REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: 6206/01

In the matter between :

HT GROUP (PTY) LTD Plaintiff/Respondent

and

D HAZELHURST First Defendant/
First Excipient

INDEPENDENT NEWSPAPERS (PTY) LTD Second Defendant/
Second Excipient

JUDGMENT

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1 The Plaintiff is a funeral company. It trades under the name, "Doves". Its motto is, it would seem, "We Care". The Plaintiff had a contract with the City of Johannesburg to bury paupers. On 8 June 2001 The Star newspaper published what it described as an "exposé"

which revealed, in unflattering terms, details of the manner in which the Plaintiff was allegedly carrying out its contract. A further article followed on 11 June 2001. The next day The Star editorialised the issue in a piece entitled "Dignity for the Dead".

2 The Plaintiff was quick to respond. Within a month summons was issued citing the editor of The Star as First Defendant, and the owner publisher and printer of the newspaper as Second Defendant. Damages of R2 million are claimed from the Defendants jointly and severally, on the grounds that the Plaintiff has been defamed in the articles. The Defendants have not pleaded. Instead they have noted an exception to the particulars of the Plaintiff's claim on the basis that they are vague and embarrassing.

3 In its particulars of claim the Plaintiff referred to and annexed a copy of each of the three articles complained of. The particulars contain an allegation that the articles referred directly to the Plaintiff and to the Dove funeral business conducted by it. In paragraph 9 of the particulars of claim, the following allegation is made :

> " **The statements contained in the aforesaid articles concerning the Plaintiff and its aforesaid funeral business are *per se* wrongful and defamatory of the Plaintiff and was** (sic) **calculated to cause the Plaintiff financial prejudice**."

In paragraph 10 the Plaintiff alleges that "**As a result of the defamation**" it has been damaged in its business reputation and goodwill and has suffered and will further suffer patrimonial loss resulting from reduced profits. The particulars of claim then set out the computation of the Plaintiff's damages.

4 The Plaintiff declined an invitation contained in a Rule 23(1) notice to remedy the defects in its particulars of claim of which the Defendants complained. The Defendants accordingly excepted to the particulars of claim as being vague and embarrassing on the following grounds: "**The particulars of claim identify neither the allegedly defamatory passages on which the Plaintiff relies in the newspaper articles allegedly published by the Defendants (annexures "A", "B" and "C" to the particulars of claim) nor the respects in which it is alleged that these newspaper articles defamed the Plaintiff**".

5 The general approach to determining whether a pleading is excipiable on the grounds that it is vague and embarrassing is by now relatively well established. The vagueness complained of must relate to the cause of action, and not simply to one or other of the allegations. It must, it is sometimes said, be vagueness which strikes at the root of the cause of action. Vagueness *stricto sensu* is not sufficient. It must be vagueness of a kind that amounts to

embarrassment to the other party and an exception on these grounds will not be allowed unless the excipient will be seriously prejudiced if the vagueness is not cured. In order to determine whether this threshold has been reached, an *ad hoc* quantitative analysis of the pleading is called for, requiring a consideration of the nature of the allegations, their content, the nature of the claim, and possibly even the relationship between the parties. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice (*Quinlan v McGregor* 1960 (4) SA 303 (DCLD) at 393F-H; *Lockhat & Others v Minister of the Interior* 1960 (3) SA 765 (DCLD) at 777A-D; *Absa Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (WLD) at 421J-422B).

6 Of these requirements the element of prejudice has perhaps been the most slippery to pin down. **Conradie** J sought to define it as ultimately lying in an inability properly to prepare to meet an opponent's case (*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298I). That formulation has not found universal favour (cf *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (WLD) at 901G). It seems to me that no one definition of prejudice is apt to apply to all cases. Ultimately it is a question of fairness requiring an assessment of the offending pleading in the light of the

factors mentioned above.

7 Objections of this kind must be considered with reference to the basic principle that particulars of claim should be so framed that a defendant may reasonably and fairly be required to plead to them, and that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Rule 18(4), which provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer, with sufficient particularity to enable the opposite party to reply thereto, is an adjunct to that general common law requirement (*Trope v South African Reserve Bank & Another & 2 Other Cases* 1992 (3) SA 208 (TPD) at 210H; *Buchner & Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA (T) at 216I-J; *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere* 2001 (2) SA 790 (TPA) at 798F-799J). In some cases, but not necessarily in all, a failure to comply with the requirements of Rule 18 may simultaneously render a pleading vulnerable to an exception on the grounds that it is vague and embarrassing and expose it to the sanction contemplated in Rule 18(12) read with Rule 30(1).

8 There is, I think, something to be said for the suggestion made by **Harms** JA in his guise as author of Civil Procedure in the Supreme

Court (at B18.7, page B-140) to that effect that, since the abolition of further particulars for the purposes of pleading, a greater degree of particularity of pleadings is to be expected (*Jowell v Bramwell-Jones & Others, supra*, at 901E-G). It is certainly to be encouraged. It must also be borne in mind, however, that pleadings should not be examined under too-powerful a microscope, and unless a Court is persuaded that there is real embarrassment and prejudice, an exception should not be allowed (*South African National Parks v Ras* 2002 (2) SA 537 (C) at 541E-542A).

9 Mr Chaskalson, who appeared for the Defendants, submitted that the Defendants would have had no complaint if the particulars of claim had either identified the particular passages in the articles which, it was contended, were defamatory, or had stated the respects in which the articles were allegedly defamatory of the Plaintiff. Complaints similar to the one raised here have more than once enjoyed consideration by our Courts in the context of cases involving publication of allegedly defamatory material. The correct general approach, it seems to me, was formulated by **Van Heerden** J in *Deedat v Muslim Digest & Others* 1980 (2) SA 922 (DCLD) at 928E-G :

" **A Plaintiff is entitled to rely on the whole of an article if he claims that the whole of it is defamatory of him. He may, however, in an appropriate case be under a duty to furnish the Defendant with**

particulars of those portions or words upon which he specifically relies. There is no hard and fast rule which dictates such a duty. In each case the matter complained of as being defamatory has to be considered and the Court has to ask itself whether in the particular circumstances the Defendant would or would not be embarrassed in pleading. The test is not the length of the document but the nature of the matter complained of. ***Meintjies v Wallachs Ltd*** **1913 TPD 278 and** ***Amalgamated Engineering Union v Hodgson*** **1939 WLD 295. Where the defamatory meaning is not quite explicit a Court would probably be more inclined to order the words or passages relied on to be pointed out but might be less so inclined when the Plaintiff sets out the meaning or meanings which he attributes to the article. This is sometimes loosely referred to as pleading an innuendo.** "

(See also the remarks of **Wessels** J in *Meintjies v Wallachs Ltd, supra*, at 282)

10 **Van Heerden** J's reference to pleading an innuendo is, in this context, a reference to a so-called "quasi innuendo", that is, a paraphrase of the allegedly defamatory statement in order to point to and identify the sting of the defamation (compare *New Age Press Limited v O'Keef* 1947 (1) SA 311 (W) at 315; *Sachs v Werkerspers Uitgewers Maatskappy (Edms) Bpk* 1952 (2) SA 261 (W) at 263A; *Demmers v Wyllie & Others* 1978 (4) SA 619 (DCLD) at 622C-D; *Deedat v Muslim Digest & Others, supra*, at 928H). The English Courts require the Plaintiff to plead the particular innuendo, in this sense of the word, in most if not all cases, even where the Plaintiff

alleges that the natural and ordinary meanings of the words are *per se* defamatory (*Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151 (HL) at 171-172; *Allsop v Church of England Newspapers Ltd & Another* [1972] 2 All ER (CA) 26 at 29; *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd & Another* [1972] 3 All ER 417 (CA) at 419). It seems to me that, save perhaps in the clearest cases, the English approach has much to commend it. As appears from the extract from the *Deedat* decision quoted above, our Courts have adopted a less rigid approach. I shall do likewise.

11 It is, of course, no solution to say that the Defendants in the present case can produce an exception-proof plea by simply denying the allegations, or pleading a series of potential special defences in the alternative. If that were the test, the object of pleadings would be rendered nugatory (*Trope v South African Reserve Bank & Another, supra,* at 211B-D; *Absa Bank Ltd v Boksburg Transitional Local Council, supra,* at 421I). Mr Scholtz, on behalf of the Plaintiff, did not suggest as much. Instead, he submitted that in the present case it was clear to any reasonable reader that the articles complained of all alluded to, or developed, three basic themes, each of which was manifestly defamatory of the Plaintiff. These themes were, he said, 1) that the Plaintiff had breached various health laws, 2) that the Plaintiff was guilty of treating the bodies of paupers in an undignified way and 3) that the Plaintiff was acting in breach of its

agreement with the City of Johannesburg. Mr Chaskalson identified some 12 possible passages in the articles which, he said, might be seen as defamatory and several others which, so he argued, could also potentially form a basis for the Plaintiff's complaint. Several of the potentially offending passages identified by Mr Chaskalson would, or might arguably, fall within the three broad themes mentioned by Mr Scholtz. Certain others do not comfortably fit into any of these categories, for example, the mention in the first article of remarks made by an opposition politician in the City Council concerning the possibility of fraud, or the incident describing certain insensitive remarks by an alleged employee of the Plaintiff.

12 There is no *numerus clausus* of defamatory allegations. Whether a particular article is defamatory of the Plaintiff is to be determined objectively and with reference to the hypothetical reasonable reader of normal intelligence and judgment (*SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616G). Judicial decision-making on whether publication of particular material is *prima facie* defamatory of a Plaintiff may be informed by a variety of factors. Some parts of an allegedly offending newspaper article may in a given case be clearly defamatory of the Plaintiff, others less obviously so. Without prejudging the ultimate outcome of the trial, it does appear to me that *prima facie* certain of the passages in the three articles referred to are defamatory of the Plaintiff. I agree with

Mr Chaskalson, however, that as the pleadings stand at present the Defendants are left to speculate to a large extent as to the particular respects in which the Plaintiff contends it was defamed.

13 There are a number of potential defences open to a defendant in opposing a claim for damages arising from publication of allegedly defamatory material. A Defendant may wish to deny that a particular statement referred to the Plaintiff; he may wish to place in issue whether a particular passage was *prima facie* defamatory; he may wish to plead that certain defamatory allegations were true and that publication was for the public benefit, or contend that they constituted fair comment on matters of public importance. The Supreme Court of Appeal has also held, in a decision recently endorsed by the Constitutional Court, that a publisher may successfully ward off a claim for defamation if it is able to show that publication of the defamatory material was reasonable in all the circumstances even in the absence of one or more of the recognised defences (*National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA); *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC)). The Defendant may wish to raise differing defences to the different respects in which the Plaintiff contends it has been defamed in an article or, as here, a series of articles. Until it knows precisely what charges it has to meet, as it were, it is hardly in a position sensibly to do so. The particular respect or respects in which the Plaintiff has

been defamed also affects the assessment of the quantum of damages to which it may ultimately be entitled. Where there is uncertainty on the pleadings about this, that process of assessment is also rendered more difficult both for the Defendant and the Court (cf *Kritzinger v Perskorporasie van Suid Afrika (Edms) Bpk en 'n Andere* 1981 (2) SA 373 (O)).

14 In a number of previous decisions it was held that it was not necessary for the Plaintiff in a defamation action to identify the particular passages in published material of which it had complained (see, for example, *Meintjies v Wallachs Limited, supra; Amalgamated Engineering Union v Hodgson* 1939 WLD 295 at 299; *Cleghorn & Harris Ltd v National Union of Distributive Workers* 1940 CPD 632 at 643-644; *Argus Printing & Publishing Co v Weichardt* 1940 CPD 453 at 464; *Rogaly v General Imports (Pty) Ltd* 1948 (1) SA 1216 (C) at 1226-1227). In each of those cases, however, the Plaintiff had pleaded the particular quasi-innuendo, in other words, it had paraphrased the allegedly defamatory content of the material. In the present case the Plaintiff has not done so. Those decisions are accordingly distinguishable. It is one thing for the Plaintiff's counsel in argument to identify the three broad "themes" running through the articles which, it is submitted, are defamatory of it. The Defendant is, I think, entitled in a case such as this to be told this in the particulars of claim, or to have the particular passages

complained of, identified. In my opinion the Defendants have shown that the particulars of claim are vague and that the Defendants are as a consequence embarrassed and prejudiced thereby as contemplated in Rule 23(1).

15 It follows that in my view the Defendants' exception was well taken. There will be the following order :

15.1 The Defendants' exception is upheld.

15.2 The Plaintiff is given leave to amend its particulars of claim so as to remove the Defendants' cause of complaint as set out in its notice of exception, within ten days of the date of this order, failing which the particulars of the Plaintiff's claim will be deemed to be set aside, with costs.

15.3 The Plaintiff shall bear the costs occasioned by the exception, including the costs of the hearing on 13 March 2003.

I J MULLER A. J.

High Court
CAPE TOWN

18 March 2003