

SOUTH AFRICA / JUDGMENT

Gqubule-Mbeki and Another v Economic Freedom Fighters and Another (30143/2018) [2020] ZAGPJHC 2 (24 January 2020)

[2020] ZAGPJHC 2

COURT

South Gauteng High Court, Johannesburg

BEFORE

Modiba

CASE / FILE NUMBER

30143/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 30143/2018

In

the matter between:

THANDEKA

GQUBULE-MBEKI

First

Applicant

ANTON

HARBER

Second

Applicant

And

ECONOMIC

FREEDOM FIGHTERS

First

Respondent

MBUYISENI

QUINTIN NDLOZI

Second

Respondent

JUDGMENT

MODIBA J

INTRODUCTION

- [1] There is an ongoing public debate about the infiltration of media houses by StratCom and the use of the media to spread disinformation about anti-apartheid activists. In the founding papers filed in this application, StratCom is defined as a notorious propaganda and disinformation unit of the security police of the apartheid government. The big question that has come up is: who are the journalists who worked with StratCom in that regard?
- [2] When she testified at the Truth and Reconciliation Commission (“TRC”) more than two decades ago, the late Ms Winnie Madikizela-Mandela (“Ms Madikizela- Mandela”) named Thandeka-Gqubule Mbeki and Nomavenda Mathiane as two such journalists. The TRC did not confirm the allegations due to lack of evidence.
- [3] More than 20 years later, before she passed away, Ms Madikizela-Mandela repeated the allegations in a documentary on her life aired by the Huffington Post (“HP”) on 4 April 2018. This time she included Anton Harber’s (“Mr Harber”) name alongside that of Ms Gqubule-Mbeki and Ms Mathiane as StratCom journalists. Subsequently, the Economic Freedom Front (“the EFF”) and its national spokesperson Dr Mbuyiseni Quinton Ndlozi (“Dr Ndlozi”) published certain statements peddling these allegations. Aggrieved by these statements, Ms Gqubule-Mbeki and Mr Harber brought this application to clear their names.
- [4] It is an application for defamatory relief. Ms Gqubule-Mbeki and Mr Harber seek an order in terms of which:
- [4.1] certain statements made against them by the EFF and Dr Ndlozi are declared to be defamatory and false, and their publication unlawful;
- [4.2] the EFF and Dr Ndlozi are ordered to remove the statements from all their media platforms and to publish a statement on their media platforms within 24 hours of the order, retracting the defamatory statements and unreservedly apologizing to them for the allegations that they make in the statements;
- [4.3] the EFF and Dr Ndlozi are ordered to pay them R 500 000.00 each, jointly and severally, alternatively, a referral of the quantification of their damages to oral evidence;
- [4.4] the costs for the application are to be paid jointly and severally by the EFF and Dr Ndlozi on the attorney and client scale.
- [5] Ms. Gqubule-Mbeki and Mr. Harber instituted this application on 16 August

2018. The EFF and Dr Ndlozi oppose it. In their answering affidavit deposed to by Dr Ndlozi, the EFF and Dr Ndlozi raise two points in limine, the first in respect of the non-joinder of parties who published the documentary on two other media platforms, and the second in respect of the inappropriate nature of application proceedings given the existence of material disputes of fact, irresolvable on the papers. They also oppose the application on the merits.
- [6] Several days before the application was scheduled for hearing, the EFF and Dr Ndlozi filed an application for leave to file a supplementary affidavit to set out a proper legal defence for the allegedly defamatory statements and referring the matter to trial on such directions as the court may deem appropriate. They also sought an order granting the applicants leave to file any supplementary replying affidavit to their supplementary answering affidavit. Ms Gqubule-Mbeki and Mr Harber do not oppose the request to admit the supplementary answering affidavit but oppose the application to refer the matter to trial.
- [7] In this judgment, I follow the following structure: I first give a detailed description of the parties and elaborate on the background to the application. Thereafter, I deal with the EFF and Dr Ndlozi's preliminary points. I find that both stand to be dismissed for lack of merit. Then I deal with their application to file a supplementary affidavit. I grant this application. I however, dismiss the application to refer the matter to trial for the purpose of allowing the EFF and Dr Ndlozi to place before the court a proper legal defence, also for lack of merit. Lastly, I determine the merits of the application.
- [8] In the latter section of the judgment I set out the parties' respective contentions, followed by an identification of the issues that stand to be determined between the parties. I then set out the applicable legal principles. Then I apply the principles to the issues that arose between the parties. I conclude that the impugned statements are defamatory. Then I determine the quantum of damages, taking into account authorities to which the parties referred me, as well as aggravating and mitigating factors found to be present. The last consideration I make is in respect of the costs of the application. An order consistent with the

conclusion

reached in respect of all the issues that I was requested to determine concludes the judgment.

THE PARTIES

- [9] The first applicant, Ms. Gqubule-Mbeki is a journalist. At the time of this application, she was employed by the South African Broadcasting Corporation ("SABC") as the Economics Editor.

- [10] The second applicant, Mr. Harber is an academic and a journalist. At the time of this application, he was employed by the University of the Witwatersrand as an Adjunct Professor of Journalism. He is also the Founding Editor of the Mail and Guardian newspaper. He previously worked for The Sunday Post, The Sowetan, The Rand Daily Mail and regularly writes for several print media platforms including The Business Day, Financial Mail, Daily Maverick, The Conversation, and Media24.
- [11] From here onwards, I jointly refer to Ms. Gqubule-Mbeki and Mr. Harber as the applicants and individually by their names. In their founding affidavits, they respectively attest to their industrious careers as journalists in South Africa during and post-apartheid, spanning over 30 years.
- [12] Ms. Gqubule-Mbeki details her involvement as a social justice activist, actively involved in the fight against apartheid during the 1980s and early 1990s. During this period, she was arrested by the apartheid police and detained in solitary confinement for one month while pregnant and, without being charged.
- [13] Mr. Harber also chronicles his participation in the fight against apartheid, specifically his participation in the legal battle against the closure in 1988 of the Mail and Guardian Newspaper, as well as his participation in local and international anti-censorship campaigns against the South African government's freedom of expression and access to information restrictions during the state of emergency. He also narrates how he was personally targeted and intimidated by the apartheid police as a result of his participation in the fight against apartheid.
- [14] The first respondent, the EFF hardly needs an elaborate introduction as it is a prevalent participant in the South African political landscape. It is registered with the Independent Electoral Commission as a political party. It is the third largest political party with significant national, provincial and local representation in the South African legislature.
- [15] As already stated, the second respondent, Dr Ndlozi, is the national spokesperson for the EFF.
- [16] Similarly, I jointly refer to the EFF and Dr Ndlozi as the respondents and individually by their names.

BACKGROUND

FACTS

- [17] The background facts are largely common cause. In June 2017, HP interviewed the late Ms. Winnie Madikizela-Mandela ("Ms. Madikizela-Mandela") as part of a documentary production on her life ("the documentary"). During the interview, she alleged that the applicants and Ms. Mathiane were agents of the apartheid state who specialized in writing negative stories about her and that while retained as journalists by the then Weekly Mail, now the Mail and Guardian newspaper, Ms. Gqubule-Mbeki and Mr. Harber wrote such

stories for StratCom. Ms Madikizela- Mandela has since passed away.

[18] On 4 April 2018, HP published the documentary on its website without affording the applicants an opportunity to respond to Ms. Madikizela-Mandela's allegations.

[19] On 12 April 2018, the EFF published the following statement on its website ("the EFF statement"):

[See PDF for image]

[20] On the same date, Dr Ndlozi also published the EFF statement on his personal twitter account. There he added the following statement ("Dr Ndlozi's gloss"):

"Must Read: EFF Condemns SANEF's Silence on #StratCom Revelations"

We call on all the 40 journalists, many of whom are still working in the media, who were on the payroll of apartheid's #StratCom to confess & ask for forgiveness. If they do not, EFF will reveal their names one by one"

[21] On 13 April 2018, Dr Ndlozi published the statement below on his Twitter account in response to a Poilticsweb publication on Twitter ("Dr Ndlozi's statement").

[22] On 13 April 2018 HP issued a public statement, unequivocally and unreservedly apologizing to the applicants and to Ms. Mathiane. In the statement, it acknowledged the applicants and Ms. Mathiane as campaigning anti-apartheid journalists and as leaders of their craft. It states that Ms. Madikizela-Mandela's allegations are her opinion, untested and that she did not produce any evidence to substantiate them. It further acknowledged that its publication of the video is not in keeping with the spirit of the Press Code in that it failed to seek comments from the applicants and from Ms. Mathiane prior to publishing the interview and to give a proper context to the history that the documentary recounts. It also stated that the publication, the reaction to it on social media as well as statements by various political actors in society should have been avoided.

[23] On 10 May 2018, the applicants' attorneys sent letters of demand to the respondents demanding that they desist from making, publishing or causing to be published any further defamatory allegations concerning the applicants to any party, remove the statements from their media platforms and post an unconditional apology and full retraction of the statements on their media platforms.

[24] On 25 May 2018, the respondents' attorney, admitting the publication of the statements as alleged, denied that the statements are defamatory but also sought to justify them.

POINTS IN LIMINE

Non-joinder

- [25] The respondents take issue with the non-joinder of Ian Thanduxolo Jindela (“Jindela”) and the Editor of Uncensored Stories That Media Ignore Website (“the Uncensored Stories Editor”).
- [26] Jindela operates a channel on YouTube where he has published a video of the documentary. The Uncensored Stories Editor has also published the documentary on the aforesaid website (“the Uncensored Stories Website”). The documentary was still available on these platforms when the application was heard. It is for that reason that the respondents complain that the applicants were remiss not to have joined these parties. They contend that these third parties have a direct and substantial interest in the matter as they stand to be prejudiced by the order that the applicants seek.
- [27] The respondents seek a stay of the application until all the interested parties have been joined. The applicants oppose the non-joinder point primarily on the basis that the offending statements which form the basis of the relief sought are the respondents’ and not Ms Madikizela-Mandela’s. Further, no order is sought against Jindela and the Uncensored Stories Editor.
- [28] Although submissions in respect of the non-joinder point are set out in the respondents’ heads of argument, they were not specifically dealt with during argument. Neither was the non-joinder point specifically abandoned. It is for that reason that I deal with it. I find that it lacks merit.
- [29] Although the primary source of the allegedly defamatory statements are the allegations that Ms Madikizela-Mandela made against the applicants in the documentary, the relief that the applicants seek is not directed at her allegations. It is directed at the allegations as peddled by the respondents in the statements that the respondents made pursuant to those allegations.
- [30] Notably, the applicants do not challenge the publication of the documentary by Jindela and The Uncensored Stories Editor, hence they seek no order against these third parties. For that reason, I agree with the applicants that these third parties have no interest in the order that the applicants seek against the respondents.
- [31] The respondents have not demonstrated that these parties have a direct and substantial interest in the relief that the applicants seek. Therefore the non-joinder point stands to be dismissed.
- [32] While the applicants’ election to only pursue the respondents and not these third parties or even Ms Madikizela-Mandela is one that bears no relevance to the non-joinder point or to the question whether the respondents defamed them, for reasons that I outline later in this judgment, it is one that I am unable to ignore when exercising my judicial discretion in respect of the appropriate quantum for damages as well as the costs of the application.

Material disputes of fact

- [33] The respondents complain that the applicants incorrectly followed the application procedure given that they seek monetary damages against them. They contend that the quantum of damages claimed is illiquid and “seems to have been drawn from the air” and that the applicants have not set out the damages in a manner that reasonably enables them to assess the quantum thereof. They rely on the trite legal principle that material disputes of facts irresolvable on the papers have to be proceeded with by way of action proceedings.
- [34] Indeed the principle relied upon is correct. However, the respondents have not raised a material dispute of facts irresolvable on the papers. As elucidated above, the facts underlying the relief that the applicants seek are common cause. So are additional averments relied upon by the applicants in respect of the reach of the published statements and the harm that it caused them. The respondents’ basis for opposition is not factual but legal. Therefore no value would be derived from a trial procedure as no material dispute of facts irresolvable on the papers exists.
- [35] There is no hard and fast rule against using an application procedure in a damages suit. Damages for defamation fall under the general head of damages. Unlike other heads of damages such as loss of income, they are incapable of quantification. The factor that determines the appropriate procedure is whether there are foreseeable material disputes of fact irresolvable on the papers that could arise between the parties. Where there are none, as in the present application, the application procedure is competent. The second determining factor is whether the applicants are able to prove the alleged damages by way of affidavit. The averments that they have advanced in this regard are largely undisputed. If the matter went to trial, the applicants would simply repeat the same averments under oath. Thus, a trial would only serve to be dilatory and escalate legal costs.
- [36] The respondents’ complaint in respect of the second point in limine also lacks merit. It therefore stands to be dismissed.

REQUEST FOR LEAVE TO FILE A SUPPLEMENTARY ANSWERING AFFIDAVIT

- [37] This application seems to be precipitated by the respondents’ belated engagement of senior counsel on 30 September 2019, two weeks before the application was heard. Consultation with him only occurred on 8 October 2019, less than a week before the application was heard. It was at this consultation that he advised that it was necessary to supplement the respondents’ answering affidavit to properly set out the respondents’ defence. The respondents contend that their complete defence as advised by their senior counsel would require that they:

[37.1] set out the provisions of section 16 (1) (b) of the Constitution which provides for the right of freedom of expression, which they contend includes the right to impart information and ideas. The impugned statements relate to matters of serious national importance as they suggest that there are racist journalists who aided and abetted apartheid, who still operate in the media, who must be identified and put to account. This is the EFF’s *raison d’être*;

[37.2] rely on section 19 (1) (c) of the Constitution which guarantees the right to political freedom, which includes the right to campaign for a political party or a cause. They contend that the impugned statements are political speech which the EFF has the right to make based on its right to political freedom and given its *raison d'être*, so that “the 40 off journalists who were mentioned in the statement can be identified and excised from any influence in the media space”;

[37.3] engage the services of an expert witness who will guide the court to determine the content, ambit and legal parameters of the Constitutional provisions referred to above. They also intend to call several witnesses named in the supplementary answering affidavit;

[37.4] issue a subpoena duces tecum to various departments who have relevant documents for the respondents' exercise of the Constitutional rights mentioned above;

[37.5] make out a case for the development of the common law defences to defamation and align them to the Constitution as envisaged in section 39 of the Constitution.

[38] The applicants do not oppose the respondents' request for leave to file the supplementary affidavit. They oppose their request that the matter be referred to trial.

[39] I find that it is in the interests of justice that the respondents' request to refer the matter to trial is dealt with on the merits, particularly given that the applicants do not oppose the respondents' request for leave to file the supplementary affidavit. Further, they do not stand to be prejudiced by its admission.

[40] Therefore, leave to file the supplementary answering affidavit stands to be granted. Further, failure to comply with the prescribed time frames for the filing of this affidavit stands to be condoned.

[41] It is important to observe that the respondents do not seek a postponement to supplement their basis for opposition. They seek a referral of the application to trial. For the latter request, the test referred to in paragraph 33 and 34 of this judgment is applicable. I find that the respondents fail to meet it.

[42] Regarding the issues in respect of which the respondents seek to supplement their defence, there is no foreseeable material dispute of fact irresolvable on the papers that arises between the parties. The respondents' defence, which is primarily based on their right to political freedom, is pleaded in their answering affidavit. The applicants have not placed their pleaded constitutional rights in dispute. Therefore the legal advice belatedly received from their senior counsel does not validate their request to refer the matter to trial, more so that the respondents have not established the relevance of the additional evidence that they seek to place before court to the issues that stand to be determined in this application, or the prejudice that they stand to suffer if their request is not granted.

[43] Furthermore, the content of the constitutional rights sought to be asserted by the respondents is a legal issue for determination by the court. It is not an issue in respect of which the court requires the assistance of experts.

[44] The respondents are not contending for an amendment of their defence as initially pleaded. They have not placed any reasons before the court as to why they have not placed the additional evidence that they intend to place before court by way of affidavit.

[45] Therefore the request to refer the matter to trial stands to be dismissed.

THE MERITS OF THE DEFAMATORY RELIEF

[46] The applicants deny the allegations that the respondents made against them. They contend that the respondents' statements are defamatory.

[47] The respondents have advanced varied responses to the applicants' assertion. On the one hand they contend that the statements are not defamatory. On the other hand, they impliedly admit that the statements are defamatory but seek to justify them by raising the defences referred to above.

[48] In their reply to the applicants' letter of demand, the respondents denied that the statements refer to the applicants specifically. They continued to advance this contention in their answering affidavit where they argued for an interpretation of the statements that distinguishes the applicants from the 40 journalists who are on the StratCom list. Further, in their reply to the applicants' letter of demand and later in their answering affidavit, they contended that they merely paraphrased what Ms. Madikizela-Mandela stated in the documentary. They asserted Ms. Madikizela- Mandela's right to aggressively respond to the applicants' negative reportage against her, and to use a public platform to defend herself and her image. They also asserted EFF's right as a political party to express its fair comment about information that was in the public domain and that as journalists, the applicants should not be too sensitive.

[49] They also suggested that the allegations are true as they were made by a person they consider to have credibility in the person of Ms. Madikizela-Mandela.

[50] Another postulation they have advanced is that since the applicants were politically active during apartheid, it is probable that they were used by StratCom without their knowledge as that was one of its methodologies.

Issues

that arise

[51] In relation to the merits of the application, the following issues stand to be determined:

[51.1] whether the impugned statements meet the test for defamation; if they do

[51.2] whether the statements would tend to lower the applicants in the estimation of right thinking members of the society. If they would

[51.2.1] whether the publication of the statements was reasonable;

[51.2.2] whether the statements constitute protected fair comment.

Applicable legal principles

[52] The trite legal principles set out below are applicable to the dispute between the parties.

[53] Defamation is the wrongful and intentional publication of defamatory words or conduct that refer to another person.

[54] The onus to establish that the impugned statement or conduct is defamatory and that the respondents have published it lies with the applicants. Once they discharge this onus, a presumption that the publication is intentional and wrongful arises against the respondents. To escape liability, the respondents ought to set out a defence to rebut this presumption. The onus that they bear in this regard is a full onus and not a mere evidentiary burden.

[55] As mentioned above the respondents have raised the reasonable publication and fair comment defence. To succeed in this regard, they ought to establish:

[55.1] in relation to the reasonable publication defence; that the publication of the defamatory statement is reasonable in the relevant circumstances and therefore justified. In that regard the court will take into account the following circumstances:

[55.1.1] the public interest in the matter;

[55.1.2] the nature, extent, and tone of the allegations;

[55.1.3] the nature of the information on which the allegations were based;

[55.1.4] steps taken to verify the information;

[55.1.5] whether the applicant was given an opportunity to comment on the allegations before publication

[55.2] in relation to the fair comment defence; that:

[55.2.1] the statement is a comment or an opinion as opposed to a statement of fact;

[55.2.2] such comment expresses an honestly-held opinion, without malice, on a matter of public interest;

[55.2.3] the comment or public opinion is based on underlying facts that are true and which are incorporated in the statement.

Are the statements defamatory?

[56] I find that the impugned statements are defamatory.

[57] The respondents' denial that they did not make the call that the applicants were StratCom journalist is disingenuous. Read together, it is clear that the EEF statement, Dr Ndlozi's gloss and Dr Ndlozi's statement was prompted by Ms Madikizela-Mandela's allegations against the applicants. In the impugned statements, the respondents advance Ms Madikizela-Mandela's

allegations that the applicants and Ms Mathiane were part of the journalists on StratCom's payroll who wrote stories during apartheid to destroy anti-apartheid activists, including Ms. Madikizela-Mandela. They conclude that by so doing, the applicants were party to the destruction of lives and mass murder of activists by the apartheid regime.

- [58] The statements peddle Ms. Madikizela-Mandela's allegations against the applicants as a factual truth, yet the respondents have not placed any evidence before this court in support of Ms. Madikizela-Mandela's allegations.
- [59] The EFF statement and Dr Ndlozi's gloss demand that as part of these journalists, the applicants must confess and ask for forgiveness for their collaboration with StratCom. In the EFF statement, the respondents do not draw a distinction between the 40 journalists alleged to be on the StratCom list and the applicants. On the contrary, they imply that the applicants are part of the list as they have been named by Ms Madikizela-Mandela as having worked for StratCom.
- [60] The respondents' contention in these proceedings that their call for these journalists to come out, confess and ask for forgiveness exclude the applicants is not consistent with the rest of the statement. Firstly, in the statement "The EFF condemns South African National Forum's silence following revelations that journalists who served on Apartheid's Strategic Communications to destroy anti- apartheid activists still report in different news rooms across the country's media fraternity." Then the statement goes on to state that "A video showing Mama Winnie Mandela naming some of these journalists has long come out yet SANEF is dead silent." The applicants were not only specifically named by Ms Madikizela-Mandela, they still work in the media industry. The EFF surmises that the applicants are some of 'these journalist',

implying that they are part of the 40 journalists on the StratCom list.

- [61] Further, the allegations that Ms Madikizela-Mandela made against the applicants in the video and the respondents' summation of the allegations as published in their statements are consistent with Ms Madikizela Mandela's testimony at the Truth and Reconciliation Commission ("TRC") in 1995. A transcript of the TRC proceedings attached to Ms Gqubule-Mbeki's founding affidavit reflects that when questioned concerning these allegations at the TRC, Ms. Madikizela- Mandela stated that she was privy to allegations that there are journalists retained by StratCom to discredit the ANC and some of its members including her. She testified that she heard about the existence of a list of these journalists but was not privy to it. She also heard at the time that journalists such as Ms Gqubule-Mbeki and Ms Mathiane were associated with the apartheid police and concluded that they must be StratCom journalists. When questioned on these allegations, she admitted that she has no direct evidence. She also testified that she cannot confirm that their names are on the alleged StratCom list.

- [62] Therefore, Ms. Madikizela-Mandela's evidence at the TRC does not attest to the truth of the allegations. On the contrary, it confirms that Ms Madikizela-Mandela herself could not confirm that the allegations were true when she testified at the TRC and that she had no evidence confirming that the allegations are true.
- [63] In their letter in reply to the applicants' demand for a retraction and apology, HP confirms that more than 20 years after Ms Madikizela-Mandela testified at the TRC, when she was interviewed for the documentary, she presented no evidence of the allegations.
- [64] Lastly, Dr Ndlozi's statement advances the view that Mr. Harber's involvement in the article which exposed StratCom's campaign to tarnish Ms. Madikizela- Mandela's reputation, published on 30 June 1995 was self-serving and mala fide because prior to 1995, he wrote and edited publications for StratCom. Here clearly, Dr Ndlozi states as a fact that Mr. Harber wrote and edited publications for StratCom.
- [65] The respondents have not presented any evidence before this court of the truthfulness of the allegations. They clearly did not have such evidence when they published the statements. They have not taken the court into their confidence regarding the steps they took prior to publishing the statements to verify their truth.
- [66] In their application to refer the matter to trial in order to present a complete defence, it appears that they are yet to investigate the evidence in support of their allegations. They do not explain why they did not verify the allegations prior to publishing the statements or even after these proceedings were instituted. On the contrary their version before this court illustrates that they had no intention of verifying the allegations and that they had accepted the allegations as true as they were made by a person who in their view has credibility as she is of a high standing. The standing of a person does not absolve them from the responsibility to back up allegations with evidence.
- [67] In light of the respondents' statement that the 40 journalist were on StratCom's payroll, their postulation that the applicants were used by StratCom without their knowledge is irrational. The applicants could not have been used by StratCom without their knowledge if they were paid. Be that as it may, the postulation also remains speculative as the respondents' have presented no proof of it.
- [68] The applicants' contentions in light of their respective participation in the struggle against apartheid cannot be refuted. The statements by innuendo allege against them, that they played a deceitful and shameful role in the struggle against apartheid because they pretended to be anti-apartheid activists but were in fact agents of the apartheid government who worked to undermine the struggle against apartheid; they were traitors who deceitfully betrayed their friends and comrades in the struggle against apartheid and cannot be trusted because they were shameless and deceitful traitors. So is their contention that the allegations are particularly vicious in the context of the anti-apartheid struggle that dealt ruthlessly with any traitor variously branded as a "sell out", "askari" or "impimpi".

[69] The applicants have made detailed averments in relation to the reach of the statements, the impact of their publication by the EFF and Dr Ndlozi as influential political role players as opposed to ordinary South Africans as well as the harm they have suffered as a result. To these issues I return later.

[70] It is common cause that the respondents published the impugned statements. I therefore, find that the applicants have discharged the onus to prove that the published statements are defamatory.

Is the publication of the statements reasonable in the circumstances and therefore justified?

[71] This is a defence ordinarily available to the media. It promotes freedom of expression by allowing the media to contribute to public opinion on political, social and economic issues without fear of a damages claim in the event that it published certain facts erroneously. It was extended to a non-media party for the first time in *Manuel*[1]. Coincidentally, the first respondent was the respondent in *Manuel*. Therefore, its reliance on this defence in this case is not surprising.

[72] I am respectfully disinclined to agree with the reasoning in *Manuel* for extending this defence to non-media players. I am of the view that the extension of the reasonable publication defence to parties who are not part of the media is inappropriate. I also do not agree that the public access to social media justifies such an extension. The respondents' conduct in this case demonstrates how toxic social media can be due to the absence of regulation.

[73] On the contrary, the media is an organized profession bound by media ethics as set out in the Press Code. Its members are held accountable under the Press Code, which requires journalists to report news truthfully, accurately and fairly, in context and in a balanced manner, without distortion, exaggeration or misrepresentation. Further, it requires journalists to only report what is true, having regard to the source of the news as fact, but to publish such facts fairly and with due regard to the context and the importance of the news. Where a report is not based on facts or is founded on opinions, allegations, rumours or suppositions, journalists are to report it in a way that indicates its status. Where its accuracy is in doubt, journalists are required to verify the news. Where it was not practical to verify the news, this should be stated.

[74] There is no mechanism that regulates the conduct of general members of the public including non-media entities on social media. Extending this defence to non-media players will lower the threshold for defamation, thereby encouraging reckless publication of information that has not been verified, under circumstances where the publisher is not bound to act fairly towards the implicated person as journalists are.

- [75] The lower threshold for defamation by media players is safeguarded by the Press Code and for that reason justified. It promotes compliance with the Press Code by exculpating compliant journalists from liability for defamation while at the same time projecting the person against whom a report is made from the harm that often results when untested allegations are published as the truth.
- [76] Even if the defence was available to the respondents as non-media players, the respondents have failed to satisfy four of five factors that would justify the publication of the statements. I have no doubt that it is in the public interest to know whether there are any journalists who worked with the apartheid machinery to peddle misinformation against organizations and their members who opposed apartheid as such entities and persons engaged in an illegitimate course contrary to the public interest at that time. However, as already established, in over twenty years, no shred of evidence has been advanced by the originator of the allegations made against the applicants or the respondents before court, yet they are published as a foregone truth, despite knowledge by the publishers

that the allegations have not been verified. The applicants' denial of the allegations has not satisfied the respondents. Hence they have refused to retract them and to apologize.

- [77] Contrary to what is expected ethically from members of the media, the applicants were not given an opportunity to comment on the allegations before they were published.

- [78] Therefore, the respondent's reasonable publication defence stands to fail.

Fair comment defence

- [79] The cardinal pillar of this defence is that the respondents comment or opinion is based on underlying facts that are true. As already established, the respondents fail in this regard.
- [80] Their *raison d'être* as stated earlier is no doubt a noble one in the context of South Africa's history of racial supremacy, oppression, inequality and lack of freedom. However, advancing this objective on the basis of unfounded allegations is not only venomous as experienced by the applicants, it may entrap this country in its ugly past by entrenching mistrust and disunity among those who belonged to different factions during apartheid, but even more dangerously, by sowing mistrust and disunity among those who advanced the same course as the applicants. Further, it brings the media into disrepute. At worst, it may expose the implicated journalists to a variety of risks.
- [81] The respondents have not satisfied this court that they hold this opinion honestly. Failure to verify the allegations and to accept the applicants' version that the allegations are not true is unfair, particularly because the respondents continue to publish them. It appears that nothing other than the force of the law in the form of a court order would get the respondents to cease from their injurious conduct.
- [82] Therefore, the respondents' fair comment defence also stands to be dismissed.

QUANTUM OF DAMAGES

- [83] Relying primarily on Manuel where my brother Matojane J awarded damages for defamation in the amount of R 500 000.00, the applicants seek the same amount to be awarded to each of them. On my invitation, the parties submitted supplementary heads of argument on quantum, relying on various other authorities. Typically the applicants advance authorities where a high quantum was awarded, while the respondents advance those where a lower quantum was awarded. What clearly emerges from these authorities is that courts have historically been awarding low quantum for defamation and that the high quantum which the applicants are contending for is only a recent phenomenon in respect of which the superior courts are yet to pronounce themselves.
- [84] As already stated, the quantum of general damages is incapable of quantification. Its award is discretionary, considering the peculiar facts of each case including mitigating and aggravating circumstances. It is for that reason that previous awards only serve as a mere guideline.
- [85] In this case, I find that both aggravating and mitigating factors are present.

Aggravating factors

- [86] The respondents have not only refused to concede that the allegations are defamatory, they have reprobated and approbated their position as demonstrated earlier, seeking justification in the event that the court finds that the allegations are defamatory. It is clear in these proceedings that the originator of the allegations could not prove them, neither could the respondents, yet they persisted with them, refused to accede to the applicants' demand to retract and apologize and went on to defend the applicants' claims on very spurious grounds.
- [87] The allegations are harmful not only to the person of the applicants but to their profession as journalists and their standing as senior journalists. As already stated above, the allegations also have the potential to bring the media into disrepute, and to sow disunity and mistrust in society and in the political landscape.
- [88] The defamatory statements were published on the respondents' Twitter account where the respondents' have a significantly large following. Some of their followers, as evidenced by the responses posted on the respondents' Twitter account have not only accepted the allegations as true, they have further published the statements, thereby compounding their reach. Others have posted disparaging remarks against the applicants in response to the allegations.
- [89] It concerns this court that the applicants were tardy in bringing the application. They only instituted the application four months after the publication of the statements. Further, they brought the application in the ordinary course, hence it is only determined almost two years after the statements were published. Given the undisputed case they make out regarding the serious and injurious nature of the allegations as well the extent of their publication, the

applicants ought to have acted with haste to curb the resultant impairment. With the lapse of time, it is probable that the readership value of the statements has decreased.

[90] While the applicants are not obliged to seek defamatory relief against each person or entity who has defamed them, for the purpose of determining just and equitable damages, it concerns this court that the applicants sought no relief against the originator of the allegations, Ms Madikizela-Mandela, after she made the allegations at the TRC; but even more importantly, after she repeated them in the documentary. The fact that the applicants opted to pursue the respondents due to their political influence does not

justify not seeking relief against Ms Madikizela- Mandela because she too carried significant influence in South African politics.

[91] Even more importantly is that the documentary in which Ms Madikizela- Mandela makes the allegations continues to be available on other platforms, yet the applicants opted not to pursue the relevant publishers. It is absurd that the applicants endure harm when the allegations are peddled by the EFF but are not harmed when they were peddled by Ms Madikizela-Mandela or other publishers.

[92] I find that the applicants' lack of haste in bringing the application, as well as their selective response to the publishers of the allegations is highly mitigating as the allegations continue to be available on the internet.

[93] These mitigating factors distinguish this case from others where courts awarded a higher quantum of damages based on the presence of similar aggravating factors.

[94] Another distinguishing factor is that the applicants specifically state that they are not interested in the money and, for that reason they intend donating it to journalism related causes. Impliedly, the primary vindication that the applicants seek is a declaration that the allegations are false and their publication unlawful, a retraction of the allegations, an apology and an interdict from further publication of the allegations. Given that the primary purpose of general damages for defamation is not to punish the respondent but to serve as solatium for the applicant, the applicants' attitude to the quantum when considered against the mitigating factors, which outweigh the aggravating factors, justify a substantially lower award from that claimed. For that reason, I find that an award of R40, 000.00 for each applicant is just and equitable in the circumstances.

COSTS

[95] Where a party has refused to take down manifestly defamatory statements, courts have awarded punitive costs against it. I am not persuaded that the peculiar circumstances of this case warrants such costs. I find it absurd to punish the respondents with a high cost order given the applicants' selective response to the publishers, resulting in the continued availability of the defamatory allegations in the public domain. I therefore find that costs on the ordinary scale is appropriate.

[96] In the premises, the following order is made:

ORDER

1. The application succeeds.
2. The respondents' point in limine in respect of the non-joinder of Ian Thanduxolo Jindela and the Editor of Uncensored Stories That Media Ignore Website is dismissed.
3. The respondents' point in limine in respect of the foreseeable material disputes of fact, irresolvable on the papers is dismissed.
4. The respondents are granted leave to file a supplementary answering affidavit.
5. Condonation for the late filing of the respondents' supplementary answering affidavit is granted.
6. The respondents' request to refer the matter to trial is dismissed.
7. In this order 'the statements' are the statements referred to in the judgment as the EFF statement, Dr Ndlozi's gloss and Dr Ndlozi's statement.
8. It is declared that the allegations made about the applications in the statements are defamatory and false.
9. It is declared that the respondents' publication of the statements was and continues to be unlawful.
10. The respondents are ordered to remove the statements within 24 hours of the granting of this order from all their media platforms including the first respondents' website and the second respondents' Twitter account.
11. The respondents are ordered, within 24 hours of the granting of this order, to publish a notice on all their media platforms, on which the statements had been published, in which they unconditionally retract and apologise for the allegations made about the applicants in the statements.
12. The respondents are interdicted from publishing any statement that says or implies that the applicants worked for or collaborated with the apartheid government.
13. The respondents are ordered jointly and severally to pay damages of R40,000.00 to each of the applicants.
14. The respondents are ordered jointly and severally to pay the applicants' costs of the application.

L T MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES

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Nicqui Galaktiou Inc

Date of hearing:

15 October 2019

Date of judgment:

24 January 2020

[1] Manuel v Economic Freedom Fighters and Others 2019 (5) SA 210 (GJ)

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