



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

CASE NO: 8618/08

In the matter between:

NORMAN WALLACE PUDNEY

First Plaintiff

WW ACTION ENTERTAINMENT

Second Plaintiff

AND EVENTS CC

and

HAGEN ENGLER

First Defendant

UPPERCASE MEDIA

Second Defendant

(PROPIETARY) LIMITED

JUDGMENT delivered this 29th day of April 2013

NDITA ; J

[1] The plaintiffs, in two causes of action, first sue the defendants for damages in the sum of R100 000, 00 based on

certain defamatory utterances published, together with the image of the first plaintiff, dressed as a clown, in a copy of the For Him Magazine (FHM), of which the first defendant, at the time was the editor and the second defendant the publisher. In the second cause of action, the plaintiff alleges that the full extent of the defamation of the first plaintiff 'commensurately defamed the second plaintiff and caused damage likely to result in both plaintiffs losing business opportunities'.

[2] It must be stated from the outset that for the purpose of this judgment, it is only the claim by the first plaintiff that falls to be considered. This is so because the second plaintiff is a close corporation and defamation derives from the *actio iniuriarum*, a remedy available for the protection of personality rights consisting of physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*) not to recover patrimonial loss. This old principle has been reaffirmed by the Supreme Court of Appeal in *Media 24 v SA Taxi Securitisation* (437/2010) [2011] ZASCA 117 (5 July 2011) when it stated that a close corporation:

"has no *corpus*, it can have no *dignitas*, nor *fama* in the sense of personality rights. What it can have is reputation in the sense of goodwill. But that reputation is not a personality right. It is an integral part of the corporations'

patrimony. Damage done to the reputation could therefore constitute a patrimonial for which compensation could be claimed under the action *legis Aquiliae* and not the *actio iniuriarum*.”

In this case, the plaintiffs have not claimed any such damages. It follows that a sustainable cause of action in respect of the second plaintiff ought therefore to have been made under the *lex Aquilia*. It remains to be said that Counsel for the plaintiffs conceded this fact, albeit towards the end of the trial. For this reason, the second cause of action wherein it is alleged that the second plaintiff was defamed cannot succeed. In the result, reference to the second plaintiff in this judgment is only relevant to the question of costs because the claim falls to be dismissed.

[3] The first plaintiff is an adult performing artist who has performed as, and developed the character “*Puddles the Clown*”. It is alleged that he has in this capacity entertained up to 35 000 people per year. The second plaintiff, a close corporation duly incorporated in terms of the laws of the Republic of South Africa, with its registered address at 170 Mountain Rise Road, Scarborough, Western Cape is a vehicle through which the first plaintiff performs and markets his public image, character and talents. The first plaintiff is the sole member of the second plaintiff.

[4] According to the particulars of claim, to promote his performing character, the plaintiff modelled at a Boss Models/First Production photo shoot for Master File Corporation ('MFC') on 29 November 2006. He was photographed by MFC agents in his Puddles the Clown character, riding a unicycle. MFC provides a database of images to users, subject to certain terms and conditions that regulate such use. It is common cause in these proceedings that the image was published by the defendants in the December 2007 FHM issue. Certain alleged defamatory statements associated with the photograph of the plaintiff were also published in the same issue. In order to fully comprehend the issues in these proceedings, it is necessary to set out the plaintiff's cause of action as pleaded in the particulars of claim. The plaintiff alleges that:

"11. The image of the first plaintiff was used and published by defendants in the following manner and context:

11.1 On the cover of the December 2007 issue of FHM first defendant, acting in the capacity as aforesaid, caused a reference to be recorded to an article regarding "25 Things that suck";

11.2 At page 81 of the magazine, of which page a copy is annexed hereto as Annexure "NP3", an article appeared under the title "FHM calls Bullshit";

11.3 The main image that appears on such page was one of first plaintiff depicting his character as “Puddles the Clown” riding a unicycle, the image reflected on “NP1”;

11.4 The introductory paragraph of the article read as follows:

“We’ve taken it for far too long, men. It’s high time someone stood up, extended an outstretched finger and waved it in the face of all that is absolute rubbish”;

11.5 The introduction continued:

“Like roaches, debt and beggars at the robot, some miff things just never seem to go away, and FHM has had enough! . . .

FHM hereby calls bullshit on the following 25 examples of utter *kakness*!”;

11.6 The article proceeded to state:

3. Clowns and Mimes

Seriously, what the hell? Grown men, often with long term tik habits, dressed like transvestites from hell, scaring the crap out of defenceless children who grow up damaged. Like us! You’d have to be a mental-midget crack head to find a clown in anyway entertaining. Plus, they usually just weird hippies under the goofy shoes and hideous makeup. Hardly childminding material.

11.7 In close proximity to the image of first plaintiff’s face the word “Bollocks!” appeared together with an image of a bull’s scrotum.

11.8 A “window” appeared on the left side of the page next to the image of first plaintiff on the unicycle, containing the words “Will work for the second wheel”.

11.9 The image of the plaintiff was recorded as full-page image with the text on the page superimposed over such image.”

[5] According to the plaintiff, the statements associated with his image which are featured prominently on the relevant page, depicted him in a defamatory manner and impaired his *fama*. Alternatively, so alleged the plaintiff, the statements conveyed to a person of reasonable intelligence that the vocation and business of plaintiffs as “*absolute rubbish*” and “*bullshit*”. In addition, they suggested that the plaintiff:

“(a) as one of the genus of grown ‘men, often with long term *tik* habits’, is a drug abuser.

(b) is a ‘weird hippy, under goofy shoes and hideous makeup’, denoting some other mental instability or aberrant social behaviour;

(c) causes, by the exercise of his profession, emotional damage and stress to children.”

[6] As earlier said in this judgment, the image of the plaintiff was sourced from MFC pursuant to a photo shoot. Use of FMC images is subject to certain Terms and Conditions. One of such terms is that the user of the image shall not permit its use in a defamatory, pornographic or unlawful context, contrary to ethical business practices. Clause H-4 c specifically provides as follows:

“Sensitive issues

If any image of a person is to be used in a sensitive context (including, abuse, mental condition, religious, political or racial bias), then the existence of a model release form may not be sufficient to protect you from action by the person depicted in the image (the “Model”). . .”

It is against this background that the second leg of the plaintiff’s claim is premised on the fact that the defendants intentionally and maliciously breached the duty arising from their agreement with MFC by showing the plaintiff in a sensitive context relating to ‘substance abuse’ and ‘mental condition’, contrary to the MFC provisions mentioned above.

[7] The defendants pleaded that the article was not intended to defame any person, but was made in jest, and that a reader of reasonable intelligence would understand it as such. Furthermore, the article did not make any reference to, nor identity either of the plaintiffs’, nor could their identities be inferred from it. In particular, the article relating to “Car Guards” does not refer to clowns and mimes, and would not have been reasonably understood to do so.

[8] The pleadings further reveal that the defendants instructed their attorneys to record the following:

“It is in fact apparent from a careful perusal of the whole of the article that the comments regarding, inter alia, clowns and mimes were just goo-natured fun and said in jest in a manner consistent with the light hearted manner. Issues of this nature are normally dealt with and which has been understood as such by the readers of the article.

However, should your client still be of the opinion that he was treated unfairly; our client is prepared to publish a written apology in this regard. It is also our client’s intention not use your client’s image in the same context as has been used in the article.”

[9] The defendants filed an amended plea wherein they pleaded that the first plaintiff signed a Masterfile Model Release and waived any right to claim damages from the defendants, alternatively, the first plaintiff voluntarily assumed the risk of his photograph being published in the manner in which it was. According to the defendants, by signing the relief form, the first plaintiff:

1. irrevocably transferred and assigned to Master File all right, title and interest in and to his image appearing in the photograph, including the unrestricted right to license the publication and reproduction of the photograph and the first plaintiff’s image.
2. understood and agreed that the photograph was intended to be licensed for commercial gain by Masterfile and its licensees;

3. consented to the publication and reproduction of the photograph and his image by any licensee in any form, without restrictions on change or alterations to or distortions of the photograph and his image, in all media, including for any purpose whatsoever;

4. waived any right that he might have to approve a finished product or the text that may be used in connection with any reproduction or publication of the photograph and his image'

5. released Masterfile and its licences from any claim for remuneration for any form of damage or compensation, including (without limitation to any claim for libel and/or privacy and /or any publicity claim or any other cause of action associated with any use of the photograph and the first plaintiff's image, even if such use is objectionable to him).

[10] In replication, the plaintiffs alleged that the defendants' amended plea failed to set out a basis on which it can be construed that an agreement between Masterfile and the first plaintiff had been concluded. With regard to the waiver, the first plaintiff pleaded that he had never been aware of the fact that he had been required to sign a document exempting any party from any wrongdoing, delict, or other unlawful action, committed and/or

perpetrated to the first or second plaintiff. The first plaintiff further averred that he would only have signed such a document if the gist and content had been misrepresented to him, and his signing the document was never intended to signify his assent to its contents. In addition, the first plaintiff denied that the defendants were Masterfile *'licensees as described in the release'*. In the light of the fact that the Model Release specifically stipulated that its provisions should be construed according to the laws of the province of Ontario and the applicable federal laws of Canada, the first plaintiff pleaded that he had no knowledge of whether such laws permit the contractual exemption from liability for wilful, intentional and malicious actions. If that be so, it would, according to the plaintiff, be unconscionable and against public policy in Canada to exempt the defendants for liability in the present case. The first plaintiff further averred that if it is established that the first plaintiff waived his rights, the second plaintiff's rights to claim and recover damages remained unaffected by the waiver of the first plaintiff. In any event, according to the plaintiffs, such an exclusion is against public policy as well as the values of the Constitution of the Republic of South Africa.

The Issues

[11] It is trite that at common law, the elements of delict of defamation are:

- (a) the wrongful and
- (b) intentional
- (c) publication
- (d) of a defamatory statement
- (e) concerning the plaintiff.

In the present matter, having regard to the aforementioned elements, the main issues for determination as can be discerned from the pleadings can be summarised as follows:

1. Whether the publication by FHM is defamatory.
2. If it is, whether it could be understood to refer to the first plaintiff. Put differently, it is whether the plaintiff was clearly recognisable and identifiable in the publication.
3. Whether the defendants' defence that it was not intended to defame any person but was published in jest and would have been so understood by readers of reasonable intelligence.
4. whether the model release signed by the plaintiff indemnified the defendants from liability.
5. Whether the model release form is *contra bonos mores*.

A further issue that arises in these proceedings relates to liability for costs which stood over for later determination, occasioned by the postponement on May 2012.

Was the publication by FHM *prima facie* defamatory?

[12] The first question which must be considered is whether or not the publication in FHM is *prima facie* defamatory. It has long been accepted that the determination of whether a publication is defamatory and therefore *prima facie* wrongful involves a two-staged enquiry. (See *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 CC). The first is to determine the meaning of the publication as a matter of interpretation and the second whether the meaning is defamatory. The test is objective. In making this determination, a court must take into account what the publication conveys and what a reasonable person may infer from it. Whether the article was published in jest remains to be considered later in this judgment. The publication of the image of the first plaintiff as a clown riding a unicycle per se is not defamatory. However, the same cannot be said of the text associated with it. The description of clowns and mimes as grown up men with long-term *tik* habits, dressed like transvestites from

hell, scaring the crap out of defenceless children who grow up damaged, is without a doubt defamatory. A reasonable reader would have regard not only to what is stated about clowns but to what is implied in the rest of the article. The caption of the article boldly refers to what *'FHM calls bullshit'* and invites men to extend an outstretched finger and wave it in the face of all that is absolute rubbish. By implication, clowns and mimes fall into this category. Next to the image, it states *'will work for a second wheel'*. It also has an insert showing a bull's scrotum, highlighted in similar fashion as the one on clowns and mimes. It is more probable that the article bore a defamatory meaning to a reasonable reader. In my view, there is no room for a reasonable alternative interpretation that renders it capable of being construed as innocent. To this end, the defendants correctly conceded that any reasonable reader would tend to think less of clowns and mimes if he/she were to learn them that they often have long term *tik* habits, scare children, wear goofy shoes and hideous make-up. Without repeating the entire publication, it can therefore be accepted that the publication by FHM is defamatory. Indeed, I think, it is fitting to conclude that the effect of the article was belittling and humiliating to the first plaintiff as the words used have a tendency of disparaging him in the eyes of people. But the matter does not end

there, context is equally important. Thus, it must be considered in the circumstances of this case whether the publication can be understood to refer to the plaintiff.

Can the defamatory statements be understood to refer to the first plaintiff?

[13] It is trite that the onus to prove the defamation lies with the plaintiff. In the context of this matter, the plaintiff must prove that the words in the relevant paragraph of the publication refer to him or that he is the person who has been defamed. Counsel for the defendants argued that the plaintiff failed to show that the paragraph refers to him rather than to the totality of clowns and mimes, and was similarly unable to show that a reference to Puddles the Clown is a reference to him. Should this court uphold this contention, it is the end of the matter. It therefore is in my view sensible to deal with this contention upfront in the context of the arguments presented as well as the evidence tendered.

[14] At this point, it makes sense to consider the evidence tendered on behalf of the plaintiff. As earlier alluded to in this judgment, it is common cause that the first plaintiff, Mr Norman Pugney is a performing artist and has been one for 25 years. He

testified that at the beginning of his career, he was self-taught but later trained in Broadway, New York. One of his performances features the use of a unicycle, which he has been riding since the age of 13 years. According to his evidence, he has, through his character, Puddles the Clown, entertained approximately 35 000, 00 people. He is the sole member of the second plaintiff, a company which was formed in 2007.

[15] With regard to the events leading to publication of his image as Puddles the Clown in the FHM magazine, the plaintiff testified that he was advised by his friend and fellow juggler, Mr Gabriel Heflin that there would be an audition for artists with skills on 29 November 2006. Clad in his performance attire, he attended the audition which was followed by a photo shoot, and was paid an amount of R1400.00. During his testimony, the plaintiff was shown a Masterfile Model Release duly signed by him. The plaintiff testified that he did not recall signing the form, but even if he did, he could not *'have signed away his good name'* as his performing character is his livelihood. The release reads as follows:

“FOR VALUE RECEIVED (receipt and sufficiency of which are acknowledged as full and final payment for the rights conveyed hereunder and release

granted herein), I, the undersigned, hereby irrevocably transfer and assign to Masterfile Corporation ("Masterfile") all right, title and interest, in and to my image ("My Image") appearing in the photographs taken of me on 29. 11. 2006 at . . .

Including the unrestricted right to publish or reproduce and to licence the publication and reproduction of the Photographs and My Image. I acknowledge and agree that Masterfile owns the copyright to the photographs.

I understand and agree that the Photographs are intended to be licensed for commercial gain by Masterfile, its agents, representatives, licensees and/or assignees (the "Parties"). I consent to the publication and reproduction of the Photographs and My Image by the Parties and their licensees in any form, without any restrictions on changes or alterations to or distortions of the Photographs and My Image, in all media, now or hereafter developed, including, but not limited to, advertising, display, editorial, internet, packaging, television, or for any other purpose whatsoever. I hereby waive any right that I may have to approve a finished product or the text that may be used in connection with any reproduction or publication of any of the Photographs or my Image. I hereby release Masterfile, the Photographer, the Parties and their licensees from any claim for remuneration for any form of damage or compensation, including (without limitation) any claim for libel and/or invasion of privacy and /or any publicity claim or any other cause of action associated with any use of the Photographs and My Image, even if such is objectionable to me. I hereby expressly waive any right to seek, obtain, or enforce any

injunctive or other equitable relief against Masterfile, the Photographer, the Parties and their licensees. I agree that this Model Release shall be governed and construed according to the laws of the Province of Ontario and the applicable Federal laws of Canada and I agree to the exclusive jurisdiction and venue of the courts located in Toronto, Ontario.

. . . “

[16] Pursuant to photo shoot, the first plaintiff testified that in November 2007, he received a call from Mr Mark Sampson, a stand-up comedian he has known since 1993, alerting him to an article published in FHM, slating his profession and industry and depicting him as a substance abuser. In his evidence, the image was clearly recognisable as himself as well as the fictional character Puddles.

[17] In cross-examination, the first plaintiff readily conceded that when he performs, he hides himself in the Puddles persona, through make-up and the attire, and as such he was not easily recognisable or identifiable, unless a person already knew him, as is the case with Mr Sampson. He further admitted that the use of his image is illustrative of clowns generally. Whilst admitting that he signed the Masterfile Model Release fully aware that he was selling his image, the first plaintiff stated that he did not read the

Terms and Conditions and had no control of over how other people would use it, but he believed that the image would be used in a positive light. The first plaintiff further had no direct knowledge of how the defendants sourced the image from Masterfile or what their relationship with Great Stock was. When it was put to him that the publication, read in context of other articles, was tongue in cheek satire or good natured fun, and not intended to defame, he responded that its effect degraded him. It is for this reason that he felt that an apology would not do him any good even though clowns are meant to be funny. He was referred to other text in the publication which he also considered to be an attempt at humour, but was adamant that the caption on a clown on the unicycle and the words 'will work for a second wheel' implied that he would be prepared to work for virtually anything, thus degrading him.

[18] As earlier alluded to in this judgment, Mr Mark Sampson, after purchasing the December 2007 issue of FHM magazine, saw the image of Puddles the Clown, which he immediately recognised and identified as the first plaintiff, whom he has known since 1993. In his opinion, the image was not a big transformation of the first plaintiff as he was recognisable. After reading the text associated with the image, Mr Sampson was concerned with the manner in

which the article depicted the first plaintiff, who is also a family entertainer. According to the witness, it suggested that clowns were '*crack-heads*', and that was in his view damaging to the first plaintiff who was recognisable to also other people who know him in the South Peninsula. Although he saw the implied humour associated with the image, he considered the use of the image as degrading and unacceptable.

[19] Another performing artist, Mr Martin Scott, was, as the plaintiff, also photographed for an advert for Masterfile. He also did not recall signing document relating to the photo shoot. Mr Scott was shown the FHM by the first plaintiff. The first plaintiff was identified from the magazine by a young child in his presence.

[20] It is the law that the plaintiff must establish that the words complained of, (in this case accompanying the image of Puddles the Clown), would lead a reasonable person to believe that the words refer to the plaintiff personally, not to a large indeterminate number of clowns. In *Neuman CC v Beauty Without Cruelty* 1986 (4) SA 675 (CC) at 680 B, the principle was explained as follows:

"It is also trite that a plaintiff or applicant in a defamatory action must allege and prove that the defamatory matter was published of and concerning him. It must refer to or concern him personally (see Burchell the Law of Defamation in South Africa at 128; Goodall v Hoogendoorn LTD 1926 Ad 11 at 15; South African Associated Newspapers Ltd and Another v Estate Pelser 1975 (4) SA 797 (A) at 810C; Knupffer v The London Express Newspaper Ltd (1944) 1 ALL ER 495 (HL) and it is whether the ordinary reasonable reader would have understood the words complained of, in conjunction in this case with the picture, to apply to the plaintiff or as in this case to the applicant ... This gives rise to a two-stage inquiry. Firstly, whether the words (with the picture) are reasonably capable of referring to the plaintiff or applicant. This is a question of law and can be decided on exception. Secondly, and if the answer to the first part is in the affirmative, whether a reasonable person would regard the words as referring to the plaintiff or applicant. This is a question of fact on which evidence would be admissible."

[21] The question that must therefore be considered is whether the defamatory publication is 'of and concerning' the plaintiff. One of the arguments advanced on behalf of the defendants is that a reasonable reader of FHM would recognise that the image is merely illustrative of a typical clown and given that there is no assertion that the plaintiff is a tik addict, the words cannot be imputed on the first plaintiff. The second leg is that Puddles is a

fictional character created by the first plaintiff and has no *locus standi in judicio*. Whilst the latter contention is correct, I do not agree with the former.

[22] Even though the plaintiff testified that he would probably not be recognisable by anyone meeting him in the street as Puddles the Clown, there is uncontested evidence that he was recognised or identified from the photograph by both Mr Sampson and Mr Scott. The contention that the people who know the plaintiff will invariably know that he is not a *tik* addict is, in my view, devoid of merit. I cannot comprehend how it can be expected that every person who knows or can recognise or identify the plaintiff as featured in the article can be privy to his true character and tendencies. I therefore, hold that the plaintiff was personally recognisable and identifiable from the image of Puddles the Clown.

[23] It must be accepted in these proceedings that the defamatory words on their own and without reference to the photograph, merely constitute, as correctly argued by Counsel for the defendants, a generic defamatory statement. According to the defendants, it cannot be found that a reader of average intelligence would understand the defamatory statements as

referring to the plaintiff personally. Having found that the first plaintiff was recognisable and identifiable in his character of Puddles the Clown, I proceed to determine whether the defamatory statements could be understood as referring to the plaintiff by the ordinary reader. There are certain special features indicating that this is the case. For example, the reference to goofy shoes, hideous makeup and the second wheel would induce any reasonable reader to examine the featured clown. In addition, although the article also includes content on car guards and airline fares, the image of Puddles the Clown is prominently featured in the article. That on its own is bound to catch the attention of a reader. The yellow highlight in a bold font corresponding with the clowns and mimes words conveys a clear message to the reader that what FHM calls '*Bullshit*' is linked to the description of clowns. It is my judgment that the probabilities are that the words are capable of being understood as referring to the plaintiff.

Was the publication made in jest?

[24] I now turn to the defendants' defence that the publication was not intended to defame any person but was published in jest and would have been so understood by readers of reasonable

intelligence. They therefore bear the onus of proving this defence on a balance of probabilities.

[25] The defendants, in support of this defence tendered the evidence of one witness, Mr Hagen Engler, the first defendant. It is common cause that he was the editor of FHM magazine at the time of the publication of the article. He testified that the defendants' lack of intention to defame is best understood in the context of the magazine's target market. According to his evidence, between 70 and 80 percent of FHM's readership is made up of grown man from about 28/29 years upwards. In his evidence, these are loud and party-going males in the prime of their lives. The magazine content in his opinion is sexy, funny and useful, and is not meant to be taken seriously and is purely for entertainment and a laugh, but not exclusively. This is obvious from the captions. The first defendant further testified that the FHM content is satirical.

[26] The first defendant was extensively cross-examined on the use of profanities in the publication as well as on the article he wrote in his blog, which he claimed was regulated and sometimes sanctioned by FHM policy. When it was suggested to him that the

main purpose of the article was to put scorn through use of humour, he was adamant that satire is part of being funny. He was examined on the contents of each article and what follows is an upshot of how in his evidence he explained how the words could be understood:

1 ‘*Will work for a second wheel*’: The words can only relate to the clown on the unicycle. It can also be interpreted to mean that the clown is a beggar. Stated differently, it equated the profession of the first plaintiff with that of unemployed beggars seeking favours from members of the public.

2. ‘*Clowns and mimes*’: The words are highlighted in a yellow block as they pertain to the main picture. Clowns and mimes are an example of utter *kakness* but only humour was intended. The use of the profanity can, in certain instances, be derogatory.

3 ‘*Long term tik habits*’: Although the first defendant conceded that the drug tik has impacted negatively on people’s lives, the words were not intended to insult.

4. ‘*Goofy shoes*’ and *hideous make-up*’: The witness conceded that not all clowns wear goofy or whacky shoes.

5. ‘*Mental midgets and crack-heads*’: Crack-head means a person who has crossed the level of sanity. The use of the words

was intended to support the assertion that clowns can be scary. The image of the clown served to illustrate the words used.

6. *'Bollocks'*: Use of this word is accompanied by the image of a bull's backside with hanging scrotum in close proximity of the clown's face. It refers to a load of rubbish but was not intended to scorn clowns and mimes.

7. *'Like Roaches'*: The words likened clowns and mimes to cockroaches which are considered as dirty, vile and repulsive insects. However, Mr Engler explained that the likeness could also be interpreted as tough and hard to destroy.

[27] It was put to Mr Engler that, contrary to the averments in his plea, that FHM magazine routinely dealt with light-hearted issues, the 2007 issue contained serious articles masked under humorous captions. The witness conceded this point.

[28] Before analysing the evidence, it seems sensible to first recapture the applicable principles and the approach of the courts where the defence of absence of *animus iniuriandi* has been raised. These were succinctly summarised by Brand AJ, in *Le Roux and Others v Dey (Freedom of Expression Institute and*

Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC)

at 274 as follows:

“[31] As to the first ground, established principles of our law dictate that motive to raise a laugh and not to injure, in itself, would not exclude *animus iniuriandi*. This is so because in our law motive does not necessarily correlate with intent. A defendant who foresaw the possibility that his attempt at humour might be defamatory of the plaintiff, but nonetheless proceeds with the attempt will have *animus iniuriandi* or intent in the form of *dolus eventualis*.”

[29] It will be recalled that the publication referring to the plaintiffs has been found to be defamatory; the defendants in rebuttal must therefore plead and prove facts justifying the basis of their denial. The first defendant in his evidence emphasized that the article was satirical. The Concise Oxford Dictionary defines satire as ‘*the use of humour, irony, exaggeration, or ridicule to expose and criticize people’s stupidity or vices*’. Whilst it can be accepted that satire does constitute one form of the legal defence of jest, however, defamatory ridicule masked as satire cannot exculpate one from liability. That said, it must be equally borne in mind that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other. (See *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1197 at 1207(D)).

[30] With regard to the context, the court in *Mangope v Asmal and another* 1977 (4) SA 277 (T) explained thus:

"The next question is whether the words do not constitute meaningless abuse. Again it will depend on the circumstances in which they were uttered whether the words constitute meaningless abuse or not. In this regard what was said by Price J in *Wood NO and Another v Branson* at 371D is instructive: 'The context in which a word is used, the circumstances in which it is used, the tone in which it is uttered, are all facts which may render meaningless abuse defamatory.' I may possibly add thereto the obvious, ie that words which are *prima facie* defamatory can by those very facts be taken out of the cadre of defamatory matter and reduced to meaningless abuse. It would obviously be premature to decide without the aid of evidence whether the words in question constitute meaningless abuse. Mr *Marcus* argues that, as the words were uttered during a public meeting by one politician of and concerning another politician, the Court as a matter of policy ought not to sustain an action for damages based on defamation. (I shall deal with the argument in this context based on s 15(1) read with s 35(3) of the interim Constitution later.) It is, of course, so that over the years the Courts have held that public figures, and in particular politicians, must expect severe criticism from their political opponents. The position was succinctly put by Ogilvie Thompson CJ in *Botha en 'n Ander v Marais* (*supra* at 49F--H): 'Dit moet nie uit die oog verloor word nie dat die gewraakte woorde tydens 'n politieke G toespraak gedurende 'n verkiesingsveldtog deur 'n politikus van een politieke party tov 'n ander politikus, 'n lid van 'n ander politieke party, gebesig is. Onder sodanige omstandighede - *alhoewel ek geensins te kenne wil gee dat*

straffeloos belaster kan word nie - is sterkbewoorde kritiek van 'n politieke opponent niks ongehoord nie (vgl met betrekking tot die verweer van billike kommentaar, *Waring v Mervis and Others* 547, en gewysdes daar aangehaal).' (My emphasis.) I understand the Chief Justice to have said that even politicians can be defamed. They must, however, not be overhasty to complain about slatings against them unless it is really serious. Now it is obvious, in my view, that a distinction must be drawn between an attack against the dignity and reputation of a politician, on the one hand, and an attack upon his political views, policies and conduct, on the other hand. When it comes to the latter, the Courts will be slower to come to the assistance of a politician. But, even if, in that context, a defendant oversteps the bounds of what is permissible, he will be held liable. On the other hand, if there is an unwarranted slating which lowers him in the esteem of his fellow human beings which is not at all necessary in commenting upon his policy and his conduct, a Court will be more readily inclined to protect his dignity and reputation.

[31] The meaning of the ordinary reader was revisited in *Times Media Ltd and others v Niselow and another* [2005] 1 All SA 567 (SCA) at 573, Mpati AP (as he then was) stated thus:

“[9] The first question to be considered is whether the article and cartoon conveyed to the ordinary reader of the Sunday Times one or more or all of the defamatory imputations attributed to them in the particulars of claim. Such an ordinary reader would be “a person who gives a reasonable meaning to the words used within the context of the document as whole and excludes a

person who is prepared to give a meaning to those words which cannot be reasonably attributed thereto.” (*Demmers v Wylie and others* 1980 1) SA 835 (A) at 842 H.) Very recently this court (per Lewis JA), in *Mthembi-Mahanyele v Mail & Guardian Ltd and another* [2004] 3 All SA 511 (SCA) at 520 paragraph [26], endorsed the following statement by Colman J in *Channing v South African Financial Gazetted Ltd* 1966 (3) SA 470 (w) at 474 –C:

“... the ordinary reader is a ‘reasonable’, ‘right-thinking’ person, of average education and normal intelligence; he is not a man of ‘morbid and suspicious mind’, nor is he ‘supercritical’ or abnormally sensitive; and he must be assumed to have read the article as articles in newspapers are usually read. For that assumption authority is to be found in *Basner v Trigger* 1945 AD 22 at pp 35-6. It is no doubt fair to impute to the ordinary reader of the South African Financial Gazette a somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purpose of this enquiry, the training or the habits of mind of a lawyer.”

As to the attributes of a “right-thinking” person Marais JA said the following in *Independent Newspaper Holdings Ltd and others v Suliman* [2004] 3 All SA 137 (SCA) at 153 paragraph [29]:

“For myself, I have no doubt that sound legal policy should not require a court hearing a defamation suit to ascertain in the meaning and effect of words by reference to the meaning and effect that would be attributed to them by anyone other than the well-known notional reasonable person in the particular circumstances. Anything less would be unfair to the publisher of the statement

who is sought to be held liable; anything more would be unfair to a plaintiff who bears the onus of establishing both the meaning of the words used and the defamatory nature of that meaning. In the former case it would subject the publisher to liability for less than reasonable interpretations of published matter; in the latter case it would require the plaintiff to establish more than that reasonable readers would attribute a particular meaning of a defamatory nature to the matter. The same considerations apply, so it seems to me, to the suggestion (Jansen JA in *SA Associated Newspapers Ltd en 'n ander v Samuels* 1980 (1) SA 24 (A) at 30 and *Demmers v Wyllie* 1980 (1) SA 835 (A) at 840) that one test should be applied when ascertaining the meaning of the words used and another more intellectually and ethically rigorous test when deciding whether the ascertained meaning is indeed defamatory. In my view, neither logic nor sound legal policy requires the application of two different criteria to these questions.”

[32] With this exposition of the law in mind, I turn to consider what the cross-examination of the first defendant with regard to the meaning the words in the publication conveyed elicited. When it was suggested to him that the article relating to beggars read in context with the words applicable to the first plaintiff, it contained a nuance that the first plaintiff was a beggar, he responded that: “I don’t think it was thought through in that way. It can be interpreted in that way.”

In similar vein, when asked about what was humorous with long-term *tik* habits, his unpersuasive response was that the word '*tik*' is humorous without giving an explanation of why that is so. Yet, he readily conceded that drugs are a serious social problem. In addition, the first defendant conceded that the article about clowns and mimes "*in a certain way would be derogatory*". But the evidence must be analysed in the context of the publication. The highlight of the article is what:

'FHM calls bullshit' and inviting men to extend an outstretched finger and wave it in the face of all that is absolute rubbish'.

Reference to the first plaintiff clearly falls into this category. It continues:

"Read our list of shame, nod in quiet agreement, then vow to make a difference! Complacency: you have had your time. Begone! FHM hereby calls bullshit on the following 25 examples of utter kakness!"

In addition, the article likens the plaintiff in the Puddles and Clown attire to a cockroach and a beggar, faking employment. Putting aside the profane language used, and considering the context, I have no doubt that there is nothing humorous or off-beat in the text used to describe clowns and mimes. Admittedly, some of the articles featured in the FHM December 2007 edition are not serious. For example, the ones on vegetarians, sushi, Goths,

traffic circles, etc. However, the words used with reference to the plaintiff clearly overstep the bounds of what is permissible.

[33] Counsel for the defendants argued that an important element of the evidence demonstrating lack of *animus iniuriandi* is that the photograph of Puddles the Clown was acquired after the article had been completed, and for this reason, this case was distinguishable from the facts of *Le Roux v Dey* supra, where Brand AJ in his majority judgment stated the following (at 318 B):

“On assumption, in the applicants’ favour, that they intended to amuse fellow learners through wit, they knew at the time that an inherent element of the joke was to humiliate Dr and the principal.”

I do not consider the acquisition of the photograph after the article had been written as an indication of absence of an intention to defame. The element of defamation lies in the publication. Furthermore, the evidence of the first defendant amply demonstrates that the defendants foresaw that the statements were likely to subject the first plaintiff to ridicule and humiliation but went ahead and published the article all the same. In my judgment, an ordinary reader would understand the statement as belittling the plaintiff, making him to look foolish and unworthy of respect, or as exposing him to ridicule and contempt. I am of the firm view that

this court must protect the reputation and dignity of the plaintiff. In any event, even if the statements did raise a laugh, I am fortified in my view by the dictum in *Dey, supra*, where the court dealt with the issue of jest and held thus:

“.....the mere fact that a statement raised a laugh does not mean that it is not defamatory. Writing for the majority of the Supreme Court of Appeal in this case, Harms DP formulated the principle as follows. 'It appears to me that if a publication is objectively and in the circumstances in jest it may not be defamatory. But there is a clear line. A joke at the expense of someone — making someone the butt of a degrading joke — is likely to be interpreted as defamatory. A joke at which the subject can laugh will usually be inoffensive.' In the same vein Harms DP also referred to the distinction drawn by the author, Melius de Villiers, between 'legitimate jest and jest that is not legitimate'. Latching on to this distinction, both the applicants and the FXI maintained that the majority of the Supreme Court of Appeal set themselves up as arbiters of what is a 'legitimate joke' in the sense of whether or not a joke is in good taste, unwholesome, objectively funny, and so forth. They further argued, with particular reference to certain passages from the judgment of Sachs J in *Laugh It Off Promotions*, that the majority of the Supreme Court of Appeal had erred in doing so. But I do not believe that is what the majority of the Supreme Court of Appeal set out to do. What they did was to differentiate between jokes which are defamatory and those which are not. This becomes particularly clear when proper note is taken of the substance of the distinction by Melius de Villiers to which Harms DP referred. What De Villiers describes as jest which is not legitimate, is a joke which

would be insulting, offensive or degrading to another. Or, to apply the test formulated by Harms DP, a joke in which the subject cannot share because it is hurtful and defamatory to the subject. I believe that is essentially the same distinction that Innes CJ sought to draw in *Kimpton v Rhodesian Newspapers Ltd* when he said that a statement which raises a laugh is defamatory when there is an element of *contumelia* in the joke that is when it is insulting or degrading to the butt of the joke. What I distil from all this is that in the present context, the question is not so much whether the attempt at a joke is objectively funny or not. Nor is it of any real consequence whether we regard the joke as unsavoury or whether we think that those who may laugh at it would be acting improperly. The real question is whether the reasonable observer will — perhaps while laughing — understand the joke as belittling the plaintiff; as making the plaintiff look foolish and unworthy of respect; or as exposing the plaintiff to ridicule and contempt. Everyday experience tells us that jokes are often intended to and are frequently more effective in destroying the image of those at whom they are aimed. If the joke then achieves that purpose, it is defamatory, even when it is hilariously funny to everyone, apart from the victim. In the case of defamation the line might not be so bright and sometimes it might even be wavering. Nonetheless, it is there. In principle it is crossed when the joke becomes hurtful; when it represents the teacher as foolish, ridiculous and unworthy of respect. In the end it comes down to a value judgment. In this case I share the value judgment of the High Court, and the majority of the Supreme Court of Appeal, that the applicants had crossed the line”.

In the present matter, the defendants crossed that line.

[34] The defendants in argument stated that the first plaintiff accepted that the words were published in jest. In addition, Mr Sampson testified that the whole article in which the paragraph in question appears was intended to be funny but overstepped the mark. Whereas Mr Sampson's subjective opinion bears little reference to the determination of this issues, I do not think that this concession bolsters the defendants' case. It remains to be said that Mr Sampson, is the very person who recognised the image of the first plaintiff in FHM as Puddles the Clown and considered it as an affront to his (the first plaintiff's) dignity. He testified that upon seeing the photograph, he was upset that the first plaintiff was portrayed in a negative light as he (the plaintiff) is respectable and provides family fun. The first plaintiff on the other hand gave evidence to the effect that the written apology offered by FHM was unacceptable because of the irreparable damage done, it therefore would not serve any good. It seems to me that there would not be any need for this litigation if the plaintiff had readily accepted that the publication was made in jest. The proper context of the plaintiff's evidence is that although he recognised that some of the statements may have been an attempt at humour, he did not know that his image would be used in a negative light.

[35] The views I have expressed in this judgment thus far carry very little weight if the defendants are entitled to rely on the plaintiff's waiver of his rights to use the photograph, and therefore released Masterfile, its agents, or licencees from any claim for remuneration for any damage or compensation, including any claim for libel or any other cause associated with their use. I then turn to determine whether the defendants are entitled to rely on the waiver.

Are the defendants entitled to rely on the plaintiff's waiver?

[36] As I have previously said, it is not in dispute that the plaintiff signed the Masterfile Model Release wherein he expressly waived any right to seek, obtain or enforce an injunctive or other equitable relief against Masterfile and its agents. For the waiver to kick in, the defendants must be shown to have been, at the time the of publication of the photograph and defamatory content, licensees of Masterfile. The defendants are required to prove that the terms of the waiver relied upon were part of the agreement between the plaintiff and Masterfile, and by virtue of them being licencees, they were fully entitled to invoke the injunctive exempting them from liability.

[37] The approach to the interpretation of exemption clauses as expounded and restated in *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) at 516 was summarised as follows:

“[5] The approach to the interpretation of exemption clauses is well-known. In *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 para [6] Marais JA said:

‘Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in my mind. It amounts to this: In matters of contract the parties are taken to have intended their rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application. (See *South African Railway and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419D-E.)’

Scott JA, in *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989 stated:

‘Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (a) AT 804 C. But the alternative meaning upon which reliance is placed to demonstrate ambiguity must be one to which the language is fairly susceptible; it must not be “fanciful” or “remote” (cf *Canada Steamship Lines v Regem* [1952] All ER (PC) at 310 C –D.”

[38] In order to properly examine the defendants’ reliance on the exemption clause, it is in my view fitting to provide a concise background of Masterfile as gleaned from the documents downloaded from its website and admitted in evidence. Masterfile is a Stock Image Lincensor and its Head Office is in Toronto, but it has strategic alliances with independent agents around the world. In the document, Masterfile explains its processes in the following manner:

“We acquire, organize, distribute, and license images for commercial use in media ranging from editorial publications to print advertising websites. Our

images are acquired under exclusive contract from professional photographers and illustrators who are paid a royalty every time an image is licensed. The images are store digitally, showcased, licensed and delivered instantly to business clients worldwide via the internet 24/7.”

The mode acquisition of images by clients is explained thus:

“How clients obtain images

Clients acquire images from Masterfile either by searching on this website or else by calling or emailing us and using our free custom research service. High-resolution images can be downloaded from this website in minutes. Images are licensed, not sold outright. We and our licensors retain copyright of all the images.”

[39] Against this background, I proceed to consider whether or not the defendants were the licensees of Masterfile, and thus entitled to rely on the waiver. This determination necessitates an examination of the evidence.

[40] The first plaintiff readily admitted that he sold his photograph as Puddles the Clown to Masterfile. During cross-examination, he was quizzed on the allegation in the replication to the effect that the defendants were not licencees of Masterfile. He understandably was unable to confirm the assertion but merely

stated that in accordance with his understanding, the defendants ought to be licensees of Masterfile.

[41] The first defendant, testifying on behalf of both defendants, gave a broad outline of how the photograph of Puddles the Clown was obtained. According to his evidence, as FHM editor, he would come up with an idea and the picture editor, Ms Celia McCulla would then search for corresponding images in the database. The witness testified that he has no personal knowledge of how the image of Puddles the Clown was obtained but surmises from the correspondence filed of record that Ms McCulla obtained it from Great Stock!, a company he presumed to be an affiliate of Masterfile. He further stated that despite the fact that he, as the second defendant was sued in his personal capacity, he had never heard of Masterfile before. I must, from the outset, record that Ms McCulla did not give any evidence in these proceedings. According to the first defendant, she has since left the media industry but her telephone details were available. According to the witness, the manner in which the defendants obtain high resolution images is by sending out a request to agencies. In this instance, the company that responded to such a request is Great Stock! (Pty) Ltd. These images are low resolution and have a water mark,

and both of these features protect them from unauthorised use. The first defendant explained that on receipt of the images, FHM selects the ones it wishes to purchase and Great Stock! would then send a high resolution image, without the watermark which FHM could use for publication. In addition, Great Stock! has an ongoing business relationship with FHM, such that it invoices and bills FHM on a monthly basis. It is not in dispute that the image of Puddles the Clown was owned by Masterfile. At this point, in order to fully comprehend the evidence of the first defendant, reference must be made to the email correspondence from which he, in his evidence draws inferences.

[42] On 14 September 2007, Ms McCulla sent the following email to Images-General:

“Hi

Can you help with the following search? Please note that where possible the images should be humorous and offbeat.

Clowns and mimes –perhaps a clown or mime being hit or beat up or looking really stupid.

Goths – all in black and the heavy make-up

T Cruise

Sushi – do not send if not humorous

Australia – perhaps a barren desert, a map or their poisonous animals such as the Redback Widow or Inland Taipan etc etc

Rercord store staff – bad attitudes, tattooed with piercing.

Roadblocks –local only

Moles – as in skin moles – cancerous or not

Bon Jovi

Vegetarians

If you need further info, please let me know.

Regards,

Celia McCulla –Picture Editor – FHM South Africa

[43] Great Stock!, through Ms Nadia Bowes-Moosa responded to the request by return of email on 17 September 2007 as follows:

“Good morning Celia

I apologise for the late response, as our Research Department needed more time in order to get the best images for you.

I have attached images, as per your brief received on Friday. Please let me know if is what you are looking for.

Feel free to contact me should you need assistance with anything else.

Kind regards”

[44] According to invoices discovered by the defendants, dated 30 October 2007, the defendants, paid an amount of R5, 472.00 for the images received. The photograph of Puddles the Clown is not amongst those for which payment was tendered. The first defendant testified that FHM was unable to trace or find an invoice relevant to the purchase of the image of Puddles the Clown. Nonetheless, it was contended on behalf of the defendants that in all probabilities, the purchase of the image was a legitimate transaction, first between Masterfile and Great Stock! (based on the contract of agency) and then between Great Stock! and FHM (based on a contract of sale). Put differently, the second defendant, also the owner of FHM is a licensee as described by Masterfile. Furthermore, given that the first defendant was an employee of the second defendant, a factor giving rise to vicarious liability, the first plaintiff's waiver applied to or included anyone employed by a licensee and using the photographs of the first plaintiff in that capacity.

[45] It remains to be considered whether the defendants are Masterfile licencees as set out in their plea. I have in this judgment already outlined the terms and conditions of use of Masterfile images. In order to become licencees, the defendants were

required to register on the Masterfile website. In my view, there are formidable obstacles to the defendants' reliance on the waiver on the basis of being a Masterfile licencees. First, the defendants have not presented in evidence any document constituting the requisite licence, or any proof that they had requested it. Neither have they produced proof of registration, a clear indication that they cannot be entitled to any rights from Masterfile, more particularly the right to invoke the waiver. Second, the first defendant, as FHM editor, testified that he had no knowledge of any interaction between the magazine and Masterfile. Third, the claim to being a licensee requires that a licence fee be paid, no evidence was tendered indicating that this was the case. There, therefore, is no basis from which an inference can be drawn that the defendants were licensees of Masterfile. At another level, the defendants rely primarily on the agency relationship between Great Stock! and Masterfile. To rely successfully on the waiver on these terms, it must be reiterated that the defendants must prove the existence of a contract between themselves and Great Stock! The question is therefore whether the facts as revealed by the evidence admit the drawing of such an inference.

[46] As earlier stated, the evidence pertinent to the defendants' dealings with Great Stock! is largely inferential as the first defendant admitted in his evidence that he does not have first hand knowledge of how the image of the first plaintiff was obtained. The only reference to any interaction between the defendants and Great Stock! is the email correspondence referred to in this judgment. What the email correspondence establishes with certainty is that Ms McCulla did request the image of a clown and received the photograph of Puddles the Clown. The difficulty that arises is that, for the defendants to prove their purchase of the image, there ought to be evidence presented to that effect. There is absolutely none. It simply does not bolster the defendant's case to prove that for other images, payment was tendered to Great Stock!. It does the contrary. In the absence of a receipt for the purchase of the first plaintiff's image as Puddles the Clown, there, at least, ought to be an explanation of the transaction itself. This could have been easily achieved by evidence of the very person who attended to the securing of the photograph from Great Stock!, Ms McCulla. The puzzling aspect in these proceedings is that the first defendant eagerly testified that he had the telephone details of Ms McCulla. He was aware that she was in the dog rearing business. It therefore cannot be said that this witness was

unavailable. Yet Ms McCulla was not called as a witness. The defendants ask the court to clutch the straws and draw an inference that the photograph was purchased from Great Stock!, and this is how the low resolution image featured on the December 2007 was obtained, yet this could have been easily explained by the available witness. Ms McCulla's evidence would have explained and clarified the basis upon which the image of the first plaintiff was obtained by FHM. To compound matters, Clause 2 of the Great Stock! Terms and Conditions stipulates that:

“... Images may not be used or reproduced in any event until GS issues an invoice granting you the right to use the images for the use specified on the invoice, and for no other purpose.”

[47] Assuming in the defendants' favour that for some reason, the invoice was misplaced or could not be traced, it can be expected that as soon as payment was tendered, Great Stock kept a copy or record of the parties to whom it had issued invoices. Given the sound business relations between Great Stock! and FHM, it is not unreasonable to expect that Great Stock! would readily provide a copy of whatever records it may have, pointing towards the issuing of the licence in respect of the subject photograph. At the very least, the defendants could have presented evidence to the effect

that Great Stock! had specified the existence of an invoice in writing.

[48] It is my judgment that there is no basis on which it can, in this matter, be inferred that the defendants purchased the image of the first plaintiff from the Great Stock!, thereby invoking the injunctive promised by the waiver signed by the plaintiff. After all, an inference of this nature can only be drawn when solid facts justifying it have been presented to the court. This is not the case in the matter at hand.

[49] Having found that it has not been established that the defendants were licencees of Masterfile and that there is no contractual link between the defendant and Great Stock!, it seems prudent to now deal with the contention that the plaintiff had in any event, generally waived his rights to sue for damages. Pertinent to this issue is whether the waiver is couched in a language so wide that it operated in favour of the rest of the people who acquired the image of the first plaintiff. The approach of the courts as set out in *Stott, supra* is simply that Courts should not readily come to the conclusion that the liability of a party for wrongdoing was intended to be excluded by contract.

[50] In the present matter, there is no ambiguity in the waiver and the Masterfile Terms and Conditions. When the language of the waiver is read in the context of the entire clause in its commercial background, it clearly was intended to operate in favour of Masterfile, the Parties and their licencees, not indeterminate parties. In addition, the Masterfile Terms and Conditions of use of its images require that there must be a contractual link between Masterfile and the user of the image. In the light of the finding to the effect that the defendants are not licencees of Masterfile, and that neither have they proved the existence of contractual link with Great Stock, the Masterfile agent, it is clear that the defendants' reliance on the waiver is misplaced.

[51] The views expressed by Professors Dale Hutchinson and Belinda Van Heerden in *The Tort/ Contract Divide Seen from the South African Perspective*, 1997 Acta Juridica, 97 page 113 with regard to matters dealing with claims for economic loss and unlimited liability to unknown claims are relevant in the present matter:

"Here [where a breach of contract causes loss not to a contracting party but within a contractual matrix, as in *Compass Motors*] there is no privity of

contract between the plaintiff and the defendant, but each is linked by way of contracts to a middle party and there is a clear tripartite understanding of where the risk is to lie In such a case, there is a little danger of indeterminate liability. . . .

Even though, the plaintiff is *ex hypothesi*, the plaintiff has no contractual remedy against the defendant, all the parties to the arrangement knew where the respective risks lay. Therefore, each party, with high knowledge of his risk exposure, could reasonably have expected to have protected himself, by other means (for example, through contractual arrangements with other parties or by taking out appropriate insurance). This of course also brings the anti-circumvention argument strongly to the fore: to superimpose on the consensual arrangements a delictual duty of care would disturb the balance, by allowing a shifting of losses within the matrix, contrary to the original understanding of the parties. Unlike the concurrence situation [as was the case in *Lilicrap* above], it cannot be argued that the scope of delictual liability necessarily be circumscribed by the specific provisions of a contract between the plaintiff and the defendant – in this type of case, there is no direct contractual link between them.”

[52] Even if it could be said that there is ambiguity in the Master File Release document and the ambit of its reach, the correct approach to its interpretation would be to construe it against the proferens. I have already stated that Masterfile Model Release is couched in unambiguous terms. Even if it can be said that there is

ambiguity, the alternative meaning that the waiver was intended to apply generally is 'fanciful' and 'remote'. For the reasons outlined above, it is inconceivable that the waiver could by any means of interpretation be construed to operate in favour of the defendants on the basis of its generality.

[53] Two issues for determination remain, namely, whether the Model Release is *contra bonos mores*, and whether the Model Release should be construed according to the laws of Ontario and the Federal Laws of Canada. In the light of the finding that the defendants are not entitled to the protection of the waiver, it is in my view, not necessary to determine issues.

[54] In conclusion, I have in this judgment found that the statements published in the FHM December 2007 issue are defamatory of the first plaintiff who was recognisable and identifiable in his image as Puddles the Clown, prominently featured on the relevant page. In addition, the defendants' defence of jest has been found to be unsustainable. In similar context, I have found that the defendants have not established privity of contract entitling them to rely on the Release signed by the plaintiff. Linked to this finding, I have in this judgment held that the

ambit of the application of the waiver was unambiguous and if it was, any interpretation to the effect that it was intended to operate in favour of indeterminate defendants is fanciful. It follows as a matter of course that the defendants are liable jointly and severally for the damages suffered by the first plaintiff.

[55] As indicated earlier in this judgment, the second plaintiff has neither *corpus* nor *dignitas*. Any damage done to its reputation therefore constitutes patrimonial loss for which compensation could be claimed under the action *legis Aquiliae* and not the *Actio Iniuriarum*. There is no such claim in these proceedings. It follows that the claim by the second plaintiff must be dismissed with costs. Counsel for the defendants submitted that these should be the costs separately incurred in defending the second plaintiff's claim. I agree.

COSTS

[56] It is trite that as a general rule, costs follow the result. It was submitted on behalf of the defendants that the question of costs must depend on the extent of the plaintiff's success; if token damages are awarded, the plaintiffs should be ordered to pay the defendants' costs or each party pay its own costs. In the event of

either of the plaintiffs being successful, it was further contended that the defendants should be ordered to pay costs of the successful party on the magistrate court scale as the Magistrates' Courts have, in terms of section 29 (1) of the Magistrates' Court Act 32 of 1944 read with Government Notice R459 of 24 March 1995, jurisdiction in respect of all actions that do not exceed R100 000, 00.

[57] It is so that the amount of the plaintiff's claim falls squarely within the jurisdiction of the Magistrates' Court, but the nature of the issues in this matter clearly show that a hearing before this court is justified regardless of the damages award. There, therefore, is in my view, no reason to deviate from the general rule.

COSTS OCCASIONED BY THE POSPONEMENT

[58] I now turn to consider the liability for costs occasioned by the postponement of the hearing of this matter on 17 May 2012 as well as the wasted costs of the postponement. In considering this point, some background is necessary. Summons in this matter were issued 28 May 2008. The defendants filed their plea on 08 August 2008. The defence raised in the plea was primarily that the publication was made in jest and that the first plaintiff was not

recognisable in his image of Puddles the Clown. It was specifically pleaded that:

“Save that the Defendants do not know whether the Plaintiffs were parties to the MFC agreement and make no admissions in that regard, all the allegations and conclusions of law set out herein are denied.”

The parties held a Rule 37 conference on 21 October 2011, setting out the manner of conduct of the trial. Pursuant to the conference, the defendant filed an amended plea filed on 23 April 2012 wherein they raised the defence of waiver. The amendment was filed on 11 May 2012, whilst the trial was due to be heard on 17 May 2012. According to the first plaintiff, because he had no recollection of signing the waiver, the introduction of the amendment necessitated a consultation with Mr Gabriel Heflin, who had arranged his presence at the photo shoot with a view to establishing the circumstances surrounding the waiver. In addition, the belated amendment also necessitated an opportunity on the part of the plaintiff to properly and fairly present their case in relation to the contents of the amended plea.

[59] The defendants on the other hand submitted that the notice of the intention to amend had been served on the plaintiffs more than three weeks before the trial and no objection was lodged. The

three weeks gave the plaintiffs sufficient time to deal with issues raised and even consult with Mr Heflin. The first defendant in his affidavit avers that the consultation with Mr Heflin is of no consequence as whatever he had to say is immaterial when regard is had to the fact that the first plaintiff signed the release form. It is not in dispute that the matter was on 17 May 2012 postponed because no judge was available to hear it. To this, the first defendants alleged that it was therefore open to the plaintiff to utilise the days between the 17 – 21 May 2012 to consult with Mr Heflin.

[60] The approach to be adopted with regard to costs occasioned by a postponement is restated by Griesel AJA in *Subleme Technologies (Pty) (Ltd) v Jonker and Another* 2010 (2) SA 522 SCA as follows:

“With regards to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs. It is important to bear in mind, however, that a litigant necessarily ‘responsible’ for the case not proceeding merely because he or she applies for a postponement. In certain circumstances, a litigant may be forced to apply for a postponement as a result of the conduct of an opponent, eg through inadequate discovery, a late

amendment or any number of other reasons. The 'normal rule' only applies to 'the party who was at fault or in default.'

[61] The crux of the defendants' submission is that the plaintiff had approximately three weeks to prepare and plead for trial on the new issue of waiver and Masterfile licence. This contention must be examined having regard to the nature of the amendment. The amendment introduced by the defendants is significant as it strikes at the very core of the plaintiff's case. In my mind, the fact that the first plaintiff is a signatory of the disclaimer does not lessen its impact. It makes perfect sense that the plaintiff would need time to respond, plead and prepare for trial or take some other action. It can be accepted that the defendants got hold of the model release document in November 2011. The situation is further exacerbated by the fact that the court is in the dark as to the reasons for the late filing as the defendants did not file any affidavit setting out the reason/s for their late filing. The first defendant also did not proffer any explanation when cross-examined on this aspect. Even though the plaintiff may have had three weeks within which to react to the amendment, it does not lie on the defendant to prescribe to the plaintiff the reasonableness of three weeks to respond to the amendment. As I have said, the

amendment was material. It required in my view, a full investigation of the facts as well as acquisition of evidence pertaining thereto.

[62] In the premises, it is my view that the defendants jointly and severally should bear the costs occasioned by the application to postpone and the wasted costs of postponement.

QUANTUM OF DAMAGES

[63] It will be recalled that the plaintiffs' claim against the defendant is for damages in the amount of R100 00. 00. It was pleaded that the plaintiffs jointly, alternatively individually and cumulatively, suffered damages in that amount. The plaintiff did not lead any evidence in quantification of the damages. Similarly, as correctly submitted on behalf of the defendants, neither did the particulars of claim contain any allegation regarding the extent of readership of FHM. In determining the quantum of damages in a defamation case, it is trite that the Court will have regard to all the circumstances in the case. Counsel for the defendants referred the court to the judgment of *Buthelezi v Poorter and others* 1975 (4) SA 608 (W) at 613H-616G wherein the relevant circumstances were outlined as follows:

1. The content of the defamatory statement and how 'bad' it was.
2. How seriously would readers take a defamatory statement appearing in a publication of that kind.
3. To what extent was the plaintiff known to people generally.
4. The extent of the publication.
5. The conduct of the defendant after the publication. Has he or she apologised.
6. The recklessness of the publication.

[64] Obviously, the factors enumerated above must be considered in the context of that particular case but may have regard to award of damages in similar matters. However, in *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 SCA at 260E-H, the court cautioned that:

"Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers to be fair and just in all the circumstances.

The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings.”

[65] Counsel for the defendants further emphasized that in considering the award of damages, Courts recognise the importance of freedom expression. The allegation that the plaintiff has long term *tik* habits is very grave. Evidence was tendered that the plaintiff is a family entertainer, appears at children’s parties and has entertained crowds of approximately 35 000, 00. Although no evidence of the impact of the defamatory statements was led, I think it can be accepted that FHM readership is relatively wide. I have already concluded that the context of the article was deriding and humiliating to the plaintiff, not only because of the statements relating to clowns and mimes because it is linked to the following:

1. A ‘bull’s scrotum’,
2. ‘Will work for a second wheel’,
3. Caption of what FHM calls ‘bullshit’ as well as reference to cockroaches.

The fact that the plaintiff thought that the apology was not enough is understandable, the extent of the humiliation and degradation warrants much more than an apology. It must be said that it is clear from the language used in the rest of the magazine that it (FHM) is indeed not intended to be a serious read. But it does contain some serious articles. Putting aside the profanities, the message conveyed is deriding of plaintiff in his character Puddles the Clown. I am constrained to find that only humour was intended. Similarly, I have no doubt that ordinary readers would view the allegation of having long-term *tik* habits in a very serious light. This is compounded by the fact that the plaintiff's audience is constituted of young children whose mothers would overly concern with exposing them to a clown so depicted. I, therefore, hold that the defamation and resultant humiliation was of a serious nature and cannot be airbrushed in the name of jest. The plaintiff is therefore entitled to a substantial amount of damages, taking all the relevant factors into account, not to token damages as suggested by the defendants. In my judgment, damages in the sum of R60 000 (sixty thousand) are justified.

[66] In conclusion, I have in this judgment summarised my findings in respect of the issues for adjudication, including the

issue of costs occasioned by the application for postponement and the postponement. In analysing the amount of damages, I have indicated the amount I consider equitable. It is therefore appropriate to collate the findings made into a final order.

ORDER

[67] I, therefore, find that the plaintiff is entitled to the relief sought in these proceedings with costs. In all these circumstances, the order which I make is as follows:

1. The plaintiff's claim for damages against both defendants succeeds.
2. The defendants are ordered to pay damages to the plaintiff in the amount of R60 000, 00 (sixty thousand) jointly and severally, the one to pay the other to be absolved.
3. The defendants are ordered to pay costs of suit on the High Court scale jointly and severally, the one to pay the other to be absolved.

4. The defendants are further ordered to pay the costs occasioned by the application to postpone and the wasted costs of postponement on the High Court scale.
5. The second plaintiff's claim is dismissed with costs.

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JUDGE: WESTERN CAPE HIGH COURT

FOR THE 1ST & 2ND PLAINTIFF- Adv. T.A Barnard

Instructed by - Pitman Spencer - Adam Pitman

FOR THE 1ST & 2ND DEFENDANT - Adv. E.W Fagan

Instructed by - Werksmans Attorneys

DATE OF HEARING - 11 September 2012

DATE OF JUDGMENT - 29 April 2013
