

SOUTH AFRICA / JUDGMENT

Daily Maverick (PTY) Ltd and Another v Modiba (33428/2020) [2022] ZAGPJHC 582 (12 August 2022)

[2022] ZAGPJHC 582

COURT

South Gauteng High Court, Johannesburg

BEFORE

Matojane

CASE / FILE NUMBER

33428/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No: 33428/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
15/08/2022
In the

matter between:

DAILY
MAVERICK (PTY)
LIMITED
First Applicant
BRANISLAV
BRKIC
Second Applicant
And
MODIBE
JULIUS
MODIBA
Respondent

JUDGMENT**MATOJANE**

- [1] This is an application for default judgment in an action for defamation. The applicants have issued summons against the defendant, Mr Modibe Julius Modiba, for damages in the amount of R500 000.00 for a series of allegedly false and defamatory Tweets that the defendant has posted about the first applicant. The applicants also seek the removal of the alleged defamatory statements within 24 hours of the date of the court order on all the platforms on which the respondent has posted the statements and an unconditional retraction and apology.
- [2] The first applicant is the owner and publisher of the Daily Maverick website, an online news and information service published on [www. DailyMaverick.co.za](http://www.DailyMaverick.co.za). The second applicant is its Editor in Chief.
- [3] The summons and Particulars of Claim were served on the respondent on 26 January 2021. Despite being aware of the action, he has not filed a notice of intention to defend within the time allowed by the court rules. In a Tweet published on 19 March 2020, the respondent referring to the first applicant stated, "we'll meet in court. On 12 April 2020, the respondent posted a tweet indicating that the first applicant had:
- "no place to hide as all they [the Daily Maverick] does is to threaten and threaten but never act".
- [4] There is little doubt that the respondent is aware of these proceedings. The notice of set down, the application for default judgment and confirmatory affidavits were served by the sheriff of the court on the respondent personally on 22 February 2022. He was invited to the Caselines file via the email address he provided. He has not attended the proceedings on the hearing date and has not contacted the court or the applicants to indicate why he has not attended. It is clear that the respondent has made a choice not to engage with the current proceedings.
- [5] The applicants are applying for default judgment in terms of Rule 31 of the Uniform Rules of Court. The court is bound to proceed based on the applicants' unchallenged allegations in the Particulars of Claim as the defendant has chosen not to challenge the allegations and present countervailing evidence. There is, therefore, no need to make findings of fact or determine whether the respondent could have raised a defence as he has not disputed the applicant's allegations.
- It remains to determine whether the applicants have made out a case for the relief that they seek.
- [6] The relevant facts pleaded in the Particulars of Claim are as follows:

6. On 3 January 2020, the defendant published on his public Twitter account, using the handle @mmodiba10, that he had decided to stop writing and sending articles to Daily Maverick for publication because "[t]hey only publish articles where you criticise black leaders/ANC, or EFF. Once you start writing about anything which is seen as 'anti white' they have a problem". The Twitter post is attached as "POC1".
7. On 3 March 2020 the defendant repeated his statement of 3 January 2020 and published the following statements on his public Twitter account, using the handle @mmodiba10:
 - 7.1 A representative of Daily Maverick requested that the defendant "write a negative article about" Independent News and Media owner Iqbal Surve and former Public Investment Corporation Chief Executive Officer Dan Matjila, "but when asked for proof, they never sent that proof". The relevant Twitter posts are attached as "POC2" and "POC3".
 - 7.2 Daily Maverick required content based on conspiracy theories rather than facts in order to "settle their personal vendettas". ("POC3")
 - 7.3 A representative of Daily Maverick instructed the defendant to:
 - 7.3.1 "spy on the EFF ... and write negatively about them";
 - 7.3.2 "create false stories"; and
 - 7.3.3 mobilizess students and social media influences to comment and respond negatively about anything to do with certain ANC, EFF and people like @lqbalSurve, Dan Majtila, @Duduzane Zuma and @Lesufi."
 - 7.4 Daily Maverick is "busy trying to find dirt" on senior Economic Freedom Fighters (EFF) members Floyd Shivambu and Julius Malema "and numerous other ANC leaders" by "using bogus Twitter accounts and students & certain highly profile journalists to influence the narrative.
- 8 On 4 March 2020, Independent News and Media publications and online news website Independent Online published an article titled "Daily Maverick asked me to write and do negative tweets about Dr Iqbal Surve". A copy of the article is attached as "POC7" ("Independent article").
- 9 The Independent article includes the following statements made by the defendant:
 - 9.1 Daily Maverick "orchestrated and financially sponsored a smear campaign against prominent businessmen and executives".
 - 9.2 Daily Maverick commissioned and published "propaganda and paid narrative".
 - 9.3 Daily Maverick "paid him [the defendant] and other students weekly stipends to write and tweet negative stories about various targets viewed as proponents of transformation". Daily Maverick paid the defendant "and other students R500 weekly stipends for the job".
 - 9.4 Daily Maverick recruited the students from various Gauteng universities, especially Wits University, to generate paid content.

9.5 Daily Maverick paid the defendant and the other students for content in the following way:

9.5.1 In "cash through its drivers, who met him at a garage on William Nicol Drive in Johannesburg".

9.5.2 "They would tell me to meet someone at the mall or that we should meet at the Shell garage by William Nicol."

9.5.3 "They would send drivers in Toyota Corolla's to come give me the R500 every week."

9.5.4 "They told me it's for data."

9.5.5 "They never deposited the money into our bank account because it would leave a paper trail."

- [7] The second applicant, Mr Branislav Brkic, has deposed to an affidavit in support of the application for default judgement. This affidavit, together with exhibits attached to it, sets out the applicant's history with the respondent, the events giving rise to this action and its impact. He also gave oral evidence about the impact of the Tweets and the personal distress it caused him.
- [8] On or about 17 January 2019, the respondent first contacted the first applicant via email, attaching an unsolicited article he submitted for publication. Daily Maverick considered his submission piece suitable for publication and published it on 18 January under the headline "have our liberation movements and let us down". Such unsolicited submissions are published on the same basis as a letter to the editor in the newspaper and are published at the discretion of the daily Maverick editors. No reward was offered to the respondent, whether in cash or kind, as is customary with all guest columnists.
- [9] Over the next ten months, the respondent continued to submit unsolicited columns to Daily Maverick. In total, four were published. No payment was made to the respondent for his columns, and no form of compensation was ever discussed since he was a guest contributor, not a journalist.
- [10] In June 2019, an article by the defendant entitled "Why Zindzi Mandela should be protected" was editorially considered unfit for publication because it was poorly written and incoherent. Respondent submitted more columns which were also considered unfit for publication. One of them, an article about the establishment of a national women's football league, was rejected because it lacked depth, and another on Pan-Africanism because it was too short for a Daily Maverick column, was incoherent and lacked real

conclusion.

- [11] Nothing more was heard from the respondent until 3 January 2020, when he posted a message on the social media platform Twitter using the account @mmodiba10 and stating the following:

"I took a decision to stop writing / sending articles to the Daily Maverick. They only publish articles where you criticise black leaders /ANC, or EFF". Once you start writing about anything which is seen as 'anti-white', they have a problem (Let's create our platforms)".

- [12] Upon publication, the tweet immediately reached all of the respondent's followers, the Tweet is still accessible to about 54,000 followers of the respondent at the time of deposing to this affidavit. The tweet has been "retweeted" 431 times and "liked" by 785 Twitter users. Despite the false content of this tweet, the first applicant did not respond to it, regarding it as a superficial attempt on the part of the respondent to garner online attention.
- [13] On 3 March 2020, the respondent posted a series of messages on his Twitter account, claiming inter alia that the Daily Maverick instructed him to produce negative articles about specific individuals like Independent Media owner Dr Iqbal Surve' and Former Public Investment Corporation head Dr Dan Matjila without factual basis. The respondent claimed that the Daily Maverick was engaged in a concerted campaign to mobilise students and social media influencers to spread baseless negative news and content regarding the individuals above and others for payment.
- [14] Upon publication, the tweets immediately reached all the respondent's followers and are still accessible to 54,000 followers. The tweets have been "retweeted" 1 536 times and "liked" by 2166 Twitter users.
- [15] The next day on 4 March 2020, an article was published on Independent online (IOL), a digital news platform of Independent Media owned by Dr Surve'. The article referenced an interview that IOL had conducted with the respondent stating, among other things, that Daily Maverick recruited the respondent and other unnamed students to produce fake propaganda, that Daily Maverick paid them R500 in cash every week, and that Daily Maverick drivers in branded vehicles would meet the defendant at a certain garage where they will hand over cash. The money was never deposited into his and the student's banking accounts because "it will leave a paper trail". Daily Maverick was exploiting gullible students by paying them to create fake news, and Daily Maverick placed him in a position where he "ended up selling my soul to push a certain narrative."
- [16] The IOL article was retweeted by, amongst others, the leader of the Economic Freedom Fighters, Mr Julius Sello Malema. Upon publication on Twitter by Mr Malema, the tweet sharing the article immediately reached and is still accessible to 3.6 million of Mr Malema's followers. The tweet has been retweeted 778 times and "liked" by 1 488 Twitter users.
- [17] On 5 March 2020, the economic freedom fighters published a statement on its Twitter account called @EFF South Africa titled "EFF statement on embedded journalism at the Daily Maverick, stating, amongst others, that:

"The EFF is not surprised by the recent reports that political hitmen Daily Maverick have been paying columnists to write negative articles against those they disagree with..."

[18] On 11 March 2020, IOL published another article titled "Why is SANEF defending Daily Maverick no matter what? asks Mothelo. This publication referred to the respondent's claims made about the Daily Maverick. Significantly, IOL never enquired from the respondent about the details of students who were allegedly paid to write negative propaganda or the articles they wrote or investigated whether indeed Daily Maverick had branded cars.

Were the respondent's statements about the applicants defamatory?

[19] Defamation is part of the law of delict and can be defined as any damaging statements made publicly with the intention to harm or damage someone's good name and reputation. The Constitutional Court in *Le Roux and Others v Dey*³ confirmed a two-part test to determine whether a publication is defamatory and, therefore prima facie wrongful. The first is to determine the meaning of the publication as a matter of interpretation and the second whether that meaning is defamatory. See also *EFF and others v Manuel*[1]

[20] The Constitutional Court explained that:

"[I]n establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test, the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied."

[21] Defamatory statements are presumed to be false and to have caused damage to their target. The requirement of wrongfulness and intention is deemed to be present once a person has proven publication of a defamatory statement concerning the plaintiff. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention[2]

[22] The applicants have proved the two elements of defamation in this case. First, the words used by the defendant are obviously defamatory; a reasonable reader will understand the words to mean that Daily Maverick and, by extension, the second applicant and its journalists lack integrity, are unethical, and drive a secret agenda to tarnish the reputation of specific individuals and organizations by deliberately engineering fake news about them. Use a covert web of gullible students who are paid to produce a pre-determined narrative in pursuit of a racist agenda. It is hard to conceive of a more damaging accusation that is likely to injure the good esteem and harm the reputation of a news publication or a journalist.

[23] Based on the responses to the respondent's tweets which were disseminated widely, and his elaboration on them in repeated interviews on IOL, the country's largest national news website, the patently false and defamatory allegations were believed and taken seriously by the EFF, IOL and the Information Communication & Technology Union (ICTU), an affiliate of the South African Federation of Trade Unions which released a statement calling for the closure of Daily Maverick. In its media statement, it stated that:

ICTU GROSSLY DISAPPOINTED WITH DAILY MAVERICK EXPOSÉ*

4 March 2020

Media Statement: Immediate Release

Information Communication Technology Union (ICTU), the biggest Union in print media, is disappointed with the recent social media publication by the content contributor Mr Modiba Modiba of gross violation of ethics allegations made against Daily Maverick Media House.

The crux of the statements made on the 3 March 2020 through Twitter, a social media platform, is that Daily Maverick has contracted him and most probably other students to assault and damage the image of his opponents in the media fraternity, and the primary target has been Sekunjalo Independent Media, and it's Sister Companies like Ayo Technologies.

According to the immediate publication following Twitter posts mentioning various parties, both in private and business capacities, clearly shows that the well-orchestrated smear campaign using gullible students speak of the lowest moral decay, personally, and ever erosion of code of good practice journalist practice has been violently violated by the Daily Maverick.

These moronic strategy and tactics proves that Daily Maverick is in essence an agent provocateur which serves the interest of the racists and no liberal proponents whose main agenda is to fight back hard and dirty to stifle progressive socio-political discourse of the country by publishing a sponsored narrow narrative, in actual fact it continues to be a shame to mention Daily Maverick and media house in the same sentence, they should be called out for exactly what they are A THIRD FORCE masquerading as a media house.

[24] Since the applicants have proved the elements of defamation, the respondent's statement is deemed untrue; even if this was not the case, Mr Brkic, in his affidavit and his oral evidence in court, has denied the allegations as false and malicious.

Damages

[25] General damages in defamation cases serve three purposes. First, to compensate the plaintiff for the distress suffered from the defamation[3]. Second, to repair the harm to their dignity and reputation. Third, as a vindication of reputation. The third objective shows that, unlike damages for other wrongs, general damages for defamation may have a purely symbolic function and not to punish.

- [26] The factors to be considered by a trial court in determining an appropriate award include the character and status of the plaintiff; the extent of the defamatory publication; its envisaged actual impact on the plaintiff; and the subsequent conduct of the person who made the defamatory statement, including his or her efforts, if any, to make amends after the publication[4].
- [27] Mr Brkic's position and standing as founder and Editor in Chief of Daily Maverick require that he be seen as honest and ethical. He testified that Daily Maverick is an online daily newspaper that has around 7 million readers every month and that it also publishes a weekly newspaper, DM168. He testified that Daily Maverick was founded to defend the truth and honesty and the publication's reputation is at the centre of everything they do. He testified about the effect upon him of the defamatory Tweets and the hurt he experienced. He could not count the numbers of times he has been called a racist since the publication of the defamatory statements.
- [28] He testified further that the Daily Maverick was awarded the Global Shining Light award for investigative journalism for its work on the Gupta Leaks. It has shared this award with Rappler, a Filipino news website founded by Nobel Peace Prize winner Maria Ressa. Mr Brkic himself was awarded the Nat Nakasa Award in 2018 in recognition of courageous and brave journalism. The Daily Maverick has a record of breaking other important journalistic investigations, including the Marikana story, the allegations of fraud and corruption in the VBS Bank case, and the Digital Vibes corruption scandal involving the former minister of health and the Covid PPE corruption scandal, where emergency funds were looted.
- [29] The insinuation that the Daily Maverick and its journalists are all racist is not only harmful but despicable. Mr Modiba accuses Daily Maverick of "only publishing articles where you criticize black leaders ANC, or EFF and of having a problem with "anything which is seen as anti-white". He falsely alleges that the Daily Maverick instructed him to "spy and produce negative stories" about the ANC and the EFF, and mobilize students and social media influencers "to comment and respond negatively about anything to do with the ANC, EFF and people like Igbal Surve'.
- [30] Mr Brkic testified that the harm caused by Mr Modiba is incalculable as they are a credible news publication held in high esteem by the general public and the journalism profession locally and internationally. The effect of the defamatory tweets has been that if anyone from around the globe googles the Daily Maverick, they will "literally be able to find Modiba's ridiculous accusations of us paying him and paying other students to tweet against Igbal Surve'.
- [31] The respondent's use of social media to spread his defamatory lies about the applicants and the steps taken to increase the audience for his lies by mentioning the names of Dr Surve', Dr Matjila and high-profile politicians such as Duduzane Zuma, Panyaza Lusufi, Floyd Shivambu, Julius Malema and the EFF to make his Tweets trend, compounds the harm inflicted on the applicants. This is a significant consideration in assessing the damages to be

awarded as the defendant embarked on a calculated and premeditated campaign to reach as large an audience as possible and inflict as much reputational harm on the Daily Maverick as possible.

- [32] On 12 March 2020, the attorneys acting for the applicants wrote to the respondent to settle the matter amicably by asking that he delete the defamatory statements from his Twitter account and publish an unconditional retraction and apology to Daily Maverick for the harm he has caused. The respondent refused any attempt at an amicable settlement and escalated his attacks by taunting the applicants. He Tweeted:

"You asked me to retract my statement last week, I DID NOT. WHAT MAKES YOU THINK I'L RETRACT NOW. BACKWARD NEVER, FORWARD EVER"

- [33] The Supreme Court of Appeal in Van der Berg[5] , dealing with the award for damages in defamation cases, held:

"The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best it can make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings".

- [34] Counsel for the applicant indicated in his supplementary heads of argument that the applicants no longer persist in their prayer for R500 000.00 in general damages, given the concern raised by the SCA in EFF v Manuel that an award of R500 000.00 for damages is extraordinarily high and not in line with the recent general trend. Counsel indicated that applicants do not seek a judgment that would have any punitive, exemplary effect but an award that would vindicate the applicants in the eyes of the public as compensation for the wrong they have suffered at the hands of the respondent.
- [35] Understandably, the applicant desire a retraction and apology from the defendant, in my view, forcing the defendant to express false regret and an insincere acknowledgement of the injury he has inflicted on the applicants will do more harm than good. Twitterers will further repeat the defamatory statements with no compassion for the applicants. This judgment and a retraction will go a long way toward vindicating the applicant in the eyes of the public.
- [36] I find that the applicants are entitled to the default judgment they seek. The costs on an attorney and client scale are justified by the respondent's obstinate attitude and recalcitrance, which forced the applicants to incur unnecessary costs of coming to court to seek redress.

[37] Weighing up all the circumstances to which regard may properly be had, I am of the view that an appropriate award of damages would be R100 000.00.

[38] I make the following order:

1. The statements made and published by the respondent, as detailed in paragraph 6 above, are declared defamatory and unlawful.
2. The respondent is ordered to pay the sum of R100 000 (one hundred thousand rands) to the first applicant, with interest on the said sum, calculated at the prescribed rate of interest from the date of

judgment

to the date of payment.

3. Within 24 hours of this order, the respondent is directed to remove the defamatory statements from all of the platforms where he originally published them.
4. The respondent is directed within 24 hours of this order to issue an unconditional retraction to the applicants for having published the defamatory statements and to publish such retraction on all the platforms where the defamatory statements were originally published, with equal prominence.
5. The defendant is ordered to pay costs on an attorney and client scale

KE MATOJANE JUDGE OF THE HIGH COURT

Heard: 12 July 2022

Judgment:

12 August 2022

For the Applicants:

Advocate M Marongo

Instructed by Willem de Klerk Attorneys

[1] 2021(3) SA 425 (SCA)

[2] Khumalo v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) par 18

[3] Muller v Independent Newspapers (Pty) Ltd and Another 1972 (2) SA 589

[4] Economic Freedom Fighters and Others v Manuel 2021 (3) SA 425 (SCA) at page 96.

[5] Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others (466/98)

[2000] ZASCA 73; 2001 (2) SA 242 (SCA) par 48

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