

**IN THE MAGISTRATES COURT FOR THE DISTRICT OF KUILSRIVER
HELD AT KUILSRIVER**

CASE NO: 1399/2022

In the matter between:

RUBEN THEODOR FITCHAT

Plaintiff

and

TYRONE JOHNSON

Defendant

DEFENDANT'S WRITTEN ARGUMENT

PLAINTIFF'S CLAIM

1. The Plaintiff issued summons against the Defendant for R 200,000-00 in damages caused to his good name and reputation due to a Whatsapp posted on the Kleinbron Estate Whatsapp group on 10 January 2022. The Whatsapp reads: "*Guys, just caught the guy from 91 Frangipani filming my child in a towel on my balcony, not cool*".
2. The Plaintiff stated in his particulars of claim he was filming another neighbour, Mrs Franken, with his cellphone, when the Defendant came out onto his balcony. The Plaintiff claims there was no child on the balcony, alternatively, if there was a child, the child was not filmed, alternatively, if there was a child on the balcony, the Defendant neglected his duty to prevent the child from being filmed.

3. The Plaintiff further stated in his particulars of claim the Defendant's comments were made with the intention to slander and defame the Plaintiff, and that the comment insinuates the Plaintiff is a paedophile. As a result of the defamation, the Plaintiff's reputation has been damaged. He claims further that members of the estate avoid the Plaintiff and his family and give them dirty looks, they cannot have normal relationships with the members of the estate and their children will not be able to play normally in the neighbourhood when they grow up.

DEFENDANT'S DEFENCE

4. The Defendant stated in his plea there is a history of the Plaintiff filming children on his cellphone in the estate. The Defendant states that on 10 January 2022, he witnessed the Plaintiff filming Mrs Franken, whereafter the Plaintiff turned to film the Defendant. At that point his child, wearing only a towel, ran out onto the balcony. The Defendant tried to push him back, but he ran out onto the balcony again, followed by his mother, the Defendant's wife, who then took him inside.
5. The Defendant's defence is therefore that his Whatsapp message was the stating of a fact in the public interest.
6. The Defendant further pleaded that the Plaintiff has himself tarnished his reputation through his own actions - by threatening children and his aggressive interactions with other members in the state.

LEGAL REQUIREMENTS FOR DEFAMATION AND DEFENCE THERETO

7. It is trite that for Plaintiff to succeed with his claim of defamation, he will have to prove the Whatsapp message was wrongful and intentional. The test to apply is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a defamatory meaning¹.
8. Once it has been established that a statement is defamatory, a true statement in the public interest is an absolute defence.
9. In determining whether a statement is in the public interest, the court will have regard not only to the subject matter of the statement but to all the circumstances surrounding the publication and in particular the time, manner and occasion of the publication.²

EVIDENCE LED BY PLAINTIFF & CROSS-EXAMINATION

10. The Plaintiff gave the Court a glimpse of his true self under cross-examination. All the Defendant's witnesses testified of the Plaintiff's aggressive and threatening nature. His aggressive behaviour was clear for all to see during the cross-examination of the Plaintiff, until the Defendant's attorney made him aware that his demeanour is also taken into account when the Court makes a value judgment about the Plaintiff's evidence.

¹ Mthembi-Mahanyele v Mail & Guardian Ltd and Another, 1997 (1) SA 391 (A).

² Independent Newspapers Holdings Ltd and Others v Suliman 2004 (3) All SA 137 (SCA)

11. The Plaintiff testified that on 10 January 2022, the Defendant posted a Whatsapp message on the Kleinbron estate message group, saying the Plaintiff was filming the Defendant's child in a towel, on the Defendant's balcony. Plaintiff said the Defendant purposefully used the word "child" in his Whatsapp and not "son", to make people think it was his daughter, because daughters are more vulnerable. The Plaintiff only later became aware that the 'child' referred to was Plaintiff's son and not his daughter. The Plaintiff denies recording a child with his phone, saying he was recording another neighbour, Mrs Franken, and there is no child visible on the recording.
12. The recording shows Mrs Franken speaking to the Defendant, and the Plaintiff turns around to record the Defendant on the balcony. There is no child in the recording, but the child can be heard crying and the Defendant's wife can also be heard on the recording. The Defendant later identified the child crying as being his son.
13. The Plaintiff testified Mrs Franken harassed him, and was acting suspiciously, upon which he started to record her with his cellphone.
14. The Plaintiff then went on to mention two incidents of conflict with his neighbours and other members of the estate. On 19 October 2021, a group of children were playing in the street in front of his house, making noise. It was around 8pm, when he tried to put his new-born baby to sleep. He believes the children were encouraged to make noise in front of his house by Mrs Franken. The Plaintiff said he went outside to ask the children not to make noise, and to play somewhere else. At that point, three men came to his house, one of them

being Thys Van Tonder. The men threatened him, and as he went back into the house, they followed him and tried to gain access to his house, where his wife and children were. The Plaintiff and his wife were extremely scared.

15. Under cross examination, the Plaintiff was asked whether the children were not merely playing, upon which the Plaintiff said it was unreasonable to play at 10pm at night. He was reminded that he said 8pm during his evidence in chief, upon which the Plaintiff replied, 8, 9 10, there is no difference, especially if you have a baby.
16. The Plaintiff further testified that in order to protect his family, he opened a criminal case against Mrs Franken, bought a firearm and got a rottweiler. The Plaintiff admitted that tensions with his neighbours already started to build up from 19 October 2021.
17. During Christmas 2021, there was an incident where his house was vandalised - his Jo-Jo tank and his pool cover was slashed. This was very traumatising, and he suffered severe emotional trauma. He stated that he lived in fear that his children might drown in the swimming pool, and it was traumatising to know someone came onto your property while you were sleeping.
18. Under cross examination, the Plaintiff said they don't have a pool cover currently because they never take the children outside. He said this was because of fear that the children being kidnapped, and also because the Defendant is harassing him every time he goes outside. Plaintiff did not make any mention, (as he did in his particulars of claim), that he is unable to take his

children outside because people are giving him dirty looks because of the Defendant's Whatsapp message.

19. Plaintiff said he initially suspected it was children being spiteful, because he found a muddy footprint on the wall, but now he is suspecting the Defendant to be the guilty party. Plaintiff stated he suspects the Defendant wants him to "get angry at children and do something to children, so that they can say 'look what he did' ". This statement is in itself very concerning, but has no bearing on the defamation matter before this court, and it would be the wrong forum to comment on it any further.
20. The Plaintiff continued to explain that on 31 December 2021, some children were throwing stones at his dogs, trying to get them to bark. He calmly took one of the dogs to where the children were standing, showed them the dog, and said to them the dog is going to hurt them if they come near him or his property.
21. The Plaintiff stated that a little bit later he saw an unknown black man and woman approaching his property and felt very scared and threatened, upon which he called the estate security. He opened the door with his firearm in his hand (a B-B gun), and his dog by his side. The woman was the parent of one of the children he threatened with his dog. After exchanging words, he told the man and woman to leave, and fired one shot into the air. The woman later laid criminal charges against him, but the charges were eventually withdrawn.
22. Under cross examination, the SJC report was read to the Plaintiff, and he denied the events as depicted in the report. He said he didn't threaten the

children or shout at them. It was put to the Plaintiff that a person who did nothing wrong, and didn't threaten the children, would not feel terrified when two unknown people approached his home. The Plaintiff said these were people "taking the law into their own hands" by approaching him personally, and not making use of the SJC or the police.

23. The Plaintiff then testified that on 10 January 2022, Mrs Franken was standing in front of his house. He filmed her with his cellphone because she was acting suspicious. He stated she called the children in the park purposefully towards her, specifically so that he had no choice but to film them. Mr Johnson then called from his balcony, and the Plaintiff turned his camera to Mr Johnson, and then turned the camera back to Mrs Franken.
24. He testified that a group of parents started gathering in the street. The Plaintiff was frightened and called SJC security. When Charl from SJC arrived, he showed the Plaintiff the Defendant's whatsapp message. According to the Plaintiff, the Whatsapp clearly insinuated he is a paedophile and rapes children. The Plaintiff stated that he is not a paedophile, and he does not rape children.
25. Under cross examination, the Plaintiff was asked why he reads the Whatsapp message to specifically imply "paedophile" and "rape" when neither of those words were used. The Whatsapp message referred to the Plaintiff recording a minor child in a towel, in circumstances where the Plaintiff was in fact recording children in the park and any adult that were present. The Plaintiff's immediate response was "*I didn't, you did*". The question was never answered as the Plaintiff got very upset.

26. The Plaintiff testified that as a result of the whatsapp, people blocked his wife on whatsapp, and people are giving him dirty looks. They are afraid to take the children out of the house. His wife doesn't go out anymore. The family's movements are confined. They have no freedom of movement because of Mr Johnson's actions.
27. Under cross-examination he did not accept that these things were happening because of his own behaviour towards the members of the estate or the fact that he was constantly filming people and children.
28. The Plaintiff testified that Badisa came to his home and interviewed him and his wife. This was humiliating and upsetting. He assumed this was because of the Defendant laying criminal charges against him, because Badisa said they have to do a home visit within 48 hours of a criminal charge. The Plaintiff called SAPS Inspector Bezuidenhout as a witness, presumably to give evidence to support Plaintiff's theory that the Defendant laid criminal charges against him, which caused the trauma, embarrassment and stigma of Badisa visiting his family. Inspector Bezuidenhout however testified there were no criminal charges laid by the Defendant.
29. Under cross examination, the Plaintiff said he cannot explain why Badisa was at his house if the Defendant didn't lay criminal charges. It was put to the Plaintiff that they could have been there because of the criminal charges laid by the mother after the dog incident, but he denied this as a possibility, saying it was too long after the incident.

30. The Plaintiff testified that the Defendant does not have a reasonable expectation of privacy in a public space, and he also does not have a reasonable expectation of privacy on his balcony, and therefore he can be filmed without his permission. Under cross-examination, the Plaintiff was asked whether he could understand that people don't like being recorded, even though they don't have a right to privacy in a public place. It genuinely seemed that the Plaintiff could not grasp this concept. He said if there are 10 SJC cameras at the park filming people, what difference does it make if there is another camera.
31. The Plaintiff testified that he estimates his damages to be R 200,000 because the family will have to move. The Plaintiff however did not lead any further evidence as to the quantum of the damages he had suffered, and called no witnesses to confirm the financial or emotional damages. The Plaintiff's wife was present for the entire proceeding, and was not called as a witness to confirm how she was emotionally traumatised, and how she feared leaving the house, as testified by the Plaintiff and stated in his particulars of claim. The Plaintiff's wife was more interested in playing the role of instructing attorney than that of traumatised mother.
32. Except for Inspector Bezuidenhout, none of the witnesses called by the Plaintiff were willing to testify, and were excused. Inspector Bezuidenhout testified there were no criminal charges brought against the Plaintiff by the Defendant.

EVIDENCE LED BY DEFENDANT

33. The Defendant testified his relationship with the Plaintiff had always been good, until the Plaintiff started recording people and children with his cellphone.
34. The Defendant testified he heard a commotion in the street on 10 January 2022, and went out onto the balcony to investigate. He saw the Plaintiff recording his neighbour, Mrs Franken, on his cellphone, and called out to the Plaintiff. The Plaintiff turned and pointed his cellphone at the Defendant. At that point, the Defendant's son came running out onto the balcony, wearing only a towel. The Defendant tried to push the child back inside, but he came running out again, followed by his mother who then took him inside. The child can clearly be heard crying on the video recording "Addendum 7", followed by the mother's voice saying "get inside".
35. Due to the commotion in the street, some parents standing in the park started to gather in the street in front of the Defendant's house, as per the video marked "Addendum 6". Once the children have been put to bed, the Defendant posted the Whatsapp message on the group while he was still very upset by the events. Under cross examination, the Defendant stated he posted the message because he thinks the Plaintiff is a danger and was trying to warn other members.
36. The Defendant testified that the Plaintiff's reputation was already tarnished prior to events of 10 January 2022, due to the Plaintiff's own aggressive and

threatening behaviour towards children, the Plaintiff's continuous filming of people despite being requested not to do so.

37. Under cross examination the Defendant admitted he never asked to see the recording and therefore does not know what was recorded.
38. Under cross examination, the Defendant was also asked to draw a circle on a map of the park, to indicate where the *witnesses were standing at the time the Defendant was on the balcony*. The Defendant drew a circle around the entire park, because at the time that the recording was made, children were laying across the whole park.

EVIDENCE LED BY WITNESS CHANTAL LOBAR

39. Ms Lobar testified her daughters were playing in the park on 10 January 2022, when they ran into the house saying the Plaintiff was filming children in the park again. By that time, the children in the neighbourhood have been aware of the Plaintiff's recording habit, and told to inform their parents if they witness this happening again. She walked towards the Plaintiff's house to speak to him about it, when she noticed other parents doing the same, as they have also been called by their children. A short while later the head of SJC security arrived at the scene as well to speak to the Plaintiff. She does not know who called the SJC, but presumed it was one of the parents. She only read the Whatsapp message later when she got home. She testified she did not understand the message to have anything to do with paedophilia, but was aware of the Plaintiff's recording habit, and as such understood the message to indicate the Plaintiff was filming children again.

40. Under cross-examination, the Plaintiff wanted to compare his filming of children in the park to children being filmed at school sporting events. The witness explained to the Plaintiff that filming children is such a sensitive issue, that her children's school has prohibited it, unless the parents give their consent. Only a photographer can take photos and make videos at the school.
41. The witness told the Plaintiff she does not like her children to be filmed, and wants to know why he is doing it.
42. Under cross-examination, the witness testified she did not think the Plaintiff is a paedophile and didn't know him to be able to say whether he is dangerous or not.

EVIDENCE LED BY WITNESS THYS VAN TONDER

43. Mr Van Tonder was one of the parents present at the altercation on 19 October 2021, where he can be heard on the recording telling the Plaintiff to stop recording him as the Plaintiff does not have permission to record him.
44. Mr Van Tonder posted a reply to the Defendant's Whatsapp message saying "*Call the police, also tell the history*". He explained he referred in his Whatsapp to the Plaintiff's history of filming people and children.
45. Mr Van Tonder testified he does not think the Plaintiff is a paedophile, but said in his opinion he the Plaintiff is dangerous, because he witnessed the Plaintiff threaten his own children on 19 October 2021.

EVIDENCE LED BY WITNESS MARINE FRANKEN

46. Mrs Franken testified she stood at the edge of the park with her back to the Plaintiff's house, when she noticed the Plaintiff filming her with his cellphone. She started talking to the Plaintiff when the Defendant came out onto the balcony. At that point, the Defendant turned his cellphone towards the Defendant to film the Defendant on his balcony. The Defendant's child came running out onto the balcony and the Defendant tried to push him back inside, but the child ran out again, followed by his mother, who then took him inside.
47. There were other parents with their children present at the park, and some of the other parents started to gather towards the edge of the park. At some point the SJC arrived to speak to the Plaintiff. She then left the park and went home. She only saw the Defendant's Whatsapp message later in the evening but though nothing of it, as it resembled the events that she witnessed. She did not link the message to sexual deviancy and paedophilia.
48. Under cross examination she testified she does not think the Plaintiff is a paedophile, and does not think the Plaintiff is dangerous.

THE REASONABLE PERSON TEST

49. A lot of evidence were led about two events leading up to 10 January 2022, being altercations between neighbours on 19 October 2021 and 21 December 2021. Even though these events have no direct bearing on whether the Whatsapp posted on 10 January 2022 was defamatory of not, it does set the stage for the relationship between the Plaintiff and other members of the estate.

The Plaintiff's past behaviour influences his image and good name in the estate and in this specific instance, it was already well known that the Plaintiff was confrontational towards other people and children in the estate, and that he routinely filmed people on his cellphone.

50. These confrontations were confirmed by the Plaintiff. The Court even got a rare glimpse of the Plaintiff's aggressive behaviour under cross-examination.
51. The Whatsapp group is a limited group for members of the estate only. It is therefore reasonable to submit that this Honourable Court should apply the 'reasonable person' test as being the '*reasonable person residing within the Kleinbron Estate*'. It is therefore not unreasonable to assume the reasonable person residing within the Kleinbron Estate would already be aware of the Plaintiff and his history of filming people on his cellphone.

THE CELLPHONE VIDEO MADE ON 10 JANUARY 2022

52. The Plaintiff admitted he filmed with his cellphone on the 10th of January 2022, including children playing in the park, Mrs Franken and the Defendant on the balcony. He stated in examination in chief the Defendant has no reasonable expectation of privacy on his balcony, and therefore he did nothing wrong. What he denied is that the Defendant's child was filmed on the balcony.
53. It is correct that the video footage does not show a child being filmed on the balcony. However, a child can clearly be heard on the video, and the Defendant's wife can also be heard calling to the child to go inside.

54. However, both the Defendant, his wife and Marine Franken testified they witnesses the Plaintiff film Ms Franken, then turned his whole body and his phone towards the Defendant, and eventually turning back to Mrs Franken. During this period, the child ran out onto the balcony, followed by the Defendant's wife.
55. To any onlooker, it would look *prima facie*, as if the Plaintiff was filming the whole sequence of events, including the child running out onto the balcony, whether or not the child was actually captured onto the film or not.

THE WHATSAPP MESSAGE

56. The Whatsapp message reads: '*Guys, just caught the guy from 91 Frangipani filming my child in a towel on my balcony, not cool*'. The Whatsapp was sent during events that were already taking place, where the Plaintiff was filming children in the park, and these children have called their parents.
57. Given the specific events that were already unfolding and Plaintiff's known history of filming children, it cannot be said the Whatsapp post was defamatory.
58. Plaintiff himself interprets the Whatsapp as a pre-meditated intentional act to destroy Plaintiff's good name and cause as much damage as possible to Plaintiff's character. Plaintiff mentioned under examination in chief several time he interprets the Whsatapp to mean he is a paedophile and rapist.
59. Plaintiff did not call any witnesses to testify about their interpretation of the meaning of the Whatsapp. In fact, Plaintiff's witnesses refused to testify on his

behalf. Plaintiff's own interpretation of the Whatsapp message is not the measure at which to determine defamation, but the interpretation of the person reading the text.

60. There is no mention of any sexual deviancy, paedophilia or rape in the Whatsapp message. Plaintiff was under cross-examination unable to explain why he interpreted the text in such a way. Under cross examination, the Plaintiff was asked why he reads the Whatsapp message to specifically imply "paedophile" and "rape" when neither of those words were used. The Plaintiff's response was "*I didn't, you did*", and no further explanation was given. It is needless to say that those words do not appear anywhere in the Whatsapp of comments thereto.
61. Plaintiff asked the Defendant under cross-examination "*If I was a paedophile, why was I not found guilty?*" This question made no sense at the time, but may refer to Plaintiff's incorrect belief that the Defendant opened a criminal case against him. Alternatively, Plaintiff could be suggesting that a person is only doing something wrong if he is indeed convicted thereof, which is also not correct. Irrelevant in any event.
62. The Plaintiff states in his particulars of claim that the people started gathering outside his home *because* of the Whatsapp message. Witnesses Marine Franken, Chantal Lobar and the Defendant testified this is not the case. The people at the park were gathering because the children in the park called their parents when they noticed the Plaintiff filming them.

63. This is confirmed by Annexure "P12", which clearly shows the Whatsapp was sent at 20h18, and Annexure "P13" which shows the Plaintiff's emergency call was made the Kleinbron estate security at 20h24. It is not possible for such a group of people to read the Whatsapp and rush to the Plaintiff's house in six minutes.
64. This also confirms why the Defendant posted at 21h38 that the security was there and sorting it out (Annexure P12). He was unaware that the emergency call was made by the Plaintiff, and assumed the call was made by one of the concerned parents in the park.

DAMAGES

65. Plaintiff works from home as a computer programme. Plaintiff's wife is not working and currently studying towards an LLB degree. Plaintiff was asked to quantify his damages caused by the Defendant's Whatsapp message. Plaintiff led no evidence relating to the damage done to his reputation and good name. Plaintiff did not lead any evidence that his friends, colleagues or employer saw the message and that his ability to earn an income was affected, or that he lost any work or clients or friends as a result of the Whatsapp. It can be assumed that if there were any, he would have led evidence to that regard.
66. Plaintiff did not mention any emotional damages in the form of is family needing therapy for their trauma, or any other emotional damages. It can be assumed that if there were any, he would have led evidence to that regard.

67. Plaintiff's only statement relating to his damages was that he would have to move, because his family can no longer go outside.
68. At this point it is worth noting evidence given by Plaintiff under cross examination. Plaintiff said he did not repair his broken pool cover, because he keeps his kids inside for their own safety. When questioned, he said he was fearful of his children being kidnapped, and referred to a newspaper story about a child being kidnapped in the area. He completely forgot his particulars of claim which stated his family is no longer going outside due to the stigma of paedophilia. He also make reference to the Defendant harassing him, but not a single mention about living in fear of his neighbours, or the stigma caused by the Defendant's Whatsapp message.
69. Plaintiff led no further evidence relating to the damages he or his family suffered.

CONSPIRACY THEORIES

70. Plaintiff alluded to several conspiracy theories, which does not deserve any of the Court's attention, except for a bare mention.
71. Plaintiff seems to state the Defendant was in some way influenced, coerced or paid by the witness Marine Franken, to call his child to the balcony, in an effort to get the Plaintiff to record the child on the Defendant's balcony. This would then give Mrs Franken ammunition to call the Plaintiff a paedophile. Plaintiff also alluded to Mrs Franken willfully calling the children in the park to her, in an

effort to get the Plaintiff to film them, so that Mrs Franken can get him into trouble.

72. It is interesting however to note the Plaintiff went from denying there was a child on the balcony *at all*, to saying the child on the balcony was planned by Mrs Franken.

CIRCLES DRAWN ON PLAINTIFF'S MAPS

73. The witness Marianne Johnson was asked to indicate on a printed map of the park where *every person* was standing. This was objected to as being an unreasonable request, as she ran out for a few seconds to get her child from the balcony. She was then asked to draw a circle to indicate where a group of *witnesses* were standing. The circle she drew was small and centred around the front of the houses and edge of the park.
74. The Defendant was asked the previous day to indicate where the people in the park were standing at the time that he came out onto the balcony. He drew a circle around the whole park.
75. The Plaintiff is no doubt going to use this aspect to cast doubt on the credibility of the Defendant, alternatively the witness. This Honourable Court must take into account that the vantage point of the Defendant and the witness were very different. The Defendant was standing on his balcony for a number of minutes, and had a view of the full park and had time to observe what was happening across the whole park.

76. The witness on the other hand, came running out in a state of stress to grab her son back into the house, as she was hearing the commotion outside and wanted to prevent her child from being filmed. She rushed out for a few seconds onto the balcony, and observed what was happening right in front of her – there were people standing in front of their house and on the edge of the park. She did not linger on the balcony, and she did not have time to observe the rest of the park, as she was trying to get her child into the house. Her view of the park was a passing glance, limited to what was happening in her field of vision.

SUBMISSIONS ON EVIDENCE

77. Defendant submits the Whatsapp message cannot be defamatory and submits this action should be dismissed with costs.
78. Defendant called several witnesses confirming their understanding of the Whatsapp message reflecting the events as they were unfolding on 10 January 2022. It formed part of and depicted events that were actually happening in and around the park at that moment.
79. Plaintiff failed to lead any evidence as to the estate community's interpretation of the Whatsapp message.
80. Should this Honourable Court however find the Whatsapp message to be defamatory when applying the reasonable person test, it is submitted the Whatsapp message is a true statement of fact, reflecting the events as they

were actually happening, and in the public interest, which is a defence against defamation.

81. In any event, this Honourable Court should dismiss this application with costs.

COSTS

82. Defendant believes there to be sufficient grounds to grant a punitive cost order on the basis of attorney and client scale. This action is clearly vexatious and based on a conspiracy theory concocted in the mind of the Plaintiff.

83. Plaintiff also conducted his own case, and a lot of legal costs could have been spared the Defendant if the Plaintiff consulted an attorney ahead of time. Instead, the Plaintiff relied on his wife's legal studies and used this action against the Defendant as a practical learning experience. The Defendant had to incur legal costs, whereas the Plaintiff had no legal costs.

84. It is submitted that the action should be dismissed on a punitive scale, as between attorney and client.

Francis Erasmus Attorneys

December 2022, Cape Town