

SOUTH AFRICA / JUDGMENT

Gupta and Others v Malema and Others (9797/16) [2016] ZAGPPHC 64 (11 February 2016)

[2016] ZAGPPHC 64

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw

CASE / FILE NUMBER

9797/16

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

CASE

NO: 9797/16

In

the matter between:

AJAY

KUMAR GUPTA

First

Applicant

ATUL

KUMAR

GUPTA

Second Applicant

RAJESCH

KUMAR

GUPTA Third

Applicant

and

nine other applicants

and

JULIUS SELLO
MALEMA First
Respondent
ECONOMIC FREEDOM
FIGHTERS Second
Respondent
NTOBENG
NTOBENG Third
Respondent
LIEUTENANT
GENERAL
KHOMOTSO Fourth
Respondent

JUDGMENT

J W LOUW. J

- [1] On 9 February 2016 I granted various interdicts in the urgent court against the first to third respondents after hearing argument by counsel for the applicants and for the respondents. I indicated that I would give my reasons as soon as possible. These are those reasons.
- [2] The first to third applicants are brothers and are generally referred to by the media as "the Guptas". They are commercially active in South Africa and directly or indirectly hold shares in the companies which are the fourth to twelfth applicants. The applicants' founding affidavit has been deposed to by a Mr. Nazeem Howa, who states that he is the chief executive officer of the fifth applicant, Oakbay Investments (Pty) Ltd, which is the holding company of the majority of the other applicant companies. It is alleged that Oakbay has approximately 4 500 employees 'with a monthly payroll of approximately R45 million.
- [3] The fourth applicant is the owner of an immovable property situate in Saxonwold, Johannesburg, which is the residence of the Gupta brothers. The sixth applicant, Sahara Computers (Pty) Ltd is an importer and distributor of computer ware to various end users, with a staff compliment of approximately 200. It is alleged that Sahara has numerous vehicles and that it has warehouses stocked with imported computers, components and other equipment. The seventh applicant, TNA Media (Pty) Ltd, is the publisher of a daily newspaper. It is alleged that TNA has approximately 180 employees, many of whom are journalists who carry expensive equipment in order to cover the news on a daily basis, and that it has branded vehicles to ensure that they are identified as belonging to TNA and to indicate that the occupants are from the media.

- [4] The eighth applicant is Infinity Media (Pty) Ltd which trades as ANN7 news channel. It is alleged that Infinity is the owner of extremely expensive television equipment and that it frequently hosts national and international public figures as part of its news coverage. Like TNA, it has a fleet of branded vehicles and its journalists are identified as ANN7 journalists. The ninth to twelfth applicants conduct the business of mining, mining services, engineering and manufacturing. It is alleged that these applicants own substantial property and equipment and that they employ hundreds of people.
- [5] The first to third respondents, against whom the interdicts were sought and to whom I shall refer as the respondents, do not deny any of the abovementioned allegations relating to the applicants. The fourth respondent, who is the acting commissioner of police, abided the decision of the court. The relief sought against him, and which was granted, was that he be requested to take the necessary steps to protect the interests of the applicants in as far as they might unlawfully be infringed by criminal activity resulting from the conduct of the first to third respondents and in particular any non-compliance of the provisions of the interdicts granted against the first to third respondents.
- [6] On 4 February 2016, the first respondent, who is the president of the second respondent ("the EFF"), appeared on national television at a press conference hosted by the EFF. The applicants say that the first respondent stated during the press conference that the Gupta brothers should leave the country, that South Africa was not for sale over a plate of curry and that the Gupta brothers and all their businesses, directly and indirectly, will be removed from South Africa by whatever means. These allegations are not denied in the first to third respondents' answering affidavit which was deposed to by the first respondent. The first respondent states, however, that given the manner in which the Gupta brothers have abused the generosity and hospitality of the South African state, it was time that they vacated the country and left. There was no need to evict them by force and the EFF would not be involved in any such activities. They should be removed lawfully. According to the applicants, the first respondent further accused TNA and ANN7 of being a cartel with the only objective of looting state resources and he banned any of their journalists to cover any events involving the EFF. This is admitted in the answering affidavit.
- [7] On Saturday 6 February 2016, the third respondent, who is the spokesperson of the EFF in Gauteng, issued a press statement from which I quote the following passages:
- "Now our message is simple, the Guptas, otherwise known as the ZUPTAS must heed the call of the Commander in Chief of the EFF and vacate South Africa, otherwise, the predictability of what could happen to them and any of their properties, becomes a highly volatile matter. No one can guarantee their safety in Gauteng.
- We are sick and tired of massaging the cheap and thug-like egos of counter revolutionary neo-capital tendencies of the likes of the ZUPTAS.

In short, we are going to physically drive the ZUPTAS out of our province by any means possible; they cannot have their headquarters

in this province any longer.

We will mobilise all our branches, especially in the Ekurhuleni, Johannesburg and Tshwane where we suspect their major activities are based.

At this time we only wish to advise them to start sorting out visas, as for the airport, OR Tambo International Airport, remains their only option for port of exit because Waterkloof must be respected for its stately and military functions. We cannot have our public facilities being bastardised into private playgrounds of the likes of the ZUPTAS."

[8] The applicants understood these statements to be a clear message that the respondents intended to use their members and their resources to destroy the businesses of the applicants and would stop by no means to violently prevent the applicants from conducting their businesses. Mr. Moegsien Williams, the editor in chief of TNA and ANN 7, sent a letter by e-mail to the EFF on 6 February 2016 in response to the EFF's press conference of 4 February 2016 and the press statement of 6 February 2016 referred to in the previous paragraph. The letter, inter alia, reads as follows:

"Despite your allegations leveled against The New Age and ANN7, we pride ourselves in covering news stories without any fear or favour. We would like to reiterate our independence and maintain that we are committed in reporting news which is free and fair.

Having said the above, we are tremendously concerned about the threats that you have leveled against our companies, some of our shareholders and our employees. You (ought to) know, with respect, that media freedom, which includes the right to receive information, is enshrined in our Constitution. It is unfortunate that you have resorted to violent intimidation, to such an extent that our employees (and shareholders) fear for their safety.

.....

In order to ensure that our employees are afforded the right to continue with their work, unhindered and without any fear of violence against them, we would request you to retract your statements. Due to the urgency of the matter, we request you to provide us with your aforementioned reply before 12 noon tomorrow afternoon."

[9] On 7 February 2016, the secretary general of the EFF replied by letter in which the following, inter alia, is stated:

"The EFF has reached a conclusion that The New Age (TNA) and ANN7 do not constitute part of "free media" but instead they are criminal enterprises that are used by the Gupta family and Zuma to engage in money laundering and racketeering. Our view is that these are communication entities of the Gupta family that seek to normalise the corrupt activities of the Gupta family and Zuma. The TNA is involved in state corruption and this is reflected in the unreasonable and unexplained expenditure of government's advertisement since its conception.

Finally, we restate our demand that the Gupta Family must with immediate effect disengage from all affairs, government, business and media in South Africa and leave the country."

- [10] There was no retraction by the respondents of the statements made during the press conference of 4 February or in the press statement issued by the third respondent on 6 February. The applicants then proceeded to launch the present application on an urgent basis.
- [11] The first respondent states in his answering affidavit that the interpretation given by the applicants to the statement in the press release that no one could guarantee the applicants' safety in Gauteng was baseless, that the statement was not equivalent to calling for violence against the Guptas and that only the police could guarantee the safety not only of the Guptas but of everyone. Adv. NGO Maritz SC, who appeared for the applicants, submitted, in my view correctly, that It was not the job of the EFF to guarantee the safety of the applicants and that there was no reason for such a statement to be made except if it was intended as a threat of violence.
- [12] Adv. Semenya SC, who appeared for the respondents, submitted that the statement could not be interpreted to be an incitement to violence and that the respondents were merely exercising their constitutional right to campaign for the

upcoming municipal elections. The proposition merely has to be stated to be rejected. It ignores the preceding

sentence of the press release that "the ZUPTAS must heed the call of the Commander in Chief of the EFF and vacate South Africa, otherwise, the predictability of what could happen to them and any of their properties, becomes a highly volatile matter". No reasonable and right-thinking person would consider the statement not to be a threat of violence and that the respondents were merely campaigning for the upcoming elections. Mr. Semenya further submitted that there was no evidence on the papers of any violence being committed. But that is not the applicants' case. They don't allege that any violence has been committed by any of the respondents. Their case is that in view of the statements which have been made, their right not to be threatened with violence has been infringed and that they have a reasonable apprehension that violence will be committed against them.

- [13] In regard to the statement that the EFF was going to physically drive the Zuptas out of Gauteng by any means possible, the first respondent states in the answering affidavit that the statement does not show any threat of violence and that the EFF will act lawfully, which

would include marches, petitions and, if necessary, legal proceedings to force the Gupta family out of Gauteng, all of which is lawful. One must, however, look at the words which were used and not at what the respondents say what they intended to convey. The interpretation contended for by the respondents ignores the word "physically" and the words "by any means possible". No reasonable and right-thinking member of society would consider the statement to · exclude violence as a means of driving the Guptas out of Gauteng.

[14] The applicants and their employees have a constitutionally protected right not to be threatened with violence. The statements made by the respondents, as they would be understood by a reasonable and right thinking person, caused the applicants to reasonably apprehend that they would be harmed. It was not submitted by the respondents that the applicants have any alternative remedy. In the result, I granted the order sought by the applicants with the amendments which were suggested by Mr. Maritz.

Counsel for applicants: Adv. NGO Maritz SC; Adv. PG Cilliers SC; Adv. APJ Els.

Instructed by : Vari der Merwe & Associates, Pretoria.

Counsel for 1st to 3rd respondents: Adv. AM Semenya SC.

Instructed by: Tumi Mokwena Incorporated, Johannesburg.

¹This is a reference to the first respondent.

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