

SOUTH AFRICA / JUDGMENT

Kassel v Thompson Reuters (Markets) SA (16/34227) [2018] ZAGPJHC 413; 2019 (1) SA 251 (GJ) (12 June 2018) [2018] ZAGPJHC 413

COURT

South Gauteng High Court, Johannesburg

BEFORE

David Unterhalter

CASE / FILE NUMBER

16/34227

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 16/34227
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.

In the matter

between:

DAVID
KASSEL Applicant
and
THOMPSON REUTERS (MARKETS)
SA Respondent

JUDGMENT

UNTERHALTER J

INTRODUCTION

This case concerns a particular class of persons: politically exposed persons (“PEP(s)”). There is no universal definition of PEPs. The Financial Action Task Force (FATF), an international body of which South Africa is a member, defines domestic and foreign PEPs. In essence, PEPs enjoy or have enjoyed high office within the state and its institutions from which office PEPs discharge prominent public functions. There is no closed list of these offices. They include heads of state or government, senior

government, judicial and military officials; and, importantly for this case, senior executives of state owned corporations.

The designation of this class of persons is intended to facilitate enhanced due diligence by financial institutions when a customer or prospective customer is a PEP. And it is common ground that this enhanced scrutiny is part of a worldwide effort to exercise greater vigilance in the global financial system so as to detect and deter money laundering and the financing of terrorism. Many countries, South Africa included, have passed legislation that requires enhanced due diligence of PEPs.

The Respondent (“Thompson Reuters”) has an international database of PEPs. Thompson Reuters offers a service to subscribers

called World-Check. Subscribers, for the most part financial institutions, consult World-Check to find out whether a person is

listed in the World-Check database as a PEP.

The Applicant (“Mr Kassel”) is listed as a PEP in the World-Check database. He is listed as a former senior official of a State Owned Enterprise.

Mr Kassel was a non-executive director of a company, Mbada Diamonds (Private) Ltd (“Mbada”). Mbada was a joint venture

between The New Reclamation Group (Pty) Ltd (Reclam), of which Mr Kassel is the executive chair, and the Zimbabwe Government. The Shareholders of Mbada were Grandwell Holdings Limited, a subsidiary of Reclam, and Marange Resources (Private) Limited, a wholly owned subsidiary of the Zimbabwe Mining Development Corporation. Mr Kassel says that Mbada was constituted so as to permit New Reclam to undertake mining in Zimbabwe, in compliance with Zimbabwe’s indigenization legislation, that required New Reclam to forego a controlling interest in Mbada. Mr Kassel relinquished his position as a non-executive director of Mbada on 8 October 2014.

Mr Kassel says that he should not be listed as a PEP. He complains that his continued listing by Thompson Reuters is defamatory and his name should be removed from the listing.

The central question before me is whether the continued listing of Mr Kassel as a PEP is defamatory, and, if it is, does Mr Kassel have a right to prevent Thompson Reuters from publishing his name as a PEP.

IS THE PUBLICATION DEFAMATORY?

The original recordal of Mr Kassel in World-Check, of which Mr Kassel complains in the founding affidavit, reflects Mr Kassel as a PEP N (designating National Government), being a former Senior Official of a State Owned Enterprise. The recordal lists certain biographical information that is stated to derive from named sources. The information given is that Mr Kassel was a member of the Board of Directors of Mbada, as a representative of Grandwell Holdings (August 2009–October 2014), and Executive Chairman of The New Reclamation Group (Pty) Ltd (1998 -). Three sources are cited as links to the internet. One of the links includes in the identified link the following : “chiadzwa- gang-individual’s – and fugitives.” That link could not be accessed by subscribers, it was a broken link.

There is a dispute as to whether the reference to this link is defamatory of Mr Kassel. The founding affidavit makes much of the chiadzwa link as defamatory. I do not however need to determine this dispute because Thompson Reuters has removed the chiadzwa link from the current sources referred to in the listing of Mr Kassel. What now appears is a reference to Reclam’s 2011 annual report. Mr Kassel seeks an interdict against Thompson Reuters. An interdict cannot be given for past conduct. Upon the removal of the chiadzwa link, this ground of complaint (whatever its merit) could no longer sustain the relief sought by Mr Kassel.

The case for Mr Kassel that was pressed by Mr Marcus and Mr Spottiswoode was this. The mere listing of Mr Kassel as a PEP when he was a director of a State Owned Enterprise was not defamatory, but the

retention of his listing after he had resigned from that position is defamatory.

The argument was developed in this way. The classification of persons as PEPs is intended to convey to the ordinary reader of World-Check that such persons warrant enhanced scrutiny because their positions carry greater risk of association with or involvement in transactions linked to money laundering or the financing of terrorism. This attribution of enhanced risk is

defamatory of a person once they have resigned from the office that gave rise to their political exposure, unless there is some reason to suppose that the risk remains, and hence the listing as a PEP remains justified. The guidelines of World-Check, so it was submitted, recognize that the risk associated with a PEP is closely related to the office or function held by a person. Once a person leaves office, continued listing as a PEP may not be warranted if there is no adverse information concerning a person, over a long enough period, so as to permit of the conclusion that the sources of the person’s wealth are legitimate and their remaining influence has not been abused.

Mr Kassel says that he has vacated his office. No adverse information concerning him is offered by Thompson Reuters. The retention of his listing as a PEP conveys the defamatory implication that Mr Kassel is a person to whom an enhanced risk of association with money laundering and the financing of terrorism continues to attach – when in fact there is no basis for such attribution.

The analysis must commence, as the Constitutional Court has made plain in *Le Roux*[1], with the ordinary meaning of the statements made in the listing referencing Mr Kassel. Ordinary meaning is ascertained

by recourse to the construct of the understanding of the reasonable reader. The statements are construed in context, and their meaning is derived both from what is expressly stated and what is implied.

World-Check is a highly specialized publication. It is used, for the most part, by financial institutions to ascertain whether a person is a PEP so as to comply with regulatory requirements of enhanced scrutiny. The reasonable reader must be taken to be a reader somewhat informed of the regulatory purpose for which persons are listed as PEPs.

Such a reader reading the listing of Mr Kassel in World-Check would understand that Mr Kassel is listed as a PEP because for a period of time he was a former Senior Official of a named State Owned Enterprise. Understood in the context of the regulatory purpose for which PEPs are listed, this statement concerning Mr Kassel is not defamatory for two principal reasons.

First, that a person is politically exposed by reason of their occupancy of a high office of state does not say of that person that he or she has abused their office or is otherwise corrupt. It is the office that gives rise to the risk because of the influence that attaches to it. But that says nothing as to whether a particular person occupying that office has been compromised. That is the point of the due diligence that is to be done. The listing of a person as a PEP and the office that gives rise to this designation neither anticipates nor implies the outcome of the enhanced scrutiny that is to be undertaken.

Thus, to be listed as a PEP by reason of a person's occupancy of a high office of state does not injure the esteem in which they are held because mere occupancy of office entails no attribution of wrongdoing. The ordinary reader would simply understand that the listing of a person and their office gives rise to a risk that may require enhanced regulatory scrutiny. But that says nothing whatsoever as to a listed PEP being a wrongdoer.

Second, the designation of persons as PEPs defines a very wide class, comprising the more senior positions in government and the state. This too is relevant to the ordinary meaning of the statement concerning Mr Kassel. Mr Kassel is listed as a PEP in a class that is peopled with the great and the good. Whether a particular PEP is indeed good is the very point of the enhanced scrutiny. But there is no presumption whatsoever that merely listing a person as a PEP renders them suspect. For the reasonable reader of this publication, the listing of Mr Kassel as a PEP provides no reason to regard Mr Kassel any differently from the Queen of England, who is also, I

am told, a PEP.

For these reasons, Mr Marcus correctly conceded that the listing of Mr Kassel as a PEP, as a director of Mbada, would not have been defamatory. Mr Kassel's case, as I have indicated, now rests on the proposition that the retention of his listing as a PEP is defamatory because he is no longer a director of Mbada and hence there is no reason to continue listing him as a PEP.

This proposition cannot be accepted. It may very well be that once a PEP vacates their office they are, as time goes by, ever less exposed and the reason to retain their designation diminishes or comes to have little or no value. But the diminishing utility of listing such as person as a PEP does not mean that the retention of the listing is defamatory.

This follows from the conclusion I have already reached. If the occupation of high office by a PEP, for all the risks of exposure,

is not defamatory of the person who occupies that office, how does vacating that office and still referencing their exposure to risk become defamatory? The answer appears to be that Mr Kassel, on resigning his directorship, was not politically exposed.

Assuming that is so, why is it defamatory to say of Mr Kassel that he was once a director of a State Owned Enterprise and remains a PEP? As the analysis offered above has emphasized, to be listed as a PEP entails no attribution of wrongdoing. To continue to be listed as such, after vacating an office of state, adds nothing that would now give rise to such an attribution. At worst, the continued listing of Mr Kassel as a PEP is an incorrect assessment of risk. The continued listing does not say or imply that Mr Kassel has conducted himself in a manner that amounts to wrongdoing, any more than it did so when he was listed and was a director of Mbada.

This puts the matter on the most favourable basis for Mr Kassel, that is to say, that his continued listing as a PEP is unwarranted because Thompson Reuters has no basis to believe that he continues to pose a risk of political exposure.

It was submitted on behalf of Mr Kassel that the defamation comes about because Thompson Reuters has failed to give effect to their own editorial guidelines as to the expiration of PEP status. Those guidelines refer to the Wolfsberg Group which has said the following :

"In the case of a former PEP, continued treatment as a PEP may not be warranted if there has been no sufficiently adverse or derogatory

information widely published for a period of time that is long enough to conclude that:

Taking into account the susceptibility of the former position to corruption, their source of wealth is legitimate and the individual has not abused such remaining influence as he or she may have."

There are a number of observations to make about the guidelines. First, they reference but do not adopt the position of the Wolfsberg Group. Second, even the Wolfsberg stance is less than categorical: it simply indicates an approach that may be warranted. Third, the guidelines in fact adopt a rule that a former PEP's status will be removed three election terms after the PEP vacates

their office (12 or 15 years depending on the country). This rule is said to mark a compromise between the position “once a PEP always a PEP “ and an individual risk-based approach. Fourth, on the rule in fact adopted in the guidelines, World-Check has adhered to its own guidelines in respect of Mr Kassel.

Mr Kassel’s recourse to the guidelines, even on the favourable assumption that the guidelines are known to the ordinary reader of World-Check, does not advance his case. The guidelines consider when it might be said of a person who held but vacated their office that the risk of exposure no longer warrants listing that person as a PEP. That is an enquiry into risk. It is not, as I have explained, an enquiry into the warranted attribution of wrongdoing. The continued listing of Mr Kassel as a PEP does not imply that there is widely published information about him of an adverse or derogatory kind. The methodology apparently advocated by the Wolfsberg Group recommends looking for information to decide whether to continue to list a person as a PEP. The methodology is just that: a way of deciding whether to retain a listing. The methodology does not say or imply that if a listing is retained there is an affirmative implication of wrongdoing.

World-Check may, in continuing to list Mr Kassel as a PEP, have it wrong on the assessment of his exposure to political risk. That, as the guidelines make plain, is a matter of judgment. But saying that there is political risk that continues to warrant Mr Kassel’s listing as a PEP does not in any way say or imply that Mr Kassel is a person who has or may have done anything wrong while in office or thereafter.

Accordingly, I find that the current listing of Mr Kassel in World Check is not defamatory and he has not been defamed.

COSTS AND ORDER

Once, as I have found, the current entry in the listing of Mr Kassel is not defamatory, it was common ground that he is not entitled to any interdictory relief.

There remains only the question of costs. Thompson Reuters seek a punitive order because in his replying affidavit Mr Kassel falsely claimed that Thompson Reuters had included reference to the now withdrawn press report to seek to make out the requirement in the Wolfsberg position that there should be adverse press reports to warrant the continued designation of a person as a PEP. That imputation cannot be sustained and should not have been made.

I am inclined however to allow that Mr Kassel may have allowed a litigious zeal for unwarranted inference to overcome the good sense of a careful reading of the guidelines.

In the result, the application is dismissed with costs, the costs to include the costs consequent upon the employment of two counsel.

David Unterhalter

Judge of the High Court

Gauteng Local Division: Johannesburg.

Date of Hearing: 4 June 2018

Judgment Delivered: 12 June 2018

Appearances:

Advocate for the Applicant: Gilbert Marcus SC and Kim Spottiswoode instructed by Werksmans Attorneys.

Advocate for the Respondent: Wim Trengove SC and M.D Stubbs instructed by Webber Wentzel.

[1] Le Roux and Others v Dey 2011 (3) SA 274 (CC) at [89]

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