



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

Case No: 5037/2017

In the matter between:

SOUTH AFRICAN BUTLER ACADEMY CC

Applicant

vs

CHRISTINE IRENE FREIIN VON ULMENSTEIN

Respondent

JUDGMENT: 28 JUNE 2017

HENNEY, J

Introduction

[1] The Applicant seeks an interim order directing the Respondent to remove an article she posted on or about 27 February 2013 on the social media blog under the name of "*Whale Tales Blog*" and the internet link known as <http://www.whalecottage.com>. The article is entitled: "**The SA Butler Academy grossly misleads students and hospitality industry clients!**"

[2] The Applicant seeks an order directing the Respondent to remove the aggrieved article from the website or any other website or social media platform, on

which it has been published. The interim order is sought, pending the finalisation of an action for damages instituted under case number 23686/2016. In the action proceedings, the Applicant as the Plaintiff instituted the action against the Respondent as the Defendant. The action is defended. Mr Montzinger appears for the Applicant and Mr Brink for the Respondent in these proceedings.

[3] The Applicant has instituted this application through its sole member, Newton Cross who deposed to the founding affidavit which forms the basis of the application. In it, it states that the Applicant is a unique Butler training institute which offers Butler training to individuals who want to start a new career as professional butlers/household managers and personal assistants.

[4] The Applicant contends that it is renowned for its modern approach to Butler services in private households, resorts, exclusive yachts and passenger liners. Its training material is sourced worldwide but is customized for its unique requirements and standards.

[5] The Respondent is a highly qualified businesswoman who holds a B.Com (Hons) cum laude as well as an MBA degree, respectively from the University of Stellenbosch and University of Witwatersrand Business School. As from 1996 she set up her first guesthouse under the name of Whale Cottage in Hermanus and established a portfolio of guesthouses' under the name and style of Whale Cottage in Camps Bay, Bakoven, Franschoek and Plettenberg Bay. She says as part of her marketing the Whale Cottage portfolio and to satisfy her love for writing, she started a newsletter called Whale Tales. The rest of her experience and qualifications is set

out in her answering affidavit. These qualifications and experience may, at a later stage, during the action proceedings become relevant, but in my view, given the conclusion that the court will be coming to, would not be relevant and of any assistance to the court in these proceedings.

[6] The Respondent's article is based on the experience she had with a person by the name of Ms Hettie Novakovic ("Novakovic"). Novakovic was recruited by the Respondent without the intervention of the Applicant. She was a graduate from the Applicant. However, at that stage she was no longer associated with the Applicant. She was in the employ of the Respondent during February 2013 where she assisted at the Whale Cottage in Camps Bay. The employment relationship between the Respondent and Novakovic turned sour. As a result of this the Respondent, due to the fact that Novakovic was a graduate of the Applicant, lodged a telephonic complaint with the Applicant regarding the conduct and the suitability of Novakovic as a Butler.

[7] She spoke to Adrian Coetzer ("Coetzer") whom she believed was associated with the Applicant. Coetzer during the conversation with the Respondent was sympathetic with her cause and complaint, and also aligned himself with the complaint she had against Novakovic. According to the Respondent, Coetzer, however, after having welcomed her feedback, later sent her an email, wherein he attacked her personally. This resulted in the Respondent posting the article on her blog. The article makes the following statements concerning the Applicant:

- 1) That the Applicant is "... dishonourable and unprofessional, butler training recruitment body, based in Cape Town."

- 2) That one of the students of the Applicant "...Mrs Novakovic had acted unprofessionally by being late for work, without giving notice, was late for work twice in four days, did not follow instructions about the breakfast, serving time or any other instructions for that matter, did not own up to damages she caused... Did not want to interact with our guest over breakfast... refused to shake hands to welcome our new guests... was unable to manage the housekeepers... left to go home and during guest check in training... prepared a dreadfully kitsch table to our wedding anniversary guests we wanted to spoil... generously took a coffee and breakfast break herself while the rest of the staff were focused on getting the rooms ready for the new arriving guests..."
- 3) "The SA Butler Academy website (and its Facebook page) is riddled with typing errors, and is overwritten with extravagant exaggerated claims..."
- 4) "Butler student applicants should be fluent in English, but neither the Academy's website, its Facebook page nor Mrs Novakovic's writing reflects this fluency!"
- 5) "The logo (provided cheekily by the Academy yesterday) reflects five star [t] s - however, the Academy is not graded by the Tourism Grading Council, and its use of the star is therefore unlawful..."
- 6) "... Reflecting the unprofessional nature of the Academy and its graduates..."

7) *"At a cost of R19500 for an 8 week course, it would appear that the SA Butler Academy students themselves are being taken for a ride..."*

8) *"...Needless to say, we would warn any potential Butler student and any potential employer of butler via the SA Butler Academy's Guild Recruitment against any dealings with the SA Butler Academy!"*

The Applicant's Case

[8] The Applicant submits that the words quoted above, in the context of the article are wrongful and defamatory of the Applicant, in that they were intended and were understood by readers of the article that the Applicant:

- a) is dishonest in its dealings with its current and prospective students;
- b) acts unprofessional and unethical;
- c) is dishonest in its dealings with the public;
- d) makes use of fraudulent marketing to attract prospective students and clients; and
- e) is committing fraud in the manner it conducts its business.

[9] The Applicant further contends that besides the defamatory meaning of the article, that in the context of the article as a whole, the Respondent's intention was to convey the innuendo and/or convey the meaning that the Applicant is in fact dishonest. The innuendo is wrongful and defamatory of the Applicant. The Applicant submits that none of the portrayals of it are true, and is done only with the intention to defame and cause damage to it.

[10] Mr Brink, for the very first time during the hearing of the application submitted that the application is fatally flawed because the Applicant failed to ask in its relief in the parallel action for damages, pending between the parties, that the offending article be removed. He submitted that for this reason alone this application for interim relief before this court should be dismissed. Mr Montzinger in answer to this submitted that this point was not properly raised on the papers. It was neither raised in the Respondents answering affidavit nor in the heads of argument. I agree with the submission of Mr Montzinger and therefore this aspect needs no further discussion and attention from this court.

[11] The Applicant submitted that the Respondent's plea of prescription based on the fact that its claim for damages was caused by the publishing of the article during February 2013 and that summons was only issued during December 2016, thus its claim had prescribed, is baseless. According to the Applicant, the damage that was caused by the article only became apparent during 2016 and it understands that its cause of action for damages is only complete when the damages have also been ascertained.

[12] Furthermore, that on every occasion the article is read as a result of a Google search by a prospective student, a new cause of action arises. In this regard the Applicant refers to two emails received from one Dale John Bierman and a certain Marelize Bekker, about their perceptions of the Applicant after they saw what was posted on the Internet. Bierman in his email to the Applicant, made it clear that upon researching the Applicant he came across the negative information about it. According to the Applicant this negative information is nothing else than

the Respondent's article. Bierman mentions that the article almost made him withdraw his application and made him wary of the Applicant.

[13] Bekker's email makes it clear that the Applicant was not her first choice due to a negative remark she saw on a blog site. According to the Applicant, the only negative remark online is the blog of the Respondent, which forms the subject of this application. Bekker saw the post of the Respondent in February of this year (2017) and wanted to join another institution. She did, however, enroll with the Applicant because of circumstances beyond her control, but stated emphatically, that she would have gone to another institution directly as a result of that specific negative comment regarding the South African Butler Academy.

[14] The Applicant contends that from the respective emails of Bekker and Bierman, it is apparent that as recent as 2016 the blog posted by the Respondent resulted in potential harm for the Applicant. It is also clear that prospective students would first conduct research about a specific institution on the Internet, where after they would make a decision whether to enroll at such an institution. It is the Applicant's belief that the reduction in the number of enrolled students is a direct result of the factually incorrect article published on the blog of the Respondent.

[15] If the Respondent is allowed to continue to have the article posted on the website, the possibility is unavoidable that the Applicant will continue to suffer further damages as a result of the defamatory article. The presence of the article is therefore continuing to cause damage and will continue to cause, at least in future, damage to the Applicant.

[16] After the Respondent, during July 2016, was requested by the Applicant's attorneys to remove the blog posts, she instead posted the following response on the website: *"...The Sour Service Award goes to the SA Butler Academy, for sending a lawyer's letter 3 years later (!) after we posted the post 'The SA Butler Academy, grossly mislead students and hospitality industry clients!' About the Academy on blog (sic) it now feeling the damaging effect of the blogpost and requesting that the post be removed. The SA Butler Academy has not held back in bad-mouthing and disparaging us on every possible social media platform! Numerous Butler students have called and emailed me about the misleading claims made by the SA Butler Academy, finding our Blogpost on the first page of Google!..."*

[17] The Applicant contends that this response indicates that the Respondent acknowledges that the contents of the article is damaging. Further, in this response, the Respondent indicates that either existing or prospective students have contacted her directly after reading the blog post which they found on the first page of Google.

[18] On 10 February 2017, the Applicant's attorney by means of a letter, once again, requested the Respondent to remove the article, pending the determination of the action proceedings. The Respondent failed to adhere to this request.

[19] The Applicant submits that the Respondent is acutely aware of the damage it has suffered and will continue to suffer, and the effect the presence of the article is continuing to have on its prospective operations. Despite its efforts to market its

business on a continuous basis, it is evident from the amount of students that enroll, that people are discouraged to be associated with the Applicant due to this defamatory article. This in fact has resulted in a drop in the number of enrolments.

[20] The Applicant argues that it has a prima facie right, because it is the person that has been named in the article containing the defamatory statements. And since it provides training courses, marketed on its website, the Respondent is primarily attempting to defame it. The negative portrayal of the Applicant further infringes on its right to privacy and its right to take part in day-to-day commercial activity without the fear of being unfairly defamed. The harm that the Applicant is suffering is apparent. Applicant contends it has already suffered damages in the approximate amount of R500 000,00.

[21] The reputation of the Applicant affects its goodwill, which in turn affects its capacity to attract customers and make profit. The Respondent has 30,000 followers on her blog on various social media platforms. The article is therefore causing harm to the business of the Applicant and its reputation on a daily basis.

[22] The Applicant contends that the balance of convenience clearly favours it, and that the Respondent would suffer no prejudice if an interim order was made. The Applicant is seeking that these rights be protected in the interim while the matter can be fully adjudicated during the trial. And in the event that the Respondent should defend the action successfully, she will still have an opportunity to re-post the article on her website after the conclusion of the trial.

[23] It contends that it has no other alternative remedy at this late stage, which would address the harm, that the Applicant has suffered and will continue to suffer. The Applicant lastly argues that it is entitled to relief on an urgent basis as the continued presence of the article on the website of the Respondent has caused harm in the manner it has done. It is further urgent because for every day that the article remains on a public forum, it continues to cause harm to the Applicant.

The Respondent case

[24] Mr Brink submits that as long back as 2013, the Applicant was aware of the article and only decided to institute proceedings regarding these blog posts in 2016. According to Mr Brink, the claim arose immediately when the statement was made, in this case, when the article was published in 2013. It is strange that it took the Applicant more than 3 years to institute these proceedings. He therefore submits that this claim against the Respondent has prescribed.

[25] The Respondent further argues that the Applicant has presented no evidence at all, that it suffered damage as a result of the Respondent's post. It relies only on the emails from two alleged students' claims that as a result of the article they were reluctant to enroll as students with the Applicant. No affidavit is provided by these students, even though both of them are said to have gone to study with the Applicant.

[26] The Respondent alleges that it is perfectly clear when reading the emails that they have been solicited by the Applicant. Both of these emails do not directly

refer to the Applicant. In the emails they also do not make mention of the Respondent's blog post at all. This, according to the Respondent, is not evidence of harm flowing from the Respondent's conduct. And there is also no other evidence of harm flowing from the Respondent's post.

[27] The Respondent further states in her answering affidavit, that the Applicant's characterization and description of itself amount to a puff of the offered services by it. Which was cut and pasted from its promotional material and it appears to be massively overblown. Although she has not seen the Applicants material, but it is clear from what she has seen on its website, it is not world-class.

[28] She further stated that the Applicant is not world renowned and has a fairly poor reputation among those offering those kind of services and from old graduates. In this regard, she refers to an unsolicited email from a graduate of the Applicant, Quinton Christie, who claims that the Applicant uses false and misleading advertising/marketing. She also referred to a further email from a person named Steven Ferry, who also claims to have had multiple complaints about the Applicant from graduates and others who claimed that the Applicant makes itself guilty of *"knowing disingenuousness, false advertising and suspect credentials for training others."* The Respondent submits that she could not obtain statements from these two persons, but will, if possible, lead their evidence at the trial.

[29] Based on her own experience, she denies that the Applicant's standards are above the expected international standards and further denies that the Applicant is the world's most exclusive privatized facility offering such training. On the basis of

this, therefore, the Respondent argues that the Applicant has not shown that it has a prima facie right. There is no basis to suggest that the Applicant is more exclusive than the British Butler Institute. She states that she has the necessary qualifications, training and experience in the hospitality industry, as well as her writing abilities to counter the Applicant's contention that she is not qualified enough to express an opinion about this subject. As referred to previously.

[30] She states that the matter did not start with the blog post, but with her contacting the Applicant telephonically to complain about the services of Novakovic. This happened when she spoke to Coetzer, who initially welcomed her feedback and confirmed that other clients had similar complaints about Novakovic. He later, however, sent her an e-mail in which he attacked her personally.

[31] As a result of this email, she gave them the so called Sour Service Award on 22 February 2013, wherein she stated the following: *"The Sour Service award goes to The South African Butler Academy, and its Recruitment Manager, Adriaan Coetzer, who initially welcomed feedback about one of the graduates of the Academy, Hettie Novakovic, with whom we had worked for a few days and whose butler training was a core reason why we had appointed her. However, in a very short period of time, her performance deteriorated, she was poor at following instructions, and made mistakes, the SA Butler Academy training Academy clearly (sic) leading to an arrogance in its students, and being too short at 8 weeks to teach students any depth. Coetzer telephonically said that our feedback confirmed what other clients had reflected and their own experience offer, but lashed out in a subsequent email, disputing our feedback and being defensive about his graduate!"*

[32] The Applicant in response to the Sour Service Award, according to the Respondent, attacked her in a subsequent blog post on their website, which she does not have any more, because it had been removed. This blog post was not disclosed by the Applicant and was posted for almost 4 years which since had been removed, when these proceedings were contemplated. Her 27 February 2013 blog post, which is the subject of this dispute, was in response to that blog which the Applicant posted.

[33] According to the Respondent, what was posted on her blog in relation to the Applicant, was fair comment and in the public interest. The criticism relating to Novakovic was not directed towards the Applicant. Where she made reference to typing errors on the website of the Applicant and its Facebook page it was not defamatory.

[34] She further contends that the website is overwritten and makes extravagant and exaggerated claims more especially where the Applicant states that it is the best Butler Academy in the world, which is simply not the case. Her comment in this regard, the Respondent submits is fair, true, and in the public interest. The rest of the criticism which she leveled against the Applicant, which is set out in paragraph 16 of the Applicant's founding affidavit is either not defamatory, but fair comment and in the public interests.

[35] The Applicant's request that she remove the blog which the Applicant states is an attempt to mitigate its damages is fraught with difficulty, because the Applicant has posted an article on its website, drawing attention to the proceedings it

instituted against the Respondent, which is linked to the whole summons which the Applicant has instituted against the Respondent.

[36] The article of the Respondent which the Applicant claims is defamatory is linked to this article. In so doing, the Applicant has ostentatiously paraded the Respondent's article before every reader of its own website. Anyone reading the website of the Applicant would come across the Respondent's article, which is the subject of this litigation. It is therefore difficult to see how the Applicant can complain that it suffered damages as a result of an increase in people coming across the disputed article, whereas the very same article is being published by the Applicant on its own webpage.

[37] The Applicants claim that people are discouraged from wanting to study at the institution due to negative publicity caused by this article is very speculative and entirely unsubstantiated. According to the Respondent, there may be other causes for the non-increase in the enrolment figure of students with the Applicant. The Respondent further disputes, that at the very least two students were reluctant to join the Applicant's institution as a result of this article.

[38] The Respondent further denies that the Applicant is entitled to the interdictory relief being sought in these proceedings. She denies that the Applicant has a prima facie right to the relief it is seeking. The Respondent further denies that the Applicant has suffered any harm or that any harm is apparent.

[39] The Respondent denies that the balance of convenience favours the Applicant. The harm that would be suffered by her and the community at large would be much greater because the effect of forcing her by means of an interdict to remove the article would have a chilling effect to the right to freedom of expression as protected by the Constitution. The Respondent further submits that this chilling effect will affect bloggers in general, who blog on matters of public interest and would affect the rights of members of the public to receive fair comment and information in the public interest.

[40] The Respondent denies that the Applicant has no other remedy, because it has instituted action proceedings against the Respondent. The Applicant has also failed to show why the relief it is seeking should be granted on an urgent basis.

Analysis

[41] The requirements for interim relief are well-known. It is not required at this stage for the Applicant to establish its rights to relief on a balance of probabilities. The Applicant only needs to show a prima facie right, although open to some doubt. In *Webster v Mitchell*,¹ Clayden J, held that: *"The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not*

¹ 1948 (1) SA 1186 (W) at 1189.

succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

[42] In this matter, the Applicant alleges that the article posted by the Respondent is defamatory in nature. The Applicant further alleges that what is contained in the article is not true and unsubstantiated. The article has caused harm to its good name and reputation. The Respondent does not deny that she posted the article on her blog. She says that the comment was fair and in the public interest.

[43] Given the time lapse between the publication of the article that was on 27 February 2013 and the institution of the action proceedings that occurred on 10 December 2016, there is a reasonable prospect that the Respondent's special plea of prescription may be upheld. This fact therefore places in question whether the applicant has established that it has a prima facie right.

[44] One of the further difficulties the court has with the Applicant's case was that the article was published more than 3 years ago. At that time when the Applicant became aware of it, it did not take any action to prevent the further publication or prevent it from being further posted or exposed on the Respondent's blog, in order to prevent any harm that it would cause to its reputation and good name.

[45] The Applicant argues that at that stage, it was unaware that any harm was caused by the posting of the article. It is difficult to understand why the Applicant at that stage, after this article was posted on the website of the Respondent, did not foresee, given the serious allegations the Respondent made in the article against it, that it would cause harm and why it did not take any action to have it removed from the Respondent's website.

[46] Mr Montzinger argued that given the nature of these proceedings, the Applicant is not required to show damages. While this may be so, it is still incumbent upon the Applicant to show in these proceedings that there is a reasonable apprehension of harm. Reasonable apprehension of harm is a reasonable belief that the Applicant would suffer damages, which the Applicant has to prove in order to claim interim relief.

[47] Ordinarily, in proceedings like these, in assessing whether there would be a reasonable apprehension of harm, a court would have regard, usually on an urgent basis, immediately after the Respondent has committed a wrong, to come to the assistance of an applicant for interdictory relief, in order to prevent harm to the Applicant. In such a case the person suffering the prejudice would immediately come to the court for assistance, to prevent or mitigate further harm, that is not what the Applicant did.

[48] This did not happen in this case. Ironically, the Applicant waited for a period of almost 4 years after the Respondent published the article to come to this court for assistance in order to seek the court's assistance to prevent harm occurring. In

my view, there was no way, if the Applicant was serious about protecting its good name and reputation and had a belief that it would be harmed, that it did not take any steps to safeguard itself against any harm that could be caused by the publication of this article.

[49] The only conclusion the court can come to, is that at that stage, the Applicant must have been under the reasonable belief that the article would not affect its good name and reputation. Otherwise, the Applicant as a business would have acted to prevent the Respondent tarnishing its name and reputation. It is further difficult to understand that under the circumstances where there was a scurrilous attack on the good name and reputation of the Applicant already in February 2013, that it would only have felt the harmful effects of the article almost 4 years after the publication of the article.

[50] The Applicant's evidence with regard to the harm it suffered is open to some serious doubt and, as correctly pointed out by the Respondent, at this stage it is vague and unsubstantiated as to what exactly this harm is. As far as this aspect is concerned, and based on the facts as presented by the Applicant, it would have difficulty in obtaining final relief at the trial. Given these facts and considerations, the Applicant's case at this stage is not merely open to some doubt, but the facts set out in contradiction by the Respondent, throws serious doubt on the case of the Applicant.

[51] It is doubtful whether at this stage after the article have been posted for such a long period on the Respondent's website, that harm, if any, had been caused or

further harm could still be caused. One would have expected that given the fact that this article had been published such a long time ago, that there would have been evidence of substantial harm that was caused thereby, than that which the Applicant had attempted to show. At this stage, it will serve no purpose to grant an interdict in the absence of any cogent evidence that harm had indeed been caused or that harm would in all likelihood be caused.

[52] I am not convinced that the balance of convenience favours the Applicant, given the long period that this article had been posted on the Respondent's website. On the contrary, given the facts and circumstances of this case and the length of time the article had been posted on the Respondent's website before the Applicant has seriously attempted to have it removed, it would not be in the public interest to have it removed at this late stage. The public's right to be informed and the Respondents freedom of expression due to the Applicant's tardy response, has far overtaken the Applicant's right it may have had in preventing any alleged harm that the publishing of the article, may have caused.

[53] I am also not convinced that this matter is urgent, given the scanty and unconvincing evidence regarding the alleged harm it has caused after this article had been published on the website of the Respondent for a period of almost 4 years, that in refusing the interdict, the Applicant suffered irreparable harm.

In any event, it has instituted action proceedings against the Respondent, which would not leave the Applicant without any other suitable remedy.

Condonation

[54] In terms of an order granted by *Rogers J*, the Respondent had to file her answering affidavit, before 21 April 2017. She did not comply with the order and only filed her answering affidavit on 16 May 2017. In terms of this order, the Applicant and the Respondent has not complied with the order to file its answering affidavit on 21 April 2017, in turn, had to file its replying affidavit on before 12 May 2017, which was 13 court days after 21 April 2017.

[55] The Respondent did not file any application for condonation for the late filing of its answering affidavit and merely requested the court to accept the answering affidavit without any censure. The Applicant, however, asked the court to exercise its discretion in allowing the late filing of the answering affidavit which the court did and requested that in the event that the court should not grant the application, it should order that each party pay its own costs in order to show the court's displeasure with the conduct of the Respondent. I agree with the submission of Mr Montzinger, even though the Respondent was successful in resisting the application for interdictory relief.

Order

[56] In the result, I make the following order:

"The application is dismissed, and each party to pay its own costs."



R.C.A. HENNEY
Judge of the High Court