Final Heads/JH

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**
**(REPUBLIC OF SOUTH AFRICA)**

CASE NO :

In the matter between:

**WRAYPEX (PTY) LIMITED** Plaintiff

and

**ARTHUR BARNES** First Defendant
**EDWARD MERVYN JOHN GAYLORD** Second Defendant
**HELEN DUIGAN** Third Defendant
**LISA ESSBERGER** Fourth Defendant

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## PLAINTIFF'S HEADS OF ARGUMENT

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1. The Defendant Gaylard (hereinafter "Gaylard") admitted during the hearing[1] that he transmitted a letter to GDACE containing the second statement.[2]

2. Gaylard, and the other Defendants, testify to studied ignorance of the

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[1] but not in his pleadings

[2] See : Record, page 41, line 24 – page 25, line 13;
Record, page 71f, line 16 and further;
Record, page 71p, lines 7-13;
Plaintiff's Bundle, page 1630

legal requirements for townships and environmental approval.[3]

3. Imputing illegality to the Plaintiff's activities is defamatory *per se*.[4]

4. Gaylard did not attempt to prove, nor was it proven, that the activities on 25 July 2005 were illegal. In fact Gaylard is estopped from doing so as a result of issue estoppel having been unsuccessful in interdicting the activities based on their alleged illegality.

5. As a consequence, Gaylard has not established the defences of:

5.1 truth and public benefit;[5] or

5.2 *fair comment*.[6]

6. Gaylard's studied ignorance[7] amounts to recklessness in relation to the truth of the statement of illegality and the defence of qualified

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[3] See: Record, page 81, lines 1-20

[4] See: **Mavromatis v Douglas** 1971 (2) SA 520 (R) at 321 A-B;
**Suid-Afrikaanse Uitsaai Korporasie v O'Malley** 1977 (3) SA 394 (A)

[5] See: **Crawford v Albu** 1917 AD 102;
**Johnson v Rand Daily Mails** 1928 AD 190 at 197

[6] as the opinion of illegality was not based on facts proven to be true

[7] See: Record, page 81, line 1-20

privilege is therefore not available to him.[8]

7. It is submitted that the defence of reasonable publication as pleaded by Gaylard is not available to individuals but only to the press but that it is in any event for the same reasons unavailable to him.

8. The reliance on Section 31(4) of the National Environmental Management Act 170 of 1998 (hereinafter "NEMA") falters for the same reason as recklessness as to the truth of a statement can neither be reasonable nor *bona fide*.

9. In South Africa freedom of expression[9] is not a pre-eminent freedom ranking above all others. It is not even an unqualified right.[10] Moreover the Constitution proclaims three co-joined, reciprocal and covalent values to be foundational to the Republic, i.e. human dignity, equality and freedom.

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[8] See: **Monckten v British South Africa Co** 1920 AD 324 at 332

[9] See: Section 16 of Act 108 of 1996

[10] See: **S v Mamabolo (ETV and others intervening)** 2001 (3) SA 409 (CC) at paragraph 41

10. In balancing equal constitutional rights[11] invoked by different parties must attempt to reconcile them.

11. The right to freedom of speech does not, however, extend to an individual making false statements.[12]

12. The reliance by Gaylard, and the other Defendants, on Section 17 of the Constitution is artificial and to describe the letter as a petition referred to in the Section is simply wrong.

13. Gaylard's reliance on Sections 24 and 33 of the Constitution again suffers from the deficiency that a false statement made in protecting this right is not constitutionally protected.

14. To hold, as a matter of principle, that false statements are constitutionally protected would negate any competing right and elevate lying to being lawful.

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[11] Freedom of expression, Section 16;
Freedom of trade, occupation and profession, Section 22;
Dignity, Section 10;
Just administrative action, Section 33

[12] See: **Khumalo and Others v Holomisa** 2002 (5) SA 401 (CC), specifically the discussion of the common law and the conclusion at paragraph 45

15. Had Gaylard merely reported the fact of construction activities to the authorities and sought an investigation by the authorities, the Plaintiff could not have complained but he chose to recklessly ascribe illegality to the Plaintiff's actions.

16. Gaylard's denial of instructions to Deneys Reitz to send the letter of 26 July 2005 to the MEC and GDACE[13] falls to be rejected on the probabilities and circumstances where:

16.1 Deneys Reitz states that they act for <u>various members</u> of the conservancy; and

16.2 Deneys Reitz threatens that *"our clients"* shall bring an application; and

16.3 Gaylard is one of the three applicants when the threatened application is brought; and

16.4 information contained in the letter emanates from Gaylard;

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[13] See: Defendant's bundle, page 1628;
Record, page 711, line 21

and

16.5 Gaylard cannot explain the inclusion of the information and eventually says in cross-examination that he cannot remember how it got in the letter.

17. It is submitted that the third statements were proven as was receipt (as the letter is an annexure to the interdict application).

18. The arguments in relation to the second statements and the defences raised equally hold true for the third statements.

19. Gaylard admitted transmitting the fourth statement to all the recipients pleaded.[14]

20. It is submitted that the words are defamatory *per se*.[15]

21. The above quoted cases illustrate the meaning attached to the word

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[14] See: Record, page 64, line 18 to page 65, line 10

[15] See: **Wightman t/a J W Construction v Headfour (Pty) Limited and Another** 2007 (2) SA 128 (C) at 133 F-G;
**Fourie NO v Le Roux and Others** 2006 (1) SA 279 (T);
**Weiner NO v Broekhuizen** 2003 (4) SA 301 (SCA) at 309 H

*"stealth"* by our courts.

22. Gaylard failed to establish the truth of this statement as he could not gainsay, and it was shown that each individual objector received a similar letter to Exhibit "A".

23. Again Gaylard's recklessness is demonstrated when he quite incorrectly testifies that *"I did not read the terms of the law"*[16] but suggests that the public participation process forms part of the township application process.[17]

24. As a consequence, Gaylard has not established the defences of:

24.1 truth and public benefit; or

24.2 fair comment in relation to the fourth statement.

25. A defence of fair comment fails for similar reasons to those stated above.

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[16] See: Record, page 69, line 18

[17] See: Record, page 69

26. The various statutory defences fail for the same reasons as set out in relation to the second statement.

27. Gaylard was aware of the cost of delays[18] and agreed that any complaint, even a false one, would take up time of the officials and delay the process.[19]

28. The Defendant, Essberger (hereinafter "Essberger") authorised Denning to publish the statements which he did.[20]

29. Essberger similarly made the statements recklessly and in studied ignorance.[21]

30. Essberger testified that the Finfoot was at the bridge[22] which is not on Blair Athol.

31. She then in short succession contradicts herself and says:

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[18] See: Record, page 71o, line 20-21

[19] See: Record, page 71q, line 12-20

[20] See: Record, page 99, lines 6-7

[21] See: Record, page 108, line 21 to page 109, line 7;
Record, page 109, line 20-22

[22] See: Record, page 97, line 8

*"An African Finfoot was not seen and has not been seen since ...."*[23]

and in answer to the Court's question:

*"M'Lord I believe it has moved onto Letabo."*[24]

32. Essberger's evidence is unsafe and falls to be rejected as she is clearly prepared to lie in order to sustain her version.

33. It is submitted that the truth of the statements has not been established.

34. The statements are factual and not an opinion and the defence of fair comment is therefore not applicable.

35. Imputing illegality to the Plaintiff's activities is defamatory *per se*.[25]

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[23] See: Record, page 97, lines 9-10

[24] See: Record, page 99, line 10

[25] See footnote 4

36. Essberger's studied ignorance[26] amounts to recklessness in relation to the truth of her statements and qualified privilege is therefore not available to her.[27]

37. The defence of reasonable publication as pleaded by Essberger is for the same reasons unavailable to her and has in any event not been extended to private individuals as opposed to the press.

38. The arguments in relation to statutory defences raised by Essberger already made in relation to Gaylard apply equally.

39. The Defendant, Duigan, admits helping to draft and authorising the letter of 14 September 2004 to the Town Planner of Centurion, City of Tshwane.[28]

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[26] See: Record, page 108, line 23 to page 109, line 4;
Record, page 109, line 4;
Record, page 109, line 20-22

[27] See: **Monckten v British South Africa Co** 1920 AD 324 at 332

[28] See: Record, page 136, line 1-6;
Record, page 172, line 2-4;
Record, page 183, line 15-25

40. The letter was received as an objection.[29]

41. The statements impute illegality and are therefore defamatory *per se*.[30]

42. Duigan did not prove or attempt to prove that:

42.1 an EIA was required by the authorities; or

42.2 that a public meeting had not been held as required; or

42.3 which due process and associated legal requirements have not been met,

as at 14 September 2004.

43. In fact Duigan in studied ignorance authorises the publication of the letter and this amounts to recklessness in relation to the truth of the

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[29] See: page 548, Defendant's Bundle 2;
Record, page 240, line 8 to 241, line 3

[30] See footnote 4

statements.[31]

44. The arguments in relation to the common law and statutory defences raised by this Defendant are therefore similar to those already set out above in relation to the Defendant's Gaylard and Essberger.

45. The Defendant Barnes (hereinafter "Barnes") was singularly unimpressive in his testimony in relation to the conversation between himself and Hampson.

46. Barnes could not testify as to the exact words used during the conversation.

47. Barnes' answers to the statements of Hampson being put to him were evasive and except for one instance not a denial.[32]

48. Except for the general denial, i.e. not having used the word *"fraud"* or *"bribery"*, Barnes' Counsel could not put to Hampson the exact words used by Barnes nor deny that the statements were made, bar the use

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[31] See: page 172, line 16 to 175, line 11

[32] See: page 259-261

of the words *"fraud"* and *"bribery"*.

49. Despite cross-examination by the Court and Defendants' Counsel, Hampson gave clear evidence and did not at any stage contradict himself.

50. It is submitted that on a balance of probabilities, the Plaintiff has proven the second statements in relation to Barnes. Barnes did not attempt to prove the truth of any of these statements.

51. It is submitted that the truth of the second statements had not been proven.

52. It is further submitted that the second statements are statements of fact and not opinion and that the defence of fair comment does therefore not apply.

53. It is submitted that the defence of reasonable publication does not apply for the same reasons as set out above in relation to the other Defendants.

54. It is further submitted that the statutory defences raised by Barnes are

for the same reasons as set out in relation to the other Defendants not applicable.

55. Section 38 of the Constitution entitles the victim of a violation of any fundamental right to *"appropriate relief"*. Section 172(1)(b) of the Constitution empowers any court which adjudicates on such a claim to *"make any order that is just and equitable"*.

56. The Constitutional Court and the Supreme Court of Appeal have repeatedly emphasised the scope and flexibility of the Court's remedial powers under Sections 38 and 172.[33]

57. The Courts are obliged to employ these flexible remedial powers to ensure that the victims of constitutional violations are given effective relief:

*57.1 "Given the historical context in which the interim constitution was adopted and the extensive violation of fundamental rights*

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[33] See: **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC), paragraphs 18 and 19;
**Pretoria City Council v Walker** 1998 (2) SA 363 (CC) at paragraph 95;
**Dawood v Minister of Home Affairs** 2000 (3) SA 936 (CC) at paragraph 60;
**Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Limited (Agri SA and Legal Resources Centre, *amici curiae*)** 2004 (6) 40 (SCA) at paragraph 42

*which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when legal process does establish that an infringement of an entrenched right has occurred it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."*[34]

57.2 *"Courts should not be overawed by practical problems. They should attempt to synchronize the real world with the ideal construct of a constitutional world and they have a duty to*

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[34] See: **Frose v Minister of Safety and Security** 1997 (3) SA 786 (CC), paragraph 69

*mould an order that will provide effective relief to those affected by a constitutional breach."*[35]

58. The Constitutional Court and the Supreme Court of Appeal have awarded constitutional damages as relief for the violation of fundamental rights in the **Modderklip** case. In so doing, the Court has emphasised the appropriateness of damages awards as an effective remedy for violations of constitutional rights which cause financial harm.[36]

59. Ordinary damages in civil actions serve a compensatory purposes. Punitive damages (or *"exemplary damages")* are a remedy reserved for exceptional cases where the egregious conduct of the Defendant demands a punitive and deterrent response from the Courts. The

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[35] See : **Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Limited (Agri SA and Legal Resources Centre, *amici curiae)*** 2004 (6) SA 40 (SCA) at paragraph 42;
**Minister of Health v Treatment Action Campaign** 2002 (5) SA 721 (CC), paragraphs 102 and 103;
**Minister of Home Affairs v NICRO** 2005 (3) SA 280 (CC), paragraph 74;
**President of the RSA v Modderklip** 2005 (5) SA 3 (CC) at paragraph 58

[36] See: **Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Limited (Agri SA and Legal Resources Centre, *amici curiae)*** 2004 (6) SA 40 (SCA) at paragraphs 42 to 44;
**President of the RSA v Modderklip** 2005 (5) SA 3 (CC) at paragraph 53 to 56;
**MEC, Department of Welfare, Eastern Cape v Kate** 2006 (4) SA 478 (SCA), paragraphs 23-33

distinction between the two forms of damages was recently described by the Privy Council as follows:

> *"The starting point for any discussion of the limit of the Court's jurisdiction to award exemplary damages is to identify the rationale of the jurisdiction. This is no doubt, although different forms of words have been used, each with its own shades of meaning. For present purposes the essence of the rationale can be sufficiently encapsulated as follows. In ordinary the appropriate response of a court to the commission of a tort is to require the wrongdoer to make good the wronged person's loss, so far as a payment of money can achieve this. In appropriate circumstances this may include aggravated damages. Essentially a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the Court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment by way of condemnation and*

*punishment."*[37]

60. In all these circumstances, the Plaintiff shall seek an order that the Defendants are liable for damages caused by the defamatory statements and as a result of any delay caused.

**E L THERON**
Chambers
Sandton
18 November 2010

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[37] See: **A v Michael Bernard Bottrill** [2002] UKPC 44 (9 July 2002) at paragraph 21; **Frose v Minister of Safety and Security** 1997 (3) SA 786 (CC). See generally the discussion on exemplary damages