

SOUTH AFRICA / JUDGMENT

M.M.S v H.K and Another (2023/117058) [2025] ZAGPJHC 88 (7 February 2025)

[2025] ZAGPJHC 88**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2023/117058

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Source record**FLYNOTES:**

CIVIL LAW – Defamation – Interdict –
Ex
parte application – Full disclosure of all facts that might
be material – Non-disclosure of text message, a
material
fact – Defendant’s argued that statements were based
on true facts and genuine concern for defendant’s
daughter –
Applicant failed to establish that statements were false –
Evidence insufficient to establish harassment
– Conduct not
shown to be disproportionate to alleged circumstances – Rule
nisi discharged – Application
dismissed.
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED.
SIGNATURE
DATE: 7 February 2025
Case
No. 2023-117058

In the matter between: MMS
Applicant
and
HK
First Respondent
VG
Second Respondent

JUDGMENT

WILSON J:

1 On 14 November 2023, the applicant, MMS, applied ex parte for an order restraining the respondents, HK and VG, from defaming, insulting or publishing any injurious falsehoods about him. The purpose of that relief was apparently to prevent the publication of any material that might suggest either that MMS had paid for sex with HK's daughter, A, while knowing that the money he paid A was funding A's drug habit, or that MMS had encouraged or enabled A to engage in sex work with others in order to fund her drug habit.

2 In addition, MMS sought an interdict restraining HK and VG from making unsolicited contact with MMS, his family members, friends, acquaintances, business associates, or the religious group to which he is affiliated, with the intent to harass or defame him. MMS also sought relief restraining HK and VG from "harassing", "threatening" or "invading [MMS'] privacy" in any other way. MMS asked that HK and VG be prevented from disseminating court papers containing averments about the transactional nature of the alleged sexual relationship between MMS and A. After a hearing in camera, my brother Strijdom AJ issued a rule nisi, operating as an interim interdict, substantially in the terms that MMS sought.

3 The rule nisi was then served on HK and VG, and has been extended in order to allow HK and VG to file the papers necessary to oppose its confirmation. MMS' application to confirm Strijdom AJ's interim order was enrolled in my opposed motion court on 28 January 2025.

MMS' case

4 MMS' founding affidavit makes out a prima facie case that HK and VG have hounded him, over a number of years, with entirely false allegations that he had taken a purely sexual interest in A, and that he has no real regard for her welfare.

5 MMS disputes this. He describes his interest in A as that of a "mentor and guide". MMS first met A when HK became his

insurance broker. A was in her mid-thirties at the time, while MMS was in his late sixties. A had, and by all accounts continues to have, a difficult life. She was diagnosed with a form of late-stage liver cancer when she was twenty. The cancer has been kept at bay with a combination of chemotherapy, surgery and, most recently, immunotherapy. A also struggles with drug addiction. She has a strained – MMS says "toxic" – relationship with HK. HK no longer lives with A's mother,

B, but is apparently in a relationship with VG. Ms. Strathern, who appeared for MMS, described VG as HK's "mistress".

6 Given these challenging family dynamics, A's chronic illness and her drug addiction, MMS described his role in A's life as that of a placid and non-judgmental friend. MMS says that he paid A to do odd jobs for his business. He intervened on her behalf

when HK stopped paying for A's immunotherapy. He funded A's litigation in this court to compel HK to do so. He tried to help A when he believed she had been committed to a drug treatment centre against her will.

7 In his founding affidavit, MMS paints himself as the victim of a relentless, unhinged and baseless attack on his reputation by HK

and VG. MMS sought relief ex parte because he was afraid that, if HK and VG were given notice of his application to restrain their slanderous harassment, they would publish false, injurious and defamatory matter as widely as possible so as to cause MMS' reputation maximum damage before the matter came to a hearing.

HK's and VG's case

8 HK's and VG's affidavits paint a different picture. HK says that, in November 2020, A showed him her profile on an internet page advertising escort services. A told him that MMS paid her for sex, and that she had sex with MMS weekly. HK also says that A had presented him with doctors' invoices for her cancer treatment, for which HK then reimbursed A. HK says that it turned out that the doctors' invoices were forged, and the money he gave to A had in fact been used to purchase drugs.

9 HK tried to intervene with A, principally by having her admitted, apparently against her will, to a drug treatment centre. He also made it a condition of any future help from him that A break off all contact with MMS. It seems clear to me that HK's later

refusal to fund A's immunotherapy was animated, at least in part, by his belief that A continued to be involved with MMS.

10 There is no serious dispute that both HK and VG have sent a number of incendiary messages to and about MMS criticising in strident terms what they say is the unwholesome nature of his relationship with A. Nonetheless, HK and VG both maintain that the facts underlying their claims – that MMS pays A for sex, and that A uses that money to fund her drug habit – are true. HK says MMS is an extremely bad influence on A, and that the messages are intended to get MMS to leave A alone.

The ex parte application

11 As an applicant for relief ex parte, MMS was required to make full disclosure of all the facts that might be material to the relief he sought. The law places that duty on an applicant ex parte so that a court can assess whether there really is good reason to place someone under restraint without hearing from them.

12 In this case, MMS did not disclose all that he should have. In particular, he failed to disclose a critical communication that triggered much of the animosity later to develop between MMS, HK and VG. That communication took the form of a text message that HK sent to MMS' cell phone on 28 November 2020. In it, HK explained that he was "extremely concerned". HK revealed that he had recently found out that A was a drug addict, and had been a drug addict for "the last 7 years". For the last three years, HK alleged, MMS had paid A for sex. The money was then used to fund A's drug habit. HK asks MMS to "please refrain from giving [A] any money going forward".

13 The tone of the message is restrained. It cannot fairly be described as defamatory, or intended to harass or intimidate. MMS admitted before me that he received the message. The content of the message places an entirely different gloss on HK's conduct. It

indicates that HK had reason to believe MMS was in a sexual relationship with A; that the relationship was fundamentally transactional in nature; that the money A said that she received from MMS was being used to fund her drug habit; and that it is at least possible that MMS knew this. Plainly, HK's message of 28 November 2020 was material to the relief MMS sought ex parte. It should have been disclosed.

The application for final relief

14 As must be clear by now, the core facts relevant to MMS' claim are hotly disputed. On the one hand, MMS denies having sex of a transactional nature with A, and paints HK and VG as unreasonably obsessed with his perfectly innocent relationship with A. HK and VG, on the other hand, substantially admit that they sent a large number of inflammatory communications to and about MMS in the years between November 2020 and November 2023. They also admit threatening to publish more allegations about MMS to anyone who might have an interest in them. HK and VG maintain that their primary objective in doing so was to discourage MMS from having anything to do with A, because he was sexually exploiting her, encouraging her to use drugs, and driving a wedge between A and HK. MMS himself acknowledges on the papers that HK's and VG's conduct is not incessant. It waxes and wanes. The frequency of the communications and threats of publication of which MMS complains increases whenever he intercedes on A's behalf. After a fairly lengthy pause, it flared up most recently when MMS helped fund the litigation to compel HK to pay for A's immunotherapy.

15 Both the non-disclosure of HK's message of 28 November 2020, and the entirely different slant on the case provided in HK's

and VG's answering affidavits, mean that the rule nisi cannot survive. I am prepared to accept, as Ms. Strathern urged, that the 28 November 2020 message was not withheld in bad faith (MMS says he lost it), but that hardly makes a difference. The non-disclosure of a fact material to relief sought ex parte need not be culpable to be fatal to any application to sustain that relief. It is enough that the material was relevant, and that it was not placed before the court.

16 Ms. Strathern nonetheless submitted that, if the evidence is properly analysed, there is in truth no material dispute of fact on

the papers, and that MMS is entitled to his relief. When pressed on this, however, Ms. Strathern could do no better than to argue that HK and VG admit that they are the source of the material MMS regards as defamatory or injurious. Ms. Strathern also submitted that the repetition of the allegations, often in fairly lurid terms (HK and VG have said, for example, that MMS keeps A as a "sex slave"), amounts to harassment within the meaning given to that term in section 1 of the Protection from Harassment Act 17 of 2011.

17 However, HK's and VG's admissions do not carry MMS' case that far. In the first place, while they are clearly prima facie defamatory, I have no way of determining whether HK's and VG's publications are based on substantially true facts. If the facts HK and VG allege are true, it seems to me that much of what HK and VG have published, or have threatened to publish, would either be in the public interest or would amount to fair comment.

18 In any event, it is well-established that a final interdict in restraint of defamation cannot be granted when the facts underlying

the alleged defamatory matter are in dispute (see, for example, *IRD Global Limited v The Global Fund to fight AIDS, Tuberculosis and Malaria* 2025 (1) SA 117 (SCA), especially paragraphs 25 and 26). Even an interim interdict in restraint of defamation could not be sustained on the facts before me, since HK and VG have laid "a sustainable foundation . . . by way of evidence" that they have a defence to MMS' claims that he has been defamed (see *Herbal Zone (Pty) Ltd v Infitech Technologies* 2017 BIP 172 (SCA), paras 37 and 38). HK's and VG's version – that their conduct was animated by true facts, and that it arose from genuine concern for A and from justified disgust with MMS' role in her life – may well sustain a complete defence to MMS' defamation claim.

19 Nor can a case for interim or final relief in restraint of injurious falsehood be sustained, since the the facts underlying HK's

and VG's publications are in dispute. So while I accept that HK and VG have published or threatened to publish material injurious to MMS, there is no basis on which I can fairly assess the truth or falsity of that material.

20 Nor, finally, has even a prima facie case of harassment been made out. It is of course true that HK and VG have repeatedly published distressing allegations and fairly strong epithets about MMS and his conduct. But even the repeated communication of material that makes its target feel harassed will not be unlawful unless the communication is also objectively unreasonable (see, for example, section 1 (a) of the Act). In order to determine the objective reasonableness of

HK's and VG's conduct and communications, it is necessary to know whether or not the facts they allege about MMS are true.

21 Ms. Strathern did not submit, and I cannot accept, that HK's and VG's conduct on the undisputed facts has been shown to be so disproportionate that it would be unlawful even if everything they say about MMS is true. There can accordingly be no question, on papers before me, that a case of harassment in the legal sense has been made out.

22 It follows from all of this that an interdict cannot be sustained on the undisputed facts, and that MMS knew or ought to have known this before he instituted this application. Even if I were to overlook the patent and material non-disclosure of the 28 November

2020 message in the ex parte approach to Strijdom AJ, MMS must have known that, given the opportunity to do so, HK and VG would dispute his version of the facts on objectively bona fide and reasonable grounds.

23 Accordingly, MMS' application has to fail. I have given some thought to whether the matter should be referred to trial. But

given MMS' clear foreknowledge of the disputes that were bound to arise, I do not think that a referral would be appropriate.

The counter-application

24 HK instituted a counter-application to restrain MMS from harassing, defaming or intimidating him. Whether that case can be sustained depends substantially on how the underlying factual disputes between the parties are ultimately resolved. Ms. Metzger accepted that if I dismiss the main application on the basis that it cannot succeed in the face of a foreseeable dispute of fact, then the counter-application must suffer the same fate.

Order

25 For all these reasons –

25.1 The rule nisi granted by Strijdom AJ on 14 November 2023 is discharged.

25.2 The application and the counter-application are both dismissed, each with costs, including the costs of counsel on the "B" scale.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 7 February 2025.

HEARD ON:

28 January 2025

DECIDED ON:

7 February 2025

For the Applicant:

N Strathern

Instructed by Vanessa Fernihough and Associates

For the First Respondent: L Metzger

Instructed by Strydom M and Associates

For the Second Respondent: S Liebenberg

Instructed by Darryl Ackerman Attorneys

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