

- A may be required to abate the noise nuisance occasioned by their use of erf 1883, Walmer, Port Elizabeth, situated at 3, 3rd Avenue, Walmer, Port Elizabeth (hereafter referred to as erf 1883);
- B (d) declaring that zoning condition (xiv) applicable to erf 1883 does not authorise the first and second respondents to cause a noise nuisance;
- B (e) directing the first applicant to pay the costs of the second, third, fourth and fifth applicants and the fourth respondent occasioned by the application for a postponement on 30 January 2003;
- C (f) directing the first and second respondents, jointly and severally, the one paying, the other to be absolved, to pay the costs of the second, third, fourth and fifth applicants, occasioned by its opposition to their application to intervene;
- D (g) directing the first and second respondents, jointly and severally, the one paying, the other to be absolved, to pay the costs of the main application.

D First Applicant's Attorneys: *Joubert Galpin Searle Inc.* Second to Fifth Applicants' Attorney: *Robert J Marinidae.* First and Second Respondents' Attorneys: *Friedman Scheekel.* Fourth Respondent's Attorney: *Robert J Marinidae.*

F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V
W
X
Y
Z
[
]
(PTY) LTD
TSICHLAS AND ANOTHER v TOUCH LINE MEDIA
WITWATERSRAND LOCAL DIVISION
KUNY AJ
2003 March 14; June 26

Case No 2783/03

H Defamation—Publication—Electronic media—Internet website—Place of publication—Publication taking place at place where website accessed. Defamation—Remedies—Injunctive—Application to injunctive publication of existing and future defamatory material on Internet website—Such interdicts having effect of permanent interdicts and grossly curtailing freedom of expression guaranteed by s 16 of Constitution of the Republic of South Africa Act 108 of 1996—Common law providing no basis for granting of such interdicts—Requirements for order restraining publication of existing defamatory material not being met—Order restraining future publication of defamatory material not competent—Application dismissed.

A *Injunctive*—Final interdict—Injunctive restraining publication of existing and future defamatory material on Internet website—Evidence not proving further injury arising from continued publication of existing defamatory material—Action for damages also being satisfactory alternative relief—Order restraining future publication of defamatory material not being competent—Application dismissed.

B *Jurisdiction*—Grounds of—Residence—Respondent's place of business, not being principal place of business, within Court's area of jurisdiction—Such presence sufficient to found jurisdiction.

The (first) applicant was the club secretary of the second applicant football club and the respondent was the owner and publisher of a football magazine and Internet website. The 20 selected statements which formed the basis of the applicant's complaint had all appeared in the 'chat forum' of the respondent's website and had been contributed by various users of the website. The applicant contended that the statements were defamatory of her and sought to injunct the respondent from publishing on its website material which was defamatory of her (prayer 2), ordering the respondent to remove the 20 selected statements appearing on its website (prayer 3) and ordering the respondent to monitor its website and to remove any defamatory material which might, in the future, be placed on the website by participants in its chat forums (prayer 4). The applicant had not called upon the respondent to withdraw the statements remaining on its website chat forum pages prior to launching the application. Simultaneously with her application, she instituted an action for damages for defamation against the respondent (as second defendant) arising out of certain other material which had been published in its magazine. Whilst the respondent had a place of business within the area of jurisdiction of the Court, its principal place of business was in Cape Town. On that basis, *inter alia*, the respondent denied that the Court had jurisdiction to entertain the application. The applicant relied for jurisdiction upon the respondent's residence within the Court's area of jurisdiction, as well as the fact that the cause of action had arisen within its area of jurisdiction because the applicant's attorney had accessed the respondent's website within its area of jurisdiction.

Held, that it seemed to be common cause that the respondent had a principal place of business within the area of jurisdiction of the Court even though that might not be its principal place of business in the Republic as a whole, and that such 'presence' was sufficient to provide the Court with jurisdiction. (At 119H–H1L)

Held, further, that jurisdiction did not rest solely on that ground. The statements were published within the area of jurisdiction of the Court, and once they had been accessed by, and thus published to, the attorney, there had been 'publication' as a requisite element of defamation. (At 119I and 120A/B–B/C.)

Held, further, that prayers 3 and 4, if granted, would effectively constitute interdicts, and indeed interdicts of a permanent and not merely an interim nature. Accordingly, the Court was obliged to deal with the matter on the basis that the applicant was seeking permanent and not interim relief. The law was clear that, insofar as a permanent interdict was sought, the applicant had to establish (a) a clear right; (b) that she had suffered injury or that injury was reasonably apprehended; and (c) that no other suitable form of relief was available to her. (At 4 and 124D–D/E and H1L.)

Held, further, that the applicant in prayers 2 and 4 sought to impose what would be drastic constraints on the respondent's freedom to publish certain matters on its website discussion forum. The right to freedom of expression as embodied in s 16 of the Constitution of the Republic of South Africa Act 108 of 1996 would be grossly curtailed if such an order were made. Since

A it was impossible to evaluate in advance whether material that was not yet known, presented or published would be defamatory or possibly met by a good defence, there was in any event no basis at common law for such an order. (At 129A/B-C.)

B *Held*, further, on the assumption that at least some of the statements complained of were *prima facie* defamatory and that others bore a secondary meaning and contained defamatory innuendo, that, insofar as any of the statements might already have caused her injury, the applicant was entitled to claim, by way of action, such damages as she might have suffered. Their 'continued publication' might simply add to the *quantum* of the damages when ultimately assessed by the trial Court. (At 129D-D/E and F-F/G.)

C *Held*, further, that the evidence failed to establish that the continued publication of the allegedly defamatory material would cause the applicant further injury. There was in addition no reason to believe that defamatory statements would necessarily continue to be published or that, if they were, the applicant would be harmed any further than she might already have been harmed by the original publication of such statements. (At 129J-130A/B.)

D *Held*, further, that, had the applicant prior to launching the application taken steps to draw the respondent's attention to the material, the application might well have been avoided. (At 131C/D-D.)

E *Held*, further, that the applicant's contention that there was no other suitable or satisfactory remedy available to her was not correct: not only had she been free to challenge and respond to the material on the website itself, by engaging in the ongoing debate at the time (had she known about it), but she retained the right to sue for damages and, on her own affidavit, she intended doing so. (At 131H/I-J.)

F *Held*, accordingly, that (1) there was no basis in law or on the facts for the granting of prayers 2 or 4; (2) in regard to prayer 3, the applicant had not established either (a) that if the continued publication of the statements were allowed, she would suffer further injury; or (b) that she had no other satisfactory remedy available to her (At 132C-E/F.) Application dismissed.

Annotations:
Reported cases

G *Atlas Organic Fertilizers (Pty) Ltd v Phketwyn Gihwano (Pty) Ltd and Others* 1981 (2) SA 173 (T); dictum at 204B-E applied
Brichesi v Potter and Others 1974 (4) SA 831 (W); discussed and distinguished

H *Cleghon and Harris Ltd v National Union of Distributive Workers* 1940 CPD 409; dictum at 415 discussed and distinguished
Heibon v Bignani 1931 WLD 167; dictum at 168-9 referred to
National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA); dicta at 1215-1216 and 1216F applied
Kenn v American Civil Liberties Union 117 S Ct 2329 (1997) (138 L Ed 2d 874); referred to

Roberts v The Critic Ltd and Others 1919 WLD 26; applied.
Statutes

I The Constitution of the Republic of South Africa Act 108 of 1996, s 16; see *Jacob's Statutes of South Africa* 2002 vol 5 at 1-146.

J Application to restrain the publication of existing and future defamatory material on an Internet website. The facts appear from the reasons for judgment.

A *J J Reyneke SC* (with him *J Moonroof*) for the applicants.
J Neudigate SC (with him *R G L Selzner*) for the respondent.

Cur ante vult.

Posita (June 26).

B **Kuny AJ:** On 10 February this year the two applicants launched an urgent application against the respondent for the relief set out in the applicants' notice of application dated 7 February 2003.

C The first prayer in the notice of application was for condemnation, insofar as that may be necessary, in view of the fact that the matter was launched as one of urgency. Prayers 2, 3 and 4 are the substantive prayers and read as follows:

- 2. Interdicting the respondent from publishing material defamatory of the applicants on the kick-off website.
- 3. Ordering the respondent to remove defamatory material identified in annexure S1 to this notice and appearing on the kick-off website, from the said website, within 24 hours from service of this order on respondent.
- 4. Ordering the respondent to monitor its website and to remove defamatory material placed on the said website by participants on the forums on the website within one hour of such publication.
- 5. The costs of the application.

E As far as prayer 1 was concerned, the matter was dealt with on a semi-urgent basis after the respondent had filed an answering affidavit and the applicants had replied thereto. The papers, ultimately, were very substantial, running into some 336 pages, and the matter was dealt with as a full-scale opposed application on 14 March of this year. The question of urgency therefore fell away.

F After hearing argument, judgment was reserved and it is this judgment which I now deliver. Mr *Reyneke SC*, together with Mr *Moonroof*, appeared for the applicants and the respondent was represented by Mr *Neudigate SC*, together with Mr *Selzner*, both of the Cape Bar. I should say at the outset that both sets of counsel presented very extensive heads of argument and files containing copies of a large number of authorities and I am indebted to counsel for the thorough argument and competent manner in which the matter was argued. The fact that I may not refer in this judgment to many of the cases cited does not mean that I have not had regard to them; they have been of great assistance to me.

The background

H In the founding affidavit, the first applicant, Mrs Anastasia Tsiichlas, has set out, in considerable detail, her *curriculum vitae* and it constitutes a very impressive record of achievement. She indicates that, having been born in Greece, she came to South Africa in 1973 and became a South African citizen in the early 1990s. She is married to Evangelos Tsiichlas, a former international soccer player and coach from Greece and he is also a South African citizen.

I She sets out that, since 1987, she has been associated with the second applicant, the Sundowns Football Club, as its club secretary and that, J

- A since then, she has established an extensive record of participation at various levels in the soccer world in South Africa and indeed, it seems, internationally. I need not, for the purposes of this judgment, go into the details, save to mention that first applicant was the first woman appointed to the board of governors of the Premier Soccer League in South Africa. In 1997 she was elected as the first woman serving on the executive committee of the South African Football Association, which controls the national football teams. She is the past chairman of women's football in South Africa and she has also been appointed to Fifa to serve on its football committee as the first woman from South Africa. She serves on this committee together with various soccer legends such as C Pele and others — Fifa is an International Federation of Football Associations, responsible for, *inter alia*, the World Cup held every four years. She was appointed by the South African Football Association to a task committee responsible for the South African delegation going to the World Cup in South Korea and she received the President's Sports Award from President Mbeki in May 2002.
- D She states in para 4.15 that, as a woman in a managerial position with the second applicant, she lives and works in a male-dominated environment. She states:
- 'I relish this challenge. The defamatory statements outlined in this affidavit compromised me in the management of the second applicant and in my dealings with male soccer players and personalities. For this reason I am hurt, insulted and defamed by these statements.'
- E She states that her reputation is very important to her and that the second applicant, of which she is now the managing director, has, under her guidance, achieved considerable football success over the years and F is also involved in community work.
- She sets out in para 5 the credentials of the second applicant, Sundowns Football Club (Pty) Ltd and in para 5.4 indicates the considerable success achieved over the years by Sundowns football team. She states in para 5.9 that the number of supporters of the team total approximately three million and that the Sundowns logo and name are very well known. First applicant therefore contends that the statements which were allegedly made of and concerning her personally would constitute not only a reflection on her, but also on the club and the team itself.
- H From the foregoing it is clear that the founding affidavit establishes very impressive credentials for both first applicant individually and for the second applicant. I should say, however, that despite examining carefully the various statements which are alleged to be defamatory or injurious of the first applicant, I can find nothing which reflects adversely on or defames the second applicant directly. There is authority to the effect that a trading company can be defamed and may sue for damages for defamation. In the present matter, however, it seems to me *prima facie*, that the second applicant has been joined as an applicant only to cover the possibility that some harm might be suffered vicariously by it. It is therefore a party to this application, on the back, so to speak of the first applicant. For the sake of convenience and brevity in this judgment, J I propose to treat the applicants as one and to refer only to the 'applicant'

as meaning both applicants (save where the context requires otherwise). A In order to understand the nature of the relief sought in this application, it is necessary to refer briefly to the background and the relevant facts. The respondent is a company which has its registered office in Cape Town. The applicant alleges that respondent's principal place of business is within the area of jurisdiction of this Court, at 5 Protea Place, Protea Park. The respondent's answer to this allegation is, as I read it, a *non sequitur*, because what the respondent says is 'I deny that respondent's principal place of business is within the area of jurisdiction of this Honourable Court at 5 Protea Place, Protea Park, Fredman Drive, Sandton'. Its principal place of business being the place where all its work and administration is done, where the *Kick-Off* C magazine is produced and published and from where it is distributed and the place where the *Kick-Off* website is produced, managed and hosted, are all, according to respondent, in Cape Town. This does not, however, answer the allegation that, insofar as it has a place of business within the area of jurisdiction of this Court, that place of business is at 5 Protea Place, Protea Park, Fredman Drive, Sandton. The relevance of this will be seen when I deal with the question of jurisdiction, which is in issue in this matter.

The founding papers proceed to deal with the business of the respondent as being a purveyor of public media. It is alleged, and it is a common cause, that it is the owner and publisher of *Kick-Off* magazine, E a journal published in South Africa and circulated in Southern Africa. The journal is aimed at those members of the public who love, follow and support football, or 'soccer' as it is commonly known. The editor of the journal is a Mr Richard McGuire.

The respondent is also the owner and publisher of an Internet website F known as 'kick-off', which is to be found on the Internet at a given Internet address. (Para 6.2). The references to the website in the affidavits are to this website, unless the contrary appears, and it is alleged that the website is under the control of and is published by the respondent.

It is unnecessary, for the purpose of this judgment, to go into the G details set out fully in the affidavits of several experts who testify as to what an Internet website is, how it functions and how access is gained to a website. Suffice it to say that the Internet, which has become a world-wide phenomenon today, is growing and proliferating at an exponential rate. It is used throughout the world today by many millions of people who have access to computer technology and it functions in the manner described in some detail in the papers before me.

The particular aspect of the website which is in issue in this matter is that section which is called a 'discussion forum' or, in common parlance, a 'chat forum'. This is fully explained in the affidavits and it is not in dispute as to what a 'discussion' or 'chat' forum is, how the public are able to gain access to it via the respondent's website address and how it functions.

Insight into the functioning and content of the 'chat' or discussion forum is assisted by the attachment to the founding affidavit of many pages emanating from the discussion forum. I refer in particular to J

A annexure S8 to the applicant's founding papers, as well as a number of pages which have been annexed as annexures to the respondent's answering affidavit. In effect, the chat or discussion forum enables interested users, readers and persons concerned with the sport of football to write (call) in, by way of electronic communications, and engage in debate, discussion, comment or whatever else the user of the website may wish to contribute to the discussion forum. Various topics are, from time to time, put up for debate and discussion, mainly by users themselves, and this may provoke discussion, often animated, vigorous, angry, abusive, critical . . . etc, as one can see from the pages from the chat forum annexed to the papers.

C It seems that football fans in general and in South Africa in particular are very vociferous in the views which they express and are sometimes very critical of the management, administration, organisation, selection of players, and the performance of players on the field. Comments and opinions are often strongly expressed, sometimes in the most lurid and insulting terms, as can be seen from the statements which have been complained about by the applicant and which are set out in annexure S1 to the notice of application. This annexure refers to 20 selected statements which form the basis of the applicant's complaint. I will return to these statements in due course.

E The point is that the 'kick-off website, as opposed to the *Kick-Off* printed magazine, attracts many thousands of what are called 'postings' to its web pages; postings being the messages, statements, questions, answers . . . etc, which are contributed by various users and which, having been 'posted' on the web pages of the forum, may remain there for an indefinite period of time or until removed.

F This application arises from the fact that, over a period of time commencing from 8 November 2002 until 3 February 2003, a number of statements had appeared on or had been contributed by various users of the website (not inserted or 'posted' by respondent itself) concerning the applicant, Mrs Tsihlas. This application is based upon and relates solely to those 20 selected statements. I emphasise this because, side by side with this application, an action claiming damages for alleged defamation was launched in the middle of December 2002 by Mrs Tsihlas and the Sundowns Football Club (the same applicants as in this application) against Mr McGuire, the editor of *Kick-Off* magazine as first defendant, Touch Line Media (Pty) Ltd as the second defendant and National News Distributors, the firm conducting the business of distribution of newspapers and magazines as third defendant.

H The reason I mention this action, reference to which was introduced by the applicant herself in the founding affidavit, is the fact that a total amount of R8 million is being claimed from the three defendants arising from the publication in the respondent's print magazine (and not its website magazine) of a letter from a contributor and the editor's letter which are to be found on pp 73-4 of the papers. The letter from a reader was published in the magazine under the heading: 'Sundown management are destroying the club'. Mr McGuire's letter (p 74) is an answer to the letters which were addressed by the applicants'

KUNY AJ TSICHLAS AND ANOTHER v TOUCH LINE MEDIA (PTY) LTD 119
2004 (2) SA 112 WLD

attorneys to the second respondent in the action (respondent in this A action).

The significance of those proceedings is that applicant availed herself of the remedy of suing for damages (in a very large amount) in respect of the 'tarnishing of her reputation' whereas, *in casu*, she contends that damages 'will however be difficult to quantify and cannot fully compensate the applicants for insidious and unreparable (sic) harm done to their *fama*, their *dignitas* and their goodwill'. These rights, applicant says, can only be protected through an interdict since 'damages will not compensate the applicants from the tarnishing of their reputation in the world of soccer' (para 63, p 42). I fail to see the difference between the two situations, save that applicant maintains that, in respect of the website chat forum defamations, the 'injury is ongoing'.

C It seems that the reason why the applicant saw fit to annex those papers to her affidavit was to indicate that the respondent had treated her attorneys' complaints and demands so dismissively that no purpose would have been served, in the present matter, to have requested the respondent, prior to launching this application, to withdraw the various 'offensive' statements from the website.

E It is, indeed, common cause that, prior to launching this application, applicant did not call upon the respondent to withdraw the statements which continued to appear and some of which still remain, on the website chat forum pages.

Jurisdiction

Before proceeding to deal with the substance of this application, I should deal, in the first instance, with the question of jurisdiction. The respondent has contended that this Court has no jurisdiction to hear this application in view of the fact that the respondent is not registered within the jurisdiction of this Court and that the service provider is also resident in Cape Town. It is, accordingly, contended that the Cape Town Court and not this Court would have jurisdiction and that there is no basis upon which this Court can exercise jurisdiction.

G Section 19 of the Supreme Court Act 59 of 1959, as amended, provides that a Court has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction. It nevertheless appears from the allegation made by the applicant, which is not really disputed by the respondent, that the respondent does have a *principal place of business* within the area of the jurisdiction of this Court, even though that might not be its principal place of business in the Republic as a whole. In my view, this 'presence' is sufficient to provide this Court with jurisdiction.

H Jurisdiction in this matter does not, however, rest solely on this ground. An applicant appears to have founded jurisdiction in this Court principally on the basis that the 'cause of action' arose within the area of this Court's jurisdiction. In this regard, it is alleged that the applicant's attorney accessed the respondent's website in Sandton in January of this year and, in so doing, came upon various statements in the discussion forum web pages, which he drew to the attention of the applicant. Until

A then, the applicant had apparently not seen or heard about the existence of these statements or complained about them or had any kind of feedback as a result of those statements having been made and appearing continuously on the website chat forum pages for all users thereof to see.

I am of the view that the statements were published of and concerning the applicant within the area of jurisdiction of this Court. Once they had been accessed by, and thereby published to, the attorney, there was, in my view, 'publication' as a requisite element of defamation.

I refer in this regard to *The Law of Defamation in South Africa* by Burchell at 67, where the learned author says, under the heading 'What is meant by publication':

C 'Publication is the act of making known a defamatory statement, or the act of conveying an imputation by conduct, to a person or persons, other than the person who is the subject of the defamatory imputation.'

In *casu*, it seems clear that the publication consisted of the words which are now being complained of having been made known to the applicant's attorney by the access which he gained to the website.

At 79 of the same work, the learned author deals with the 'place of publication' as follows:

'In an age of radio, television and other sophisticated methods of communication, it becomes important to determine where publication takes place. The delict is committed where the words are published.'

Duncan and Neill state that publication takes place where the words complained of are heard, read or the conduct is seen by the publishee. Thus, the letter is published at the place where it is read by the recipient and words spoken over the telephone are heard by the person at the other end of the line. Words or visual images broadcast over radio or television are published where the broadcasts are received.'

F It seems to me that this statement of the law in relation to the 'place of publication' is directly applicable *in casu* and I find that publication took place to the applicant's attorney in Gauteng within the jurisdiction of this Court, thereby conferring jurisdiction on this Court to hear this matter.

G I do not propose to deal with the various complications which may arise from this finding. In effect, my conclusion would mean that, whenever anybody, anywhere in the world, accesses this website and reads and understands the words which are complained of in this matter, there will have been publication to that user at the particular place where the user has accessed the website. Bearing in mind that we are dealing with the Internet and electronic communications, that national or geographic boundaries would not apply and that distances are irrelevant, the implications of this conclusion are enormous.

Burchell (supra) is aware of this problem, not specifically in relation to the Internet, but generally in the age of mass communication. At 80-1 he says:

I 'It is surprising that in an age of mass communication the question of choice of law and defamation has not arisen squarely for decision, but it is nevertheless true that the South African courts appear to have a free hand in selecting any of the above theories, or any other theory for that matter, when a case does arise. J The prospect of a multitude of actions arising out of an "international delict"'

A flowing from broadcast or television is indeed a nightmare, and the only solace we can find at present is that the rules of jurisdiction could well restrict the number of countries whose courts would be competent to entertain proceedings arising out of publication of the material. In this work it is not possible to discuss any further the vexed question of the conflict of laws pertaining to defamation.'

B The learned author goes on to point out that there can be multiple publications of the same defamatory matter. This does not, however, detract from, but rather supports, the conclusion to which I have arrived, that this Court has jurisdiction to deal with this matter by virtue of respondent's presence in the area as well as the fact that publication, in relation to the applicant, took place within its jurisdiction.

C The substance of this application

I proceeded to deal with the question that formed the major part of the argument in this matter, namely the question of responsibility and liability arising from the publication of defamatory matter on respondent's website chat forum. (For the purpose of this question, I make the assumption that at least some of the matter was defamatory.)

D I have heard a considerable amount of argument from both sides regarding the question of the respondent's responsibility in law as the owner or publisher of this website and its obligation to monitor and control what may appear on it. There is as yet very little authority, certainly in South Africa, regarding the Internet and its management, administration, monitoring and control and, accordingly, both parties have made reference to American and Australian authorities, as well as to rely upon our common law and its application to the relatively recent development of this form of electronic and almost instantaneous communication and dissemination of information on a global scale. Counsel F have raised the pertinent and vexed question as to whether publication of material on the Internet and, more specifically, in the so-called discussion or chat forum, is to be likened to and dealt with on the same basis as the print media and/or the broadcast or television media or whether new or different or special principles and considerations should apply.

G The matter is indeed complex and the law, or to put it more accurately, the extension of the law, in relation to this form of communication will, no doubt, be developed and adopted as more cases begin to arise throughout the world. Various articles have been written, both here and overseas, and the courts in other jurisdictions have already been confronted and have had to deal with problems such as, *inter alia*, H jurisdiction, publication, choice of law. There is also the question of new legislation, which may, for example, have to be enacted to deal with freedom of expression on the Internet, the protection of information on the Internet and the limitation of liability in relation to the publication of matter on the Internet.

I I refer, in this regard, to three articles which have been brought to my attention and which bring to light some of these problems. An article titled 'The Internet and the First Amendment', written by Douglas W Vicks, published in the *Modern Law Review* 1998, deals specifically with problems arising from a decision in the United States Supreme Court in the matter of *Reno v American Civil Liberty Union* 117 S Ct 2329 (1997) J

A (138 L Ed 2d 874) relating to the validity of certain legislation regarding the publication on the Internet of pornographic matter and which legislation was held by the United States Supreme Court to be unconstitutional.

B In an article titled 'Defamation on the Internet and other Computer Networks' by Sanet Nel, published in 1997 I *GLISA*, the author focuses particularly on the question of when and where publication of defamatory matter on the Internet occurs and who may be liable in respect of such defamation.

D Finally, there is an article titled 'Protection of Information on the Internet' by one Esmé du Plessis, a patent attorney practising in South Africa. This article, published in (1997) *Human Rights and Constitutional Law Journal of Southern Africa*, concerns matters which are not directly relevant to the present application, but I take the liberty of referring to the first and portion of the second paragraph of this article in order to indicate the sort of problems that can and are likely to arise in the future in relation to the Internet:

E 'The president of one of the world's largest software companies is quoted in a copy of a magazine as expecting that communication-centric computing, as contrasted with computer-centric computing, will revolutionise conventional business transaction procedures. In communication-centric computing, a user's computing environment expands beyond his own micro processor with its operating and application systems to include the so-called global information infrastructure with its information super highways, of which the Internet, with its information highway to the worldwide web and beyond, forms a part. He believes that the Internet is on the way to becoming the world's largest transaction system and, in the process, will revolutionise current practices in many areas such as in business and ultimately also in law. He refers to the big leaps in digital data transmission technology which are instrumental in bringing about these changes as a shifting paradigm and certainly the shifting takes place at a tremendous pace and in diverse directions, with new developments in the areas of computer hardware, communication technology and service software being introduced on a daily basis.

F The real problem arises when an attempt is made to determine the parameters of the legal framework within which such revolutionised system is to function. In this contribution, it is envisaged to address only some intellectual property law issues which will have to be faced in order to determine the rights of and protection available in parties delimiting information into a hypertext(?) knowledge base such as the worldwide web and, even beyond that, into cyber space, ie the boundless trove of digitised data, including information, advertising and entertainment which is populated or at least visited by users of the system.

G Having dealt in the article with the question of the proliferation of information and problems arising out of questions of confidentiality and protection on the basis of copyright, the author concludes with the following: (at 21)

H 'In view of the perceived inadequacies of the current South African legislative position and the possible complication that an implied licence may be construed, the introduction of suitable legislative measures is strongly urged.'

I It seems to me that it may well become necessary, in the near future, for the Legislature to bring its mind to bear on the particular and peculiar problems which may arise out of the Internet and to deal legislatively

A with certain problems in respect of which the common law may perhaps not be adequate to provide suitable or satisfactory answers. These already exist in the Electronic Communications and Transactions Act 25 of 2002, in which provision is made for the protection of so-called 'service providers' who are regarded as conduits rather than as principals in the dissemination of information.

B The respondent, almost as a 'throw-away' defence, suggests in its answering affidavit that it may be entitled to rely upon the provisions of this Act. At p 218 para 17 the respondent says the following:

C 'Respondent is a wholly owned subsidiary of Media 24 Ltd who in turn is a member of the On-line Publishers Association, a representative body referred to in s 71 of the Electronic Communications and Transactions Act 25 of 2002. Respondent, through its holding company, enjoys membership of OPA (that is On-line Publishers Association). As such respondent enjoys the limitations of liability provided for in the Act.'

D It seems that the respondent does not have much confidence in this possible defence, because nowhere else in its papers do I find mention made of this, and understandably so. The whole basis on which its website operates seems to be that of a principal purveyor of information. It is clearly not, nor does it fall within the definition of, a service provider. Indeed, it has a service provider in the form of Small World Digital (Pty) Ltd and that service provider, as I understand the technology, holds the information to which access is gained via the respondent's website.

E My conclusion in regard to this purported defence, if one can call it that, is that all the evidence in the papers before me points towards the respondent being a principal purveyor of information; in my view it is not entitled to the protection afforded by the Act to service providers.

F To return to the question of responsibility and liability in the present matter, the Internet, in the world of instantaneous electronic communication and the consequent dissemination, globally, of information, data, literature, news, articles, pictures, music . . . etc has proliferated so rapidly and exponentially that both statutory and common law have scarcely had time to catch up or come to grips with and assess how to deal with the myriad problems which may arise and which are likely to arise.

G Against this background and in the context of this application, I am now being called upon to make a definitive and possibly binding ruling regarding the administration, management, monitoring and control of Internet websites which incorporate discussion or chat forums as part of the facilities offered to the users of websites. I do not believe, having regard to the nature of this application and the form of relief being sought, that it is either necessary or appropriate for this Court to embark upon such an enquiry or determination. As will be seen below, the orders I propose to make do not require me to engage in an in-depth or definitive analysis of the nature, intricacies and legal implications of the publication of defamatory information on the Internet and, in particular, in an Internet discussion forum.

H To do so would involve a lengthy, difficult and essentially academic exercise in the context of this application. Insofar as the applicants have indicated in the founding affidavit that they intend to institute an action

A for damages arising out of the allegedly defamatory or injurious matter complained of in this application, it would clearly be more appropriate for the trial Court to deal with any such issues, should they arise at such a trial.

I come now to deal with the essence of the application. The form of relief sought in prayer 2 is for the granting of an interdict. In the case of prayer 3, applicant seeks an order that the respondent remove the defamatory material (identified in annexure S1) appearing on the 'kick-off website from the said website within 24 hours from service of the order on the respondent. Prayer 4 seeks a general order requiring respondent to remove defamatory matter within one hour of publication. C Whilst neither prayer 3 nor 4 refer to 'interdicts', both prayers, if granted, would have the effect of interdicting the respondent from carrying the material complained of or any defamatory matter whatsoever, on its website! By requiring the removal thereof, it is implicit that the applicant would be seeking to interdict the respondent from continuing to carry such material on the website. Thus, the substance and effect of these prayers, if granted, would constitute interdicts, and, indeed, interdicts of a permanent and not merely an interim nature. Prayer 4 goes so far as to require respondent to monitor the website and to remove defamatory material posted thereon by participants in the forums on the website within one hour of such publication. Prayer 2 deals specifically with defamatory material relating only to the applicant, whereas prayer 4 contains no such limitation, either with regard to the identity of persons who may be defamed, the nature of the material or any limitation in time, context or circumstances.

I will assume in favour of the applicant that prayer 4 was intended to refer only to defamatory material concerning the applicant since I cannot imagine that she could have intended to seek an order as wide as the one framed in prayer 4. Be that as it may, these three prayers, read conjunctively or disjunctively, amount in substance to the applicant seeking final interdictory relief and not merely temporary interdicts.

It is true that the applicant, in para 63 of her founding affidavit, indicates that she intends to institute an action for damages against the respondent. She stresses, however, that damages will be difficult to quantify and cannot fully compensate for the insidious and irreparable harm done to her *yama*, her *dignitas* and her goodwill, yet the prayers are not formulated to seek only interim relief; if granted their effect, in substance, would clearly constitute permanent interdicts. I must, accordingly, deal with this matter on the basis that the applicant is seeking permanent and not interim relief.

Now, the law is clear that, insofar as a permanent interdict is sought, the applicant would have to establish (a) a clear right; (b) that she has suffered injury or that injury is reasonably apprehended; and (c) that no other suitable form of relief is available to applicant. It is on the basis of these requirements that I approach this application. The main thrust of the application is to be found in prayer 3, which deals with the specific paragraphs complained of. Prayers 2 and 4, although couched in general terms, are obviously intended to bolster prayer 3 so as to prevent any such material appearing on that forum at any time in the future, thereby

giving applicant blanket protection insofar as it is reasonably possible for a respondent to monitor and control the postings on the chat forum.

The applicant, at this stage, requires that if, at any time in the future, matter of a defamatory nature should appear on the respondent's website, then the respondent must, within one hour of such publication, take steps to remove that matter. It seems clear from the papers and particularly from the respondent's answering affidavit, and further affidavits filed in relation to the statements that have recently been removed from the chat forum pages, that the respondent now has the technology to enable it to remove such material. The software in this regard apparently became available to the respondent from 7 February, but, even prior thereto, the respondent would, it seems, have been able to remove matter by instructing its service provider to do so and the assumption is that the service provider would have been able to remove such matter.

The question is whether there is any basis in law for the applicant to require the respondent to remove defamatory matter in the future—matter that may not yet have been written, and the content of which at this point in time is uncertain or unknown. Even if such matter turns out to be defamatory, the publication thereof by the respondent may not be unlawful in that respondent may have a good defence to its publication.

I refer in this regard to several reported cases which have a bearing on the grant or refusal of this type of relief. In the case of *Roberts v The Critic Ltd and Others* 1919 WLD 26, in which the Court was faced with an application on motion to restrain the publication of libel, the headnote reads as follows:

'The Court requires to be satisfied:

- (i) that the publication threatened would necessarily be defamatory;
- (ii) that no defence such as, eg, truth and public benefit, could be established in an action on the publication; and
- (iii) that nothing has occurred such as, eg, consent to the publication, to deprive the applicant of his remedy.'

Quere, whether and in what circumstances an interdict can be granted to restrain the publication of matter not before the Court.'

This question was answered by Ward J at 30 as follows:

'I think I have jurisdiction to make an order restraining the publication of a specific statement that is defamatory, but in the present case I am asked to restrain the publication of an article in so far as it is defamatory; if the applicant's contention is correct this will come to the same thing as restraining any continuation of the article at all, because that contention is that no continuation of the article can be written that is not defamatory. . . . There is the great difficulty in the way of granting an interdict restraining the publication of an article which purports to deal with a matter of great public interest, and which I have not before me. It is impossible to say what it will contain, however grave one's suspicions may be. The respondents specifically state that the continuation will not be libellous, nor will it slander the petitioner, nor will it affect her good name and fair fame. It can only be determined upon the publication of the article if this statement be true. I think it is impossible for me to deal with it now. In the cases I have referred to the defendants insisted on the right to publish the statements complained of. The interdict must therefore be discharged.'

That *dictum* enunciates a principle which is, in my view, equally

A applicable today. See also, in this regard, the cases of *Cleghorn and Harris Ltd v National Union of Distributive Workers* 1940 CPD 409 at 415 and *Heilbron v Bilgumani* 1931 WLD 167, particularly at 168–9.

In *Atlas Organic Fertilizers (Pty) Ltd v Phketwyn Ghuano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 204B–E Van Dijkhorst J, although dealing with quite a different type of matter, said the following:

B 'The claim for an interdict restraining the defendants from manufacturing and/or selling glwanomix under any name whatsoever is based upon the campaign of unlawful competition and mainly rested upon the alleged latching of Atlas' production secrets and know-how. In view of the fact that I have found against Atlas on that part of its claim, the foundation for an interdict has largely been caved away. *The remaining unlawful conduct which I found to have been proved was not a continuing wrong at the date of issue of summons and nor is it at present.* The Day contract irregularities were confined to 1978. The enticement of sale staff occurred during March and April 1978 and has not occurred since. *The unlawful selling campaign quided in May 1978 and there is no evidence that it had been resumed.*

D In respect of the passing-off and infringement of a trade mark a permanent interdict was granted in favour of Atlas already on 4 July 1978 by consent. *In my view, therefore, no case for an interdict has been made out.*

(My emphasis.)

E The applicant attempts to circumvent this problem by suggesting that she is being subjected to ongoing and continuous vilification by the respondent. For this she relies, first, upon the material published in the print magazine forum on 14 October and 11 November 2002, which has given rise to the R8 million action referred to above and, secondly, on the 20 statements which form the basis of the present application.

F Apart from that material, the applicant has referred to nothing else to indicate that there has been any continuing and ongoing campaign carried out by respondent to defame and vilify her in its website discussion forum or elsewhere.

G It is common cause that respondent is not the author of the material which appears in the chat forum, nor did it initiate or encourage its publication. The evidence shows that there are many thousands of people who access this type of website and the chat forum and one has only to examine the pages that have been annexed to gain some idea of the volume and the nature of the postings that appear daily in the discussion forum.

H In my view, therefore, applicant's reliance on 20 statements that appeared between 8 November 2002 and 3 February 2003, even read with the letter of 14 October and the article of 11 November 2002, does not establish that applicant is being subjected to a 'continuing and ongoing campaign' of vilification and defamation by the respondent. In the light of this avowal, it is surprising that the applicant was not even aware of the existence of these statements on the website until they were drawn to her attention by her attorney.

J The applicant, being a public figure and occupying a very important position, both in relation to the second applicant and in the football world in South Africa and perhaps internationally, must, of course, expect that, if things are not going well for her club, she may be subjected

A to attack, criticism and possibly even the kind of meaningless abuse of which some of the statements seem to amount to.

On the other hand, the papers reveal that, over the years, Sundowns football team has achieved considerable success and has won innumerable trophies and competitions and it is likely that, in good times, the applicant, far from being vilified, would have been complimented and praised for the successes of the team.

This does not, of course, entitle her critics to abuse her with impunity and to make comments which have no bearing upon her competence or her achievements or the manner in which she runs the club; I accept that some of the statements constitute vicious, nasty and sometimes meaningless abuse of the most offensive kind. It is another matter, though, to require this Court to prevent in advance defamatory or derogatory statements from being made on a website discussion forum or to order their removal once they have already appeared. The Constitution of the Republic of South Africa 108 of 1996 guarantees freedom of expression. Section 16 of chap 1, headed 'Freedom of Expression', provides that:

- (1) Everyone has the right of freedom of expression, which includes
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity;
 - (d) academic freedom and freedom of scientific research.
- (2) The right in ss (1) does not extend to—
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

F I would point out that some of the statements concerning the applicant are clearly racially based, insofar as there are repeated derogatory references to the fact that she is 'Greek'. She is referred to as being a member of the 'big fat Greek family business'; 'if the Greeks are booted out things at Sundown will improve'; She is referred to as a 'Greek prostitute', a 'Greek hooker', a 'Greek bitch'. The Constitution, in s 10 of the Bill of Rights also contains the concomitant right to 'human dignity'; s 10, under the heading 'Human Dignity' provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'.

H Although it has been suggested that the right to human dignity has primacy over other rights, there does appear, on the authorities, to be a tension between, on the one hand, the right to human dignity and on the other hand, the right to freedom of expression. It is the function of the Court to strike a balance between these rights, which may sometimes appear to be in conflict.

I In the case of *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1215F–1216E Heler JA (dealing with the then interim Constitution) said the following:

J 'I turn to consider the views expressed above in the context of the interim Constitution. I do so in light of s 35(3), which reads as follows:

A "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter."

This provision, as Kenridge AJ explained in *Du Plessis and Others v De Klerk and Another** "ensures that the values embodied in chap 3 will permeate the common law in all its aspects". The resultant position appears to be the same as in Canada, which is described as follows in the *Church of Scientology* case *supra* at 156 paras 91 and 92:

C "It is clear from *Dolphin Delivery (supra)* that the common law must be interpreted in a manner which is consistent with Charter principles. The obligation is simply a manifestation of the inherent jurisdiction of the Courts to modify or extend the common law or order to comply with prevailing social conditions and values . . . Historically, the common law evolved as a result of the Courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society in our legal system. It follows that it is appropriate for the Courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter."

D At 1216F-1217D the learned Judge continues:

E "The entrenched rights, it says, may be limited only to the extent that the limitation is reasonable and justifiable in an open democratic society based on freedom and equality. (Compare *Shabada and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) at 740 (para [26]) (1995 (2) SACR 761; 1995 (12) BCLR 1593). Some of the rights may only be limited if, in addition to being reasonable, the limitation is also necessary. One of these is the right "to respect for and protection of . . . dignity" conferred by s 10. The right "to freedom of speech and expression, which shall include freedom of the press and other media" is conferred by s 15(1). Any limitation on this right must, in so far as it relates to free and fair political activity, also pass the necessary test.

F The proper balance between these two rights in judgments *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) and *Buhlezi v South African Broadcasting Corporation* [1999] 1 B All SA 147 (D). I share the view expressed in *Holomisa* at 607E-G that

G "... s 10's recognition of every person's right to respect for and protection of his or her dignity' must encompass . . . the right to a good name and reputation. A further consideration is that the Constitutional Court, although in a very different context, has given primacy to the rights to life and dignity in the catalogue of constitutional protections. As Chaskalson P (with whose reasons most of the other Judges agreed) stated in *S v Madiqanyane and Another* 1995 (3) SA 391 (CC) at 451C-D:

H "The rights to life and dignity are the most important of all human rights, and the source of all personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

I I also agree that

J "(i)n a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power . . .

*1996 (3) SA 850 (CC) at 885G-H (1996 (5) BCLR 658).

A It is for this very reason that the Constitution recognises the special A importance and role of the media in nurturing and strengthening our democracy."

B In the present matter, the applicant seeks in prayers 2 and 4 to impose B what would be drastic constraints on the respondent's freedom to publish certain matter on its website discussion forum. I am of the view B that the rights embodied in s 16 of the Constitution would be grossly curtailed if I were to make such an order. In any event, there is no basis at common law for the Court to do so, particularly in respect of material not yet known, presented or published and not being in a position to evaluate, in advance, whether such material would not only be defamatory but may be met by a good defence.

C Insofar as the relief sought in prayer 3 is concerned, we already know C what the nature of the material is and for the purpose of this judgment I do not propose to consider each individual statement in order to ascertain whether it is defamatory, or merely injurious, or whether or to what extent it is simply meaningless abuse. I will assume, for the D purposes of this judgment, that at least some of the statements appear to be *prima facie* defamatory and that others may bear a secondary meaning and contain defamatory innuendo. Others are, in my view, meaningless and in the context in which they were published.

E The fact that some of the statements may be defamatory is not, *per se*, E sufficient for the applicant to obtain an order interdicting their further publication. The applicant, in order to interdict existing or past defamatory publications, must show not only a clear right but also that she has sustained injury or reasonably apprehends further injury, and that there is no other suitable remedy available to her.

F Insofar as any of these statements may already have caused her injury, F applicant would be entitled to claim, by way of action, such damages as she might have suffered. Their 'continued publication' may, however, simply add to the *quantum* of the damages when ultimately assessed by the trial Court.

G Insofar as applicant alleges an 'ongoing or continuing intent' on the G part of the respondent to defame or injure her, the evidence concerning the already-published defamatory matter does not, in my view, establish that respondent has such intent.

H I am not aware whether any further statements of this nature have H been posted on the discussion forum, but, viewing the matter as at 14 March, on which date this application was heard, several months had already elapsed since the first such statement appeared on the discussion forum, on 8 November, and the last such publication complained of was on 3 February. The statements had appeared sporadically, from time to time, between those dates, particularly, it seems, on or about 16, 20 and 21 January, when a number of statements concerning the applicant and her family business were posted.

I In my view, this evidence failed to establish that the continued I publication of the allegedly defamatory material would cause applicant further injury. Insofar as any such statements which had been published may already have caused her injury, an interdict would merely have the effect of trying to 'close the stable door after the horse has bolted'. There J

A is, furthermore, no reason to believe that defamatory statements will necessarily continue to be published or that, if they are, applicant will be harmed any further than she may already have been harmed by the original publication of such statements.

I have been referred to cases where the Court has been asked to interdict the continuing publication of defamatory matter which had already been published. I refer in this regard, for example, to the case of *Bartolazi v Poorer and Others* 1974 (4) SA 831 (W), in which the applicant, who was a minister of the Evangelical and Lutheran Church of South Africa, sought an interdict against the editor, publisher and distributor of a publication which contained seriously defamatory matter of himself as well as the further publication of such article. The applicant established that the issue of a magazine called *To the Point*, datelined 1 February 1974 (which was the date upon which the application was made), was about to be published and the applicant sought an interdict against that publication notwithstanding that some issues of the magazine had already been made available to the public several days before that. The Court granted the interdict notwithstanding that a limited publication had already taken place. The facts there were, however, distinguishable from those *in casu*. The substantial publication of the article was about to take place on the day and date on which the application was brought before the Court and, therefore, even though some copies had been put out prior thereto, the purpose of the application was to stop the widespread and potentially very harmful publication of the matter contained in the article, which was before the Court and could be evaluated by the Court.

Similarly, in the case of *Cleghorn and Harris Ltd v National Union of Disturbance Workers* 1940 CPD 409, the applicant had brought an application for an interdict in respect of a certain handbill which contained an attack on business houses which were alleged to have dismissed employees on the excuse of the inability of the different firms to meet the demands of the new wage determination. The applicant sought an interdict against the further distribution of this hand bill. The headnote reads as follows:

"The applicant alleged that it was one of four big departmental stores, and that though it had not dismissed any of its employees on account of the Wage Determination in question, it was not mentioned in the above list. It was further alleged that the handbill in the circumstances was defamatory and false, had been published maliciously and had caused and would continue to cause irreparable pecuniary loss to applicant in its business. It was stated that it was applicant's intention forthwith to institute action on this defamation and that despite request respondent had declined to withdraw its handbill or to discontinue its publication. A rule nisi having been issued calling on respondent to show cause why it should not be restrained *pendente lite* from publishing and distributing the said handbill,

Held, on the return day, as applicant had on the facts established a *prima facie* case and had further shown that the continued publication and distribution of the handbill would cause it irreparable injury, the rule should be made final, costs of the application to be reserved for decision by the Judge presiding at the trial. The distinction to be drawn between *Cleghorn* and the present matter is that the publication that was sought to be restrained was before the

Court, it had already been distributed and was about to be further distributed. The Court was able to examine and to evaluate it and was satisfied that the applicant had established the probable harmful effect of its further publication. It was, accordingly, considered appropriate to grant an interim interdict pending the trial. It was also relevant that the applicant had called upon the respondent to refrain from further distribution of the handbill but the respondent had declined to do so.

In the present instance, the applicant took no steps at all, prior to the launching of this application, to apprise the respondent that objectionable material had been posted on the website and to call upon the respondent to remove such material. In this regard, the respondent has stated that it cannot be expected to know about everything that appears on its website, nor is it responsible for everything that appears on its website. Had the applicant taken steps, prior to the launching of this application, to draw the respondent's attention to this material, the respondent may well have acted differently in respect of some of the material and this application may have been avoided.

As it turns out, having now acquired the appropriate software on or about 7 February, which enables it to remove material from its website, the respondent undertook without prejudice to do so. Pursuant thereto, it has now removed four specific items which, in its view, may have constituted objectionable (defamatory) material. One cannot be certain what the respondent's attitude might have been had applicant drawn its attention to these matters prior to launching this application but I am not persuaded that the respondent had exhibited an ongoing intent to defame or injure such that a prior demand or request would not have elicited a positive and co-operative response (without prejudice to its right to publish).

Applicant alleges that she would suffer continuing harm and that her reputation would continue to be adversely affected by the ongoing publication of these statements on the website. Apart from her say-so, there is nothing to support that suggestion. It seems to me that, by 14 March, when this matter was argued, these 20 statements, appearing amongst the mass of already-published and new material published daily, would long have been out of the public mind and eye. However, even if these statements were or are still being read by some people, from time to time, they are likely to be viewed and understood in the context of a then topical debate and discussion which had been taking place at the particular time. Any further harm which the applicant may suffer in such event is a matter that can best be dealt with by the trial Court in its overall evaluation of any damages suffered by applicant and not by way of an interdict.

Finally, insofar as applicant contends that there is no other suitable or satisfactory remedy or relief available to her, her own conduct in relation to the material which appeared in the print magazine forum belies this contention. Not only was applicant free to have challenged and responded to this material on the website itself by engaging in the on-going debate at the time (had she known about it), but she retains the right to sue for damages and, on her own affidavit, she states that she intends to do so. Should she succeed in her damages claim, she will be awarded

A such amount as the trial Court considers adequate and appropriate having regard to any harm caused to her good name and reputation, for any *nigiria* which she may have suffered. These damages would, no doubt, encompass any damages which may be proved to have resulted from further, continued or unnecessarily prolonged publication of defamatory material.
B If, on the other hand, she fails in that action, then, *a fortiori*, she would not, in any event, have been entitled to the order and the interdict which she seeks in prayer 3.

C The order

To summarise the conclusions which I have reached:

1. For the reasons given, I am of the view that there is no basis in law or on the facts for the applicant to obtain the relief sought in prayers 2 and 4 of the notice of application.

D 2. In regard to prayer 3, which deals with the existing material, even if some of that material may be defamatory of the applicant, she has not established at least two of the basic requirements for the grant of what is, in effect, a permanent interdict, namely:

E (a) that, if the continued publication of these statements were to be allowed, she has reason to apprehend that she will suffer further injury;

(b) insofar as applicant contends that she has no satisfactory remedy available to her other than the order sought in prayer 3, I am of the view that, by bringing an action (as she, in fact, intends to do and as she has already done in respect of the material published in the print magazine) a trial Court would be in a better position to determine:

F (i) whether and/or to what extent all or some of the 20 statements objected to, are defamatory of one or other or both of the applicants;

G (ii) whether the respondent has a good defence to the publication of any such defamatory material. In this regard the trial Court may have to consider the responsibility and the liability of the owner/proprietor of an Internet website containing a discussion forum of this nature;

H (iii) the *quantum* of damages, if any, suffered by each of the applicants in consequence of the publication of any such defamatory material in the discussion forum.

I In the circumstances, I make the following order in respect of both applicants:

1. The application is dismissed in respect of the relief sought in prayers 2, 3 and 4 of the notice of application.

2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the respondent's taxed party and party costs. Such costs are to include the costs of two counsel.

Applicants' Attorneys: *Hojnecy, Herbst & Gironada Inc, Sandton.* A
Respondent's Attorneys: *Abrahams & Gross Inc.*

S v MANZI

NATAL PROVINCIAL DIVISION

P O COMBRINCK J, NILES-DUNER J and KRUGER J

2003 August 15, 26

Case No ART28/03

Criminal procedure—Trial—The accused—Absence of from Court—Criminal Procedure Act 51 of 1977, ss 158(1) and 322(1)—By agreement, accused having taken up position in room normally used by intermediaries and therefore being able to hear, but not to see, witness testifying—Accused's absence not per se resulting in failure of justice—Whether accused's absence resulting in failure of justice to be determined with reference to circumstances and facts of each case—On facts, absence of accused not resulting in failure of justice—Conviction and sentence confirmed.

This was an appeal against conviction on a charge of rape by the appellant of a 14-year-old girl, for which he was sentenced to 14 years' imprisonment. The State in turn applied for an increase in sentence. The Court found there to be no merit in any of the parties' contentions relating either to the merits of the conviction or to sentence and proceeded to consider the only remaining issue, namely whether or not the appellant had had a fair trial. It was the appellant's contention that he had not had a fair trial, in that the trial had been conducted in his absence. The parties had agreed at the outset that the proceedings would be held *in camera* and that the appellant (the accused) would take up the position normally taken up by the intermediary. In other words, he would sit outside the Court, in the room in which the intermediary and the witness would normally sit, from where he was both visible and audible to the Court on a television monitor. From that position witnesses were audible, but not visible, to the appellant. The appellant relied for his contention on the provisions of s 158(1) of the Criminal Procedure Act 51 of 1977, which required that all criminal proceedings take place in the presence of the accused. He also referred the Court to s 35(3)(e) of the Constitution of the Republic of South Africa Act 108 of 1996. The State's response was that even if the procedure adopted had constituted an irregularity, the conviction ought nonetheless not to be quashed as, in terms of the proviso to s 322(1) of the Criminal Procedure Act, the irregularity had not resulted in a failure of justice. The defence countered that the irregularity fell within the category of gross irregularities