

SOUTH AFRICA / JUDGMENT

Native Child Africa (Pty) Ltd v Akinwale (2023-125850) [2023] ZAGPPHC 2007 (11 December 2023) [2023] ZAGPPHC 2007

COURT

North Gauteng High Court, Pretoria

BEFORE

Khwinana

CASE / FILE NUMBER

2023-125850

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FLYNOTES:.CIVIL

LAW – Defamation – Interim

interdict –

Social media influencer contracted as brand ambassador for haircare business – Failed to reach targets and disregarded contractual agreement – Publishing statements on social media and encouraging her followers to harass the business on its social media pages – Far-reaching influence of internet underscores urgency in addressing such conduct, particularly by individuals with significant online following – Without timely intervention, followers of such influencers could engage in damaging actions against brands – Interdict granted.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 2023-125850

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE

SIGNATURE

In

the matter between: NATIVE
CHILD AFRICA (PTY) LTD
APPLICANT
AND
MARY
OLUWATOBILOBA AKINWALE
RESPONDENT

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] This is an urgent application for an interim interdict, pending the institution of action proceedings against the Respondent for damages. The applicant seeks an order to restrain, remove, retract, and an apology from the Respondent with costs on an attorney-client scale.
- [2] The application is urgent, and the applicant was requested to proceed with merits. The matter stood down to the next day. On the next court day, the Respondent approached the court with an attorney and an advocate. An application to postpone was sought which was opposed. I have denied the application, and I ordered the Applicant to proceed.
- [3] It is important to mention that attorney and advocate were present in court when this matter started the previous day as it is a rule that the court cannot remain with one counsel. Counsel for the respondent addressed the court that their application must be dismissed with costs.

BACKGROUND

- [4] The applicant, Native Child Africa (Pty) Ltd is a small business that makes and sells natural haircare products, founded and is run by Ms Sonto Poee. The business was established in 2016. The applicant promoted and sold its products over the Internet and in the stores, also at (four retailers namely Clicks, and Dischem).
- [5] The applicant has also recently launched and is running 4 small natural haircare salons, catering specifically to the needs of the natural hair community. The applicant has 50 employees and, by implication, supports 50 families.

- [6] The respondent, Mary Oluwatobiloba Akinwale, is a quantity surveying student at the University of Pretoria and is a social media influencer with over 108,000 social media followers across Instagram, TikTok and X (formerly known as Twitter). The respondent lives a lavish lifestyle based on her social media posts and, according to her rate card, charges brands as much as R10 000 for a 60-second video posted on her social media.
- [7] The respondent has a significant reach on social media due to her followers and has ongoing social media campaigns with various brands. On 17 November 2023, the respondent began publishing a series of defamatory statements and videos against the applicant to more than 108,000 of her social media followers on TikTok, Instagram, X (the defamatory posts).
- [8] It is alleged that the Respondent made defamatory posts, false accusations, defamatory remarks, accusing the applicant of inter alia, exploitation and unethical business practices. It is also alleged that she called on her followers to harass the applicant on its various social media pages, encouraged them to repost her defamatory posts, and told them to go to the applicant's major retail clients to tell them to stop selling the applicant's products.
- [9] According to the Applicant since the publication of the defamatory posts, in the space of less than 3 weeks, the Applicant has endured further defamation and harassment by over 500 social media users on the Applicant's social media pages, on their major retail client's social media pages, by emails directed at the Applicant and in online Google reviews – all based on the respondent's defamatory statements.
- [10] In the same timeframe, the applicant has also seen an over 80% decline in its revenue over the Black Friday period (when compared to revenue achieved in previous years over the same period) and has experienced a significant dip in product purchase orders from one of its major retail clients. The applicant's brand and goodwill had been tarnished, its finances had been severely compromised.
- [11] It has been stated that in attempts to curtail this state of affairs, the applicant sought by various means to engage with the respondent, calling upon her to cease her conduct and to remove and retract her defamatory posts which has not been refuted by the Respondent. The applicant alleges that her efforts were in vain thus the urgent interdict application to salvage and protect the brand and goodwill from continuing reputational and financial damage.
- [12] The Respondent took the stand in response and replied that she did post and invited her followers. She says that she has taken the posts down as per the requests. She denies that what she said is defamatory she says it is true, and the applicant has not paid its ambassadors as per her discussions with them. She said she was willing to apologize.

- [13] During cross-examination, the respondent admits to posts about the applicant. She said she was willing to apologize. She says it is true she lied in some of her posts. She says her followers know that she lies sometimes. She was not engaged to be married. She is a student, who dropped out due to stress, she made a proposal to the applicant but the figures are not true.
- [14] She has been paid 120\$ and is an ambassador of acer and other companies. Her father gives her R1500.00 (one thousand rand) as an allowance. She gets R3000.00 (three thousand rand) from her different companies in total. She says she did not understand the contract when concerned with the number of insights. She says she had 49000 insights which included Instagram and TikTok. She admitted that she did not reach the number on Instagram alone as per the contract, which entailed that she will receive R1600.00.
- [15] She says she came to court because she wanted to understand the order that the applicant was seeking and did not sign the settlement as she is not legally inclined.

THE LEGAL MATRIX

- [16] The requirements for the granting of an Interim Interdict were set out in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*[1] as follows:

"Briefly these requisites are that the Applicant for such temporary relief must show:-

- (a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
- (b) that, if the right is only prime facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief, and
- (d) that the Applicant has no other satisfactory remedy."

- [17] Turning now to whether or not the interim interdict should be confirmed and made final. It was held in *Liberty Group LTD and Others v Mall Space Management CC*[2]:

"The law in regard to the grant of a final interdict is settled. An Applicant for an interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other remedy. It was held by this Court in Hotz v University of Cape Town that, once the Applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited and that there is no general discretion to refuse relief."

- [18] The Constitutional Court has made it clear that a trading corporation, such as the applicant, has a right to its good name and reputation, and that right is enforceable through a common-law claim for defamation[3]. It of course follows, that this right is enforceable against any person who infringes the corporation's right to a good name. This fact has also been recognized in various courts where a company's reputation was defamed and the relief sought by said company was an interdict.
- [19] In Halewood[4], the Johannesburg High Court granted an urgent interdict and punitive costs against the respondent after the respondent engaged in a social media campaign to defame the applicant. This case is similar in many respects to the present matter. In granting punitive costs, the court found that the fact that the respondent persisted with the impugned behaviour justified a punitive costs order.
- [20] In Nisamoseki[5] the Johannesburg High Court granted an urgent interdict restraining the respondent from posting and/or repeating defamatory statements

against the applicant, a business, on social media. The court also granted cost. In Hartland[6] the Western Cape High Court granted an urgent interdict, with punitive costs, against the respondent after the respondent posted a defamatory statement against the applicant in a WhatsApp group with 300 people. The statement, inter alia, accused the applicant of engaging in unethical business practices (I pause here to note here is one of the insinuations of the defamatory statements that the respondent made against the applicant).

SUBMISSIONS

- [21] Counsel for the applicant submits that the law on defamation is settled and the applicant's claim is unassailable. There was a publication - to more than 100,000 followers. The respondent did not dispute the publication of the statements, nor did she dispute that she was the publisher. The comments were defamatory per se. The statements were made against the applicant.
- [22] The South African Human Rights Commission, in its social media charter,[7] recognizes the very real perils of ordinary social media users using these various social media platforms to post defamatory content. These perils are exacerbated when it is a social media influencer using these platforms for that purpose.
- [23] The respondent did not put up any bona fide or viable defence to justify any of the defamatory statements at the hearing. She attempted to state that it was simply truth that the applicant refused to pay her, and that they just don't pay their ambassadors. This is plainly false and so on the papers and on the proofs of payments made to those social media influencers that properly performed in terms of the contract.

- [24] The respondent worked for less than two weeks as a brand ambassador for the applicant and had failed to reach her target as per the agreement with the applicant. She then embarked on a campaign to do the exact opposite of what she had engaged with the applicant to do. Instead of promoting the brand – she started trashing the applicant's reputation and goodwill. The applicant says this was done to simply extort payment from the applicant.
- [25] In awarding punitive costs, the court here considered the various aspects of the respondent's conduct, including the:
- 25.1. respondents' conduct leading up to the proceedings and how they conducted themselves in the litigation called for censure;
- 25.2. respondents made false submissions to the Court, and to make matters worse they sought a punitive costs order against the applicants, based on the fallacious contentions that the applicants refused to agree to a postponement;
- [26] In Hartland,[8] the court decided that an apology was not an appropriate relief. In Supreme Court of Appeal in EFF and Others v Manuel[9] stated that an apology was inextricably linked to the question of general damages. Counsel for the applicant submits that this should not apply to this matter because the respondent, Ms Akinwale, conceded that she has no difficulty with issuing an apology.
- [26] In deciding to award costs, the court considered the fact, among other things, that it was the conduct of the respondent that resulted in the litigation. One starkly distinguishing factor that distinguishes this present matter from any of the aforementioned cases is that the respondents in those matters did not go as far or act nearly as egregiously or with the level of impunity and disdain that the respondent, Ms. Akinwale, acted within this matter.
- [27] One thing that these judgments all take into consideration is the fact that statements made through social media have the potential to reach millions and cause significant damage. As the court in R.K v R.B[10]. put it, "In today's world the most effective, efficient, and immediate way of conveying one's ideas and thoughts is via the internet. At the same time, the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to the reputational integrity of individuals."
- [28] The applicant demonstrated that there was no unwillingness on the part of the applicant to engage with the respondent regarding payment – all it asked was for her to meet the minimum requirements. Instead of engaging the applicant, the respondent went to the extreme lengths of galvanizing hundreds of thousands of followers to join her in her campaign to bring the brand down.

[29] The applicant sought all reasonable means to engage the respondent and to put an end to her conduct – there were various points when the respondent could have paused to consider the implications of her actions. Instead, she acted with impunity and total disregard for the damage she was causing. She had several occasions to avoid this situation.

29.1 During the contract negotiation – she could have rejected the terms if they seemed unfair to her, but instead, she entered into the contract;

29.2 During the discussion with Ms. Kayla Viljoen regarding the insights that she submitted, she could have exercised any measure of patience and restraint – or even called Ms. Viljoen to discuss the matter further, when Ms. Viljoen generously offered “you are always more than welcome to contact me directly at any stage if you have any questions or concerns. It's always best to first ask and clarify a matter before assuming or resorting to further measures.” Instead of acting reasonably, she escalated the matter further and aggressively;

29.3 Upon cancellation of the agreement by the applicant on 30 days’ notice, when Ms Viljoen guaranteed payment for the work that she did in the month of October by saying “Please send me your updated insights. We will pay you for October as soon as you have [sent] me this reach”

29.4 – she could have sent the statistics and received payment, she decided to act vindictively and aggressively;

29.5 clarify the situation – the respondent could have paused and thought about the consequences of her actions, but she persisted;

29.6 If this was not sufficient reason to pause, she could have taken the second media statement issued on 20 November 2023 more seriously as it set out all of the facts and threatened urgent legal action, she doubled down on her resolve, even accusing the applicant of being the party that was lying;

[30] Counsel for respondent submits that the respondent advertised the business of the business of the Applicant but in one post didn't reach the agreed views and she had to supplement her reach by creating more posts which according to her exceeded the numbers she was required to reach. The Applicant failed to pay the Respondent and this frustrated the Respondent to a point where she had to raise public awareness about the conduct of the Applicant. The Respondent made social media posts expressing her dissatisfaction about the Applicant's conduct which posts the Applicant deem defamatory.

[31] The Respondent intended to raise public awareness and tell the truth about non-payment on the part of the Applicant. It is trite in matters of defamation that intention should be present and the publicized statements should be untrue and unlawful which is not the case in casu because the Respondent was indeed not paid by the Applicant. The Respondent before the Applicant can institute the present proceedings removed all the statements upon request.

- [32] No prejudice is suffered at this point by the Applicant as the truthful content they deemed defamatory was removed. The Respondent is a student who is trying to make a living out of social media through content creation and enjoys her constitutional right to freedom of expression. The balance of convenience and consideration of prejudice favours the marginalised Respondent who was denied payment of R1 600,00 by the Applicant who spend more than that to approach the court for the relief mentioned above and we submit that is a clear abuse of process.
- [33] There is an alternative remedy available for the Applicant in another court for damages if they are aggrieved by the conduct of the respondent. It is trite that any Applicant who approaches the court for an interim interdict must satisfy the Court that there is an existence of a prima facie right, irreparable harm, the balance of convenience and the absence of an alternative remedy. The requirements for an interdict were set out in *Setlogelo v Setlogelo*, *Joubert NNO and Others v Maranda Mining Company (Pty) Ltd and Others*.
- [34] It is submitted that the Applicant has not made out a case for the relief sought in the Notice of Motion and the application should accordingly be struck off from the roll and no order to costs if the court find costs order to be appropriate we pray for the order to be on party and party scale
- [35] The respondent did not reconsider her course considering the threat of urgent legal action. She had an opportunity to cease her conduct when the sheriff contacted her to physically serve the letter upon her and ended up affixing it to her residence on 23 November 2023. But with impunity, she posted about the applicant again on the very next day on 24 November 2023;
- [36] Upon the launching of this application, which was physically served on her on 29 November 2023, the respondent could have reconsidered the requests of the applicant but she failed to. The respondent displayed an obstinate disregard for the consequences of her actions. The applicant was not only forced to litigate, despite financial constraints, but the applicant had to endure counsel being forced to come back to court a second time.
- [37] The respondent first appeared before the court, she submitted that she is just a student with no source of income whatsoever, this was a bald-faced lie. The applicant demonstrated to the Court that the respondent has issued invoices of up to R33 000.00 for three mere posts. The applicant also demonstrated that the respondent, as a social media influencer with more than 100 000 followers has a rate card in terms of which she charges up to R10 000.00 per 60-second video posted on her timeline.

ANALYSIS

[38] The respondent's primary defence is based on the assertion that her statements were true, particularly regarding the issue of non-payment. The truth is a common and potent defence in defamation cases, as true statements, even if damaging to someone's reputation, typically do not constitute defamation.

Despite the respondent's claims, there appears to be documentary evidence (proof of payment) contradicting her statements. This discrepancy raises questions about the veracity of her defence.

[39] Willis J[11] said "In our law, it is not good enough, as a defence to or a ground of justification for a defamation, that the published words may be true: it must also be to the public benefit or in the public interest that they be published. A distinction must always be kept between what "is interesting to the public" as opposed to "what it is in the public interest to make known". The courts do not pander to prurience."

[39] In Hartland[12] the court held that "The test to determine whether a statement is per se defamatory involves a two-stage inquiry. The first is to establish the natural or ordinary meaning of the statement and the second is whether that meaning is defamatory. The test is an objective one, where the Court is called upon to determine what meaning the reasonable reader of ordinary intelligence would attribute to the statement In applying this test it is accepted that the reasonable reader would understand the statement in its context and that they would have regard to what is expressly stated as well to what is implied."

[40] The context in which the statements were made is also important. If the respondent's comments were part of a larger discussion or debate, this context might influence how the statements are perceived and whether they are deemed defamatory. A significant development involves the respondent's acknowledgment of a specific post where she labelled the applicant as "thieves."

[41] This admission by the respondent that she indeed authored and posted on social media is imperative to consider. The term "thieves" is a strong and accusatory word, generally understood as imputing criminal behaviour. Such a statement can be seen as defamatory per se, meaning it is inherently damaging to the applicant's reputation without the need for additional context or explanation.

[42] The respondent's acknowledgment of making the post simplifies certain aspects of the case, particularly around establishing the source of the statement. However, it also places a greater burden on her to justify or defend the statement.

[43] The respondent's actions demonstrated a disregard for the contractual agreement she had with the applicant. This behavior reflects a lack of understanding and maturity concerning her contractual obligations. It is crucial for individuals to fully understand their responsibilities when they enter into a contract. As someone who agreed to serve as a brand ambassador for the company, the respondent was expected to uphold certain standards and

conduct herself in a manner befitting that role. Her failure to do so indicates a significant lapse in fulfilling her contractual duties.

- [44] This situation serves as an important reminder for social media influencers to thoroughly read and understand the terms and conditions of their contracts. It is not tenable to claim a lack of understanding, as suggested by the respondent. The respondent engaged in a campaign that negatively impacted the brand's reputation, failing to fulfill her own contractual obligations. Her actions appeared driven by vindictiveness and malice, highlighting the need for influencers to approach their contractual and professional responsibilities with greater care and consideration.
- [45] During the proceedings, the respondent was allowed to present oral submissions to the court. Throughout this process, she exhibited a lack of remorse for the harm her actions may have caused the applicant. Her focus appeared to be primarily on her interests, aiming to avoid personal repercussions rather than meaningfully addressing the issues raised in the case. This approach indicated a self-centered perspective, with little consideration for the broader implications of her actions.
- [46] The respondent's response to the applicant's initial media statement on November 19, 2023, was marked by vindictiveness. This behaviour, as observed throughout the proceedings, warrants consideration for a punitive costs order due to her relentless approach. Her actions reflect a disregard for legal principles and the authority of the court, which cannot be overlooked.
- [47] The far-reaching influence of the internet, capable of impacting millions swiftly, underscores the urgency in addressing such conduct, particularly by individuals like the respondent with a significant online following. Without timely intervention, followers of such influencers could engage in damaging or even aggressive actions against brands, potentially leading to a disregard for law and order on social media platforms.
- [48] It's imperative to advise the respondent that in addressing disputes, the focus should be on constructive resolution rather than resorting to tactics that harm a brand's reputation. The Respondent was forewarned that the Applicant would approach the Court if she did not remove the posts. Notwithstanding this, the Respondent then proceeded to institute these proceedings. The questions of fulfilling the requirements to have an interdict issued remain[13]s.
- [49] The applicant has demonstrated a prima facie right, having been targeted by the respondent. Their image and reputation have suffered considerable damage. Without intervention to limit the respondent's conduct, the applicant faces the risk of irreversible harm due to this character defamation. As a social media influencer, the respondent might gain more followers, potentially enhancing her image while further harming the applicant. The balance of convenience is skewed if such actions persist. Therefore, the most appropriate relief at this juncture is to impose a restraint on the respondent, pending further legal proceedings.

[50] It is important to quote from the SAHRC Charter that says “The Charter sets out a guidance note for social media users explaining what is acceptable and unacceptable. Guidance notes are provided for issues such as — harmful expression, defamation, privacy, crimen injuria, harassment and bullying, image based violence, disinformation, misinformation, safety of children and cyber bullying. The Charter provides definitions and the steps a person can take if their rights or the rights of others are violated.

The recommended solutions will, if adhered to, help reduce the misuse of social media. Through the Charter, the Commission will carry out its obligation to educate on human rights and create strong, independent and capable citizens — thereby helping to strengthen a constitutional democracy.

The Charter is an important document especially as the use of social media is only likely to increase. It is intended to create mindfulness when social media platforms are being used. The Charter is a personal contract in which the individual can be empowered to help in the advancement of human rights

[51] The Charter serves as an essential tool for educating the public about using social platforms responsibly, particularly in balancing the advancement of human rights with the prevention of defamation. It is important for the public to actively seek education on these matters. Additionally, it is advisable for companies and social

media influencers to reference the Charter in their contracts and to make it publicly available in their online spaces.

[52] Having reviewed all the evidence and relevant case law, I am convinced that the applicant has fulfilled the requirements set out necessary for the issuing of an interdict. Given the respondent's conduct, the imposition of punitive costs is warranted and appropriate.

Order

In the circumstances, I make the following Order:

1. That the respondent is interdicted and restrained from publishing any defamatory statements , posts, memes, comments, video clips or sound clips to or on any platform(including TikTok, Instagram, Facebook, X(formerly known as Twitter) and WhatsApp) referring to the Applicant or encouraging her social media followers to do so;
2. That the respondent is interdicted and restrained from publishing , any statements ,posts , memes , comments , video clips or sound clips (including Tik Tok, Instagram , Facebook, X(formerly known as twitter) and WhatsApp) on any platform which , directly or indirectly, invites , entices or calls on the public to boycott the applicant’s business or products;

3. That the respondent is ordered to remove all defamatory statements , posts , memes , comments , video clips or sound clips , on any platform (including Tik Tok, Instagram , Facebook, X(formerly known as Twitter) and Whatsapp) made by the respondent against the Applicant commencing on or before 17 November 2023;
4. That the respondent is ordered to post a video and written retraction and/or apology of and/or for any defamatory statements, posts, memes, comments, video clips, or sound clips that the respondent made against the applicant on any platform (including Tik Tok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp), which retraction and/or apology posts should remain published for a period of not less than 60 (sixty) calendar days;
5. That the orders in paragraph 2 above shall operate as an interim interdict pending the institution of action proceedings by the applicant against the respondent within 60 (sixty) calendar days from the date of the order;
6. That the respondent is to pay the costs of this application, on a scale between attorney and client.

ACTING JUDGE OF THE GAUTENG HIGH COURT

KHWINANA ENB

COUNSEL FOR APPLICANT: ADV D. MUTEMWA Instructed by Thobakgale Attorneys Inc

COUNSEL FOR RESPONDENT: ADV KM NTJANA Instructed by SL Attorneys Date of Hearing: 06 & 07 December 2023 Date of Judgment: 11 December 2023

[1]LF Boshoff Investment (Pty)Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267 A-F, by Corbett J

[2] 2020

(1) SA 30 (SCA)

[3] Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others 2023 (2) SA 404 (CC) at para 87.

[4] Halewood International South Africa (Pty) Ltd v Van Zyl and another 2023 JDR 1011 (GJ) (unreported – case number 2023/019330)

(Healwood); Nisamoseki Trading Enterprise (Pty) Ltd t/a Nisa Willckx Interiors v Sithole (2023 - 101760) [2023] ZAGPJHC 1217 (26 October

2023) (Nisamoseki); Hartland Lifestyle Estate (Pty) Ltd and another v APC Marketing (Pty) Ltd and another 2023 JDR 2166 (WCC) (6831/2023) (Hartland); R.K v R.B 2015 (1) SA 270 (KZP) (R.K v R.B); Botha v Smuts and Another (2832/2019) [2020] ZAECPHC 19 (Botha)

[5] Nisamoseki Trading Enterprise (Pty) Ltd t/a Nisa Willckx Interiors v Sithole (2023 - 101760) [2023] ZAGPJHC 1217 (26 October 2023)

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- [6] Hartland Lifestyle Estate (Pty) Ltd and Another v APC Marketing (Pty)Ltd and Another (6831/2023) [2023] ZAWCHC 150 (13 June 2023)
- [7] <https://www.sahrc.org.za/home/21/files/SAHRC%20Social%20Media%20Charter%20FINAL.pdf> (accessed 06 December 2023) (SAHRC social media Charter)
- [8] Hartland Lifestyle Estate (Pty) Ltd and Another v APC Marketing (Pty)Ltd and Another (6831/2023) [2023] ZAWCHC 150 (13 June 2023)
- [9] EFF and Others v Manuel 2021
- (3) SA 425 (SCA) at para [111].
- [10] R.K.M v R.L.B (10175/2013) [2014] ZAKZPHC 49; 2015 (1) SA 270 (KZP) (19 September 2014)
- [11] H v W [2013] 2 All SA 218 (GSJ)
- [12] Ibid
- [13] See Setlogelo v Setlogelo 1914 AD 221.
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Prepared on 11 October 2026 · Esheria