REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT

PRETORIA

Case Nos 30729/05

30730/05

32648/05

32649/05

WRAYPEX (PTY) LTD

PLAINTIFF

V

BARNES AND OTHERS

DEFENDANTS

CIVIL TRIAL Claim for damages, defamation, etc.

CORAM Sapire AJ

JUDGMENT

The Plaintiff has instituted four actions in which it claims damages in prodigious amounts from four separate individuals.

The delicts, which ground ail four actions, are the publication of matter that the Plaintiff alleges is to be defamatory or otherwise injurious to the plaintiff, and so actionable.

The parties agreed to consolidate the four actions as much of the evidence and many of the issues are relevant and common to all of them.

The parties have also agreed to separate the questions of the amount, if any, of damages the court should award, from the merits of plaintiff's claims, and to defer adjudication on the former until the latter has been determined. This latter is the subject of the present trial.

By agreement, which did not affect the ultimate onus, the Defendants testified first in support of their pleas. After they did so, and after they had closed their cases the closing of their cases, the witnesses called by the Plaintiff testified.

The Defendants were generally satisfactory witnesses, and emerged as sincere and truthful. So did Wray who testified for the defendant. He however gave the impression of being a strong and successful man

used to command and getting his own way. He was a man not to be thwarted.

I will refer to, and identify each of the separate actions by the surname of the defendant, and deal with them la numerical order according to the case number under which each of them is registered. Where points of law or fact and argument are common to two or more of the cases I will deal with them only once, when it is apposite to do so.

Barnes' case

The particulars of Plaintiffs calm against Barnes, after citation of the parties reads

3. The Defendant wrongfully, and with the intention to injure the Malaita published the following false and malicious statements of and concerning the Plaintiff

    3.1. that the Plaintiff did not comply with due process and associated legal requirements in relation to the proposed Blair Atholl township; and

    3.2. that the Plaintiff had not submitted a comprehensive environmental impact assessment to the responsible authorities for approval in accordance with existing legislation concerning applications for changes in land use; and

3.3. that the Plaintiff had not held a public meeting of interested parties and that it was required by statute

("The first statements').

4. The Defendant made and published the first statements to the Town Planner, Centurion, City of Tshwane on or about 14 September 2004.

5. The first statements are *per se* defamatory of the Plaintiff.

6. Alternatively to paragraph 5, Defendant intended the following defamatory innuendo when he made the first statements:

6.1. that the Plaintiff acts or acted illegality; and /or

6.2. that the Plaintiff is dishonest; and/or

6.3. that the Plaintiff acts or acted deceitfully and/or fraudulently.

and in addition, the persons to whom the first statements were made and published as aforesaid understood the statements to bear such innuendo.

7. As a result of the publication of the first statements, the Plaintiff has:

7.1. been injured in its fair name and reputation; and

7.2. suffered damages in the sum of R 5 000 000.00.

8. The Defendant wrongfully and with the intention to injure the Plaintiff, published the following false and malicious statements of and concerting the Plaintiff:

8.1. that it is earning out illegal activities on the proposed Blair Atholl development by digging foundations on the propemi of the proposed development;

8.2. that it had committed fraud by representing that it would pay for the relocation of the school currently situated on the properly of the proposed Blair Atholl development, whilst, in truth, the Gary Player Foundation was doing so; and

8.3. that it had bribed government officials in other to obtain consent for the proposed development, and in particular that it had promised or given stands on the Blair Atholl development to those officials; and

8.4. thay it had not informed interested parties in the correct manner and within the prescribed time period of the record of decision regarding the Blair Atholl development; and

8.5. that it had no rights to utilise water from the Crocodile River, and that it was utilising same illegally; and

8.6. the chemicals to be utilised on the proposed golf course on the development would polute the Crocodile River.

("the second statements").

9. The Defendant made and published the second statements to:

9.1. Adrian Hampson; and/or
9.2. Norman Jeffrey; and
9.3. Terry O'Donoghue; and/or
9.4. Audrey O'Donoghue; and/or
9.5. Anthony Duigan; and/or
9.6. Helen Duigan; and/or
9.7. Wessel Wessels; and/or
9.8. Cynthia Barnes; and/or

9.9. Janice Kahn; and/or
9.10. Mark Kahn; and/or
9.11. Corlette Wessels; and/or
9.12. Janine Naschenweng; and/or
9.13. Julie Jeffrey; and/or
9.14. Lynne Clark; and/or
9.15. Matthew Angus; and/or
9.16. Lilian Buenzla; and/or
9.17. Rita van Wyk; and/or
9.18. Tommy van Wyngaard; and/or
9.19. Mervin Gaylard; and/or
9.20. Wayne Nell; and/or
9.21. Lise Essberger; and/or
9.22. Officials of the Gauteng Department of Agriculture, Consrvation and Environment; and/or
9.23. Various other persons to the Plaintiff unknown.

The second statements are *per se* defamatory of the Plaintiff.

10. The second statements are per defamatory of the Plaintiff.

11. Alternatively to paragrpah 10, the Defendant intended the following defamatory innuendo when he made the second statements:

11.1. That the Plaintiff acts or acted illegally; and/or

11.2. That the Plaintiff is dishonest; and/or

11.3. That the Plaintiff acts or acted illegally and/or dishonestly,

And in addition, the person or persons to whom the second statements were made and published as aforesaid understood the statements to bear such an innuendo.

12. As a result of the publication of the second statements, the Plaintiff has:

    12.1. Been injured in its fair name and reputation; and

    12.2. Suffered damages in the sum of R 10 000 000.00

13. The defendant when making the first and/or second statements knew that the Plaintiff:

    13.1. Was seeking the necessary statutory approval for the proposed development; and/or

    13.2. Had expended and would expend money to obtain approval for the proposed development; and/or

    13.3. Would suffer damages in the event of the necessary statutory approvals not being obtained; and/or

    13.4. Would suffer damages in the event of the necessary statutory approvals being delayed.

14. Alternatively to paragraphs 13.3 and 13.4, the Defedant should have foreseen:

    14.1. That the Plaintiff would suffer damages in the event of the necessary statutory approvals not being obtained; and

    14.2. That the Plaintiff would suffer damages in the event that the necessary statutory approvals are delayed.

15. The Defendant when making the first and/or second statements intended the delay and/or refusal of the necessary statutory approvals.

16. The necessary statutory approvals were in fact delayed as a result of the Defendant making the first and/or second statements.

17. The Plaintiff has, as a result of the delays, suffered damages in the amount of R20 000 000.00 being inter alia costs of finance and contractual penalties.

18. The Defendant, when making the first and/or second statements, and publishing it as aforesaid:

    18.1. Acted unlawfully and wrongfully;

    18.2. Violated the Plaintiff's fundamental rights to dignity and fair administrative action;

    18.3. Intended to violate the Plaintiff's fundamental right to dignity and fair administratuive action

19. By virtue of the facts herein stated, the Plaintiff

    19.1. Has suffered a violation of its fundamental rights to dignity and fair administrative action; and

    19.2. Has suffered damages in the amount of R10 000 000.00.

20. In the premises the Defendant is liable in damages to the Plaintiff in the sum of R10 000 000.00.

21. Having regard to the egregious nature of the Defendant's violation of the Plaintiff's fundamental rights to dignity and fair administrative action as set out above, appropriate relief as set out in Section 38 of Act 108 of 1996 include, in addition to the compensatory damages contemplated in paragraph 20 above, punitive constutional damages of R5 000 000.00, alternative;y, punitive damages of R5 000 000.00 under the common law of delict to promote the spirit, purport and objects of the Bill of Rights.

WHEREFORE the Plaintiff prays for judgment against the Defendant for

1. Payment of the amount of R 55 000 000.00;
2. Payment of the amount of R 5 000 000.00;
3. Interest on the aforesaid amount at 15.5% per annum from the date of judgment to the date of final payment;
4. Costs of the suit on the attorney and client scale;
5. Further and/or alternative relief.

There are four cumulative claims totalling R40 000 000 arising out of the publication of the offending words viz-

a) Defamation, comprising one claim based on the alleged defamatory nature of the words themselves in their ordinary sense, and one based on a special meaning to be attached to the words used and so understood by the person to whom they were published (paragraphs 3 to 12)

b) Wrongfully causing financial loss by the use or publication of the same words upon which the defamation claim is based (paragraphs 13-17)

c) Wrongful invasion of the Plaintiff's fundamental rights to dignity and fair administrative action (paragraphs 18 and 19)

d) Punitive damages under constitutional provisions alleged (paragraph 20).

After amending the original plea, defendant pleaded

DEFENDANT'S SPECIAL PLEA

A. Section 16 of the Constitution of the Republic of South Africa, Act 108 of 1996 ['the Constitution of the Republic of South Africa'] guarantees the defendant rights to freedom of expression, including the statements complained of by the plaintiff in its particulars of claim.

B. This action is brought by the plaintiff to intimidate and/ or silence the defendant during the currency of the action, and not to vindicate its reputation.

C. This is evidenced by –

(i) The inflated damages amounts purportedly sought by the plaintiff and, in respect of which. the plaintiff can have no bona fide belief that they could ever be grained;

(ii) The actions brought against other persons who raised objections to the plaintiffs conduct in pursuing a residential property development under case numbers 30729/05, 32648/05, 32649/05 and 30730/05;

(iii) The institution of the action despite the statutory exclusion and the obviously privileged nature of foe statements complained of

WHEREFORE, the defendant prays that the Plaintiff's claim be dismissed with costs on an attorney and client scale.

DEFENDANT'S AMENDED PLEA

The Defendant pleads as follows to the Plaintiffs Particulars of Claim:

1. AD PARAGRAPHS 1 & 2

1.1. The Defendant admits paragraph 1 of the Plaintiff's Particulars of Claim ("the claim")

1.2. Save to state that the Defendant's full names are Arthur Robert Barnes, and that he is a metallurgist, the allegations in paragraph 2 of the claim are admitted:

2. AD PARAGRAPHS 3 TO 5

2.1. The Defendant denies each allegation in paragraphs 3 to 5 of the claim, including the subparagraphs

2.2. In amplification of the foregoing, the Defendant pleads as follows:

2.2.1. On or about 4 September 2004, the committee of the Rhenosterspruit Nature Reserve ("RNR"), a conservancy registered with the Gauteng Department of Agriculture, Conservation and Environment ("GDACE"), and which has legal personality, objected to aspects of a development of the Plaintiff;

2.2.2. The objection was contained in a letter addressed to the Town Planner, Centurion, City of Tshwane;

2.2.3. The letter of objection contained reference to concerns of the RNR in relation to the development of the Plaintiff and requested that such concerns be given proper consideration.

2.2.4. The Defendant, qua secretary of the RNR, signed the letter for an on behalf of the RNR

2.2.5. All submissions contained in the letter of 14 September 2004,

2.2.5.1. were not made by the Defendant

2.2.5.2. were made for an on behalf of the RNR, being an entity that has legal personality;

2.2.5.3. were made to an organ of state

2.2.5.4. were made to an organ of state responsible for protecting the environment and were made in the reasonable and bona fide belief at the time of making the submissions that such submissions constituted disclosure of an environmental risk; and/or

2.2.5.5. were true and publication thereof was in the public interest.

Alternatively

2.2.6. The comments made in the statement complained of:

- Were made in good faith
- Were comments on matters of public interest and concern
- Were based on facts that were generally known or disclosed, alternatively true or substantially true
- Were, in the circumstances, fair.

Alternatively

Privilege

2.2.7. The statements complained of were published on a privileged occasion

in that:

- The statements made were published in the discharge of a duty or exercise of a right;
- The statements complained of were published to the Town Planner, Centurion, City of Tshwane (“town planner”) and the town planner had a duty or right to receive the statements.

Further alternatively

Reasonable publication

2.2.8. It was reasonable to publish the statements complained of in that:

- The statements complained of were published in the bona fide and reasonable belief that they were true
- They were not published recklessly
- Reasonable steps had been taken to ensure that the factual allegations therein were true
- In the circumstances, the Defendant was not negligent
- The information contained therein was such that it was in the public interest that it be published to the person who received the communication.

Further alternatively

Statutory protection

2.2.9. The Defendant is excised liability in terms of section 31(4) of the

National Environmental Management Act, 107 of 1998 in that:

The Defendant, in good faith, reasonably believed that he was disclosing evidence of an environmental risk;

- The disclosure alleged by the Plaintiff is disclosure to an organ of state in that the town planner is administration in the local sphere of government, alternatively, is a functionary exercising public power or performing a public function in terms of section 22 of the Environment Conservation Act, 73 of 1989 and section 16 of the National Environmental Management Act, 107 of 1998

Alternatively

2.2.10. the Defendant lacked the requisite intention to defame the Plaintiff in that:

- he *bona fide* believed the statements published to the town planner, Centurion, City of Tshwane, was protected in that it was privileged and/or he was excused liability in terms of the National Environmental Management Act, 107 of 1998 for the reasons set out above, and/or was not negligent in holding such belief.

3. AD PRAPGRAPH 6

3.1. The Defendant denies each allegation in paragraph 6 of the claim.

3.2. In amplification of the foregoing, the Defendant repeats the allegations in paragraphs 2.2 (including subparagraphs) above.

4. AD PARAGRAPH 7

4.1. The defendant denies each allegation in paragraph 7 of the claim.

5. AD PARAGRAPHS 8 & 9

5.1. The defendant denies each allegation in paragraphs 8 and 9 of the claim, including subparagraphs.

5.2. Alternatively, and insofar as this Honourable Court finds that the Defendant made any of the statements alleged to the recipients identified or at all;

5.2.1. The statements were true; and

5.2.2. The publication of the statements was in the public interest

Alternatively

Fair comment

5.3. The comments made in the statements complained of

- were comments made in good faith;
- were comments of matters of the public interest or concern;
- were based on facts that were generally known or disclosed, alternatively true or substantially true; and
- were, in the circumstances, fair.

Alternatively

Privilege

5.4. the statements complained of were published on a privileged occasion in that:

- the statements complained of were published were published in the discharge of a duty or exercise of a right
- the statements complained of were published to the Town Planner, Centurion, City of Tshwane (“town planner”), and the town planner had a duty had a duty or right to receive statements

Further alternatively;

Reasonable publication

5.5. It was reasonable to publish the statements complained of in that:

- The statements complained were published in the bona fide and reasonable belief that they were true;
- They were not published recklessly;
- Reasonable steps had been taken to ensure that the factual allegation contained therein were true;
- In the circumstances, the defendant was not negligent;
- The information contained therein was such that it was in the public interest that it be published to the publishee.

Further alternatively;

Statutory protection

5.6. The Defendant is excused liability in terms of section 31(4) of the National Environmental Management Act, 107 of 1998 in that:

- The defendant, in good faith, reasonably believed thathe was disclosing evidence of an environmental risk;
- The disclosure alleged by the Plaintiff is disclosure to an organ of state in that the town planner is administration in the local sphere of government, alternatively is a functionary exercising public power or performing a public function in terms of section 22 of the Environment Conservation Act 73 of 1989 and section 16 of the National Environmental Management Act 107 of 1998.

Alternatively;

Intention

5.7. The defendant lacked the requisite intention to defame the Plaintiff in that:

- He bona fide believed the statements published to the town planner, Centurion, City of Tshwane, were true and/or;
- He was not negligentin holding such a belief; and/or
- He bona fide believed that his communication to the town planner, Centurion, City of Tshwane, was protected in that it was privileged and/or he was excused liability in terms of the National Environmental Management Act 107 of 1998 for the same reasons set out above, and/or was not negligent in holding such a belief.

6. AD PARAGRAPH 10

6.1. The Defendant denies each allegation in paragraph 10 of the claim.

7. AD PARAGRAPH 11

7.1. The Defendant denies each allegation in paragraph 11 of the claim, including its subparagraphs;

7.2. In amplification of the foregoing, the Defendant repeats the allegations contained in paragraph 5.

8. AD PARAGRAPH 12

9. The Defendant denies each allegation in paragraph 12 of the claim, including its subparagraphs

10. AD PARAGRAPH 13

10.1. The Defendant denies making the statement alleged or at all;

10.2. Alternatively, the Defendant pleads that the first statements were made to an organ of state responsible for protecting the environment, and were made in the reasonable and *bona fide* belief at the time of making the submissions constituted the disclosure of an environmental risk

10.3. Defendant admits that Plaintiff is a developer that sought statutory approvals for a residential property development as alleged in paragraph 13.1 of the claim.

10.4. Defendant has no knowledge of the allegations in paragraphs 13.2, 13.3 and 13.4, accordingly denies same and puts Plaintiff to the proof thereof,

10.5. Paragraph 2 is repeated, *mutatis mutandis*.

11. AD PARAGRAPH 14

11.1. The Defendant denies each of the allegations in paragraph 14 and puts Plaintiff to the proof thereof;

11.2. Paragraph 2 above is repeated, *mutatis mutandis*.

12. AD PARAGRAPH 15

12.1. Defendant denies each of the allegations in paragraph 15 and puts Plaintiff to proof thereof;

12.2. In amplification of the foregoing, Defendant pleads that:

12.2.1. It did not make the first/second statements as alleged or at all;

12.2.2. Insofar as this Honourable Court finds Defendant made first/second statements as alleged or at all, each statement were made in the process of preparing submissions to organs of state responsible for protecting the environment or constituted submissions to such organ of state and were made in the reasonable and bona fide belief at the time of making the submissions that such submissions constituted disclosure of an environmental risk;

13. AD PARAGRAPH 16

13.1. Defendant denies the allegations in paragraph 15 and puts Plaintiff to the proof thereof

13.2. Insofar as this Honourable Court finds Defendant made first/second statements as alleged or at all, each statement were made in the process of preparing submissions to organs of state responsible for protecting the environment or constituted submissions to such organ of state and were made in the reasonable and bona fide belief at the time of making the submissions that such submissions constituted disclosure of an environmental risk, and that any delays that ensued were the consequence

not of his statements, but of the process envisaged by the applicable legislation

14. AD PARAGRAPH 17

14.1. Defendant has no knowledge of the allegations in paragraph 17, accordingly denies same and puts Plaintiff to the proof thereof;

15. AD PARAGRAPH 18

16. Defendant denies each allegation in paragraph 18, including subparagraphs, and puts Plaintiff to the proof thereof;

16.1. Paragraph 2 above is repeated, *mutatis mutandis*.

17. AD PARAGRAPH 19

17.1. Defendant denies each of the allegations in paragraph 19, including its subparagraphs, and puts Plaintiff to the proof thereof

18. AD PARAGRAPH 20

18.1. Defendant denies eachof the allegations in paragraph 10, and puts Plaintiff to the proof thereof;

19. AD PARAGRAPH 21

19.1. Defendant denies each of the allegations in paragrpah 21, including all subparagraphs, and puts Plaintiff to the proof thereof;

WHEREFORE Defendant prays tor:

(a) Judgment in its favour,

ii) Costs of on the scale of attorney and client."

I have reproduced the pleadings in Barnes' case to facilitate appreciation of the issues. The pleadings in the other three cases are similar except to the extent that Plaintiff complains of publication or use of different offending words.

The Plaintiff is a company, engaged in property development. In 2003, it intended to establish a golfing estate on a number of farms collectively known as Blair Athol. The then projected estate is some 605 hectares in extent, on which when the development is completed 300 residences will stand, adjoining an eighteen hole golf course. A hotel can be established on one erf.

The site of the then proposed development was at the time rural land situated in, or adjoining an area known as the. Renosterspruit Nature Reserve (‘RNR’). It is a conservancy registered with the Gauteng Department of Agriculture. Conservation, and Environment (‘GDACE’), and which has legal personality.

In order to achieve its object, the Plaintiff was obliged apart from other preparatory steps, to obtain township approval from the Tshwane Municipal authorities in terms of the Town Planning and Townships Ordinance 15 of 11986 (Gauteng). it also had to have written

authorisation as contemplated in Section 22 of the Environment Conservation Act 73 of 1989. GDACE was the authority from which a positive ruling referred to as a Reason of Decision (‘ROD') had to be obtained.

There appeared to have been some confusion in which the defendants appeared to have shared as to the relationship between the applications to the municipal council and GDACE.

The conservancy itself, and a number of individuals including the four defendants, who were members of the conservancy, personally opposed the establishment of the golfing estate, Some were more adamant intense and active in their opposition than others. The projected township and golfing estate, they saw as an unwelcome intrusion upon tic tranquillity and ambiance of the rustic environment in which they lived, which they valued and enjoyed. Of great importance to them was what they saw, as threat to the pristine flora and native fauna. The conservancy was dedicated to the preservation of the existing environmental conditions, and saw vivo Plaintiff's project as a threat to that which it was to protect.

To further this opposition, the conservancy, and a number of its individual members, including the Defendants, as they were entitled to do, voiced their objections formally to the thy council from which approval for the township was a required. As `affected and interested' (words of the relevant Act), parties they also made their objections known to GRACE. in so doing they made use of the opportunities

afforded them by the provisions legislation governing the process of getting the necessary township establishment approval and permission for change of land use.

The plaintiff has made its elairns for damages against Barnes and the other Defendants based on three separate causes of action with which I will deal seriatim. It was in the course of advancing their objections that Barnes and the other defendants published those words which in evidence they admitted they had so done.

DEFAMATION

The Plaintiff has in his particulars of claim quoted words of which it complains. Only in evidence did it emerge that the words complained of appeared in a letter dated 14th September 2004.

It would have been preferable in pleading, to have quoted the whole letter, so that the reader could read the words in context.

The words -or which the Plaintiff complains approximate to those which appear in the letter to the Town Planner dated I4th September 2004, but also to the words appearing in a draft of the letter dated 8th Septentber.2004. to which Plaintiffs attorney refers in his letter dated 1 October 2004 to Renosterspruit Nature Reserve and some of its members. The draft had been prepared and circulated for consideration of members of the conservancy. Only after the draft had been amended to accommodate changes softening its tone, suggested

by a member; was the letter in its final forth, and dated 14.th September 2004, scat to the addressee.

The draft appears to have been purloined, and to have come into the hands of plaintiff’s attorney in a manner; which was not explained.

The words themselves, which must be read in the context of the letter as a whole are not defamatory, as they do not impinge, negatively on qualities of the Plaintiff as a company. The words purport to do no more than to bring to the attention of the Town Planner that in the writer's view, the Plaintiff had not proceeded properly in its application for the establishment of the township or for obtaining approval from the Environment Authorities. The Defendants testified that they were determined to ensure that due process was followed.

The plaintiff sought to make much of the use of the word 'illegal'' and quoted authority for the proposition that to make an accusation of illegality was in itself defamatory. Although courts have indeed placed such an interpretation on the use of the word illegal, the interpretation must be confined to the facts of those cases.

The word “illegal” is not synonymous with the 'criminal'. To describe an act as illegal does not necessarily imply vileness, baseness of character, or Moral turpitude. The word was used in the letter to refer to steps taken in anticipation of township approval being granted. That the defendant or some of them were confused as to the necessary steps to be taken for township approval on the one hand and in applying for permission from the conservation authorities on the other

is not an indication of intention to injure or the use of the words for that purpose.

I can find no intention on the part of the signatories to the letter that the words complained of should have the innuendo attributed to them. There is no suggestion in the letter of the Plaintiff being dishonest or acting in a deceitful or fraudulent manner.

Although it is alleged that the persons to whom the first statement were made and published understood the statements to bear such innuendo, the addressee of the letter was not called as a witness and no evidence of circumstances was adduced to justify the secondary meaning.

The Defendant who in an official capacity was a co-signatory of the letter had the right to matte the statements attributed to him, in furtherance of the opposition to the approval of the Township. On Defendant's evidence, he believed the words to be true.

If one pays attention to the exact wording of the letter the meaning is clear. The last sentence of the letter sums up what it was intended to convey.

The letter is supplementary to the original formal objection to the proposed Blair Athol Township. The original objection was on far wider grounds than the concerts voiced in the context in which the words complained of were used. The objection in the third paragraph of the letter it is stated that although the developer has taken note of

some of the specific objections already Lodged the lack of adherence to due process and associated legal requirements was a concern.

The letter goes on to express that a comprehensive environmental impact assessment has not been submitted to the responsible authorities for approval in accordance with existing legislation concerning applications for changes in land use.

The letter also observes that no public meeting of interested and affected parties had teen held as of that date.

It is quite dear that in raising these concerns even if they may not have turned out to have been justified objectively speaking, the words complained of were properly addressed to the Town Planner and it was for him to determine whether they were factually correct or relevant to the application with which he was dealing. Environmental impact of a proposed township would appear to be relevant to an application with which the addressee of the letter was concerned.

The second allegedly defamatory -statements are those enumerated in paragraph 8 of the Particulars of Claim. The words Plaintiff alleges the Defendant published to the persons listed in paragraph 9. The date of the publication is not alleged. The words complained of, except those cited in paragraphs 8.2 and 8.3 do not appear to have a defamatory meaning.

As far as the allegation in 8.2 is concerned the allegation that the Defendant had said of the Plaintiff that it had committed a fraud by representing that it would pay for the relocation of the school currently situated on the property of the Blair Atholl Development

whilst in truth the Gary Player Foundation was doing so, was explained by the Defendant. He said that to his knowledge the Plaintiff had undertaken to pay for the relocation of the school. He later became aware that the Gary Player Foundation was seeking funds from the public for this purpose. This led him to think that the plaintiff was not honouring its expressed and advertised intention of assuming this obligation. There is no evidence of the exact words Plaintiff alleges Barnes used and his explanation is acceptable indicating a lack of intent to defame the Plaintiff in the manner alleged.

The publication of the second statement to Adrian Hampson requires closer attention. Hampson testified that the Defendant had said certain things to him, the exact words of which he could not recall. The effect of what the Defendant said to him. Hampson said was what is alleged in the particulars of claim.

There are a number of disturbing aspects of Hampson's evidence. He was not impressive being inclined to evade answering questions. it is his account, not always consistent, of how the words came to be published to him that gives rise to uneasiness.

His evidence was, initially, that he had done work for the Plaintiff and that he was worried whether he would receive the amount for which he had invoiced the company. He later said that his concern was not about the money owing, which was not vet due but whether he would

be getting more work from the plaintiff. He approached his friend Tyrone Yates for comforting assurance. Yates as the estate manager for the project was an employee of the Plaintiff It was he who referred him to Barnes.

This is strange. If indeed Hampson was owed money which was not yet due and if had doubts as to whether he would be paid the amount owing to him or whether the plaintiff would be continuing with the development the right person to have spoken to would have been Mr Wray, who was the person principally engaged in advancing the project.

Yates's referral of him, to Barnes raises a question as to whether he was not sent as an agent provocateur to gather material on which the Plaintiff intended to base the present action. Plaintiff did not attempt to prove publication to the other persons mentioned in paragraph 9 of the Particulars of Claim.

It would appear that the events to which this witness has testified took place sometime before 22' July 2005. Counsel signed the Particulars of Claim on the 15th of July 2005.

According to Barnes, the witness contacted him and asked to to call on him at his house. An appointment was made and the witness duly arrived. Hampson explained that he was having trouble with the Plaintiff and Wray about amounts owed to him.

In the course of the conversation, the progress of the environmental application it was discussed and flames admits that he told Hampson that the Renosterspruit Conservancy had not given up its opposition.

and was appealing against the ROD (Record of Decision). He does not remember having specifically referred to any of the matters alleged to have been published by him.

Barnes recalled however, that in a conversation with Mr Wray, some time earlier, Wray had told him that: “he had secured the necessary permission at the highest level." He may have told Hampson about this but he firmly denies haying mentioned any bribe or the name of the MEC or any question of an erf on the estate been given to anybody to secure the necessary permission.

Barnes was criticized for hesitancy and uncertainty in relation to what was said when he met with Hampson. Barnes steadfastly maintained that he had not spoken of Wray having bribed officials or having used the word fraud. Barnes is a cautious man as is evidenced by the manner in which he discussed the issues with the committee of Renosterfontein. To them he was at pains to refrain from stating as a fact that bribery had taken place when discussing the matter with the Renosterfontein executive and members and recognised that they should employ a private investigator. Suspicions of this nature abound in the times in which we live when daily reports made in the media of corruption in government and provincial offices. It is unlikely that Barnes would have been more unguarded in speaking to a stranger than in 'committee".

As Hampson like Barnes was not able to remember the exact words Barnes said to him there is a strong possibility that the words complained of amount to Hampson's interpretation of what was actually said. A possibility enhanced by what the likely purpose of his visit to Barnes was.

After the meeting, Harnpson went back to the Estate Manager who told him to go to Mr Wray to report to him on what had taken place. The outcome of this was that he was called upon to make an affidavit, which Defendant's counsel produced as an exhibit.

The Affidavit was made at Plaintiff's place of business on the 22nd of July 2005. The Commissioner attesting the affidavit was an attorney practising in Plaintiffs attorneys attended at Plaintiff's offices for the taking of the oath.

This evidence brought to mind what I have since identified as the provisions of Rule D.4 of the *UNIFORM RULES OF PROFESSIONAL CONDUCT of the General Council of the Bar of South Africa*. The rule is that legal practitioners should ordinarily not obtain affidavits from prospective witnesses, except in cases in which the practitioner is intended to present such evidence by means of the production of affidavits deposed to by them.

Counsel on both sides were all unaware of the impropriety of taking the witness' evidence on oath and Defendant's counsel was

particularly disturbed that I should have questioned the propriety of the manner in which the witnesses statement was recorded.

The impression get is that Yates referred the witness to Barnes to obtain actionable material. Whatever Mr Barnes may have said was transmuted in the process of recall and recording in order to provide the necessary material for a defamation action.

The impression is strengthened by the evidence given by Barnes who recounted how Hampson was at pains to tell him that Wray 'was an evil man'. This sort of talk was calculated to invite or encourage negative remarks about Wray from Barnes. These circumstances give rise to scepticism as to the reliability of Hampson's evidence. I am not satisfied that on the balance of probabilities the Defendant said that Wray obtained approval for his project because he bribed the MEC, Mr Mosunkutu. The witness did not know that name which must have been supplied by Plaintiff.

I cannot find on the balance of probabilities that Barnes used words accusing Wray or the Plaintiff of fraud or bribery.

<u>Cause of action, pecuniary loss consequent on publication of the words complained of</u>

The Plaintiff alleged that when the Defendant made the first and or second statements he knew that the Plaintiff was seeking the necessary statutory approval, had already upended a considerable amount of money to this end and would suffer damages in the event of the necessary statutory approvals not being obtained or delayed. This claim was not substantiated by the evidence as there was no proof connecting the statements causally with any additional time in fact taken in obtaining the necessary approvals.

The evidence discloses that both the township application and the ROD were eventually granted and that a number of interested and affected parties apart from the Defendant pursued an appeal against the issue of the ROD. Opposition to the granting of the township application, the application under the Environment Act and the appeal resulted in protracted proceedings. There is nothing to show that any of the words complained of prolonged the proceedings one iota. There is nothing to show that the alleged 'wrongful words" contributed in any way to additional delays. Wray was questioned on this topic at some length but was not able to identify any lengthening of the time before which the Plaintiff was able to proceed with the project. Wray was not able to indicate causal connection between any of the words complained of used by any of the defendants with any delays. For this reason, alone the Plaintiff cannot succeed on this cause of action.

There is however a further consideration emerging from the judgment in

TELEMATRIX (PTY) LTD t/a MATRIX VEHICLE TRACKING v ADVERTISING STANDARDS AUTHORITY SA 2006 (1) SA 461 (SCA)

The of the portion headnote dealing with the topic pure economic loss reads

> *Delict - Damage - First principle of law of delict that everyone lo bear loss he or she suffers - Aquilian liability providing exception to rule - To be liable for loss of someone else, act or omission of defendant to be wrongful and negligent and to cause loss.*
>
> *Delict - Wrongfulness - Of conduct causing pure -economic loss - Act or omission causing pure economic loss not prima fade wrongful - Policy considerations to exist dictating that plaintiff to be recompensed by defendant for loss suffered.*

The evidence in all of the four cases is that the defendants published the words complained of, in the course of statutorily provided adversarial proceedings in which they were entitled to participate only to the person vested by law with the duty to receive representations. If in some respects the submissions showed incorrect perception of the procedure, it is not correct to categorise this as a result of 'studied persistence in ignorance', for which Mr Theron argued. There are no policy considerations making the words complained of actionable.

Third Cause of Action- Violation of Plaintiffs Fundamental Rights to Dignity and Fair Administrative Action

Under this head the Plaintiff claims RI0 000 000. 00 (TEN MILLION RAND).

There is nothing to show that Plaintiff's fundamental rights to dignity and fair administrative action were disturbed. The Plaintiff succeeded eventually in the administrative action to which it refers and there is no hint of evidence that its dignity as a company was impaired by the use of the first or second statement.

The same applies to the additional claim founded on the terms of Section 38 of Act 108 of 1996. The Plaintiff claims punitive constitutional damages of R 5,000,000 (FIVE MILLION RAND).

I see no basis for granting any relief under this head.

The Defendant as is the case with the other Defendants are persons who had a genuine concern about the deleterious effect the establishment of the golf estate would have on what until then been pristine countryside.

Their concern was understandable and some officers in the Gauteng administration viewed the social impact as being strongly negative. The defendants were entitled to place before the authorities their fears and concerns and to oppose the applications made by the Plaintiff as strenuously as they did. In so doing no rights of the Plaintiff were violated.

Judgment is in favour of the Defendant Barnes and the action is dismissed with costs including the costs of two counsel.

E M J Gaylord

The Plaintiff alleges that the Defendant wrongfully and with intention, to injure the Plaintiff published the following false and malicious statements of and concerning the Plaintiff:

a) *That the Plaintiff did not comply with due process and associated legal requirements in relation to the proposed Blair Atholl Township; and*
b) *That the Plaintiff had not submitted a comprehensive environmental impact assessment to the responsible authorities for approval in act in accordance with existing legislation concerning applications for changes in land use; and*
c) *That the Plaintiff had not held a public meeting of interested parties and that it was required by Statute.*

These allegations are referred to as “the first statements”. The statements are alleged to have been made and published to the Town Planner Centurion, City of Tshwane on or about the 14th of September 2004.

The Plaintiff alleges these statements to be per se defamatory of it.

It emerged in the evidence that the statements are the same as those dealt with in considering Barnes' case.

Gaylard was not a signatory of the letter. He agreed with its contents but he did not publish it. The Renosterfontein conservatory, a legal persona apart from the Defendant published the letter.

In addition to the considerations examined in dealing with Barnes' case, Plaintiff cannot succeed against this Defendant in its claim for damages arising out of the publication to the Town Planner of the material appearing in the letter addressed to that official.

A second cause of action for defamation is alleged it being said by the Plaintiff that the Defendant wrongfully and with the intention to injure the Plaintiff published a false and malicious statement of and concerning the Plaintiff. The statement alleged is that the Defendant was “conducting illegal construction related activities on the proposed Blair Atholl development.”

Publication is alleged to have been made to Tsheko Ratsheko of the Gauteng Department of Agriculture and Conservation and Environment on or about the 26th and/or 27th July 2005.

Even if the statement can be read as having a defamatory meaning which is doubtful, it is quite clear on the evidence that the Defendant believed it to be true and made the statement to an official who had an interest to receive information from the Defendant who had a right to convey the information to that official.

The third statements which the Defendant is alleged to have made of and concerning the Plaintiff and which are said to be defamatory are:

(a) *“It is clear from the recent developments on site that the developer is in breach of the conditions set out in the Record of Decision and is not taking heed of the warnings issued by officials of your department”,*

(b) *"You are therefore requested to take the necessary measures against the developer to stop the unlawful construction activities as a matter of urgency?”*

It is difficult to see how (b) can be construed as defamatory. As far as (a) is concerned the Defendant reasonably believed that his report to Dr Cornelius who is the addressee of these statements was true and accurate. The substance of the statement was a subject of legitimate communication between the Defendant and the Department.

The claims made as far as they relate to these statements must fail.

Against this Defendant, the Plaintiff also alleges that he was defamed by the Defendant having communicated to a number of people that Plaintiff's approaches made to individuals were obviously an attempt to stifle opposition by stealth'. The sting in this statement is said to be the use of the word “stealth”.

Defendant made the statement to a number of people who had received individual letters from the Plaintiff in which the Plaintiff had sought to get each of them to withdraw opposition to the granting of approval for the establishment of the estate.

The defendant explained that he used the word 'stealth" to indicate that the Plaintiff was attempting to split the opposition by approaching individuals, independently of, and unknown to others opposing the project, in order to avoid public hearings for the determination of the issues, which divided them from the Plaintiff. There is a range of meanings of the word 'stealth": The word conveys the action of doing something slowly, quietly, and covertly, in order to avoid detection. The word "stealth" can furthermore have meanings implying secretiveness, dishonesty or cunning behaviour or actions. I do not think that Defendant intended those meanings. While cunningness may have been attributed to the Plaintiff this is not in itself defamatory.

I am not persuaded that the use of the word 'stealth" in this context is defamatory.

The Defendant was quite within his rights to speak to those with whom he had a common interest and to indicate that the Plaintiff was attempting to divide them in order to weaken or eliminate the opposition.

What I have already said about the second third and fourth causes of the action applies equally to the same causes of action against the Defendant in this case.

The Plaintiff has not advanced any sustainable claim against this Defendant.

Helen Duigan

The first statements which the Plaintiff alleges were made by the Defendant defaming plaintiff are the same as are alleged against the previous Defendants with whose cases I have dealt. These are the statements appearing in the letter of the 14th of September 2044 addressed to the Town Planner, Centurion, City of Tshwane. The Defendant did not sign the letter itself and although the evidence is that she saw, altered and approved the letter in its final form it was not she who published its contents. This in itself is a bar to a finding in Plaintiffs favour on this claim. The letter is one that could properly have been sent to the Town Planner. The letter as a whole including the words complained of, although critical of the Plaintiff is not defamatory of it. The criticism is pertinent and specific and not calculated to injure the plaintiff.

Plaintiffs claims in terms of its second third and fourth causes of the action, are not sustainable for the reasons already given.

LISE ESSBERGER

The allegation against the Defendant in this case is that she published the following false and malicious statements of and concerning the Plaintiff:

(c) "Again 'jumped the gun' in that earthmoving has been done prior to expiry of the period allowed for appeal against the ROD issued', and

(d) Was destroyed a known nesting site of the African Fin foot. a protected bird species."

These statements are not defamatory per se. The words quoted do not form a sentences. Defendant made and published a report including the words complained of, to Khabisi Mosumkutu, the MSC for Agriculture Conservation and Environment for Gauteng on or about the 1303 of July 2005. They refer to the Plaintiff having embarked on works, which should not have been under taken because the ROD as originally issued had a provision suspending all operations pending appeal. The defendant complained of this before GACE amended ROD by withdrawing the condition therein for the suspension, or before the Defendant knew of such withdrawal.

The words alleged in d) are not defamatory. The Defendant reported what she had observed, namely that in the course of earthmoving operations the nesting place of the bird had been disturbed. Plaintiff's counsel argued that she lied in her evidence because she said later

that the bird was now nesting on her property. I can find no mendacity in this. She and the other three defendants are as far as gauged from their demeanour and the manner in which they testified sincere truthful and responsible persons. Their concern was to prevent the harm to the environment of their homes not to defame or otherwise injure the plaintiff.

The Plaintiff alleges that the words had a defamatory innuendo. There is no evidence to support this.

As in the cases of the other Defendants, and for the same reasons the second, third and fourth claims do not succeed.

The conclusion to which I come is that the plaintiff does not succeed on any of its claims against the four defendants. There can be no award of damages. This therefore concludes the litigation.

Judgment is granted to each of the defendants against the plaintiff in each of the four actions which have been combined