IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 15600/2007

In the matter between:

NATHEEM ALBERTUS	Plaintiff
and	
SON PUBLISHERS	1st Defendant
MEDIA 24 LIMITED t/a SON UITGEWERS	2nd Defendant
ANDREW KOOPMAN	3rd Defendant
MELVIN WHITEBOOI	4th Defendant

JUDGMENT : 2 JUNE 2010

TRAVERSO, DJP:

[1] The plaintiff, Natheem Albertus is claiming from the defendants jointly and severally an amount of R750 000,00 as damages for defamation to his character. What gave rise to this claim is an article which appeared in a daily newspaper known as "*Die Kaapse Son*" ("*Son*") on 5 November 2005. The third defendant, Andrew Koopman ("*Koopman*"), was at the time employed as a sports reporter. Presently he is the editor of the Son. The fourth defendant, Melvin Whitebooi ("*Whitebooi*"), was the author of the article.

[2] The plaintiff is a practicing attorney, who practices as such for his own account. The plaintiff was admitted as an attorney during October 1994. It is now common cause between the parties that the allegations contained in the article, to which I will refer in more detail later, were false

and defamatory of the plaintiff. Initially the defendants denied that the allegations were false and in addition pleaded a defence of justification for the publication because it was alleged that the allegations therein were true and publication thereof in the public interest. It was only on 26 March 2010 that the defendants indicated that they would not persist with that defence.

[3] The plaintiff became aware of the article on the day of its publication. He was attending mosque, when a prominent businessman alerted him that an article had been published in the Son in which "*terrible things*" had been said about him. The plaintiff proceeded with his prayers, and thereafter went to buy a copy of the Son. The plaintiff testified about his understandable anxiety and disbelief when he read the article. He stated that the article still haunts him. This too is understandable. The article read as follows:

"PROKUREUR WOU NIGGIE 'INRUIL'

'n Prokureur wat tans in die hooggeregshof in Kaapstad teregstaan op aanklagte van bedrog, het probeer om die saak buite die hof te skik.

Hy en die klaers se regspan het Woensdagoggend tot 03:00 die oggend nog probeer skik, maar op die ou end is besluit om nie die skikking te aanvaar nie.

Die bedrogbedrag is R22 miljoen.

Die saak het sy ontstaan reeds in 1998 toe prokureur Natheem Albertus vir Ekloba Fishing opgetree het in 'n kwota-saak. Albertus is na bewering betaal vir die werk, maar hy het dit glo nooit gedoen nie.

Ekloba het gevra dat die lêers (van die werk) voorgelê word vir taksering. Ekloba het toe beweer Albertus was oneerlik en opportunisties, en dat die lêers nooit voorgelê was vir taksering nie.

In 'n skrywe gerig aan die wetsgenootskap op 13 November 2002 is Albertus van Albertus-prokureurs versoek om alle dokumentasie aan Ekloba Fishing Closed Corporation aan mnr. Walter Phillips jr. te oorhandig. Dit was aangesien prokureur Albertus se dienste lankal beëindig is en Ekloba hom niks skuld nie.

Albertus het toe nog volgehou dat hy wel die werk gedoen het. Toe hy gevra is of die rekening getakseer was, het hy geantwoord dat die kliënt dit moet aanvra.

Daar is gevra dat die lêers nie later as 12:00 op 15 November 2002 aan die Wetgenootskap oorhandig moet word nie.

Daar was egter 'n gesloer, en dit het adv. Theo Swartz genoop om 'n klag van bedrog te gaan lê.

Van die beweringe teen Albertus is dat hy uit die staansppor daarop aangedring het om 'n persoonlike ledebelang in Ekloba Fishing te kry, wat hulle geweier het. Hy het daarna aangehou om 'n ledebelang te kry deur aan Ekloba te sê dat hy sy niggie Hawa Kagee, as 'n beslote korporasie sou insluit.

Hy sou in ruil daarvoor gratis regsdienste aan Ekloba aanbied, beweer Ekloba Fishing. Albertus het in 1998 Ekloba Fishing gaan herregistreer en sy niggie se naam by die bestaande ledetal gaan voeg. Ekloba se lede was baie ontsteld, want dit het beteken hul ledebelang sou verminder word.

En toe gebruik Albertus na bewering vir Hawa as sy benoemde, en hy wat Albertus is, ontvang toe na bewering alle finansiële voordele.

Albertus het toe blykbaar vir F. Karitses and Company as Ekloba se rekeningkundige beampte laat vervang. Hy het hom vervang met sy neef M. Sedick van Sedick en Vennote, wat as hy die nuwe rekeningkundige beampte geregistreer het.

Na bewering kom dit daarop neer dat Albertus beplan het om Ekloba Fishing oor te neem, luidens hofstukke en saaknommer 6857/02.

Luidens 'n brief aan die wetsgenootskap, het Albertus glo hoog oneties opgetree deur sy magsposisie as prokureur te gebruik om sodoende voorheen benadeelde vissersmanne te manipuleer en onbehoorlik te beïnvloed sodat hy in die persoon van sy niggie – Hawee Kajee – 'n ledebelang in Ekloba Fishing kon verkry.

Daar word beweer dat Albertus voorgegee het dat hy 'n boot gekoop het, wat nooit gedoen is nie. Hy het met die verkoper 'n kontrak opgestel om te sê daar is 'n boot gekoop.

- *Albertus het nooit in enige van sy antwoorde gemeld dat hy die lêers aan Walter Phillips, een van die direkteure van Ekloba, oorhandig het nie.*

Albertus skryf in 'n skrywe gedateer 7 Mei 2003 dat Phillips die lêers 'n tyd gelede kom afhaal het. Phillips het gesê dit is 'n infame leuen.

Albertus sê in die skrywe van 7 Mei 2003 dat Phillips die dokumente moes vernietig het. Phillips ontken dit.

- *Die saak duur voort."*

(I have not highlighted the many spelling and linguistic mistakes.)

[4] The thrust of the article is therefore that:

(a) the plaintiff, as an attorney, was standing trial in the High Court of Cape Town on charges of fraud amounting to R22m;

(b) the plaintiff, as an attorney, received payment of fees for professional work which he did not perform;

(c) the plaintiff was dishonest and opportunistic and failed to have fees taxed when he was required to do so;

(d) the plaintiff coerced members of the Ukloba Fishing Close Corporation, in exchange for gratuitous legal

services to make his niece, Hawa Kajee a member of the close corporation;

(e) the plaintiff behaved unethically by using his position of power to manipulate previously disadvantaged fisherman in a manner that enabled his niece to obtain member's interest in Ukloba Fishing Close Corporation;

(f) the plaintiff falsely drew up a contract which reflected that he had bought a boat when in fact he had not done so.

[5] The truth was that the plaintiff was representing clients in a civil trial in the High Court. The matter involved a dispute between the minority and the majority members of the Close Corporation, Ukloba Fishing CC. The case was acrimonious. The plaintiff acted for the minority shareholders. The majority, amongst other things, made

personal attacks on the plaintiff in the Court papers. That just as background.

[6] The determination of quantum in matters such as the present requires the exercise of a discretion.

[7] In determining what an adequate amount would be the aggravating circumstances must be considered and weighed up against those circumstances which would mitigate the damages. [See Neethling – Persoonlikheidsreg, (4th Edition) at p. 206 & 207.]

[8] In doing so, it must be borne in mind that an action for defamation is an attempt to restore a person's dignity and reputation – it is not an action aimed at financial gain. Robust awards may well have a "*chilling effect*" on freedom of expression. (See Dikoko v. Mokhatla, 2006(6) SA 235 CC.)

[9] Mr. Albertus, with reference to an article by Neethling and referred to in LAWSA, Vol. 20 para. 403, argued that although punitive damages may not be awarded, I should order "*aggravating compensatory*" damages which will be regarded, not as punishment for the defendants' conduct, but as compensation for outraged feelings. He submitted that by doing so one can do justice to the true concept of satisfaction.

[10] This result is in my view achieved in any event by the balancing act that a Court is required to do. In my view, it would be wrong to label an award "*aggravating compensatory damages*" when in truth it amounts to punitive damages.

[11] In this matter there are both aggravating circumstances and circumstances which will, to some degree, mitigate the damages.

[12] In aggravation firstly is the contents of the article. It is common cause that the plaintiff enjoys good standing in the community. He is a prominent and well respected attorney. To publish an article stating that he is standing trial for fraud of several million rand when there is not a shred of truth in it is unforgiveable. So too is the conduct of the defendants. Firstly, the code of conduct of Media 24 journalists (or any journalist one would hope) demands that before defamatory statements are published about a person, they will be given an opportunity to comment on the article. The defendants, in their pleadings, contended that this was done. But even on the defendants' version, this is not correct. On the defendants' own version, the fourth defendant phoned the plaintiff, identified himself and stated that he wanted to

discuss the Ukloba case with him. The plaintiff apparently refused to discuss the matter with fourth defendant, and put down the phone. At no stage was the plaintiff informed that what Whitebooi wanted to discuss with him was a defamatory article which the first and second defendants were about to publish. I have no doubt that had the plaintiff been made aware of this fact he would have wanted to set the record straight.

[13] On the plaintiff's version he was phoned by Mr. Prins ("*Prins*") – not Whitebooi. Prins was a freelance reporter. But it is not necessary to consider this in any great detail. It is not disputed that, no one, not Prins or Whitebooi, alerted the plaintiff that the article in question will be published.

[14] What makes matters worse is that Whitebooi conceded during his evidence that he was aware that the Ukloba case

was a civil one. The inference that the publication of this article was malicious is therefore irresistible.

[15] The publication of the article was preceded by a letter from the plaintiff to the defendants stating:

> ***"We record that your Mr Prins wanted the writer's version of Ukloba Fishing before his prints an article in "Die Kaapse Son". As indicated to your Mr. Prins, it was difficult for me to give him my version of Ukloba Fishing, if I do not know exactly what he is referring to and exactly what the allegations are.***
>
> ***However, I insist that I be given a copy of any article you propose to publish in advance of it going to print, to ensure that it reflects accurately the true facts and that it does not infringe on my constitutional rights. The article must be fair and accurate in all its detail and must under no circumstances seek to influence the case, as it is still pending.***
>
> ...
>
> *9.* ***In the circumstances, you are advised, that it would be extremely unwise for you to allow your newspaper to be used by the respondents to achieve their diabolical purpose by repeating the defamatory allegations made by the respondents. In this regard we advise further that the High Court on 22 August 2003 granted our clients' application for an order striking out certain allegations contained in Walter Phillips's affidavit as being scandalous, vexatious,***

argumentative or irrelevant with costs including those of two counsel."

This letter was sent to the defendants on 12 September 2003 – more than a year before the article was published.

[16] The defendants contended that they did not receive the letter. The evidence tendered in this regard by the defendants' witnesses was most unsatisfactory. It was contradictory and at times ridiculous. I have no hesitation in rejecting it. I say so for the following reasons.

[17] First it was alleged that the letter was sent to the wrong fax number. When it was pointed out to the defendants that it was sent to a number which appears on their website, they contended that the number in question has been out of order – since 2003 !! Yet the number in question appears, as I have indicated, on their website and on various other

advertisements on the internet. The IT manager of Media 24 testified that she is unable to state whether that fax number was working in 2003 because her records for that number only goes back to 2006. It is difficult to imagine what records would exist of a fax machine which has been out of order since 2003 ! On the probabilities I am therefore satisfied that the third or fourth defendants received the letter. Mr. Theron, for the defendants, argued that considering that the letter was sent more than a year prior to publication thereof, it cannot be said that the fourth defendant was negligent in not recalling the contents thereof when he wrote the article. But that aspect was never addressed in evidence. It was never the fourth defendant's case that he had seen the letter but had forgotten about it as a result of the effluxion of time. One can therefore not speculate about this. All I can find is that on the probabilities fourth defendant received the letter and that this should have alerted him, particularly because

he never attended Court himself and had to rely on second hand information from Prins.

[18] Even when the defendants received the summons they initially persisted with a defence of justification. This persisted until 9 April 2010 when the defendants amended their Plea to admit the defamation.

[19] On the other side of the scale however the plaintiff never issued a letter of demand to the defendants, and summons was only issued 3 years after the publication of the article. The plaintiff's explanation for the delay in issuing summons was not in all respects satisfactory. If in fact this article caused the plaintiff as much anxiety as he professed, one would have expected him to have demanded an apology and/or a retraction without any delay.

[20] Instead an apology was only published on 1 April 2010. Of course any apology published 3 years after an article of this nature can never carry much weight. Particularly not in the form in which it was published. Your average reader would no longer have any recollection of the original article. In any event the apology was given far less prominence than the original article. This must however be judged in view of the fact that the plaintiff waited 3 years to issue summons and before that did not send any letter of demand to the defendants.

[21] The defamation in this case was undoubtedly serious. It is difficult to conceive of worse things to publish about an attorney. It was published in a daily newspaper with a large circulation. The fact that it was published in a tabloid which consists mainly of gossip and scandal should make no difference. The article was written in a manner which gave it an appearance of being a factual account of a current event.

There was nothing to indicate that it was anything other than an accurate account of what had taken place in Court. That is how any reasonable reader would have read it.

[22] Before I proceed to discuss the *quantum*, there is one further matter. During the plaintiff's evidence Mr. Theron wanted to introduce certain documents which would indicate that certain steps taken by the plaintiff would have constituted a transgression of the rules of the Law Society. I disallowed this and indicated that I would give my reasons later. I give my reasons now. It is by now well established that particulars of one incident or act cannot be relied on as tending to show disrepute in mitigation of damages. (See South African Associated Newspapers Ltd & Another v. Yutar, 1969(2) SA 442 AD at 457 E-G.) The fact that this incident related to the plaintiff's conduct during the Ukloba trial is irrelevant. The trial alluded to by the Son – namely a criminal trial in which the plaintiff stood accused of fraud –

never took place. Whatever the nature of the complaint might have been it can never mitigate the plaintiff's damages because it is totally unrelated to the fictitious trial that was described in the article.

[23] I return to the award. Our Courts have over the years expressed a reluctance to award huge amounts as damages for defamatory statements. Awards in previous matters are no more than a guideline.

[24] Mr. Albertus for the plaintiff, argued that an award of R350 000,00 to R400 000,00 would be appropriate. The defendants tendered an amount of R55 000,00. This amount is clearly inadequate. This was an extremely serious assault on the plaintiff's character. If it was not for those mitigating factors to which I referred above, the award that I propose making would have been higher. As regards

the costs, I do not believe that this case warrants the costs of two Counsel.

[25] In the circumstances I make the following order:

The defendants are ordered to pay the plaintiff, jointly and severally, the one paying the other to be absolved:

(a) the sum of R150 000,00 (one hundred and fifty thousand rand);

(b) costs of suit.

TRAVERSO, DJP