THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Appeal Case No: A115/2019

Court *a quo* Case No: 5376/2018

In the matter between

COLIN IAN CHAPLIN **APPELLANT**

And

LAUREN FINE **FIRST RESPONDENT**

SHERI COHEN **SECOND RESPONDENT**

Coram: Erasmus, Steyn and Rogers JJ

Heard: 15 May 2020

Delivered: 21 July 2020 (by email to the parties)

[By arrangement with the parties, this judgment was not placed on SAFLII pending finalisation of the appellant's application to the Supreme Court of Appeal for special leave to appeal. That application was dismissed on 12 October 2020.]

JUDGMENT

Rogers J (Erasmus and Steyn JJ concurring)

[1] The appellant, Mr Colin Chaplin, was the respondent in the court *a quo* in an application brought by the present respondents, Ms Lauren Fine and Ms Sheri Cohen, for his committal for contempt of court. Chaplin appeals against the ensuing judgment in which (a) he was found guilty of contempt by breaching two previous court orders; (b) he was sentenced to six months' imprisonment for the said contempt; (c) a suspended sentence of six months' imprisonment on a previous finding of contempt was put into operation, the sentences in (b) and (c) to run concurrently; and (d) he was ordered to pay the costs of the present respondents on the scale between attorney and client, including the costs of two counsel.

[2] For the sake of brevity, and meaning no disrespect, I refer to the people who feature in the narrative by their surnames. I refer to Fine and Cohen collectively as the 'applicants', as they were in the court *a quo*.

[3] The conduct alleged to constitute the contempt takes the form of abusive and threatening writings to and about Fine and Cohen. The main issues in the appeal are: (a) whether it was proved beyond reasonable doubt that Chaplin was the author of the writings; (b) if so, whether the court *a quo* erred by imposing sentence as part of its judgment on the merits. On the first issue, Chaplin denies his authorship of the writings. On the second issue, he contends that the court *a quo* should have followed a two-stage procedure: in the first stage the court should have dealt only with 'conviction', leaving sanction (if it arose) to a second hearing.

[4] The application giving rise to the present appeal, launched in 2018, was the third against Chaplin in connection with abusive writings. The first, launched in December 2011, gave rise to an agreed order (without admission of responsibility) later that month. The second, instituted in July 2017, led to an order granted in August 2017 (the outcome of which Chaplin abided).

[5] Although the 2011 and 2017 orders stand as valid orders, Chaplin denies that he was responsible for the abusive writings which were the subject of those applications. Their authorship has an important bearing on whether Chaplin was the author of the writings which led to the 2018 application.

[6] I reproduce quoted extracts from the disputed writings exactly as written, replicating mis-spellings, punctuation and capitalisation.

[7] Chaplin went to a prestigious Cape Town school, spent three years at Stellenbosch University studying Economics, obtained an LLB (Hons) in England, and returned to Cape Town where he has engaged in property development and literary services under the name Woodleys. In respect of literary services, his LinkedIn profile states that Woodleys' core area of expertise is in 'project managing new publications from inception to completion'. Woodleys is said to offer 'specialised outsourced literary services for local and international publishing companies'. His qualifications include a diploma in Advanced Editing.[1]

[8] Fine has at all material times been a practising attorney. Cohen, her sister, is in public relations.

[1] 1/86-87. [References to the main record are volume number/page number. In the case of the supplementary record, the volume number is preceded by the letter S.]

[9] Since 2011 Fine, and later Cohen as well, became the targets of unlawful harassment in the form of abusive and threatening letters, emails and posts on Facebook and consumer platforms. The only question is authorship.

The 2011 application

[10] In 2008 / 2009 a Ms Danielle Vermaas was in a romantic relationship with Chaplin. From correspondence Vermaas wrote to Chaplin in 2009 it appears that Chaplin did not want to continue the relationship but that she did.

[11] Fine and Chaplin dated for a few months as from November 2009. She terminated the relationship sometime in the first half of 2010. According to her, Chaplin tried to rekindle the romance by displaying solicitude for Fine's mother, Merle, who had recently been diagnosed with terminal cancer. Chaplin regularly visited Fine's mother unsolicited and against Fine's wishes. He also made contact her, her friends and her family.

[12] In August 2010 Chaplin accused Vermaas of causing trouble for him on social media and blamed her for the fact that Fine had blocked him on Facebook and was not responding to his SMSes. Vermaas, on the other hand, claimed that Chaplin sent her threatening messages about her supposed interference with his 'girlfriend'.

[13] On 10 August 2010 Vermaas messaged Fine, saying that she would not normally email someone she did not know but that she had received a very strange SMS from Fine's 'boyfriend' (Chaplin) who seemed to be upset about 'mutual people we know on Facebook'. Fine met with Vermaas a few days later. Vermaas told Fine that Chaplin had threatened to bring a court application against her. Fine says that it emerged from the conversation that Chaplin had dated her and Vermaas simultaneously. (This seems not to have been the case, so Vermaas may not have been truthful with her.) Vermaas told Fine that notwithstanding

Chaplin's threats, she retained feelings for him. Fine responded that she wanted nothing to do with Chaplin, and that Vermaas was welcome to pursue a relationship with him. They parted on friendly terms.

[14] On 27 September 2010 Chaplin paid Fine's mother another unsolicited visit. Fine gathered from her mother that the latter had confronted Chaplin about the two-timing allegation. Fine was worried about how Chaplin might react to information that she and Vermaas had met. She warned Vermaas. The latter expressed concern that Chaplin might harm her. Fine told her that if that is how she felt she could apply for a restraining order but that she (Fine) did not want to act for her or be involved.

[15] On 29 September 2010 Vermaas applied to the Cape Town Magistrate's Court for an interim protection order against Chaplin in terms of the Domestic Violence Act 116 of 1998. In her statement in support of the order, she alleged that Chaplin had been defaming her and subjecting her to psychological abuse. From what Chaplin told a *Noseweek* journalist about a year later, it appears that an interim *ex parte* order was granted. Chaplin opposed the application, and it served before court on 3 November 2010. According to Chaplin, Vermaas withdrew the application.

[16] During February 2011 Chaplin made contact with Mia Gibson, a friend of Fine's who was an attorney at Bernadt Vukic Potash & Getz ('BVPG'). He wrote her long emails, displaying concern for Fine and accusing Vermaas of stalking him. One of his emails included a screenshot from Vermaas' Facebook account.[2]

[17] Over the period 20 February – 1 March 2011 several abusive Facebook messages and emails were sent to Fine's acquaintances and family, purporting to

[2] S1/13 para 33 read with S1/75

come from Vermaas.[3] On 1 March 2011 BVPG (Gibson) sent Vermaas a letter demanding that she desist. Vermaas replied that her Facebook and Gmail accounts had been hacked and that she was busy laying a charge against a suspect (this was Chaplin). It is evident that at this time (early March 2011) Fine, Cohen and their friend Alexandra Burger entertained the possibility that Vermaas might be behind the early 2011 writings, and were suspicious of both Chaplin and Vermaas.

[18] The criminal charge led to further emails from Chaplin to Gibson. There was also a telephone call in which Chaplin continued his accusations against Vermaas. During this conversation, Gibson confronted Chaplin with the fact that only a person with access to Vermaas' password-protected Facebook account could have obtained the screenshot he had emailed to her in February. On Fine's version, as confirmed by Gibson, Chaplin initially claimed that he had got this document from someone investigating Vermaas but later alleged that the information had been delivered to his flat anonymously. Gibson made it plain to Chaplin that Fine wanted nothing to do with him and that continued harassment could lead to legal proceedings.

[19] In late August 2011 an article appeared in *Noseweek* under the title 'Trivial Pursuit'.[4] It appears from this article that the journalist interviewed Chaplin. The article alleged among other things that Vermaas and Fine had teamed up to get a restraining order against him and that Vermaas' statement in support of the order had contained many untruths. The article portrayed Chaplin as a victim.

[20] In the closing months of 2011 there was a slew of abusive writings directed at Fine and BVPG ('the 2011 writings'). Some were anonymous, others

[3] S1/76 and 8/726-727.
[4] S1/81-89. This was the 'September' issue of *Noseweek.*

under assumed names. Those documents which were in hardcopy were addressed to BVPG's postal address, using similar stationery.

[21] Fine suspected Chaplin, and reported the matter to the police. She also obtained a report from an expert, Ms Yvette Palm, who found that all the 2011 writings emanated from the same printer and that there was strong evidence that they were written by the same author.

[22] On 6 October 2011 the police executed a search warrant at the homes of Chaplin and his parents. Various items were seized (documents and computers), but were returned a week later, without having been examined, because the warrant was defective. Fine alleged that the search was part of the police investigation into Vermaas' hacking complaint. Chaplin alleged that the search related to Fine's harassment complaint, and that was certainly an aspect of interest to the investigating officer, Capt Marx, because Ms Palm was present during the search. No printers were seized because Ms Palm was satisfied that the printers in question had not been used to generate the 2011 writings.

[23] In December 2011 a follow-up article appeared in *Noseweek*.[5] This continued to portray Chaplin as a victim of unfounded legal action at the hands of Fine and Vermaas.

[24] According to affidavits by Fine and her client, Sylvia Ireland, Chaplin arrived at Ireland's home on the evening of 13 December 2011 to convey a warning to Fine that he intended to 'run with a story' that would destroy Fine but that she had a 'way out', namely to blame everything on Vermaas, in which case Chaplin could 'save' her.

[5] S1/91-93.

[25] On the following day, 14 December 2011, Fine launched an urgent application for an interdict. Chaplin filed what the court *a quo* described[6] as a brief 'preliminary answering affidavit'. On 20 December 2011 the matter was settled by an agreed order ('the 2011 order')[7] in terms whereof neither party was to contact the other or the other's colleagues, friends, family and clients, or 'to make any untruthful disparaging statements regarding each other to any third parties'. It was recorded that the order was not to be construed as an admission of any fact or corroboration of any allegations contained in either party's papers.

The 2017 application

[26] For more than three years there were no abusive writings. However, the harassment resumed in March 2015, gathering pace and continuing until further proceedings were launched in July 2017. Because these writings formed the subject matter of the 2017 application, I shall refer to them as the '2017 writings' though they spanned the years 2015 – 2017.

[27] One category of the 2017 writings were numerous posts on websites which provide platforms for consumer complaints – *hellopeter*, *pissedconsumer*, *complaintsboard*, *badservicesouthafrica*, *ripoffreport* and *gripeo*. The earliest one in the record is dated 23 April 2015.[8] These posts, in repetitively similar formulations, alleged that Fine, Gibson, Andrea Keller (also an attorney), BVPG and Norton Rose Fulbright ('NRF', the firm which Fine had joined) had given very bad service, were rude and unhelpful, that they should be investigated by the Cape Law Society ('CLS'), and that clients should take their business elsewhere. In Fine's case, it was repeatedly claimed that she had been 'named and shamed' in *Noseweek* and that she had brought the legal profession into disrepute.

[6] Para 16.
[7] S1/98-99.
[8] 4/346.

[28] There were also many complaints about Cohen and her employer, Corporate Image, alleging that the 'customer' had received very bad service, that Cohen was rude and unhelpful, and that customers should take their business elsewhere.

[29] These 'complaints' were posted under assumed names. Some were evidently made up.[9] Others were suggestive of a connection between the complainant and the families of Fine and / or Vermaas.[10] There were posts under other names as well, even *Noseweek*'s editor, Martin Welz. Only one was a real person known to Fine, *viz* Sharon Boonzaaier, who confirmed under oath in the 2017 application that she had had nothing to do with the complaint.

[30] It is clear from the evidence that none of these were genuine consumer complaints. They were not from people who were clients of Fine or Cohen. Cohen serviced only a single client through a single point of contact, and was on friendly terms with that person.

[31] The other category in the 2017 writings were Facebook messages. The earliest of these in the record is dated 12 January 2016.[11] Some were anonymous, others under made-up names[12] or names suggestive of a connection between the writer and Fine and / or Vermaas.[13] There are also posts under another names.

[32] Whereas the 'consumer complaints' purported to be from dissatisfied clients, the abusive Facebook posts intentionally created the impression that Vermaas' mother was the author. The unifying theme was that Fine had hurt Vermaas by taking Chaplin away from Vermaas; that in the process Chaplin had

[9] Eg 'ayersrock', 'Leta Worst', 'Blue Fresnaye', 'z.zed', 'iamfickle', 'Croc Dundee', 'Koala Joey', 'Koalanet', 'Talented Ripley', 'Vulture', 'Onion Award'.
[10] Eg eg 'Gerda Fine', 'Adele Scheepers', 'Gerda Scheepers'. Vermaas has an aunt and uncle called Gerhard and Gerda Scheepers. Gerhard operates a citrus exporting business called Cape Citrus: Fine para 34.2 at 4/280.
[11] S1/26.
[12] Eg Jesus Saviour', 'Jesus Saint', 'kangaroo', 'Croc Dundee', 'Talented Mr Ripley', 'Rinkels'.
[13] Eg 'Lauren Scheepers', 'Adele', 'Adele Scheep', 'Gerda', 'Gerda Merwe'

insulted the feelings of the writer's daughter; that the writer had needed to take revenge by making Fine sever her relationship with Chaplin; that this was done by getting Fine to help Vermaas bring an application for a restraining order and by feeding lies to Fine about Chaplin; that a further step in the strategy was to send anonymous writings which Fine would attribute to Chaplin; that after this strategy succeeded, Fine herself, and then her sister and her sister's children, needed to be punished; and that part of the punishment was to post abusive consumer complaints.

[33] These posts were characterised by recurring tropes: that the writer would not allow Fine to 'bully' Vermaas; that Fine was a 'silly' or 'stupid' 'little girl'; that the writer had to make Fine believe that Chaplin was a 'bad person'; that the writer wanted to 'hurt' Chaplin; that the writer's strategy was a good 'joke'; that the writer had so enjoyed 'playing' Fine and Chaplin off against each other; that the writer had left 'clues'; that these clues had included references to *Farmers Weekly*, vultures, the 'onion award' and citrus farming; that Chaplin had been able to 'solve' the clues but Fine had not; that Chaplin had been 'innocent' but Fine had been fooled into thinking otherwise; that Chaplin had always cared for Fine's mother, which Vermaas had hated; that Fine had been 'embarrassed' and would do anything to make it appear that the abusive writings came from Chaplin; that the strategy had worked so well that each time a new abusive message was posted, Fine would be forced to take action against him; and that Fine was just as 'guilty' as the writer.

[34] Among the 'clues' left by the author as to the supposed writer's identity were the following (some of these messages were directed at Fine, others at Cohen):

12 January 2016:[14] 'My brother in law is a farmer!!!!!'

25 May 2016:[15] 'I know my daughters hearts just like your mother knew your sisters heart.'

15 June 2016:[16] 'Do you know why I used Farmers Weekly pictures??? Because my family are farmers!!!!!!'

2 August 2016:[17] 'My daughter now has a good life and your sister is just a JOKE to evryone.'

31 August 2016:[18] 'Do you know that it wasnt Lauren Fine that told my daughter how to get a restraining order it was ME! I got one against my ex husband … Here I will give you a clue where I am. I live in a town starting with a K and ending with a D!!! My daughter now has her life and a special career your sister has nothing and is a JOKE!!'[19]

24 October 2016:[20] 'You must understand that the letters allowed Danielle to have a life even if it meant that Lauren lost hers!!!'

24 October 2016:[21] 'The references to Laurens mental issues were things that I have been diagnosed with and yes I have been in a mental institution before!!' (In his email to Sarah Wassall, written in late September 2009,[22] Chaplin stated that there was a history of mental illness in Vermaas' family and that her mother had been 'committed' several times. In one of Chaplin's emails to Gibson in

[14] 4/345.
[15] 4/338-339.
[16] 4/335.
[17] 4/336.
[18] 4/339.
[19] Given the writer's statement that citrus farming was carried on in this area, the reference is perhaps to Kirkwood in the Eastern Cape.
[20] 4/337.
[21] 4/342.
[22] This is what Chaplin later told Gibson: 4/324.

February / March 2010,[23] he wrote that Vermaas' mother was 'treated during the 90s for mental issues', on his understanding for being bipolar.)

11 November 2016:[24] 'They *[the letters]* were about punnishing Colin Chaplin. He made both my children have to leave there home. My dauughter had to change her name!!!!!' (Danielle started using the surname Margeaux.)

6 February 2017:[25] 'I didnt buy the Farmers Weekly magazines i borrowed them from my sister!! Does that help you LAuren??? She is married to a farmer!! They have many farms but they dont do animals they farm fruit. I will give you a clue Lauren it is an orange color!!! Does that help you LAuren?????'

15 February 2017:[26] 'I left so many clues for you in the letters but you never saw them. It was the 'Boomerang' comment wasnt it?? Thats how he new it was me wasnt it! You see Lauren I went to Australia once for a wedding but you didn't get that did you!!!'

21 February 2017:[27] 'You are just as guilty as we are so dont try and bully Danielle by taking away her facebook friends!!'

31 May 2017:[28] '... and only Danielle has family that are farmers doesnt she!!'

[35] In an attempt to find conclusive evidence about who was behind the abusive posts, Fine made requests for information under the Promotion of Access to Information Act 2 of 2000. On several occasions she obtained orders, in terms of the Protection from Harassment Act 17 of 2011, requiring service providers to supply particulars about computers from which abusive posts had been uploaded, which led her to various internet cafes.

[23] 4/324.
[24] 4/337.
[25] 4/341.
[26] 4/338.
[27] 4/340.
[28] S2/140.

[36] At first these enquiries were a dead-end because the internet cafes were not able to tell her who had used the computers on the relevant dates. But eventually her persistence was rewarded. An order pertaining to abusive posts uploaded on 21 February 2017, one of which was time-stamped 08:15, led her to an internet cafe in Constantia called Wizardz, from which she obtained CCTV footage for the period before and after 08:15 on that date. Stills from this footage were attached in subsequent legal proceedings. A person whom Fine identified as Chaplin could be seen. He was at Wizardz for about one hour, entering as soon as the establishment opened at 08:00. He sat at a single computer for an hour, and during that period only one other patron, who was there for ten minutes, entered the cafe.

[37] In June 2017 Fine obtained an expert report from Professor E F Kotzé, a linguist. Kotzé examined a selection of authentic Chaplin writings as well as all the contentious 2011 and 2017 writings. He concluded that Chaplin was the author of the 2011 and 2017 writings.

[38] On 7 July 2017 Fine and Cohen instituted an application for an interdict, a finding that Chaplin was in contempt of the 2011 order and a suspended sentence of six months' imprisonment. Chaplin, represented by attorneys, filed a notice of opposition. On 28 July 2017 an order was made by agreement in terms whereof Chaplin was to show cause on 22 August why the relief sought in the notice of motion should not be granted and in which, without admission of responsibility, he agreed that the rule would operate as an interim interdict.

[39] On 14 August 2017, by which date Chaplin had not filed answering affidavits, Chaplin's attorneys filed a notice of withdrawal as his attorneys. On the same day Chaplin filed a notice of intention to abide which stated that he was unable to oppose the matter due to lack of financial resources; that his failure to

oppose should not be construed as an admission of the applicants' allegations; that he reserved the right to deal with such averments at a later time, if necessary; and that he was willing to supply any fingerprint and DNA samples that might reasonably be required.

[40] Fine's attorneys, NRF, immediately notified Chaplin that if he failed to answer the applicants' averments they would be deemed to be admitted; that his notice to abide was not sufficient to place the applicants' allegations in issue; that it was impermissible for him to reserve his rights to deal with the averments at a later time, and that he should deal with them now if at all.

[41] There was no further response from Chaplin and he did not appear in court on 22 August 2017. Le Grange J thereupon made the rule nisi final, found Chaplin in contempt of the 2011 order and imposed a suspended sentence of six months' imprisonment. Chaplin was ordered to pay the applicants' costs on the attorney and client scale, including the costs of two counsel. He was also ordered to remove all offending posts he had published on the internet and Facebook. He was required to file an affidavit setting out compliance with this order. On 15 September 2017 he filed an affidavit, stating that he had furnished his attorneys with a power of attorney to take the necessary steps, and particulars of those steps were set out. The applicants say that they were dissatisfied with the adequacy of these steps but were advised not to pursue contempt proceedings.

The 2018 application

[42] Following the 2017 order there was a respite of about six months. But on 14 February 2018 Cohen, who worked at her employer's Johannesburg office, learnt that six letters for her attention had been delivered at her employer's Cape Town office. Since she had been at the Cape Town office in January, these letters must have arrived later in January or in the first two weeks of February. Fine

collected and opened the envelopes. They were found to contain more abusive writings. Fine's father found a seventh letter in his letter box on 26 February 2018. (This is the address at which Chaplin used to visit Fine's late mother.) One of the enclosures in this envelope was a computer screen shot. The computer's date was 14 February 2018.[29]

[43] I shall refer to these seven letters as the 2018 writings. Six of them purported to have been sent by standard mail, and in those instances where the postal stamp was legible, the date stamps reflected dates in early August, before the granting of the 2017 order. Fine alleged in her founding affidavit that this was a poorly executed strategy to make it seem that the letters were sent before the 2017 order was made. By appearance, the envelopes showed signs of unusual wear and tear, and were sloppily sealed. The perpetrator had evidently used old envelopes and had hand-delivered them. (The strategy, even if not exposed, would in any event have been futile, because by 28 July 2017 there was an interim order binding on Chaplin.)

[44] Since Chaplin denied authorship of the 2018 writings, he did not claim to know when they were sent. I am satisfied that it was proved beyond reasonable doubt that these letters were sent in January / February 2018.

[45] Fine and Cohen issued the third application on 27 March 2018. The founding papers included a supplementary report by Kotzé in which he opined that the 2017 and 2018 writings were authored by the same person.

[46] In his opposing affidavit Chaplin denied being responsible for the 2011, 2017 and 2018 writings. His answering papers included expert reports from the

[29] The format of the screenshot caused the applicants to conclude that the presence of Chaplin's email address on the screen proved that the computer was his. It turned out that the email address was part of the article published in the *Weekend Argus* of 10 September 2011. Although this error was convincingly demonstrated in Chaplin's answering affidavit, he did not take issue with the fact that the date on the computer was 14 February 2018.

following forensic linguists: Dr Gerald R McMenamin (American), Ms Lezandra Grundlingh (South African) and (jointly) Dr Sheila Queralt and Dr Núria Gavaldà (Spanish). For convenience I refer to the two Spanish authors collectively as 'QG'.

[47] McMenamin criticised Kotzé's methodology but did not undertake his own analysis.

[48] Grundlingh compared the 2011 and 2018 writings with authentic writings of Chaplin and Vermaas (the latter is referred to in her report as X), and concluded that although Chaplin could not with certainty be excluded as the author of the disputed writings, there were more similarities between Vermaas' writings and the disputed writings than there were between Chaplin's writings and the disputed writings.

[49] QG also compared the 2011 and 2018 writings with authentic writings of Chaplin and Vermaas (who were referred to in their report as K1 and K2). QG concluded that there was a 'high probability' that the authors of the K1 texts (Chaplin's known writings) and the disputed writings were different people, and that there was a 'medium-high probability' that the authors of the K2 texts (Vermaas' known writings) and the disputed writings were the same person.

[50] Kotzé prepared a further report, filed as part of the applicants' replying affidavits, in which he answered McMenamin's criticisms, directed his own criticisms at the reports of Grundlingh and QG, and gave further reasons for his opinion Chaplin could be linked 'unequivocally' to the disputed writings.

[51] Chaplin was permitted to file supplementary answering affidavits, which included ripostes from McMenamin, Grundlingh and QG together with a report from yet another linguistic expert, Dr Carole Chaski (American). Like

McMenamin, Chaski did not undertake her own analysis but criticised Kotzé's methodology. In her supplementary affidavit, Grundlingh said with admirable candour that she did not have the same experience as the other experts in the case, indeed that this was her first forensic assignment, and she acknowledged the justness of some, but by no means all, of Kotzé's criticisms.[30]

[52] The case was argued before the court *a quo*, which delivered judgment for the applicants in the terms previously summarised. The court *a quo* refused leave to appeal but leave to appeal to a full court was granted on petition by the Supreme Court of Appeal.

The judgment of the court *a quo*

[53] After summarising the 2011 and 2017 applications, the court *a quo* observed that it 'would appear to be strange' that Chaplin had agreed to the 2011 order and failed to oppose the 2017 order if the author of the 2011 and 2017 writings was someone over whom he had no control.[31]

[54] The court *a quo* then summarised the 2018 application, and observed that Chaplin had not disputed that the same person was responsible for the 2011, 2017 and 2018 writings. From this it followed that, because Chaplin was responsible for the 2011 and 2017 writings, he was also responsible for the 2018 writings.[32] The 2017 order could not have been granted in the absence of a finding by Le Grange J that Chaplin was responsible for the 2017 writings. This, coupled with the fact that one individual was responsible for all the harassment, led to the 'inescapable conclusion' that Chaplin was also responsible for the 2018 writings.[33] The learned judge rejected Chaplin's reliance on the rule in

[30] Para 6 at 7/600.
[31] Para 32.
[32] Para 39.
[33] Para 40.

Hollington,[34] holding that it did not apply in the circumstances at hand, since the 2018 application was dependent on the findings made in the 2017 proceedings.[35]

[55] The court *a quo* said that in any event the Wizardz footage made it clear beyond reasonable doubt that Chaplin was responsible for the 2017 writings, evidence which Chaplin had failed to answer.[36] Chaplin's literary qualifications would have enabled him to disguise his authorship, which reduced the value of the expert reports.[37] Moreover, none of the experts had suggested that there was more than one author of the abusive writings, and the CCTV footage established that Chaplin was that author.[38] The court *a quo* thus rejected the notion that Vermaas was responsible for the harassment, which painted her in a derogatory light and Chaplin in a favourable light.[39]

[56] The court *a quo* thus found that Chaplin had violated the 2011 and 2017 orders and had not discharged the evidential burden of raising a reasonable doubt as to wilfulness and *mala fides*. His contempt had thus been proved beyond reasonable doubt.[4041]

[57] The court *a quo* proceeded to address sanction as follows:

> '58. It is clear that by attempting to conceal his identity [Chaplin] confirms that he appreciates that his conduct is unlawful. Unlawfulness and *mala fides* flow naturally from [Chaplin's] conduct in that he has professed a desire to continue to conduct himself in contempt of the 2011 and 2017 orders by stating for example: "I will wait a few weeks and then send you some more letters and then write some NASTY complaints about you and your sister on the internet".

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[34] *Hollington v F Hewthorn & Company Ltd* [1943] 2 All ER 35.
[35] Paras 41-42.
[36] Paras 43-44.
[37] Paras 46-48.
[38] Para 49.
[39] Paras 51.
[40] Paras 53-57.
[41] Paras 53-57.

59. As a consequence the requirements for the triggering of the suspended sentence ordered by Le Grange J as well as those for [Chaplin] to be held in further contempt are satisfied.'

The court *a quo*'s orders immediately followed these two paragraphs.

Authorship of the disputed writings

[58] It is common ground that because the applicants were seeking Chaplin's committal to prison, they had to establish his breach of the 2011 and 2017 orders beyond reasonable doubt[42] and that the *Plascon-Evans* rule applied to genuine disputes of fact. If Chaplin was the author of the 2018 writings, his conduct was undoubtedly a breach of the 2011 and 2017 orders, and such breach was undoubtedly wilful and *mala fide*. The sole question is whether Chaplin's authorship was proved beyond reasonable doubt.

[59] If one were to disregard evidence of Chaplin's alleged authorship of the 2011 and 2017 writings, the evidence would not show beyond reasonable doubt that he was responsible for the 2018 writings, however strong the suspicion might be. Chaplin's counsel submitted that proof that Chaplin was the author of the 2011 and 2017 writings was inadmissible similar fact evidence ('SFE') in the 2018 application, because its sole purpose was to show that Chaplin had a proclivity to author abusive writings. Counsel submitted that authorship of the 2011 and 2017 writings was relevant only to an appropriate sanction, something which would not arise until it were established beyond reasonable doubt that Chaplin was the author of the 2018 writings.

[60] With these submissions I cannot agree. The 'rule' against SFE was discussed in *Savoi & others v National Director of Public Prosecutions & another*.[43] After considering Commonwealth jurisprudence, Madlanga J said, of

[42] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Matjhabeng Local Municipality v Eskom Holdings Ltd & others; Mkhonto & others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2018 (1) SA 1 (CC) para 67.
[43] [2014] ZASCA 5; 2014 (5) SA 317 (CC) paras 50-62.

the position in South Africa, that the 'real question should be whether, when looked at in its totality, evidence of similar facts "has sufficient probative value to outweigh its prejudicial effects"; and that is a matter of degree in each case'.[44]

[61] Our courts have been reluctant to allow SFE for the purpose of proving not only that the accused committed the crime but that a crime was committed at all. Where, however, it is satisfactorily proved by other evidence that the crime was committed by somebody, SFE has often been allowed as evidence to identify the accused as the perpetrator.[45] The more unusual the conduct common to the previous and later incidents, the higher the probative value of the SFE is likely to be.

[62] Here it has been proved beyond reasonable doubt that Fine and Cohen were the targets of unlawful abusive and threatening writings in 2018. It is unusual for two sisters to become the joint targets of such harassment. If the 2011 and 2017 writings pursue similar themes and display similar styles to the 2018 writings, evidence that Chaplin was the author of the 2011 and 2017 writings would have sufficient probative value to outweigh any prejudicial effects of admitting the evidence.

[63] The court *a quo* dealt with the merits somewhat perfunctorily. The applicants were seeking to persuade the court *a quo*, without the safeguard of oral evidence, that Chaplin's denial of his authorship of the 2011, 2017 and 2018 writings was false beyond reasonable doubt. The terms of the 2011 order were such that Chaplin's authorship of the 2011 writings could not be taken for granted. And unless *res judicata* / issue estoppel was operative, the authorship of the 2017 writings was also at large. The question of *res judicata* / issue estoppel did not

[44] Para 55.
[45] See *R v Butelezi* 1944 TPD 254 at 259; *R v D* 1958 (4) SA 364 (A) at 369B-C; *S v D* 1991 (2) SACR 543 (A) at 546d-h; *S v Nduna* 2011 (1) SACR 115 (SCA) para 17.

receive attention in the court *a quo*'s judgment, and, for reasons I shall presently explain, I do not think it should be applied.

[64] I also do not think that the expert evidence was categorical that only one person could have been responsible for all the disputed writings. Indeed, the 2017 writings were not even made available to Chaplin's experts. In essence, therefore, the court *a quo*'s reasoning rested on the Wizardz evidence. That evidence was certainly powerful, and perhaps it was enough, but in view of the high evidential threshold that had to be met, and Chaplin's denials and the substantial body of expert evidence he tendered, a more rigorous engagement on the question of authorship was needed and must now be undertaken.

[65] This unfortunately lengthens this judgment because in order to reach a conclusion on the 2018 application we effectively have to determine the merits of the two previous applications. I shall first deal with non-expert evidence but wish to foreshadow three matters about the expert evidence.

(a) Firstly, the determination of authorship in the present case does not rest solely, or even mainly, on expert testimony.

(b) Second, language and its use are a staple of the lawyer's business. Although forensic linguists can assist the court, and although certain types of investigation (particularly quantitative analysis) may be difficult for the layperson to undertake, there are, in this case, many features of content and style about which judges can form intelligent views without expert help. The court is less dependent on linguistic expertise than it might be in other scientific fields.

(c) Third, there was a glaring omission in the materials supplied to Grundlingh and QG. They were given the 2011 and 2018 writings but not the 2017 writings.[46] One is left to wonder why the 2017 writings were omitted. An answer

[46] QG attached to their report all the writings furnished to them. The 'unknown' ('UK') texts are at 3/233-245 (the 2011 writings) and 3/245-255 (the 2018 writings). When their 'failure' to deal with the 2017 writings was

which suggests itself is that Chaplin and his advisors knew that there was compelling non-expert evidence that he was the author of the 2017 writings. Chaplin would not have wanted a finding from his experts that the authors of the 2017 and 2018 writings were one and the same person. A consequence of this omission is that if it is found, on the strength of other evidence, that Chaplin was the author of the 2017 writings, the reports of Grundlingh and QG cease to have any weight, because even a layperson can see that many of the characteristics of the 2011 and 2018 writings to which they attached weight abound in the 2017 writings.

Authorship of the 2011 writings

[66] Although the 2017 and 2018 writings insinuate that they were authored by Vermaas' mother, it was not Chaplin's case that they were in fact written by Vermaas' mother. Of course, he did not bear an onus of proving who the was responsible for the writings but the only person to whom he pointed was Vermaas.

[67] As to motive, the case for Vermaas' authorship is not compelling. On 13 August 2010 Vermaas learnt that Fine was not interested in a relationship with Chaplin, so Fine was not an obstacle. Vermaas' application for a restraining order, and her message to him of 28 September 2010,[47] indicate that by late September 2010 Vermaas herself did not want to pursue a relationship with him. The earliest 2011 writings were in the latter part of February, and most were authored after the appearance of the first *Noseweek* article in August 2011. There seems little reason for her to have initiated a relentless campaign at that late time.

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pointed out by Kotzé, they replied – fairly enough – that they had not analysed those writings because they had had no knowledge of or access to them (7/591).
Grundlingh did not attach the writings to her report but they were furnished by Chaplin's attorneys upon request (6/435 ff). These are not arranged in a satisfactory way. The 2011 writings are at 6/442-447 and 455-458, duplicated (in different formats) at 6/468-487. The 2018 writings are at 6/448-449 and 459-467, duplicated (in different formats) at 6/488-491. All the remaining documents furnished by Chaplin's attorneys were authentic writings of Vermaas and Chaplin. By contrast, most of the 2017 writings are attached to Kotzé's 2017 report at 4/334-349, though some 2017 writings (not attached to Kotzé's report) appear elsewhere in the record (S1/21-22, 59; S2/107, 108, 110, 113, 134, 136, 137, 140, 141 and 157).
[47] 3/262.

[68] Turning to Chaplin, he was very upset with Vermaas for bringing the application for a restraining order. About a year later he told *Noseweek* that the police had called at his place of employment because he needed to sign receipt of the *ex parte* order. The police had told the office manageress that Chaplin was to be considered dangerous. Chaplin claimed that he lost his job as a result. He also came to believe that Fine had advised Vermaas to seek a restraining order. This was at about the same time that she had reprimanded him for visiting her mother and told him that it was time for him to 'move on'.

[69] Chaplin was interested in pursuing a relationship with Fine, and believed that Vermaas had alienated Fine from him. He was further angered when Vermaas laid a criminal charge against him in March 2011. His lengthy emails to Gibson in February / March 2011 show how fixated he was with these events and bore a strong sense of grievance, while still conveying solicitude for Fine, whom he contrasted favourably with Vermaas. But Gibson's communication with him in March 2011 could have left him in no doubt that Fine wanted nothing to do with him.

[70] When he was interviewed by *Noseweek* in advance of the first article, he was reported to have said that he had 'exhausted every avenue to clear my name' He was 'furious' that an 'unsubstantiated order' had been made against him by 'a woman scorned' (Vermaas) who had 'lied to the court'. He could not understand why Fine had become involved, since he had only ever been good to her and her family: 'In return, she branded me with the stigma of a domestic violence charge which never goes away. People just think that you go around beating up women.' He told the reporter that he could not imagine having a normal life or normal relationships again.

[71] His attitude to Fine would not have been helped by the fact that she, too, was interviewed by *Noseweek*. She described Chaplin in unflattering terms and said that what really upset her were his 'endless lies'. Chaplin, invited by the reporter to respond, riposted that it was becoming increasingly clear to him that 'in order to justify what she did last year, she has attacked my character by spreading rumours and lies about me'.

[72] The abusive Facebook messages of February / March 2011 purported to come from Vermaas herself. These messages were to persons known to Fine. They contained themes that were to characterise the 2017 and 2018 writings – that Fine had ruined Vermaas' prospects with Chaplin; that Vermaas had fed Fine lies to hurt Chaplin; that Fine was stupid and had believed the lies; and that Chaplin had worked out what was going on but was innocent and gentle. It is wholly implausible that Vermaas would have written messages in her own name saying the sorts of things which the messages contained. Her 'confessions' would have exposed her to criminal and civil action.

[73] On the other hand, Chaplin's state of mind in 2011 was such that a wish to get revenge on Vermaas and Fine was entirely plausible, as was the portrayal of himself as an innocent victim. This is what he conveyed to *Noseweek*. It is a theme which pervaded the 2017 and 2018 writings. The recipients of the 2011 writings were people of whom Chaplin would have had knowledge by virtue of his relationship with Fine.

[74] The next 2011 writings in the appeal record were sent shortly after publication of the first *Noseweek* article. The envelopes in which two of the abusive letters arrived at BVPG had postage stamps depicting vultures, and on one of these envelopes was another image of a vulture, dripping blood.[48] One of

[48] 6/472 and 484.

the enclosures in a 2011 letter was a picture of a vulture in flight, also dripping blood.[49] The significance of the vulture theme will appear presently.

[75] Some of the letters were addressed to lawyers at BVPG.[50] They were clearly written under an assumed name. 'Mike Bailey' purports to have been prompted into writing by recently reading the September issue of *Noseweek* (he enclosed a copy of the article). 'Bailey' launched an attack on BVPG for employing Fine, who had 'methodically and maliciously slapped a domestic violence charge on an innocent, Colin Chaplin'. BVPG was urged to hold an internal hearing 'to get to the bottom of this despicable act of injustice'. The writer 'would never have thought that a so-called reputable law practice … would stoop to such unethical standards'.

[76] The content of this letter is not compatible with authorship by Vermaas or her mother. The claim that Fine and her employer had in effect brought the legal profession into disrepute was a theme that was to continue in the 2017 writings. That the writer was not a person whose native tongue was Afrikaans is suggested by the fact that the writer twice referred to another alleged victim of malicious prosecution, 'Fred van der Vywer' (instead of 'Vyver').

[77] Another message, this time anonymous, hailed Fine and BVPG as August's joint winners of the 'onion award' for having brought the legal fraternity into disrepute, reference again being made to the *Noseweek* article.[51] This was a matter for the CLS to investigate.

[78] From the content and style, the authors of the 'Mike Bailey letters and the 'onion award' message were the same person. During the course of the 2017 and

[49] 6/483.
[50] 6/458 (to Gibson);5/360 (to Mr C Hessian).
[51] 4/481.

2018 writings,[52] the anonymous author was to explain the link between the 'onion award' and the 'vulture' theme as follows. A week after the first *Noseweek* article appeared, there was an article in the property segment of the *Weekend Argus* about a 'vulture property fund' founded by Chaplin.[53] On the back page of the same segment was a column called 'Onions and Orchids'.[54] In 2017 and 2018 the writer (now purporting to be Vermaas' mother) said that 'she' had seen these two pieces and that they had given 'her' the idea about vultures and the 'onion award'.

[79] If it is proved beyond reasonable doubt that Chaplin was the author of the 2017 writings, this would be powerful evidence that he was the author of the 2011 writings, because they are linked by the 'vulture' and 'onion award' themes. Another relevant consideration is that Chaplin would have wanted to view the article about his new vulture fund. Since the 'Orchid and Onion' column was evidently in close proximity to it, he is likely to have had knowledge of both features. On the other hand, it would be a great coincidence if Vermaas or her mother saw the vulture fund article.

[80] Another piece of evidence linking Chaplin to the 'onion award' and 'vulture' documents of 2011 has to do with dates. Chaplin annexed to his answering affidavit a copy of the 'vulture property fund' article, from which one can see that it was published on Saturday 10 September 2011.[55] The post office impress on the two vulture stamps of 2011 is also clearly visible: 4 September 2011 and 7 September 2011 respectively.[56] The conclusions to be drawn from the fact that these two letters were posted *before* the publication of the vulture article scarcely need to be spelt out. As at 4 and 7 September 2011, Vermaas and her mother could not have known of the 'vulture fund' whereas Chaplin did.

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[52] See, in particular 4/342 and 1/78 from the 2017 and 2018 writings respectively.
[53] A vulture fund is a private equity fund targeting distressed assets.
[54] This column, which is still running, is in fact called 'Orchids and Onions'.
[55] 3/267.
[56] 6/484 and 472.

[81] It was around the same time that 'John Long' sent a message to Fine,[57] making reference to the *Noseweek* article and saying that she could kiss her partnership goodbye. The writer asked Fine if she had 'heard of the boomerang' – you 'throw it out, and it comes back to you'. This is what was going to happen to Fine. The message also included the phrase, 'What a silly girl!', which was to be a repeated refrain in the 2017 and 2018 writings. The 'boomerang' remark was also to be echoed in the later writings. If Chaplin was the author of 2017 writings (including the 'boomerang' reference to which reference will presently be made), the inference would be irresistible that he was also the author of the 'John Long' email.

[82] Another message, from 'Nicky Johnson',[58] said how 'embarrassed' Fine must be: 'What a JOKE, at least u r giving us a good laugh!' The 'joke' motif, and the capitalisation of the word, pervade the 2017 and 2018 writings. Similar themes, with reference to the *Noseweek* article, emanated from 'Ben Siegel' and 'Michelle Schneiderman'.[59]

[83] On 29 September 2011 an anonymous author emailed Fine from the address alex_burger@ymail.com.[60] The opening and closing paragraphs of the letter in effect told Fine that an email address incorporating the name of her close friend was used to grab her attention. The writer said that Fine would realise that *Noseweek* always did follow-up stories. Her statements to *Noseweek* would be addressed in the follow-up story. One of her allegations, the writer said, would be refuted by the fact that for most of 2011 her 'ex-boyfriend' had been overseas and had not been in the Atlantic seaboard area since September 2010. Fine also needed to know that her ex-boyfriend was now able to prove that Vermaas' Facebook and Gmail accounts had *not* been hacked. In the last two weeks it had

[57] 6/457.
[58] 6/474.
[59] 6/472 and 5/361.
[60] S1/90.

also come to her ex-boyfriend's attention that he was the subject of two police investigations initiated by Fine, and that Fine had abused her position as a lawyer to send the police 'running after' him. The problem for Fine was that Chaplin had done nothing wrong.

[84] The writer said that in order to save face Fine had been telling her friends that *Noseweek* had apologised to her but when her friends read the follow-up article they would know she had been lying to them. (This notion was to feature in the 2017 writings as well.)

[85] After making various accusations of dishonesty against Vermaas, the writer said that what was damaging for Fine was that she had once again believed Vermaas' stories. This was 'a very stupid thing to do':

> 'Your ex boyfriend is yet to comment on these matters but given what you have done will have little choice but to. No one wants to see further damage done to you but you are leaving this guy with no way out. You need to act like an adult, accept responsibility for your actions and undo the damage you have caused … This email is written in the remote hope that you will have the common sense to undo all the damage you have done and accept responsibility for your actions.'

[86] This letter, which does not even purport to have been written by Vermaas, could hardly be her handiwork. It is written entirely from Chaplin's perspective, and professes knowledge of facts unknown to Fine and Vermaas. The threat of public disclosures if Fine did not 'accept responsibility' and make amends is of a piece with the alleged message he conveyed to Sylvia Ireland. The overwhelming probabilities are that Chaplin was the writer of this email.

[87] There was indeed a follow-up article in *Noseweek*. On 2 December 2011, an anonymous writer, with the fabricated name 'I Kling', wrote to Fine in connection with this article. The writer said that, having majored in psychology,

he/she could plainly see that Fine was suffering from psychological issues. The writer offered his/her services free of charge if Fine wanted someone to talk to. The writer nevertheless gave Fine the unsolicited advice that she could start 'by forgiving your boyfriend and move on with your life'.

[88] This idea of 'moving on with your life' was, of course, what Fine had urged upon Chaplin in late September 2010. There is a further aspect of interest in this document but I must first mention another anonymous document targeted at Fine, headed 'N.P.D. – Narcissistic Personality Disorder'.[61] It set out the supposed symptoms of this disorder and conveyed that Fine met the criteria. The document concluded with the remark: 'Psychology Department – if only one of you have been helped, than *[sic]*the effort has been worthwhile!'

[89] In the 'I Kling' and 'NPD" writings the words 'psychology' / 'psychological' appear three times, all spelt correctly. What is revealing is that Vermaas, in the statement she wrote out in late September 2010 in support of the restraining order,[62] also used the word 'psychological' three times but she made the same spelling mistake each time – she omitted the 'h'. In the same statement she complained that Chaplin 'clearly dispizes me'.

[90] It is curious that the linguists did not pick up on these matters. It is unlikely that Vermaas would have written 'psycological' three times if she knew the correct spelling. The word 'psychological' and its cognates, correctly spelt, feature in the disputed 2011 writings and in authentic Chaplin writings.[63] In the 2011 writings the word 'despise' does not appear but 'despicable' features twice, both times correctly spelt.[64] Chaplin spells 'despise' correctly in his authentic

[61] 6/455.
[62] 6/453-454.
[63] 4/322 ('psychological' and 'psychic').
[64] 5/362, 6/458.

writings.[65] This is another piece of evidence pointing strongly away from Vermaas' authorship.

[91] The last of the 2011 writings to which I shall refer are letters sent by 'Alex Davison' and 'Lurch Jeram'.[66] These were sent to public authorities. The writer complained that Fine had used the police to further her 'vendetta' against her former boyfriend. The authorities were urged to investigate this 'abuse of power'. Both letters referred to the *Noseweek* articles and alleged that the police conducted a search and seizure operation despite a defective warrant. The supposed need for Fine's conduct to be investigated had also featured in the 'Bailey' and 'onion award' documents. The 'Davison' and 'Jeram' letters exhibit knowledge of the search and seizure operation, about which Chaplin was evidently vexed.

[92] Another aspect which the linguists overlooked is this. In Vermaas' acknowledged writings,[67] she always inserts a comma before the word 'but' when it functions as a coordinating conjunction (25 times by my count); and she almost always inserts a comma before 'because' when it introduces a subordinate clause (12 out of 14 times). First-language speakers of English rarely place a comma before 'because', and grammar and style guides rarely call for one. Although grammarians have rules about when 'but' as a conjunction should and should not be preceded by a comma, few people are familiar with the rules and even fewer observe them. The tendency, at least in this country, is for English speakers to omit commas before 'but'.

[93] Vermaas' extensive use of commas before 'but' and 'because' is probably attributable to the fact that English is not her first language, and that in Afrikaans the equivalent words '*maar*' and '*want*' are almost always preceded by a comma.

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[65] 4/322.
[66] 4/358 and 5/359.
[67] The examples of her usage will be found in the writings at 3/255-261, 6/453-454, S1/68 and S1/77.

Chaplin's authentic writings follow the usual practice of first-language English speakers. Confining oneself to his email writings, he uses 'but' as a coordinating conjunction 37 times, and on 36 of those occasions there is no preceding comma. He uses 'because' 10 times, and on 9 of those occasions there is no preceding comma.

[94] In the disputed 2011 writings the word 'but' is used 10 times, and on 7 of those occasions there is no preceding comma. The full word 'because' does not feature but the abbreviated form ''cause', introducing a subordinate clause, appears twice, on neither occasion with a preceding comma. Again, this militates against Vermaas' authorship of the 2011 writings.

[95] The 2011 writings include words and phrases which are more likely to have featured in the writings of an educated person whose first language is English than those of an Afrikaans-speaker for whom English is a second language.[68]

[96] The order granted by agreement on 20 December 2011 immediately brought the spate of abusive writings to an end. This is strong evidence that the author of the 2011 writings was a person with knowledge of the 2011 application and order. There is no evidence that Vermaas was aware of the 2011 proceedings, let alone the order. Fine alleged that Vermaas had no involvement in the 2011 proceedings and that the case was not reported in the press.

[68] See eg: 'unscrupulous lawyer' (5/359, 6/485), 'ascertain' and 'stoop to such unethical standards' (6/458), 'personal vendetta' and 'travesty of justice' (4/358), 'petty domestic squabbles' (5/359), 'waiting with bated breath' (6/473), 'saga' (5/361, 6/485), 'bringing the legal fraternity into disrepute' and 'prestigious' (6/481, 485), 'cover up one's wrongdoings' (3/237), 'red rag in front of a bull' (S1/90), 'coping mechanisms' and 'out of kilter' (3/237), 'maliciously and methodically' (5/362, 6/458).

[97] If Vermaas was in truth behind the 2011 writings, and if she did have knowledge of the 2011 order, she would have had every reason to continue with her successful campaign of getting Fine to think that Chaplin was responsible for the harassment. Why stop writing if, by continuing to write, Vermaas might get Chaplin punished for contempt of the 2011 order?

[98] In my view, Chaplin's denial of authorship of the 2011 writings must yield to the overwhelming evidence to the contrary. His denial can be dismissed on the papers as so far-fetched, in the light of all the circumstances, as to be untenable. I dismiss, as absurd, the notion that two persons might independently have been responsible for the writings. Chaplin's authorship would be placed beyond any disputation if he were proved to have been the author of the 2017 writings, a matter to which I now turn.

Authorship of the 2017 writings

Res judicata / issue estoppel

[99] In relation to the 2017 writings, there is the preliminary question whether, in view of the 2017 order, it was open to Chaplin, in the 2018 application, to dispute his authorship of those writings. Le Grange J could not have made the orders he did without finding that Chaplin was the author of at least some of the 2017 writings. Every finding which it is necessary for a court to make in order to grant a particular order must be taken to have been determined, even though it has not been expressly declared.[69]

[69] *Boshoff v Union Government* 1932 TPD 345 at 350-351; *Turk v Turk* 1954 (3) SA 971 (W); *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others* 2013 (6 SA 499 (SCA) paras 20-21.

[100] This question was touched upon in the appeal, and the applicants' counsel submitted in their heads of argument that their clients had not been required to re-prove, or the court *a quo* to reconsider, the findings underpinning the 2017 order. In support of that submission, counsel argued that contempt proceedings are by their very nature dependent on the existence of an order in earlier proceedings. It is the order, not the facts underpinning the order, that an applicant for contempt must prove.

[101] The applicants' counsel are right that if their clients proved beyond reasonable doubt that Chaplin was responsible for the 2018 writings, they did not need to prove – as a formal element of their cause of action – that he was the author of the 2017 writings. This is because the 2017 order was binding on Chaplin whether or not he was in truth the author of the 2017 writings. The argument, however, misses the point. In the present case, proof that Chaplin authored the 2017 writings was not a formal element of the cause of action in the 2018 application, but evidentially it was vitally important to the question whether Chaplin was the author of the 2018 writings, which was indeed a formal element of the cause of action.

[102] Accordingly, the applicants' counsel's primary submission can be sustained only if *res judicata*, or more accurately issue estoppel,[70] operated to bar Chaplin from contesting his authorship of the 2017 writings. I have concluded that it is undesirable to deal with the 2017 writings on that basis. Although in criminal law the pleas of *autrofois acquit* and *convict* have been held to be based on the

[70] The issue in the 2017 application was whether, by authoring the 2017 writings, Chaplin was in contempt of the 2011 order. That question was finally disposed of by the 2017 order. *Res judicata* would apply if the applicants had tried to bring the same claim a second time. The applicants did not do so. Their 2018 application advanced a different claim, namely that Chaplin, by authoring the 2018 writings, was in contempt of the 2011 and 2017 orders. There could be no defence of *res judicata* to that application. However, an issue arguably determined in the course of the 2017 application, *viz* whether Chaplin was the author of the 2017 writings, was evidentially relevant to the question whether Chaplin was the author of the 2018 writings, so the question is whether Chaplin was estopped, in the 2018 application, from contesting the implied finding on that issue.

principles of *res judicata*,[71] it does not necessarily follow that issue estoppel applies to quasi-criminal proceedings.

[103] Although *R v Kriel*[72] could be cited as an instance of issue estoppel operating against an accused, and although in England *R v Hogan*[73] was to similar effect, *Hogan* was overruled in *DPP v Humphrys*,[74] which held that issue estoppel has no place in English criminal law. The highest courts in Australia and Canada have been divided on the question whether issue estoppel in favour of an accused still has a role to play in criminal proceedings but they have been uniform in holding that the prosecution cannot rely on a previous conviction to found an issue estoppel against the accused.[75] The position is the same in New Zealand and Ireland.[76]

[104] If the question were to arise again in South Africa in ordinary criminal proceedings, our courts may follow other Commonwealth jurisdictions in refusing to allow an issue estoppel to be raised against an accused. Civil contempt proceedings may be distinguishable but they have a criminal dimension, and I can see arguments for and against the applicability of issue estoppel. Since we were not fully addressed on the matter, I prefer to leave it open.

[105] Moreover, even if issue estoppel could in appropriate circumstances be invoked against a respondent in contempt proceedings, our courts will not permit issue estoppel to operate in circumstances where to apply it may be unjust and

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[71] *R v Manaesewitz* 1933 AD 165.
[72] 1939 CPD 221.
[73] [1974] 1 QB 398.
[74] [1977] AC 1.
[75] *R v Story* [1978] HCA 39; (1978) 140 CLR 364 para 26 (Barwick CJ), paras 5-6 (Gibbs J) and paras 11-12 (Murphy J); *R v Rogers* [1994] HCA 42; (1994) 181 CLR 251 para 17 (per Mason J) and para 24 (per Dean and Gaudron JJ); *R v Mahalingan* 2008 SCC 63 CanLII; [2008] 3 SCR 316 para 57.
[76] *R v Davis* [1982] 1 NZLR 584 (CA); *R v Degnan* [2001] 1 NZLR 280 paras 8-9; *Clifford v Director of Public Prosecutions* [2013] IESC 43 paras 6.8-6.10.

unfair.[77] In the present case, Chaplin has claimed that lack of financial resources prevented him from putting up evidence in opposition to the 2017 application. While one may be sceptical of this and may think that the Wizardz CCTV footage loomed large in his decision, we cannot reject his explanation on the papers. Particularly in proceedings of this kind, it would be unfair if his conviction in the 2018 application were secured on the strength of an uncontested finding made in the 2017 application.

[106] Assuming, then, that issue estoppel does not to apply, the rule in *Hollington supra* becomes operative. In terms of that rule, the conclusions reached by an earlier court on an issue arising for decision in a later case are not admissible evidence.

[107] The applicants' counsel referred us to the recent judgment in *Institute for Accountability in Southern Africa v Public Protector & others*[78] where Coppin J held that findings made in earlier proceedings against the Public Protector at the suit of third parties were admissible evidence of the facts in question in subsequent civil proceedings for declaratory relief and mandatory interdicts, and that the rule in *Hollington* should not be extended to successive civil proceedings. With respect, the way in which Coppin J confined *Hollington* is not in accordance with binding authority: see the judgment of the Supreme Court of Appeal in *Mulaudzi v Old Mutual*[79] which dealt with the question whether a finding in earlier civil proceedings was admissible evidence in later civil proceedings. *Mulaudzi* was not mentioned in Coppin J's judgment and may not have been cited to him in argument.

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[77] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 24-26.
[78] [2020] 2 All SA 469 (GP).
[79] *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited & others; National Director of Public Prosecutions & another v Mulaudzi* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 40. See also, in this court, *Graham v Park Mews Body Corporate & another* 2012 (1) SA 321 (WCC) paras 59-65.

[108] However, even if the rule in *Hollington* did not render Le Grange J's implicit finding inadmissible, it would only be a piece of evidence, not conclusive. Since the 2017 proceedings were unopposed and because Le Grange J was not called upon to give a reasoned judgment, the evidential value of his opinion must necessarily be slight in comparison with the extensive factual and expert evidence bearing on the question of authorship of the 2017 writings.

[109] I also disagree with the applicants' submission that the affidavit filed by Chaplin to prove compliance with the 2017 order was an admission of responsibility for the 2017 writings. He was bound by the 2017 order and had to take such steps as he could to remove the offending posts.

[110] Conversely I disagree with the submission by Chaplin's counsel that reliance, in the 2018 application, on authorship of the 2017 writings amounted to Chaplin being 'punished again' for something that had formed the subject matter of the 2017 application. In the 2018 application, the investigation into Chaplin's authorship of the 2017 writings was evidence relevant to the question whether he was the author of the 2018 writings. Any new punishment imposed on him in the 2018 application is punishment for his authorship of the 2018 writings.

The Wizardz evidence

[111] The papers in the 2017 application were placed before the court *a quo* as part of the material to be taken into account in adjudicating the 2018 application. In her 2018 founding affidavit, Fine dealt with the Wizardz evidence by way of summary since it had been dealt with fully in the 2017 application.[80] She said that the CCTV footage had provided undeniable evidence that Chaplin was responsible for the three posts uploaded on the Wizardz computer on 21 February 2017.

[80] Paras 23.2 - 23.3.

[112] In his answering affidavit, Chaplin denied in general terms that he authored the 2011 or 2017 writings but did not traverse the said paragraphs in Fine's founding affidavit and did not deal with the full account contained in the 2017 application. Fine pointed this out in her replying affidavit[81] and again summarised the evidence. Although Chaplin filed a supplementary answering affidavit, he still did not deal with the Wizardz evidence.

[113] In the 2017 application, Fine stated that she had viewed the CCTV footage and was able to identify Chaplin. Stills from the CCTV footage were attached to her affidavit. She also testified that the blue Adidas cap, shorts, sandals and A300 polar watch which the figure in the Wizardz footage was wearing matched the cap, shorts, sandals and watch that Chaplin could be seen wearing in images taken from his public Facebook page. She alleged that Chaplin had a distinctive mole on his right leg which was visible in the Wizardz footage. And she pointed out that Chaplin had computer facilities at home and thus did not need an internet cafe for legitimate purposes.

[114] Apart from the fact that Chaplin did not properly challenge the applicants' Wizardz evidence, it is undeniable that someone with a motive to harass them uploaded abusive posts from a computer at Wizardz at the very time the person identified by Fine as Chaplin was there. And it would be stretching credulity to suppose that someone else (Chaplin's thesis would be Vermaas) was at Wizardz at the very time that a man, looking remarkably like him and dressed in clothes and accessories that he was wont to wear, happened to be there.

[115] Chaplin's evasive denial does not raise a genuine dispute of fact. It was proved beyond reasonable doubt that he was the author of the three posts uploaded from the Wizardz computer.

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[81] Paras 4.4 - 4.6 at 4/270-271; para 11 at 4/273; para 74 at 4/290.

[116] Regarding the Wizardz evidence, Chaplin's counsel submitted – in the alternative to his SFE objection (which I have rejected as unsound) and to his client's denial (which I have rejected as patently untenable) – that proof of Chaplin's authorship of the Wizardz posts had 'little or no probative value' in determining the authorship of the 2018 writings. I disagree. As will appear from what follows, the Wizardz evidence permits one, through a process of incremental reasoning, to link Chaplin to all the 2017 writings; this in turn confirms his authorship of the 2011 writings; and Chaplin's authorship of the 2011 and 2017 writings amply justifies a conclusion that he was the author of the 2018 writings.

[117] One of the Wizardz posts[82] was a 'consumer complaint' about 'bad service' from Fine, 'a bad attorney who has also been named and shamed in Noseweek Magazine!!'. This type of complaint and terminology occurs frequently in the 2017 writings. The first sentence of this post ends with two exclamation marks and the second with three exclamation marks. The name and username given by this 'complainant' were 'Leta Worst' and 'JoeyKangaroo'.

[118] The author of the second post[83] asked Fine on which website the writer should place Cohen's daughters, suggesting a site where 'some nice older man can find them!!!', remarking that the writer's son loved to watch pornography. The message concluded with an instruction to Lauren that she must 'stop BULLYING Danielle!!!' The message abounds with multiple question and exclamation marks. There is a mis-spelling of 'their' in the phrase 'there home address'. The apostrophe comma is absent from the contraction 'doesnt'. For reasons I shall explain later, it is significant that the letter starts with the strange capitalisation of Fine's first name, 'So LAuren…'. This 'complainant' gave the name 'Leta9'.

[82] 4/348; also at S2/153.
[83] 4/341; also at S2/152.

[119] The third post,[84] also purporting to be a consumer complaint against NRF, stated that if one went to attorneys they should tell you up front that they have been 'named and shamed in the media for being a "very bad attorney"???'. Each sentence ends with multiple question or exclamation marks.

Other writings from 'Leta', 'Joey', 'Kangaroo' etc

[120] Since Chaplin was undeniably the author of the above three posts, it must follow that he was the author of other posts under cognate names – on 31 May 2016 under the name 'kangaroo';[85] on 9 October 2016 (three)[86] and 19 October (two)[87] under the names 'koalajoey'/'Koala Joey'; on 18 January 2017 under the name 'Koalanet';[88] on 21 February 2017 under the name 'Leta9';[89] and on 23 March 2017 (two) under the name 'Leta23'.[90] The chances are zero that these posts, many of which pursue similar themes to those contained in the Wizardz posts, were coincidentally the work of a second person operating independently of Chaplin.

[121] There are features, other than the assumed names, by which these messages can be linked to Chaplin. In general, and in keeping with all the 2017 writings, the author of these messages employed multiple exclamation and question marks, capitalised words for emphasis, and refrained from inserting an apostrophe in contractions such as 'didnt', 'doesnt', 'wouldnt' etc.

[122] There is also a commonality of themes. The message of 31 May 2016 referred to *Noseweek* and included the notion that Vermaas had hated the fact that Chaplin cared for Fine's mother. The messages of 9 October 2016 and one of the

[84] S1/59.
[85] 4/345.
[86] 4/340 (two) and 347.
[87] 4/340.
[88] 4/340.
[89] 4/340.
[90] 4/340-341.

messages of 19 October purported to be consumer complaints and urged the CLS to investigate Fine. They contained the 'named and shamed' trope with reference to 'two different editions of *Noseweek*'. There is the mis-spelling 'proffession'.

[123] The other message of 19 October told Fine 'why we had to get the restraining order against' Chaplin – to 'make him look like he was a bad person'. One of their reasons was 'to HURT him!!!'. Fine was alleged to have been 'embarrassed' because she had not wanted her mother to find out what Fine had done to Chaplin. The author could now write more letters to force Fine to act against Chaplin.

[124] The message of 18 January 2017 asked the CLS to remove Fine as an attorney. She had been 'named and shamed in several editions' of *Noseweek*. She had forced an innocent woman to 'file for a restraining order' against her boyfriend because she 'mistakenly thought he had been unfaithfull to her!!!' One of 'Leta's' posts of 23 March complained of 'bad service' and rudeness from Fine of NRF, and again included the 'named and shamed' theme.

[125] The message of 21 February 2017 (not identified as one of the three Wizardz posts) contained a theme that Fine had 'wanted' the letters to be from Chaplin so that she could justify all the terrible things she had said about him. Fine was 'just as guilty as we' so she should not try to 'bully' Danielle. The writer was 'going to bully your sister and her children back at you on the internet now!!' Fine was 'stupid'. Chaplin had never cheated on her. (One can infer that this message was posted shortly before the Wizardz message in which Chaplin asked Fine on which pornographic site he should place Cohen's children.)

[126] 'Leta's' other post of 23 March 2017 dragged the [X] family into the abuse (Fine was friendly with certain members of that family), and threatened to disclose on the internet that a member of the [X] family had supposedly

committed adultery ‘with two women at the same time’. Fine was said to be a ‘bully’, and was alleged to have tried to frame Chaplin for the letters which the writer had sent. The writer referred to having ‘[put] up information about your sisters *[sic]* children’, which clearly links the author to one of the Wizardz posts. (Fine alleged that her friendship with the [X] family was not known to Vermaas or the latter’s mother.)

The other [X] posts / ‘RashS’

[127] The ‘Leta’ post about the [X] family, which for the reasons explained above was undoubtedly Chaplin’s work, allows one to link him to the four posts of 23 May 2017 under the name ‘RashS’.[91] Two of these posts alleged that a member of the [X] family had had a ‘threesome’ with his wife and another woman. There is a zero possibility that a person other than Chaplin coincidentally decided to harass Fine with the same theme a few weeks after Chaplin had done so. We also know, from Chaplin’s authentic writings, that ‘RashS’ is likely to be a ‘clue’ pointing to Rasheda Samuels whom Chaplin in 2010 had identified as a Vermaas accomplice.[92]

[128] Since Chaplin’s experts attach some significance to religious themes in the 2011 and 2018 writings, I note that in these two messages ‘RashS’ said that the threesome had been ‘a SIN in the eyes of the LORD our GOD!!!’ and ‘a sin in gods eyes!!!’

[129] Since one can discount the possibility that a person other than Chaplin coincidentally started abusing Fine at exactly the same time under exactly the same name ‘RashS’, Chaplin must also be the author of the other two posts under that name on 23 May 2017. One message, targeted at Cohen, asked her, ‘Sheri why the romance novel???’ (From Chaplin’s authentic writings one knows that he

[91] 4/342.
[92] See Chaplin’s email to Sarah Wassall at 4/319. The date 2010 can be inferred from the content of the email.

wrote a romance for Fine's mother because the latter 'love[d] her trashy romance novels'[93] and Chaplin thought that she deserved to be the star of such a story. The opening chapters are part of the record.[94]) 'RashS' went on to say that Vermaas had hated Fine's mother, and that if Fine's mother had not told Chaplin 'what was going on', there would never have been a restraining order, the *Noseweek* story or any 'letters'.

[130] The last 'RashS' messages told Cohen how easy it had been to fool Fine. Fine would never be able to apologise to Chaplin and she would have to lie to make it appear that Chaplin was the author of the letters. Fine was 'such a LIAR!!!' The writer said 'it was so much fun playing them against each other!!!'

The 'vulture' writings

[131] The 2017 writings considered thus far, all of which are undoubtedly Chaplin's work, also enable one to link him to the many 'vulture' posts in the 2017 writings. The one linking piece of evidence is the 'RashS' message in which the writer asked why Fine had not understood 'why the "vulture" was used!!!'[95] Chaplin had 'got it' but not Fine. Chaplin's authorship of this message shows that he had knowledge that the 'vulture' theme had featured in the 2011 writings and in earlier 2017 writings.

[132] The other linking piece of evidence is a message from 'Vulture5' on 31 May 2017.[96] The writer accused a member of the [X] family of having 'organised a threesome for her husband', and continued:

'HE was stil a married at the time!!! That is adultury!!!' [Y] please ask Lauren what the vulture picture is about!!! She knows what it means doesnt she???? She wont want to be honest with

[93] See Chaplin's email to Gibson at 4/321.
[94] 4/325-333.
[95] 4/342.
[96] S2/141.

you. She will lie to you but you must make her tel the truth!!! The vulture is the key to understadning what happened!!!'

[133] The chances are vanishingly small that someone other than Chaplin also decided to start harassing Fine about a supposed threesome in the [X] family and to pursue the familiar theme of Fine's supposed propensity for lying. So 'Vulture5' must be Chaplin.

[134] Posts by or referring to 'vulture' cover 14 of the 2017 writings, and the evidence thus far on its own establishes beyond reasonable doubt that Chaplin must have authored of those writings as well.

Other 2017 writings

[135] It would be tedious to examine all the other 2017 writings in detail. Once it is found that Chaplin was the author of the three Wizardz posts, the other posts under cognate names, the 'RashS' posts, and the 'vulture' writings, it is impossible to resist the conclusion that he was the author of all the 2017 writings. They are characterised by similar themes, similar formulations, and display a similar style of writing. I wish to highlight only a few aspects of these other writings.

[136] I referred earlier to the strange capitalisation, 'LAuren', in one of the three Wizardz posts. This capitalisation in her name appears at least 11 times in the 2017 writings,[97] and in one of these messages, in which her name was capitalised in this way four times, the author also wrote, 'Cape LAw Society'.[98] The explanation is almost certainly that Chaplin's affectionate name for Fine was 'La',

[97] In the anonymous posts of 2 August 2016 (once) and 24 October 2016 (twice); in the 'Annual Award' posting of 24 October 2016 (four times); in the 'Marion' posting of 6 February 2017 (three times) and in the 'Leta23' posting of 23 March 2017 (once).
[98] 4/342.

which one sees throughout his authentic 2010 / 2011 emails to Wassell and Gibson.

[137] An anonymous message of 4 March 2016 to Fine[99] said that they had had 'so much fun' making Chaplin defend himself against Fine, even though he was 'innocent'. The writer claimed to have put 'your sisters children on some very bad websites so some bad men can find them!' This is very similar, in content and formulation (including the absence of an apostrophe), to things said by Chaplin on 21 February 2017 and 23 March 2017 under the name 'Leta'.

[138] The Australian theme, which one can discern in the names 'kangaroo' and' koala' which Chaplin chose for some of the messages above, can be detected in other posts as well. There are five messages under the names 'Croc Dundee' / 'DundeeC' / 'Mick Dundee';[100] a message from 'ayersrock' (alluding to the famous Australian landmark, Ayers Rock);[101] and one from 'Adele Scheepers' with the username 'Didgeridoo<Australian>'.[102] The name 'Joey', which Chaplin incorporated into a number of his assumed names, also features in a post of 11 March 2017 from 'Joey Jackman'[103] (the surname perhaps a reference to the Australian actor Hugh Jackman).

[139] In one of these 'Australian' posts, on 15 February 2017 under the name 'DundeeC',[104] the writer said that the 'Dummies Award' went to Fine. (This harks back to the onion award document.) The 'best game in the whole world was playing you against your stupid ex boyfriend Colin Chaplin!' Chaplin was 'innocent'. He would never have found out 'if your stupid mother didnt tell him!!'

[99] 4/334.
[100] 4/347 and 4/337-338.
[101] S2/113.
[102] 4/347-348.
[103] 4/339.
[104] 4/338.

The writer had told Fine that Chaplin 'was a psycho'. The writer had left 'so many clues' but Fine had never seen them. This message concluded:

> 'It was the 'Boomerang' comment wasnt it?? Thats how he new it was me wasnt it! You see Lauren I went to Australia once for a wedding but you didnt get that did you!!! The best game in the whole WORLD playing you against Colin Chaplin and all he could do was try and defend himself against you!!!'

'John Long' had explained the 'boomerang effect' to Fine in one of the 2011 writings.

[140] A message posted on 24 October 2016[105] was under the name 'Onion Award'. Again the writer spoke of having left 'so many clues'. There is reference to the *Farmers Weekly* and the way in which the writer had come to link the 'vulture' theme with the 'onion award'.

[141] On 23 February 2017[106] and 4 March 2017[107] there were two abusive posts making reference to Rosalind Lambert-Porter, a person whom Chaplin had briefly dated before Vermaas and who also subsequently complained of harassment. One of these posts was from 'Talented Mr Ripley', the other from 'RLP'. The first stated that the author 'gave you [Lambert-Porter] becuase you would grab onto someone who had something bad to say about him wouldnt you???'. These references to Lambert-Porter are significant for two reasons.

(a) First, the insinuation that the Vermaas family led Fine to Lambert-Porter is factually untrue. Fine explained[108] that in 2011 she asked senior counsel to cast his eye over her draft founding affidavit in the 2011 application. After reading the papers, this advocate told Fine that he had recently advised a distant cousin

[105] 4/342.
[106] S1/21-22.
[107] 4/343.
[108] Paras 62-62 at S21,

of his who had come in for similar treatment from a Colin Chaplin. This distant cousin was Lambert-Porter, and this is how Fine came to obtain her evidence.

(b) Second, and as Fine stated in the 2017 application, Chaplin was the only common denominator between her and Lambert-Porter. The fact that the author of the posts attacked the two women in a single message cannot conceivably be mere coincidence.

[142] The post of 23 February 2017 pursued similar themes to the other 2017 writings, and Chaplin is no doubt the author. He must thus also be the author of another post of 23 February 2017 under the name 'Talented Ripley'.[109]

[143] As in Chaplin's authentic writings but unlike Vermaas' authentic writings, the author of the 2017 writings places no comma before the words 'but' and 'because'. By my count there are 19 instances of 'but' and 21 of 'because', not once with a preceding comma.[110]

[144] A final feature of the 2017 writings to which Fine drew attention is that although they imply the doing of harm to Chaplin, none of them cast him in a bad light. The people who come off badly are the supposed writer (Vermaas' mother) and Fine, her sister and acquaintances – the writer by virtue of the dastardly acts to which 'she' confesses, the rest by virtue of the awful things said about them.

[145] As with the 2011 writings, the fact that the 2017 writings came to an end with the granting of the 27 order points to the fact that the author had knowledge of the 2017 application and of the order. Fine alleged that Vermaas was not involved in the 2017 application and that it was not reported in the press.

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[109] 4/343.

[110] These are to be found in the writings at 4/334-343, 345, S1/22-23, S2/111, S2/136, S2/140 and S2/157.

Conclusion on 2017 writings

[146] I am thus satisfied beyond reasonable doubt that Chaplin was the author of all the 2017 writings. His authorship of the 2017 writings also confirms his authorship of the 2011 writings.

Authorship of the 2018 writings

[147] The seven 2018 letters are characterised by a similar style to the 2017 writings: multiple question and exclamation marks; capitalisation for emphasis; the absence of an apostrophe in contractions and with the possessive 's'; and in one instance a religious allusion.

[148] The themes are also familiar. In the first letter the writer said that 'we have almost got Colin havnt we!!!', and continued: 'I will wait a few weeks and then send you some more letters and write some NASTY complaints about you and your sister on the internet'.

[149] Significantly, this letter included the sentence: 'I got the idea for the HILLBILLY letter I sent to NOSEWEEK from my sister Farmers Weekly magazines.' In one of the 2017 writings, a message to Cohen from 'Gerda' on 25 May 2016,[111] the writer had said: 'Did you know that I sent the letter to Noseweek calling your sister a "hillbilly"???'. Chaplin undoubtedly wrote the message of 25 May 2016. Unless there was a copycat at work in 2018, he must also have been the author of the first of the 2018 letters. Chaplin had evidently spoken to Vermaas of 'hillbillies' during their short liaison because on 12 July 2009 Vermaas ended her message to Chaplin thus: 'I should have listened to you a long time ago about those hillbillies from oudtshoorn…'.[112]

[111] 4/338-339.
[112] 3/255.

[150] In the second letter, the writer referred to the seizure of Chaplin's computers, and said that when Fine took Chaplin to court the writer had stopped sending the letters 'so that [Fine] could tell people that it must have been him and that Noseweek were wrong!' Chaplin, however, had been 'innocent'. The writer said that 'she' was enclosing 'a picture of me at my eldest daughters wedding!', and taunted, 'I left clues in the letter but your sister could not solve it!' Once again, and as with the 2017 writings, the writer was seeking to point the finger at Vermaas' mother, and was pursuing familiar themes.

[151] The third letter started with the familiar assertion: 'So now you know why we needed the restraining order against Colin and why he had to think it was Laurens idea!!'. The writer claimed that after the *Noseweek* story the writer had known that Chaplin would try to talk to Fine and that if they succeeded Fine would find out that she had been lied to, so the writer had had no choice but to make Fine think that Chaplin was 'stalking her'. The writer did so by 'sending the letters'. There is an echo of one of the 2017 messages when the author wrote: 'As a mother you will understand that there is nothing you wouldnt do for your children!!! Colin and Lauren were sacrificed so that my children could have a good life.'

[152] The author showed familiarity with the 2017 writings, saying that '22 times I wrote complaints on the Internet about your sister and I used my sisters surname SCHEEPERS and your sister didn't get it!!!'. The author boasted that '[t]he vulture was my genius!!!', and explained about the article which had appeared in the newspaper concerning Chaplin's vulture fund. The author also wrote: 'I had no choice but to put the comments on the internet about Mia Gibson and the [Xses]', thus showing familiarity with the abusive statements about the [X] family for which Chaplin was responsible in 2017. Enclosed with this letter

was a screenshot containing the ‘vulture fund’ article, reflecting the date of the computer as 14 February 2018.

[153] The fourth letter is a short one which, although addressed to Cohen, was intended for Fine. The author asked why Fine could not find out who the author was – the author had left ‘so many clues’. The author asked whether Fine knew that the author’s ‘sisters husband Gerhard is a farmer!!!’, adding: ‘The Farmers Weekly magazines I got from their home!!!!’.

[154] The fifth letter alleged that Chaplin had humiliated the author’s daughter, who had had to leave home, dye her hair and change her name. Vermaas had only lied to Fine because she loved Chaplin and wanted Fine out of the way. The author asked Cohen if she wondered why the author had used pictures and stamps of vultures, and again enclosed a copy of the ‘vulture fund’ article. It had been ‘a miracle a sign from GOD’ when Chaplin had appeared in the *Weekend Argus*. Again the connection between vultures and the onion award was explained, the author stating: ‘That is why I gave you so man ONION AWARDS!!!’.

[155] The author of the fifth letter referred to an earlier letter in this sequence, and concluded: ‘I know that you still must have many questions for me. In my next letter I will tell you all about AUSTRALIA and my medical diagnosis!!!’.

[156] The sixth letter displayed knowledge of the 2011 and 2017 writings, opening with the sentence: ‘It was the BOOMERANG letter wasn’t it????’. The author stated that ‘I wen to Australia for my eldest daughters wedding’, who was married in ‘the presence of GOD’. The writer ‘wore a beautiful dress designed by my daughter’. The writer was ‘not going to apologise for calling you narcissistic!!’ (harking back to the NPD document of 2011). The writer concluded by promising Cohen that she would answer her further questions in the next letter.

The writer enclosed an advertisement from 'Hillbilly Homes Lifestyle'[113] and an article on 'spiritual well-being' by the evangelist Angus Buchan.[114] These two extracts were from *Farmer's Weekly* of 4 August 2017.

[157] The seventh letter started: 'What a JOKE Lauren and Colin are (anything but FINE)! I would like to thank them for the entertainment they are providing me with.' Again, the writer stated that the letters were sent so that Fine would think that she was being harassed by Chaplin 'and get a restraining order against him!!'. To keep her career, Fine had had to tell her fellow attorneys that *Noseweek* was wrong, and she had to take him to court 'to make him stop sending her letters'. The writer had known when to stop sending the letters, because Fine had supposedly told the writer when she was taking him to court. Chaplin 'was innocent but your sister maliciously prosecuted him'. The letter continued with themes familiar from the 2017 writings.

[158] Significantly, there are two paragraphs in Afrikaans. Perhaps the author wished to suggest that 'she' was Afrikaans-speaking. That endeavour fails, because the Afrikaans is decidedly not that of a person whose first language is Afrikaans.[115]

[159] Once again, the 2018 writings are characterised by the absence of a comma before 'but' and 'because'. These words are used at least seven times and twice respectively in circumstances where Vermaas would have used a comma.[116]

[160] Since Chaplin was, beyond reasonable doubt, the author of the 2011 and 2017 writings, the stylistic and thematic similarities of the 2018 writings and the knowledge which the author displayed of the earlier writings lead to the

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[113] 1/82.
[114] 1/83.
[115] My colleague, Judge Steyn, a member of this appellate panel, has confirmed this.
[116] See at S1/71, 73, 75, 84, 85.

inescapable conclusion that Chaplin was also the author of the 2018 writings. Since his denial of authorship in relation to the 2011 and 2017 writings is undoubtedly dishonest, his denial in relation to the 2018 writings rings hollow. (Chaplin's own experts seem to have had no doubt that the 2011 and 2018 writings were authored by the same person.)

[161] The only theoretical alternative is that someone with a motive to harm Chaplin had insight into the 2011 and 2017 writings, and copied his style and themes in the 2018 writings in order to frame him. And the only person to whom Chaplin has pointed is Vermaas. I have already explained why, even in 2011, Vermaas did not have a strong incentive to harass Fine or to harm Chaplin in this way. Since Vermaas was not the author of the 2011 and 2017 writings, the theory that she was a copycat requires one to accept that in January / February 2018 she decided – eight or nine years after last having had anything to do with Chaplin and Fine – to wreak revenge on them.

[162] This theory also requires one to suppose that Vermaas had knowledge of the 2011 and 2017 applications, that at the beginning of 2018 she drew the court files and made copies of the 2011 and 2017 writings, and that she had the linguistic ability to craft letters which would convincingly indicate (as indeed they do) that the author of the earlier writings was also the author of the 2018 writings.

[163] Then one has to believe that Vermaas decided to perpetuate the insinuation, made by Chaplin in the 2017 writings, that her own mother was the author of the 2011, 2017 and 2018 writings. In other words, the theory would be that Vermaas was pretending to be Chaplin pretending to be Vermaas' mother, with the inevitable danger that somebody might investigate Vermaas' mother, which might in turn lead back to Vermaas herself. It is difficult to imagine

Vermaas or her mother confessing to the conduct which the 2018 writings ascribed to them.

[164] And finally, one must suppose that Vermaas, who was trying to frame Chaplin, made it appear that the letters had been sent before the 2017 order was made. This would have been utterly self-defeating if her intention was to have Chaplin punished for contempt of court.

[165] This theory, with its multiple implausibilities, has no factual foundation, and can be rejected as not reasonably possibly true.

[166] I should mention that neither side filed an affidavit by Vermaas in the 2011 or 2017 proceedings. At a late stage of the 2018 proceedings the applicants sought condonation to file an affidavit from her, which Chaplin opposed. It appears from the transcript of argument in the court *a quo* that in order to prevent delay the applicants abandoned their attempt to introduce her affidavit. We may infer that Vermaas denied being the author of the writings because Chaplin said in effect, like Mandy Rice-Davies, 'Well, she would say that, wouldn't she'.[117]

The expert evidence

[167] Chaplin's counsel submitted that Kotzé's conclusions were 'clearly disputed by at least four global experts and one local expert'; that Kotzé's methodology, analysis and findings could not be relied on; that Chaplin's countervailing expert evidence was 'more than sufficient grounds to reject out of hand the testimony tendered by' Kotzé; that at any rate Kotzé's evidence could not be said to establish Chaplin's authorship beyond reasonable doubt; and that there was a 'litany of material disputes (of fact and opinion) between the parties' experts', which created 'significantly more than mere reasonable doubt'.

[117] Paras 37 and 40 at 7/563 and 565.

[168] These submissions overlook the three considerations I foreshadowed earlier in this judgment.[118] This is a case where non-expert evidence establishes Chaplin's authorship of all the writings beyond reasonable doubt. The question is whether the expert evidence proffered by Chaplin detracts sufficiently from the non-expert evidence to leave reasonable doubt. The non-expert evidence, however, is of a kind which cannot really be undone by expert opinion.

[169] I have already foreshadowed a great failing in the analyses performed by Grundlingh and QG, namely that they take no account of the 2017 writings. Having regard to the contents of their respective reports, I have no doubt that if they had been asked to determine whether the author of the 2018 writings was the same person as the author of the 2017 writings, their answer would have been an unequivocal yes.

[170] Another signal deficiency in the their analyses is, as Kotzé rightly pointed out, that their premise seems to have been that the 2011 and 2018 writings were the writer's ordinary style, the question being whether that style was closer to the known style of Chaplin or Vermaas. However, one does not need to be an expert to see that most of the 2011 writings, and all of the 2017 and 2018 writings, represent a material departure from the ordinary styles of both Chaplin and Vermaas. Whoever was writing the disputed documents was deliberately affecting, indeed flaunting, a bizarre style. Although there are, here and there, a few traces in Vermaas' authentic writings that English might not be her first language, in general she writes English well and naturally, and commits relatively few gross spelling errors. Chaplin, as an English speaker, also writes well.

[171] The author of the 2017 and 2018 writings, by contrast, went out of his or her way to spell words incorrectly. Some of these appear from extracts I have

[118] Para 65 above.

already quoted but there are many more. For example, the author often wrote ‘becuase’, ‘beleive’, ‘wil’, ‘tel’ and ‘stil’ (instead of ‘will’, ‘tell’ and ‘still’) and so on. Neither Chaplin nor Vermaas, in their authentic writings, mis-spell these words, though both have occasional lapses.

[172] In these circumstances, most of the tools used by the experts are likely to be unreliable. The abusive writings are a distinct genre, marked by sensationalism, exaggeration, an accusatory and taunting tone, and an artificial style. Since Chaplin and Vermaas knew each other’s authentic style, either of them – if they had sufficient linguistic skill – could have drawn on features from the writings of the other, though there is little evidence of this having been done.

[173] Nevertheless, I make the following observations concerning Grundlingh’s qualitative analysis. Of the five stylistic features on which she based that analysis, almost all are common to the 2017 and 2018 writings and / or consistent with Chaplin’s authorship. I have already mentioned the use of multiple exclamation and question marks, the absence of an apostrophe in contractions and the use of capitalisation in the 2017 writings, which are undoubtedly his.

[174] Grundlingh said that whereas Chaplin used single and double inverted commas interchangeably, Vermaas and the author of the 2011 writings only used double inverted commas. Although the Vermaas sample is small, this seems to be true in relation to her writings and the 2011 writings. But if Grundlingh had examined the authentic Chaplin emails in the record as well as the 2017 writings, she would have been struck by two things:

(a) First, in his authentic emails Chaplin always uses double inverted commas,[119] and departs from this style in only one of the formal writings Grundlingh examined.[120]

[119] 4/316, 319, 323.

(b) Second, in the 2017 writings, which are undoubtedly Chaplin's, he used double inverted commas most of the time[121] (as in his authentic emails) but used single inverted commas at least once.[122] On Grundlingh's logic, this is something Vermaas would never have done.

[175] Grundlingh noted that Chaplin's authentic writings do not employ underlining for emphasis whereas the 2011 writings did. However, Grundlingh cited only one instance where Vermaas herself underlined a word, and this was not in her email writings but in her handwritten statement in support of the restraining order. Furthermore, there is no underlining in the 2017 and 2018 writings, so the point has no traction.

[176] A similar critique could be made of QG's stylistic analysis. They say that in the 2011 and 2018 writings, mis-spellings, supposedly attributable to similarities in pronunciation, occur. But the same mis-spellings abound in the 2017 writings of which Chaplin was undoubtedly the author. Even in the three short Wizardz posts, one finds 'there' instead of their' and 'advise' instead of 'advice'.

[177] The use of multiple co-ordinated conjunctions, rather than short sentences, is said by QG to be typical of Vermaas and the disputed writings but not those of Chaplin. Since QG were given a very small sample of Chaplin's authentic writings, I do not believe that any such inference can be drawn. But in any event, the same pattern of multiple co-ordinated conjunctions is to be found in the 2017 writings.

[178] QG say that whereas Chaplin expresses currency as 'R7,5 million', the 2011 writings contain the expression '45 million rand'. I am surprised that experts

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[120] 6/499-500. In the other formal writings she examined – at 6/503-506 – he used double inverted commas.
[121] 4/334, 339, 3432, 343, 345 and 346. On these pages there are at least 13 sets of double inverted commas.
[122] 4/338: It was the 'Boomerang' comment…

should have regarded a single instance of a currency expression in Chaplin's writings and in the disputed writings respectively as being of any moment. But I would add that if they had been given a fuller sample of Chaplin's writings, they would have seen that in a single email[123] Chaplin spoke of an asking price 'between 500 and 600 thousand Rands', followed a few words later by the statement that he was going to 'offer R350 000'. And in another email[124] he said he was going into a meeting to discuss 'buying a fourty *[sic]* five million Rand piece of property'.

[179] QG said that the way Chaplin and the disputed author formatted dates differed. Chaplin, they said, wrote '12th of August' whereas in one of the 2018 writings the author wrote '15 of October'. A single sample from disputed writings in which the author is deliberately mangling language does not constitute evidence of different authorship. I have never known any reasonably intelligent person to write '15 of October' and it is not an error that might be induced by following an Afrikaans practice. There is no sample of the way Vermaas formatted dates, and Chaplin's own style was not entirely uniform – in one letter he wrote 'on November 17'.[125]

[180] QG made reference to Afrikaans features in Vermaas' writings. I think Spanish linguists ought not to have opined on such matters as whether the use of the word 'braai' and 'Mampara' in South Africa are more likely to be used by Afrikaans-speakers than English-speakers. They referred to the fact that in the 2011 and 2018 writings there are religious allusions and frequent references to magazines such as *Noseweek* and *Farmers Weekly*. Indeed, and a great many more in the 2017 writings.

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[123] 4/316.
[124] 4/317.
[125] 4/318.

[181] QG say that Chaplin follows the correct and usual style of placing a comma after greetings and farewells, eg: 'Hi Janice,'; 'Regards,', whereas Vermaas and the author of the disputed writings follow the unusual practice of omitting the comma. QG are wrong. In South Africa the usual practice is the other way round.[126] This does not necessarily nullify QG's point. However, if Chaplin consciously, in his own writings, followed the unusual practice of inserting commas after greetings and farewells, he may well have consciously eliminated this from his 'anonymous' writings.

[182] I am unimpressed by the 'keyness' analyses of Kotzé on the one side and Grundlingh on the other. I am similarly unimpressed with stylometric analysis focusing on sentence and paragraph complexity. Not only are the disputed writings a specialised and artificial genre; the samples of the authentic writings of Chaplin and Vermaas are small:

(a) The authentic genre closest in style to the disputed writings are informal emails and Facebook messages. QG had regard to only 15 authentic Chaplin emails,[127] of which 11 were messages of only a few lines and the remainder incomplete extracts from Chaplin's lengthy narratives to Gibson. Grundlingh's analysis did not include any authentic Chaplin emails. Kotzé had the most extensive corpus of Chaplin's emails,[128] some relatively short but most of them of more substantial length.

(b) Kotzé did not include Vermaas in his analysis. For purposes of their analysis, QG had regard to only ten Vermaas emails,[129] of which five were

[126] There are random confirmations of this in the record: eg NRF's letters/emails at 1/46, 52; Fine's emails at 4/350 and 353; Gibson's email at 4/352; Kotzé's email at 4/355-6; Grundlingh's email at 6/435, Chaplin's attorney's emails at 6/436 and 7/568; Martin Welz's email at 8/724; BVPG's letter at 8/725; Lambert-Porter's letter at S2/100.
[127] 3/225-232.
[128] 4/315-324 (21 emails by my count.)
[129] 3/255-262.

relatively short (seven lines or less). Grundlingh had access to only three authentic Vermaas emails.[130]

[183] As I have said, most of the stylistic features on which Grundlingh and QG based their qualitative analyses are features common to the 2011, 2017 and 2018 writings. Indeed, I think Grundlingh and QG seem to have taken it for granted that the same author was behind the 2011 and 2018 writings, and I am sure they would have reached the same conclusion if the 2017 writings had been included in their brief. Kotzé is the only expert to have enquired whether the same hand was behind the 2011, 2017 and 2018 writings, and his conclusion was unequivocally yes.

[184] Because of the unusual nature of the disputed writings and the deliberate adoption by the author of an artificial style, the traces of the true author are likely to be subtle. I have already mentioned the way in which Vermaas almost invariably places commas before 'but' and 'because'. The absence of these features in the disputed writings does not show that Chaplin is the author but does point strongly away from the only other person who has been identified as a suspect.

[185] The same is true of the correct spelling of 'psychology' and its cognates in the disputed writings. The fact that Chaplin in authentic writings also spelt this word correctly is unremarkable for an educated English-speaker but the fact that Vermaas spelt the word wrongly on the three occasions she used it militates against her authorship of the disputed writings.

[186] Whatever the flaws in Kotzé's methodology (a matter on which it is unnecessary to express an opinion), he detected two other subtle errors (ie traces of true authorship to which the writer may not have been alert) in Chaplin's

[130] 6/492, 494 and 495.

authentic writings and the disputed writings. The first is that Chaplin invariably writes ‘bought’ (instead of ‘brought’) as the past tense of ‘bring’. In the authentic Chaplin writings and in the disputed writings, one finds no instance of ‘brought’ where its use was dictated, and no instance of ‘bought’ where that word would have been correct (ie as the past tense of ‘buy’).

[187] Kotzé also undertook phrase searches on very large English-language databases. He chose two expressions encountered seven and six times respectively in the disputed writings, namely ‘she has bought nothing but shame’ and ‘she has bought the legal profession’. The phrase ‘she has bought nothing but’ returned only 906 hits, while the exact phrase ‘she has bought nothing but shame’ only seven hits, all being from the disputed writings on the CLS website. The phrase ‘she has bought shame on the legal profession’ yielded only six hits, again being from the disputed writings on the CLS website. By contrast, the correct phrase ‘has brought the legal profession’ yielded 77 600 hits.

[188] The other distinctive Chaplin error which Kotzé identified is his tendency to write ‘women’ when ‘woman’ is dictated by the context. In authentic writings he makes this error not only in emails but in more formal texts. This error, too, one finds on quite a few occasions in the disputed writings.

[189] Chaski, who did not comment on the ‘women’ error, stated that the ‘bought’ error is common. Although she attached some samples of internet searches to demonstrate this, most of them seem to be from people who, to judge by their names, did not have English as their first language. I would think that among people whose first language is English the error is less common in writing than in speech (where there could be a slip of the tongue). Chaski did not comment on the outcome of Kotzé’s phrase searches.

[190] In the circumstances, when the expert evidence is viewed holistically in the light of Chaplin's proven authorship, on non-linguistic grounds, of the 2017 writings, it supports rather than detracts from the conclusion that he was the author of the 2018 writings.

[191] I thus consider that the court *a quo* was right to find that the applicants had proved beyond reasonable doubt that Chaplin was the author of the 2018 texts and that he had thus wilfully and with *mala fides* breached the 2011 and 2017 orders.

Sanction for the proven breach

[192] Chaplin's counsel submitted that after Chaplin was found guilty of contempt but before sanction was imposed, the court *a quo* should have permitted him to adduce mitigating evidence, with separate consideration being given to (a) the sentence imposed for the new contempt and to (b) the question whether the suspended sentence of 2017 should be brought into operation. With reference to *Fakie*, it was argued that a respondent in civil contempt proceedings is entitled to analogous protections to those enjoyed by an accused person in criminal proceedings.

[193] This point was not raised in the answering papers or in the heads of argument in the court *a quo*. We requested a transcript of the proceedings, from which it appears that the point was not raised in oral argument. It first emerged in the application for leave to appeal, by which time Chaplin had engaged his current senior counsel.

[194] What was discussed *a quo*, in relation to sentence, was the question whether – if it were found that Chaplin was the author of the letters – a psychological assessment was needed. This started with a remark by the applicants' counsel, at the beginning of his submissions, that on the question of sanction there was a 'strong feeling' on the part of the applicants that there was

‘something wrong psychologically’ with Chaplin and that ‘one may want to bring that into play one way or another’. Counsel added, though, that ‘it is a difficult subject to broach’.

[195] Chaplin’s counsel devoted most of his oral argument to the merits. On sanction, he said that if the court found Chaplin guilty, then on the applicants’ version there was something ‘pathological’ about his behaviour. A civilised society should not send ‘somebody who is ill to prison’. The judge said that there was nothing in Chaplin’s version to suggest a need for evaluation. Chaplin did not exhibit any confusion. Counsel responded that because the proceedings were criminal, the court ‘would in any event have regard to mitigating circumstances and to a host of other factors before sending him to imprisonment directly’. The court, in imposing sentence, had a very wide discretion. The court was entitled to reject his version and come to the conclusion that whoever was sending those letters ‘would seem to have issues’. The judge remarked that the ‘prosecution’ (ie the applicants) were not asking for an investigation and that it had not occurred to the judge himself that he was duty-bound to send Chaplin for observation; the judge was not qualified to say that Chaplin was sick. Counsel responded that the ‘constitutional thing to do’ would be to order some sort of investigation.

[196] In his replying submissions, the applicants’ counsel said that, if one applied the analogy of a criminal case, the defence could not ask for an accused to be sent for observation without some sort of medical evidence to support the possibility that there was something wrong with the accused. The court could not do so *mero motu* just because ‘the circumstances are strange’. A foundation had to be laid. To the extent that Chaplin’s counsel relied on the applicants’ statement that there was something ‘pathological’ about Chaplin’s behaviour, the applicants did not have medical expertise.

[197] In the above exchanges, Chaplin's counsel was not asking the court to defer evidence and submissions on sentence to a later stage. What he was saying was that if the court found Chaplin to be in contempt, it was within the court's power to order some sort of psychological assessment rather than imposing imprisonment. The notice of appeal does not raise, as a ground of appeal, that the court should have ordered a psychological assessment rather than imposing imprisonment. The complaint was that the court had not considered Chaplin's personal circumstances 'which in a criminal trial would entail the leading of evidence in mitigation prior to sentencing, which was not done *in casu*'. I should add, though, for the sake of completeness that I do not consider that there was a sufficient foundation to have required the court *a quo* to seek a psychological assessment. One cannot assume that all deviant behaviour has its source in a mental disorder.

[198] Turning to the question whether a two-stage process should be followed in civil contempt proceedings, Chaplin's counsel did not cite any South African authority to that effect but referred us to Commonwealth decisions where proceedings were adjourned after a finding of contempt to allow the defendant to be heard on the question of sanction. In this country there are many cases in which committal or fines have been imposed as part of a single process, and indeed it has been the norm hitherto.[131]

[199] The applicants' counsel drew our attention to *Soller v Soller* [2000] 3 All SA 531 (C) where Donen AJ rejected a contention – also raised for the first time in an application for leave to appeal – that sentence should not have been imposed without affording the delinquent party an opportunity to lead evidence in mitigation of sentence. In that case, the delinquent party's counsel cited an

[131] Examples include *Protea Holdings Ltd v Wriwt & another* 1978 (3) SA 865 (W), *Sparks v Sparks* 1998 (4) SA 714 (W), *Chetcutti v Chetcutti* [2001] 1 All SA 75 (Tk), *Jeebhai v Minister of Home Affairs & another* 2007 (4) SA 294 (T) and *H v M* 2009 (1) SA 329 (W).

unreported judgment, *Heystek v Reichenberg* Case 99/28370 WLD, in which Kuny AJ had allowed a respondent a reasonable opportunity, after conviction, to lead mitigating evidence. Donen AJ said that considerations of fairness might have dictated such a course in *Heystek* but that the same did not apply to the case before him.

[200] The institution of civil contempt proceedings on notice of motion has been sanctioned by our highest courts. Although such proceedings have a criminal dimension, the private applicant has a personal interest in having the contempt addressed by an appropriate sanction. The approved procedure involves the private applicant setting out, in a notice of motion, the relief she seeks, including the sanction, and setting out, in her founding affidavit, the facts relevant *inter alia* to an appropriate sanction. Unless a court orders a separation of issues in civil proceedings, the whole case is determined pursuant to a single hearing, even though certain issues might only need to be determined if the court finds in favour of the claimant on other issues.

[201] A respondent in civil contempt proceedings is not an accused person. I accept that where a criminal sanction is sought the respondent is entitled to 'analogous protections' to those enjoyed by an accused person but it is the substantive aspect of protection rather than procedural technicalities that need to be assessed when deciding what adaptations, if any, should be made to ordinary motion proceedings.

[202] In relation to sanction, the most important substantive aspect of 'analogous protection' is that the respondent in civil contempt proceedings is entitled to be heard on the question of sanction. The conventional single-stage procedure accommodates this. First, the respondent in his answering affidavit is entitled, and is indeed expected, to advance facts germane to the question of sanction in case

the court finds him to be in contempt. Second, the respondent is entitled, during argument, to make submissions on the question of sentence if the court should find against the respondent on the merits.

[203] In conventional criminal proceedings, the two-stage procedure is decreed by statute.[132] One obvious reason for this is that evidence of previous convictions is generally inadmissible on guilt but highly relevant to sentence. For this reason, the Criminal Procedure Act provides that previous convictions may only be proved by the prosecution after the accused has been convicted.[133] The two-stage procedure became entrenched at a time when jury trials were the norm and where the jury needed to be sequestered from inadmissible evidence that might taint their views.

[204] There may be other reasons why, in particular cases, fairness dictates that sentence be the subject of a separate hearing after conviction. However, and but for the mandatory statutory regime, it would not necessarily be unfair in all cases to have conviction and sentence dealt with together. One knows, from experience, that in the vast majority of criminal cases in the lower courts the facts relevant to sentence are placed before the court by way of an *ex parte* statement by the accused's lawyer. This could just as well be done in a single-stage process.

[205] In the present case, Chaplin had the opportunity in his answering affidavit, and through counsel in written and oral argument, to deal with an appropriate sanction in the event of the court finding him to be the author of the 2018 writings. He chose not to do so. Even now, we are not told what evidence he would like to adduce if the case were remitted for sentence. The complaint seems to be entirely procedural in nature.

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[132] See, in particular, s 274 of the Criminal Procedure Act 51 of 1977.
[133] Section 271.

[206] We also know, with the benefit of hindsight, that if a two-stage procedure had been followed, Chaplin would not, in the sanction phase, have acknowledged guilt and expressed remorse. He applied for leave to appeal against his conviction on the merits and continues to this day to protest his innocence.

[207] This was also not a case where there was a range of plausible factual findings which the court *a quo* might have made on the merits, ie this is not a case where Chaplin needed to know the precise factual findings on the merits before being able to advance properly focused submissions on sanction. The applicants' case was conducted on the footing that Chaplin was the author of the 2011, 2017 and 2018 writings. There was no realistic prospect of the court finding that Chaplin did not author the 2017 writings but did author the 2018 writings. And there was no realistic prospect of the court finding that Chaplin authored some but not all of the 2018 writings. If Chaplin was convicted, it would only have been on the basis that he was the author of the 2017 writings and that he deliberately and wilfully breached the 2011 and 2017 orders by writing the seven letters making up the 2018 writings. The contingency of that finding was one which Chaplin was able to address, as a fallback position, in his answering papers and in argument.

[208] I do not think that fairness dictates that in every contempt application where a criminal sanction is sought a two-stage process must be followed. To insist on a two-stage process in every case would delay the finalisation of contempt proceedings (where expeditious determination is usually desirable) and involve both parties in additional expense. Whether fairness dictates that sanction be held over for later determination depends, in my view, on the circumstances of the case. I thus consider Donen AJ's approach in *Soller* to be correct.

[209] At least where the respondent is legally represented, the starting point is whether the respondent has asked the court to hold over the question of sanction.

If such a request is made, the respondent would need to set out the circumstances making it fair for a separation to be granted. The applicant would also be entitled to be heard on that question. In the present case, Chaplin's counsel did not ask for sanction to be held over for later determination. And as I have said, the circumstances were not such as to make a two-stage process the only fair way of dealing with sanction. If the question of sanction received scant attention in argument, I venture to suggest that this was for the reason that a sentence of six months' imprisonment could not seriously be contested in the circumstances of the case.

[210] I have considered the Commonwealth authorities cited by Chaplin's counsel. One must be cautious about reliance on authorities from jurisdictions where the procedure for dealing with civil contempt may differ from ours. More importantly, the cases cited do not lay down a rule that a two-stage process must always be followed. The cases represent factual scenarios in which judges have found it appropriate to adjourn proceedings to afford the defendant an opportunity to make representations on sanction. In some of these cases the defendants did not have legal representation or were convicted *in absentia*. In others, which are not in point, the contempt was common cause and only sentence was in issue. Yet others are distinguishable because they dealt with contempt in the face of the court rather than non-compliance with orders. The cases do not seem to me to show more than that which I unhesitatingly accept, *viz* that in all cases the court must follow a process which is fair in the circumstances.

[211] I thus reject the procedural argument. It is not clear to me to what extent, if any, the notice of appeal attacks the court *a quo*'s sentence in the event of the procedural argument failing. It was submitted that there was insufficient evidence before the court *a quo* for imposition of sentence, particularly regarding Chaplin's personal circumstances.

[212] The facts before the court *a quo* included the information contained on Chaplin's LinkedIn profile. Although we do not know his exact age, his profile indicates that he has been engaged in property business in Cape Town since 1998. His university studies must have been undertaken before that. So it was known that he was a middle-aged man from a privileged background and with a good education. He also appears to have been single and without children. It was also apparent from the papers that, like him, his parents lived in the Southern Suburbs and were supportive of him. His mother described herself as a retired businesswoman, and she has several university degrees. Chaplin's father is an engineer.

[213] Of course, it would have been open to Chaplin to place further personal circumstances before the court *a quo* but he chose not to do so. I do not think the court *a quo* was obliged to ferret out more information about his background.

[214] In addition to Chaplin's personal circumstances, a relevant sanction needed to take into account the nature and extent of his wrongdoing and the interests of the community. His contempt in 2018 was a repeat of the contempt that led to the 2017 order. Repeated contempt by way of positive conduct is particularly reprehensible. Furthermore, the conduct (the 2018 writings) was in itself unlawful, quite apart from any question of contempt. Courts are entitled to view this type of harassment in a serious light.

[215] Although the sparseness of the court *a quo*'s sentencing remarks is unfortunate, I do not think that a sentence of six months' imprisonment for the 2018 contempt induces a sense of shock. Although this happened to be what the applicants sought in their notice of motion, I do not accept that the court *a quo* was unaware that it had a discretion to impose less (or, with fair warning, more). Chaplin's counsel did not argue that six months' imprisonment was excessive, and

did not propose a different period. Had he done so, the court would no doubt have addressed the argument.

[216] From the exchanges between the court *a quo* and counsel one can see that the judge considered the possibility of bringing the 2017 sentence into effect and imposing a suspended sentence for the 2018 contempt, so that Chaplin would continue to have the proverbial sword hanging over his head. In the event, the course actually followed by the court was more favourable to Chaplin. And even if I were to accept that the absence of full motivation vitiates the court *a quo*'s sanction so that we are at large to reconsider an appropriate sanction, I would not impose less than six months' imprisonment.

[217] The same applies to the triggering of the suspended sentence of 2017. The 2017 writings comprised a much larger body of abusive and threatening writings than the six 2018 letters. A sentence of six months' imprisonment for unlawful and contemptuous behaviour spanning a period from March 2015 – May 2017 and comprising more than a hundred abusive and threatening writings was not unreasonable, and indeed there was no appeal against that order. Chaplin was granted an opportunity to remedy his ways by refraining from further unlawful and contemptuous behaviour. He wilfully threw away that chance, and in my view the triggering of the suspended sentence was almost inevitable. He can regard himself as fortunate that the two sentences are to run concurrently. Once again, I note that Chaplin's counsel did not argue in the court *a quo* that if his client was found guilty of the contempt it was inappropriate to activate the 2017 sentence.

[218] As a matter of formulation, para 2 of the court *a quo*'s order was wrong, since the court was not sentencing Chaplin afresh for the conduct which formed the subject of the 2017 application but was ordering a sentence already imposed to be brought into operation. The court *a quo* in this respect followed the formulation

of para 3 of the applicants' notice of motion. I do not think, however, that the judge was under a misapprehension as to the substance of what he was doing.

Conclusion and costs

[219] The applicants' employment of two counsel in the appeal was justified. Although they sought and were granted costs on the attorney and client scale in the court *a quo*, they did not ask for a punitive costs order in the appeal.

[220] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

O L Rogers
Judge of the High Court
Western Cape Division

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