

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

Case No. 2005/6018

DATE:01/11/2007

In the matter between:

**MARTIN CHARLES GISHEN**

Plaintiff

and

**NARESH BABU**

Defendant

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**P.A. MEYER, AJ**

[1] The plaintiff in this matter is an attorney. He was appointed by the defendant's former wife on 17 November 2003 to institute divorce proceedings on her behalf against the defendant. The divorce proceedings between the defendant and his former wife turned out to be highly contested and various

ancillary matters arose. The defendant, under cover of a letter dated 1 February 2005, laid a complaint relating to professional misconduct against the plaintiff with the Law Society of the Northern Province (“the Law Society”). On 1 October 2005, the plaintiff was advised that the Law Society had decided that no unprofessional conduct could be found on the available evidence.

[2] The plaintiff sues for defamation, asserting that the following statements in the defendant’s complaint to the Law Society were defamatory of him:

*“(16) My ex-wife is fortunate to have an arrangement with Mr Gishen in that she does not have to pay Mr Gishen any legal/professional fees. Mr Gishen allegedly does all her personal litigation on the understanding that she will set-off any fees by giving him conveyancing and litigation work through her employer.*

*Standard Bank employs Ms Babu in the capacity of a Priority Banker. She deals with Home Loans and other matters that regularly require involvement from Attorneys on the Standard Bank panel and is thus in a position to engage in such practice. Standard Bank has confirmed their willingness to co-operate with the committee in this regard.*

*(17) Whilst we were still married I recall my ex-wife often referring to the gifts and incentives she received from this firm of attorneys. I do not know the exact details of such arrangement but fully understand that the arrangement she has with Mr Gishen places*

*me under financial pressure and unfairly prejudices my position. Despite this arrangement Mr Gishen deceived the court during the Rule 43 proceedings and filed a counter-claim against me for a contribution to costs”*

[3] The plaintiff alleged that the statements were *per se* defamatory of him in that they imputed to him criminal and unprofessional conduct. The plaintiff further pleaded certain selected meanings that are to be attributed to the statements as an alternative to his general allegation that the statements were defamatory *per se*, namely that they were meant and understood to mean that:

- (a) *“the Plaintiff bribed the former wife of the Defendant to pass on to him conveyancing and litigation work for her employer the Standard Bank by rendering to her legal professional services free of charge in the litigation between herself and the Defendant;”*
- (b) *“in the past the Plaintiff bribed the former wife of the Defendant to direct to him conveyancing and litigation work for her employer the Standard Bank by giving her or causing his firm to give to her gifts and incentives;”*
- (c) *“the Plaintiff acted corruptly in that he induced the wife of the Defendant to act in breach of her duty to the Standard bank her employer for reward in consideration of her passing on to the Plaintiff in breach of her duty to her employer conveyancing and litigation work which otherwise would not have been entrusted by her employer to the Plaintiff;”*

- (d) *“the Plaintiff was guilty of improper, unprofessional and unethical conduct as an attorney in that contrary to the rules for professional conduct and ethical rules governing the profession of attorneys he employed the former wife of the Defendant to obtain for him from the Standard Bank conveyancing and litigation work;”*
- (e) *“in breach of his duty as an attorney to be honest with the Court the Plaintiff had deceived the Court during Rule 43 proceedings between the Defendant and his former wife by representing to the Court that the Defendant’s former wife required a contribution to costs well-knowing that she did not and by failing to disclose to the Court that he was rendering legal services to her free of charge.”*

[4] Such meanings were not pleaded as an *innuendo*, but a *quasi-innuendo* so as to point to the sting of the imputation. It is permitted for a plaintiff to select the meanings of the offending statements upon which he relies in the alternative to any other defamatory meaning or meanings which he contends that the statements bear *per se* [See: *Sachs v Werkerspers Uitgewersmaatskappy (Edms) Bpk* 1952 (2) SA 261 (W) at 272H – 273B; *Gayre v SA Associated Newspapers Ltd* 1963 (3) SA 376 (T) at 378H – 379A; *Geyser en ‘n Ander v Pont* 1968 (4) SA 67 (W) at 70A; *Marais v Steyn en ‘n Ander* 1975 (3) SA 479 (T) at 486C-D; *HRH King Zwelithini of Kwa Zulu v Mervis and Another* 1978 (2) SA 521 (W) at 524D-H; *Demmers v Wyllie and Others* 1978 (4) SA 619 (D&CLD) at 622F-H; *De Villiers v Schutte* 2001 (3) SA 834 (CPD) at 839A-C].

[5] The defendant denied that the statements were *per se* defamatory of the plaintiff or that the other meanings could be attributed to them.

[6] Applying the test of what the ordinary, reasonable, balanced and right-thinking person of average intelligence and education reading the statements complained of in their context would think of them in order to determine whether the meaning of the statements is defamatory, I am satisfied that the statements made by the defendant of the plaintiff at the very least inform the reader that the plaintiff was guilty of improper, unprofessional and unethical conduct as an attorney in that Ms Babu did not have to pay the plaintiff any professional legal fees for her personal litigation on the understanding that such fees would be set-off by Ms Babu giving the plaintiff conveyancing and litigation work through her employer, and that the plaintiff deceived the court during the Rule 43 proceedings by failing to disclose to the court such arrangement. The statements complained of were, in my view, clearly defamatory. (See: *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at pp 518 – 519, paras 10 - 12)

[7] It was common cause at the trial that the statement in paragraph 17 of the defendant's complaint to the Law Society relating to the gifts and incentives which had allegedly been received by Ms Babu, was a statement concerning the plaintiff's incorporated attorney's practice, Gishen-Gilchrist Inc., and that all the

other statements contained in paragraphs 16 and 17 were statements of and concerning the plaintiff personally.

[8] Once defamatory statements are published, presumptions that the publication was unlawful and that the statements were made *animo injuriandi* arise (See: *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at pp 518 – 519, paras 10 - 12).

[9] The defendant pleaded that the statements were true and that it was in the public interest that the facts were published, or, in the alternative, that publication of the statements was protected by qualified privilege. The *onus* to establish the defences of truth in the public benefit or of publication on a privileged occasion rested on the defendant and the plaintiff had to prove that the occasion was abused or, put differently, that the respondent was actuated by malice (See: *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1216J - 1218E; *Neethling v Du Preez and Others*; *Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 770H – J; *Basner v Trigger* 1946 AD 83 at 93 – 95).

[10] Adv E Jacobs, who appeared for the defendant, correctly in my view, conceded that the truth of the alleged arrangement between Ms Babu and the plaintiff had not been established. Adv Jacobs, however, further submitted that the evidence established that the plaintiff deceived the court during the Rule 43

proceedings. I disagree. Counsel's latter submission is irreconcilable with the former. The allegation of the plaintiff's alleged deception of the court presupposes the existence of an arrangement between Ms Babu and the plaintiff that Ms Babu did not personally have to pay any professional legal fees to the plaintiff in exchange for conveyancing and litigation work which she would give the plaintiff through her employer. Such alleged arrangement had not been established. I am of the view that there is also no reason to hold that the statement which the defendant made to the Law Society concerning any such alleged deception of the court by the plaintiff had any foundation in fact.

[11] In her affidavit in the Rule 43 proceedings, Ms Babu said that *"I do not have any assets or other means to proceed with a contested divorce action. Consequently, I request that the court orders the applicant to make a contribution to my costs in the sum of R15 000.00, having regard to the fact that the pleadings have closed and I now have to start preparing for trial which involves discovery and consultations for myself and my witnesses with my Attorney and Counsel, none of which I can afford."* Ms Babu's various bank accounts reflect a total credit balance of approximately R32 000.00 at the time when she deposed to her affidavit in the Rule 43 proceedings on 26 February 2006. It was put to the plaintiff in cross-examination that he nevertheless asked for a contribution for costs and that the plaintiff, as an attorney, on that basis had misled the court. The defendant testified that what gave rise to his allegation of deception on the part of the plaintiff was the fact that Ms Babu had applied for a contribution to her

costs in the divorce proceedings at a time when and under circumstances where the plaintiff, as her attorney, would have had access to all her information, which was a reference to the funds that had been available to Ms Babu. The plaintiff denied the allegation of deception and testified that Ms Babu had informed him that she did not have the funds to finance a full scale trial, and that, even if she did have the said amount to her credit in her banking accounts, it would not have been sufficient to finance the litigation. Ms Babu testified that she required the funds that had been to her credit in her banking accounts at the time to move into a flat, to establish a home for her and her son, to buy a car, to maintain her son, and that she was unable to afford the litigation. This evidence, which was not refuted, in my view, refutes the allegation of deception on the part of the plaintiff. But, the allegation of deception made by the defendant to the Law Society did not concern any amount that stood to the credit of Ms Babu at the time when she deposed to her Rule 43 affidavit and the non-disclosure thereof, but that the plaintiff had filed a counter-claim against the defendant for a contribution to costs despite the arrangement which Ms Babu had with him. The truth of such allegation has not been established.

[12] The defence of of truth in the public benefit must accordingly fail.

[13] There can be no doubt that an occasion where a member of the public lays a complaint before the professional body representing attorneys is a privileged one. The privilege is a qualified one (*Yazbek v Seymour* 2001 (3) SA



695 (E)). This was not contested by the plaintiff's counsel, Adv R.L. Selvan SC, who approached the matter on this basis.

[14] If it is established that the statements were made with knowledge of their untruthfulness or that the defendant did not believe that the facts stated by him were true, the inference that would arise, in the absence of any indication to the contrary, would be that the statements were actuated by malice (See: *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) at 578H; (See: *Naylor and Another v Jansen; Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) at pp 554 A – C)).

[15] The plaintiff denied the alleged arrangement whereby Ms Babu did not have to pay him his legal fees and disbursements in her personal litigation against the defendant, that the plaintiff undertook Ms Babu's personal litigation on the understanding that she would set-off his fees by giving him conveyancing and litigation work through her employer, that Ms Babu had ever referred her employer's conveyancing or litigation work to the plaintiff or his firm, that the plaintiff or his firm had ever given Ms Babu gifts and incentives, or that the plaintiff had deceived the court in the Rule 43 proceedings.

[16] The plaintiff's evidence is supported by Ms Babu on all the material aspects. The plaintiff testified that he met Ms Babu for the first time during November 2003 when she consulted him in connection with the institution of divorce proceedings against the defendant. Ms Babu testified that she was

referred to the plaintiff by her stepfather “*who had previous legal dealings with him*”. They both testified that they did not know one another before then. They both testified that they came to a fee arrangement during such first consultation, which was a fee of R2 500.00 payable immediately if the divorce action was undefended. The plaintiff testified that the arrangement was the normal attorney and client tariff if it was defended and Ms Babu testified that the arrangement was tariff if it was defended. The plaintiff testified that he considered the matter to be simple and he anticipated that it would not be defended. Ms Babu testified that they had no idea at that time that the matter would be defended.

[17] The divorce proceedings, however, turned out to be highly contested. The plaintiff testified that when the matter became contested, Ms Babu had told him that she had no money to pay him upfront. The plaintiff required of Ms Babu to make part payments every month, because of his disbursements, and they arranged that Ms Babu would pay to the plaintiff monthly what she could afford and that the outstanding balance would be paid when the matrimonial home, which was then jointly owned by Ms Babu and the defendant, was sold. Such arrangement essentially accords with the testimony of Ms Babu. She also testified about a further arrangement that she would make payment to the plaintiff of R250.00 per month, which payments were reduced to R100.00 per month at some stage.

[18] The plaintiff testified that Ms Babu had from the inception paid certain monies to him on account of his fees and disbursements in the divorce action and ancillary matters, namely the sum of R2 500.00 that was paid to the plaintiff on 25/11/03, the sum of R500.00 paid on 27/05/04, sums of R250.00 paid on 1/6/04, 21/6/04, 28/6/04, 20/7/04, 30/7/04, 31/8/04, 31/8/04, and on 5/10/04, the sum of R3000.00 paid on 18/11/04, sums of R300,00 paid on 22/4/05, 23/5/05, 22/6/05, 22/7/05, 23/8/05, 22/9/05, and sums of R100,00 paid on 22/10/05, 23/11/05, 22/12/05, 23/1/05, 22/2/06, 23/3/06 and 22/4/06. All the debits and credits were, according to the plaintiff, reflected in his ledger. Ms Babu testified that the former matrimonial had been sold by public auction on 15 February 2006. A tax invoice was only prepared and given to Ms Babu on 16 May 2006. The balance owing by Ms Babu to the plaintiff in respect of his fees and disbursements as at that date was the sum of R105 971,72. The plaintiff and Ms Babu testified that they had had a meeting where they had reached agreement on such balance owing by Ms Babu to the plaintiff.

[19] The plaintiff's version is further supported by his internal instruction sheet which he testified he personally completed at the time of their first consultation, his reply dated 23 March 2005 to the Law Society, his tax invoice dated 16 May 2006 reflecting Ms Babu's total indebtedness to him in the sum of R116 471,72, and the reconciliation forming part of the tax invoice reflecting the amounts that had already been paid to the plaintiff by Ms Babu. The plaintiff also called Ms Patricia Coulentianos, who is employed by Standard Bank in the capacity of

Suite Manager overseeing nineteen Relationship Managers, whose evidence showed that there was but a negligible opportunity for Ms Babu to have directed legal work to the plaintiff. I shall deal with her evidence later on in this judgment.

[20] The defendant's counsel put it to the plaintiff in cross-examination that the basis upon which the defendant had made the statements to the Law Society was because of the plaintiff's withholding of information, because of information that Ms Babu had conveyed to the defendant and to his father, and because of gifts given to Ms Babu which the defendant had seen. The defendant testified that the allegations which Ms Babu had made to him and the failure to produce the plaintiff's statements and invoices issued to Ms Babu and the plaintiff's receipts of payment from Ms Babu, were suspicious and gave rise to the statements which he had made to the Law Society.

[21] The defendant, who is a senior Bank Manager at the Standard Bank and in its employ for the past 20 years, testified that Ms Babu and he had gone out to dinner during the time of their separation before a divorce order was granted. Ms Babu had insisted on paying for the dinner and he had mentioned to her that he was impressed that she had insisted on paying since it never happened before. Ms Babu, according to the defendant, replied by saying that she believed divorces are expensive. When the defendant then told Ms Babu that he had already paid R34 000.00 in legal fees, she had laughed and said he should go to her attorney – he does not charge her anything. The defendant testified that Ms

Babu had said that the plaintiff viewed her as his client Standard Bank rather than as a client in her personal capacity - someone to help him and he would help her. Ms Babu, according to the plaintiff, had told him that she and the plaintiff had made an arrangement that she did not need to pay the plaintiff any fees.

[22] Such details, and particularly their alleged dining out during the time of their separation, were never put to the plaintiff or to Ms Babu under cross-examination. What was merely put to the plaintiff under cross-examination on this issue was that Ms Babu had specifically said to the defendant that the litigation did not cost her anything. Contradictory versions of the defendant were put to Ms Babu, namely that she had said to the defendant that she did not pay any fees to the plaintiff, and later on during her cross-examination that the defendant says that she had acknowledged to him that she would refer work to the plaintiff and pay little fees.

[23] When cross-examined, the defendant said that he did not inform his attorney of Ms Babu's communication to him that she was receiving free legal services, because he did not think it would be proper to inform his attorney thereof and that is why he had referred the matter to the Law Society. I find this version to be unconvincing and improbable in view of the defendant's own statement that his former wife receiving free legal services was of serious concern to him, and it would, in my view, have been a matter which he would

have discussed with his own attorney, particularly since he discussed other matters of concern to him with other attorneys. The defendant in any event contradicted his version in this regard under further cross-examination by saying that the issue of Ms Babu receiving free legal services was not a complaint or a matter which he wanted the Law Society to investigate. This version too was contradicted under further cross-examination when it was conceded by the defendant that his "*complaint*" was that his wife received free legal services while he had extensive legal fees.

[24] On 29 October 2004, the defendant launched a Rule 43(6) application against Ms Babu for a contribution towards his costs. The defendant made no mention of any arrangement between Ms Babu and her attorney in his affidavit in support of that application. On the contrary, the defendant alleged therein that it had come to light after the previous Rule 43 order had been granted that Ms Babu had various investments or savings accounts to draw from "*in order to finance litigation*" against him. The defendant attempted to explain the omission to refer to the alleged arrangement by saying that he did not have the expertise to draft legal documents, that the plaintiff would have denied such statement if it was made, and that the defendant was more concerned about his own costs. I am unable to accept these explanations. The alleged arrangement between Ms Babu and the plaintiff would have been highly relevant to and it would have supported the defendant's Rule 43(6) application. It is, in my view, improbable that such alleged arrangement would not have been referred to by the defendant

in his supporting affidavit had Ms Babu indeed informed the defendant thereof. The defendant also attempted to explain his statement that Ms Babu was able to finance her litigation by saying that she did not need to finance her litigation in “a *technical sense*”. Upon being asked what he meant thereby, he testified that Ms Babu had to pay legal fees in the eyes of everybody, but the plaintiff had never given her an account. I find this explanation to be unintelligible. It is, in my view, improbable that the defendant would have made the statement that Ms Babu had various investments or savings accounts to draw from in order to finance the litigation against the defendant had Ms Babu indeed informed him of the alleged arrangement between her and the plaintiff in terms whereof she did not need to pay legal fees.

[25] The defendant’s counsel put it to Ms Babu that the defendant conceded that she had made payment of the sums of R2 500.00 and R3 000.00 to the plaintiff. It was further put to her that the defendant became aware that she “*did not pay substantial amounts*” and his only reasonable inference was that she was not paying or at least not paying substantial amounts. In giving evidence, the defendant, however, still persisted with the truth of his statements to the Law Society and he testified that he did not accept that the payments had been made. Such evidence contradicted the statements that had been put to Ms Babu.

[26] It was put to the plaintiff under cross-examination that Ms Babu had told the defendant’s father that the divorce proceedings were not costing her anything

and it was put to Ms Babu that she had told the defendant's father on at least on one occasion that she could go on for ever, because it was costing her nothing. Such statements were, however, contradicted by the evidence of the defendant's father, Mr Prakash Babu, who testified that Ms Babu had said to him that it was costing her nothing before the divorce was granted.

[27] The defendant did not suggest in his evidence that Ms Babu was employed in the capacity of a Priority Banker at the Standard Bank as was alleged by him in his statement to the Law Society. The uncontradicted evidence was that Ms Babu was, until February 2005, an assistant to one of the Relationship Managers at Priority Banking and that she had a mere administrative and "*back office*" function. Ms Coulentianos testified that it is the function of the Relationship Managers to liase with clients of the bank and, in so doing, may recommend names of conveyancing attorneys on the Standard Bank panel to clients when requested. It was, according to Ms Coulentianos, highly unlikely that Ms Babu would have been in a position to allocate work to attorneys, unless she interviewed clients, and it would have been the exception for her to liaise with clients on the referral of conveyancing attorneys. Ms Babu also denied that her function included the recommendation of attorneys to clients of the bank and she particularly denied that she ever referred the plaintiff to any client of the bank. Ms Babu also testified that the Relationship Manager would liaise with clients of the bank, and that she, as the assistant, would also on the odd occasion liase with clients. The defendant testified that he had personal



knowledge of Ms Babu's post and that it was possible for Ms Babu to give work to attorneys. It was suggested by him that work could be referred to a conveyancing attorney in the process of capturing the relevant data. Such was, however, never put to the plaintiff, to Ms Babu or to Ms Coulentianos. The evidence of Ms Coulentianos was further that the Portfolio does not deal with litigation. The defendant conceded that he knows what litigation means and he testified that his reference to litigation should rather have been a reference to legal work. The evidence accordingly establishes that there was only a negligible opportunity for Ms Babu to have directed legal work to the plaintiff.

[28] The defendant testified under cross-examination that he had not said in his complaint to the Law Society that Standard Bank would co-operate with an investigation into the alleged arrangement between Ms Babu and the plaintiff, but that Standard Bank would co-operate if there was any allegation of misconduct. This evidence is, in my view, refuted by the wording of the defendant's statement that "*Standard Bank has confirmed their willingness to co-operate with the committee in this regard*" as well as the context in which such statement was made. The defendant further conceded that Standard Bank had not confirmed its willingness to co-operate with the Law Society.

[29] In maintenance proceedings that were ancillary to the divorce proceedings between Ms Babu and the defendant, Ms Babu was *inter alia* required to furnish to the defendant the tax invoices rendered to her by the plaintiff. Such request

was refused on the grounds of irrelevancy. Similar requests were made to the plaintiff in the present proceedings, and initially also refused. The present proceedings were, however, instituted after the plaintiff had made the statements to the Law Society and the plaintiff's refusal to comply with any request for documents for purposes of these proceedings could accordingly not have been a ground on which the plaintiff could possibly have relied in making the statements to the Law Society. The undisputed evidence of the plaintiff, insofar as the divorce proceedings are concerned, was that the defendant's legal representatives were given the plaintiff's ledger sheet wherein all the debits and credits relating to Ms Babu's indebtedness to the plaintiff had been recorded, the defendant had a list of all payments which Ms Babu had made to the plaintiff, and at the maintenance enquiry which preceded the defendant's complaint to the Law Society, Ms Babu's counsel informed the court that Ms Babu was liable to pay legal fees. The defendant's aforesaid statements to the Law Society were also not qualified on the basis that they were made because of the plaintiff's withholding of information. By the time of this trial the plaintiff had furnished the defendant's legal representatives with the relevant tax invoice, but the defendant nevertheless persisted that his statements to the Law Society are true.

[30] It was put to the plaintiff that the defendant could recall seeing a wall clock on which the plaintiff's firm name was engraved, that the defendant had seen a Waterman pen with the details of the plaintiff's firm engraved thereon, and that Ms Babu showed the defendant two Nationwide air tickets from the plaintiff that

the defendant had told her to give back. Such was denied by the plaintiff. It was put to Ms Babu that she had received gifts from the plaintiff, which she had shown to the defendant. It was further put to her that she had shown the defendant the clock and the Waterman pen and that she had told the defendant that she had received two Nationwide air tickets from the plaintiff. Such allegations were denied by Ms Babu and she also denied that the plaintiff had ever given her gifts or incentives. In giving evidence, the defendant alluded to these gifts and testified that a white wall clock with the plaintiff's firm name engraved thereon was in their family home, that Ms Babu had a black and gold Waterman fountain pen with the plaintiff's firm name engraved thereon, and that other gifts included two vouchers for airtickets to Durban, which the defendant had told Ms Babu to give back, because she would be dismissed, and items of stationery that were also personalized with the plaintiff's firm name. The allegations of the wall clock having been in their family home and of stationery were never put to Ms Babu or to the plaintiff. The defendant's evidence of air tickets also seems to contradict the statements of Nationwide air tickets which were put to the plaintiff and to Ms Babu under cross-examination. The defendant's initial statement to the Law Society was not that the defendant had seen the items, but it was stated by the defendant that *"[w]hilst we were still married I recall my ex-wife often referring to the gifts and incentives she received from this firm of attorneys."*

[31] The evidence of the defendant and of his father on the issue of malice, was, in my view, accordingly not credible and is contradictory and improbable in material respects. I consider the evidence of the plaintiff, Ms Babu and Ms Coulentianos to be credible and probable on the material aspects and there appears to me to be no reason why I should reject their evidence on the issue under consideration. I accordingly approach this question on the basis that the evidence given by the plaintiff, Ms Babu and Ms Coulentianos was correct.

[32] I am of the view that malice on the part of the defendant was established on a balance of probabilities. If it is true that Ms Babu was dealt with by the plaintiff as a client in the ordinary course, then it is improbable that she would have misrepresented the position to the defendant or to his father and it is further improbable that the defendant would have made the statements to the Law Society on the basis of her alleged communications or the alleged suspicion created thereby. The necessary inference to be drawn is that the defendant's statements to the Law Society were untrue to his knowledge, or that the defendant did not believe them to be true, and that they were made with the object of injuring the plaintiff in his reputation. The statements were, in my view, actuated by malice since there is no indication to the contrary, save for the evidence of the defendant and that of his father, which evidence I cannot accept on this issue.

[33] The defence of qualified privilege must accordingly also fail. I now turn to the determination of damages.

[34] Adv Jacobs submitted that the publication of the defamatory statements concerned both the plaintiff and his firm and it was for the plaintiff to establish which damages were suffered by him and which by his firm. Adv Selvan SC, correctly in my view, countered such contention by submitting that no amount is claimed by way of special damages and it would accordingly be irrelevant that the professional company as well as the plaintiff were defamed.

[35] The plaintiff holds the degrees B.Comm. LL.B. and an FICB diploma and has been a practising attorney for the past 38 years. He acted for many years as chairman of the Springs Local Attorneys Association. He was a member of the committee which was concerned with the implementation of Small Claims Courts in South Africa and he was appointed as the first Commissioner of the Smalls Claims Courts in South Africa at a ceremony attended by various dignitaries. The plaintiff testified that his practice as an attorney has always been very successful and he attributed his success to his skill, exceptional hard work and the very good name and reputation which he has built up over the years. The plaintiff has never been subjected to disciplinary proceedings and he only had two minor complaints against him in the past which were summarily dismissed by the Law Society.

[36] The defamation is undoubtedly serious. It ascribes improper, unprofessional, unethical and dishonest conduct to the plaintiff in his capacity as an attorney. In *Gelb v Hawkins* 1960 (3) SA 687(A.D.), Holmes A.J.A. said this at 693F – G: *“In addition to the factors which I have mentioned, in my view the Court a quo did not sufficiently take into account the consideration that it is a grave and ugly thing falsely to say of an attorney that he deliberately deceived the Court, and to that end was a party to the leading of perjured testimony. It is worse when it is said of an attorney who, according to the evidence, was trained in the strict observance of professional ethics, and for thirty years has jealously guarded his good name.”* [Also see: *South African Associated Newspapers Ltd. v. Yutar* 1969 (2) SA 442 (A.D) at 458C; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at 259F – 260 I].

[37] It is also common cause between the parties that the Law Society considers touting for conveyancing work, including collusion by attorneys with bank officials, in a very serious light and that such complaints receive immediate and serious attention. The plaintiff referred to two of his university friends that had been struck off the Roll of Attorneys for touting. The defendant’s counsel also put it to the plaintiff under cross-examination that touting is a very serious complaint and that, had the plaintiff indeed been touting, it would have been in the public interest to report such conduct to the Law Society, which the plaintiff confirmed.

[38] The defendant persisted with his allegations at the trial and he has demonstrated an unrepentant attitude towards the plaintiff.

[39] The publication of the defamatory statements was limited and made to a restricted class of persons, but it forms part of the permanent record of the professional body to which it was made.

[40] There is no evidence that that the plaintiff has been lowered in the esteem of colleagues, clients or others. The plaintiff testified that the allegations against him were very upsetting and caused him a lot of personal trauma and distress. He has been practicing for 38 years and he never had a black mark against his name. He had the sword of disciplinary proceedings over his head for a considerable time, and only after a delay of approximately eight months did the Law Society inform him by letter dated 1 October 2005 that no unprofessional conduct could be found on his part.

[41] It is also relevant to the assessment of an appropriate award that the complaint to the Law Society arose as a result of highly contested divorce proceedings where there has been acrimony not only between the litigants, but also between the parties to the present proceedings. The defamatory statements were included in the complaint. An award for damages in this instance should, in my view, be in keeping with the notion of not awarding large sums of damages

too readily. [See: *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 261 (SCA) at 260F - H].

[42] I consider an award of damages in the sum of R35 000.00 to be just and fair in all the circumstances.

[43] In the result the following order is made:

Judgment is granted against the defendant in favour of the plaintiff for:

1. Payment of the sum of R35 000.00; and
2. Costs of suit.

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**P.A. MEYER, A.J.**  
**ACTING JUDGE OF THE HIGH COURT**