

SOUTH AFRICA / JUDGMENT

Mazwai v Nkosi (2021/14182) [2024] ZAGPJHC 86 (30 January 2024)

[2024] ZAGPJHC 86

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2021/14182

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2021/14182

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES:NO

(3)

REVISED: NO

DATE

30/01/2024

SIGNATURE

In the matter between:

MAZWAI; NONTSIKELELO

Applicant

And

NKOSI; THEMBA MBONGENI

Respondent

In re:

THEMBA MBONGENI NKOSI

Applicant

NONTSIKELELO MAZWAI

Respondent

ORDER

1.

The application for condonation is dismissed with costs and the

application for leave to appeal is thus not entertained.

2.

The costs of both applications are to be borne by the respondent (Nontsikelelo Mazwai) and de bonis propriis by her attorney (Risiva Maxwell Khosa) jointly and severally (the one paying the other to be absolved) such costs to be calculated on the scale as between attorney and client.

JUDGMENT

FISHER J

Introduction

- [1] This is an application for leave to appeal against a final order interdicting further defamation of the applicant (in the main application). The parties as referred to as in the main application.
- [2] The application for leave to appeal is brought fifteen months late. Thus, the first issue to determine is whether the respondent (in the main application) should be granted the condonation necessary for the application for leave to appeal to be entertained by this court.
- [3] Before dealing with the procedural and factual background it is useful to consider the legal principles that apply.

Applicable legal principles

- [4] I shall start with the application for condonation. The requirements to be fulfilled before a court will consider condoning the late filing of a process are well settled. In essence, it is a matter of the interest of justice.
- [5] The inquiry to be undertaken includes the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.[1]

- [6] In relation to the application for leave to appeal, in terms of section 17(1) of the Superior Courts Act[2] leave may only be given if the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard.

Background

- [7] The respondent says she is a musician, poet and human rights activist.
- [8] The judgment in issue was in respect of part B of an application launched by the applicant, Mr Nkosi, a DJ also known by his stage name DJ Euphonik.
- [9] Part A of the application was dealt with in the urgent court and interim interdictory relief was granted pending the determination of part A.
- [10] The interim interdict was confirmed by me in the motion court.
- [11] In essence, the defamatory material involved comments disseminated on social media by the respondent in terms of which it was said that the applicant engaged in gender-based violence extending to rape.
- [12] An entity which calls itself Women for Change featured in the case in that one aspect of defamation arose out of a re-tweet (i.e. republication of a statement on the social media platform Twitter (as it was previously known- now called X).
- [13] An entity/organization styled Wise4Africa (“W4A”) is now involved in the case and is funding this litigation.
- [14] Advocate Motsehao Brenda Madumise is the or at least a guiding mind behind W4A.
- [15] At the court’s request Ms Madumise filed an affidavit to which she attached the constitution of W4A. it emerges therefrom and from the affidavit of Ms Madumise that the organization runs on donations from the public. It’s constitution does not give it the power to litigate.
- [16] Ms Madumise describes herself as a director of W4A which she describes as a ‘non-partisan, non-profit feminist organization that looks at gender-based violence and gender discrimination ecosystem (sic) and responds to such by identifying sustainable interventions.’
- [17] Judgment in the main application was handed down on 09 March 2022.
- [18] Costs were granted against the respondent on a punitive scale. The judgment reads as follows in relation to such punitive order:

“[15] The respondent is no stranger to this type of litigation. She has already been restrained from making similar public statements under Case Number 16531/2020, which pertains to another DJ.

[16] Furthermore, she had costs awarded against her on a punitive scale in part A of this application. She was also afforded an opportunity by the applicant's attorneys to redress and cease her conduct prior to the launching of the application. She stubbornly elected not to do so and rather has proceeded to defend the matter. It is clear that she doggedly defends her position without any cogent basis. Her behaviour in relation to this litigation borders on the contemptuous.

[17] The platforms for social activism in the realm of Gender Based Violence must not be abused. The irresponsible use of such platforms

inures to the detriment of this important movement for change and does not assist.

[18] In the circumstances the respondent is directed to pay the costs of part B of the application on the scale as between attorney and client.”

[19] The bills of cost have been taxed in the amount of approximately R180 000. A writ of execution was issued on behalf of the applicant.

[20] On 15 March 2023, the respondent addressed email correspondence to Schindlers attorneys, the applicant’s attorneys, which reads as follows:

"...I am an artist and this time of the year is not really one in which we are earning money. Also we are coming off the back end of COVID which annihilated our businesses, I am still at the stage where one has lost everything and is required to rebuild. I would like to confirm that I respect the court system and continue to abide by the court order. I am aware that I have an outstanding bill and it is one I shall honor once I am in a position to...

I take full responsibility and accountability for the amount owed and I full acknowledge that I lost the case. In hindsight I see that I could have handled myself better and I am thankful for the difficult learning curve that has so much refined my emotional intelligence.

I thank you for your hard work as it was you who were my teachers for this difficult lesson on how to handle my emotions better.

I hope the documents attached suffice in proving that I genuinely don't have anything at the moment but I take full responsibility for my actions.

I hope we can come to some final understanding and put an end to this chapter. I am sure we all would appreciate to end this with dignity and peace. I will continue to cooperate with you and respect the rights of your client..." (emphasis added)

[21] Following upon this correspondence there were attempts to settle, but these proved unsuccessful.

[22] On 05 May 2023, Schindlers received email correspondence from Mr. Risiva Khosa of Kekana Hlatshwayo Radebe Incorporated confirming that he had been briefed on this matter under and the matter under 2020/1653 to represent the respondent. The matter under case number 2020/1635 involves Mr. Thato Sikwane and the respondent. The application of Mr Sikwane

was also brought to interdict the respondents from disseminating accusations of a similar nature to those in this matter. The respondent also lost the Sikwane application. Ms Madumise also insinuated herself into that matter on behalf of W4A.

[23] On 09 May 2023 Schindlers forwarded the email chain between their offices and the respondent to Mr Khosa. Schindlers confirmed that they had not received a response from the respondent since 03 April 2023, despite their follow ups. It was requested that Mr Khosa take instructions from the respondent in respect of her previous wish to settle the case.

[24] On 10 May 2023, Mr Khosa addressed email correspondence to Schindlers, which reads as follows:

"We confirm that we have consulted and I have been instructed as follows:

1. The orders are far reaching and open ended; and
2. They constitute a permanent gag order without specification and ultimately, without proper cause, curtail our client's right to freedom of speech. Consequently, please note that I hold instructions to appeal the order and I am in the process of settling same."

[25] It is relevant that although Mr Khosa came on record on 05 May 2023 the application for leave to appeal was delivered seven weeks later.

[26] The respondent concedes that she is not financially able to pay the costs of these proceedings. The indications are that W4A is the driving force behind the application.

[27] The grounds on which leave to appeal is sought are, in essence, that the relief granted is vague, overbroad and ambiguous and was based on a re-tweet of a tweet for which the respondent was not responsible.

[28] There is also the strange accusation that the judgment is "verbatim" a copy of the judgment by handed under case number 16531/2020. This is entirely false and no reference was had by me to the judgment mentioned.

[29] When the matter came to be argued in the first instance, I noted the respondents claim that she could not pay the costs of prosecuting this matter. I noticed also, as I have said, that the motivation for the application was clearly that Ms Madumise wished that the appeal be ventilated apparently in the interests of a general lobby against gender-based violence.

[30] The applicant seeks those costs be paid by the respondent's attorney, Mr Khoza de bonis propriis and on an attorney and client scale. As I have said it was confirmed that the funder of the litigation was W4A.

[31] In the circumstances I sought an affidavit in relation to the nature of the organization and whether a tender of costs in the event of an adverse costs order would be forthcoming. I also accorded to Mr Khoza the opportunity of dealing with the order sought against him de bonis propriis. The applications were postponed for this purpose.

- [32] The affidavits invited by me were duly delivered, albeit late. The upshot was that the costs were neither tendered by Ms Madumise nor W4A and the relief sought against Mr Khoza was opposed by him.

Discussion

- [33] As far as the merits of the application for leave to appeal are concerned, a central difficulty for the respondent is that the defamatory nature of the material disseminated is not brought into question and nor is any viable defence raised.
- [34] The material was found to be defamatory and the onus thus fell on the respondent to prove a viable defence to its publication. No attempt was made to do so and still no defence is raised. There is merely the general contention that the respondent should be entitled to vindicate her rights to freedom of speech and dignity.
- [35] Thus, there are no prospects of success in the application for leave to appeal.
- [36] This does not auger well for the prospects of the condonation application. even if there had been a satisfactory explanation provided for the default, which is not the case, the application would have failed because of the lack of prospects of success.

Costs

- [37] As far as the costs are concerned Mr Khoza provided no facts which dealt with the concerns expressed by the applicant to the effect that no reasonable, legally trained person could have believed that there were any prospects of success in either application. He expressed the following in regard to the opportunity afforded him by the court:

"I respectfully submit that the Applicant [respondent] brought this application in an attempt to vindicate her constitutional rights and that she should be given an opportunity to do so.

I also submit that, I find it disturbing that I have to address this affidavit dealing with costs, in a matter that has barely been argued before the Court. The impression that this is creating for me, is that the matter has already been decided as the general rule for costs is that they follow the cause. At this stage, the cause has not been established, yet I already, as a legal representative, have to be defending myself against an adverse and inimical personal costs order."

- [38] The respondent, on her correspondence quoted above, had clearly accepted the judgment and, as such, had arguably prerempted it.
- [39] The attorney, Mr Khosa took instructions from a third party who had insinuated herself into a matter which was more than a year old and for the purposes of furthering her own agenda.
- [40] Mr Khosa had access to the email correspondence between the applicant and the respondent so he knew that the respondent had accepted liability under the judgment.

- [41] Mr Khosa facilitated this insinuation by Ms Madumise into a case in which she had no personal involvement. He did so on the basis that he knew or should have known that there were no conceivable prospects of success in either application.
- [42] It seems that Mr Khosa was content to run the case on the basis that his own fees and those of counsel who argued the matter were taken care of by W4A but the applicant was at risk.
- [43] His co-operation facilitated the misguided weaponization by a third party of proceedings which were long finalized. It is not in the interests of justice that this practice be allowed.
- [44] In the circumstances, to my mind, this is a proper case for an order of costs de bonis propriis and on a punitive scale.
- [45] The respondent has likewise acquiesced in the bringing of these ill-fated processes after having previously accepted the judgment and in the knowledge that she cannot even pay the costs which have been taxed.

Order

[46] I thus grant an order which reads as follows:

1. The application for condonation is dismissed with costs and the application for leave to appeal is thus not entertained.
2. The costs of both applications are to be borne by the respondent (Nontsikelelo Mazwai) and de bonis propriis by her attorney (Risiva Maxwell Khosa) jointly and severally (the one paying the other to be absolved) such costs to be calculated on the scale as between attorney and client.

FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 30 January 2024.

Heard: 15 January 2023

Delivered: 30 January 2024

APPEARANCES:

Applicant's counsel: Adv.

P Seseane.

Applicant's Attorneys:

Kekana Hlatshwayo Radebe INC

Respondent's Counsel:

Adv. M Nowitz

Respondent Attorneys:

Schindlers Attorneys

[1] Grootboom v National Prosecuting Authority 2014

(2) SA 68 (CC) at 75H–76C.

[2] Act 10 of 2013

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