

SOUTH AFRICA / JUDGMENT

Mabuza v Letwaba (5068/2021) [2023] ZAMPMBHC 24 (12 April 2023)

[2023] ZAMPMBHC 24

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

5068/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 5068/2021

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

DATE: 12/04/2023

In the matter between:

DAVID DABEDE MABUZA

Applicant

and

JOEL POMPIES LETWABA

Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

- [1] The erstwhile Deputy President, Mr David Dabede Mabuza (“The Applicant”) launched an application in this Court following events that occurred on 03 February and 18 October 2021, more succinctly set out hereunder. The Applicant seeks an order against Mr Joel Pompies Letwaba (“The Respondent”) in the following terms:
1. Interdicting and restraining the respondent from making any oral or written statements and/or stating publicly that the applicant:
 - 1.1. was responsible for ordering the killing of people while Premier of Mpumalanga;
 - 1.2. is the cause of problems in the country and in the African National Congress;
 - 1.3. is responsible for the killing of whistle-blowers;
 - 1.4. is one of South Africa's most feared politicians and/or persons;
 - 1.5. knows the identity of masterminds of political assassinations in Mpumalanga Province;
 - 1.6. has caused criminal cases opened against him to disappear.
 2. Ordering the respondent to issue a public apology to the applicant in the following terms:
 - 2.1. The apology is to be made by the respondent in person and is to be broadcasted on the national television broadcasters Newzroom Afrika and eNCA and published in the Citizen newspaper.
 - 2.2. The respondent is to approach the media organisations mentioned in paragraph 2.1 above, within 14 days of this Court's order, to arrange for the airing and publication of the apology.
 - 2.3. Should the media organisations mentioned in paragraph 2.1 above refuse to give the respondent sufficient airtime to make the apology, the applicant is entitled to approach this Court again, on the same papers duly supplemented, for appropriate alternative relief.
 - 2.4. The apology is to be in the following terms:

"On 3 February 2021 and 18 October 2021, I publicly stated, on interviews given on Newzroom Afrika and eNCA respectively, that Mr David Mabuza, the Deputy President of South Africa and the African National Congress, was responsible for political killings in Mpumalanga Province and made related allegations. I made these statements without evidence and I appreciate that they are false. In the circumstances, I unreservedly retract the statements which I made and apologise to the Deputy President for having made them"
 - 2.5. Ordering the respondent to pay the costs of this application on the attorney-own client scale, such costs to include the costs of two counsel.

FACTUAL

BACKGROUND

- [2] The factual matrix giving rise to the causa are vested in two interviews, one conducted on Newzroom Afrika and the other on eNCA (collectively referred to as “the broadcasters”) on 03 February and 31 October 2021 respectively. It is common cause that the interviews were conducted between the news anchors of the respective broadcasters and the Respondent, though the interview with Newzroom Afrika also included several guests in the same segment. On 04 February 2021, following the interview with Newzroom Afrika, the Citizen, a newspaper, published an article about the interview.
- [3] In both the interviews with the broadcasters, it is alleged that the Respondent made false and highly defamatory statements about the Applicant. These statements were:
- 3.1 That in the time from when the Applicant became Premier of Mpumalanga "people began perishing one by one".
- 3.2 That, in the time that the Applicant was Premier of Mpumalanga, about 27 people were assassinated and "evaporated into thin air".
- 3.3 That the Applicant is the "genesis of problems in the country" and the "genesis of all problems in the ANC".
- 3.4 That the Applicant is responsible for the killing of whistle-blowers.
- 3.5 That the Applicant is a man without ethics and morals.
- 3.6 That the Applicant is "South Africa's most feared political monster".
- 3.7 That when one talks of the Applicant some people shriek with horror and get so paralysed that they are confined to wheelchairs.
- 3.8 That in the time that the Applicant was Premier of Mpumalanga, 38 people were killed or assassinated and their cases evaporated into thin air.
- 3.9 That the Applicant knows the masterminds behind assassinations in Mpumalanga Province.
- 3.10 That the Applicant is a "political monster who brutalised the people of Mpumalanga Province".
- 3.11 That criminal cases have been opened against the Applicant, which have then "evaporated".
- [4] On 24 November 2021, the Applicant instructed his erstwhile Attorneys of record to address a letter to the Respondent demanding certain undertakings and an apology. The Respondent has allegedly not heeded to the demands which, according to the Applicant, led to the issuance of this application.

- [5] The application was issued on 03 December 2021 and personally served on 4 December 2021. Following the service, the Respondent opposed the application by serving a notice to oppose on the Applicant on 10 December 2021 and subsequent thereto an answering affidavit was served on 31 January 2022, albeit, that it was late. It is not clear from the papers when the replying affidavit was filed. However, this is immaterial since it was not raised as an issue in dispute

ASSERTION BY THE PARTIES

- [6] The Applicant asserts that the statements made by the Respondent are false and defamatory and that as such, there is no evidence to support these them. As relief, he asks for an interdict and a public apology more succinctly outlined in paragraph 1 of this judgment.
- [7] The Respondent asserts that such statements are not defamatory since the comments made therein are comments which have been made in the public domain for decades. In furtherance to this point, he adds that there are hundreds of thousands hits on the world wide web, published books, investigative articles and research reports which have never been challenges by the Applicant.
- [8] It appears from the papers filed that the main defences are truth and public interest and fair comment. It also appears that the Respondent requests condonation, from this Court, for late filing of his answering affidavit. It seems that the Applicant, in his reply, did not dispute condonation for the Respondent's late filing of his answering affidavit.
- [9] In addition thereto, the Respondent raises two points in limine couched as follows:
- 9.1 Firstly, that the Applicant's founding affidavit is not properly commissioned since it was signed by the Applicant in Barberton but was commissioned at 46 Silky Oak which, according to the Respondent, does not exist in Barberton.
- 9.2 And secondly that this Court lacks Jurisdiction to adjudicate this application since the cause of action arose within Gauteng province
- [10] In response to the first point in limine, the Applicant asserts that, while 46 Silky Oak is in Centurion, there is no rule that a commissioner of oaths cannot accept swearing of an oath in a different location different to where he or she is ordinarily located. He adds that the commissioning of his founding affidavit took occurred at a place other than the commissioner's address.
- [11] In response to the second point in limine, the Applicant asserts that one of the main grounds of Jurisdiction is that Respondent resides within the Jurisdiction of the Court. This assertion, according to the Applicant, was admitted in paragraph 3 of the Respondent's answering affidavit the he resides in Mpumalanga.

ISSUES

[12] The court is called upon to determine whether or not:

12.1 the Respondent's late filing of his answering affidavit should be condoned;

12.2 a Commissioner of oaths may commission an affidavit in a place other than his ordinary address;

12.3 Whether this Court has Jurisdiction to adjudicate this Application;

12.4 The statements made by the Respondent during the interviews with the broadcasters were false and defamatory;

12.5 The main defences of truth, public interest and fair comment suffice;

LEGAL FRAMEWORK AND EVALUATION

Condonation for late filing of the answering affidavit

[13] In terms of Rule 27(3) of the Uniform Rules of Court, the court may, on good cause shown, condone any non-compliance with the such rules. The words "good cause shown" offers the Court a wide discretion to assess whether the fact pass muster[1].

[14] The Respondent raised numerous reason why he could not file his answering affidavit timeously, chief among which, that numerous attorneys had refused to accept the instructions and the attorney on record was willing to accommodate him despite his impecunious position. The Respondent states that the offices of his current attorneys of record only re-opened on the 11th January

2022. The Applicant in his reply did not deny any of the reasons. I am of the view that delay was transient and as such the statements allegedly made by the Applicant to the broadcasters are of such a serious nature that they warrant a response. In my view, this in the interest of the public, since the Applicant bore one of the highest public office. Accordingly, the late filing of the Respondent's answering affidavit is condoned.

Commissioning an affidavit in place other than his ordinary address

[15] The allegation made by the Respondents is that the Applicant's founding affidavit was not properly commissioned, for reasons already outlined in one of the preceding paragraph. This allegation directly disputes the validity of the founding affidavit. In as far as the validity is concerned, this Court is inclined to apply the maxim omnia praesumuntur rite essa acta in terms of which the person who disputes the validity of the affidavit bears the onus to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken fails[2].

[16] In reply, the Applicant argued that the Commission of oath was in Barberton, with the Applicant, when he administered the oath. Furthermore, he argues that there is no law that prohibits the commissioner from administer his oath in a place other than his ordinary

address. I agree with the Applicant, the Justices of the Peace and commissioners of Oaths Act[3] does not restrict a commissioner of oath from administering his oath only where he ordinarily resides. Furthermore, the Respondent, as the bearer of the onus, has not adduced any evidence contrary thereto. I am therefore inclined to dismiss the first point in limine.

Jurisdiction of the Court

[17] The Respondent argued that this Court has no Jurisdiction to hear the Application. The Applicant in reply argued that the Respondent resides within this Court's Jurisdiction. The second point in limine is frivolous at best since it is trite that Jurisdiction is inferred by virtue of the residence of the Defendant or the Respondent, as the case may be[4]. As correctly alluded by the Applicant, the Respondent even admitted to residing at an address which is within the jurisdiction of this Court. Due to the frivolity of this argument, it will exorbitant to canvass it any further. Accordingly, the second point in limine is dismissed.

The alleged defamatory statements

[18] According to LAWSA at paragraph 114:

"A statement is defamatory if it has the effect of injuring a plaintiff's reputation. A plaintiff's reputation is injured if the statement tends to lower the plaintiff in the estimation of right-thinking members of society. The elements of the delict can therefore be summarized as the unlawful or wrongful publication, animus iniuriandi, of a defamatory statement concerning the plaintiff." ...

[19] Additionally, the defamatory statements must have been published and such publication must be attributable to the Respondent[5]. The defamatory statement will be deemed to be attributable to the Respondent if he or she knew or could reasonably have expected that another person would take cognisance of the defamatory statements[6].

[20] Accordingly, this Court has to make a determination on the following:

20.1 Was there statements made by the Respondent and if so where they defamatory;

20.2 Were the statements published and if so was the publication attributable to the Respondent.

[21] The Respondent does not dispute that he made statements, whether or not the statements were defamatory will depend if such statements injured the reputation of the Applicant to the extent that it lowered the latter in the eyes of a reasonable man. Public figures are often subjects of scrutiny by virtue of the offices they hold. As such, they are expected to endure robust comment, however this does not mean that they cannot be defamed[7]. The best approach to finding the appropriate balance is to evaluate whether or not, in particular circumstances, the publication of defamatory statements could be justifiable in which case such statements would not be unlawful[8]. It is clear from the papers filed that the statements made were not substantiated with any evidence. The Respondent had the opportunity

to obtain such evidence which would form part of this application, instead the Respondent's answering affidavit is riddled with innuendos. The Respondent knew or ought to have known that he would eventually have to substantiate his claim, and this application

would have been the best platform to do so.

[22] It is my view that the statements made had the effect of damaging the reputation of the Applicant. This is more so, since these statements having nothing to do with the official duties of the Applicant or their execution thereof. The statements levied against the Applicant were conspicuously offensive and had an effect of lowering the Applicant in the eyes of a reasonable man. They had or have far reaching consequences which have or will negatively affect the Applicant personally and in his office. Accordingly, I find that the statements made were defamatory.

[23] I now turn to the publication of these statements. According to LAWSA at paragraph 113:

"Publication of the defamatory statement is presumed if it is proved that a book, newspaper, journal or other such document containing the statement was sold or distributed to the public; that defamatory words were spoken within the hearing of third persons..."

[24] Publication of these statements can simply be attributed to the Respondent because he did not dispute that he made such statements, furthermore, such publications occurred in two National public broadcasters. It is without a doubt that the defamatory statements reached the hearing of third persons. The Publication of the defamatory statements were intentional and the Respondent has not rebutted this position[9].

The defences of truth, public interest and fair comment

[25] Truth and public interest and fair comment are two defences that have recognised as rebutting the presumption of wrongfulness. A Defendant relying on truth and public interest must plead and prove that the statement is substantially true and was published in the public interest[10]. I have already alluded, in the preceding paragraph, that the Respondent has not provided any evidence to substantiate the claims

couched in the defamatory statements. It would be reiterative to repeat this point; it suffices to say that the Respondent has failed to prove on a balance of probabilities that the defamatory statements are true and in the public interest[11]. Accordingly, the defence of truth and public interest cannot stand.

[26] The Defence of fair comment, has four elements, namely that the defamatory statement[12]:

26.1 Must be a comment and not a statement of fact;

26.2 must be fair, by which is meant only that it must be an honestly held opinion, not that it is balanced or temperate;

26.3 the facts on which it is based must be true and must be clearly stated or clearly indicated, or matters of public knowledge; and

26.4 the comment must relate to a matter of public interest.

[27] These elements are mutually dependent, in other words, if the defamatory statements do not pass muster on only one of the elements, the defence of fair comment will not suffice.

[28] Relating to the first element, for a defamatory statement to be considered as a comment, it must be true. This was echoed in *Crawford v Albu*[13] when the Court held that “there can be no fair comment upon facts which are not true”. This is definitive of this matter; there can be no inference of truth where the facts lack evidence. Accordingly, the defamatory statements cannot be regarded as comments. This brings an end to the enquiry as already discussed in the preceding paragraph. Accordingly, the defence of fair comment also does not stand.

[29] To illustrate the extent to which the statements made by the Respondent are fallacious. According to the Respondent, the Applicant is responsible for the killing of whistle-blowers. The Respondent had the opportunity in his answering papers to provide proof that the Applicant was tried and convicted for these allegations. All this Court has, is unsubstantiated meandering allegations without any evidence.

CONCLUSION

[30] In conclusion, I find that the statements made by the Respondent during the interviews with the broadcasters were defamatory. The defences of truth and public interest and fair comment do not stand

ORDER

[31] In the result, I make the following order:

1. The Respondent is interdicted and restrained from making any oral or written statements and/or stating publicly that the applicant:

1.1 was responsible for ordering the killing of people while Premier of Mpumalanga;

1.2 is the cause of problems in the country and in the African National Congress;

1.3 is responsible for the killing of whistle-blowers;

1.4 is one of South Africa’s most feared politicians and/or persons;

1.5 knows the identity of masterminds of political assassinations in Mpumalanga Province;

1.6 has caused cases opened against him to disappear.

2. The Respondent is directed to issue a public apology to the Applicant in the following terms:

2.1 The apology is to be made by the Respondent in person and is to be broadcasted on the national television broadcasters Newzroom Afrika and eNCA and published in the Citizen newspaper;

2.2 The Respondent is to approach the media organisations mentioned in paragraph 2.1 above, within 14 days of this Court's order, to arrange for the airing and publication of the apology;

2.3 Should the media organisations mentioned in paragraph 2.1 above refuse to give the Respondent sufficient airtime to make the apology, the applicant is entitled to approach this Court again, on the same papers duly supplemented, for appropriate alternative relief;

2.4 The apology is to be in the following terms:

“On 3 February 2021 and 18 October 2021, I publicly stated, on interviews given on Newzroom Afrika and eNCA respectively, that Mr David Mabuza, the then Deputy President of South Africa and the African National Congress, was responsible for political killings in Mpumalanga Province and made related allegations. I made these statements without evidence and I appreciate that they are false. In the circumstances, I unreservedly retract the statements which I made and apologise to the former Deputy President for having made them”.

2.5 An order that the respondent must pay the costs of this application on the scale as between attorney and client scale, such costs to include the costs of two Counsel, if applicable.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 12 April 2023 at 10:00.

APPEARANCES:

Counsel for the Applicant:

Adv MR Hellens SC

Adv A Friedman

Instructed by: Ulrich

Roux and Associates

C/O Slabber Attorneys Inc

Counsel for the Respondent: Mr

MM Labe

Instructed by: MM

Labe Attorneys

Date of Judgment: 12 April 2023

- [1] Smith NO v Brummer NO 1954
- (3) SA 352 (O) at 358A
- [2] Ladybrand Hotels v Stellenbosch Farmers [1974] 1 ALL SA 438 (O)
- [3] 16 of 1963
- [4] Alphera Financial Services, a division of BMW Financial Services (South Africa) (Pty) Ltd v Lemmetjies (6380/2020) [2021] ZAGPPHC 163 (8 March 2021) at paragraph 29
- [5] S v Kiley 1962 3 All SA 191 (T); 1962 3 SA 318 (T)
- [6] Pretorius v Niehaus 1960 2 All SA 571 (O); 1960 3 SA 109 (O)
- [7] LE ROUX AND OTHERS v DEY 2010 (4) SA 210 (SCA)
- [8] MTHEMBI-MAHANYELE v MAIL & GUARDIAN LTD AND ANOTHER 2004 (6) SA 329 (SCA)
- [9] LAWSA at paragraph 113: "Publication of a defamatory statement raises two rebuttable presumptions of fact, namely a presumption of intent (*animus iniuriandi*) as well as a presumption of unlawfulness. Once these presumptions arise, the onus rests on the defendant to rebut them"
- [10] ECONOMIC FREEDOM FIGHTERS AND OTHERS v MANUEL 2021 (3) SA 425 (SCA)
- [11] LAWSA at paragraph 124
- [12] ECONOMIC FREEDOM FIGHTERS AND OTHERS *supra* n10
- [13] 1917 AD 102

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