

SOUTH AFRICA / JUDGMENT

Liebenberg v Van der Merwe (4762/2022) [2022] ZAFSHC 287 (24 October 2022)

[2022] ZAFSHC 287**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

4762/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****No.: 4762/2022****Reportable:**

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

LOUIS

PETRUS

LIEBENBERG Applicant

and

SCHALK

WILLEM VAN DER

MERWE Respondent

JUDGMENT

BY: VAN RHYN, J

HEARD ON: 7 OCTOBER 2022 AND 20 OCTOBER 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the applicant's legal representative and the respondent by email and released to SAFLII. The date and time for hand-down deemed to be at 14h00 on 24 OCTOBER 2022.

[1] This is an urgent application issued on 29 September 2022 in which the applicant seeks the following relief:

"1. That this matter be heard as one of urgency, and that the time limits, forms and service provided for in the Rules of this Honourable Court, be dispensed with in terms of the provisions of Rule 6(12)

2. That the respondent be mandatory interdicted and ordered to remove any defamatory, derogatory or postings protected by privacy concerning and in respect of the Applicant which are already on electronic media, which were created and/or distributed and/or published by the respondent;
3. That the respondent be prohibitory interdicted, interdicting the respondent from continuing to disseminate, create, distribute and/or publish, directly or indirectly, false and/or defamatory and/or derogatory allegations, posts, and publications in respect of and concerning the applicant on electronic media and the internet as a whole (inter alia but not limited to Facebook, WhatsApp, YouTube, or any other social media platform of whatsoever nature), or to any legal person (individual or entity) albeit verbal, in writing or through any possible medium;
4. That the respondent pays the cost of this application on an attorney and client scale.

[2] The applicant, Louis Petrus Liebenberg is an adult male businessman, a diamond broker and investor of Bronkhorstspuit, Gauteng Province. The respondent, Schalk Willem van der Merwe is an adult self-employed business- and labour consultant with residential address at Henneman in the Free State Province.

[3] The applicant and the respondent have known each other since August

2021. The applicant became aware of criminal charges preferred against the respondent and his wife during March 2022 and decided to assist them by paying their bail deposits. Thereafter the relationship between the applicant and the respondent disintegrated to such a degree that, according to the applicant, the respondent then embarked upon a malicious social media campaign against him.

- [4] The applicant contends that prior to 24 August 2022 the respondent published a host of derogatory and defamatory statements about him on a Facebook page, created and administered by the respondent. On 24 August the applicant's attorney of record sent a letter per WhatsApp message to the respondent's cellular phone demanding the removal of the derogatory postings and to furnish a written undertaking not to make any derogatory and defamatory statements in future.
- [5] Initially the respondent refused to remove the publications about the applicant, but shortly thereafter removed the publications about the applicant. However, on Thursday 22 September 2022, the respondent published a post on his Facebook page which is available to the public as a whole, stating the following about the applicant: "Mal soos 'n haas" which post received 85 reactions, 35 comments and 1 share at the time the founding affidavit was drafted.
- [6] On Saturday 24 September 2022 the respondent published a further post on his Facebook page that he intends to chat about the applicant and described him as "die psigopaat vals Christen Ponzi-skema baas" and added his intention to close down the applicant's business within a month. The publication received 216 reactions, 200

comments and 17 shares at the time of the drafting of the founding affidavit.

- [7] The next publication by the respondent was also on 24 September 2022 when the respondent published a live video with a total broadcasting time of 27:01 minutes which allegedly contains a host of defamatory allegations against the applicant. This video, which was also open to the public as a whole received 196 reactions, 115 comments, 48 shares

and more than 5 500 views. A transcript of the video is attached to the founding affidavit. At the hearing of the matter on 7 October 2022 Mr Coetsee, counsel on behalf of the applicant indicated that the video is available for viewing if the court so wishes. A translation of the transcript in English is also appended to the founding affidavit. The video was shared by the respondent on 6 different Facebook pages of which the respondent is the administrator. Consequently, the video received more reactions.

- [8] On Sunday 25 September 2022 the respondent made a further video posting on his personal Facebook page to dissuade the applicant from taking any action against him. This video received 154 reactions, 177 comments, 6 shares and more than 3 900 views. A transcript of the said video and a translation thereof in English are attached to the founding affidavit. Later the same evening the respondent requested the applicant to discuss a settlement which was followed by

a further publication on Monday, 26 September 2022 wherein he asked his followers whether he should work with the applicant or 'knock him over'. The post also received reactions and comments from the public.

- [9] The respondent filed a notice to oppose, answering affidavit and concise heads of argument on Friday, 6 October 2022, shortly prior to the hearing of the urgent application. Mr Coetsee, then presented arguments where after the respondent, who appeared in person presented his arguments. A power failure necessitated an adjournment of the court proceedings. In chambers, Mr Coetsee requested the court to adjudicate the matter on the papers to avoid incurring any further costs as the legal representatives on behalf of the applicant are from Pretoria. The respondent too travelled from Pretoria for the hearing of the matter.
- [10] The respondent requested a postponement for the further hearing of arguments on the basis that it will provide him with an opportunity to obtain legal representation and to file a supplementary affidavit or further heads of argument, if so advised. The matter was postponed to 20 October 2022 for further hearing.
- [11] On 20 October 2022, when the matter was called there was no appearance by the respondent. I was informed by Mr Coetsee that his attorney did not receive any indication that the respondent in the meanwhile obtained legal representation. The respondent did not file a supplementary affidavit or supplementary heads of argument. The matter proceeded on an unopposed basis after a diligent search for the whereabouts of the respondent was conducted in the passages of the court building. An order in favour of the applicant was granted. Approximately 15 minutes later the respondent arrived at the court and requested the matter to be called again. Since the applicant did not object, the order granted approximately 20 minutes earlier was rescinded to avail the respondent an opportunity to address the court.
- [12] It is not in dispute that the respondent is the author of the posting on his Facebook page which has given rise to this litigation. The publications on Facebook and other social media have been and can still be widely viewed and circulated. The publications are globally accessible by anybody with internet connections. On behalf of the applicant it is argued that the statements and publications made by the respondent on his social media platforms are, in every conceivable context unlawful, defamatory, wrongful and injurious of the applicant and intended by the respondent to injure him in his dignity and reputation.
- [13] The following are some of the statements (translated from Afrikaans to English) concerning the applicant in the video posted by the respondent;
- 13.1 that the applicant is a “... fake Christian and a Ponzi scheme fraudster”
- 13.2 that the applicant is hanging around on Facebook “... to masturbate pretending to be a man”
- 13.3 the applicant is a “...fucking farce and a “fucking arsehole”
- 13.4 the applicant is a “...crook, hypocrite trash walking with a bible under his arm, a liar and a ridiculous fool, a whore and a scamster”

13.5 the applicant is a "... psychopath, crazy and stupid".

[14] The respondent opposes the application, firstly on the basis that the application is not urgent and secondly on the basis that the applicant brought this application with dirty hands in an attempt to stop the respondent from exposing the applicant's questionable business dealings and making same known to the general public.

[15] The respondent prays for the application to be dismissed with a punitive cost order on the grounds that the application is "by its very nature frivolous, vexatious and even malicious". According to the respondent the applicant is involved in so called "high risk business ventures" where the public is invited to become partners without any guarantees in respect of capital input into such ventures. The respondent contends that investigations by the media and law enforcement agencies are ongoing against the applicant regarding such business ventures and this application is an attempt by the applicant to "gag" or prevent the respondent from warning the public about the applicant's "Ponzi-skema"

[16] The applicant complains that the postings by the respondent publishes information which portrays him as:

(16.1) a dishonest, greedy businessman involved in criminal activity;

(16.2) an immoral person who cannot be trusted;

(16.3) a person who has a problem with his previous business partners, that he has been in prison and bribes government officials.

(16.4) a person known for his manic, crazy rants on social media, insinuating that he is mentally unstable.

[17] The applicant regards the publications as defamatory since it has the effect of tarnishing his status, good name and reputation. Defamation is defined as the intentional infringement of another's right to his good name, or more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermined his status, good name or reputation.[1] Its focus is the protection of the constitutional rights to dignity and privacy of any person.

[18] In *Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae)[2] the Constitutional Court dealt with whether a statement is defamatory as follows:

"Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the person to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test, the criterion is what meaning the reasonable

reader of ordinary intelligence would attribute to the statement. In applying this test, it is acceptable that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied” [3]

- [19] On proof by the applicant that a statement is indeed defamatory two rebuttable presumptions arise: first that the publication was unlawful and second, that the statement was made *animo iniuriandi*, i.e. with a deliberate intention to inflict injury. The onus rests on the respondent/defendant to dispel this *prima facie* case. This is a full onus and requires the defendant to allege and prove facts that dispel wrongfulness such as truth and public interest.[4]
- [20] Mr Coetsee argued that the respondent fails to make out any accepting defence in his answering affidavit in that he does not enjoy any privilege entitling him to make the allegations in question, nor does he state that his allegations are true. The respondent does not state that the allegations, which are stated as facts in the publications, are merely his opinion or that his allegations amount to fair comment or were published in the public interest.
- [21] The posts are, on an application of the relevant test, clearly defamatory. The respondent’s defence is that he and his wife have been slandered, threatened, belittled and bad mouthed by the applicant which somehow affords him the right to publish defamatory statements regarding the applicant. The respondent failed to append any proof of postings or threats made by the applicant and indicated that he intends taking legal action against the applicant. The respondent, in his answering affidavit makes no allegation to substantiate the truth of the allegations regarding the applicant. I am satisfied that it is neither to the public benefit or in the public interest to listen or read what the respondent published regarding the applicant.[5]
- [22] A further issue for consideration by this Court is whether this matter is indeed urgent. The alleged defamatory publications were made on 22, 24, 25 and 26 September 2022. The letter of demand to remove the publications was delivered to the respondent on 26 September 2022. The application was issued on 29 September 2022 and the respondent acknowledged receipt of the application on his Facebook page on the 30th of September 2022.
- [23] Even though the application was enrolled as an urgent matter on 7 October 2022, it was not finalized on the particular day due to an emergency outage (electricity) from 11h00 to 16h00 due to vandalism. At the request of the respondent, the application was postponed for 2 weeks to the opposed roll of 20 October 2022. I am satisfied that this matter is urgent and that condonation be granted as prayed for by the applicant.

- [24] The applicant is seeking a final mandatory and prohibitory interdict. Mr Coetsee argued that the applicant has satisfied the requirements for a final interdict against the respondent. To my mind the first two requirements for an interdict set out in *Setlogelo v Setlogelo*[6] have been satisfied. Insofar as an interdict is concerned, the applicant has a clear right to his privacy and the protection of his reputation. The applicant has indeed been defamed.
- [25] The third requirement, namely the question whether there is the absence of similar protection by any other ordinary remedy has been addressed by Mr Coetsee by explaining that the applicant does not intend to institute a claim for damages against the respondent simply because the respondent will not be able to comply with such an order due to financial difficulties experienced by the respondent. The applicant furthermore contend that he has tried, without any success to complain to Facebook about the respondent's conduct.
- [26] I am satisfied that interdictory relief is justified. The further question is whether the court may restrain the respondent to publish any material not yet known to the court in future, as per prayer 3 of the Notice of Motion. I am of the view that, despite the possibility of further defamatory postings on the internet posing a risk to the reputational integrity of the applicant, the relief claimed in prayer 3 of the Notice of Motion would be a drastic limitation and restraint on the respondent's freedom of expression.[7] Even if further postings by the respondent might seem defamatory to the applicant, not all such postings by the respondent would be actionable as it depends on the contents thereof and the potential defense relied upon by the respondent in future. In any event, the applicant could always approach the court for relief in the future.
- [27] The awarding of costs is in the discretion of the court. The applicant in this matter is successful and I see no reason why the respondent should not be ordered to pay costs. The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be[8]. The court should take into account all the circumstances before exercising its discretion as to costs. It must also strive to achieve fairness to both parties.
- [28] The respondent indicated his address for service of the application at Henneman in the Free State Province. However, the respondent subsequently indicated that he is actually residing at Pretoria where he also conducts his business. This matter could have been dealt with in the Gauteng Division, Pretoria seeing that both parties are residing at Pretoria, which would have resulted in a substantial costs reduction. Furthermore, the respondent insisted that the matter be postponed and not adjudicated upon the papers already filed subsequent to the power failure that occurred on 7 October 2022, which resulted in further costs, including travelling costs for the applicant's legal representatives. Even though the respondent was granted leave to file a supplementary affidavit and/or supplementary heads of argument before resuming with the application on 20 October 2022, no further documents were filed by or on behalf of the respondent.

[29] The applicant, in the letter of demand sent an ultimatum to the respondent which clearly indicated that the respondent was afforded an opportunity to remove the defamatory postings on Facebook, failing which the applicant will launch an urgent application with concomitant cost implications.

[30] I therefore agree with the contention on behalf of the applicant that the respondent's uncooperative and unreasonable conduct is deserving of censure by this court and constitutes exceptional circumstances justifying a punitive cost award.

ORDER:

[31] The following order is made:

1. Condonation is granted to the Applicant for the non-compliance with the prescribed rules pertaining to form, process and times and that the application be heard as an urgent application in terms of the provision of Rule 6(12) of the Uniform Rules of Court.
2. The respondent is mandatory interdicted and ordered to remove any defamatory, derogatory or postings protected by privacy concerning and in respect of the applicant which are already on electronic media, which were created and/or distributed and/or published by the Respondent.
3. The Respondent shall pay the costs of this application on an attorney and client scale, including the travelling costs of the applicant's

attorney and counsel.

VAN RHYN, J

On behalf of the Applicant: AV M COETSEE

Instructed by: F

J SDENEKAL ATTORNEYS

BLOEMFONTEIN

On behalf of the Respondent: In Person

[1] Neethling's Law of Personality, Neethling, Potgieter & Visser, Second Edition, at p 131, para 2.1.

[2] 2011 (3) SA 274 (CC).

[3] At [89].

[4] Le Roux v Dey (supra) at [85].

[5] H v W [2013] 2 All SA 218 (GSJ).

[6] 1914 AD 221 at 227.

[7] M v B (10175/2013) [2014] ZAKZPHC 49 at [22] – [25].

[8] Erasmus v Grunow 1980 (2) SA 793 (O) at 798 B-C.

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