IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A530/2008

In the matter between:

MARK STEYN Appellant

and

ALEXANDRA SECURITY (PTY) LTD First Respondent
ANDRE DOMINIC CHEMINAIS Second Respondent

JUDGMENT: 26 JUNE 2009

OWEN ROGERS AJ

Introduction

[1] The appellant as defendant was sued by the respondents as plaintiffs in the Magistrates Court for the District of Cape Town for damages arising from alleged defamation. For convenience, and meaning no disrespect, I shall refer to the appellant as Steyn and the second respondent as Cheminais. I shall refer to the first respondent as Alexandra Security.

[2] Sunset Links is a housing estate adjacent to the Milnerton golf course. At the time relevant to this case there was a substantial number of completed and occupied houses on the estate but some were still under construction and some erven were vacant.

[3] Alexandra Security was appointed with effect from 1 December 2005 to provide security services to the estate. The terms of the appointment were subsequently recorded in a written contract. The schedule to the contract, which set out the services to be provided by Alexandra Security, was not attached to the copy of the contract adduced as an exhibit. However, the proposal by Alexandra Security, which was accepted by the trustees of the Sunset Links Home Owners Association ("the SLHOA"), indicates that the company was to provide four security officers and a security manager for the day shift, and three officers and a security manager for the night shift. Alexandra Security was also to supply, for the use of these employees, a response vehicle, a golf cart, a bicycle, four two-way radios, a guard monitoring system and two surveillance cameras at the entry and exit booms.

[4] By and large the estate was incident-free until March 2007. On 2 March 2007 there was a break-in at a home and the intruder fired a shot while fleeing. A number of further break-ins or attempted break-ins occurred over the period March to June 2007. It appeared that the estate was being targeted by criminals.

[5] Steyn was the owner of an erf in the estate. In the first half of 2007 he was having a dwelling built on the erf and was regularly on site to supervise the contractors.

[6] Steyn had learnt of the shooting incident from another resident sometime in March or April 2007. He testified that he had not been informed thereof by the SLHOA's trustees nor by Alexandra Security. The security arrangements did not make a favourable impression on him. He was particularly irked by the fact that the security camera at the exit was being propped up by a piece of wood (its metal bracket having apparently rusted away). He took a photograph of this on 19 March 2007. He also had an incident with one of his contractors whom he had dismissed on 17 May 2007 and who had threatened to return to site to remove materials. Steyn asked the guard on duty to ensure that the contractor was not allowed back onto the estate but (he said) the guard *"looked at me blankly"*. Steyn then phoned Alexandra Security's office and spoke with Cheminais, who said (according to Steyn) that it was not possible to prevent the contractor from returning to the estate because he might use a different vehicle. Steyn testified that he also told Cheminais about the fact that the existing camera was being propped up with a piece of wood, Cheminais' response allegedly being that he would attend to this. The conversation was described by Steyn as difficult and unfriendly.

[7] On 7 June 2007 Alexandra Security, under Cheminais' signature, wrote a letter to all residents as follows:

> *"It has been noted over the past three months that 95% of the home owners at THE LINKS still to date have not yet looked at their general security needs at home. Home owners are still not making use of their alarm systems, alarms systems are still found not working and very importantly patio doors and windows are still left open at night.*
>
> *Over the past two weeks we have had no less that five incidents of house breaking and theft reported at THE LINKS. Not one of these incidents was forced entry and access was obtained by climbing through open windows and walking through patio doors.*

The following issues have been noted with regard to some homes that had been visited over the last two weeks.

- *No system installed at all.*
- *Current system is totally outdated and in serious need of an upgrade.*
- *Current system is faulty and therefore it is not in use.*
- *Residents do not understand the workings of the system and therefore it is not in use.*
- *Alarm system is not linked to any monitoring company.*

We as a concerned security company still offer you as a home owner at THE LINKS a free service with regard to the inspection of your current alarm system, intercom and CCTV systems.

Please note that because of the amount of houses on the estate this would need to be done on a first come first serve basis.

Should you have any queries please do not hesitate to contact our office for assistance in this regard."

[8] Steyn was angered by this letter. He felt Alexandra Security was blaming the residents for the increased crime. The exit camera was still being held in place by the same piece of wood. He decided to pen an open letter to Alexandra Security and to the trustees for circulation to all residents. He showed a draft to a friend on the estate, one Gomes, who suggested that the letter be toned down in what it said concerning Mr Wesley Van Rooyen, the estate manager (an employee of the SLHOA). The finalised letter dated 12 June 2007 was then issued and distributed by Steyn.

[9] The part of the letter which contained the alleged defamatory statements reads as follows (under the heading *"Security Management"*). For convenience I have numbered the paragraphs. The emphasis is in the original:

"1. The security service to our beautiful estate is totally unacceptable.

2. There is an alarmingly dismissive service delivery attitude by Messrs Alexandra Security, as evidenced not only by the excessive crime at Sunset Links, but also by the context [sic] *of their recent letters addressed to Sunset Links homeowners and residents whereby their contention is that crime and lack of security at Sunset Links* ***is our fault****. Owners and residents have been dismissed and blamed for the spate of robberies and the shooting at our homes because, apparently, we have faulty alarms; we do not have alarms; we don't know how to operate our alarm systems; and 'very importantly', because we leave our patio doors and windows open.*

3. I invested in this beautiful estate because of the security promise made available to us as a community. I did not invest in this estate to have an ineffectual imbecile, who the SLHOA Trustees have agreed to pay nearly R1m a year, tell me that it isn't his job, because, actually, it is my job; that it is my fault if I get robbed, shot at or raped in my home. I reject with contempt Messrs Alexandra Security's aforementioned contention and its service delivery standards, as well as the perceived endorsement thereof by the SLHOA Trustees.

4. I recently had a discussion with Mr. Andre Cheminais, the Managing Director of Alexandra Security, whereby I identified to him that the security camera to the exit of the estate was being held in position by an arbitrary piece of wood, a situation that I find unacceptable. It is unprofessional and it creates an impression of an unfocussed and tardy security service, not to mention the obvious risk to the operation of the camera, should the wood rot away and/or fall out. Mr. Andre Cheminais purported to be entirely unaware of this situation but promised to personally attend to the matter with immediate effect.

5. Alas, some 27 days later, the camera is still held in position by an arbitrary piece of wood.

6. At no other secure resident estate at which I have either business or personal interests is such unprofessional behaviour tolerated, nor would it ever be condoned by the relevant estate Trustees.

> *7. I am exceptionally concerned by the lack of best practice and professional conduct afforded towards Sunset Links owners and residents. Most Sunset Links residents do not know that, initially, the SLHOA Trustees, deliberately decided to* ***not*** *inform homeowners and residents of the recent gun shooting at Sunset Links. It is an utter disgrace that we were in fact only notified some 2 weeks later. This initial deliberate concealment may legally be considered to be* ***a neglect of duty of care*** *and* ***a failure in fiduciary duty*** *and was practically a naïve and dangerous decision which placed Sunset Links owners and residents at risk."*

[10] In March 2007 the trustees had given notice to Alexandra Security of concerns about the company's performance. A further notice followed on 21 June 2007 concerning the alleged ineffective and inferior cameras and surveillance equipment. On the same day the trustees notified residents that they were assessing the position and taking expert advice from another company on the way forward. On 22 June 2007 Alexandra Security informed the SLHOA that the company was terminating the security contract with effect from 30 June 2007 because (as it was put in the letter) the SLHOA could no longer afford the company's services (this presumably a reference to the fact that the company had made certain upgrading proposals). Alexandra Security also complained that its staff had been abused by residents. With effect from 1 July 2007 a firm called Thorburn was contracted to provide security services to the estate.

[11] This is a brief survey of the events which culminated in the plaintiffs' action for defamation in the court *a quo*. It is unfortunate that the parties had to go to law, with four days of evidence and a further day of argument in the magistrates court and a further day (with lengthy heads of argument) in this court. Inevitably costs must by now have overwhelmed everything else.

[12] In their particulars of claim the plaintiffs alleged that Steyn's letter was defamatory of Alexandra Security because the words would have been understood by readers to mean that the security service being rendered by the company was of an unacceptably poor quality; that the company's employees and representatives were callous and dismissive towards clients; that the company was not capable of curbing crime at Sunset Links; that the company was blaming its clients for the crimes that had been committed at the estate; that the level of service was disproportionately poor compared to the income being earned; that the company was shirking its responsibilities; that the company was unprofessional; and that the company had failed to properly install a security camera at the exit of the estate and had failed to attend to Steyn's complaints in that regard. The letter was alleged to be defamatory of Cheminais personally because the words would have been understood by readers to mean that he was incompetent; that he shirked his responsibilities as managing director of the company; that he was unprofessional; and that he was dishonest by claiming to be unaware of an unsatisfactory situation of which he was in truth aware and by promising personally to attend to Steyn's complaint and then failing to do so.

[13] Alexandra Security alleged that in consequence of Steyn's letter its contract had been terminated and alleged patrimonial loss in that regard of R77 000. Alexandra Security also claimed general damages of R50 000 for harm to its reputation. To bring its claim within the jurisdiction of the magistrates court, Alexandra Security claimed only R100 000. Cheminais claimed R30 000 as damages for harm to his reputation.

[14] Steyn in his plea denied that the letter was defamatory of either of the plaintiffs. In the alternative he sought to justify the defamations on the alternative grounds of qualified privilege, truth and public benefit, and fair

comment. He also alleged an absence of *animus iniuriandi* on the basis that he had been unaware of the falsity of any averments in his letter.

[15] By agreement Steyn (the defendant) led his evidence first. He himself testified and was followed by Graham Manchip (an employee of the estate's managing agents), Wesley Van Rooyen (the estate manager), Michael Gomes (a resident) and William Soden (also a resident). The plaintiffs called Jacques Ferreira (the company's regional director) and Cheminais (the erstwhile managing director and former shareholder of the company – he had in the meanwhile left the company after his shares had been bought in an empowerment transaction). The magistrate found that Steyn's letter was indeed defamatory. She rejected the defences (though did not expressly address the question of qualified privilege) and awarded Alexandra Security R10 000 and Cheminais R30 000. (Alexandra Security's claim for patrimonial loss fell by the way as it was apparent that the company itself had cancelled the contract.)

[16] Steyn in his notice of appeal contended that the magistrate had erred in every material respect and these contentions were developed in argument in this court. Not surprisingly the plaintiffs (as respondents in the appeal) submitted that the magistrate's judgment was correct.

Defamation

[17] Mr White, for Steyn, submitted that in deciding whether the letter was defamatory one needed to consider the position of the two plaintiffs separately. I think that is right, but a defamation of a company's managing director may at the same time be a defamation of the company itself.

[18] As regards Cheminais personally, the letter is clearly defamatory. He is called an *"ineffectual imbecile"*. Obviously the word *"imbecile"* is not here being used in its strict medical sense, but to the mind of the reasonable reader the phrase would convey that Cheminais, despite being the managing director of a security company, was incompetent and stupid to a marked degree and unfit for the job. The letter also says of Cheminais that despite running a company that was earning a substantial fee he had told residents that it was not the company's job to provide security and that the residents were to blame if they were robbed, shot or raped in their homes. (Although paragraph 3 is phrased as recording a statement made by Cheminais to Steyn, in the context of the preceding paragraph it is clear that Steyn was referring to himself as a sample resident and conveying that this was what Cheminais had told residents in general.) Steyn's statement would convey to the reasonable reader that Cheminais had a callous attitude towards the residents and improperly deflected what was his responsibility onto the residents. The statement that Cheminais had failed, despite a promise, to remedy the propping up of the camera would convey that he was unprofessional and tardy in running the company's business. All of these statements would tend to lower Cheminais in the estimation of reasonable people.

[19] In the particulars of claim it was said that the letter accused Cheminais of dishonesty. I would not go so far. The fact that he allegedly promised to attend to the camera and then failed to do so would suggest a lack of diligence rather than dishonesty. Although the word *"purported"* in paragraph 4 of the letter might have been used by Steyn to indicate that he (Steyn) was repeating what Cheminais had said without vouching for the fact that Cheminais had not previously been aware of the issue, I do not think that the phraseology would have been understood by the reasonable reader as a positive accusation of dishonesty.

[20] Mr White for Steyn submitted that the word *"imbecile"* was, in context, no more than meaningless abuse. He referred to *Wood NO v Branson* 1952 (3) SA 369 (T) (where the defendant had referred to the plaintiffs as *"South Hills cows"* and *"old bitches"*) and *Nepgen v Blomerus* 1943 CPD 465 (where the defendant had called the plaintiff *"'n nietige klein ruspetjie en... 'n skobbejak"*). In both of these cases the insults had been used in the course of heated verbal altercations, or in *rixa* as it is sometimes put (*LAWSA* 2nd Edition Volume 7 para 257). The court in each case considered the ordinary meaning of the words in question and concluded that they were not *per se* defamatory. For example in *Wood NO v Branson* Price J said (somewhat quaintly) that *"[a]fter all, a cow is a harmless, docile and useful animal"* and that in some circles one might say *"Mrs Jones is a pleasant old cow"*. He said that unlike the words *"donkey"* or *"ass"* (where a defamatory innuendo would not be difficult to prove), the innuendo in the words *"cow"* and *"bitch"* needed to be alleged and proved before the words could be elevated above meaningless abuse. Importantly, Price J also said at 371D-E: *"The context in which a word is used, the circumstances in which it is used and the tone in which it is uttered are all facts which may render meaningless abuse defamatory"*. The judgment in *Nepgen* proceeded along similar lines.

[21] In the present case, the phrase *"ineffectual imbecile"* is abuse, but it is not meaningless. The words have an ordinary meaning, and such meaning is defamatory. There is no question here of *rixa*; the words were contained in a considered letter. The context, circumstances and indeed tone in which they were uttered render them defamatory. The serious insult to Cheminais' reputation was magnified by the context of the letter as a whole.

[22] As regards Alexandra Security, Steyn said that the company was providing a *"totally unacceptable service"* and had an *"alarmingly dismissive service*

delivery attitude". The first statement would convey to the reasonable reader that the service the company was rendering was markedly worse than could be expected from a reasonably competent firm, while the second statement would convey that Alexandra Security was not concerned about the quality of the service it provided or how it service was perceived by residents. These statements would be calculated to injure a trading corporation in its business reputation.

[23] In *Johnson v Rand Daily Mails* 1928 AD 190 there appears to have been no doubt in anybody's mind that it was defamatory to say of a caterer that the service he had provided on a particular occasion was *"worse than anything I have ever seen"*, that the tablecloths were *"indescribably filthy"*, that one *"had to turn back the greasy tablecloths to save one's clothes from contact with it"* and the like. In the same way, the statements made about Alexandra Security in the present case were defamatory.

[24] Since the letter was defamatory of both plaintiffs, there is a presumption that the publication was wrongful and that Steyn acted *animo iniuriandi*, and the onus was on Steyn to establish lawful justification or the absence of *animus iniuriandi* (*LAWSA* 2nd Edition, Volume 7, para 245).

Qualified privilege

[25] As noted earlier, the magistrate failed to address Steyn's defence of qualified privilege. Steyn pleaded that the letter was published by him as a member of the SLHOA to members of the SLHOA and that he had a right or duty to make the publication. It is convenient to deal with this defence first, because in the context of this case it seems to impose the least exacting evidential burden on the defendant.

[26] The defence of qualified privilege was described thus by Corbett JA (as he then was) in *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) at 557E-G:

> *"The particular category of privilege which, in the light of the above finding, would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it (see De Waal v Ziervogel 1938 AD 112 at 121-3). The test is an objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one."*

[27] It has been observed that strictly speaking it is not the defamatory communication that is privileged in these circumstances but rather the occasion on which the communication is made. The circumstances of the communication and the relationship between the parties rebut the presumption of wrongfulness, and it is then for the plaintiff to prove actual malice by the defendant (hence the description of the defence as qualified rather than absolute). Although in former days the defence was said to rebut *animus iniuriandi* (see *De Waal v Ziervogel* 1938 AD 112 at 122) it is now recognised as going rather to the issue of wrongfulness (see *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) at 851D). The *"malice"* which defeats the justification is not limited to spite or ill-will but covers improper motives in general (see *Basner v Trigger* 1946 AD 83 at 95).

[28] Even if the occasion is privileged, the defamatory communication will only be protected in regard to such statements as are relevant or germane to the occasion. Relevance in this context has been said to be essentially *"a matter of reason and commonsense, having its foundation in the facts, circumstances*

and principles governing each particular case", a *"blend of logic and experience lying outside the law"* (*Van Der Berg v Coopers & Lynbrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) para 26).

[29] Once these elements of the defence are established, it is not necessary for the defendant to go further and prove that the statements he made were true or constituted fair comment. To make a defamatory statement one knows to be false would generally defeat the privilege because of malice, but that is attributable to the defendant's state of mind rather than the objective falsity of the statement.

[30] Given the policy considerations underlying the defence, there is no closed list of qualifying privileged occasions. As is apparent from the passage I have quoted from *Borgin*, the court judges the situation by the standard of the ordinary reasonable person, guided by the criterion of public policy. Since the advent of the constitutional era, public policy is rooted in the values of the Constitution, which places a premium both on individual dignity and on freedom of expression (cf *Treatment Action Campaign v Rath & Others* 2007 (4) SA 563 (C) at 567H).

[31] Steyn was a member of the SLHOA. The recipients of his letter were homeowners and residents of Sunset Links. Those who were owners would have been members of the SLHOA. Residents who were not owners may not have been members of the SLHOA. It is obvious, I think, that all owners and residents at Sunset Links had an interest in the security services at the estate. The legitimate interest in this issue was heightened by the crime spike they were experiencing. In my view, the relationship between Steyn and his fellow owners and residents, coupled with the circumstances in which they found themselves (victims of a spate of recent break-ins), created a situation in

which the reasonable person would recognise that it was desirable that they should be able to speak their minds freely to each other on the topic of security. The circumstances of the present case, from the perspective of the reasonable person, entitled Steyn to speak out as he did in the protection of the security interests common to him and his audience. The responses which Steyn received from residents confirm that the issues he raised were indeed important to them.

[32] Obviously the constitutional interests of individual dignity (s10 of the Constitution) and freedom of expression (s16) are often in tension with each other in the field of defamation. In this particular case, though, one must also remember the right of people to personal security (s12(1)) and that the SLHOA is a manifestation (though an uncontroversial and mundane one) of the fundamental right of people to associate together for lawful purposes (s18). In my opinion, the balancing of the constitutionally-based policy considerations at play do not require an unduly restrictive approach in assessing whether the occasion was privileged. The dignity of persons implicated in statements made on such occasions is sufficiently accommodated by the requirement that the statements should be relevant and by the rule that privilege will not be available to one actuated by malice. A further consideration in this regard is that even if the defamed person has no remedy in damages owing to the defence of qualified privilege, he or she would generally have a protected right of response to the same audience as received the defamatory communication.

[33] As to authority, our attention has not been drawn to any reported case dealing with a closely similar situation. Mention should, though, be made of the judgment of Nkabinde AJA (as she then was) in *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA), where it was held that statements made in a report by a branch

secretary of a trade union and addressed to members of the union were made on a privileged occasion. Nkabinde AJA quoted from the judgment of O'Regan J in *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) where O'Regan J had spoken of freedom of expression as being one of a *"web of mutually supporting rights"* in the Constitution:

> *"It* [i.e. freedom of expression] *is closely related to freedom of religion, belief and opinion (s15), the right to dignity (s10), as well as the right to freedom of association (s18), the right to vote and to stand for public office (s19) and the right to assembly (s17). These rights, taken together, protect the rights of individuals, not only individually to form and express opinions, of whatever nature, but to establish associations in groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."*

[34] In *Tsatsi* the report in question had accused the union's management of embracing fraudsters and of unprecedented harassment against staff. The defamation claim was defeated on grounds of qualified privilege. The truth or otherwise of the statements was not relevant to this conclusion. (In paragraph 14 of her judgment Nkabinde AJA said that the truth or falsity of the statements had no bearing on whether they were relevant or germane to the privileged occasion. She cited a passage from *Borgin* where Corbett JA had said that the defence of qualified privilege is not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true might give rise to the inference that he was actuated by express malice – *Borgin* at 578H-579A.)

[35] In English law, to which our courts have frequently referred on this topic, it has often been held that shareholders of a company have a common interest in

the affairs of the company and that communications between them on that topic enjoy qualified privilege (see *Gatley on Libel and Slander* 9th Edition para 14.44 and cases their cited).

[36] I thus conclude that the occasion of Steyn's communication with the residents was one enjoying qualified privilege. I should add that Mr Coughlan who appeared in the appeal for the respondents (but not at the trial) did not press us to rule otherwise.

[37] Having found that the occasion was privileged, I must now consider whether the statements in Steyn's letter were relevant or germane to the occasion. Except for Steyn's reference to Cheminais as an *"ineffectual imbecile"*, my answer to that question is yes. The topic was security at Sunset Links. Steyn was entitled to convey to his fellow owners and residents that in his opinion the security services at the estate were *"totally unacceptable"* and that Alexandra Security had an *"alarmingly dismissive service delivery attitude"*. Although the statements were as a matter of formulation expressed as assertions of fact, they would have been understood by the recipients of Steyn's letter as being his opinions. If the statements had not been made on a privileged occasion, it would have been necessary to consider whether these particular assertions were opinions on stated facts (in which case they might have been assessed on the principles pertaining to fair comment) or bald opinions (in which case the more stringent test of truth and public benefit might have been applicable). However, this distinction does not seem to me to be of significance once the occasion of the communication is found to be privileged.

[38] Taken literally, paragraph 3 of Steyn's letter attributes to Cheminais a statement that security at the estate was not his job but Steyn's job and that it

was Steyn's fault if Steyn was robbed, shot or raped in his home. However, and despite Mr Coughlan's submission to the contrary, I do not believe any reader of the letter would have understood Steyn to be making this literal assertion. The preceding paragraph refers to letters addressed by Alexandra Security to residents. I quoted earlier the letter of 7 June 2007. This letter had been preceded by several earlier ones. In a letter of 5 March 2007 Alexandra Security reported to residents on two recent incidents and it was stated that intruders had obtained access through an open window or door. Residents were reminded of certain *"basic hints of general security"* and asked to be *"more vigilant"*. A similar letter was sent to residents on 1 June 2007, asking them *"to please assist us in assisting you to secure your immediate surroundings"*. These letters, and particularly the one of 7 June 2007, would have been fresh in the minds of the recipients of Steyn's letter. What Steyn was doing in paragraph 3 of the letter was giving his view of the security company's attitude as reflected in their letters, which he saw as deflecting responsibility from the company to the residents. He was not speaking literally and would not have been so understood.

[39] Paragraphs 4 to 6 of the letter all appear to deal with the same topic, namely the fact that a security camera was being propped up by a piece of wood and that this had not been remedied for some time despite the matter having been drawn to Cheminais' attention. This fact, and Steyn's view as to the unprofessionalism which it exhibited, were relevant to the issue of security at the estate.

[40] Whether Steyn's opinions and assessments were fair and true is not relevant to the availability of the defence of qualified privilege. Nor is it necessary, given the presence of the required elements of qualified privilege, to undertake an assessment of whether Steyn's statements concerning Alexander Security

and Cheminais were true. In fairness to them, though, I should say that I share the magistrate's view that much of the criticism was exaggerated. Steyn did not call expert evidence to establish what standards are maintained by reasonably competent security firms or to explain what level of service could have been expected in the light of the contract (bearing in mind that Alexandra Security could not be blamed for failing to provide a more extensive service than that for which it had contracted and that according to Cheminais he had informed the trustees from the outset that the budget to which he was confined did not make it possible to provide an adequate security service). The trustees had expressed satisfaction with Alexandra Security's services over the period December 2005 to February 2007. There were certainly some points of criticism, but I would be surprised if that were not true of most security companies. Although the witnesses for Steyn described Thorburn's level of performance as superior, there was no evidence as to the terms of its contract with the SLHOA.

[41] I should also say that the way Steyn portrayed Alexandra Security's attitude as reflected in the company's letters to residents was not altogether fair. It appears that some residents had been lax, and it was perfectly appropriate for Alexandra Security to indicate to residents how they could assist in combating the surge in crime. Alexandra Security was not thereby indicating that the company itself was not obliged to provide an efficient security service in accordance with its contract. The company's letters to residents were approved by the SLHOA's trustees. It would be unrealistic to suppose that the provision of an efficient security service (by efficient, I mean proper performance within the parameters of the contract) would guarantee an absence of crime. The estate presented particular difficulties in security because of the absence of perimeter fencing, proximity to a public golf course and the beach, and limited external lighting. This said, one must acknowledge

that given the crime surge confronting the residents they (or some of them) might have felt frustration at not hearing from their security service provider what steps the latter was taking to meet the threat.

[42] However, the fact that Steyn's criticisms were, objectively speaking, unfair or exaggerated does not deprive them of protection under the defence of qualified privilege. The same is true of Mr Coughlan's submission that Steyn acted precipitately by publishing his letter without first attempting to arrange a meeting with Cheminais to discuss the issues. The plaintiffs did not replicate to Steyn's plea by alleging malice on Steyn's part. Even if such a response were open to the plaintiffs in the absence of a replication, the evidence does not establish that Steyn was stating anything he knew to be untrue. Most of the statements in his letter were expressions of his opinion, and appear to have represented his genuine beliefs. As to objective facts asserted in the letter, Alexandra Security had indeed addressed letters to residents (though Steyn's assertion as to the attitude those letters reflected was his own opinion). The only other objective fact asserted in the letter concerned the security camera. The evidence clearly established that the camera had for some time been propped up by a piece of wood. Steyn testified that he had told Cheminais about this in their conversation on 17 May 2007. Although it was put to Steyn in cross-examination that Cheminais would deny this, in the event Cheminais testified only that he could not recall being told. The plaintiffs certainly did not prove on a balance of probabilities that Steyn had knowingly made a false statement in this regard and was actuated by malice. His letter commenced with the words *"I address this letter to you in good faith"* and said that his purpose was to *"facilitate dialogue between all stakeholders at Sunset Links so that we may find positive and sustainable solutions to the very serious problems we all are faced with at our estate"*. The evidence does not cast doubt on the genuineness of this purpose.

[43] Mr Coughlan argued that Steyn may have been actuated by the improper motive of *"getting back"* at Cheminais because Steyn was angered by what he (Steyn) saw as the unhelpful and unfriendly attitude displayed by Cheminais. However, this proposition was not put to Steyn in cross-examination and in any event cannot be regarded as proved on a balance of probability. It is no doubt true that the telephonic discussion was one of the circumstances which caused Steyn to form (reasonably or unreasonably) the unfavourable view he did of Alexander Security's service but this is a very different thing from saying that Steyn did not really have a strongly negative view of Alexandra Security's service and that he used deliberately exaggerated criticism in order to settle a private score with Cheminais.

[44] This leaves Steyn's statement in the letter that Cheminais was an *"ineffectual imbecile"*. I do not think that this sort of insulting invective should enjoy protection. It was not germane to the privileged occasion to descend to personal abuse. What was germane was the quality of the security service and the attitude of the security company. One could reach the same outcome by inferring from the extreme language that it was intended to insult and hurt without regard to truth. Whatever the quality may have been of Alexandra Security's service at Sunset Links, Steyn made no serious attempt to establish that Cheminais was in general ineffectual or markedly stupid nor does the evidence disclose that that is really what Steyn thought. On the contrary, a fair reading of Steyn's evidence is that he used an extreme phrase (by which he intended to brand Cheminais as *"useless"*) in order to heighten reaction to his letter. To the extent that this alternative line of reasoning rests on malice, I do not think in this particular respect that any injustice would be done to Steyn by inferring malice despite the absence of a replication. The plaintiffs pleaded falsity and an intention to injure, and the dividing line between the

latter state of mind and malice is not always easy to draw. Given the way the trial was conducted, it could come as no surprise to Steyn that Cheminais would contend there the use of an improper motive in the use of this particular insult was to be inferred.

[45] I mentioned earlier that a defamation of a company's managing director might at the same time be a defamation of the company itself. However, I do not think a fair reading of the pleadings in this case reflects that the plaintiffs intended to allege that the *"ineffectual imbecile"* insult was a defamation of the company. The alleged defamation of the company arose from other statements in the letter. Accordingly, I do not think it is open to the court to uphold the company's claim merely on the strength of this particular phrase.

[46] In conclusion on this aspect, therefore, I find that the defence of qualified privilege was a complete answer to the claim by Alexandra Security and was also an answer to Cheminais' claim except in respect of the statement that he was an *"ineffectual imbecile"*.

Other defences

[47] In the light of what has been set out above, it is not necessary to consider the defences of fair comments and truth and public benefit. Except for the phrase *"ineffectual imbecile"*, Steyn already has the protection of qualified privilege. The single offending phrase is no more justifiable on the basis of fair comment or truth than it is on the basis of qualified privilege.

Damages

[48] Since the magistrate found that the first page of Steyn's letter was as a whole defamatory of Cheminais and since I have come to the view that Steyn is only liable for a more limited defamation, this court is at large to assess an appropriate award of damages.

[49] Our courts are not traditionally generous in defamation awards. Comparison with other cases was said in *Van Der Berg* to serve a very limited purpose. The award must in each case depend on the facts of the case seen against the background of prevailing attitudes of the community. The court must do its best to make a realistic assessment of what it considers just and fair in all the circumstances (para 48).

[50] In the present case the publication was quite widespread – there were several hundred recipients of Steyn's letter. The offending phrase was calculated to stir up feelings against Cheminais, though it is difficult to isolate the effect of the offending phrase from the letter as a whole. Cheminais headed a company with security contracts with a number of prestigious hotels and property groups. He personally knew the majority of the residents at Sunset Links. He testified that the letter's effect was to cause him to leave the adjacent Sunset Beach estate where he then resided. On the other hand, the very fact that the offending phrase was an exaggerated insult probably meant that fair-minded readers would attach relatively little weight to it.

[51] Doing the best I can and making what Smalberger JA in *Van Der Berg* described somewhat discouragingly as *"little more than an enlightened guess"* (para 48), I think a sum of R10 000 would be appropriate.

Order and costs

[52] In this court Steyn as the appellant has achieved substantial success by reversing the lower court's decision in favour of Alexandra Security and by a substantial reduction in the award of damages to Cheminais. He is thus entitled to his costs of appeal.

[53] As regard costs in the court *a quo*, the effect of this court's judgment is that Alexandra Security's claim should have been dismissed while Cheminais should have been upheld in the sum of R10 000. One possibility would be to award Cheminais his costs against Steyn and to grant Steyn his costs against Alexandra Security. However, since the evidence on all issues was intermingled, a just result would be for the parties to bear their own costs in the lower court.

[54] I would thus make the following order:

(a) The appeal succeeds with costs, such costs to be payable by the respondents jointly and severally.

(b) The order of the court *a quo* is replaced with an order in the following terms:

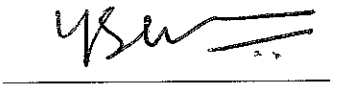
"(i) The first plaintiff's claim is dismissed.

(ii) The defendant is ordered to pay the second plaintiff damages in the amount of R10 000 together with interest thereon at 15,5% per annum from 17 September 2007.

(iii) No order is made as to costs."

OWEN ROGERS AJ

[53] I concur and it is so ordered.



MEER J