

SOUTH AFRICA / JUDGMENT

Godongwana v Mdwaba (2023-125276)

[2024] ZAGPJHC 46 (26 January 2024)

[2024] ZAGPJHC 46**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

2023-125276

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2023-125276

1. Reportable: No
2. Of interest to other judges: No
3. Revised

26 January 2024

In the matter between

ENOCH GODONGWANA Applicant

and

MTHUNZI PERRY-MASON MDWABA Respondent

JUDGMENT

DOSIO J:

Introduction

- [1] This is an urgent application in terms of Uniform Rule 6(12) comprising of a declaratory order and an interdict against the respondent and his company.

[2] The declarator is to the effect that the statements made about the applicant in the media, that he was party to the solicitation of a bribe from the respondent, are defamatory and false.

[3] The applicant seeks the additional relief, namely, that:

‘3. It is declared that the respondent’s publication of the statement is unlawful;

4. The respondent is ordered to retract the statement within 24 hours from all media platforms including by deleting any statement made on any social media platform relating to this matter;

5. The respondent is ordered, within 24 hours, to issue a statement as follows:

On 7th November 2023, I did a television interview with the broadcaster of Newzroom Afrika, Mr Xoli Mngabi. I made false, malicious and defamatory statements against Minister of Finance, Mr Enoch Gondongwana, which suggest that he was involved in the solicitation of a bribe in the amount of R500 000 000.00 from me. The interview was followed by a number of interviews on different media platforms wherein I made similar allegations against Mr Enoch Gondongwana. I therefore unconditionally withdraw these allegations and apologise for making it as it is entirely false. I had no valid basis whatsoever for asserting that Mr Enoch Gondongwane tried to solicit R500 000 000.00 bribe from me.

6. The respondent is interdicted from doing any interview that says or implies that the applicant tried to solicit a bribe in the amount of R500 000 000.00.

7. The respondent is ordered to pay damages of R1 000 000 to the applicant.

8. In the alternative to paragraph 7 above:

8.1. It is declared that the respondent is liable to pay damages to the applicant.

8.2. The quantification of those damages is referred to oral evidence.

9. The respondent is ordered to pay the applicant’s costs on an attorney and client scale.

10. The applicant is granted further or alternative relief.’

[4] The matter is opposed. The respondent denies the allegations of defamation.

[5] The respondent raised two points in limine, namely that the matter lacked urgency and that the application fails to satisfy the requirements for a final interdict.

[6] Having found that this matter is urgent I proceeded to hear the parties.

[7] Accordingly, the first point in limine is dismissed.

Background

- [8] The applicant's complaint stems from various interviews where the respondent allegedly defamed him.
- [9] On 18 December 2022, Thuja, which is a company where the respondent is director, concluded a contract with the Unemployment Insurance Fund ('UIF').
- [10] In terms of the contract, the UIF was supposed to make payment of the first tranches of monies to Thuja by 31 January 2023. It appears these payments never occurred and the respondent believes that Thuja's efforts to implement the contract are being undermined by the Ministry represented by Minister Thulas Nxesi.
- [11] There is a contractual dispute between the Minister of Labour and the respondent regarding the legality of a contract which is set down for hearing on 25 January 2024 in the High Court.
- [12] The applicant contends that the respondent feels that the contractual dispute with the Minister of Labour involves the applicant as well and that this has fuelled the spurious and defamatory allegations.
- [13] It appears that on 19 May 2023 at a restaurant in Johannesburg, called the Codfather, a certain 'T' and 'J' informed the respondent that a bribe was required from him. 'T' is a businessman and close friend of the respondent.
- [14] On 7 November 2023, the respondent did a television show with Xoli Mngabi of Newzroom Afrika where the respondent allegedly made false and malicious statements against the applicant, in that it was alleged that the applicant was one of the Ministers, who through an unnamed intermediary, tried to solicit a bribe in the amount of R500 000 000.00 from the respondent. The respondent alleged that the applicant was conniving to siphon money in the UIF, referred to as a 'gate pass fee', which is 10% of the contract amount.
- [15] The respondent is alleged to have repeated these false and defamatory statements during an interview with Bongani Mbingwa of 702 Radio, on Sunday World podcast, as well as on ENCA.
- [16] During the Newzroom Afrika interview, although the applicant's name was not mentioned, the respondent did mention that the other Minister that is involved in the alleged bribery scandal is the Minister who is 'involved with a very big player in our country called Treasury'. The applicant understood this to mean him. This has resulted in various media reports where the reference is also understood to mean the applicant. These media reports appeared

in the Sowetan on 7 November 2023, South African Labour News dated 27 November 2023, Eye Witness News and IOL News dated 9 November 2023.

- [17] On 8 November 2023 the applicant's attorney sent a letter of demand to the respondent's email, followed by a second e-mail dated 21 November 2023 explaining that the statement was false and defamatory. The applicant demanded that the respondent publicly retract the allegations within seven days and tender an apology and that failure to do this would result in the institution of legal proceedings against him.

Submissions of the applicant

- [18] The applicant contends that if he had solicited a bribe, which is a criminal offence, then there was a duty to report the conduct to the relevant law enforcement authorities, yet to date no report has been made.
- [19] It was argued that the statements impugn the applicant's dignity, suggesting that he is corrupt and not trustworthy. In addition, such allegations affect the public confidence in the office that he holds.
- [20] Due to no charges having been laid, the applicant contends that it is clear that the respondent has no evidence to support the allegations which have been falsely and irresponsibly made.
- [21] It was contended that the fact that the respondent relies on an unnamed source is not a defence to a claim of defamation.
- [22] It was further argued that the defences of truth and public benefit, fair comment and animus iniurandi are not available to the respondent.

Submissions of the respondent

- [23] As regards the interdict, it was argued that the applicant seeks to interdict the respondent from events that have already taken place or are unknown, as a result an interdict cannot be granted, as the application is speculative based on the applicant's unfounded anxieties. It was submitted that there is no thread of evidence to suggest that the continuation of damage will occur or that the family of the applicant are being threatened. It was stressed that due to the fact that the respondent was 'told', it was not unlawful to merely repeat the allegations.
- [24] It was argued that if the applicant believes he has been defamed he must seek recourse from the intermediaries and not the respondent.
- [25] It was further argued that the applicant never approached the respondent to ask him for the names of the people who gave the respondent this information. Instead the applicant has run to Court to silence a whistle blower. He should rather have called in the whistle blower in order to expose the real defamers and not gag the whistle blower.
- [26] It was argued that the respondent's statements in the interviews were not mala fides and that the respondent had no intention to defame or injure anyone and that he engaged in the interviews in good faith.

[27] It was argued that the respondent is of a reasonable belief that the information shared with him on 19 May 2023 and the subsequent meetings, was true and correct and that those two individuals, namely ‘T’ and ‘J’ represented the applicant as well.

Evaluation

[28] The applicant has a long history of contributing to the society, with an appointment on 5 August 2021 as Minister of Finance.

[29] The relevant portion of the interview dated 7 November 2023 with Newzroom Afrika, which the applicant contends falsely alleges that he is one of the three Ministers who tried to solicit a bribe from the respondent is the following:

‘Mr MDWABA: He does. Then I was told that the other one is the Minister who is involved with a very big player in our country called Treasury. This has been okayed with him. This conversation was okayed with him. It needed to be okayed with him because Nxesi had always said he is going to suspend or he is going to cancel and you know he’s going to send it to Treasury to investigate, which by the way in itself is nonsense because Treasury has no say in this matter. This is not law. This Section 5D of the Unemployment Insurance Fund.

.....

Mr XOLI MNGABI: You are saying that the Minister

MR MDWABA: Ja

MR XOLI MNGABI: who runs Treasury

MR MDWABA: Yes

MR XOLI MNGABI: is party to this.

MR MDWABA: Okayed, I was told, I was told.

MR XOLI MNGABI: Your time is really running out. Have you gone to a police station.

MR MDWABA: No

MR XOLI MNGABI: to either lay

MR XOLI MNGABI: a charge

.....’ [my emphasis]

[30] The relevant portion of the interview with Bongani Bingwa of 702 Radio is ‘the following:

BONGANI: So Lets talk about the bribe. You say you were approached through intermediaries. So let’s talk about the bribe. You say you were approached through intermediaries. Mm-Hmm. What was, what was the deal? What was said to you?

MR MDWABA: Well, I think it actually started without an intention. Well, certainly with the people I met, I don't think it started like that. Their principles are saying, take care of this, pay 10%. If I take out.

BONGANI: That's a bribe, right? It is

MR MR MDWABA: A bribe. They say, they call it gateway fees.'

[31] The applicant is adamant that he never solicited a bribe from the respondent and never gave his 'ok' to any illegal transaction relating to the contract between the respondent and the Department of Labour. The applicant also denies ever having sent an intermediary to speak to the respondent on his behalf. In fact, the applicant confirms that he has nothing to do with the dispute between the respondent and the Department of Labour.

[32] It is unfortunate that the respondent does not trust the police or that he is unwilling to provide the media with the names of the intermediaries. He should have verified the truth thereof and laid a formal charge. The respondent cannot expect the public to believe him and continue spreading these allegations without supporting proof.

[33] The respondent argued that the case of *Economic Freedom Fighters and Others v Manuel*[1] ('EFF v Manuel'), is distinguishable from the matter in *casu*, in that the impugned statement mentioning that Mr Trevor Manuel was corrupt, was made directly by the EFF. It was contended that the statements in the matter in *casu* were not made by the respondent, in that he was merely conveying and repeating information given to him by the intermediaries.

[34] In the matter of *Tsedu v Lekota*,[2] the Supreme Court of Appeal stated that:

'The article purported to be a report of what had been said in a book that had been published some three years earlier. In the course of a radio interview about the article shortly after it had appeared, Tsedu remarked to the interviewer that if the respondents 'have problems with [what was said in the book] they should take the author of the book to court and not CityPress'. It is evident from that remark that he was under the impression that a newspaper may publish defamatory statements with impunity if they have been originated by someone else. Well, journalists who keep Kelsey Stuart's *Newspaperman's Guide* to the

Law[3] by their side know that that is not so from the following passage:

'[a] person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it but so are the editor, printer, publisher and proprietor.

So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on only as a rumour, without endorsing it.'[4] [my emphasis]

[35] On the basis of the case of *Tsedu v Lekota*,^[5] the respondent is liable for publishing and repeating the rumour that he heard at the restaurant called Codfather.

[36] This Court finds that the matter in casu and the matter of *EFF v Manuel*^[6] is similar for the following reasons:

- (a) Mr Manuel and the applicant in the matter in casu regarded the statements as defamatory and untrue. Both requested a retraction of the statements, which demand was rejected.
- (b) In both cases a declaratory order was sought that the content of the statements were false and defamatory.
- (c) Both requested the statements to be removed from the public media.
- (d) Both requested the publication of an apology, together with an interdict against future and further publications.
- (e) In both instances the defamation allegation was based on allegations of dishonesty.
- (f) In both instances there was an urgent public interest in deciding whether the applicant, as in this matter, was engaged in corruption.
- (g) In both cases the injured parties sought interdictory relief in final terms.

Defamation

[37] The requirements for defamation are trite. It requires a twofold enquiry.^[7] The first is to ask whether the meaning was defamatory and the second is to decide whether the meaning so attributed to the words 'is likely to injure the good esteem in which the plaintiff was held by the reasonable or average person to whom the statement was published.' The meaning of the statement is determined objectively by the legal construct of the reasonable reader and is not a matter on which evidence may be led.^[8]

[38] The applicant has succeeded in identifying six manifestations of the defamatory character of the statement, these are:

- (a) That the applicant is involved with other Ministers to unlawfully and corruptly solicit a bribe of R500 000 000.00 from the respondent;
- (b) That he gave an 'ok' or permission to the solicitation of the bribe;
- (c) That he wishes to use his position as a Minister to solicit a bribe which will be used to fund the ANC;
- (d) That the Minister lacks integrity;
- (e) That the Minister is not trustworthy; and
- (f) That he is not upholding his oath of office, which requires him to obey the law.

- [39] It is clear to this Court that there can be no doubt that the effect of these statements would in the eyes of the reasonable reader diminish the esteem in which any person about whom they were made was held by others in the community.[9]
- [40] Once the statement has been shown to be defamatory, it is presumed that that the statement was published wrongfully and with the intention to injure.[10]
- [41] It accordingly falls upon the respondent to produce facts and evidence which would exclude wrongfulness and intention to injure.
- [42] The respondent contends that he merely disclosed what was conveyed to him and that he never of his own volition, accused the applicant of corruption. This Court disagrees.
- [43] From the exchange of words during the Newzroom Afrika interview the suggestion of corruption and the involvement of the applicant is clear.
- [44] The contention that there is no thread of evidence to suggest the statements are ongoing is rejected by this Court as there are five instances of repetition of these statements on YouTube.
- [45] The respondent's contention that the applicant seeks to interdict him from events that have already taken place is equally misplaced, in that in terms of prayer four of the notice of motion, no retraction has taken place as yet. In addition, prayer five and six has also not happened and is a future event. It is clear that the declaratory order pertains to past conduct and the interdict pertains to future conduct.
- [46] In the answering affidavit the respondent does not specifically address any of the legally recognisable grounds which ordinarily negate wrongfulness in the delict of defamation. There is no mention of any defences in the respondent's heads of argument either.
- [47] The defences in law available to the respondent are truth and public benefit, absence of animus iniuriandi and fair comment.

Defences

1. Truth and public benefit

- [48] A defence of truth and public benefit negates unlawfulness. In the matter of EFF v Manuel, [11] the Supreme Court of Appeal held that:

‘A defendant relying on truth and public interest must plead and prove that the statement is substantially true and was published in the public interest.’

- [49] During argument the respondent's counsel added some substance to the defence of ‘truth and public interest’ by arguing that the respondent believed the information given to him was the truth and of public interest.

- [50] The respondent claims he was told by two unnamed sources, namely ‘T’ and ‘J’. It is the unnamed ‘J’ who is an ‘intelligence officer’ and who spoke to the respondent.
- [51] The respondent was evasive as to the nature and content of the disclosures, or of its source and as to the steps he took to satisfy himself as to the reliability of the source and the truth of the allegations. The only explanation given by the respondent is that he went to a dinner at Codfather and certain things were said to him. The respondent then went ahead to publish what he was told, without any further questioning of what was said to him.
- [52] On the respondent’s version he does not know if the statement is true or not as he was ‘told’. If he was told and there are no supporting affidavits, the respondent has no basis in truth to make the statements. The respondent can also have no ‘reasonable’ belief that the statement is true when it is based on hearsay.
- [53] The respondent’s reliance on his subjective ‘belief’ in the truthfulness of what he was allegedly told is not a defence of truth. A similar defence was explicitly rejected in the matter of *EFF v Manuel*, [12] where the Supreme Court of Appeal held that:

‘The applicants made no attempt to establish that the defamatory statements about Mr Manuel were true. The furthest they went was to claim that they believed to be true what they had been told in a WhatsApp message by a whistle-blower,

whose identity they kept secret. There was no attempt to refute Mr Manuel’s statements that he was not related to Mr Kieswetter and that they were neither business associates or companions. As those factual propositions were the foundation for the entire statement and its attack on Mr Manuel the failure to establish that they were substantially true was fatal to the defence. It was correctly rejected by the high court and not surprisingly it was not pursued in argument.’ [13] [my emphasis]

- [54] The applicant is adamant that the statements are false as he maintains that he never gave any instruction to any intermediary, nor participated in any bribery scandal.
- [55] The failure to establish what ‘T’ and ‘J’ told him was substantially true, is fatal to this defence. The public cannot be expected to believe these statements where there is no proof to substantiate the allegations. No serious business person could have taken what happened at the restaurant Codfather during the night of 19 May 2023 as ‘evidence’.

2. Fair Comment

- [56] In order for a defence of fair comment to succeed, it has four elements.

These are:

- (a) There must be a comment and not a statement of fact;
- (b) it must be a fair and honestly held opinion;

(c) the facts on which it is based must be true, clearly stated and matters of public knowledge; and

(d) the comment must relate to a matter of public interest.[14]

[57] If the comment is made maliciously, with an improper motive, it is wrongful and the defence is not available.[15]

[58] The respondent's counsel stated that the fair comment was supplied by the intermediaries. It was argued that the only way the veracity of the statements can be assessed is by leading of oral evidence.

[59] This Court disagrees. There is no need to refer this aspect to oral evidence.

This Court can decide it on the papers.

[60] An applicant who seeks final relief on notice of motion must in the event of conflict, accept the version set up by the opponent unless the latter's allegations are, in the opinion of the Court, not such to raise a real, genuine or bona fide dispute of fact, or are so far-fetched or clearly are so untenable that the court is justified in rejecting them merely on the papers.[16]

[61] The high-water mark of the respondent's case is hearsay, scant and far-fetched evidence. It is strange that the respondent considers Mr 'T' to be a key witness, yet fails to attach an affidavit deposed by Mr 'T'. It is clear the respondent therefore is lowering the standing of the applicant without having to account for the veracity of his claims.

[62] A real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the respondents seriously and unambiguously addressed the fact disputed. A bare denial, such as in this application, that the respondent did not intend to defame the applicant, is not sufficient.

[63] In the absence of supporting affidavits and a failure to lay a criminal charge against the applicant, the statement remains untrue. There is accordingly no genuine dispute of fact.

[64] Where defamation is established and the defences to a claim for an interdict are shown on the papers to be without substance, the grant of a final interdict is permissible.[17]

[65] The respondent made no case of fair comment in the answering affidavit. Furthermore, this defence is not available as the statement is not a comment, but fact.

[66] The respondent spread these statements with reckless indifference as to whether they were actually true.

[67] Due to the statements remaining untrue, the actions of the respondent in spreading them is wrongful and the defence of fair comment is not applicable.

3. Animus iniurandi

[68] It is trite that delictual liability depends in general terms on fault which, in the case of defamation and all other iniuriae, is fault of a particular nature, namely animus iniurandi. [18]

[69] In the matter of EFF v Manuel,[19] the Supreme Court of Appeal took several factors into consideration to establish whether there was an intent to injure. These factors are as follows:

- (a) Was there a failure to verify the information before publication;
- (b) Was there a continuation of the publication after the letter of demand;
- (c) Was the matter opposed to the bitter end.

[70] The Supreme Court of Appeal in the matter of EFF v Manuel[20] held that:

‘Viewing these facts from the perspective of a contention that the statement was published without the animus iniuriandi they fell woefully short of discharging the onus on that issue. It is clear that the EFF published the statement accusing Mr Manuel of nepotism and corruption on the basis of statements made by its source that it made no attempt to check. Even if it were given the same benefit that the conventional media are given in regard to non-disclosure of their sources, that would not assist its case. The allegations it made were clearly defamatory and concerned a public figure given the responsibility of interviewing people and advising the President on the appointment of the Commissioner of SARS. That is a most serious allegation. To do so on the basis of a message of this type without any endeavour to confirm the truth of the allegations is inconsistent with the absence of an intention to injure. It demonstrates a willingness to wound irrespective of the truth of the allegations.’[21] [my emphasis]

[71] There is no evidence of any steps taken by the respondent in the matter in casu to verify the information before publishing it. He took the information from ‘J’, whom he met for the first time on 19 May 2023 and published it.

[72] The respondent kept this information for five months and decided to publish it months later.

[73] On 8 November 2023 the correct facts were put before the respondent, but he did not relent and continued spreading these claims. Even during the week in which he appeared in the urgent Court, the respondent refrained from giving an undertaking not to spread the statements and has fought this matter to the bitter end.

[74] In the matter of EFF v Manuel[22] the Supreme Court of Appeal stated that:

‘The position was made worse in regard to the continuing publication of the statement after 27 March 2019 when Mr Manuel had said that the facts were false and demanded a retraction and its removal.’[23]

[75] The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. The respondent has more than 12000 followers on Twitter and he wields considerable public influence, which in the absence of substantiated facts and untruthful allegations can and has caused serious damage to the dignity of the applicant.

[76] The relentless spreading of these statements shows an intent to injure.

[77] Dignity is not only a value fundamental to the Constitution, but it is also a justiciable and enforceable right that must be respected and protected.

[78] The respondent has argued that to stop repeating the statements limits his Constitutional right in terms of s16 of the Constitution to his freedom of speech. The fact of the matter is, that no one has the right to defame. Until such stage as a criminal case is opened and should sufficient facts bring about a conviction, the applicant is entitled to his Constitutional right in terms of s10 of the Constitution, to have his dignity respected and protected.

[79] The requirements of a final interdict are set-out in the seminal cases of *Setlogelo v Setlogelo*, [24] as cited with approval in the matter of *Pilane and Another v Pilane and Others*. [25] An applicant seeking such final relief is required to satisfy the Court of the existence of the following requirements, namely:

- (a) A clear right;
- (b) There must be an injury actually committed or reasonably apprehended;
- (c) There must not be similar protection available to the applicant by any ordinary means remedy.

Clear right

[80] This Court finds there is ongoing harm. The statements are being repeated and the respondent has no intention to retract them.

[81] The applicant has a clear right to protect his dignity and reputation. It is clear that the spurious allegations not only affect the applicant but also the office that he holds.

Injury actually committed

[82] The applicant and his family are being abused and accused of corruption by the public. There is evidence of such abuse from social media. The applicant does not have the names of ‘T’ and ‘J’ and neither has the respondent offered to give the applicant these names.

[83] The applicant has also received threats from certain sections of the public, arising directly from the allegations of corruption made by the respondent. The Department of Finance, as the nerve-centre of the economy should be free from suspicions of corruption. It is furthermore in the public interest that a person holding the office of Minister of Finance should be free from blemish, especially allegations of corruption which remain unsubstantiated.

[84] As stated supra in paragraph [75], the applicant is being subjected to continued abuse by Twitter users who believe the allegations made by the respondent.

No similar protection by any ordinary remedy

[85] The respondent contends that there exists remedies or protection available to the applicant in that the applicant can sue for incidental damages by way of action in the event the respondent is indeed wrong in his actions.

[86] This Court disagrees. In the matter of EFF v Manuel[26] the Supreme Court of Appeal stated that:

‘In circumstances where the applicants were obdurate, and where the integrity of an institution of state was being undermined on the basis of Mr Manuel’s alleged corrupt and nepotistic conduct, an award of damages, in due course, could hardly be said to be a viable and compelling alternative to an interdict prohibiting further publication.’[27] [my emphasis]

Further the Supreme Court of Appeal stated:

‘There is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements proceeding by way of motion proceedings, on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they would obtain instant, though not necessarily

complete, relief. There is precedent for this in the well-known case of Buthelezi v Poorter,[28] where an interdict was granted urgently in relation to an egregious piece of character assassination.’[29] [my emphasis]

[87] If it is so that the allegations are false, then it is in the public interest that they should be addressed without delay. The opposite also applies, in that if the statements are true, they would significantly impact public confidence and the confidence of the markets generally in the office of the Minister of Finance.

[88] This Court finds the applicant has passed the threshold for a final interdict and accordingly the second point in limine raised by the respondent is dismissed.

The question of the quantum

[89] The applicant seeks an amount of R1 000 000.00 in damages.

[90] In the matter of EFF v Manuel,[30] the Supreme Court of Appeal stated that:

‘...Claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors.’[31]

[91] Furthermore, in the matter of National Director of Public Prosecutions v Zuma,[32], the Supreme Court of Appeal stated that motion proceedings are geared to deal with the resolution of common cause facts.[33]

[92] Illiquid claims by their very nature involve the resolution of factual issues.

[93] As a result, motion proceedings are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise.[34]

[94] Uniform Rule 18(10), ‘enjoins any party claiming damages to provide sufficient information to enable the opposing party to know why the particular amount being claimed as damages is in fact being claimed’.[35]

[95] Relevant evidence needs to be presented and fully explored for a Court to determine an appropriate award.

[96] A court, in motion proceedings, in terms of Uniform Rule 6(5)(g), has a discretion to direct that oral evidence be heard on specified issues with a view to resolving a dispute of fact or, in appropriate circumstances, to order the matter to trial.

[97] The quantum of damages and the reputational damage the applicant seeks, is not readily capable of determination on the papers. Accordingly, this Court refers the question of quantum to oral evidence.

The request by the applicant for a retraction of the statements made and an apology

[98] A retraction and an apology will help to secure redress for the applicant, however, the Supreme Court of Appeal in the matter of EFF v Manuel,[36] stated that:

‘...An apology has always weighed heavily in determining the quantum of damages in defamation cases as occurred in Le Roux and Others v Dey.[37] In our view, whether an order for an apology should be made is inextricably bound up with the question of damages. As the latter

award falls to be set aside and referred to oral evidence, so too must the order to publish a retraction and apology be set aside and referred to the high court for determination after the hearing of oral evidence on damages.’[38] [my emphasis]

[99] Accordingly, the order for the publication of a retraction and an apology will be referred to oral evidence.

Costs

[100] The applicant seeks costs against the respondent on the attorney and client scale.

- [101] It is clear that the applicant has had to bring these proceedings to protect his rights, and reputation.
- [102] The applicant is a victim of a vicious assault on his dignity. If he is successful, he is entitled to his costs.
- [103] The letter of demand to cease, retract and file an apology was sent to the respondent on 8 November 2023, stating that the respondent had seven days to do so. To date, no retraction or apology has occurred.
- [104] It appears that the respondent is in receipt of a possible dubious tender that has been set down for 25 January in the High Court. The grievance of the respondent is that his business ambitions have been thwarted by the Minister of Labour, Mr Thulas Nxesi, for reasons which fall outside the scope of this application.
- [105] It is clear the respondent in order to safeguard his commercial interests, has thrown unsubstantiated accusations widely, to put pressure on the government, to accede to his demands.
- [106] Costs are within the discretion of this Court.
- [107] The behaviour of the respondent cries out for a punitive costs order including the costs of two counsel.

Order

[108] In the premises the following order is made:

1. the applicant's non-compliance with the Rules of the Honourable

Court relating to service and time periods is condoned, and this application is heard on an urgent basis in terms of Rule 6(12),

2. It is declared that the allegations made about the applicant in the

statement, specifically that he was party to the solicitation of a bribe from the respondent or his company ('the statement')

are defamatory and false.

3. It is declared that the respondent's publication of the statement is unlawful

and that he is liable to pay damages to the applicant;

4. The respondent is interdicted from doing any interview that says or

implies

that the applicant tried to solicit a bribe in the amount of R500 000 000.00.

7. The quantification of damages, an apology and retraction of the statements is referred to oral evidence.

8. The respondent to pay the applicant's costs on an attorney and client scale,

to include the costs of two counsel.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 26 January 2024

Date Heard:

18 January 2024

Judgment handed down:

26 January 2024

Appearances:

On behalf of the Plaintiff: Adv T.N Ngcukaitobi SC

Adv P. Managa

Instructed by: RUDOLPH BALOYI INC.

On behalf of the Defendants: Adv P.J Ngandwe

Adv K. Lefaladi

Instructed by: KGANARE KHUMALO INC.

[1] EFF and Others v Manuel (711/2019) [2020] ZASCA 172 (17 December 2020).

[2] Tsedu v Lekota (715/07)

[2009] ZASCA 11 (17 March 2009).

[3] 5 ed (1990) by Bell Dewar and Hall p 43.

[4] Tsedu v Lekota (note 2 above) para 4.

[5] Ibid.

[6] EFF v Manuel (note 1 above).

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- [7] see *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) ('*Le Roux v Dey*') para 89.
- [8] *Le Roux v Dey* (note 7 above) para 90.
- [9] *EFF v Manuel* (note 1 above) para 35.
- [10] *Ibid* para 36.
- [11] *EFF v Manuel* (note 1 above) para 37.
- [12] *EFF v Manuel* (note 1 above).
- [13] *Ibid* para 37.
- [14] *Crawford v Albu* 1917 AD 102 at 115-117.
- [15] *Ibid* page 114.
- [16] *Plascon-Evans paints Ltd v van Riebeeck Paints (Pty) Ltd* [1984 93] SA 623 (A) at 634E-635C].
- [17] *EFF v Manuel* (note 1 above) para 88; *Heilbron v Blignault* 1931 WLD 167 at 169; *Buthelezi v Poorter* 1974 (4) SA 831 (W) at 838A-B.
- [18] *Whittaker v Roos and Bateman* 1912 AD at 124-125.
- [19] *EFF v Manuel* (note 1 above).
- [20] *Ibid*.
- [21] *Ibid* para 81.
- [22] *Ibid*.
- [23] *Ibid* para 82.
- [24] *Setlogelo v Setlogelo* 1914 AD 221.
- [25] *Pilane and Another v Pilane and Others*
- [2013] ZACC 3.
- [26] *EFF v Manuel* (note 1 above).
- [27] *Ibid* para 89.
- [28] *Buthelezi v Poorter* 1975 (4) SA 831 (W).
- [29] *EFF v Manuel* (note 1 above) para 111.
- [30] *Ibid*.
- [31] *Ibid* para 93.

[32] National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA).

[33] Ibid para 26.

[34] EFF v Manuel (note 1 above) para 105.

[35] Grindrod (Pty) Ltd v Delport and Others 1997 (1) SA 342 (W).

[36] EFF v Manuel.

[37] Le Roux and Others v Dey (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (8 March 2011).

[38] EFF v Manuel (note 1 above) para 130.

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