

LEGAL REPORT
THE LOST BOYS OF BIRD ISLAND
BY MARK MINNIE & CHRIS STEYN

1. Introduction

The manuscript is the collaborative result of two unconnected individuals who conducted independent investigations into the same events dating back some 30 years. At the time only a fraction of the available evidence was publicly disclosed. The full extent of the allegations involving several then-powerful National Party cabinet ministers remained concealed until now. The publication of these allegations remains of public interest, even after all the years, but because of the passage of time some evidentiary issues do arise.

2. Can the dead be defamed?

The manuscript contains defamatory statements regarding several deceased persons, notably Magnus Malan, John Wiley and Dave Allen. Wiley and Allen are implicated in rape/statutory rape and what would now be termed human trafficking. Malan is implicated in the same crimes and more. He is accused of having discharged a firearm in the anus of a young boy (p92, 96); being a key part of a paedophile ring (p104; 152-3); interfering with evidence (p106); abusing state resources (p93); the attempted murder of Minnie (p117); and orchestrating the murders of both Wiley and Allen (p144; 149); some of the boys who went to Bird Island (p144) and the Van Rooyen couple (p151-2).

Malan is gradually exposed. He is named in the Introduction, shortly after reference is made to “two prominent National Party cabinet members” suspected of abusing young boys. He is again referred to (although not named) in chapter 7 as “Ore” (referring to a man with prominent ears, dubbed “Wingnut” by Minnie) where he is said to have been a sadist who violently raped an underage child after drugging him. Steyn refers to “the most senior cabinet

minister alleged to be involved” (p59), also in apparent reference to Malan. “Wingnut” features throughout the book and is repeatedly implicated of the various crimes listed above.

Only on p93 is “Wingnut” identified as the minister of defence, whom readers would by then know was Malan. He is again mentioned by name on p132 and finally named as having been implicated in organised paedophile activities and the possible murder of the Van Rooyen couple (p152-3).

Notwithstanding the gradual and somewhat oblique manner in which Malan is exposed, there is no doubt that in the end he is directly implicated in the most heinous of crimes.

It is often said that the dead cannot be defamed. It is true that no case law exists in South Africa that affords family members the right to sue for defamatory material published about their deceased relative. But the issue has never featured on appellate level in this country and is certainly not universally accepted as being settled law. In some foreign jurisdictions limited recourse (an interdict; declaration of falsity) has been proposed for relatives against the publication of false defamatory materials concerning the dead. In Germany it constitutes a criminal offence and at least one South African author has suggested that it could constitute the crime of *crimen iniuria*, irrespective of the death of the victim.

The “rule” that the dead cannot be defamed is not absolute, but it would no doubt be a long and arduous precedent-creating journey for anyone wishing to make law on this score. I suspect the chances of that happening are minimal and even if it does materialise, the publisher has recourse to the usual defences of truth and public interest, fair comment and reasonable publication.

Besides, it is clear from the book as a whole that the material concerning Malan, Wiley and Allan is based on independent investigations by the two authors, the results of which is detailed in the manuscript. It can hardly be suggested that the authors and publisher seek to benefit from a gratuitous and scurrilous attack

on the reputations of the deceased, simply because they face no risk of legal action.

Family members cannot sue on the basis that the defamation of their deceased relative injured their own reputations. It has been held that the reasonable reader would not think less of those related to or close to the defamed person, merely by reason of their association. The position is different if the defamatory material also constitutes an injury to the heirs and relatives of the deceased personally, for example alleging that they endorsed or associated with the deeds of the deceased. This is however not the case in the manuscript.

The position of the news media is somewhat different, as is apparent from *Playboy* and *You Magazine* having been sanctioned for defaming the dead (p133-4). The difference is that the press code only applies to subscribers thereto, which the publisher is not.

In conclusion I therefore believe that the risk of legal liability based on the publication of defamatory material concerning Malan, Wiley and Allen is minimal.

3. The living can sue

Barend du Plessis is first mentioned by name on p133 as directly associated with Allen, Wiley and Malan and having visited Bird Island together with these individuals (see also p141).

At that point the reader would no doubt make the link to Du Plessis being the person referred to as the “second cabinet minister” in the introduction (p2); the person referred to during Allen’s confession to Minnie (p44); the person identified by Steyn’s “NP source” (p56) and by Steyn herself on p75; one of the three “VIP’s” who flew to the island in the military helicopter (p140 - where he is referred to a “BdP”); and as the “third, still-living minister who was accused of paedophilia” (p149).

The manuscript, read as a whole, clearly to my mind implicates Du Plessis in child sex activities. He is still alive and would have a cause of action to sue the publisher and/or authors for defamation. In that event the publisher would bear the onus in justifying the publication. That means proving the truth of the allegations or at the very least, proving that the allegations were reasonably believed and published.

The difficulty in proving truth is that it requires hard evidence. The evidence of Minnie and Steyn would go some way in laying a basis for the truth of the allegations but would not be enough. The missing docket compounds this problem significantly as does the fact that the original source (Allen) is deceased. Minnie's evidence would, it seems, mostly be based on his recollection of events and information given some 30 years ago. He would be vulnerable under cross-examination in the witness box.

The reconstructed docket (p126), if still at hand, would be useful, being a contemporaneous record of information, but it would nonetheless remain Minnie's version alone.

The Brigadier would in principle be a valuable witness because of the information Minnie shared with him at the time, but the brigadier is never named nor is it apparent he is still alive and if so, would be willing or capable to give evidence.

There is a real risk that, if du Plessis takes action, the publisher would be unable to produce enough evidence to justify publication of the allegations relating to him.

I therefore suggest that du Plessis not be identified as the "other/second/third minister" implicated in paedophilia. The difficulty may be that he was indeed publicly implicated as having accompanied Malan and Allen on at least one trip to Bird Island (the *Playboy* article – p 132-3), but in the context of the book and

several mentions of the “other” cabinet minister, that reference is the key to linking him to the allegations.

Precisely how du Plessis is excised from the manuscript is the authors’ and publisher’s prerogative but I am happy to be part of any discussion on this.

4. Victims of sexual crimes

The identities of the victims of sexual offences may by law not be disclosed. Where an adult victim has expressly given informed consent to such disclosure it is however generally regarded as lawful to identify the individual.

But child victims, even after attaining majority, remain a contentious issue.

The manuscript generally does not identify the child victims, except for William Hart (p80; 83-4; 89-93). I do not know if William Hart is his real name, or whether he has been consulted in the writing of the book, or whether he is still alive.

Unless there are facts I am not privy to, I suggest Hart’s name be redacted.

5. The senior public prosecutor

John Scott is identified as the senior public prosecutor who refused to prosecute (p68). The context and prevailing circumstances probably carry a defamatory meaning of the prosecutor. It implies a departure from the “without fear, favour or prejudice” principle applicable to the prosecutorial authorities in general. I would however think that the failure to prosecute is a demonstrable fact and although there would be a dispute as to the motivation behind the decision, I think the publisher would have reasonable prospects of justifying any defamation that may be incidental to Scott’s identification.

6. Post publication disclosure by authors

I was asked by the publisher what the consequences may be if the author(s) themselves identify those who are not identified in the manuscript, post publication. The law provides that the publisher (in the wide sense of the word) of defamatory material may be held liable. If the author/s for example subsequently name du Plessis, or disclose information which would serve to identify him as the “other minister”, the publisher cannot be held liable for that disclosure unless it somehow participated therein. In other words the risk of liability for post-publication disclosure rests on the party making the disclosure.

7. Conclusion

I believe that publication of the allegations contained in the manuscript is of public interest. Although they are alleged to have taken place several decades ago, publication proved impossible at the time. The allegations involve serious crimes committed against marginalised children by powerful individuals in public office. As Minnie points out in the final chapter, the book is about honouring the victims, calling the legacies of the perpetrators to account and reminding society of those it has failed.

If the publisher or authors have any special concerns not addressed above, I request that you kindly bring them to my attention.

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