

SOUTH AFRICA / JUDGMENT

Ramokgopa v Nxumalo (7922/2020) [2022] ZAWCHC 175 (8 September 2022)

[2022] ZAWCHC 175

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman

CASE / FILE NUMBER

7922/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 7922/2020

In

the matter between:

Ramaano
Marathi
Ramokgopa
Plaintiff
And
Siphelele
Lenah
Nxumalo
Defendant

JUDGMENT

ELECTRONICALLY DELIVERED

8 SEPTEMBER 2022

Baartman, J

- [1] The plaintiff instituted action proceedings[1] alleging that the defendant had defamed him and that he had suffered both patrimonial and non patrimonial harm. On 3 December 2020, the defendant, then legally represented, filed a notice of intention to oppose but failed to file her plea. On 4 February 2021, the plaintiff served a Notice of Bar whereafter, on 8 February 2021, the defendant's attorneys withdrew. On 10 February 2021, the plaintiff set the matter down for default judgment. This judgment concerns that latter application.
- [2] The killing of University of Cape Town (UCT) student, Ms Uyinenene Mrwetyana, in a post office close to campus caused a public outcry and it was a highly emotional period for the country and young students at UCT in particular. On 4 September 2019, the university held a highly publicised memorial service for the slain student; hundreds attended the service. At that service, a list of alleged 'Rapists at UCT' was read out that included the plaintiff who was identified as an 'assaulter and rapist'. In addition to that reading out, the list was disseminated to attendees at the memorial service and made its way onto social media platforms. The list has since been circulated on the anniversary of the tragic event.
- [3] On 9 January 2020, UCT, through its Communication and Marketing Department, issued a statement from which the following appears:

'[UCT] repeats the request for staff and students to utilise the institutional processes available, to assist victims of sexual and genderbased violence (SGBV).

UCT does not support the circulation of the list of persons on social media platforms. UCT urges all social media users who have shared this list to consider that legal action could be taken against them....

Last year, the same list of names was inappropriately circulated on social media. During this time, UCT investigated the claims that implicated the individuals on the list. Therefore, the continued circulation of these names is now counterintuitive and defamatory.

Should there be any allegations which have not been attended to, we remind staff and students that there are appropriate reporting channels in place at UCT, and we urge survivors to use the online reporting tool to report these cases. These SGBV cases are then expedited through the ad hoc special tribunal.

...

We ask those in our community and beyond, who are circulating these unfounded claims, to remove them immediately and we appeal to survivors to please use the protected processes available to them to seek justice.'

[4] The matter raises a number of relevant issues, and the result of these proceedings will have consequences for all involved. Importantly, the matter has a wider social context because affected persons may have many reasons to prefer not to use the UCT process. Importantly, these proceedings could deter survivors or victims of genderbased violence from reporting incidents of violence and so perpetuate these soul destroying crimes. Therefore, it was

important to afford the defendant every opportunity to defend the claim against her. The following attempts were made to afford the defendant that opportunity:

- (a) On 10 February 2021, after the defendant's attorney had withdrawn, the Notice of Bar was reserved at the email address that her erstwhile attorney had provided. In terms of that second Notice of Bar, the dies to file her plea expired on 17 February 2021.
- (b) She failed to respond and on 15 September 2021, the plaintiff served a Notice of Default Judgment on her at the same email address.
- (c) On 18 October 2021, the plaintiff served a Notice of Set Down of the application for default judgment in the same manner. On 19 October 2021, the plaintiff served the notices of Default Judgment and the notice of Set Down by way of WhatsApp, using the contact details in terms of the order for substituted service referred to in paragraph 1 above.
- (d) On 5 November 2021, Erasmus J, removed the matter from the unopposed roll and granted the plaintiff 'leave to approach the Registrar...to refer the matter on an expedited basis for judicial case management in terms of Uniform Rule 37A'.
- (e) On 2 March 2022 per email correspondence, the plaintiff provided the defendant with a copy of the 5 November 2021 order and a Rule 37A Notice from which it is apparent that the matter had been set down for a pretrial conference on 9 March 2022 and the venue thereof. The plaintiff also provided an agenda for a pretrial conference between the parties and suggested 3 March 2022 as a date but invited alternate dates should the latter be unsuitable. The defendant failed to respond and did not attend the pretrial conference scheduled for 9 March 2022.
- (f) On the latter date, I postponed the pretrial conference to 11 March 2022 on which date I postponed it to 24 March and directed the plaintiff to make a last attempt to locate the defendant through UCT and a tracing agent. On the latter date, the plaintiff's representative indicated that it had served the notice on an au pair company linked to the defendant, on her father and on the defendant. The latter was served by way of email, Facebook message and Instagram message. The defendant failed to respond.

- (g) On 19 May 2022 I proceeded with the application for default judgment virtually. The plaintiff led the evidence of Doctor Del Fabbro (Dr Del Fabbro), who was in Gauteng at the time, and the plaintiff testified. After their evidence had been led and while the plaintiff's counsel was addressing the court in respect of the defamation quantum, I was informed of an email my registrar had received from the defendant. That email correspondence was sent from the same email address that the plaintiff had used to notify the defendant of the proceedings to that stage. It follows that she had had notice of the process all along.
- (h) It was apparent from the correspondence that the defendant was vexed that the proceedings were continuing in her absence. She further took offence that a notice had been served on her father whom she alleged was deceased. She accused the court of adding to her trauma, presumably because the plaintiff had, at my direction, gone to great lengths and expense to serve notices on her. In the exercise of judicial restraint, I postponed the hearing to 14 June 2022.
- (i) On the latter date, the defendant, who was in KwaZuluNatal (KZN), had a very bad connection and a contemptuous attitude; she indicated that she wanted to defend the action but was only available

until 10h30, at which stage she would lose internet connection. Despite judicial restraint now stretched to its limits, I postponed

the matter to 16 August 2022 for further hearing in open court. Unsurprisingly, the defendant failed to attend, but sent email

correspondence that came to my attention after the hearing when I had already reserved judgment. I have not had regard to the correspondence as I was not inclined to indulge the defendant any further.

[5] I deal with the evidence led to the extent necessary for this

judgment.

Dr Giada Del Fabbro

[6] A clinical psychologist with 16 years' experience, Dr Del Fabbro, performed a psychological evaluation on the plaintiff 18 months after the 'listing incident'. He was then a 22yearold postgraduate student who gave the following history:

'He stated that he had been dating a girl while he was attending the University of Cape Town. He stated that when they broke up, she was very unhappy. He stated that the following year there was a lot of protest and activism regarding the death of Uyunene Mrwetyana because of gender based violence. He stated that a list of alleged rapists was revealed at her memorial service in September 2019 and his name was included on that list. This list was circulated on social media and privy to a wide audience due to the considerable press coverage and attention to the death of Ms Mrwetyana. The University of Cape Town subsequently released a letter in January 2020

stating that they did not support the circulation or compilation of such list.

He stated that he had attended the protest but left before the list was revealed to take a nap. He stated that he found out from a friend that his name had been included on the list. He was then removed from a WhatsApp group that included his friends and which had been part of the protest movement. He stated that he felt confused at first as if it was surreal. He stated that he felt worried and scared, and his mind was racing trying to understand why he would have been included on the list given that he had never committed a sexual offence. He stated that he began receiving many mean and aggressive messages from people and that he stopped attending lectures.

He stated that he did not reach out to anyone and isolated himself. He stated that some friends were supportive. He stated that he went to the student tribunal at UCT to contest his name being included on the list but they were unsympathetic. They advised him not to do anything. He stated that he went to the OIC at UCT and went through all his sexual history to try and understand what had happened.

He stated that he did not leave his room in the residence at UCT from September of that year. He missed several lectures and tried to study from his room. He stated that his marks deteriorated but that he managed to get into a postgraduate course despite.

He stated that he started seeing a psychologist in Cape Town in October of that year and that this helped. He stated that he felt scared and anxious and experienced chronic panic attacks. He had nightmares at night and would break out in cold sweats in the morning. In December, he began taking medication for his mood symptoms in the form of He stated that he had begun suffering from insomnia as he began fearing having nightmares. He stated that he used food for comfort in December.'

[7] The doctor concluded that the plaintiff 'satisfies criteria for a diagnosis of posttraumatic stress disorder. This diagnosis is directly because of the incident in question'. Dr Del Fabbro concluded as follows:

'...this diagnosis is causally linked to the incident in question, namely the inclusion of [the plaintiff's] name on a list of alleged sexual offenders. It is clear that his preexisting difficulties with self esteem as well as depression and anxiety have been exacerbated by the incident in question and compromised his level of functioning to a considerable degree. [The plaintiff's] academic progress has been threatened by these events as well as his social functioning and future professional aspirations in the legal profession. He has had to bear the additional costs of psychotherapy and psychiatric management and medication because of his deterioration in functioning after the incident in question.'

[8] She recommended the following:

'[The plaintiff] would benefit from continuing psychotherapy to assist him in managing these symptoms as well as his depressive symptoms and resolving his self-esteem and anxiety issues stemming from the incident in question. Psychiatric management should also be continued until such time as his mood symptoms have stabilised.'

[9] The doctor estimated the costs of continued treatment at R160 000 for psychotherapy for approximately 3 years. She further estimated the costs for psychiatry consultations and medication to be R36 000 and R45 000 respectively. The plaintiff had claimed R200 000 in respect of future medical expenses.

Ramaano Morathi Ramokgopa (the plaintiff)

[10] The plaintiff confirmed his complaint to Dr Del Fabbro as described above. He described the atmosphere on campus as follows:

'It was quite hectic...during the time [Ms Mrwetyana] was still missing it was a bit sad,...people were worried. When it was found out that... she was murdered...that was very tense, very hostile, very sad. There were posters. There were paintings. People were very angry.'

[11] At the time, the plaintiff was a 20-year-old final-year bachelor of social science student. Although, he was not present when the names of alleged perpetrators of gender-based violence were called out, he afterwards saw a video of which he said the following:

'I saw a video of one of the people who was called out on the list who was there. Then he was getting chastised and people were throwing things at him, shouting at him, swearing at him as he had to leave the whole memorial.'

[12] He said that the defendant read out the names of 'a list of rapists at UCT... that is what it was titled'. He was kicked off a WhatsApp group as follows:

'... I got kicked off because they put my name on the group. I remember I was going to a birthday party and then they posted the list and then they asked me what my surname was. Then I told them. You know I said this is my surname and then one lady left the group and then they said I must leave the group. They kicked me off the group. A couple of other groups I was kicked off of. These are WhatsApp groups and ja.'

[13] His invitation to the birthday party was cancelled via WhatsApp as follows:

'Hi Ramaas,

I do not really know how to go about this so I am just going to ask. They named a bunch of assaulters ... I do not want to accuse you of anything ... I think what is best is if you do not come tomorrow night. Even if you did not do anything, right now I am putting the females first and there is a little bit of doubt I would rather they feel safe in the current climate. I love you and know that you are kindhearted and would not purposefully hurt anyone so please understand what place this is coming from.'

[14] He said the following about other WhatsApp messages he got:

'A lot more questions. Some not just questions ... fuck off, like fuck you. Sometimes just emoji with ...angriness, ja blocking and then a lot of: "Hey what is going on?". Dude I saw your name on the list. '

[15] Others reacted to him as follows:

'Then sometimes verbally and sometimes people or many times people just stopped contacting you. If they see you in the streets I suppose, outside they do not engage with you. They do not talk. Ja. Scoff at you...if I would sit next to someone sometimes,... they would stand up and then go and sit somewhere else...'

[16] His described his reactions to the above as follows:

'The first big one was just anxiousness and I was very anxious. I was having panic attacks regularly and...bad ones where you kind of drop and convulse. I was very suicidal and I was just immobilised....I called some suicide hot lines...'

[17] He stopped attending lectures, for which one lecturer thanked him as follows:

'...One said thank you for being considerate, you have made the right decision... my philosophy lecturer said, thanks for the consideration. The choice is yours and then my politics lecturer is just like the choice is yours. Ja and the tutorials compulsion, they said it is fine, that I would not have to go to tutorials...[exams were written] separately, in another venue.

[18] The plaintiff had the following interaction with the defendant:

'... So in 2019 the defendant while I was still isolating in my room, she asked me for notes, for politics notes. Then I was very excited that someone was talking to me so I sent the notes and then she is like: "I hope you did well. We can get lunch sometime if you would like". And then I was like: "Yes, please let us get lunch".'

[19] They met for lunch and had the following exchange:

'... She asked me how I had been. She told me she was struggling, this, that because of the whole context and I was on the list and then she told me she was the one who put me on the list.

Then you know, I was surprise and then I asked why. Ja, I was like, Why? What happened?" and then, you know she said ... "I do not know". She said: "I am sorry for that". She said she did not want to put my name on the list. She said that there was this one lady, Mieka, who is an ex girlfriend of mine and then she said: "Mieka said I must put you on the list" and that she had first objected. Then I asked why because Mieka and I had never had sex.. '

[20] The defendant indicated that she had not wanted to comply with the request to put the plaintiff's name on the list as follows:

'... "Ja I did not want to put you on the list because I have seen your interactions before and everything she said prior to that there was no indication of anything bad. She only spoke glowingly of you.'

[21] The plaintiff then asked the defendant, 'Well then can you help me? Can you do something about the list?' The defendant replied that she was unable to assist. The defendant further said that she did not believe that the plaintiff's name should have been included on list. He said the following:

'So, my personal view is that no, I shouldn't have been on the list. I remember all my sexual encounters. I don't have too many and I don't feel I should be on the list. Always make sure to keep things [consensual] and you know we'd learnt about affirmative consent at, at UCT affirmative enthusiastic consent, you know so, and I try to practise that and in my personal view the, the list has no merit. And I think one of the reasons that I don't go around say "no, no, no" is because I believe so often women don't, you know, get dismissed with these kinds of things. So, my view is always like let people have their say and then

- then I will have my say. But no one other than putting my name on the list, does say anything. They just put my name on the list.'

[22] The plaintiff explained his reason for leaving UCT as follows:

'So, going from UCT to WITS was always an option because it was cheaper. But after my name was on the list I just knew I couldn't go back to UCT. I saw there was no life for me there. I was terrified really. I couldn't be on campus; campus would give me panic attacks and I just thought, you know, what I need to study let me just go to Jo'burg and I think it would be easier there.'

[23] The plaintiff said the following about financing the litigation and his past medical expenses:

'I have one biological sibling [brother]. He's always been close very close to me. I live with him now....I grew up in Gauteng [Mulbarton] ...we moved to Pretoria from 2004 to 2006. Then my mother passed away, I moved back to Johannesburg to live with my uncle and aunt. ...

So, at first, so when my parents passed away they owned a property. So, my mom had a house. Then we got rent from the house....So, that money is supposed to be used for my lifestyle I used that to pay [medical costs of R23 279.72] I first saw Dr Tunbridge in September and up till 2020....

I was not really coping ...then I went to Jenine Smith and Dr Tunbridge ...my first ever psychiatrist.'

Evaluation

[24] Dr Del Fabbro was qualified to undertake the assessment and prepare a comprehensive report. She was able to substantiate her conclusion and treatment prognosis. Her expertise is not in dispute and she was a credible witness. I am persuaded by her methodology and accept that the plaintiff suffered posttraumatic stress disorder and that it is directly linked to his name being included on the list of alleged rapists at UCT.

[25] The plaintiff was a credible witness and his complaint about the effect the inclusion of his name on the list had on him is supported by expert evidence. The defendant chose not to put any contrary version before court. The defendant apparently appreciated the consequences of adding the plaintiff's name to the list. This court has held that it would be preposterous to give the alleged abuser editorial rights over the victim's narrative and that in the current onslaught on women and children, speaking out should be encouraged.[2] The difficulty in this matter is that the defendant is neither a victim nor a survivor of sexual abuse. It is often necessary that we give a voice to a friend, family member or stranger, who suffered or continues to suffer abuse when they are unable to speak out. Again, this is not such a case, as the defendant was reluctant to comply with the request to add the plaintiff's name.

[26] The conversation, referred to above, between the parties after the defendant had borrowed the plaintiff's notes and had coffee with him, suggests that she did not believe the allegations her friend had made against the plaintiff. Instead, she attested to his good character. In those circumstances, her refusal to remove his name from the list of 'rapists at UCT' or engage in this litigation, is deliberate and contemptuous of the obvious harm done to the plaintiff.

[27] Fellow students' and former friends to the plaintiff's reaction, once they learnt that his name had been included in the list, is appropriate and should not surprise anyone in the climate of ongoing sexual abuse and the inability of the authorities to turn the tide. Sexually deviant behaviour should not be tolerated and everyone should take a stand against it. As a result, the plaintiff reacted as he did a complete meltdown leading to suicidal thoughts when confronted with the gravity of the inclusion of his name on the list. The plaintiff has a right to his dignity. Section 10 of the Constitution provides as follows:

'10. Everyone has inherent dignity and the right to have their dignity respected and protected.'

[28] The right to dignity competes with section 16 of the Constitution which provides as follows:

'16 (1) everyone has the right to freedom of expression, which includes

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

...'

[29] This judgment does not deal with the appropriateness or otherwise of the publication of the list. Instead, it is concerned only with the appropriateness of the inclusion of the plaintiff's name on the list. He had testified that there was no basis for the inclusion of his name as he has never offended in the manner suggested. The evidence suggests that the defendant

agreed with that version. There is nothing to gainsay that version, despite numerous opportunities afforded the defendant to put her version before court. It follows that publication of the plaintiff's name as a sexual offender was done while the defendant did not believe it to be true. That was wrongful. The plaintiff has been injured in his dignity.[3]

[30] The circulation of the list was extensive and is repeated annually at the anniversary of the tragic event that led to the initial publication of the list. It is extremely defamatory to the plaintiff and he will continue to suffer and be stigmatised. It is axiomatic that a person reading that list will form a negative view of the plaintiff and consider him to be a rapist as the list indicates.[4] The plaintiff alleges that there is no justification for his name being on the list. In the absence of a response from his accuser, I accept that there is no justification for having included his name in the list. The plaintiff has been defamed, his right to dignity infringed and his good name tarnished. The defendant has refused to remove the plaintiff's name from the list. The plaintiff is yet to start a professional career and no doubt this unfortunate incident will continue to haunt him, irrespective of the outcome of these proceedings. A truly unenviable position.

[31] The plaintiff claimed R23 279.72 in respect of his past medical expenses and testified that he had actually spent the amount on medical treatment. I intend to award the amount claimed. In respect of future medical expenses, the plaintiff has claimed R200 000. However, the medical evidence referred to above quantified the amount in excess of the amount claimed. I intend to award the amount claimed.

[32] In respect of general damages for the injury to his reputation and dignity, the plaintiff claimed R500 000. The amount represents vindication for his reputation to restore his standing in the community and allow him to enter his professional life free from the stigma currently clinging to him. The defendant's dismissive attitude towards the harm done to the plaintiff is an aggravating factor.[5] However, I consider the broader impact and the need to encourage platforms for victims and survivors of sexual abuse to speak out. In the circumstances of this matter, perforce, judgement in his favour will start the process of restoring the plaintiff's dignity. The list will be remembered, at least at the anniversary of the tragic event so too the plaintiff's removal from it. Therefore, a lower award is no affront to his injured dignity.

Conclusion

[33] I am persuaded that the attendees at the memorial service for Ms Mrwetyana, where the list titled "Rapists at UCT" was first published, reasonably understood that the plaintiff was a rapist and an assaulter. The memorial service was part of an unprecedented outcry after Ms Mrwetyana's brutal murder. At the time, the defendant did not have reason to believe that the allegations against the plaintiff had any merit, nevertheless, she made no attempt to ascertain the correctness of the allegations while appreciating the defamatory nature thereof. The defendant further refused to correct the wrong when the plaintiff requested her to remove his name from the list, despite the extensive and continued publication of the list.

The inclusion of the plaintiff's name on the list titled "Rapists at UCT" was defamatory. [6] The plaintiff has suffered as indicated above and will continue to need professional assistance to recover from the harm done to him. Mr Brouwer, the plaintiff's counsel, submitted that the circumstances of this matter warrant a deviation from previous conservative quantum awards. There is merit in the submission, although I also have to consider broader issues of genderbased violence.

[34] I, for the reasons stated above, make the following order:

- (a) Default judgment is hereby granted against the defendant in terms of Rule 31(2)(a) of the Uniform Rules of the above honourable court for:
 - (i) payment of the sum of R80 000 in respect of the harm caused to the plaintiff's reputation;
 - (ii) payment of the sum of R23 279.72 in respect of past medical expenses;
 - (iii) payment of the sum of R200 000.00 in respect of future medical expenses;
 - (iv) interest on the sums awarded in paragraphs (i)(iii) above at the maximum permissible rate in law from date of service of the summons to date of final payment.

[35] The defendant is hereby directed within 30 days of service of this order to:

- (a) apologise to the plaintiff in writing; and
- (b) broadcast a formal written apology, inter alia, retracting what she said of and concerning the plaintiff via her social media accounts.

[36] The manner of service contemplated above must be in accordance with the substituted service order granted on 13 November 2020, attached as "X1".

[37] Costs of the action are granted in favour of the plaintiff.

Baartman J

"X1"

Case Number: 7922/20

BEFORE THE HONOURABLE MS JUSTICE BAARTMAN

CAPE TOWN: FRIDAY 13 November 2020

In the ex parte application of:

RAMAANO MORATHI RAMOKGOPA

APPLICANT

In re:

RAMAANO MORATHI RAMOKGOPA

PLAINTIFF

SIPHELELE LENA NXUMALO

DEFENDANT

DRAFT ORDER

Having read the papers filed of record and having heard from the legal presentative for the applicant:

IT IS ORDERED THAT:

1. Service of the Combined Summons instituted under case number 7922/20, take place upon the Defendant by way of substituted service in the following manner:

1.1. by service on the Defendant by way of WhatsApp message to the following number:

1.1.1. [...];

WITZ INC C/O

ASSHETONSMITH GINSBERG INCORPORATED

EMAIL: anne@asg.law

Tel: 021 424 7390

1.2. by way of Facebook Messenger to the following Facebook Profile:

1.2.1. <https://www.facebook.com/speck.nxumalo>; and

1.3. by way of Instagram direct message to the following Instagram profiles:

1.3.1. <https://www.instagram.com/livingwithlenah/>;

1.3.2. <https://www.instagram.com/saltedbakery/>

2. that the Defendant be given 10 (ten) days to file a notice of intention to defend the action proceedings against her; and

3. The cost hereof are costs in the cause

[1] Served via substituted service in terms of a court order dated 13 November 2020 which provided for service by way of WhatsApp message to a specified cellular telephone number, or Facebook to a specified profile, and by way of Instagram direct messages to specified profiles.

[2] *Booyesen v Major and Another* (5043/2021) (2021] ZAWCHC 273 (31 August 2021).

[3] *Manuel v Economic Freedom Fighters and Others* (13349/2019) (2019] ZAGPJHC 157 (30 May2019).

[4] Le Roux and Others v Dey (CCT45/10)

[2011] ZACC 4 (8 March 2011).

[5] Esselen v Argus Printing and Publishing Co Ltd and Others 1992

(3) SA 764 (T) at 771 F1.

[6] Khumalo and Others v Holomisa [2002] ZACC 12; 2002

(8) BCLR 771 (CC) para 18.

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