



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 19 May 2023

Case No. 2023/43063

In the matter between:

**QUANDOMANZI INVESTMENTS (PTY) LTD trading as
SM STRUCTURES**

Applicant

and

DEVI SANKAREE GOVENDER

First Respondent

EMEDIA HOLDINGS LTD

Second Respondent

ETV (PTY) LTD

Third Respondent

ENCA (PTY) LTD

Fourth Respondent

EMEDIA INVESTMENTS (PTY) LTD

Fifth Respondent

Neutral citation: Quandomanzi Investments (Pty) Ltd t/a SM Structures v Devi Sankaree Govender (2023/43063) [2023] ZAGPJHC 516 (19 May 2023)

JUDGMENT

WILSON J:

- 1 The applicant, SM Structures, seeks urgent and final relief restraining the respondents from publishing or broadcasting material defaming it, and from broadcasting a television programme about it which is scheduled to go out on 21 May 2023. The respondents, to whom I shall refer collectively as “Etv”, accept that the application is urgent, but they do not accept that it should be granted.

The complaints about SM Structures’ work

- 2 SM Structures specialises in the construction of large steel-framed structures, such as warehouses, worker accommodation, and (presumably small and medium-sized) factories. In common with most construction companies, some of its clients are happy with the work that SM Structures does, but others are not. This application was triggered by one dissatisfied customer, Bianca Gericke. Ms. Gericke complains that SM Structures performed substandard work on the structure her company contracted it to erect. She suggests that SM Structures was both late in performing the work and that the work, when it was complete, was of an unacceptably low quality.
- 3 SM Structures strongly disputes that it has performed substandard work, but it is not necessary for me to get into the detail of the controversy. It is enough to note that Ms. Gericke was sufficiently dissatisfied to post a negative review of SM Structures on “HelloPeter”, a well-known online forum in which consumers can review and comment on the quality of goods and services for which they have contracted.

- 4 HelloPeter also allows for providers of goods and services to reply to the reviews they have received. SM Structures took the opportunity to reply to Ms. Gericke's review. It characterised her complaints as inaccurate and misguided. There followed an exchange of views on the HelloPeter platform between SM Structures and Ms. Gericke. The exchange was robust, but, by the standards of internet commentary, relatively tame. SM Structures and Ms. Gericke did not agree about the standard of work that SM Structures had done. Nor could they agree about what SM Structures characterised as Ms. Gericke's own contribution to whatever delays and defects she said had characterised the work.
- 5 Ms. Gericke was by no means the only person dissatisfied with work SM Structures had done for them. Etv's answering papers annex a substantial number of negative HelloPeter reviews, together with SM Structures' comments on those reviews. Etv produced photographs of crumbling buildings it was told show SM Structures' shoddy work. The affidavit also sets out the content of three interviews: one conducted with Ms. Gericke, and two conducted with other people dissatisfied with SM Structures' work.
- 6 These interviews were conducted by the first respondent, Devi Govender. Ms. Govender is a well-known broadcast journalist, whose programme, "the Devi Show", focusses on consumer affairs. Ms. Gericke contacted researchers working on the Devi Show with her complaints about SM Structures. She referred those researchers to information about other people dissatisfied with SM Structures' work.

- 7 Ms. Govender also conducted an interview with Amanuel Gebremeskel, the chief executive of the Southern African Institute of Steel Construction. In paragraph 17 of her answering affidavit, Ms. Govender says she conducted that interview “to gain an understanding of the type of work being undertaken by [SM Structures] and the quality which could be expected by customers using [its] services”. Ms. Govender’s answering affidavit also outlines a range of other investigations – mostly internet research about building standards and steel-based construction – aimed at evaluating and contextualising the complaints the Devi Show had received about SM Structures’ work.
- 8 Once all this had been done, on 29 March 2023, Ms. Govender went to SM Structures’ premises in Wynberg with a camera crew. She asked for an interview with Jon-Marco Maycock, who is SM Structures’ general manager. After some demur, Mr. Maycock sat for an interview and gave SM Structures’ views on the complaints that had been brought to Ms. Govender’s attention. It is not clear whether this interview was on camera, but Mr. Maycock agreed to a further interview, presumably on camera, provided that a list of questions was sent to him in advance.
- 9 On 3 April 2023, one of Ms. Govender’s researchers invited Mr. Maycock to an interview at Etv’s studios in Hyde Park. The purpose of this interview was said to be to afford SM Structures a right of reply to the various complaints about it. SM Structures’ response – first from Steve Maycock, SM Structures’ chief executive, and later from SM Structures’ attorneys – was to request the list of questions to which Jon-Marco Maycock had earlier referred. That list was sent to SM Structures on 12 April 2023. The list only refers to the facts

applicable to the three individuals, including Ms. Gericke, that Ms. Govender had interviewed. This is because, although there were numerous complaints against SM Structures, the Devi Show's producers had decided to focus on these three in the time allocated to the segment of the Show meant to address SM Structures' work.

10 On 19 April 2023, through its attorneys, SM Structures submitted a 19-page response to Ms. Govender's questions, but declined to make anyone available to be interviewed. It also made clear that its written answers to the Devi Show's questions could not be used in the show, unless its prior consent was obtained. Bernadette Maguire, the Devi Show's managing editor, responded to this message on the same day. It is hard not to read into her message a degree of exasperation. Ms. Maguire asked SM Structures' attorney to confirm that SM Structures really did not want the Devi Show to communicate the contents of its detailed reply on the programme.

11 Ms. Maguire's message was met with an assertion that SM Structures considered that, in light of the reply SM Structures had given, a broadcast featuring the three complaints on which the Devi Show submitted questions would be defamatory and unlawful. An interdict application was threatened, eventually launched, and was ultimately enrolled before me.

The defamation alleged

12 SM Structures declined to set out the defamatory statements that it wishes to restrain in its founding affidavit. That was unfortunate. It is an elementary rule of motion proceedings that the applicant must make out their case in the founding affidavit. In a case in restraint of alleged defamation, it is close to an

absolute rule that the defamatory matter alleged must be quoted or otherwise clearly adverted to in the founding affidavit. I cannot say why SM Structures departed from this rule.

- 13 The best offering Ms. Carstens, who appeared for SM Structures, could make was to draw my attention to paragraph 42 of the founding affidavit. There, it is suggested that the material Etv intends to broadcast will create the wrongful impression that SM Structures is unprofessional, dishonest, supplying inferior materials, or otherwise conducting itself in breach of its contractual obligations to its customers. But these are plainly not the allegedly defamatory statements of which SM Structures complains. They are conclusions that SM Structures fears will be drawn from the defamatory matter alleged. The defamatory matter itself is completely absent from SM Structures' founding affidavit.
- 14 In light of this, Ms. Carstens was constrained to rely on Etv's answering affidavit, in which Ms. Govender outlines what she was told in the three interviews she conducted with Ms. Gericke and the two other complainants that Etv intends to feature in its programme. Ms. Carstens submitted that the material gathered in those interviews is false and defamatory, and that Etv intends to report that material as the truth.
- 15 However, on any construction of the papers, this submission fails at every step. In the first place, it has not been established, even *prima facie*, that the information conveyed to Ms. Govender was false. SM Structures clearly disagrees with it, but there is nothing on the papers – and especially nothing on SM Structures' affidavits – that demonstrates that the complaints are false as opposed to merely contested.

16 Secondly, there is no basis on which to suggest that Etv intends to report the complaints as the truth rather than as one side of a contested story. Having chosen to apply for a final interdict, SM Structures is bound to make out its case on the facts set out in Etv's answering affidavit, and on any other undisputed facts. The facts set out in Etv's answering affidavit demonstrate a careful and measured approach to the complaints made against SM Structures. This approach keeps the complaints at arms-length, and seeks to contextualise them with, and test them against, facts about the standards applicable to the industry in which SM Structures operates, and, critically, facts about SM Structures' response to the complaints themselves.

No basis for interdictory relief

17 A publication is defamatory if it tends to lower the person defamed "in the estimation of the ordinary intelligent or right-thinking members of society" (*Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) ("*Hix*"), 403G-H). The test is objective. What matters is not what the publisher intends, but "what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied" (*Le Roux v Dey* 2011 (3) SA 274 (CC), para 89).

18 Once it has been established that a publication is defamatory, wrongfulness and intent to injure are presumed (*Le Roux*, para 85), but that presumption may be rebutted if any one of a number of known justifications is established. One of these justifications is that the defamatory publication constitutes "fair

comment”. A publication is fair comment where it is an expression of opinion, where it is based on true facts and where it relates to a matter of public interest. The publication must also be fair in the sense that that it conveys an honestly-held opinion without malice. It need not, however, be “just, equitable, reasonable, level-headed and balanced” (*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) (“*McBride*”), paras 80 to 83).

19 In *Hix*, it was held that applications for orders placing prior restraints on publication ought to be approached with caution (p 402C-D) . Moreover, where “a sustainable foundation [is] 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” in any post-publication damages claim, a prior restraint will not generally be granted (*Herbal Zone (Pty) Ltd v Infitech Technologies* 2017 BIP 172 (SCA), paras 37 and 38). This is because, where such a defence has been set up, the applicant has no reasonable apprehension that it will be unlawfully defamed in the forthcoming publication.

20 It is, in my view, clear from the facts of this case that SM Structures cannot reasonably apprehend that it is about to be unlawfully defamed. Etv has done more than enough to establish that the broadcast it intends to put out will constitute fair comment on SM Structures’ business practices and the complaints made about them, even if the broadcast contains some *prima facie* defamatory material. In the context of this case, the “true fact” on which Etv set up its fair comment defence was the fact that it had been approached with complaints about SM Structures which were credible and honest on their face. What Etv had to establish, therefore, was not that the complaints against SM

Structures were well-founded and meritorious in every respect, but that they were genuinely and honestly pursued. That has plainly been established on Etv's version – which, as I have already pointed out, is the version on which SM Structures was bound to make out its case.

21 Ms. Carstens appeared to submit in her argument that SM Structures reasonably anticipates that the programme to be broadcast will be so one-sided as to be defamatory: that, in other words, the complaints will be set out without weight being given to SM's views on them. I do not think this has been established. There is no reason to believe that the programme will not give due weight to the material it has gathered from SM Structures' responses to the HelloPeter reviews, or from its initial, presumably unembargoed, interview with Jon-Marco Maycock.

22 In any event, any apprehension of an adverse slant to the programme can only reasonably arise from SM Structures' own refusal to have its comprehensive written response to the complaints aired on the programme, and its own refusal to honour Jon-Marco Maycock's undertaking to be interviewed for that programme.

23 A business that offers goods and services to the general public must expect, at some point, to be criticised – with or without justification – for the quality of the goods and services it has provided. Where that criticism is not in itself defamatory, false and injurious or otherwise unlawful, and is to be published by a third party, the business faces a choice. That choice is either to ask the third party publisher to present, fairly and in context, the business's own take on the complaints featured, or to eschew the publication completely.

- 24 Unhappy with either of these responses, SM Structures seeks to chart a third course. It asks me to restrain what it says will be an unbalanced broadcast in circumstances where it is preventing the use of the information that it considers necessary to strike the appropriate balance. Whatever else may be said of our broadcast media, it is clearly entitled not to be held to ransom in this way.
- 25 SM Structures has established neither a clear right to the relief its seeks, nor a reasonable apprehension of harm.
- 26 The application is dismissed with costs.



S D J WILSON
Judge of the High Court

HEARD ON: 16 May 2023

DECIDED ON: 19 May 2023

For the Applicant: T Carstens
Instructed by Retief & SJ Meintjes Inc

For the Respondents: B Winks
Instructed by Rosengarten and Feinberg