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

CASE NO: 22440/2014

In the matter between:

LEONARD CHARLES KATZ Plaintiff

and

MARTIN SYLVESTER WELZ First Defendant

(Identify No. [….])

CHAUCER PUBLICATIONS (PROPRIETARY) LIMITED Second Defendant

(Registration No. 2001/025520/07)

Coram: N Mayosi AJ

Delivered: 26 April 2021

JUDGEMENT

MAYOSI, AJ

INTRODUCTION

1 This is an action for damages for defamation, in which the plaintiff is Mr Leonard Katz, a director of Edward Nathan Sonnenbergs Inc. which is a firm of attorneys that practices nationally and internationally in the name and style of ENS Africa (**ENS**). The plaintiff is a senior attorney, who has practised as an attorney, uninterrupted, since his admission to practice on 28 January 1987.

2 The plaintiff specialises in insolvency law, corporate rescue and recoveries. In addition to being the national head of ENS's Insolvency, Business Rescue, Corporate Recoveries Department, he is also the head of the Durban office of ENS.

3 The first defendant is Mr Martin Welz, a senior journalist and the editor of a monthly magazine known as Noseweek that is sold and circulated throughout South Africa, and in Namibia. Mr Welz began his career as a journalist in 1975 and has practiced as such, uninterrupted, since then. He has held senior positions at various national news publications, including the position of Pretoria Bureau Chief for the Sunday Times; Parliamentary Correspondent for the Sunday Express and head of investigations at Rapport. Mr Welz has been the editor of Noseweek since it was founded in 1993.

4 The second defendant, Chaucer Publications, is the owner, publisher and distributor of Noseweek.

5 In addition to being the editor of Noseweek, Mr Welz is also the sole director and corporate controller of Chaucer Publications.

6 Mr Katz brings this defamation action as a result of the publication of the following content in an edition of Noseweek in July 2014:

6.1 A graphic and/or digital representation of Mr Katz published on the front cover of Noseweek with the caption "*The man who stole justice*" (**the cover page**). This same image also appeared on page 3 of the magazine. The digital image, as well as the accompanying caption, were published once again in the August 2014 edition of Noseweek.

6.2 An editorial article entitled "*Lennie the Liquidator makes mockery of the law*", of which Mr Welz was the author, together with the same digital image of Mr Katz (**the editorial**).

6.3 An article entitled *"And then there's Brakspear"* of which Mr Welz was the author, together with the same digital image of Mr Katz (**the Brakspear article**).

7 Mr Katz asserts that the digital image and the caption *"The Man who stole justice"* are *per se* wrongful and defamatory of him in that they were intended, and were understood by readers of Noseweek to mean that Mr Katz had acted to subvert the course of justice; was dishonest; and had conducted himself in an unlawful and unprofessional manner.

8 The editorial contained the following statements concerning Mr Katz:

8.1 "*While several ENS directors have actively helped design the fraudulent schemes, and all ENS directors and senior partners have knowingly and happily shared in the spoils and must therefore share responsibility, one director stands out above the rest in his aggressive fee charging and disregard for his victims and the law. He is Leonard Katz, director and 'specialist' in charge of the insolvency and liquidation Department of ENS, and better known in the trade as 'Lennie the Liquidator.'*

8.2 "*More than a year ago serious allegations of fraudulent manipulation of court proceedings (including the use of a fake court order) by Katz and other members of ENS were formally brought to the attention of the Judge President of the KwaZulu- Natal High Court and the Chief Justice of South Africa.*"

8.3 It questioned how it was possible "*that judges tolerate that the likes of Katz continue to practice as officers of the court, despite the damning evidence against them having been public knowledge for years? By now his impunity knows no bounds.*"

8.4 "*You want what can't legally be done? Agree to pay Lennie an extra million-or-three and he will pull it off, by hook or by crook.*"

8.5 "*All South Africa's banks and many of the very rich know it, and are happy to hire the likes of Lennie when the law gets in their way. And so the rot spreads.*"

Mr Katz's complaint is that the above content in the editorial article is *per se* wrongful and defamatory of him in that these words were intended, and understood by readers of Noseweek to mean that he acted, *inter alia*, fraudulently and/or devised fraudulent schemes; is a dishonest person generally who has been guilty of unprofessional conduct; is unfit to practice as an attorney and is prepared to act unlawfully and/or unprofessionally on behalf of his clients, in return for the payment of money.

9 Mr Katz objects to the following content in the Brakspear article on the basis that it is *per se* wrongful and defamatory of him:

9.1 "*What to do? Call in Lennie the Liquidator. Katz immediately negotiated his R1m bonus fee, then set about applying his old recipe, but this time with some salad on the side. The plan was to fraudulently manufacture a debt with which to liquidate Brakspear's West-Dunes Property 5. And then to appoint a friendly liquidator who would not dream of suing Nedbank's Fairbairn Trust.*"

9.2 "*Only days before Christmas in 2008, when his victim and most betterclass lawyers could safely be assumed to be on holiday, Katz filed notice of an urgent application for the provisional liquidation of Westdunes, to be heard in the KwaZulu-Natal High Court, Durban, at 9.30am on 23 December."*

9.3 "*From then on everything went as Katz had planned. He urgently applied for and was given the court permission to cancel the sale to Moti, sell the farm to Applemint for R25m - and charge the company in liquidation his outrageously extravagant fee.*"

9.4 "*Katz's plan was to fraudulently manufacture a debt to liquidate*

Brakspear's property."

9.5 "*It emerges that what the fraudsters did was to try to mimic an earlier R7m payment received by Brakspear from another trust established long*

ago by his father: the Brakspear Trust in the Isle of Man."

9.6 "*A significant concluding point to make with regard to Katz's credibility:*

on 31 March 2009 Katz submitted an invoice to the liquidators of West June's in which he demanded payment of fees totalling R227,417.97 for services rendered by himself and his assistants at court in Durban on 5 and 6 February, 2009. It was paid. On 28 May 2010 he submitted another invoice, with a different invoice number, but listing the identical services hours and totalling the same R227,417.97. That also got paid, without question."

9.7 "*When are South Africa's judges going to stop buying second-hand cars from this fraud salesman? Until they do, they share the shame.*"

10 In the view of Mr Katz, these words were intended and were understood by readers of Noseweek to mean that he, amongst other things, acted fraudulently

and/or fraudulently manufactured a debt in order to liquidate a company; that as an attorney, has no integrity and has acted without scruples; has charged fees which are unjustified and/or are unconscionable and/or to which he was not entitled; and rendered false invoices.

11 It is common cause that the July 2014 and August 2014 editions of Noseweek were delivered to its subscribers and were offered for sale and sold to members of the general public.

12 Mr Welz and Chaucer Publications admitted that for the third quarter of 2014 (the period from July to September 2014), total sales of 16 967 copies of Noseweek were recorded.

13 Mr Katz seeks damages for defamation in the amount of R1 000 000.00

14 In his defence Mr Welz denies that the material to which Mr Katz objects is defamatory. In the alternative, in the event of this Court finding that the impugned material is defamatory, Mr Welz asserts that the content published was substantially true and was published in the public interest; or amounted to fair comment premised on substantially true facts; or that it was published on a privileged occasion in that the defendants had a moral or social duty to make the publication, which was made to people who had a right to receive the information; and/or that the contents to which Mr Katz objected were published reasonably in the circumstances.

15 Mr Welz further asserts that when reading the passages complained of and all other material published in Noseweek, its readers would be familiar with, or quickly register what he describes as the publication's *'uniquely free, irreverent and occasionally entertainingly cheeky style of writing'*, a style which he says Mr Katz himself has on occasion described as *'satirical'*. Mr Welz further asserts that the passages complained of are a reasonable response to documents, statements and court records that are quoted in the Noseweek reports concerned - said documents, statements and court records having been either generated by Mr Katz himself, or with his knowledge, or at his behest, or being known to him.

16 Chaucer Publications also denies any defamation, and raises in the alternative the defences of public interest privilege; or reasonable publication; or fair comment or truth and public benefit. It says that Noseweek is subscribed to and circulated within a niche market of professional persons *'who are not insensitive*

to the publication's typically extravagant journalistic style, and accordingly understand and appreciate same.'

17 The trial commenced on 24 February 2020 and was concluded on 25 September

2020. It was heard over a period of 19 days. Mr Katz was represented by Adv

Manca SC assisted by Adv Engelbrecht. Mr Welz represented himself. Chaucer Publications was represented by Adv Fehr and Adv Bishop, who was briefed for the purposes of argument only.

LEGAL PRINCIPLES APPLICABLE TO DEFAMATION

18 An action for damages is one that seeks to protect one of the personal rights to which every person is entitled, that is the right to a good name, unimpaired reputation and esteem by others. In our new constitutional order, reputation forms part of the concept of human dignity which is a fundamental constitutional value. In the result, the law of defamation lies at the intersection of two fundamental values, both protected by the Constitution, namely the rights to freedom of expression, including freedom of the press and other media, and the protection of reputation or good name.[1]

19 The elements of defamation are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement concerning the plaintiff.[2]

20 The question whether a statement is defamatory in its ordinary meaning, or is *per se* defamatory involves a two-stage inquiry. The first is to establish the

[1] LAWSA *Defamation* Vol 14(2) - Third Edition, para 109

[2] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) para [18]

natural or ordinary meaning of the statement. The second is whether that meaning is defamatory.[3]

Stage 1: The natural or ordinary meaning of statements

21 The test to be applied is an objective one. This Court is not concerned with the meaning which the maker of the statements intended to convey, or with the meaning those to whom it was published gave to it or whether they believed it. In accordance with the objective test, the question is what meaning the reasonable reader of ordinary intelligence would attribute to the statement in its context. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.[4] With regard to context, headlines are not to be read in isolation since the ordinary reader is taken to have read the article as a whole.[5]

22 It must also be borne in mind that the ordinary reader is subject to limitations. He or she is not a lawyer called upon to interpret the precise meaning of some legal document.[6]

Stage 2: Is the meaning of the statements defamatory?

23 At the second stage, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published.[7] The well-known test proposed by Lord Atkin in *Sim v Stretch*[8] is that a statement is defamatory if it would *"tend to lower the plaintiff in estimation of right-thinking members of society generally."* Although this test has been widely applied, it should be qualified in two respects. First, it is recognised that the reference to "right-

[3] Le Roux and Others v Dey 2011 (3) SA 274 (CC) para [85]

[4] Le Roux, para [89]

[5] Tsedu v Lekota [2009] 3 All SA 46 (SCA); 2009 (4) SA 372 (SCA)

[6] LAWSA *Defamation* Vol 14(2) - Third Edition, para 116

[7] Le Roux, para [91]

[8] 1936 2 All ER 1237 (HR) 1240

thinking persons" is no more than a convenient description of a reasonable person of normal understanding and development. That is, it is a legal construct of an individual utilised by the courts.[9]

24 Second, it has been accepted that the reference to the views of society generally is not to be equated with views held by the national community, but that it also includes views held by a substantial and respectable section of the community. Defamatory statements include statements affecting moral character, imputing for example dishonesty, unethical or unprincipled behaviour; reflecting on office, profession or occupation, or which expose a person to enmity, ridicule or contempt.[10]

25 This Court agrees with the submissions made on behalf of the plaintiff, and finds that the statements written and published by the defendants in the cover page, the editorial and the Brakspear article are indeed defamatory of Mr Katz.

26 The ordinary meaning of the statements convey or imply that Mr Katz deliberately acted to subvert the course of justice, is dishonest, has conducted

himself in an unlawful manner, has been guilty of unprofessional conduct or conducted himself in an unprofessional manner, has acted fraudulently and/or devised fraudulent schemes, is a dishonest person generally, is unfit to practice as an attorney, is prepared to act unlawfully and/or unprofessionally on behalf of his clients in return for the payment of money, as an attorney has no integrity and has acted without scruples and that this has been a matter of public knowledge for years, has exploited his clients, has acted in a criminal manner, has acted in disregard of the law and has fraudulently manipulated court proceedings, has charged fees which are unjustified and/or are unconscionable, has fraudulently manufactured a debt in order to liquidate a company, deliberately misled the court, has acted in a criminal manner, has acted in disregard of the law and has rendered false invoices for his fees.

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[9] Le Roux, para [91]

[10] Le Roux, para [91]

27 The statements are accordingly likely to injure the good esteem in which Mr Katz is held by the reasonable average person to whom they were published.

Defences available for defamation

28 Where in defamation proceedings the publication of a defamatory statement is admitted, two presumptions arise, namely that the publication was wrongful and the defendant acted *animo iniuriandi*. The onus is then upon the defendant to establish either some lawful justification or excuse, or the absence of *animus iniuriandi*.[11]

29 In this matter the defendants have admitted publication of the defamatory statements, and accordingly the onus shifts to them to establish their defences.

30 It has been confirmed by both the Supreme Court of Appeal [12] and the Constitutional Court[13] that the defendants bear a full onus of proving their defences, on a balance of probabilities.

31 I deal in turn with the legal principles applicable to each of the defences raised by the defendants, and pursued by them in the argument of the matter.

Truth and public benefit

32 It is lawful to publish a defamatory statement which is true, provided the publication is for the public benefit.[14]

33 A defendant who relies on the defence of truth and public benefit must plead and prove that the defamatory statement complained of is in substance true.

[11] Khumalo v Holomisa 2002 (8) BCLR 771 (CC)
[12] National Media Ltd v Bogoshi [1998] 4 All SA 347 (SCA); 1999 1 BCLR 1 (SCA); 1998 (4) SA 1196
[13] Khumalo v Holomisa 2002 (8) BCLR 771 (CC); 2002 (5) SA 401 (CC)
[14] Vol 14(2) - Third Edition, para 124

What must be established is the *"sting of the charge"*, or the *"gist of the defamation"* and the fact that there is some exaggeration in the language used does not deprive the defence of its effect.[15]

Absolute and qualified privilege

34 The general principle is that it not unlawful to publish a defamatory statement on an occasion which the law regards as privileged. The consideration underlying the principle is that on these recognised occasions the law regards the free flow of information as so important that it should not be hampered by the fear of liability for defamation.[16]

35 Absolute privilege can only be created by statute. It is therefore not a defence that is available to the defendants in this particular matter.

36 Unlike the defence of absolute privilege, qualified privilege does not afford absolute immunity to the publisher of a defamatory statement. The protection conferred by this defence is provisional and the publication will be wrongful if the publisher acted with an improper motive.[17]

37 The three categories of occasions that enjoy qualified privilege are recognised, namely: (a) statements published in discharge of a duty or exercise of a right; (b) statements published in the course of judicial or quasi-judicial proceedings; and (c) reports of proceedings of courts, Parliament and public bodies. These occasions should not be regarded as *numerus clausus*. Whether a particular instance is privileged depends upon public policy considerations.[18]

38 Mr Welz asserts as one of his defences this form of qualified privilege, on the basis that the defendants had a moral or *'social'* duty to make the publications, which were made to people who had a right to receive the information. This defence cannot be sustained, because the courts do not recognise, as between

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[15] Vol 14(2) - Third Edition, para 124
[16] LAWSA *Defamation* Vol 14(2) - Third Edition, para 125
[17] Vol 14(2) - Third Edition, para 126
[18] Vol 14(2) - Third Edition, para 126

a newspaper and its readers, a community of interest sufficient to sustain the defence of qualified privilege. Though it may be said that the press has a duty to publish, every reader of the newspaper cannot be regarded as having a sufficient interest in the subject matter.[19]

Fair comment

39 It is lawful to publish a defamatory statement which is fair comment on facts that are true and are matters of public interest. The immunity afforded to such a publication is provisional, and the publication will be wrongful if the publisher acted with an improper motive. Four requirements have been set by the courts for successful reliance on this defence:[20]

39.1 the defamatory statement must amount to comment or opinion as opposed to a statement of fact;

39.2 the comment must be fair;

39.3 the facts on which the comment is based must be true and must be expressly stated or clearly indicated in the document or speech containing the defamatory statement;

39.4 the comment must relate to a matter of public interest.

40 It is often difficult to distinguish comment and fact, particularly where comment is presented as fact. The test is an objective one in that the statement must be recognisable to the ordinary reasonable person as a comment and not as a statement of fact. The general rule is that the comment must be based upon facts expressly stated or clearly indicated so that the reader is able to distinguish between what is fact and what is comment. It is not necessary to

[19] Vol 14(2) - Third Edition, para 127

[20] Vol 14(2) - Third Edition, para 130

set out the facts verbatim and in full, but there must be some reference in the article that indicates what facts are being commented on.[21]

Media privilege / reasonable publication

41 In *National Media Ltd v Bogoshi*[22] the Supreme Court of Appeal accepted that publication of a defamatory statement by the press may, even in the absence of stereotyped defences excluding wrongfulness (for example truth for public benefit, fair comment and privilege), be lawful if the publication was reasonable.[23] What would be regarded as reasonable in any given case is dependent on all the circumstances of the case.[24]

42 However, since the defence deals with defamatory statements that can cause extraordinary harm that could be false, it is to be applied with great caution and restraint.

43 The requirement of reasonableness demands a high degree of circumspection from editors and editorial staff on account of the nature of their occupation, the powerful position of the media and the credibility which it enjoys amongst large sections of the community.[24] Although no definitive list of potentially relevant factors is possible, the test of reasonableness includes, according to *Bogoshi' s* case, considerations such as:[25]

43.1 the nature, extent and tone of the defamatory allegations;

43.2 the severity of the consequences of publication;

43.3 the nature of the information on which the allegations were based and the

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[21] LAWSA *Defamation* Vol 14(2) - Third Edition, para 130

[22] [1998] 4 All SA 347 (SCA); 1999 1 BCLR 1 (SCA); 1998 (4) SA 1196 (SCA)

[23] At 1212. See also Mthembi-Mahanyele v Mail & Guardian Ltd [2004] 3 All SA 511 (SCA) [24]

Bogoshi, at 1213

[24] Bogoshi, at 1212-1213

[25] Bogoshi, at 1212-1213

reliability of their source;

43.4 the steps taken to verify the information, including the opportunity given to the person concerned to respond; and

43.5 the need to publish before establishing the truth of the allegations in a positive manner.

44 I now turn to analyse the defences raised by the defendants with reference to the evidence placed before the Court.

ANALYSIS OF THE EVIDENCE AND DEFENCES RAISED

45 I consider it an appropriate point to first set out the factual matrix relevant to the Brakspear article. Much of the evidence led in this case concerned the content of the Brakspear article, and to this end this Court spent a considerable amount of time hearing the evidence of Mr Ian Brakspear, called by Mr Welz, in this regard. What appears below is a summary of the salient features of that evidence.

46 At the heart of the Brakspear article is a fairly convoluted structure of corporate dealings between an entity named West Dunes Properties 5 (Pty) Ltd (**West Dunes**), the Westley Trust, the JAM Brakspear Overseas Trust (referred to either as the **JAMBOT Trust** or the **Brakspear Trust**) and other entities in relation to, in essence, the obligations of West Dunes in connection with its purchase of a farm in Franschoek, commonly known as Klein Normandie.

47 Mr Ian Brakspear was the sole director of West Dunes. The entire issued share capital of West Dunes was owned by an entity named Money Box Investments 0012 (Pty) Ltd.

48 West Dunes' purchase of the farm Klein Normandie was in part financed by a loan made available to West Dunes by First Rand Ltd (**First Rand** or **Rand Merchant Bank**).

49 The Westley Trust was required to provide First Rand with a guarantee as part of the security provided to First Rand for this loan. This is reflected in the first paragraph of the Brakspear articles, wherein Mr Welz wrote, *inter alia*:

'[Brakspear] had bought the farm in the name of a company, Westdunes Property 5, funded with a R13-million bond from Rand Merchant Bank and backed by a guarantee from the Jersey-registered Wesley Trust.'

50 Fairbairn Private Bank Jersey (the "**Jersey Bank**") issued the guarantee on behalf of the Westley Trust to First Rand in the sum of £550,000. Hence, the Westley Trust was liable to indemnify the Jersey Bank if the Jersey Bank became liable under its guarantee to First Rand.

51 As security for a loan made by the Jersey Bank to the Westley Trust and the bank's potential liability under the guarantee given to First Rand, the JAMBOT Trust (also referred to as **the Guernsey Trustees**) gave the Jersey Bank a guarantee, expressed to be a guarantee of the facilities granted by the Jersey Bank to the Westley Trust. That guarantee was secured by securing a deposit of
£900,000 held by the JAMBOT Trust with the Fairbairn Private Bank (IOM) Ltd (the "**Ilse of Man Bank**").

52 Mr Welz confirmed his understanding that funds held by the JAMBOT Trust were used indirectly as security to fund West Dunes' acquisition of the farm. As Mr Welz put it, he understood that "*a pot of money now belonging to the Isle of Man Trust held by the Isle of Man Bank, will be held in that pot as security for that guarantee given to Rand Merchant Bank."*

53 At all material times though, the primary liability under the guarantee given to First Rand lay with the Westley Trust. Mr Welz acknowledged this to have been so.

54 At some stage, the bank guarantee given to First Rand was reduced to £500,000 and the cash security provided by the JAMBOT Trust was increased to £915,000.

55 On or about 3 July 2007, First Rand called up the bank guarantee. On or about 5 July 2007 the Isle of Man Bank remitted to First Rand £500,000, from the £915,000 it held as security at the time in favour of the Jersey Bank.

56 The payment of £500,000 to First Rand was from money held by the JAMBOT Trust, which had been put up as security and was used to pay and reduce the First Rand loan to West Dunes.

57 The effect of the security structure put in place was therefore as follows:

57.1 If First Rand called up the guarantee given to it by the Jersey Bank on behalf of the Westley Trust, the Jersey Bank would be entitled to call upon the guarantee given to it by the JAMBOT Trust. In other words, the cash required to make payment under the guarantees would ultimately come from the JAMBOT Trust, specifically JAMBOT Trust's cash deposit of £915,000 held with the Isle of Man Bank.

57.2 Hence, ultimately JAMBOT Trust's money would be used to settle the Westley Trust's primary obligation under the guarantee it was required to give to First Rand in respect of the loan to West Dunes. This is also how Mr Welz understood it.

58 It follows that once payment was made to First Rand under the aforesaid agreements:

58.1 The JAMBOT Trust would have a right of recourse against the Westley Trust (broadly because its money was used to settle the Westley Trust's guarantee to First Rand).

58.2 The Westley Trust in turn would, as a matter of law, have a right of recourse against West Dunes for being called upon to perform under the guarantee it was required to furnish to First Rand as security for the loan West Dunes obtained from First Rand.

59 The net result therefore was that:

59.1 the Westley Trust would become liable to the JAMBOT Trust for

£500,000 in respect of the payment that was made on its behalf by the JAMBOT Trust to settle the guarantee given to First Rand Ltd; and

59.2 the Westley Trust would have a claim against West Dunes for £500,000.

It would become a creditor of West Dunes for that amount.

60 What then occurred was that, on 14 May 2008, the JAMBOT Trust made a written demand to the Westley Trust for payment of the £500,000 paid by it pursuant to the guarantee given by it to the Jersey Bank for the Westley Trust's liabilities.

61 The Westley Trust initially disputed this liability on 27 May 2008. On or about 13 September 2012, the JAMBOT Trust instituted proceedings against the Westley Trust for payment of, amongst other things, the £500,000 paid to First Rand pursuant to it calling up the guarantee.

62 On or about 21 September 2012, judgement was taken by the JAMBOT Trust against the Westley Trust by consent for the amount it claimed was due and payable to it, which included the £500,000 paid under the guarantees. This was known to Mr Welz when he wrote and the second defendant published the Brakspear article in July 2014.

63 In the winding up and liquidation of West Dunes that was initiated on 19 December 2008 and which, according to Mr Welz in the Brakspear article, was initiated by Mr Katz on the basis of him having manufactured a debt, the Westley Trust ultimately succeeded in proving acclaim for £500,000 against West Dunes.

64 For the sake of convenience during argument, Mr Manca for the plaintiff categorised the defamatory statements at issue as follows:

64.1 The statement, which appeared in the Brakspear article, that Mr Katz fraudulently manufactured a claim to bring about or otherwise fraudulently brought about the liquidation of West Dunes.

64.2 The statement that Mr Katz obtained or relied on a fraudulent or fake court order for the provisional liquidation of West Dunes. In the editorial, Mr Welz wrote of serious allegations that had been made a year previously, of fraudulent manipulation of court proceedings (including the use of a fake order) by Mr Katz and other members of ENS, which allegations had been formally brought to the attention of the Judge President of the KwaZulu-Natal High Court and the Chief Justice.

64.3 The statement in the Brakspear article that Mr Katz procured the appointment of a "*friendly liquidator*" in respect of the West Dunes liquidation to protect his client, Nedbank Ltd's Fairbairn Trust, from any claims that West Dunes might have against it.

64.4 The statements in the editorial that if you agree to pay Mr Katz an extra million or three, he will act unlawfully to achieve your goals and, connected with that, that Mr Katz negotiated a R1 million bonus fee in connection with the liquidation of West Dunes. The latter statement appeared in the Brakspear article.

64.5 The statements made in both the editorial and the Brakspear article that Mr Katz overcharges legal fees and/or has double charged for services rendered in the West Dunes matter.

64.6 The statements that Mr Katz is guilty of designing fraudulent schemes, shows disregard for the law and his "victims", and that there exists "*damning evidence*" against him, which has been public knowledge for years. These were written by Mr Welz in the editorial, and published by Chaucer Publications.

65 I deal with these defamatory statements, as categorized, in the sequence that appears below.

The R1m bonus fee; the plan to fraudulently manufacture a debt and the friendly liquidator

66 In the Brakspear article, the following statement was written by the first defendant and published by the second defendant:

'What to do? Call in Lenny the Liquidator. Katz immediately negotiated his R1m bonus fee, then set about applying his old recipe, but this time with some salad on the side. The plan was to fraudulently manufacture a debt with which to liquidate Brakspear's Westdunes Property 5. And then to appoint a friendly liquidator who would not dream of suing Nedbank's Fairburn Trust.'

67 The defendants pleaded that the above statements were (a) substantially true and were published in the public interest; alternatively (b) they constituted fair comment premised on substantially true facts, or further that (c) they were reasonably published in the circumstances.

68 I deal first with the R1m bonus fee.

The statement that Mr Katz immediately negotiated his R1m bonus fee

69 Mr Welz did not lead any evidence to support the published statement that Mr Katz had negotiated a R1 million bonus fee in relation to the West Dunes liquidation, or that he had done so on any other occasion.

70 The only reference in Mr Welz's evidence to a proposed payment of R1 million is contained in an email sent by Mr Levetan of ENS to Mr Brakspear's attorney, Mr Nico Le Roux, on 8 December 2008. In the email, which concerned settlement negotiations, Mr Levetan wrote the following, *inter alia*: to Mr Le Roux:

"*As discussed and as proposed by you, my clients will receive a minimum of R1million but this is to be increased pro rata should the free residue be more than has been projected. As we discussed yesterday, what is meant by this is*

that all creditors of West Dunes Properties should receive their pro rata portion of the free residue on such sale of shares, but that my clients would be guaranteed a minimum of R1-million. If their proportion is more, then they must be paid the correct amount, but if their proportion is less on a pro-rated basis, they will still receive a minimum of R1-million of the free residue."

71 In cross-examination Mr Welz was constrained to concede, in relation to the statement regarding the bonus fee, that:

71.1 Mr Levetan' s email did not concern any bonus fee negotiated by Mr Katz, and the proposal about the payment of R1 million was in fact a proposal made by Mr Brakspear's attorney, Mr Le Roux.

71.2 The statement published regarding Mr Katz immediately negotiating his R1m bonus fee is not true and was a misstatement.

71.3 His publication of the statement that Mr Katz "*immediately negotiated his 1 million bonus fee*" was careless.

72 Mr Bishop argued on behalf of the second defendant that the statement that Mr Katz immediately negotiated his R1m bonus fee is not defamatory, because an ordinary reader of Noseweek would be aware that highly skilled professionals such as attorneys or bankers could, and do, negotiate and get paid bonuses for jobs well done, and that it is not defamatory of an attorney to say that they are well paid.

73 But the meaning contended for by Mr Bishop cannot be sustained. First, the R1m bonus fee that Mr Welz stated in the terms was negotiated by Mr Katz was not for a job well done. It was ostensibly a reward for, amongst other things, manufacturing a debt which, presumably, did not exist. This, in my view, is what a reader of ordinary intelligence would understand from this statement, taken in context.

74 Second, the meaning contended for by the second defendant seeks to sever the statement about the R1m bonus fee from the broader context in which the statement appears, a context which includes not only the content of the

remainder of the Brakspear article, but also the contents of the cover page and the editorial. In that context, the defendants made and published statements that: (a) Mr Katz stole justice; (b) he stands out above the rest of his partners at ENS in his aggressive fee charging and disregard for *'his victims'*; (c) Mr Katz will do for his clients, something *'that can't legally be done'* in return for *'an extra million-or-three';* (d) Mr Katz submitted two invoices to the liquidators of West Dunes, for the same amount in relation to – presumably, as would be understood

by the ordinary reasonable reader - the same services, effectively double charging.

75 Mr Welz wrote the statement, as a fact, when in fact it was not true in that no R1m bonus fee had been negotiated by Mr Katz.

76 In the circumstances, and based on the evidence before this Court, the statement that Mr Katz immediately negotiated a R1m bonus fee is not only not true and therefore could not amount to fair comment, or be in the public interest, but there can be no justification for its publication on the grounds of reasonableness.

Mr Katz's plan to fraudulently manufacture a debt

77 In regard to the winding up of West Dunes, the defendants published the statements that Mr Katz's *"plan was to fraudulently manufacture a debt with which to liquidate Brakspear's West-Dunes Property 5. And then to appoint a friendly liquidator who would not dream of suing Nedbank's Fairbairn Trust."*

78 To establish the truth of the first sentence set out in the above quote, the defendants must prove that:

78.1 there was no debt due by West Dunes on which it could be liquidated;

78.2 that Mr Katz knew that there was no debt due by West Dunes on which it could be liquidated; and

78.3 Mr Katz, with such knowledge, intentionally misrepresented that there was such a debt.

79 In support of the statements published by the defendants that Mr Katz fraudulently procured the liquidation of West Dunes:

79.1 Mr Welz asserts that the claim relied upon by the Westley Trust in the founding affidavit deposed to by Mr Nico Botha, in support of the application for the liquidation of West Dunes is false and a fraud, and that the Westley Trust had no *locus standi* to bring the liquidation application.

79.2 Mr Welz further contends that the annexure marked "NB5" to the founding affidavit in support of the liquidation application was a manufactured document. Mr Welz asserted that the document was taken out of context, and that it was not an admission of West Dunes' insolvency.

79.3 Mr Welz also took issue with the fact that the liquidation application was brought on an urgent basis, contending that the application was not urgent.

79.4 Mr Welz further asserted that the alternative motivation for the liquidation of West Dunes, i.e. so that the then existing sale of the farm to Mr Moti's company could be cancelled and the farm sold to Applemint at a higher price, was itself a fraud on the court.

80 I analyse each one of these claims below, for their truth and reasonableness for the purposes of the defences raised by the defendants, with reference to the evidence of Mr Welz and Mr Brakspear, who testified for the first defendant in relation to these matters.

The Westley Trust's claim against West Dunes

81 In the founding affidavit delivered in support of the Westley Trust's application for the winding up of West Dunes that was instituted on 19 December 2008, the deponent Mr Nico Botha asserted that "*In and during June 2008, the Westley Trust lent and advanced the sum of £500,000 to [West Dunes] at the latter's special instance and request.*"

82 The defendants take exception to this and assert that the £500,000 in question was not a loan made by the Westley Trust to West Dunes, but that the money came from the JAMBOT Trust and that it was paid pursuant to a distribution made to Mr Brakspear and was used (presumably at Mr Brakspear's instance) to reduce the debt owed by West Dunes to First Rand.

83 Mr Welz contends that Mr Brakspear phoned the trustees of the JAMBOT Trust at the time and they, so it is alleged, agreed to pay the debt due and payable to First Rand "*as a distribution*" to Mr Brakspear.

84 Mr Brakspear's evidence though was that back in 2004 when the structure was put in place, it was agreed and he was advised that if any payment had to be made by the JAMBOT Trust, it would be recorded as a distribution to Mr Brakspear.

85 In cross examination, Mr Brakspear also testified that (i) he received a call from an Ms Sharon Gordian of the trustees for the JAMBOT Trust and (ii) that the reason for the call was to advise him that RMB had called up the guarantee.

86 In support of their version, Mr Welz and Mr Brakspear relied mainly on two documents:

86.1 A valuation report for the JAMBOT Trust as at 29 February 2008, which on the face of it reflects a distribution to "IB" (which is contended to be a reference to Mr Brakspear) of £500,000 on 5 July 2007; and

86.2 A so-called SWIFT confirmation that reflects that the payment of £500,000 made to First Rand was made from the Isle of Man (i.e. the Isle of Man Bank).

87 It seems that based on this ostensible discrepancy, namely that the payment made to First Rand came from the Isle of Man bank (JAMBOT Trust's bank) and not directly from the Westley Trust, the defendants inferred and accused Mr Katz of having fraudulently manufactured a debt to cause West Dunes to go into liquidation.

88 However, what actually occurred, as stated above, was that:

88.1 On 14 May 2008, a written demand was made by the JAMBOT Trust to the Westley Trust for payment of the £500,000 paid by it pursuant to the guarantee given by it to the Jersey Bank for the Westley Trust's liabilities.

88.2 Notwithstanding the Westley Trust initially disputing this liability on 27 May 2008, on or about 13 September 2012, the JAMBOT Trust instituted proceedings against the Westley Trust for payment of, amongst other things, the £500,000 paid to First Rand pursuant to its calling up the guarantee.

88.3 On or about 21 September 2012, judgement was taken by the JAMBOT Trust against the Westley Trust by consent for the amount it claimed was due and payable to it, which included the £500,000 paid under the guarantees. This was known to Mr Welz before the writing and publication of the statement with which this section is concerned.

89 This is also consistent with:

89.1 the evidence of Mr Botha led in the trial proceedings brought by Mr Brakspear in 2013 seeking to rescind the liquidation of West Dunes, to the effect that, the moment that the guarantee was paid to First Rand

Bank by Fairburn Private Bank, Westley Trust stood in the shoes as creditor.

89.2 the fact that the Westley Trust ultimately proved a claim for £500,000 (approximately R7 million) against West Dunes.

90 In the premises, it is not surprising to find that:

90.1 The records relied upon by Mr Welz and Mr Brakspear show that payment was made directly from the Isle of Man Bank to First Rand. It is consistent with the security structure put in place by the parties that the Ilse of Man Bank would ultimately have to make payment of the amount called up by First Rand under the guarantee.

90.2 JAMBOT Trust's records reflect the payment as a distribution to Mr Brakspear. The transaction to buy the farm and the security structure put up to assist in the financing thereof was set up at the behest of and for the benefit of Mr Brakspear. £500,000 had been paid out of the assets of the JAMBOT Trust pursuant to First Rand calling up its guarantee. It had to be accounted for in the JAMBOT Trust's accounts. It could hardly be accounted for as a distribution to any of the other beneficiaries of the trust and it was clearly not a loan. The only apparent beneficiary of the payment that the JAMBOT Trust was forced to make to First Rand, was Mr Brakspear. Hence it makes perfect sense that from an accounting point of view it was recorded as a "*distribution*" to Mr Brakspear in the books of the JAMBOT Trust. Indeed, in his evidence, Mr Brakspear testified that this is precisely what he was advised at the outset would happen if the guarantees were called up.

91 Conversely, the version relied upon by Mr Welz and advanced by Mr Brakspear cannot be sustained for the following reasons:

91.1 In the answering affidavit deposed to by Mr Brakspear on 22 December 2008, in opposition to the liquidation application, Mr

Brakspear makes no mention of the version that the money paid to First Rand was in fact pursuant to a distribution made to him.

91.2 Mr Brakspear attempts to explain this discrepancy in his evidence before this Court, by stating that at the time that he deposed to the answering affidavit he did not have the relevant documents in his possession, as they were with his mother. His evidence though is that he came into possession of the relevant documents and gave them to his legal advisers a "*couple of days*" later after his mother urgently returned from the UK after the urgent liquidation application was launched.

91.3 Notwithstanding the fact that Mr Brakspear, on his version, had documentary evidence by late December 2008 or early January 2009, for a considerable period of time no mention is made of the assertion that the payment made by the Isle of Man Bank to First Rand was ostensibly pursuant to a distribution made to him in his personal capacity.

91.4 Mr Welz referred in his evidence in chief to a letter sent by Mr Brakspear's attorney on 5 February 2009 to Mr Graham Perry, one of the liquidators of West Dunes. In it, it was expressly stated that it was Mr Brakspear's contention "*from the outset that the trust that is in fact owed the money is the JAM Brakspear Trust and not the Westley Trust as contained in the applicant's affidavit. This information has now been used by Mr Katz in the intervening application.*"

91.5 No mention was made of any distribution ostensibly made to Mr Brakspear and that Mr Brakspear would therefore be the person entitled to claim the £500,000 from West Dunes.

91.6 On the same day (5 February 2009), Mr Nel, one of the other liquidators of West Dunes, deposed to an affidavit in support of an application

brought in terms of section 386(5) of the Companies Act, 1973 in which he deposed to the fact that the liquidators have had discussions with Mr Brakspear to establish the identity of the creditors of West Dunes. Mr Nel noted in his affidavit that the Westley Trust contended that it is a creditor in the amount of R7 million, that Mr Brakspear disputes that this amount is owing to the Westley Trust and contends that the creditor is in fact the JAMBOT Trust. Mr Brakspear advised Mr Nel that his claim against West Dunes was in the sum of R4.5 million (i.e. not £500,000 or the Rand equivalent, approximately R7 million at the time).

91.7 On or about 11 February 2009, Mr Brakspear filed an answering affidavit/intervention application in the section 386 (5) application. In his affidavit he expressly refers to Mr Nel's affidavit. Mr Brakspear did not dispute Mr Nel's version of what Mr Brakspear had advised the liquidators and in fact confirmed that the JAMBOT Trust was a creditor of West Dunes.

91.8 Again, Mr Brakspear made no mention of any alleged distribution made by the JAMBOT Trust to him.

91.9 The first reference one finds to the version now relied upon by the defendants and Mr Brakspear, seems to be found in West Dunes' attorneys letter of 1 September 2009, some seven months after Mr Brakspear deposed to this affidavit in support of the section 386(5) application. In her letter, Ms Fiona Scott advised the liquidators that her client, Mr Brakspear intends lodging a claim for the R7 million against West Dunes "*as it was he who the money was distributed to and it was he who "loaned" the money to West Dean properties five (Pty) Limited.*"

91.10 Mr Welz conceded though that Mr Brakspear never proved or attempted to prove a claim for £500,000 (or R7million) against West Dunes.

91.11 In cross-examination, Mr Welz also conceded that in his discussions with Mr Brakspear, Mr Brakspear had advised him on occasion that he

contended that the JAMBOT Trust was "*owed for the money they had stood in for*".

92 In the circumstances, it is inconceivable that Mr Welz, who holds himself out as an accomplished investigative journalist, would not have recognised that there were a number of material inconsistencies in Mr Brakspear's version that the payment of £500,000 to First Rand was made pursuant to a distribution to him.

93 Indeed, on 5 June 2014, shortly before the July 2014 article was published, Mr Brakspear forwarded to Mr Welz an email he had sent on 8 April 2009 to West Dunes' attorney at the time, Ms Scott, in which he advised Ms Scott that he had given some thought about attending the creditors meeting convened for the coming Tuesday but had decided not to attend. The first reason advanced by Mr Brakspear for his decision not to attend the creditors meeting was that he does "*not understand trust or company law and do not want to prejudice [himself] in any way whatsoever.*"

94 This also should have alerted Mr Welz to the risk of relying on Mr Brakspear's belated version that the payment was made pursuant to a distribution to him.

95 On the balance of probabilities, I am satisfied that they clearly point to the fact that when First Rand called up the guarantee that the Westley Trust had provided (through the Jersey Bank), the security structure put in place by the parties to procure the guarantee was triggered. This resulted in the cash put up

by the JAMBOT Trust as security being utilised to settle the Westley Trust's primary obligation under the guarantee given to First Rand. This in turn triggered a right of recourse in favour of the JAMBOT Trust against the Westley Trust, which in turn had a right of recourse against West Dunes.

96 The Westley Trust accordingly had a claim against West Dunes for £500,000 (approximately R7 million at the time), albeit not arising from a loan, but from the fact that the guarantee that the Westley Trust was required to give to First Rand had been called up, and paid.

97 Even if Mr Welz and Mr Brakspear's version is accepted as true, namely that the

£500,000 payment made to First Rand was made pursuant to a distribution to Mr Brakspear, the alternative interpretation, namely that the payment was made pursuant to the parties giving effect to the security structure put in place between them and that pursuant to the Westley Trust's right of recourse it became a creditor of West Dunes for the sum of £500,000/R7 million, was at least very plausible.

98 There is no evidence that the valuation report for the JAMBOT Trust as at 29 February 2008 was in either the Westley Trust or Mr Katz's possession at the time the application for the liquidation of West Dunes was launched. Indeed, Mr Brakspear's evidence is that the reports were sent to his mother who would then forward them to him.

99 Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[26]

100 The trustees of the Westley Trust and Mr Katz may be criticised for describing the Westley Trust's claim against West Dunes as a loan, instead of a right of recourse pursuant to its being required to perform under the guarantee given to First Rand. But that is the highwater mark of the criticism. There was an underlying indebtedness, and that is what was required for the purposes of the application brought on 19 December 2008.

101 There is simply no evidence that Mr Katz acted fraudulently when he advised the Westley Trust that it was a creditor of West Dunes in the sum of approximately R7 million. This was correct.

102 Mr Welz acknowledges the difficulty one has in getting to the bottom of the security structure put in place between the parties. Commenting on the structure, Mr Welz stated that West Dunes' advisers [not a reference to ENS or Mr Katz] "*developed such an elaborate structure which was part fact, part*

[26] LAWSA, Criminal Law (Vol 11 – Third Edition), para 363

fiction, that they quite often got confused themselves as to who they were speaking for, and about which sum they were talking."

103 The defendants called Mr Ciaran Ryan, who led evidence regarding an interview he had with Mr Katz in December 2013 regarding the Brakspear matter. Mr Ryan testified that he had a discussion with Mr Welz about the interview subsequently, although Mr Ryan was unable to confirm exactly when the discussion took place.

104 Mr Ryan's evidence was that during the discussion with Mr Welz he advised Mr Welz:

104.1 that he found the case "*very complex*" and that he did not know that he was particularly more illuminated about the case after the interview with Mr Katz;

104.2 he advised that he thought the case was a "*jumble*" and it was clearly an investment banking deal which was "*highly convoluted*".

105 Although it might then have been inaccurate to describe the Westley Trust's claim against West Dunes as a loan arising from monies advanced, pursuant to First Rand calling up the guarantee and payment being made thereunder, the Westley Trust had a claim for £500,000/R7million against West Dunes arising from its right of recourse. Hence, there was no fraud or material misrepresentation. The Westley Trust was a valid creditor of West Dunes.

106 And of course, it is not disputed that West Dunes, through its attorney and counsel, consented to both the provisional and final winding up orders. That being the case, it is difficult to discern on what basis the defendants could conclude and state that Mr Katz fraudulently procured the winding up of West Dunes

107 Moreover, it is also clear that West Dunes was commercially insolvent.

107.1 On 28 November 2007, First Rand had taken judgement against West Dunes and Mr Brakspear for R12 745 030.91 arising from the fact that

West Dunes had failed to repay the loan advanced to it by First Rand.

107.2 In cross-examination, Mr Welz was pointed to an affidavit deposed to by West Dunes' former attorney, Ms Scott, in which she confirmed that based on the instructions she had received from Mr Brakspear, it was self-evident that West Dunes was insolvent.

108 Notwithstanding the fact that the defendants had knowledge of a version diametrically opposed to the version that they published (which opposing version was confirmed on oath by Mr Katz, by senior and junior counsel and West Dunes' own former attorney and counsel) in affidavits filed at court in 2013, the defendants simply ignored this.

109 The opposing facts and version of what transpired did not suit the narrative that the defendants were adamant on presenting to the public about Mr Katz.

The alleged fabricated annexure to the liquidation application

110 As stated above, in further support of the defendants' contention that the application to liquidate West Dunes was part of some fraudulent scheme, Mr Welz suggested that the annexure marked "NB5" to the founding affidavit in support of the liquidation application was a manufactured document.

111 Mr Brakspear asserted the same and denied ever having written the email included in the annexure.

112 Mr Brakspear's evidence was that he ostensibly advised his attorney and counsel at the time they were consulting to oppose the urgent liquidation application that he did not write the email, yet no mention is to be found of this

in his answering affidavit delivered on 22 December 2008. Again therefore, the defendants would have been alerted to an inconsistency in Mr Brakspear's version.

113 In any event, in cross-examination Mr Brakspear's denial of having been the author of the email concerned was shown to be false. He did write the email and it was not a manufactured document.

114 The defendants led no evidence of any attempt made by them to further investigate or obtain Mr Katz's comment in relation to the purported belief that annexure "NB5" was a manufactured document.

The liquidation application was not urgent

115 Regarding Mr Welz's reliance on the assertion that the liquidation application was brought on an urgent basis when, in his opinion, the application was not urgent, Mr Welz conceded in evidence that urgency is a matter of law in respect of which he is not competent to express an opinion.

116 The defendants did not lead any evidence regarding their investigating the issue of urgency any further or requesting Mr Katz's comment before publication of the offending articles.

117 Liquidation applications are by their very nature urgent and are regularly brought on an urgent basis.[27] There was nothing untoward in the application being brought on an urgent basis and it is common cause that West Dunes, acting through its attorney and counsel, consented to its winding up on that basis.

The intention to cancel the Zambrotti sale

118 Finally, Mr Welz asserted in his evidence that the application to liquidate West

[27] Myburgh v The Master of the High Court Bloemfontein Free State Division, NO 2019 JDR 1698 (FB) para [13]; Ex parte Nel and Others NNO 2014 (6) SA 545 (GP)

Dunes was motivated by a desire to cancel the sale of the farm to Zambrotti (another one of Mr Moti's entities) so that Klein Normandie could be sold to Applemint for a better price, was itself fraudulent.

119 Firstly, in the founding affidavit delivered in support of the liquidation application, it was expressly disclosed to the court that one of the reasons why the company should be wound up (and on an urgent basis) was because a liquidator would be in a position to elect whether or not to continue with the existing sale (to Zambrotti), or to cancel it in order to sell the farm for a higher purchase price.

120 Secondly, the opportunity to cancel the sale with Zambrotti and accept the higher offer from Applemint is precisely what motivated West Dunes to consent to its liquidation:

120.1 In cross-examination, Mr Welz was referred to an affidavit deposed to by the attorney for West Dunes and Mr Brakspear (which was available to Mr Welz by at least 5 June 2014), in which Ms Scott explained that in the days leading up to the application for the provisional liquidation of West Dunes, Mr Brakspear was advised of the benefits of allowing West Dunes to go into liquidation, specifically that the sale to Zambrotti could be cancelled which would allow for a new sale to be concluded in respect

of the better offer that was on the table from Applemint.

120.2 After the provisional liquidation order was obtained, Mr Brakspear assisted the provisional liquidators to secure the sale of the farm to Applemint.

120.3 On the day that the final liquidation order was obtained, Ms Scott (on behalf of West Dunes and Mr Brakspear) wrote to one of the liquidators and placed on record that an application to extend the liquidators' powers to resile from the sale agreement concluded with

Zambrotti and to accept any other offer on the property must be brought as a matter of urgency.

120.4 That application was issued the next day and in cross-examination, Mr Welz confirmed that Mr Brakspear supported the liquidators' application for authority to terminate the sale between West Dunes and Zambrotti and to sell the farm to Applemint.

121 All of this was known to Mr Welz before he published the offending articles, yet no suggestion is made in the defamatory articles that Mr Brakspear was party to any purported "*fraud*".

122 In any event, there is nothing untoward in using the process of a liquidation application to procure better value for an insolvent company's creditors.

Conclusion on Mr Katz's alleged fraudulent scheme to liquidate West Dunes

123 In the premises, in addition to their failure to prove the truth of the statements published about Mr Katz, in the circumstances it cannot be said that the statements published by the defendants were reasonable in all the circumstances:

123.1 Accusing anyone, let alone an attorney, of fraud, fabricating evidence and abusing court proceedings is a very serious allegation.

123.2 The fact that the Westley Trust had a claim against West Dunes (at least on the probabilities), was evident from the documents that were in the defendants' possession and their knowledge of the security structure before they published the offending articles.

123.3 In the very opening paragraph of the Brakspear article the defendants stated that the loan to West Dunes was "*backed by a guarantee from the Jersey-registered Westley Trust.*" Ignoring the security structure put in place behind the Westley Trust, that statement alone demonstrates

that the defendants must have known that if the guarantee was called up (which is common cause), the Westley Trust would have a corresponding claim (right of recourse) against West Dunes.

123.4 Indeed Mr Welz knew there existed a material dispute regarding the issue. In cross-examination Mr Welz acknowledged that there was as he put it a "*whole dispute*" as to whether the payment of £500,000 was a distribution to Mr Brakspear or a payment made under the guarantee and security structure referred to above.

123.5 Mr Brakspear's version is contradicted by contemporaneous correspondence sent by his and West Dunes' attorney and by affidavits deposed to by Mr Brakspear at the time. On the face of it, it is clear, or the defendants should at least have been alerted to the fact, that Mr Brakspear's belated version that the monies were paid pursuant to a distribution to him, was nothing more than an *ex-post facto* contrivance.

123.6 Notwithstanding this, the defendants maliciously accused Mr Katz of fraud and did so in the most derisory tone.

123.7 Mr Welz made no attempt to clarify the position with Mr Katz and in fact entirely ignored his version that he had given under oath in 2013.

124 The timing of the publication is also of significance. It was published more than 5 ½ years after the events described in the articles, but little more than a month before Mr Brakspear's High Court case before Kgomo J, in which the truth of his allegations could be proved in a positive manner, was due to start.

125 On 2 June 2014, less than a month before the offending article was published, Mr Brakspear wrote an email to Mr Welz in which he stated "*FYI – case has been set down on the opposed roll 14 August 2014 – hopefully I can use your story*"

126 It is evident from this email, that Mr Brakspear had an expectation that he would be able to use the defendants' articles, due to be published in the July 2014 edition of Noseweek, in his upcoming trial set down for 14 August 2014.

This calls into question the objectivity of Mr Welz, a seasoned journalist, to place the truth facts before members of the public, and is another significant factor to negate any suggestion that the publications were reasonable.

Mr Katz's alleged appointment of a friendly liquidator

127 The statement made in this regard bears repeating and it is as follows:

'What to do? Call in Lenny the Liquidator. Katz immediately negotiated his R1m bonus fee, then set about applying his old recipe, but this time with some salad on the side. The plan was to fraudulently manufacture a debt with which to liquidate Brakspear's Westdunes Property 5. And then to appoint a friendly liquidator who would not dream of suing Nedbank's Fairburn Trust.'

128 In his evidence, and as appears in the Brakspear article, Mr Welz asserted that the other motive for Mr Katz's alleged "*fraudulent scheme*" to liquidate West Dunes was to acquire control over West Dunes to prevent it from instituting a damages claim against Mr Katz's client, i.e. the Nedbank Fairbairn Trust.

129 The alleged claim – and all of this is contained in the Brakspear article - arises from Mr Justin Thomas, acting on behalf of the trustee for the Westley Trust, inadvertently disclosing the Westley Trust's financial predicament to Mr Moti's legal adviser. It is alleged that because of this disclosure, Mr Moti cancelled the purchase agreement he had with West Dunes for Klein Normandie, through an entity by the name of Zambien Investments 99 (Pty) Ltd for R37.75 million. Subsequently the farm was sold in execution to another Moti entity (Zambrotti) for significantly less than what it had previously been sold to Mr Moti's other entity. This, it is asserted, gave rise to a potential damages claim against the Westley Trust's trustees.

130 The evidence was that following three liquidators were appointed for West Dunes.

130.1 Mr Eugene Nel, an attorney who appeared to have taken the lead role. He was appointed pursuant to a requisition received from RMB Private Bank, the largest creditor of West Dunes.

130.2 Mr Graham Perry was appointed at the behest of Mr Brakspear; and

130.3 Ms Marlene Elizabeth Retief, was appointed pursuant to a requisition signed by the Westley Trust.

131 In his evidence in chief and in cross examination, Mr Welz conceded that:

131.1 Before the liquidation of West Dunes, Mr Brakspear consulted with a liquidator, Mr Graham Perry and procured the appointment of Mr Perry as his own "*friendly liquidator*" to look after Mr Brakspear's interests.

131.2 Mr Welz had knowledge of this before he published the offending article.

131.3 It was known to him that where more than one liquidator is appointed (as was the case in the West Dunes liquidation) they are obliged as a matter of law to act jointly in everything they do. It is not surprising that this would be known to Mr Welz because, in addition to him being a seasoned and experienced investigative journalist who must surely have acquired vast knowledge of these matters throughout his career, before he commenced his journalism career he was employed for two years in the Office of the Master of the High Court in Pretoria auditing deceased and insolvent estates, and completed three years of attorney's articles whilst obtaining his B.Proc degree.

132 It is apparent from the concessions made that there can be no truth to the statements published by the defendants in the Brakspear article that part of Mr Katz's fraudulent plan included appointing a friendly liquidator who would prevent any action being taken against Nedbank's Fairburn Trust.

133 That it was not true, was known to the defendants by the time they published the offending articles. There can be no benefit to the public in publishing untrue statements, and neither can such a statement constitute fair comment. The fact commented on must be true, and here, to the extent that it may even be said that the statement made is a comment, the facts underpinning it are not true.

134 The defendants did not advance any evidence to support a contention that notwithstanding the fact that the statements published were not true, it was reasonable in the circumstances for them to have published the untrue statement.

135 This is one of the statements which Mr Bishop argued, on behalf of the second defendant, were not defamatory. But once again Mr Bishop indulged in an exercise in which he sought to excise this statement from the context in which it was made, and the defamatory narrative that that context sought to promote, founded as it was on statements that have been established, and were known at the time, to not have been substantially true. An ordinary reader will read the statement in the context set out from the cover page, the editorial and the remaining contents of the Brakspear article itself. In any event in his evidence, Mr Welz made is clear why he himself wrote such a statement, i.e., he believed – despite knowing facts that did not support this belief - that Mr Katz would want

to appoint a friendly liquidator in order to prevent any action being taken against one of his clients as a result of Mr Thomas's *faux pas*.

136 This statement, made in the context of the particular paragraph in which it occurs and the context of the Brakspear article as whole, sought to paint Mr Katz as a an attorney without any scruples, who will go to all lengths to further a fraudulent agenda and this, in my view, is what the ordinary reader of such material would understand.

137 The statement was not true, and there is no evidence justifying why it was reasonable to write and publish it in the circumstances.

The alleged fake order

138 In the editorial Mr Welz wrote, and Chaucer Publications published, that:

'More than a year ago, serious allegations of fraudulent manipulation of court proceedings (including the use of a fake court order) by Katz and other members of ENS were formally brought to the attention of the Judge President of the
KwaZulu-Natal High Court and the Chief Justice of South Africa."

139 To appreciate the full context of what is being said here, as would the reasonable ordinary reader of the July 2014 edition of Noseweek, one must also have regard to the contents of the Brakspear article wherein, from the third paragraph of the left column on page 11 the magazine until the fourth paragraph of the middle column on the same page, Mr Welz sets out his full thesis of the fake order supposedly obtained by Mr Katz. To quote from Mr Welz's culinary parlance (*'salad on the side'*), if the editorial was the appetiser (the cover page having been the menu), then the Brakspear article was the main meal. There, in the Brakspear article, he sets out fully what he only teases about in the editorial in regard to the fake order allegedly obtained and used by Mr Katz. To paraphrase from one of Mr Bishop's submissions in argument on behalf of the second defendant, the reasonable reader would understand the statements made in this edition of Noseweek in their context, which means the context of the Brakspear article as a whole and also the context between the editorial and the article. The context of the cover page, which already set the scene, supported by a digital image of a man who stole justice, must not be forgotten in this picture.

140 The *'fake order'* spoken of in the editorial and the Brakspear article is the provisional order of liquidation obtained on 23 December 2008.

141 In evidence, Mr Welz conceded that counsel acting for West Dunes consented to the order for the provisional winding up of West Dunes and that the order was granted by consent in chambers.

142 The defendants have therefore conceded that there is no truth to the publication or suggestion in the offending articles that Mr Katz fraudulently obtained and/or relied on a fake order for the provisional winding up of West Dunes.

143 Mr Welz conceded further that he had come to this view before he published the offending articles in July 2014.

144 Instead, Mr Welz's evidence in these proceedings was not that the order was fake, but that he had come to the conclusion that Mr Katz had pressured or browbeaten the attorney and counsel acting for West Dunes into agreeing to the provisional liquidation order. However, this is not what the defendants wrote and published. It is accordingly irrelevant for these proceedings.

145 Having thus come to the conclusion that there were no merits to Mr Brakspear's allegations that the provisional liquidation order was a fake, there can be no justification for the defendants having published Mr Brakspear's allegations to the contrary when the defendants knew them to be false.

146 There is also no dispute from the defendants that subsequently the final liquidation order was taken by agreement in February 2009. The concessions made by the defendants were therefore well made.

147 Mr Welz's evidence was that he phoned Ms Scott regarding the question whether Mr Brakspear consented to the provisional liquidation order. Although Mr Welz was critical of the fact that Ms Scott did not express herself more forcefully or clearly, her response was consistent with Mr Brakspear having consented to the provisional liquidation order being taken by agreement.

148 In cross examination, Mr Welz conceded that before the defendants published the offending articles:

148.1 He had seen and read a letter dated 15 September 2010, sent by West Dunes' attorney at the time, Ms Scott, in which she confirmed that the provisional liquidation order was taken by consent.

148.2 On 12 November 2013 (approximately seven months before the Brakspear article was published) Mr Brakspear had sent Mr Welz a copy of Nedgroup Trust (Jersey) Ltd's intervention application in respect of Mr Brakspear's application to set aside the winding up of West Dunes. It included an affidavit by Mr Katz in which he deposed to the fact that the provisional liquidation order was taken by agreement. This version was confirmed by both senior and junior counsel, who both deposed to confirmatory affidavits.

148.3 On 26 November 2013, Mr Brakspear sent Mr Welz a copy of the supplementary affidavit filed in the intervention application, again deposed to by Mr Katz. In it Mr Katz again set out the process that was followed when the application for the provisional winding up of West Dunes was brought to court and presented a full explanation for the apparent discrepancies identified by Mr Brakspear in his application to set aside the provisional liquidation order.

148.4 On 5 June 2014 (less than a month before the July 2014 edition was published), Mr Brakspear provided Mr Welz with a copy of the affidavit deposed to by his and West Dunes' former attorney, Ms Scott. In it she stated under oath that after extensive consultation with Mr Brakspear in the days leading up to the hearing on 23 December 2009, and having taken advice from liquidator Mr Graham Perry, it was agreed that although an answering affidavit would be filed in the liquidation application, West Dunes would consent to the provisional winding up order. Although the Westley Trust's claim against West Dunes would be disputed, they would consent to the liquidation for "*tactical reasons*" i.e. so that the Zambrotti sale could be cancelled and the better Applemint offer accepted. She stated that Mr Brakspear accepted that West Dunes was in fact *de facto* insolvent even before Westley Trust's liquidation application was served. Ms Scott's affidavit was confirmed in a letter from

West Dunes' counsel at the time, Adv. Alberts, who confirmed Ms Scott's version of events.

149 Mr Welz further conceded in cross-examination that notwithstanding his reliance in the Brakspear article on the fact that the provisional liquidation order was "*not typed on the High Court's typewriters or in the court's standard format*" as purported evidence confirming that the order was fake, Mr Welz was well aware of the practice in South African courts that draft orders are often prepared by counsel and handed up to the judge to make an order of court.

150 In cross-examination Mr Welz, in response to the conflicting versions being put to him and it being demonstrated that it was clearly known to him before he published the offending article, Mr Welz stated "*I believe I certainly must have known it, but I would have excluded it as irrelevant to a news article with a particular focus.*"

151 On the evidence, it is clear that the "*particular focus*" of the defendants' publications was to attack Mr Katz, and in pursuit of this goal Mr Welz was not about to let the truth get in the way of what he considered to be a good story.

152 It is not in the public interest, and can be of no public benefit, to write and publish untrue statements about an individual.

153 On behalf of the second defendant, it was argued that its primary defence was that the allegation of a complaint having been made of the serious manipulation of court proceedings, including Mr Katz's use of a fake order, was true. This loses sight of the fact that by the time that Mr Welz wrote the article, and Chaucer Publications published it, they were fully aware that there was no merit to Mr Brakspear's complaint; that the allegation was unfounded; that it was not true and they proceeded to write and publish nevertheless. I fail to see how their conduct can be said to have been reasonable, in particular when regard is had to the following injunction from *Bogoshi*:[28]

'Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Prof Visser is correct in saying

[28] 1998 (4) All SA 347 (A), p 361J-362B

(1982 THRHR 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst sections of the community…."

The alleged double charging / overcharging of fees

154 It will be recalled that in the editorial the defendants wrote and published the following:

154.1 "*While several ENS directors have actively helped design the fraudulent schemes, and all ENS directors and senior partners have knowingly and happily shared in the spoils and must therefore share responsibility, one director stands out above the rest in his aggressive fee charging and disregard for his victims and the law. He is Leonard Katz, director and*

'specialist' in charge of the insolvency and liquidation Department of ENS, and better known in the trade as 'Lennie the Liquidator.'

154.2 "*You want what can't legally be done? Agree to pay Lennie an extra million-or-three and he will pull it off, by hook or by crook.*"

155 The Brakspear article contained the following statement:

"*A significant concluding point to make with regard to Katz's credibility: on 31 March 2009 Katz submitted an invoice to the liquidators of West June's in which he demanded payment of fees totalling R227,417.97 for services rendered by himself and his assistants at court in Durban on 5 and 6 February, 2009. It was paid. On 28 May 2010 he submitted another invoice, with a different invoice number, but listing the identical services hours and totalling the same R227,417.97. That also got paid, without question.*"

156 It is apparent from these statements that the view expressed by Mr Welz is that Mr Katz charges excessive fees and does so aggressively, and has no difficulty charging his clients fees to which he is not entitled, and also fees as a result of the fraudulent schemes that, according to Mr Welz, Mr Katz concocts for them.

157 It becomes necessary then, to assess whether the facts upon which these comments or opinions are made, are true. The defendants pleaded that the above statements were (a) substantially true and were published in the public interest; alternatively (b) they constituted fair comment premised on substantially true facts, or further that (c) they were reasonably published in the circumstances.

158 In apparent support for the statement that Mr Katz charges excessive fees, Mr Welz led evidence in respect of a letter addressed by the Master of the High Court, Cape Town dated 10 July 2013 to Mr Katz which concerned, amongst other things, the fees charged by ENS in a liquidation relating to an entity named Chestnut Hill Investments (Pty) Ltd, in which Mr Katz had been involved:

158.1 In this letter, the Master expressed concern about and was querying the fees and disbursements incurred in connection with the liquidation of Chestnut Hill Investments (Pty) Ltd.

158.2 In cross-examination, Mr Welz conceded that he did not do any investigation regarding the allegations made by the Master and what ultimately transpired in respect of the matter.

158.3 Mr Welz further conceded that he is not in a position to judge whether the work that was done in the Chestnut Hill matter was justified or not.

158.4 The apparent high water mark of Mr Welz's evidence was that he has a "*sense as an ordinary citizen*" that the fees charged by Mr Katz and his teams are "*enormous, they are enormous from an ordinary person's point of view*".

158.5 Mr Welz conceded though that he did not know whether they might be justified in the circumstances.

158.6 In cross-examination, Mr Welz was pointed to the fact that on 29 October 2013, the court reviewed and set aside the Master's refusal to confirm the account in the Chestnut Hill liquidation and the account was confirmed by the Court.

159 Mr Welz also baldly relied on the fees incurred in the Brakspear matter as apparent evidence in support of his contention that Mr Katz charges excessively.

160 In relation to the statement that Mr Katz double billed in the Brakspear matter, in cross-examination and after being taken by Mr Manca to the relevant accounting records and correspondence regarding ENS' relevant invoicing, Mr Welz was constrained to concede that Mr Katz did not bill twice for the same work as he had stated in his article.

161 Mr Welz in fact conceded that the statement regarding Mr Katz having double billed is not true. Therefore the comment that Mr Welz made in the Brakspear article that: *'It is either grand larceny or a terribly fortunate error'* which flowed from his suggestion of double-billing in relation to the 31 March 2009 and 28 May 2010 invoices, cannot have been fair comment, given that the underlying inference or implied fact that was embedded in his statement regarding the two invoices, was simply not true.

162 Notwithstanding this, Mr Welz asserted that based on the records he had seen at the time it was reasonable to deduce that Mr Katz had invoiced twice for the same work. Mr Welz however did not produce any documentary evidence to support his contention that his belief that Mr Katz had double billed was reasonable.

163 The SCA in *Bogoshi* held as follows*:*

'Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation

was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."[29]

164 Mr Welz conceded in cross-examination that notwithstanding the significance he had placed on the alleged double billing as evidence of Mr Katz alleged dishonesty and impugned credibility, he did not afford Mr Katz any opportunity to explain the purported double-billing before the statements were published. Therefore, Mr Welz took no steps to verify his double-billing notion from the only person who could either prove or disprove it before publication – Mr Katz. There is no explanation as to why an experienced journalist like himself, who prides himself on showing respect for the constitutional rights of his subjects, did not do so. This, in circumstances where Mr Katz was the subject of the cover page; the editorial and the Brakspear article – front and centre.

165 Finally, Mr Welz attempted to lead evidence in relation to documents provided to him by one Mr Steven Kruger, as purported evidence of Mr Katz overcharging or charging excessive fees. Mr Kruger was a witness whom Mr Welz had supposedly secured and who was initially willing to testify, until he changed his mind on the eve of the hearing and decided not to. However, he was clearly available to give evidence, judging by his presence on the virtual Microsoft Teams platform through which the trial was conducted, during the course of *'his'* evidence which Mr Welz attempted to place before the Court, and further judging by Mr Kruger's willingness and ability to actually furnish Mr Welz with contemporaneous instructions during the course of the proceedings in relation to the evidence that was being led, ostensibly on his behalf. Even though he appeared to be present and available to give it. Needless to say, everything Mr Welz had to say on behalf of Mr Kruger (who listening

[29] Supra, p. 360G-I

throughout) was hearsay, and accordingly, inadmissible evidence. This Court places no reliance on it.

166 No expert or other independent evidence was led to support the contention that Mr Katz's fees are excessive or unjustified. Mr Welz attempted to place such evidence before the Court, but the evidence itself was procured only after the publication of the articles and was objected to by the plaintiff, which objection this Court upheld, as the writing and publication of the articles could clearly not have been influenced by knowledge obtained after publication of the articles.

167 This matter - the apparent double charging – is a matter which in the Brakspear article Mr Welz says expressly goes to Mr Katz's credibility. Having made the visceral link between the 'facts' set out in that paragraph, with Mr Katz's credibility in the same paragraph, the mere suggestion of impropriety questions, if it does not outright impugn, Mr Katz's integrity and ethical demeanour as an attorney, and therefore impugns his ability to practise his profession. In circumstances where all that Mr Welz could, and in my view should, have done before publication - and nothing suggests this was not available to him - was to verify this apparent double-billing with Mr Katz himself, I see no reason to find that the writing of such a statement and its publication were justified on the grounds of reasonableness. The facts stated in the paragraph regarding the invoices sent may have been true as Mr Bishop asserts, but the implied meaning that a reasonable reader would make of them, in the fuller context of the cover page, the editorial and the Brakspear article, was not true. Mr Welz could and should have verified this beforehand with Mr Katz, and accordingly the writing and publication thereof could not have been for the public benefit, nor could it constitute fair comment.

168 Mr Bishop's argument that this statement is protected comment loses sight of the sting in it, which is that the apparent double-billing impugns Mr Katz's credibility. This Mr Welz states this in terms in the Brakspear article. The meaning that is implied from the 'facts' put up by Mr Welz, which forms part of its primary or ordinary meaning of the statement[30] viewed in context, is that not only does Mr Katz charge fees aggressively and excessively, but he also

[30] Argus Printing & Publishing Co Ltd v Esselen's Estate

charges fees to which he is not entitled which makes him a legal practitioner lacking in credibility and, for that matter, integrity. That is what the reasonable reader would understand from this statement, in its full context.

169 In the premises, the defendants have failed to establish the truth of the statements published that Mr Katz charges excessive fees, or that he doublebills (which is false, on the evidence led).

170 Similarly, no evidence has been led on which it can plausibly be contended that the defendants were reasonable, or that it was fair comment to publish the statements regarding Mr Katz. Mr Welz's personal feelings about the fees charged by Mr Katz are irrelevant and to then publish highly defamatory statements that Mr Katz overcharges or double bills cannot be justifiable, absent at least some credible evidence that this is in fact true.

<u>The allegations that Mr Katz designs fraudulent schemes and there is damning evidence against him</u>

171 The statement made and published in the editorial is that *"While several ENS directors have actively helped design fraudulent schemes, and all the ENS directors and senior partners have knowingly and happily shared in the spoils and must therefore share responsibility, one director stands out above the rest in his aggressive fee charging and disregard for his victims, and the law."* And that director, Mr Welz says, is Mr Katz.

172 In the editorial Mr Welz goes further and writes: *'How is it possible that judges tolerate that the likes of Katz continue to practice as officers of the court, despite the damning evidence against them having been made public knowledge for years? By now his impunity knows no bounds.'*

173 None of the evidence led demonstrated the truth of the statement that Mr Katz is in general guilty of designing fraudulent schemes, nor did it establish that there is any so-called "*damning evidence*" against Mr Katz.

174 In apparent support of the above statements, Mr Welz led evidence in relation to:

174.1 A matter in which Investec has been accused of unlawful phone tapping; 174.2 The Investec / Midtown matter; and 174.3 Mr Geoff Chait's dealings with Investec.

175 This evidence is dealt with in turn below.

The Investec phone tapping matter

176 It appears that the defendants sought to establish that Mr Katz was involved in an alleged phone tapping affair.

177 The defendants called Mr Leonard Knipe, a retired Major General from the SAPS, to lead evidence in relation to the alleged phone tapping. Mr Knipe had been tasked with investigating the alleged phone tapping. Asked about Mr Katz's involvement in the affair, Mr Knipe's evidence was that although Mr Katz's name came up as the attorney of record for Investec, Mr Knipe found no evidence that Mr Katz performed any improper function.

178 Next, the defendants called Mr Leslie Haupt to lead evidence regarding the alleged phone tapping by Investec Bank.

179 Mr Haupt did not lead any admissible evidence to indicate that Mr Katz (or Sonnenberg Hoffman Galombik for that matter) was involved in the alleged phone tapping by Investec Bank. Mr Haupt's evidence constitute inadmissible hearsay evidence. He had no direct knowledge of the things about which he was testifying, and none of it implicated Mr Katz.

180 Mr Haupt's evidence took the matter no further, and was of no assistance to the defendants.

181 Finally, Mr Welz sought to rely on what he referred to as the Murphy Report. It was authored by a Michael Murphy who was not called to give evidence. The entire contents of the report constituted hearsay evidence which was inadmissible and therefore disregarded by the Court.

182 This report is inadmissible hearsay evidence and this Court was constrained to have no regard to it.[38]

The Investec / Midtown matter

183 The defendants called Mr Justin Lewis to lead evidence in relation to the Investec / Midtown matter. Mr Welz wrote about this matter in the Katz and mice article which formed part of the July 2014 issue, which is the subject matter of this litigation.

184 Mr Lewis led evidence regarding a funding arrangement between Midtown Building Systems Holdings CC ("Midtown") and Investec in respect of a property development in Plettenberg Bay that collapsed and led to the liquidation of Midtown.

185 Mr Lewis accused Investec of improper conduct in advancing claims against Midtown which he asserted, in chief, did not exist.

186 Notwithstanding this, Mr Lewis's evidence was that he consented to the liquidation of the company and signed a supporting affidavit in support thereof.

187 Moreover, in cross-examination, Mr Lewis was constrained to concede that in subsequent court proceedings against him and his wife (who stood surety for the debts of Midtown up to an amount of R3million), judgement was handed down against him and his wife for the full amount. .

188 As far as Mr Katz's involvement in the matter was concerned, according to Mr Lewis' evidence, Mr Katz's only involvement was that he acted for Investec in the liquidation application brought by Investec and subsequent proceedings.

189 Hence, Mr Lewis' evidence also constitutes no evidence of the truth of the statements published by the defendants, nor to the reasonableness thereof.

Geoff Chait

190 Mr Chait gave evidence in relation to his dealings with Investec Bank in relation to the Victoria Junction development. It appeared from him evidence that the Fairweather Trust, of which he was a trustee, borrowed money in order to finance the development.

191 He and his sons as well as a Mr Novick stood sureties for the Fairweather Trust under the loan.

192 During 1997 and 1998, the trust fell into arrears and Investec called up the loan and threatened, *inter alia*, to sequestrate him, his sons and their families.

193 During this period, Mr Chait had one meeting with Mr Katz. He described Mr Katz as the hatchet man brought in by Investec to bully him. He described the abusive manner in which Mr Katz addressed him at this meeting. This was his only dealing with Mr Katz.

194 Thereafter, the immovable property on which the development was situated was sold to Investec Bank for an agreed amount of R25million. He was granted an interest moratorium by Investec for the outstanding balance of the loan which stayed in place until 2005/6.

195 He described how he and his fellow trustee took a decision to no longer repay the capital to Investec as he had discovered that Investec had agreed to sell the property to Protea Hotels behind his back.

196 Protea Hotels subsequently on sold the property and despite Mr Arthur Gillis of Protea Hotels agreeing to cut Mr Chait in on that deal, Protea Hotels did not do so.

197 Investec issued summons against the Fairweather Trust and the sureties for the outstanding capital and interest. The Fairweather Trust was represented by senior and junior counsel and Johannesburg attorneys. A plea and a claim in reconvention in a substantial amount (Mr Chait could not remember the number) was filed.

198 The litigation was settled when the trust and the sureties agreed to pay Investec's capital, interests and costs and agreed to withdraw the claim in reconvention.

199 Mr Chait candidly admitted that he settled because he had little confidence in his own case.

200 He also testified that at some time, which he could not remember, he was shown photographs of a bugging device placed in the parking garage of the building in which he had his office. He could not remember who showed him the photographs.

201 He was unable to tender any admissible evidence in relation to Mr Katz's involvement in the alleged phone tapping of his office.

202 This Court finds no evidence, let alone "*damning evidence*" that Mr Katz is guilty of devising fraudulent schemes and that this has been public knowledge for years.

PRINCIPLES RELATING TO THE AWARD OF DAMAGES FOR DEFAMATION

203 The successful plaintiff in a defamation action is entitled to an award of general damages as a *solatium* to compensate the plaintiff for the impingement on his or her dignity and reputation. Despite the recognised impropriety of damages as a remedy in certain circumstances, the present position in our law seems to be that, apart from an interdict, a claim for damages is the only remedy available to someone who has suffered an infringement of a personality right.[31]

204 The court has a wide discretion in determining the award of general damages *ex aequo et bono* having regard to all the circumstances of the case and the prevailing attitudes of the community.[32] Generally speaking, *"our courts have not been generous in their awards of solatia. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches."*[33] The idea of *"punitive damages"* in order to punish the defendant, rather than to compensate the plaintiff for his or her loss or harm, has been rejected by the majority of the Constitutional Court.[34]

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[31] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

[32] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

[33] Per Grosskopf JA in Argus Printing & Publishing Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) 590

[34] Fose v Minister of Safety & Security 1997 (7) BCLR 851 (CC); 1991 (3) SA 786 (CC) (per Ackerman J) 822-823; 826-828 (Didcott J); 829-832 per Kriegler J. See also Esselen v Argus Printing & Publishing Co Ltd 1992 (3) SA 764 (T); Tsedu, supra, 2009 (4) SA 372 (SCA) 19

205 There is no formula for the determination of general damages. That flows from the infinite number of varying factors that may come into play. Factors which the courts have taken into account include those set out below.

The nature of the defamatory statements written and published

206 This goes to the seriousness of the defamatory statement made against a plaintiff. Imputations of serious dishonesty may cause greater hurt to dignity and reputation than imputations of private immorality or political unreliability, and may attract greater awards of damages.[35]

207 The statements published by the defendants regarding Mr Katz are highly defamatory. Accusing any person, let alone an attorney, of corruption and/or fraud is about as serious and damaging an allegation as can be made.[36]

The nature and extent of the publication

208 A defamatory statement published in a serious journal with a wide circulation may attract a higher award than a publication of an ephemeral nature to a limited number of people. Re-publication or repetition which is the natural and probable result of the initial publication may also be taken into account.[37]

209 There was nothing ephemeral about the publication of the defamatory statements concerning Mr Katz. Mr Welz published his repetition of them well into 2020, culminating with a letter to prospective funders of his defence in this litigation - in February 2020 - where he asserted the essence of the statements once more, and vowed to vindicate their truth in these proceedings. He has failed to do so here.

210 As stated above, the defendants admitted that just for the third quarter of 2014 (July to September 2014), total sales of 16 967 copies of Noseweek were

[35] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

[36] Economic Freedom Fighters and Others v Manuel; In Re Manuel v Economic Freedom Fighters and Others (13349/2019) ZAG2PJHC 172 (18 June 2019) at [10]

[37] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

recorded. Circulation was surely widened even beyond this as a result of the publication of letters and related articles that occurred since the initial publication of the defamatory statements.

211 Mr Welz certainly regards Noseweek as a serious journal, judging by the offence he took to it having been described as a tabloid by Kgomo J in his judgment. Its circulation at the time of the initial publication of the defamatory articles, combined with the subsequent re-publications to which I have alluded, and about which more is said below, can hardly be said to be anything but wide.

The reputation, character and conduct of the plaintiff

212 The plaintiff may adduce evidence of his or her character and reputation and standing in the community. Mr Katz did not do so in this case.

213 In correspondence addressed to the Court on 18 January 2021, the attorneys of record for the second defendant drew this Court's attention to the judgement delivered by the Supreme Court of Appeal on 17 December 2020, in the matter of *Economic Freedom Fighters and Others v Manuel* [2020] ZASCA 172, specifically paragraphs 119 to 127 of the judgement which, it was submitted, addressed the issue of damages where a plaintiff has chosen not to lead evidence, and the general quantum of damages awarded in defamation matters. In these paragraphs of its judgement, the SCA dealt with the question of whether or not the court *a quo* should have referred the question of the quantum of damages to be awarded to Mr Manuel, to oral evidence. The SCA ultimately held that the court a *quo* should have done so.

214 Whilst the correspondence did not go as far as to say that the fact that the plaintiff did not personally lead any evidence regarding the harm to his reputation should be held against him, the suggestion embedded in the referral of this Court to those specific paragraphs of the SCA's judgement is either that his failure to lead evidence in this regard disentitles him to any damages, or that this should be a factor to be considered by this Court in assessing the question of damages.

215 The fact that no evidence is led on reputation does not mean that only nominal damages must be awarded, or none at all, since it is accepted that every person has a reputation that is worthy of protection.[38] As the SCA has confirmed and as the courts have held in several other cases, there is no empirical measure to determine compensation for damages of this nature. This Court, in determining an appropriate award, must have regard to all the facts and circumstances of a particular case.[39]

216 In any event, and in addition to the principles set out above, as to Mr Katz's reputation and esteem after the publication of the defamatory articles evidence was put before the Court on his behalf of a letter written by one of Noseweek's readers and published in its June 2018 edition that compared Mr Katz's conduct as previously described in Noseweek (as one of Nedbank's lawyers) to the conduct of the Nazis in the concentration camps during WWII. Mr Katz is Jewish. The impact of the articles on Mr Katz's reputation and esteem is patent from the repugnance of the association, or comparison, made in this letter.

217 The defendant may also adduce evidence of the plaintiff's lack of reputation or general bad character, but not of particular facts which show only that the plaintiff ought to be a person of bad reputation.[40] Mr Katz is certainly not the most popular person to Mr Welz and the witnesses that he called, based on what they view as his abrasive, rude and arrogant manner. However, the reputation and respect to which a person is entitled may be different from his or her popularity.[41] Further, the grounds for which the plaintiff's character is to be impeached should be placed at issue in the pleadings, and notice should be

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[38] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137, fn 9. See also Van der Berg v Coopers & Lybrand Trust (Pty) Ltd [2001] 1 All SA 425 (A) para [46]

[39] See also Dikoko v Mokhatla 2006 (6) SA 235 (CC) para [71] and [77]; Tsedu supra, at para [21]

[40] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

[41] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

given of the intention to adduce evidence on matters in mitigation not raised in the pleadings.[42] This has not occurred in this case.

218 The extent to which the defendants prove that the defamatory statements made were true may be taken into account where a plea of truth and public benefit fails.[43] My finding above is that the defendants have not discharged the onus on them to prove, on a balance of probabilities, the truth of the defamatory statements written and published in July and August 2014, and accordingly there can have been no public benefit in them, nor can the comments made in relation to those statements (which were presented as fact, though not true) have been fair.

The motives and conduct of the defendant

219 The fact that the defendant has embarked on a deliberate and unfounded attempt to destroy the plaintiff's reputation will be an aggravating factor. The conduct of the defendant from the date of the publication of the statements to the date of the judgement is relevant. Expressions of regret and apology may be mitigatory.[44] There have been no such expressions from the defendants in this case.

220 The conduct of Mr Welz since the first publication of the defamatory statements in July 2014 is, in my view, an aggravating factor in the question of what can be appropriate damages to award in this matter.

221 In the September 2014 edition of Noseweek, the defendants published a letter sent by Mr Katz to the defendants, in which he, referring to the defamatory articles in the July 2014 edition, pointed out that if the defendants had applied their minds to the various affidavits filed in the Brakspear matter, they would have come to the view that West Dunes was validly placed into liquidation and

[42] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137, fn 10
[43] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137
[44] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

that the true facts could be established from the affidavits (including those of Mr Brakspear's attorney and counsel) filed in the application to set aside the winding up of West Dunes. Mr Katz expressly stated that the defendants deliberately chose to ignore what was said in answer to Mr Brakspear's wild allegations. Mr Katz asserted that the defendant's failure to have regard to the affidavit of Mr Brakspear's own attorney, which accords with his affidavit filed in that matter (confirmed, on oath, by two counsel) was, at best, reckless, and at worst, dishonest.

222 Mr Welz published his response and stated, "*In short, so far, we stand by our story*".

223 On 20 October 2014, Mr Brakspear's application for an order setting aside the winding up of West Dunes was dismissed with costs. In the judgement the court concluded that Mr Brakspear's allegations of impropriety, fraud and fictitiousness were nothing more than wild, reckless, unsubstantiated allegations. The court found:

> *"[251] The evidence of the applicant (Mr Ian Brakspear) himself must be treated with great circumspection where it is not consistent with that of his own legal team, the Nedgroup Trust or the liquidators. That is so because he jumped from one standpoint to another and back without blinking an eyelid. In my view and finding he was a mendacious witness whose evidence was resplendent or shot through with contradictions and inherent improbabilities. […]*
>
> *[252] He was evasive while giving evidence and/or answering questions during his cross-examination. He has conceded to being angry, frustrated and combustible, it was clear that he was to some degree actuated by extreme malice towards the liquidators, Nedgroup Trust and its attorney, Leonard Charles Katz who was and is a senior practitioner with attorneys' firm, Edward Nathan Sonnenbergs among others. This was amply demonstrated, not only in the allegations in his affidavits but also in his "know this Katz" email of 1 November 2012.*

[253] The applicant confirmed in his evidence that it was his "life mission" to bring about the downfall of Mr Katz. As a result, it is my view that because of his hostility and vindictiveness he (applicant/Mr Brakspear) cannot reasonably be said to have had a commensurate ability to present or view facts objectively. It also bears mention that as part of his ostensible vendetta, he used the fringe publication, Noseweek edited by his friend and adviser at court, Mr Martin Welz, as a platform to publish allegations which may amount to criminal defamation unless they are proven to be true or in the public interest, among others."

224 Notwithstanding this, the defendants persisted with their assertion that the facts contained in the defamatory articles published in July 2014 were true.

225 In the December 2014 edition of Noseweek, the defendants, in response to the Kgomo J judgement and Mr Katz advising that he intends to institute defamation proceedings against the defendants, wrote and published the following:

"On another day and under different circumstances I might have been just a bit rattled by all of that. But I know that Noseweek's earlier stories on the subject were squarely based on the evidence quoted in them. I also know that several of the judge's statements quoted here are either half- truths, or simply nonsense."

226 On 17 March 2015, the National Prosecuting Authority declined to prosecute anybody arising out of the allegations made by Mr Brakspear.

227 On 9 December 2015, Mr Brakspear's petition for leave to appeal to the Supreme Court of Appeal, against the Kgomo J judgement, was dismissed.

228 None of the above events convinced Mr Welz and the second defendant to change their stance.

229 Instead, in the December 2015 edition of Noseweek, the defendants published an editorial penned by Mr Welz in response to these proceedings having been

instituted by the plaintiff against the defendants. In it the defendants published the following:

> *"Judge Kgomo' s judgement, which Mr Katz found so much to his liking is undoubtedly the most arrogantly, ludicrously, incompetent High Court judgements I have read in my long career. On that score, it might have been just sadly unfortunate. However, it also reflects malicious bias, which makes it reprehensible. … Katz's summons was a gift. It offers me the opportunity to fully unpack all the damning evidence in an open court room, should not have happened already elsewhere."*

230 On 9 March 2016, Mr Brakspear's application for further consideration for leave to appeal in terms of section 17 (2) (f) of the *Superior Court Act*, 2013 was dismissed.

231 During or about July 2016, the defendants refused Mr Katz's offer to settle these proceedings on the basis that the defendants publish a retraction and apology and agree to pay his party-and-party costs to date.

232 On or about 1 May 2018, the defendants published an article with the title "*How Nedbank lied, and lied, and lied*" in which the defendants again recounted Mr Brakspear's version of events.

233 On 5 July 2018, the Royal Court of Jersey struck out the Brakspears' claims.

234 On 22 July 2018, the defendants published another article regarding the Brakspear saga titled "*Nedbank offshore saga continues*". In it the defendants again refer to Mr Katz and published a picture of him with the remark immediately thereunder "*Standing up to rogue bankers and their lawyer Leonard Katz*".

235 On 2 August 2019, the Court of Appeal of Jersey dismissed the Brakspears' appeal.

236 On 18 February 2020, shortly before the trial proceedings in this matter were due to commence, Mr Welz distributed an email to Noseweek's "*shareholders*

and its friends and major supporters over the years." In the email, which was a request for funding to assist the defendants in these proceedings, Mr Welz published the following statements:

> *"In Noseweek I have frequently championed the cause of the self-made successful businessman who, in a moment of weakness falls victim to the legal manipulations of one or other big financier, assisted by one or other less scrupulous attorney. Mr Leonard Katz, head of insolvency at Edward Nathan Sonnenbergs (ENS, "the largest law firm in Africa") is one such attorney. …*
>
> *We have made a discovery of thousands of pages of documents related to a number of cases in which Mr Katz has acted in what I can only euphemistically describe as manipulated liquidations…*
>
> *Ian Brakspear's cases in South Africa (there were three over a four-year period) failed, but Katz's propensity to manipulate, bully and to lie baldly in court documents – assisted by his favourite counsel – was a significant factor. By suing us, Katz has opened the way to us to prove it, now with the benefits of vastly more evidence and experience. What in those cases was merely probable, is now easily shown to be true."*

237 The truth of the matter is, in the present proceedings neither Mr Welz nor the second defendant have unpacked any evidence, let alone evidence that is damning, establishing the substantial truth of the statements written and published by them concerning Mr Katz, and accordingly they have failed to uphold their defences to Mr Katz's summons. In addition, no evidence has been placed before this Court demonstrating that Mr Welz's biting, derisory and condescending commentary in response to the Kgomo J judgement was justified. Unfortunately therefore for Mr Welz, the gift presented by Mr Katz's summons failed, in my view, to deliver the anticipated fruits.

238 Persistence in a defence of truth and public benefit which fails may increase the award, as may recklessness and irresponsibility on the part of the defendants.[45]

239 The defendants persisted with their defamation of Mr Katz and refused to retract and apologise for the defamatory articles published in July 2014, notwithstanding the ever-growing confirmation that the statements contained therein were not true and that there was no justification for the offending statements published in those articles.

240 In the circumstances, the defendants have abused their powerful position as members of the media and a publisher of a widely distributed magazine to launch and sustain a vicious unsubstantiated attack against the person of Mr Katz. They appear to have turned a blind eye to the injunction in *Bogoshi,* that members of the press should not labour under the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published (which in this case, persisted with long after publication and the objective facts showed otherwise) in a newspaper, wherein the Supreme Court of Appeal cited Professor Visser' s view that a high degree of circumspection must be expected of editors on account of the nature of their occupation, particularly in light of the powerful position of the press and the credibility and the credibility which it enjoys among large section of the community.[46]

241 As stated above, in considering the amount of damages to be awarded in a case for defamation, the Court has to take into account that essentially the plaintiff seeks the vindication of his reputation by claiming compensation from the defendants and as a conciliation of the wrong done to him. The aggravating factor is the conduct of the defendants and the manner in which the defamatory statements were made and their attitude subsequent to the publication.

242 Considering all of the factors which I have set out above, all of which I consider to be aggravating, this case justifies a significant award in damages. Awards in other cases provide generalised guidance on what award might be appropriate.

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[45] LAWSA *Defamation* Vol 14(2) - Third Edition, para 137

[46] Supra, page 361J-362B

242.1 In *Hlongwana v Tiso Blackstar Group (Pty) Ltd*[47] an award of R300 000 (for a claim of R2 000 000) was made for defamatory allegations published in *Times Live* and *Sowetan Live* that the plaintiff (an advocate and arms dealer) was involved in the arms deal scandal, specifically links with Gupta family and received bribes.

242.2 In *Engelbrecht and another v Independent Media (Pty) Ltd and another*[48], a recent case with some similar facts to this one, the court awarded R300 000 on a claim of R5 million, where allegations that the insolvency practitioner plaintiffs were corrupt, fraudulent and intimidated opponents where published in a certain newspaper and on internet sites which are widely distributed between the Council of the Bar, the Judiciary and the side bar in Johannesburg, where the plaintiffs practice.

243 The court concludes that the defendants have failed to discharge the onus on them of proving that the defamatory statements were true and published in the public interest; constituted fair comment and that their publication was reasonable in the circumstances.

244 Weighing up all of the above circumstances, to which regard may properly be had in the assessment of damages in matter of this kind, I am of the view that an appropriate award of damages would be R330 000.00.

COSTS

245 The usual rule, namely that the successful party should be entitled to the costs of the proceedings, applies to these proceedings.

246 The factors that are relevant to the costs order in this matter are set out below.

247 On 18 July 2016, Mr Katz addressed a letter to the defendants in which he advised that he was prepared to settle the claim against them provided that

[47] [2018] ZAGPPHC 214 (5 April 2018).

[48] [2019] LNQD 41 (GSJ).

the defendants published an apology and retraction in the September and October 2016 editions of Noseweek and that the defendants accept liability for his partyand-party costs. The defendants refused to do so.

248 The defendants refused to retract, or apologise for the defamatory statements published regarding Mr Katz and, instead, republished them on more than one occasion, as set out above.

249 In these proceedings, Mr Welz has conceded in evidence that:

249.1 at least certain of the defamatory statements published concerning Mr Katz were known to be false;

249.2 the defendants have been in possession of documentary evidence that demonstrates the defamatory statements to be false; and

249.3 a number of courts, both in this country and in Jersey, have rejected as false Mr Brakspear's version, which was written and published by the defendants;

249.4 the allegations made in the defamatory statements, either directly or the essence of them, were repeatedly published, thereby continuing their dissemination.

250 A further factor to consider is the fact that these trial proceedings were extended for much longer than was required. This is directly attributable to Mr Welz generally being unprepared in the conduct of his defence, leading irrelevant evidence and often being late for the commencement of the hearings.

251 Such conduct would ordinarily warrant a punitive costs order. However, I do not deem a punitive costs order to be just and equitable in the circumstances of this case. Mr Welz was a lay litigant. He could not afford representation, and exercised his right to defend himself. He has already been mulcted with costs on two occasions during the conduct of this lengthy trial – once for a

postponement application that went against him, whilst on another occasion he was ordered to pay the wasted costs of that day after his witnesses failed to turn up.

CONCLUSION

252 In the result, I make the following order:

252.1 The first and second defendants are ordered, jointly and severally, to pay damages to the plaintiff in the sum of R330 000.

252.2 The first and second defendant shall pay interest on the sum of R330 000 at the *mora* rate from the date of this judgement to the date of payment.

252.3 The defendants are to pay, jointly and severally, the costs of the action such costs to include the costs attendant upon the employment of two counsel.

Ncumisa Mayosi

Acting Judge of the High Court

Western Cape Division