

SOUTH AFRICA / JUDGMENT

Media24 (Pty) Ltd v Nhleko and Another (4126/2019) [2021] ZAWCHC 186 (16 September 2021) [2021] ZAWCHC 186

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

4126/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 4126/2019

In

the matter between:

MEDIA24
(PTY) LTD
APPLICANT
AND
NKOSINATHI
NHLEKO
FIRST RESPONDENT
DR
NOMCEBO
MTHEMBU
SECOND RESPONDENT
IN

RE: NKOSINATHI
NHLEKO
FIRST PLAINTIFF
DR
NOMCEBO
MTHEMBU
SECOND PLAINTIFF
MEDIA24
(PTY)
LTD
DEFENDANT

JUDGMENT

DELIVERED ON 16 SEPTEMBER 2021

THULARE AJ

- [1] This is an application by Media24 (Pty) Ltd (Media24) for leave to amend its plea. Media24, the defendant in the main action, desired to amend its plea. The respondents, who are the plaintiffs in the main action, objected to the proposed amendment. Media24 prayed for a cost order against the respondents on a punitive attorney and own client scale.
- [2] The issue is whether Media24 should be granted leave to amend its plea and whether the respondents should be punished for raising an objection to the proposed amendment and whether the Respondents' attorney of record should pay out of his own pocket for the opposition.
- [3] Media24 is the owner and publisher of City Press newspaper. The newspaper published an article on its front page of Sunday 27

November 2016, together with a colour photograph depicting the respondents, who were life partners, holding hands. Underneath the

photograph the following was written: "LUCRATIVE PARTNERSHIP" and thereunder "Police Minister Nathi Nhleko with Indoni founder Nomcebo Mthembu". At the time that the article was written the first respondent was the Minister of Police in the Republic of South Africa. The second respondent was the founder of a non-profit organization, Indoni, which provided services to the Ministry of Police. The article was titled "Nhleko's R30m blessing" with the subtitle "Police Minister implicated for signing off millions of rands for work done by his love interest- and for going all out to reinstate charges against Ipid head Robert McBride". The article was annexed as "N1" to the summons in an action by the respondents against Media 24 for causing injury and destroying their good name, reputation and dignity.

- [4] To properly contextualize the proposed amendment objected to, it is necessary to make reference to both the allegations in the

particulars of claim, the article where applicable, the corresponding plea thereto and the objection raised thereon. Where necessary,

reference will also be made to the “Indoni budget for mass education for six months” annexed as “CP1” to the proposed amended plea.

[5] In paragraph 5, the particulars of claim read as follows:

“5

On the 27th November 2016, the Defendant, through one of the newspapers that it owns, City Press (hereinafter referred to as “City Press”), deliberately, intentionally, unlawfully, falsely, wrongfully, negligently and maliciously published an article (hereinafter referred to as “the article”) with a sensational headline, on the front page of its newspaper, on a Sunday, accompanied with a colourful not to be missed picture of the First and Second Plaintiffs holding hands, having as its sole purpose to cause injury and destroy Plaintiffs’ good name, reputation and dignity.”

The proposed amended plea reads:

“5. AD PARAGRAPH 5

5.1 It is admitted that the Defendant published the article attached to the Particulars of Claim as “N1” (“the article”) in the City Press newspaper on Sunday, 27 November 2016.

5.2 It is admitted that the article was published on the front page of City Press, together with a colour photograph depicting the

Plaintiffs holding hands.

5.3 Save as aforesaid, the allegations in this paragraph are denied.”

Grounds 1 and 2 of the objection reads:

“1. The proposed amendments in paragraphs 5.3; 8; 16; 17; 18 and 19 constitute a bare denial of the facts as reflected in the Plaintiffs’

Particulars of Claim.

2. Defendant’s proposed Amendments to its Plea is an elaborate lie with the sole purpose of misleading the Honourable Court, the Public at large and the Plaintiffs.”

[6] Paragraph 8 of the plea is in response to paragraph 9 and more specifically paragraphs 9.1 to 9.11 of the particulars of claim.

Paragraph 9.1 to 9.11 reads:

“9

THE GIST AND/OR STING OF THE ARTICLE ITSELF

9.1 The said article was published with a catchy and sensational headline that read “Nhleko’s R30m blessing” (see annexure “N1”).

9.2 Followed by the date;

9.3 the name of the author of the article; and

9.4 the “City Press”.

9.5 A colour picture depicts both Plaintiffs holding hands, with a “sub deck” identifying both Plaintiffs clearly.

9.6 The first two lines of the actual article, without any confusion, identifies both Plaintiffs and clearly states that Second Plaintiff “scored more than R30 million” for providing services, “that police ministry officials claim they could have received for free”.

9.7 The 5th and 6th lines of the article state that they (City Press) are in possession of two documents that reveal that Second Plaintiff’s “nongovernmental organization (NGO) charged more than 30.8 million for six months’ work, starting in April last year”.

9.8 Those two documents allegedly reveal, “One, a “community implementation plan” to produce “185 000 peer educators”, totaled R28.09 million. The other job, aimed at “producing 6000 peer educators”, totaled R2.74 million.”

9.9 On line 14 of the said article, First Plaintiff’s hard work and dedication to stop xenophobia in country was reduced to nothing more than a “money spinner”.

9.10 Lines 30; 31 and 32 of the said article state “Another email refers to Nhleko’s alleged resolve to give Mthembu the contract. “I even recorded the meeting where the minister tried to force the head of events, the acting chief financial officer ... To give her [Mthembu] the contract. Pity I deleted it. Eish”.

9.11 Lines 49; 50; 51 and 52 show figures that lines 47 and 48 state that “several ministry officials confirmed were paid”.

Paragraph 8 of the proposed plea reads:

“8. AD PARAGRAPH 9.1 TO 9.11

8.1 It is admitted that the words alleged to be quotations from the article were published in the article.

8.2 However, it is denied:

8.2.1 the heading of the article was “sensational”, as alleged in paragraph 9.1; and

8.2.2 the meaning or effect of the article was as alleged in paragraph 9.9- i.e, that “First Plaintiff’s hard work and dedication to stop xenophobia in country (sic) was reduced to nothing more than a ‘money-spinner’.”

8.2.3 Save as aforesaid, the allegations in these paragraphs are denied.”

[7] Paragraph 16 of the proposed amended plea is a response to paragraphs 17, 18 and 19 of the particulars of claim. These paragraphs of the particulars read as follows:

“17.

Xenophobia had taken innocent lives, shattered lives and communities. The First Plaintiff was, through the Police Ministry endeavouring to stop xenophobia and rebuild the broken and destroyed communities caused through xenophobia however Defendant’s article was aimed at doing the exact opposite to what First Plaintiff was doing, that is, it referred to First Plaintiff’s “WE ARE ONE HUMANITY” campaign, as merely a “money-spinner”.

18.

The general South African Public lost faith in the “we are one humanity” campaign simply due to the article referring to the campaign as a mere “money-spinner”.

19.

The article removed the bona fides from the “We are one humanity” campaign that the First Plaintiff was striving to achieve and replaced it with doubts, negativity, skepticism and disgust in the minds of the South African public.”

The plea reads:

“16. AD PARAGRAPH 17, 18 AND 19

16.1 The Defendant admits that xenophobia has taken innocent lives, shattered lives and communities.

16.2 The Defendant admits that the article published the fact that an official in the Ministry of Police described the “We Are One Humanity” campaign against xenophobia as a money-spinner.

16.3 Save as aforesaid, the allegations in these paragraphs are denied.”

[8] Paragraph 17 of the plea was a response to paragraphs 20, 21, 22 and 23 of the particulars. The particulars read:

“20

The article appeared at a time when the majority of the general public had lost faith in the Ministers deployed by the African National Congress.

21

The perception had already been created that majority of the Ministers and politicians in general (of the African National Congress) were there to loot the coffers of the country at the expense of taxpayers and the public at large.

22

The contents of the article spoke directly to the supporters of the opposition parties and fuelled fires that were already enraging within them.

23

Over and above the opposition parties and their supporters, the article spoke to those members of the African National Congress who had had enough of the corruption within government hence the article had the effect of causing disgust and apathy amongst this group.”

Paragraph 17 of the plea read:

“17. AD PARAGRAPH 20, 21, 22 AND 23

17.1. These allegations are denied.

17.2. Without derogating from the generality of the denial in paragraph 17.1, it is specifically denied that –

17.2.1. the “majority of the general public” had the feeling or belief ascribed to them in paragraph 20;

17.2.2. there was a general perception in respect of the majority of the Minister and politicians of the African National Congress, as alleged in paragraph 21; and

17.2.3. the article had the aim, effect or target audience alleged in paragraphs 22 and 23.”

[9] Paragraph 18 of the proposed plea dealt with paragraph 24(1) and 24(2) of the amended particulars of claim. The amended particulars

read:

“24

24(1) Most importantly the article not only confirmed the doubts held by the general public about Ministers of the African National Congress but managed to successfully tarnish the image, good name and reputation of First Plaintiff to such an extent that the National Executive Committee of the African National Congress saw fit to remove First Plaintiff as Minister of Police and ultimately to prevent him being appointed as Minister in any portfolio due to his tarnished image and reputation and more especially due to the doubts that the article created in the very National Executive Committee that has the authority to deploy Ministers to National Government.

24(2) The wrongful and intentional publication of the defamatory article by the Defendant is the cause of general damages suffered by both Plaintiffs totaling R30 million, each of the Plaintiff claiming an amount of R15 million.”

The proposed plea reads:

“18. AD PARAGRAPH 24.1 AND 24.2

18.1 The allegations in these paragraphs are denied.

18.2 Without derogating from the generality of the denial in paragraph 18.1, it is specifically denied that –

18.2.1. the article had the effect on the First Plaintiff’s image, good name or reputation as alleged;

18.2.2. the article caused the First Plaintiff to be removed as Minister of Police;

18.2.3. the article ultimately prevented the First Plaintiff from being appointed as Minister in any portfolio;

18.2.4. the article has caused the Plaintiffs to suffer damages as alleged; and

18.2.5. the publication of the article was wrongful or defamatory.”

[10] Paragraph 19 of the proposed plea is in response to paragraph 25 of the particulars.

Paragraph 25 reads:

“25

THE PUBLICATION OF THE ARTICLE IS A TOTAL CONTRADICTION OF THE SOUTH AFRICAN PRESS CODE AND DEFENDANT’S OWN PRINCIPLES AND STANDARDS

25.1 The article is a total contradiction of what the Defendant’s purpose is, that is to “build communities through excellent journalism ...”

25.2 The article is a total contradiction of Defendant’s “How do we do it”, that is, “We tell stories that matter ... we design solutions that work”. The article in fact told an untrue story that had the effect of causing more problems for the community and not solutions. The article caused the South African public, to lose faith in the Ministry of Police, the very same institution that was meant to protect them.

25.3 It is common knowledge that the Defendant’s motto is “enriching lives 24/7”. In total contradiction, the article had the effect of destroying lives.

25.4 The article contradicted Defendant’s core values which are courage, integrity, accountability and respect as the article failed to uphold its own core values and that of the South African Press Code.

25.5 The article displayed a total lack of respect for the South African Public, as the Defendant, in order to promote its own malicious and hidden agenda, published an article that deliberately misled and misinformed the general South African Public thereby causing large scale fear, panic and disgust in the minds of the South African public against the Plaintiffs.

25.6 The Defendant informs the public that it subscribes to “7 key behaviours help us live our values and drive our culture:

We are a team

We put our customers first

We play to win

We execute fast

We employ only the best

We keep learning

We have fun”

25.7 The Defendant, by publishing the article has lost sight of its “7 behaviours” hence acted wrongfully, maliciously and unlawfully.”

“19. AD PARAGRAPH 25.1 TO 25.7

19.1 It is admitted that the words alleged to be quotations from the Defendant’s website do indeed appear on Defendant’s website.

19.2. Save as aforesaid, the allegations in these paragraphs are denied. Without derogating from the generality of this denial, it is specifically denied that the article-

19.2.1. “told an untrue story”;

19.2.2. “caused the South African public to lose faith in the Ministry of Police”;

19.2.3. “had the effect of destroying lives”;

19.2.4. “contradicted the Defendant’s core values” and that of the Press Code;

19.2.5. was published to promote a malicious and hidden agenda, or to mislead and misinform the general South African public, or was published wrongfully, maliciously or unlawfully.”

[11] Paragraph 26.3 to 26.6 of the particulars of claim read as follows:

“26

THE DUTY THAT RESTS ON THE DEFENDANT

26.3 The false information that was given to the Defendant could have been tested and verified with the various public documents available to Defendant for example Auditor General Reports and other public accounting documents that were easily and readily available to Defendant in the light of “written allegations” against the Plaintiffs, all of which Defendant failed to do.

26.4 Defendant failed in its duty to first verify the accuracy of the information given to it before publication of the article.

26.5 Defendant failed in its duty to investigate the nature of the information given to it and the reliability of the source that had given the information to it.

26.6 Defendant failed to pause and reconsider the information by first making contact with First Plaintiff to verify the authenticity of the information given to it.”

“21. AD PARAGRAPH 26.3 TO 26.6

21.1. The allegations in these paragraphs are denied.

21.2. The Defendant denies that City Press was given false information.

21.3. The Defendant further denies that the information with which City Press was furnished could have been tested or verified in the manner alleged, in particular because such documents, to the knowledge of the Defendant, which contained the information required to verify the allegations and/or were readily available to the Defendant.

21.4 The Defendant denies that City Press failed to verify the information given to it or the availability of its sources. City Press relied, inter alia, on:

21.4.1. information it received from three independent sources, from the South African Police Services (SAPS), the Ministry of Police and the Independent Police Investigative Directorate (IPID); and

21.4.2. documentation in the form of an itemized “Budget” or breakdown of costs from Indoni for a “Mass Community

Implementation Plan” for a period of 6 months which totaled approximately R30 800 000, a copy of which is attached

marked “CP1”;

21.5 City Press further took reasonable steps to obtain comment from the Ministry of Police and the Second Plaintiff prior to publishing the article, and included in the article the comments that it received from the Ministry of Police’s spokesperson.

21.6 The Second Plaintiff failed to comment on the article prior to its publication, despite being given a reasonable opportunity to do so, and further failed –

21.6.1. to refer the City Press to any other persons that should be approached for comment, or

21.6.2. to furnish the City Press with any documentation to rebut or cast a different light on the information given to City Press and referred to in the article.

21.7. Even if the allegations in the article were false (which is denied), the publication of the article was reasonable and lawful in the light of the information City Press was given, the circumstances in which it was published, and the fact that the article comprised political speech.

21.8 Further, to the extent that the statement in the article that “Police Minister Nathi Nhleko’s girlfriend, Nomcebo Mthembu, has allegedly scored more than R30 million for providing services that police ministry officials claim they could have received for free”, or any allegations in the article pertaining or related thereto, can reasonably be construed as comment, such comment was fair and protected, and based on the following facts:

21.8.1 The First Plaintiff was the Minister of Police when the “We Are One Humanity” campaign was implemented by the Ministry of Police, the Civilian Secretariat for Police Service (“CSPS”) and/or the South African Police Service (“SAPS”) to combat xenophobic violence.

21.8.2 The Second Plaintiff is the Founder and Chairperson of the Non-Governmental Organisation, Indoni.

21.8.3 The Second Plaintiff’s NGO, Indoni performed work for the “We Are One Humanity” campaign and was paid by the Ministry of Police, the CSPS and/or the SAPS for such work.

21.8.4 The Second Plaintiff was romantically involved with the First Plaintiff at the time that Indoni performed work for the “We

Are One Humanity” campaign and at the time that Indoni was paid by the Ministry of Police, the CSPS and/or the SAPS for such work.

21.8.5 No tender was issued or awarded by the Ministry of Police, the CSPS or the SAPS for work performed by Indoni in the “We Are One Humanity” campaign and for which Indoni was paid.

21.8.6 The City Press received documents from an official in IPID that comprised the budget and costs breakdown Indoni submitted for work it would perform in the “We Are One Humanity” campaign, and specifically for its “Mass Community Implementation Plan”. These documents indicated that costs were to be incurred by Indoni over a six- month period totaling over R30m.

21.8.7 The City Press was in fact told by an official in the Ministry of Police that the costs reflected in the aforesaid documents were in fact paid by the Ministry of Police, the CSPS and/or the SAPS.

21.8.8 The City Press was in fact told by officials in the Ministry of Police that other NGOs had offered to provide similar services to those provided by Indoni for free or for under R200 000.

21.8.9 The Department of Arts and Culture had already proposed a similar project.

21.8.10 The First Plaintiff, in his capacity as Minister of Police, launched the “We Are One Humanity” campaign during or about 19 April 2015. According to two officials in IPID, by that stage, Indoni was already committed to rendering services in the campaign in that it had arranged T-shirts and flyers for this launch and were paid for their services in tis event.

21.8.11 The Memorandum of Understanding that the Ministry of Police spokesperson and the Plaintiffs have relied on in justification of then work performed and payments made to Indoni in the “We Are One Humanity” campaign does not in fact justify the work performed by, or payments made to, Indoni in the campaign.

21.8.12 The 2015/16 Annual Report of the CSPS records that the “We Are One Humanity” campaign was not budgeted for and that, to cover the costs of the campaign, funds had to be diverted from other projects and other cost-saving measures had to be put in place.

21.9 Further, to the extent that the reference in the article to “blessing” can reasonably be construed as comment, such comment was fair and protected, and based on the following true

facts:

21.9.1 The First and Second Plaintiffs were romantically involved at the relevant time;

21.9.2 The First Plaintiff was the Minister of Police at the relevant time;

21.9.3 The First Plaintiff is considerably older than the Second Plaintiff;

21.9.4 The word ‘blessing’ is colloquially used to describe a relationship between an older, wealthy or powerful man and a younger woman.

[12] The opposition is grounded as follows:

“6

Defendant’s reliance on Annexures marked “CPI” as per paragraph 21.4.2 is an insult to the integrity and intelligence of the Plaintiffs;

- (a) Annexures “CPI” is neither addressed to the Police Ministry nor is an invoice or proof of payment;
- (b) Defendant’s proposed amendments fails to reconcile the heading of annexure “N1” to Plaintiffs’ Particulars of Claim and paragraph 1 of annexure “N1”, with its undated annexures “CP1”, which is neither proof of payment nor an invoice.

7

Paragraph two of Annexure “N1” to Plaintiffs’ Particulars of Claim explicitly states “Two documents detailing cost breakdowns, as well as a series of emails, have been obtained by City Press from officials in the police ministry. They reveal Mthembu’s nongovernmental organization (NGO) charged more than R30.8 million for six months’ work, starting in April last year”

- (a) Defendant's proposed amendments are silent on this paragraph hence fails to address this paragraph in its proposed amendments;
- (b) The only annexures that Defendant relies on as per its proposed amendments are "CP1" which can by no means be reconciled with the allegations made in paragraph two of annexure "N1".

8

Annexure "N1" states "NHLEKO'S R30M BLESSING."

- (i) The Defendant's proposed amendments fail to verify, with authority and proof, the headline, which is central and crucial to Plaintiff's claim;

- "Nhleko" refers to First Plaintiff;

- A "R30M BLESSING" refers to Second Plaintiff: Defendant's proposed amendments fail to respond to this statement as is expected of it in terms of the Rules of this Honourable Court.

- (ii) Directly beneath the main caption of the article and in bold print appear the words "Police Minister implicated for signing off millions of rands for work done by his love interest ..."

- The proposed amendments fail to address this statement.

- The Defendant must in its pleadings, inform the Honourable Court and the Plaintiffs on which dates, according to information it has in its possession and/or according to its "reliable" sources, did the First Plaintiff "sign off millions of rands" for work done by Second Plaintiff."

[13] Paragraph 8 of the particulars of claim read as follows:

"8

The said article alleged that First Plaintiff, whilst First Plaintiff was the Minister of Police, situated in Cape Town, made payment of R30million to Second Plaintiff hence this Honourable Court has jurisdiction in this matter."

The proposed amended plea reads as follows:

"7 AD PARAGRAPH 8

7.1 It is admitted that this Honourable Court has jurisdiction in the matter.

7.2 It is denied that the article alleged that the First Plaintiff "made payment of R30 million to the Second Plaintiff" whilst he was the Minister of Police.

7.3 The defendant pleads that the article alleged that, according to a source within the Ministry of Police, the Ministry of Police made payment of R30 million to Indoni SA (Indoni) for the "We Are One Humanity Campaign" against xenophobia, and that such payments were made to Indoni after the First Plaintiff became Minister of Police.

[14] The objection is as follows:

In terms of paragraph 7.2 and 7.3 of Defendant's proposed amendments, Defendant denies that the "article alleged that the First Plaintiff made payment of R30 million to the Second Plaintiff whilst he was the Minister of Police"; and specifically states in paragraph 7.3 that "the Ministry of Police made payment of R30 million to Indoni SA ("Indoni") ..."

- (a) The Defendant's proposed amendments fails to reconcile the headline of the article with this paragraph as the headline clearly states that "Nhleko's R30m blessing."
- (b) This paragraph further fails to show how "Indoni" was made to be "Nhleko's blessing"; and
- (c) Fails to show how "Indoni" was made to be the "Police Minister's love interest".

10

The Defendant's proposed amendments fail to justify the first paragraph of the said article, as it is made up of nothing but bare denials and a web of lies, which is served to Plaintiffs under the pretext of its proposed amendments;

- (a) The said first paragraph of the article marked annexure "N1" of the Particulars of Claim, will be quoted at this stage for ease of reference for this Honourable Court, "Police Minister Nathi Nhleko's girlfriend, Nomcebo Mthembu, has allegedly scored more than R30 million for providing services which police ministry officials claim they could have received for free";
- (b) The Plaintiffs pray that this Honourable Court will dismiss the Defendant's proposed amendments together with its defence to these proceedings based on the fact that the proposed amendments are served merely as a delaying tactic, to defeat the ends of justice and frustrate and bully the Plaintiffs into abandoning their claim;
- (c) It is not difficult to see right through the game plan of the Defendant when one peruses its proposed amendments: it is a desperate attempt to clutch on straws and attempt to justify the unlawful conduct that it has committed against the Plaintiffs;
- (d) The proposed amendments are proof that the Defendant will even go as far as abusing the Rules of this Honourable Court to cover up their unlawful conduct and justify their "dirty tricks campaign".

Plaintiffs objections are based on the allegations as presented in Annexure "N1" of the Particulars of Claim."

[15] In my view, the whole case revolves around two salient points, to wit, the role if any played by the First Respondent in, as well as, the payment of more than R30 million if any, which the Police Ministry, Civilian Secretariat for Police or the SAPS made to Indoni. Rule 22(2) of the Uniform Rules of Court read as follows:

"22 Plea

(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all the material facts upon which it relies.”

[16] The purpose of the pleadings is to define the issues between the parties, not to obfuscate them [Gusha v Road Accident Fund 2012

(2) SA 371 (SCA) at para 7]. In Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 AD at 107C-E it was said:

“At the outset it need hardly be stressed that:

‘The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.’

(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers’ Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.’

The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances

- ...”

A defamation case where the allegations arise out of an alleged secondary report made to a journalist which is founded on other

primary facts alleged by a source, is inherently a composite matter. It is a matter made up of several parts or elements. Its architecture

is complex. More is required of a party in such a case, to state its case with sufficient detail and precision.

[17] The role attributed to the First Respondent by the article, and as a direct consequence of that role, the alleged payment of over R30 million to Indoni, are clearly articulated in the particulars as amongst others deliberate, unlawful, false and malicious, and is directing the attention of the applicant as being the basis of the claim. A plea is a facility available to the Applicant to define the issues it wishes to be placed before the trial court to allow the court to have a thorough investigation thereof.

[18] The article, in the parts referred to by the Respondents in paragraph 9 and especially paragraphs 9.1 to 9.11 of their particulars of claim, and read within the context of the entire article, made direct allegations and these included that:

- (a) The First Respondent worked with Second Respondent and her team directly, before the campaign was submitted for consideration.
- (b) The First Respondent held a press briefing on Sunday , April 19 where he launched the campaign and announced Indoni as the service provider before the matter went out to tender.
- (c) The First Respondent appointed Indoni.
- (d) Ministry staff resisted the First Respondent's appointment of Indoni.
- (e) Ministry staff were forced to pay for the launch because the event took place and expenses were incurred.
- (f) The event took place and Indoni had printed material for the occasion after getting direct approval from the First Respondent.
- (g) The First Respondent had resolved to give the Second Respondent the contract and allegedly forced the Head of Events, the then Acting Chief Financial Officer, to give the contract to Second Respondent.

[19] The relevant parts of the article read as follows:

"In one of the recently sent emails, a ministry official -whose identity City Press is withholding- claims that Nhleko's "We Are One Humanity" Campaign against xenophobia was a money-spinner.

The email goes on to state that Nhleko did not put the campaign out to tender, despite misgivings expressed by Ministry officials. "Here the minister is working with Nomcebo and her team on the "We Are Africa" proposal on April 17 2015, before it was submitted for consideration. He held a press briefing [on] Sunday, April 19, launching the campaign and announcing them [Indoni] as the service providers before the matter went out to tender," the official says.

The emails also claim that ministry staff resisted Nhleko's appointment of Indoni and were forced to pay Mthembu for the launch,

because the event took place and Indoni had printed material for the occasion- after getting "direct approval from the minister".

In the emails, the staff also questioned why the ministry had to hold such an event, given that one had already been proposed by the department of arts and culture. "Even the choice of theme -We are Africa - had to be changed to We Are One Humanity. And they wanted us to pay millions for it," one email reads.

Another official wrote: “We got some NGOs to do it for under R200 000, and others to do it for free.”

Another email refers to Nhleko’s alleged resolve to give Mthembu the contract. “I even recorded the meeting where the minister tried to force the head of events, the acting chief financial officer ... to give her [Mthembu] the contract. Pity I deleted it. Eish.”

- [20] I have considered the Applicant’s plea to the allegations individually and collectively, and in particular its paragraphs 7, 8, 9, 17, 18, 19, 21, 22 and 23. Except for (b) above, I am unable to trace or at least have an understanding of the Applicant’s case or its response to (a), (c), (d), (e), (f) and (g) above. The article made direct and unequivocal allegations which implicated the First Respondent. However, in my view, the Applicant seems to back paddle in their plea. It seems to me that now the Applicant seeks to require of the reader of the plea, especially in its paragraph 21, to now “join the dots” and make his or her own adverse conclusions without the enthusiasm, courage and boldness which the Applicant put on display in the article around the central role it placed the First Respondent to have played.
- [21] The article goes beyond a simple report that according to a source within the Ministry of Police, the Ministry made a payment of R30 million to Indoni for the We Are One Humanity Campaign against xenophobia and that such payments were made to Indoni after the First Respondent became the Minister of Police. The title refers to the First Respondent’s R30m blessing and the subtitle implicates him in signing off millions of rands for work done by his love interest. This mast of direct involvement of the First Respondent hoisted in the article, in giving Indoni the work, appear to have been blown away by the winds of a change of front by Applicant in its plea.
- [22] A denial that the heading of the article was sensational and that the meaning or effect of the article that first respondent’s hard work and dedication to stop xenophobia in the country was reduced to nothing more than a money spinner, coupled with a blanket and general denial, is simply insufficient. It is a denial that under the circumstances lacks clarity, is evasive and does not answer the direct point of substance. It lacks sufficient precision which would enable the Respondents to know what case, on this point, they have to meet. The Applicant must deal specifically with this allegation in his plea [*Sterling Consumer Products (Pty) Ltd v Cohen and Other Related Cases* [2000] 4 All SA 221 (W) at para 10h to para 11].
- [23] If one made a comparison with the allegations as regards the amount paid, the picture becomes clearer. The relevant parts of the article read as follows:

“Two documents detailing cost breakdowns, as well as a series of emails, have been obtained by City Press from officials in the police

ministry.

They reveal Mthembu’s nongovernmental organization (NGO) charged more than R30.8 million for six months’ work, starting in April last year.

One, a “mass community implementation plan” to produce “185 000 peer educators” totaled R28.09 million.

The other job, aimed at “producing 6 000 peer educators”, totaled R2.74 million. ...

However, a breakdown of costs Indoni sent to the ministry – and which several ministry officials confirmed were paid – reveal the following, among other items, that Indoni charged for:

- R1.32 million for “photographers and videographers”;
- R321 000 for “paint and stickers”;
- R1.2 million for “creative materials” at R500 a child; and
- R1.83 million on “programme administration costs, including human resources”.

[24] In its plea, the case for the Applicant is clear. The case is that City Press received these documents from an official in IPID and that City Press was informed by an official in the Ministry of Police that the costs reflected in these documents were in fact paid by the Ministry of Police, the CSPS and/or the SAPS. City Press’ case is that this part of the article was based on verified information, furnished by confidential sources and supported by documentary evidence and that it was published in good faith and belief that it was true or substantially true and in the public interest, that if the statements were not true, the statements constituted fair and protected comment and political speech and that the publication was reasonable in the circumstances.

[25] However, the Applicant was aware that the First Respondent’s response to the allegations that the Civilian Secretariat for the Police Service paid Indoni R30 million were untrue, before the publication of the article on 27 November 2016. It was aware that the First Respondent, through his spokesperson, had denied a funding contract between the Ministry and Indoni. He had acknowledged the existence of a Memorandum of Understanding between the Ministry and Indoni which had been signed before the First Respondent was appointed Minister of Police. The Applicant was aware that all it had was a breakdown of costs which Indoni had allegedly sent to the Ministry which, according to it, several Ministry officials confirmed had been paid.

[26] The introductory paragraph of the article reads:

“Police Minister Nathi Nhleko’s girlfriend, Nomcebo Mthembu, has allegedly scored more than R30 million for providing services which police ministry officials claim they could have received for free.”

The Concise Oxford English Dictionary, Tenth Edition, Revised, Oxford University Press, 2002 (the Dictionary) defines the word “score” amongst others as “gain (a point, goal, run etc) in a competitive game” or “be successful” or “succeed in obtaining”. The Dictionary defines the word “charge” as including “demand (an amount) as a price for a service rendered or goods supplied.” It defines “sign off on” as amongst others to “assent or give one’s approval to”. It defines “bless” amongst others as to “grant (health, prosperity, etc) to someone”.

[27] The bleeding edge of these parts of the article is that Indoni was paid R30 million, for a mass community implementation plan worth R28.09 million and a peer educator producing plan worth R2.74 million, which was the price approved by Nhleko for his love

interest. The chase, in the story, was the payment. It is against this background that I understood the allegations contained in

paragraph 26.2 to 26.6 of the particulars of claim. The plea, in my view, fails to cut to the chase. In a response covering five pages, in paragraph 21 of its plea, Media24 utters no single syllable to cover its report of a payment.

[28] The Applicant pleaded publishing the truth, or substantial truth, public interest, protected comment and political speech. In *National Media Limited and Others v Bogoshi* [1998] ZASCA 94; [1998] 4 All SA 347 (A) at 352a-b it was said:

“In considering the validity of the third defence it is useful to bear in mind that liability for defamation postulates an objective element of unlawfulness and a subjective element of fault (animus injuriandi – the deliberate intention to injure).”

Although the presence of both elements is presumed once the publication of defamatory material is admitted or proved, the plaintiff is required to allege that the defendant acted unlawfully and animus injuriandi, and it is for the defendant either to admit or deny these allegations. A bare denial however is not enough: the defendant is required to plead facts which legally justify his denial of unlawfulness or animus injuriandi as the case may be.”

[29] When one read the plea as a whole, the unanswered question remained: “Did the Applicant rely on false Ministry corridors’

gossip of an alleged payment, to run a page 1 article and leading story of its Sunday newspaper?” If not, what are the primary

factual allegations upon which the Applicant’s “truth, comment and/or speech” is based? A bare denial, under the circumstances, is not enough. From its plea, one does not know if it had or did not have any money trail to ground its truth. Its case is not clear and unambiguous.

[30] “O Maratahelele kgotsa o Mmegadikgang?” This is the simple general question that the former Minister of Police and his life partner are asking to Media24 in general and in particular to City Press newspaper in their objections. Loosely translated the Setswana expression enquires: “Are you a gossip monger driving publicity stunts or a professional news reporter?” In my view it is a fair question necessary for investigative journalism in a democratic dispensation for a vibrant and an informative media. The proposed amendment does not seek to provide sufficient particularity in the plea and does not state the material facts upon which the Applicant relies to sustain its defence in the defamation action. It does not define the issues more precisely.

[31] Rule 28 (4) of the Uniform Rules provides:

“28 Amendments to pleadings and documents

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.”

The question in this matter is whether the amendment, if allowed, would cause an injustice to the Respondents, which injustice cannot be compensated by costs [Moolman v Estate Moolman 1927 CPD 27 at page 29; Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others 2020 (1) BCLR 1 (CC) at 89 and 90]. The Applicant’s plea does not facilitate the proper ventilation of the true dispute between the parties. This, in my view, is highly prejudicial to the Respondents. They would be worse off than they were when the proposed plea was filed, if the amendments were granted, in determining the real questions on the alleged role of the First Respondent in, and the alleged more than R30 million, payment to Indoni.

[32] In my view, the injustice suffered by the Respondents can be avoided by a postponement and an opportunity to the Applicant to cure the injustice, by enabling the Applicant to come to grips with the real issues between it and the Respondents. The Respondents will suffer delay and expense, but that can be cured by an appropriate order as to costs [Greyling v Nieuwoudt 1951 (1) SA 88 (O) at p 91E-H; Affordable Medicines Trust and Others v Minister of Health of RSA and Another [2005] ZACC 3; 2006 (3) SA 247 (CC) at para 9].

[33] For these reasons I make the following order:

- (a) Leave to effect the amendment to the Applicant’s plea on the furnished particulars of amendment as envisaged in this notice of motion is not authorized.
- (b) The Applicant is granted leave to make consequential adjustments to the furnished particulars of amendment of the plea as envisaged in this notice of motion.
- (c) The Applicant is granted leave to deliver its consequential adjusted particulars of amendment of the plea within twenty (20) days of this order.
- (d) The Applicant to pay the costs, including costs occasioned by any consequential adjusted particulars of the plea.

DM THULARE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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COUNSEL FOR THE RESPONDENTS: ADV. I GOBERDHAN

INSTRUCTING ATTORNEYS:

NENE ATTORNEYS

DATE HEARD:

02 AUGUST 2021

DATE OF JUDGMENT:

16 SEPTEMBER 2021

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