IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 27179/2020

(1) REPORTABLE: ~~NO~~ YES
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~ YES

17/11/2020

T.J. RAULINGA DATE

In the matter between:

HARITH GENERAL PARTNERS (PTY) LTD	**FIRST APPLICANT**
MAHLOELE, TSHEPO DAUN	**SECOND APPLICANT**
MOLEKETI, PHILLIP JABULANI	**THIRD APPLICANT**
CELE, LUNGILE	**FOURTH APPLICANT**
MORAR, ROSHAN	**FIFTH APPLICANT**
LUGEMWA, MOTSEOA ALIX-MARY	**SIXTH APPLICANT**

And

UNITED DEMOCRATIC MOVEMENT	**FIRST RESPONDENT**
HOLOMISA, BANTUBONKE	**SECOND RESPONDENT**

JUDGMENT

RAULINGA J

1. The interim relief sought in Part A of this application was initially sought to be enrolled as one of urgency on 08 July 2020 but was, by agreement, removed from the roll.

2. The applicants now seek final orders under Part B of the Notice of Motion.

3. The orders which the applicants now seek are set out in a draft order which reads as follows:

"1. That the respondents be and are hereby:

1.1 Interdicted and restrained from making or repeating any defamatory allegations (whether orally or in writing) against the applicants (or any of them), and or from injuring them in their dignity, by way of the publication of any statement in any form, including but not limited to letters, internet posts, or 'Twitter', 'Facebook' or on any other social media, and the like, which statement is the same as or similar to, or which respectively reflects, upon the applicants (or any of them) arising from or based on any of the content of the respondents' letter dated 17 June 2020 to the President of the Republic of South Africa and others, a copy of which appears as annexure "TDM8"to the founding affidavit at page 105 (006-110) (and also as "TDM20" to the replaying affidavit at page 235 (006-240) ("the letter");

1.2 Ordered to forthwith remove and delete the letter whosesoever and however the letter has been published by the respondents on the Internet, and to remove and delete all and any posts and comments made in response thereto in so far as it is within their power to do so;

1.3 Ordered to make and publish an appropriate retraction letter, and an appropriate apology to the applicants by name for defaming them and injuring them in their dignity in the letter, on all the same websites and with the same prominence where the letter was published by them.

2. The respondents jointly and severally, the one paying the other to be absolved, are liable for and shall pay damages to the applicants in the following amounts:

    2.1 To the first applicant (for defamation), in the sum of R800.000;

    2.2 To the second and third applicants (for defarmation and injuria), each in the sum of R750.000;

    2.3 To the Forth to Sixth applicants (for defamation and injuria), each in the sum of R300.000 together with interest on the aforesaid amounts calculated at the prescribed rate of interest of 10% per annum, a tempore morae to date of payment.

3. Alternatively, to prayers 2.1 to 2.3 hereof, and should this Court decline to make an award of damages on the papers filed of record, that the question of the quantum of damages be referred to an enquiry by way of oral evidence on a date to be arranged with the Registrar of this Court;

4. That the respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and own client, alternatively, on such other scale as this court deems meet, such costs to exclude the costs for which the applicants are liable in terms of the Order of Ms Justice Tolmay dated 08 July 2020."

5. It is prudent to mention that the new relief sought per the applicants' supplementary submissions was done without an application to amend the original Notice of Motion.

6. The central feature of this application is a letter to the President, dated 17 July 2020 written and published by the respondents, in which they request him to investigate allegations of corruption at the Development Bank of Southern Africa ("the DBSA"). The aforementioned allegations are detailed in the impugned letter. They came to the respondents' attention pursuant to the receipt of information from a whistle blower regarding a loan granted by the DBSA to a company called Poseidon (Pty) Ltd.

7. The loan which was granted for the development of water infrastructure, consisted of initial funding of R50 million, with a further amount of R300 million expected to follow.

8. The ensuing desktop research conducted by the second respondent revealed that several of the applicants occupied influential positions in the governance of the DBSA at various stages.

9. The second, third and fifth applicants are directions in the first applicant, Harith. Harith is a 60% shareholder in (Crede Infrastructure Development (Pty) Ltd. In turn Crede is a 100% shareholder in Poseidon. Consequently, the applicants are indirect shareholders in Poseidon, the recipient of the loan. The sixth applicant is a trustee of an infrastructure fund managed by Harith.

10. It is alleged that the applicants have been fingered as wrongdoers in a report prepared by the Judicial Commission of Enquiry into allegations

of impropriety at the Public Investment Corporation ("the PIC"), which was chaired by Justice Mpati ("the Mpati Commission or "the PIC Commission").

11. The letter contains numerous statements and allegations which may per se be defamatory of and injurious to the applicants; the applicants are not in possession of proof that the letter was received and read by any of the recipients referred to above. The overwhelming probability, therefore, is that the letter was indeed received by the recipients referred to above.

12. There is a 'tweet', referring to the first to third applicants' conduct as 'looting' and calling them 'locusts which was published and repeated on several websites by second respondent in response to several persons who commented on or 'liked' the letter once it was first published on the Twitter websites described above.

13. The alleged defamatory and injurious contents of the statement may be summarised as follows:

    13.1 That Harith, and by extension its directors, the second to fifth applicants, are engaged in the systematic looting of the DBSA;

    13.2 That Harith is led by individuals such as Mahloele and Moleketi who are enriching themselves at the expense of the DBSA;

    13.3 That the individuals, through Harith, are locusts and elitists 'varaciously consuming every opportunity' and 'depleting one source of funds' after another;

13.4 That a company by the name of Poseidon (Pty) Ltd is being used by the applicants to plunder state resources;

13.5 That Mahloele and Moleketi are also directors of Poseidon which permits them to control its affairs to their own personal benefit, and as such are guilty of breaches of their fiduciary duties.

14. The applicants therefore submit that the statements contained in the letter and the tweets are, per se defamatory of, and injurious to the applicants. As a consequence, they submit that the gravity of the delicts committed should be compensated by the quantum of damages as stated in the Notice of Motion.

15. It seems to me that the respondents do not deny that they have made and published the said statements. However, they submit that the letter is based on fact-based information:

(i) the findings contained in the Mpati Report, in which the applicants are implicated is corruption at the PIC; and

(ii) the information from the whistle blower, which implicates the applicants in corruption at the DBSA.

16. The respondents raised a number of defences; to wit:

16.1 First Constitutional defence: absolute immunity and or qualified privilege;

16.2 Second Constitutional defence: the publication was reasonable;

16.3 First common law defence: the statements are not defamatory per se;

16.4 Second common law defence: truth and public benefit;

16.5 Third common law defence: the statement constitutes fair comment; and

16.6 Fourth common law defence: lack of animus iniuriandi.

17. The respondents raised a *point in limine* of *lis pandensis*, in that on 13 July 2018, an application for a similar interdict was instituted in this Court, under case number: 46074/2018 by Mr Mahloele and Mr Moleketi; together with four other applicants, for very similar relief.

18. An interim order was granted, pending the institution of an action. Summons was issued and the action is pending, awaiting a trial date. The action is opposed and a plea has been filed.

19. In respect of the interim interdict, leave to appeal was granted against the order of Judge Tlhapi to the Supreme Court of Appeal and that too is pending.

20. The fact that the applicants have since abandoned their application for an interim interdict and, are now moving an application for a final interdict, (albeit without the consent of the court), does not alter the issue of the pending appeal in the SCA of Judge Tlhapi's judgment.

21. Of relevance is whether the 13 July 2018 application for similar relief plagues the present application.

22. In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others*[1], Wallis JA explained the rationale for the special plea of *lis alibi pendens* as follows:

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[1] 2013(6) SA 499 (SCA) at para 3

"As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the Court in which the pleas are raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The Courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach different conclusions. It is a plea that has been recognised by our Courts for over 100 years"

Wallis JA, further stated the following:

"The plea bears an affinity to the plea of res judicata, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:

'Exception of lis pendens also requires same persons, thing and cause:' - The exception that a suit is already pending is quite akin to the exception of res judicata, in as much as when a suit is pending before another Judge, this exception is granted just so often as, and in all those cases in which often a suit has been ended there is room for the exception of res judicata in terms of what had already been said. Thus the suit must already have started to be mooted before another Judge between the same parties, about the same matter and on the same cause since the

place where a judicial proceeding has once been taken up is also the place where it ought to be given is ending".

23. On this point alone, the matter ought to be stayed until the determination of the related issues.

24. In the event that I might be wrong on this conclusion, there is another burning issue related to this application.

25. One must at this stage categorically state that one is not convinced that the requirements for a final interdictory relief have been met. Regarding the approach to be followed in interdicts to restrain the publication of defamatory material such as the present case, the following statement of Greenberg J in *Heilbron v Blignaut*[2] was quoted with approval by Plewman J in *Hix Networking Technologies v System Publishers (Pty) Ltd and another*[3], as follows:

"If an injury which would give rise to a claim in law is apprehended, then I think it is clear that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion his facts must be clear and if there is a dispute as to whether what is about to be is actionable, it cannot be decided on motion. The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence. Thus if the defendant sets up

[2] 1931 WLD 167 at 169
[3] 1997 (1) SA 391 (A)

that he can prove truth and public benefit the Court is not entitled to disregard the statement on oath to that effect, because if his statement were true, it would be a defence, and the basis of the claim for an interdict is that of an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed".

26. Subsequently, Willis JA said in Herbal Zone:

"An interdict to prevent the publication of defamatory matter is directed at preventing the party interdicted from making statements in the future. If granted it impinges upon that party's constitutionally protected right to freedom of speech. For that reason, such an interdict is only frequently granted, the party claiming that they will be injured by such speech ordinarily being left to their remedy of a claim for damages in due course. Nugent JA said this:

"Where it is alleged, for example that a publication is defamatory, but it has to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose "

27. I agree with the respondents that, in cases where defences excluding unlawfulness have been properly raised, the alternative remedy of a damages action must be preferred.

28. In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and pleadings, is for all the affidavits to be delivered and the entire application to be

disposed of in a single hearing – *Theron and Another NNO v Loubser NO and Others*[4].

29. The plaintiff has no duty to prove wrongfulness and intention. It is for the defendant to raise these defences and prove them. The defendant bears the onus of placing facts before the court and show them on a balance of probabilities. e.g. true and in the public benefit, constituted fair comment and the publication was made on a privileged Occasion[5].

30. In casu, the respondents have raised constitutional and common law defences. What is left is for them to prove same on a balance of probabilities. Therefore, the mere say so of a deponent who alleges a defence of justification should not be accepted at face value: the facts on which it is based must be analysed to determine its weight. A factual foundation for a defence of fair comment or truth and public benefit must be established in evidence. Herbal Zone (supra) at para 38. See also *Tau v Mashaba*[6] *2020 (5) SA 135 (SCA)*, in which this dictum was approved.

31. Although the courts have recently granted declaratory orders in defamation proceedings on application (*Manuel v EFF and Others* [7] and in *Hanekom v Zuma*[8], the facts in those cases were distinguishable from this matter.

32. Referring to *Tau v Mashaba* (supra) Tolmay J in *Mokate v United Democratic Movement and Another*, case number 26427/2020, held a

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[4] 2014(3) 323 (SCA) at para 26.
[5] National Medical Limited v Bogoshi 1998 (4) SA 1196 (SCA) at para 43.
[6] 2020 (5) SA 135 (SCA).
[7] GLD case number: 13349/2019 (30 May 2019).
[8] Case number: D6316/2019 (Kwazulu-Natal Local Division (335/2019 [202] ZASLA 26 (26 March 2019)

different view regarding the inappropriateness of granting interdictory relief in defamation matters on application, especially where actionable defences are raised. I am in agreement with her view (though obiter).

33. In Tau, supra, the principles set out above to the effect that defences which have been plausibly raised by the respondent cannot be finally dismissed on paper were reaffirmed. As already stated above, the respondents have raised defences which may not be rejected out of hand.

34. Having said that, it is not to say that the respondents' defences are likely to succeed in the defamation action, which is pending. That is an issue to be decided by the trial court. But where a factual foundation for a defence of justification has been set up in motion proceedings, a court cannot know whether defamation has been proved until trial process has shown where the truth lies. And of course, if the defence of justification fails, the respondents will have to pay damages - *Tau v Mashaba* (supra) at para 25.

35. Also of importance is that the applicants seek a final interdict. I agree with the respondents that these principles constitute a permanent stumbling block to granting the final interdictory relief sought in the present application, in that it will be impossible to make a definitive finding of a clear right based on defamation. In my view, a final interdict is not competent. The applicants do have an alternative remedy in that they can always institute a defamation action. The claims for damages, removal and retraction are all dependent on finding of defamation which cannot be granted in the face of defences raised. Further, the

consequential claim would not be competent because there is no logical link between such an interdict and such claims. This is so because an interdict is not a remedy for past invasion of right: it is concerned with the present and the future - See *Tau v Mashaba* (supra) at para 26.

36. Dealing with the decisions in Manuel and Hanekom (supra), these decisions are distinguishable from this application. Firstly, the Manuel decision is subject of an appeal pending before the Constitutional Court. As matters stand, the applicants are not entitled to damages in the absence of oral evidence.

37. It is now common cause that in the Manuel matter, the defamatory statement was a tweet appearing on the official Twitter of the EFF, in which the transparency of the selection process of the new SARS Commissioner was criticised as a secretive process was followed.

38. In the Hanekom matter, the defamatory statement was a tweet by former President Zuma that Mr Hanekom is "a known enemy agent". The court accepted Mr Hanekom's contention that the sting of this statement was that Mr Hanekom was an 'appointed spy'.

39. In the present matter, the impugned statement by the second respondent was contained in a letter to the President of the Republic of South Africa, as well as to other high-ranking officials. Later, a letter containing the same issue was sent to the National Assembly. Therefore, the distinction to be drawn pertains to the purpose of the letter which in view of the respondents was to root out corruption.

40. By reason of the conclusion to which I have come, I do not wish to deal in detail with the distinctions in these three matters. Nor am I inclined to analyse the alleged defamatory statements by the applicants and the defences raised by the respondents. It suffices that the matter be dealt with as succinctly decided by the SCA in *Tau v Mashaba*. The application must be dismissed with costs.

41. It may be necessary to briefly deal with the issue of costs. The relief sought in Part A of this application was initially sought to be enrolled as one of urgency on 8 July 2020, but was, by agreement, removed from the roll and the applicants were ordered to pay the wasted costs. The applicants now seek final relief, having amended their Notice of Motion without a formal application to this Court.

42. When the hearing of these proceedings commenced, the Court mero motu raised the question whether the issues were not similar to those in the Mokate matter and, whether the principles laid down by the SCA in the Tau decision should not be applied. The applicants were adamant that the Court should follow what was decided in Manuel or in Hanekom, despite the fact that the two decisions are distinguishable from the present application. The applicants persisted that the issues be decided on application despite fierce opposition by the respondents.

43. Had the applicants conceded, the issue could have been stayed for hearing in a trial. In the circumstances punitive costs are unavoidable.

44. Consequently, the application is dismissed with costs on the scale of attorney and client. The costs include the costs of the employment of two counsel.

JUDGE T. J RAULINGA

JUDGE OF THE HIGH COURT

APPEARENCES

For the Applicant		Adv. BM Slon
Instructed by	:	Nicqui Galaktiou Inc.
For the Respondent	:	Adv. DC Mpofu SC
		Adv K Pillay
Instructed by		Mabuza Attorneys
Matter heard on		10 September 2020
Date of Judgment		17 November 2020