

SOUTH AFRICA / JUDGMENT

Mamburu v Jacobs and Another (2853/2022) [2024] ZANWHC 299 (9 December 2024)

[2024] ZANWHC 299**COURT**

North West High Court, Mafikeng

BEFORE

O.Y Dibetso-Bodibe

CASE / FILE NUMBER

2853/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST PROVINCIAL DIVISION, MAHIKENG****Case****No.: 2853/2022****Reportable:**NOCirculate
to Judges: NOCirculate
to Magistrates: NOCirculate
to Regional Magistrates: NO
In**the matter between:**THIZWILONDI
JUSTICE MAMBURU
Plaintiff
and
NEVILLE
LESLIE JACOBS
1st Defendant
RAVANA
SEWSUNKER JACOBS
2nd Defendant

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

[1] Before this Court are four Special Pleas by the Defendants for consideration. By agreement between the Parties, the matter is to be decided on the papers before the Court and heads of argument by both Parties. The Defendants not being legally represented, this process appeared just and equitable under the circumstances.

FACTUAL BACKGROUND

- [2] On 30 November 2022, the Plaintiff instituted an action before this Court for delictual damages based on an alleged defamation of character against the Defendants. To this end, the Defendants raised four Special Pleas against the Plaintiff's claim.
- [3] The history of this matter has its origins from an application for a protection order which was instituted by the 1st Defendant against certain pupils and teachers of the International School of South Africa (ISSA) in the Magisterial District of Mahikeng held at Mmabatho on 05 November 2019.
- [4] The 1st Defendant, who was the applicant on behalf of his minor child, also a pupil at ISSA, applied for a protection order in terms of the Harassment Act 17 of 2011 against the bullying of the minor child. An interim protection order was issued in favour of the minor child on 13 November 2019. Subsequent to that order and for some reasons not so clear on the papers before this Court, the

Plaintiff, who is a Senior Magistrate, presided over the matter and delivered a judgment on 29 November 2019 setting aside the interim protection order.

- [5] Aggrieved by the said order, the Defendants instituted an application in the High Court of Gauteng Division held at Pretoria sitting as the Equality Court (Equality Court) under Case No. 90409/2019 against thirteen respondents including the Plaintiff who is cited as the 11th respondent. The application was launched in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).
- [6] It is against the said backdrop that the action for defamation of character was instituted by the Plaintiff in this Court alleging that the Defendants made averments in their affidavits with the intention to injure his dignity and reputation. As alluded to this Court is seized with four special pleas which it now proceeds to consider.

1ST SPECIAL PLEA OF PRESCRIPTION

- [7] The Defendants raised a special plea of prescription as follows:

“1.1 The period of Extinctive Prescription in respect of defamation as provided in Section 3(2)(b) of the Prescription Act 68 of 1969 (“the Act”), is 1 (one) year,

1.2 Similarly, Section 5(1)(a)(i) of the Act provides that Extinctive Prescription shall commence in respect of an action for defamation “Where the debtor is known to the creditor, from the date when the defamation was first brought to the knowledge of the creditor”

The Plaintiff’s allegations in his particulars of claim received by the Defendants 2nd December 2022 is out of time, as the Plaintiff was well aware of the statements made in Defendants affidavit, 6 December 2019 which affidavits were filed ... in Equality Court... To clarify the time line the Plaintiff had 1 year from the said date to deliver his letter of demand and also issue summons.

1.3 ... Taking into consideration Section 3 of Extinctive Prescription of the Prescription Act, the Plaintiff ought to have instituted Summons within one year. That is on or before 6 December 2020.

1.4 The Plaintiff’s summons was served on the First and Second Defendants on 2 December 2022 which is +/- 36 months later i.e. 3 years later after the date of the alleged defamation.

1.5 Wherefore the First and Second Defendants pray: that the Plaintiff’s claim be dismissed with costs due to the claim being prescribed in terms of Section 3(2)(b) read with Section 5(1)(a)(i) of the Prescription Act 68 of 1969.”

[8] In response the Plaintiff denied that the prescription in respect of defamation is one year and pleaded that:

[8.1] “the prescription period for defamation is three years in terms of section 11(d) of the Prescription Act,

[8.3] Wherefore the Plaintiff prays that the first special plea be dismissed with costs.”

[9] In their heads of argument the Defendants contended that “Taking into consideration the Prescription Act, the Plaintiff... instituted summons and served the First and Second Defendant within the procedural time frames, rather 2nd December 2022, on the eve of prescription...” and further that “in this instance Plaintiff elected to serve summons on the eve of prescription and without any prior notice to the Defendants, that is some +/- 3 years later.”

[10] Section 11 of the Prescription Act deals with periods of prescription of debts and Subsection (d) thereof provides that except where an Act of Parliament provides otherwise, the period of prescription in respect of any other debt shall be three years. It is in terms of Section 11(d) that the Prescription Act provides for a specific period i.e. three years within which to institute a claim. The sections quoted by the Defendants to allege one year period of prescription do not form part of the Prescription and therefore misplaced.

[11] The alleged defamatory statements which formed part of the Defendants' affidavit were served on the respondents on 04 December 2019 and the Summons on the claim of defamation was filed with this court on 30 November

2022. Therefore, the alleged debt of the Plaintiff had commenced and became due when the alleged defamatory statements were publicized on 04 December 2019. The Plaintiff's summons was served on the Defendants on 02 December 2022 which is just under three years and/or two days before three years expires. This has been correctly stated by the Defendants in their heads of argument that the Plaintiff instituted summons and served the First and Second Defendants on the eve of prescription.

[12] In the circumstances, the Plaintiff's claim has not prescribed.

SECOND SPECIAL PLEA OF LIS ALIBI PENDENS

[13] The Defendants raised the special plea of Lis Alibi Pendens (Latin word literally meaning "dispute elsewhere pending") stating:

[13.1] That "The cause of action for the Plaintiff is that he claims defamation that the Defendants, have allegedly defamed him in their affidavits in respect of the application to the Equality Court ... Defendants still await a date of hearing in the matter ... Plaintiff failed to complete his form 3 ... and to explain his version of events to rebut the Defendants complaint ... What is unsettling about this matter he is extracting paragraphs from Defendants papers..."

[14] On the other hand the Plaintiff states that:

[14.1] "Save to mention that facts of the two matters and cause of action are not the same. The issues for determination in the Equality Court is not the same as in this Court. Equality Court's power and function is to make a determination whether there was unfair discrimination, hate speech or harassment has taken place as alleged by the applicant. This Court in the defamation case must make a determination whether the statements made by the First Defendant in his affidavits in the Equality Court are defamatory. If so, whether the statements impaired or injured the reputation, dignity, good name and esteem of the Plaintiff."

[15] "As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being

litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy

underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions." [1]

- [16] “There is room for the application of that principle only where the same dispute between the parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.”[2]
- [17] The Plaintiff’s alleged defamatory statements are in fact averments made by the Defendants in their founding papers before the Equality Court. In other words the alleged defamation arise but for the Defendants affidavits which were duly served on the 12 respondents who are respondents together with the Plaintiff before the Equality Court.
- [18] This, in my view, does not constitute a separate cause of action to be adjudicated outside of the jurisdiction of the Equality Court. The Defendants’ founding papers are still under consideration before the Equality Court. This Court is, therefore, incompetent to entertain the Plaintiff’s claim on defamation. The Plaintiff counted the chickens before they hatch, the claim being premature and/or to be dealt with accordingly in the Plaintiff’s answering affidavit before the Equality Court.
- [19] In the circumstances, the special plea of *lis alibi pendens* is upheld.

THIRD SPECIAL PLEA: PLAINTIFF’S FAILURE TO SERVE THE DEFENDANTS WITH A NOTICE OF INTENTION OF LEGAL PROCEEDINGS

[20] In this special plea the Defendants averred that:

[20.1] The Plaintiff failed to serve a notice of intention to institute legal proceedings within the prescribed period of one year...

[20.2] In the premises the Plaintiff’s claim is bad in procedure and should be dismissed with costs.

[21] The Defendants contended that “The Plaintiff failed to inform First and Second Defendants that there was possible cause of action against them and demand the possible removal of the cause of complaint within a stated time so as to avert formal proceedings and/or to serve the Defendants with a letter of demand or notice of intention to institute legal proceedings with a reasonable period...”

[22] In response to this special plea the Plaintiff stated that:

[22.1] “Save to mention that the First Defendant is not an Organ of State nor is in the employ of Organ of state. The Plaintiff does not have to give the First Defendant notice of intention to institute legal proceedings.”

[22.2] “Wherefore the Plaintiff prays that the third special plea of the First Defendant be dismissed with costs.”

[23] The Plaintiff contended that “the Defendants have a wrong grasp of interpretation of law in this regard... This special plea is incomprehensible because the Plaintiff had no duty to give the Defendants prior notice of his intention to institute legal action against them.”

[24] In this special plea the defendants relied on the Supreme Court of Appeal case of Minister of Finance and Others v Gore N.O (230/06) [2006] ZASCA (8 September 2006). With due respect, the case dealt with knowledge of the facts from which debt arises in terms of the Prescription Act. The case gave no guidance as to the averments made by the Defendants in their special plea.

[25] In the circumstances, the special plea is misguided, bad in law and cannot, therefore, be sustained.

FOURTH SPECIAL PLEA OF NON-JOINDER AND MIS-JOINDER

[26] In this special plea the Defendants alleged that:

[26.1] “Plaintiff’s claim also stems from the First Defendant’s application on behalf of his minor child for a protection from harassment matter at Mmabatho District Court... when Plaintiff as the Presiding Officer allowed a person who was not party proper to defame, impair the good name and reputation of Second Defendant...

[26.2] Prayer: Subsequent to this special plea being upheld, the matter should be stayed pending the joining of the Minister of Justice and Constitutional Development and T. Netshilindi, who is the author of the discriminatory statements and who the Plaintiff in Mmabatho case gave platform to defame the Second Defendant who was not present at the proceedings. The matter be stayed pending the joinder and pending the finalisation of the proceedings at the Equality Court.”

[27] In response to the Defendants’ averments, the Plaintiff stated that:

[27.1] “Save to mention that the person whose reputation, dignity, good name and good esteem is impaired by the defamatory statements in the affidavits of the First Defendant is the Plaintiff, not the Minister of Justice and Constitutional Development nor T. Netshilindi. The Minister of Justice and Constitutional Development and T. Netshilindi have no interest and are not affected by the defamatory statements published by the First Defendant to the third parties.”

[28] Having upheld the special plea of *lis alibi pendens*, the issue of joinder of other parties in the Plaintiff’s claim cannot ensue until such time as the proceedings before the Equality Court have been finalized. This special plea is therefore, unwarranted.

ORDER

[29] In the premises, the following order is made:

[29.1] The second special plea of *lis alibi pendens* is upheld.

[29.2] The first, third and fourth special pleas are dismissed.

[29.3] The Plaintiff's claim of defamation is stayed pending the finalisation of the matter between the Parties by the Equality Court.

[29.4] The Plaintiff to pay the cost in respect of the second special plea, and

[29.5] The Defendants to pay the costs in respect of the first, third and fourth special pleas.

O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING:

17 August 2023

DATE OF JUDGMENT:

09 December 2024

APPEARANCES

FOR THE APPLICANTS:

Self-Represented

FOR THE RESPONDENT:

Adv K. Phahlamohlaka

INSTRUCTED BY:

Lehabe Attorneys

[1] Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others (741/12) [2013] ZASCA 129 (26 September 2013) (Caesarstone) at para 2

[2] Caesarstone ibid at para 4

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