IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 14156/2019

In the matter between:

FREDERICK BECKER Plaintiff

and

GYSBERT BRITS Defendant

Coram: Wille, J

Heard: 9th of March 2022

Delivered: 23rd of March 2022

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an unfortunate civil trial about an action for defamation. The plaintiff is a very successful farmer in this particular farming area.[1] The defendant is a 'pastor' who also resides in this area. The plaintiff has been a farmer in the area for over (20) years. He is also an *alumni* to the University of Stellenbosch. He graduated in 1992. The defendant is well known to him in that the defendant was the pastor to his family for at least (7) years.

[2] This case in the main, concerns two letters written by the defendant about the plaintiff. For the purposes of convenience these letters will be referred to as the 'university' letter and the 'divorce' letter, respectively. As far as the former is concerned, it is alleged that the defendant penned a letter in support of the plaintiff's son. This, for the latter's re-admission to the University of Stellenbosch. The plaintiff's son, at that stage,

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[1] '*Malmesbury'*

had failed his first year of study at the university and was seeking his 're-admission' so as to pursue further studies, albeit in a different direction.

[3] In short, the university letter recorded that one of the reasons[2] why the plaintiff's son was unable to advance and proceed successfully (with his studies), was, *inter alia*, because his father (the plaintiff), had during this time abused alcohol and that this abuse of alcohol made it impossible for the plaintiff's son to concentrate and focus on his studies. In short, it was advanced that the failure on the part of the plaintiff's son was the 'fault' of the plaintiff.

[4] The divorce letter was sent to the plaintiff's ex-wife's legal representatives and made similar accusations about the plaintiff's alleged abuse of alcohol. The plaintiff advances that there were a host of unnecessary statements in both these letters. Further, that these letters were defamatory and that he accordingly suffered damages in the amount of R500 000,00. At the outset, I must say that it is difficult to discern why these letters were necessary at all (and, particularly the detail as set out in these letters). In my view, unnecessary information was recorded in these letters.

[5] In the defendant's amended plea, he avers that the statements that he made were both the truth and were also made in the interests of the plaintiff's son.[3] Alternatively, that the statements amounted to fair comment. Moreover, it is alleged that the divorce letter was drafted in support of the plaintiff's wife to support her in her divorce proceedings and,

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[2] It subsequently transpired that there were in existence 'several other reasons' for this lack of achievement.
[3] I assume to the benefit of the defendant that he is alleging 'public benefit' as a defense to wrongfulness.

was in any event subject to some species of 'qualified' privilege. This too, seems to be a rather novel approach by the defendant.

[6] In addition, the publication of the letters is disputed. Moreover, a shield is raised that these statements were neither defamatory, nor wrongful and, were not made with the intention to defame the plaintiff.

THE CASE FOR THE PLAINTIFF

[7] The plaintiff called (4) witnesses in support of his case and he also testified in support of his own case. He was cross-examined *ad nauseum* by the defendant's counsel in connection with mostly, what I consider to be, irrelevant issues. The cross-examination of the plaintiff was at times banal and monotonous. Despite my guidance in this connection, there was simply no interest, on the part of the defendant, in being concise and to the point. By way of example, the plaintiff was 'interrogated' about the size of his 'ice-maker' located at his holiday home.

MR WELLMAN

[8] He is a manager of a grain producing business in this farming area. This business acts as a broker for the sellers and buyers of grain, for commission. Their company has numerous shareholders and the plaintiff is one of these shareholders. He has resided in the

area for at least the last (3) years. He has known the plaintiff for some time prior, as the plaintiff is part of a wheat study group, of which he is also a member.

[9] This study group meets quarterly and after the meeting the members would enjoy a 'braai'[4] and, a few alcoholic beverages. On occasion, he also went on a wheat farmers 'tour' in the company of the plaintiff. The plaintiff was the driver of the bus on this specific tour. He also frequented the plaintiff's home and this sometimes, uninvited. He never found the plaintiff drunk or inebriated.

[10] The plaintiff is a highly respected farmer in the area and is well liked by all his neighbours. It has never been brought to his attention (within this small community), that the plaintiff abuses or has an issue with alcohol. He has never seen the plaintiff drunk and was accordingly unable to meaningfully comment on the content of the two letters written by the defendant.

MR DU PLESSIS

[11] He is the plaintiff's current attorney of record and has been an attorney for over (33) years. He was instructed as the new lawyer for the plaintiff in the latter's divorce action, when the plaintiff's former attorney withdrew as his attorney of record.[5] Both the letters formed part and parcel of the discovered documents in the divorce action.[6] The defendant

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[4] A *'barbeque'*.

[5] Ms Wolpe was the previous attorney of record and was substituted by the current attorney of record.

[6] The plaintiff's ex-wife deposed to a formal discovery affidavit in this connection.

attended (at court), upon the divorce proceedings in support of the plaintiff's ex-wife. The defendant's presence at these divorce proceedings was, according to him, not required as a matter of law.

[12] He testified that for some unknown reason whilst the defendant was in attendance at these divorce proceedings (between the plaintiff and his ex-wife), the defendant often smirked and laughed during the course of these proceedings. It was common cause that the university letter was sent to the university and the divorce letter was sent to the attorneys representing the plaintiff's ex-wife.

MS WHITEHEAD

[13] She holds a master's degree in commerce and she is a registered psychologist. She was called as an expert in the divorce proceedings in connection with the discrete issue of the 'employability' of the plaintiff's ex-wife. Her report deals, *inter alia*, with some of the protracted tensions and the alleged emotional hurt encountered in the former matrimonial home.

[14] Notably, her report does not however mention any alcohol abuse by the plaintiff. The plaintiff's ex-wife did not mention to this expert any alcohol abuse by the plaintiff. Significantly, this report was compiled after the dispatch of the two letters by the defendant. These letters specifically mentioned the alleged abuse of alcohol by the plaintiff. The defendant stated that he had a 'church-pastor' relationship with the plaintiff,

but that he was also a friend to the plaintiff's family. Besides, the defendant also never mentioned the plaintiff's alleged abuse of alcohol to her.

MR BESTER

[15] He is a teacher by profession. He has lived in this farming area since 1992. He met the plaintiff more than a decade ago and they are friends. He knows the defendant, but they are not friends. His son and the plaintiff's son were in the same grade at primary school and accordingly their respective families became friends. They frequently visited each other and on one occasion, they went on a family holiday together.

[16] They as a family were very much involved in sport when their respective children were in primary school together. His son visited the plaintiff's farm on numerous occasions and his son never raised any complaints about the behaviour of the plaintiff. He never observed the plaintiff in an intoxicated state and he never observed the plaintiff behaving inappropriately in any form or manner.

[17] On one occasion, they went on a 'father and son' outing with the school to the West Coast. He attended with his son and the plaintiff attended with his son. The plaintiff's son thereafter told his son that they had enjoyed a very nice weekend together. Surprisingly, about (2) weeks thereafter, he heard from his wife, that the plaintiff's ex-wife, had stated that this weekend away was 'disastrous'.

[18] He was astonished by this accusation by the plaintiff's ex-wife. Sometime thereafter[7], the plaintiff's ex-wife approached him as she wanted to know the approximate cost involved in the sending of a child to boarding school for his secondary education. This, because at that stage she was mindful of seeking a divorce from the plaintiff.

[19] During the course of the following year, he held a birthday party at his home. The plaintiff arrived later with a friend as they were at a prior work function. The plaintiff's ex-wife arrived separately and the agreement was that she would give the plaintiff a lift home after the function.

[20] He escorted both the plaintiff and his ex-wife to her vehicle when they left, after the party. According to him, the plaintiff was not drunk when the plaintiff left this party. A few days later, he became aware of a rumour that the plaintiff had been the most inebriated person at this party. He was surprised at this allegation, as this was untrue.

[21] He also had occasion to attend the plaintiff's (50th) birthday party. The plaintiff was not drunk at this event. He denied that it was common knowledge that the plaintiff was a drunkard or abused alcohol. He further opined that if the plaintiff was a drunkard he would have, of necessity, borne some knowledge about this. He was a very strong and credible witness.

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[7] This occurred during 2012.

[22] The defendant's counsel sought to further cross-examine this witness with reference to certain video material. This was met with a valid objection. No foundation had been chartered for this video material to have been entered into the record of the proceedings and, this video material had not been the subject of any formal discovery in terms of the rules of court. In order to prevent any prejudice to the defendant on this score, I ruled that this witness may be re-called to be cross-examined on the limited issue of the video material. This, in the event that the video material was properly entered in the record as evidential material. This witness was never re-called and he was accordingly not requested to comment on this video material.

MR BECKER

[23] He is the plaintiff and he holds a degree in agriculture from the University of Stellenbosch. His grandfather acquired the farm[8],which he now owns and farms. He has been a farmer on this farm since 1992. He went to the local high school and is very well known in this area, particularly amongst the farming community. He was married on the 24th of August 1996. His wife left the farm and their matrimonial home on the 29th of October 2018. He was finally divorced from his wife on the 19th of February 2020.

[24] He met the defendant more than a decade ago and they became family friends and socialized on occasion. He testified that the university letter was very harmful to his reputation and dignity. This was so, *inter alia*, because his student number was clearly

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[8] The farm is called '*Uitkyk'*.

referenced on the re-admission application to which the university letter was attached. This is a procedure which is followed (in their protocols), by the university and accordingly the university letter was, as a result, very widely published to some of the university academia. He contends that this amounts to the 'wide publication' of the university letter.

[25] In his view, the divorce letter was part of the well-orchestrated stratagem by his ex-wife, with the help (and acquiescence), of the defendant, devised solely in an attempt to extract from him an advantageous financial settlement in the heavily opposed pending divorce proceedings. As for the allegation about his son moving out of his home was concerned, his son told him the following, namely; that this was because he wanted to sleep late in the mornings; that he did not want to get up so early; that he wanted to be refreshed for his examinations and that he did not want to travel into school from the farm every morning. This, had nothing to do with any so-called 'fear' of his father.[9]

[26] Further, according to him, it dawned upon his son[10], that he would not be successful and would not be able to pass his first year of university study and his son then conveniently decided to blame his father for this failure. As far as the letters were concerned, he afforded to the defendant ample opportunity to apologize and explain his actions prior to the summons being issued out for damages.

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[9] Why the defendant had to mention this in the university letter, escapes me.
[10] During the June of 2016.

[27] The defendant refused or failed to avail himself of this opportunity and only 'responded' to the plaintiff's demands after service of the summons upon the defendant. In his view, the letters written by the defendant could have very easily been formulated in a very generic way, with non-specific terms. This, without the 'sting' which was defamatory of him.

[28] He also emphasized that the timing of the creation and dispatch of the divorce letter, left a lot to be desired. This coincided with the delivery of an application launched by his ex-wife for certain 'urgent' interim monetary matrimonial relief.[11] He vehemently denied that he verbally abused any of his children in many manner whatsoever. This was also never relayed to any of the experts commissioned on behalf of his ex-wife in the unfortunate divorce proceedings.

THE 'WHATSAPP' MESSAGES

[29] A plethora of 'WhatsApp' messages between the defendant and the plaintiff's ex-wife were obtained via the mechanism and process of a subpoena. No less than (87) messages were exchanged between the defendant and the plaintiff's ex-wife, during 2017. Significantly, in these WhatsApp messages, no reference was ever made to any abuse of alcohol by the plaintiff or any untoward behaviour, by the plaintiff, towards his children.

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[11] This in accordance with rule 43 of the Uniform Rules of Court.

[30] Further, during the course of 2018, no less than (120) WhatsApp messages were exchanged between the defendant and the plaintiff's ex-wife. Similarly, no reference was made to any alcohol abuse on the part of the plaintiff in these communications.

[31] According to him, it was self-evident that the defendant played an 'active role' in his divorce proceedings. Again, during the course of 2019, a further (187) WhatsApp messages were exchanged between the defendant and the plaintiff's ex-wife. This, again with no mention of the plaintiff's alleged alcohol abuse. Further, according to the plaintiff, the plaintiff's ex-wife admitted that it was the defendant who encouraged (and/or advised), her to get divorced from the plaintiff.

THE LETTERS

[32] It is necessary for the purposes of this judgment to quote extensively from the content of both of these letters. I will quote from the university letter first and thereafter, from the divorce letter.

THE 'UNIVERSITY' LETTER

'...Hiermee verklaar ek, Bertie Brits, dat ek vir Fred Backer sedert 2010 ken en dat hy sedert 2015 'n lidmaat van my gemeente is. Ek ken Fred en sy ouers baie goed en was baie keer by hulle aan huis en het eerstehandse ondervinding aangaande die negatiewe huislike omstandighede wat sy skoolloopbaan, matriekjaar, asook sy studies aan Stettenbosch Universiteit bemoeilik het…'

'...Die omstandighede by die huist a.g,v. onder andere drankmisbruik deur Derick Becker (Fred se pa), was van so 'n aard dat Fred nie vir sy matriekeksamen by die huis kon leer nie maar moes by vriende in Malmesbury studeer. Hierdie stresvolle omstandighede het ook 'n groot invloed gedurende sy eerste studiejaar aan die Universiteit van Stellenbosch op hom gehad…'

THE 'DIVORCE' LETTER

'...According to all of the members of the family, except for Mr Becker himself, the abuse of alcohol played a big role in the deterioration of the marriage…'

'...I have seen Mr. Becker heavily intoxicated on several occasions. On several occasions I saw Mr Becker staggering heavily and once saw him fell [sic]over on account of heavy drinking. I have also found that he cannot account for things he would say during those times if [sic] intoxication, which understandably, makes it difficult for him to see the problem as well as the effect on his family of what he says and does during intoxication. Mr Becker does not see the alcohol as the problem but declared that the excessive drinking [sic] he was simply self-medication [sic] and that something else is actually the problem that leads to the drinking…'

'...Mr Becker is a good man that has done a lot of good but according to me has a problem with alcohol abuse…'

THE 'RE-ADMISSION' APPLICATION

[33] Similarly, certain aspects of the re-admission application of necessity need to be referenced, as this remains relevant evidential material to be considered. Most significantly, in his re-admission application, the plaintiff's son emphasised that according

to him, he had selected and opted for an incorrect line of study to pursue for his first year of study.[12] Further, he highlighted that he was the victim of an unfortunate assault and his mobile phone was stolen by this 'mugger'. In addition he was involved in a motor vehicle accident during this time. Further, he experienced certain very private issues relating to his sexual orientation. The alleged alcohol consumption by the plaintiff was listed as the last and final difficult circumstance that he allegedly endured during the course of his first year of study.

THE RELEVANT 'EVIDENTIAL' MATERIAL

[34] I was somewhat obliged (due to the peculiar circumstances of this matter and the manner in which the defendant elected to mount his challenges to the action), to issue out an interim interlocutory ruling concerning the introduction of certain video material. In summary, I permitted to the defendant the right to cross-examine the plaintiff (albeit, to a limited extent), in connection with the alleged video material. This despite a proper procedural foundation for the introduction thereof, being present.

[35] The existence or otherwise of this video material never formed the subject of any discrete discovery procedure by the defendant (other than in terms of a procedural notice by the defendant, to which a notice of objection was filed). Nevertheless, for the sake of preventing a further waste of valuable court time, I permitted the introduction of (1) of the 'video clips' for the purposes of the limited cross-examination of the plaintiff.

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[12] He referenced an 'interview process' that he attended with a professional in this connection.

[36] In my view, this video material did not assist the defendant in any significant manner. I say this because of the specific shields piloted by the defendant against wrongfulness.

[37] The 'video clip' was taken at the home of the plaintiff during the social occasion of a barbeque. This was a private occasion and in any event does not exhibit that the plaintiff abused alcohol. Besides, it is pleaded that it is 'publicly well-known' that the plaintiff abuses alcohol. How this shield, in these circumstances, would render the allegations in the letters 'lawful' is extremely difficult to discern.

[38] I have alluded to the plethora of WhatsApp messages between the defendant and the plaintiff's ex-wife. However, it is apposite that I refer to the content of a particular exchange on the 31st of July 2019, in the following terms;

'...Ek se weer; die 2 briewe sou anders bewoord gewees het sou ek die oplieding in die hofaspekte van berading en gevolge gehad het. Ek dink nie ek het 'n kans in 'n hof sou ek 'n naamskendingsdagvaarding kry nie al drink Derick -soos ons almal weet. Dit gaan minimum R100 000 kos en, sou ek veloor ook sy hofkoste plus 'n boete. Jy weet ek het 2 maal vir jou gevra dat ek nie die briewe in die hof wil he nie. Jy het na die eerste saak op die versoek dat die eerste brief nie in die hof moet wees nie my verseker dat dit nie gebruik sal word nie omdat daar baie ander bewyse is, van so aard dat julle nie eens hoef te gebruik nie. Ek het die briewe baie gelees en besef dat my manier van skryf hoogs onprofessioneel was en die bewoording uit plek. Ek het onnodige inligting gedeel wat hulle nie verlang om besluite te neem nie. Hierdie bewoording was gerig volgens wat jy aan my gese hulle noodig het…'

THE CASE FOR THE DEFENDANT

MRS WIEHAN

[39] She was married to the plaintiff. They were married in 1996 and divorced about (24) years later. They met at University. She is an occupational therapist. They have (3) sons born of their marriage. According to her, the plaintiff commenced drinking more alcohol after being married for about (4) years. He mostly consumed alcohol at his home[13] and, also at social and family gatherings.

[40] She testified that the plaintiff consumed at least (1) beer and (1) bottle of wine every night. This, in the privacy of his home on the farm. Co-incidentally this was somewhat different to the content of her affidavit filed in support of her rule 43 application. This latter affidavit regrettably catered for much exaggeration on her part.

[41] Another aspect of her evidence focused on the video material. The video material was taken about (4) years ago, while they were married, at their matrimonial home and, while they were entertaining mutual friends. This, at the occasion of a barbeque. It was meant to exhibit what the plaintiff's 'state' was when he had consumed, in her view, too much alcohol.[14]

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[13] What the plaintiff did in the privacy of his home is, of course, of no concern of and to, the defendant.
[14] This exercise failed as this 'video material' did not show that her husband was inebriated.

[42] She testified that she on numerous occasions requested her husband to consume less alcohol. She considered herself to be a religious person, but was vague as to whether her father also consumed too much alcohol. According to her, she had tolerated her husband's unnecessary use of alcohol for the past (10) years.

[43] She maintained that the letters written by the defendant (about the plaintiff), were the truth and in the public interest. She gave an account of several occasions, mostly historical (going back many years), of when the plaintiff consumed too much alcohol (in her view). Reference was also made to the plethora of WhatsApp messages between her and the defendant for about (3) years prior to her divorce. She testified about the application procedure to the university for her son's re-admission. The documentation was mostly created by her son with the help of a family friend.

[44] The university letter was created by the defendant at the request of her son. The divorce letter was created by the defendant, at her specific request. She was requested to do this by her lawyer. According to her lawyer, this letter would not be utilized in any manner in the litigation against the plaintiff.[15] I must say, that I find this very difficult to discern. This does not make sense from a litigation perspective or strategy.

[45] She conceded that the plaintiff was a very successful farmer and art collector. He is a jovial, happy, socially acceptable, and a very popular person. She gratuitously added that

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[15] According to her it was 'just to have'.

her ex-husband was ‘vulgar’. The plaintiff was and is a wonderful person, but she just wanted him to consume less alcohol.

[46] She was unable to explain or give any reason why the divorce letter was prepared on the day before the hearing of the opposed rule 43 application. It was specifically pointed out to her (during cross-examination), that the issues before the court in this latter opposed rule 43 application, related solely to issues of monetary maintenance. Put in another way, the letter was not germane to the live issues at stake.

[47] Not only could she not explain why the divorce letter was necessary, but she could also not explain why the letters were subsequently discovered by her, for use in the divorce action. Curiously, she testified that her son granted some type of ‘permission’ for these letters to be formally discovered. Importantly, she conceded the plaintiff was not an alcoholic, that he was in good physical health and held a very high valued insurance policy registered over his life.

[48] She was evasive in her evidence and mostly prone to exaggeration. She was also somewhat bold in her approach in that she advised the defendant to ignore the defamation action chartered against him. It was suggested to her that the reason that her son failed his first year of study, was largely due to the fact that he initially selected the incorrect study line of choice. Strangely, she denied this, despite the letter from a counsellor and her son’s own reasons as set out in his re-admission application. Further, it was suggested to her that there were indeed many reasons and factors that contributed towards this lack of

achievement by her son. This, also because he failed his academic year, in the immediate year following. She was unable to explain this despite the objective evidence stacked up against her on this score.

MR BRITZ

[49] He is the defendant. His wife and the plaintiff's ex-wife were friends. As a result, the plaintiff asked the defendant (some time ago), to preside over an event from a religious perspective. The plaintiff and the defendant enjoyed a good relationship. The defendant testified that the plaintiff was and is a good person, but in his view, the plaintiff consumed too much alcohol.

[50] He attempted to 'convert' the plaintiff from a ‘religious’ perspective. He testified to the fact that on one single occasion, in the privacy of his home, the plaintiff stumbled and fell down in the presence of his own son, due to the fact that the plaintiff had consumed too much alcohol. To his credit, the plaintiff called the next day to apologize.

[51] He gave evidence about a somewhat similar incident at a church function, where, according to him, the plaintiff had consumed too much alcohol and, as a result, was unable to open the latch (clip) to the defendant's pedestrian gate. Further, according to him, the plaintiff required assistance to get into his wife’s motor vehicle. These occasions, *inter alia*, occurred a long time ago.[16]

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[16] This, in 2015 and in 2017.

[52] The defendant (unprompted), opined that he did, as a rule, not judge people. Curiously, this is exactly what he did in 'writing' by way of his letters. He testified that he attempted to assist the plaintiff, as a friend and not in any official capacity. However, according to the defendant, he did an investigation, wrote a report and then gave the entire 'Becker' family advice. Strangely, according to him, this did not amount to 'counselling' at all.

[53] A 'non-counselling' meeting occurred after this investigation.[17] The plaintiff eventually left this meeting as he had in any event formed the view that his marriage was at an end.[18] He also referenced a discussion which he had with the plaintiff while on his thresher harvester.[19] According to him, he attempted to persuade the plaintiff to consume less alcohol. This, again from a religious perspective. By contrast, the plaintiff's view was that his ex-wife would incessantly raise issues in connection with 'any' alcohol consumption by him, irrespective of how much alcohol he consumed.

[54] During this conversation, the plaintiff opined that his ex-wife was alienating his children from him and that she tended to be obsessive about their children. Regrettably, the plaintiff viewed his wife's approaches towards his alcohol consumption, always to be in the form of an 'ultimatum' to him.

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[17] This, on the 15th of November 2018. In the divorce letter the defendant refers to 'counselling' on his part.
[18] He had by this stage been served with his divorce summons.
[19] This occurred during 2017.

[55] He was requested to explain the plethora of WhatsApp messages that were exchanged foregoing the plaintiff's ex-wife's vacation of the matrimonial home and their subsequent divorce. Further, he was asked about a number of boxes (containing certain of the plaintiff's ex-wife's items), that had already been stored at his home. This, prior to the plaintiff's ex-wife's vacation of the matrimonial home. The defendant's responses in this connection were not convincing and, I remained unpersuaded by the reasons given by him.

MR OKKIE BECKER

[56] He is the plaintiff's second eldest son and is now a major. The defendant is well known to him. He testified that his father consumes (1) beer when he returns home from work in the evenings and thereafter consumes wine with his evening dinner. His father is a very social person and enjoys entertaining his friends. On some of these occasions, his father does consume too much alcohol. His father entertains his friends mostly over the weekends, but also midweek.

[57] On occasion, after consuming too much alcohol his father would fall asleep on the couch in the living room and, he was then obliged put his father to bed. Significantly, he testified that in his view what his father was doing was 'wrong' by consuming alcohol. The amount of alcohol consumed by his father was not the 'real' issue. This testimony by him was unsolicited.

MR FREDERICK BECKER

[58] He is the eldest son of the plaintiff. He testified about his final school exams. During this time and, for a period, he stayed at the residence of a family friend. This, because he struggled to study at his home because it was to 'noisy' for him. He suffers from several learning challenges. This evidence was irrelevant in the context of his university studies. This also, because he vacated his home on the farm during the year preceding his university studies.

[59] According to him, his father does consume a lot of alcohol, but not to the extent that his father 'falls over' as a result. He mentioned a social wedding function at which his father was also afforded the honour of making the introduction speeches at the wedding. After his father had delivered his speech, his father did consume a lot of alcohol. He was unable to specifically recall the other isolated incidents referred to by the other defence witnesses.

[60] He agreed that his university re-admission application was personal and private. He requested the defendant for the university letter. He conceded it was 'convenient' to blame his father for the failure of his first academic year at university .[20] Indeed, there were several other factors and reasons that contributed to the failure of this academic year.

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[20] During 2019.

CONSIDERATION

[61] The plaintiff was interrogated at length (for a number of days even), about his consumption of alcohol. Much of this cross-examination was totally irrelevant and at times, in my view, may have amounted to an infringement of the plaintiff's rights to human dignity. I say this, because it seemed to me that the defendant had cultivated a strategy focused on a 'character assassination' of the plaintiff. This, rather than a considered legal challenge to the defamation action.

[62] This unfortunate strategy that was adopted by the defendant, will no doubt make it near impossible for the '*Becker-Family-Unit'* (albeit, already considerably damaged by the divorce), to once again ever function as a family unit in any meaningful way.

[63] I suggested (on many occasions) to the defendant's counsel that he abstain from his chosen line of questioning. Regrettably, he nevertheless saw it fit to progress with this line of cross-examination and at times *ad nauseum*. By way of elaboration, he asked the plaintiff to recall and describe what he had to drink at a lunch event that occurred more than a decade ago.

[64] Another aspect that was explored was connected with the alleged specific quantities of alcohol that the plaintiff historically purchased for use on his farm. The plaintiff was a good witness. He conceded that indeed, on some occasions he did consume a lot of alcohol and, that he had on one occasion driven a motor vehicle whilst he was over the

legal alcohol limit. This, however not with his children in his motor vehicle. He was interrogated about his alleged behaviour at a 'Valentine's Day' function and about other school functions that also occurred more than a decade ago.

[65] One of the themes explored by the defendant was in connection with the plaintiff's alleged suicide tendencies. Again, he conceded this and expounded that living with his ex-wife had on occasion pushed him towards having some of these tendencies. Again, this line of questioning was, in my view, inappropriate, irrelevant and unnecessary. In summary, the plaintiff's entire life was put under a proverbial microscope. The defendant had nothing to gain by the adoption of this strategy.

[66] The defendant conceded a 'narrow' publication of the two subject letters. Most importantly, the defendant never meaningfully engaged with the topic that the content of both of these letters, was wrongful. This, despite the amended plea filed by the defendant. The shields raised by the defendant were that the statements made in the letters were the truth and were to the public benefit.

[67] The references in the letters to the plaintiff and the words used are *per se* defamatory of the plaintiff. I say this also because it is necessary to view the letters in their correct factual context. Regard must be had to the plethora of WhatsApp messages between the defendant and the plaintiff's ex-wife. Further, it is hard to discern why it was necessary to include much of the detail (which was included), in both of the letters.

[68] It is so that the word 'abuse'- *standing alone* – lends itself to a number of definitions. However, in this peculiar context, none of the definitions favour the defendant. Once and if, it is exhibited that the publication of the defamatory matter has taken place, then in that event, it is presumed that this was done with the requisite *animus iniuriandi.*[21]

[69] *Animus* in turn, goes to and is inextricably linked to the quantum of damages to be assessed (if awarded). I also need to examine the 'timing' of the divorce letter and the specific unnecessary content in the divorce letter. These are all factors that 'weigh in' when assessing *animus*.

[70] The divorce letter was written a very short time prior to the hearing of the opposed interim application solely for 'monetary' relief. It was written, so it is averred, solely for the records of the attorney and counsel representing the plaintiff's ex-wife. It was thereafter formally discovered by the plaintiff's ex-wife by means of a discovery affidavit (under oath). These versions are somewhat mutually destructive of and to each other.

[71] Turning now, for a moment, to the university letter. In my view, there was simply no need for the specific defamatory detail given by the defendant (in this letter) for the purpose required for the re-admission application. I say this because this specific and unnecessary detail served no purpose. The detail given did not, *per se*, promote the case

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[21] Hereinafter referred to merely as *'animus'*.

for the plaintiff's son. Put in another way, the same result could have been achieved with a much more 'watered-down' and 'generic' non-specific letter.

[72] No doubt, the defendant wanted to cause harm to the plaintiff and this with an ulterior motive. In summary, generally what the defendant intended to convey was; that the plaintiff was an abuser of alcohol; that the plaintiff's son could not even study at his own home because of the plaintiff's conduct; that the plaintiff's ex-wife and children were obliged to escape their matrimonial home and that the plaintiff, at times, acted in an uncontrollable manner.

[73] In my view, it is so that the defendant conspired with the plaintiff's ex-wife to attempt to settle some score with the plaintiff. Tragically, the plaintiff's children were also hauled into this totally unnecessary skirmish and feud. This was done under the guise of support for their mother. While this may have seemed to have been a desirable stratagem (by the defendant), it did not make it an acceptable method of resisting the claims against him.

[74] The defendant elected not to apologize and showed no remorse. The defendant steadfastly advanced that his letters were fully justified and, in fact warranted. Further, the defendant attempted to flavour his defence with some kind of religious rationalization. By way of elaboration, in his heads of argument, the defendant advanced, *inter alia*, that:

'*…alcohol is the devil that is known to destroy homes and lives…'*

[75] The defendant takes the position that a requirement for his re-admission application was to supply the detail provided by him. I disagree. By way of amplification there was no need to include in the university letter any reference to the alleged difficulties encountered by the plaintiff's son during the preparation for his final school examinations, in the preceding year.

[76] In another throw of the dice, the defendant avers that he harboured no *animus* as he was requested to 'create' both of the subject letters and this was not done out of his own volition. I disagree. This, may in turn be a factor that 'weighs in' when dealing with the issue of the quantum of damages to be awarded (if any).

[77] The position is also taken by the defendant that objectively viewed the content of the university letter may very well be defamatory. However, it was not defamatory of the plaintiff. Again, this reasoning is hard to discern. The defendant also says that what was stated in the university letter was the truth and was in the public benefit, alternatively, amounted to fair comment. Again, this reasoning, based on these facts, is hard to discern.

[78] Turning now to the divorce letter, it is submitted that the content of the letter is not defamatory and, in any event, is protected by some species of qualified privilege. This against the backdrop that the letter was not marked confidential (or private) and was formally discovered by way of a discovery affidavit.

[79] It is trite law that a duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of a trial, that his or her claim or defence, should succeed. By way of illustration, a three-legged approach was adopted in *Pillay*[22], to the effect that the first rule is that the party who claims something from another has the duty to satisfy the court that he or she is entitled to the relief sought.

[80] Further, where the party against whom the claim is made sets up a special defence, for that special defence to be upheld, the defendant must satisfy the court that he or she is entitled to succeed on it. It should be stated from the outset that the plaintiff claims that the letters were written with the deliberate intention to defame him and to injure his reputation. Further, that certain of the statements in the letters were, *per se,* defamatory and accordingly damaged the good name and reputation of the plaintiff.

[81] Defamation laws are generally aimed at protecting a person's right to an unimpaired reputation and good name. Reputation is the reflection which the individual has in the eyes of society. In *Masetlha*[23], the following was stated generally in connection with the career and reputation of an individual, namely:

'*…People live not by bread alone; indeed, in the case of career functionaries, reputation and bread are often inseparable…'*

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[22] *Pillay v Krishna* 1946 AD 946 at 951-2

[23] *Masetlha v President of South Africa and Another* 2008(1) SA 566 (CC).

[82] Reputation and dignity are discrete concepts. Respect for reputation and dignity of others is a requirement of our law with unfortunate consequences for defaulters. Thus, damages arising from defamation, fall to be awarded to an injured party thereto.

[83] The defendant conceded that he knows that the plaintiff is a 'good' person. This, in turn, fortifies the good reputation that the plaintiff has which is deserving of protection. In the plaintiff's view, the defendant created the letters out of pure malice and in support of his ex-wife. This theme by the plaintiff finds some corroboration upon careful dissection of some of the material in the plethora of WhatsApp communications between the defendant and the plaintiff's ex-wife.

[84] The plaintiff further contended that the allegations made by the defendant were further exacerbated by the way the defendant elected to conduct his defense to the trial. Reference was made to an external defamation case of a famous cricket player abroad.[24] In this matter it was held that the way in which the trial was conducted (on behalf of the defendant) was conducted as such, because of the specific instructions of the defendant. Further, it was held that the sustained and aggressive assertion of the 'plea justification' at the trial, increased the damages recoverable by a factor of about (20) percent. Whilst I remain generally persuaded by this reasoning, I am not persuaded that this is part of our law.

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[24] *Cairns v Modi* [2012] EWHC 756 (QB).

[85] As a general proposition the test for defamation is whether, in the eyes of a reasonable person with ordinary intelligence, the words used so impaired a person's good name, reputation or esteem in the community.[25] Reasonable readers take into consideration, not only what the words used expressly state, but also the implication of the words used.

[86] Notwithstanding the content of the letters, the defendant appears to be adamant that the allegations made were, the truth and in the public interest, fair comment and/or that some species of privilege was attached to the divorce letter. In my view, the words used by the defendant in the letters were harmful to the good name and reputation of the plaintiff and, amounted to a violation of the plaintiff's dignity. Thus, the statements in the letters were defamatory by their nature.

[87] The difficulty that presents the defendant is that he gave very little thought (if any), to the possible harm that his letters would cause to the plaintiff. His evidence to the effect that he relied to some extent, on what was told to him and, to what was asked of him, provides him with no armor in this connection.

[88] Besides, I am unable to discern, on the facts of this case, how the defendant demonstrated in evidence that, the allegations in the letters, were made in the public interest. In addition, public benefit rests on the advising of the public of something which

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[25] *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) 451.

will be in their interest to be told about. If this is known, mere repetition thereof provides no shelter.[26]

[89] Further, no effective buffer was put up in connection with the defense of fair comment.[27] Qualified privilege does not apply as alluded to earlier in this judgment.[28] Simply put, the evidence reveals no valid defense in law to the plaintiff's claims. The defenses raised to unlawfulness are of no moment.

[90] The words about the plaintiff's alleged alcohol abuse are clearly defamatory. Publication of a defamatory statement is *prima facie* wrongful and the onus rests on the defendant to dispel the *prima facie* case.[29] The defendant denies that the subject words used were defamatory. They however 'speak for themselves' and accordingly, this contention is also rejected. Put in another way, the defendant was unable to tender any alternative non-defamatory meaning to the subject words used in his letters.

[91] The plaintiff testified in a forthright manner and, clearly articulated the injuries sustained to his reputation and dignity. I find that the plaintiff achieved the legal threshold that he sustained damages arising from the defamation (caused to his good reputation and dignity) and should therefore be entitled to an award in damages. The issue remaining is the quantum of the damages to be awarded.

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[26] *Mohamed v Kassim* 1973 (2) SA 1 (RA).
[27] *Marais v Richard* 1981 (1) SA 1157 (A).
[28] *May v Udwin* 1981 (1) SA 1 (A).
[29] *Neethling v Du Preez* 1994 (1) SA 708 (A) at 769 -780.

[92] The plaintiff contends that damages in the amount of R500 000,00 would be an appropriate award. No mechanical arithmetical calculation is advanced and nor is there any obligation on the plaintiff that such a calculation be advanced. It is well established that a comparison of cases is helpful in quantifying the damages in a defamation claim. Useful as this exercise may be, a comparison of the cases cannot be used as the primary tool to determine the award.

[93] In *Dikoko*[30], the difficulty that courts face when quantifying damages in defamation cases was rationalized in the following terms, namely:

'…*There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured, is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur…'*

and

'…There is something conceptually incongruous in attempting to establish a proportionate relationship between the vindication of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower one. It is the judicial finding in favour of the integrity of the

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[30] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para [109] - [110].

complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank…'

[94] In *Muller*[31], the court emphasized some of the important factors to be considered to determine the *quantum* in defamation actions in the following manner, namely:

'…the character and status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done'

[95] The plaintiff, is a successful and respected farmer in the area. He grew up amidst this small farming community. His good reputation and dignity are deserving of protection. The defamatory statements made by the defendant were totally unnecessary and were extremely unkind. Thereafter, the defendant attempted to justify his defamatory statements. This, in the way that he orchestrated his defenses during the trial action.

[96] In addition, the defendant did not apologize at all. Notwithstanding the service of the summons on the defendant, he failed to take any steps to apologize for the defamatory content in the letters. It is very difficult to discern why the defendant did not initiate an apology towards the plaintiff to mitigate his damages (if any). Further, no apology was tendered during the court proceedings. The defendant insisted on presenting the evidence of the plaintiff's ex-wife and (2) of his children.

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[31] *Muller v SA Associated Newspapers Ltd and Others* 1972 (2) SA 589 (C) at 595.

[97] I hold the view that an aggravating factor, to be considered, is that the defamatory statements were made by a person who was a 'pastor' in the local community and the 'pastor' to the plaintiff and his family. Undoubtedly, the defendant holds some degree of *gravitas* in the local community and, he should be clothed in the recognition of respect for human dignity.

[98] It is so that awards generally tend to be conservative in defamation cases. This, *inter alia*, because defamation actions should not be embarked upon for the purpose of generating income. It must also be borne in mind that a 'grander' award does not necessarily restore one's injury to reputation and dignity. However, I hold the view that the defamation in this matter, for the reasons set out, warrants the grant of a not insubstantial award in damages. This notwithstanding that I accept the defendant's contention that there was only a 'narrow' publication of the subject letters.

COSTS

[99] As a general rule costs are awarded to a successful party. The discrete issue before me in this connection is whether a punitive costs award (on the scale of attorney and client), is warranted in the circumstances of these peculiar facts. In my view, the defendant did indeed subject his opponent to unnecessary expense. This, in the way that the action was defended.

[100] In my award of damages, I did not consider the way in which the action was defended (in computing the quantum thereof), despite the fact I was vigorously requested to do so by reference to the external authority in the *Cairns*[32] matter.

[101] To the contrary, I embrace the more conservative view that the analysis referred to in *Cairns,* rather goes to the issue of costs. I say this because one of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The last thing that our already congested court rolls require is a further congestion by an unwarranted proliferation of litigation.[33]

[102] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[34] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties, as well as any other circumstance, which may have a bearing on the issue of costs and, then make such order as to costs as would be fair in the discretion of the court.

[103] No hard and fast rules have been set for conformity by the court unless there are special circumstances.[35] Costs follow the event in that the successful party should be

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[32] *Cairns v Modi* [2012] EWHC 756 (QB).
[33] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) at [16].
[34] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F - G
[35] *Fripp v Gibbon & Co* 1913 AD 354 at 364.

awarded costs.[36] In all the circumstances of the matter, I hold the view that a punitive costs order in this matter is warranted because of the manner in which the defendants elected to defend the action. I have alluded to some of these reasons for this conclusion in my judgment. It is precisely for these reasons that the costs awarded in this matter will be on the scale as between attorney and client. I was also asked to deal with the reserved costs in connection with the opposed amendment application. In this connection, I adopt a forthright and practical approach as I am entitled to do in these circumstances.

IN PASSING AND 'OBITER'

[104] The defendant also raised the defence of 'knowledge' of unlawfulness. This, in connection with *animus.* Fortunately, this action does not fall to be determined on an examination of the validity or otherwise of the issue of the 'knowledge' of unlawfulness in connection with actions for defamation. I say this because this defence (if it indeed still finds application in our law), has been euthanized by the actual words that appear in the letters (viewed in their appropriate context). This, with the content of some of the significant WhatsApp messages

[105] I hold the view that 'knowledge' of unlawfulness no longer finds application in our law in connection with actions for defamation. I agree with the view expressed in the matter of *Le Roux.*[37] This latter view is also endorsed by Professor Fagan.[38] The penchant remarks in *Le Roux* are apposite, namely:

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[36] *Union Government v Gass* 1959 4 SA 401 (A) at 413.
[37] *Le Roux v Dey* 2010 (4) SA 210 (A) 219 - 25

'…The notion that animus iniuriandi in the context of defamation required 'coloured intent' was rejected as a Pandectist import which created more difficulties than it solved…'

ORDER

[106] In the result, I make the following order in favour of the plaintiff, against the defendant:

1. That the plaintiff's claim for damages is granted and the plaintiff is awarded the amount of R350 000,00.

2. That the plaintiff is awarded interest thereon at the permissible legal rate (as promulgated from time to time), calculated from the date of judgment to the date of final payment (both days inclusive).

3. That the defendant shall be liable for the plaintiff's costs of suit, on the scale as between attorney and client (in accordance with the tariff of court fees payable in respect of the various Provincial and Local Divisions of the High Court), as taxed or agreed.

4. That each party shall bear their own respective costs of and incidental to the opposed application to amend the defendant's plea.

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[38] Anton Fagan - *Undoing Delict* - Juta - 2018 page 165 - (The South African Law of delict under the Constitution).

E. D. WILLE
Judge of the High Court
Cape Town