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IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 10646/01

In the matter between:

RICHARD MICHAEL MOBERLY YOUNG Plaintiff

And

YUNIS SHAIKH Defendant

JUDGMENT: 26 SEPTEMBER 2003

NEL, J

The plaintiff, Richard Michael Moberly Young ('*Young*'), claims payment of an amount of R250, 000-00 from the defendant, Yunis Shaikh ('*Shaikh*').

This represents a claim for damages which allegedly arose from the defamatory contents of an interview of *Shaikh* which was broadcasted on a South African television station known as eTV on 21 November 2001 and repeated on 26 November 2001.

The interview related to the much debated arms acquisition program of the government and more specifically to the role played by *Shaikh*'s brother "Chippy" in the award of a major contract to a company in which a third brother, Shabir, held a not insignificant minority shareholding.

During the interview *Shaikh* denied any wrongdoing by "Chippy", and in the process accused *Young* of lying, of having initiated a programme of sleaze and

slander and of having tendered in respect of an untested product which he had refused to guarantee.

The contents of the interview and the defamatory meaning of the statements about and concerning *Young* were not denied.

A half hearted attempt to advance a defence of fair comment was not pursued.

Paragraph 4, 5 and 6 of the Particulars of Claim read as follows:

> *"4. eTV is capable of being received throughout South Africa, without a digital decoder, and broadcasts to all parts of South Africa, including the jurisdictional area of this Honourable Court.*
>
> *5. 5.1 eTV has a substantial audience in South Africa.*
>
> *5.2 The interview in question would have been watched by between 400 000 and 600 000 viewers on 21 November 2001, and by between 200 000 and 300 000 viewers on 26 November 2001.*
>
> *6. During the course of the interview, the defendant made inter alia the following statements about and concerning the plaintiff:*
>
> *6.1 'Yes, he's the owner of C2I2. Richard Young won R30 million worth of contracts. He intended to win more. He put forward a tender saying he has a demonstrator model of a product that has never been tested under battle conditions, for which product he refused to stand guarantee for. When called upon to do so, he declined. So he wants to offer a product to the military that's worth R30 million. He refuses to stand guarantee for that product when called upon to do so.'*
>
> *6.2 'When the cabinet refuses to carry the cost of that guarantee, Richard Young in a fit of pique, then begins a programme of sleaze and slander.'*

6.3 *'Bear in mind he has already won a R30 million contract; he wants to win another R30 million product, er, tender with a product that he doesn't even have.'*

6.4 *'He then says, 'Chippy Shaikh, because you will not give me that R30 million contract, you are guilty of conflict of interest.'*

6.5 *'Richard Young has embarked on a campaign of sleaze and slander, using the press – the gullible press, I may add.'*

6.6 *'No, our victimization is that we are now subjected to mob justice, the mob justice Patta, that you and members of the Fifth Column, by means of sleaze and slander and a tissue of lies have allowed and whipped up the public into a frenzy that now they bay for the blood of anybody.'*

6.7 *'The media has kept the issue alive, it has given the issue publicity, except it has done so unfairly. It has accepted a tissue of lies from Richard Young and yet, on the other hand and as a matter of course, it has denigrated, humiliated, caricatured the Shaikh family to be a bunch of rogues ...' "*

Paragraph 7 & 8 read as follows:

"7. The said statements are in their ordinary meaning defamatory of the plaintiff, alternatively and in any event were intended to mean, and were understood by viewers of eTV to mean, the following:

7.1 *the plaintiff is a liar;*

7.2 *the plaintiff is dishonest;*

7.3 *the plaintiff is dishonourable and untrustworthy;*

7.4 *the plaintiff is guilty of disgraceful conduct;*

7.5 *the plaintiff defames people in order to achieve his ends;*

7.6 the plaintiff misuses the media in order to achieve his ends.

8. The publication as aforesaid took place with the intention of injuring the plaintiff in his reputation."

In reply thereto, *Shaikh* pleaded as follows:

"6.(a) To the extent that the statements contained in paragraph 6 of the Particulars of Claim, taken in their context, exceed the bounds of fair comment, the Defendant admits that they are, in their ordinary meaning, defamatory of the Plaintiff.

(b) In amplification of paragraph (a) above the Defendant admits that to the extent that the meanings set forth in paragraph 7 of the Particulars of Claim may fairly be attributed to the statements quoted in paragraph 6 of the Particulars of Claim, the said statements in paragraph 6 of the Particulars of Claim are not fair comment.

(c) The Defendant otherwise denies the allegations contained in paragraph 7 and 8 of the Particulars of Claim.

(d) The Defendant hereby unconditionally and unreservedly apologises to the Plaintiff and further tenders to pay the Plaintiff's costs of this action up to and including the consideration of this Plea."

Background

Young is the managing director of a company registered in 1992 as CCII Systems (Pty) Limited but also known as C^2I^2.

He is an electronics engineer and holds a Masters degree in electronics engineering from the University of Cape Town and a Doctorate in engineering from the University of Witwatersrand.

His involvement with data communication systems started during his university years and his specialist field is real-time data communications for mission-critical distributed systems.

This means (in his words)

> *"Well, the area of my speciality is actually combat systems for naval combat ships and naval systems employ a variety of distributed subsystems, sensors and effectors such as weapons and these days computers to correlate the data. Because of the very short time scales of engagements, these combat systems operate on what they call real-time. When we use the term mission critical, it means that if there is a failure of the systems to operate in these short times, that there could be severe catastrophies such as loss of life, loss of the ship. So, that encompasses the terms mission critical and real-time."*
>
> *"...Okay, the typical scenario is actually an in-coming missile, because it's very small, it's travelling very fast. It's normally fired to travel just above the sea. So, the time that the ship senses this missile is normally about between 15 and 20 kilometres away, which gives the ship about say between 10 and 15 seconds to react. It requires the whole correlation of data from the search radar, the – getting the traffic radars to start tracking this missile, the guns or the missiles to slew around to engage and of course, there are safety elements such as the – the involvement of the crew. So, there is a lot of different things happening in a very short time, all very tightly coordinated in terms of the data and the time in which the data has to be shared.*
>
> *All right. C^2I^2, this is the work that it does, it is inter alia to create combat suites which will do this job of taking the in-coming data, translating it and sending messages through to the weaponry on the ship. Is that more or less correct?"*

In 1983, South Africa started to develop combat suites for naval vessels. A combat suite is a set of systems that enables a naval vessel to engage in combat.

In 1985 *Young* started to work for a company then known as Triveth-UEC (Pty) Limited and was personally involved in the development of a combat suite for the

South African submarines. This company became UEC Projects (Pty) Limited which later became Altech Defence Systems (Pty) Limited, then 100% owned by the South African electronics group Altech Limited.

The submarine project was superseded by a frigate project but this was also cancelled during 1991. *Young* then decided to first complete his Masters degree but was approached by Armscor to continue his work but now in respect of a smaller surface combat vessel, a patrol corvette.

During 1993 the navy started a formal corvette acquisition project (Project Sitron) and because a combat system was considered to be strategically advantageous to the country, the navy and Armscor decided to effectively retain the capabilities they had built up during the eighties and early nineties on the submarine and frigate programmes.

To this end a number of companies were tasked by Armscor to investigate, define and develop the various sections of technologies in which they had been involved or in which they had specialised.

C^2I^2 was known to be a specialist in data communications and was approached not only for it's input in that field, but also for development of a system architecture, namely, the integration of the various elements of the combat systems, also known as an Information Management System (IMS).

During 1995 when C^2I^2 was already in it's third year of development of the systems a defence review was initiated and the development continued under a so-called 'Technology Retention' programme.

As a number of companies were working on various elements of the integrated combat systems their individual endeavors had to be integrated and the technical coordinating and management thereof was carried out by Altech.

In addition Altech was also involved in developing a navigation system and a combat management system, both completely indigenously developed for the requirements of the strike craft.

To circumvent problems commonly encountered on modern warships, the navy specified the use of fibre optic cabling for the Combat Suite data network.

At the beginning of 1999 C^2I^2 had fully completed the IMS in accordance with the technical baseline, consisting of specifications, test plans and technical plans which had encompassed all the requirements.

By October 1999 and with the complete involvement of the navy, Armscor and the systems integrator, by then known as African Defence Systems, the IMS system had been fully tested and had qualified in all respects.

In the meantime and in March 1998, 50% of the shares of Altech Defence Systems were sold to a French company, Thompson-CSF and the remaining 50% in February 1999.

During November 1999 Thompson International transferred 80% of the shares of Altech Defence Systems to its South African subsidiary, Thompson-CSF Holding (Southern Africa) (Pty) Limited and changed the name of Altech Defence Systems to African Defence Systems.

Thompson-CSF of France held 85% of the shares of the Thompson-CSF Holding (Southern Africa), Gestilac S.A. held 5% and Nkobi Investments (Pty) Limited held the remaining 10%.

The latter company is a wholly-owned subsidiary of Nkobi Holdings (Pty) Limited of which Shabir Shaikh is a director and a major shareholder. He is also a director of Thompson-CSF Holding (Southern Africa).

Soon after the acquisition by Thompson-CSF of the first 50% shareholding in Altech, it had become apparent that it was trying to persuade the navy and Amscor that the indigenous systems which had been developed were not appropriate for the corvette combat suite and that they should be replaced by it's own system, a system which did not comply with the required specifications.

Eventually, and contrary to the initial specifications and wishes of the navy, including the specified use of fibre optic cabling, and at a price in excess of that of the indigenous systems, the French owned system was purchased by the weapons-acquisition committee.

At the time, a brother of *Shaikh* and *Shabir,* 'Chippy' Shaikh, ('*Chippy*') was the chief of acquisitions for armaments at the Department of Defence.

Following upon concern expressed about various aspects of the arms procurement, an investigation by the Public Protector the Auditor-General and the Director of Public Prosecutions was launched.

Young was subpoenaed as a witness and presented his evidence in accordance with an 76 page '*Aide Memoire*', exhibit 'A'.

At the end thereof Y*oung* summarised his complaints as follows:

> *"534. In conclusion, I wish to state the following:*
>
> *535. Regarding the System Management System (SMS), the price offered by C^2I^2 Systems was fraudulently misrepresented to justify awarding this contract to ADS, when clearly C^2I^2 Systems's price was lower than that of ADS.*

536. *Regarding the IPMS Simulator, C^2I^2 Systems was clearly and unambiguously selected by the PCB to supply this element and this was communicated to the GFC by Armscor on behalf of the DoD. However, the GFC have with or without Armscor's permission deselected C^2I^2 Systems's IPMS Simulator for reasons they refuse to explain. Notwithstanding the responsibilities of the parties, nor the legalities of this matter, it would appear that C^2I^2 Systems are being punished for crying foul on other parts of the Corvette contract.*

537. *With respect to the Information Management System, C^2I^2 Systems was involved in the development of the IMS for the SAN for 7 years and was* ***nominated*** *in terms of the formal tender documents (i.e. Request for Information and Request for Offer) as the supplier of this sub-system for the Corvettes Combat Suite. Later, this nomination evolved into* ***selection*** *in terms of the Request for Best and Final Offer. Thus a legitimate expectation that C^2I^2 Systems would be selected as the supplier was created by our previous involvement in the project as well as the tender documentation of Armscor and DoD and events relating to the process of acquiring the Corvettes.*

538. *It was specified by Armscor and SAN that the South African industry should be the suppliers of the sub-systems of the Combat Suite and that a South African company should be the Combat Suite contractor, responsible for the integration of the Combat Suite sub-systems.*

539. *The end result, however, was that C^2I^2 Systems was manoeuvred out of the contract, by the French-controlled company ADS, which also became the Combat Suite main contractor.*

540. *There were no lawful reasons for not awarding the contract to C^2I^2 Systems.*

541. *A clear conflict of interest arose, which led to unfair and unlawful competition namely:*

542. *The fact that ADS, the nominated and eventually selected main contractor, could compete with other bidders for the sub-system contracts.*

1. *The fact that ADS obtained C^2I^2 Systems's price and technical specifications and directly or indirectly, disclosed these to what later became C^2I^2 Systems's competitor.*

2. *The fact that Detexis and ADS are both in the Thomson-CSF group and form part of the prime contractor, i.e. the European South African Corvette Consortium (ESACC).*

3. *The fact that Mr Shamin (Chippy) Shaikh played a role in the process regarding the selection of the contractors for the Combat Suite, is improper considering that his brother Schabir Shaikh has a direct interest, as director and shareholder in both ADS and Thomson-CSF (Southern Africa).*

543. *In the bigger picture, Thomson-CSF, through an irregular acquisition process, obtained a major share of the Corvette supply contract, contrary to what was envisaged by Armscor and the SA Navy."*

The interview of *Shaikh* followed after the investigation and the publication of a joint report by the Public Protector, the Auditor General and the Director of Public Prosecutions in which they recorded their finding that there had been a conflict of interest situation when the contract was awarded.

<u>The Issues</u>

Young concluded his evidence by stating that in his profession and in the arms industry his reputation and perceived integrity and honesty are of critical importance.

He sells hardware which is difficult to conceptualise and software which is a completely intangible component of very complex and expensive systems on which the combat capacities of very expensive battle ships are based.

People must therefore be able to trust him when he markets his own products or when he reviews other system designs.

On a personal level his reputation is also important to him and it is not possible to reach all members of his family who might have seen the program. With the exception of the apology in the plea, *Shaikh* has never apologized to him and has not published an apology in the media.

Young also stated that if *Shaikh* had attended the inquiry and if he had listened to the evidence, he could not have come to the conclusions which he claimed to have come to.

He also stated that the product in respect of which he had tendered was not a demonstrator model but a very sophisticated product which to this day can be seen and touched and which had been evaluated by the navy and Armscor as a superior product.

Since early 1999 he has sold the hardware and the four lowest levels of protocol software of the IMS for use in Awac aircrafts, to the United States Navy, the Unites States Marine Corpse, the Swedish Navy and the German Navy.

It is being used in the latest United States aircraft carrier, the USS Ronald Reagan, commissioned this year, as well as in the US Navy's latest class of ships, the San Antonio class of Marine Corpse assault vessels.

He also denied ever having lied or ever having started a campaign of sleaze and slander as alleged by *Shaikh*.

During cross-examination it was put to him that he could have claimed publication of an apology as an alternate to damages and that he should have accepted the apology in the plea. He responded by stating that the interview had been seen by between 400, 000 and 600, 000 people and that this should be compared to the apology in the plea which had only been by him and his legal

team. He agreed that he had not demanded an apology prior to the issue of summons.

He agreed that C^2I^2 is in fact challenging it's deselection and has sued the Government for damages. He also agreed that during a period prior to the interview, his views had been sought and published in the media.

He had made a formal complaint to the Auditor-General about a conflict of interest between the two brothers and this had been picked up by the media during the course of the public hearing.

His evidence in regard to the facts set out above under the heading 'Background', and his evidence regarding his product and the necessity to protect his good name and reputation were not put in issue.

Shaikh testified that he is an attorney, practices as a labour law consultant and that he had been a candidate for appointment as a Judge in the Labour Court.

His brother "*Chippy*" was chief of acquisitions for armaments at the Department of Defence.

A third brother, Riaaz, was the South African ambassador to Algeria, and the fourth brother, *Shabir*, a businessman.

The original arrangement was that *Shabir* and "*Chippy*" would have appeared on the television program but as "*Chippy*" had been suspended and *Shabir* had taken ill, it was decided that *Shaikh* would participate to express their point of view in regard to the impression which had been created that they had colluded in a corrupt practice.

According to his evidence this was decided only approximately an hour and a half before the interview, which was recorded a day or two before the broadcast.

He also stated that he had not had any intention to defame *Young* and had merely sought to defend his family's name and their integrity.

He also felt that *Young* had been pursuing his cause in the wrong forum, ie. the press and in the media in general.

He had attended the public hearing of the investigation by the Public Protector and having listened to the evidence of *Young* and naval personel had come to the conclusions expressed during the interview.

He conceded however, that he had read the official report which had been published a week before the interview, and that there was nothing contained therein which suggested that *Young* had fabricated anything or that he had initiated a program of sleaze and slander.

Shaikh also stated that having seen the replay of the interview he had been surprised to see that he had been so intemperate, and to the extent that he had exceeded the bounds of fair comment and had given offence to *Young*, he apologised.

<u>The Claim</u>

Shaikh is an attorney and a member of an obviously prominent family, not only in business circles but also in political circles.

During the interview he did not attempt to justify the award of the contract to the foreign company as having been regular or even in the best interests of the navy.

When questioned about the implications of the joint report he started to blame *Young* and in effect accused him of being an opportunistic liar.

It reads as follows: (DP is the interviewer, Deborah Patta)

"DP: You say that it's not, that the Auditor-General didn't say that there was anything unlawful. He can't make that finding because there is no law. There is no law to disobey because we don't have proper laws about conflict of interest in this country. I mean that is one of the problems with this whole procurement process. It was a very murky and very shady area. The implication that is (sic) takes from this report, the perception of the public is that there was some thing unethical that happened and that this was a self-enrichment scheme for the Shaikh family.

YS: That perception is created by you, Patta, and the others in the media and how did that come about? It is you Patta, in an interview in Terror Lekota insisted that Shamin Shaikh is guilty of conflict of interest even before the Auditor-General had concluded his report. Now where did you get? ... [Interrupted]

DP: [Inaudible] but was that opening the way? [Interrupted]

YS: Yes, now here did you get the way from? The media got the way from no less than Richard Young. Richard Young was a supplier to ADS and Thomsons (sic). Richard ... [Interrupted]

DP: This is C-Squared I-Squared company?

YS: Yes, he's the owner of C2I2. Richard Young won R30 Million worth of contracts. He intended to win more. He put forward a tender saying he has a demonstrator model of a product that has never been tested under battle conditions, for which product he refused to stand guarantee for. When called upon to do so, he declined. He wants to offer a product to the military that's worth R30 Million. He refuses to stand guarantee for that product when called upon to do so. When the cabinet refuses to carry the cost of that guarantee, Richard Young, in a fit of pique, then begins a program of sleaze and slander. Bear in mind he has already won that R30 million contract, he wants to win another R30 million product. (ahh) tender with a product that he doesn't even have. He then says

'Chippy Shaikh because you will not give me that R30 million contract, you are guilty of conflict of interest'. Chippy Shaikh was standing up for good governance. Richard Young has embarked about a campaign of sleaze and slander, using the press- the gullible press, I may add.

DP: Do you think it's fair that your brother has been singled out for charges?

YS: It's not fair and we certainly feel we have been victimized, but we are not victimized by our government, we are not victimized by Bululane, we are not victimized by Selby Baqwa, we are not victimized by Shauket Fakie. No, our victimization is that we are now subjected to mob justice, the mob justice Patta, that you and members of the Fith column, by means of sleaze and slander and a tissue of lies, have allowed and whipped up the public into a frenzy that now they bay for the blood of any body."

The statement by *Shaikh*, an attorney that he had no intention to defame *Young* while rabidly attacking his integrity, must obviously be rejected as false.

Mr *Vahed* who appeared on behalf of *Shaikh* submitted that *Young* should have claimed the publication of an apology instead of damages and should, in any event, have been satisfied by the apology tendered in the plea.

He referred to the judgment of *Willis J* in *Mineworkers Investment Co (Pty) Ltd v. Modibane* 2002 (6) SA 512 at p. 525 where, after referring to the *amende honorable* as 'a little treasure lost in a nook of our legal attic', the learned judge continued as follows (E-H)

"Even if I am wrong in the conclusion that the amende honorable is still part of our law, there are other reasons why I believe a remedy analogous thereto should be available. I agree with the submission of Mr Chaskalson that if the only remedy available in a defamation action is damages, then very often an appropriate balance will not be struck between the protection of reputation on the one hand and freedom of expression on the other. It fails in two respects: (i) often, it does not afford an adequate protection to reputation and (ii) it can, at least indirectly, impose restrictions on freedom of expression. Awards of damages can ruin defendants financially and this risk can operate to restrict

information being published which may indeed be in the public interest. The uncertainty as to whether the 'truth plus public benefit' defence will succeed can inhibit freedom of expression. As Hefer JA, as he then was, said in the case of National Media Ltd v Bogoshi (supra at 1210G-I):

> *'Much has been written about the 'chilling' effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.'*

Furthermore, the harm done by a defamatory statement is the damage to the reputation of the victim. A public apology which will usually be far less expensive than an award of damages, can 'set the record straight', restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression."

Even if the "little treasure" can be recovered from a "nook in our legal attic", I do not believe that a published apology in this matter would serve the interests of justice.

Freedom of expression does not include the right to falsely attack the integrity of a fellow citizen for selfish reasons or for reasons which having nothing to do with "public benefit".

If the award which I intend to make will have a "chilling" effect on possible future and similarly baseless and selfish attacks on the integrity of others, it would certainly, in my view, be and additional reason not to make use of the lost "little treasure".

An apology in a plea and a half-hearted apology in evidence ("*to the extend that I exceeded the bounds of fair comment and I gave offence to Mr. Young, I apologise*") can certainly not be regarded as adequate.

Mr. *Fagan*, who appeared on behalf of *Young* referred to a number of decisions in which awards of damages for defamation were made. The awards ranged (in today's terms) between approximately R30, 000-00 and R400,000-00.

Shaikh showed no compunction when attacking the integrity of *Young* and was indifferent to any financial harm which his baseless accusations could have caused.

In the circumstances there should in my view, not be any reasons to try to avoid '*serous financial harm to the culprit.*'

As submitted by Mr. *Fagan*, previous judgments as to the determination of appropriate awards serve only a limited purpose and can only be instructive.

In this regard he referred to *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others 2001* (2) SA 242 (SCA).

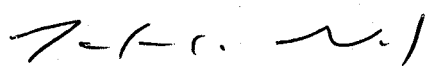
Having regard to *Buthelezi v Poorter and Others* 1975 (4) SA 608 (W) referred to by Mr. *Fagan*, and having regard to the often expressed reluctance of our Courts to award huge amounts as damages for defamatory statements, I am of the view that an appropriate award would be R150, 000-00.

In the result, Defendant is ordered to pay to the Plaintiff

(a) The amount of R150, 000-00;

(b) Interest thereon *a tempore morae* calculated at the prescribed rate of 15,5 per cent per annum from the date of service of the summons to date of payment;

(c) Costs of suit.



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