IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NUMBER: 899/2020

In the matter between: -

WEZIWE TIKANA-GXOTIWE Applicant

and

LUNGILE MXUBE Respondent

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. We submit that the applicant (referred to herein as the *"MEC"* interchangeably) has not made out a case for the relief sought, which relief, *inter alia*, is a claim that the applicant has been defamed.

2. Our heads of argument are structured as follows: -

    2.1. Firstly, we state that the claim brought by the applicant is vague and embarrassing and that the applicant has not made out a case for defamation;

    2.2. Secondly, we argue that a final order on motion is inappropriate and the

matter should be dismissed as it should have been brought on trial;

2.3. Thirdly, we set out the defences of truth and public benefit as well as that of fair comment in the event that the court finds that the statements are defamatory in nature.

VAGUE AND EMBARRASSING

3. The applicant states that the Facebook posts annexed to her founding affidavit are defamatory of the applicant.

4. We submit that the failure to specify the defamatory passages may render the pleading vague and embarrassing in certain circumstances.

5. In Deedat v Muslim Digest[1] the court stated that: -

> *"A plaintiff is entitled to rely on the whole of an article if he claims that the whole of it is defamatory of him. He may however in an appropriate case be under a duty to furnish the defendant with particulars of those portions or words upon which he specifically relies. There is no hard and fast rule which dictates such a duty. In each case the matter complained of as being defamatory has to be considered and the Court has to ask itself whether in the particular circumstances the defendant would or would not be embarrassed in the pleading. The test is not the length of the document but the nature of the matter complained of."*

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[1] 1980 (2) SA 922 (D) at 928.

6. In Kruger v Johnnic Publishing (Pty) Ltd and Another[2] Botha J held that in an action for damages for defamation it will depend on the circumstances whether it will be required of a plaintiff to indicate the defamatory passages in a document which he alleges to be defamatory as a whole. The test is not the length of the document but the nature of the contents. Where the content of the document varies in degrees of offensiveness and a number of potential defences are open to the defendant, the plaintiff may be required to identify the defamatory passages. Since the abolition of a request for further particulars for pleading, there is a greater need for particularity in pleadings.

7. We submit that in the Facebook posts which are lengthy and contain many allegations. The applicant is required to identify the passages alleged to be defamatory.

8. We submit that the respondent is embarrassed because he does not know on which of all the potentially defamatory allegations in the Facebook posts, the MEC relies.

9. In the founding affidavit the MEC only identifies five paragraphs that are said to be defamatory. These are contained in paragraph 6.4.3, 6.4.5, 6.4.7 and 8.2.3.

10. These are the only occasions, in the founding affidavit, where the MEC quotes directly from the Facebook posts. She then makes the sweeping allegation in

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[2] 2004 (4) SA 306 (T) at 309F - J.

paragraph 6.9 of the founding affidavit that: -

> *"The said Facebook posts portray me either expressly or implicitly as either corrupt, incompetent, lacking in integrity, involved in criminal enterprise, taking part in criminal activities and/or a liar"*.

11. In the replying affidavit this last quote is stressed time and time again. However, the MEC fails to state which portions of the Facebook posts imply that she is: -

    11.1. corrupt;

    11.2. incompetent;

    11.3. lacking in integrity;

    11.4. involved in criminal enterprises;

    11.5. taking part in criminal activity;

    11.6. a liar.

12. Any respondent would have different defences to each of the statements and the defamatory nature of the statements imputed thereto by the applicant or the reasonable objective reader.

13. In the replying affidavit the applicant states that she seeks an order declaring that the allegations about her be declared false and defamatory. She alludes to

paragraph 5.2 of the founding affidavit and says that the posts make clear reference to her either by name or by title and the reasonable reader would have understood these posts to be referring to her.[3]

14. The applicant should not be permitted to make a case in the replying affidavit. it is trite that our law does not permit this. We do not concede that she has made out a case in reply in any event.

15. The applicant states that it is clear that her case is that all portions of the posts which refer to her are defamatory and false. She fails to state in the founding affidavit or in the replying affidavit which statements are defamatory and how they give rise to the conclusion that she is corrupt, incompetent, lacking in integrity, involved in criminal enterprises, taking part in criminal activity and/or a liar.

16. We submit that the respondent cannot defend himself without any particularity as aforestated. The only time that the MEC refers to exactly which statements defame her and in what manner, is set out in the heads of argument. This is inadequate.

17. The applicant states that all the statements relating to her are defamatory and all of them lead to the conclusion which she contends for above. However, there are different defences to each of the statements and the respondent is left

[3] See paragraph 15 of the replying affidavit at p 136.

to guess.

18. On this premise the application ought to be dismissed.

PROCEEDINGS ARE INAPPROPRIATE

19. The applicant is mindful of the risk in proceeding by way of motion. She refers to the case of Malema v Rawula[4] in her heads of argument. In that case Mullins AJ stated the following, which is also quoted in the applicant's heads of argument: -

> *"As far as I have been able to ascertain, bringing a defamation claim by way of application for a final interdict and damages is a new phenomenon in our law (as opposed to an interim interdict pending an action for damages). In my view, it is inappropriate and undesirable. The reason I say this is the following: The person making the defamatory statement may have a very good reason for doing so, but may not have the hard evidence to hand, which evidence may be in possession of the person who claims to have been defamed and/or third parties; in an action a defendant will have the benefit of pleadings in which the issues are narrowly defined, of the discovery process, of requesting particulars for trial, of a pre-trial conference and the subpoenaing of witnesses and documents duces tecum; he/she will be entitled to cross-examine the plaintiff and the witnesses called on behalf of the plaintiff in order to test their version and to give evidence and call his/her own witnesses; evidence of an expert nature might be necessary. An application deprived the respondent of all these extremely valuable and necessary*

litigation tools." (our underlining)

20. This case is on all fours with the Malema-case. The respondent is deprived of subpoenaing witnesses; having the benefit of cross-examining the applicant; and having an opportunity to prove the truth of the statement made.

21. We submit that the applicant should have foreseen this and on this basis the application ought to be dismissed with costs.

22. The applicant contends that Mullins AJ's above judgment in Malema is on appeal and is clearly wrong.

23. The applicant has ignored the SCA authority cited therein, namely Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others[5] where Wallis JA stated the following: -

> *"[37] The contentions in regard to onus or proof were also contrary to established authority, to which for some reason we were not referred. This court dealt with the proper approach of a court to an application for an interdict to restraint the publication of defamatory matter in Hix Networking.[6] There it approved, with some clarification, the following passages from the judgment of Greenberg J in Heilbron v Blignaut:[7]*
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> *'If an injury which would give rise to a claim in law is apprehended, then I think it*

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4 Unreported judgment under case number 1204/2019 in the Eastern Cape, Port Elizabeth Division.

5 [2017] 2 All SA 347 (SCA) at 361D – 362A.

6 1997 (1) SA 391 (A).

7 1931 WLD 167 at 169.

is clear law 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 done is actionable, it cannot be decided on motion. Thus if the defendant sets up that he can prove truth and public benefit, the court is not entitled to disregard his statement on oath to that effect, because, if the statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct from which there is no defence in law, is about to be committed.'

[38] The clarification was to point out that Greenberg J did not hold that the mere ipse dixit of the respondent would suffice to prevent a court from granting an interdict. What is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent. It is not sufficient simply to state that at the trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefor." (my underlining)

24. We submit further that an application for a final interdict must allege and establish on a balance of probabilities that he/she has no alternative remedy. In Chapman's Peak Hotel (Pty) Ltd and Another v Jab and Annalene Restaurants CC t/a O'Hagans.[8] The test for an alternative remedy was expressed thus: -

"It must be borne in mind in this regard that the alternative remedy postulated in this context must:

(a) be adequate in the circumstances;

(b) be ordinary and reasonable;

(c) be a legal remedy; and

(d) grant similar protection."

25. This case was also referred to by Mullins AJ. The learned judge also stated that defamation actions have traditionally been brought by way of action, although interim interdicts pending an action for damages, while rare, have been granted, but are limited to preventing a respondent from making defamatory statements in the future.

26. What the applicant seeks in this case is relief that would ordinarily follow by way of action, i.e. damages and an order declaring the statements to be defamatory.

27. It is within this context that the defences raised by the respondent ought to be regarded.

28. We only include the respondent's defences insofar as the MEC states that this Court must find that the statements or questions put in the post are defamatory and that they have the sting for which the MEC contends (which is denied).

DEFENCES

Truth and public benefit

29. It is difficult to raise defences when the MEC has not raised specific comments

[8] [2001] 4 All SA 415 (C) at 420D – F.

in her affidavits that specify how each is defamatory. Instead she simply says that all of them are defamatory and imply that she is corrupt, incompetent, lacking in integrity, involved in criminal enterprises, taking part in criminal activity and/or a liar.

30. We submit that the MEC has not included all the relevant Facebook posts. The respondent has in a supplementary affidavit referred to the background documents that informed the contents of the post.

31. Apart from the submission that the comments ask questions of the Premier based on reports in the media and/or documents that are in the public domain, the respondent submits that the comments are substantially true.

32. The best evidence of this- in motion proceedings-is to refer to documents related to his post.

33. We submit that the statements can be divided broadly into 3 categories: (i) those that say that the MEC has personal relationships with her subordinates; (ii) that the administrative centre (depicted in the photographs) of her department controls her and thereby her department; (iii) that her department is corrupt and has manipulated tenders.

34. Notably, other than saying that these statements are false and defamatory the MEC says nothing about why these statements that have been made of her in the public domain are false. Admittedly, she does not bear the onus to prove the

falsity. The respondent has the onus of proving truth and public benefit.

35. To this extent the respondent has attached documents that point to the truth of his comments and questions posed by his posts.

36. We submit that the respondent is prejudiced as he cannot call witnesses to prove the truth of his posts. This, we repeat, is because these are motion proceedings.

37. Nevertheless, in regard to (i) above the respondent annexes to his supplementary affidavit the affidavit of Amanda Zono who claims she was fired from the department because she "shared" a boyfriend with the MEC[9]. He also attaches the City Press article headed "MEC, ex-lovers in jobs-for-pals scandal"[10].

38. The PSC report annexed to the supplementary affidavit is evidence of impropriety in the department.[11] The findings are that the department hired persons without the right qualifications for positions in the department. The MEC must be held accountable for this.

39. The letter from the Head of Department speaks to this and shows further that the MEC ignored the advice of Counsel who was employed to consider the issue.

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9 Annexure SA1 to the SA at pp196-198.
10 Annexure SA2 to the SA at pp199-202.
11 Annexure SA3 to the SA at pp203-227.

40. The MEC must be held responsible. By her own admission, as evidenced by the article in the Daily Dispatch, that she protected certain of these individuals.[12]

41. In regard to (iii) the respondent annexes an enquiry from the Hawks which evidences tender manipulation and corruption in the department. The MEC is head of the department and must be held accountable for such corruption.

42. At the very least the respondent should be given the opportunity to prove the truth of his statements if this Court holds that he has a case to answer. This could be done in a trial.

43. It goes without saying that the truth of these statements is in the public benefit. The MEC holds public office and heads a department of government. She should be beyond reproach.

44. Instead, the MEC is embroiled in litigation to clear her name. In the case of Weziwe Tikana-Gxotiwe v Holomisa[13], Bloem J commented on her impropriety regarding the Moica Lodge which is owned by her daughter. In that case 18 patients were quarantined at Moica Lodge by the Health department.

45. The department is also being investigated by the Hawks for tender manipulation as evidenced by annexure "SA4" to the Supplementary Affidavit. [14]

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12 Annexure SA6 at pp238-239.
13 [2020] ZAECGHC 54
14 Pp 228-234

Fair Comment

46. The MEC is a politician. When one deals with politicians or political matters, courts have allowed for a good deal of latitude for comment. Bloem J referred to Crawford v Albu in the Holomisa case referred to above:[15]

"*People who occupy a public position or for any other reason have been so unfortunate as to focus upon themselves the light of public opinion must be expected to be criticised. And more particularly must those who, however righteous their motives, place themselves in determined opposition to society generally or to a section of society not be surprised if they find themselves assailed with some vehemence or even exaggeration. All this the law does not prohibit. Free speech and freethought are part of our common inheritance. And the law will not interfere with them. But still there are limits which must not be transgressed. Comment to be fair must not distort or misrepresent facts.*"

47. The MEC must be prepared for criticism and should not be treated like any other member of society. She should expect robust, even exaggerated comments to be made about her,

48. It is within this context that the photographs ought to be viewed. Drinking expensive whiskey in a country ravaged by poverty should be commented upon. Boasting that the people depicted are the "administrative" centre is putting them

[15] 1917 AD 102 at 105

in an elite category. The respondent should be allowed to comment thereon especially since the same people in the photograph choose to share these photos on social media. The photos were taken in the ministerial home. The respondent asks whether this should be permitted. He queries whether it is appropriate. He should be permitted to do so.

49. The defence of fair comment applies equally to the respondent's comments. If the reports and documents prove are true, nothing prevents the respondent from voicing his opinion.

CONCLUSION

50. We submit that the MEC has not made out a proper case for defamation and the application ought to be dismissed with costs including the costs attendant upon the employment of two counsel.

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