

SOUTH AFRICA / JUDGMENT

Kaymak and Another v Ralushai (2016/21096) [2023] ZAGPJHC 60 (26 January 2023) [2023] ZAGPJHC 60

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2016/21096

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, JOHANNESBURG
CASE
NO: 2016/21096

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
26/1/2023
In

the matter between:

KAYMAK,
SELIM
First
Applicant
CALISKAN,
SEMSETTIN
Second
Applicant
and
RALUSHAI,
TSHIVHE Respondent
SUMA
COAL (PROPRIETARY) LIMITED
First
Applicant
KAYMAK,

SELIM
Second
Applicant
CALISKAN,
SEMSETTIN
Third
Applicant
RALUSHAI,
TSHIVHE
Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application to make settlement agreement an order of court – only one clause not fully implemented at time of application, namely a clause prohibiting defamation and derogatory statements by the respondent – the defamatory material the publication of which is prohibited not described and clause incapable of being meaningfully implemented – Publication of defamatory material would constitute a delict whether or not the clause were made an order of court – Application dismissed

Order

[1] In this matter I make the following order:

1. The application to make the settlement agreement entered into and concluded under the case number 2016/21096 on 22 September 2016 an order of court is dismissed;
2. The counter-application is dismissed;
3. The applicant's striking out application is dismissed;
4. All parties are to pay the own costs.

[2] I refer in this judgment to the applicants and the respondents in the counterapplication as 'the applicants' and to the respondent and the applicant in the counter- application as 'the respondent.'

[3] The reasons for the order follow below.

Introduction

- [4] This is an application to make settlement agreement an order of Court in terms of Rule 41(4) of the Uniform Rules of Court. The Rule provides that any party to a settlement which has been reduced to writing and signed but which has not been carried out, may apply for judgment in terms of the settlement.
- [5] The respondent counter-applies for an order that the settlement agreement be declared unlawful and be set aside, or alternatively that clause 21 of the agreement be declared unlawful and severed from the settlement agreement. A prayer relating to relief in terms of the Companies Act, 71 of 2008, was abandoned during argument.
- [6] The first and second applicants entered into an agreement with the respondent on 22 September 2016. The settlement agreement sets out the undertakings of the parties and in clause 27 of the agreement it is agreed that the settlement agreement be made an order of Court and that, once made an order of Court the agreement would set out the entire agreement between the parties and shall serve as the full and final settlement of the matter under case number 21096/16, and all past disputes between the parties up to date

of making this order.

- [7] The agreement provided, inter alia, in clause 21 that an interim order granted by the Court by consent on 23 June 2016 be made a final order. The order granted on 23 June 2016 read as follows:

“BY AGREEMENT BETWEEN THE PARTIES, IT IS ORDERED THAT:-

1. The application is removed from the roll.
2. The Respondent or any company or entity related to the Respondent is interdicted and restrained from publishing any material that refers to the Applicants and/or an companies related to the Applicants as being involved in any criminal conduct of whatsoever nature.
3. The Respondent or any company or entity related to the Respondent is interdicted and restrained from making disparaging and defamatory remarks about the Applicants to:-
 - 3.1 the Minister of Mineral Resources in South Africa;
 - 3.2 officials at the Department of Mineral Resources South Africa;
 - 3.3 the Turkish ambassador to South Africa and/or any other the member of the Turkish Government;
 - 3.4 the South African Ambassador to Turkey and/or any other member of the Department of International Relations and Co-operations South Africa;
 - 3.5 the Directorate For Priority Crime Investigations; and
 - 3.6 the International Police Organisation, known as INTERPOL.

4. Paragraph 2 and 3 shall operate as an interim order pending the finalisation of this Application.
5. Costs are costs in the cause.”
- [8] In the agreement therefore the interim relief became final by agreement between the parties.
- [9] While the Court order and clause 21 of the settlement agreement refer also to “any company or entity related to the Respondent”, third parties not before Court and not parties to the agreement cannot be bound to the Court order or to the agreement. The clause

would be binding only inter partes.

- [10] It is common cause on the papers[1] that between the parties that the agreement has been carried out, save for the provisions of the aforesaid clause 21 that constitutes

an ongoing undertaking. It is however not an undertaking that grants any protection to the applicants. Defamation is a recognised delict and any defamation by the respondent would be actionable at the instance of the applicants whether or not the agreement were made an order of court; conversely the applicants would have to prove the actual defamation whether or not clause 21 were made into an order of court.

- [11] Similarly, the laying of false and trumped-up charges with the law enforcement authorities will be actionable; the making of true statements to assist the authorities in carrying out investigations will not be actionable at the instance of the applicants. Again, the status of clause 21 of the settlement agreement is of no moment.

- [12] The courts do not interdict future defamation in broad terms. It is not possible to interdict a respondent in broad and general terms from defaming an applicant in the future. Rather, a court may interdict specific acts of defamation, for example, it may interdict the respondent from repeating an allegation that the applicant stole money from his employer. Thus, in *Buthelezi v Poorter and Others*[2] the applicant sought an interdict to the further publication of an article containing specified, specific defamatory material.

Similarly, in *Cleghorn and Harris Ltd v National Union of Distributive Workers*[3] the applicant brought an application to interdict the further publication of a handbill containing allegedly defamatory material.

The allegedly defamatory material must be placed before the Court. It can not be merely referred to as ‘material’ without

setting out what the material consists of. The Court must be in a position to evaluate the material and must be satisfied that the applicant has established the probable harmful effect of its publication.[4]

- [13] I therefore conclude that clause 21 of the settlement agreement is too vague to be implemented meaningfully or to stand on its own. The application must fail.
- [14] The refusal of the application implies that the counter application has become moot. There are no grounds to find that clause 21 or indeed the whole agreement (most of which was implemented) was unlawful and contra bonos mores.

Striking out application

- [15] The applicants brought an application to strike out portions of the respondent's answering affidavit on the grounds that the averments are irrelevant and scandalous. The applicants make a bald allegation to the effect that they will be prejudiced should the offending paragraphs not be struck, but this averment is not substantiated with reference to specific instances of prejudice. I am of the view that the application to strike out has no merit.

Conclusion

- [16] I therefore make the order as set out above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 27 JANUARY 2023.

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ATTORNEYS

DATE OF THE HEARING: 23

JANUARY 2023

DATE OF ORDER: 27

JANUARY 2023

DATE OF JUDGMENT: 27

JANUARY 2023

- [1] Cf paras 35 and 36 of the founding affidavit.
- [2] Buthelezi v Poorter and Others 1974
- (4) SA 831 (W).
- [3] Cleghorn and Harris Ltd v National Union of Distributive Workers 1940 CPD 409.
- [4] Tsichlas and Another v Touch Line Media (Pty) Ltd 2004
- (2) SA 112 (W) 130J-131A.

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