

SOUTH AFRICA / JUDGMENT

Diketane v Makgwale (10987/2024) [2024] ZALMPPHC 162 (1 November 2024)

[2024] ZALMPPHC 162

COURT

Limpopo High Court, Polokwane

BEFORE

Pillay AJ

CASE / FILE NUMBER

10987/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 10987/2024

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

1/11/2024

SIGNATURE:

In

the matter between:

SELEGE
PAUL DIKETANE
APPLICANT
And
DEBIS
MARATHAGANYE MAKGWALE
RESPONDENT
Heard
:
15
October 2024
Delivered
:
1
November 2024 by circulation to the parties' legal representatives
Coram
: PILLAY
AJ

JUDGEMENT

PILLAY AJ

Introduction

- [1] The Applicant seeks on an urgent basis an interdict, restraining and interdicting the Respondent, from posting or supplying any information pertaining to the Applicant on Facebook, group chats, conducting radio and newspaper interviews and any other social media and to stop making false defamatory statements about the Applicant. That the Respondent is to remove such postings articles and audio listed by him and to publish an unconditional apology to the Applicant concerning the aforesaid defamatory statements.
- [2] Further, in the event that the Respondent fails to comply with the above-mentioned order that the Respondent then be placed under arrest for non-compliance for a period of thirty (30) days or a period determined by the Court.
- [3] The application is opposed by the Respondent who disputed the allegations and raised the following points in limine;
- [3.1] The lack of urgency
- [3.2] Material dispute of fact
- [3.3] Non-Joinder

Brief

Background

- [4] In 2008 Nkgonyeletse Secondary School sustained structural damage requiring repairs from the Department of Education. The Respondent is the Chairperson of the School Governing Body (SGB) and attended a meeting held on 2 September 2024 where the Department of Education with the Department of Public Works indicated that a budget of R32 800 000,00 was available for the restoration of the School. On 4 September 2024 a meeting for the purpose of creating a Project Steering Committee was held and due to disputes concerning the appointees the meeting was postponed until 12 September 2024. The Steering Committee was appointed however, dispute arose concerning a visit to the Tribal Office on 14 September 2024. The Respondent referred the issue on the 16 September 2024 to the School Governing Body Federation, where a decision was taken to halt the plans, in respect of the building project.
- [5] This resulted in interviews over various platforms on social media, newspaper articles, Facebook, Radio, Turf News, On the Block News. In the newspaper article written by Moyahabo Mabebe number "SP8" of the Applicant's annexures with the headline titled SGB halts school project amidst bribery allegation. Councillor accused of soliciting bribes. The article reads... "according to the SGB chairperson David Makgwale. the Politician insisted on being appointed as the chairperson of the project steering committee and was actively involved in introducing the main contractors to the Tribal House. This conduct did not sit well with the School Governing Body as they felt threatened and put a halt to the project until clarity could be obtained from the Councillor in respect of who was responsible for the project".
- [6] The Respondent attended various meetings and interviews, where he vocalized his opinion, concerning his impression of the conduct of the Applicant. He also indicated that the Applicant sought to threaten them with a Summons, demanding an apology for character assassination. The Respondent stated that it was sent by WhatsApp, instead of being delivered by a Sheriff of the Court.
- [7] The Respondent indicated to the reporter that the Applicant claimed, he had done reputational damage to him, by informing the media about the Applicant's actions. He indicated that the story was all over social media, in all areas, and concerned community members were talking about it. He further informed the reporter that he had heard stories that the Applicant wanted to mobilise parents, to stop their children from going to school. He wondered who would agree to such ridiculousness.
- [8] Based on the aforesaid, the Applicant on 18 September 2024 served on the Respondent a letter of demand, in which the Respondent was informed that the posts and correspondences, contained numerous unverified, spurious, scandalous and defamatory statements and remarks, against the Applicant. That the Applicant denied the derogatory and defamatory allegations, with specific reference to the following;

- [8.1] That he had certain personal interest in the project.
- [8.2] That he claimed to be representing the person of ANC Sekhukhune Regional Secretary.
- [8.3] That he appointed a project steering committee and had introduced the contractor to the Royal House without the knowledge of the SGB or School Principal.
- [8.4] That he already made prior arrangements on who should be employed from the community side and also which local businesses should benefit from the project.
- [9] The Applicant indicated that the statements were wrongful, malicious, distasteful, unlawful and defamatory and made with the intention of defaming the Applicant and injuring his reputation. The comments made by the Respondent was intended to mean, or at the very least conveyed the innuendo, that the Applicant is dishonest and untrustworthy, the worst kind of a leader, self-serving and an extortionist.
- [10] The Applicant informed the Respondent that as a result of the defamatory statements, the Applicant has suffered damage to his dignity, his self- esteem and or reputation, in both his professional and personal life.
- [11] The Applicant demanded that the Respondent publicly withdraw the social media posts and correspondences, by authoring and circulating a further social media post, on the Facebook site of On the Block News, Radio Turf news, Capricorn FM news and Thobela FM, his Facebook site wall and a WhatsApp messenger text and/or email communique to the Applicant and the Office of the ANC Regional Secretary, retracting his posts and/or correspondence and apologising for this conduct within 48 hours from the date of the letter of demand.
- [12] The Respondent was informed that should he fail, refuse, neglect to retract or withdraw the correspondence and or furnish the Applicant with an apology the Applicant would have no option but to proceed against the Respondent for any and all damages suffered, as a result of the Respondent's conduct, which damage the Applicant was already in the process of quantifying.
- [13] Amidst the letter of demand, the Respondent persisted in expressing his views concerning the circumstances and the role played by the Applicant, as highlighted in the various articles, especially "SP8" wherein mention was made of the communication from the Applicant.
- [14] This triggered the Applicant to approach the Court on an urgent basis, seeking the orders as contained in the Notice of motion. The Applicant highlighted that there was urgent intervention needed by the Court, due to the defamatory posts and harassment on social media and he would not be able to obtain substantial redress, in respect of the severe harm, that will likely result, from the Respondent's continued intentional damage, to his good name and that of his Office.

- [15] The Applicant indicated that the Respondent had conducted himself in a manner which showed no remorse, and he had not retracted or apologised for his previous and unlawful conduct and without the Honourable Court's urgent intervention, the Respondent would, most likely, to begin posting more defamatory statements on social media. The Applicant argued that this was not a case of self-created urgency.
- [16] The Applicants highlighted the matter remains urgent, as there is a continuous infringement of the Applicant's Constitutional right to dignity, entitling him to approach the Honourable Court on an urgent basis.
- [17] In answer to the allegations the Respondent raises the point in limine concerning urgency, highlighting the delay in the timeframe in which the Applicant approached the Court flowing from the incident. The Respondent argued that the last post was dated 22 September 2024 and the Applicant only instituted proceedings on 4 October 2024. The Respondent argued that the rule pertaining to urgency required two legs to be present before urgency could properly be ventilated, namely the urgency should not be self-created and the Applicant must provide reasons why substantial relief, cannot be achieved in due course. The Respondent argued that the truncated timelines for the Respondent to file their Notice of opposition and Answering affidavit was extremely short. In comparison to the Applicant who had a number of days to properly adjudicate this application. It was argued that the application was fatally flawed due to the self-created urgency by the Applicant. The Applicant would have found redress in instituting a claim for damages against the Respondent.
- [18] The Respondent submitted that the court has the power to condone non-compliance with the rules, and to accelerate the hearing of the matter, however, this should be exercised with judicial discretion and in the light of significant and satisfactory grounds been shown by the Applicant. This depended on three major considerations;
- [18.1] The prejudice that the Applicant may suffer by having to wait for a hearing in the ordinary course
- [18.2] The prejudice that other litigants might suffer if the application were to be given preference.
- [18.3] The prejudice that the Respondents might suffer on account of the abridgement of the prescribed terms and an early hearing of the matter.
- [19] The Respondent maintained that the Applicant had not made out a case for urgency and the application was an abuse of the Court process. He indicated that the Applicant did have redress, in the criminal proceedings or in a civil claim for damages.
- [20] The second point in limine concerned the material dispute of fact, as found in Rule 6(5)(g) [1] which provides that where there is a material bona fide dispute of fact that could not be decided on the papers the Court was faced with three alternatives; it may dismiss the application or direct that oral evidence be heard on specific issues or refer the matter to

trial. The Respondent indicated that the Court was not restricted to the listed remedies, and could make any order it deemed fit, and which was directed to ensure a just and expeditious decision.

- [21] The Respondent argued that from the papers in front of Court, there was a material dispute of fact and further that the Applicant should have known at the launching of the application, that this would be the case. The Respondent noted that the Applicant should have proceeded by way of Action so as to obtain oral evidence, to ventilate the issue and this was sufficient grounds for the application to be dismissed.
- [22] The Respondent's third point in limine was the issue of non-joinder. The Respondent submitted that he did not have the necessary power and authority to dictate what should be posted, reported or discussed, on the various platforms mentioned. The Applicant had an obligation to cite the various platforms as Respondents to this application, as it was clear that they would have a direct and substantial interest in these proceedings. He mentioned the identity of Mr Derek Mosoana, the Provincial Convener of the SGB Federation, who was not cited as a Respondent in the proceedings. The Respondent indicated that if the Court found that there were defamatory statements made, Mr Derek Mosoana would have a direct and substantial interest, in the outcome of the matter, as he would have to comply with the order, that the Court would make.
- [23] The Respondent sought that the Court scrutinise the meaning of the words used, to determine if the statements were defamatory, by relying on an objective, ordinary meaning of the statement, and what it was intended to convey. The second stage was to determine whether the statement was likely to injure the good esteem in which the Plaintiff was held, by the reasonable average person, to whom it was published.
- [24] The Respondent argued that the Applicant as Ward Councillor held a political position and as such his conduct was in the public interest. The post, interviews and publications, were to the benefit of the public. The Respondent indicated that the Applicant had not made out a case either for urgency, especially as the Applicant was afforded an opportunity, to comment on the allegations, before it was published, and the Applicant, elected not to render any comment to the journalist.
- [25] The Respondent highlighted that the application was defective, lacked the necessary urgency and that there was a material substantial dispute of fact, which could only be cured by referring the matter to oral evidence. The Respondent indicated that the Applicant, at the time of launching the application, was well aware of this dispute. This was evident from the fact that not all persons that made allegations against the Applicant was before Court and therefore the application was destined to be dismissed with Costs.
- [26] In reply the Applicant sought condonation for the late filing of the replying affidavit, which was on account of circumstances beyond the Applicant's control. The Respondent had no objection, so condonation was granted. The Applicant maintained the application was urgent and that substantial redress would not be afforded to him, if the interlocutory

proceedings were only heard on the ordinary role, in due course. The Applicant believed that the Respondent would continue to persist with his defamatory actions. The Applicant reserved his rights to institute a claim for damages if he so deemed necessary.

[27] The Applicant argued that there was no material dispute of facts, as the Respondent admitted to publishing defamatory statements, regarding the Applicant, to third parties, which statements were neither retracted nor substantiated with any factual evidence. The Respondent did not show any defence in law permitting him to continue with the said unlawfully actions, as he clearly intended to persist with this conduct. On that basis the Applicant was entitled to the relief prayed for in the Notice of motion.

Issues

[28] The following issues were identified;

[28.1] The Court needed to ventilate the issue of urgency,

[28.2] Whether there was a material dispute of fact which could not be resolved on the papers.

[28.3] Non-joinder of the other persons or organisations, that the Respondent argued, were involved in respect of the circulation of the information alleged to be defamatory.

[28.4] Whether the Applicant had made out a case for defamation.

[28.5] The appropriateness of the relief sought by the Applicant in the Notice of motion.

[28.6] Costs.

The Relevant Law and Applicability to the Issues

[29] For an Applicant to succeed on any grounds of urgency the Applicant needs to show that this was not self-created urgency and that the Applicant would not be afforded substantial redress, if the matter was to be heard in due course.

[30] The procedure set out in Rule 6(12) was not simply there for the taking. The principle set out in a case of East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited[2] and others in which it was held:-

"The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course. The rules allow the Court to come to the assistance of a litigant because if the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required, before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an Applicant will not be able to obtain substantial redress in an application in due course, will be determined by the facts of each case. An Applicant must make out his case in this regard."^[3]

[31] The High Court, Pretoria, in *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited*^[4] stressed the importance of providing viable reasons for dispensing with the formalities in application proceedings, when instituting an urgent application, as set out in Rule 6(12) of the Uniform Court Rules.

[32] The argument raised by the Respondent concerning the lack of urgency, and the opportunity to institute a criminal case of defamation, alternatively a civil case for damages, did not equate to substantial redress in due course. From the time the Applicant became aware of the defamatory comments, attempts were made by the Applicant, in the form of the letter of demand, to put a halt to these defamatory comments. The Respondent persisted with his comments and opinions, in respect of the matter, as evident in the newspaper article. He even highlighted the pending litigation, on the part of the Applicant, with no fear of the consequences of his comments. His argument that the Applicant was afforded an opportunity to comment, cannot be sustained, for the simple fact that no amount of denials, could circumvent the harm caused by the opinions and comments made by the Respondent. The Applicant made out a case for urgency, as the Applicant would not be afforded substantial redress in due course, due to the Respondent's continued infringement of the Applicant's Constitutional right of dignity.

[33] The Respondent raised a material dispute of fact that could not be adjudicated on paper. From the Answering affidavit, there appeared to be no dispute concerning the opinions expressed by the Respondent to the various organisations without restraint as to the veracity of the truth contained therein.

[34] The Plascon

- Evans Rule^[5] states:

"where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order."*(my italics)*

[35] The Respondent relied on the initial dispute that existed, which triggered the decision, to put the project on hold, as motivation for the comments about the Applicant. The Respondent on his own version placed before the Court the fact that he was responsible, for informing the various organisations. These were allegations not supported by any real facts or proof to justify the defamatory comments, innuendo and speculative rumours,

concerning the character and integrity of the Applicant. On the Respondent's own papers this point in limine must be dismissed as it is without merit.

- [36] The letter of demand failed to dissuade him from persisting in the circulation of the false information. He did not take steps to prohibit same or made any undertakings to refrain from publishing similar information in the future. There is no material dispute as his version supports the Applicant's allegation of his role in the spreading of this false information. At no stage did he indicate that there was truth to this allegations or provide proof of same.
- [37] It respect of the non -joinder, the Respondent indicated that the Applicant's prayer 5 was not capable of being executed, as the Respondent did not have the necessary power or authority to dictate what should be posted, reported or discussed on the various communication, media platforms. According to him, these parties would have a direct and substantial interest in these proceedings. Further, mention was made of the journalist Moyahabo Mabeka and Mr Derick Mosoana who were not cited as Respondents in these proceedings, but had an interest in the outcome.
- [38] In the decision of Judicial Service Commission and Another v Cape Bar Council and Another[6] the Supreme Court of Appeal confirmed the principle as follows;
- [12] It has by now become settled law that the joinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg Burger v Rand Water Board 2007 (1) SA 30 (SCA) para 7; Andries Chari Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)
- [39] The Applicant took issue with the conduct and manner of the Respondent concerning the defamatory allegations made by the Respondent. Granted they may have been other people involved in the circulating of the information, this did not preclude the Applicant from instituting proceedings against the Respondent, simply based on the Respondent's conduct. The right to litigate against other individuals was entirely up to the Applicant, but this did not warrant the need for the joinder of the other parties to this litigation. This point in limine also is to be dismissed.
- [40] This Court accepts that the Respondent conveyed information complained about and that publication took place on various platforms, but most telling was the newspaper article marked 'SPB' attached to the founding affidavit. In the article the Respondent made averments concerning the Applicant as highlighted above in paragraph 5 to paragraph 7. These comments were direct quotes from the Respondent and the literal understanding

thereof, was to defame the character of the Applicant. On account of the Respondent's comments, the esteem and reputation of the Applicant and his role in the community was diminished.

- [41] The Respondent justified his conduct, on the basis that the community needed to know what was happening concerning this project, however, the manner in which he went about vocalising, circulating and or publishing this information, was defamatory to the good name of the Applicant and with the intent to offend the reputation of the Applicant.
- [42] There was no justification for the manner in which those comments were relayed and the Respondent did not motivate or argue that it was the truth. The Respondent indicated that the SGB had written a letter of apology to the Applicant which according to the Applicant was not received. The Respondent however, did not apologise himself, in respect of his own comments.
- [43] The Applicant sought various relief from the Court as contained in the Notice of motion. In respect of the interdict the Court took cognisance of the requirements to be satisfied for the Court to grant a final interdict being the following:
- [43.1] A clear right;
- [43.2] A well-grounded apprehension of the irreparable harm if the final relief is not granted.
- [43.3] A balance of convenience in favour of the granting of the relief sought
- [43.4] The absence of any other satisfactory remedy.
- [44] The Applicants highlighted why these grounds have been met, and that the Applicant had no suitable alternative remedy available, except to have launched this application. The Applicants sought that the Court grant the application. The Respondent maintained that the application should be dismissed.
- [45] The applicants seeks relief in the form of an interdict prohibiting the defamatory comments from being perpetuated by the Respondent and interdicting the Respondent from commenting on the Applicant, the office held by the Applicant and any political organization to which the Applicant would be affiliated to, in future.
- [46] The Applicant had set out in detail, motivation for the relief sought for protection by way of the interdict, as well as seeking a formal apology for the harm caused by the defamatory comments. The Applicant has a right to have his name and reputation protected and not to be accused unjustly, by false unsubstantiated allegations, which are defamatory. The Applicant had a real apprehension of irreparable harm if this application was not granted.

- [47] When weighing up the submissions made, concerning the prejudice to be suffered it was noteworthy that the balance of convenience favours the Applicant. The Applicant highlighted that he does not have an adequate alternative remedy, due to the irreparable harm, that is envisioned, if this application was not granted. The Court order was the necessary relief to protect his rights and would serve to ensure that the Respondent did not persist with this conduct in future.
- [48] The Applicants have made out a case for approaching the Court on an urgent basis for protection and relief. However, the Court takes cognisance of the fact that the Respondent and Applicant are both involved in this project, for the restoration of the School. Certain of the prayers sought by the Applicant as contained in the Notice of motion and the Draft Court order was exceptionally wide and could lead to misinterpretation and unenforceability. This would result in an order that was not just and equitable, in the circumstances, to all the parties.
- [49] Prayer 2 reads, "the Respondent is interdicted and restrained from posting/supplying any information pertaining to the Applicant on Facebook group chats conducting radio and newspaper interviews and any other social media."

Prayer 8 reads, " the Respondent is interdicted and restrained from making reference to the Applicant and the Ward Councillor's office, office of the African National Congress Regional Secretary and or Makhuduthamaga Local Municipality whether indirectly or directly.

- [50] The wording of both these prayers are extremely wide as it would prevent the Respondent from for example, introducing the Applicant at a meeting, or reporting back on a meeting, where the Applicant or the various organizations were present. The purpose sought for the protection was in relation to defamatory comments made and same should rightly be afforded the Applicant, but this protection must be seen in context and in the interest of justice. This protection cannot be so wide that it frustrates the administration of the Offices held by both parties.

Costs

- [51] The Applicant sought punitive costs on account of the conduct of the Respondent and requested the Court to mark its disapproval by granting an order of costs on an attorney and client scale. The Applicant argued that this order would ensure that the Applicant be indemnified, and not be out of pocket, in respect of the expense involved in him having to litigate.
- [52] The Applicant indicated that the Respondent's motives were vexatious reckless and malicious, or frivolous, or that he had acted unreasonably in his conduct of the litigation, or that his conduct was in some way reprehensible.[7]

[53] The Respondent sought the dismissal of the application with costs. This Court notes that costs follow the successful party and is in the discretion of the Court. I find no merit to justify a punitive cost order as sought by the Applicant.

Order

[54] In the result I make the following order;

[54.1] In terms of the provisions of Rule 6(12) the normal requirements pertaining to the rules and formalities in respect of timelines are dispensed with and this matter is found to be urgent.

[51.2] The Respondent is interdicted and prohibited from making false and defamatory statements about the Applicant with specific reference to the manner in which the Applicant conducts himself in his professional and or personal life.

[51.3] The Respondent is prohibited and interdicted from making false and or defamatory comments and or opinions about the Applicant via radio and newspaper interviews, posting on Facebook, group chats or any other social media.

[51.4] In the event that the Respondent fails to comply with the abovementioned orders, the Applicant shall be entitled to approach the Honourable Court, on the same papers duly supplemented, for an order of contempt of Court, and committing the Respondent for a period of thirty (30) days imprisonment.

[51.3] It is declared that the allegations made concerning the Applicant, Selege Paul Diketane posted on Facebook group On the Block News dated the 15 September 2024, Radio Turf news dated 17 September 2024, Sunday World newspaper article dated 22 September 2024 and subsequent live radio interviews on Capricorn FM and Thobela FM are defamatory and false.

[51.4] The Respondent is ordered to publish a retraction of the opinions and or comments, made by him and publish an unconditional apology on the abovementioned social media pages, newspaper articles, radio interviews, SGB meeting and community meeting within a period of ten (10) days from date of this order.

[51.5] The Respondent is ordered to pay the costs of the application on party and party scale B.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES

FOR THE APPLICANT Adv M Bresler INSTRUCTED BY Tlhasi Attorneys INC FOR THE
RESPONDENT Adv D Chuene INSTRUCTED BY K N Maleka Attorneys INC DATE OF HEARING 15
October 2024 DATE OF JUDGEMENT 1 November 2024

[1] Uniform Rules of Court

[2] See 2011 JDR 1832

[3] (2012) JOL 28244 (GSJ) at para 6 and 7.

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- [4] [2023] ZAGPPHC 709 (21 August 2023)
- [5] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) 634-5
- [6] 2013(1)SA170(SCA) at [12]
- [7] Erasmus, Superior Court Practice, Vol 2 on page D5-22
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