IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4960/94

In the matter between:

DR ROBERT MILTON HALL	Applicant
and	
MARTIN WELZ	First Respondent
CHAUCER PUBLICATIONS CC	Second Respondent
ARGUS HOLDINGS LIMITED	Third Respondent
ANDREW PATTERSON DRYSDALE	Fourth Respondent
JONATHAN CECIL BESTRICK HOBDAY	Fifth Respondent
ALLIED MEDIA DISTRIBUTORS	Sixth Respondent
JEAN LE MAY	Seventh Respondent

JUDGMENT DELIVERED ON 27 SEPTEMBER 1996

CONRADIE, J:

Issue no. 7 of a magazine called Noseweek carried an article written by first defendant, the editor of the magazine, about the plaintiff Robert Hall, and his dealings with the South African Reserve Bank.

The plaintiff alleges that the article defamed and humiliated him. He claims from the first and from the second defendant, the publisher of the magazine, R500 000 in damages for defamation and R50 000 for *iniuria*. I shall henceforth

also refer to the first and second defendants as the Noseweek defendants. They were at the start of the trial represented by **Mr Bertelsmann**. When the trial resumed at the beginning of the third term, the first defendant represented himself whilst the second defendant was represented by **Mr Taylor** assisted by **Mr Joubert**. After some days **Mr Taylor** disappeared and did not return. **Mr Joubert** alone then represented the second defendant. The article complained of I shall call for short the Noseweek article.

There were three broad areas of criticism leveled against the plaintiff.

1. **Plaintiff's veracity and probity –**

   The Noseweek defendants - so the plaintiff alleged - said or insinuated about him that he-

   (a) has 'a great way with the truth' carrying the implication that he is a liar;

   (b) misrepresented his residential status to the Reserve Bank;

   (c) improperly influenced Reserve Bank officials to overlook exchange control transgressions and had an improper relationship with such officials;

   (d) lied to the Receiver of Revenue about his assets and liabilities;

   (e) lied to the Receiver of Revenue about R693 000 which he pretended had accrued to him as a capital gain;

   (f) lied to the Receiver about the accounting requirements of a foreign corporation;

   (g) lied about knowing a Mr Grimmig;

(h) lied about his departure from the United States of America, and

(i) forged someone's signature to a document.

2 Plaintiff's exchange control manipulations

The next broad category of statements relates to the plaintiff's alleged contravention of exchange control regulations. The contraventions are said to have been repeated and extremely profitable. They involved transactions in financial rands, or 'fiddling the finrand' as first defendant put it in the Noseweek article.

3. Plaintiff as a tax and debt defaulter

The third area of criticism pertains to the plaintiff's alleged failure to meet his financial obligations. It was alleged that the plaintiff failed to honour his obligations to a private citizen, Mr Grimmig, and to the public purse. The plaintiff was alleged to have failed to repay money to Mr Grimmig under circumstances which amounted to him evading his obligation.

The criticism of the plaintiff's tax defalcations falls into two parts -

1. (a) his failure to pay tax to which he had been assessed in the United States of America;

(b) his departure from the United States in order to avoid paying such taxes;

2. his failure to declare income to the South African *fiscus* and his consequent evasion of income tax.

Specific allegations in these categories overlap. For example, 1(d) (e) (0 and (h) might equally well have been included in the tax default category.

The Iniuria claim

The plaintiff alleged that he had been humiliated and degraded by certain statements in the Noseweek article which were made wrongfully and with the intent to injure him.

The offending statements concerning the plaintiff were -

(a) 'He would even have you believe self-indulgence is an admirable form of patriotism'

(b) "... is it the fact that he appears to have made a successful life-time career of self- promotion as a Nobel Prize nominee (failed 1972)"

(c) "By his own account, Robert Hall is a mediocre dentist who, thirty years ago in America, struck it lucky and has never had to work again..."

The claim is one for R50 000.00.

On the morning of 22 August 1996 when the trial had been running for many days, the plaintiff moved amendments to his pleadings accompanied by a tender of wasted costs.

The main effect of the amendments was to remove from the area of controversy those statements appertaining to the plaintiff's tax affairs i.e. his failure to pay

tax and misrepresentations made to the tax authorities. The plaintiff no longer complains of the statements or innuendos that he has –

(a) misrepresented his. income or asset position to the Revenue;

(b) never declared an income or paid tax in South Africa or the United States of America.

The plaintiff also abandoned his complaint about the Noseweek comment that he 'has a great way with the truth'.

The Noseweek defendants deny that the article is defamatory of the plaintiff. The defence is unsustainable and they did not persist with it. In the alternative, they plead that the facts are substantially true and correct and were published in the public interest. There are further alternative pleas to which I need not devote attention. A special plea was abandoned at the beginning of the trial.

The plaintiff also sues Argus Holdings Ltd. the owner of the Week-End Argus (third defendant), its editor-in-chief, Andrew Drysdale (fourth defendant), its editor Jonathan Hobday (fifth defendant), the printer and distributor of the newspaper, Allied Media Distributors (Pty) Ltd (sixth defendant) and the journalist who wrote an article in the 25 April 1994 edition of the Week-End Argus (seventh defendant). He alleges that this article, which I shall call the Argus article, also defamed him. I shall henceforth refer to the third to seventh defendants as "the Argus defendants". They did not all share the same representation. The third to sixth defendants were represented by Mr **Kirk Cohen**. Mr **Butler** appeared on behalf of the seventh defendant, the author of the article. Quite late in the proceedings an amendment was moved by Mr **Butler** withdrawing an admission that the seventh defendant had been

responsible for the headings and captions of the Argus article as well as the body thereof. I allowed the amendment over the protestations of the plaintiff's counsel who thought he saw a defendant falling from his grasp.

There were originally, in substance, three claims against the Argus defendants. The first claim was for Rim damages. It was said to have arisen from the Argus defendants making common cause with the Noseweek defendants, and adopting their article as their own. In the alternative the plaintiff alleged that the Argus article drew the attention of its readers to the Noseweek article, thereby increasing its publication. For this, in the alternative, the plaintiff also claimed Rim. The third claim is for Rim damages arising from the publication of defamatory matter of the Argus defendants' own making. A further claim of R50 000 for humiliation and degradation brought the total against the third to seventh defendants to R2 050 000.

The Argus defendants admit that the Argus article, excluding captions and headings, was written by the seventh defendant and that it was edited, published and distributed by the fourth, fifth and sixth defendants. They deny that the Argus article was defamatory. As in the case of the Noseweek defendants, the defence was not pressed. Again, like the Noseweek defendants, the Argus defendants plead that the words in the Argus article were substantially true and that publication was in the public interest.

The Argus defendants brought an application for absolution at the close of the plaintiff's case.

I granted the application in part. The effect of the judgment was that the Argus defendants were absolved on the causes of action contained in paragraphs 20

and 21 of the particulars of claim. The Argus defendants' point about the averments in paragraph 20 was that the plaintiff had presented no evidence of a conspiracy or anything which could amount to the making of common cause between the Noseweek and Argus defendants. The objection to paragraph 21 was really more in the nature of an exception. The point was that one cannot, whether deliberately or negligently, incur liability for defamation merely by drawing attention to defamatory words where that does not amount to a republication of the defamation. While the averments in paragraph 21 could have been struck out if exception had been taken to them, those in paragraph 20 could not. Nor could a plea of misjoinder have succeeded since the Argus and Noseweek defendants were alleged to be joint wrongdoers. They were said to have conspired to defame the plaintiff. The misjoinder of the Noseweek and Argus defendants has cost implications. I return to it under that rubric.

The statements in the Argus article originally said to be defamatory of the plaintiff, may be summarised as follows –

The plaintiff –

(a) is a criminal or suspected criminal; a fugitive from justice or is wanted by the authorities.

(b) has frequently transgressed Laws relating to exchange control and has made illegal profits by doing so.

(c) is not creditworthy.

(d) is dishonest and not law abiding.

R50 000 was claimed for *iniuria* on the ground that the Argus defendants had implied that the plaintiff was a hypocrite.

By way of the amendments referred to earlier the plaintiff withdrew all his complaints against the Argus defendants save that they published words meaning, or carrying the implication, that he was a criminal or suspected criminal or a fugitive from justice or was wanted by the authorities. The *iniuria* claim was also withdrawn.

I turn now to the first major remaining issue between parties.

Deceiving the Reserve Bank

The passages in the Noseweek article bearing upon the plaintiff's resident status for exchange control purposes read as follows –

> "On 7 January 1981 Dr Hall formally applied for, and was granted, permanent resident status in South Africa. His passport was so endorsed.
>
> Not long afterwards - he claims it was on the advice of the then foreign exchange manager at Barclays Bank, Mr Ticky Gill, who was a guest in his home at the time - Dr Hall wrote a letter to the Reserve Bank in which he solemnly lied that he was not permanently resident in South Africa. Barclays Foreign Exchange Division formally submitted the letter to the Reserve bank on Dr Hall's behalf.
>
> Mr Gill has, of course, since become a leading light at the Reserve Bank.
>
> Ever since then, until today, Dr Hall has been treated by the Reserve

> Bank as a nonresident, and been allowed to do repeated finrand deals which, by law, are denied to permanent residents."
>
> "None of the Reserve Bank officials who have been entertained by Dr Hall at his home in the Cape have asked to see his passport to determine his resident status. Not that they need to; he frequently declares himself a South African permanent resident from public platforms."
>
> "What special hold has Dr Hall got over officials of the South African Reserve Bank that makes them indulge his repealed and extremely profitable contraventions of the Exchange Control laws? Do they secretly sympathise with his curious, right-wing views? Is it because of his declared support for the "Buthelezi Option"?
>
> Or is it the fact that he appears to have made a successful lifetime career of self- promotion as a Nobel Prize nominee (failed 1972)."

An application for permanent residence was initiated by the plaintiff on 25 November 1980 and submitted to the department of Home Affairs on 7 January 1981. In the application the plaintiff declared over his signature that the details in the application were true and correct and that it was his "firm intention to reside permanently in South Africa" The plaintiff's permanent residence permit was issued on 29 December 1981 and endorsed in his passport on 7 January 1982.

The first defendant was not quite right in suggesting in the Noseweek article that the permanent resident status granted to the plaintiff by the department of Home Affairs determined his status for exchange control purposes. It would, I

suppose, normally be decisive. However, there is a category of permanent resident called a foreign national temporarily resident. The status of foreign national temporarily resident is one which is accorded by the Reserve Bank's exchange control department to foreign residents who, although they might reside in South Africa indefinitely, have not decided to make the country their new home. One may, therefore, be the holder of a permanent residence permit without losing one's status as a foreign national temporarily resident for exchange control purposes. This status one would only lose once one had acquired a new domicile of choice. A person classified as foreign national temporarily resident is treated very much like a non resident. The only difference is that a foreign national temporarily resident may operate a resident (ordinary) banking account. The account of a nonresident is designated non-resident and subject to formalities because withdrawals are freely transferable overseas. Provided then that tie plaintiff had not acquired a new domicile of choice in South Africa, he could legitimately claim to be a foreign national temporarily resident and thereby lay claim to the foreign exchange privileges accorded to a non-resident.

Early in 1980 the plaintiff bought a house 'Petit Pavilion' in Hout Bay with finrand. An application by the Standard Bank to the Reserve Bank to introduce the finrand to buy Petit Pavilion was made on 16 January1980. On 11 March 1980 a further application, handled by French Bank, for the introduction of more finrand was granted for improvements to the house. The plaintiff did not remain content with Petit Pavilion for long. That same year he discovered Leeuwkoppie. Leeuwkoppie was a proper gentleman's estate of 350 acres. It is not what one might regard as *a pied á terre*, even for a man with the plaintiff's resources. Indeed that is not how plaintiff appears to have regarded it. In a

telling letter to the estate agent who was negotiating the sale of Leeuwkoppie he wrote on 15 September 1980 –

> "1 am moving my entire family here from California because we have fallen in love with this marvelous Republic, its people, customs and its physical beauty. It is my intention to enjoy Leeuwkoppie for the rest of our family's lives, since my children intend to stay there upon my death, keeping it as a farm and nature preserve."

The letter is as close an affirmation of the acquisition of a new domicile of choice as one is likely to get. One should not forget, also, that at about that time the plaintiff met Elsa van Zyl (born Lindhardt) a South African citizen whom he married shortly thereafter. The marriage no doubt cemented the bond which the plaintiff felt with South Africa.

In Later years the plaintiff publicly confirmed that he settled in South Africa *animo manendi.* In an interview with a journalist of 'Die Burger' on 20 June 1987, which published an article on 'Stellenkloof' the Cape-Dutch manor house restored by the plaintiff, he is reported as having made South Africa his new home in 1980. Since then, he declared, he had not looked back; he would never leave South Africa again; it was the most wonderful country on earth. In a fulsome video production about himself in which the plaintiff participated he said –

> "As an American living in South Africa, I feel rather privileged. I love this country. I love the people. I love the scenery. I love its location and I've been very happy in the eight years that I've decided to live permanently here in South Africa."

The video transcript bears a date 5 July 1989. That must be the date on which the script was written. Eight years before that would be July 1981. In another passage spoken by the plaintiff himself, he says:

> "I came to South Africa in 1980. I'd been reading the history of South Africa for twelve or fifteen years and have always wanted to get here. And once I came to Cape Town, which is very similar to Santa Barbara, California, without the smog, I decided to settle here in Hout Bay."

The impression left by these words is that the plaintiff had no hesitation in selecting Hout Bay as his new home.

The acquisition of a domicile of choice involves the abandonment of an earlier domicile of choice or domicile of origin. The plaintiff's domicile of origin was the United States of America. One must see whether, apart from the attraction which the plaintiff felt for South Africa, there was anything else which may be supposed to have prompted his decision to give up his domicile of origin.

It was suggested by the first defendant that the existence of huge tax liabilities in the United States of America played a part in the plaintiff's decision to leave the land of his birth. I think that this suggestion has merit. The circumstances surrounding the plaintiff's departure from his home in California without paying his tax liabilities are dealt with elsewhere. For the purpose of the domicile point it is sufficient to note that it is understandable that, having left behind him an enormous tax debt which was year by year becoming more burdensome by the addition of interest and penalties, the plaintiff would not have wished to return

to the United States of America, where at any time the Internal Revenue Service might be alerted to his presence.

Years later, (at the end of 1995 to be exact) the plaintiff would contend that he did not intend to settle in South Africa permanently. He did so in representations made to the department of Home Affairs. He owned, he said, a second home in Colorado, his children lived there, and he always contemplated returning if the political situation in South Africa worsened. I would question this assertion. Political situation or no political situation, the worst place in the world for the plaintiff to go would be the United States of America where his mountainous tax debt overshadowed the hope of a tranquil retirement.

Even if I were to accept such evidence, it would not follow that no new domicile of choice had been acquired. Acquisition of a domicile of choice does not exclude the contemplation of leaving that domicile if something untoward should happen. The law in this regard has been settled by the appellate division in *Ley vs Ley's Executor* 1951 3 SA 186 (A) at 190-191. The *animus manendi* is proved by showing an intention to remain indefinitely. It does not involve proving that the *de cuius* has resolved to live and, come what may, die in his adopted country.

Looking at all the *indiciae,* I find it amply proved that by the time the plaintiff received his South African permanent residence permit on 7 January 1982, he had resolved to make South Africa his new home. The issue of the permit was the final step in the acquisition of a new domicile of choice. It is, therefore, with no little astonishment that one finds the plaintiff writing to the Reserve Bank on 1 February 1982 saying this -

"Dear Sir,

I advise that I entered South Africa on 20th March, 1981 and am a foreign national temporarily resident in South Africa.

Furthermore I advise that I have foreign assets and hereby undertake not to place these or any portion thereof, at the disposal of any South African resident. I understand that I may deal freely in my foreign assets and may retain the income thereon overseas. I also conduct a foreign banking account.

My bankers in South Africa are Barclays National Bank.

Yours sincerely."

The letter, the plaintiff has on various occasions maintained, was written on the advice of Mr Gill who was then with Barclays National Bank's exchange control department. In a statement to the Reserve Bank, much later when the Reserve Bank was investigating him, the plaintiff said explicitly that he had advised Mr Gill that he had applied for a permanent residence permit and that Mr Gill thereupon dictated the letter of 1 February 1982 to Elsa van Zyl, who was shortly to become Mrs Hall.

It is clear, as *Mr* ***Van den Berg*** for the plaintiff argued, that the letter was written by a knowledgeable person. It is probable that Mr Gill dictated it to Elsa van Zyl. It may be, although I think it unlikely, that the plaintiff told Mr Gill that he had received a permanent residence permit. But that alone, as we have seen, would not have made Mr Gill's suggested classification of him as a

foreign national temporarily resident wrong. The letter of 1 February 1982 was annexed to an application by First National Bank to the Reserve Bank since only a commercial bank can make such an application. In the application there is an indication of what information the plaintiff might have given, and probably gave, to Mr Gill. The application sets out that the plaintiff is a regular visitor to South Africa who sometimes stays for extended periods. I quote –

> "The applicant, an extremely influential and well-connected person, visits South Africa regularly on holiday, sometimes for fairly extended periods. We, therefore, attach his declaration as called for in section C2(d)(i) of the Exchange Control Rulings."

On that information, which would only have come from the plaintiff, Mr Gill chose the correct classification; and on reading those details, the Reserve Bank would have had no reason to query the plaintiff's categorisation of himself as a foreign national temporarily resident. There is no hint in the letter of 1 February 1982 of a special status being negotiated for the plaintiff. The classification as a foreign national temporarily resident is by no means special. It is one of the Reserve Banks standard classifications for exchange control purposes. Nor did the accompanying application from Barclays Bank seek a special status for the plaintiff.

All went well until 1985 when the plaintiff had the misfortune to overspend on his credit card overseas. When asked to explain he put up a version that as an American citizen, though resident in South Africa. He was not subject to exchange control. That was patent nonsense. The plaintiff could not possibly have thought that he was exempted from exchange control. He had by then

made many applications on behalf of himself and his companies for permission to export and import currency.

The one thing the plaintiff strove desperately to avoid was categorisation as an immigrant. This is what he really was, but classification as such would have had consequences that the plaintiff found unpalatable. Firstly, as a settler, he would have had a three year so-called window period in which to conclude foreign currency transactions. Thereafter, he would be treated as a resident. This was bad but worse still was that he would have been obliged to declare his foreign assets (and liabilities) and, after the three years, repatriate the income to South Africa.

There was another vita) consideration, one may suppose, for the plaintiff's wishing to conceal his true status. Mr Lautenberg, an assistant general manager of the Reserve Bank's exchange control department told the court that if the plaintiff had taken up immigrant status he would not, as an income beneficiary of the Lion Family Trust, have been permitted to invest financial rands in the country, except up to an amount of R200 000 of which R180 000 would have had to be earmarked for buying a residence. That would not have been nearly enough for one whose intention was to live splendidly off income derived from his trust.

So, for the next decade, the plaintiff played a cat and mouse game with the Reserve Bank, his bankers and his advisers. Despite the fact that he had been told in 1985 that he was regarded as a South African resident, he described himself in 1989 as a permanent resident who was regarded as a non-resident for exchange control purposes. By the end of 1989 the plaintiff was even

pretending that he was one of four or five people who had been given a ‘special status’

.

On 28 December 1989 the plaintiff wrote to Diners Club International, in response to a query of theirs, that for exchange control purposes he was regarded as a resident with non-resident status This was a ‘special status’ granted to him by the Reserve Bank. In court proceedings in 1991, the plaintiff stated that Tickey Gill, vice president of Barclays Bank, had secured this unique status for him since he did not want to declare his world-wide assets and the Reserve Bank gave him approval not to do so. That he did not want to disclose his overseas assets was true, but the pressure on the plaintiff to disclose such assets kept mounting. At a meeting with the Reserve Bank in 1991 questions were asked of the plaintiff concerning his residential status. Mr Van Staden, an investigator at the Reserve Bank, conveyed to the plaintiff that the Reserve Bank regarded him as a permanent resident. The plaintiff explained that he was under the impression, ‘after the Gill letter, that he had a special status, although he professed to being confused in this regard. He said not even his bankers could clarify his status.

On 25 March 1994 the plaintiff wrote to Nedbank to say that at a ‘private meeting’ with ‘Reserve Bank officials on 31 March 1992, the plaintiff had been told that his status “had been changed”. The change, however, had not been confirmed in writing. Mr Cerff, the exchange control manager of Ncdbank on 29 March 1994 proclaimed that as far as the plaintiff was concerned he was still a non-resident.

At a meeting with Reserve Bank officials in May 1994 - of which a note was kept by Mr Cerff of Nedbank - the plaintiff was asked to submit a report on,

inter alia, his residential status. A report was faxed on 17 May 1994. The plaintiff acknowledged having been told by Mr Van Staden on 31 March 1992 that he was a permanent resident for all purposes. However, this, he said, had not been confirmed in writing. In 1994 the plaintiff was still playing cat and mouse. The one thing that he should have done years ago, the only honest thing to have done, was to have acknowledged that he was an immigrant to South Africa, having chosen to make this country his new home. Had he done this, all the aggravating confusion about his exchange control status would have been avoided.

I have no hesitation in saying that the plaintiff's original representation to the Reserve Bank was to his knowledge, false. The wording of the letter would have been suggested by Mr Gill on the strength of information imparted to him by the plaintiff. That Mr Gill drafted the letter does not exonerate the plaintiff who lied to the Reserve Bank in the hope of thereby securing for himself advantages to which he would not otherwise have been entitled. It is to these advantages that I now turn.

Transgressing exchange control

The plaintiff's particulars of claim allege that the Noseweek article was defamatory of him because, ***inter alia,*** it stated directly or by implication that he had frequently transgressed the laws relating to exchange control. The Noseweek article does not directly state that the plaintiff contravened exchange control regulations. It does, however, carry the implication that he did so. The passages in question are the following –

(a) "He knew how never to pay tax, and how to make a living out of fiddling the finrand",

(c) "Ever since then, until today, Dr Hall has been treated by the Reserve Bank as a non-resident, and been allowed to do repeated finrand deals which,, by law, are denied to permanent residents".

(d) "But now the doctor may find himself sharing the unique tax status traditionally given to professional prostitutes who are required to pay tax on their illegal earnings."

It is correct, as ***Mr Joubert*** for the second defendant pointed out, that the innuendo pleaded is not linked to any specific words. The position is further complicated by the fact that passages (a) and (c) are among those allegations which were deleted by amendment. The passage in (b) was deleted in para 13.4 of the particulars of claim, but survives as part of the passage quoted in paragraph 15.2. However, I do not believe that I should now, at the conclusion of a long trial, non-suit the plaintiff for not having pleaded the words from which he seeks to derive the implication. All parties have throughout the trial accepted that the plaintiff's foreign exchange dealings were in issue. They featured prominently in the evidence. They cannot now be ignored because of a defect in the pleadings.

There are really, as I see it, three categories of exchange control contraventions. The first category relates to the plaintiff's true status. He should have declared himself to be the immigrant that he really was. His deceiving the Reserve Bank about this meant that such permission as he did obtain from the Reserve Bank was obtained under false pretences. The permission in every case where the plaintiff's status as a foreign national temporarily resident played a part was, therefore, invalidated by the fraud.

The statement that the plaintiff had been allowed to do repeated finrand deals which a permanent resident would not have been permitted to do, appears in the same passage as, and is directly linked to, the status said to have been obtained by the plaintiff under false pretences. Strictly speaking, all that the passage implies is that the plaintiff misused the status which he had improperly obtained. The innuendo pleaded by the plaintiff goes further than this, however, so that it is advisable to deal with two other categories of contraventions as well.

The second category relates to the classification which the plaintiff had deceitfully persuaded the Reserve Bank to give to him. I shall call this the plaintiff's designated status. The plaintiff, as we have seen, was classified by the Reserve Bank as a foreign national temporarily resident. A foreign national temporarily resident is really only a special category of non-resident. The plaintiff did not conform to the rules governing his designated status. He entered into transactions for which Reserve Bank approval should have been sought, without seeking such approval. In some cases Reserve Bank approval, had it been sought, would have been granted. In other cases it would have been refused. In either case the plaintiff did not do what he was supposed to do: ask the Reserve Bank's permission.

The third category has to do with the plaintiff's companies, Lenert Property (Ply) Ltd ('Lenert') and Stellenkloof (Pty) Ltd ('Stellenkloof'). I call them plaintiff's companies. He did not own the shares but he was the controlling mind of each. As we shall presently see, several impermissible transactions were concluded between the plaintiff, Lenert and Stellenkloof.

Mr Lautenberg is a high-ranking Reserve Bank official who testified on the scope and application of exchange control rulings. Money which enters the country as finrand must be deposited into a financial rand account and cannot be released without reserve bank approval. No finrand transactions are permitted to a South African resident. If the Reserve Bank becomes aware of information which would lead it to categorise a person as a resident, it would classify him as such. An affected person is a company of which the shares are held by a non-resident or a discretionary trust of which one of the beneficiaries is a non-resident. No resident may lend money to an affected person without Reserve Bank approval. An affected person may borrow a percentage of its invested capital. A loan from one affected company to another requires approval from the Reserve Bank. Provided that assets entered the country as part of the property of a foreign national and provided that there was a genuine sale, the Reserve Bank would permit the proceeds to be transferred offshore by means of commercial rand. The logic is that the country, in losing the equivalent currency, has obtained an asset. There is no loss to the country. A foreign national who sells such an asset is at liberty to use the proceeds of the sale locally without Reserve Bank approval. The rule is "once finrand always finrand". Money introduced into the Republic in finrand remains finrand and can with the required approval, only be utilised for legitimate finrand purposes such as the purchase of a dwelling or shares in an economically viable or property owning company. If Reserve Bank approval for the purchase of shares in a company is given, approval is conditional upon the endorsement of the shares of that company as being non-resident owned, with the consequence that they are not tradable. On the sale of a financial rand asset, the proceeds should be deposited back into a financial rand account, and either transferred back

overseas or, with permission, used for a legitimate finrand purpose. It is not permissible, directly or indirectly, to use finrand to defray living expenses.

Early in his South African sojourn, the plaintiff indulged in roundtripping. The roundtripping involved importing financial rand and exporting commercial rand. The profit on the differential could be quite substantial. The details of the transactions appear from a schedule which the Argus defendants annexed to their heads of argument. I can do no better than incorporate it into this judgment as an annexure. The annexure shows in the third to sixth columns finrand applications made by the plaintiff. The third column details applications to introduce finrand. The fourth column shows - in order to illustrate the magnitude - the present value of each application. The fifth column details applications to transfer money out of the country, and the sixth column the equivalent present value.

The 'outcome' columns show what became of each application. Column three shows that between January 1980 and **September** 1987 R7,654m (R36 332m in present value) of financial rand were introduced into South Africa. The money (commercial rand) which was sent out of the country amounted to R233 272 (present value RI 375m). The applications to transfer money all concerned art works that had allegedly been sold. The transactions were questionable. In February and April 1982 the plaintiff sold art works to the value of R65 750 (now R375 432) to Mrs E van Zyl, the fiancée who would four months later become his wife. Other artworks worth R37 480 (now R21 0 000) were allegedly sold to Mr and Mrs G Prinsloo and friends. G Prinsloo was the plaintiff's foreman. I think that it is on the evidence unlikely that such art works were sold or had even been brought into the country. They do not appear on any inventories of the plaintiff's goods imported at the time of his arrival. Moreover,

it has not been explained why the proceeds of the art works should have been transferred overseas. At almost the same time that an application was made for a transferral of commercial rand, another application was made to introduce finrand. The inference that the plaintiff indulged in roundtripping is overwhelming.

When the plaintiff first came to this country, he set up an elaborate financial structure. At the top axe two trusts. The Lion Family Trust, a foreign trust, owns the whole of Grada Corporation, a Panamanian registered company and all the share capital of Lenert. Lenert owned Leeuwkoppie Estate. The beneficiaries of the Lion Family Trust were the plaintiff and his two children. The Lion Family Trust had as its trustees Portman Services SA, a Geneva based entity. It made distributions to the plaintiff through the medium of the Grada Corporation. It was settled by Marlene Boesch-Webber.

The plaintiff claimed merely to be a beneficiary of the Lion Family Trust, and a local representative of the Grada Corporation. However, although the trust was expressed to be a discretionary trust, it was controlled by the plaintiff through the device of a 'letter of wishes'. Mr Loch Davies, an attorney who is an acknowledged expert in the field and acted for the plaintiff in the early days, told me that a letter of wishes is in off-shore jurisdictions like Jersey a common way of retaining control of a trust whilst making it appear as though the trustees were exercising an independent function.

It is worth quoting the letter of wishes in full –

"To the present and future trustees of the Lion Family Trust, and to the directors of Portman Services S A as the first corporate trustees of the said Trust:

I wish it to be known that the Lion Family Trust has been settled by me in order to establish a vehicle which will become the ultimate owner of the worldwide assets of Dr Robert M Hall.

While acknowledging the Legal powers of the trustees, and not wishing to detract therefrom, it is nonetheless my wish that during his lifetime, the trustees should accept the advices and/or instructions of Dr Hall with regard to all the investment planning, policy and strategy implementation of decisions taken in respect of the assets of the Trust. During this period, it is my wish that The Board of Executors in Cape Town act in a consultancy capacity to the Trust, and that it be authorised to remit Dr Hall's advices to the trustees in Geneva.

Upon the death of Dr Robert M Hall it is my wish that The Board of Executors should exercise an investment planning and advisory function and that the trustees should then be guided by The Board of Executors as to the investment planning, policy and strategy implementation of the Trust's assets.

While recognising that the Lion Family Trust is a discretionary settlement, it is my wish that the assets of the Trust should be managed entirely for the benefit of Dr Hall and his family, and that any eventual decision as to the distribution of any or all of the assets of the Trust should only be taken on the advice of Dr Robert M Hall during his lifetime and thereafter on the advice of The Board of Executors.

Signed in GENEVA this 13th day of January 1981."

Plaintiff also, through the Lion Family Trust, controlled Grada. Together they were the vehicles for the control and ownership of the plaintiff's world-wide assets. It was the non-disclosure of this relationship to the Reserve Bank which enabled the plaintiff to abuse his designated status. A foreign national temporarily resident could, as we have seen, import and export currency like a non-resident. But a non-resident would not have been permitted to import *finrand* if it had been known that he was the beneficiary of a discretionary trust.

Some time later, in August 1983, the Elro Trust was formed. Its purpose was to hold shares in Stellenkloof. It first owned ninety percent but ended up holding seventy five percent of the shares. The other twenty five percent were held by Elsa Hall. Its beneficiaries were the plaintiff, his wife and the Lion Family Trust. Stellenkloof became the owner of an estate near Stellenbosch called Nietgegundt which was rechristened Stellenkloof. Stellenkloof was acquired and restored with the aid of R2.146 m borrowed from Lenert. Lenert had the money available because it had sold Leeuwkoppie.

The money used by the Lion Family Trust to buy the shares in Lenert was financial rand. Permission was granted for the introduction of financial rand for this purpose. Since all its shares were owned by the Lion Family Trust., a non-resident, Lenert was an affected person. Stellenkloof was also an affected person, because the Elro Trust which owned its shares was an affected person. This was so because the Lion Family Trust, one of its beneficiaries, was a non-resident.

These circumstances resulted in a number of exchange control contraventions.

Reserve Bank approval for a loan made by Lenert to the plaintiff (a loan from an affected person to a non-resident) was required. Similarly a loan made by

Stellenkloof to the plaintiff would have required Reserve Bank approval. There was a further complication. The money lent to the plaintiff was borrowed by Stellenkloof on the security of a bond passed over its property which, it will be recalled, had been bought with money Lent to it by Lenert. Since both companies were affected persons, the loan required Reserve Bank approval. Stellenkloof's unauthorised borrowing from First National Bank was also unlawful. As an affected person it needed exchange control approval to borrow. The proceeds of the sale of Leeuwkoppie in Lenert's hands would have been finrand, but the transaction took place between the abolition of the finrand on *5* February 1983 and its re-introduction on 1 September 1985. It does not seem to me that the re-introduction of the finrand mechanism made the Stellenkloof property once more subject to finrand restrictions.

The plaintiff's own position was bizarre. He borrowed money from Barclays National Bank (about R300 000) on overdraft. On 7 August 1989, Barclays wrote a detailed account intended for the Reserve Bank asking for condonation for the plaintiff's having borrowed as a nonresident without exchange control approval. The plaintiff was, of course, not a non-resident. He might lawfully have borrowed from the bank without Reserve Bank approval. But he needed for his own purposes, at all costs, to maintain, as against the Reserve Bank, the pretence that he was a non-resident. It may have had something to do with a major transgression of exchange control regulations in which the plaintiff had been involved shortly before.

In April 1989 Nicolaas Heyns and the plaintiff entered into one of their ill-fated business ventures. They acquired a dormant company, Firgrove Industrial Park (Pty) Ltd ('Firgrove'), in which each was allotted one half of the 1230 issued R1,00 shares. Each therefore obtained 615 shares in Firgrove for R615,00. The company borrowed money to set up a manufacturing plant. Grada Corporation

then bought the plaintiff's shares for R1,05m. The price was paid in financial rands introduced on the application of Heyns.

On 15 May 1991 the plaintiff sold his shares to a South African resident for R2.05m. That R2,05m was then paid over by the plaintiff to Stellenkloof to reduce the latter's overdraft. The R2,05m proceeds were designated financial rands which could only have been paid into a financial rand account, or reinvested with Reserve Bank approval. If the Reserve Bank had been asked to authorise investment of the money it would not have permitted it to be used as loan capital in a company. The money would have had to be used to buy equity. What made it worse was that the plaintiff had been paying his living expenses with the Stellenkloof overdraft. He was therefore indirectly using financial rands to defray his living expenses. Such a state of affairs would never have been tolerated by the Reserve Bank.

I wish to make a closing comment. As late as November 1994, by which time the Reserve Bank had repeatedly informed the plaintiff that he was regarded as a South African resident, he writes on behalf of Grada Corporation to a Mr William Collins of Baring Bros (Guernsey) Ltd to 'sell both contracts when the Finrand hits 400 or below." He was still then, in stubborn defiance of the Reserve Bank directives, speculating in financial rand through the (Grada Corporation which he has always controlled).

Manipulating the Reserve Bank

The plaintiff's complaint that the Noseweek defendants insinuated that he had exercised improper influence over Reserve Bank officials to turn a blind eye to

his transgressions of the exchange control laws, is based on the following passages in the Noseweek article.

a. "The story we have to tell is curious and amazing. But even more interesting is what it reveals - yet again - about the incompetence and strange actions of the South African Reserve Bank. What special hold has Dr Hall got over officials of the South African Reserve Bank that makes them indulge his repeated and extremely profitable contraventions of the Exchange Control laws? Do they secretly sympathise with his curious, right-wing views? Is it because of his declared support for the "Buthelezi Option"? Or is it the fact that he appears to have made a successful lifetime career of self promotion as a Nobel Prize nominee? (Failed 1972) If it is his millionaire status that's had the Reserve Bank in awe all these years, the Receiver's move has prompted the ever inventive doctor to claim a new status,- as South Africa's poorest millionaire!"

b. "On 7 January 1981 Dr Hall formally applied for, and was granted, permanent resident status in South Africa. His passport was so endorsed. NB: long afterwards - he claims it was on the advice of the then foreign exchange manager at Barclays Bank, Mr Ticky Gill, who was a guest in his home at the time - Dr Hall wrote a letter to the Reserve Bank in which he solemnly lied that he was not permanently resident in South Africa. Barclays Foreign Exchange Division formally submitted the letter to the Reserve bank on Dr Hall's behalf. Mr Gill has, of course, since become a leading light at the Reserve Bank. Ever since then, until today, Dr Hall has been treated by the Reserve Bank as a non-resident, and been allowed to do repeated finrand deals which, by law, are denied to permanent residents."

c. "As recently as March that same year, at a special meeting held at the Reserve Bank in Pretoria, Hall is recorded telling officials and his own bankers, FNB, that he had "an investment interest" in Grada. John Postmus at the Reserve Bank has confirmed in court papers that he received a formal complaint about Dr Hall's dealings in 1990. He claimed to have investigated the matter but, he said, curiously, he could not remember what he had done about it, or what the outcome had been."

d. "None of the Reserve Bank officials who have been entertained by Dr Hall at his home in the Cape have asked to see his passport to determine his resident status. Not that they need to; he frequently declares himself a South African permanent resident from public platforms. But, as far as the Reserve Bank is concerned, ignorance is, and remains, bliss!"

His unique status for exchange control purposes was the plaintiff's own invention. Although the first defendant suggested that the Reserve Bank connived at and gave him special favours, there has been no convincing evidence of that. What has been shown is confusion on the part of the Reserve Bank. The Reserve Bank and its officials are open to criticism for not having acted more vigorously in clearing it up. That much is certain. However, the first defendant suggested in argument that the Reserve Bank's failure to act against the plaintiff in later years was such a grotesque dereliction of duty that I should infer from it that the Reserve Bank had 'indulged' the plaintiff and by 'treating' him as a non-resident 'allowed' him to 'do repeated Finrand deals.' I think that the evidence, on the whole, is too insubstantial to sustain a finding on a balance of probabilities. There is nothing in the mountain of Reserve Bank paper before me to suggest that, and the only witness from the Reserve Bank who testified

had no personal knowledge of the plaintiff's relationship with the Reserve Bank.

The reasons put forward in the article for the plaintiff having a 'hold' over Reserve Bank officials are facetious. They would have been understood, particularly in a publication like Noseweek, as satirical banter. No one would have believed that the plaintiff could have achieved a 'hold' over Reserve Bank officials for reasons like those proffered. This would have led the reasonable reader to suspect that the question posed in the Noseweek article about the plaintiff's hold over Reserve Bank officials is meant as a sardonic comment rather than as a statement of fact.

However, there is quite a strong suggestion in the article that Mr Gill's appointment to a high position in the Reserve Bank was somehow linked to favourable treatment which the plaintiff received. That in turn may have led the reasonable reader to infer that there was an improper relationship between the plaintiff and Mr Gill, particularly since the passage is open to the interpretation that the plaintiff lied to the Reserve Bank on the advice of Mr Gill. The impression would have been strengthened by the suggestion that Mr Postmus was less than candid about his investigation of the plaintiff's affairs and that the plaintiff entertained Reserve Bank officials at this home in the Cape. I should say in this regard that no evidence was produced of any Reserve Bank officials having been entertained by the plaintiff. But the question is whether the plaintiff can be heard to complain about what is really an assault on the Reserve Bank when he himself neglected no opportunity to attempt to manipulate Reserve Bank officials.

It started with the very first application to the Reserve Bank on 1 February

1982. The application impresses upon the Reserve Bank what an important man the plaintiff is. The relevant passage from the application has been cited earlier. That could only have been intended to impress officialdom and discourage any enquiry into the plaintiff's assertions. The plaintiff's counsel argued that his commercial bank and not the plaintiff himself was responsible for conveying this kind of information to the Reserve Bank. I do not see how this exonerates the plaintiff from complicity. Take the following distasteful name-dropping in June 1983 as an example –

> "The applicant is an extremely influential and wealthy man, is apparently well-known to senators Horwood and Koornhof. We are further advised that the applicant is a personal friend of president Reagan of the USA."

That information would on a balance of probabilities, have come from the plaintiff himself. One need not speculate too long on why the plaintiff told his bankers who his friend are, nor need one speculate long on the motive for conveying information about the plaintiff's powerful friends to the Reserve Bank. The mention of the plaintiff's powerful political friends was calculated to inhibit any Reserve Bank official who might have thought of raising a query about plaintiff's status from doing so.

This was the plaintiff's *modus operandi.* One sees that from a submission to the Reserve Bank in August 1989. The text was approved by Ernst & Young on behalf of the plaintiff. After stating that the plaintiff 'has non-resident status for South African exchange control purposes", the document expands on how much the plaintiff has done to "actively promote South Africa's view overseas" and to "create an understanding of the South African situation in other countries". (That was heady stuff in the eighties). The document then proceeds –

> "As a result of his influence and connections he was accorded a special concession by the authorities who granted him a permanent residence permit without having to complete immigration formalities and the accompanying declaration of assets. He is therefore a non-resident with permanent resident status."

Although there is no name-dropping that time, the obvious influence-peddling is every bit as effective. It was intended to serve the same purpose.

Although, therefore, it might not have been quite correct to suggest that the plaintiff in fact had a hold over Reserve Bank officials, or that he and the Reserve Bank had conspired to transgress exchange control regulations, his own blatantly manipulative conduct in relation to Reserve Bank officials was such that it may fairly be described as an attempt to get a hold over such officials.

In the circumstances I believe that the Noseweek defendants have proved their statements concerning the plaintiff's relationship with the Reserve Bank to have been substantially true. They fell short of proving that plaintiff had established an improper relationship with Reserve Bank officials, but proved that he *tried* by influence-peddling and deception to do so. That is close enough to the truth.

Income Tax - General

The sting of the allegations concerning the plaintiff's income tax evasion is that he –

a. neglected to pay huge amounts of tax to which he had been assessed in the United Stated of America.

b. deceived the Revenue in South Africa.

The United States

The complaint about the statements concerning his failure to pay tax in the United States has been withdrawn. Plaintiff must be taken to have conceded that he neglected to pay U S taxes which he ought to have paid.

South Africa

The statements in the Noseweek article -

> "the doctor may find himself sharing the unique tax status traditionally given to professional prostitutes who are required to pay tax on their illegal earnings ..."
>
> "(he) ... has told the Receiver of Revenue he is really, if the truth be known, a poor man"
>
> "he knew how never to pay tax."
>
> "he has never declared an income or paid tax, here or anywhere,"

read in context were clearly intended to, and did, mean that the plaintiff was obliged to pay lax but unlawfully failed to do so. They would, if untrue, plainly be defamatory. They mean that the plaintiff was and is a tax defaulter in this country and the United States. It has now been conceded by the plaintiff that it was quite true (and in the public interest) to say of him that he has never paid tax although he has been obliged to do so, and has never even declared his income when he should have done so. Despite the harm which admissions like these cause to the plaintiff's *fama*, he has persisted in claiming damages in

respect of certain specific instances of fiscal misconduct alleged by the Noseweek defendants.

These specific instances of misconduct were, prior to amendment, that plaintiff had misled the Receiver by –

i. pretending that he was too poor to pay tax
ii. concealing finrand transactions from which he derived income
iii. disguising income in the form of interest as a capital accrual;
iv. misrepresenting the accounting requirements of an off-shore entity called Grada Corporation.

Having conceded i and *ii,* he continues to maintain that he has been defamed by the statements in iii and iv.

Disguising income as capital

On 6 January 1990 the plaintiff, Nicolaas Albertus Heyns ('Heyns') and others entered into a written agreement concerning the sale of, *inter alia*, Greenstone Industries (Pty) Ltd ("Greenstone"). The agreement (as originally drafted) provided that the purchase price would be R2 m payable in three instalments, the last and largest being R1.3 m on 31 December 1990. It was provided that the outstanding balance would bear interest at 20% per annum compounded monthly. The purchase price was to be allocated first to claims against the company and thereafter to the purchase price of the shares.

The plaintiff then began to have second thoughts about the tax implications of the agreement. If he were to receive interest, he would obviously be liable to income tax. Paying tax is something the plaintiff finds abhorrent. He and his

advisers then began to cast about for a way of restructuring the agreement so that no income would seem to accrue to the plaintiff. The solution which they hit upon was to turn the interest receipts into a capital gain by the expedient of capitalising the interest. Interest was calculated at R693 000. This increased the purchase price of the shares and claims in Greenstone from R2m to R2.693m. For good measure the increased price of R2.693 was stated to be also in respect of a restraint of trade by the sellers, the plaintiff and Grada.

But now there was a difficulty, or, rather, two difficulties. Firstly, Heyns was obviously only prepared to pay interest on so much of the purchase price as remained outstanding. Secondly, Heyns was going to want to deduct the interest paid by him as a revenue expense. The first difficulty was resolved by declaring that Heyns would pay the plaintiff R15 000 per month, supposedly not as interest but as capital redemptions, and would be entitled to a 'rebate' for each month by which payment of the capital was anticipated. This deal was contained in a letter- agreement concluded on the same day. I suppose it could be regarded as an addendum to the main agreement. It had the obvious advantage that it could be secreted from unwelcome attention.

It seems clear that the main agreement had been signed on the morning of the sixth. The letter refers to the signing of an agreement that morning. It is also clear that certain alterations to the agreement were made when all the parties were no longer present. The only reason for the modification of the agreement concluded earlier was to make the Receiver believe, if he should find out, that the interest earlier agreed upon had been capitalised.

The Receiver was not in the plaintiff1s income tax return told about the circumstances. The accrual of R693 000 was presented to him as though it had

simply been part of the purchase price. He could not guess that a part of it was supposed to represent capitalised interest. Had he been made aware of this he could, of course, have applied his mind to the interesting question whether or not one can, by capitalising interest, change its character from revenue to capital. Without the necessary information, he could not begin to apply his mind properly. If the plaintiff had meant to be completely honest with the Receiver, he would have revealed to him what he had done, and taken his chance on the law. As it was, there was a concealment of the material facts surrounding the transaction.

Plaintiff's version of what happened is set out in a letter dated 25 November 1994 to captain Buhrer of the SAP commercial crime unit. It appears from his letter that the plaintiff maintains that the agreement was signed on the evening of Saturday 6 January 1990. The assertion is almost certainly false. Moreover, the plaintiff suggests that the R693 000 payment was really in respect of a restraint of trade. Heyns, he said, was afraid that the plaintiff might market the same quality green serpentine stone from deposits in the vicinity of the Greenstone mine, and was prepared to pay heavily to avoid such competition. As it happened the amount supposedly agreed upon for the restraint was exactly the same as the amount which had originally been interest. One wonders, if the restraint was of such crucial interest to Heyns that he was prepared to pay nearly R700 000 for it, why no value had been placed on the restraint in the original agreement.

The plaintiff's solution to the second problem was more innovative. Heyns might be persuaded to change his stance that the R693 000 was really interest after all. Of course this would cost Heyns money, since if he did this, he would

no longer be able to treat the interest as a tax deductible expense. This meant that Heyns would have to be compensated.

On 5 July 1995, Heyns deposed to an affidavit which he furnished to the SA Police Services. The body of the affidavit is a transcript of conversations between the plaintiff and Heyns. The police investigation diary reflects that certain additional affidavits were filed in the docket on 8 January 1996. Among them is an affidavit by the plaintiff. Annexed to the affidavit are the same transcripts of the conversations forming part of the Heyns affidavit.

The one conversation is revealing. It reveals that the plaintiff offered Heyns rands or dollars to change his version of events. It is not necessary for me to recount the sordid details. If as a result Heyns now stood to lose a tax deduction of R700 000, he would require R350 000 (or US $100 000) to recoup his loss. That is what the plaintiff offered him.

The plaintiff protests that the transcripts are incomplete. He does *not* protest that he or Heyns did not state what is transcribed and annexed to his affidavit, but declares that during the course of the conversations, Heyns "kept on trying to make me say that I should pay him money in exchange for his co-operation, and that I eventually agreed".

There is, therefore, no dispute about the existence of the fraudulent scheme. The plaintiff's excuse is that he did not initiate it. This seems to be errant nonsense. He was the one who stood to gain from the scheme, not Heyns. These events strongly suggest that the plaintiff had no faith in the soundness of his case and

that the first defendant was quite right when he wrote that an attempt had been made to disguise the interest accrual as one of a capital nature.

The accounts of Grada Corporation

The occasion for the plaintiff's complaint that the Noseweek defendants intended to convey the innuendo that the plaintiff had deliberately lied about the accounting requirements of Panama in order to deceive the Receiver, is a passage in the Noseweek article reading as follows:

> "But on 30 November 1992 in reply to the S A taxman's increasingly pressing demand to see the accounts of Grada, CISA, a trust management company in Geneva, well- known in certain off-shore business circles, sent Dr Hall a fax for him to hand to the Receiver. As you would expect, it read: "Grada Corporation is a Panamanian corporation and as such has no accounts. Consequently we regret that we cannot comply with your request." And the Receiver is supposed to believe that?"

Grada Corporation, as we have seen, is a corporation registered in Panama, controlled by the Lion Family Trust of which the plaintiff is a beneficiary. Although Grada Corporation is registered in Panama, it is administered in Switzerland. The first defendant's mock surprise about the Receiver's credulity is not difficult to comprehend. The facsimile message sent to the Receiver can only mean that a Panamanian corporation is not by law obliged to keep accounts. It does not mean that a Panamanian corporation may not keep accounts.

I do not believe that a corporation, no matter where it is registered, can operate without accounts. The office bearers of the corporation cannot walk about with its accounts in their heads. The corporation must keep a record of its income

and expenditure. It must have a record of its assets and liabilities. If it does not have these, it would not be able to function effectively or at all. If new administrators were to take over the corporation, they would not know where they were. it is ridiculous to contend that a large investment company like Grada Corporation can carry on Without accounts. The plaintiff, one feels sure, would not have dreamt of permitting it. He, after all, was the one who would be vitally interested in an accounting. In fact, there are in the papers before the court examples of record keeping by Grada, just as one would expect. The inference that the plaintiff lied about Grada's accounts is in my view inescapable. In the context of the Noseweek article the statements concerning the accounts of Grada Corporation are therefore substantially true.

Leaving America behind

The plaintiff has taken offence at the suggestion in the Noseweek article that

a. he left the USA to avoid paying his taxes; and

b. lied about the reason for his departure from America.

The offending passage reads –

> "When Dr Hall left America in the early Seventies, he announced he had been invited to Germany to apply his inventive genius there. It also happened to be at the time when the US Internal Revenue Service planned to collect some tax from him. (Currently still outstanding $2,1 million plus interest. Total $16 million). Not surprisingly he says he has cut all ties with America and never intends to return."

It became common cause during the trial that tax judgments had been entered against the plaintiff in the USA. Some of the judgments were granted by consent. It appears from the orders themselves that the plaintiff had taken the tax assessments on appeal and then 'stipulated' to the tax deficiencies, which means that the orders were made by agreement. They were signed on behalf of the plaintiff by his attorney, a Mr William Sutton. The two most dramatic of these orders, both dated 1 June1976, cover five amounts to a total of $999 827.67. Two so-called "notices of state tax lien" at the instance of the State of California Franchise Tax Board issued on 2 October 1987 and 9 October 1991 amount to $9 480.08 and $283 080.19. Those were the amounts at the time. Interest keeps accruing. The latter judgments or orders are not relevant to the plaintiff's departure from the U.S.

There is the circumstantial evidence that the plaintiff left his Californian domicile not long before these two biggest judgments were entered against him on 1 June 1976. He himself contended that he left in 1975. That was before the date of the tax judgments, but proceedings must have been instituted well before that. The inference which I was asked to draw was that the plaintiff had left to evade payment of the assessed taxes. I must say that it looks very much like it. The plaintiff has, twenty years later, not yet paid those taxes. It cannot be said, and has not been suggested, that he did not have the means to do so. One must then logically conclude that he had departed from the Unites States to avoid paying. The plaintiff sought to avoid this inference by suggesting that he had always believed that the taxes had been paid by his U.S. attorneys. He was, according to him, dismayed to learn, shortly before the trial, that it was contended that the taxes had not been paid. He dispatched a legal team to America to investigate this disquieting state of affairs. The legal team returned with the news that, although bad weather in Pittsburgh foiled some of their

investigative endeavours, they did discover from an employee of the Internal Revenue Service that no current tax Liability for the plaintiff was shown on their giant Washington computer. Fortified by this discovery, the plaintiff's counsel suggested to the first defendant in cross-examination that he could not say whether perhaps these amounts had not been paid. His answer was that he did not know but that during May 1994 when the information concerning the tax debts was collected, liens which had been established to secure the debts had not been cancelled.

In argument it was also suggested that the plaintiff had rebutted the inference that the debts remained unpaid. I disagree. It is pretty well inconceivable that the plaintiff would not have demanded an accounting from his American attorney if he had left instructions and money to settle his tax debts. The judgments are of great magnitude. Even assuming a rand/dollar exchange rate of RO,75 to $1, a 1 million U S dollar tax liability expressed in rand in current terms would be of the order of R8,5 million. Even if the plaintiff's American attorneys had not been asked for an accounting, they must surely have accounted to the plaintiff on their own initiative. Moreover, an honest man who was genuinely astonished at the fact that his attorney had permitted judgments of more than R8,5 million to remain unpaid, would have contacted him to demand an explanation and an accounting. Plaintiff's legal team conducted all kinds of inconclusive investigations in the United States. They did not speak to Mr William Sutton, the one person who might have been expected to give them useful information. Nor did they contact the State of California's 'lien desk' whose telephone number they had. There is also no suggestion that any attempt has since been made to contact Mr Sutton although, as we all know, the United States is by E-mail seconds away. It is interesting that in a letter from his ex-wife, solicited by the plaintiff, she mentions the fact that the plaintiff's house at

Toro Canyon Road had been sold by the Internal Revenue Service. This, one assumes, would have caused some consternation if the plaintiff thought his tax liabilities had been settled and was bound to have led to recriminations against his attorney. When, in addition to these factors, there is brought into account that the plaintiff chose not to testify, there cannot be any doubt that he had left the United States with the intention of evading payment of his tax obligations.

Although the plaintiff worked for the Hans Grimmig KG., he did not live in Germany. He lived the Life of a country gentleman in England. It seems unlikely that the prospect of working with or for Hans Grimmig was the plaintiff's principal motivation for leaving the United States of America. When, therefore, the plaintiff gave Mr Chet Holcombe of the Santa Barbara News-Press to understand that he was leaving America to work for, or with, a large German corporation, he was not revealing the whole truth. It was not Hans Grimmig K.G. which lured him from America: it was the fiscus who drove him out. By hiding his principal motivation for leaving, the plaintiff laid himself open to the kind of criticism voiced in the Noseweek article. He can, accordingly, not succeed on either of these two issues.

Grimmig's Gripe

There are two complaints associated with the tale told by Noseweek about Dr Grimmig. The Noseweek defendants are said to have conveyed to (heir readers that –

a. the plaintiff fled from Germany to avoid honouring his obligations to Springer Verlag;
b. the plaintiff lied about knowing Grimmig and about having received an advance of 40 000 Swiss Francs.

This is the passage relied upon by the plaintiff –

> "He left Germany without leaving a forwarding address, just as German industrialist and publisher Hans Grimmig (of the massive Springer Verlag) - who had paid him an advance of 40 000 Swiss Francs - was becoming disillusioned with Hall. Grimmig would later come to South Africa in search of his money. Arriving in Cape Town in 1983, he called Hall: 'He denied knowing me and also denied ever having been to Germany', said Grimmig recalling the conversation. '1 feel that such deceitful conduct should sooner or later have legal consequences' ".

This is one area of the Noseweek article where the first defendant's research proved to have been inadequate. There is a corporation called Hans Grimmig GmbH. The man in charge of that business is Dr Dieter Grimmig. He is a son of Hans Grimmig whose name, I take it, the corporation bears. It is common cause that Dieter is alive and well and that Hans died in the early 1960's. The facts, as we now know them, are that Dieter Grimmig, although he is a German industrialist, is not a publisher. He has nothing to do with the Springer Verlag. The idea that he might have had something to do with the Springer Verlag probably originated with an article on the plaintiff which appeared in the Santa Barbara News-Press on 29 December 1975. I t was written by Chet Holcombe. Mr Holcombe's article was relied upon by the first defendant in writing the Noseweek article. Mr Holcombe told his readers that plaintiff had "accepted a position offered by Grimmig KG, Heidelberg, the publisher of his three books on the use of his surgical tools ... "A little later in the article Mr Holcombe wrote -

> "So successful were both sets of surgeon's instruments that they have been used in many countries, together with the Hall textbooks on the use

> of the tools. Springer Verlag Heidelberg is the publisher of his books, while the Readers' Digest and other magazines have told of them".

It is easy to see how a careless reader of this article could have concluded that there was a connection between Grimmig K.G. and Springer Verlag, both of which are said to be the publisher of the plaintiff's books. A careful reader would, on the other hand, have asked himself how two entities could have published the same books and would have tried to clear it up with Mr Chet Holcombe and Dr Dieter Grimmig.

The first defendant testified that he had indeed spoken to Holcombe before writing his Noseweek article in order to satisfy himself that the Santa Barbara News-Press article was genuine. This testimony was dramatically shown to be false when plaintiff's counsel in cross-examination produced an obituary from the same newspaper dated 10 July 1987 mourning the death of Mr Holcombe. Not much turns on this, save that it illustrates the dangers of gilding the lily.

The other documentation on which the first defendant relied in writing the Noseweek article, was a letter from Dr Dieter Grimmig to Heyns recalling his encounter with the plaintiff years earlier. One does not know how carefully the first defendant read the Grimmig letter. It is signed Dipl. Ing. Dieter Grimmig. There is no mention of Hans Grimmig. When the first defendant then telephoned Grimmig, as he claims he did, he would, I presume, have asked to speak to the signatory of the letter, Dr Dieter Grimmig. Had he spoken to a person who identified himself as Dr Dieter Grimmig, he would have - must have - asked him about Hans, the lead actor in the drama. He would then have discovered that the Santa Barbara News-Press article was incorrect. He may also have discovered that, contrary to what Grimmig's letter implied, the plaintiff did not live in Germany but only had an accommodation address there

which was the address of Grimmig's secretary. The first defendant would then not have written that the plaintiff had left Germany. Moreover, if Grimmig had told him what the first defendant pretended he did, the first defendant would not have remained ensnared in his earlier error that Grimmig had anything to do with the Springer Verlag. Again, although the first defendant's evidence in this regard was unsatisfactory and unreliable, nothing much turns on it, except that it illustrates that lilies are best left ungilded.

The evidence that the plaintiff departed without leaving a forwarding address is also a little thin. Grimmig states –

> "By hints from the Sladmore Gallery ... I have learned of Dr Hall's address in South Africa ..."

I am not at all sure that this passage means that Grimmig had to ferret out a forwarding address which had been concealed. Persons at the plaintiff's place of residence in England may have known perfectly well where he was.

The errors – which are attributable to the first defendant's carelessness first in reading and then in checking his sources – are, however, as I have indicated, not material. The sting of the article is that -

a. Grimmig advanced money to the plaintiff.
b. The plaintiff moved away -
    i. without settling the debt.
    ii. without leaving word with Grimmig of where he had gone.
c. When he was traced plaintiff falsely denied having ever met Grimmig.

I must be satisfied that the sting of the article is true. To prove the truth of the facts published by the Noseweek defendants, they tendered in evidence the letter written by Dr Dieter Grimmig to Heyns as well as a later statement faxed by Dr Grimmig on 1 April 1996 at the request of the Noseweek Legal advisers. Dr Grimmig could not be prevailed upon to travel to South Africa for the trial. The second defendant accordingly asked for the statements to be admitted under Section 3 of the Law of Evidence Amendment Act. I overruled the plaintiff's objection to the admission of these documents. My reasons appear from that judgment. Thereupon the plaintiff tendered an affidavit made by the former counsel of the Noseweek defendants concerning a telephonic consultation with Dr Grimmig. That was also admitted in evidence. It was said to show the unreliability of the two Grimmig statements. I am not satisfied that it does. I think, rather, that an analysis of the Grimmig statements together with such other relevant evidence as has emerged, tends to show that the statements, if a little vague here and there, are sufficiently reliable for the purposes of this case. I deal with the component elements one by one.

Not repaying money owed

Grimmig's statement in this regard reads -

> "I herewith confirm that Dr Robert Hall owes me 39,423 Swiss Francs since March 1978 and in addition interest on this amount from that time till today. Dr Hall failed to comply with his obligations from a contract dating January 1976. On the other hand he did not return the money he was paid."

These pointed allegations have not been shown to be suspect. On the contrary, there are indications that they are reliable. When the plaintiff's counsel interviewed Grimmig in Germany at the beginning of 1996, he expressed his

preparedness to prevail upon his client to pay Dr Grimmig the money which the latter claimed was owed to him. Ms Patricia Thomson. the plaintiff's secretary, was present at the interview. She says in an affidavit that counsel's offer to Grimmig to prevail upon his client to effect repayment was intended merely to challenge Grimmig on the foundation of his belief that the plaintiff (and not anyone else) was his debtor. I find his explanation forced. Counsel must have been armed with instructions from his client that the latter had never become indebted to Grimmig. The plaintiffs case seems to be that although it is admitted that Grimmig paid him 40 000 Swiss Francs, he should have looked for reimbursement to the American sponsors of the plaintiff.

On 2 February 1996 Ms Thomson wrote to Grimmig to ask whether he should not have looked to the 3M Co to reimburse him instead of to Dr Hall. There was no reply to this letter. However, Grimmig does in his statement deal with the topic. He says that the arrangement was that he would pay the plaintiff and that the plaintiff had promised him that such amounts would be repaid by "Hall's American sponsors", failing which, he himself would repay any amounts due. Some payments were received from the United States but they ceased when the plaintiff left London during or about 1979. 40 000 Swiss francs were then due.

Mr *Van Den Berg* made great play of the fact that Grimmig did not in his earlier letter mention that the *causa* for the debt had in reality been a guarantee. This statement, he argued, represented a departure from the letter and made his evidence so flawed as to make it unreliable. I do not agree with the submission. It does not help the plaintiff to nitpick. The only way in which he could have seriously challenged Grimmig's evidence, would have been to give evidence himself. I have nothing from the plaintiff's side, not even extracurially, to suggest that Grimmig is mistaken. There is therefore no reason for me to

suppose that Grimmig might in cross- examination have deviated from his statement to such an extent as to reduce its cogency.

Moving surreptitiously

It is clear from the Grimmig letter that the plaintiff did not confide in him where he had moved his residence. It may not have been correct to say that he left no forwarding address at his old residential address but the point is a minor one. The article suggests that he moved slyly owing his employer money and without informing him of his new address. That in its essentials was true.

Denying Grimmig

Grimmig says this –

> "1 have learned of Dr Hall's address in South Africa and have in May 1983 tried to visit him in Hout Bay and to call him to account. But Dr Hall had himself denied. The next day I had him on the phone, but he denied knowing me and also denied having ever been to Germany."

The plaintiff's acknowledgement of Grimmig has varied. To a reporter of Eikestadnuus, the plaintiff recounted that he knew no one by the name of Grimmig. In a long statement to the Department of Home Affairs, however, the plaintiff maintained that he performed investment consultancy work for "a certain Mr Grimmig" while he was living in the United Kingdom. It is apparent from letters addressed by the plaintiff to Dr Dieter Grimmig that they were at one time on quite cordial terms. It has not been explained what could have soured their relationship to the point where - if the plaintiffs version is to be

accepted - Dr Grimmig would have made up the curious story of his attempted visit to the plaintiff in Hout Bay. It is just not the kind of story one invents.

In the light of the plaintiff's ambivalent attitude to his relationship with Dr Grimmig, I do not think that there is anything before me which might lead me to doubt the essential soundness of the two Grimmig statements. I am satisfied that Grimmig's statements are reliable. That being so, I find that the Noseweek article concerning the Grimmig affair was, despite its inaccuracies, substantially true.

Faking Marlene Boesch-Webber's signature

Marlene Boesch-Webber is the secretary and one of the directors of Grada Corporation. On 18 August 1987 she attended a board meeting of Grada at which it was resolved that she be authorised to empower the plaintiff to be the corporation's representative in South Africa. Marlene Boesch-Webber signed a power of attorney giving effect to the resolution. By the time an agreement was concluded on 20 April 1989 between Heyns, the plaintiff, Solvig Bowman and Grada Corporation, the plaintiff had held that power of attorney for 18 months. The agreement was the same one already discussed in connection with the importation of finrand for the purchase of shares in Firgrove. It was pointed out in evidence by the first defendant that the agreement, and a deed of cession executed on the same day, purported to be signed by Marlene Boesch-Webber, but that the signature did not correspond with that on the resolution and power of attorney of Grada. It was not denied in cross-examination of the first defendant that the plaintiff had signed the agreement and the cession. The contention was that the signing of Marlene Boesch-Webber's name had been authorised. The signatures could therefore not be said to have been fakes.

The paragraph in which the statement about the faking of Marlene Boesch-Webber's signature occurs reads as follows –

> "Since the early 1980's the Reserve Bank has known that Dr I-Jail operates his off-shore business interests through a trust registered in Jersey and a Panama company known as the Grada Corporation. He has, from time to time, declared so himself. So transparent is his ownership of the Grada Corporation that he does not even bother to get one of the front directors in Switzerland to sign contracts on its behalf. Instead he brazenly fakes Marlene Boesch-Webber's signature whenever the occasion demands."

The plaintiff's counsel relied on the common law rule that an agent may. with the necessary authority, write his principal's name instead of his own. That is then taken to be the principal's signature. Here we have something different. The plaintiff did not write the name of the principal, Grada Corporation. He wrote the name of the principal's agent, Marlene Boesch-Webber. He held out to the world that this particular agent had signed on behalf of the principal. That was, of course, not true. A different agent, a sub-agent, had signed her name.

There was every reason for the plaintiff to have chosed this way of doing things. It was important that his relationship with Grada Corporation should not appear from the contract. Payment was to be made in financial rands and we know, from what has gone before, that the Reserve Bank would not have given permission for the transaction to proceed if the plaintiffs incestuous relationship with Grada Corporation were made to appear from the contact. It is clear, moreover, from a note dictated by the plaintiff to his typist, that he was careful

not to be identified from the agreement as an agent for Grada Corporation. His choice of Marlene Boesch-Webber's name instead of his own was therefore a concealment which could properly have been described as a fake.

Finally, I should say that I agree with the first defendant that the Noseweek article does not suggest that the plaintiff was signing the contract in fraud of Grada. It does not suggest shameful conduct *vis a vis* Grada, but rather a provocative use of the plaintiff's own authority in and control over Grada.

The Noseweek Iniuria claim

I now turn to a discussion of the three statements said to have been made intentionally to injure the plaintiff and which are alleged to have humiliated and degraded him. Mr Van Den Berg did not press the iniuria claim; but he did not abandon it, so I must deal with it.

Indulging oneself

The remark in the Noseweek article that "he (the plaintiff) would even have you believe self indulgence is an admirable form of patriotism", is a dig at the publicity which had been given to the plaintiffs restoration of the Cape Dutch farmhouse on Stellenkloof and at the opulence of Stellenkloof itself. The comment is directed at the swan lake in the gardens, the waterfall, the flood lit tennis court and the pool with its timber deck. The plaintiff represented it in interviews with journalists as a major contribution to the cultural heritage of the Cape and as a gift to his adopted country. The first defendant said in evidence that he thought the whole thing rather pretentious. Hence the ironic comment. I quite fail to see how this comment could have hurt the plaintiff's feelings. It is

the sort of criticism which a public figure - or one who seeks public attention like the plaintiff does - should accept with equanimity.

Let me suppose that I am wrong in thinking that the words were not injurious. The plaintiff then encounters the difficulty that he did not testify about the injury to his feelings. Instead, he called someone to say that shortly after having read the Noseweek article he, the plaintiff, looked crestfallen. There is no telling what he felt offended about. There were many other, more seriously damaging, statements which he might have taken to heart. I am unable, therefore, to find that the plaintiff has proved any damages here.

Promoting oneself

The plaintiff was nominated to receive the Nobel prize for medicine in 1973 by the American Society of maxillo-facial surgeons on the strength of his supposed contributions to the development of a range of air-driven hand tools used in surgical procedures. The Hall air drill which the plaintiff claims to have invented was at the time of its introduction onto the market a significant advance on equipment used in surgery to cut or shape hard tissue like bone.

There was litigation about the Hall air drill. First of all the U.S Patent Office found that the plaintiff and his then partner, a man called Roth, were entitled to the patent filed by a certain dc Groff, an employee of Aro Corporation which manufactured the tool. The plaintiff and Roth had presented Aro with a list of specifications for an air driven drill which they envisaged. The question before the board was whether their suggestions amounted to a complete conception of the invention, that is to say, whether they had conveyed to De Groff ‘an idea of specific means for accomplishing the desired end.’ The board found that they

had. The appeal tribunal disagreed. It found that the inventive steps were taken by De Groff. He had not been supplied with such detail that he would have been able "without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation."

Dc Groff was therefore held to be entitled to the patent. He was the inventor. It is not as though the plaintiff has ever challenged the correctness of that decision. In evidence in a so-called interference hearing' - a hearing to determine precedence on a patent - the plaintiff deposed that he and his partner Roth had been selling a piece of equipment called a Weber dental hand piece. They felt that this hand piece was not altogether satisfactory, so, using the Weber hand piece as a sample, they approached numerous manufacturers asking them to develop a modified piece of equipment which would better serve the needs of customers. Eventually, after many attempts had failed, they came to Aro Corporation and asked them if they could do the job. They made no suggestions as to the type of motor or brake mechanism, or control lever, flow of air, or type of turbine. The engineering staff at Aro Corporation did all the work.

When, thereafter. Roth's attorney approached the plaintiff with a patent application for him to co-sign with Roth, the plaintiff refused to sign it. He refused because, not having been the inventor, the claim would have been fraudulent. The plaintiff's attorney made his client's attitude perfectly clear in a letter dated 13 November 1963. The relevant part reads –

> I have been directed to advise you that Dr Hall is not in a position to execute the tendered application for the following reason -

1. He is not the inventor, either singly or jointly with Mr Roth, of any of the inventions attributed to him in the tendered specification: and he did not design, devise or otherwise invent the structure set forth in the tendered application.

2. The only patentable inventions or discoveries made by him, either alone or with others, in the field of surgical drills are those covered by the patent application filed in the United States Patent Office on May 26, 1961, (Serial No. 112, 864).

3. In his opinion, if he were to subscribe to the Oath, Power of Attorney and Petition of the application signed by Daniel D. Roth and tendered by you for his signature, he would be committing perjury.

For the above reasons, I have been instructed to direct that you delete Dr. Hall's name from the application. since neither you nor the patent counsel designated therein has any authority, express or implied, to represent him in this or any other patent application.

Very truly yours,

William D. Sutton".

A video recording, twice broadcast on the national television system, made with the plaintiff's co-operation, was tendered in evidence. In it plaintiff is described

as the ‘man who changed the entire course of surgical history’. At one point the voiceover narrator proclaims -

> “Inspired by his dream of surgical revolution, he threw himself into years of painstakingly difficult research and development. The obstacles were many, with little or no encouragement. But finally, the first major breakthrough; and in 1963 success - the completion of the first basic unit”.

There is further talk of the miraculous Hall air drill which ‘carved a name for the inventor in the history of surgery’. When the truth emerged in the course of this trial - that the plaintiff was not the inventor of the Hall air drill, the surgiotme, the orthotome, the neurotome or the craniotome – he was compelled to back down. To salvage what remained of his image, he disclosed-a patent registered in his name for twelve drill attachments so that people might not think he had invented nothing at all.

There are many examples of publication of the statement that the plaintiff had been a Nobel prize nominee. Some of these were made in magazine and newspaper articles. The plaintiff would not be responsible for the occasionally fulsome language, but that he should have seen fit to claim that he had been nominated for a Nobel prize because of his inventive skills, I find breathtaking. The effrontery of the plaintiff’s claim to have invented the Hall airdrill (and other major surgical devices) justifies the Noseweek comment that the plaintiff has made a successful lifetime career of self-promotion.

Striking it lucky

It was conceded by the first defendant that there was no evidence that the plaintiff had been a mediocre dentist. The statement appears to have derived from an utterance by the plaintiff in the video recording made about him and his supposed accomplishments. The plaintiff said that he had not been a good student and had therefore had to work harder than other students. It was probably this utterance which was misinterpreted by the first defendant to mean that plaintiff had himself confessed to being a mediocre dentist.

I shall assume that it is hurtful to say of someone that he is incapable of practising his profession well, particularly if the source of that information is stated to be an admission by that person himself. "Mediocre' means Hof middling quality, neither good nor bad, indifferent, of poor quality, second rate". The epithet is admittedly undeserved. There is no evidence that the plaintiff was a mediocre dentist. The difficulty with this part of the claim is that mentioned earlier: the plaintiff has chosen not to speak of his own pain on reading the offending words. Without having heard his own evidence on his own distress, I am afraid that I cannot help him.

The Argus

The case which survives against the Argus defendants, is that the Argus article states of the plaintiff, directly or by implication, that he is a:

criminal or suspected criminal, and/or

a fugitive from justice, and/or

wanted by authorities or to be arrested by authorities.

This, it is alleged, is evidenced by the plaintiffs photograph; the caption: **WANTED: Millionaire Robert Hall is on the run:** the heading **"American sought for Rl.5m tax debt",** and the following extract from the Argus article –

> "All his records and those of his companies have been seized from the offices of accountants Ernst and Young, Cape Town, by an officer of the police commercial crime unit, who was accompanied by a member of the Receiver of Revenue's staff."
>
> "This was confirmed yesterday by Captain John Sterrenberg, media liaison officer for the police."
>
> "The commercial crime unit is in the process of verifying allegations pertaining to contraventions of the Income Tax Act" added Captain Sterrenberg.".

The defence to these allegations is that the article does not bear the meaning pleaded. It is contended that the words state explicitly, and would have been understood by the ordinary reader to mean, that the plaintiff was wanted or sought by the Receiver of Revenue, was being pursued by the Receiver of Revenue, and was, in a sense other than the literal one, on the run from the Receiver of Revenue.

It was submitted by *Mr Kirk-Cohen* that the word "wanted' could be used in a

variety of meanings. It can indubitably have the meaning contended for by the plaintiff:

> "Want - to hunt or seek in order to apprehend (he is wanted for murder)" (Webster's New Collegiate Dictionary [19741).

The word need not necessarily connote impending or intended arrest, even when used in this sense:

> want - (as **wanted** adj) (of a suspected criminal etc.) sought by the police. (The Concise Dictionary of Current English [1984]).

It can have a broader meaning of being sought for:

> Want, vb (tr. often passive) to seek or request the presence of. "You are wanted upstairs" (Collins Dictionary of the English Language, [19791).

The phrase 'on the run' can similarly be used in a narrow (literal) sense:

> on the run 1: in haste: without pausing: 2: in retreat, running away. (Webster, *supra).*

This phrase, too, has broader connotations:

> a: escaping from arrest: fugitive
> b: in rapid flight; retreating.

c: hurrying from place to place (Collins, *supra)*. According to the ***"Shorter** Oxford English **Dictionary"*** (Third Edition) the word "seek" can have the following meanings:

1. To go in search or quest of; to try to find, look for.
2. To pursue with hostile intention; to go to attack, advance against; to persecute, harass, afflict.

Which specific meaning should be accorded the word must be ascertained by a reading of the article as a whole, and the word in its context. See *Demmers v Wyllie & Others* 1978 (4) SA 619 (D). Where an article is capable of two different constructions, it will be held to have the non- defamatory meaning. See *Conroy v Nicol & Another* 1951 (1) SA 653 (A) at 663C, quoting with approval, *Neville v Fine Art and General Insurance Company* 1897 A.C. 73:

"It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

The decision in *Conroy's* case is not quite in point. The words presently under consideration are defamatory in all their possible meanings. But I do consider that *Conroy's* case is helpful in implying, as I think it does, that if there are shades of defamatory meaning one should not seize upon the darkest one, by which I mean the one that the defendants cannot justify. The caption and headings are perfectly capable of meaning no more than that the plaintiff is on the defensive in an assault by the Receiver. I do not, therefore, consider at any length Mr Van den Berg's argument (and Mr Kirk-Cohen's counter-argument) that one is obliged to consider the reaction of the ordinary reasonable reader

who would have read only the caption and headlines and not the body of the article.

In case I have erred on this score, however, let me say that it seems to me that the plaintiff's counsel tended to rely rather too much on cases, the facts of which are different. One cannot lay down as a general rule that a defamatory headline by itself does or does not give rise to liability. That is so, because the test is the reaction of the ordinary reader to published matter. The reaction of the ordinary reader to a headline will vary from one to another. It will depend on many factors. Say the headline forms part of a street poster. Here, the ordinary reader may not be in a position to satisfy his curiosity by reading the advertised article. Or it may advertise a newspaper that he does not normally read. The danger that the impression left by the poster may be the only one is very real. Or take the case of text giving an innocent meaning to a defamatory headline where the text is buried so deep in the article or is so obscure that an ordinary newspaper reader might overlook it. Here again, the danger of the ordinary reader being left with the impression created by the headline alone, is very real. But that is not to say that, as a matter of law, a *prima facie* defamatory headline may be read apart from the body of an article from which it is apparent that no, or a lesser, defamatory meaning was intended. All that one can say is that whether or not the ordinary reader would have read a headline on its own, depends upon the circumstances, one of which is the accessibility of the text.

In casu, I think that the text can be said to have been readily accessible. I do not believe that the ordinary reader of the Argus article would have read only the headlines. If the headlines of the article caught his attention - and headlines are there, after all, to guide newspaper readers to what interests them - he would have read the text which was not long, difficult or tucked away somewhere. If

the headlines interested him so little that he did not bother to read the text, he would not, I am sure, have remembered them for longer than it took him to put the newspaper down. His appreciation of the plaintiff's *fama* would not have been altered.

The decisions in *Kritzinger v Pekorporasie van S.A. 1981 2 SA 373 (0)* and *English and Scottish Co-Operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd 119801 1 KB 440 (CA)* do not in the unqualified form contended for by Mr Van den Berg "support the contention that the heading in isolation could sustain an action, regardless of whether the text was substantially correct." They are, at best, examples of circumstances where an ordinary reader would have been so influenced by the heading that it would have coloured the rest of the article.

The text of the article makes it quite clear that the plaintiff is not stated to be in physical flight. No mention is made of a departure by the plaintiff. It would immediately have been apparent to the reasonable reader (who must be supposed to know a little about what sells newspapers) that if there had been a physical departure by the plaintiff, that would have been the sensational event which would have received the most coverage. Further, the text of the article makes it clear that it is the Receiver who is after the plaintiff's blood. He laid a charge with the commercial unit of the South African police. The police acted in response to that charge. It is not said that they suspect the plaintiff of anything. The Receiver is the one who suspects the plaintiff of having contravened the Income Tax Act. The reader is thus given to understand that the plaintiff might have committed some statutory offence. He would undoubtedly infer from the seizure of the plaintiff's records and those of his companies that the Receiver regards it as a statutory offence of some gravity. Perhaps he would think to

himself that the Receiver was being excessively cautious because there was a large amount of tax involved and because a 'surety' for the tax had not materialised. He would have concluded that the plaintiff had got himself into trouble over unpaid tax. The Receiver was now getting the better of him. The Receiver was on the offensive while the plaintiff was in retreat. I agree with Mr Kirk-Cohen that a reading of the article as a whole makes it clear that the word "wanted" is not used in the sense of evading capture or arrest. The 'pursuit" is that of the Receiver and not that of the South African Police Services.

I agree, also, that the words "on the run" were in the context of the article used in their metaphorical sense. The plaintiff was on the run, in the sense that, although he could be found, he was conducting his affairs in such a manner as to evade one who had hostile intentions. An appropriate analogy would be a debtor who alienates his assets so as to evade his creditors. Such a person is "on the run" from his creditors. The words are used in the sense that plaintiff - ostensibly a wealthy man - is evading his obligations to the Receiver in the manner set forth in the article: he had been assessed; he had promised a surety bond; none had materialised. In the circumstances, and in the sense intended by the article and understood by the average reader, plaintiff was pursued by the Receiver, wanted by the Receiver and on the run from the Receiver.

The Argus defendants submitted in the alternative that even if the words complained of were to be understood in a non-figurative sense, they were true since the plaintiff was a suspected criminal and was and is a criminal and a fugitive from justice both locally and internationally. In the light of the view which I have taken - that the Argus defendants' principal submission is correct - it is not necessary for me to devote time to the alternative argument.

The Argus defendants relied on two sets of circumstances for the truth of their assertion that the plaintiff was (figuratively) running away from the Receiver. They concern two interlinked undertakings given to the Revenue. The plaintiff who, it was thought at the time, was in possession of R1.6m worth of Krugerrands undertook not to dispose of them until he had had a surety mortgage bond registered over the immovable property of Stellenkloof. He was a party to a false assurance to the Receiver that he had not disposed of, and would not dispose of, the Krugerrands. Then, having disposed of the Krugerrands, he failed to have the surety mortgage bond registered.

The Krugerrands

Stellenkloof subdivided its property and during February and April 1993 received the purchase prices of altogether R1.68m for three subdivided portions. The proceeds were deposited not, as one would have expected, into Stellenkloof's banking account but into an account of the plaintiff himself. There are several disquieting features of this transaction.

An amount of R1.133m in respect of the sale of two portions of Stellenkloof was received on 12 February 1993. Three days later the purchase price of 700 Kruger rands from the Cape Gold Coin Exchange was debited to the plaintiffs account. On 17 February the plaintiff bought another 400 Kruger rands from the Cape Gold Coin Exchange. On the same day he made application to the Reserve Bank via Rennies Travel for an additional travel allowance for an overseas trip commencing on 27 February 1993 and ending on 28 April 1993. As is evidenced by his passport, the plaintiff left Cape Town on 27 February 1993. He arrived back in the country some time during March 1993.

On 24 March 1993 the plaintiff paid Investec R34 000 for 50 Krugerrands. He received into his Stellenbosch account an amount of R469 302 in respect of the sale of a portion of Stellenkloof on 21 April 1993. The day after that he paid Investec R448 000,00 for an additional 400 Krugerrands. On 19 May 1993 the plaintiff applied to the Reserve Bank via Rennies Travel for an additional business allowance stating that he would depart on 2 June 1993. On 25 May 1993 he faxed Investec, saying that he would collect the 450 Kruger rands being held for his account two days later. There are no stamps in the plaintiff's passports indicating that he left the Republic on or about 2 June 1993. However, I agree with Mr Kirk-Cohen that the plaintiff probably had another passport which he has not disclosed. There is no indication of what became of these Kruger rands. No documentation concerning their sale has been discovered by the plaintiff. The inference that the coins were taken overseas is in the circumstances a strong one.

On 27 July 1993 there was a meeting with the Receiver of Revenue, attended by the plaintiff, Mr Clegg, the tax specialist of Ernst & Young, the plaintiff's accountants and auditors, and Mr Krige, a professional assistant of that firm. The purpose of the meeting was to explain to the Receiver that the plaintiff was unable to pay the tax to which he had been assessed and to ask the Receiver to defer payment of the tax until after the hearing of an appeal which the plaintiff had lodged.

At the meeting, Clegg explained to the Receiver that the plaintiff had no assets in South Africa. In the plaintiffs presence he advanced the suggestion that the proceeds of the sale of portions of Stellenkloof had reduced the company's overdraft. This as we now know was not true. It was at this point that the

Receiver revealed that he knew that the plaintiff had purchased Krugerrands with Stellenkloof's money. This revelation caused consternation in the ranks of the plaintiff's advisers. A hurried meeting between Clegg and the plaintiff was held in seclusion, whereupon the meeting was informed that Stellenkloof would, as security for the plaintiff's tax debt, give a surety bond by way of a second mortgage over its property. An unequivocal undertaking was given to the Receiver that the bond would be registered within two weeks, and that, pending registration of the bond, there would be no further sale of any Krugerrands. Mr Cowdry, a conveyancer from Syfret, Godlondton and Fuller-Moore, was instructed to see to the registration of a second mortgage bond as soon as possible.

On 4 August 1993 Mr Krige wrote to the Receiver on behalf of the plaintiff, advising him that the plaintiff had received on behalf of Stellenkloof an amount of R1,681m all of which he had invested in Kruger rands on 15 and 17 February. 24 March and 22 April 1993. He assured the Receiver that there had been no further sales or purchases of coins. When Mr Krige at the suggestion of the Receiver attempted on 4 January 1994 to audit the Kruger rands, he was shocked to find that contrary to the undertaking given to the Receiver, 1 240 of the coins could not be accounted for. Investec held 100 of the Kruger rands on behalf of the plaintiff, not on behalf of Stellenkloof, whilst 260 coins had been deposited at Nedbank.

Plaintiff has, as I noted earlier, never explained the disappearance of these coins. If he had disposed of them before the meeting with the Receiver on 27 July 1993, he would, of course, have lied to the Receiver. If he had disposed of them after the meeting, he would have breached his undertaking to the Receiver in the light of the fact that the surety bond had by 4 January 1994 not yet been

registered and has, in fact, as we shall presently see, to this day not been registered.

The explanation for the disappearance of some of the coins which was given to Mr Krige by the plaintiff's wife was that 965 of them had been given to her in settlement of a debt. The difficulty with Mrs Hall's assertion is that the plaintiff had not in any of the contradictory statements of assets and liabilities which he had given to the Receiver on various occasions declared this debt as a liability. His wife had not declared it as an asset. It was not suggested in cross-examination how the plaintiff would have contracted such a large debt to his wife. Eventually, when the plaintiffs view was sought, he told Krige that the remaining 275 Kruger rands (1240 minus 965) were sold in September and October W9,3 by Stellenkloof at a profit. The R345 000 sale proceeds were not accounted for. I have been shown no proof of such sales.

Mr Tredoux argued on behalf of the plaintiff that the Receiver could never have laid claim to the Krugerrands which were Stellenkloof's property. That is true; but it is the plaintiff's attitude to the Receiver which is under the spotlight. There is no reason to believe that, had the plaintiff wanted to, he could not have obtained the necessary funds from Grada to give security or even satisfy the Receiver's claim pending his appeal. Yet he was prepared to lie and cheat in order to forestall payment of the tax to which he had been assessed. That is the conduct of a man who is figuratively evading the fescues, a man who is running away from the Receiver.

The surety bond

Mr Cowdry of the firm Syfret Godlonton Fuller-Moore Inc testified that the

plaintiff who was his client at the time, in August 1993 instructed him to see to the registration of a surety mortgage bond over the immovable property of Stellenkloof in favour of the Receiver of Revenue. The bond was to secure the plaintiff's indebtedness to the Receiver in respect of income tax to which he had been assessed pending a decision by the Income Tax Special Court. The bond was to be for R1.6m but what with interest accruing on the amount, discussions ensued as to whether the amount of the bond should not be increased.

Shortly thereafter the plaintiff instructed Cowdry to stop work on registering the bond. Plaintiff had changed his tax advisers. Their advice was to withhold registration. Ernst & Young were embarrassed by this development in view of the undertaking given to the Revenue that a bond would be registered and on 27 January 1994 advised the Revenue of these new developments. On the same day, the plaintiffs new advisers concluded that registration should proceed, after all, and the plaintiff advised Mr Cowdry accordingly. On 19 February 1994 a draft bond for R1.6m was forwarded to the Receiver for his approval. On 22 March 1994 the Revenue approved registration of the bond. On 2 May 1994 the bond documents were lodged for registration. At the last moment a problem with regard to Reserve Bank approval arose. Stellenkloof as an affected company, could not borrow money locally without Reserve Bank approval. By August 1994 when the new tax consultants resigned, the bond had not yet been registered. Then documents were lost in the post and the whole registration process had to start over again. Before it could get under way the plaintiff's latest tax adviser wrote to the Receiver in May 1995 declining to give any surety bond at all. The last letter on Cowdry's file is a threat from the Receiver on 15 September 1995 to sequestrate the plaintiff.

We have not been told what the advice from the latest tax adviser could have

been. Could it have been that agreements count for nothing? That one may break one's word with impunity? Of course, the Revenue has its remedies, but in the meantime three years have gone by and the plaintiff's financial position is precarious. He is, as he has confessed, insolvent. Where does that leave the Receiver? Exactly where plaintiff and his latest adviser intended him to be: in a much weaker position than he would have been if plaintiff had, like an honourable man, kept his word.

The history of the registration of the bond is a deplorable one. The plaintiff had agreed to have a bond registered. He was bound by that agreement. He received an important *quid pro quo* for it. The Receiver agreed not to enforce the assessment immediately as he was entitled to have done. There is no doubt in my mind, having regard to this sorry history, that the plaintiff could be said, figuratively, to have been running from the Receiver. He was evading his obligations. It does not help to protest, as the plaintiff does, that he broke his word on legal advice. He is still on the run and the Receiver is after him.

The public interest

The plaintiff is a man who has sought and attained publicity. He has actively promoted an image of himself as a famous millionaire who invented the Hall air drill, and other important pieces of medical equipment. There can be no question that the plaintiff has sought the limelight, and has actively promoted himself as being a high-profile, highly principled, wealthy man with a social conscience. He has occupied public platforms, publicly supported political campaigns, and promoted himself whenever the opportunity arose. He played a quasi-political role, promoting himself as a personal friend of former president Reagan, calling himself an unofficial ambassador to South Africa and an

advisor to the Reagan administration on South Africa. The plaintiff has thrown away the shield of privacy to the same extent as a public figure or politician.

Mr Van den Berg argued that the Noseweek defendants should not be permitted to raise long forgotten scandals in order to discredit the plaintiff. He argued that the Grimmig episode and the plaintiff's unhappy departure from America lay forgotten in the mists of time and that no one had any interest in bringing them back into the light.

I agree with Mr Kirk-Cohen that our law will not permit buried misdemeanors to be exhumed where a plaintiff has reformed and put those misdemeanors behind him. Everyone is entitled to another chance. That is clearly morally just. The plaintiff has, however, not started a new life. He has continued on the same road as before. He cannot strut on the public stage and then be heard to say that it is against the public interest to be told what kind of a man he really is.

It was also argued on behalf of the plaintiff that even public figures have a right to have some aspects of their lives kept private. I agree. That proposition is well established. But it applies to truly private matters, not to dealings with public bodies and creditors.

Conclusion on the merits

The plaintiff has, in my view, not succeeded on any of the remaining averments of defamation which remained in issue. In each case the defendants have managed to prove, on a balance of probability, and by dint of much sustained effort, that what was said about the plaintiff was substantially true and in the public interest. The plaintiff's claims must therefore be dismissed.

The costs

a. Generally

The plaintiff has been unsuccessful. There is no reason to deviate from the rule that the loser pays the costs of his opponents. All the defendants' counsel have asked for costs on a punitive scale. Their pleadings have been amended to include such a prayer. It is to a consideration of the merits of that request that I now turn.

The plaintiff, as he issued summons, knew that the allegations made against him by the first and second defendants in the Noseweek article were true. If he issued summons with any hope of success in the action, which I must suppose he did, it was based on the expectation that the defendants would be unable to prove that the statements made about him were true. His approach was, I realise that the things you have said about me are true, but if you do not manage to prove them, I shall nevertheless recover very large damages against you.' The plaintiff then set about making it as difficult as he reasonably could for the defendants to prove the truth of their statements.

The plaintiff's attitude to the litigation is encapsulated in the following passage which appears in the answering affidavit of his attorney, Mr Anastasios Vavatsanidis, in the application for security for costs:

> "The defendants in this matter published defamatory statements of and concerning plaintiff and thereafter set up their defence on the basis that the allegations which were published were not only true but also

> published in the public interest. The onus in this regard is on defendants. Plaintiff is accordingly perfectly entitled to put the defendants to the proof of the truth of the allegations which they published and of such ancillary facts as they have elected to introduce. While it may be so that defendants would have found it more convenient if plaintiff made factual admissions in order to prove their case they cannot seriously argue that this is a procedural right. Accordingly it is respectfully submitted that plaintiff had every right to put defendants to the proof of the facts contained in the Court records of the United States of America."

I find it difficult to believe that the plaintiff embarked on this defamation action to protect his *fama.* He knew that his public image was the result of a carefully contrived and sustained deception. He sued not to salvage his reputation but to sustain a colossal fraud. The whole exercise was a reckless gamble. It has been a long, costly and futile trial. I have repeatedly asked myself in the course of it why the action had ever been brought. It seems a self- destructive thing to have done. It has engaged resources on a huge scale. It has placed a very severe and quite unnecessary burden on all the defendants. There never was any real dispute on the facts. They were barely challenged. In most cases they could not have been, yet the plaintiff persisted in litigating with a psychopathic ruthlessness as to the outcome. It is not even as though the plaintiff was taken by surprise. He was from the outset in possession of the same evidentiary material as the defendants. This kind of litigation ought, in general, to be discouraged by a special and punitive costs order.

The cost to the Noseweek defendants has been ruinous. In the end, the plaintiff abandoned many of the allegations against the Noseweek defendants, but not before the trial had been made much more expensive than it need have been. I

think, in this regard, particularly of the falsehoods conveyed to the department of Home Affairs in the plaintiff's application for permanent residence. The evidence concerning this was relevant with regard to the aspersion cast upon the plaintiff that he had "a way with the truth." The plaintiff, in that application, answered *no* to a question whether he had left any debts abroad and *no* to a question whether he had ever been subject to a civil action. The Noseweek defendants then sought to establish that civil judgments for the non-payment of US taxes had been granted against plaintiff when he lived in California. These were obtained pursuant to civil actions which had been taken against him. At first, and for quite a while, plaintiff declined to admit that he was the judgment debtor described in the tax judgments and liens as Robert Milton Hall. Eventually the evidence that the debtor could have been none other than the plaintiff became so overwhelming that he was compelled to concede that the judgments had been granted against him. In November 1995, before the trial started, he had set Out his version of why the American judgments remained unpaid in a statement to the Department of Home Affairs. It was that his attorney had failed him. The attorney failed to pay the more than one million US dollars required to discharge the debts. The story is silly, but that is not the point. The point is that the plaintiff never believed that there was any doubt about the identity of the debtor in those judgments. I do not believe that the strategy of failing to make admissions where admissions are due in a civil trial is a procedural right. Far from it. The refusal to make reasonable admissions may be, and in this case was, an abuse of the process of the court.

Unfortunately, the Argus defendants were also involved in all of this. It will be recalled that the Argus defendants were sued on the footing that they were jointly responsible for the Noseweek article. This, I cannot help thinking, was major tactical blunder on the part of the plaintiff. By the time the Argus

defendants could extricate themselves from the welter of complaints made against the Noseweek defendants, it was too late. The costs of preparation (which) were enormous) had already been incurred. Besides, the Argus defendants were by then trapped in the hearing. Their costs were appreciably increased by having to listen to days of evidence and argument which had nothing to do with the plaintiff's complaints about what they had published.

Then there was the abandonment of the allegation that the Argus defendants had said (or implied) that the plaintiff unlawfully dealt in financial rands. That came late in the day. The averment had put the Argus defendants to an immense amount of preparation. There were mountains of Reserve Bank documents to work through. Some (too many in my view) found their way into a bundle of Reserve Bank documents which was handed up. Where one has this kind of extensive pre-trial research and preparation which then turns out to have been done in vain, only an attorney and client costs order can be adequate recompense. The Argus defendants were also obliged to sit through a long application by the Noseweek defendants against the Receiver of Revenue for access to certain of his records. That application was in my view ill-conceived, but the fact remains that the Argus defendants would not have become reluctant spectators of that skirmish if they had not been ill-advisedly joined in the action. The plaintiff had a rather better case against the Argus defendants. I say this because it - or the part of it which remained after amendment - depended on the interpretation which a court might give to the headings and caption (read with or without the text) of the Argus article. Had that been the bone of contention from the beginning I would not have thought of ordering attorney and client costs against the plaintiff. Instead, and quite apart from dragging the Argus defendants into the Noseweek controversy about exchange control, the plaintiff sought to blame them for having said that he had transgressed exchange control

regulations when the article plainly said exactly the opposite. It said that the plaintiff was able to indulge in exchange transactions because he had been specifically permitted by the Reserve Bank to do so.

On 22 August 1996 the plaintiff proposed amendments to his pleadings. They were only finally moved on 27 August, but from 22 August everyone proceeded on the assumption that they would be granted. Their effect has been described at the beginning of the judgment. They considerably narrowed the issues. I think that the plaintiff ought to be given credit for this.

I am satisfied that the plaintiff should be ordered to pay the costs of the third to seventh defendants on the scale as between attorney and client up to and including the hearing on 22August 1996. This order applies to –

a. the costs of the application for absolution.
b. the qualifying fees of the expert witnesses Salmon and Morris.

The costs consequent upon the amendments moved on 27 August 1996 are to be paid by the plaintiff on the party and party scale.

Onus of Proof

The defendants at the outset of the trial launched a major application to attempt to persuade me that the *onus* of proving truth in the public interest, after the decision of *Holomisa v Argus Newspapers Ltd,* no longer rested on them. The application failed. The costs were reserved. All the defendants supported the contention that the law had changed. All were therefore lose. I see no reason

why the costs of this application should not follow the result. The plaintiff employed two counsel in the trial. This was reasonable. The interlocutory application was complex and involved considerable research and analysis. I think that it was therefore also reasonable for the plaintiff to employ two counsel in the application. The first to seventh defendants should jointly and severally pay the plaintiffs costs.

Application against the Receiver of Revenue

The first and second defendants lost the application and were ordered to pay the plaintiffs (and the Receiver's) costs. The plaintiff submits that three trial days were lost due to the application and that the Noseweek defendants should be ordered to pay the 'wasted' costs. I do not understand the submission. The only costs that were 'wasted' were those of the Argus defendants who were not parties to the application. They would have been entitled to costs from the plaintiff under the general costs order for being compelled to attend court while the Revenue application was being argued. However, the Argus defendants, although they were not parties to the application, did file papers indicating (heir support and contributing to the case of the Noseweek applicants. In the circumstances I think that they should pay such of their own costs as relate to the Revenue application, which would include the costs of attending court while (ha application was argued.

Application to compel trial particulars

Plaintiff requested trial particulars on 28 February 1996. When, by 22 March 1996, two days after the start of the trial, these particulars had not yet been delivered, the plaintiff first set down an application to compel. The application

was not proceeded with because the Noseweek defendants undertook to provide the particulars by five o'clock on that day. The Noseweek defendants, it seems clear enough, should in the circumstances pay the costs of the application to compel.

The first Reserve Bank application

The application for access to documentation in the possession of the Reserve Bank was necessitated by the provisions of Section 33 of the South African Reserve Bank Act 90 of 1989. The order was granted by consent. Costs were agreed to be costs in the cause. The plaintiff is to pay those costs on the party and party scale.

The Second Reserve Bank application

The next Reserve Bank application was more problematical. I he application was settled. All the parties agreed to an order that costs of the application be costs in the action. When the plaintiff by amendment removed from the field of contention the allegation that it had been said of him that he had illegally dealt in financial rands, the costs order was, at the insistence of the Argus defendants, recalled. They were apprehensive that they might lose what remained of the action against them, while at the same time having won the financial rand battle by default. This would mean that, in having to pay the costs of the action, they would be obliged to pay the costs of an application in relation to a distinct issue on which they had been successful. The plaintiff seized the opportunity to argue that, despite its earlier acquiescence in the costs order, the Argus defendants should be ordered to pay the costs. The costs order was not really recalled for the benefit of the plaintiff, but for the peace of mind of the Argus defendants

who might have found themselves in an inequitable situation because of the plaintiff's amendments. In my view the earlier order that the costs of the application were to be costs in the action should simply be reinstated. The plaintiff is therefore to pay such costs on a party and party scale.

The next question is what those costs should comprise. An advocate and an attorney for the Reserve Bank remained in attendance throughout the two days of the witness Lautenberg's consultations and testimony. The witness, however, was in the nature of an expert witness on exchange controls and the policy of the Reserve Bank. He had no knowledge of the facts in dispute. I do not think that it was necessary to protect him so assiduously. If the Reserve Bank thought it proper as a precautionary measure, it should pay the costs itself. The costs which have been ordered to be in the cause do not, therefore, include the costs of legal representation of the Reserve Bank witness on the second day. The costs of the first day would in any event have been incurred and are included.

The Hearsay Applications

a. The foreign judgments

The first of the hearsay applications was an application by the Argus defendants in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988 to admit in evidence certain documents listed in a schedule to the notice of motion. The documents in the schedule were the so-called American judgments as well as documentation in connection with litigation between Peggoty Ann Henriques and the plaintiff. Finally, there was the affidavit deposed to by Mr Michael Venter, a representative of the Receiver of Revenue in Bellville.

The application in respect of the American tax judgments was necessitated by the recalcitrance of the plaintiff who refused to admit them. His attitude was that he was "not required to make any admission which would assist the applicants in discharging the onus which rests upon them at the trial". In taking up this attitude he knowingly ran the risk of attracting criticism from the bench on the conduct of his case. In a civil trial parties are expected to co-operate in eliminating disputes. A failure to act reasonably in this regard may attract an adverse costs order.

The concern of the third to seventh defendants with the United States tax judgments arose, of course, from the plaintiff's allegation that they had made common cause with the Noseweek defendants or had assisted in spreading the Noseweek defamation. Since no evidence on either of these aspects was presented to the Court, absolution was ordered. This meant that these issues as far as the Argus defendants were concerned, fell away quite early on 26 March 1996. That part of the application dealing with the admission of the affidavit of Venter nevertheless lived on. At quite a late stage, on 5 August 1996, the Noseweek defendants joined as applicants in the hearsay application. They were clearly entitled to join. They had an interest in the issues. Only the affidavit of Venter was then still in contention. On 28 August 1996 the plaintiff abandoned its remaining opposition to the hearsay application by conceding that the affidavit of Venter could be admitted in evidence. The concession was made since there no longer appeared to be any reason for opposing the admission of the affidavit. It had, in the light of other and better evidence tendered in the course of the trial, become unimportant.

I consider that I should, in the light of the plaintiff's attitude to the conduct of

the litigation, order him to pay the costs of this application on the scale as between attorney and client. His only defence against the charge that he had left tax judgments behind him in the United States, was the forlorn hope that the judgments might not be proved against him. The same applies to the Henriques judgment. The only exception is the affidavit of Venter in respect of which the plaintiff had an arguable case. That issue, however, formed a small part of the application and its presence cannot save the plaintiff from the order which I propose. There are certain qualifications to the order. The first and second defendants can obviously not get any costs until after 5 August 1996. The applicants, the Argus defendants, annexed to their founding affidavit documentation which already formed part of the record and could conveniently have been accessed in other files. I refer to the documents annexed from pages 31 to 113. The same applies to annexure JFL6 annexed to the Argus defendants' replying affidavit at pages 144 to 164. Since it was not necessary to copy and annex these documents, the costs are disallowed.

b. The Grimmig statements

The Grimmig hearsay application was a minor tussle between the Noseweek defendants and the plaintiff. The Noseweek defendants walked off with the spoils of victory. However, the tussle did not end ignominiously for the plaintiff. He ought not to pay the costs of the application on any but the ordinary party and party scale.

The Security application

The security application was brought by the Argus defendants against the plaintiff for an order directing him to furnish security for the applicants' costs.

The application was unsuccessful. The costs were ordered to stand over. The plaintiffs conduct in the security application, it seems to me, is open to serious criticism. His opposition to the application was characterised by the evasiveness and secretiveness concerning his financial affairs which has been conspicuous in his conduct, not only during this trial, but during his entire sojourn in this country. He starts his opposition by registering the complaint that he was given less than a week to deal with the application, and in particular to deal with the expert evidence of Mr Salmon, an accountant, who testified on the plaintiff's solvency. The answer is given by a Mr Vavatsinides, the plaintiff's attorney, in these words:

> "In the circumstances it has simply been impossible for plaintiff to deal with the affidavit of the expert witness Mr Salmon as any expert briefed by plaintiff will have to read not only the expert report but also the source documentation on which the said report is based and which runs to many thousands of pages. Such experts as I have approached on plaintiffs behalf have simply been unavailable to attend to the matter at such short notice".

The affidavit goes on to say that, should the aspect of the plaintiff's insolvency be relevant, which is not admitted, the application ought to be postponed to enable the plaintiff to procure an expert opinion. It was, and this became perfectly clear later on, not necessary for the plaintiff to consult with experts to decide whether or not he was solvent. Since the plaintiffs assets, by his own account, are valued at no more than R50 796, the question whether he was able to pay to his wife a loan debt of R1.79m and to Lenert a loan debt of R1.3m seemed a simple one to answer. The application was nevertheless stood down to allow the plaintiff time to deal with the allegations with which he had said he

did not have time to deal. On 21 August 1996, nine days after service of the founding affidavit, the plaintiff produced a one and a half page affidavit in which he stated that he was prepared to concede that he might be commercially insolvent and might not be able to pay the defendants' costs from his own resources in the event of his claims being dismissed. That was all that was required in the first place. Instead, the plaintiff, as he has so frequently done, threw up a smokescreen which included attacking the Argus defendants for supposedly being unreasonable and wasting the court's time.

The answering affidavit also made the point that the above concessions were made "as it is impossible for me, within a matter of a week or two, to properly account for my current financial position". That kind of response is not a candid one. As I indicated above, the dispute was not about the value of his assets, in which event it might have been a complex matter to determine. The dispute was about whether or not he has any assets at all.

It is not an invariable rule that a litigant who fails to obtain the desired relief should pay his own costs. There are cases where the successful opponent may be ordered to pay his own costs. This in my view is such a case. The plaintiff's conduct has been such that I consider that the Court ought to express its displeasure by depriving him of his costs of the security application. Each party therefore pays its own costs. The plaintiff must, as a result of having joined the Noseweek defendants and as part of the general costs order, pay the costs of the Noseweek defendants which were wasted by their having to attend court during the hearing of the application.

There has been a great deal of paper handed up which was not, as things turned out, referred to in evidence. Much of it was of marginal relevance, and a great

deal of it was repetitious. It would not be fair to saddle other litigants bar those who introduced the paper with the costs of these excesses. There were many more unnecessary documents and duplications than the ones I identify. I purport to do no more than make a rough and ready assessment.

Orders

1. The plaintiff's claims against the first to the seventh defendants are dismissed.

2. The plaintiff is ordered to pay

    (a) on the scale as between attorney and client -

        i. the costs of the first and second defendants which are to include the costs of the employment of two counsel from *5* - 22 August 1996;

        ii. the costs of the third to seventh defendants up to and including the hearing on 22 August 1996;

        iii. the qualifying fees of the expert witnesses Salmon and Morris;

        iv. the costs of the application for absolution;

        v. the costs of the first application under the Law of Evidence Amendment Act of the first to seventh defendants except for the costs of pages 31 - 113 and 144 - 164 in respect of which the costs are disallowed.

    (b) on the scale as between party and party the costs of -

        i. the third to seventh defendants after 22 August 1996;

        ii. the amendments moved on 27 August 1996;

iii. the first Reserve Bank application;

iv. the second Reserve Bank application which include the costs of the Reserve Bank up to and including the first day of attendance of Mr Lautenberg;

v. the second application under the Law of Evidence Amendment Act.

4. The parties are to pay their own costs of the application for security for costs.

5. The defendants are ordered to pay, jointly and severally, the costs of the plaintiff in the application to determine the incidence of the onus, such costs to include those incidental to the employment of two counsel.

6. The first and second defendants are ordered to pay the plaintiff's costs of the application for trial particulars dated 28 February 1996.

7. The costs of the third to seventh defendants consequent upon the Revenue application are to be paid by themselves.

8. Execution of the costs order granted in favour of the plaintiff in the Revenue application is stayed until –

a. the costs order in favour of the first and second defendants have been taxed; or

b. the Court orders otherwise.

8. The costs of perusing and copying the following documents are disallowed to the litigant who introduced the documents. Other litigants are entitled to their fees for perusing such documents on the party and party scale irrespective of any general costs order.

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J H CONRADIE