

SOUTH AFRICA / JUDGMENT

Akani Retirement Fund Administators (Pty) Ltd v NBC Holdings (Pty) Ltd and Another (10182/2020) [2020] ZAGPJHC 174 (28 May 2020) [2020] ZAGPJHC 174

COURT

South Gauteng High Court, Johannesburg

BEFORE

RT Sutherland

CASE / FILE NUMBER

10182/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE:YES

(2) OF INTEREST TO OTHER JUDGES:YES

28 MAY 2020 RT SUTHERLAND

CASE NO: 10182/2020

In the matter between: -

AKANI RETIREMENT FUND ADMINISTATORS (PTY) LTD APPLICANT

and

NBC HOLDINGS (PTY) LTD

FIRST RESPONDENT

NBC LESOTHO INSURANCE COMPANY LTD SECOND RESPONDENT

JUDGMENT

SUTHERLAND ADJP:

INTRODUCTION[1]

- [1] On 11 May 2020, I gave an order in an urgent application, and undertook to provide reasons thereafter, which I now do.[2]
- [2] The applicant (Akani), prior to this application became engaged in litigation with the first respondent (NBC) and several other parties. That litigation is ongoing. The second respondent, a subsidiary of NBC, and a domiciliary of Lesotho (herein called L) was not involved in that litigation. The respondents each made critical remarks about Akani with reference to that litigation imputing a corrupt character to Akani. In addition, L made critical remarks about Akani's alleged experience in eSwatini imputing a corrupt character. It is not cogently disputed that the remarks were defamatory; what is in dispute is whether they were unlawful. Akani's grievance about the defamation is the font of the present application.
- [3] Extensive relief was sought against each respondent. Several discrete issues were raised by each respondent and they are dealt with in turn.
- [4] The material facts are hardly on dispute, save in one respect raised by Land which aspect is addressed in the context of that contention.

NARRATIVE OF THE MATERIAL EVENTS

- [5] Akani and NBA are rivals in the business of the administration of pension and provident funds. Typically, such funds are controlled by a board of trustees elected by employers and employees in equal numbers. A person designated as the Principal Officer is the chief executive officer. The fund administrator is appointed by the trustees and reports on its given mandate to the principal officer and to the board.
- [6] The Chemical Industries National Provident Fund (the Fund) is one such entity. NBC has been, for some thirty years, the administrator. Axiomatically, NBC deploys particular employees to manage the client's business and maintain a positive relationship with the principal officer and the trustees. In the case of the Fund, NBC's men on the spot were Cheena and Ginya, persons who NBC alleges are at the heart of unlawful conduct calculated to lose NBC its client, the Fund.
- [7] In December 2019, apparently to the surprise of the executive of NBC, it was given the contractual three months' notice to terminate its mandate. In its place Akani was appointed and was set to take control on 1 March 2020. NBC took up the stance that there was skulduggery afoot and the fruits of their investigations fortified their opinion. As a result, NBC launched an urgent application to set aside the termination of its own appointment and set aside the appointment of Akani. NBC were joined by other members of the Fund and interested parties. The application is a review based on the allegation that these decisions by the Fund are unlawful.
- [8] In broad terms, Akani is accused of corrupt conduct in concert with office bearers of the Fund and employees of NBC. The thrust of the case is that Akani conspired with employees of NBC, Cheena and Ginya, and with the Principal Officer of the Fund, Dangazele, and

certain other trustees, to wreck NBC's relationship with the Fund with the objective of securing Akani's appointment in its place. In the affidavits presented to the court, in the review application, details were laid out of payments made via entities, including Neighbour Funeral Scheme, controlled by one, Letsane, the controlling mind of Akani and deponent to its affidavits, to the, by now, ex-employees of NBC, Cheena and Ginya, and other persons. In the answering papers in the review, Akani did not address these allegedly suspicious payments, despite the fact that Letjane, Cheena and Ginya all deposed to affidavits.

- [9] The relief in the review application was framed in the customary manner: Part A was for interim relief to freeze the status quo to keep NBC in office and exclude Akani, pending Part B, the review proper. The matter came before Vally J. On 12 March 2020 he issued an order granting interim relief. The material part of the order reads:

"(1) The [Fund and others] are interdicted and restrained from taking any steps to implement the appointment of the [Akani and others] from providing administrative, consulting and actuarial services to the First Respondent.

- (2) [NBC and one other] are to continue providing administrative, consulting and actuarial services to the [Fund]n accordance with the agreements which were in place between these applicants and the [Fund] as at 29 January 2020.
- (3) The orders in paragraphs (1) and (2) above shall terminate on 31 July 2020 unless extended by this court either mero motu or on good cause shown.
- (4) The [Fund] is to file the Record in terms of Rule 53 (4) (d) of the Uniform Rules of Court by 27 March 2020.
- (5) The Record is to include the preliminary forensic report concerning [NBC, inter alia] which was placed before the Board of Trustees of the [Fund] prior to it taking the decision to terminate the services of the Ninth and Tenth Applicants.
- (6)"

(Part B was referred to oral evidence. That hearing is set for 12 June 2020.)

- [10] On the same day, 12 March 2020, NBC sent a letter to members of the Fund and other interested parties. Some of the co-applicants in the review were among the recipients; the vast majority were not, and had no intimate knowledge of the litigation, but many would probably have been, at least vaguely, aware of the dispute about the termination of NBC's mandate and the appointment of a new administrator. The material portion of the letter reads:

"As advised, an urgent case was brought in the South Gauteng High Court in Johannesburg by concerned [Fund] members to interdict NBC's termination as fund administrators, consultants and actuaries to [the Fund].

The court handed down judgment today (12 March 2020), having found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful.

The interdict remains in force until 3 July 2020 unless extended by the court of its own accord or upon good cause being shown."

(emphasis supplied)

[11] On 27 March 2020, a periodical publication called the "Public Eye", domiciled in Lesotho, was published online to the world. In that issue, an article appeared which included an interview with one, Godfrey Vatsha (Vatsha), an employee of L. His status was the subject of debate; he denies he is a director of L, but he passes himself off as director on L's letterhead. He also has a consultancy relationship with NBC, whatever that means. The article was unflattering about NBC. Vatsha supplied information to the journalist who wrote the piece. Vatsha is quoted in the piece. The portion of the article that is of interest to this controversy reads thus:

"Concerned members of the CINPF were extremely unhappy about having their fund and retirement savings being handed to a corrupt business like Akani";

"Akani, on the other hand is a small and frankly insignificant entity with little or no track record in South Africa. It has also lost its licence to operate as a financial services provider in eSwatini due to instances of corruption by its directors who'd misappropriated members' retirement savings for personal use."

"Evidence of corruption was accepted by the court when interdicting Akani's unlawful attempt to steal a longstanding client fund away from NBC Holdings."

[12] A partial similarity can be noticed between these published remarks and the text of NBC's letter.

[13] When these utterances came to the attention of Akani, it launched this application. Its grievances are plain from the tenor of the extensive prayers sought:

"Akani thus seeks an order:

(1)

declaring that:

the statement, "having found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful" in the NBC letter is false and defamatory of Akani; the statements in the Article are false and defamatory of Akani;

(2)

directing NBC, within 1 day of this Order, to:

provide a list to Akani, supported by evidence of transmission, of all the entities and individuals to whom NBC sent the NBC letter ("the recipients");

send a letter to all of the recipients, retracting the NBC letter and stating the following:

"We refer to our letter dated 12 March 2020.

The contents of that letter were false to the extent that it was stated that Akani's appointment to provide services to the Chemical Industries National Provident Fund ("the Fund") was unlawful, or that it was suggested that a Court had found that Akani had acted corruptly in any manner or to any extent.

The correct position is that:

no Court has made findings of corruption against Akani; and no Court has ruled that Akani's appointment by the Fund was or is unlawful.

This letter of correction is sent to you after Akani successfully sued NBC for defamation, and is sent as ordered by the High Court of South Africa, Gauteng Local Division, Johannesburg."

(3)

provide Akani with proof that the correction letter, as described in 74.2.2 above, has been sent to all of the recipients;

(4)

directing NBC Lesotho, within 5 days of this Order, to issue an unconditional apology for the statements it made in the Article pertaining to Akani, by placing a half- page advertisement in the Public Eye newspaper stating the following:

"NBC Lesotho has previously given statements to Public Eye regarding a competing entity, Akani, which statements were published in Public Eye on 27 March 2020. The High Court of South Africa, Gauteng Local Division, Johannesburg, has found that these statements were false and defamatory, and ordered NBC Lesotho to publish this retraction and apology to Akani. NBC Lesotho hereby retracts its statements as they pertain to Akani, and apologises wholeheartedly for misleading the public on this score and prejudicing Akani."

- (5) interdicting the respondents from making any further statements of a defamatory nature and effect against Akani, including but not limited to repeating the statements made in the NBC letter or the Article;
- (6) ordering NBC and NBC Lesotho, jointly and severally, the one absolving the other, to make payment to Akani of damages in the amount of R 750,000.00 alternatively a figure this Court deems meet, with interest accruing on such amount from the date of this Order;

(7) ordering NBC and NBC Lesotho, jointly and severally, the one absolving the other, to pay Akani's costs, on the scale as between attorney and own client, including the cost of two counsel."

[14] By such route this matter was then heard on Friday 9 May 2020. Applications to strike out passages for various reason, including irrelevance and impermissibility of making out a case in reply were made. The fate of these applications is addressed en passant the real issues.

THE UNLAWFULNESS OF THE DEFAMATORY STATEMENTS

The NBC letter as regards the order and judgment of Vally J

[15] Akani emphasised that it sought relief only in respect of the allusions to the judgment of Vally J. The matter is addressed on that basis.[3]

[16] What did Vally J actually say? The text of the order is bland, as it should be, and contains no commentary.[4] In the judgment, Vally J, as he was called upon to do in an application for interim relief, addressed what was relevant to that

question only. In order to capture the tenor, burden and context of the judgment, it is necessary to cite the following passages, lengthy though they may be, which are pertinent to this controversy. Emphasis is given to paragraph 4.15 of the judgment in which critical remarks are made. The text reads:

"4.2: To understand the member applicants' claim, it is necessary to have regard to some of the pertinent events which led to the termination of the NBC contract and to the conclusion of the replacement contract with Akani. These events are: one, on 21- 22 November 2019, the Board of the Fund resolved to remove NBC as an administrator;

two, about a week later on 2 December 2019, Akani was invited to tender through a closed bid process to replace NBC as the administrator.

Akani though was not the only party invited to tender. There are eleven (11) other parties that were invited to tender;

three, the employees of NBC, that is Mr Chaane and Mr Ginya, were for many years tasked to manage the relationship between NBC and the Fund. They held senior positions in NBC and were privy to the business methods of NBC as well as many of its secrets. Their duties involved assisting the Fund in all matters relating to its business including providing secretarial services to the meetings of the Board. This afforded them the privilege of attending meetings of the Board as a result of which they came to learn many of the Board's business as well as its decisions and its secrets;

four, on 4 December 2019, Messrs Chaane and Ginya resigned from NBC. Their resignations were not accepted but they were immediately suspended and summoned to attend a disciplinary hearing to answer to the charge that they were instrumental in destroying the relationship between NBC and the Fund and that they colluded with Akani to ensure that Akani replaced NBC.

However, on the same day, 4 December 2019, they were immediately employed by Mr Letjane in a funeral business which is linked to Akani. Their employment contracts contain some very strange clauses that were not explained by either them or Akani;

five, on 5 December, Akani submitted a substantial tender document which, they contend, could never have been compiled in three days;

six, the next day 6 December 2019, the Fund shortlisted Akani as a potential administrator to replace NBC;

seven, on 11 December 2019, Akani made a presentation to the Board wherein it marketed its bid;

eight, two days later on 13 December 2019, Akani was appointed as an administrator;

nine, it is common cause that the appointment took place without the LAC and the RAC being consulted;

ten, it is common cause that the appointment took place without a proper due diligence being completed prior to the appointment. The Fund claims that the appointment was subject to the due diligence being conducted and the due diligence took place on 12 December

2019. Akani says that after it marketed its bid through the presentation to the Board on its proposals on 11 December, it was asked if the Board could undertake a due diligence of its, that is Akani's, systems. This was agreed to. The due diligence then took place on 12 December when members of the Board visited the premises of Akani to view its systems. Thereafter Akani was appointed on 13 December. We have no further details as to what the due diligence involved;

eleven, the Rules of the Fund contains a clause which forms the bedrock of the members, member applicants' case. It is Rule 13 (9) which provides that the Regional Advisory Committees that is the RAC's up to six shall be established to advise and assist and make recommendations to the Trustees in all matters relating to the operation of the Fund. The applicants rely strongly, the applicants

place a strong emphasis on compliance with this rule, for, the failure to comply with this rule as the basis for its claim to relief;

twelve, on 20 December 2019 Akani made the following payments to Mr Chaane: RSO 000, R40 000 and R2 000. On the same date they paid Mr Ginya R2 000. They then paid Mr Ginya R3 000 on 7 January 2020 no, on the same date they paid Mr Ginya R2 000 and R3 000 on 7 January 2020 and R4 900 on 15 January 2020. These payments have not been explained by Mr Chaane or Mr Ginya either in these papers or anywhere else or on the other hand by Akani. These papers may in their view, they may well be in contravention of Section 12 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereinafter referred to as "PRECCA").

4.9 (in this paragraph, the allegations against NBC relied on to accuse it of maladministration were tabulated.

Vally J says that, *prima facie*, such grounds, if substantiated, are sound grounds to terminate NBC's mandate. It is unnecessary to cite them for the purposes of this judgment.)

4.11 The Board clearly has good grounds to be aggrieved with, if these are correct, to have been aggrieved with NBC. And if we accept that fact, then it is not possible to draw the inference which the applicants ask for, that the decision to terminate the... the services of NBC, was engineered to suit corrupt purposes.

4.12 This is apart from the fact that the main and only substantial evidence put up by the applicants about the alleged corrupt conduct relates to the dealings between Messrs Chaane, Ginya and Akani. Assuming and that is without deciding that those dealings establish a corrupt relationship between those parties, it still does not allow for a conclusion that the Board of the Fund was contaminated by that corruption.

4.15 The evidence that they, that they have brought before the court indicates evidence of an alleged corrupt relationship between Akani and Messrs Chaane, Ginya is very strong. And Akani and the two individuals will have to do better than what they did in these papers to show that the applicants are incorrect in their allegation. This is despite the fact that the allegations presented, presently founded on inferential logic. So strong is the evidence that if no equally strong evidence is forthcoming from them, the inference may well be drawn. In that case the Fund will be legally bound to have no relationship with them, failing which Board members will be acting in breach of their statutory and common law fiduciary duties. Hence it remains a reasonable prospect that should it be found that Akani, that the appointment that the relationship between Akani and the two individuals is one that is tainted by corruption, then the appointment of Akani may well be set aside. (emphasis supplied.)

4.16 It would not make sense, in these circumstances, it would not make sense to allow Akani to assume its contractual duty prior to the finalisation of Part B in this application. Hence, in other words, even if the termination of the contract of NBC's is upheld in Part B, it still is still not a fait accompli that this will automatically result in the appointment of Akani being allowed to stand. The two are separate and distinguishable.

4.17 As I said, on the basis of these papers it cannot be said that there is a prospect of the appointment of Akani being set aside is not relatively high. In these circumstances, the most practical and reasonable solution would be to grant the interdict and to leave NBC, and to leave the issue of NBC providing the services as it has been doing over the last few years in place. That will be only until this issue is finalised and until the Fund is able to the necessary structures in place in order to avoid any harm

that could come to its members."

[17] When NBC wrote its letter, as cited above, was it accurate? The supposed source for this allegation could only be the contents of paragraph 4.15 of the judgment. Could what Vally J said there, be properly conveyed to the reader by the statement in the letter? A debate ensued about the grammatical structure of the statement by NBC. There are two phrases:

'having found strong evidence of corruption' is the first phrase; standing alone, its meaning seems obvious: there was a finding of corruption on the part of Akani. The deeper controversy is how such a "finding" was understood by the reader. The second phrase's meaning is hotly contested. Does it mean that the court "found that the appointment of Akani was unlawful", or does it mean that the court found "strong evidence.... that the appointment was unlawful". It was common cause that the court

did not find the appointment to be unlawful.

[18] The statement is expressed in loose terms. What is the dominant impression made on the reasonable reader is the test. If one is to be true to the test of the dominant impression, the disaggregation of the phrases in the mind of that reader is a mistake. The dominant impression conveys one message and the constituent parts of the message transmit that single idea which is captured by the reader. When the reasonable reader reads that strong evidence of corruption was found and, in the same breath, reads that the appointment was unlawful these bits fuse into a message that is digested as a finding that the appointment was unlawful because of the finding of strong evidence of corruption. Plainly therefore, NBC's statement cannot be accurate and is indeed misleading.

[19] An aspect of importance is how the reasonable reader grasps the allusions to the court "having found" something or other. In the parlance of the commuter on the Parkhurst bus, this means the court decided something. In this example the reasonable

reader understands that a court decided that the evidence of corruption was strong. When coupled with the allusion to a finding

that the appointment was unlawful, the reasonable reader infers that the finding is final, for were it to be otherwise, how would a court go on to find unlawfulness? True enough, the pedant on the Parkhurst Bus, might parse the phrase and mark out the phrases with his red pen, but the habits and sensibilities of this kind of person are not the test.[5]

[20] Accordingly, the judgment was inaccurately reported and the effect of the inaccurate report was to mislead the reasonable reader into a belief that a court had decided that Akani had been unlawfully appointed because it was corrupt.

[21] As regards the text per se:

21.1 The letter suggests that a finding of corruption on the part of Akani had been made when there had been no such final finding, when what had been found was merely that ostensibly plausible evidence had been tendered that could support such an allegation.

21.2 The letter suggests that a finding of unlawful conduct on the part of Akani had been made when there had been no such finding.[6]

[22] Thus far, the textual inaccuracy and the consequences of misleading the reader has been addressed. There remains the further aspect of the misleading effect of the letter by the omission of the context in which the judgment was given. The further respects in which the letter was misleading are that:

22.1 It omitted to fairly contextualise the proceedings which were in respect of an application for an interim status quo order to keep NBC in office until such time as the allegations of corruption and unlawful conduct made by NBC were adjudicated in subsequent proceedings. NBC argued that the allusions to an interdict until a stipulated date provided the relevant context. This is incorrect. The reader would, from that reference, learn only that NBC remained in the saddle and that its incumbency might be extended. This does nothing to deflect from the misleading message about Akani.

22.2 It omitted to convey that the decision to grant the interim order in favour of NBC was not a final order and the question of whether or not the allegations that Akani is corrupt or acted unlawfully can be proven, were yet to be decided.

The L interview in Public Eye with Vatsha as regards the order and judgment of Vally J

[23] Could a comparison of what Vatsha informed the journalist from the Public Eye with what Vally J actually said be construed as accurate? The third sentence in the cited passage is the critical text. The statement, as with the letter of NBC, is textually inaccurate. The word "accepted" means to the reasonable reader a decision by the Court. Any theoretical hesitation when reading "accepted" as to the potential contingency of what implications that word might

hold is dispelled by the allusion to an unlawful attempt to steal a client. The digested message is that the court decided that Akani, without regard to the law, and by corrupt means, attempted to steal a client from NBC. The important dimension of contingency in the remarks by Vally J is not conveyed.

[24] The omissions in respect of context are indistinguishable from those for which NBC is criticised and need not be repeated.

Why is it important to report an order and judgment of a court accurately and avoid being misleading?

[25] Freedom of speech is no licence to mislead. A distinction exists between expressing an opinion and reporting a fact. What a court orders and what a judge says are facts. If a person chooses to report these facts it should be obvious that appropriate care be taken not to distort the meaning of the court's utterances. In litigation it is no sin to hold strongly one's own view of the controversy and express it in such terms. If your claim against your adversary is that of corruption and that is what is set out in your affidavit, the repetition of your opinion and the supposed justification you rely on, does not put into the public domain anything more than what you have stated in your papers, itself a public document. If you choose to report what the court has held, you are not at liberty to cast your own slant on the

import of the judgment. You must report accurately and avoid creating an incorrect impression. A mere inaccuracy of no moment is, by definition, of no moment. But an inaccuracy that misrepresents is intolerable.

[26] In *Argus Printing and Publishing Co v Anastassiades* 1954(1) SA 72 (W) at 74G - 75C, it was held:

"The applicant, of course, enjoys a qualified privilege in respect of all reports of judicial proceedings. Such a report, however much it may be condensed, is privileged

'because it is for the public benefit that such publications should be made, so that those who are not in a position to attend the court may by reading them see the manner in which justice is administered.'

(*Siffman v Weakley*, 1909 T.S. 1095 at p. 1099.)

But it only receives that protection if it is fair and substantially accurate. While it is not to be judged

'by the exact standard of accuracy which would be expected in a report purporting to come from the hand of a trained lawyer,'

a report containing a defamatory statement forfeits the privilege

'if it be a garbled account - if anything be omitted that ought to have been stated, or much more, if anything be introduced that did not take place.'

(*van Leggelo v Argus Printing and Publishing Co. Ltd.*, 1935 T.P.D 230 at pp. 238 and 239.)

It is, however, not every inaccuracy, as the respondent appears to assume, which will render a newspaper report of court proceedings

defamatory, or which will render the publication of a defamatory statement made in the course of such proceedings actionable. If the report contains nothing defamatory, it does not, of course, become defamatory merely because it is inaccurate, and the publication of such a defamatory statement will only become actionable if the inaccuracy adds to or accentuates or constitutes the omission of something which diminishes or mitigates the derogatory nature of the statement. The reason is that such a report would not be a fair report. *Rutland v The Argus Printing and Publishing Co. Ltd.*, 1953 (1) P.H. J.2, upon which the respondent relies, does not support the assumption to which I have referred. That appears from the following passage in the

judgment:

'If, as a result of the omission from the report of materially relevant features in the proceedings, the truncated report as published in the newspaper is defamatory, that will - subject to any special defence which may arise on the facts of any particular case

- ordinarily be actionable But if the published report, however brief, is not defamatory, a litigant cannot complain that the report is not as full as he or she would have wished. Still less can matters omitted from the report be relied upon by the litigant in order to assign a defamatory meaning to the otherwise non- defamatory words of the report as published.'

I should add that the privilege will also be lost if it is shown, by intrinsic or extrinsic evidence, that the publication took place with an improper or indirect motive. (Basner v Trigger, 1946 AD 83 at p. 97.)"

- [27] The intolerability of inaccurate reports of a court 's utterances, which are also defamatory, is all the more acute in an age of fake news and hyperbolic public discourse. In my view, although a reasonable reporter of a court judgment need not exercise a lawyer's insight and felicity with language to transmit what that person understands a judgment says, more than just ordinary care is required when doing so, precisely because it is a judgment of a court. There ought to be an appreciation that the dissemination of wrong information about decisions of the courts has serious adverse consequences for the public interest , no less than deleterious consequences for the litigants or other persons referred to in the report of the judgment. A person reporting on what a judgment says, as distinct from comment on the judgment however critical and adverse, must accept a responsibility to ensure that the report is not misleading. Where a misleading report is also defamatory there can be no defence to excuse it. Such conduct is wrongful and unlawful.[7]
- [28] NBC contended that its letter fell within the bounds of qualified privilege. Indeed, in so far as it might choose to express its own opinions about Akani being corrupt, that might have been a complete defence if the disclosures had been made to a confidential circle to whom it could claim a duty to report. However, NBC was not communicating with its own confidential circle, comprising, say, its own directors. The recipients all were persons with whom Akani had actual or potential relationships no less than NBC: the recipients were all (bar the co-applicants in the review) clients or potential clients of both NBC and Akani.
- [29] NBC seeks to rely on the prior adverse propaganda put out about it by Akani, but this is a false premise; in defending its own reputation or in reporting to its client base about the developments in the dispute over incumbency, it could never be entitled to misrepresent what a court said.[8] No public interest is served by a principle that would allow, under cover of qualified privilege, falsehoods about a judgment of the court to be peddled. In misrepresenting the import of the judgment, it must be inferred that it endeavoured to bolster its own adverse opinion about Akani, which it may, for the purposes of the judgment, be assumed to be bona fide and even reasonably held. However, it is this very conjunction of circumstances from which the animus injuriandi can be inferred. Accordingly, the defence of qualified privilege must fail.
- [30] The defence of truth and the public interest is raised by NBC. It fails on the simple basis that what it states is untrue.[9]

- [31] L makes no case to challenge the conclusion that what Vatsha said in the interview was lawful, despite it being defamatory.
- [32] Accordingly, in both instances, in respect of the misleading report about the judgment of the court, the elements of defamation are established, and no valid defences are proven.[10]
- The statement by L that Akani was expelled from Eswatini because its directors are thieves
- [33] The accusation is plain: it claims that Akani operated in eSwatini , that it had a licence to operate in that country which was withdrawn and the reason for that withdrawal was the theft by its directors from the members of an unnamed pension fund.
- [34] To make these claims about a pension fund administrator is plainly defamatory.
- [35] In Akani's founding papers the component parts of the claim are refuted. It is alleged that Akani had never operated in eSwatini. The deponent to Akani's affidavit volunteers that a subsidiary of Akani did once operate in eSwatini. That subsidiary, Akani Swaziland Retirement administrators (Pty) Ltd is said to have ceased to do work there in 2012. It is said that there were no common directors with Akani itself. Moreover, no findings of misconduct, as alleged, by that subsidiary were ever made.
- [36] L, despite an opportunity to either refine or revise its allegation as published in Public Eye, either by conceding that Akani was not the entity to which reference was intended, or that it could substantiate its allegation against the subsidiary, or suggest that Vatsha was misunderstood, or indeed refute Akani's denials, remained silent. No defence is proffered. It follows that the statement, absence a defence being put up, is prima facie unlawful.

THE SPECIAL DEFENCES ADVANCED BY L

- [37] In part, the absence of a defence by L to the unlawfulness of the defamatory remarks published in the Public Eye, is because its true case was premised on the absence of jurisdiction of the court over it. It raised two principal bases to resist: the absence of proper service and the absence of the jurisdiction of the Gauteng Division. These are addressed in turn.

EFFECTIVE SERVICE ON L

- [38] L is not a South African company, rather, it is domiciled in Lesotho. It has no office or presence in South Africa. It is common cause that no service was effected on it that is compliant with the rules of court. It was suggested that an edictal citation was the appropriate way to serve on a foreigner domiciled abroad.
- [39] L was notified of the litigation by way of email. A letter of demand was initially transmitted to Vatsha at his email, a co.za domain address. Vatsha responded to that demand from that address. The notice of motion and founding papers were transmitted to that email address.

- [40] However, notwithstanding these circumstances, L responded to the application by filing an answering affidavit and after the filing of the replying affidavit by Akani, L filed an application to strike out swathes of the replying affidavit. It briefed South African attorneys, filed heads of argument and furthermore argued the matter, being represented by senior counsel.
- [41] The participation in the proceedings was expressly stated to be without prejudice to the right to object on, inter alia, the grounds of no service.
- [42] In my view, service of process is an instrumental device to achieve the objectives of due and timeous notice to any person that a court is being called upon to consider the grant of relief that materially affects that person. Service and procedures prescribed for this purpose are not an end in themselves. Ultimately, even when service takes place in terms of the rules, a court has to be satisfied that service has been effective.[11] In addition any manner. otherwise than in terms of the rules of court, to give notice of litigation may be authorised by a court.[12]
- [43] When a litigant participates fully in proceedings, can it still be heard to raise inadequacies about service, or indeed to raise a complaint about no service in terms of the rules at all? In my view that would be plainly silly. It would make a mockery of the judicial process to engage in this sort of pretence: ie, a party appears to deny that it can be seen. In the past this type of petty technicality might have found favour with a certain kind of mind-set, but the modern judiciary regards it as something up with which we will not put; substance must trump form.
- [44] The absence of seeking, in advance, the court's leave for an unorthodox type of service is a point that bears mention. In an urgent application, to insist on such as preliminary step, seems self-evidently inappropriate.
- [45] In my view, service has been effective as proven by the full participation of the litigant, L.

DOES THE GAUTENG COURT HAVE JURISDICTION OVER L?

- [46] Self-evidently, L, being a foreign entity with no assets or presence in South Africa, is beyond the jurisdiction of this court on any territorial premise. The contention advanced on behalf of Akani, is that notwithstanding that circumstance there is nevertheless a sound foundation to exercise jurisdiction by this court over L.
- [47] The argument in favour of jurisdiction is premised on an approach that eschews mechanistic thinking and ritualistic gestures, which were once thought to be dispositive of the issue of jurisdiction, in favour of a frank acknowledgement of global interconnectedness and the appreciation that effective dispute resolution demands a rational and expansive perspective of the role of the courts. Foreigners are perpetually among us and even when not rubbing shoulders with us, their actions abroad have material effects on us within our own country. The modern approach is well expressed by *Howie Pin Bid Industrial Holdings (Pty) Ltd v Strang* and another 2008

(3) SA 355 (SCA) at [54] to [57].[13]

"[54] jurisdiction in the present case will fall within the terms of s 19(1)(a)[14] if the matter can be said to involve a 'cause arising' or be a matter of which the court 'may according to law take cognizance'. A 'cause arising' is not to be confused with a cause of action, and to determine what a 'cause arising' is, as also to determine of what matter a court may take cognizance, one is driven back to the common-law jurisdictional principles. If those principles can be developed to accommodate a situation like the present there will be conformity with s 19(1)(a). Which is not to say that the common law must conform to the legislation. It is rather the converse. The legislation in question has all along merely been concerned to reflect or implement the common law. All one is therefore looking to ensure is that between the Act and the development sought to be achieved there is harmony.

[55] Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases when their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiffs jurisdiction. It seems to me that, firstly, one has to apply reasonable and practical expedients in moving away, where necessary, from historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of successful enforcement abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there (leaving aside, of course, other costs considerations). And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the forum conveniens and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the

court of the defendant's domicile.

[56] In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness

and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.

[57] As to the principle of effectiveness, despite its having been described as 'the basic principle of jurisdiction in our law' it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been 'trifling'. However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly."

[48] The necessity of attachment, when it is mere a ritual is criticised: (Bid Industrial Holdings at [47] to [48]). The insistence on the establishment of effectiveness of the order under all circumstances is repudiated: (Bid Industrial Holdings at [55] -[57]). Matters of status, for example, probably stand in a class of their own. At the other end of the spectrum, where a delict is committed in the territory of the Court by a foreigner in another country, the policy considerations are wholly different. The efficacy of the order is a matter for the party who seeks enforcement to address.

What facts establish the appropriate connectedness?

[49] The source of the court's jurisdiction in this matter is derived from Section 21(1) Superior Courts Act 10 of 2013 which provides:

"(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a)

to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b)

to review the proceedings of all such courts;

(c)

in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

(Emphasis supplied)

[50] On the papers this evidence of interconnectedness is shown in the following respects:

50.1 To publish online is in effect to publish to the world. It is undisputed that the article was accessed online and read in Gauteng. This means that L's unlawful remarks were published in Gauteng.[15]

50.2 The victim of the delict is a South African company.

50.3 Some of the remarks published were about a South African court's judgment.

50.4 L's holding company, NBC is a South African company over which the Court has jurisdiction.

50.5 L and NBC have common directors.

50.6 L uses resources from NBC based in Gauteng.

50.7 Land NBC acted in solidarity and in concert to injure a South African company in South Africa.

Why is it convenient for the matter against L to be heard with the matter against NBC in Gauteng?

- [51] The core facts pertinent to both L and NBC are part of wider dispute being litigated in Gauteng.
- [52] Jurisdiction over NBC unquestioned: to run two cases would result in a considerable overlap, albeit not in respect of every issue.
- [53] The relief needed is in South Africa not in Lesotho.

AVERMENTS IN THE FOUNDING AFFIDAVIT AND THE REPLYING AFFIDAVIT: THE STRIKING OUT ISSUE

- [54] L alleges that it is aggrieved that the replying affidavit introduced new allegations on issues not raised in the Founding affidavit. This is impermissible and thus these allegations of fact should be struck out. That is the general rule.
- [55] When a litigant adopts the stance that there is new material in a relying affidavit, it can apply to file a rebuttal.[16] It can also elect not to answer further. If it does so, it must live with its choice. It is inappropriate to contend the matter be struck out, but if the court finds that it should remain, that an opportunity then to file a fourth affidavit is for the asking. In this case L this is what L sought by so doing sought to eat its cake and have it. This stance should not be indulged; not least of all in urgent proceedings. Moreover, not when the opportunity manifestly exists to rebut the new material.

On the facts what was said in Akani's Affidavits?

- [56] L sought to strike out the allegations in Akani's RA as impermissible and upon that premise argued that the founding affidavit and the supplementary founding affidavit lacked averments that could establish jurisdiction. The complaint of new material allegations pertinent to jurisdiction, in reply, is unfounded.
- [57] In the founding affidavit Akani traversed the defamatory statements attributable to both respondents, alleged NBC was the holding company of L, which was a Lesotho based company, alleged the two respondents had embarked on a deliberate scheme to vilify Akani in South Africa where Akani would suffer harm because its reputation with his existing and potential clientele would be tarnished. What does this add up to? In essence, it is an allegation that a foreign entity committed a delict in South Africa with the intention to harm a local company in South Africa.
- [58] In answer, the answering affidavit stated, pithily, that L was a company in Lesotho, had no assets in South Africa and confessed that the two respondents had common directors. Not unimportantly, the complaint about non-service because it was not domiciled in South Africa was raised as also relevant hereto. What does this amount to? In my view this merely asserts an immunity based on a territorial principle. However, as addressed above, the territorial principle is

no longer dispositive.

[59] Akani was entitled to reply to rebut the efficacy of the averments based on territorial immunity and in so doing rely on facts to demonstrate it relied on interconnectedness. In the replying affidavit, it added very little by way of "new" facts, rather it reiterated the premise foreshadowed in the founding affidavit that interconnectedness was the basis of the entitlement to secure relief against L in a South African court. The "new" facts were amplifications of the connectedness theme: ie, Vatsha was domiciled in Gauteng, signed the answering affidavit in Johannesburg, was also an executive in NBC, and had a South African email address. It named the two directors who were common to both respondents, a fact offered in the answering affidavit. The rest of the content was polemical, not factual, and was already raised or foreshadowed in the founding affidavit.

[60] Accordingly, the objection to the allegations and the strike out application were unsound.

DISPUTE OF FACT: WHAT DISPUTE OF FACT?

[61] An allegation that a foreseeable dispute of fact about the core issues existed was advanced by L. It was argued that there was a dispute of fact about whether Akani was indeed corrupt. It is true enough that such a dispute exists in the review application. Whether or not Akani is indeed corrupt is irrelevant in these proceedings, on the papers as drawn. There can be no dispute of fact about what was published in Public Eye. That publication squarely broadcasts what it says Vatsha told it. L chose not to deny these plain facts; hence for the purposes of these proceedings they are common cause. The defamation relating to eSwatini also was not denied; ergo, the fact of the statement is common cause. Had there been a substantiation of the allegations which had been, in the founding affidavit, roundly refuted, a material dispute could have arisen. There could also be no validity in the notion that because of the urgency no instructions could be obtained on the issue: Vatsha was available to L's legal advisers and either he could substantiate his belief or apologise

- he did neither. There were no material disputes of fact.

THE RESULT IN RESPECT OF L

[62] Accordingly, all the defences raised by L fail; it unlawfully defamed Akani.

THE CASE FOR AN INTERDICT AGAINST FURTHER DEFAMATION AND DECLARATION OF RIGHTS

[63] It is plain that the effect of the relief sought is final whether cast as pending the review or not.[17] A clear right not to be defamed has indeed been violated.

[64] I distinguish the case made out for a declaration of rights from the case made out for an interdict against future delicts.

- [65] It seems plain to me that the prospects of future defamatory statements, in the context of the overall litigation, is so slim that no interdict is warranted. The refusal to undertake not to defame Akani is not per se enough to found a premise that a risk of repetition is likely to occur. In little more than a month, the review will be conducted and a final finding on whether Akani is corrupt or NBC is incompetent will be made. The controversial statements were not made in contexts in which a rationale exists to persist in making the statements.
- [66] Relief for what has already occurred is appropriate as a clear right has been violated. The irreparable harm is axiomatic. There is no suitable alternative relief obtainable in respect of the misrepresentations of the judgment of Vally J and no more suitable time to say so than now.
- [67] In respect of NBC, a letter to correct the misleading letter is the appropriate way to address the harm the first letter causes. The text need not be grovelling; a bland correction in the terms set out in the order suffices.
- [68] In respect of L, a declaration is appropriate. What steps Akani takes to publish the order is a matter for it to address.

CONCLUSIONS AND ORDER

- [69] For the reasons as set out, I made the order on 11 May 2020, which for good order I repeat herein:

AS REGARDS THE FIRST RESPONDENT:

1. A declarator hereby issues that the letter of 12 March 2020, from the first respondent to several recipients, insofar as the contents thereof alluded to the order and judgment of Vally J given on 12 March in proceedings between, inter alia, the applicant and first respondent (the Vally judgment), the contents of the letter were a material distortion of the meaning and import of the Vally judgment.
2. The conduct of the first respondent as described in paragraph I was defamatory, wrongful and unlawful.
3. The first respondent is ordered to publish to every recipient of the letter of 12 March 2020 the following statement:
 - 3.1. On 11 May 2020 the Gauteng Local Division of the High Court of South Africa ordered us to communicate this statement to you.
 - 3.2. Our letter of 12 March 2020, insofar as it purported to report on the order and judgment of Vally J (the Vally judgment) in the legal proceedings between Akani Retirement Fund Administrators (Pty) Ltd (Akani) and NBC concerning the alleged impropriety of Akani's appointment to manage the CIPF and thereby replace NBC as manager, did not accurately report the meaning and import of the Vally judgment when it stated that:

"[The Court] [h]aving found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful."

3.3. The respects in which the quoted statement did not accurately or fairly convey the meaning and import of the Vally judgment were, in particular, that:

3.3.1. It suggested that a finding of corruption on the part of Akani had been made when there had been no such final finding, and merely that ostensibly plausible evidence had been tendered that could support such an allegation;

3.3.2. It suggested that a finding of unlawful conduct on the part of Akani had been made when there had been no such finding;

3.3.3. It omitted to fairly contextualise the proceedings which were in respect of an application for an interim status quo order to keep NBC in office until such time as the allegations of corruption and unlawful conduct made by NBC were adjudicated in subsequent proceedings;

3.3.4. In proceedings for interim relief a court deals with allegations on affidavit and on the basis thereof, in this case, Vally J had to decide whether it was appropriate, in the interim, to allow the arrangements which exist for the management of the CIPF to be undisturbed and left in the hands of NBC;

3.3.5. The decision to grant the interim order in favour of NBC was not a final order and the question of whether or not the allegations that Akani is corrupt or acted unlawfully can be proven, are yet to be decided;

3.3.6. The Vally judgment expressed the view that on the allegations on affidavit presented to the court there was strong evidence alleged that supported the possibility that Akani was corrupt, and that were acts of corruption to be proven in later proceedings, the inference could be drawn that Akani had acted unlawfully in procuring an appointment to manage the CIPF.

3.3.7. A copy of a transcript of the Vally judgment is available and anyone who wants a copy may ask for it to be sent.

4. The statement shall be sent to the recipients of the letter of 12 March 2020 within 10 days of the date of this order, and simultaneously, the Chief Executive Officer of the first respondent shall depose to an affidavit stating that, having appraised himself of the relevant facts about the transmission of the letter of 12 March 2020 and the recipients thereof, to the best of his knowledge and belief, this statement had been sent to every recipient of the letter of 12 March 2020.
5. A copy of the statement and the affidavit described in paragraph 4 shall be filed with the Registrar of this Court by uploading the documents on Caselines, and a copy sent to the attorney of record of the Applicant.
6. The first respondent shall bear 50% of the applicant's costs including the costs of two counsel.

AS REGARDS THE SECOND RESPONDENT:

7. It is declared that despite the second respondent being a perigrinus in the jurisdiction of this court, and despite service on it having not taken place in accordance with the Rules of this Court, effective service of the second respondent indeed took place.
8. It is declared that the publication of a statement by one, Vatsha, in Lesotho, on behalf of the second respondent, to a journalist of the Public Eye, a magazine which is published online to the world, constitutes a publication thereof in Gauteng, by reason of the statement being accessed online in Gauteng.
9. It is declared that this court has jurisdiction over the second respondent in respect of the conduct described in paragraph 8.
10. A declarator hereby issues that the statements made by Vatsha, on behalf of the second respondent, as published in Public Eye of 27 March 2020, insofar as the contents alluded to the order and judgment of Vally J given on 12 March in proceedings between, inter alia the applicant and first respondent (the Vally judgment), were a material distortion of the meaning and import of the Vally judgment; the relevant statements were:

"Evidence of corruption was accepted by the Court when interdicting Akani' s unlawful attempt to steal a long standing client Fund away from NBC."

11. The material distortions consisted, in particular, of the following:

11.1. It suggested that a finding of corruption on the part of Akani had been made when there had been no such final finding, and merely that ostensibly plausible evidence had been tendered that could support such an allegation;

11.2. It suggested that a finding of unlawful conduct on the part of Akani had been made when there had been no such finding;

11.3. It omitted to fairly contextualise the proceedings which were in respect of an application for an interim status quo order to keep NBC in office until such time as the allegations of corruption and unlawful conduct made by NBC, were adjudicated in subsequent proceedings;

11.4. It omitted to convey that in such proceedings for interim relief the court deals with allegations on affidavit and on the basis thereof Vally J decided whether it is appropriate, in the interim, to allow the arrangements which exist for the management of the CIPF to be undisturbed;

11.5. It omitted to convey that the decision to grant the interim order in favour of NBV is not a final order and the question of whether or not the allegations that Akani is corrupt or acted unlawfully are proven, is yet to be decided;

11.6. It omitted to state that the Vally judgment expressed the view that on the allegations presented to the court there was strong evidence alleged that was supportive to the possibility that Akani was corrupt, and were that to be proven in later proceedings, the inference could be drawn that Akani had acted unlawfully in procuring an appointment to manage the CIPF.

12. The conduct of the first respondent as described in paragraphs 10 and 11 was defamatory, wrongful and unlawful.

13. A declarator hereby issues that that the statements made by Vatsha, on behalf of the second respondent, as published in Public Eye of 27 March 2020, to the effect that the Applicant was expelled from eSwatini for corruption, that it forfeited its business licence in eSwatini, and that its directors are thieves are defamatory, wholly unsubstantiated and are *prima facie* wrongful and unlawful; the relevant statements were:

"Akani.... has also lost its licence to operate in eSwatini due to instances of corruption by its directors who'd misappropriated members retirement savings for personal use."

14. The second respondent shall bear 50% of the applicant's costs, including the costs of two counsel.

ROLAND SUTHERLAND

Judge of the High Court,

Gauteng Division, Johannesburg

Heard: 8 May 2020

Order issued: 11 May 2020

Judgment:

28 May 2020

For the Applicant:

Adv A Franklin SC, with him, Adv P McNally SC, and Adv B Manentsa

Instructed by Webber Wentzel

For First Respondent:

Adv C Watt-Pringle SC, with him Adv K McLean

Instructed by Shepstone and Wylie

For second Respondent: Adv P Daniels SC,

Instructed by Tabacks

[1] This hearing was conducted entirely on zoom and the documentation lodged on Caselines.

- [2] Although urgency was initially disputed on the papers, at the hearing it was not pressed.
- [3] Akani protested that passages in the answering affidavit of NBC which set out further allegations of fact tending to support an inference of crookedness by Akani were irrelevant to the true issue; ie the misrepresentation of the court order and the implications that flowed from that conduct. The further details were of more supposedly nefarious payments made by entities associated with Akani to the several individuals who were allegedly the agents of Akani's corrupt scheme. These additional allegations amplified the core of the case set up in the founding affidavits in the review application before Vally J. NBC had included these allegations to substantiate the perspective that the weight of evidence supporting Akani's corrupt conspiracy was gargantuan. Indeed, it is correct that the only relevance these extra allegations could have would be to substantiate the case on review set down to be heard barely a month after these proceedings. Therefore, these allegations have been ignored for the purposes of adjudicating this case. Paradoxically, Akani included a swathe of documents as annexures to its replying affidavit but did not traverse them. NBC applied to have them struck out for that reason. On the principles in *Swissborough Diamond Mines Ltd v Government*, RSA 1992 (2) SA 279 (T) at 324F-H, they, indeed, warrant striking out.
- [4] The statements in the judgment of Vally J are derived from an unofficial transcript of the oral judgment delivered. No issue was taken with this fact and all parties accepted that the text presented was an accurate recounting of the Judge's oral delivery. Some editing was supplied to enhance readability but the occasional hesitation or repetition commonplace in an oral delivery have not been edited out. The transcript was produced for the purposes of this application and was not available to anyone before 27 March 2020. Naturally, the transcript cannot be used or relied upon by anyone not a litigant in these proceedings and its status must not be misconstrued as an official text.
- [5] *Channing v SA Financial Gazette* 1966
- (3) SA 470 (W) at 473B-474G; *SAHRC v Khumalo* 2019
- (l) SA 289 (GJ) at [90].
- [6] NBC argued that the unlawfulness of an appointment could not be attributed to Akani as the power to appoint was that of the Fund.

This fact is correct but misses the point. The corrupt conduct of Akani is linked causally to the act of appointment.

- [7] See too: *Benson v Robinson* 1967
- (1) SA 420{AD} at 426F-H and 427E; *Johnson v Beckett* [1991] ZASCA 175; 1992
- (1) SA 762 (A) at 773 C-E.
- [8] In this regard, what NBC did is quite different from the circumstances illustrated in *Borgin v De Villiers & Another* 1980

- [3] SA 557 (AD) where a rebuttal of a defamation was published which itself was defamatory and true of the initial defamer. See too: *Tuch and others NNO v Myerson and Others NNO* 2010
- (2) SA 462 (SCA)
- [9] See: *Modiri v Minister of Safety and Security* 2011
- (6) SA 370 (SCA) at [13]; [24]: - the test is objective and fact- specific.
- [10] See; *Khumalo & Another v Holomisa* 2002
- (5) SA 401 (CC)
- [11] Rule 4(10) of the Uniform Rules of Court.
- [12] Rule 4 (2) of the Uniform Rules of Court.
- [13] The court in *Bid Industrial Holdings* was concerned principally with the constitutionality of an arrest to secure jurisdiction over a defendant. The process had been served on the perigrinus whilst in South Africa. In the present case the "notice" of the litigation reached L by way of Vatsha 's email whilst in Johannesburg.
- [14] Section 19 (1) is now supplanted by section 21 (l) of the Superior Courts Act 10 of 2013 - cited in para [49] of this judgment.
- [15] *Tschilas & Another v Touch Line Media* 2004
- (2) SA 112 (W) at 1191- 1218, esp 120Bff.
- [16] See, eg: *Tantoush v Refugee Appeal Board & Others* 2008 (I) SA 232 (T) at [51]
- [17] See: *Metlika Trading Ltd v C, SARS* 2005 (3) SA I (SCA) at [24]

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