REPORTABLE

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

SOUTH AFRICA
CAPE TOWN)

CASE NO: 18830/2020

In the matter between:

PAUL STEPHEN JACOBSON **Applicant**

And

SHELLEY ANN FINCH **Respondent**

Heard: 6 and 10 June, 17 October 2022, and 03 February 2023

Delivered: 22 May 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 22 May 2023 at 10h00.

JUDGMENT

LEKHULENI J

[1] The feeding of the homeless people by some 'good Samaritans' during the hard lockdown ripped the community of Atlantic Seaboard apart. This case manifests a broader dispute that played out on social media platforms such as Facebook

during the Covid-19 pandemic between some residents of the Atlantic Seaboard. These residents were divided on how to deal with the issues of acute poverty and homelessness during the Covid-19 hard lockdown. They chose to express their views on Facebook. The applicant and some of his supporters believed that homeless people had to be removed from the streets and housed in shelters in line with the Western Cape government policy. The applicant was against those who fed homeless people on the streets, and he advocated for responsible giving to NGOs that housed homeless people.

[2] On the other hand, the respondent and some of her supporters shared a different view. Mr Peter Wagenaar ("Mr Wagenaar"), a resident of Mouille Point, shared the respondent's view and had the plight of people experiencing homelessness at heart. He prepared meals for the homeless and distributed them from his Beach Road, Sea Point residence. This provoked the wrath of certain residents, including the applicant. At the time, the police rebuked Mr Wagenaar for feeding homeless people and acting in violation of the lockdown rules. Amid the rising tension on social media platform on this issue, the applicant publicly shared Mr Wagenaar's personal details on Facebook, including his identity number, address, vehicle description, and vehicle registration numbers. Immediately after the applicant publicised Mr Wagenaar's details, the latter's vehicle was torched by unknown people.

[3] Later, on 6 May 2020, the respondent wrote a post on her Facebook page about the incident. She tagged her friends and journalists, and the incident was widely reported on various media platforms. In her post, the respondent called for

people to refrain from hateful comments and sought to use the incident to raise funds for Mr Wagenaar's feeding scheme. Consequent thereto, the applicant applied for and obtained an interim protection order against the respondent. In his application for a protection order, the applicant averred that the respondent accused him of a hateful crime that he had not committed and of spreading rumours about him on social media. In an attempt to resolve the conflict, the parties decided to come together and discussed the matter. Subsequent to those discussions, the respondent apologised in writing to the applicant for insinuating that the applicant was responsible for torching Mr Wagenaar's vehicle. This culminated in the applicant withdrawing his application for an interim protection order against the respondent.

[4] During November 2020, an event was held to commemorate the torching of Mr Wagenaar's vehicle. Mr Wagenaar's vehicle (the shell thereof), was brought back to the Atlantic Seaboard area having been painted and decorated and was used to raise funds for charity. Photos of this event were shared on Facebook. The applicant and some of his associates, made some disparaging remarks about the event and about Mr Wagenaar.

[5] In December 2020, the applicant sent a demand to the respondent. In the letter, it was suggested for the first time that the respondent's apology in the interim protection order proceedings was insincere. The applicant demanded that the respondent apologise to him in very broad terms. The applicant's letter of demand did not refer to the respondent having defamed the applicant by referring to him as a 'nob' or a 'misogynist'. The respondent disagreed with the opinion expressed in the letter, and on 14 December 2020, the applicant launched this application in which he

sought an interdict restraining the respondent from publishing defamatory statements against him and for damages in the sum of R250 000.

[6] For the first time in his founding affidavit, the applicant averred that the respondent defamed him by referring to him as a 'nob' and a 'misogynist' and described the applicant's behaviour as 'awful'. In his prayers, the applicant sought an unreserved apology from the respondent in broad terms. On 17 August 2021, the matter came before Allie J, on the opposed roll, who, after considering the issues, gave judgment on 1 September 2021 and granted an order that the respondent's direct statements about the applicant and his business made on Facebook and other community chat sites, were defamatory and wrongful. Allie J ordered the respondent to remove the offending posts and referred the determination of whether the applicant is entitled to an apology, the ambit thereof, and whether he ought to receive a damages award and the quantum thereof to oral evidence.

[7] This matter served before this Court for hearing of oral evidence on the stated issues aforementioned.

SUMMARY OF EVIDENCE

[8] The applicant and the respondent presented oral evidence. The applicant testified and called his wife to corroborate his version. The respondent testified and closed her case without calling any witnesses. For the purposes of this judgment, I will summarise the evidence of the witnesses to the extent necessary, and I will not regurgitate their evidence verbatim. The applicant testified that he grew up in Sea

Point and went to School at Camps Bay. He went to the University of Cape Town ("UCT") and studied Business Science and later, did an honours degree in marketing. He stayed in different parts of the world, and around 1992, the applicant settled in the Western Cape and started to be involved in business enterprises. The applicant testified that he got involved in community matters and in the rate-payers' associations. He also wanted to understand the dynamics of street dwellers. To this end, he collaborated with the CEO of the Heaven Night Shelter, Mr Hassan Khan, to house homeless people.

[9] He chaired community meetings, and Mr Khan advised the community on how to give responsibly to street dwellers and how to deal with the destitute. He works with the City of Cape Town ("the City") to do more for the vulnerable and for people without homes. He testified that he is not controversial and always endeavours to be ethical and honourable. Residents persuaded him to take up office as a ward councillor for the Freedom Front Plus. He thought he would succeed, but unfortunately, he did not get sufficient support due to negative publicity. He came second in the race.

[10] The applicant testified that he does not tolerate rudeness and is sensitive to words, as he believes one can lift people up or bring them down with words. He held the view that the community needed to uplift the destitute by engaging with NGOs, with support systems, and shelters. People should not live on the streets but in shelters. His Facebook Action group is underpinned by three cardinal values the City of Cape Town shares: appreciating the city's law and by-laws, appreciating giving with dignity rather than handouts, and being respectful to others.

[11] The applicant referred the court to the initiative of the City of Cape Town, in which the City asserts that the Covid-19 Pandemic has made life challenging for everyone and that our most vulnerable residents have been the hardest hit. The applicant believed that those who are in a position to make a difference in someone's life should consider donations. The donations would go to an NGO working in the community that the City has vetted. He desires to lift the destitute by engaging with NGOs as they have a structured support system. His view is aligned with that of the City and its policy of giving responsibly and ensuring that the vulnerable, particularly the homeless, are placed in shelters and removed from the streets.

[12] Given his status and involvement in the community, and as the administrator of his Facebook group (the Atlantic Seaboard and City Bowl action group), in April 2020, during the hard lockdown, he received a complaint from Mouille Point residents that one Peter Wagenaar who lived in an apartment block in Mouille Point was handing out food parcels from his Mini Cooper motor vehicle on Beach Road, Mouille Point. He was further informed that residents of the apartment block were upset by this behaviour because it violated the lockdown regulations, and that scores of homeless people waited outside the apartment block all day for food parcels.

[13] According to him, Mr Wagenaar was not following the City's policy of responsible giving by supporting shelters; instead, Mr Wagenaar was handing out food directly. Another group, Sea Point Community Network, posted a video in which Captain Penz warned Mr Wagenaar and told him that he was not allowed to feed the

homeless in the street and that if he continued with this behaviour, he would be arrested. The applicant further testified that in order to name and shame Mr Wagenaar, he published on a Facebook group of Mouille Point residents that it was unlawful and against public policy to hand out food parcels to homeless people. People enquired and wanted to know Mr Wagenaar. He testified that he never spoke to Mr Wagenaar nor saw his car. However, hundreds of residents posted their disapproval of the conduct of Mr Wagenaar.

[14] Frustrated and worried about Mr Wagenaar's behaviour, he published the name, ID numbers, address, and vehicle details of Mr Wagenaar on Facebook. The reason for posting these details was to garner support and pressure Mr Wagenaar to desist once he had seen the extent to which Mouille Point and other residents disapproved of his actions. Pursuant to his posting the particulars of Mr Wagenaar on the Facebook page, Mr Wagenaar's Mini Cooper motor vehicle was burnt to ashes. Applicant testified that he was not involved in torching Mr Wagenaar's vehicle. However, he regrets posting Mr Wagenaar's details on Facebook. His family had to go through a lot due to that post. He had nothing to do with the burning of that car. The police investigated the matter; he was neither a suspect nor charged for this act or arson.

[15] The applicant testified that the respondent went on a campaign on the social media platform that he burnt Mr Wagenaars' vehicle. According to him, the respondent contacted every conceivable media house on the allegations that the applicant was involved in torching Mr Wagenaar's vehicle. The respondent also claimed that the applicant threatened and bullied people far too many times. People

phoned his pet shop – Vondis - and asked if that is where the applicant worked. They threatened to come to the shop to attack him. He was frightened and nervous. People phoned in and threatened to burn his house. He had to get security services for a week to protect his family.

[16] People discussed boycotting his business and called him a despicable human being. He had to apply for a protection order against the respondent to stop her from tarnishing his good name. However, he withdrew the interim protection order against the respondent based on their settlement agreement. His attorney subsequently filed a notice of withdrawal of the interim interdict application. In that settlement, the respondent apologised for her post on Facebook concerning the applicant, which had insinuated that the applicant was responsible for the burning of Mr Wagenaar's vehicle. However, the applicant testified in this court that he disagreed with his legal representative on the terms the interim protection order was to be withdrawn.

[17] The applicant also testified on the impact of the respondent's words that Allie J found defamatory against him, namely, calling him a 'nob', that he was abusing the courts and bullying people, that his behaviour was awful, that he was a 'misogynist' and a harasser of women, that he was involved in criminal activity such as fraud, maliciously tried to have respondent arrested, and implied that he was involved with the crime of torching Mr Wagenaar's vehicle.

[18] The applicant testified that he had a clean record and that being labelled an arsonist was disgraceful and disturbing. These accusations dearly affected him and his family. On the word 'nob', he testified that this word did not shake him and that he

has been called far worse than a nob; however, he finds this word highly disturbing. These allegations against him affected his family negatively. The applicant refuted the allegations that he is a misogynist. He testified that he is involved in woman's sports and to be labelled a harasser of women is outrageous and he finds it difficult to recover from these accusations. As a result of these accusations, no one allowed their children to play with his kids. During cross-examination, he conceded that people have different views in dealing with homelessness and hunger. He also acknowledged that he thanked the respondent through the social media platform for posting the apology. However, he did not accept or recognise that apology.

[19] Regarding the second apology that the respondent tendered to him after Allie J's judgment, the applicant acknowledged that the respondent posted that apology on her Facebook page, and he was initially unaware of it. He testified that the respondent should have shared it with his family, peers, and friends. The applicant criticised the respondent for not sending the apology directly to him. The apology was only sent to him directly, a few weeks later, by Mr Gootkin, the respondent's attorney, to his attorney.

[20] During cross-examination, counsel referred him to two controversial posts he made on Facebook in which he referred to Mr Julius Malema as a 'monkey'. In that post, he stated: *"State of the nation address Tonight. Which clowns are going to turn up? Are they gonna address the state of this nation? Are the princesses going to turn up in attire worth tens of thousands of rands? Will the monkey be making a spectacle of himself again?"* In response to the question whether he was aware of the undertone of calling one a monkey, he responded that he was not aware. He was

also referred to a post that he made on Facebook in which he stated that 20 percent of the world's Muslims are radical. In that post, he stated that every fifth Muslim you meet has the potential to kill you. He conceded that Muslim people would find his post offensive. He was also asked during cross-examination whether his posts of September 2020 were not offensive against women, where he stated, *"looking for woman with balls"*. In response, he stated that it was a cry for organisations to stand up for women's rights. That was, in short, his evidence.

[21] His wife, Josephine Jacobson ("Ms Jacobson"), also testified. She stated that she was aware of the words the respondent posted that the court found defamatory against the applicant. She testified that these posts affected their family and business tremendously. Many clients cancelled business with them due to the derogatory statements made against them on social media. The applicant suffered greatly as they had to keep a low profile. She testified that the applicant was involved at their daughter's school as an assistant netball coach. Due to the tension in the community, her husband had to withdraw from this coaching responsibility. The alleged statements by the respondent caused tension in their marriage, and people threatened to blow up their house. This in her opinion, was scary.

[22] Ms Jacobson did not deny during cross-examination that the applicant posted the personal particulars of Mr Wagenaar, and that a few weeks thereafter, Mr Wagenaar's vehicle was burnt. She admitted that the publication of the personal details of Mr Wagenaar drew public outcry. She also testified that the applicant was vilified for sharing the personal details of Mr Wagenaar on social media and that this

was triggered by the respondent's publication of defamatory statements against the applicant. That was, in brief, the applicant's case.

[23] The respondent testified that she currently resides in the United Kingdom, travelling around doing some house-sitting. She previously resided in Sea Point for about three years. She lived in Claremont before and moved to Sea Pont around 2019. She relocated to the United Kingdom during the course of these proceedings. She testified that she left school in standard nine, studied journalism at Cape Peninsular University of Technology ("CPUT") for a short while, and completed a certificate in journalism. Later, she embarked on a career in the hospitality industry. She has a one-person digital marketing agency and does social media, graphic design, and marketing for businesses and organisations. She is also involved in charitable organisations. She does a lot of professional work with charities and has been a volunteer for a charity called, The Santa Shoebox Project for many years. During the lockdown, she partnered with charitable groups in Gugulethu, and they supported soup kitchens in Gugulethu.

[24] The respondent testified that one could have three levels of presence on Facebook. The first one is that of a personal Facebook profile. One can connect directly with friends and acquaintances in terms of this tier and can post to friends only or make it available to the public. If one only makes that content available to friends, it is only seen by people you have connected with through a friend request you had to accept. The second tier is the Facebook page. She testified that organisations or businesses generally use Facebook pages. Whatever is posted on a page is always public, and there's no option of making it private. One must have a

Facebook profile to be able to manage a page. The third type of presence one can have is a Facebook group which is intended to be a meeting and engagement place for people with shared interests. In these groups, people request to join, and the group administrator determines whether people may join the group. Typically, the content that is shared in that group can only be seen by people who are members of that group.

[25] The respondent testified that three Facebook groups are relevant in this matter, namely: The Sea Point Community group, The Sea Point Community Network, and the City Bowl Action Group. According to the respondent, the applicant is the City Bowl Action Group administrator. This group discussed community news. Shortly before her initial engagement with the applicant, a new administrator took over the group, and she subsequently observed a perceptible change in the content and tone of the group. It was much more, in her opinion, anti-homeless, advocating not to give homeless people handouts on the street.

[26] The respondent further testified that she was quite assertive and vehement in her engagement with the applicant because she was very passionate about the treatment of homeless people during the pandemic. The applicant's stance was that residents were not to give food or money to homeless people; a stance maintained particularly during the hard lockdown. She disagreed strongly with him on that stance because she knew that at that time, there were very few food resources that the homeless could access. She believed the applicant's stance and opinions were impractical and unfair and could endanger the community. Her stance was that it was not just about providing meals to the homeless people but rather ensuring that

their community remained safe. She was removed from the group because she argued vehemently with the applicant. She is not a member of the Sea Point Community Group. According to her, this group is administered by the applicant and his legal representative. It is quite exclusionary, and of the view that the only people who matter in their community are ratepayers and property owners.

[27] The respondent is a member of the Sea Point group. This group is founded on the principle that Sea Point is a multicultural community with residents of varying socio-economic groups. She testified that this group supports an inclusive community, a Sea Point that welcomes all its residents, including the homeless, whether they own property or not. When the hard lockdown was announced, it profoundly impacted the homeless people. People knew that she was involved in charity projects, and she started getting direct messages and WhatsApp messages from families pleading for help because they had not eaten in days.

[28] The lockdown impacted her deeply, especially when she saw homeless people wandering around from bin to bin, desperately looking for something to eat. At the time, the shelters that were generally in operation, reduced their capacity because of social distancing restrictions. According to the respondent, it was evident that the situation for homeless people was dire and desperate. As a result, community action networks grew, and people prepared sandwiches to feed the homeless people.

[29] Mr Wagenaar was one of the people involved in the outreach to feed the poor. She testified that Mr Wagenaar, out of his pocket, began to cook meals for up to 100

people per day from his kitchen. Mr Wagenaar would cook meals daily and then take them to a bus stop outside of his apartment and offer those meals to the homeless. She testified that Mr Wagenaar was cautious about adhering to social distancing rules. He also distributed personal protective equipment and offered the homeless masks and hand sanitizers. She was aware that the applicant posted the personal details of Mr Wagenaar and that subsequent thereto, the latter's vehicle was torched.

[30] On 06 May 2020, the respondent posted on Facebook and condemned the applicant's posting of Mr Wagenaar's detail on a Facebook page. She disputed that she labelled the applicant an arsonist in her Facebook post, nor did she accuse him of torching Mr Wagenaar's car. The respondent further testified that she posted a factual account of what happened on her personal profile. She tagged her friends who were members of the media or journalists to alert them to the story. She testified that she did not share it with other groups, and she did not do anything to actively distribute it.

[31] The respondent testified further that after her post, the applicant applied for a protection order against her not to harass him and his family. She saw this endeavour as an attempt to revenge and intimidate her. She disputed that she harassed the applicant or insinuated that the applicant was involved in a criminal offence. She instructed an attorney to oppose the applicant's application for a protection order against her. However, it turned out that the parties were able to settle the matter between them. She apologised to the applicant to the extent that the latter felt that she had insinuated that he was responsible for torching Mr Wagenaar's vehicle. Pursuant to that, the applicant withdrew his application for an

interim protection order against her. Thereafter, the applicant's attorneys filed a formal notice of withdrawal of the application. She testified that the applicant's attorney posted the apology on the social media platform. It transpired later that there were some misunderstandings on the terms of the withdrawal. The applicant wanted the notice of withdrawal to incorporate terms to the effect that the respondent would not post anything in the future about the applicant. When the respondent demanded a reciprocal undertaking from the applicant, the latter refused.

[32] The respondent testified that on 09 December 2020, she received a letter of demand from the applicant's attorney in which the applicant rejected the respondent's apology regarding the protection order. In that letter, the applicant suggested that the respondent's apology was not sincere. The demand did not refer to the words 'misogynist' or 'nob'. The letter of demand also set out how the respondent should apologise to the applicant broadly and comprehensively. It also demanded that the respondent admit that she was wrong to abuse the applicant on Facebook. The respondent testified that this was an apology she simply could not give in the format demanded. She testified that the applicant never demanded an apology for calling him a 'nob' or 'misogynist' in her post of 2 May 2020.

[33] The respondent testified that, in her view, the judgment of Allie J found that the respondent was justified in opposing the applicant's application because the apology the applicant sought was too prescriptive and dogmatic. However, the court referred the matter to oral evidence to ascertain whether the applicant was entitled to an apology and if so, on what terms. She testified that in accordance with the judgment of Allie J, in March 2022, she posted a second apology to the applicant on

her Facebook personal profile, and shared it. She also posted it on the Sea Point Facebook, where she had made the defamatory remarks against the applicant. She felt it was appropriate to share it in that platform. In the second apology, she apologised for referring to the applicant as a 'nob', a 'misogynist', and for stating in a Facebook post that the applicant attempted to harass and intimidate her by obtaining the interim protection order against her. She stated in that apology that she regrets having made these remarks and unreservedly apologized to the applicant for doing so.

[34] The respondent stated that her apology was sincere, and she was happy in court to apologise to the applicant for calling him names. She never had any direct engagement with the applicant and she asked her attorneys to do so. That was, in short, the evidence before court.

SUBMISSIONS BY THE PARTIES

[35] At the hearing of this matter, Mr Fehr, who appeared for the applicant, argued that the damages for defamation are not given to punish a respondent but to console an applicant through compensation for the harm that was caused by the defamation. Counsel argued that the award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Mr Fehr submitted that the quantum of the award is at the court's discretion. To this end, Counsel referred the court to several authorities, in particular, to the decision of the Supreme Court of Appeal in *Mogale and Others v Seima* 2008 (5) SA 637 (SCA), in which the court set out factors that the court must consider when exercising its

discretion, namely: the seriousness of the allegations, how widely the statements were circulated, the nature of the publication, the reputation, character, and conduct of the applicant, the motives and conduct of the respondent.

[36] Counsel also referred the court to the decision of *Katz and Welz Another* (22440/2014) [2021] ZAWCHC 76 (26 April 2021), where the court held that expressions of regret or apology may be mitigatory. Mr Fehr acknowledged that an apology was made in this matter however, in his view, it was half-hearted. He argued that the question of the apology becomes a factor to consider in the size of the award instead of not awarding anything at all. Even though there is an apology, Counsel argued that there should still be a substantial damages award. Counsel further submitted that an apology alone was not a sufficient redress. According to Counsel, the court should determine the question of ordering an apology at the same time as damages. Mr Fehr implored the court to award damages in favour of the applicant and to direct the respondent to repost the two previous apologies on her Facebook wall, the applicant's Facebook wall, and all the groups she made previous posts about the applicant. Counsel further implored the court to grant costs against the respondent on an attorney and client scale.

[37] Meanwhile, Mr Kelly, who appeared on behalf of the respondent, argued that the applicant is the author of his own misfortune by deciding to publicise Mr Wagenaar’s personal details during the time when the community was divided on the issue of feeding the homeless during the hard lockdown. Counsel contended that the respondent’s apology addressed the words that Allie J found defamatory against the applicant. Mr Kelly submitted that the respondent apologised to the applicant after

the latter applied for a protection order in so far as the applicant felt any of her posts insinuated that he had done wrong. Pursuant to that apology, counsel argued that the applicant and his wife acknowledged the apology publicly.

[38] Mr Kelly further submitted that after Allie J found that the insults the respondent made against the applicant were defamatory, the respondent wrote an apology and posted the apology in the same group on Facebook in which the defamatory comments were made. According to Counsel, this was the best way to compensate for and ameliorate the defamatory effect on the applicant. Only later was the apology sent to the attorney with an invitation to withdraw the proceedings. Mr Kelly argued that the applicant's attorney accepted the respondent's apology on the applicant's behalf and further wanted damages. The argument that the respondent's apology is insincere, so the argument proceeded, is undermined by the applicant's conduct. Counsel relied on the Constitutional Court case of *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), and argued that it is entirely within the court's discretion if it were to find that the apology was sincerely given, to find that it is sufficient to remedy the harm the applicant suffered and that in this case, a damages award would not be appropriate.

[39] Counsel contended that the cases relied upon by the applicant, namely: *Katz v Welz (supra),* and *Young v Shaikh* 2004 (3) SA 46 (C), are distinguishable from this matter in that those case dealt with serious allegations of fraud and corruption respectively, levelled against plaintiffs. Whereas in the present matter, the respondent only insulted the applicant. To this end, counsel submitted that the claim for damages in defamation cases are only granted in very serious cases where the

integrity of a party is impugned, not where insults are found to be defamatory. Pursuant to the respondent's sincere apology, and in the context of this case where no one was suggesting that the applicant was dishonest, counsel submitted that that should be the end of the matter. He implored the court to dismiss the applicant's case with costs.

ISSUES IN DISPUTE

[40] Pursuant to the finding of Allie J, this court is enjoined to determine the following disputed issues:

40.1 Whether the applicant is entitled to an apology from the respondent, and if so, the ambit thereof; and

40.2 Whether the respondent should be ordered to pay damages to the applicant, and if so, the quantum of such damages.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[41] It is common cause that on 1 September 2021, Allie J determined that the respondent had wrongfully defamed the applicant. The learned justice found that the determination of whether the applicant is entitled to an apology, the ambit thereof, as well as whether he ought to receive a damages award and the quantum thereof requires further elucidation at a hearing in due course. Pursuant to that finding, the respondent issued a second apology to the applicant on 07 March 2022. The respondent apologised for what Allie J found were defamatory statements against the applicant. The respondent unreservedly apologised for referencing the applicant

as a ‘nob’. The respondent apologised for referring to the applicant as a ‘misogynist’ in her Facebook account. She also apologised for stating on a Facebook page that the applicant attempted to harass and intimidate her when he obtained an interim protection order against her.

[42] The respondent, of her own volition, posted the apology to the same Facebook group in which the defamatory statements were made. It appears to me that the respondent unreservedly regrets her actions and that her apology was sincere. The respondent has expressed penitence and deep contrition towards the applicant. The respondent accepted responsibility and expressed heartfelt remorse for her wrongdoing. In my view, her apology was honestly made with a clear understanding that her behaviour was wrong and that the applicant should accept her undertaking that she would not engage in such conduct in the future. More so, during her evidence in chief, the respondent testified that upon reflection, she understood that she should not have called the applicant names. She testified that her apology was sincere and that she was contented in court to apologise to the applicant for calling him names - which she did. All she wanted was to move on with her life.

[43] Notably, she apologised twice in writing to the applicant. I repeat, the sincerity and credibility of the respondent’s apology are buttressed by her posting the apology to her Facebook page where she made the defamatory statements. The first apology that the respondent made to the applicant on 29 September 2020, was a sequel to an interim protection order the applicant applied for and obtained against the respondent on 29 June 2020. In that apology, the respondent apologised to the

applicant for any perception that the applicant may have formed that the respondent's post of 6 May 2020 had insinuated that the applicant was responsible for torching Mr Wagenaar's vehicle. Pursuant to that apology, a negotiated settlement was reached, and the applicant withdrew his protection order application against the respondent. The respondent posted that apology (the first apology) on her Facebook page, and the applicant, in response, thanked her on the same platform. The applicant's wife also acknowledged the respondent's apology on Facebook. She even expressed a wish for the rest of the community to do likewise.

[44] On the objective facts before court, I am of the view that the applicant's incessant misgivings and discontent with the respondent's apology are unjustified.

[45] In her testimony, the respondent told the court that she intended to apologise to the applicant for her comments and that she desired that the matter should come to an end. These assertions, in my view, are corroborated by the instructions that the respondent gave her legal representatives on 5 April 2022, after she made the second apology, to invite the applicant to end the impasse by withdrawing the current proceedings on the basis that each party pay its own costs. In response, the applicant, through his attorneys of record, accepted the apology to the extent that the respondent apologised for referencing him as a nob, a misogynist, and attempting to harass and intimidate the respondent. The applicant contended that the respondent's apology was deficient in many respects. Among others, the applicant submitted that Allie J found that describing the applicant's behaviour as 'awful' was a direct statement and was defamatory. Whilst I agree with the findings of Allie J, I am constrained to disagree with the applicant's stance.

[46] It must be stressed that effective apologies do not have a precise formula. See Guthrie *et al* 'Contrition in the Courtroom: Do Apologies Affect Adjudication?' *Cornell Law Review* 2013 (98) 1189 at 1197. Many people who are genuinely sorry struggle to find the right words. A meaningful apology may be difficult to capture in words. However, the crux of the apology must express heartfelt remorse for the wrongful action and an undertaking that the wrongful conduct will not be repeated.

[47] In the present matter, the respondent sincerely apologised and admitted the wrong she did. This court listened to the applicant's and respondent's oral evidence and observed the respondent's deep contrition during the proceedings. Both apologies in respect of the protection order and the one made after the Allie J's judgment, were published widely on Facebook. The applicant is free to republish these apologies should he so wishes, in his group and on his Facebook personal profile. This view is fortified by the relief the applicant seeks in his heads of argument that this court should direct the respondent to republish the two apologies widely on Facebook.

[48] I must also add that I find the applicant 's stance somewhat puzzling, perhaps even duplicitous. For example, when he withdrew the interim protection order against the respondent, he wanted an undertaking from the respondent that the latter would not post anything about him in the future. When a reciprocal undertaking was sought from him not to post anything concerning the respondent on any social media platform, he did not oblige. Conveniently, the applicant wanted the respondent to be

gagged against him while, at the same time, he would enjoy the freedom of posting anything against the respondent.

[49] Furthermore, I had the opportunity to read all the various Facebook posts discovered and filed on record and observed that the applicant has never apologised to anybody for his indiscretions. As an aside, and an issue which cast aspersions on his credibility, the applicant made extremely controversial and defamatory statements online, including referring to Mr Julius Malema as “a monkey”. The applicant stated on social media that every Muslim you meet has the potential to kill you. He has not publicly apologised for these public posts. In my view, these public statements are offensive and express hatred of Mr Malema and the Muslim community. The applicant’s comments amount to hate speech prohibited by section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The applicant’s posts are also inimical to the values of our Constitution that the people of South Africa are united in their diversity.

[50] In addition, the applicant further published sensitive personal information of Mr Wagenaar on social media in violation of the Protection of Personal Information Act 4 of 2013, which in all probability, led to the torching of Mr Wagenaar’s vehicle. Without a doubt, that did not only come at an expense emotionally, but also financially. Ostensibly, he has not apologised to Mr Wagenaar or any of the aforementioned for his religious and racial stereotypes, profiling and/or undertones. Remarkably, his evidence was concentrated on protecting himself and his business.

[51] Not only that, in an endeavour to garner support for his political campaign, he publicly posted a demeaning flyer on Facebook depicting naked homeless people. He has not apologised for that post or perhaps could see nothing wrong with that flyer. During cross-examination, he sought to distance himself from this flyer and denied sharing it on social media. However, when pressed for an answer and the respondent's counsel exhibited the applicant's Facebook post headed "*judge for yourself*", the applicant admitted that, indeed, he shared these nude photographs on Facebook. He was publicly condemned and chastised for his reprehensible conduct in the mainstream media and on Facebook. Notwithstanding his gross posts on his Facebook page, he insists that the respondent must apologise to him and over and above, be awarded damages. In my view, the applicant tarnished the value of his own integrity and reputation.

[52] Interestingly, when the respondent apologised for the first time after the interim protection order was granted, the applicant thanked her on social media. He did not challenge the respondent that the apology was insincere or half-hearted. The applicant's wife acknowledged the respondent's apology on Facebook. She stated that the respondent had apologised and, hopefully, the rest of the community would do likewise. I find it very opportunistic for the applicant to acknowledge the respondent's apology publicly and then later institute proceedings based on the same complaint for which he had accepted an apology.

[53] In any event, whilst I accept that the respondent defamed the applicant, I am of the view, that the payment of damages in the present matter is unwarranted. I am further of the view that the respondent's public apologies were genuine enough to

assuage and ease the applicant's feelings for the injury to his reputation. To this end, I share the views expressed in *Mineworkers Investment CO (Pty) Ltd v Modibani* 2002 (6) SA 512 (W) para 25, where Willis J, observed that the harm done by a defamatory statement is the damage to the reputation of the victim. The learned justice noted that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. The court held that a public apology which will usually be far less expensive than an award of damages, can set the record straight, restore the reputation of the victim, give the victim the necessary satisfaction, avoid severe financial harm to the culprit, and encourage rather than inhibit freedom of expression.'

[54] Similarly, *Neethling on Personality Rights* (2020) at 95, points out that a retraction or apology is also accepted as an alternative remedy in foreign legal systems because this remedy can be much more effective for natural restitution purposes – such as restoring or vindicating a person's good name than a sum of money. Similar sentiments were expressed by the Constitutional Court in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC), where the court recognised an apology as a competent remedy for restorative justice in defamation cases.

[55] In *casu,* the applicant sought an order for damages coupled with an order directing the publication of the respondent's two apologies on Facebook. I am of the view that in the circumstances of this case, the three apologies that the respondent made are adequate and sufficiently good to mitigate the applicant's reputational injury suffered pursuant to the respondent's wrongful conduct.

[56] Visser and Potgieter, *Law of Damages* 3 edition (2012) at 528, argues, and quite correctly so, in my view, that in suitable circumstances, the honourable amends or public apology, a Roman-Dutch law remedy which has recently found favour in South African law, can be utilized by a person who defamed another to make an appropriate public apology in lieu of paying damages whilst the victim of a defamation may similarly have the opportunity of having a damaged reputation restored by the remedy of a public apology. This remedy can take three forms: an exclusive remedy; an alternative remedy to damages (satisfaction); and a cumulative remedy with damage. See also *Mineworkers Investment CO (Pty) Ltd v Modibani (supra)* para 28.

[57] Crucially, it cannot be said that the insults that Allie J found defamatory against the applicant are so egregious and abhorrent that they warrant three apologies and an additional payment of damages. In my view, the respondent's apology is restorative and far less costly than an award of damages which ordinarily is retributive, punitory and will have a chilling effect on the respondent. In *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210G, Hefer JA, as he then was, observed that 'much has been written about the 'chilling' effect of defamation actions, but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error'.

[58] As discussed above, the respondent published her unconditional apology long before the applicant instituted the application against her (the first apology which led to the withdrawal of the interim protection order). The respondent also apologised

(the second apology) before the oral evidence was heard and immediately after the pronouncement of Allie J. The respondent has also apologised orally, during her evidence in chief at the hearing of this matter (the third apology). The applicant seeks an order that the respondent be ordered to repost the two written apologies (which the applicant considers insincere) on her Facebook wall and on all the groups she made her previous posts about the applicant. In addition, the applicant also seeks an order in the sum of R250 000 as damages for the injury to his personality. I do not agree.

[59] I must emphasise that the applicant's claim for damages against the respondent is not and should not be a quick money making scheme. In my view, the damages sought by the applicant can only be granted in very serious cases where the integrity and reputation of a party are impugned, not where retracted insults, as in this case, are found to be defamatory. To my mind, in the present matter, where an unconditional apology was tendered within a reasonable time, publicised, and publicly acknowledged by the applicant, and where no one suggested that the applicant was dishonest, that should be the end of the matter.

[60] Furthermore, an apology should not be used as a measure to embarrass the respondent. As discussed above, the respondent apologised and widely circulated her apology on her Facebook wall. Importantly, the applicant is in possession of the two apologies from the respondent. He is at liberty to share these apologies widely to his satisfaction to assuage his feelings. The two apologies the respondent made and the apology she made under oath during her evidence-in-chief, are more than sufficient, in my view, to ease and abate the personality injury that the applicant

suffered as a result of the respondent's wrongful conduct. Several people on Facebook have commented on these apologies. Some even thought that the respondent was forced to apologised.

[61] On a conspectus of all the evidence before court, I am of the view that this is not a case where damages are to be ordered. The apologies that the respondent tendered are adequate in the circumstances to compensate the applicant for his injury to his honour, dignity, and reputation.

COSTS

[62] The general rule in matters of costs in civil suits is that costs follow the event; that is, the successful party's costs are to be paid by the unsuccessful party. This rule applies except where there are good grounds to depart from its application, such as misconduct on the part of the successful party or other exceptional circumstances. However, the court has a discretion in awarding costs, and such discretion must be exercised judicially upon a consideration of the facts in each case. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Ohers* 1996 (2) SA 621 (CC). The decision to award costs is a matter of fairness to both parties.

[63] In the present matter, it cannot be disputed that the respondent defamed the applicant; however, she sincerely apologised for her wrongful conduct. Notwithstanding her apology, which the applicant publicly acknowledged, the applicant proceeded to institute this application against the respondent. The

respondent apologised again after Allie J found that her statements against the applicant were defamatory. Her apology was sincere and adequate. As a result, I am of the view, that this is a case where each party must pay its own costs.

ORDER

[64] The applicant's claim for damages against the respondent is hereby dismissed, with each party ordered to pay its own costs.

LEKHULENI JD

JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT