlers (Proprietary Limited ("Hendlers"), second respondent. System is the owner of Computer Week. Hendlers is the printer and distributor thereof. When referring to them jointly I will do so as "the respondents".

There is a background to the application which must be sketched before the events surrounding the preparation and publication of the

article are considered. An American corporation Novell Incorporated of Utah in the United States of America manufactures computer network operating systems including systems such as NetWare, WordPerfect, PerfectOffice, GroupWise and similar products. It is the world's largest manufacturer of such systems with a world-wide turnover, at the time, of 2 billion US dollars a year. Computer programmes are of course protected by copyright. But the market for computer hardware and software is a highly competitive one and Novell Incorporated's success has (according to the evidence) arisen from and depends, in significant measure, on the provision of reliable support services to users. Novell Incorporated conducts its operations by dividing the world market into three divisions each of which deals with a particular segment of the market. As far as South Africa is concerned the relevant division is the Europe, Middle East and Africa division. It has been the practice of this

division to have the selection of distributors in any country (such as South Africa) made by the joint decision of a representative in such country and the management team of the division. Distributors are selected on the basis of their financial stability, technical competence and the ability to hold substantial inventories of Novell products. Once a distributor has been selected that distributor is officially appointed as such in terms of an appointment agreement with Novell Incorporated. Such agreements allot a specified territory to the distributor; oblige the distributor to purchase its requirements from Novell Incorporated; and authorise the distributor to use the logo "Novell Authorised Distributor". The authorised distributor may not sell directly to the public but must sell to authorised resellers who deal with the public. But it is the authorised distributors who give technical support to end users and it is the link between Novell Incorporated and the appointed authorised

distributors which is regarded as essential to the maintenance of the quality and reputation of the products in the market. It is stated in the answering affidavits that prices charged by authorised dealers reflect or include a component relevant to the costs of the provision of the support service and the cost of ongoing developments for the upgrading of existing systems.

What must be further noted is that Novell Incorporated in November 1993 registered, as a wholly owned subsidiary, a South African company, Novell South Africa (Proprietary) Limited ("Novell SA"). This company was registered in order to serve as a channel for Novell products in South Africa. It is Novell SA which, in this scheme of things, provides the user support services in South Africa. In order to strengthen the hand of Novell SA, the South African copyright in the Novell products was assigned to it on 8 February 1995. On 14 February

1995 Novell SA, with a view to protecting the rights afforded it by section 23 of the Copyright Act 98 of 1978, through its attorneys, addressed a letter to Hix notifying it that it was now the owner in South Africa of the copyright in Novell computer products. At this point the respondents became involved.

ComputerWeek is a publication of some 15 years standing and one of two leading publications of its kind. The article which is the subject matter of the litigation was written by one Frank Heydenrych. The article deals with the distribution rights of dealers in Novell products. Heydenrych said of ComputerWeek in an answering affidavit that it publishes factual information regarding computer products and technology and that it seeks to ensure that what it publishes is accurate, and where appropriate it affords persons who may be affected by what it proposes to publish a right to confirm or contradict what is to be said,

and a right to reply.

I now turn to matters directly relevant to this appeal. Shortly after 14 February 1995 System submitted a draft of the article it intended publishing to Hix. Hix objected to it and the proceedings were launched as a matter of urgency by notice of motion dated 17 February 1995. The application was based on the fact that the respondents proposed to publish the article in question in the edition of ComputerWeek to be published on 20 February 1995 and that it was defamatory. The draft and what was finally published differed in one important respect to which reference will presently be made. In fact by the time the case was called on 17 February 1995 a large proportion of the issue for 20 February had already been dispatched for distribution and could not be recalled. The application was postponed, in terms of an interim order, to 20 February so as to allow the filing of answering and replying

affidavits. On 20 February the matter was argued.

It is the article actually published which has to be considered. It is necessary to quote it in full.

"20 February 1995

NOVELL MOVES ON GREY MARKET

A ComputerWeek Exclusive

by Frank Heydenrych

Novell SA has become the first local software company to have its principal assign to it copyright to all major aspects of its products. This move is aimed at stopping the distribution of product through grey or parallel channels.

Following on this, Novell SA, through Spoor and Fisher, patent and copyright specialist attorneys, last week delivered a letter of constraint to HIX Distribution. The letter informs HIX of the copyright assignment and forbids HIX to supply grey or parallel-sourced Novell product into the SA market.

Novell has invoked its copyright to a greater extent than any other local software distributor, protecting the logo, packaging and executable code of NetWare and WordPerfect products.

In terms of copyright law, said Charles Webster of Spoor and Fisher, Novell may now prevent the unauthorised distribution of any of its products which are protected. If a

grey importer should continue to distribute the products in question, Novell could seek a court interdict.

Novell SA MD Richard Beytagh said the level of grey Novell product in the SA market was as high as 25%, and he placed the value of business lost to Novell SA at around R25 million.

'We have taken this decision in the interests of the end-user', Beytagh said. 'We urge all Novell product users to ascertain whether their product is grey or legitimate by contacting us and checking the serial number. We will be happy to legitimise all software at advantageous rates.'

HIX MD Steven Mazabow declined to comment on the Novell development, or whether his company would comply with the Novell letter of constraint.

* If you wish to check your Novell serial number, the Novell SA toll-free number is 0800 23 24 25."

After hearing the parties the application was dismissed with costs.

On 13 April 1995 leave to appeal was granted.

Much of the argument in this Court was directed to the question of what the proper approach to the grant or refusal of an interim interdict restraining publication on the ground of defamation should be in our law.

Since an interdict was refused in this case publication took place. But the appeal has been pursued (so it was argued) because of the importance of the legal issues and, of course, because of the costs.

It will, in the circumstances, be helpful, before considering the facts in detail, to re-examine the principles upon which a court should act in such cases. The setting must however be outlined. Hix, a dealer in Novell products and on its own admission "an alternative source of Novell products", alleged that the article was defamatory of it; that publication was imminent; and that it would suffer irreparable harm to its reputation, its ability to trade and its goodwill in the market place if the article were to be published. It therefore sought an interim interdict prohibiting publication pending the institution of an action for a final interdict. In the answering affidavits the respondents denied that the article was defamatory and in addition set out the factual grounds for a

plea of justification, namely truth and public benefit. It is in relation to this situation that reference must be made to authority.

The learned Judge *a quo*, Heher J, approached the matter on the basis that the defamatory nature of the article had been established or could be assumed, and he then examined the situation where the defence of truth and public benefit was raised on the basis laid down by Coetzee J in *Buthelezi v Poorter and Others* 1974 (4) SA 831 (W) at 836-838. This entailed determining whether the respondents had laid a sustainable foundation for their averments - that is whether the words accepted by the learned Judge as being *prima facie* defamatory, namely that Hix's sources of supply were unauthorised and carried the tag of illegitimacy, were true and in the public interest. Hix's counsel, in the face of a compelling case in the answering affidavits (to which I will refer very briefly later), sought to meet the respondents' case by advancing a

contention that the Court was being asked to accept the *ipse dixit* of the deponent that the article could be justified. After analysing the opposing contentions the learned Judge concluded

"It is not clear that the respondents have no defence to the action. I [am] ... accordingly satisfied upon the rule enunciated in *Heilbron v Blignaut* 1931 WLD 167 at 168-9 that the applicant cannot succeed in its claim for an interim interdict."

In this Court Hix's counsel founded his argument on the proposition that Heher J had erred in following *Heilbron v Blignaut*. He laid emphasis on (what he contended was) the opposing approach of Howes J in *Cleghorn & Harris Ltd v National Union of Distributive Workers* 1940 CPD 409. In this judgment Howes J discussed the *Heilbron* case and also referred to the cases of *Roberts v The Critic Ltd and Others* 1919 WLD 26 and *Norris v Mentz* 1930 WLD 160. Counsel also drew attention to a number of other cases in which the *Cleghorn* case had been

referred to with approval, such as *Raw v Botha and Another* 1965 (3) SA 630 (D), *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others* 1979 (3) SA 447 (W) and *Church of Scientology in SA Incorporated Association Not for Gain and Another v Readers Digest Association (Pty) Ltd* 1980 (4) SA 313 (C). The *Buthlezi* and *Heilbron* cases, Hix's counsel argued, had been based on or unduly influenced by English law and they deviated from, and were inconsistent with, the ordinary tests laid down by this Court in *Setlogelo v Setlogelo* 1914 AD 221 for an interim interdict. Counsel for the respondents, for his part, contended that a rule more benevolent towards those wishing to publish was called for. He argued firstly that there is no warrant for a uniform approach to the grant of interim interdicts and, secondly, that the recognition by our Courts of the value of free speech and the weight to be attached thereto, when determining whether an interim interdict should

be granted, called for a "differentiated" approach favouring the freedom of the press to publish information obtained by it. These arguments call for a re-examination of the approach adopted by the Court *a quo*.

The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are -

- (a) a *prima facie* right;
- (b) a well grounded apprehension of irreparable harm if the relief is not granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.

To these must be added the fact that the remedy is a discretionary remedy and that the Court has a wide discretion (a matter to which I shall return).

This is of course the classic formulation of the principles as laid down by this Court in *Setlogelo v Setlogelo* (*supra*). See LAWSA, Volume 11, paras 322-327 and the cases there cited.

With regard to counsel for Hix's contention I am by no means satisfied that he is correct in submitting that Greenberg J's judgment in the *Heilbron* case was based on English law. Indeed it is apparent from the following passage that the learned Judge was concerned to apply the accepted principles in our law. At 169 he stated:

"It does not appear to me that the law as laid down there is in any way peculiar to libel or slander. I think it is the law which would apply to any apprehended injury. If an injury which would give rise to a claim in law is apprehended, then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear, and if there is a dispute as to whether what is about to be done is actionable, it cannot be decided on motion.

The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence. Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed."

Furthermore the learned Judge then went on to contrast the approach of the English courts with that which he was taking.

It was to precisely this question that Coetzee J too directed his attention in the *Buthlezi* case. The argument in that case turned upon how the phrase "set up a defence" in Greenberg J's judgment was to be interpreted (see 835 D-E). As the detailed analysis (at 835E to 836F) by Coetzee J shows Greenberg J had not held (as was suggested by counsel in the *Buthlezi* case) that the mere *ipse dixit* of a deponent alleging a

defence of justification should be accepted. It is, I think, implicit in this discussion and I think also in both judgments read as a whole, that no departure from the established rules was being proposed or indeed applied.

The decision in *Cleghorn & Harris* also does not in my view provide support for the submissions of Hix's counsel. In that case Howes J reviewed the Transvaal decisions and sought to distinguish them (at 416) because "in none of them is there any allegation of irreparable injury to the applicant as there is in this case". That statement must be read with what is said thereafter (at 419) where the learned Judge continued -

"... [I]f the statement of law set out in *Roberts v The Critic Ltd and Others* (*supra*) and quoted with approval in *Heilbron v Blignaut* at pages 168-169, is to be taken literally then no application for an interdict in cases of defamation is ever likely to succeed for it is almost impossible to

imagine a case where there is not 'any doubt' that no 'defence ...*could* be successfully set up in an action on the libel'."

The analysis of *Heilbron v Blignaut* by Coetzee J, to which I have already referred, makes it clear, I think, that the statement of the law referred to was not intended to be taken literally. I consider that *Cleghorn & Harris* and *Heilbron v Blignaut* are reconcilable and that counsel overstated his submission.

The argument of respondents' counsel (namely that a "differentiated" approach is called for) has inherent in it the contention that the right of free speech, including in it the right to publish, is a pre-eminent right. In this regard he argued that the fact that section 15 of the Constitution of the Republic of South Africa Act 200 of 1993, which entrenches the right of free speech, calls for such an approach. This is also a contention advanced in the answering affidavits. Counsel coupled

his submission with a reference to section 35 (3) of the Constitution which enjoins this Court, in the development of the common law, to have due regard to the spirit, purport and objects of Chapter 3 of the Constitution (which chapter includes section 15).

That it is this Court's duty to develop the common law, in the manner laid down in the Constitution, is clear and I would, of course, endorse the importance of the rights of freedom of thought and speech as one of the main pillars of a democratic society based on individual freedom.

Unlike some of the rights embodied in Chapter 3, freedom of speech and of the press is not a newly created right. As is pointed out by Kentridge AJ in the case of *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 58 p 884 B-D freedom to publish, when not suppressed or restricted by statute, has been emphatically

endorsed and vindicated in many judgments of our Courts. To the cases cited by the learned Judge as examples I would add only two additional references by directing attention to the dicta of Rumpff JA in the case of *Publications Control Board v William Heinemann Ltd and Others* 1965 (4) SA 137 (A) at 160 E-G and those of Corbett CJ in the case of *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 25 B-E. Given the importance of the topic it is, I think, appropriate to quote the passage from Rumpff JA's judgment and to add a reference to what the Court of Appeal in England said on the interlocutory interventions limiting free speech as long ago as 1891.

What Rumpff JA said was as follows:

"The freedom of speech - which includes the freedom to print - is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is

necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost. And in its approach to the law, including any statute by which the Court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such extent as it in clear terms declares, and, if it gives a discretion to a Court of law, only to such extent as is absolutely necessary."

This sentiment, despite the differences between English law and South African law (particularly the fact that truth alone is not in South Africa a defence), finds its parallel in the remarks of Lord Coleridge CJ in *Bonnard v Perryman* [1891] 2 Ch 269 at 284 namely:

"But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before

the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

Section 15, of itself, does not, in my view, call for a differentiated approach favouring the press in matters of this kind or for a departure from the well established rules followed by our Courts in other applications for interim interdicts. When it comes to balancing the conflicting interests of the press and the individual it seems to me that this process can well be accommodated within the four corners of the established rules.

To the extent to which it may be suggested that there have been cases in which a tendency to unduly restrict the freedom of the press to publish (having so it was argued a "chilling effect" upon the enjoyment of free speech), such cases, must in my view, reflect an incorrect weighing of the countervailing interests of the parties. All that need be said is that the proper recognition of the importance of free speech is a factor which must be given full value in all cases. I would also add the observation that, of course, I am concerned only to examine the principles relevant to interim interdicts and this judgment does not purport to investigate the boundaries of free speech in general.

This leaves for consideration the question of how or where, in the scheme of things, these important considerations are to be dealt with. A digression is required to examine what the ambit is of the discretion which the Court, particularly a Court of Appeal, has. This question has

been dealt with by this Court in the case of *Knox D'arcy Ltd and Others v Jamieson and Others* [1996] 3 All SA 669. In the judgment of E M Grosskopf JA there is a careful examination of the authorities. The conclusion (at 680(f)) is drawn that:

"... the statement that a court has a wide discretion seems to mean no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."

and (at 680(i)-681(b)):

"The courts have not defined the considerations which may be taken into account in exercising the so-called discretion save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice which may be suffered by the applicant and the availability of other remedies" ... [and] ... "Finally in regard to the so called discretionary nature of an interdict: if a court hearing an application for an interim interdict had a truly discretionary power, it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict, and that a court of appeal would not be entitled to interfere

merely because it disagreed with the lower court's choice (*Perskor* case at 800 D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this court seem to refute it."

It is clear that a court of appeal is not bound to the conclusions of the lower Court and may depart from the lower Court's order on any grounds which it feels render this necessary. It is in these cases not limited to an examination of the exercise of the Court's discretion on the more limited basis applicable in a truly discretionary situation.

To sum up, cases involving an attempt to restrain publication must be approached with caution. If section 15 adds anything to this proposition it would merely be to underline that, though circumstances may sometimes dictate otherwise, freedom of speech is a right not to be overridden lightly. The appropriate stage for this consideration would in most cases be the point at which the balance of convenience is

determined. It is at that stage that consideration should be given to the fact that the person allegedly defamed (if this be the case) will, if the interdict is refused, nonetheless have a cause of action which will result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned. And in the exercise of its discretion in granting or refusing an interim interdict regard should be had *inter alia* to the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving, in the limited time afforded to it in cases of urgency, the defence which it wishes to raise and the fact that the order may, in substance though not in form, amount to a permanent interdict.

As the extract from Heher J's judgment quoted above shows, he approached the matter in accordance with the principles I have discussed.

A more detailed review of the evidence than I have made was undertaken. For a reason which will become apparent I do not propose to examine the evidence in as much detail. The respondents' case was that they alleged justification on the grounds of truth and public benefit. The question, as Heher J put it, was "whether the respondents have laid a sustainable foundation for their averments that the applicant's sources of supply were, and are indeed, unauthorised by the manufacturer and therefore justifiably carry the tag of illegitimacy ...".

In the answering affidavits the issue of public interest was dealt with as follows:

"It is one of the principal objectives of Computerweek to inform its readership of matters relevant to the distribution of information technology in South Africa. That is precisely what the article here in question seeks to do. I respectively (sic) submit that in properly informing the readership of Computerweek of the position that Novell SA has now taken in respect of grey importers, the respondents have

published in the public interest, and have accordingly set up a defence sufficient to resist the interim interdict that is now sought."

Hix's response was to dispute only the allegations regarding the status of its existing stock. Its complaint thus was not that the information given in the article was not in the public interest. This fact can therefore be taken to have been established.

In so far as Hix's stock is concerned there were conflicting accounts as to whether or not Hix acquired its existing stock from an authorised source. The respondents in setting up the facts upon which they rely for the contention that the source was not authorised filed an affidavit by the managing director of Novell SA one Beytagh. He dealt with the status of Hix's stock and its rights in regard to the distribution of Novell products. In the founding affidavit Hix asserted that it had acquired its stock from a source in America. Beytagh's evidence was

that for the South African market the only authorised source was in the United Kingdom. It is unnecessary to debate the conflicting contentions advanced in the affidavits. Enough was said in contradiction of Hix to cast serious doubt on its *prima facie* case and accordingly to render it open to doubt. This fact justified the Court's reliance upon *Heilbron v Blignaut*. I am satisfied that the learned Judge did not err in this regard.

There is only one further feature of the case upon which I would comment. This is the fact that Hix refused, in express terms in the reply, to tender an undertaking to cover the respondents' losses should it transpire that the interim relief it sought should not have been granted. In cases of this nature this is a very common rider added to the Court's order when an interdict is granted. It is designed to protect the person against whom the interdict is granted from suffering loss as a result of the interdict being granted. This is because the interdict is a judicial act.

The party interdicted would not (in the absence of malice) be able to recover damages. See *Hillman Bros (West Rand) (Proprietary) Limited v Van Den Heuvel* 1937 WLD 41 at 46, *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 690H-691B.

In the present case the appellant's refusal to offer an undertaking would, in my view, have ensured that the balance of convenience favoured the respondents.

It is not, in my view, necessary to discuss that aspect of the case in greater detail because the result the learned Judge arrived at can also be reached by another (and as I think more direct) approach. This is to examine Hix's complaints that the article was defamatory.

It is trite that a defamatory statement is one which injures the person to whom it refers by lowering him in the estimation of ordinary intelligent or right thinking members of society generally as that phrase

has been explained in this Court in *Mohammed v Jassiem* 1996 (1) SA 673 (A) at 703G-704D. In the founding affidavit (para 20) Hix placed its complaint squarely on the assertion that the article was defamatory. The particular passages that were said to be defamatory were also detailed in the founding affidavit (para 19). The first and main complaint, namely that Hix was referred to as "a leading grey importer", was based on a passage in the draft article. The published article omitted this phrase and the complaint thus fell away. I would however add that in as much as Mazabow (the voice of Hix) seemed to accept a description of himself, in a document annexed to the answering affidavit, as a "grey market dealer" with some satisfaction, the complaint would seem, in any event, not to have much substance. The next complaint was that it was "alleged" in the article that the stock (of Novell products) presently held by "Hix" is grey or parallel sourced. The article does not

make any reference to the appellant's "existing stock". It says no more than that Hix has, by the attorney's letter of 14 February 1995, and in consequence of the assignment of copyright to Novell SA on 8 February 1995, been forbidden to "supply grey or parallel sourced product into the South African market". I am unable to ascertain in what way what is actually stated in the article can be said to lower the Hix's reputation in the eyes of right thinking people generally.

The next complaint was that the article "implies" that Hix was an unauthorised dealer in Novell products. In my view the article, particularly having regard to the fourth paragraph thereof, is referring to future events. The words "Novell may now prevent unauthorised distribution of any of its products" seem to make this clear. Again I cannot see any ground for complaint. Next it was said that the article "implies" that Hix is responsible for loss of business to Novell SA. Even

if this is implied (which I doubt), it does not, in the absence of anything more, seem to me in a modern competitive world to be defamatory.

Finally it was said that the article "implies" that the products sold by Hix in the past "are illegitimate and require to be legitimised". It is not stated in the article that products sold by Hix in the past were illegitimate. The article must be read in relation to what was being discussed, namely, in part at least, the right of purchasers to claim (from the party obliged to provide them) the support services which users require. Again I cannot see anything in the assertion complained of which would lower Hix's reputation among right thinking people generally.

It follows from what I have said that the learned Judge's finding (or perhaps only acceptance for the purposes of his judgment) that the article was *prima facie* defamatory was incorrect.

It also follows, for all these reasons that the appeal cannot succeed.

The appeal is dismissed with costs.

C PLEWMAN JA

CONCUR:

CORBETT CJ)

E M GROSSKOPF JA)

HARMS JA)

SCHUTZ JA)