

SOUTH AFRICA / JUDGMENT

Economic Freedom Fighters and Others v Manuel; In Re: Manuel v Economic Freedom Fighters and Others (13349/2019) [2019] ZAGPJHC 172 (18 June 2019)

[2019] ZAGPJHC 172

COURT

South Gauteng High Court, Johannesburg

BEFORE

K E Matojane

CASE / FILE NUMBER

13349/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13349/2019

18 June 2019

In the matter between:

ECONOMIC FREEDOM FIGHTERS First

Applicant

MBUYISENI QUINTIN NDLOZI Second

Applicant

JULIUS SELLO MALEMA Third

Applicant

and

TREVOR ANDREW MANUEL Respondent

In re:

TREVOR ANDREW MANUEL Applicant

ECONOMIC FREEDOM FIGHTERS First

Respondent

MBUYISENI QUINTIN NDLOZI Second

Respondent

JULIUS SELLO MALEMA Third

Respondent

JUDGMENT ON LEAVE TO APPEAL

MATOJANE J

Introduction

- [1] This is an opposed application for leave to appeal to the Full Court of this Division, against the whole of my judgment handed down on 30 May 2019 wherein I granted a declaratory order to the effect that the statement published by the Economic Freedom Fighters, Dr Ndlozi, and Mr Malema (who shall be referred to as the respondents) about Mr Manuel was false, defamatory and unlawful. I ordered the respondents to remove the statement from all the media platforms and to publish a retraction as well as an apology.
- [2] Section 17(1)(a)(,) Superior Courts Act 10 of 2013 provides that a judge may only give leave to appeal if he or she is of the opinion that the appeal would have a reasonable prospect of success. It is appropriate at this stage to draw attention to the fact that appeals are brought against orders made by a court and not against comments made in the course of judgment. [1] Unless the higher court finds that the impugned statement is not defamatory, the orders the court made are correct and cannot be set aside.
- [3] The respondents have taken issue with every aspect of the judgment. I quote verbatim the grounds of appeal as summarised by counsel in the respondent's heads of argument:
1. 'The Learned judge erred in not properly having regard to the context of the application and the public interest arising therefrom;
 2. the learned Judge erred in respect of how he should have evaluated political speech;
 3. the Learned Judge erred in granting the interdict in the absence of appropriate evidence to sustain such a relief;
 4. The learned judge erred in awarding damages that were too high in quantum.'

The relief is overboard

- [4] The respondents claim that the Court committed two fundamental misdirections in respect of their objection that the relief sought

was overboard.

[5] First, they say that Mr Manuel did not identify the particular portions of the statement to which he objected to. They argue that Mr Manuel was obliged to 'point out the defamatory portions of the statement. They rely for this submission on the authority of *Deedat v Muslim Digest*.^[2]

[6] Van Heerden J in *Deedat v Muslim Digest* stated that:

'A Plaintiff is entitled to rely on the whole of an article if he claims that the whole of it is defamatory of him. He may, however, in an appropriate case, be under a duty to furnish the Defendant with particulars of those portions or words upon which he specifically relies. There is no hard and fast rule which dictates such a duty. In each case, the matter complained of as being defamatory has to be considered and the court has to ask itself whether in the particular circumstances the Defendant would or would not be embarrassed in pleading. The test is not the length of the document, but the nature of the matter complained of. *Meintjies v Wal/achs Ltd* 1913 TPD 278 and *Amalgamated Engineering Union v Hodgson* 1939 WLD 295. Where the defamatory meaning is not quite explicit, a Court would probably be more inclined to order the W(Jrds or passages relied on to be pointed out but might be less so inclined when the Plaintiff sets out the meaning or meanings which he attributes to the article. This is sometimes loosely referred to as pleading an innuendo.'

[7] In the current matter, the defamatory meaning is explicit, and there is no need to have them pointed out. Mr Manuel has, in any event, identified which portions of the statement violate his rights. In prayer 1.3 of the notice of motion, he sought only to have declared defamatory and false 'the allegations made about the applicant in the statement. Mr Manuel has explained the defamatory sting of the article and the respondents in their answering affidavit have not complained of embarrassment in pleading to the allegation that the statement was defamatory. There is no merit in the allegation that the relief sought was overboard.

[8] Second, the respondents aver that the Court erred in finding that Mr Manuel was entitled to act in the public interest in defamation

proceedings and rejected the respondents' contention that the relief in this respect was overly broad. This argument is without merit. Even if Mr Manuel was entitled only to bring this application in his interest and not in the public interest, the argument that he does not have public interest standing (which is not true) does not provide a reason for setting aside the order the Court made vindicating Mr Manuel reputation and dignity.

Interdictory requirements are met

- [9] The respondents claim that the Court erred in finding that Mr Manuel had met the requirements for interdictory relief. In particular, they argue that Mr Manuel adduced no evidence to demonstrate that he has suffered and continues to suffer harm to his reputation, both in his personal and professional capacity, through the widespread dissemination of the statement.
- [10] Accusing any person of corruption and nepotism is about as serious and damaging an allegation as can be made in these times. The likelihood of serious harm to reputation is plain, even if Mr Manuel's family and friends knew the allegation is not true.
- [11] The publication of a defamatory matter results in presumed damages even if the applicant cannot prove actual damages.[3] The court assumes that the aggrieved person has suffered harm to his reputation and feelings. It is the respondents who are required to demonstrate that Mr Manuel was not harmed. The argument by the respondents that no evidence was led by Mr Manuel regarding the harm that he suffered has no merit. Mr Manuel has in any event, explained the reputational harm that he has suffered as a result of the publication of the statement as follows in paragraph 77 of the founding affidavit:

'the effect of the statement has been especially painful because of my history of service to South Africa. my honesty and integrity are fundamentally important to me, and have motivated my conducted throughout my career. The defamatory statements have undermined my contribution to the country, and have sought to strip me of my dignity.'

- [12] The respondents argue that Mr Manuel has given effect to an 'alternative remedy' by releasing a press statement which subsequently received widespread media coverage. The respondents rely on *DA v ANC*[4] where the Constitutional Court held that during elections assertions, claims, statements and comments by one political party might be countered most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspapers.
- [13] The case concerned the proper interpretation of the Electoral Act in the light of its punitive and criminal penalty provisions; the court's reasoning does not apply in a defamation case as contended for by the respondents. The Court explained that:

'What is at stake here is an issue of statutory interpretation. It is not a defamation case. The law of defamation must be invoked with caution. The rights and interests weighed against each other in a defamation case are not those at issue here. The reputation and dignity of a particular person are not at the forefront of the statutory interpretation enquiry before us. The requirements to sustain a defamation claim, as well as those that underlie defences to the claim, are grounded in the competing rights to and interests of freedom of expression as against those of dignity and reputation. To import the latter considerations here would unnecessarily distort a fairly straightforward enquiry into the meaning and purpose of statutory provisions.'

[14] The respondents did not refer to any authority for the proposition that publication by Mr Manuel in the press of a responsive statement constituted an alternative remedy that precluded him from seeking interdictory relief. Mr Manuel sought a legal remedy.

[15] The respondents claim that no evidence was led that Mr Manuel's apprehension of the publication of further such statements was reasonable. In paragraph 12.2 of their answering affidavit, the respondents make it clear that they will continue to publish other similar defamatory statements about Mr Manuel unless he obtains an interdictory relief. The respondents state:

'Respectfully, even after the statement was demonstrated to be false, the respondents were under no obligation to take down the statement. The statement only acquired the legal effect of being defamatory when the court declared it as such.'

The defence of truth and public interest

[16] Instead of proving the sting of the charge, the respondents seem to argue a different case which has nothing to do with a defamation claim. They argue, for example, that the Court erred in finding that:

1. Mr Manuel recused himself from the interviews of the new SARS Commissioner, and that such recusal was only done because they were colleagues;
2. There is no basis in saying that the process was secretive;
3. The Learned Judge erred in finding that the respondents had to show a reasonable apprehension of bias in order to sustain an attack that Mr Manuel's self-imposed recusal demonstrate the validity of the respondent's attack on him.

[17] As stated in my judgment, a complete defence to a defamation claim is that the statement is true and in the public interest. The

sting of the charge that Mr Manuel and Mr Kieswetter were relatives, close business associates and companions, which resulted in an interview process that was corrupt, nepotistic and secretive must be proved.

[18] The defence of truth and public interest cannot assist the respondents because they conceded expressly in their supplementary heads of argument that the information contained in the impugned statement was false.

[19] The respondents argue that the Court erred in finding that the respondents 'put up no facts . . . to support the truth of their averments, nor do they refute the sting of the defamation.' The respondents argue that the proper test to be applied to the statement is that it was a political speech which is exempt from a finding of defamation.

[20] The respondents submit that 'the statement itself did not need to be supported by facts or explained away, as such, on account of its political nature.' The absolute defence of political speech alleged by the respondents has no basis in law, and the respondents have made these

bald averments without referring to any authority. In my view, the respondents will not be liable in defamation if they can show that they were unaware of the falsity of the material published, did not publish recklessly and the publication was reasonable in the circumstances.

The statement is defamatory per se

- [21] The respondents contend that the Court erred in finding that a reasonable person would have understood the statement to mean that Mr Manuel is corrupt and nepotistic and conducted the appointment process in a deliberate attempt to disguise his familial relationship with Mr Kieswetter, and that the statement would have the effect of lowering Mr Manuel's reputation in the estimation of right-thinking members of the society.
- [22] This submission is difficult to understand as the statement expressly said that Mr Manuel was corrupt nepotistic and sought to hide his familial relationship with Mr Kieswetter. It is trite that allegations of corruption, dishonesty, and immoral conduct are defamatory.
- [23] The respondents make an astonishing submission that a reasonable reader of ordinary intelligence would be used to the kind of language used by the respondents as being consistent with 'their colourful rhetorical style'. The publication of defamatory and false statements, even in a colourful rhetorical style, is unlawful. The injury is focussed not on the actual victim, but on the perception of other people that the statement brings a discredit on the reputation of another person. The ordinary person embodies 'others'.

The publication of the impugned statement was not reasonable

- [24] The respondents raise the following grounds of appeal, which were clearly not thought through. They argue that the Court erred in finding that the respondents 'were nonetheless liable for their genuinely held belief after publishing the statement upon receipt of information from an informed source'. They state that the Court erred in finding that the publication was not reasonable. The respondents make the following claim, which show that they do not apprehend that they bore the full onus to establish that the publication of the impugned statement was lawful by establishing one of the recognised defences.
- (a) The Court 'heard no evidence from the respondents in respect of what steps they may or may not have taken to verify the content of the statement themselves';
 - (b) The Court, 'had no basis upon which to determine that the respondents' genuinely held belief and publication at the time was not reasonable, nor that they failed to take any steps to verify the content of the information received by their source.'
 - (c) 'Had the Court wished to hear such further evidence, the Court ought to have postponed the hearing and or directed the respondents to supplement their affidavits.'
 - (d) 'In any event, it is telling that, notwithstanding the postponement of the original hearing, Mr Manuel did not file a further affidavit raising such grounds of opposition.'

[25] Based on the evidence before this Court, the respondents did not attempt to verify the truth of the allegation, but simply accepted everything their 'confidential source' stated at face value, and took no steps to corroborate the supposed allegations. Mr Manuel's side of the story was not sought as required in terms of the Bogoshi[5]

judgment.

It follows that the respondents have failed to satisfy the requirements of reasonable publication.

[26] There can never be a public interest in the continued publication of a statement once it is known that it contains deliberate falsehoods.

Such publication is eminently malicious. Malice is established where someone publishes a defamatory expression knowing that it is false and recklessly indifferent as to whether it is true or false.[6] The remaining grounds of appeal falls to be dismissed as lacking in merit.

Damages

[27] The respondents complain that the award of R500 000 is 'too high in quantum', relying in this regard on the case of *Mogale v Seima*[7] in which the court made an award of R12 000.

[28] In a defamation case, the damages which are available to an aggrieved party do not require proof of actual loss or injury. As explained in *Tsedu and Others v Lekota and Others*[8] a mathematical or empirical calculation are impossible, and each case must be addressed in its facts.

[29] In *Skinner v Shapiro*,[9] the court held at 167 that:

'The amount of damages is entirely in the discretion of the Court. Such discretion, however, is exercised on reasonable and not on arbitrary principles. One is entitled to have regard to the character of the defamatory words, their falseness and the malice displayed by the defendant; the rank and position of the parties in society, the special relationship that existed between them, the persons to whom the defamatory words were published and the place, time and mode of publication; the continuance of the circulation of the defamatory words, the tardiness, inadequacy or entire absence of an apology. The Court is entitled to consider the general conduct of the defendant, from the date of the defamation; and the events leading up to it, down to including his demeanour at the trial and the nature of his defence.'

[30] Smalberger JA in *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others*,[10] was at pains to explain that using previous decisions as guidelines in calculating an appropriate award has a limited purpose. He stated that:

'Comparisons of the kind suggested serve a very limited purpose. In the nature of thing, no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. 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 as 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.'

The seriousness of the defamatory statement

[31] False allegations of corruption and nepotism are among the most serious and egregious allegations that one person can make against another. Corrupt people are loathed in civilized societies. The statement was published with complete disregard for the truth and with the sole intention to injure Mr Manuel as shown by the stubborn refusal to remove the statement on their social media platforms despite its known falsity.

The breadth of the distribution and publication

[32] The respondents knew that communication via Twitter is instantaneous, inter- active borderless and far-reaching. This is a significant factor to consider in defamation cases because a person searching on the internet anywhere in the world will know that Mr Manuel is a dishonest and corrupt person.

The motivation of the defendant

[33] The respondents persisted in advancing the truth and public interest defence, even though they knew that the statement was false. They refused to tender an apology or a retraction for no reason other than to spite Mr Manuel. The respondents refused to make any concession when it was obvious that they should do so.[11]

The conduct of the respondents

[34] Instead of retracting the defamatory statement and apologising, Mr Malema again took to Twitter to defend and reiterate the defamatory statement.

[35] The reputation, prominence and professional standing of Mr Manual, and the fact that the EFF is the third largest political party in the country, are important factors to consider in the assessment of damages in the particular circumstances of this case.

[36] I am of the view, based on all of the preceding, that an award of R500 000 in general damages is reasonable under the circumstances.

[37] I find that the respondents' grounds of appeal lack the prospect of success.

In the result, I make the following order:

1. The application for leave to appeal is dismissed with costs, including the costs of two counsel.

K E MATOJANE

JUDGE OF THE HIGH COURT

Date of hearing: 14 June 2019

Date of judgment: 18 June 2019

Appearances:

Counsel for the Applicant: Adv. C Steinberg Adv. M Mbikiwa

Instructing Attorneys: Webber Wentzel Attorneys

Counsel for the Respondents: Adv. K Premhid

Instructing Attorneys: Ian Levitt Attorneys

[1] Mkangeli and Others v Joubert and Others 2001 (2) SA 1191 (CC).

[2] 1980 (2) SA 922 (DCLD) at 928E-G.

[3] In Mthembi-Mahanyele v Mail & Guardian Ltd and Another [2004] 3 All SA 511 (SCA) para 3.1

[4] Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC).

[5] National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 at 1212A-1213C.

[6] Vincent v Long 1988 (3) SA 45 (C) at 50B-D.

[7] 2008 (5) SA 637 SCA

[8] 2009 (4) SA 372 (SCA) at 381 para 25.

[9] 1924 (WLD) 157.

[10] 2001 (2) SA 242 (SCA).

[11] Muller v Independent Newspapers (Pty) Ltd and Another (A462/2014) (2016] ZAWCHC 59 (4 May 2016)

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Prepared on 11 October 2026 · Esheria