REPORTABLE

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

CASE NO: 6831/2023

In the matter between:

HARTLAND LIFESTYLE ESTATE (PTY) LTD	**First Applicant**
DALMAR KONSTRUKSIE (PTY) LTD	**Second Applicant**
versus	
APC MARKETING (PTY) LTD	**First Respondent**
HENDRIK HORN	**Second Respondent**

HEARING DATE: 23 May 2023

JUDGMENT DELIVERED ELECTRONICALLY ON 13 JUNE 2023

ADHIKARI, AJ

[1] The first applicant ('Hartland') is a property development company engaged in the development and construction of a housing development known as the Hartland Lifestyle Estate Development ('the development') in Mosselbay.

[2] The development is envisaged to consist of two separate sectional title schemes, a retirement village, approximately 1 000 individual residential erven, commercial space and a private school. To date, 88 sectional title units and 60 individual dwelling houses have been constructed. Approximately 50 houses are currently under construction.

[3] The second applicant ('Dalmar') is a construction company and also a shareholder of Hartland. Dalmar is engaged in the construction of the homes that are being built as part of the development.

[4] Dalmar, during or about August 2022, appointed the first respondent ('Dakman') as a contractor to erect the roofs of the dwellings in Phases 3 and 4 of the development. The second respondent ('Mr Horn') is the self-described *'controlling mind'* of Dakman.

[5] It is common cause that during February 2023, Dalmar terminated its contract with Dakman due to a dispute regarding, *inter alia*, the standard of Dakman's workmanship and its productivity.

[6] It is common cause that on 10 April 2023 the respondents caused what they describe as a public interest notice/corrective media statement[1] to be published on a WhatsApp group consisting of some 300 persons in the Herolds Bay area. In addition, it is common cause that since 14 April 2023 the respondents have caused statements in relation to the development to be published on Facebook.

[7] The content of the various statements made by the respondents is not disputed nor is it disputed that the respondents caused the statements to be published in the public domain.

[8] The respondents published the following statements:

> [8.1.1] *'An ever increasing number of deviations from the National Building Regulations were committed by Dalmar for financial gain'*;
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> [8.1.2] *'On numerous occasions Dakman requested that an engineer attend to life threatening problems in regard to the roofs and to provide solutions thereto because there were no municipal inspectors, NHBRC inspectors or*

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[1] The Afrikaans phrase used in the founding papers is *'publieke belang kennisgewing / regstellende media verklaring'*.

roof inspectors visible or available during the whole of the period from August 2022 to January 2023';

[8.1.3] *'Nothing was done about this situation, and upon Dakman's insistence that the situation with regard to the designs of the roofs be corrected, Dalmar/Hartland commenced to blackmail Dakman into proceeding with the erection of the roofs'*;

[8.1.4] *'Dakman considers public safety as its first priority above financial gain as money can be replaced, lives not'*;

[8.1.5] '*As a result of inspections carried out in early December 2022 on Dakman's instance, the ITCSA confirmed that what occurred on the site was not in accordance with the national building regulations and issued certain necessary remedial recommendations which to date has not been fully carried out'*;

[8.1.6] '*The departures from the National Building Regulations with regard to roofs as well as other aspects such as retaining walls, electricity installations, pacing, ventilation holes, gas installations, etc have also been confirmed by* [MITEK SA; ITC SA; NHBRC; Engineering Council of South Africa; and Mossel Bay municipal building inspectors]';

[8.2] *'The Municipality has been defrauded by the engineer and Dalmar who submitted "structural completion certificates" without performing inspections'*;

[8.3] *' … one of the home's occupants moved in with an occupation certificate with no roof inspection, electrical C.O.C[2] but the dwelling's DB box[3] wiring was not even connected; gas installations C.O.C gas pipes had not even been connected'*;

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[2] Certificate of Compliace.

[3] Distribution board box.

[8.4] *'One looks at all the respects in which Dakman's concerns were confirmed by the engineers etc., and one wonders whether this also occurs at other sites (Herolds Bay Country Estate and Eden Lifestyle)'*;

[8.5] *'There is already police investigation and department of labour investigation of the electrician who has been found electrocuted on site. What makes it worse is that Dalmar still takes chances with life threatening situations. This is reckless';*

[8.6] *'It is incredibly difficult to convey to the public the extent to which the Dalmar product cuts corners for financial gain, nobody can believe it';*

[8.7] *'Even some of the agents are being bullied – if they should complain about the quality or time it takes to build, they are fired';*

[8.8] *'who stands up for the pensioners which are done in at Hartland? – not the agents … not the building inspections … not the NHBRC';*

[8.8.1] 'If Dalmar Construction / Hartland Estate acted honourably towards their clients we would not have been in this position.'

[9] The respondents have also published a number of photographs depicting uncompleted building work at the development in a manner so as to imply that the images depict completed work.

[10] The respondents admit to publishing the aforementioned statements but contend that the statements are true and in the public interest. The respondents further admit that they have no intention of stopping the publications.

[11] The applicants approached the Court on an urgent basis for the following relief:

[11.1] An order interdicting and restraining the respondents from making or repeating any allegations concerning the applicants by way of the publication

of any statement in any form, including but not limited to posts on social media platforms; and

[11.2] An order directing the respondents to remove the offending publications; and

[11.3] An order directing the respondents to publish an appropriate retraction and apology to the applicants for defaming them and injuring their dignity and reputation on the platforms where the offending statements have been published.

Condonation:

[12] The application was initially set down for hearing in the urgent court on 12 May 2023.

[13] The notice of motion required the respondents to deliver their answering affidavits by 5 May 2023. It appears from the record that the respondents' erstwhile attorney reached an agreement with the applicants' attorneys in respect of the further conduct of the matter in terms of which the respondents would deliver their answering affidavits by 12 May 2023, the applicants would deliver their replying affidavits by 17 May 2023 and the hearing would be postponed to 19 May 2023.

[14] However, on 8 May 2023 the respondents' erstwhile attorneys withdrew as their attorneys of record. On 9 May 2023 the applicants' attorneys addressed correspondence to Mr Horn, advising him that they had been contacted by Mr Eduard Taljaard ('Mr Taljaardt') of Jet Law Incorporated ('Jet Law') on 8 May 2023, who had indicated that he may come on record for the respondents and that they had advised Mr Taljaardt of the agreed timeframes for the further conduct of the matter. The applicants' attorneys advised Mr Horn that they had not received any further communication from Jet Law and drew his attention to the fact that the agreed timeframes needed to be complied with and that a further postponement of the matter would not be countenanced, given the urgency of the matter.

[15] On 11 May 2023 Jet Law addressed correspondence to the applicants' attorneys in which they, *inter alia*, indicated that they would be requesting a further extension of time within which to deliver the respondents' answering affidavits. The applicants' attorneys responded on 12 May 2023 and indicated that if the respondents sought a further postponement, a substantive postponement application would have to be brought.

[16] The matter came before the urgent duty Judge on 12 May 2023, and was postponed by agreement to 19 May 2023. The order postponing the application does not make reference to the parties' agreement in respect of the further conduct of the matter.

[17] The respondents did not deliver their answering affidavits on 12 May 2023. Ultimately the respondents delivered their answering affidavit on 16 May 2023. In the answering affidavit the respondents explain that the delay was due largely to their inability to provide financial instructions to their erstwhile attorneys.

[18] It appears from the replying affidavit that in light of the late delivery of the answering affidavit, the parties agreed to the hearing being postponed to 23 May 2023 to afford the applicants an opportunity to deliver replying affidavits. Thus when the matter came before the urgent duty Judge on 19 May 2023, it was again postponed by agreement to 23 May 2023.

[19] The respondents seek condonation for the late delivery of the answering affidavit. The application for condonation is not opposed, however, the respondents contend that the applicants' alleged refusal to agree to a postponement and their insistence that the respondents deliver a substantive postponement application was unreasonable and purportedly resulted in *'unnecessary costs and time being expended'*. The respondents further contend that the conduct of the applicants in this regard warrants a punitive costs order.

[20] It is by now trite that it is incumbent on a party that has not complied with a Rule of Court to apply for condonation as soon as possible and that condonation is not a mere formality, nor is to be had for the asking. Where condonation is sought, a

full and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand the reasons and to assess the responsibility.

[21] Further, as the Appellate Division (as it then was) confirmed in *RepublikeinsePublikasies (Edms) Bpk v AfrikaansePersPublikasies (Edms) Bpk*[4] an applicant in urgent proceedings is entitled to frame its own rules, which, if reasonably formulated, a respondent will ignore at its peril. Thus, where the timeframes set by an applicant in urgent proceedings are not adhered to, it is appropriate for a respondent to seek condonation for the failure to adhere to the rules framed by the applicant.

[22] The respondents have fully set out the explanation for the delay in the delivery of the answering affidavit, their explanation covers the entire period of the delay and is reasonable.[5] Further, by the time the matter came before me, a full set of papers had been delivered and both parties had prepared comprehensive heads of argument. Consequently, the late delivery of the answering affidavit did not prejudice the applicants or the Court. I am thus satisfied that it is the interests of justice for condonation to be granted.

[23] The applicants' stance in regard to the requested postponements was not unreasonable. The applicants approached the Court on an urgent basis and were thus entitled and indeed required to set a reasonable timeframe for the delivery of further affidavits. The respondents sought an indulgence from the applicants to permit the late delivery of the answering affidavit. The applicants agreed to an initial postponement but when a second postponement was postulated by the respondents, the applicants quite reasonably took the stance that a postponement application would have to be brought. Ultimately, the applicants, after receiving the answering affidavit and having had sight of the respondents' explanation for the delay in delivery of the answering affidavits, agreed to a further postponement.

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[4] *RepublikeinsePublikasies (Edms) Bpk v AfrikaansePersPublikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H - 782G.

[5] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para [22].

[24] The respondents accept in their heads of argument that they were obliged to bring a substantive condonation application and further acknowledge that ordinarily the party seeking condonation ought to tender the costs occasioned by such a request. Yet, the respondents persist in seeking an attorney client costs order against the applicants.

[25] The applicants' conduct in this matter cannot be faulted. Further, the respondents were ultimately not required to bring a substantive postponement application. Consequently, it is unclear on what basis the respondents contend that the applicants' conduct resulted in *'unnecessary costs and time being expended'.* Indeed, the respondents' insistence on seeking punitive costs against the applicants is patently unreasonable in the circumstances of this matter. There is no cogent basis for any costs order to be made against the applicants in respect of the condonation application.

Points *in limine:*

[26] The respondents raise two points *in limine*, urgency and the applicants' ostensible failure to make out a case for relief in the founding affidavit. The third so-styled preliminary point raised by the respondents in the answering affidavit, is the applicants' purported failure to meet the requirements for interdictory relief. The latter is not a preliminary point but goes to the merits of the application.

[27] I turn now to deal with the two preliminary points properly so-called, before dealing with the merits of the application.

Urgency

[28] The respondents contend that no case has been made out in the founding affidavit for urgency. The respondents contend that the word '*urgent*' is only used once in the founding affidavit and that no case is made out as to why the applicants cannot obtain substantial redress in the ordinary course. In the respondents' heads of argument, the submission is made that the applicants were aware of the *'alleged defamation as early as 8 February 2023 but elected to delay action until April 2023'*.

[29] This contention is not entirely accurate.

[30] The applicants state in the founding affidavit that Dakman, being the second respondent, had started defaming the applicants in February 2023. However, the respondents' argument loses sight of the fact that the applicants also allege in the founding affidavit that the respondents (that is both Dakman and Mr Horn) commenced publishing the offending statements on social media platforms on 10 April 2023. The founding affidavit contains no detail as to the nature or content of the alleged defamatory statements made by Dakman in February 2023 and critically, the applicants rely on the respondents' publication in April 2023 of allegedly defamatory statements on social media platforms for the relief sought.

[31] The applicants' allegation in the founding affidavit that the respondents commenced publishing the offending statements on social media platforms on 10 April 2023 is admit by the respondents. The applicants further allege in the founding affidavit that the respondents persisted with the publication of further offending statements from 14 April 2023. This too is admitted by the respondents. Finally, the applicants allege in the founding affidavit that respondents *'have no intention of stopping the publications'* as the respondents again published the offending statements on 26 April 2023 and 27 April 2023. This is also admitted by the respondents who further state in terms in the answering affidavit *'[f]or so long as the Applicants are going to remain ignorant as to the unsafe roofs, action must be taken and the public must be made aware of this.'*

[32] This application was issued on 28 April 2023. Given that the applicants place reliance for the relief sought on the respondents' conduct in April 2023 (not February 2023), and the last publication by the respondents of an offending statement took place on 27 April 2023, there can be no suggestion that the applicants failed to act with sufficient expedition to warrant a hearing on an urgent basis. Consequently, I am persuaded that the application is urgent.

Failure to make out a case in the founding affidavit

[33] In the answering affidavit the respondents contend that the applicants have failed to make out a *prima facie* case for defamation in the founding affidavit, *'as no nexus is drawn between the publications and any negative effect on the [a]pplicants'*.

[34] This contention is not correct. The applicants state in the founding affidavit that the publications have resulted in numerous concerns being raised with Hartland property consultants by existing occupiers and prospective purchasers regarding the content of the respondents' publications. In addition, two Hartland property consultants deposed to confirmatory affidavits in which they confirm that such concerns have been raised with them. The Hartland property consultants further state in the confirmatory affidavits that the respondents' publications have negatively impacted on how existing and prospective clients view the development, and that this in turn will negatively affect the business reputation, sales and success of the development as well as the value of existing properties.

[35] In the result, the contention that a case was not made out in the founding papers is misconceived.

[36] The respondents further contend that the publications are true and in the public interest. Although this issue is not a preliminary point, properly so-called, and in fact goes to the merits of the application, one aspect of the respondents' argument in this regard bears mention at this juncture.

[37] In argument, Mr Taljaardt for the respondents, submitted that the applicants had failed to make out a case in the founding affidavit that the publications are not true or in the public interest. This submission is misplaced in that it is trite that the respondents bear the onus of establishing the defence of truth for the public benefit. I return to this issue below when dealing with the merits of the application. However, it is apposite to mention that founding papers include an affidavit from the consulting engineer for the development who states that he was on site doing inspections at least three to times a week, and an affidavit from the appointed electrical contractor for the development who states that the electrical compliance certificates issued in

respect of the development were compliant with all the relevant regulations and procedures. Consequently, there is no merit in Mr Taljaart's submission in this regard.

Entitlement to final relief:

[38] The applicants contend that the respondents' publications are defamatory and that as a consequence they are entitled to the interdictory relief sought.

[39] It is trite that the three requirements for a final interdict are, a clear right; a threat to breach such right in the case of a prohibitory interdict, and no other remedy.

[40] To determine whether an applicant has a clear right is a matter of substantive law.[6] Whether that right is clear is a matter of evidence. In order therefore to establish a clear right, the applicants have to prove on a balance of probability, facts which in terms of substantive law establish the right relied on.[7]

[41] An interdict is not a remedy for a past invasion of rights but is concerned with present or future infringements and is appropriate only when future injury is feared.[8] Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.

[42] The remedy of an interdict is termed discretionary[9] in the sense that a Court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. The discretion of the Court is bound up with the

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6 *Minister of Law & Order*, *Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 3 SA 89 (BG) at 97–98.

7 LAWSA Vol. 11, 2nd Ed. 397.

8 *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at para [20].

9 *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T); *Burger v Rautenbach* 1980 (4) SA 650 (C) and *Grundling v Beyers* 1967 (2) SA 131 (W).

question whether the rights of the party complaining can be protected by an alternative and ordinary remedy.[10]

[43] The existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives similar protection to an interdict against the injury that is occurring or is apprehended.[11] The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.

[44] Once an applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.[12]

Legal principles applicable to defamation:

[45] At common law, the elements of the delict of defamation are the unlawful or wrongful publication, *animo iniuriandi* of a defamatory statement concerning the plaintiff.[13] The falsity of a defamatory statement is not an element of the delict.[14]

[46] The test to determine whether a statement is *per se* defamatory involves a two-stage inquiry. The first is to establish the natural or ordinary meaning of the statement and the second is whether that meaning is defamatory.[15]

[47] In establishing the ordinary meaning of a statement, the Court is not concerned with the meaning that the maker of the statement intended to convey, or the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff.[16] The

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10 *Transvaal Property Investment Co* at 351.

11 *Hotz v UCT* 2017 (2) SA 485 (SCA) at para [36].

12 *Hotz* at para [20].

13 *Khumalo* at para [18].

14 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1218E-F.

15 *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as amici curiae*) 2011 (3) SA 274 (CC) at para [89].

16 *Le Roux* at para [91].

test is an objective one, where the Court is called upon to determine what meaning the reasonable reader of ordinary intelligence would attribute to the statement.[17] In applying this test it is accepted that the reasonable reader would understand the statement in its context and that they would have regard to what is expressly stated as well to what is implied.[18]

[48] As to the second stage, it is well settled that a statement is defamatory if it has the effect of harming the dignity of a complainant. Put differently, a statement is defamatory if it is likely to injure the good esteem in which a complainant is held by the reasonable or average person to whom it had been published.[19]

[49] Once a party establishes that a defamatory statement concerning him/herself has been published, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must therefore raise and establish a defence which rebuts either unlawfulness or intention.[20] The onus on the defendant to rebut one or the other presumption is a full onus, that must be discharged on a preponderance of probabilities.[21] A bare denial by the defendant will therefore not be enough - facts must be pleaded and proved that will be sufficient to establish the defence.[22]

[50] The respondents in this matter contend that the publications were true and in the public benefit. Thus, the respondents must plead and prove that the defamatory statements complained of are, on a balance of probabilities, true and also that it is to the public benefit or in the public interest that the statements be published.[23]

[51] I turn now to the question of whether defamation has been established.

Has defamation been established?

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17 *Le Roux* at para [91].
18 *Le Roux* at para [91].
19 *Le Roux* at para [91].
20 *Khumalo* at para [18]; *Joubert and Others v Venter* 1985 (1) SA 654 (A) at 696A-B.
21 *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para [14].
22 *Hardaker* at para [14]; *Bogoshi* at 1202H.
23 *Haroldt v Wills* 2013 (2) SA 530 (GSJ) at para [27].

[52] The ordinary meaning of the statements complained of convey or imply that the applicants deliberately subverted the law by deviating from the National Building Regulations and Building Standards Act 103 of 1977 ('the NBRBS Act') and the approved roof designs for financial gain, resulting in a potentially life threatening situation at the development; are dishonest; have failed to carry out necessary remedial actions; have defrauded the Municipality; have exploited their elderly clients; have sold homes in the development that have not been duly inspected and are potentially dangerous to occupants; failed to ensure that proper safety standards were adhered to during the construction process; and that the death of an electrician on site resulted from the applicants' flouting of building standards and is the subject of a police investigation.

[53] I am satisfied that the statements complained of are likely to injure the good esteem in which the applicants are held by the reasonable or average person to whom the statements have been published, and that the statements are accordingly defamatory.

The respondents' defence:

[54] The respondents have admitted to publishing the defamatory statements but contend that the statements are both true and that it is in the public interest that the statements were published. This is the only defence that the respondents have raised in response to the merits of the applicants' claim.

[55] It is trite that a factual foundation for a defence of truth and in the public interest must be laid in evidence. The mere say-so of a deponent who alleges a defence of justification should not be accepted at face value. The facts on which it is based must be analysed to determine its weight and whether or not it is established that the statement was true and in the public interest.

[56] The respondents rely solely on the evidence of Mr Horn, who deposed to the answering affidavit, in support of their defence.

[57] Mr Horn states in the answering affidavit that he is not an expert but that that he has *'considerate (sic) understanding as to the requirements of erecting safe roofing for residential and commercial properties and the building regulations and legislation paralleled (sic) with the erecting of such roofing'*. The respondents have not filed any expert affidavits supporting Mr Horn's contentions.

[58] The respondents did not adduce any evidence substantiating their claim that the applicants had defrauded the Municipality. Indeed, it appears from the record that the Municipality disputes the respondents' claims in this regard.

[59] On the other hand, the applicants filed affidavits from:

[59.1] The consulting engineer for the development, Mr Hannes Lourens ('Mr Lourens') confirming that the necessary inspections were conducted on a regular basis;

[59.2] The development's electrical contractor, Mr Emile van Rensburg ('Mr van Rensburg') confirming that proper the electrical compliance certificates were issued; and

[59.3] An expert affidavit of the engineer responsible for inspecting and certifying the design and erection of the roof trusses and braces of the buildings erected as part of Phases 3 and 4 of the development, Mr Roland Adams ('Mr Adams') in which he confirms that all the roof trusses and braces are sound; the relevant remedial work to deal with minor deviations from the approved roof designs has been completed; the roofs have been built according to the approved designs; the roofs have been constructed safely and have been certified as such.

[60] Mr Horn's response to the affidavit of Mr Lourens is the bald, unsubstantiated statement that the confirmatory affidavit '*is a blatant lie*.' Given that Mr Horn has no professional engineering qualification he is not in a position to refute Mr Lourens' allegations. There is no response in the answering affidavit to the affidavit of Mr van Rensburg and consequently his averments stand uncontroverted.

[61] Mr Taljaard submitted in argument that the expert affidavit of Mr Adams ought to disregarded in that it amounts to new matter raised in reply. This submission does not withstand scrutiny.

[62] First, all that the applicants were required to prove at the outset, was the publication of defamatory matter concerning themselves. Once this was established, the defamatory statements are presumed to have been published with intent to injure with knowledge of wrongfulness and that the publication was unlawful. The onus then shifted to the respondents who, in order to escape liability, were required to plead and prove facts sufficient to establish the defence of truth for the public benefit. The respondents thus bore the full onus of proving that the statements were true, and that the publication thereof was in the public interest. The applicants were not required to establish the falsity of the defamatory statements.[24] Consequently, Mr Taljaardt's submission is contrary to the settled legal position.

[63] Second, the applicants in any event alleged in the founding affidavit that the defamatory statements are untrue and filed the affidavits Mr Lourens and Mr van Rensburg in support of their contentions. The expert affidavit of Mr Adams filed with the replying affidavit merely confirms the position set out in the founding affidavit and rebuts the bald allegations made by Mr Horn in the answering affidavit. There is thus no merit in the submission that a new case was made out in reply.

[64] Third, the respondents did not seek leave in terms of Rule 6(5)(e) to file a further affidavit to rebut the expert evidence of Mr Adams, nor did they seek to strike out the expert affidavit.[25] Mr Adams' evidence is thus unchallenged and falls to be accepted.

[65] As regards the matter of the police investigation into the death of an electrician at the development, the applicants state in the founding affidavit that the fatal incident occurred on 14 December 2021 on a property purchased by a private

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[24] *Khumalo* at para [44]

[25] *Pretoria Portland Cement Company Ltd. and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para [63]; *Tantoush v Refugee Appeal Board,* 2008 (1) SA 232 (T) at para [51] and [71]; *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TSC) at 550F-G.

company that was the developer and builder of a particular dwelling on that company's own property. Critically, the applicants state that they were not the client or builder in respect of the property where the incident took place and further that the investigation was conducted by the Department of Labour on 23 March 2023 and that the applicants were only requested to assist in the investigation as they were not liable for the incident. The respondents failed to put up any evidence to refute these contentions.

[66] In addition, there is correspondence on record from the roof truss supplier sent to Mr Horn on 12 December 2022, several months before the defamatory statements were published, in which the supplier confirms that it has reviewed the detail of the roofing supplied to the development and has confirmed that the design complies with the manufacturer's bracing requirements. The respondents put up no evidence to refute the content of the correspondence from the supplier.

[67] The correspondence from the supplier was put up in reply, in response to the allegations in the answering affidavit that the applicants had *'cut corners'* in respect of the roof trusses and braces and that the supplier had on 12 December 2022 confirmed Mr Horn's concerns regarding the roof trusses and braces. The correspondence from the supplier put up by the applicants in reply clearly demonstrates that the falsity of Mr Horn's averments in the answering affidavit in regard to the supplier's concerns. It is thus not surprising that the respondents failed to put up any documentation or other evidence supporting Mr Horn's allegations.

[68] Mr Taljaardt also submitted in argument that the respondents have raised *bona fide* disputes of fact which cannot not be determined on motion, and that the application falls to be dismissed on this basis. This submission does not accord with the settled authorities.

[69] The SCA in *Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others*[26] confirmed that that defamation claims, which include an order for final interdictory relief, can be brought on motion, however, a respondent

[26] *Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others* [2017] 2 All SA 347 (SCA) at para [36] – [38].

may ask for the matter to be referred to trial where a sustainable foundation has been laid by way of evidence that a defence such as truth and public interest is available to be pursued by the respondent.

[70] The SCA stated in *Herbal Zone:*

> '*It is not sufficient simply to state that at a trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefore.*'[27]

[71] The factual disputes that the respondents seek to rely on are bald, fictitious, and so clearly untenable that I am justified in rejecting the respondents' version on the papers.[28] Consequently, the respondents have failed to establish a factual foundation in the evidence to substantiate their claim that the publications are true.

[72] In summary, the factual propositions which form the foundation of the defamatory statements published by the respondents are that the applicants flouted the applicable construction safety standards and failed to adhere to the approved roof design, and in so doing caused the buildings in the development to be constructed in a dangerous and potentially life-threatening manner. Given that these factual propositions are the foundation for the respondents' statements, the failure to establish that these factual propositions are substantially true is fatal to the defence of truth and public benefit.

[73] Given the conclusion that I have reached above, it is not strictly necessary for me to consider whether it was in the public interest for the statements to published, however, for the sake of completeness the following bears mention.

[74] On 8 February 2023 Dalmar's attorneys addressed correspondence to Dakman demanding, *inter alia*, that Dakman undertake to desist from making further defamatory statements about Dalmar.

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27 *Herbal Zone* at para [38].

28 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D.

[75] Mr Horn, on behalf of Dakman responded on 10 February 2023 and stated that the following two options were open to Dalmar.

> [75.1] Option one according to Dakman was for Dalmar to persist with its complaints against Dakman, in which case the matter would be resolved in the media and in Court, and all the statements, photographs and evidence would then be placed on record and thus open to scrutiny by the public, the NHBRC, financial institutions and others for them to draw their own conclusions.[29]
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> [75.2] Option two according to Dakman was for Dalmar to give a written undertaking that it would comply with the guidelines of the NBRBS Act in respect of roofs and make payment of all of Dakman's outstanding invoices by 15h00 on 10 February 2023, without any retention.

[76] Mr Horn went on to state that if Dalmar elected to go with option two, he (Mr Horn) undertook to sign a *'non-disclosure'* contract which would have the effect of severing all relations between Dalmar and Dakman.

[77] It is clear that the email of 10 February 2023 contains an implied threat that if Dalmar sought to take legal action against Dakman as Dalmar had indicated in its letter of 8 February 2023, the respondents would continue to publish the defamatory statements about Dalmar and would use the court process and the media to further publicise the defamatory statements, and that unless Dalmar agreed to pay Dakman's outstanding invoices the respondents would continue publishing the defamatory statements.

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[29] The email of 10 February 2023 is written in Afrikaans and states as follows in relevant part:
'Daar is twee opsies beskikbaar:

1. *Dalmar skop vas en baklei in die Media of Hof waarin ek die reg om myself te verdedig het. In beide gevalle word al die skrywe, foto's en bewyse op rekord geplaas vry om besigtig te word deur die gemeenskap, NHBRC, Finansieele (sic) instellings, ens. om hul eie gevolgtrekkings te maak.*
2. *Teen 15:00 vandag ontvang ek 'n skriftelike onderneming vanaf U kliënt om die riglyne van die Nationale (sic) Bou Wet te volg m.b.t. die dakke. Al my uitstaande fakture betaal is teen 15:00 vandag – retensies inkluis want daar gaan verseker die retensie teen my gehou word op defektiewe ontwerpe + strukture waar die bouregulasies NIE deur U kliënt gevolg is nie.*

Indien Opsie 2 gekies word onderneem ek om 'n "Non-disclosure" kontrak by U kantoor te kom onderteken wat ons paaie dan sal laat skei.'

[78] It is further clear from the email that if Dakman's outstanding invoices were paid, Mr Horn would sign a non-disclosure agreement and the respondents would as a consequence cease publishing the untrue and defamatory statements about Dalmar.

[79] The applicants justifiably characterise the email of 10 February 2023 as an attempt to extort payment from Dalmar of Dakman's outstanding invoices in exchange for the respondents' silence as regards the alleged construction irregularities.

[80] The fact that Mr Horn was prepared to sign non-disclosure agreement if Dakman's outstanding invoices were paid flies in the face of the respondents' contention that the defamatory statements were published in the public interest. Quite clearly Mr Horn was prepared to forego drawing the public's attention to the allegations of unsafe construction in exchange for monetary compensation. This is indicative of the fact that the public interest was not the motivating factor for the publication of the defamatory statements.

[81] It is not in the public interest, and can be of no public benefit to publish untrue statements about the applicants, quite aside from the fact that the evidence demonstrates that the respondents were not acting in the public interest in publishing the defamatory statements.

Clear right

[82] Under the Constitution the right to dignity and the right to freedom of expression are both accorded protection. Both rights are central to our constitutional dispensation. The right to dignity under the Constitution protects both the individual's sense of self-worth as well as the individual reputation of each person, in other words, the public's estimation of the worth and value of a particular individual.[30] In this sense, the right to dignity is most commonly protected under the umbrella of

[30] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para [27].

the law of defamation, which lies at the intersection of the freedom of speech and the protection of reputation or good name.[31]

[83] However, the applicants in this matter are both corporate entities and thus do not have a constitutional right to dignity. Trading corporations historically have the right to sue for defamation under the *actio iniuriarum*. Trading corporations further have a right to reputation which is sourced in the common law.[32] Although a trading corporation has no feelings, dignity or sense of self-worth which can be harmed, it has an objective external interest, in its right to reputation and a good name.

[84] It follows therefore that trading corporations such as the applicants have a right to seek to protect their reputation and good name. Further a trading corporation is entitled to vindicate its reputation by seeking an interdict, a declaratory order, a retraction or an apology.[33] Consequently, I find that the applicants have established a clear right to the relief sought.

Breach of the right

[85] As I have already found, the applicants have proved, on a balance of probabilities, that the respondents caused defamatory statements about the applicants to be published in the public domain and the respondents have failed to prove that the defamatory statements were true or that the publication was in the public interest. Consequently, the defence of truth and public benefit does not avail the respondents.

[86] Further, the respondents state in terms that they intend to continue with their unlawful conduct. The applicants have thus established a breach of their reputational rights and that the breach is ongoing.

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31 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para [26].

32 *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC); *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (10) BCLR 1180 (CC).

33 *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* 2023 (2) SA 404 (CC) at para [110]. See also *Hix Networking Technologies v System Publishers (Pty) Ltd & another* 1997 (1) SA 391 (A).

No alternative remedy

[87] The SCA in *Hix Networking*[34] in dealing with the proper approach of a court to an application for an interdict to restrain the publication of defamatory matter approved the following passage from *Heilbron v Blignault*:[35]

> *'If an injury which would give rise to a claim in law is apprehended, then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear, and if there is a dispute as to whether what is about to be done is actionable, it cannot be decided on motion. The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence. Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, ie conduct for which there is no defence in law, is about to be committed.'*

[88] As alluded to earlier in the judgment the SCA in *Hix Networking* clarified that the mere *ipse dixit* of a respondent will not suffice to prevent a Court from granting an interdict.

[89] Further the SCA in *EFF and Others v Manuel*[36] confirmed the appropriateness of bringing a defamation claim by way of application for a final interdict, stating:

> *'There is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements proceeding by way of motion proceedings, on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they would obtain instant, though not necessarily complete, relief. There is precedent for this in the well-known case of Buthelezi v Poorter, where an interdict was granted urgently in relation to an egregious piece of*

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34 *Hix Networking* at para [37].
35 *Heilbron v Blignault* 1931 WLD 167 at 169.
36 *EFF and Others v Manuel* 2021 (3) SA 425 (SCA) at para [111].

character assassination. Notably, however, the question of damages was dealt with separately.'

[90] Consequently, there is nothing unusual or inappropriate in a defamation complainant electing to pursue relief other than damages. The respondents, however, contend that a claim for damages constitutes an effective alternative remedy available to the applicants.

[91] A claim for damages is a backward-looking remedy that will only address the past defamatory statements made by the respondents. In this case, however, the respondents have made it clear that they intend to persist in publishing their untrue defamatory statements about the applicants.

[92] The respondents failed to address how an action for damages would provide effective relief to the applicants in respect of the ongoing harm that the respondents have admitted that they intend to cause to the applicants by continuing to publish the false defamatory statements.

[93] The applicants have a clear right to their reputation and good name and the respondents have breached that right. The breach is ongoing as the defamatory material remains accessible online and through social media platforms. Having failed to discharge their onus to show that the defamatory statements were not unlawful, the respondents cannot justify the publication and continued publication of the defamatory material. The applicants have suffered and continue to suffer ongoing harm to their reputations. An award of damages would be backward looking, and thus would not be effective against the continued harm to the applicants' reputation.

[94] Further, an action for damages may be appropriate as an alternative remedy vindicating the right to reputation in cases where it is alleged that a publication is defamatory, but it has yet to be established that the defamation is unlawful, if it is later found to have been infringed, and an anticipatory ban on publication will seldom

be necessary for that purpose.[37] However this is not such a case. In this matter the defamatory publication has been proven to be unlawful.

[95] The final alternative remedy raised by the respondents to the interdictory relief sought is that the applicants ought to have approached Facebook, to ask for the defamatory posts to be removed. The respondents failed to adduce any evidence to demonstrate that the posts violate Facebook's policies or that Facebook would comply with a request to remove the defamatory posts. In any event it is not Facebook that has breached the applicants' reputational rights but the respondents, who are quite easily able to remove the defamatory posts.

[96] I am satisfied that the applicants have no effective alternative remedy available to them other than to be granted an interdict prohibiting the continuation or repetition of the defamatory statements.

The appropriate relief:

[97] In this matter the injury sought to be restrained is defamation, and in accordance with the settled authorities to which I have referred, the applicants are entitled to the intervention of the Court by way of an interdict given that it is clear that the respondents have no defence and the applicants have established all the requirements for the grant of a final interdict restraining the continued publication by the respondents of unlawful defamatory statements about the applicants.

[98] I am satisfied that by issuing an interdict that the respondents are to refrain from making or repeating any defamatory allegations concerning the applicants by way of publication and to remove the defamatory statements published, the Court will be providing an effective remedy to the applicants.

[99] Insofar as the apology and retraction sought by the applicants is concerned, the Constitutional Court has confirmed that an apology is an appropriate remedy in respect of an actionable injury to a person's dignity.[38]

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[37] *Midi Television (Pty) Ltd v Director of Public Prosecutions 2007 (5) SA S40 (SCA) at para [20].*

[38] *Le Roux* at para [150] and paras [202] - [203].

[100] However, the SCA in *EFF v Manuel*,[39] after considering the *dicta* in *Le Roux* and *The Citizen 1978 (Pty) Ltd and Others v McBride*[40] held as follows:

> *'Neither of these two judgments suggested that an order for publication of a retraction and apology on its own and not in conjunction with an award of damages would be an adequate remedy. The high court's order for publication of a retraction and apology in this case was made in conjunction with its order for damages. We have held that the latter should not have been made without hearing evidence. The applicants had suggested in their challenge to the quantum of damages, that an apology would be sufficient redress, but that suggestion can only be considered in conjunction with the consideration of whether an award of damages should be made and the quantum of that award. An apology has always weighed heavily in determining the quantum of damages in defamation cases as occurred in Le Roux v Dey. In our view, whether an order for an apology should be made is inextricably bound up with the question of damages. As the latter award falls to be set aside and referred to oral evidence, so too must the order to publish a retraction and apology be set aside and referred to the high court for determination after the hearing of oral evidence on damages.'*

[101] Given that in this matter the applicants have elected not to pursue an action for damages, in line with the judgment of the SCA in *EFF v Manuel* the retraction an apology sought by the applicants is not competent relief.

[102] I am, however, mindful of the fact that the respondents' false and defamatory statements have been widely publicised on various platforms including on social media and have caused concern among both current occupants of the development and prospective occupants. In the circumstances the applicants are entitled to appropriate just and equitable relief addressing this particular issue.

[103] While I am constrained not to order the retraction and apology sought by the applicants, I am of the view that it would be appropriate in the circumstances of this matter for the respondents to be directed to publish a copy of the order of this Court on all the same social media platforms and websites that the defamatory statements were published on, with the same prominence as those statements.

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[39] *EFF v Manuel* at para [128].

[40] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC).

Costs:

[104] As regards the issue of costs, the applicants have been substantially successful and there is no reason why costs ought not to follow the result.

[105] Insofar as the appropriate scale on which costs are to be awarded, it was submitted on behalf of the applicants that it would be appropriate for the respondents to pay the costs of the application on an attorney client scale.

[106] It is trite that the ordinary rule is that the successful party is awarded costs as between party and party. Further, an award of attorney and client costs is not lightly granted and requires an applicant to demonstrate the existence of special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. However, where the Court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.

[107] The respondents' conduct leading up to these proceedings and the manner in which they have conducted themselves in the litigation calls for censure.

[108] The respondents published false, defamatory statements about the applicants and in response to a request for an undertaking that they cease their unlawful conduct, sought to extort payment of outstanding invoices in exchange for their silence.

[109] They then sought to dress up their opprobrious conduct as an attempt to warn the public of a potentially life-threatening situation with scant regard to the reputational harm inflicted on the applicants.

[110] The respondents made serious allegations of malfeasance and fraud against the applicants and various professionals engaged by the applicants without any factual basis.

[111] They persisted with their unlawful, dishonest conduct and have stated in terms that they intend to continue their unlawful, dishonest conduct notwithstanding clear evidence in both the founding and replying papers refuting the truth of their allegations.

[112] The respondents made clearly false submissions to this Court and to make matters worse they seek a punitive costs order against the applicants, based on the fallacious contentions that the applicants refused to agree to a postponement and that the applicants conduct caused *'unnecessary costs and time being expended'*.

[113] In the circumstances I am satisfied the respondents' conduct warrants the award attorney client costs.

In the result I make the following order:

1. The respondents' statements relating to the manner in which dwellings in the Hartland Lifestyle Estate Development have been constructed by, or at the instance of the applicants are false and defamatory.

2. The publication of the statements referred to in paragraph 1 above was and continues to be unlawful.

3. The respondents are interdicted and restrained from making or repeating any statements relating to the manner in which dwellings in the Hartland Lifestyle Estate Development have been constructed by, or at the instance of the applicants, by way of publication of such statements in any form including but not limited to letters, internet posts, and posts on any social media platforms including Twitter, Facebook and WhatsApp.

4. The respondents are directed to take all steps necessary to remove and delete any and all statements published by them, relating to the manner in which dwellings in the Hartland Lifestyle Estate Development have been constructed by, or at the instance of the applicants, within 24 hours of the grant of this order.

5. The respondents are directed to publish a copy of this order on all social media platforms and websites that the defamatory statements referred to in paragraph 1 of this order were published, with the same prominence as those publications, within 24 hours of the grant of this order.

6. The respondents shall pay the applicants' costs of suit on an attorney and client scale jointly and severally the one paying the other to be absolved.

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ADHIKARI, AJ

APPEARANCES:

Applicant's Counsel:	**Adv. A Newton**
Respondent's Counsel:	**Mr J E Taljaard (Attorney)**