IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 7513/2016

DATE: 21 NOVEMBER 2016

In the matter between:

DANIEL MARTIN WALDIS AND ANOTHER Applicant

and

CHRISTINE IRENE FREIIA

VAN ULMENSTEIN Respondent

JUDGMENT

DAVIS, J

This matter began as an urgent application for an order that respondent remove a blog post which appeared in July 2015. Applicant also seeks the suppression of further publications and statements which are alleged by the applicants to be defamatory of them in circumstances where they had been widely published already. Respondent maintains that the statements are true and that they are made in the public interest or constitute a fair comment about a public figure concerning a public health matter of considerable importance. The relief now sought is final in effect and has to be treated

accordingly. Hence it is not sought pending the outcome of any other relief. The way the matter was argued before me was on the basis that a final interdict was sought by the applicants.

The second applicant produces chocolate, allegedly from a firm of Swiss Lindt chocolate. It claims that it has established itself as a premium supplier of chocolate in the local market and that it has done so for a number of years, not only in the Western Cape but also in other parts of South Africa. First applicant is the founder of second applicant, and although he does not own any shares in the second applicant and is not a director thereof, he is involved in the management of the business and appears to be "the face" of the business.

Respondent is a blog writer and restaurant reviewer, and writes generally about tourism, restaurants and wine in terms of an internet link www.whalecottage.com. Respondent claims that her blog focuses predominantly on restaurants and the tourism industry with a clear focus on the Cape Town and Winelands area.

In July 2015 an article appeared in Noseweek magazine, accusing the second applicant of incorrect claims concerning the quality of its chocolates. The article focused primarily on

the allegation that the chocolate which was claimed to be sugar-free was not so. A related complaint by consumers concerned apparent incorrect information on the labelling of the chocolates which were produced by second respondent.

On 23 July 2015 respondent posted an article, following upon the Noseweek publication, which applicant avers contained defamatory remarks about the first applicant directly and, as a consequence, against second applicant both directly and indirectly. To the extent that it is relevant to these proceedings the article reads thus:

> "One cannot get more notorious than being featured in Noseweek ... and to have a Facebook group created about one's business. Such a "honour" has been bestowed upon Daniel Waldis, owner of Le Chocolatier, who has operated in Franschoek, now in Stellenbosch and with a factory in Paarl. His claims on the Le Chocolatier chocolate slab range have been misleading and even life threatening to diabetics ... Initially chocolates were made in the Le Chocolatier Restaurant in Franschoek but a space next door became available and the chocolates were made there with a retail outlet selling chocolates too. He had a short-lived partnership with the current owners of African Chocolate Dreams who

had brought their chocolate making machine with them but they disappeared overnight and opened their own shop on Main Road. Waldis continued selling a large range of chocolate truffles, supposedly made elsewhere but I recognised one of my favourites made Tomes in the V & A Waterfront, insisted that they were all handmade by his staff ... In the meantime I received an increasing number of calls from business persons who had found the Le Chocolatier on my blog and calling me when they could not get through to them. I would go there for coffee and the staff would tell me that there was a technical problem which they had reported to Telkom. Then I received more calls and they were from the company which leased the point of sale machine to Waldis and was not paid I was told. More and more debt seekers called me to find Waldis... Noseweek quotes Debbie Logan, an organic product retailer in Johannesburg, who has been outspoken in her criticism of the product range and Waldis's business practice. The "organic" certified claim supposedly issued by a Swiss company was found to be "a fraud". She visited Waldis in Paarl in May. She discovered that Waldis imported chocolate bars from overseas, remaking them into slabs, making his handmade claim fraudulent too! It is clear that Waldis is a fraud continuously looking for business

opportunities to make money at the expense and even the health of consumers."

In the light of this blog, applicants contend that the article of respondent was not properly checked for factual inaccuracies, was totally wrong and was intended to cause the applicants harm. Applicants submit further that the article is a clear attempt to portray the applicants as a person and a company that, in the case of the former, is dishonest and the latter as a company that was acting fraudulently. Both intentionally do not comply with the applicable laws and regulations regulating the industry and the former is a person who is a fugitive from the authorities in Switzerland.

Mr Montzinger, on behalf of applicant, submitted that none of these portrayals are either true nor could be substantiated and were set out only with the intention to defame and to cause the applicants harm. In his view, the portrayal further infringed on both applicant's rights to privacy and the second applicant's right to take part in the day to day commercial intercourse without fear of being unfairly defamed.

Mr Brink who appeared on behalf of the respondent, contended, by contrast, that the evidence on the record established that consumers had complained about the

mislabelling of the chocolate. Noseweek printed an article in July 2015 in which it was reported that the applicants had lied about the sugar content of their chocolate. The first applicant contacted the editor and told him something that he chose not to disclose to the Court, even though it was pertinently raised in answer. It is not disclosed, and nothing he said to the editor of Noseweek was such that the editor believed that a retraction of the article was necessary.

The applicants had put up various defences which were designed to show that their chocolate was sugar-free, correctly labelled and not the subject of any criminal investigation. Attached to the answering papers is a final report, as it is headed, generated by AgriFood Technology Station at the Faculty of Applied Sciences at Cape Peninsula University of Technology. To the extent relevant, it reads thus:

> "Determination of Sucrose in dark chocolate ...
>
> The sample was received on the 2nd of March 2015 and stored at room temperature prior to analysis. A standard in-house laboratory method was employed for total of sugar analysis and referenced against AOAC accredited method ... Sucrose analysis results for the sample supplied results on average of duplicate determinations. Analysis Sucrose (G) value (per 100g) 0.34"

The other point of reference is that the company name, that is second respondent, is set out in the final report and the contact person is indicated to be Daniel Waldis.

The second document is attached to the founding affidavit, from the Cape Winelands District Municipality. The header is:

> "Inspection conducted in terms of Section 82 of the National Health Act 2003 ... and Section 11 of the Foodstuffs, Cosmetics and Disinfectants Act 1972 ... regulations relating to the powers and duties of inspectors and analysts conducting inspections and analyses of foodstuffs and at food premises. Inspection report Le Chocolatier unit for Oosterland Street, Paarl ..."

The report then reads:

> "During an inspection conducted on the abovementioned premises on 2015-07-15 the following was found; the whole floor is properly tiled as requested, the general hygiene was satisfactory during the inspection, new labels were changed in line with the conditions stipulated in the regulations governing the label and advertising foodstuffs ... of 1 March 2010."

The third document attached to the founding papers was generated by the South African Police Service. It is dated the 7th December 2015, and, to the extent relevant, reads thus:

> "SAPS Stellenbosch opened an enquiry in June 2015 after Mr Waldis from Le Chocolatier Stellenbosch contacted this office. We investigated social media claims about the sugar content in Le Chocolatier's sugar-free chocolates after conducting microchem lab in Cape Town. It turned out that the lab technologists could not confirm that the certificate shown in social media that 27% sugar and 11% fat was Le Chocolatier's chocolates tested and therefore she named the test as chocolate. Further we investigated this test was ordered and paid for from a company called Superfoods which also supplied the questioned dubious sample (sic)."

To this respondent contends as follows: the first document was a report performed on "dark chocolate" that shows a sucrose level of 0.34. Respondent points out that the report did not state what chocolate was tested. In reply, the first applicant does not even claim that it was second applicant's chocolate that was tested. Mr Brink submitted that it was clear that the respondent's objection in this particular connection had been

accurate; that is, the test was not performed on the applicant's chocolates. He speculated that it may have been a competitor's chocolate which had been tested. The second document, that is from the municipality, revealed that the chocolates were now correctly labelled. In Mr Brink's view, consideration of this letter showed that it carried little weight at all. How would an inspection conducted "on the abovementioned premises in 2015-07-15" have been able to determine whether the labelling was correct? In Mr Brink's view it could be inferred that the inspector was shown a previous document. Respondent pointed out that what could be ascertained from this report is that at some point the chocolate had been mislabelled for the report contains the following sentence:

> "The new labels have changed in line with the conditions stipulated in the regulations ..."

In reply, it was stated that this document "clearly proves the fact that although the second applicant was not obliged to indicate the sugar level contents the labels were in any event adjusted to reflect the contents". In Mr Brink's view this particular contention is not supported by the contents of the letter generated from the Municipality.

Turning to the letter from SAPS, which states that first applicant opened a criminal investigation of allegations against himself, there were two aspects in Mr Brink's view, which needed comment. Firstly, the report on which the applicants rely was framed as dark chocolate and, secondly, in answer the respondent challenges applicants to state how this letter was generated, which challenge was ignored.

In Mr Brink's view it was fair to describe the documents as having been wholly discredited in answer and not having been rehabilitated in reply.

DEFENCES

Much of the dispute turned on the various defences which had been offered by respondent. Mr Montzinger submitted that none of these were sustainable if considered against the law and the facts as I have set them out. To summarise: respondent contended that statements of fact in the article were *bona fide*, true and in the public interest. Secondly, respondent contended that the contents of the article constituted fair comment. According to Mr Montzinger, on the facts and the law as it stands at present neither of these defences could be sustained.

GENERAL PRINCIPLES REGARDING DEFAMATION

In the light of this background, and of these contentions, I turn to deal, albeit briefly, with the general principles relating to the law of defamation. It is trite law that defamation is defined as the wrongful and intentional publication of defamatory words or conduct that refers to a plaintiff. See Loubser *et al* Law of Delict at 340. In Khumalo v Holomisa 2002(5) SA 401 (CC) at para 18, the Constitutional Court said:

> "The common law elements in the delict of defamation are:
>
> (a) The wrongful; and
>
> (b) Intentional (c) publication of (d) a defamatory statement/statements concerning the plaintiff"

Once a plaintiff establishes that a defendant has published a defamatory statement concerning himself/herself it is presumed that this publication is both wrongful and intentional. A defendant wishing to avoid liability for defamation must raise a defence which rebuts either the requirement of wrongfulness or intention.

The general test for wrongfulness is based upon the *boni mores* or the legal convictions of the community. This means

that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable. See Neethling *et al* Law of Personality at 135. The application of the *boni mores* test involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable.

In this balancing process the conflict between the defendant's freedom of expression and the plaintiff's right to a good name demands resolution. See National Media Ltd v Bogoshi 1998(4) SA 1196 (SCA) 1207. See also Jonathan Burchell Personality Rights at 179. In Mtembi-Mahanyele v Mail & Guardian 2004(6) SA 329 (SCA) the Court affirmed the principle that the test for determining whether the words in respect of which there is a complaint of defamation is whether a reasonable person with ordinary intelligence might reasonably understand the words concerned to convey a meaning which is defamatory of the litigant concerned. See para 25.

Mr Montzinger submitted that once shown to be defamatory, the defence could not be restricted to whether the words were true but whether they were I the public interest. A distinction has been drawn between "what is interesting to the public" as

opposed to "what is in the public interest". See Bogoshi, *supra* at 1208. There is a question relating to defamation which requires further development. In an extremely relevant article on the question of defamation Professor Anton Fagan criticised the judgment of the Constitutional Court in Le Roux and Others v Day (Freedom of Expression Institute and Restorative Justice Centre as *Amici Curiae*) 2011(3) SCA 274 (CC), in "The Constitutional Court loses its (and our) sense of humour : Le Roux v Day" 2011 (128) SALJ 395.

Before a court arrives at its analysis of the justifications raised by respondent, it should pay heed to Professor Fagan's article because, contrary to the approach of the Constitutional Court and, in particular the majority judgment in Le Roux v Day, *supra*, Fagan correctly invokes the approach to speech developed by John Searle Speech Acts : An essay in the Philosophy of Language (1969) in which a distinction is drawn between various forms of speech and, in particular, the emphasis upon the importance of what Searle refers to as speech with illocutionary force. See also John Searle and Daniel van der Veken Foundations Illocutionary Logic (1985) in which this concept is developed extensively. See also Peter Tiersma 'The language of defamation' 1988 (66) Texas Law Review 303).

Briefly, utterances with a propositional content but no illocutionary force cannot be defamatory. In other words, the point made is that to defame someone is to make probable one or more of a particular set of consequences by performing conduct of a particular kind or nature. (Fagan at 602). Expressed differently, speech must contain a specific form of assertion before it can be regarded for the purposes of the law as being defamatory.

The concept of illocutionary force must be distinguished from its propositional content as in the former case, the illocutionary force connotes the effect of the words which the speaker intended to convey. As Searle *supra* writes "often in actual speech situations, the context will make it clear what the illocutionary force of the utterances are without its being necessary to make the appropriate explicit illocutionary force indicator".

The relevance of this recource to the theory of language will become clear presently in this judgment. Suffice to say: the philosophy of language does not appear either to be part of South African legal education nor of the conceptional approach to defamation by lawyers dealing with this question.

With this context, I must now refer to the issue of the defences

which are adopted by the respondent in an attempt to stave off the order which was sought by applicants.

STATEMENT IS *BONA FIDE* TRUE AND IN THE PUBLIC INTEREST

Mr Montzinger submitted that, from the papers it was evident that the respondent's blog was not based upon original research but was premised on information obtained from articles and other sources. The respondent had not tendered any evidence to the effect that any of her claims in the offending article were true and to what extent the repost was to the benefit of the public. In his view, the issue of truthfulness of the factual allegations had to be decided in favour of the applicants. He further submitted on the strength of Mahomed v Kassim 1973 (2) SA 1 (RA) at 9, that public benefit "lies in the telling the public of something of which they were ignorant but something which it was in their interest to know, if they already knew it, it hardly seems that their reputation can be of value." Mr Montzinger submitted that when the respondent's answering affidavit was considered, it justified the conclusion that even on her version, there was no need for the article to be in the public domain, since the information was "already out there".

With regard to the defence of fair comment, Mr Montzinger submitted that, if the Court should reject the claim that the contents of the article were in the public interest, the ground of fair comment must also fail as one of the requirements thereof was that the matter should be in the public interest.

In Mr Montzinger's view the entire range of defences raised by respondent fell within the ambit of Willis, J, (as he then was), described in Heroldt v Wills 2013(2) SA 530 (GSJ) at para 27. In this case the respondent was the author of a pasting on Facebook which gave rise to the litigation. It read, to the extent relevant:

"Letter to WH for public consumption"

(WH was the applicant in the matter.) Included in the posting was the following passage:

"I wonder too what happened to the person who I counted as a best friend for 15 years and how this behaviour is justified. Remember I see the broken-hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are there more reasons to not have to take responsibility for the consequences of your own behaviour? But mostly I wonder whether when you look in the mirror in your drunken testosterone haze you still

see a man."

The applicant, in this case, complained that the posting portrayed him as a father who did not provide financially for his family, a father who would rather go out drinking than caring for his family and a person who had a clear problem with both drugs and alcohol.

Willis, J dealt with the question of respondent's defences at paras 27-29:

> "In our law it's not good enough as a defence to, or a ground of justification for defamation that the published words may be true. It must also be to the public benefit or in the public interest that they are published. The distinction must always be kept between what is interesting to the public as opposed to what is in the public interest domain. The Courts do not pander to prurience. I am satisfied that it is neither in the public benefit or in the public interest that the words in respect of which the applicant has been published, even if it is accepted that they are true. The next defence which needs to be considered is that of fair comment. In Crawford v Albu it was held that in order to qualify as "fair comment" the comment must be based on facts

> expressly stated or clearly indicated and admitted or proved to be true. When a defence to or a ground of justification for defamation is raised in motion court proceedings the assessment of facts differs from that set out in Plascon-Evans Paints Limited ...The respondent having raised the defence of fair comment bears a burden of rebuttal. This burden presents the respondent with an insuperable difficulty in the present case. She has been unable to justify her posting. Furthermore malice or improper motive by the perpetrator of the comment also acts to defeat the defence of fair comment. The background to the posting together with the words themselves indicates that the respondent acted out of malice when she posted the offending comments."

In contrast the facts upon which this judgment was based, Mr Brink submitted that, given the requirements for a final interdict, the question arose in this case as to the injury actually committed or reasonably apprehended. He noted that on the record in the present dispute the applicant hoped "that the matter would blow over". Thereafter "it had become apparent that the article is still causing major damage to the reputation of second applicant as well as my personal name" and that "recently (he) lost a potential customer of well over R4million after the customer made use of the Google search

engine to obtain more information.

First applicant also avers that the injury to himself was that he was portrayed as dishonest and fraudulent.

When dealing with these defences and their application as a whole, the analysis must be considered within the broader context of freedom of expression. During the dark days of apartheid and thus surprisingly, Rumpff, JA (as he then was) said in Publications Control Board v William Heineman Ltd and Others 1965(4) SA 137(A) at 160:

> "The freedom of speech – which includes the freedom to print – is a facet of civilisation which always presents two well-known inherent traits. The one consisted the constant desire by some to abuse it, the other is an inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger, it is based on intolerance and is a symptom of the primitive urgent in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish the story - it should be anxious to steer a course as close to the preservation of liberty as possible, and to do so because freedom of

speech is a hard won and precious asset, yet easily lost."

This *dictum* was written a very long time ago and within the context of a repressive and racist regime, when section 16 of the Republic South Africa Constitution Act 108 of 1996 was not even a glint in the political eye. This section provides *inter alia* that everyone has the right to freedom of expression which includes (a) freedom of the press and other media and (b) freedom to receive or impart information or ideas. Following the advert of the constitutional dispensation section 16 holds considerable importance. In Democratic Alliance v African National Congress and Another 2015(2) SA 232 CC, the Court, though dealing with an overtly political statement I should add, said:

> "Political life in democratic South Africa has seldom mean polite, orderly and restrained. It has also been loud, rowdy and fractious. That is not a bad thing. Within the boundaries the Constitution sets it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as is possible." para 133.

Similarly in Islamic Unity Convention of Independent Broadcasting Authority and Others 2002(4) SA 294 (CC) at

para 28, the Court made the point that it is not just that which is already tolerable that must be tolerated "but also ... those that offend, shock or disturb ... Such are the demands that pluralism, tolerance and broadmindedness without which there is no democratic society.

EVALUATION

In the light of the debate concerning both the defamatory quality of the statements contained in the blog and the defences raised, it is important to turn to the evaluation of this case within the prism of the prevailing constitutional imperative.

Much of the debate concerned the view that as others have "injured/harmed" the applicants prior to this publication, no defence recognised in our law was available to respondent. The question arises to whether this particular submission by the applicants is sufficient to ensure that neither of the defences raised can be invoked in this case. Let me turn briefly therefore to deal with the two defences.

TRUTH AND PUBLIC INTEREST

Prima facie wrongfulness of a defendant's conduct will be

rebutted if he or she proves that the defamatory remarks are true and in the public interest. The defendant need only prove that the remarks are substantially and not literally true; that is the sting of the charge is true. See Laubscher 2003 Stellenbosch Law Review 364. What is in the public interest will of course depend on the convictions of the community (the so-called *boni mores*) and in this regard, "the time, the manner and the occasion of the publication" does play an important role. See Independent Newspaper Holdings Limited v Suliman [2006] 3 SA 137 (SCA) at para 47.

It is also so that past transgressions should not be raised up after a long lapse of time. See Kent v Republic and Press (Pty) Ltd 1994(4) SA 261 (E) at 265. This of course is sufficient, in my view, to suggest that if something is recently in the public domain, the fact that it is already present, does not mean that the defence of truth and public interest cannot be invoked.

FAIR COMMENT

Prima facie wrongfulness of defamatory publication may also be rebutted if a defendant proves that the defamation forms part of fair comment or facts that are true and in the public interest. This requires the establishment of four issues:

(1) the defamation must amount to comment and not to the assertion of an independent fact;

(2) the comment must be fair;

(3) the facts on which the comment is based must be true; and

(4) these facts must be in the public interest.

I return now to the implication of statements possessed of illocutionary force which concept now becomes particularly important. Even if a court is not prepared to invoke this concept in the notion of what constitutes defamation, it surely must apply in the application of the two defences to which I have made reference.

In my view, there can be no doubt that chocolates which claim to be diabetically friendly and are not in fact so falls within the scope of the public interest, particularly because, as the respondent has submitted, this claim holds major concerns for diabetics who purchase chocolates which do not comport with its diabetically friendly claim; that is chocolates that are sugar-free. To suggest further that these issues are not ones which fall directly within the domain of truth and public interest or fair comment would be significantly reduce the scope of consumer journalism. As a matter of course consumer journalism raises questions such as one which is central to

this case, namely whether a particular foodstuff or other product is in accordance with its claims. There is little doubt that the issue of the nature of the chocolates which are produced by the second applicant is of considerable public importance and commendably has been raised in a number of publications.

Furthermore, in this case persistent allegations about a product that is not what it purports to be surely remains of public interest and importance, notwithstanding that the allegations have been made previously.

On either of the defences the respondent has raised a justifiable defence save for certain sentences which appear within the blog; that is sentences which have illocutionary force and which are assertions of a kind which have the defamatory meaning as averred by the applicant. Only these statements should fall within the scope of the law of defamation.

The interesting question is what relief should now be granted. This case has the added difference from the traditional dispute which might face a court, which has to deal with the publication of a report in a newspaper or similar written publication. The reason is that, when dealing with a blog or

other form of internet publication, the offending passages can be deleted, leaving the balance of the report in the public domain precisely because the balance of the report does not breach the law of defamation and can be preserved, pursuant to a commitment to freedom of speech.

I accept that it might be argued that some people have saved the earlier report on a computer, but they are not before this Court and this problem was never pleaded nor argued.

Accordingly, in dealing with an internet publication, a different form of relief is available under the circumstances.

Before I grant the order which follows upon this reasoning I should add that the attempt by the applicants to invoke the approach adopted by Willis, J in Herholdt v Wills to which I have referred, cannot succeed. In that case what was placed on Facebook were personal statements which was not in the public interest, and which were clearly directed adversely at an individual. The question as to what possible interest other than prurience of members of the public could be shown in these statements was not only raised by the learned judge but correctly, in my view, he rejected the defences to find in favour of the applicant. This is an entirely different case from the factual matrix this Court. Central to this case is a product

which, it is alleged, does not stand up to the (illegible) claims made on its behalf.

The evidence put up by the applicants in justification, in particular the report regarding the sucrose levels is exquisitely vague. There is no basis by which it can be concluded that this constituted a testing of the product's claim to be diabetically friendly. The report by the municipality indicates that there was incorrect labelling at some point, which necessitated a relabeling. The report by the South African Police Service is almost incomprehensible and has absolutely no particular role to play in the evaluation of this case. Therefore absent two small passages, to which I shall refer, there is no basis by which this blog falls foul of our law of defamation.

COSTS

There is one other issue which I must deal with before setting out the order, and that is the question of costs. It appears that the blog post was published in July 2015. Applicants threatened an interim application in October 2015. Notwithstanding this threat, a final launch occurred many months later, that is on the 5th of May 2016, with the idea that it be heard on the 9th of May 2016. The matter did not enjoy a

judicial audience until the 12th of May 2016. By then the respondent had employed counsel and an attorney. On the 12th of May the matter was postponed to a date in August 2016 with no interim relief and costs to stand over. What happened is that bringing the application with no working days notice after a ten month delay was effectively, in my view, an abuse of an urgent procedure. Accordingly the costs of the 12th of May 2016 must be awarded to respondent. Given the finding to which I come I do not propose to award any costs beyond this issue.

In light thereof the following order is made:

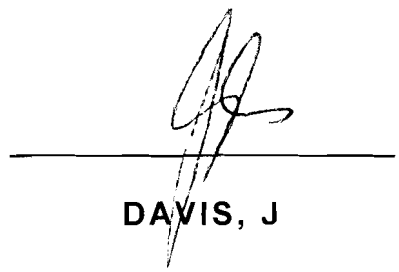
The respondent is ordered to remove the following sentences form the article titled "Daniel Walders Le Chocolatier chocolate claims are fraudulent and life threatening" from the website www.whalecottage.com or any other website or social media platform on which it might have been published.

1. In the first paragraph the sentence "his claims on the Le Chocolatier chocolate slab range have been misleading and even life threatening to diabetics."

2. In the final paragraph of the article the line "it is clear that Waldis is a fraud continuously looking for business

opportunities to make money at the expense and even the health of consumers".

Respondent is to be awarded the costs of the wasted hearing on 12 May 2016. There is no other award as to costs.



DAVIS, J