

SOUTH AFRICA / JUDGMENT

Gen4foods (Pty) Ltd v Hadebe and Another (D12392/2023) [2024] ZAKZDHC 67 (2 October 2024) [2024] ZAKZDHC 67

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D12392/2023

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FLYNOTES:

CIVIL LAW – Defamation – Interdict
– Social
media posts boycotting products – Alleged that consumption
of rotten polony led to illness of multiple people
and death of
child – Unverified story – Applicant has a clear right
to prevent falsehoods about quality of its
products –
Suffered an injury in false allegations linking it to death child
– Respondent made no attempt to
ascertain truth of what it
was posting – No other satisfactory remedy –
Requirements for final interdict established
– Rule nisi
confirmed.
SAFLII
Note: Certain
personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII
Policy
IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
Case
no: D12392/2023
In

the matter between: GEN4FOODS
 (PTY) LTD
 APPLICANT
 and
 ANTHONY
 HADEBE
 FIRST RESPONDENT
 ECONOMIC
 FREEDOM FIGHTERS
 SECOND RESPONDENT

Coram: Mossop J

Heard: 12 September 2024

Delivered: 2 October 2024
 ORDER
 The

following order is granted: 1.
 The rule nisi granted by Bedderson J on 9 November 2023 is confirmed against the second respondent, save for paragraph 3.1.2 thereof.

 2.
 The second respondent shall pay the applicant’s costs on the scale of attorney and client, such to include the costs of senior counsel.

 3.
 The costs ordered in paragraph 2 shall be joint and several with the order of costs awarded against the first respondent by Pitman AJ in confirming the rule nisi against the first respondent on 8 December 2023.

JUDGMENT

MOSSOP J:

Introduction

[1] The applicant is a manufacturer of emulsified meat products, including polony. One of its brands is the ‘Thompson’s Tasty Meats’ brand, which was established in 1860. Thompson’s meat products are sold, inter alia, by Shoprite, a national supermarket chain.

[2] The first respondent claimed that he purchased a two kilogram

Thompson's 'Family Value' chicken polony (the polony) from Shoprite at its Bridge City, Durban store (the store) on 14 August 2023. He claimed, further, that his nine children, wife, and brother ate of the polony and became ill and that one of his children died directly as a consequence of eating the polony, which was allegedly rotten and not fit for human consumption.

- [3] The second respondent took up the first respondent's cause and both began publishing allegations on popular social media platforms such as Facebook and X,[1] calling, essentially, for a boycott of Thompson's products and for justice for both the child who died and the first respondent and decrying the quality of the products manufactured by the applicant. The first respondent repeatedly stated publicly that the child had passed away as a consequence of eating rotten and contaminated polony manufactured by the applicant. The second respondent also made such an allegation on more than one occasion.
- [4] The applicant regarded those repeated statements as being untrue and defamatory of it and brought urgent application proceedings against the respondents.
- [5] In this judgment, any reference to a 'post' is intended to include a post on either Facebook or X where not expressly stated.

The relief claimed

- [6] The applicant commenced an application against the respondents on 9 November 2023. It claimed a rule nisi in the following terms:

'3.1 The Respondents be and are hereby forthwith interdicted and restrained from:

3.1.1 making defamatory and inflammatory statements, comments and remarks on any social media platform, including Facebook, Instagram, X (formerly known as Twitter), or any other medium or social media forum, stating that the Applicant's product namely Thompsons chicken polony caused the death of the first respondent's minor child;

3.1.2 causing damage or harm to the Applicants (sic) business/es, any of its employees, personnel, or service providers, its buildings or properties or unlawfully interfering in or obstructing the Applicant's business operations in any way.

3.2 The Respondents are ordered and directed to forthwith delete and remove any communications, declarations and statements, on social media, including Facebook, Instagram, X (formerly known as Twitter), or any other medium or forum, which states that the Applicant's product namely Thompsons chicken polony caused the death of the first respondents (sic) minor child.

3.3 That the First Respondent be ordered to pay the costs of the application, on an attorney and client scale, only in the event of the First Respondent opposing the application;

3.4 That the Second Respondent be ordered to pay the costs of the application on an attorney and client scale.

3.(sic) The Orders contained in paragraphs 3.1 and 3.2 above are to operate with immediate effect, pending the finalisation of this matter.’

Proceedings on 9 November 2023

- [7] The urgent application first came before Bedderson J. He was satisfied, correctly in my view, that the matter was urgent. Both respondents delivered a joint notice of intention to oppose the relief claimed by the applicant and both were represented by one counsel, instructed by a firm of attorneys. Ultimately, however, a consent order was taken exactly in the terms set out in the notice of motion, which included the interim relief sought by the applicant. The rule was returnable on 8 December 2023.
- [8] Subsequent thereto, and on 23 November 2023, the firm of attorneys who acted on behalf of both respondents formally withdrew as the first respondent’s attorneys of record and continued thereafter to act only on behalf of the second respondent. A possible reason why this may have occurred is considered later in this judgment. The first respondent was accordingly left unrepresented.

Proceedings on 8 December 2023

- [9] On the return date of the rule nisi, 8 December 2023, there was no appearance for the first respondent, who was also not personally in attendance. By virtue of the fact that the first respondent had opposed the application, Pitman AJ confirmed the rule nisi against him with costs and extended the rule nisi against the second respondent until it was either confirmed or discharged.

The issue

- [10] Before me, the applicant now seeks confirmation of the rule nisi with a punitive costs order against the second respondent, while the second respondent seeks the discharge of the rule and an order that its costs be paid by the applicant.

The first respondent’s allegations

- [11] While the rule nisi has already been confirmed against the first respondent, it is still necessary to consider the allegations that he made for they were the catalyst for everything that subsequently occurred.
- [12] It appears relatively certain that the first respondent purchased the polony from the store as he claimed to have done. He put up a till slip establishing a purchase of such a product from the store, although the date of the purchase itself is not clearly reflected on the till slip. The only date that can be clearly discerned from the photograph of the till slip attached to the papers is 17 July 2023, and not 14 August 2023, as alleged by the first respondent.

[13] Be that as it may, on 15 August 2023, the first respondent proceeded to the store and lodged a complaint with it based upon the quality of the polony that he purchased, citing the reasons mentioned in the introduction to this judgment. On 29 August 2023, two representatives of the applicant, Mr Anthony Pillay (Mr Pillay) and Mr Brightman Mjoka, met with the first respondent at a popular local restaurant. They listened to the first respondent's complaint and, as a sign of empathy with his alleged suffering,

presented him with a complimentary pack of Thompson's products. A few days later, however, the first respondent sent an email to Mr Pillay and complained that the polony in the complimentary pack was also 'rotten'.

[14] Prior to his meeting with the applicant's representatives, the first respondent had commenced what was to be a series of posts on both Facebook and X. The first was made on 25 August 2023, and read as follows:

'If you wake up one morning and sea (sic) #RIP in my wall!! You must know ShopRite South Africa took my 16 months old son life.

My son has been referred to Poly clinic from Lindelani because he's getting worse and he doesn't look good at all ... see more.'

[15] The gender of the child was clearly established by that post. It was, obviously, a male child. The first respondent confirmed this when he posted the following message on those same platforms three days later on 28 August 2023, namely:

'PLEASE, HELP ME GET #JUSTICE FOR MY SON.'

The name of this child was never stated, although the first respondent did later provide copies of medical documents pertaining to a boy, aged one year and 11 months (and not a boy aged 16 months).

[16] The applicant has submitted that the post of 25 August 2023 established that the first respondent had alleged that his son had died. I do not attach the same meaning to that post. The applicant's conclusion does not seem to consider both paragraphs of the post, only the first paragraph. The referral to the fact that his son 'has' been referred to the Poly clinic indicated, in my view, that the child was alive but that his condition was getting worse. If he was already dead, his condition could not be deteriorating. However, one possible meaning of the post on 28 August 2023 is that the first respondent's son had died,

but that is not the only meaning possible. But what is certain is that the child was a boy.

[17] Six days later, on 31 August 2023, the content of the first respondent's posts changed. He now posted the following message on Facebook and X:

'REST IN PEACE N[...] YAM

SEKUZE KWAMANELA UMNTANAM

BECAUSE OF A PRODUCT I PERSONALLY BOUGHT AT SHOPRITE BRIDGE CITY FOR THOMPSON FAMILY VALUE POLONY.

I RECEIVED A CALL FROM KWAMASHU POLY CLINIC THAT MY DAUGHTER HAS PASSED ON THIS MORNING @04:30am,

After she's been in and out of government clinics and hospital trying to fight for her life because of a product I personally bought at shoprite in Bridge city Mall, kwamashu highway open space that I have been nagging people about asking for assistant from the masses in helping my family get #JUSTICE from Thompson's brand and Shoprite group for making my family ill after eating the rotten polony.

LALA UPHUMULE SNENHLANHLA SDUDLA

SAMHADEBE SOBONANA EKSENI

NGYAXOLISA ANGIKWAZANGA UKUKU;WE;A

UKUZE IKWAZI UKUTHOLA USIZO

OLUSEZINGENI ELIPHEZULUHLEZE'

[18] It was now clear from this post that the first respondent's daughter had apparently died.

[19] Then on 10 September 2023, the first respondent posted the following message:

'SHARE SHARE SHARE SHARE SHARE

JUST A FRIENDLY WARNING!!

Good citizens of South Africa, PLEASE DON'T BUY FOOD FROM #SHOPRITE South Africa, especially #Thompson's_Meat product'.

'If you truly love your family, especially your kids or babies!! You will do the right thing and never buy from #shoprite south africa, and Thompson's_Meat because their products are NOT safe at all, and they don't care about their customers.

I'M A LIVING TESTIMONY OF THAT.

Just a quick update on the case of my son against #Shoprite South Africa and #Thompson's_Meat.

I was advised to open an official case at Ntuzuma police station yesterday (09/09/23) against #Shoprite South Africa and #Thompson's_Meat but my Attorney advised me not to share the case number on social media for safety

reasons.

Will give you the details of the case when my Advocate gives me a go ahead.'

[20] This post made no reference to the passing of the first respondent's daughter, but only mentioned his son.

The second respondent's allegations

[21] The second respondent states that the first respondent first contacted it for assistance. Assistance was given. On 1 November 2023, the second respondent posted the following message:

'A father from Kwa Mashu, Ward 47, who has lost his 2 year old child because he was sold rotten polony from ShopRite in Bridge City speaks to the Provincial Chairperson, Commissar Mongezi Twala.

Thompson polony and Shoprite will pay for their sins. Six members of this family are currently seriously ill and vomiting, while a 2 year old has now lost her life.

#RegisterToVoteEFF'

[22] This post conveyed the message that the first respondent's family were still ill from consuming 'rotten polony'. The likelihood of that being true was slight considering that the first respondent had informed Shoprite on 15 August 2023 that his family had become ill from eating spoiled polony. It would be extraordinary if, six weeks later, six members of the first respondent's family were still 'seriously ill and vomiting'.

[23] The same day, 1 November 2023, the second respondent met with the first respondent and videotaped that meeting. The video was then posted on X by the second respondent. The first respondent was interviewed in isiZulu and what he said has been translated into English and the transcript of that interview has been put up. It reveals that the first respondent stated that:

- (a) His son appeared to have problems with his stomach and he had been told to take him to a specialist, but he could not afford that.
- (b) He had lost his job, 'having used to run an office' and he now owed people and his life was 'a mess';
- (c) His family views him as a failure and he had separated from his fiancé because of the loss of the child;
- (d) These events '... happened on the 15th and I reported it on the 16th ...';
- (e) He had also tried to commit suicide;
- (f) The polony had worms in it;
- (g) The problem does not lie with Shoprite generally, but with Shoprite stores situated in black communities. Other communities have proper services from Shoprite and their products are 'right'; and
- (h) It is suggested that Shoprite changes the 'best before dates' on the products that they sell.

No proof of any of these allegations was provided by the first respondent and none appear to have been demanded from him by the second respondent.

[24] What is notable from the transcript of the video is that the first respondent, again, appeared to indicate that his son had been stricken, not his daughter.

[25] Then, the next day, 2 November 2023, the following was posted by the second respondent:

‘EFF KZN Provincial Chairperson, Commissar Mongezi Twala, went on an oversight visit at Shoprite Bridge City in Kwa-Mashu to check on expired food which has resulted in a 2 year old child from KwaMashu losing her life after purchasing Thompson polony at Shoprite.

The EFF will ensure that the child’s life is not lost in vein (sic) and all those who are responsible are held accountable for their actions.

#RegisterToVote EFF’.

[26] Contrary to what was stated in the video, this post appeared to refer to the child that died as being a girl by the use of the pronoun ‘her’.

Television

[27] As news of the alleged tragedy spread, the first respondent was interviewed by a local television station called ‘1 KZN TV’. The footage of his interview with the television station was posted on 3 November 2023. When he was interviewed, the first respondent, naturally, again spoke isiZulu and a transcript of that interview has been prepared and translated and is before the court.

[28] In the interview, the first respondent stated that:

‘... the 16th of August 2023 is the day that I will never forget it was a nightmare. Where I woke up to the news that everyone I love and believe in are in hospital ...’

He claimed that the polony had expired but, confusingly, also acknowledged that its expiry date was in 2024,[2] which was several months into the future relative to the date of purchase of the polony (and of the interview). The first respondent

then acknowledged that, in fact, his daughter had died and that two of his other children were in and out of hospital. He stated that he had lost his job and that the mother of his child had also lost her job because she was forced to spend a substantial period of time at home nursing her children back to health.

The Sunday Tribune

[29] The allegations of the respondents publicly attributing the death of a child to the eating of rotten polony manufactured by the applicant led directly to a story being published in the Sunday Tribune, a weekly Sunday newspaper that circulates in KwaZulu-Natal. The heading to the story, published on 5 November 2023, was:

‘Child died after eating polony’.

The opening paragraph of the story read as follows:

‘The father of a toddler who died after allegedly eating expired polony has vowed to take legal action against the company that sold the product and the manufacturer.’

No legal proceedings have ever been instituted by the first respondent against the applicant.

Sympathetic support

[30] The first respondent’s version of what had occurred attracted sympathetic support from other members of the public who access the social media platforms that the first and second respondents used. Thus, a person named Linda Zungu posted the following message on 28 August 2023:

‘Those who have Twitter, let’s apply more pressure ... kuzogcina thina kodwa eng’kwaziyo’.

[31] This is, perhaps, understandable in a way. Our society values human life, especially the lives of young, innocent children. To lose a child in circumstances where it could have easily been avoided, unsurprisingly, evokes sympathy in other members of society. And the story advanced by the first respondent was undoubtedly tragic and heart-breaking.

[32] But was it true? It remained simply an unverified story, confusing in its constituent elements. A terrible story undoubtedly, but an unverified story, nonetheless. There were no demonstrable, objective facts that could be referenced, other than the purchase of the polony. There was contradictory information about when the polony was consumed. There was no evidence that the deceased child had eaten the polony. There was no proof that the polony was contaminated. There was no proof that the polony had caused the death of a child. There was no proof that the first respondent’s child had died.

[33] The applicant accordingly set about conducting its own investigations into the matter.

Scientific examination

[34] As a starting point, the applicant did not accept that there was anything wrong with the product that the first respondent had purchased. The first respondent still had some of the polony left and handed it over to the applicant to permit a laboratory analysis of it to occur (the complaint sample). The complaint sample and a control sample (the retention sample) were delivered by the applicant to the South African National Accredited System (SANAS) laboratory for testing. That testing revealed that the pathogen load in the complaint sample was within the normal range and there were no distinct indicators that it was contaminated with bacteria or toxins that would have caused an illness.

- [35] The applicant also caused the complaint sample and the retention sample to be examined by a laboratory called Anelich Consulting Food Safety Solutions. The scientist who performed the analysis was Adjunct Professor Lucia Anelich (Professor Anelich), who holds a PhD in microbiology.
- [36] Professor Anelich conducted a comparative analysis between the complaint sample and the retention sample. The retention sample had the same use by date and the same batch number as the complaint sample provided by the first respondent.
- [37] Professor Anelich prepared a written report on her findings which, in summary, were that the complaint sample was high in its total plate count and in its yeast and mould counts compared to the retention sample. According to Professor Anelich, this merely indicated that the complaint sample had been handled by the first respondent and had been exposed to the environment, whereas the retention sample had been sealed and not handled. In all other respects, the process hygiene criteria counts were normal in respect of both samples.
- [38] Professor Anelich stated the following in her written report:

‘Importantly, both the complaint and retention samples show an absence of Salmonella, L. monocytogenes and Staphylococcus aureus. The latter organism must reach high levels (in the region of 100 000 cfu/g[3]) before it produces a toxin, which when ingested, causes foodborne disease. This clearly did not occur in this case.’

The evidence of Mr B[...] S[...]

- [39] Despite the confusing narrative advanced by the first respondent, it is unfortunately true that a young girl with whom he had an association did, in fact, pass away. The deceased child was, however, not his child. And she did not die from eating contaminated polony manufactured by the applicant.
- [40] The young girl who died was named M[...] Z[...] M[...] (M[...]) who was also known as ‘S[...]’. She was born on 29 July 2022, and she passed away on 31 October 2023. Her official death certificate, which is before the court, records her cause of death to be due to ‘natural causes’. She was the biological daughter of Mr B[...] S[...] (Mr S[...]) and Ms N[...] M[...] (Ms M[...]). After she was conceived, but prior to her birth, M[...]’s parents’ relationship failed, and they separated. She was born after that separation. Having terminated her relationship with Mr S[...], Ms M[...] commenced a relationship with the first respondent.
- [41] Mr S[...] became aware that M[...] was not well during August 2023 and was advised by Ms M[...] that this was because M[...] was apparently experiencing teething difficulties. Her condition appeared to improve initially but it then deteriorated, and she, sadly, passed away.
- [42] Mr S[...] came to learn that allegations were being made by both respondents that M[...] had died because of consuming contaminated polony, a fact that he knew not to be true. Mr S[...]’s sister, Ms N[...] M[...], informed him that the second respondent, which is a well-known national political party, was using M[...]’s death as a campaign tool for the upcoming

national elections and she was extremely unhappy about this. She therefore sent an email, in the name of her brother, to the applicant advising it to contact him. In that email, she advised the applicant that it was being 'scammed'.

[43] Mr S[...] subsequently met with a representative of the applicant and told his story. He then deposed to an affidavit, commissioned on 7 November 2023, confirming the details of M[...]’s untimely death and his affidavit was filed with this court by the applicant’s attorneys.

[44] Once the affidavit of Mr S[...] was received by the applicant, its attorneys served a copy on the attorneys then acting for both the respondents. Reference was made previously to the fact that the attorneys acting for both respondents suddenly withdrew from representing the first respondent. The reason for this might have been the delivery to him of Mr S[...]’s affidavit. On 22

November 2023, the attorneys stopped acting for the first respondent.

The retraction

[45] A copy of Mr S[...]’s affidavit was also provided to the Sunday Tribune by the applicant’s attorneys. They requested a retraction and apology from the newspaper. This was readily acceded to, and the newspaper published an apology to the applicant on Sunday, 12 November 2023, in which it apologised for any harm its story may have caused. It specifically recorded that it retracted its story.

Analysis

[46] In seeking confirmation of the rule nisi, the applicant argues that the narrative advanced by the first respondent, and embraced unquestioningly by the second respondent,

was false. It submits that there is no evidence that M[...] passed away from eating contaminated polony. It further submits that the first respondent’s story was not consistent and could not withstand even the slightest strain of scrutiny. The scientific tests performed on the polony established that it could not have caused the death of M[...] and the death certificate supplied by Mr S[...] established that proposition beyond doubt. Other than M[...], no other child associated with the first respondent died. In my view, these submissions are unquestionably true.

[47] The second respondent has disclosed that it made a ‘with prejudice offer’ to have the rule confirmed, with no order as to costs against it, to which offer the applicant did not acquiesce. Reversing its stance, the second respondent now argues for

the discharge of the rule with costs, and, in argument, made four principal submissions in justification of that order:

- (a) The applicant had not established that it was entitled to a final interdict;
- (b) The relief granted provisionally against it had since become moot;

- (c) It had raised a valid defence to the allegations that it had defamed the applicant; and
- (d) The applicant was impermissibly seeking to interdict it from making defamatory allegations about it in the future.

Each of these allegations must be carefully considered.

[48] As regards the first allegation, the applicant is a juristic entity and is, just like a natural person, entitled to protect its reputation and is not required to suffer false and harmful allegations made about it simply because it is not a warm bodied person. This was affirmed by the Constitutional Court in *Reddell and others v Mineral Sands Resources (Pty) Ltd and others*[4] where the court remarked that:

‘... a trading corporation has a right at common law to its good name and reputation, and that right is enforceable through a common-law claim for defamation.’

[49] The requisites for a final interdict in our law have been certain for over a century.[5] If an applicant is able to establish the three basic requirements for a final interdict, then the court hearing the application has very little scope for refusing that relief because there is no general discretion to refuse to grant interdictory relief.[6]

[50] The second respondent asserts that the applicant has failed to establish that the second respondent is about to, or will continue to, publish defamatory material about it and has not established that it will suffer irreparable harm if a final interdict is not granted. In making that argument, the second respondent states that:

‘The EFF uses its social media accounts to advance its political mandate. Furthermore, it disseminates information of public importance such as the subject matter of this application. It therefore claims that the social media posts containing the impugned statements are reasonable publication and in the public interest.’

[51] What the second respondent regards its political mandate to be is not disclosed or discussed. It appears to me that it is possibly a rather elastic concept that could be invoked when it suits the second respondent to do so. Moreover, the second respondent is entirely unrepentant about its conduct. As will become apparent, it continues to argue that it was justified in doing what it did.

[52] In the Australian case of *Lange v Australian Broadcasting Corporation*[7] the following was held:

‘Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue.’

- [53] The second respondent has claimed that it reasonably believed what it was told by the first respondent. Why his story was believed is not addressed at all. Even the most cursory examination of the first respondent's version would have revealed inexplicable contradictions that would have required extreme caution to be exercised. The second respondent has not stated at all that it interrogated the first respondent's story and sought to satisfy itself of its veracity.
- [54] The applicant has a clear right to prevent falsehoods about the quality of its products from taking root in the community and from being published. It has already suffered an injury in the false allegations made by the second respondent linking it to the death of M[...] and, it seems to me, it has no other satisfactory remedy at its disposal to protect itself. In my view, the applicant has established the requirements for a final interdict and the second respondent's conduct was not reasonable in the circumstances.
- [55] The second point argued by the second respondent is that the relief granted provisionally against it has since become moot. This arises, so the argument goes, from the fact that it alleges that it complied with the provisional order granted by Bedderson J on 9 November 2023. That may be so. But it required the bringing of the application before the second respondent was constrained to act as it now claims to have acted. In truth, the applicant's attorneys wrote to the second respondent's attorneys on 2 November 2023 before bringing this application and sought certain undertakings from the second respondent that would have averted the bringing of this application. The undertakings sought were not provided.
- [56] Generally, 'a matter is moot when a court's judgment will have no practical effect on the parties'.^[8] This will classically be the case where there is no longer an active controversy in existence between the parties.
- [57] For the second respondent to claim that the issue is moot it must necessarily concede that its own conduct was unlawful, has permanently ceased, and will not be repeated in the future. It does not do so. The fact that one party may obey a court order granted against it does not, in my view, make an issue moot. That is even less so where the party obeys the court order but continues to argue, as in this matter, that it was justified in doing what it did.
- [58] The second respondent contended in argument that it was entitled to disseminate the information that it did. The deponent to the second respondent's answering affidavit acknowledged that he was not a medical expert but asserted that he did a Google search relative to the 'acceptable plate count' arising out of the laboratory tests conducted on the polony at the instance of the applicant. He pointed out that the laboratory test results identified high plate and yeast counts. He stated that he did not know what that meant but concluded that the applicant's polony was not suitable for consumption. Thus:

'I submit that the death of M[...] following her consuming the Applicant's product cannot be remotely removed from the

conclusion

reached by Mr Hadebe [the first respondent] and subsequently conveyed to me prompting the EFF to make the statements on social media.’

[59] That extract reveals the continued error in the second respondent’s approach. There was no evidence whatsoever that M[...] consumed any polony. The matter is consequently not moot. The issue between the parties has not been conceded and is accordingly alive. Orders of court are to be complied with. Grudging compliance does not create mootness.

[60] The second respondent raises as a third point the allegation that it has a bona fide defence to the applicant’s claim. To defend itself against such a claim, a respondent is entitled to, and must, present facts that establish a defence recognised in law. The essential allegations of defamation

are:

- (a) the wrongful and
- (b) intentional
- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff.[9]

[61] In *Le Roux and others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae),[10] the Constitutional Court expressed itself as follows concerning what each of the parties is required to establish:

‘All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff

has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the

exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence.’

(footnotes omitted)

[62] Ms Qono, who appears for the second respondent, submitted in her heads of argument that the second respondent had, indeed, put up a defence that was good in law. Thus, it was submitted that the following proposition from *Heilbron v Blignault*[11] applied to the position of the second respondent:

‘... if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence...’[12]

[63] While the wording of this extract is clear and uncontroversial, its relevance to the facts of this matter is less so. The second defendant has not stated at any juncture in its answering affidavit that what it published was both true and that it was in the interests of the general public that it be disclosed. The second respondent could not do so, because it could not establish the

first part of that proposition: it could not establish that what it published was the truth. To the contrary, it was not the truth, as M[...] did not die from eating contaminated polony.

[64] In stating what it did, the second respondent took no steps to satisfy itself that the allegations made by the first respondent were true and failed to closely question the obvious inconsistencies in the first respondent’s changing versions of what had allegedly occurred. It is to the shame of the second respondent that it considered it acceptable to seize upon the death of a young child and assimilate it into its election campaign to make political capital out of it.

[65] The statements made by the second respondent were unequivocally untrue. It hardly needs to be stated that it cannot be to the benefit of the public to permit untrue narratives to be published masquerading as the truth. As was stated in the Canadian case of *Hill v Church of Scientology of Toronto*: [13]

‘False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to the healthy participation in the affairs of the community. Indeed they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society . . . False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre.’

[66] In my view, the granting of a final interdict will be justified where a respondent has palpably demonstrated that it has no defence to the allegations made about its conduct. No defence has been established by the second respondent.

[67] The final point taken by the second respondent is that the applicant is unlawfully attempting to muzzle it from making defamatory statements about it in the future. Section 16 of the Constitution, [14] identifies the right of citizens to freely receive or impart information or ideas. It is a right that is jealously protected. This right to freedom of expression is often met with a counter argument that the subject of such expression has the right to protect his or her dignity [15] and reputation, which are no less important rights. Indeed, there is an argument that human dignity is ‘perhaps the pre-eminent value’.[16] There is thus an uneasy tension between these two rights and a balance must accordingly be struck between them.

[68] A court should accordingly be cautious to grant a final interdict against a party preventing future publication, even if potentially defamatory, lest the right enshrined

in s 16 of the Constitution be unnecessarily assailed. The Supreme Court of Appeal indicated in *Herbal Zone (Pty) Ltd and others v Infitech Technologies (Pty) Ltd and others*[17] that an interdict to prevent a party from making defamatory statements in the future is 'only infrequently granted' because:

'... it impinges upon that party's constitutionally protected right to freedom of speech.' However, where the facts of a matter call for the granting of a final interdict, for example, where no true defence is raised, a court should not hesitate to do so.[18]

[69] The relief sought by the applicant, however, is specific and not wide ranging in its reach. The applicant does not seek to generally prohibit the second respondent from making defamatory statements about it or its products in the future. The relief claimed by the applicant is more specific, nuanced and limited. It is designed only to prohibit the second respondent from making statements on social media platforms about M[...] having died from consuming the applicant's product. The second defendant was accordingly only required to remove posts from those social networking platforms that it used that related to that specific allegation.

[70] The second respondent is thus incorrect in asserting, as it does, that the applicant is attempting to prevent it from generally making defamatory statements about the applicant in the future. Such a prohibition may be objectionable given that the wording of the future statements sought to be interdicted cannot be known now and thus interdicting them may legitimately interfere with

the right to freedom of expression. But that is not what the notice of motion seeks to achieve. The point is accordingly misconceived.

[71] That the applicant seeks the form of relief that it does is a reflection of the fact that we live in a digital age in which there is easy and ready access to the internet. The internet is regarded widely as being the main source of information-sharing and knowledge production presently in existence. As was stated by Chetty J in *RM v RB*: [19]

'In today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet. At the same time the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to the reputational integrity of individuals.'

Conclusion

[72] I am satisfied that the applicant is entitled to the confirmation of the rule granted on 9 November 2023, save in one respect. The relief granted by Bedderson J at paragraph 3.1.2 of the order has not been established. There was no evidence to show that there was any

physical threat made to the persons associated with the applicant or the property of the applicant. It is so that when the second respondent's leadership cohort descended upon the store on 2 November 2023, there had been a degree of civil unrest caused by the second respondent's officials' behaviour and the South African Police Services were summoned to restore order. That, however, did not involve the applicant and it was not their premises or employees that were at risk. There has been no other evidence that any threat was made to justify the granting of the relief set forth in paragraph 3.1.2 of the order and I accordingly intend discharging that paragraph.

Costs

[73] As regards the issue of costs, the second respondent acted recklessly and made false allegations about the applicant, which were intended to be read by a large number of people. In *Nkosi v Mazwai*, [20] the court observed that:

'Any person who has [a] substantial social media following and who is able, as a consequence thereof to reach out to and influence, a large community of people, as the respondent is able to do, is required to ensure that they exercise temperance and responsibility in the dissemination of public posts. More importantly, the respondent ought to ensure that her public statements are based and founded in truth and in fact.'

Moorcroft AJ accurately observed in *Nisamoseki Trading Enterprise (Pty) Ltd t/a Nisa Willckx Interiors v Sithole* [21] that an ordinary person armed with a cellular telephone and with access to the internet can reach more people today than a king with his armies two thousand years ago.

[74] There was no attempt on the second respondent's part to act with any temperance and there was no attempt to ascertain the truth of what it was posting. The potential for harm was thus maximised. The second respondent still maintains that it was justified in posting the messages and videos that it did. In its first message posted on 1 November 2023, the second respondent stated that the applicant and Shoprite would 'pay for their sins'. In its post on 2 November 2023, the second respondent stated that those responsible

would be 'held accountable for their actions'. The sinner was, in fact, neither the applicant nor Shoprite, but the second respondent. The second respondent will accordingly understand that it must now also be held accountable for its actions. In such circumstances, the applicant is entitled to its costs on a punitive scale.

Order

[75] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the applicant: Mr D Ramdhani SC Instructed by: McGregor Erasmus Attorneys Incorporated Bond Square First Floor 12 Browns Road The Point Durban Counsel for the first respondent: No appearance Counsel for the second respondent: Ms Z Qono Instructed by: Ian Levitt Attorneys The Leonardo Office Level 12 75 Maude Street Sandown Sandton

- [1] For an analysis of the nature of these ubiquitous social networking platforms see *Heroldt v Wills* [2013] ZAGPJHC 1; 2013 (2) SA 530 (GSJ); 2013 (5) BCLR 554 (GSJ); [2013] 2 All SA 218 (GSJ) paras 11-23.
- [2] A photograph of the offending polony that forms part of the papers reveals its expiry date as being January 2024.
- [3] 'Cfu/g' is a reference to 'colony-forming units', which is 'a small number of microbial cells that are able to multiply via binary fission to form a colony': <https://www.collinsdictionary.com/dictionary/english/colony-forming-unit>.
- [3] 'Cfu/g' is a reference to 'colony-forming units', which is 'a small number of microbial cells that are able to multiply via binary fission to form a colony':
<https://www.collinsdictionary.com/dictionary/english/colony-forming-unit>.
- [4] *Reddell and others v Mineral Sands Resources (Pty) Ltd and others* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) para 87.
- [5] *Setlogelo v Setlogelo* 1914 AD 221: The requisites, all of which must be present, are (a) a clear right on the part of the applicant; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy; see also *Liberty Group Ltd and others v Mall Space Management CC* [2019] ZASCA 142; 2020 (1) SA 30 (SCA) para 22.
- [6] *Hotz and others v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA); [2016] 4 All SA 723 (SCA) para 29; *Lester v Ndlambe Municipality and another* [2013] ZASCA 95; 2015 (6) SA 283 (SCA) paras 23-24.
- [7] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 574, quoted, inter alia, with approval in *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1211F-G ('Bogoshi').
- [8] *Solidariteit Helpende Hand NPC and others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZASCA 35 para 12.
- [9] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) para 18.

- [10] Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 85.
- [11] Heilbron v Blignault 1931 WLD 167.
- [12] Ibid at 169.
- [13] Hill v Church of Scientology of Toronto (1995) 126 DLR (4th) 129 (SCC) at 159-160, quoted, inter alia, with approval in Bogoshi at 1209F-G.
- [14] Section 16(1) of the Constitution reads as follows: ‘Everyone has the right to freedom of expression, which includes - (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.’
- [14] Section 16(1) of the Constitution reads as follows:
- ‘Everyone has the right to freedom of expression, which includes -
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.’
- [15] Which is protected by section 10 of the Constitution.
- [16] I Currie and J de Waal The Bill of Rights Handbook 6 ed (2013) at 250. See also Christian Education South Africa v Minister of Education [2000] ZACC 11; 2000 (4) SA 757 (CC) para 15, where it is referred to as ‘the central constitutional value’.
- [17] Herbal Zone (Pty) Ltd and others v Infitech Technologies (Pty) Ltd and others [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) para 36.
- [18] NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd [2021] ZASCA 136; [2021] 4 All SA 652 (SCA) paras 29-30.
- [19] RM v RB 2015
- (1) SA 270 (KZP) para 28.
- [20] Nkosi v Mazwai [2022] ZAGPJHC 129 para 9.
- [21] Nisamoseki Trading Enterprise (Pty) Ltd t/a Nisa Willckx Interiors v Sithole [2023] ZAGPJHC 1217 para 11.

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