IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Johannesburg
REPORTABLE

CASE NOS: 2001/20548
2001/21162
DATE: 18/06/2002

In the matter between:

MINEWORKERS INVESTMENT COMPANY (PTY) LIMITED Plaintiff

and

MODIBANE, JOE **Defendant**

JUDGMENT

WILLIS J:

[1] The plaintiff claims against the defendant in two separate defamation actions. They were consolidated and set down for trial together. The first action (Case No 2001/20548) has three parts: Claim A is based upon a letter written by the defendant to certain senior persons at Johnnic Holdings Ltd, the ultimate controlling

company of the *Financial Mail,* a weekly business journal having a national circulation of about 33 504 at the time; Claim B arises from a telephonic conversation which the defendant had with a Mr Sizwe Mncwango, a Strategy Manager employed by BP SA (Pty) Ltd; Claim C arises from statements made by the defendant to a Mr Steven Moti, a journalist employed by *The Star* and published in that newspaper on 27 August, 2001. This is a daily newspaper having a national circulation of some 163 963 at the time. The second action (Case No.2001/21162) arises from an full page advertisement written and paid for by the defendant which appeared on 27 September, 2001 in *Business Day,* a daily newspaper also having a national circulation of approximately 42 867 at that time. In the second action the plaintiff seeks additional relief in the form of an interdict restraining the defendant from making further defamatory statements about it. Following an agreement between the parties the two separate actions were consolidated. As mentioned before, they were set down for trial together.

[2] The defendant, although he appeared in person at the trial, was represented by Advocate G.I. Hoffman SC, assisted by Advocate A.J Eyles when he filed his pleas. His attorneys were Cliffe Dekker Fuller Moore Inc. The defences raised in the pleas are bald denials that the alleged statements are defamatory. In Claims B and C of the first action, the defendant, in his plea, denied having made the statements to Mr Mncwango and Mr Moti respectively. Later, during the pre-trial

conference, he admitted that he had indeed had the alleged conversations with these two gentlemen.

[3] As a result of the narrowing of the issues in the pretrial conference, neither side led any evidence at the trial. The issues turned on:

(i) whether the statements (which it is common cause were made) were indeed defamatory; and

(ii) if so, the appropriate remedy; and

(iii) if damages were to be awarded, the *quantum* thereof.

[4] The defendant wrote to a Mr Paul Edwards, the Chief Executive Officer of Johnnic Holdings Ltd as well as a Mr Thomas Qhena, a director thereof. They both received this letter. The defendant said the following in the letter:

(i) **"…. There is a very dark and ugly side to MIC, which is covered by a veil of pious pontification. This underside is a mixture of greed, dishonesty, and the love of money which, as we should all know by now, is the root of all evil"**;

(ii) **" We all know of recent events in which a well-known cleric with a long history of fighting injustice but ended up in jail! My personal experience is that MIC is no different. They are wolves in sheep's skin who are abusing their positions to aggrandise themselves on the name of doing good " for the people " and in**

the process cheating people like me who are naïve enough to believe and trust their *bona fides*";

(iii) **" I studied business (B.Comm; MBA) and have been in business over twenty years and I got cheated because I naively trusted MIC and its shenanigans"**;

(iv) **"If anything the course of black business was robbed by MIC"**;

(v) **" Empowerment has been used as little more than a buzzword as a short-cut to enrich some apparutchnics (spelling might be incorrect), very often through less than honest methods**;

(vi) **" When the Bible of empowerment is written one day, this saga will be one of the sordid reminders of how the cause of Empowerment was hi-jacked by modern day pirates for their own pockets disguised as Robin Hoods".**

The plaintiff is commonly known as " MIC."

[5] The words complained of by the plaintiff when the defendant spoke to Mr Sizwe Mncwango are **" there is an outstanding claim of R120 million in respect of shares pertaining to the listing of Supergroup"** and **" (the plaintiff) seems to lack corporate governance"**.

[6] The article in *The Star* reported that the plaintiff (together with a certain trust) owed him in excess of R120 million for shares " **sold without his (** i.e the defendant's **) consent** . The defendant admits that this is what he told Mr Moti.

[7] The full-page advertisement in *Business Day* is headed “ **BLACK EMPOWERMENT BETRAYAL BY MINEWORKERS INVESTMENT COMPANY (MIC)”.** It is verbose and full of hyperbole. It accuses Mr Clifford Elk, a director of the plaintiff, of “ **a deliberate misrepresentation of facts to the public** ”. It ends with the following ringing phrases:

> “ **You can fool some of the people some of the time, but you cannot fool all the people all the time.**
> **You can run but you cannot hide**
> **MIC= black (dis) empowerment.”**

[8] A few weeks prior to the publication of this advertisement, the plaintiff’s attorney had written to the defendant’s attorney and requested an “ unconditional, unequivocal” undertaking that the defendant would make no further defamatory statements about the plaintiff. The reply, on behalf of the defendant, contains a demure denial that the defendant had any such intention. This was sent less than a month before the publication of the advertisement.

[9] During the defendant’s address, it became clear that he is aggrieved that an opportunity which he had expected for himself to acquire a stake of 5.5% in the listing of the plaintiff had not materialised. A careful reading of the advertisement suggests the same. It is not the defendant’s case (and, most importantly, nowhere

is it pleaded by the defendant) that any firm, mutually binding agreement had been reached between the defendant and any one else to this effect. Negotiations may have taken place between the defendant and certain senior executives of the plaintiff with this in mind (or, at least the mind of the defendant) but nothing more. In other words, as between the plaintiff (and any of its executives) and the defendant there has been, on the defendant's own version of events from the bar, no breach of contract or fraud.

[10] The enquiry is as to what the ordinary, reasonable, balanced and right thinking person reading the words, of which the plaintiff complains, would think of them. The words must be read in their context. The ordinary reader is taken to be a reasonable person of average intelligence and education. This enquiry must be done in order to determine whether the meaning of the words is defamatory.

(See, for example, **Helps v Natal Witness Ltd and Another** 1937 AD 46 at 51; **Johnson v Rand Daily Mails** 1928 AD 190 at 194; **Young v Kemsley and Others** 1940 AD 258 at 282; **Rhodes University College v Field** 1947 (3) SA 437 (A) at 461; **SA Associated Newspapers Ltd v Schoeman** 1962 (2) SA 613 (A) at 616G; **Botha en 'n Ander v Marais** 1974 (1) SA 44 (A) at 44E; **SA Associated Newspapers Ltd v Estate Pelser** 1975 (4) SA 797 (A) at 811A; **Suid-Afrikaanse Uitsaaikorporasie v O'Malley** 1977 (3) SA 394 (A) at 408D-E; **Coulson v Rapport Uitgewers (Edms) Bpk** 1979 (3) SA 286 (A) at 294B-295B; **SA Associated Newspapers Ltd en 'n Ander v**

Samuels 1980 (1) SA 24 (A); **Demmers v Wyllie and Others** 1980 (1) SA 835 (A) at 842B-843E; **Argus Printing and Publishing Co Ltd v Esselen's Estate** 1994 (2) SA 1 (A) at 20E-F; **Sindani v Van der Merwe and Others** 2002 (2) SA 32 (SCA) at 32C-D and **Channing v South African Financial Gazette Ltd** 1966 (3) SA 470 (W) at 473B-F which has been referred to with approval in several of the aforesaid judgments.)

[11] Applying this test, I am satisfied that the words upon which the plaintiff relies in Claim A and C of the first action inform the reader that the plaintiff is dishonest. Insofar as the offending words in Claim B are concerned, they inform the reader not that the plaintiff is dishonest but that it is incompetent. In the second action, I accept that a reader would gain the impression that the defendant was somewhat emotional and perhaps exaggerating. I also accept, as I have said already, that upon a careful reading of the advertisement, it is not clear what it is precisely that the plaintiff is alleged to have done wrong. Nevertheless, even though there may be room for other interpretations, one must determine what the ordinary reader would think in the context of the article as a whole, on a preponderance of probabilities. (See **Sindani v Van der Merwe and Others** (*supra*) at 36C-D; **Gluckman v Holford** 1940 TPD 336 and **Channing v South African Financial Gazette Ltd** (*supra*) at 473F.) In my view, the ordinary reader would indeed think that the defendant was complaining that the plaintiff had been dishonest. As was said by Lord

Devlin in **Lewis v Daily Telegraph Ltd** 1964 AC 234 at 277, " A layman reads in an implication much more freely". This case was referred to with approval in **Argus Printing and Publishing Co Ltd v Esselen's Estate** (*supra*) at 20F-G. (See also **Sindani v Van der Merwe and Others** (*supra*) at 36D-E.) I am strengthened in my view by the fact that the defendant, attempting to advance his case, submitted that he had placed the advertisement because he thought the plaintiff was a " swindler " and the public should know about this. His plea did not, however, contain a defence to this effect. Ultimately, as was said by Innes CJ in **Sutter v Brown** 1926 AD 155 at 163, " *(T)he question whether a statement is defamatory is a question of law for the decision of the Court; it depends upon the proper interpretation of the language used.*"

[12] In the absence of any of the recognised defences, allegations, whether direct or indirect, that a person is dishonest are defamatory. (See, for example, **Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others** 2001 (2) SA 242 (SCA); **Jasat and Another v Paruk** 1983 (4) SA 728 (N) .)

[13] It is now trite that once defamatory words are published, two presumptions arise:

(i) that the publication was unlawful; and

(ii) that the statements were made *animo injuriandi.*

(See, for example, **Suid-Afrikaanse Uitsaaikorporasie v O'Malley** (*supra*) at 401H-402A; **Borgin v De Villiers and Another** 1980 (3) SA 556 (A) at 571E-G; **May v Udwin** 1981 (1) SA 1 (A) at 10C-E; **Marais v Richard** 1981 (1) SA 1157 (A) at 11166H; **Joubert and Others v Venter** 1985 (1) SA 654 (A) at 696A; **Neethling v Du Preez and Others; Neethling v *The Weekly Mail* and Others** 1994 (1) SA 708 (A) at 764C-G; **Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others** (*supra*) at 252 B-C .)

As I have already said, the defendant pleaded no defence other than to deny that the words used were defamatory. The plaintiff succeeds in proving the defamation alleged in Claims A and C of the first action as well as the defamation alleged in the second action.

[13*a*] Insofar as Claim B of the first action is concerned, I have found that the offending words inform the reader not that the plaintiff is dishonest but that it is incompetent . I am not aware of any case where an allegation of incompetence has been found to constitute a defamation. *Mr Marcus* relied on the well known words of Lord Atkin in **Sim v Stretch** [1936] 2 All ER 1237 (HL) at 1240:

" *(W)ould the words tend to lower the plaintiff in the estimation of right-thinking members of society?* "

Mr Marcus submitted that they would. This quote received guarded and qualified approval in the case of **Mohamed and Another v**

Jassiem 1996 (1) SA 673 (A) at 703H-704D, 706H-707A. My understanding of the sanction which the Court in the case of **Mohamed v Jassiem** gave to this quote from Lord Atkin is slightly different from that found in **Sokhulu v New Africa Publications Ltd and Others** 2001 (4) SA 1357 (W) at 1358J-1359A. A visitor to South Africa, attempting to follow events in the media, could be forgiven for believing that accusations of incompetence are a national pastime. As a general rule, the ordinary, reasonable person must surely take these accusations as a matter of opinion rather than fact. It seems to me that modern times, and particularly our contemporary constitutional State require a somewhat less stringent test on whether comment and opinion is defamatory than that set out in **Crawford v Albu** 1917 AD 102 at 114 and 115. There is an evolving jurisprudence that the tension between the constitutional rights to dignity (which includes the right to a reputation) and freedom of speech must be managed by carefully balancing the two. In **Gardener v Whitaker** 1995 (2) SA 672 (ECD), Froneman J had to consider this complex issue of how one deals with a clash of competing rights to reputation and freedom of speech. That case was considered by the Constitutional Court in **Gardener v Whitaker** 1996 (4) SA 337 (CC). Kentridge AJ, delivering the unanimous judgment of the Court, said at 343C-D said, " *He* (i.e. Froneman J) *was balancing one fundamental right (dignity, including reputation) against another (freedom of speech), and developing (or altering), a common law rule in a manner which in his opinion struck the correct balance."* Later, at 345C-D, Kentridge AJ says, " *It follows*

from the judgment in that case (i.e. **Du Plessis and Others v De Klerk and Another** 1996 (3) SA 850 (CC)) *that, although Froneman J was correct in his interpretation of s 241 (8), the right of freedom of speech under s 15 cannot be invoked as providing a defence to an action for damages founded upon a defamation uttered before the Constitution came into force. The judgment and order of Froneman J nonetheless stand.*" The Constitutional Court decided that "*the appeal, if any, must go to the Appellate Division.*" (at 347D). Froneman J held that a plaintiff would have to prove that a defamatory statement was " *not worthy of protection as an expression of free speech.*" (at 691G). The Constitutional Court held that the correctness of this development of the common law was also matter " *to be dealt with by the Appellate Division.*" (at 347C). Froneman J now concedes that he was wrong as to the *onus* which the plaintiff bore. (See **Yazbek v Seymour** 2001 (3) SA 695 (E) at 702F-G.) In **National Media Ltd v Bogoshi** 1998 (4) SA 1196 (SCA) and **Van der Berg v Coopers and Lybrandt Trust** (*supra*), the Supreme Court of Appeal unanimously emphasised the importance of striking a balance between freedom of speech and the right to a reputation (see at 1207C-G and 253E-G respectively). Almost identical views were expressed in what was, in effect, a unanimous judgment of the Constitutional Court in **S v Mamabolo (eTV and Others Intervening)** 2001 (3) SA 409 (CC) at 429I-431B. Neither right automatically trumps the other. Kriegler J said at 431B " *How these two rights are to be balanced, in principle and in any particular set of circumstances is not a question that can or should be*

addressed here." In attempting to strike a balance between the plaintiff's right to a reputation and defendant's right to freedom of speech, I am satisfied that, in this particular context, the plaintiff's right to its reputation must yield to the defendant's right to express an opinion as to the plaintiff's competence. It is significant that in the case of **Neethling v Du Preez and Others; Neethling v *The Weekly Mail* and Others** (*supra*) at 777E-778E, the Court makes it clear there is no *numerus clausus* as to justification and that the governing factor determining the issue is the dictates of public policy. I intend no disrespect to the Court which decided this case when I note that their decision was controversial. (See, for example, **Du Plessis and Others v De Klerk and Another** (*supra*) at 858J, Annél Van Aswegen, *The Implications of a Bill of Rights for the Law of Contract and Delict* The South African Journal On Human Rights 1995, Vol 2, 50 at 61, Lawyers for Human Rights, *Disappointing decision on press freedom* 1994 *Rights* 47 and, by way of contrast, J. Neethling and J.M.Potgieter, *Laster: Die Bewyslas, Media-Privilegie en die Invloed van die Nuwe Grondwet*, THRHR, Vol 57, 1994 at 513, where the criticism of Lawyers for Human Rights was described as "ongemotiveerde" at 518 and 519.) Therein lies the significance of the passages referred to: even in the **Neethling** case it was accepted that, ultimately, it is public policy which draws the line between what is permissible and what is not in defamation actions. In my view, policy requires no intervention by this Court to come to the relief of the plaintiff in Claim B of the first action. I emphasise that, in coming to this conclusion, I

am not snatching some abstract reference to public policy from the air but am taking public policy into account together with the Constitutional Court's directive that the right to reputation and the right to freedom of expression must, in each individual case, be balanced. It should not be thought that the crush of demands for freedom of expression has burst the dyke of protection for reputation. The contours of the dyke have changed. The pace of life and the exchange of ideas and information are so rapid nowadays that opinions, even if they are quite insulting (contumelious, if more Roman, and therefore Latinate, terminology is to be used), are soon forgotten. Besides, attitudes of deference generally have changed profoundly within the last generation (See, for example **S v Mamabolo (eTV and Others Intervening)** (*supra*) at para [27]). One can only dimly perceive how much they must have changed since *La Belle Époque* (the period immediately before the First World War). Today, the market place of ideas is strewn with the low opinions which various persons have of each other. Such low opinions seldom count for very much. It is nevertheless noteworthy that, even in 1917, a strong spirit of tolerance for comment and opinion permeates **Crawford v Albu** (*supra*). The minority judgment of Solomon JA, in particular, is illuminating as to the tolerant attitudes that enjoyed considerable currency even then.

[14] The plaintiff has claimed an interdict and damages. It submitted that, as an alternative to damages, the defendant should be given the

option of publishing a full page apology in *Business Day.* This relief was not pertinently sought in the relief claimed in the summons. The summons does, however, contain the usual prayer for " alternative relief." In **Queensland Insurance Co Ltd v Banque Commerciale Africaine** 1946 AD 272 at 286 Tindall JA says, " *In the Roman-Dutch practice according to van Leeuwen (R.D.L), this prayer (the so-called <u>clausule salutare</u> asking for such other relief as the Court may deem best for the plaintiff) is of such effect that every right, to which the plaintiff may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also <u>Voet</u> (2.13.13) and van der Linden, <u>Jud. Pract</u> (2.3.7, vol 1, p147)*. *The effect of the prayer for ' such further or alternative relief as the nature of the case might require' in the English practice seems to be the same. See **Cargill v Bower** (10 Ch.D 502 at 508), in which Fry LJ. pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.*" See also **Tsoane and Others v Minister of Prisons** 1982 (2) SA 55 (C) at 63G.

[15] The plaintiff has requested that I make an order as follows:

(1) Directing the defendant to pay the plaintiff an amount of R285 000 subject to paragraph 3 below;

(2) Directing the defendant to pay the plaintiff interest on the aforesaid sum at the rate of 15,5% p.a. from date of judgment to date of payment;

(3) The order in paragraph 1 above shall take effect only in the event that the defendant fails to publish the following apology in a full page advertisement in the *Business Day* newspaper within ten days of the date of this order:

“**APOLOGY AND RETRACTION TO MINEWORKERS INVESTMENT COMPANY (PTY) LTD**

To the extent that I have made statements to certain individuals and in the public media stating or implying that the Mineworkers Investment Company (Pty) Ltd (MIC) has behaved dishonestly in its dealings with me, I unequivocally retract all such imputations and unreservedly apologise that they were made. I regret any inconvenience caused to MIC

JOE MODIBANE ”

(4) The defendant is interdicted from publishing any statements stating or

implying that the Plaintiff has behaved dishonestly;

(5) The defendant is ordered to pay the costs of the plaintiff, which costs are to include the costs of two counsel;

(6) In the event that the defendant publishes the apology referred to in paragraph 3 above, the defendant is to pay the aforesaid costs on an attorney and own client scale."

[16] The question of whether a Court can order a defendant to publish an apology for a defamation (as opposed to paying damages) has been considered by my brother Labuschagne J in a recent and, as yet, unreported judgment **Van Niekerk and Another v Jeffrey Radebe and Another** (Case No 00/21813). That case is clearly distinguishable from this one in that the manner in which the relief sought was cast was somewhat different from that which the plaintiff in this case is seeking. In that case the applicants sought an order:

" (a) declaring that the first respondent on 5 April 2000 made a false and defamatory statement on behalf of the second respondent and concerning the applicants;

(b) directing the respondents to issue an unqualified public statement in writing that they accept that the

> defamatory statement was false and that they retract it and apologise for it."

In other words, in that case, the applicants sought " all-or-nothing" relief. The applicants did not seek to give the respondent a choice of apologising or paying damages. As the alleged victims approached the Court by way of motion proceedings, they could not, by using this procedure, obtain an award for an illiquid claim for damages, even as an alternative to making a public apology. (See, for example, **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1161.)

[17] Voet, in Commmentary on the Pandects XLVII.10.17. says:

" *(B)y the customs of today there has been adopted an action for recantation, that is to say a formal withdrawal of wrongful statements.*"

and

" *But recantation does not apply to wrongs of every kind but applies only to verbal wrongs, so that in that way one who has dealt an injury by words may employ a remedy by recanting in words and the wrong may be purged in the same manner as that in which it was inflicted. Yet this is also correctly extended to wrongs expressed in writing, since evil speaking can happen just as much by written as by spoken words, as the writers below advise at length.*"

The “ writers below ” are Antonius Matthaeus II, *Crimes*, Bk 47, tit.4, ch.4, n.2; Hugo Grotius *Introduction to Jurisprudence of Holland*, 3,36,nn1&2.

Voet goes on to say:

“ *If it has been wreaked by the spreading, broadcasting or making public of a defamatory document or poem, it would not be unfair for the need to recant by public screed to be imposed, even as the insult was inflicted by the publication of a screed.*”

I have relied upon Gane’s translation of Voet.

[18] Melius De Villiers in *The Roman and Roman-Dutch Law of Injuries* says at p 177:

“ *In the systems of jurisprudence founded upon Roman Law a legal remedy has been introduced which was entirely unknown to the Romans, known as the amende honorable.*

…

This remedy took two forms. In the first place, there is the palinodia, recantatio or retractio, that is, a declaration by the person who uttered or published the defamatory words or expressions concerning another, to the effect that he withdraws such words or expressions as being untrue; and it is applied when such words or expressions are in fact untrue. In the second place there is the deprecatio or apology, which is an acknowledgement by the person who uttered or published

concerning another anything which if untrue would be defamatory, or who committed a real injury, that he has done wrong and a prayer that he may be forgiven."

He goes on to note that:

" *In Scotland the amende honorable seems to be obsolete.*" and " *In the Cape Colony, it* ***seems*** *to have been regarded* ***at one time*** *as obsolete but it has nevertheless appeared more than once subsequently in letters of demand and forms of summons.*" (my emphasis).

[19] In **Hare v White** (1865) 1 *Roscoe* 246 at 247 Cloete J said:

" *The reason why the form of action for an amende honourable and profitable came to be discontinued was that the judges often found that the sentence of the court for an amende honorable had to be enforced by civil imprisonment, and they threw out a hint that the court was not favourable to such processes.*"

In the same case Watermeyer J, who concurred in the order said:

" *There might be a very good reason for the conclusion that an action for the amende honourable and profitable was the kind of thing that the court would rather not have to enforce by civil imprisonment but that was no reason why the amende profitable should not be claimed.*"

It seems that the *amende profitable* was a payment of a monetary sum analogous to damages as we know the concept today. (See De Villiers, *op.cit.* p180.)

[20] In **Lumley v Owen**, 3 *Natal Rep. N.S.* 13 O'Connor CJ said:

" *The declaration prays, inter alia, for the amende honourable. Such a prayer is, I apprehend, in Natal, at the present day an archaism.*"

[21] In **Ward-Jackson v Cape Times Ltd** 1910 WLD 257 at 263, Curlewis J said:

" *Indeed, under the the Roman-Dutch law-although the practice **seems** to have fallen into desuetude- a plaintiff might sue for an apology or the amende honorable as it is called.*" (My emphasis)

[22] Burchell in *Personality Rights and Freedom of Expression* Juta's, 1998 says at p 495:

" *It may be true that a judge would be reluctant to enforce the amende honorable by means of civil imprisonment but that does not necessarily constitute sufficient reason for rejecting the purpose and principle of the remedy.*"

[23] The fact that a remedy has "*fallen into desuetude*" does not necessarily mean that it has been abrogated by such disuse. The *locus classicus* on the question of " abrogation by disuse", is **Green v Fitzgerald** 1914 AD 88. In that case Solomon JA said at 117**:**

" *Voet (1,3,4) dealing with the subject, says: ' For although a law is not abrogated by disuse only, as has been previously said in section 35, yet by frequent acts done contrary thereto and not afterwards repudiated by the legislator, it loses its force, ab initio, or is deprived ex*

post facto of the strength of its obligation.' And in the passage referred to in section 35, he says: 'For ancient rights are not taken away merely by disuse or by the absence of acts, but only by the frequency of contrary acts openly exercised.'"

Later at 118 he notes that the maxim *cessante ratione legis cessat lex* applies in determining whether or not law is abrogated by disuse.

[24] The guarded approach by the courts to the availability of the *amende honorable* in the old cases referred to above, exemplified by the use of words such as " seems ", suggests to me that it was not clear that the remedy had ceased to be available. Moreover, it can hardly be said that acts contrary to the remedy have frequently been exercised. The fact that there has been an understandable reluctance by the courts to enforce the remedy by civil imprisonment does not mean that the remedy *per se* has ceased to exist. After all, there is a considerable difference between a Court making an order which says, in effect, "Apologise or pay " on the one hand and, on the other, "Apologise or go to gaol." Futhermore, it can hardly be said that the underlying *ratio* for the remedy has fallen away. I had an interesting debate with *Mr Chaskalson*, who made the submissions on behalf of the plaintiff with regard to the remedy, as to why this creative and imaginative solution proposed by the plaintiff had not been put forward by other litigants over so many years. It seems to me that there are probably two reasons:

(i) Litigants were discouraged by the lack of enthusiasm of the Courts to apply the remedy (the Courts fearing that if the relevant order were to be disobeyed they would have to order civil imprisonment); and

(ii) The subtle influence of English law (English law does not have such a remedy and, for reasons about which university professors of yore would fulminate, practitioners assumed that our law was the same as the English).

The *amende honorable* was not abrogated by disuse. Rather, it was forgotten: a little treasure lost in a nook of our legal attic. I accordingly come to the conclusion that the remedy of the *amende honorable* remains part of our law.

[25] Even if I am wrong in the conclusion that the *amende honorable* is still part of our law, there are other reasons why I believe a remedy analogous thereto should be available. I agree with the submission of *Mr Chaskalson* that if the only remedy available in a defamation action is damages, then very often an appropriate balance will not be struck between the protection of reputation on the one hand and freedom of expression on the other. It fails in two respects: (i) often, it does not afford an adequate protection to reputation and (ii) it can, at least indirectly, impose restrictions on freedom of expression. Awards of damages can ruin defendants financially and this risk can operate to restrict information being published which may indeed be in the

public interest. The uncertainty as to whether the "truth plus public benefit" defence will succeed can inhibit freedom of expression. As Hefer JA, as he then was, said in the case of **National Media Ltd v Bogoshi** (*supra*) said at 1210G-I, " *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.* " Furthermore, the harm done by a defamatory statement is the damage to the reputation of the victim. 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 serious financial harm to the culprit and encourage rather than inhibit freedom of expression.

[26] In Australia, the New South Wales Law Reform Commission in a report published in 1995 said as follows:

" *The Commission regards the development of alternative remedies in the law of defamation as a significant reform of the law. A legal system which effectively promotes damages as the sole remedy in defamation is remedially crude. A plaintiff obtains damages or nothing at all."*

[27] Professor Fleming in The Law of Torts 9th ed at p. 657 says:

" *The commitment of our law* (i.e English common law) *as to damages as the principal remedy for defamation has been a mixed blessing. Perhaps its foremost ill is that it exacerbates the tension between the two competing interests of individual reputation and freedom of*

speech." Almost identical views are expressed in Winfield & Jolowicz *Tort* 15th ed at p 456.

[28] Section 173 of our Constitution (Act No. 108 of 1996) exhorts the Courts " to develop the common law " taking into account " the interests of justice." This affirms an already well established principle. (See, for example, **Pearl Assurance Co v Union Government** 1934 AD 560 at 563 ([1934] AC 570 at 579); **Feldman (Pty) Ltd v Mall** 1945 AD 733 at 789; **Willis Faber Enthoven v Receiver of Revenue** 1992 (4) SA 202 (A) at 220E-G; **Kommissaris van Binnelandse Inkomste v Willers** 1994 (3) SA 283 (A) at 332H-333B; **Minister of Law and Order v Kadir** 1995 (1) SA 303 (A) at 318E-H; **Carmichele v Minister of Safety and Security** 2001 (4) SA 938 (CC) at para [80] and the well known judgment of Innes CJ in **Blower v Norden** 1909 TS 890 at 905.) Section 39(2) of the Constitution requires the Courts, " when developing the common law, " to " promote the spirit, purport and objects of the Bill of Rights." Section 38 provides that whenever any fundamental right has been violated, a Court may " grant appropriate relief. " Section 172(1)(b) grants a Court the power, when it decides any constitutional matter to make any order that is " just and equitable." Section 167 (7) defines " a constitutional matter " as " any issue involving the interpretation, protection or enforcement of the Constitution." The Constitutional Court has in several cases indicated that "innovative remedies," tailored to the needs of a particular case, are to be welcomed, if not desired, provided they are

fair and balanced. (See, for example, **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at para [104]; **Pretoria City Council v Walker** 1998 (2) SA 363 (CC) at para. [95]; **Fose v Minister for Safety and Security** 1997 (3) SA 786 (CC) at paras. [18],[19] and [69]; **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC) at para. [65]; **Hoffmann v SA Airways** 2001 (1) SA 1 (CC) at paras. [42] and [45; **Carmichele v Minister of Safety and Security** (*supra*) at para [80].) Even if the *amende honorable* had never existed, the imperatives of our times would have required its invention. In my view, it is entirely consonant with " the spirit, purport and objects" of the Bill of Rights in our Constitution that a person who has committed a wrongful act by defaming another should, in suitable circumstances, be given an opportunity to make a appropriate public apology in lieu of paying damages; and, no less importantly, that the victim of a defamation, should similarly have the opportunity to have a damaged reputation restored by the remedy of a public apology. In the circumstances of this particular case, I am satisfied that it would be just and equitable that the defendant be given a choice between making a public apology or paying damages. I shall make an order to this effect.

[29] The assessment of damages in a defamation action is never an easy task. As was said in the case of **Van der Berg v Lybrandt Trust (Pty) Ltd** (*supra*) at 260E-H (para [48]), " *The award in each case must depend upon the facts of the particular case seen against the*

background of the prevailing attitudes in the community. Ultimately a Court must, at best it can, make a realistic assessment of what it considers just and fair in the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages hostility to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate recompense to assuage his or her wounded feelings." In addition to the **Van der Berg** case and the cases therein cited in para [48], useful guidance can be had from **Norton and Others v Ginsburg** 1953 (4) SA 537 (A) at 550F-551D, **Muller v South African Associated Newspapers Ltd and Others** 1972 92) SA 589 (C) at 595A –596B, **Buthelezi v Poorter and Others** 1975 (4) SA 608 (W) at 613 H- 616G; **Smith v Die Republikein (Edms) Bpk en 'n Ander** 1989 (3) SA 872 (SWA) at 800, **Iyman v Natal Witness Printing and Publishing Co (Pty) Ltd** 1991 (4) SA 677(N) at 686F-687E, **Chetcuti v Van der Wilt** 1993 (4) SA 397 (Tk GD) at 399F-401F, and Burchell The Law of Defamation in SA Juta's, 1985 at pp 290-307.

[30] The defamation in Claim A of the first action is exacerbated by the fact that the letter was sent with the clear intention that the "facts" therein contained should be published in *The Financial Mail.* In all the circumstances of the matter, R30 000 as damages seems to me to be appropriate. In Claim C of the first action the defamation was

published in *The Star*, a newspaper having a large circulation. R70 000 seems an appropriate award for damages. The defamation in the second action is particularly serious. A full page advertisement appeared in *Business Day*, a newspaper having a considerable circulation and whose target market is very obviously the business community. I also take into account the fact that many of the readers of this publication, being well-educated, would take into account the emotional and exaggerated tone of the advertisement. R100 000 seems to me appropriate.

[31] Insofar as the interdict is concerned, the plaintiff has a clear right to its reputation. Not only has it been defamed but also the defendant's conduct after letters were exchanged between the parties' respective attorneys relating to assurances that similar acts of defamation would not occur in future, as well as the attitude of the defendant during the hearing of this matter, make it plain that the plaintiff reasonably apprehends future acts of defamation by the defendant. There are innumerable cases dealing with the question of "the absence of similar protection by any other ordinary remedy". References to these cases can conveniently be found in *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa*, 4th ed. at pp.1064-1077 and Prest, *The Law and Practice of Interdicts*, Juta's,1996, at pp 45-48. An already lengthy judgment will needlessly be extended by referring to all these cases. As Prest notes, Van der Linden uses the words "*geen ander gewoon middel...waar door men*

met het zelfde gevolg kan geholpen worden" and "*geen ander ordinair middel...waar door men met het zelfde effect kan geholpen worden.*" (*Koopmans Handboek (Institutes)3.1.4.7* and *Judicieele Practijcq 2.19.1*). In the circumstances of this case, I am satisfied that there is no other remedy by which the plaintiff, with the same effect, "*kan geholpen worden.*" In my view, the requirements for an interdict set out in **Setlogelo v Setlogelo** 1914 AD 221 at 227 have been satisfied. Obviously, the interdict applies only to unlawful acts by the defendant.

[32] The plaintiff did not seek attorney and client costs in its prayers in either action. Normally, unless such an order is prayed for, it will not be given. (See, for example, **Fein v Rabinowitz** 1933 CPD 289 at 292; **Genn v Genn** 1948 (4) SA 430 (C) at 432-3; **Sopher v Sopher** 1957 (1) SA 598 (W) at 600E and **Marsh v Odendaalsrus Cold Storages Ltd** 1963 (2) 263 (W) at 269H.). This does not mean that such an order cannot be made. (See **Fein v Rabinowitz** (*supra*), **Genn v Genn** (*supra*) and **Sopher v Sopher** (*supra*).) The defendant's conduct does not fall naturally within the ambit of broad general guidelines set out in **Ward v Sulzer** 1973 (3) SA 701 (A) at 706F-708A. *Mr Chaskalson* submitted, however, that if the defendant elected to exercise the cheaper option of apologising in a full-page advertisement in *Business Day* (the defendant informed me from the bar that his last full-page advertisement in this newspaper had cost him about R35 000), not only would the defendant save himself a considerable sum of

money but the plaintiff would be out of pocket. In **Nel v Waterberg Landbouers Ko-öperatiewe Vereeniging** 1946 AD 597 AD at 607, Tindall JA, giving the judgment of the Court, said:

" *The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.*"

Taking this into account, as well as Section 172(1)(b) of the Constitution which grants a Court the power to make any order that is " just and equitable," I am satisfied that it would be appropriate to direct that, if the defendant does elect to make a public apology, he shall pay costs on an attorney and client scale. I shall not go so far as to direct that these costs be paid on an attorney and **own** client scale. The distinction, if any, between the two orders and the appropriateness of an order for attorney and **own** client costs was lightly touched upon in the case of **Thoroughbred Breeders' Association v Price Waterhouse** 2001 (4) SA 551 (SCA) at 596G-I. The Supreme Court of Appeal left this issue "for future consideration". Even if there is a difference (and I understand that there is), I should not go as far as the plaintiff requests. In my experience, an award of costs on an attorney and **own** client scale can lead to abuse which it

is difficult for the party against whom such an award is made to combat. Seeking such relief has become a creeping vogue among practitioners which, in my view, should not be encouraged. My failure to make such an award has nothing to do with my views of the integrity of the plaintiff's attorneys. I hold them in high regard. It has everything to do with policy. An award which has such extreme consequences should, in my view, be made in extreme cases only. (See, for example, **Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others** 1990 (2) 574 (T).) This is not an extreme case. That the plaintiff did not succeed in Claim B of the First Action is of so little consequence to either party that I shall not reflect this fact in the costs order.

[33] The following order is made:

1. The defendant is to pay the plaintiff:
   - 1.1 In respect of Claim A of the first action (Case No. 2001/20548) the sum of R30 000;
   - 1.2 In respect of Claim C of the first action (Case No. 2001/20548) the sum of R70 000;
   - 1.3 In respect of the claim in the second action (Case No. 2001/21162) the sum of R100 000;
2. The defendant is to pay the plaintiff interest on the aforesaid sums at the rate of 15,5% p.a. from date of judgment to date of payment;

3. The orders in paragraph 1 above shall take effect only in the event that the defendant fails to publish the following apology in a full page advertisement in the *Business Day* newspaper within ten days of the date of this order:

   “**APOLOGY AND RETRACTION TO MINEWORKERS INVESTMENT COMPANY (PTY) LTD**

   To the extent that I have made statements to certain individuals and in the public media stating or implying that the Mineworkers Investment Company (Pty) Ltd (MIC) has behaved dishonestly in its dealings with me, I unequivocally retract all such imputations and unreservedly apologise that they were made. I regret any inconvenience caused to MIC

   JOE MODIBANE ”

4. The defendant is interdicted from publishing any statements stating or implying that the plaintiff has behaved dishonestly;
5. The defendant is ordered to pay the costs of the plaintiff, which costs are to include the costs of two counsel;
6. In the event that the defendant publishes the apology referred to in paragraph 3 above, the defendant is to pay the aforesaid costs on an attorney and client scale.

DATED AT JOHANNESBURG THIS 18th DAY of JUNE, 2002

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for Appellant: *G.J. Marcus SC, with him M Chaskalson*

Attorneys for Appellant: Feinsteins

Defendant in Person

Date of hearing: 4th June, 2002

Date of Judgment: 18th June, 2002