

SOUTH AFRICA / JUDGMENT

Mandel and Another v Johncom Media Limited; Johncom Media Limited v Mandel and Others (2007/06719) [2008] ZAGPHC 36 (11 February 2008)

[2008] ZAGPHC 36

COURT

High Courts - Gauteng

BEFORE

Cassim

CASE / FILE NUMBER

2007/06719

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

9

06719/07

JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 2007/06719

10 In the matter between: MANDEL, CLAIRE LIZA First Applicant DIFFORD, PAUL Second Applicant and JOHNCOM MEDIA LIMITED ("the main application") Respondent AND In the matter between: JOHNCOM MEDIA LIMITED Applicant 20 and MANDEL, CLAIRE LIZA First Respondent DIFFORD, PAUL Second Respondent THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT ("the counter-application") Third Respondent

JUDGMENT

CASSIM, AJ:

Introduction

On Saturday some time after 19h00, 28 April 2007, Berman, AJ granted an urgent interim order against Johncom Media Investments Limited ("Johncom Media"), the publisher of the Sunday Times, restraining this newspaper from publishing matter arising from proceedings instituted by Ian Newcome Difford for damages allegedly suffered as a consequence of Claire Liza Difford, his former spouse, fraudulently misrepresenting that he, Ian, was the father of Paul Difford.

This order provides as follows: "1 The Respondent is interdicted from publishing information as provided for in sections 12(1) and 12(3) of the Divorce Act, 70 of 1979 pertaining to: the proceedings under case No: WLD 2001/23906 between Ian Newcome Difford and Claire Liza Mendell; and

the proceedings in this matter. 2 The order granted in paragraph 1 is an interim interdict pending the final determination of an application between the Applicants and the Respondent for substantially the same relief as

10 In the matter between:

MANDEL, CLAIRE LIZA First Applicant

DIFFORD, PAUL Second Applicant

and

JOHNCOM MEDIA LIMITED

("the main application") Respondent

AND

In the matter between:

JOHNCOM MEDIA LIMITED Applicant

20 and

MANDEL, CLAIRE LIZA First Respondent

DIFFORD, PAUL Second Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

("the counter-application") Third Respondent

JUDGMENT

CASSIM, AJ:

Introduction

On Saturday some time after 19h00, 28 April 2007, Berman, AJ granted an urgent interim order against Johncom Media Investments Limited ("Johncom Media"), the publisher of the Sunday Times, restraining this newspaper from publishing matter arising from proceedings instituted by Ian Newcome Difford for damages allegedly suffered as a consequence of Claire Liza Difford, his former spouse, fraudulently misrepresenting that he, Ian, was the father of Paul Difford.

This order provides as follows:

"1 The Respondent is interdicted from publishing information as provided for in sections 12(1) and 12(3) of the Divorce Act, 70 of 1979 pertaining to:

the proceedings under case No: WLD 2001/23906 between Ian Newcome Difford and Claire Liza Mendell; and

the proceedings in this matter.

2 The order granted in paragraph 1 is an interim interdict pending the final determination of an application between the Applicants and the Respondent for substantially the same relief as

that set out in paragraph 2 of the notice of motion dated 28 April 2007, which application must be instituted within 14 days of this order. 3 The costs of this application are reserved for determination in the application referred to in paragraph 2 above." The Applicants, in the urgent application before Berman, AJ, were Claire Liza Mandel and Paul Difford. Case No: 2001/23609 concern, as alluded to above, an allegation by Ian Difford that Claire Liza Mandel, who he divorced in February 1995, made a false misrepresentation to him concerning the paternity of Paul Difford at all times throughout the lifetime of Paul Difford from his birth on 22 December 1976 until February 2001, and claims damages. On 31 January 2008, sitting in the ordinary motion roll, I was confronted with this matter. The Applicants in the matter before Berman, AJ were not seeking the confirmation of the interim order granted by Berman, AJ on 28 April 2007. Berman, AJ had not furnished any reasons for the order which he granted, Johncom Media opposed the confirmation of the interim order granted by the court on 28 April 2007 and, by way of a counter-application, sought an order declaring section 12 of the Divorce Act, 70 of 1979 ('the Divorce Act' to be inconsistent with the

that set out in paragraph 2 of the notice of motion dated 28 April 2007, which application must be instituted within 14 days of this order.

3 The costs of this application are reserved for determination in the application referred to in paragraph 2 above."

The Applicants, in the urgent application before Berman, AJ, were Claire Liza Mandel and Paul Difford.

Case No: 2001/23609 concern, as alluded to above, an allegation by Ian Difford that Claire Liza Mandel, who he divorced in February 1995, made a false misrepresentation to him concerning the paternity of Paul Difford at all times throughout the lifetime of Paul Difford from his birth on 22 December 1976 until February 2001, and claims damages.

On 31 January 2008, sitting in the ordinary motion roll, I was confronted with this matter. The Applicants in the matter before Berman, AJ were not seeking the confirmation of the interim order granted by Berman, AJ on 28 April 2007. Berman, AJ had not furnished any reasons for the order which he granted, Johncom Media opposed the confirmation of the interim order granted by the court on 28 April 2007 and, by way of a counter-application, sought an order declaring section 12 of the Divorce Act, 70 of 1979 ('the Divorce Act' to be inconsistent with the

Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid.

6. The Applicants, in the urgent application before Berman, AJ, did not oppose the counter-application. The Minister of Justice and Constitutional Development ("the Minister") did not oppose the relief sought by Johncom Media in its constitutional challenge of section 12 of the Divorce Act. The Minister sought an opportunity to pass legislation to deal with section 12 of the Divorce Act, in terms whereof the Minister indicated the court will be vested with a discretion, upon application, to grant leave to publish particulars of a divorce action. The Minister did not, however, indicate any time frame when this is to be achieved.
7. Section 12 of the Divorce Act provides as follows: "1 Except for making known or publishing the names of the parties to a divorce action, or that a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish information of the public or any section of the public any particular of a divorce action or any information which comes to light in the course of such an action. 2 The provisions of sub-section 1 shall not apply with reference to the publication of particular or information:
 - (a) For the purpose of the administration of justice.
 - (b) In a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or (c) For the advancement of or use in a particular profession or science, 3 The provisions of sub-section 1 and 2 shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by the 10 Family Advocate in terms of the mediation in certain Divorce Matters Act 1987. 4 Any person who in contravention of this section published any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment." 8. I agree that section 12 of the Divorce Act offends the right to freedom of expression as formulated in section 16 of the 20 Constitution. Freedom of expression as the Constitutional Court has emphasised lies at the heart of a democracy. Free and open exchange of ideas carries its own inherent worth and is a necessary conduit for the proper functioning of a participatory society and assist in ensuring accountability and responsiveness. The Minister has not sought to justify the existence or retention of section 12 of the Divorce Act. The Minister has not discharged the onus of establishing that the retention of section 12 is justified in terms of section 36(1) of the Constitution. The only reservation expressed by the Minister is 30 that if given the opportunity a carefully considered Bill can be presented to Parliament in which amendments can be debated which will have the effect that section 12 will be amended to provide for a court to have a discretion under which circumstances publication of matters affecting a divorce may be published.

9. In taking the view that I have adopted in this judgment, I am influenced by the general rule that the courts are open to the public. Section 12 of the Divorce Act, on the other hand, has an absolute prohibition. The prohibition, moreover, is unlimited as to time. Section 12 prohibits publication of all information which comes to light in the course of the divorce proceedings, even if such information does not require protection. Matters of public interest which are raised in a divorce action and where there are legitimate reasons for such issues to be raised in public are prohibited.
10. In August 2002, the South African Law Commission ("the Commission") published its report, known as Project 114 on the publication of divorce proceedings and recommended that section 12 of the Divorce Act be amended to allow a court the discretion to: 20 "Make an order to lift the general ban on publication and to grant leave to any party to publish such particulars of a divorce or such information or evidence which has come to light in the course of such an action, as the court may deem fit; and close the court at any stage of proceedings where there is a likelihood that harm may result to a child."
11. I point out that the South African Law Commission commenced its investigation as early as 23 January 1998. Thus, the Commission investigated the matter for a period of in excess of 4 years. The Ministry of Justice and Constitutional Affairs had the report from August 2002 and to date, being a period in excess of 5 years, has not given effect to the recommendation of the Commission. Inaction on the part of a decision maker is tantamount to indifference. This long delay prompted me to bring finality to these proceedings as a trigger to prompt responsible action on the part of the Ministry; hence my resolve to deal with this matter on an ex tempore basis.
12. I am persuaded that the finding that section 12 is unconstitutional would not result in any injustice. First, a court retains a discretion to order the non-publication of material which unduly and unfairly infringes in the private life of a litigant. The court will weigh up the competing interest of the rights of freedom of expression and that of privacy in arriving at a just and fair decision. Similarly, the rights of children are protected; bearing in mind that the court is the upper guardian of all children, and section 8(3) of the Child Care Act, 74 of 1983 prohibits the publication in any manner whatever of any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings unless the Minister or the presiding commissioner is of the opinion that this would be just and equitable in the circumstances. The court as upper guardian of children will always bear in mind the need to protect children.
13. I am indebted to Mr Freund SC and Mr Cockerell, who appeared on behalf of Johncom Media, for the comprehensive written submissions with reference to foreign jurisdictions, which has been a great assistance to me in reaching the decision at which I have arrived.

14. I am therefore not inclined to grant the request of the Minister.¹⁰ Insofar as the costs of this application are concerned, I am of the view that each party pays its own costs. Johncom Media pursues the matter to enhance the rights of the citizens of this country, but it also does so to protect its own commercial interest. The Minister has not opposed the application, but seeks to regulate the matter holistically. The Minister may still do so before this matter reaches the Constitutional Court. The urgent interim order of 28 April 2007
15. I am mindful of the fact that I do not have reasons of the Learned Judge who granted this order. I am, however, of the view that 20 courts of law must be more vigilant in examining the term "prima facie rights" traditionally used in relation to temporary interdicts, and more emphasis must be placed on balance of convenience and prejudice. More is required than merely to look at the allegations of the applicant, in particular having regard to the newly founded rights enshrined in our Constitution.
16. Thus for instance, in this case, the Learned Judge ought to have weighed up the rights to privacy as compared to the public's interest in what was regarded as the first paternity fraud suit in our country. Access to the hearing of the matter is not prohibited, nor is any outsider prevented from perusing if not studying the pleadings. Section 12 seeks to interdict publication. On a proper consideration of the pleadings, the Learned Judge in interpreting 10 section 12 purposively (and having regard to the right to freedom of expression) ought to have found that only one of the relief sought for by Difford concerned the decree of divorce, namely that seeking to amend the consent order that was granted by the court on the occasion of the divorce.
17. The remaining of the action concerned an order that Paul Difford is not the Plaintiff's son, and whether the Plaintiff is entitled to damages in excess of R1 million occasioned on Plaintiff's version by the Defendant deliberately holding out that Paul was his son and thereby procuring maintenance payments, when, to her 20 knowledge so it is alleged she knew this to be untrue.
18. In my view, the Learned Judge could have interpreted section 12 of the Divorce Act restrictively. And if greater emphasis was placed on prejudice and balance of convenience (the newspaper having already been published) and the right of the public to information, the order which he granted could have been much more restrictive. In any event the breath and scope of the interim order is too broad and general. In content, its wording is vague and prohibitive. It should not be allowed to survive, particularly when those in whose favour it was granted no longer rely on it. 19. In the result, I make the following orders: Section 12 of the Divorce Act is hereby declared inconsistent with the Constitution and invalid.

This order of constitutional invalidity is referred to the Constitutional Court for confirmation in terms of section 167(5) of the Constitution. CASSIM AJ High Court, Johannesburg 11 February 2008

Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid.

6. The Applicants, in the urgent application before Berman, AJ, did not oppose the counter-application. The Minister of Justice and Constitutional Development ("the Minister") did not oppose the relief sought by Johncom Media in its constitutional challenge of section 12 of the Divorce Act. The Minister sought an opportunity to pass legislation to deal with section 12 of the Divorce Act, in terms whereof the Minister indicated the court will

10 be vested with a discretion, upon application, to grant leave to

publish particulars of a divorce action. The Minister did not, however, indicate any time frame when this is to be achieved.

7. Section 12 of the Divorce Act provides as follows:

"1 Except for making known or publishing the names of the parties to a divorce action, or that a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish information of

20 the public or any section of the public any

particular of a divorce action or any information which comes to light in the course of such an action.

2 The provisions of sub-section 1 shall not apply with reference to the publication of particular or information:

(a) For the purpose of the administration of justice.

(b) In a bona fide law report which does not³⁰ form part of any other publication than a

series of reports of the proceedings in courts of law; or (c) For the advancement of or use in a particular profession or science,

3 The provisions of sub-section 1 and 2 shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by the

10 Family Advocate in terms of the mediation in

certain Divorce Matters Act 1987.

4 Any person who in contravention of this section published any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

8. I agree that section 12 of the Divorce Act offends the right to freedom of expression as formulated in section 16 of the

20 Constitution. Freedom of expression as the Constitutional Court

has emphasised lies at the heart of a democracy. Free and open exchange of ideas carries its own inherent worth and is a necessary conduit for the proper functioning of a participatory society and assist in ensuring accountability and responsiveness. The Minister has not sought to justify the existence or retention of section 12 of the Divorce Act. The Minister has not discharged the onus of establishing that the retention of section 12 is justified in terms of section 36(1) of the Constitution. The only reservation expressed by the Minister is

30 that if given the opportunity a carefully considered Bill can be

presented to Parliament in which amendments can be debated which will have the effect that section 12 will be amended to provide for a court to have a discretion under which circumstances publication of matters affecting a divorce may be published.

9. In taking the view that I have adopted in this judgment, I am influenced by the general rule that the courts are open to the public. Section 12 of the Divorce Act, on the other hand, has an absolute prohibition. The prohibition, moreover, is unlimited as to time. Section 12 prohibits publication of all information which

10 comes to light in the course of the divorce proceedings, even if

such information does not require protection. Matters of public interest which are raised in a divorce action and where there are legitimate reasons for such issues to be raised in public are prohibited.

10. in August 2002, the South African Law Commission ("the Commission") published its report, known as Project 114 on the publication of divorce proceedings and recommended that section 12 of the Divorce Act be amended to allow a court the discretion to:

20 "Make an order to lift the general ban on publication and

to grant leave to any party to publish such particulars of a divorce or such information or evidence which has come to light in the course of such an action, as the court may deem fit; and close the court at any stage of proceedings where there is a likelihood that harm may result to a child."

11. I point out that the South African Law Commission commenced its investigation as early as 23 January 1998. Thus, the Commission investigated the matter for a period of in excess of 4 years. The Ministry of Justice and Constitutional Affairs had the report from August 2002 and to date, being a period in excess of 5 years, has not given effect to the recommendation of the Commission. Inaction on the part of a decision maker is tantamount to indifference. This long delay prompted me to bring finality to these proceedings as a trigger to prompt responsible

10 action on the part of the Ministry; hence my resolve to deal with

this matter on an ex tempore basis.

12. I am persuaded that the finding that section 12 is unconstitutional would not result in any injustice. First, a court retains a discretion to order the non-publication of material which unduly and unfairly infringes in the private life of a litigant. The court will weigh up the competing interest of the rights of freedom of expression and that of privacy in arriving at a just and fair decision. Similarly, the rights of children are protected; bearing in mind that the court is the upper guardian of all children, and

20 section 8(3) of the Child Care Act, 74 of 1983 prohibits the

publication in any manner whatever of any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings unless the Minister or the presiding commissioner is of the opinion that this would be just and equitable in the circumstances. The court as upper guardian of children will always bear in mind the need to protect children.

13. I am indebted to Mr Freund SC and Mr Cockerell, who appeared on behalf of Johncom Media, for the comprehensive written submissions with reference to foreign jurisdictions, which has been a great assistance to me in reaching the decision at which I have arrived.
14. I am therefore not inclined to grant the request of the Minister.¹⁰ Insofar as the costs of this application are concerned, I am of the

view that each party pays its own costs. Johncom Media pursues the matter to enhance the rights of the citizens of this country, but it also does so to protect its own commercial interest. The Minister has not opposed the application, but seeks to regulate the matter holistically. The Minister may still do so before this matter reaches the Constitutional Court.

The urgent interim order of 28 April 2007

15. I am mindful of the fact that I do not have reasons of the Learned Judge who granted this order. I am, however, of the view that

20 courts of law must be more vigilant in examining the term "prima

facie rights" traditionally used in relation to temporary interdicts, and more emphasis must be placed on balance of convenience and prejudice. More is required than merely to look at the allegations of the applicant, in particular having regard to the newly founded rights enshrined in our Constitution.

16. Thus for instance, in this case, the Learned Judge ought to have weighed up the rights to privacy as compared to the public's interest in what was regarded as the first paternity fraud suit in our country. Access to the hearing of the matter is not prohibited, nor is any outsider prevented from perusing if not studying the pleadings. Section 12 seeks to interdict publication. On a proper consideration of the pleadings, the Learned Judge in interpreting

10 section 12 purposively (and having regard to the right to freedom

of expression) ought to have found that only one of the relief sought for by Difford concerned the decree of divorce, namely that seeking to amend the consent order that was granted by the court on the occasion of the divorce.

17. The remaining of the action concerned an order that Paul Diffordis not the Plaintiff's son, and whether the Plaintiff is entitled todamages in excess of R1 million occasioned on Plaintiff's versionby the Defendant deliberately holding out that Paul was his sonand thereby procuring maintenance payments, when, to her

20 knowledge so it is alleged she knew this to be untrue.

18. In my view, the Learned Judge could have interpreted section 12of the Divorce Act restrictively. And if greater emphasis wasplaced on prejudice and balance of convenience (the newspaperhaving already been published) and the right of the public toinformation, the order which he granted could have been much more restrictive. In any event the breath and scope of the interim order is too broad and general. In content, its wording is vague and prohibitive. It should not be allowed to survive, particularly when those in whose favour it was granted no longer rely on it.

19. In the result, I make the following orders:

Section 12 of the Divorce Act is hereby declared inconsistent with the Constitution and invalid.

This order of constitutional invalidity is referred to the Constitutional Court for confirmation in terms of section 167(5) of the Constitution.

CASSIM AJ

High Court, Johannesburg

11 February 2008

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2008/36.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mandel-and-another-v-johncom-unknown-topic-agphc-2008>

Prepared on 12 October 2026 · Esheria