

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO.: 3547/2009

Heard on: 04 March 2010

Delivered on: 29 June 2010

In the matter between:

ANTHONY MAZWE MAKWETU

APPLICANT

And

LLEWELLYN FRANCOUIS SHARP

RESPONDENT

JUDGMENT

SANGONI J

[1] The applicant is the sheriff of the magistrate's court for the district of Lady Frere and Whittlesea also serving as an acting sheriff for the magistrate's court Port Elizabeth South.

[2] The respondent is the sheriff of the magistrate's court, Port Elizabeth North.

[3] On 10 October 2009 this Court granted the applicant an order by agreement. The following is the relevant portion of the order:

“1. That a rule nisi do hereby issue calling upon the Respondent to show cause to this Court on 4 March 2010 at 09h30, or as soon thereafter as the matter may be heard, why an order in the following terms should not be granted:

1.1 That the Respondent be interdicted and restrained from communicating personally or by representation, with any person, body, official, department, association, corporation or company, any opinion, allegation, imputation, innuendo, conclusion or inference, concerning the Applicant’s character, personality, conduct, business activity or personal activity.

1.2 That the Respondent pays the costs of this application.

2. That the provisions of paragraph 1.1 above operate as an interim interdict and order, pending the return date of aforementioned.”

BACKGROUND FACTORS

[4] During the period between 1 February 2009 and December 2009 there were a number of instances of disagreement between the

parties arising mainly from their business relationship and subsequent litigation against each other. It appears what finally led to the institution of these proceedings is a letter dated 11 November 2009 (Annexure O), addressed to the Deputy Minister of Justice and Constitutional Development, Mr A C Nel, by the respondent in which he says, inter alia, the following:

“The Trust and CC will in support of our application and if Opposing Papers are filed, call upon and, or subpoena:

SARS (South African Revenue Service) to testify in respect of Makwetu’s present financial status, as information has revealed that Makwetu is being investigated for non payment of Vat or provisional tax and others.

SABFS (South African Board for Sheriffs) to testify in respect of Makwetu’s payment history of levies and other financial obligations to the Board, complaints against his present acting offices and, or all other appointments he holds presently. Inquiries have revealed that many attorneys’ firms have complaints against him, but are in some instances reluctant to forward it to the South African Board for Sheriffs, as they are of the opinion it will be delayed indefinitely.

SANAPS (South African Association of Progressive Sheriffs) to testify in respect of Makwetu’s outstanding membership fees of voluntary organization. Makwetu is presently the deputy chairperson of SANAPS.

Moore Stephens Auditors will testify in respect of Makwetu's income versus expenditure and that the trust account of his acting office Port Elizabeth was in a 'total mess' and unable to audit. This was due to his refusal to appoint a bookkeeper (accountant) since his appointment as acting sheriff in 2007. Only after intervention and assistance by my office staff (bookkeeper) was it possible for Moore Stephens to proceed with the annual audit of the trust account. An application was forwarded to the SABFS and extension was requested for the submission of the annual financial obligations.

The Trust and CC will call upon SASSETA (Safety and Security Sector Education and Training Authority) to testify that Makwetu is presently being investigated for fraud, in that he submitted false claims whilst he was a member of the South African Board for Sheriffs and attended SASSETA meetings. Makwetu served as the representative of the Board on the legal chamber committee of SASSETA. Attached hereto annexure marked **LFSAT6** letter to the SANAPS chairperson and annexure marked **LFSAT7** a list of the legal chamber committee members of SASSETA.

It is our respectful submission that Makwetu is not fit to be a sheriff under these circumstances and should be suspended immediately and pending the outcome of the above investigations.

It is further respectfully submitted that his financial difficulties are due to his own over-spending and luxurious lifestyle. Information in our possession and investigations revealed that Makwetu has drawn huge salaries for himself in the amount of R744, 000.00 in the last 7 months, from

March 2009 – September 2009. This is more than R100,000.00 per month.”

- [5] As from 1 February 2009, following his appointment as sheriff of the magistrate’s court, Port Elizabeth South, the applicant agreed with the respondent to share premises and the relevant infrastructure as sheriffs. The idea behind was to share operational costs. The same arrangement was made with the ad hoc sheriff of Port Elizabeth West, Ms Soga. The respondent or his Trust was managing the sharing of the operating expenses and issuing invoices to recover such expenses from the applicant and Ms Soga. The applicant and Ms Soga fell into arrears with the payment of their pro rata share of the operating costs. As a result the applicant was called upon by the respondent to cede his book debts to the Trust and Close Corporation of which the respondent was trustee and member respectively. The Trust is known as L F Sharp Admin Trust and the Close Corporation as Ratelskloof Transport CC. The applicant did that but reserved his rights to scrutinise and verify, the amounts recorded as owing by him. Before the applicant did the verification, and on 18 September 2009, the respondent acting on his behalf and on behalf of the Trust and the CC brought an application for the sequestration of the joint estate of the applicant

and his wife. The applicant opposed the application, maintaining it was not insolvent and had committed no act of insolvency.

[6] On 12 October 2009 the respondent wrote a letter to the South African National Association of Progressive Sheriffs (SANAPS) (Annexure E), and copied it to Mr Mohammed, a member of the Executive Committee of SANAPS, SABS (South African Board for Sheriffs), as well as to the following:

- Cheslan American, the Chief Executive Officer of SABS;
- Thaka Seboka, a Member of the Board of SABS and Provincial Leader of SANAPS who was present at the meeting of the Executive Committee of SANAPS held on the 7th of October 2009;
- Charmaine Mabuza, the Deputy Chairperson of SABS and a member of the Executive Committee of SANAPS, who was present at the meeting of the Executive Committee of SANAPS held on the 7th of October 2009; and
- Bruce Rose-Innis, a Member of the Board of SABS and a member of SANAPS.

[7] Attached to the said letter (Annexure E) was a memorandum compiled by the respondent (Annexure F). In the letter the

respondent purports to send the annexed memorandum to the persons to whom it is addressed or copied for the purpose of rectifying ‘incorrect information or rumours’ forwarded presumably by the applicant, to ‘various roleplayers and /or stakeholders’ pertaining to the pending sequestration proceedings against the applicant and Ms Soga. The said role players and stakeholders are not mentioned. The incorrect information or rumours is also not disclosed of note is paragraph 67 of Annexure F. I will refer to it later. It reads as follows:

“It is evident, both Makwetu and Soga were appointed as acting Sheriffs by the Department of Justice, in consultation with the South African Board for Sheriffs (SABFS), without consulting their financial ability to start or finance an office in an urban area, or the so-called larger Sheriff office.”

- [8] On 10 November 2009 the respondent addressed a letter (Annexure K) to Attorneys Gerald Friedman, his attorneys, complaining that a Mr de Vos from the firm of attorneys failed to give due attention to his matter. He further stated “I am further aware of the fact that SARS is conducting an investigation against Mr Makwethu, or SARS is in the process of doing so, or will be doing so in the very near future. If this is indeed the case and being aware SARS is

always a preferent creditor, we as trustees and members stand to lose all our monies”. A copy of this letter was forwarded to the applicant’s attorney for response and also to Mr I. D. Mahomed. The respondent threatened to report his attorneys to the Law Society if the matter was not attended to before close of business on 11 November 2009.

- [9] On 16 November 2009 the applicant’s attorneys raised issue with the allegation in Annexure K to the effect that the applicant was being investigated by the South African Revenue Service, arguing that such an allegation was defamatory. A demand was made to the respondent to desist from the conduct of disseminating malicious rumours of and about the applicant.
- [10] There is yet another statement made by the respondent about the applicant in his letter addressed to the chairperson of SANAPS on 27 October 2009 (Annexure S) that letter is of course marked ‘confidential’ in the same way as the letter of 11 November 2009 (Annexure O) already referred to above. In Annexure S, the respondent writes:

“It has come to my personal attention that the Safety and Security Sector Education and Training Authority (SASSETA) is investigating the deputy chairperson of our organisation, Mr A. M. Makwetu for possible fraud.

The deputy chairperson, I am informed submitted false or fraudulent claims in respect of travelling and, or accommodation when he served on the legal chamber committee of SASSETA, whilst he was a member of the SA Board for Sheriffs (SABFS).

SANAPS interact with various stakeholders, the Department of Justice and Constitutional Development (DOJCD), the office of the Deputy Minister, Rules Board, Banking Council, Master of the High Court, Labor Court and SASSETA.

I am of the opinion the EXCO of SANAPS, and not only the chairperson, should urgently requests the deputy chairperson, Mr Makwetu, to resign as member of the EXCO.

Failure to comply with the request of the EXCO, the EXCO should suspend Makwetu pending the outcome of the fraud charges and, or investigation.

It is not in the interest of our new organization, if we are associated with issues like these.

I await to receive your advice”.

Annexure S was sent to SANAPS with a list (Annexure T). Setting out the names of 14 board members of SANAPS, the organisation's and contact details.

[11] In another letter on 12 November 2009 (Annexure N) the respondent forwards a copy of Annexure O to the SABS. He warns in the letter that confidentiality should apply as he would not like to jeopardise any present or future investigations. The heading in Annexure N that denotes the subject matter to be discussed therein is "A. M. Makwetu: Application for sequestration". A similar heading appears also in Annexure O and K. It appears reasonable to say that the respondent must have been feeling frustrated by the fact that the sequestration proceedings did not go swiftly and as fast as he thought they would. This comes out from the lack of patience displayed by him to his attorneys in Annexure K. The motive in Annexures K, N and O appears to have something to do with the sequestration proceedings.

[12] The applicant contends that the accusations highlighted in Annexures N, O and K are defamatory and injurious of him. They violate his constitutional rights and dignity. They are either untrue and/or constitute a malicious unfair comment.

[13] The respondent admits his conduct in the sense that he made reports to the Deputy Minister per Annexures O and T to the founding affidavit and to the SABS per Annexures N, O and S. His defence is that whilst he did that with the aim and purpose to have the applicant removed as sheriff and to have him declared unfit to hold office in such capacity, he did that within the ambit of qualified privilege. He had a duty, he claims, to bring the conduct of the applicant to the attention of the Deputy Minister and SABS who had the right to receive same. He however denies he had an interest to relay the applicant's conduct, as he perceives it, to anyone else and accordingly he denies he did so.

[14] The respondent places reliance on the provisions of the Sheriff's Act, 90 of 1986 (The Act), particularly section 45(1) where it is recorded that the Board (SABS) may on its own initiative or upon the lodging of a complaint, accusation or allegation, charge a sheriff with improper conduct. The Minister may, if in his opinion, sound reasons exist for doing so authorize any person to charge any sheriff with improper conduct and to enquire into the charge. That is the fundamental basis for the respondent, also a sheriff, for claiming that he himself would have been in breach of the sheriff's

code of conduct and ethical duty if he had failed to make such reports.

[15] The respondent also contends that it would not be appropriate for the Court to grant the relief sought as that would interfere with his legal obligation to bring the applicant's conduct to the attention of the Deputy Minister, SANAPS and SARS as he is duty bound to do. For purposes of authorising an investigation in terms of section 4(3)(b) and 16(k) of the Act. The respondent further states that he has no intention to unnecessarily publicise allegations as against the applicant and there is thus no apprehension of further harm and prejudice to the applicant which necessitates the applicant to seek the relief.

[16] The respondent admits forwarding Annexures E and F to various people as alleged. He however avers that he found that step proper in order to reverse a perception created to the effect that the association he had with the applicant was based on mentorship program and not a pure business deal. He believed the perception came from the applicant trying to justify the fact that he was in financial difficulties.

[17] The respondent denies that he made allegations to various members of the public that the applicant was under investigation by the South African Revenue Services. He dismisses that also as being inadmissible on the basis of the hearsay rule. This kind of approach by the respondent is not consistent with what is recorded in Annexure K wherein he says “I am further aware of the fact that SARS is conducting an investigation against Mr Makwetu, or SARS is in the process of doing so, or will be doing so in the very near future”. Though this annexure was addressed to his attorneys but it was copied to Mr Randall and Mr I. Mahomed. There is thus no question of hearsay.

[18] In another letter written by the respondent, that is Annexure O, the respondent writes that “... information has revealed that Makwetu is being investigated for non-payment of VAT or provisional tax and others”. The respondent draws attention to annexure LFS 21 a document addressed by SARS Assessment Centre to the Acting Sheriff for the magistrate’s court PE, West. The addressee is not the applicant but Ms Soga as she was acting sheriff for PE West. The respondent also refers to another document LFS 22, allegedly by the applicant’s bookkeeper wherein it is explained that sheriffs for PE South and West used the same Vat No. as the applicant had

been appointed for PE, West, as well up to April 2009. In any event LFS 21 what is revealed is “SARS are in process of reconciling the above account. In order for SARS to finalise this, the following is required”. The information required is proof of payment of PAYE in respect of certain payments received.

[19] The respondent also avers that he phoned SARS, “in order to assure that my letters do not record any falsehood”. It was confirmed, according to him, that the applicant was being investigated in relation to non-payment of VAT and provisional Tax. The applicant disputes he was ever investigated by SARS. In annexure LFS 21 no reference is made to VAT or provisional tax. As submitted by the respondent, I agree that it is highly unlikely that SARS would have disclosed confidential information to a person other than the relevant tax payer.

[20] The issue of non-payment of membership fees of SANAP, as reflected in Annexure O, explained by the respondent as follows. He, Deputy Secretary of SANAPS, was privy to the financial printouts of SANAPS. He then observe that as at 6 October 2009 the applicant was owing to SANAPS as membership was outstanding in excess of 120 days.

[21] The respondent reported in Annexure O that the trust account conducted by the applicant was in a 'total mess' because an auditor, Craig Killian from auditors Moore Stephen, so advised the applicant in his presence. Killian's confirmatory affidavit has not been secured as the respondent, in his explanation, cannot force him. Defence Strydom, assisted the applicant's office at the request of the respondent, to render the account auditable and an unqualified report was rendered by the auditor Killian. It is not clear when the unqualified report was made. The question is whether that remark of "in a mess" made in the circumstances would justify a report to the Deputy Minister and the SABS. In my view that would not be a matter warranting the attention of such persons more especially that 1) it was not a different report and 2) it was not even a final report.

[22] The allegation that the applicant was being investigated for fraud by SASSETA relates to alleged claims by the applicant in respect of overstated mileage usage and unnecessarily expensive accommodation. This is the version of the respondent. Such complaint which was internal in nature, was allegedly by Dr N. Maharaj who allegedly instructed the applicant to refrain from submitting overstated claims for travelling and for accommodation. What purports to be an affidavit by Dr N. Maharaj was not signed

for reasons given by the respondent. Even approaching it on the basis that it had been signed all it does is to confirm the content and correctness of the affidavit by the respondent. In his affidavit the respondent does not say, as he says in Annexure O, the applicant was being investigated for fraud, based on false claims. So the information in Annexure O is devoid of truth.

DEFENCE OF PRIVILEGE

[23] It is perhaps appropriate to first examine the defence of privilege before applying it to the facts of this case. It implies that the person who publicises a defamatory statement has a duty to make the publication on an occasion that is privileged. In other words privilege attaches to the occasion. Whether or not the occasion is privileged depends on the circumstances of the case, viewed objectively. That is whether in eyes of a reasonable man the circumstances create a duty which entitles the defendant to speak. The state of mind of the defendant becomes relevant when the enquiry is about whether or not the privileged occasion was abused.¹ The defendant bears the onus to prove that the occasion was privileged and that the publication was relevant thereto².

¹ De Waal v Ziervogel 1938 (AD) 112 at 122 – 123; Mahomed and Another v Jassiem 1996 (1) SA 672 (A) at 710 E to D.

² Yazbek v Seymour 2001 (3) SA 695 (E) at 702 G

Truthfulness of the publication has no bearing on the defence of qualified privilege but may only be relevant to an enquiry as to whether the publication was actuated by malice or not.

[24] Section 8 of the Act sets out the objects of the Board for sheriffs to be the maintenance of the esteem of the enhancement of the status of, and improvement of the standard of training and functions performed by, sheriffs. Section 43 provides that a sheriff shall be guilty of an offence if he/she makes fraudulent or misleading representations. Whenever there is a complaint, accusation or allegation against a sheriff it is to be lodged with the Board in the prescribed manner.³ The various publications in this case do not appear to have complied with section 44(1) as far as the requirement of lodging in a prescribed manner is concerned.

[25] I did not understand the version of the applicant, either on the papers or as argued by counsel Mr Scott, to be that the respondent would have no duty in normal circumstances to communicate the applicant's misconduct, if and when it exists, to SABS or the Minister of Justice. The applicant's case in respect of which he bears onus is that the respondent was motivated by malice and had

³ Section 44 (1) of the Act.

no reasonable grounds to believe in the truth of the publication.⁴

What I also have to consider is whether the publication was germane to the matter in issue. In my view the respondent would be justified in accusing the applicant of misconducting himself even without complying with section 44(1) which relates to compliance with a prescribed manner.

[26] In examining the evidence placed before court there are factors that clearly show that the respondent was actuated by malice in making the publication. I will refer to the following.

26.1 It is no wonder that some of the annexures complained of capture the heading “application for sequestration.” That is obviously irrelevant to the relief sought by the respondent. That is an indication, in my view, that the respondent was not acting in good faith. So much has been said in these papers that relate to the sequestration proceedings. It appears the parties got an opportunity, more so the respondent, to advance their respective versions in the sequestration proceedings. Issues related to such proceedings dominate the real issues relevant to the current proceedings.

⁴ Joubert & Others v Venter 1985 (1) SA 654 (A) at 702B

26.2 In as much as the defence of qualified privilege is not dependant on the truthfulness or otherwise of the publication⁵, it is, however, helpful to establish whether the respondent did or did not believe the facts stated by him were true. If untrue that may lead to an inference of malice. All that is complained of which is highlighted in Annexures O, K, F, S either constitutes falsehood or an unfair comment. It is difficult to understand how, if he believed his statements were true, he would make such statements as if they are statements of fact. To say, just to mention a few, the applicant was being investigated for fraud in submitting false claims for travelling and in another instance for non-payment of VAT, given the impression that the respondent did not believe the statements were true. This leaves one to conclude that the respondent was actuated by malice. It is also difficult to understand the relevance of reporting not only to the Minister and SABS but also to SANAPS and others who had nothing to do with the disciplinary measures that could be taken against the applicant. All that would not be covered under the defence of privilege.

THE RELIEF SOUGHT

⁵ *Borgin v De Villiers & Another* 1980 (3) SA 556 (A)

[27] While I find it reasonable and appropriate to restrain further defamatory publication in a deserving situation I agree that the order sought, as it now stands, is wide and indeed appears to be seeking to restrain all conduct, unlawful and lawful. I would expect the relief sought to be directed at restraining the publication of defamatory information or injurious material concerning the applicant. That is not the relief sought. The confirmation of the Rule would thus have disastrous consequences which would encroach on the right to freedom of expression. I find it unnecessary to enter the debate which features in a number of cases. Suffice to say I am of the view that in appropriate circumstances a respondent may be interdicted from publishing defamatory or derogatory statements and therefore an applicant “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”. In any event the applicant has recourse against the respondent for the alleged past misconduct by way of a claim for damages.⁶ In view of that potential I also find it prudent to steer clear of making a finding as to whether the previous publication is privileged communication or not.

⁶ *Heilbron v Blignaut* 1931WLD 167; *Roberts v The Critic Ltd and Others* 1919 WLD 26; *Cleghorn & Harris Ltd v National Union Distributive Workers* 1940 CPD 409 and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A).

[28] As regards the issue of urgency I find that the applicant has established the circumstances of urgency. In a situation where the respondent would continue disseminating information of and concurring the applicant the latter would be justifiably apprehensive that it would not stop.

[29] In the light of my conclusions reflected above the application must fail.

The rule *nisi* is discharged.

The application is dismissed with costs.

C T SANGONI
JUDGE OF THE HIGH COURT

FOR APPLICANT : ADV. P. W. A. SCOTT
Instructed by : Michael Randell Attorneys

FOR RESPONDENT : ADV. P. E. JOOSTER
Instructed by : Friedman Scheckter Attorneys