Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2388/2020

In the matter between:

DIMENSION DATA (PTY) LTD First Applicant

NTT LTD Second Applicant

and

RORY NIALL PEARTON Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an application for an interdict brought by way of urgency on 9 October 2020 by the Applicants seeking to interdict the Respondent from:

"2.1 threatening, harassing defaming and and/or abusing the Applicants and/or any employee of the Applicants; and/or

2.2 inciting any other person or entity to threaten, harass, defame and/or abuse the Applicants and/or any employee of the Applicants; and/or

2.3 Publishing threatening, defamatory and/or factually untrue information concerning the Applicants and/or the Applicant's employees on the Respondent's websites and/or on any other platform or social media platform;

3. The Respondent is ordered to take down his websites concerning the Applicants and their employees;

4. The Respondent is ordered to pay the costs of the application on an attorney and client scale".

[2] The Respondent opposed the application on various grounds *viz*:

"2.1 that the application was not urgent and that the Applicants failed to comply with the peremptory provisions Rule 61(2) of the Uniform Rules of Court;

2.2 that the Applicants in their affidavits, have put up objectionable matter which falls to be struck out in particular in their replying affidavit by impermissibly averring new facts in supplementation of the case put up by them in their founding affidavit in material respects;

2.3 that on the facts the Applicants have not established the requisites for the relief sought by them and therefore are not entitled to such relief".

[3] However, on 20 October 2020, the parties by agreement, agreed to remove the matter from the roll, put each other on terms and the Respondent without conceding that the Applicants are entitled to the order, agreed to be bound by the provisions of the interim order pending the determination of the application. In agreeing along those terms, the Respondent, however pertinently alleged in it that the agreement was made without conceding that the Applicants are entitled to such relief and purely to enable the dispute raised to proceed in an orderly manner in accordance with the Uniform Rules of Court as agued.

B. <u>The Parties</u>:

[4] The First Applicant is a private company duly registered and incorporated in terms of the company laws of South Africa. It is the subsidiary of the Second Applicant.

[5] The Second Respondent is NTT Ltd, a private company duly registered and incorporated in terms of the laws of England with its principal place of business for Middle East and Africa in Sandton, Gauteng.

[6] The Respondent is Rory Pearton an adult businessperson who trades as Internet Services and Technologies or iSAT. I shall throughout the judgment refer interchangeably to it as either the Respondent or iSAT. Apart from the qualifications, the Respondent states that he started a software development and support business in 1984 known as Orion. During 1988, he started iSAT as an adjunct to Orion and iSAT grew to a point relative to similar businesses nationally. Apart from his academic training, the

Respondent states that he regards himself as an expert in the field of software development and maintenance as well as the provision of internet and associated service because of his extensive knowledge and experience. The Respondent avers that he proceeded to develop his own virtual services, which were used for internal and external internet service provider systems including his own website and those of his customers; mail servers, his own administrative requirements and a major software development project being undertaken by him. His internal ISP systems included data collection, data storage and data analysis, backup and reporting for the software project.

C. Background:

[7] The First Applicant and the Respondent, during or about February 2009 concluded a written contract for Fax to Email services. On 25 June 2014, (the date the agreement was signed), the Respondent subscribed with the First Applicant for its Consumer Virtual Machine (CVM) which is described in the papers as a cloud-based service that enable the Respondent to deploy and manage virtual servers for his client base. Clause 1 of the agreement reads as follows[1]:

> "1. **Description of Service**
>
> 1.1 Internet Solutions Consumer Virtual Machine (CVM). This CVM service will provide the Partner with a self-provisioning portal on a dedicated multi-tenanted virtualisation platform. Partners will be able to acquire a virtual container with which to provision their processing needs. The Partner has access to a self-determined proof of resources, which can be defined accordingly to meet processing requirements.

[1] Page 36 of the papers.

1.2 The provisioning of CVM services is subject to the terms and conditions set out in this Schedule".

In terms of the CVM agreement, the Respondent was liable to pay fees based on usage for the processing, memory and storage capacity utilised by iSAT for its own purposes and for its customers. The CVM crashed on 18 March 2019.

D. <u>The Applicants Case</u>:

[8] Apart from the issues of harassment, threats and incitement, the Applicants state that prior to the Respondent, joining the First Applicant's CVM platform, in an email dated 10 June 2014, enquired from the First Applicant as to how the backup of data works from the CVM. The First Applicant advised him that by having an additional service called Attix 5. The First Applicant provided the Respondent with a quotation for the Attix 5 and recommended to the Respondent that he should subscribe to it. The Respondent's manager acknowledged receipt thereof. Despite that, the Respondent did not subscribe to Attix 5.

[9] The CVM crashed and the Respondent and his clients were impacted by the crash. The First Applicant avers that after corresponding with the Respondent about the crash and having categorically denied negligence on its part, on 30 September 2019, it received a letter from the Respondents attorneys alleging gross negligence on its part in respect of the failure of the CVM and demanding payment of R21 134 440 865.00 (thirty-one billion, one hundred thirty four million, four hundred forty thousand eight hundred and sixty five rand) failing which summons would be issued against the First Applicant. The letter

specifically based the gross negligence on the basis that Icehouse series and Juno series had reached their End of Life many years before the crash. On 9 October 2019, the First Applicant wrote back and denied liability. Pursuant to that, the First Applicant received a barrage of threating emails from the Respondent.

[10] The First Applicant states that it did not take kindly to the threats to an extent that on 28 October 2019, it responded to a request for a meeting to be held in Port Elizabeth but it insisted that it should be in Gauteng. In that letter with reference to the threat, the First Applicant recorded that:

> "Your client must be under no illusion that threatening our client with the press and social media is not only unhelpful, but will not under any circumstances be countenanced by our client".

[11] The First Applicant says indeed a meeting was held in Gauteng on a without prejudice basis. The legal representatives of the First Applicant made it clear that the First Applicant was denying liability. The attorneys of the Respondent stated clearly that they shall be issuing summons. The First Applicant states that despite the promise it has yet to receive the summons.

[12] The First Applicant testifies that consequent upon the meeting, the Respondent embarked on a concerted campaign to threaten and harass the Applicants and their employees seeking payment of the alleged amount for damages. The chronology of the threats, harassments and defamatory statements may summarily be stated as follows:

12.1 The Respondent on 30 September 2019 sent a letter of demand to the First Applicant alleging gross negligence on the part of the First Applicant thus demanding the amount stated above.

- The First Applicant's response dated 9 October 2019 recorded its denial of liability**.**

12.2 On 25 October 2019, the Respondent's attorneys penned a letter again alleging gross negligence on the part of the First Applicant and referenced the letter dated 9 October 2019 from the First Applicant.

12.3 On 6 December 2019, a draft press release statement was sent by the Respondent to the First Applicant, which the latter regards as constituting defamatory statement about it.

12.3.1 In response to the alleged gross negligence, the First Applicant, per letter dated 11 December 2019, pertinently raised the following issues:

(a) that the Respondent was informed by the First Applicant how to back-up data but chose not to procure the service;

(b) that the Respondent was well-aware that back-up data should always be stored in multiple copies across multiple locations; and

(c) he knew or ought to have known the CVM platform was not designed to run business or enterprise workloads.

12.4 The First Applicant attached "FII" to its papers, which it alleged was a copy of the Respondent's "press release" time line from the Respondent's previous website. On 29 June 2020, the Respondent sent an email to the Chief Executive Officer of the First Applicant (Grant Bodley) in which he included a link to its previous website. In the email, the Respondent referred the CEO to the text on the website. The First Applicant alleges that the text in part contained the following threat:

> "As the website clearly shows, Dimension Data have absolutely no defence, and have also failed to cover up their negligence, it makes embarrassing reading. Based on Dimension Data having no defence, please tell your attorneys not to send me any documents, they will just be deleted by me, I will not waste my time on nonsense. If they do annoy me, I will increase my minimum settlement amount.
>
> If you disagree with any of the context, let me know what you disagree with and provide proof to back your claim.
>
> You have until 17h00 Wednesday 1st July 2020 to complete this part of the process, and then we will continue to the next and final stage. We will shut the website down at 17h00 on Wednesday 1st July 2020.
>
> I recommend that you email me directly for confidentiality sake for [the First Applicant], and to avoid any misunderstandings or delays that might prove detrimental to you".

12.4.1 The First Applicant contends that the Respondents previous website contains the press release the latter sent to his customers as well as

extracts of a letter addressed to the Respondent by the First Applicant to which the Respondent had appended his comments.

12.5 On 1 July 2020, the Applicant's attorneys addressed a letter to the Respondent and his attorney. In the letter, the First Applicant highlighted material inaccuracies to the Respondent's letter to the First Applicant's CEO. The First Applicant once again denied liability to the Respondent and made it clear that it did not accept the threat especially of increasing the settlement amount.

12.6 Upon receipt of that letter, the Respondent on 1 July 2020 sent an email to the First Applicant's CEO and copied the First Applicant in which he recorded that (emphasis added by the First Applicant):

> "I just received a nonsense email from your attorneys. **As I warned, our minimum claim has now gone up by 10%.**
>
> You still have until 17h00 this evening to point out anything you feel is incorrect on the *https://www.isat-vs-is-and-dd.net/ Web site*, with some proof. The website will be disabled shortly after 17h00".

12.7 On 13 July 2020, the Respondent sent an email to the First Applicant stating as follows:

> "Less than 8 days to D day for Dimension Data, but still no response from you. It would seem you are not taking this very seriously?"

12.8 On 20 July 2020, the Respondent sent yet another email to the First Applicant stating:

> "Just a reminder, this is the last day for a negotiated settlement, before publication and marketing of the *https://www.isat-vs-is-and-dd.net/Web site* as well as a new press release, which also references the site.
>
> We have had no response on the matter from Dimension Data at all, this will of course be documented on the Web site. It gives some indication on how seriously Dimension Data takes its business and its future. **This behaviour certainly will not inspire any confidence in Dimension Data from existing and potential new customers and business partners.**
>
> Dimension Data staff, who knows about the situation, should be getting nervous about their continued job security at this point".

12.9 On 21 July 2020, the Respondent sent another email detailing the following:

> "We do understand that the settlement amount will be substantial. We are open to the idea of a payment plan settlement, if Dimension Data does not have the financial resources for a once off settlement. You would need to contact me within the next couple of days though to discuss the possibility.
>
> We also understand that **the disclosure of the information on the Web site will have dire consequences for Dimension Data nationally and internationally, and many staff will lose their jobs, including yourself. Dimension Data itself might not actually survive; maybe the remnants will be absorbed into NTT Ltd,** similarly like Internet Solutions was absorbed into Dimension Data. This

responsibility rests entirely on your shoulders though, and it is something you and your future career will have to live with. Dimension Data needs to act responsibly and be accountable.

In the meantime, we have republished https://www.isat-vs-is-and-dd.net/Web site. It has not been indexed for SEO yet. There has been some changes and updates made to the site.

Please check through the site, either yourself and/or people from your management team. You have until 17h00 Thursday 23rd of July to reply with details of any content you deem to be incorrect, and why.

Please remember that if you do not personally respond, we take that to mean that you entirely agree with the content of the Web site. And this will be noted on the Web site.

From Monday the 27th of July we will index the Web site at various search engines and allow the content to propagate, and then also send out a new press release, and begin the Web site marketing processes described in a previous email. And you, the rest of the management team and Dimension Data itself will immediately be in the news for all the wrong reasons".

. . .

12.10 On 25 August 2020, the Respondent wrote again to the First Applicant and stated the following:

"We have made some changes and republished the https://www.isat-vs-is-and-dd.net/ Web site. It has not been indexed for SEO yet.

Please check through the site, either yourself and/or people from your management team. You have until 17h00 Thursday 27th August to reply with details of any content you deem to be incorrect, and why.

Please remember that if you do not personally respond, we take that to mean that you entirely agree with the content of the Web site. . .".

12.11 The First Applicant avers that the Respondent sought to extend his harassment of it by addressing an email dated 2 September 2020 to the Second Applicant notwithstanding that the latter was, a separate entity and had nothing to do with the operations of the First Applicant. The contents are as follows:

"I am not sure if you are aware of the major issue iSAT has with Dimension Data in South Africa.

I have been trying to contact and alert anyone from NTT Ltd leadership via the Contract page on NTT Ltd Web site, but to no avail.

Please see the Web site https://www.isat-vs-is-and-dd.net/ and guide Dimension Data management to take responsibility for its actions and save it from seemingly want to destroy itself.

And of course protect NTT Ltd, and NTT Ltd brands from extremely bad publicity.

If Dimension Data considers any of the information on the Web site to be inaccurate, they must notify me via email. That being said Grant Bodley has not

come up with anything he disagrees on, after being asked to check on three different occasions.

Unfortunately, Dimension Data attorneys are way out of their depth as well, which is certainly not helping their clients, and maybe adding to Dimension Data confusion.

Have a look at the Web site, and you will soon agree that Dimension Data are in terrible trouble, and they do not seem to realise it, or they are trying to keep this from NTT Ltd".

12.12 The First Applicant states that on 9 September 2020, its attorneys accessed the Respondent's website and copied some extracts, which the First Applicant contextualised as containing false, misleading and defamatory statements about the applicants *inter alia* as following:

"The allegation that the First Applicant is guilty of and has admitted to gross corporate negligence;

The allegation that the Second Applicant is preparing to shut down the First Applicant globally and has no interest in the First Applicant's future.

The allegation that the First Applicant is "self-destructing" and that the Second Applicant has no interest therein;

The allegation that the First Applicant has attempted to "cover up its terrible failings; and

> The allegation that the Respondent "feels morally obliged to inform Dimension Data's clients and those thinking of working with Dimension Data to take incredible care" and that "the potential risks for corporate institutions and businesses of any size, in South Africa or anywhere else in the world, when using Dimension Data's products and services, may be great".

[13] The Applicant's attorneys once more wrote a letter to the Respondent demanding that it must decease with its conduct of harassing, defaming, threating and inciting its employees and customers.

[14] On 14 September 2020, the Applicant's attorneys wrote a letter detailing the history of the matter and the chronological unlawful campaign of harassment against the Applicants by the Respondent. In it, the Applicants' attorneys sought a written undertaking from the Respondent that he shall decease from such conduct failing such undertaking, by 18 September 2020, the Applicants shall bring an application in court for an appropriate relief. The Respondent, instead sent an email to the First Applicant stating that he was to make his (Respondent's) website live on 16 September 2020 and would also send the press release on the same day. Again, the Respondent sent an email to the First Applicant stating that if it or its employees or attorneys do not respond to the context of his website by Monday 21 September 2020, he would "understand that to mean that there are no disagreements with the text". Simultaneously, the First Applicant received communication from the Respondent's attorneys denying that they threatened, published threatening and distributing factually untrue information about the First Applicant.

E. Undertakings and flouting thereof by the Respondents:

[15] The First Applicant states that eventually, on 25 September 2020, the Respondent sent an undertaking (which was accepted by the Applicant's on 28 September 2020) to the following effect:

> "Our client undertakes that he will not:
>
> 1. deliver threatening, defamatory and factually untrue correspondence to your client's Senior Executives;
> 2. publish threatening defamatory and factually untrue information about your clients on the website;
> 3. distribute press releases to his client base which contains threatening and factually untrue information about your clients.
>
> Without conceding any obligation to do so, our client will take down the website as an interim measure. Our client will provide your client within 5 days' notice should he intend putting the website up again.
>
> . . .
>
> Our client's rights are reserved".

[16] The First Applicant avers that despite the above undertaking, the Respondent sent a barrage of emails to it and to its Executives repeating the same defamatory and threatening material like:

- "That the First Applicant has admitted to gross negligence and that the First Applicant and its attorneys have found no fault with the Respondents website".

[17] On 2 October 2020, the Respondent sent an email to the First Applicant. I shall refer to experts relied on by the First Applicant as constituting threats and thus deviating from the undertaking. The Respondent writes:

> "My patience with this process has finally runout".
>
> . . .
>
> The time is now 12h00. The new website is now available at a new VRL. At this time search engine, indexing on the website is still disabled.
>
> At 14h00 today:
>
> 1. The search engine indexing will be enabled for the new website.
> 2. The press release will also start going out to our contact database, made up of about 800 000 South African Contacts and just over 500 000 International Contacts. The sending process is load balanced over two servers, it will send 10 000 press releases in the first hour and increment by 10 000 an hour, until it reaches full capacity of about 100 000 per hour.
> 3. iSat will send out the press release manually, to selected press contracts from online computer technical news websites, and upper management contracts in the industry. If duly authorised Dimension Data Management representative advices me, in writing (email) that the company is willing in good faith to enter into settlement negotiations with me, I will suspend the above outlined process".

[18] Again on 20 October 2020 at 3:20pm, the Respondent sent an email to the First Applicant hoping that the First Applicant appreciates the repercussions of the press release and that the cut off for sending the press release was 17h00 that day.

[19] The First Applicant attests that the Respondent erroneously alleged that, "it had consented to the press release something' which was wrong. The respondent despite

that being brought to his attention continued to send two emails, similarly making a point that the "*press release to go out shortly*" and containing the following threatening statements.

> "The Applicant's attorneys are playing with the survival of Dimension Data, and they do not seem to realise it, or care. . . . Our final cut off for sending out the press release is 17h00 today, unless we hear something positive from someone in authority at Dimension Data. If Dimension Data's attorneys contact me again in between thoughts, we will send out the press release immediately".

[20] The Applicant contends that on 5 October 2020, the Respondent began distributing the defamatory and factually untrue press release about the Applicants to over one million national and international recipients and continues to do so. The First Applicant alleges that the Respondent distributed the press release to contacts in its database as well as Executives in the industry.

F. <u>The Respondents Case</u>:

[21] The Respondent states that in June 2014 he decided to supply virtual servers to his clients by means of the First Applicant's CVM product. The Respondent attests to its long-standing relationship with the First Applicant. The CVM provided the Respondent with a platform to enable it to deploy and manage virtual servers for its client base. The Respondent defines a virtual server as a means which a user may store its data and run its systems and applications without itself having to acquire the necessary hardware and thereafter having to maintain both.

[22] The Respondent testifies that prior to opting to subscribe to CVM, his General Manager, Ms Michelle Pieterse enquired from the First Applicant's, Michele Brink

regarding the means by which a client could back up data from CVM. The response was that the Respondent would have to acquire an additional service called Attix 5. The Respondent made investigations about Attix 5 and found that the applications' programmers' interface (that is the means by which the software developer would gain access to the CVM platform) would not provide sufficient capacity to enable it, without more to provide a virtual server to each customer. To do so, would have required iSAT to create and configure each virtual server for each customer and to maintain a firewall interface for each such customer. iSAT would have required the use of time and resources, which it hoped the CVM platform would save. For those reasons, the Respondent opted not to consider the Attix 5's proposal. On 25 June 2014, the Respondent signed the agreement and proceeded to develop its virtual servers.

[23] Approximately two months after the conclusion of the CVM, Ms Pieterse communicated with Mrs Brink, the General Manager of the First Applicant, in order to obtain an updated price on Attix 5. The reason was that iSAT was considering providing its customers with a data backup solution whereby they would be able to back up their data to a virtual server on CVM platform. Seemingly, iSAT did not opt to subscribe to Attix 5 and instead made use of the scheduled backup option in Microsoft SQL Server to back up vital database data and other automated systems used to backup customer and other iSAT business data.

[24] The Respondent states that on 18 March 2019, CVM platform crashed without warning and without subsequent meaningful communication from the First Applicant as to what caused it and whether there was any prospect of restoring it. The Respondent

makes the point that he communicated on numerous occasions with the First Applicant enquiring as to the actual cause of the crash to no avail. At first, all that the Respondent received was an email dated 19 March 2019 from the First Applicant. The subject matter was:

> "Major impact, cloud CVM, Randview, reflecting the affected service as "Consumer Virtual Machine"; the grade of service impact was reflected as "Major". An updated message revealed that "is engineers still attending, no ETA"."

[25] The Respondent says this information was not sufficient for iSAT to enable to plan a response to convey to and inform its customers. The Respondent continued to receive similar emails about 75 times. The emails were of no assistance to the Respondent in that it lacked detail about what the problem was, the steps taken to resolve it and if possible what was being done to assist the customers.

[26] The impact the crash had on iSAT, according to the Respondent, was that iSAT systems were down, its website was down together with those of its customers and its online helpdesk service was unavailable with the implication that any customer who wished to top up its data, make payment, implement and update its services with iSAT or to carry out any transaction requiring the internet and other services was unable to do so. The result was that the iSAT's customer support telephone lines were flooded with enquiries for customers and the emails received from.

[27] As the consequence of the crash, iSAT had to rebuild customer data from a variety of services and requested its website customers to republish their sites, which in some instances proved to be impossible. The Respondent defines its loss thus:

> "iSAT however, irretrievably lost all of the data related to the major software development project on which I and development staff had been engaged for in excess of 4 years. The consequences of the CVM crash were devastating, not only from a technical, customer relations and data loss perspective but also in human terms. A number of iSAT's staff members continue to require treatment and medication to this day as a consequence of the stress caused thereby".

G. OpenStack Software:

[28] The Respondent intimates that prior to the CVM agreement; he and his staff were able to establish that CVM was based on OpenStack Software. The Respondent states that OpenStack is the leading open source cloud solution available in the world and is supported by major information technology organisations internationally. The Respondent described OpenStack Software as follows:

> "Software (in particular open source software) is not and cannot be a static commodity. OpenStack is via a constant state of development, with various versions (or series) as they are developed, being allocated a name and being released in six month cycles. After the initial release date of each series, the series in question continues to be maintained and additional stable point releases will be made over a period approximately 18 months, where after the series in question will reach what is referred to as its "End of Life" date from which point no further maintenance will be concluded".

[29] In support, the Respondent annexed as AA9, a document reflecting such information and his knowledge about OpenStack led iSAT to have sufficient confidence to conclude that current and stored data would be safe on the CVM platform hence he concluded the agreement. Even the First Applicant characterised OpenStack to iSAT as "the best of breed product".

[30] In his *post facto* enquiries, the Respondent found that the First Applicant, being such a reputable service provider, did not act in accordance with the above stated protocols in maintaining its OpenStack Software. Because of the crash, the Respondent penned an email dated 16 April 2019 enquiring:

> "(a) which version of OpenStack was CVM running on when it crashed;
>
> (b) which version of OpenStack was CVM running on currently;
>
> (c) how many instances were impacted; and
>
> (d) how many customers were impacted".

[31] On 23 April 2019, the Respondent sent a further copy of the email to the email addresses of Andrew Green, Michelle Brink and Basha Pillay because he did not receive a response from the First Applicant. That was followed by other emails to the same persons on 30 April 2019. On 3 May 2019, Michelle Brink responded as follows to the enquiries raised above, "CVM had been running on the Icehouse version (or series) of OpenStack and when it crashed, it was running on Juno series".

[32] The Respondent alleges that the response by Ms Brink, confirmed the suspicions the Respondent had about the cause of the crash. The Respondent says in terms of the

schedule, the Icehouse series of OpenStack was released on 17 April 2014 and had reached its End of Life on 2 July 2019 (and it would have been unmaintained for a period of some six months prior thereto) and Juno, its successors had been released on 16 October 2019 and had reached its End of Life on 7 December 2019. The inexorable conclusion the Respondent arrived at was that the First Applicant had continued to operate its CVM platform and to offer and sell it to customers without conducting essential maintenance to the underpinning OpenStack Software and continuously upgrading it to the latest series as these became available.

[33] The Respondent avers that it is beyond doubt that the negligent conduct of the First Applicant described above was the cause of the collapse and the extensive adverse consequences to iSAT and to large numbers of other customers. Furthermore, the Respondent alleges that the First Applicant consistently refused to disclose to him the technical details of the collapse of the CVM platform and has consistently attempted (through the medium of this application), to frustrate the publication of the true facts.

[34] The Respondent admits, to most if not all, of the communication/emails he sent to the Applicants and the contents thereof. Regarding the press release, the Respondent says he sent it to the First Applicant for it to comment. The Respondent states that he saw fit that the negligence of the First Applicant should be brought to attention of its clients and potential clients and the public at large. Furthermore, the Respondent alleges that he formed the view that there was at least a possibility that the negligent approach by the First Applicant with regard to the use of OpenStack could have occurred elsewhere in its operations and to other products supplied by it as well.

[35] The Respondent argues that he stands by the press release and provided the First Applicant with an opportunity to provide an alternative version of events or to take responsibility and to inform the public what steps were taken to avoid recurrence. The Respondent therefore denies that the information contained in the press release was factually untrue and defamatory. Such facts were in the public interests and to the benefit of the public.

[36] The Respondent admits that on 29 June 2020 he did send the letter FA12 to the Chief Executive Officer of the First Applicant in which he included a link to its previous website. The Respondent states that the reason was to alert the First Applicant's CEO to the fact that he was intending to make the information in the website generally available in order to again afford the First Applicant an opportunity to provide any comment it might have. However, the Respondent admits that in retrospect, and duly advised, he should not have suggested that should the First Applicant again merely hand the correspondence to its attorneys for response, he would "increase my minimum settlement amount". The Respondent admits further that that was an inappropriate way of attempting to gain a response, which he now regretted. The common thread in the responses proffered by the Respondent in respect of repeated emails to the First Applicant and its CEO is that "given the First Applicant's continued silence on the real issues, it was important that I continue to push for a response". In respect of the repeated claims about the minimum amount and its increase, the Respondent regretted doing so.

[37] In respect of FA19, which is the letter dated 21 July 2020 referred to above, the Respondent alleges that the letter does not constitute a threat. However, he states that he formulated the letter without taking legal advice. In retrospect and having received such advice, he regrets any implication that his intent to publicise the background to the crash of the CVM platform and the consistent failure of the First Applicant to address that, was linked to the payment of damages. The Respondent concedes that the use of his potential claim as a means of eliciting comment was ill advised and would not be repeated.

[38] The Respondent defends the inclusion of the Second Applicant, especially the contents of FA12, by stating that the First Applicant is a subsidiary of the Second Applicant and part of the group of companies of which the latter is the holding company. Therefore, the Respondent argues that it was and still is in the interests of the Second Applicant in that capacity to be informed of the events dealt with in "FA22". The Respondent denies that such communication constitutes harassment.

[39] In a summary form, the Respondent submits that none of the extracts from the press release threatening, false, misleading or defamatory especially that such extracts are not accurately reproduced in the founding affidavit, and no material context was pointed out. The Respondent makes the point that the statements were correct in that:

(a) the First Applicant does not dispute the cause of the crash imputed by the Respondent;

(b) the conclusion arrived at by the Respondent that the First Applicant was grossly negligent is legitimate and inexorable particularly in the absence of any comment from the First Applicant as to the cause of the system failure;

(c) the website does not contain the positive assertions (that the Second Applicant is preparing to shut down the First Applicant globally and has no interest in the First Applicant's future and further that the First Applicant is "self-destructing" and the Second Applicant has no interest herein) but rather queries put up for debate as to whether the facts related might not lead to those conclusions;

(d) the only conclusion based on the facts and the absence of an explanation is that the First Applicant was grossly negligent in conducting its business;

(e) it is correct to state that "in iSAT's opinion the First Applicant has also tried to cover up its terrible failings" because it failed to provide an explanation for the crash;

(f) its failure to allow the Respondent access to the First Applicant's Head of Cloud Services, Basha Pillay; and

(g) because none of the principal employees responsible for the CVM platform remain in the services of the First Applicant.

H. Urgency:

[40] The First Applicant submits on urgency, that it became aware of the press release on 6 October 2020, when members of the press and other interested parties began calling in for comments. The Applicant started drafting papers on 2 October 2020 and had to update its papers daily having regard to the most recent harassment by the Respondent. The First Applicant further submits that the actions of the Respondent caused it to suffer real and irreparable harm to their business and shall continue to do so unless the Respondent is interdicted from doing so. The First Applicant states that there is no other form of substantial redress available to it in due course.

[41] The parties agreed on an interim order by agreement as reflected above in paragraph 3. Based on the terms of the interim order, the First Applicant submits that

urgency is no longer an issue. The First Applicant distinguishes the facts of this matter from those in *Caledon Street Restaurants CC v D'Aviera*[2]. The First Applicant argues that the decision to bring the matter on an urgency basis was triggered by the Respondent's conduct of distributing the press release on 5 October 2020. As stated, the issue of the distribution of the press release is not disputed by the Respondent. The First Applicant states that the curtailment of the times, was not drastic in that it only allowed for a period of a week for the Respondent to file the answering affidavit (inclusive of weekends). The First Applicant, however, accepted that the only prejudice would have been in respect of the filing of the Notice to Oppose. Nevertheless, the First Applicant avers that the truncation of the times was reasonable in the circumstances of this matter because it was urgent anyway.

[42] The Respondent argues that the application lacks averments to establish urgency. The press release (the publication and distribution) had already occurred therefore no prejudice would be suffered further, so the argument goes. The Respondent argues further that the Applicants have not set out facts or reasons why they contend that they could not have been afforded substantial relief at a hearing in due course. The Respondents contends that the statements in the publication are true and for the benefit of the public especially those who are in the industry. Mr Rorke, for the Respondent, argued that the Applicants waited for a period of a year before they brought the application and despite that, they gave the Respondent seven (7) days within which to file an

[2] [1998] JOL 1832 (SE).

answering affidavit, something that is ill considered and ill-conceived in the circumstances.

[43] Rule 6(12)(a) of the Uniform Rules of Court provides that in urgent applications a court or a judge may dispense with forms and service provided for in the Uniform Rules of Court and dispose of such matter at such time and place and in such manner and in accordance with such procedure as it deems meet.

[44] Rule 6(12)(b) stipulates that in any affidavit in support of an urgent application, the deponent must set forth explicitly the circumstances which render the matter urgent and the reasons why the applicant claims that he could not be afforded substantial redress at a hearing in due course.

[45] Following the procedure in Rule 6(12)(a), the Applicant gave the Respondents a period of three (3) days to file his Notice to Oppose and seven (7) days to file his Answering Affidavit. Ordinarily, if the application was not brought by way of urgency, the Respondents would have been (in terms of Rule 6(5)(b)(iii)) required to file his notice of opposition within five (5) days of service of the papers on him and 15 days to file its answering papers. This is not an application contemplated in Rule 6(4) of the Uniform Rules in that it was not brought *ex parte.*

[46] Coetzee J, in *Luna Meubel Vervaardigers v Makin and Another*[3] dealt succinctly with factors which must be taken to account in semi – urgent applications, like this one. He listed four factors (in their ascending order) which have to be borne in mind. Kroon J, in *Caledon Street Restaurant CC v D'Aviera*[4] added a fifth factor to be taken into account. The *ratio* (which is relevant) in Coetzee J's judgment has to do with the abridgement of time periods contemplated in Rule 6(5)(d) as I stated above and the setting of the matter down by the Applicant on a day other than a motion court day. He laments the latter. In this instance, Bands AJ, having considered the certificate of urgency in terms of our Practice Manual issued a directive endorsing the abridged time lines set by the Applicants and by setting the matter down on a motion court day i.e. Tuesday 20 October 2020. She decided that the matter was sufficiently urgent to merit the truncated times sought by the Applicant.

[47] Effectively, Kroon J stated that the fifth factor, which requires consideration is whether financial loss, even if irreparable and serious, can constitute grounds of urgency sufficient to entitle an applicant to a modification of the rules. Such is not applicable in this matter. The application was not brought because of financial considerations. The interdictory relief sought was for prevention of the publication of defamatory material and other reliefs sought. The Applicant had been in correspondence with the Respondent about the publication or press release and the continued threats of seeking a reward for the prescribed negligence of the Applicant in allowing the crash of the CVM platform. Prior to the launch of this application, it is correct that the Applicant sought permission to

[3] 1977 (4) SA 135 (W).
[4] [1998] JOL 1832 (SE).

serve the papers on the attorneys of the Respondent to no avail. The publication of the press release occurred on 5 October 2020. As stated, the papers were issued on 9 October 2020, by the Registrar and served on the same day at 11h13. This, as mentioned above, was after Bands AJ, on 8 October 2020 had certified that the matter was semi – urgent and allowed the truncated time periods set by the Applicant.

[48] The correspondence between the parties, which culminated in the press release span over a long time. The averments on urgency, which have been averred by the Applicant should also to be viewed in that background. The Respondent were advised at the fore of the dispute between the parties that the Applicant disputes that it was negligent in any way alleged by him. However, his conduct of threatening and harassing the Applicant continued unabated. The culmination was the press release. The release inevitably led to the harm the Applicant suffered. That the harm had occurred does not necessary imply that the conduct of the Respondent need not be urgently interdicted. The Respondent and his attorneys had not once, undertook not to continue with this conduct. The Respondent eventually made good of the threat and such conduct needed to be urgently interdicted.

[49] The Applicant clearly would suffer more harm if the press release as contained in the website had allowed remaining. That, the publication and distribution had already taken place, does not mean that an application interdicting such conduct and the taking down of the website could not be urgently interdicted. The existence of the website would perpetuate the harm contended for by the Applicant. The adverse consequences to the

business of the Applicant as an International business (something that the Respondent accepts and contends) would continue to its existing and potential clients. To me the truncated times set by the Applicant and endorsed by Bands AJ were reasonable and did not prejudice the Respondent.

I. <u>Striking Out</u>:

[50] The Respondent contends that the deponent is a legal adviser who on the face of it has no technical expertise in the field of computers and computer software and has not qualified himself as an expert in the field. The Respondent contends that the events relating to the crash of the system would not be within the direct knowledge of a legal adviser and the latter places in facts from which it may be concluded that he was directly involved in such events.

[51] The Respondent attacks some paragraphs of the replying affidavit as being impermissibly argumentative, inadmissible hearsay, and contain new matters, which were not dealt with in the founding affidavit. In respect of the hearsay evidence, the Applicant made an application for the admission of a supplementary affidavit of Mr Green. In his application to strike out the Respondent objected to the introduction of the further affidavit of Mr Andrew Green for lack of leave of this court to file such an affidavit. Such objection does not stand since the Applicant has sought such leave, which has since been granted. Furthermore, the Respondent intimates that the further affidavit should be struck out in its entire for the reason that it introduces new matter in reply.

[52] Mr Green filed a confirmatory affidavit in respect of the replying affidavit. Mr Green hereby states thus:

> "I have read the replying affidavit of Pieter Zwemstra and confirm the correctness of the allegations therein contained in so far as they pertain to me".

The Applicants accept the criticism levelled against the confirmatory affidavit, which had been criticised by the Respondent and ascribes that to the slovenly manner in which the Applicants attorneys drafted the confirmatory affidavit. To me that is poor drafting skills by the Applicant's attorneys and their nonchalant manner in which they approached it. The reason for filing the attached confirmatory affidavit was to confirm the contents of the replying affidavit as far as they pertain to him and the role he played as the Operating Officer for Cloud and Comus and as an employer of the First Applicant.

[53] The further confirmatory affidavits expatiates on the duties and responsibilities of Mr Green, his Curriculum Vitae and that he had personal first – hand knowledge of how and why the CVM platform crashed. Furthermore, Mr Green sought to confirm the following paragraphs of Mr Zwenstra, 19, 28, 48.3, 26, 27.3, 32, 40.2, 47.3 and 48.3.

[54] The filing of further affidavits is in the discretion of a court. In *Transvaal Racing Club v Jockey Club of South Africa*[5] Williamson J, confirming this principle said the following:

> "In my view the authorities do not restrict the discretion on the Court in the manner suggested. I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information not being put before the Court at an earlier stage, the Court should incline

[5] 1958 (3) SA 599 (W) at 604B–E.

towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to that course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs. In the present instance there is a completely satisfactory explanation as to why the affidavits containing new facts were not filed earlier; there is no suspicion of *mala fides* and I find no culpable remissness. No prejudice to the applicant which cannot be remedied by wasted costs being awarded, it has been suggested".

[55] Similarly in this matter no prejudice shall be suffered by the Respondent if the further confirmatory affidavit is admitted. As stated above the further affidavits is attacked basically on the same grounds as the replying affidavit is assailed, apart from what his daily duties entailed.

[56] Rule 6(15) of the Uniform Rules allows a court to strike out from any affidavit any matter which is scandalous, vexations or irrelevant. The Rule further provides that the court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it is not granted. I shall deal with the impugned paragraphs as they are categorised in the application to strike out.

Paragraphs 4 – 10 of the Replying Affidavit:

[57] The Respondent submits that these paragraphs are impermissibly argumentative. Paragraph 4 of the replying affidavit attacks the answering affidavit as containing irrelevant issues and avers these were unfounded conspiracy theories about the First

Applicant. Paragraph 4 deals with what the First Applicant considers relevant in this application. The deponent states as follows in that regard:

> "The matter is about the continuous unlawful harassment of the Applicants by the Respondent and his numerous threats to publish – and his eventual act of publishing – defamatory material concerning the Applicants, notwithstanding the Respondents express written undertakings not to do so".

[58] I find no argument being proffered in this paragraph. This is a rehash of the case the First Applicant made out in its found affidavit. Furthermore, paragraph 4 contains a global overview of the facts made out in the founding affidavit, the answering affidavit and the order sought by the Applicants.

[59] Paragraph 5 in essence highlights the admissions made and the defences raised in the answering affidavit. In that regard, the deponents state as follows:

> "These allegations are farfetched and untenable and must be rejected. Indeed, the context of the Respondent's numerous e-mails, press releases and website contradict these spacious excuses and Respondent's clear goal from the outset has always been to extract some form of payment from the First Applicant".

The excerpt encapsulates what has been contended in the founding affidavit.

[60] Similarly, paragraphs 6 and 7 re-iterate the conduct complained of and talk to the issue of the payment of the billions of Rands in damages made by the Respondent without raising any argument in relation to those issues. Paragraph 7 merely mentions that past the granting of the interim order (by agreement between the parties) the Respondent refrained from continuing with the conduct complained off.

[61] Paragraph 8 merely regurgitates the provisions of the interim order granted and the attachment is a copy of such order. In paragraph 9, the deponent asserts that the issue of urgency is academic in the light of the interim order and argument in that regard would be made at the hearing.

[62] Paragraph 10 is brief and reads:

> "In any event, in light of the interim order, there is no longer an issue of urgency so long as the Respondent abides by the interim interdict set out therein".

This paragraph deals with what the deponent perceives to be that urgency is no longer an issue, it does not argue the point at all. Paragraphs 9 and 10 do not pose an argument on urgency. Even if I am wrong, there is no prejudice that the Respondent suffers as a result thereof as envisaged by Rule 6(15).

Paragraph 19:

[63] The Respondent contends that this paragraph consists of entirely hearsay evidence, which is irrelevant and falls to be struck out. Regarding sub-paragraphs 19.2–19.4, the attack is that they constitute new evidence material to the case sought to be made in the founding affidavit. For this reason, I shall refer to paragraph 19 in its entirety. Paragraph 19 reads:

> "19. AD PARAGRAPH 13 TO 15
>
> 19.1 In computing, a "virtual machine" or VM is an emulation of a computer system. In other words, it is 'a computer within a computer'. Virtual machines are based on computer architectures and provide the functionality of a physical computer. A

physical piece of computer hardware can run many virtual machines with all of the virtual machines sharing the physical computer's hardware resources.

19.2 The First Applicant's Consumer Virtual Machine (**"CVM"**) service was precisely that a virtual machine for the consumer market. The service was "consumer" class and as such was an extremely economically-priced service (approximately one tenth the price of an "enterprise" class virtual machine service), had no service level agreement and was commonly referred to as a "best effort service".

19.3 It did not include a data backup service, as was explained to the Respondent prior to his having contracted for the service.

19.4 It was not built or intended for use in business or to host product type workloads. It was designed and priced for non-critical workloads, development and/or test-type environments.

19.5 Save as aforesaid, the allegations contained herein are denied".

[64] The issues addressed in this paragraph are a response in paragraph 13 to 15 (to state the obvious) which read:

"13. The CVM product offered by the First Applicant has precisely that purpose. As is stated in the portion of the contract document provided by the Applicants (Schedule CVM2 to annexure FA2 to the founding affidavit) the CVM product provides the subscriber (referred to as "the Partner) with a platform to enable it to deploy and manage virtual servers for its client.

14. A virtual server in simple terms is a means by which a user may store its data and run its systems and applications without itself having to acquire the necessary hardware (and

concomitant software) and thereafter having to maintain both. A virtual server accordingly also offers software development capacity (and the storage capacity to go with it).

15. The CVM product accordingly offered iSAT the opportunity, should it subscribe thereto, not only to provide its own processing and storage needs, but to offer and provide a virtual server to each of its clients".

Paragraph 19 must be viewed in the backdrop of paragraph 25 and its annexures, of the founding affidavit. In paragraph 25 of the founding affidavit, the deponent talks to the correspondence with the attorneys who were representing the Respondent about how to back-up data and informing them that it was an additional service which the Respondent chose not to procure. The deponent further states in paragraph 25.2 that the Respondent was well aware that it is common practice that back-up data should be stored in multiple copies across multiple locations. The Respondent knew or ought to have known that the CVM platform was not designed to run business or enterprise workloads. The deponent attached an email as Annexure FA9, which confirms this assertion. The contents of paragraph 2.2 thereof read:

"2.2 Furthermore, being a Consumer Virtual Machine, your client knew or ought to have known that the platform was not designed to run business or enterprise workloads".

[65] Mr Cross, for the Applicants, further referred to Annexure FA13.2 attached to the founding affidavit in support of the argument that the issues raised in this paragraph were dealt with in the founding papers. Annexure FA13.2 is an email from Julian Sunker (previous Executive of the Applicant) to Cristopher Arnold (attorneys of the Respondent) dated 9 October 2019 reading thus:

> "Please be advised that your client was fully aware that the VM service is an infrastructure – as – a service platform only, and as such Virtual Machines, applications and data remain the client's responsibility. Due to this and the services technical nature, no Service Level Agreement is available and downtime cannot be prevented". (*Sic*)

The information contained in this paragraph is merely an amplification of what is stated in Annexure FA9 and FA13.2. I find that this paragraph does not introduce new evidence material.

Paragraph 26:

[66] The objection in this regard is that the deponent is not qualified to express opinion evidence in this paragraph and therefore the contents are impermissibly argumentative and further constitute in admissible hearsay evidence. The further affidavit of Mr Green has been admitted confirming the contents of the deponent in the replying affidavit. The issue of hearsay is no longer relevant in the light thereof.

[67] Paragraph 26 is a response to paragraph 23 of the answering affidavit, which states that iSAT made use of the scheduled back-up option in Microsoft SOL Server to back-up the vital database data and other automated systems used to back-up customers and other iSAT business data. Those back-up files were copied to shared folders, different virtual servers, or the CVM platform.

[68] In reply, the deponent says the contents of paragraph 23 make no sense and denied them. In paragraphs, 26.2 and 26.3 the Applicant begins to postulate about what is meant by the Respondent as follows:

"26.2 If the Respondent means to state that he used Microsoft SQL Server to back up "*virtual database data"* to *the very same* location, namely CVM platform, where the data was located, this is simply not the proper nor an acceptable method of backing up data, as anyone proficient in computers should know. The Respondent effectively 'placed all of his eggs into one basket' and did not backup the data at all but merely made a copy of it in the same location.

26.3 If the Respondent means to state that he did properly back up his data, then that data would have been recoverable by him from the location that he backed it up and the Respondent's complaints make no sense".

There is no doubt that in those paragraphs the deponent responds to paragraph 23 of the answering affidavit in respect of the manner in which the Respondent backed-up its vital database data. It is not an impermissible argument in the light thereof.

Paragraphs 27.3 and Annexures RA3.1 and RA 3.2:

[69] This paragraph is a response to paragraphs 24 – 26 of the answering affidavit. Paragraph 24 speaks to the crash on 18 March 2019 of the CVM without warning and there was no subsequent meaningful communication from the First Applicant as to what occurred and whether there was any prospect of it being restored.

[70] Annexure RA3.1 is an email, which the First Applicant, through its Executive Basha Pillay, sent to its clients including the Respondent. It reads that at 18h00 on 19 March 2019, an emergency change, was scheduled to "replace faulty hard discs" on the CVM machines. It notified the recipients that the data synchronisation was still in progress and that some machines were with volumes and others without but by midday that day the full restoration and resynchronisation would be complete.

[71] On 25 March 2019, the First Applicant sent a message to the Respondent and other clients who were similarly affected stating as follows:

> "Following the initial hard disc failures experienced on Consumer Virtual Machine last week, a number of recovery initiatives and efforts to maintain data integrity have been undertaken. It has, unfortunately taken significantly longer than anticipated to fully restore optimal operations. We, therefore, wish to recommend an immediate alternative measure so that your business can keep running".

[72] It is common cause that the First Applicant like the Respondent or even any entity for that matter, operate through its employees. Basha Pillay, is the person who communicated with the customers of the First Applicant. The reading of the emails speaks to that. The communication contained therein talks to the cause of the crash and the efforts and the time expected to be taken to have the CVM up and running optimally again. This information does not need expert opinion and it is not necessary that the author should have confirmed the contents thereof. Not every communication sent by an entity (in proceedings) need confirmation from the person who authored the communique. The purpose of RA3.1 and RA3.2 is to establish, contrary to what is alleged by the Respondent in paragraphs 24 – 26, that there was communication and the reason was stated as "hard disc failure". The purpose is not to prove the truthfulness of the content, which would invariably need confirmation from the person who diagnosed the problem. I am not with the Respondent that this introduces new matter material.

Ad paragraphs 32 and the Confirmatory Affidavit of Green:

[73] I have dealt above with the admissibility of the confirmatory evidence of Mr Green and need not repeat that here.

[74] In paragraphs 46 – 51, the Respondent re-iterates his suspicions about the reason why the CVM platform crashed. He states, as mentioned above, that the Icehouse of Openstack and its successor Juno had reach their end of life. The Respondent opines that the inexorable conclusion was that the First Applicant was negligent in that regard by failing to continuously conducting essential maintenance of the Openstack software and upgrading it to the latest series as those became available. Further allegations are made that the First Applicant attempted to resurrect the CVM platform on a different series of Openstack which itself, had many years before, reached its End of Life.

[75] It is notable that the allegations by the Respondent in the above regard are stated as a fact. In that respect, it is incumbent upon the First Applicant to respond to such factual allegation and by either denying or accepting them. In its response, the First Applicant denied the allegations as being speculative, untenable and unfounded. In amplification, the First Applicant states that the cause of the crash as diagnosed by its engineers was a hardware malfunction in the storage subsystem that was physically separate from the Openstack CVM environment. The First Applicant went on to elucidate what that meant and states that, out of the best efforts to bring the system back online and to save all data, approximately only 10% of the data was not recoverable and the Respondent was amongst those affected.

[76] I do not find the response by the First Applicant in reply to be constituting new matter material, which needs to be struck out. It is a fair response which does not prejudice the Respondent in any way possible.

Paragraphs 40.2 and 47.3:

[77] Similarly, these paragraphs are a direct response to the issues raised in reply in paragraphs 63.6 and 63.8 of the answering affidavit and accepted would not prejudice the Respondent in any conceivable manner.

Ad Paragraph 48.3:

[78] The response in this paragraph is pursuant to paragraph 72.6 of the answering affidavit where an assertion is made by the Respondent disputing that the CVM platform was not designed to run business or enterprise workloads as plainly wrong. Both parties agree with each other in these paragraphs that Openstack Software is “best of breed”. I see no reason why this paragraph should be struck out as constituting a new matter.

[79] The application to strike out these paragraphs overlaps as it is reflected above. The objection is premised on one leg on the basis that the averments made amount to hearsay evidence. In the backdrop of the admission of the further confirmatory affidavit of Green, such argument falls by the way side. In the other leg, the objection is based on the reason for the collapse/crash of the CVM mainly. In the application to strike out, the complaint, absent the new material being introduced should be viewed in the light of the averments in the answering affidavit. Continuously, in the impugned paragraphs, the

Respondent raises the issues of Openstack Software having reached “End of Life”. Running the risk of repeating myself that is exactly what the reply addresses and states the reason for the crash as the hardware malfunction as opposed to what the Respondent continuously alleges as the cause.

J. <u>Harassment</u>:

[80] The Applicants enjoy a right not to be harassed and threatened by the Respondent in any manner. The Respondent cannot gainsay such right. The only issue, which needs determination is whether the actions of the Respondent of repeatedly sending emails to the Applicant actually amounts to harassment. Coupled with such is whether those emails contained threats to the applicants.

[81] The issue before me in this regard is not what caused the crash *per se*. The crash occurred resulting in the Respondent losing data and that impacted on the latter’s clients. That is a fact, which can never be disputed. It is apparent from the papers that the Applicants contend that the cause of the crash was the hardware malfunction in the storage sub-system that was separate from the Openstack CVM platform. The Respondent, on the other hand, alleges that it was because of Openstack Software, which had reached its “End of Life”. That issue is not for me to resolve at this stage.

[82] The Respondent, seeks to rely, for its actions of sending emails, on the failure by the Applicants to concede that they were at fault and thus grossly negligent. The Respondent further justifies its actions on the assumption that the First Applicant seeks

to avoid responsibility for the crash. Mr *Rorke*, on behalf of the Respondent, argued that the latter was entitled to demand answers from the First Applicant and to do so pertinently and insistently in the face of the First Applicant is stonewalling tactics. In the same breath, he conceded that at times, the Respondent used firm language in pointing out his entitlement to make the First Applicant's negligent conduct public and in drawing attention to the possible consequences in the form of negative public perceptions. The Respondent, as clearly demonstrated above, regretted some of the issues raised in the emails.

[83] It is exactly the strong language used by the Respondent and the regretted statements that constitute the case of the First Applicant. The language conceded speaks to the threats contended by the First Applicant. The issue of keeping on increasing the billions of Rands, which the Respondent threatened to claim from the Applicants, further speaks to the threats and the conduct the Applicants seek a final interdict in respect of.

[84] The events are chronologically stated in the preceding paragraphs about the trail of emails between the parties and the contents thereof. I shall, at all costs avoid repeating the contents.

[85] The crash occurred on 18 March 2019. There was an exchange of emails between the parties regarding the cause of the crash and the issue of negligence on the part of the First Applicant. Such exchange culminated in an email dated 30 September 2019 wherein the Respondent demanded R21 134 440 865.00. On 9 October 2019, Applicant

replied denying liability. A meeting was arranged between the parties and it was held in Gauteng on 2 December 2019. In the meeting, the First Applicant continued to deny liability. The Respondents attorneys left the meeting promising to issue summons against the First Applicant.

[86] It is clear to all and sundry that after this meeting the line was drawn. It remained with the Respondent and his attorney to proceed with the claim and sue the First Applicant as they saw fit. There was absolutely, no need to correspond with the First Applicant either in respect of the cause of the crash nor in respect of any admissions sought from it. The issue of keeping on promising to increase the damages amount each time if there is no response leaves much to be desired.

[87] "Harass" is defined in the Concise Oxford English Dictionary, Tenth Edition, Revised thus:

> "torment by subjecting to constant interference or intimidation".

Threat is defined in the same dictionary as:

> "statement of an intention to inflict injury, damage, or other hostile action as retribution . . . the possibility of trouble or danger".

[88] I chronicled the events in paragraph 12 above as stated by the Applicant and confirmed by the trail of emails sent by the respondent. Despite the fact that the First Applicant indicated that it denied liability and would accept summons through his attorney of record, the Respondent, sent no less than six emails to the Applicants combined about the same issue. This was despite that the First Applicant reminded the Respondent of its

denial of liability. The emails vary from alleging negligence, making an increase in the amount to be claimed and threatening to issue of a press release. The conduct of the Respondent amounts to harassment of the First Applicant. There was absolutely no rhyme no reason why the Respondent continued to correspond in that fashion with the First Applicant after the meeting and the consistent denial of liability. The First Applicant established that it had a right not to be harassed and threatened by the Respondent.

[89] The Respondent, as shown in paragraph 15 above, has made undertakings not to carry on with his conduct. Such undertakings were floated immediately after they have been made. It is apparent in the circumstances that the First Applicant had no other remedy available other than to approach this court for an interdict. The conduct of the Respondent was harmful to the First Applicant in the light of the harassment and the ever-increasing threats of damages claim amount.

[90] The highlighted portions of the email dated 21/02/2020 in paragraph 12.6, clearly constitute harassment and threats. The First Applicant had no business of knowing whether the claim he has against the Applicants has “now increased”. He should have just issued summons as he saw fit. Similarly, the highlighted portion of paragraphs 12.8, 12.9 and 12.11, constitute threats.

[91] With respect, I do not agree with the submission by the Respondent that he was entitled to demand answers from the First Applicant and to do so persistently and insistently in the face of its stone walling tactics. That cannot be. Furthermore, the

Respondent had no such entitlement in the wake of repeated denials by the First Applicant of negligence. There was absolutely no reason for the Respondent to extort money and an admission in that regard. It eludes me for the Respondent to argue that it did not oblige him to simply terminate his engagement with the First Applicant merely because the latter said so. I say so because at all given time the Respondent maintained that the First Applicant was negligent and liable to pay him billions of Rands. Then why did he need a confirmation of the cause of action from the Applicants when he had a clear claim instead of issuing summons. That conduct certainly needs to be interdicted.

K. <u>Defamation</u>:

[92] The First Applicant makes the point that on 20 December 2019, the Respondent sent a "press release" to iSAT's email database and annexed a copy of the timeline from the Respondents previous website. In the timeline, First Applicant avers the following to be defamatory of it:

> "1. That the First Applicant admits gross corporate negligence by acknowledging that they have not been maintaining the CVM Openstack platform for more than 4 years. (FA11)
>
> 2. Dimension Data continues not to take responsibility for their admitted gross corporate negligence. (FA16)

3. Grant Bodley did not respond, so thus confirming that Dimension Data agree (*sic*) with the facts on the Website, including admission of their guilt, and their failure to accept responsibility, and an attempted cover-up. (FA11)

4. Up until now, no response has been received from anyone at NTT Ltd. Is it possible that NTT Ltd are fine with Dimension Data self-destructing? (FA24.2)

5. Even though Dimension Data has admitted its gross negligence, it is refusing to take responsibility for its action. In iSAT's opinion it has also timed to cover up its terrible failings (FA24.4)"

[93] The Applicants argue that the above statements' ordinary objective meaning is self-evidently defamatory of it. They further argue that the rhetorical questions asked by the Respondent have no factual basis. The Applicants submit that there can be no doubt that the effect of these statements, in the eyes of a reasonable or average reader would be to diminish the esteem in which the Applicants are held. The argument by the Applicant's goes further to suggest the Respondent has failed to establish facts to support the defence of truth and public interest and therefore there is no justification for publishing untruths. The First Applicant submits that the statement by the Respondent that "it tried to cover up" its failing is absurd, untenable, speculative and that there is no basis for it. No substantial truth was established by the Respondent for the publication of the defamatory statements, so the argument goes.

[94] The Respondent argues that the statements are not defamatory if contextualised and a “disinterested observer” shall read them as such and in the context of the whole document. He further argues that an ordinary reader would have no difficulty in following the logic employed by him in concluding that the First Applicant had admitted to gross corporate negligence. Put plainly, the Respondent avers that the First Applicant had admitted the facts which gave rise to the inexorable conclusion that it was grossly negligent and the ordinary reader would reasonably understand the statements in that context.

[95] In his Heads of Argument, Mr *Rorke* submits that the alleged defamatory statements are raised as rhetorical questions as to the possible reasons why both Applicants continued to maintain their silence and story they (statements) constituted legitimate comment. Mr *Rorke* contends that an ordinary reader would not understand the Respondent to be making firm statements of fact based on admission of the underpinning facts by the First Applicant. The Respondent argues that in the circumstances, the rhetorical questions constituted fair comment in the form of an opinion formulated rhetorically, and they would have been understood by a reasonable reader as such.

[96] The Respondent submits that the comment regarding “cover-up” was in terms stated to be an opinion and was plainly justified in the context in which it was made and it would have been so understood by the reasonable reader. Regarding publication of

the press release, the Respondent states that by virtue of the standing of the First Applicant in the industry (especially in South Africa) and the extent to which its products may be relied upon are plainly matters of interest to the public at large and the assertions by the Respondent relate to facts which the public is entitled to and ought to know about.

[97] In *Khumalo and Others v Holomisa*[6] O'Regan J stated the elements of defamation as:

(a) the wrongful and

(b) intentional

(c) publication of

(d) a defamatory statement

(e) concerning the plaintiff.

The court further stated in the same paragraph:

> ". . . Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit that the publication constituted fair comment and that the publication was made on a privileged occasion". (Footnotes omitted)

[98] Dealing with the defence rebutting unlawfulness in a press statement, Heher JA said in *National Media Ltd and Others v Bogoshi*[7]

[6] 2002 (5) SA 401 (CC) at para 18; (2008 (8) BCLR 771.
[7] 1998 (4) SA 1196 at 1212G–H; [1998] 4 All SA 347 (A) at 361h-i.

"In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations". (Emphasis added)

[99] In *Modiri v Minister of Safety and Security*[8] Brand JA in dealing with the grounds of justification and the balancing of conflicting fundamental rights of freedom of expression, including freedom of the press on the one hand and the rights freedom of privacy and dignity had the following to say:

"Under the rubric of truth and public benefit, the balancing act turns mainly on the elements of public interest or benefit. If a defamatory statement is found to be substantially untrue. The law does not regard its publication as justified. Publication of a defamatory matter which is untrue or only partly true can never be in the public interest, end of story . . ." (Underlining is mine)

. . .

24. In performing the balancing act the court must therefore decide the public benefit issue with specific reference to the facts of the case before it. Needless to say that these factual situations may vary infinitely . . ."

[100] A publication is defamatory if it has a "tendency" or is calculated to undermine the reputation of the plaintiff and is *prima facie* wrongful.[9] The full onus is on the

[8] (581/2010) [2011] ZASCA (28 September 2011); 2011 (6) SA 370 (SCA); [2012] 1 All SA 154 (SCA) at para 22 and 24.
[9] *Le Roux v Dey* [2010] (3) All SA 497 (SCA) para 8.

Respondent/Defendant to dispel this *prima facie* wrongfulness by alleging and proving facts that dispel wrongfulness such as truth and public interest.[10]

[101] The test that is applicable (in this instance) in the determination of a defamatory statement is what meaning a reasonable reader would likely to give to the statement in its context and whether that meaning is defamatory. The test is objective[11].

[102] I dealt above with the genesis of the dispute between the parties. It is a crash that occurred and led to dire consequences for the Respondent. It is a fact that the Applicants (First Applicant in particular) did not agree that it was grossly negligent in the resultant crash. The First Applicant from the onset and from the meeting held between the parties at the onset recorded that it is not liable and the Respondent may issue summons against it and have then served on their attorneys. That clearly indicates its denial of negligence let alone being grossly negligent. As alluded to, in paragraph [39] above the absence of any comment by the First Applicant as to the cause of the system failure led the Respondent to opine and conclude that the First Applicant was trying to cover up "its terrible failings and therefore admitted gross negligence. This makes it abundantly clear that the finding by the Respondent that the First Applicant was guilty of gross negligence is based on the opinion of the Respondent. It is not a fact that the Respondent established beyond doubt that the First Applicant was guilty of gross negligence and admitted such. The publication therefore, of such a finding cannot, in the context be stated as a proven

[10] *Neethling v Du Preez and Others, Neethling v The Weekly Mail and Others* [1994] (3) All SA 479 (AD), 1994 (1) SA 708 (AD) at 769-780.
[11] The Law of South Africa: Joubert, First Issue 7, Damages, Deeds, Defamation to Defence, para 248.

fact. Clearly therefore, such a statement of and about the First Applicant cannot be couched as the truth and consequently its publication cannot be regarded as being in the public interest.

[103] The statement that the Second Applicant is preparing to shut down the First Applicant and has no interest in its future has no factual basis. On the face of such an unsubstantiated statement, which has been distributed throughout the country, especially to the customers of the Applicants would be read by an ordinary reader contextually would be believed to be the truth. There is no semblance of evidence supporting the statement on the facts of this matter. It is incorrect and therefore not in the public interests. The submission by the Respondent that these statements were in any event rhetorical question cannot hold in the backdrop of the fact that he did not provide facts in the website, which would substantiate those questions. Even on the facts before me, there is no evidence to suggest that the Second Applicant was in the process of shutting down the First Applicant.

[104] The issue of the First Applicant trying to cover up its failures is unsubstantiated and therefore defamatory of the First Applicant. The First Applicant, as stated before, categorically denied gross negligence and made it clear that it shall await summons which was never issued. What more was expected by the Applicants in this regard.

L. <u>Injury Caused or Reasonable Apprehended</u>:

[105] The harm that the First Applicant suffered as a result of the publication of these statements was even foreseeable to the Respondent prior to the press release. The highlighted portions of paragraph 12.8 and 12.9 speaks to that. I need not repeat them. Certainly, that is the harm, which the First Applicant has suffered because of these statements. The manner in which the Respondent conducted himself through the emails and the press release speaks to the fact that if he is not interdicted, the possibility of him carrying on cannot be doubted in light of the unending emails send by the Respondent to the Applicants.

M. <u>Suitable Alternative Remedy</u>:

[106] I cannot conceive of any other remedy which the Applicants have in order to curb or stop the behaviour displayed by the Respondent starting from the meeting of 2 December 2020 when he promised to issue summons. I agree with Mr Cross's submission that relying on damages claim as an alternative would never truly compensate for the reputational and business loss which the Applicants would suffer and suffered as that would not reverse the harm caused and likely to be caused. It is never an easy matter to prove damages in defamation claims. The only suitable remedy is to interdict the Respondent from harassing, threatening the Applicants and its employees and to disseminate defamatory matter of the Applicants.

[107] I find that the Respondents have satisfied the requirements of a final interdict and therefore the following order shall issue.

[108] In the result the following order is made:

1. The Respondent is hereby interdicted and restrained from:

    1.1 threatening, harassing and/or defaming the Applicants and/or any employee of the Applicants, and/or inciting any other person or entity to do so; and/or

    1.2 publishing threating, defamatory and/or factually untrue information concerning the Applicants and/or the Applicants' employees on the Respondent's websites and/or on any other platform; and

2. The Respondent is ordered to pay the costs of the application and the application to strike out.

_____

M MAKAULA
Judge of the High Court

Appearances:

Counsel for Applicants:	Adv GJA Cross
Instructed by:	Eversheds Sutherland Attorneys c/o Joubert Galphin Searle Port Elizabeth
Counsel for Respondent:	Adv SC Rorke SC & Adv JG Richards
Instructed by:	Rushmere Noach Incorporated Port Elizabeth

Date judgment reserved:	18 March 2021
Date judgment delivered:	05 October 2021