

SOUTH AFRICA / JUDGMENT

Mayula Procurement and Property Management (Pty) Ltd and Another v Kopane and Others (1885/2019) [2019] ZAFSHC 126 (1 August 2019) [2019] ZAFSHC 126

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser

CASE / FILE NUMBER

1885/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 1885/2019

In

the matter between:

MAYULA
PROCUREMENT AND PROPERTY
MANAGEMENT
(PTY)
LTD 1st
Applicant
HANTSI
BHETILDA
MATSEKE 2nd
Applicant
and
SEMAKALENG PATRICIA
KOPANE 1st
Respondent
THE DEMOCRATIC
ALLIANCE 2nd
Respondent
PULANE
CHOANE 3rd

Respondent
CENTRAL MEDIA GROUP
(PTY) LTD t/a “OFM” 4th
Respondent
CHARLES
SMITH 5th
Respondent
MEDIA 24 HOLDINGS
(PTY) LTD t/a “NETWORK 24” 6th
Respondent
HEARD
ON: 27 JUNE 2019

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 1 AUGUST 2019

- [1] This is an application for a defamation interdict and for the removal and deletion of a press statement and of news articles subsequently published in relation thereto. The application originally came before the court as an urgent application on 30 April 2019, but was struck from the roll with costs for want of urgency by the duty Judge on that day. It was re-enrolled again to be heard before me in the ordinary course.
- [2] It is common cause that the First Applicant is a company providing accommodation to government institutions (in Bloemfontein), and that the Second Applicant is the sole director thereof. The First Respondent is the provincial leader of the Democratic Alliance in the Free State Province. The Third to Sixth Respondents are role players in the media business. The application has its roots in a media briefing called on 1 April 2019 by the First Respondent in Bloemfontein in her capacity as provincial leader of the Second Respondent. At that briefing, she allegedly made certain defamatory statements concerning the two Applicants. It is further common cause that the First

Respondent repeated her statements afterwards in a press release later on the same day. It is alleged that the third to Sixth

Respondents subsequently published her press release for the benefit of their listeners and readers.

- [3] The press release in question cannot be repeated here word by word, because it consists of four typewritten pages. To summarise, the existence of a corrupt relationship between Mr Ace Magashule, Secretary General of the ANC, and the two Applicants is suggested in the statement. The following are relevant excerpts from the statement in this respect:

“(a) Magashule ran a well-executed state capture network while receiving 10% share of every government contract in the Free State. It is this type of operation which birthed a number of corruption scandals including the Vrede Estina Dairy project which was used to enrich the Gupta family and its associates.

- (b) But there is more: Today we can reveal information pointing to a scheme in which Ace Magashule during his tenure as premier has manipulated the awarding of lease agreements for the offices of government departments to benefit a few close allies and himself.

We will report this information to the Zondo Commission, in addition to the dossier we have sent to the Commission earlier this year, and which encapsulates the information set out above.

- (c) We also have clear information that at least one of these lease agreements was structured in such a way that it not only enabled an ally of Magashule to purchase a property, but secondly it also enabled her to renovate this property using rental while the property is not being occupied by the Provincial Department of Public Works and infrastructure.
 - (d) This building on the corner of Charlotte Maxeke and Aliwal Streets in Bloemfontein, formerly the Saambou Building, has been leased to the Department since 1 February 2018 at a monthly rental of R 726 167.36 per month, while it is still being renovated and occupation by the Department is still months away.
 - (e) We have been informed that this award was made on the insistence of Magashule during his final days in office as premier. The company involved is Mayula Procurement and Property Management (Pty) Ltd and the person behind this company Ms Hantsi Bhetilda Mayeza or Matseke, the Chairperson of the FDC.
 - (f) She has in the past been implicated in other scandals involving Magashule and his daughter, relating to both the Vogelfontein Housing Scandal and certain filling station contracts.
 - (g) The ANC leaders are getting richer and richer than the country they are supposedly governing through corruption and looting of state resources. It is nothing new that Magashule is an incorrigible crook and the DA wants him and his entire cabal in the ANC get locked up for committing these crimes against the South African state.
 - (h) As stated above, we will refer this information ... to the Zondo Commission. Our hope is on this Commission to summons Magashule to come and testify at the Commission.
 - (i) On 8 May 2019, the people of the Free State will vote for change and choose a DA government that will put them first.”
- [4] The first three prayers in the Notice of Motion concern relief relating to the urgency of the application, which relief is no longer relevant in view of the court’s decision of 30 April 2019. The remaining prayers, which now have to be decided, read as follows:

“4. The Applicants also, furthermore, pray that the Respondents be interdicted from making or repeating any allegations (whether orally or in writing) against the Applicants (or any of them), and/or from defaming or injuring them in their dignity, in any further

publications or broadcast in any form, including but not limited to internet posts, articles, letters, media interviews, “Facebook”,

“Twitter” and other social media posts and the like, which are the same as, or similar to, or which negatively

reflect upon the Applicants (or any of them) arising from or based on, any of the allegations or statements appearing:

4.1 in the press statement issued by the First Respondent on 1 April 2019 (a copy of which is annexed to the founding affidavit as “HBM5”);

4.2 in the news article published by the Third Respondent on 1 April 2019 (a copy of which is annexed to the founding affidavit as “HBM6”); and

4.3 in the news article published by the Fifth Respondent on 2 April 2019 (a copy of which is annexed to the founding affidavit as “HBM7”).

5. The Applicants also, furthermore, pray that within three (3) hours of the granting of this order:

5.1 First and Second Respondents be directed to remove and delete the press statement issued by the First Respondent in relation to the Applicants on 1 April 2019 and, in so far as it lies within their power, any posts regarding the press statement (or any of its contents) or responses thereto, from the Second Respondent’s website, “Facebook”, “Twitter” and other social media posts and the like;

5.2 Third and Fourth Respondents be directed to remove and delete the news article published by the Third and Fourth Respondents in relation to the Applicants on 1 April 2019 and, in so far as it lies within their power, any posts regarding the news article (or any of its contents) or responses thereto, from the Second Respondent’s website, “Facebook”, “Twitter” and other social media posts and the like; and

5.3 Fifth and Sixth Respondents be directed to remove and delete the news article published by the Fifth and Sixth Respondents in relation to the Applicants on 2 April 2019 and, in so far as it lies within their power, any posts regarding the news article (or any of its contents) or responses thereto, from the Second Respondent’s website, “Facebook”, “Twitter” and other social media posts and the like.

6. Costs of this application to be borne by the Respondents.”

[5] The papers filed in this application were ultimately substantial, comprising of more than 400 pages. The four counsel

representing the respective parties, submitted extensive heads of argument, and files containing copies of a large number of authorities were presented. I am indebted to counsel for their thorough arguments and their general contribution in this matter.

The fact that I may not refer in this judgement many of the cases cited, does not mean that I have not paid proper consideration to them.

- [6] In a nutshell, it is the case for the Applicants that they were defamed by the First Respondent at the press briefing as part of a smear campaign against the Second Applicant and the entities she controls, which smear campaign was already under way as of last year. They state that there is no truth in the statement of the First Respondent that they have been receiving rental income in connection with the building in question while the building was not yet ready for occupation. In this respect, the Applicants annexed correspondence received from the Department concerned to prove that no rental payments were received by the Applicants, as alleged. They submit that they have a clear right not to be defamed by statements that are false. They further point out that the First Applicant is no longer receiving financial support from some of its key funders, due to the negative publicity following the press release by the First Respondent. As a direct result, the First Applicant had to retrench some of its employees. If the media reports are allowed to persist, then there is a real likelihood that further retrenchments would follow.
- [7] The application is vigorously opposed by the Respondents. The First and Second Respondents point out in their opposing papers that the Second Applicant is not merely a business woman but that she is a public figure who holds public office as the chairperson of the Free State Development Corporation, which is a public owned creature of statute. In the press release, they did not claim to have incontrovertible evidence about the alleged lease manipulation, but according to the statement, they only had information pointing to such manipulation, and the intention was clearly that this information should be thoroughly investigated by the Zondo Commission so that conclusive findings in relation thereto could be made, they say. They further contend that the lease agreement concerning the building in question (which is annexed to the papers) clearly supports the conclusion that the building was leased as from 1 February 2018 at a monthly rental of R 726 167.36. the First and Second Respondents submit that the statement is therefore substantially true, that it constituted fair comment and that it was in any case also in the public interest. The remarks of the First Respondent fall within the realm of robust and honestly made political speech, coupled with a hint of electioneering, they say. They contend that the remarks were therefore not unlawful, even if they are ever found to be defamatory.
- [8] Turning now to the determination of this application the point of departure is no doubt that the Applicants are seeking relief by way of final and permanent interdicts against the different Respondents, as opposed to only interim relief. In this respect our law is very clear to the effect that whenever a final interdict is sought, the applicant would have to establish (a) a clear right, that (b) he has suffered injury or that the injury is reasonably apprehended, and that (c) no other suitable form of relief is available to the applicant. The application

must therefore be approached on the basis of these requirements.

[9] The first question is then whether the Applicants have established a clear right. This question goes hand in hand with the principle that, although a plaintiff must allege that the statement was defamatory it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames the plaintiff[1]. If the statement is found to be defamatory, the publication thereof is *prima facie* wrongful. The onus rests upon the defendant to dispel such a *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[2].

[10] In deciding whether the press release issued by the First and Second Respondents is defamatory of the Applicants, it needs to be analysed more closely in its overall context. Conspicuously, the information relating to the lease of the building, is not presented as an incontrovertible matter of fact. On the contrary, the statement states that “we can reveal information pointing to a scheme” and “we also have clear information that at least one of these lease agreements...” And then the statement continues to say that “we will report this information to the Zondo Commission, in addition to the dossier we have sent to the Commission earlier this year, and which encapsulates the information set out above”. The clear impact of the words used is to the effect that the Respondents in question are only in possession of certain information without any final proof thereof, and that they are referring that information for investigation by the Zondo Commission. It is public knowledge that the Commission is mandated to enquire into matters of state capture and corruption in high circles, amongst others. The idea is therefore conveyed in no uncertain terms that it is the Commission that will ultimately make a finding. In my view, this is how reasonable and right thinking people would interpret the statement. I therefore have

great difficulty in finding that the statement itself and the subsequent publication thereof is defamatory of the Applicants.

This difficulty no doubt has a direct bearing on the question whether they have shown a clear right not to be defamed, or to be protected by the Bill of Rights, which protects human dignity.

[11] If I am wrong in this respect, and assuming for the moment that the statement and the subsequent publication thereof was *prima facie* defamatory of the Applicants, then the question arises whether the Respondents have succeeded in rebutting the unlawfulness of the statement by relying on the truth thereof, the public interest, the notion of fair comment, the reasonableness of the publication thereof and on certain Constitutional values that may be applicable. In this respect I find the words of Willis J, as he then was in *H v W*[3] apposite: “In our law, it is not good enough, as a defence to or a ground of justification for a defamation, that the published words may be

true: it must also be to the public benefit or in the public interest that they be published.” In the present case, the First and Second Respondents rely on the information they have, coupled with the terms of the lease agreement,

to allege that the statement is substantially true, but they also rely on the public interest that is served by the publication of the statement.

[12] As in all matters of this kind, the court has to strike an appropriate balance between the Constitutional values of the protection of freedom of expression on the one hand, and the value of human dignity on the other. The Constitutional Court has provided valuable guidelines in striking such a balance where the falsity of a statement is at issue. In *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) O’Regan, J had the following to say[4]: “At the heart of the Constitutional dispute lies the difficulty of establishing the truth or falsehood of defamatory statements.

Burdening either plaintiffs or defendants with the onus of proving a statement to be true or false, in circumstances where proof one way or the other is impossible, therefore results in a zero-sum game... Such a zero-sum result, in whomsoever’s favour, fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and human dignity. Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi’s* case[5], a proper application of constitutional principle would have indeed required the development of the common law to avoid this result It permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if a publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable.”

[13] In the present case, the statement was issued by the First and Second Respondents and published by the further Respondents at a time when corruption and underhand dealings in government circles were investigated on a wide front and discussed extensively in the media and on other platforms. It was also a time when the country was preparing for the national elections, and when political speech and electioneering debate focused almost on a daily basis on the need to root out corruption and questionable transactions at all levels of government. In such circumstances, it could be expected that blows would be levelled at opponents at every available opportunity. The Second Applicant, being a public figure for all intents and purposes, and the first Applicant, being a business enterprise, which deals mainly with government agencies, could never expect to be spared the attention of critics and opponents in the political arena in the circumstances prevailing at the time.

[14] The Supreme Court of Appeal also had occasion to consider defamatory matter that became published in circumstances of political discourse in *Mthembi-Mahanyele v Mail and Guardian Ltd and Another* 2004 (6) SA 329 (SCA). In the judgement, Lewis JA, stated the following: “Political speech might, depending on the context, be lawful even when false provided that its publication was reasonable[6].” And elsewhere: “Errors of fact should be tolerated, provided that statements were published justifiably and reasonably. That was with

the reasonable belief that the statements made were true[7].” Further: “Admittedly what was said was stated to be fact, not opinion, but it nevertheless was clearly proffered as political criticism. And it concerned the actions of a public figure in relation to a major political talking-point[8].” In the end the court found that the publication of the defamatory article was not unlawful since it was justifiable in all the circumstances, and was not negligent. The defamation was thus not actionable.

[15] With these legal principles in mind, I have no hesitation in finding that the Applicants have not established a clear right. The statement was clearly released to the press as political criticism, and it concerned the actions of public figures (the Second Applicant and Mr Magashule) in relation to a major political talking point at the time. In such circumstances, it was certainly reasonable for the press to publish the statement, coming from the leader of a political party in the province. The public had a right to be informed of the information in the hands of the First and Second Respondents, and it can be safely said that they and the remaining Respondents were justified, in the circumstances, to convey the information as such. I come to the conclusion that the publication was therefore in the public interest and not unlawful. Whether the information is true or not, cannot be established on the papers alone and only further investigations will clarify this issue. What is clear, however, is that the Applicant cannot claim a clear right in the circumstances, and the application must fail on this point alone.

[16] As far as the requirements of injury suffered or reasonably apprehended, and no other suitable form of relief available, the

Applicants have, in my view, also not made out a case to meet these requirements sufficiently. Although the Applicants do allege that they have suffered financially as a result of the events in question, I find their allegations in this regard to be extremely vague and cryptic. In order to show that they have suffered a loss, they annexed to their papers two letters, both of which were addressed to entities other than the First Applicant, and both of which do not even remotely show any resemblance to the issues in question. The Applicants also failed to show what injury they would suffer if the allegations are repeated or not removed. Such injury, if any, will ordinarily be the subject of a claim for further damages in due course.

[17] I am also not persuaded that there were no alternative remedies available to the Applicants when they decided to approach this court for a final interdict by way of motion proceedings. By their own admission, the Applicants mention in their founding affidavit that they have decided not to make use of the mechanisms available under the Press Code of South Africa. They say that they “simply do not have any confidence” in those mechanisms, but they fail to explain why they have no such confidence. As far as an action for damages is concerned, they allege that that it would be very difficult, if not impossible, to quantify such damages. I do not find this allegation convincing at all. Since the harm alleged is of a financial nature, it should not be difficult to provide a court with financial statements to show the decline in business and income in order to prove a loss as a result of the events. In the premises, there were indeed other suitable forms of relief available to the Applicants.

- [18] Lastly, it needs to be mentioned that some of the relief sought can in any event not be granted against the Third to Sixth Respondents for different reasons as already traversed hereinbefore. The Third and Fourth Respondents point out in their answering papers that the statement in question was already removed from the Fourth Respondent's website some 9 days before the application was launched by the Internet Service Providers Association at the insistence of the Applicants. These facts are not denied in reply, and consequently, there is no need for an order for the removal or deletion of the offending material against the Respondents concerned. The Fifth and Sixth Respondents, in turn, point out that the Fifth Respondent is not employed by the Sixth Respondent, as alleged. In addition, they allege that the statement in question was not published by Network 24, the Sixth Respondent, but by an entity known as News 24. They point out that neither the Fifth nor the Sixth Respondent was responsible for or involved in the publication on News 24. It therefore appears that the Applicants are knocking at the wrong door for the relief that they seek where these two Respondents are concerned.
- [19] At the hearing of the application, I was requested to award costs against the Applicants on a punitive scale. Keeping in mind that the Applicants are already saddled with an order of costs pertaining to the striking off from the roll at the end of April 2019, I am not inclined to order costs on a punitive scale. The Applicants had a right to approach the court again for the relief they sought. I was also requested to award the costs of the condonation application that came simultaneously with the main application before me, in favour of the Respondents. This condonation application concerned the late filing of the Replying Affidavit by the Applicants. On the day of hearing, however, all the Respondents agreed, quite correctly in my view, that condonation may be granted so that the main application could proceed as soon as possible. As a result, I do not consider it fair to make an order of costs pertaining to the condonation application against the Applicants. For the rest, I find no reason to deviate from the general rule that costs would follow the result.

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

1. The application is dismissed with costs.

P J LOUBSER, J

On behalf of Applicant: T Manchu and S Alcock

Instructed by: Zikhali Inc. Sandton,

c/o Moroka Attorneys

BLOEMFONTEIN

On behalf of the 1st & 2nd Respondents: HJ Benadé

Instructed by: Minde Shapiro & Smith

c/o Symington & De Kok

On behalf of the 3rd & 4th Respondents: AJR van Rhyn (SC)

Instructed by: McIntyre & Van der Post

For the 5th & 6th Respondents: SJ Reinders

Instructed by: Phatshoane Henney Inc

[1] Le Roux v Dey 2010 (4) SA 210 (SCA) par. 15

[2] National Media Ltd v Bogoshi 1998 (4) SA 1196 (sca)

[3]

(2013) 2 All SA 218 (GSJ) at par. 27

[4] At par. 42 and 43 of the Judgment

[5] National Media Ltd v Bogoshi, supra

[6] At par. 47

[7] At par. 65

[8] At par. 74

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