

SOUTH AFRICA / JUDGMENT

Mkhwane v Dyakala (14102/2020) [2024] ZAGPJHC 638 (15 July 2024)

[2024] ZAGPJHC 638**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

14102/2020

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Source record**FLYNOTES:****CIVIL**

LAW – Defamation – Fair

comment –

Defendant

accused plaintiff of having normalized corruption within

municipality – Implication that he was personally

corrupt –

Truth and public interest – Clear and direct evidence of

corrupt state of mind – Prepared to

compromise official

responsibilities to ensure party's friends benefitted from

state resources – Allegations

substantially true on proven

facts – Justified as fair comment on true facts –

Defences constitute complete answer

– Claim dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED.

15

July 2024

Case

No. 14102/2020

In
the matter between: JASON
MKHWANE
Plaintiff
and
ANDILE
PHILIP
DYAKALA
Defendant

JUDGMENT

WILSON J:

1 On 24 December 2019, the defendant, Mr. Dyakala, sent a series of messages to a WhatsApp group called “SCM Management”.

The plaintiff, Mr. Mkhwane, was a member of the group, together with around eight other officials who worked in procurement at the Emfuleni Municipality. The purpose of the group was apparently to assist its members to communicate on professional matters related to the purchase of goods and services for the Municipality and its inhabitants. Mr. Dyakala was the Municipality’s chief financial officer. Mr. Mkhwane was, and as far as I know still is, the supply chain manager at the Municipality.

The defamatory nature of the messages

2 The messages Mr. Dyakala sent contained a series of intemperate remarks about Mr. Mkhwane. Mr. Dyakala accused Mr. Mkhwane of having “normalized corruption” within the Municipality and of being a “renowned bully”. He said that an attorney that Mr. Mkhwane had retained in a labour dispute with the Municipality had “looted” R52 million from the Municipality. Mr. Dyakala said that he did not “fight with looters” and was “tired of [Mr. Mkhwane’s] bullying tactics”. The gist of the statements, read together, was that Mr. Dyakala was locked in a struggle with Mr. Mkhwane to rid the Municipality of corruption.

3 These allegations are plainly defamatory in the sense that they would have tended to lower Mr. Mkhwane “in the estimation of the ordinary intelligent or right-thinking members of society” (*Hix Networking Technologies v System Publishers (Pty) Ltd* [1996] ZASCA 107; 1997 (1) SA 391 (A), 403G-H). What mattered was not what Mr. Dyakala intended, but the meaning the reasonable reader of ordinary intelligence would attribute to his statements. It has been held that “[i]n applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied” (*Le Roux v Dey* 2011 (3) SA 274 (CC), para 89).

4 As Mr. Dyakala all but conceded in his evidence, no reasonable reader of the messages could be in any doubt that Mr. Dyakala was accusing Mr. Mkhwane of being complicit in corruption; of bullying anyone who opposed his corrupt scheme, or the corruption of the Municipality by others; of consorting with looters; and of being a looter himself.

5 On 11 June 2020, Mr. Mkhwane instituted a claim for damages arising from the defamation embodied in Mr. Dyakala's messages to the WhatsApp group. When the trial was called before me on 13 May 2024, Mr. Ramogale, who appeared together with Mr. Sangoni

for Mr. Mkhwane, argued that, because Mr. Dyakala admitted he wrote and sent the messages, and because the messages were plainly defamatory on their face, it was for Mr. Dyakala to rebut the presumption that the statements were made wrongfully and with the intent to injure. Mr. Dyakala accordingly had the duty to begin.

6 Mr. Moeletsi, who appeared for Mr. Dyakala, argued that the duty to begin still rested on Mr. Mkhwane, because Mr. Dyakala had not admitted that his messages necessarily implied that Mr. Mkhwane was himself a "looter" or was personally corrupt. Mr. Moeletsi submitted that it was still for Mr. Mkhwane to prove that Mr. Dyakala's messages bore those implications.

7 However, for the reasons I have given, the messages were on their face defamatory. No evidence was necessary to conclude that they clearly implied that Mr. Mkhwane was both a "looter" and personally corrupt. On that basis, I ruled that Mr. Dyakala had the duty begin. This is because, once the defamatory meaning of an actionable statement has been established, the onus to prove the absence of wrongfulness or intent to injure shifts to the publisher of the statement (see *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) ("*Khumalo*"), paragraph 18). There was accordingly no evidence Mr. Mkhwane needed to lead on the merits of his claim before calling upon Mr. Dyakala to justify the WhatsApp messages.

Mr. Dyakala's defences

8 Mr. Dyakala's defences to the claim have shifted throughout these proceedings. It was initially pleaded that the allegations contained in the WhatsApp messages were justified because they were true. However, as the Constitutional Court observed in *Khumalo* at paragraph 18, truth has never been a complete defence to defamation. Even if a defamatory statement is true, it must still be in the public interest to have made it. The truth of the statement will go a long way towards establishing that it was made in the public interest, but there are (perhaps very rare) circumstances, such as those I dealt with in *Ndlozi v Media 24 t/a Daily Sun* 2024 (1) SA 215 (GJ), in which it is not in the public interest to speak the truth. In that case, I found that the true facts surrounding a rape complaint ought not to have been reported because it was not in the public interest to do so without the complainant's consent and in circumstances where the police investigation into the complaint was barely a day old.

9 Perhaps accepting this, in his written submissions, Mr. Moeletsi pivoted to rely on two defences to a claim of defamation that have long been recognised. First, he argued that, on the facts, Mr. Dyakala did not intend to injure Mr. Mkhwane by sending the WhatsApp messages. Second, Mr.

Moeletsi argued that the defamatory matter in the messages was true, and that it was in the public interest that it be published. These are unpleaded defences, but Mr. Dyakala may be entitled to rely on them if the evidence I heard covered the defences fully, that is, if “there is no reasonable ground for thinking that further examination of the facts might lead

to a different conclusion”. In these circumstances I am “entitled to, and generally should, treat” the unpleaded

defences as if they had been “expressly and timeously raised” (Middleton v Car 1949 (2) SA 374 (A) at 385).

10 After I heard the evidence, I raised with counsel the possibility that Mr. Dyakala’s defamatory statements may have been fair comment based on facts that were notorious among the group to whom they were addressed. This, too, would have been a complete defence to Mr. Mkhwane’s claim. I asked counsel to address this issue in their written submissions. Those submissions were delivered

on 27 May and 3 June 2024. Counsel were agreed that I could dispense with oral argument unless the right to present it was asserted by either party on receipt of the other’s written submissions. No such right was asserted, and, on 10 June 2024, I notified the parties that I had reserved judgment.

11 Accordingly, the fate of Mr. Dyakala’s unpleaded defences rests on an evaluation of the nature, depth and quality of the evidence led. It is to the evidence that I now turn.

The evidence

12 Mr. Dyakala and Mr. Mkhwane were each the sole witness in their own case. Mr. Dyakala gave evidence first, in conformity with my ruling that the onus was on him to justify his defamatory statements.

Mr. Dyakala’s evidence

13 Mr. Dyakala has spent his entire career to date in municipal finance. He has a Master of Business Administration degree and is currently working towards a doctorate focussing on municipal finance. His recent career has been marked by a number of government roles, in which he has either advised national or provincial ministers on municipal finance or has been drafted in to run municipalities in financial difficulty. On 18 April 2018, Mr. Dyakala was seconded from a role as a senior ministerial adviser on local government finance to be the acting chief financial officer of Emfuleni Municipality. He was permanently appointed to that position on 1 July 2019.

14 Mr. Dyakala described the Municipality as plagued with financial mismanagement, loss of financial control and corruption. That description of the Municipality’s affairs at the time of Mr. Dyakala’s secondment was not challenged before me, and I accept it. It is common ground, and publicly known, that the Municipality’s supply chain management, financial management and infrastructure and service delivery functions were placed under provincial administration from

around June 2018. It is clear from his evidence that Mr. Dyakala took it as his job to clean the Municipality up – to rid it of financial irregularity and corruption.

15 On or soon after his arrival at the Municipality (the evidence is not clear on exactly when), Mr. Dyakala said that he was confronted by Mr. Mkhwane's dual role, first as the supply chain manager at the Municipality, and second as a member of the African National Congress, of which he was or would shortly become the regional secretary. Mr Mkhwane also emphasised that he was a member of the African National Congress' "deployment committee", which helped ensure that party favourites were appointed to key roles within the Municipality. Mr. Dyakala alleged that Mr. Mkhwane took him aside and told him that Mr. Mkhwane considered it his role to implement a political "mandate" to press for the appointment as service providers to the Municipality

those businesses and individuals favoured by the ruling party. Mr. Mkhwane said that he would introduce Mr. Dyakala to favoured service providers. The implication, at least as Mr. Dyakala understood it, was that the ruling party would tell Mr. Dyakala, through Mr. Mkhwane, which service providers would be given municipal contracts.

16 Mr. Dyakala dealt with this conversation at the outset of his evidence. However, neither Mr. Sangoni, who led Mr. Mkhwane's

evidence, nor Mr. Moeletsi, who cross-examined Mr. Mkhwane, put Mr. Dyakala's account of the conversation to Mr. Mkhwane for comment. Given the potential materiality of the evidence, I felt constrained to do so myself. I asked Mr. Mkhwane what he had to say about Mr. Dyakala's assertion that Mr. Mkhwane had described his political "mandate" in the terms alleged. Mr. Mkhwane's comment on Mr. Dyakala's version was revealing. He repeatedly asserted that Mr. Dyakala's version of the conversation was "hearsay". That is of course an evasive answer, and certainly not a denial. Although Mr. Sangoni ultimately managed to tease a denial out of Mr. Mkhwane, such was the poor quality of Mr. Mkhwane's evidence on the point that I must accept that the conversation did in fact take place, more or less as Mr. Dyakala narrated it. There was nothing inherently improbable or unreliable about Mr. Dyakala's evidence, which was, overall, credible and convincing.

17 Mr. Dyakala said that he immediately pushed back against the pressure he felt that Mr. Mkhwane was placing on him to toe the party line. Mr. Dyakala said that he insisted on strict compliance with supply chain management regulations. He says he stopped appointments that were being made in breach of those regulations. He sidelined Mr. Mkhwane and made some progress in bringing the Municipality back into line with what he considered to be sound financial management. That progress, however, came to an end when Emfuleni's municipal manager was replaced toward the end of 2019. The new municipal manager, a Mr. Leseane, would, Mr. Dyakala said, put pressure on him to work with the "RS", a term he used to identify Mr. Mkhwane as the regional secretary of the African National Congress.

18 Mr. Dyakala took the view that Mr. Mkwane and Mr. Leseane were co-operating to thwart his efforts to rehabilitate the Municipality's financial systems. He said that service providers would be appointed by Mr. Mkwane and Mr. Leseane without Mr. Dyakala's knowledge. It is not clear to me whether and how often Mr. Dyakala discovered these appointments or was able to reverse them, but he gave evidence that he was able to reverse at least one irregular appointment by seeking the provincial government's intercession.

19 Mr. Dyakala also gave evidence that Mr. Mkwane would regularly appoint service providers without purchase orders and that Mr. Mkwane would transgress procurement processes in other ways. Mr. Mkwane would insist on taking a role in both evaluating and adjudicating bids for municipal contracts – roles which the law required to be kept separate. Mr. Mkwane would also place pressure on the assistant supply chain managers – Mr. Khumalo, Mr. Mhloko and Mr. Makirri – to co-operate with him in appointing

only those service providers Mr. Mkwane favoured.

20 Despite all this, Mr. Dyakala persisted, in his evidence-in-chief and under cross-examination, in the assertion that he has never accused Mr. Mkwane of being personally corrupt. However, in response to a question from me, Mr. Dyakala accepted that, given the context that he set out, anyone reading the messages he sent on 24 December 2019 would have understood that Mr. Dyakala was at least implying that Mr. Mkwane was personally corrupt. Mr. Dyakala's own proffered definition of corruption – which

he explained as the “manipulation of processes to illegitimately benefit those close to you” – is exactly what he had complained Mr. Mkwane had done, and exactly what he accused Mr. Mkwane of forcing others within the supply chain management function to do.

21 Mr. Dyakala said that he tried to complain about Mr. Mkwane to those responsible for labour relations within the Municipality, but that he was told that Mr. Mkwane was “untouchable” – whether because of his political role within the African

National Congress or because of his relationship with Mr. Leseane.

22 Mr. Dyakala also relied on a critical piece of documentary evidence. This was a report dealing with irregular expenditure at the Municipality. The report was generated by Compario Consulting, and published in its final form in January 2020. It was entered as Exhibit “O” before me. In that report, Mr. Mkwane was identified as being personally responsible for irregular expenditure. Of course, as Mr. Mkwane's counsel pointed out in their written submissions, this not the same as saying that Mr. Mkwane was personally corrupt. The report principally criticised Mr. Mkwane for poor record-keeping during procurement processes. The report nonetheless provides important information about the context in which Mr. Dyakala's messages would have been seen and understood.

23 In addition, emphasis was placed on the fact that Mr. Mkhwane had been suspended from the Municipality during the early part of 2019, apparently because of his involvement in authorising irregular expenditure. Mr. Mkhwane's suspension was lifted after he applied urgently to the Labour Court to set it aside. Mr. Mkhwane apparently had some difficulty in procuring compliance with

the Labour Court's order. He instituted a contempt of court application in which he cited Mr. Dyakala personally – although there is no indication on those papers of anything Mr. Dyakala did that might have constituted contempt.

24 In any event, Mr. Mkhwane ultimately returned to the Municipality. He then complained that Mr. Dyakala's efforts to remove some of his functions from him were in breach of the Labour Court order, and threatened to sue on that basis. Although Mr. Dyakala

characterises this as another instance of bullying, the fact of the suspension itself is also important in assessing how Mr. Dyakala's

WhatsApp messages would later be understood.

25 These material parts of Mr. Dyakala's evidence were substantially unchallenged in cross-examination. However, Mr. Sangoni emphasised in his cross-examination of Mr. Dyakala that there was no direct evidence, beyond Mr. Dyakala's say-so, that Mr.

Mkhwane was personally corrupt. The Compario report, and the fact of Mr. Mkhwane's suspension, suggest that Mr. Mkhwane was open to criticism for a lack of thoroughness in his duties. That lack of thoroughness might of course be an indication of more sinister conduct, but it was a fair point that the documents did not explicitly characterise Mr. Mkhwane as corrupt.

26 Mr. Sangoni also put to Mr. Dyakala that Mr. Dyakala had himself been investigated as a result of a complaint lodged against him by Mr. Mkhwane. While that investigation – the report in which was entered as Exhibit "J" – reached no definite conclusion, it did recommend that further steps be taken to probe Mr. Dyakala's conduct. Mr. Sangoni put to Mr. Dyakala that Mr. Mkhwane denied that he had ever sat on the bid evaluation and adjudication committees as the same time in relation to the same

bid. It was also denied that Mr. Mkhwane had ever sought to place pressure on any of his subordinates to implement a political

"mandate" to appoint the African National Congress' preferred service providers.

Mr. Mkhwane's evidence

27 Much of Mr. Mkhwane's evidence focussed on the reputational damage he said Mr. Dyakala's messages had caused him. Although Mr. Dyakala's messages were addressed only to the procurement WhatsApp group, word of Mr. Dyakala's outburst quickly got out. Mr. Dyakala said that the stigma of corruption soon attached to him, and that he experienced criticism and distrust amongst his friends and family. He also said that the content of Mr. Dyakala's messages was broadcast on the radio, which exposed

him to wider public opprobrium.

28 However, on the merits, Mr. Mkhwane's evidence had an imprecise, repetitive and dogmatic character. In relation to his party role, he denied that he was the regional secretary of the African National Congress at the time Mr. Dyakala joined Emfuleni. At

that point, the party's regional executive had been dissolved, and party affairs were run by an interim committee. He said that he only became the regional secretary after the executive was reconstituted in 2022. Mr. Mkhwane was however constrained to accept that he sat on the interim committee of the African National Congress from 2018 until his election as regional secretary. It is also worth noting that Mr. Mkhwane's own particulars of claim, dated 11 June 2020, describe him as the "former" regional secretary of the African National Congress. Although Mr. Mkhwane was somewhat coy about his role on the interim committee, there can be no serious doubt that he had a senior role within the Emfuleni structures of the African National Congress throughout 2019.

29 Mr. Mkhwane's hair-splitting manifested in other parts of his evidence. He at one point suggested that he had not bullied Mr. Dyakala because he had never physically attacked him. At another, he accepted the thrust of an Auditor-General's report

– entered as Exhibit "C" – that Emfuleni's internal financial controls were inadequate, and that its supply chain management was particularly poor, but he nonetheless denied that it was his responsibility to implement the Auditor-General's

recommendations. Mr. Mkhwane placed that responsibility squarely on Mr. Dyakala.

30 Mr. Mkhwane accepted that he was suspended in early 2019, but said that the effect of the lifting of his suspension was to clear his name. Mr. Mkhwane was confronted with a newspaper article, dated 27 February 2019 entered as Exhibit "P" before me, in which he was named as a high-level official who had "manipulated systems and official structures" within Emfuleni. Mr. Mkhwane did nothing to counter the allegations in the newspaper article other than to emphasise that, as far as he was concerned, the Labour Court order setting aside his suspension cleared him of any wrongdoing. That is of course wrong, but, as I have emphasised, the basis of Mr. Mkhwane's suspension appears to have been suspicions arising from his poor record-keeping, rather than any direct documentary evidence that he facilitated a corrupt transaction.

31 This evidence was nonetheless material for what it told me about the context in which Mr. Dyakala's messages would have been received and understood at the time they were sent. There is no serious dispute that, as at 24 December 2019, Emfuleni's procurement structures were in a parlous state. There were well-documented irregularities in Emfuleni's procurement processes which had led to credible allegations of corruption in the media. Mr. Mkhwane had been identified with those irregularities and

suspended for his role in perpetuating them. He had been returned to office, but only after he had sued the Municipality for contempt, and cited Mr. Dyakala in that suit. Mr. Mkhwane's evidence took issue with none of this, and in fact confirmed it all.

32 It is against this background that Mr. Dyakala's defences must now be assessed.

Absence of intent to injure

33 I cannot accept that Mr. Dyakala did not intend to injure Mr. Mkhwane. Mr. Moeletsi's submission to the contrary ultimately came down to the propositions that Mr. Dyakala did not subjectively intend to harm Mr. Mkhwane and did not know that it would be wrong to send the messages. Neither submission is sustainable.

34 Mr. Dyakala painted himself as locked in moral struggle with Mr. Mkhwane. The messages he sent were plainly part of that struggle. They were meant to discredit Mr. Mkhwane, and to hurt him. From Mr. Dyakala's point of view, an obviously corrupt official

had largely succeeded in evading attempts to hold him to account. He had thwarted disciplinary action, both by reversing his suspension,

and by creating a relationship with Mr. Leseane that threatened to, and to some extent did, marginalise Mr. Dyakala and render impotent his attempts to rehabilitate Emfuleni's financial systems. The tenor of the messages themselves was intemperate, baiting and frustrated. It is inconceivable that Mr. Dyakala was subjectively indifferent to the effect that they might have on Mr. Mkhwane.

35 Similarly, it is wholly improbable that a man of Mr. Dyakala's education and achievements could have thought that there was nothing improper or injurious about sending the messages he did. Mr. Mkhwane's evidence was at its most creditworthy when

he said that he felt demeaned by being attacked on the WhatsApp group by his own manager. Mr. Dyakala must have appreciated that, however he felt about Mr. Mkhwane, and whatever the truth of his allegations, the messages were inappropriate and defamatory. Mr. Dyakala was, at the very least, reckless to the possibility that he would injure Mr. Mkhwane's dignity.

36 Accordingly, I reject the submission that Mr. Dyakala lacked the intent to injure Mr. Mkhwane.

Truth and public interest

37 I accept, however, that Mr. Mkhwane was probably personally corrupt. To reach that conclusion, I need not find that Mr. Mkhwane committed a crime, or even that he facilitated any particular corrupt transaction. Nor need I conclude that he actually conspired with the African National Congress or with Mr. Leseane to secure the irregular appointment of particular service providers. The

conclusion must follow merely from my acceptance that he described his political “mandate” in the terms Mr. Dyakala alleged. The conversation Mr. Dyakala described is clear and direct evidence of a corrupt state of mind, since it demonstrates that Mr. Mkhwane was unwilling or unable to separate his role as an office bearer in the African National Congress from his role as a government procurement manager. It demonstrates that he was prepared to compromise his official responsibilities to ensure that the party’s friends benefitted from state resources. This, I think, is what is ordinarily referred to as “state capture” – albeit on a small and localised scale. It is plainly corrupt, on any reasonable definition of that term.

38 In addition, I cannot ignore the substantial documentary evidence that Mr. Mkhwane was at the centre of a web of irregularities which both the Compario report and the Auditor-General’s report describe in some detail. These irregularities, while they do not in themselves demonstrate Mr. Mkhwane’s participation in any particular corrupt transaction, confirm that Mr. Mkhwane was instrumental in creating an environment marked by poor record-keeping and irregular expenditure. In such an environment, contracts could plainly be awarded irregularly to favoured service providers. Whether or not that actually happened, Mr. Mkhwane’s admitted involvement in irregular expenditure, evaluated in light of his own description of his political “mandate”, constitutes good evidence of Mr. Mkhwane’s openness to facilitating corrupt transactions to further the interests of his party. That is enough, I think, to truthfully describe Mr. Mkhwane as corrupt.

39 Accordingly, I find that the allegation that Mr. Mkhwane was “normalising corruption”, and the implication that he was personally corrupt, to be substantially true on the proven facts.

40 That conclusion having been reached, I think I must find that it was, overall, in the public interest that the allegations were made. It was no doubt unfortunate that Mr. Dyakala aired his views at the time and in the manner that he did. There is, however, no account of constitutionally informed public policy that is compatible with telling a senior municipal finance manager that he cannot, consistently with the public interest, call out what he honestly believes to be corruption in his own department, even if he chooses to do it on a departmental WhatsApp group on Christmas Eve.

Fair Comment

41 I now turn to the allegations that Mr. Mkhwane was a “renowned bully” and that he had deployed “bullying tactics”, as well as the implication that Mr. Mkhwane was a “looter”. These, it seems to me, are statements of opinion rather than fact. A defamatory statement of that nature is justified where it “expresses an honestly-held opinion without malice on a matter of public interest on facts that are true” (*The Citizen v McBride* 2011 (4) SA 191 (CC) (“McBride”), paragraph 83).

42 The distinction between fact and comment is not always easily drawn (see in this respect *Crawford v Albu* 1917 AD 99 at 117). Sometimes a statement is both a description of a state of affairs and a comment on those affairs. How we choose to describe a particular fact often discloses an opinion about it without making any difference to the accuracy of the statement as a factual

description. For example, depending on the context, to describe a person convicted of an offence as a “criminal” may both be literally true and a personal judgement about their character.

43 Much will depend on the context in which the statement was made, and how a reasonable person would have understood it in that context. However, it seems to me that, in this case, Mr. Dyakala’s allegations of corruption were meant to be statements of fact: Mr. Mkhwane’s conduct and motives were either demonstrably corrupt or they were not. Mr. Dyakala plainly meant to convey that Mr. Mkhwane was actually corrupt, and that his conduct was such that it “normalized corruption” at Emfuleni. His

case at trial on that score depended upon him proving that these statements were in some material sense true.

44 However, the evidence about the context in which Mr. Dyakala used the words “renowned bully” and “looters”

indicates that those epithets were an expression of opinion about Mr. Mkhwane’s conduct and character. Mr. Dyakala clearly

subjectively believed that Mr. Mkhwane had bullied him – chiefly by placing him under pressure to capitulate to Mr. Mkhwane’s

political “mandate”. In addition, no reasonable person would have understood Mr. Dyakala to have been implying that Mr. Mkhwane was literally a looter: someone who breaks into and steals from unprotected property. The proposition was rather that Mr. Mkhwane is a looter because he keeps company with looters: his attorney is a looter, and he works at the Municipality on behalf of individuals who seek improper benefits from it. These are opinions in the sense that they are inferences Mr. Dyakala drew from known facts and then published on the WhatsApp group.

45 The question is accordingly whether Mr. Dyakala’s opinions were honestly-held, expressed without malice, and related to a matter of public interest. I think that they were. While Mr. Dyakala was angry at Mr. Mkhwane, his views about Mr. Mkhwane were

obviously honestly-held. It was not suggested that Mr. Dyakala had any underlying improper motive for making the statements he did. Nor was it suggested that he deliberately distorted the underlying facts (on this definition of “malice” see McBride, paragraphs 110 and 111). Mr. Dyakala said what he said because he honestly believed it. There can, moreover, be no doubt that Mr. Dyakala’s comments related to a matter of public interest.

46 In their written submissions, counsel for Mr. Mkhwane suggested that the fair comment defence is inapplicable because the

facts

on which Mr. Dyakala expressed his opinion were not set out in the WhatsApps he sent. However, even if someone passes comment on

facts that are not expressly stated, the comment will nonetheless be fair if the facts are “notorious” to the audience to which the comment is addressed (see McBride, paragraph 89).

47 In this case, it is inconceivable that the members of the WhatsApp group would have been unaware of the facts to which Mr. Dyakala was adverting. Mr. Mkhwane had been suspended for being party to financial irregularities. He had sued Mr. Dyakala in his personal

capacity to secure his reinstatement. He had been the subject of a newspaper article about corruption at the Municipality. The

Municipality was under administration, and reeling from allegations of corruption and financial irregularity. The procurement officials

on the WhatsApp group must have known all of this. Mr. Mkhwane’s role in all of this was plainly “renowned” at the Municipality.

48 Those notorious facts were, in themselves, enough to ground Mr. Dyakala’s opinions. Those opinions were not required to be dispassionate or equitable summations of the facts on which they were based. So long they were honest and rationally connect to

the facts, Mr. Dyakala’s opinions could have been “extreme, unjust, unbalanced exaggerated and prejudiced” (McBride, paragraph 83). They would still have been protected under the fair comment defence.

49 For all these reasons, I find that Mr. Dyakala’s description of Mr. Mkhwane as a “renowned bully”, his imputation of “bullying tactics” to Mr. Mkhwane, and his implication that Mr. Mkhwane was a “looter”, though defamatory, were justified as fair comment on true facts.

Mr. Mkwane’s attorney

50 It remains to deal with the allegation that Mr. Mkwane's attorney "looted R52 million" from the Municipality. This statement was alleged in itself to have been defamatory of Mr. Mkhwane, but I do not think that is correct. The statement was made to associate Mr. Mkhwane with "looting" and to imply that he was a "looter". I have already dealt

with these implications.

51 Beyond that, the statement could only conceivably have defamed Mr. Mkhwane's attorney. However, Mr. Mkhwane's attorney is not a party to these proceedings, and does not press a defamation claim on his own behalf. I should add that the attorney to

whom Mr. Dyakala referred in his WhatsApp messages is not the attorney who represents Mr. Mkhwane in these proceedings.

Mr. Dyakala's failure to fully plead his defences

52 I am satisfied that the evidence I heard was sufficient to reach the conclusions I have set out without causing prejudice to Mr. Mkhwane, even though the defences I have upheld were not fully pleaded. The truth of Mr. Dyakala's statements was in fact

pleaded, as were the facts underlying the defence of fair comment. The questions of whether the statements were made in the public

interest or were "fair" in the relevant sense were not matters of evidence, but of argument. Mr. Mkhwane was given every opportunity to present full argument on the defences that I have upheld. He has identified no prejudice to those defences being considered.

53 Mr. Mkhwane's counsel argued that the decision of the Supreme Court of Appeal in *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) precludes me, as a matter of principle, from considering unpleaded defences. In this they were mistaken. *Fischer* was not about the circumstances under which a court may consider unpleaded defences that may have arisen from the evidence after it is led. It dealt with a situation in which the factual issues between the parties were completely redefined by the presiding Judge without the consent of either party before any evidence was led. This caused substantial prejudice to one of the parties, who then appealed.

54 In this matter, after both parties had closed their cases, Mr. Dyakala sought to rely on the defence of truth and public benefit, and I asked that the parties address me on whether the defence of fair comment arose from the proven facts. Mr. Moeletsi argued that it did. Counsel for Mr. Mkwane argued that it did not.

55 But neither party suggested that further evidence was required, or that they had been prejudiced by its absence. In those circumstances, the authorities are clear that an unpleaded defence can be considered and sustained if the defendant chooses to rely upon it.

56 In this case, Mr. Dyakala took up the defences of truth and public interest and fair comment, even though he had not expressly pleaded them. He was perfectly entitled to do so (see for example *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA), paragraph 12).

Order

57 For the reasons I have given, those defences constitute a complete answer to Mr. Mkhwane's claim. Accordingly, the claim is dismissed with costs.

S D J WILSON

Judge of the High Court

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EVIDENCE HEARD ON: 13, 14 and 16 May 2024

WRITTEN SUBMISSIONS ON: 27 May and 3 June 2024

JUDGMENT

RESERVED ON: 10 June 2024

DECIDED ON:

15 July 2024

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Prepared on 14 October 2026 · Esheria