

SOUTH AFRICA / JUDGMENT

Mokhoanatse v Maphatsoe and Another (03042/2016) [2016] ZAGPJHC 256 (23 August 2016) [2016] ZAGPJHC 256

COURT

South Gauteng High Court, Johannesburg

BEFORE

Satchwell

CASE / FILE NUMBER

03042/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: 03042/2016

In the

matter between:

MOKHOANATSE

EDWARD

MAHLOMOLA

Applicant

and

MAPHATSOE

RAMANTOANA

EMMANUEL

First Respondent

MTHEMBU

JACKSON

Second Respondent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This is an opposed application for a finding of defamation and award of damages. The statements made emanate from and concern former political comrades who have become political foes. Accordingly, this judgment must take into account firstly, the approach to evidence led by way of affidavit rather than through witnesses and secondly, the latitude granted to those engaged in political debate in the South African democracy.
2. It is customary that defamation claims are pursued by way of trial action which allows litigants to themselves give evidence and be tested thereon and also to call other persons to substantiate or challenge evidence which may be in dispute. In the present matter the party who alleges he has been defamed represents himself. His opponents, who are represented, have pointed out the disadvantages of pursuing this claim by way of application but he has declined the opportunity to convert his litigation into a trial action. Accordingly, this matter has proceeded (through a multiplicity of judges of this division) by way of application and it was heard on that basis in the opposed motion court.
3. I have born in mind the now trite admonition as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; (1984) 3 SA 623 (A) insofar as it pertains to disputes of fact. In the present case there do not appear to be any such disputes of fact. I have also constantly advised applicant that I am limited to what is contained in the papers, that he cannot give evidence and that I must have regard to the version set out by respondents where there is a dispute. This he has understood.
4. It is now trite that in the interpretation of written documents (and I would suggest of verbal utterances) the starting point is, of course, the language of the document or utterance. However, it must fall to be construed by its context, the apparent purpose to which it is directed and the material known to those responsible for its production. As has been stressed in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & Others* 2013 (6) SA 520 (SCA), “context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset”.

5. Applicant is a veteran of Umkhonto we Sizwe (MK), the military wing of the African National Congress who left South Africa as a young man in September 1976 and who spent some fourteen years making his contribution to the liberation of this country from the forces of the National Party Apartheid regime and sometime thereafter assisting in the creation and development of our democracy. At the time of deposing to their affidavits, first respondent was the chairperson of the Umkhonto we Sizwe Military Veterans Association (MKMVA) and the Deputy Minister of Defence whilst second respondent was the chief whip of the African National Congress (ANC) in the National Assembly and the former National Spokesperson of the ANC.
6. The alleged defamations were committed in 2013 when applicant was involved in setting up an alternative association for veterans of MK known as South Africa First (SAF) and respondents were both expressing their views thereon and opposition thereto.
7. The background to these political developments was the involvement of applicant in certain management activities of MKMVA, his belief that he (amongst others) had uncovered certain financial irregularities in the affairs of MKMVA, the reporting of such alleged irregularities for investigation to a well-known firm of accountants, the subsequent findings thereof, complaints laid with the Hawks division of the South African Police Services (SAPS) and, what was believed by applicant, to be the SAPS subsequent inaction

against those responsible for the alleged financial irregularities. This led, several years later, to the formation of SAF which was intended to offer representation and assistance to veterans of MK. It was the formation of this SAF which led to the publication by both respondents of what are alleged to be defamations of applicant.

8. Having regard to the political alignments of both applicant and respondents, that their disputes had political character and that they were all perceived as leaders of oppositional political entities, I think it is appropriate to note that I am mindful of that which was said in both *Argus Printing and Publishing Co Ltd v IFP* [1992] ZASCA 63; 1992 (3) SA 579 (A) and also in *Mangope v Asmal and Another* 1997 (4) SA 277 (T).
9. In *Argus* supra, the court was concerned with whether or not a political body could sue for defamation. The court commented that “political debate should be unfettered. People should not be restrained in their political utterances by the fear of being subjected to claims for defamation”. “Mere debate on political questions, or expressions of disagreement with an opponent's political views, would clearly not be actionable. Even personal criticisms of a political opponent are not readily regarded as defamatory”. The court affirmed that which was said in an earlier judgment that “courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters are aware of this.” Part of the rationale for the law's reluctance to regard political utterances as defamatory stems from the “recognition that right-thinking people are not likely to be greatly influenced in their esteem of a politician by

derogatory statements made about him by other politicians or political commentators”. Accordingly, the Supreme Court of Appeal endorsed the general approach that “wide latitude” should be allowed in public debate on political matters”.

10. In the subsequent Mangope supra decision, the court said that, although even politicians can be defamed, they should not be “overhasty to complain about slatings against them unless it is really serious”. A distinction should be drawn between an attack against the “dignity

and reputation of a politician” and “an attack upon his political views, policies and conduct”. In respect of an attack on the latter, the court would be slower to come to the assistance of a politician. The court cautioned that it was not accepted that “the Constitution legalises character assassination of individuals merely because they are politicians”.

11. In the present case I note that applicant was not a ‘politician’ as understood in the above cases. He occupied no political position in any party contesting elections at that time and he was not a public figure accountable to an electorate or constituents. At that time, applicant was one of the former members of MK, struggle veterans and community leaders in organizing the entity known as SAF which he says was to “further the cause of our people for total emancipation”. That entity did not compete in the national elections in 2014, a year after the alleged defamations.

PUBLICATION BY FIRST RESPONDENT

12. On 30th April 2013, first respondent in his capacity as Chairman of the MKMVA issued a three page typed press release entitled ‘South Africa First an organ of the counter-revolution – MKMVA’. It also announces that it is the “STATEMENT OF MKMVA ON THE FORMATION OF THE NEW POLITICAL PARTY BY DISGRUNTLED FORMERS MEMBERS OF UMKHONTO WE SIZWE”. Accordingly, there can be no doubt as to the subject matter of the document.
13. In the main it comprises outdated Sino-Soviet jargon which enjoys little place in a modern democracy and is offensive to no one except those who are political or philosophical scholars, adherents of democratic principles and discourse and those who wish to uphold standards in use of the English language.
14. I must have regard to the context in which this statement was composed, prepared and issued. In summary, it may be regarded as challenging the right of any entity which comprises former MK combatants to exist within any organization other than MKMVA. That challenge is based on the existence of MKMVA as the only legitimate voice of ex-combatants within the ANC, that the formation of any other entity is a counter revolutionary endeavor, that the launch of this SAF entity is yet another attempt by enemy forces upon the liberation movement, and that there are persons who parade with fake credentials to betray the struggle in order to form this new

entity.

15. None of these general averments are the subject matter of the present complaint. But they do provide the context to that which is allegedly the defamatory statements.

Deserter

16. Paragraph 3 of page 1 states that

“Eddie Mokhoanatse and his fellow travelers, have no right to associate the creation of his power hungry imagination with former combatants of the glorious peoples’ army, Umkhonto we Sizwe”.

Paragraph 4 of the same page goes on to state

“It is important to note that Eddie Mokhoanatse aka Alex Mashinini, deserted the ANC in the eighties. While he was deployed in the German Democratic Republic, he skipped to the Federal Republic of Germany attracted by the shine of good life and bright life, while the rest of the comrades stood firm in their posts”.

17. In short, applicant in this litigation is a ‘deserter’ from his post as a combatant in MK and his desertion was occasioned by his desire to live a life of luxury. He is a soldier who has deserted his post in a time when his military organization was at war. I do not need to take judicial notice of this fact since the South African Law Reports record cases where members of the ANC who had not taken up any military positions were charged with and convicted of High Treason on the grounds of the armed state of affairs between the ANC and the then Government of the Republic of South Africa.[1] It is trite that, in military codes of conduct, the penalty for desertion by a combatant from a military posting is frequently death.
18. First respondent is clear in his answering affidavit that he did not know applicant when he was in exile and first met him during
2010. First respondent gives no indication from whom he obtained any information about or concerning applicant. There is no indication how first respondent ascertained the truth of such information or that he checked his facts before or after making this statement.
19. It is common cause that applicant was deployed over a period of years to East Berlin (which was then in the German Democratic Republic), to Zambia and then to Budapest.
20. The only area where there is a different understanding of events is the return of applicant to Berlin. On his version he returned to Berlin where his German wife owned a residence on the very day that the Berlin Wall fell (i.e. 9th October 1989) thereby rendering the previous divisions of Berlin no longer extant. He states in his replying affidavit that “a few days after my arrival in Berlin, I visited the office of the ANC and informed the then Chief Representative, Auria Mokeba, that I would be in Berlin to look after my family. I did not hear a word from the ANC in Berlin thereafter”.

21. First respondent, in his answering affidavit, says that “instead of returning to East Berlin the applicant defied the ANC and decided to settle with his wife in West Berlin. He did so without the knowledge or consent of the ANC. In violation of his oath of loyalty, the applicant abandoned the ANC. In military terms he deserted”. First respondent is at pains to point out
- that “despite the collapse of the Berlin Wall, the ANC diplomatic office in East Germany remained intact” and that the collapse of the Wall and the unification of East and West Germany “did not translate into the collapse of the ANC”.
22. First respondent has no firsthand knowledge of applicant’s doings or whereabouts. He gives no indication of how and in what manner applicant “defied” the ANC. Who was defied? In what manner? Was there an instruction ignored or refused? It appears he does not know.
23. The only apparent defiance to which he may be making reference is that applicant decided to “settle in West Berlin”. It is difficult to see how this could amount to defiance of any sort. There is nothing in the papers to suggest that ANC or MK cadres were not permitted to live in any suburb of the now united city of Berlin - at this time one suburb was much like another
- they were both part of a united city without any political or legal or military obstruction between Mitte, Wedding, Friedrichschain, Charlottenburg or Pankow.
24. In short the averment of “desertion” is solely based on place of residence in a now united city – Berlin.
25. To call a soldier a deserter is a serious allegation. It goes beyond robust critique of views or attitudes. It strikes at the very heart of an individual’s good name and reputation. It directly alleges cowardice, disloyalty, abandonment of comrades, and defiance of authority. In this particular case the desertion is claimed to have been motivated by personal desire to enjoy a life of luxury whilst loyal combatants continued in a life of austerity.
26. Applicant’s activities subsequent to his return to the Republic of South Africa in 1990 do not appear to support first respondent’s allegation of “desertion”. After engaging in business affairs, he was appointed to a position in the Commissariat of MKMVA and headed up the 50th Anniversary Task Team as well as appointed the Secretary of the Gauteng Provincial Preparatory Team for the Centenary of the ANC in
2012. As to these activities there is no dispute but first respondent seeks to contextualize this involvement as an act of charity on his part. But the facts do not support this context. It was not first respondent who approached applicant to work on the MK anniversary task team and neither was it first respondent who appointed applicant secretary of the Provincial team.

27. Furthermore, first respondent has chosen not to deal with or dispute applicant's averment that he was appointed Special Advisor to the then minister of Human Settlement, Mr Tokyo Sexwale, in early 2012. Minister Sexwale was himself a member of MK, a veteran, and a political prisoner sentenced to serve a term of 18 years imprisonment. It would be surprising that he would choose to employ a "deserter" from MK or the ANC – whether or not disciplinary action had been taken against applicant, which it

had not.

Agent Provocateur[2]

28. The press statement issued under the name of first respondent makes reference on several occasions to "agent provocateurs":
- a. "It is the wider strategy of the Democratic Alliance and the international monopoly capital to use agents provocateurs such as these ones who use their fake credentials to rewrite the history of liberation struggles of our country"
 - b. "There is no group of agent provocateurs with the capacity to stand against our forward march to liberate our people from the painful past imposed by the acrimonious and vicious apartheid racist regime".
 - c. "From the first day this group of agent provocateurs were never genuine members of our movement. Their brief has been to infiltrate and destroy the ANC and the struggles for our liberation".
29. First respondent maintains that these comments should not be interpreted as meaning that applicant joined the ANC under instructions to infiltrate and destroy the ANC. But he gives no reason why the statement should not be read in this way. It is "from the first day" that there was this lack of openness and truth about membership. That "first day" can only be the day

when the persons about whom first respondent is writing joined the ANC and MK. It from the very beginning. It was not a slow process of disillusionment. According to first respondent, these persons were deceitful persons acting for and on behalf of others with the intention or purpose of sabotage of a political movement – and they were such from the very beginning.

30. First respondent now maintains that his comments were not meant to be interpreted literally because they were uttered "in the spirit of robust political debate". After all, he says "those in opposition to the ANC are regarded as enemies of

the ANC". However, he gives no reason why a written document is composed, created, edited, authored and published and disseminated

but is not meant to be taken to mean what it says. He also offers no alternative understanding or interpretation or meaning of this document.

31. On a careful reading of the document it is quite clear that applicant is one of these agent provocateurs. He is the only person (apart from the “heroes and heroines of our struggle”) who is mentioned by name in the three page document. The entire document is a response to the formation of SAF which is described as a “splinter group”. It is the formation of “the so called political party” which is yet another attempt by the enemies of the revolution who are agent provocateurs using their fake credentials to rewrite history.
32. First respondent has attacked the character of applicant in most important respects. His entire life as a youth and young man was bound up in his service to the liberation movement. He served in Germany, Zambia and Budapest. He fell in love but left his wife and family to serve the movement in Zambia. He suffered exile from home, lived in strange countries where foreign languages were spoken, and he was at risk from injury or assassination by the agents of apartheid. He has devoted years of his life to the liberation of his country.
33. First respondent has attempted to negate this entire period of his life by stating that he was an agent provocateur from the beginning. A dishonest man who pretended to be that which he was not. A man who worked for the apartheid government which oppressed his own people and waged war on those (such as the ANC, MK, SACP, APLA and others) who would not acquiesce in their subjection. A man who sought to be accepted by MK and the ANC in order to betray those organisations. A man whose very purpose in purporting to join MK and the ANC was to sabotage or ruin or divert their programmes and campaigns.
34. The existence of such persons was widely reported on in the general press and regrettably features widely in the South African Law Reports. They were known as “askaris” or “impimpi”. From the early 1960’s they gave evidence in political trials and frequently met the fate of traitors – they were assassinated. In the years of the various States of Emergency during the 1980’s persons suspected of such disloyalty and behavior were “necklaced” or, at the very least ostracized. The fate of such persons resulted in numerous prosecutions which are also recorded in the South African Law Reports. In short, I do not need to take judicial notice of the fate of such persons – I just need to read reported judgments in the law reports and reference therein to the evidence before the courts. To be a deserter or an agent provocateur in those times was to warrant death.
35. First respondent writes of those times. He writes “from the first day” which, in the case of applicant, was
1976. The activities alleged against applicant were purportedly or allegedly perpetrated during those particularly horrendous decades when persons such as applicant would have been regarded as deserving of death.

Publication

36. It is not in dispute that this press statement was distributed.

37. The extent of dissemination was sought to be established by applicant through a bundle of news extracts which indicate publication quite far afield. Absent proof of such distribution and publication, I make no finding thereon (save that it is common cause that publication is conceded to have happened). I consider the nature and extent of publication to be more appropriate when it comes to the quantum of damages resulting from the defamation.

Defamation

38. This is not part of “robust political debate”. There is no indication whatsoever that these words were debate on political questions or expressions of disagreement with an opponent's political views or policies as identified in Argus and in Mangope supra. First respondent has far overstepped the mark. He has attempted character assassination of applicant merely because applicant dared to follow a different path.
39. To quote a Western colonial capitalist phrase, first respondent has attempted to “play the man and not the game”.
40. I have no doubt that the statements made by first respondent were defamatory. It was open to first respondent to raise a number of defences. Fair comment is not available because first respondent has not sought to rely on “fairness” at all. In fact he has attempted to distance himself from the meaning of that which he wrote. Truth is hardly appropriate since first respondent

has no firsthand knowledge of any events and relies on no authority therefore. Public benefit has not been shown or argued and I can see no basis that these statements were justified on the basis that publication thereof was necessary to enhance an open and democratic society. In short, no defence (other than freedom of robust political speech) has been suggested.

41. I must find that the statements were both wrongful and unlawful.

PUBLICATION BY SECOND RESPONDENT

42. Second respondent was approached by journalists. He states that, at that time, he was National Spokesperson for the ANC.
43. He is reported to have said certain things of and concerning applicant and which were published in the Star newspaper (a copy of which report is attached to the founding affidavit). Absent any supporting affidavit from the Star reporter or evidence from that reporter, I am only able to rely upon the answering affidavit of second respondent in regard to that which he personally said.
44. Second respondent confirms that he spoke to journalists when approached by them. He has not disputed that the purpose of and import of the journalists' queries concerned an postulated list of “enemy agents” i.e. persons pretending to be members of MK or the ANC who were, in fact, working for the apartheid regime. The context of his remarks is not in dispute.

45. The only portion of the report which he confirms emanated from himself is that he “referred to the applicant as a sell-out”. Accordingly, I cannot find that the statements attributed to second respondent about “izimpimpi” and the list and “double agents” can be found to have been said by him.
46. Second respondent says he expressed this view and attached this description to applicant for two reasons: that applicant “deserted” from the ANC and that “applicant and other disgruntled former ANC members formed SAF that made the applicant a sell-out in the eyes of the ANC”.
47. I certainly cannot find that second respondent could seek to justify his comment on the basis that applicant had deserted. After all, second respondent says that he did not know applicant. Such knowledge as he may have had of applicant’s past was hearsay obtained third, fourth and sixteenth hand from unnamed persons. It little behoves him to elaborate as to whether or not applicant had ever been a “deserter” as first respondent maintains.
48. As far as second respondent’s now stated view in his answering affidavit that applicant had turned his back on the ANC and the official MK veterans association and therefore regarded him as a “sell out” in the sense that he had abandoned the ANC and its structures as well as its policies and was therefore betraying all which that organization represented, I note that this was not the context within which the statement was made.
49. I do understand the use of the word “sell-out” to mean that someone has turned his back on former friends and associates and therefore has abandoned them and their cause. A “sell-out” is more than just a person who has changed his mind or his allegiances. There is a necessary inference that someone has sold his soul and is a “sell-out” because this abandonment or change of heart took place for financial gain or corrupt purpose or personal advantage. Such a person is not one who has sustained a change of heart – such a person is one who has made an exchange for advantage or gain or some sort. It would depend on the context within which such a description was given to know the exact sense in which applicant was a sell-out. That context is found in the portion of the newspaper articles which is not in dispute.
50. What is reported in the newspaper is that second respondent said that “Mokhoanatshe was talking about the list (the list of double agents) because he probably knows what other people know that he was a sell-out”. This full context clearly indicates that the description of sell-out is related to and linked to those who were double agents i.e. persons who were working for the

apartheid regime/ the National Party government whilst pretending they were working for the ANC and MK. The sale of one’s

integrity is in exchange for money, safety for oneself or one’s family, allegiance to the apartheid regime or any number of the inducements which our law reports indicate motivated those identified therein as “impimpi” or “double agents”.

51. Although, I do not have an affidavit from the journalist who wrote this story and he is not a witness in a trial who can be cross-examined, second respondent has not disputed that he was asked about the list of “double agents” and that was the context in which he referred to applicant as a “sell-out”.
52. I find that second respondent, as National Spokesperson of the ANC, was not a flustered and discombobulated person suddenly confronted with the novelty of the press. He was then an experienced public figure whose duties were to deal with the press. He knew what he was saying. He intended to say what he said. His statement was wrongful. He defamed applicant.
53. My comments in the earlier portion of this judgment are of application to second respondent as well.
54. I do note that there is no indication that these remarks were planned unlike those statements made by first respondent. There is every indication that second respondent was approached by the press and made verbal comments in respect to questions. This must certainly go towards the question of damages.

DAMAGES

55. Applicant has sought an apology and claimed a substantial sum of money. Absent information which can be tested on the harm inflicted upon applicant by reason of the defamation which requires evidence on the nature and extent of publication, the response thereto by persons who knew of or knew applicant, the position of applicant and his family, his employment and financial situation and any impact thereon by the defamations and so on I cannot make a finding on quantum of damages.
56. I indicated to the parties that, should I find any defamation, I would order that the matter be referred to oral evidence. This matter will be referred to the Deputy Judge President who will allocate a judge and a date to hear and determine such evidence.

ORDER

1. The application against first respondent succeeds. He has defamed applicant.
2. The application against second respondent succeeds. He has defamed applicant.
3. First and second respondents are to pay the costs of the application to date, payment to be made jointly and severally, the one paying the other to be absolved, on a party-party basis.
4. Oral evidence is to be heard to determine the question of the nature and extent of the quantum of the damages (if any) sustained by applicant by reason of the defamations perpetrated upon him by both first and second respondents. Both applicant and respondents may give evidence and any other witness whose evidence on this issue is determined by the presiding judge to be relevant. No witness may be called until reasonable notice has been given of the intention to call such witness as well as a summary of the proposed

evidence of the witness in sufficient detail to allow an assessment by the presiding judge of the justification for calling the witness.

DATED AT JOHANNESBURG 23rd AUGUST 2016

SATCHWELL J

Applicant: In Person

Counsel for Respondent: Adv K Millard.

Attorneys for Respondent: MV Gwala & Associates Inc.

Dates of hearing: 17 August 2016.

Date of judgment: 23 August 2016.

[1] See *S v Hogan* 1983 (2) SA 46 (W).

[2] The Oxford English Dictionary (2nd ed) “An agent employed to induce or incite a suspected person or group to commit an incriminating act”.

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