IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2018/20052

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

In the application of:

BAFEDILE MAFOLOGELE	First Applicant
SAMPADA PRIVATE EQUITY (PTY) LTD	Second Applicant
UMTHOMBO WEALTH (PTY) LTD	Third Applicant

and

SAMUEL MUNGADZE	First Respondent
SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND	Second Respondent

Coram: WEPENER J

Heard: 5 June 2018

Delivered: 14 June 2018

Summary: Interdict: when requirements for interdict are satisfied, court will order cessation of publication of clearly defamatory nature and unlawful information. Defendant's defence mere lip-service of well-known defences and without substance.

JUDGMENT

WEPENER J:

[1] This urgent application came before the court on Tuesday 5 June 2018 and an order was granted on 8 June 2018. The issue in this matter is the further dissemination of reports by the first respondent of matters concerning the first, second and third applicants.

[2] The first applicant is the founder, director and chief executive officer of both the second and third applicants. The second applicant is a private equity and investment management company and registered as a financial services provider.[1] The third applicant is a company associated with the second applicant and it is mentioned in some of the articles written by the first respondent. The second applicant manages assets to the value of approximately R1,7 billion on behalf of some of the biggest Retirement Funds in South Africa.

[3] The first respondent is a journalist by profession and freelance writer who renders his professional services as a news reporter to various media and news outlets in the Republic of South Africa. He claims that he subscribes to the various ethical codes of conduct that regulate all media outlets and journalists in South Africa. He admits that he was the author and disseminator of the five articles which were published and which form the subject of the applicants' complaint.

[1] In terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

[4] The second respondent is the South African Local Authorities Pension Fund who has not participated in these proceedings. Allegations of impropriety by the applicants are linked to the second respondent and improper conduct by it or it's officials. A further reference in this judgment to the respondent is to the first respondent.

[5] It is not disputed that the assets and investments which the applicant manages have been entrusted to it by parties such as Pension and Provident Funds, who hold such assets and investments on behalf of their members. The Funds hold these benefits on behalf of millions of employees in the Republic of South Africa. It is also common cause that the applicants' main mandate is to grow the value of the assets and investments entrusted to it by the various Pension and Provident Funds. The assets so entrusted to the second applicant for growth and management are invested in various companies whose shares are listed, and they trade, on the Johannesburg Stock Exchange. The applicants allege, and the respondents do not dispute, that the sensitivity of investors on every stock exchange is such that any negative perception about asset managers may affect the performance of such a manager as well as the assets under their management on the stock exchange. This is so due to the fact that a great degree of trust, credibility and integrity are not only required but also expected of asset managers. The applicants' uncontested version is that any negative allegations regarding them may result in asset owners transferring their asset management contracts to other asset managers. The applicants said that asset owners are reluctant to do business with asset managers who are perceived to be corrupt or are perceived to win business contracts though corruption, bribery or as a result of having 'captured' the relevant decision makers of investors. The applicants' allegation that their reputation is of utmost importance in that they rely on relationships with financial market data providers who are important players in the market, are not disputed. These parties will not do business with entities and persons who are perceived to be corrupt and 'captured' by decision makers who make decisions relevant to the award of business contracts in various institutions. This is so because the various investors do not wish to be associated with entities and people who cause them reputational harm. It is undisputed that the applicant has perceived that certain banks had terminated banking relationships with entities which were experienced to be capable of causing reputational

harm to such banks. The applicants fear that they face the same risk as a result of the defamatory allegations published by the first respondent.

Background

[6] In order to place this matter in its context, it is necessary to set out the complaints of the applicants regarding the nature of the articles complained of in some detail. The respondent, save for denying the defamatory nature of the allegations, and relying on certain defences to which I will return, does not deny the content of the publication nor that the innuendos alleged by the applicants were intended by the first respondent.

The statements

[7] Over a period of time the respondent wrote and caused articles to be published on different media platforms. One of these, City Press, contacted the applicants prior to the publication of an article submitted to it by the respondent. It furnished the applicants with lists of questions, seeking answers thereto. The applicants attached the questions and answers to the founding papers. The City Press thereafter refused to publish the article received from the respondent. Despite this, the respondent caused articles to be published in, inter alia, the Independent Online, New African Gazette, The Citizen and other publications. After the applicants' attorneys wrote to the respondent during May 2018, and highlighting many inaccuracies in the articles written by the respondent, demanding an undertaking that the respondent should refrain from publishing the articles pending the hearing of an urgent court application for an interdict, the respondent caused another article (the fifth article) to be published.

The first article – published on 29 April 2018.

[8] In the first article the respondent accused the first applicant and the second respondent's erstwhile chairman, Mr Maphanga, of 'hatching the plan in which hundreds of million rand were secured for "private equity" investment in the form of "property investment"'. The applicants allege, and it is not denied, that to the ordinary objective and reasonable reader of the first article, this suggests that the first applicant and

Maphanga prepared and executed an unlawful plan pursuant to which the second respondent's 'hundreds of million of rand were' invested through the second applicant in 'property investments'. The placing of 'property investment' was intended to mean, and was understood to mean or at the very least to suggest, that the 'hundreds of million rand' were in fact not invested in property investments and that there are in in fact no property investments and the said millions have been wasted and have been misappropriated for the first applicant's personal benefit. It is further alleged that the first applicant 'flew Maphanga to Barcelona' to watch a soccer match as unlawful consideration for him in working with the first applicant to 'hatch the plan' referred to before and executing such plan and that the first applicant bought 'a sleek Jeep Cherokee' for Maphanga, which to an ordinary objective reader suggests that this was a further unlawful consideration to Maphanga for participating in this plan.

[9] It is further alleged that the law firm ENS Africa conducted an audit into the second applicant's affairs and that such audit 'revealed deficiencies in financial reporting'. It is alleged that it is defamatory due to its falseness. No 'deficiencies in financial reporting' were reported to the applicants by ENS Africa. It is alleged that an mere suggestion that the 'deficiencies in financial reporting' were found, is injurious to the applicants' names and reputations in that it portrays them as those who do not perform their asset management and relevant reporting obligations properly and are unable to properly account for their asset management activities. It then alleged that this, in turn, could result in asset owners withdrawing their assets from the applicants' management. The article continues that ENS Africa was denied 'access to Sampada (second applicant) information' to which it was lawfully entitled. The applicant alleges that it suggests that the second applicant has committed irregularities in its financial reporting and that the applicants refused to provide access to its financial records for audit purposes.

[10] The final allegation in the first article is that there are 'managers' at 'SALA' (the second respondent) who 'want to act to recover the money' from the applicants. It is further alleged that the allegation that 'managers at the fund want to act to recover the money' suggests to an ordinary and objective reader and was understood by such

reader, to mean that the money which the ‘managers at the fund want act to recover’ was unlawfully taken from SALA by the applicants and their continued retention of it is also unlawful, being the reason why it should be recovered. The applicant alleged that there could be no other basis ‘to act to recover the money’ if the relevant transaction was a lawful one.

<u>The second article – published on 29 April 2018</u>

[11] The second article, published on the same date, has the same content and the applicants complained that they are defamatory and injurious for the same reasons as stated in relation to the first article.

<u>The third article – published on 30 April 2018</u>

[12] Again, save for the denials of defamation and the defences raised by the respondent to which I shall return, the allegations by the applicants are not in dispute. The third article contains a picture of the first applicant, which the first applicant states was used to create an unnecessary sensation in the article as it shows him whilst he was visiting Hollywood. It is undisputed that the picture was in any event taken of him prior to the second respondent investing in private equity funds set up by the second applicant. It completes a picture of lavishness and money improperly used by the first applicant.

[13] The article states that the first applicant has ‘a huge appetite for power and fast cars’ and that he has ‘captured’ Maphanga. It is then alleged that the words ‘capture’ and ‘captured’ are in South Africa now understood to refer to acts of bribery and corruption, in particular in the context which they were used they were understood by ordinary objective readers to mean that the first applicant has corruptly subjected Maphanga to his influence and control so that the first applicant can derive financial benefits from the second respondent through Maphanga, benefits to which the first applicant is not lawfully entitled. It is alleged that this is untrue and defamatory due to the fact that it suggests that the first applicant is guilty of bribery and corruption and that he and the second applicant secured business from the second respondent through bribery and corruption, particularly, by ‘capturing’ Maphanga.

[14] The third article further conveyed that the first applicant had his 'eyes on the SALA millions' in order to fulfil his dreams. In the context in which this is said in the article, an ordinary and objective reader understood it to mean that the first applicant has unlawful intentions to gain access to the second respondent's millions for his benefit and his and the second applicant's benefit and not for the benefit of the second respondent and that he and the second applicant are otherwise not lawfully entitled to that benefit. The third article stated that the first applicant promised Maphanga 'massive commission'. In the context in which it is stated it was understood by the ordinary and objective reader to mean that the first applicant promised to pay 'massive bribes' to Maphanga. The third article finally contained the averment that ENS Africa found evidence of 'deficiencies in financial reporting, high management fees and inaccurate manager expense allocation'.

<u>The fourth article – 17 May 2018</u>

[15] This article, which was published in The Citizen Online, alleges that the Financial Sector Conduct Authority (FSCA) was investigating allegations of corruption and maladministration at the second respondent relating to and resulting from the first applicant's alleged bribery, corruption and capturing of Maphanga. The article repeats the allegations referred to above contained in the first, second and third articles and continued that the second respondent entered into 'a questionable deal to be worth R340 million' with the second applicant. There is then an allegation that managers at the second respondent wanted the funds to be returned to the second respondent. The applicants alleged that the mere suggestion that the applicants were involved in a 'questionable deal' suggests that the relevant deal is unlawful as no lawful deal can be questionable. It is alleged that the intention to conduct the intention of the respondent to defame the applicants is clear from the fact that he failed to conduct an independent investigation into the history of the deal and because he has not seen the relevant transaction documents. The first respondent went on to allege that the deal was a product of a 'hatched plan' which suggests that it was an unlawful plan.

[16] The articles further stated:

> 'however a few months later, the Maphanga – led board replaced by Financial Services Board with a twenty-six section board headed by Jan Mahlangu and Advocate Mathome Thulare'.

In the context in which it is stated in the first three articles it was understood by ordinary and objective readers to mean that the second respondent's board was removed or replaced from office as a direct result of the alleged improper investment into the second applicant. It is clear however, that the respondent changed the allegations in the fourth and fifth articles by stating that the board was in fact replaced by the Registrar of Pension Funds as he became aware that the board had not been properly constituted. Obviously, this latter change, was as a result of the respondent then accepting that the latter was the true reason for the replacement of the board and not the reasons contained in the first three articles, namely as a result of improper investment by the board at the second applicant. Despite this change, the respondent did not point out that the first three articles contained wholly incorrect information. In both the fourth and fifth articles it is alleged that investigations by the FSCA were due to allegations of corruption and maladministration, yet nothing is said that the FSCA conducts routine investigations and inspections at Pension Funds but no such investigation had been made or suggested by the FSCA.

<u>The fifth article – 20 May 2018</u>

[17] The fifth article, in similar terms as the previous articles, was published in The Sunday Independent and it is alleged that certain whistleblowers furnished the information and that these whistleblowers are said to be senior managers of the second respondent. The applicant alleges and it is not denied that the second respondent has no senior managers in its employ and employs a principal officer as the only person in a senior management position.

<u>General</u>

[18] Save for certain inaccuracies, the respondent alleges that

> '. . . in August that year a hastily arranged fund exco meeting sat and agreed to give Mafologele's Sambada Private Equity Fund, R340 million for a proposed "property investment".'

[19] It is important to note that regarding each of the allegations of defamation and the innuendos referred to by the applicants, the applicants alleged that the statements are not true, could not have been published in the public interest and were intended and did harm and injure the applicants' good names, reputation and character.

<u>Consequences of the publication</u>

[20] The applicants allege that, save for a defamatory nature of the publication, the allegations of bribery, corruption, capturing and deficiency in reporting amongst others, which are not true and were published without evidence to substantiate them. In addition, to the defamatory nature thereof, the articles resulted in at least five investors who, either currently invest with the second applicant or contemplated investing or placing business with the second applicant, are now requiring of the applicants to account for the allegations contained in the five articles. One of the prospective clients indicated that it was uncomfortable to consider doing business with the second applicant. It is consequently, save as I indicate below, not disputed that clients and prospective clients, who place large business with the second applicant, have been influenced by the articles that the applicants are guilty of bribery, corruption and capture. There is consequently a risk that the second applicant may lose business with some of its existing clients and that it will be unable to attract new business as a result of the allegations. This is so, due to the fact that the second applicant's business is very much based on trust and integrity and allegations of bribery, corruption and capture erode such trust and integrity with a resultant loss of business.

[21] These allegations are met by the first respondent as follows:

> 'I deny the publication per se occasioned the harm contended by the applicants in these paragraphs.'

No more is said and there is no reason why the detailed uncontested allegations of the applicants should not be accepted.

<u>Defences relied upon by the respondent</u>

[22] Save for general denials, the first respondent's defences are: that the publication of the articles was reasonable and true and in and the public interest; that forensic investigators stated that requests for information for them to conduct a forensic audit were denied and that there were

> 'significant concerns regarding deficiencies in the financial reporting, high management fees and inaccurate manager expense allocation.'

The respondent alleges that this appears from an annexure to the applicant's affidavit being annexure 'FA4'. The respondents' contentions are not supported by annexure 'FA4'. The high water mark of the allegations of the statements in annexure 'FA4' is from a business partner of with the second applicant written by ENS on behalf of that partner wherein it is stated:

> '. . . Our client has significant concerns regarding its investment in Sampada.'

[23] The allegations on which the respondent relies are not contained in the letter on which he relies. Either the respondent is falsifying his evidence or he has failed to appreciate the contents of annexure 'FA4' but, it is certain that annexure 'FA4' does not purport to support that which the respondent alleges about the applicants. Annexure 'FA4' is a document annexed by the applicants to their papers in which they explain the significance of the partnership agreement which allowed the partner, on whose behalf the letter was written, access to certain information in the possession of the second applicant and not to other information. In its response to the ENS letter the applicants said:

> '. . . Your client's role in the partnership agreement is very limited and does not entitle your client to take part in the management or control of the business and the affairs of the partnership.'

[24] The answer by the applicants goes further by offering to meet with the enquiring party as requested by the enquiring party. That brings an end to the totality of the

matters contained in the documents upon which the respondent relies in support of his contention that the letter ‘bear out the accuracy of the news reports I have written’.

[25] Throughout the affidavit of the respondent coveys a defence of truth and public interest. However, he contradicts his version that he published the truth by stating:

> ‘I do not know if the allegations of impropriety levelled against the applicants are true, however, it is in the public interest to publish these allegations since they concern the use of public funds and the public body SALA.’

The admission that the allegations of impropriety were levelled against the applicants, support the applicants’ complaint regarding the defamatory nature of the allegations.

[26] Having regard to the respondent’s reliance on documents which do not bear out his version, I am inclined to agree with him that the respondent does not have knowledge or facts in support of the impropriety levelled against the applicants. It refutes a denial that the publication is defamatory. I am of the view that the allegations are not only regarding impropriety, they are per se defamatory. In my view, a party relying on truth and public interest must prove its case. Proving the truth of the statement is a pre-condition for relying on the fact that the publication may be in the public interest.

[27] The allegations published by the respondent are not true. This is borne out by his own admission that he does not know whether they are true or not. It is further borne out by the untruthful publication regarding the removal of the second respondent’s board as a direct result of the alleged improper investment with the second applicant, which the respondent later changed to the fact that the board was replaced by the Registrar due to it not having been properly constituted. The respondent, virtually en passant, changed the version without acknowledging the importance of a board not properly constituted versus it acting improperly by investing with the second applicant. This initial allegation was dropped in later articles for the truth.

[28] The respondent relies on a report containing several allegations but which has no author and no source. He further relies on certain whistleblowers who he states,

contrary to the fact that he has no knowledge about the impropriety, furnished him with information and that he stands 'by the accuracy and credibility of the information'. He further asserts that he diligently ascertained that the sources that he relied upon were corroborated by other credible independent sources, but this is where the respondent finally fails. The ENS letter which he relied upon as such corroboration, clearly fails to attain that purpose. It is clear from the entire contents of the respondent's affidavit that the one thing that he failed to do was to take reasonable steps to verify the accuracy of the material which he published.

[29] Save for relying on the truth and public interest which the respondent failed to show by any stretch of the imagination, he further stated that he acted reasonably by publishing that which he did. But, in *Bogoshi*[2], the Supreme Court of Appeal held as follows:

> 'According to the judgment in *Langer v Australian Broadcasting Corporation* the requirement for protection is "reasonableness of conduct", which is explained as follows at 574:
>
> "Whether the making of a publication was reasonable must depend on all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant and reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's contact will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."'

Defamatory nature of the allegations

[30] On a proper consideration of the allegations made by the respondent and the innuendoes relied upon by the applicants, it is my view that all of the articles contain statements which are, per se, defamatory of and concerning the first and second

[2] *National Media Limited and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1211F-G.

applicants' corruption, bribery and the capture of the office-bearers of contracting parties or decision-makers in order to win business are defamatory of the applicants and cause them harm. In this regard the harm suffered, in particular by the second applicant, cannot be, and is not, seriously disputed. Its business, are likely to suffer should these allegations remain unchecked and continue to be published on the various platforms available to the respondent. Despite the respondent's concession that he is unaware of the truthfulness of the allegations of impropriety he persistently relied on a defence of truth and public interest. That reliance is mere lip-service and has no factual basis. The attempt to put a factual basis to the truth of the allegations with reference, inter alia, to annexure 'FA4' fails miserably. What the respondent does say is that to the extent that the news reports are based on sources, these have been properly and meticulously vetted. By that, the respondent implies that the persons who furnished the information to him were properly vetted because he failed to attempt to verify the accuracy of the material which he published. The so-called corroboration and other credible independent sources relied upon by him is, in the main, the ENS letter which I have indicated he falsely relies on for his conclusions but also the fact that the City Press newspaper forwarded a set of questions to the applicants and that the applicants had the opportunity to reply, which they did. But what the respondent fails to appreciate is that this set of questions and answers were sent and received by the City Press who did not publish the allegations which the respondent wishes to promote. He took no reasonable steps, such as those taken by the City Press, to obtain the correct information in order to decide the correctness of the allegations that he was about to publish. The respondent's reliance on the reasonableness of his conduct has no basis in the facts set out by him in his answering affidavit.

[31] Indeed, in argument before me, the respondent's counsel relied on a report quoting officials of the Financial Services Board wherein it, too, made certain of the impugned allegations. The difficulty with this argument is that this was not a report by the FSCA but it was an article by the respondent in which he inserted the logo of the FSCA at the heading of the article. The result is that the applicant's counsel's reliance on what the FSCA had apparently said is far-fetched. Relying on that which the

respondent penned and distributed as being corroboration by a reputable public organisation to support the respondent's defamatory allegations, is grasping at straws.

[32] When the applicants threatened to seek relief from the courts, the respondent's attorneys on his behalf said as follows:

> 'With a view of possibly finding middle ground and/or extracting fact from fiction, our client is prepared to meet your client for an interview at a time and place so determined by your client.'

This belated request must be seen for what it is. It was for the respondent to ascertain what was fact and what was fiction prior to disseminating the defamatory matter. I have indicated that, at least in one instance, the respondent changed course after causing the publication of the first three articles in relation to the reasons why the board of the second respondent had been replaced.

[33] An overview of the papers show that the respondent, if not hounding the applicants, is intent on publishing uncorroborated allegations and conclusions which are defamatory of and regarding the applicants. The respondent's answering affidavit lacks a factual basis for the lip-service which he offers for truth and public interest and the reasonableness of his conduct.

[34] The prejudice caused by the respondent to the applicants is self-evident and is, save for a bald denial, hardly contradicted. The reliance on the truth and public interest in a part of the answering affidavit is belied by his own words that he does not know if the allegations of impropriety levelled against the applicants are true. This being so, the contention that there is any public interest in receiving the truth cannot hold water.

[35] The only other justification raised by the respondent is that of reasonableness which I have shown has no merit. Indeed, the respondent relies on the fact that a spokesperson of the FSCA had made certain comments apparently in support of the respondent's allegations. These comments are contained in the document which contains the FSCA logo and which I have indicated was the brainchild of the respondent himself. In any event, had such an official of the FSCA made any statements to

corroborate the respondent's allegations it is inexplicable why the respondent could not obtain affidavits from those officials who are in the employ of a public body to support his various allegations.

[36] Although the respondent's heads of argument lamented that there was a non-joinder of the media houses that published the articles penned by the respondent, nothing turns on this point. If the applicants so wish they can take steps against those media houses in order to obtain relief. There is no reason why the applicant should be barred from obtaining relief against the respondent who is the initiator of the publication process by forwarding his defamatory articles to the media houses for publication.

[37] The respondent repeatedly stated that the applicants' relief lies in a damages claim against him. This may be of no value to the applicants' losses as its losses may run into millions of rands whilst there is no evidence that the respondent will be able to meet such a claim. The reliance on a damages claim by the respondent is, in my view, a convenient deflection by the respondent who clearly wishes to continue to publish his false and unfounded allegations. This entitles the applicant to the relief, even if the effect of the interdict is of a permanent nature.

[38] In my view that applicants satisfied all the requirements for an interim interdict and are entitled to relief.

[39] For these reasons, I issued the following order:

1. Pending the final determination of an action for damages to be instituted by the applicants within 30 days from date on which this order is granted, the first respondent is interdicted and restrained from making, publishing, causing to be published or disseminated in any manner, on any media platform, any statements about and concerning the applicants, in regard to the matters set out in the articles marked 'FA1' to 'FA5' to the applicants' founding affidavit.

2. The costs of this application are to be paid by the first respondent.

Wepener J

Counsel for Applicants: L. Uys

Attorneys for Applicants: Malatji Kanyane Attorneys

Counsel for the First Respondent: S.L. Shangisa with N.T. Shangase

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