



**THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION,
DURBAN**

CASE NO. D6316/2019

In the matter between:

DEREK HANEKOM

APPLICANT

and

JACOB GEDLEYIHLEKISA ZUMA

RESPONDENT

ORDER

The order granted is as follows:

1. It is declared that the allegations made about the applicant, Derek Hanekom in the following statement posted as a tweet, are defamatory and false:
‘I’m not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.’

2. It is declared that the respondent, Jacob Gedleyihlekisa Zuma's publication of his tweet above was and continues to be unlawful.
 3. The respondent is ordered to remove the tweet within 24 hours from all media platforms including by deleting it from his Twitter account.
 4. The respondent is ordered, within 24 hours, to publish on Twitter from his Twitter account (@PresJGZuma) the following apology:

'On 25 July 2019, I published a tweet which alleges that Derek Hanekom is a known enemy agent. I unconditionally withdraw this allegation and apologise for making it as it is false.'
 5. The respondent is interdicted from publishing any statement that says or implies that the applicant is or was an enemy agent or an apartheid spy.
 6. The interdict in the preceding paragraph does not bar the respondent from testifying truthfully, as he is required to, at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.
 7. The applicant is awarded damages against the respondent, the quantum of which is yet to be determined.
 8. The determination of the quantum of damages of R500 000 claimed by the applicant against the respondent is referred for oral evidence.
 9. The respondent is ordered to pay the applicant's costs, including the costs of two counsel.
 10. The matter is adjourned sine die.
-

JUDGMENT

D. PILLAY J

Introduction

‘Be vigilant, comrades. The enemy is vigilant. Beware the wedge driver! Men who creep from ear to ear, driving wedges among us; who go around creating splits and divisions.

Beware the wedge driver! Watch his poisonous tongue.’

Oliver Tambo closing address, Morogoro Consultative Conference¹

[1] Derek Hanekom applies urgently to interdict Jacob Gedleyihlekisa Zuma for publishing the following statement on his twitter account on 25 July 2019:

‘I’m not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.’

[2] Mr Hanekom contends that Mr Zuma’s tweet implies that he is an apartheid spy. As a result, Mr Hanekom receives abusive messages in which he is referred to as an ‘askari’ and an ‘impimpi’. Both words are derogatory references to apartheid era spies. Threats to harm him and his wife put their personal safety at risk. He asserts that Mr Zuma’s tweet is defamatory and false, resulting in an actionable injury to his reputation and dignity. For this, he claims an apology and compensation from Mr Zuma, and an interdict.

[3] Mr Zuma admits he published his tweet about Mr Hanekom. He was responding to the tweets of Julius Malema, the leader of the Economic Freedom Fighters (EFF)

¹ L Callinicos ‘Oliver Tambo – Beyond the Engeli Mountains’ (2004) at 336. This biography has a stamp of authority with the forward by President Thabo Mbeki. [https://www.anc1912.org.za/myanc-close-ranks-be-vigilant-comrades-enemy-vigilant-beware-wedge-driver-men-who-creep-ear-ear](https://www.anc1912.org.za/myanc-close-ranks-be-vigilant-comrades-enemy-vigilant-beware-wedge-driver-men-who-creep-ear-ear;); <https://www.dailymaverick.co.za/article/2017-12-14-analysis-morogoro-conference-memorandums-wedge-drivers-and-the-saving-of-the-ancs-soul/>; <https://www.dailymaverick.co.za/opinionista/2018-09-20-petty-palace-politics-fly-in-the-face-of-the-need-for-unity/>.

published on 23 July 2019 which read:

‘Hanekom gave us the list of the ANC MPs who were going to vote with us in the vote of no confidence against Jacob Zuma.’

And

‘Today he calls us fascists, but Derek Hanekom plotted with the EFF to bring down President Zuma. The same goes with Solly Mapaila (Deputy General Secretary of the SACP) too.’

[4] Mr Zuma denies ever claiming that Mr Hanekom was an apartheid spy. Nor can his tweet be reasonably construed as suggesting that Mr Hanekom is an apartheid spy. Notwithstanding, Mr Zuma may or may not claim that Mr Hanekom is an apartheid spy when he resumes his testimony at the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State chaired by Deputy Chief Justice Zondo (the Commission). Mr Zuma’s stance is not to prove that Mr Hanekom is an apartheid spy – at least not in these proceedings. As Mr Hanekom seeks an interdict in order to ‘muzzle’ him from testify at the Commission, this application should be dismissed.

[5] Mr Zuma admits that he uses ‘the medium of Twitter to engage with the public’ and that he has ‘significant followers’. His tweet transmitted automatically to over 323 000 Twitter followers, 1817 of whom commented and 2902 retweeted Mr Zuma’s tweet.

Legal principles

[6] Defamation is the wrongful and intentional publication of defamatory words or conduct pertaining to a claimant. The four requirements to prove defamation are: a. wrongfulness, b. intention, c. publication and d. the defamatory words or conduct about the claimant.² Once a claimant establishes c. and d., then a. and b. are automatically presumed. That is, the publication is presumed to be both wrongful and intentional.³ To avoid triggering this presumption, and consequently, liability for defamation, a defendant

² Khumalo v Holomisa 2002(5) SA 401 (CC) at para 18.

³ Neethling, Potgieter, Visser ‘Law of Delict’ (1993) at 327.

must raise a defence which rebuts either the requirement of wrongfulness or intention.⁴ Constitutionally, Mr Hanekom's rights to dignity (s 10) and freedom and security (s 12) are limited by Mr Zuma's right to freedom of expression under s 16 of the Constitution of the Republic of South Africa, 1996. And vice versa.

[7] The test for defamation meaning is whether, in the opinion of a reasonable person, the words have the tendency to undermine, subvert, or impair a person's good name, reputation, or esteem in the community.⁵ This is a two-stage inquiry.

[8] First, what is the '*natural*' or '*ordinary*' meaning of the statement? For this, neither the meaning which the maker of the statement intended to convey, nor the meaning given to it by the persons to whom it was published, matters. So, whether they believed it to be true, or whether they then thought less of the plaintiff are irrelevant considerations.⁶ The test is objective. How would a reasonable person of ordinary intelligence have understood the publication?⁷ A reasonable readers are not naïve. They take into account not only what the words say, but also what they imply.⁸ Second, based on the statement's natural or ordinary meaning, would it tend to lower the claimant in the estimation of right-thinking members of society generally?⁹

[9] To imply that someone is an apartheid spy or dishonest is automatically defamatory.¹⁰ To call persons who hold high office spies, imputes to them that they lack 'the qualities that are required to be entrusted with the confidences of high office.' This 'would indeed tend to lower them in the estimation of people straddling all sectors of our society'. This is defamatory.¹¹

⁴ Neethling, Potgieter, Visser 'Law of Delict' (1993) at 327; LTC Harms and JH Hugo 'Amler's Precedents of Pleadings' (1989) at 99.

⁵ South African Associated Newspapers Ltd and Another v Yutar 1969 (2) SA 442 (A) at 451.

⁶ Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) 2011 (3) SA 274 (CC) para 89

⁷ Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) 2011 (3) SA 274 (CC) para 89

⁸ Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994 (2) SA 1 (A) at 21A-B.

⁹ Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA) paras 26-29.

¹⁰ Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA)

¹¹ Tsedu v Lekota 2009 ZASCA 11 para 17.

[10] Context is relevant for evaluating the requirements defamation.¹² When the context is political, a higher tolerance for robustness and rhetoric applies than in cases which do not implicate the public interest or the political.¹³

The issues

[11] Neither the facts nor the legal principles are in dispute. As it is common cause that Mr Zuma published his tweet, proof of the act, publication and intention are established.¹⁴ Wrongfulness is not only presumed but also conceded, that is, if I find that Mr Zuma's tweet implies that Mr Hanekom is an apartheid spy. If I do, as Mr Hanekom requests I should, then the application must succeed. If I find the opposite, then the application must fail. Reduced to this binary, the issue is a determination of fact or inferences from facts. Justification would not arise. However, Mr. Zuma reserves the right to justify his tweet as being true, fair comment or falling within the limits of the right to freedom of expression in s 16 of the Constitution.

[12] What the case is about is the 'natural' or 'ordinary' meaning of Mr Zuma's tweet in the context. Would a notional reasonable right-thinking reader with normal intelligence understand Mr Zuma's tweet to mean that Mr Hanekom is an apartheid era spy acting against the ANC? It is common cause that the posts on social media do not represent the reasonable reader's understanding, but may go to assessing quantum, if that arises. Importantly, what this dispute is not about is whether, as a fact, Mr Hanekom is an apartheid spy. Nor does it call for a value, moral or political judgment about whether Mr Hanekom's or Mr Zuma's understandings of politics within the ANC should prevail. As a dispute presented for resolution through litigation, legal principles must apply.¹⁵

¹² *Waldis v Van Ulmenstein* (2017 (4) SA 503 (WCC) para 11.

¹³ *Democratic Alliance v African National Congress and Another* (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (19 January 2015); *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002)

¹⁴ Neethling, Potgieter, Visser 'Law of Delict' (1993) at 319.

¹⁵ M H Marshall, Chief Justice Supreme Judicial Court Massachusetts United States of America Bram Fischer Memorial Lecture - Legal Resources Trust Friday, November 13, 2009.

[13] The issue boils down to interpreting Mr Zuma's tweet in the political context in which he published it. As an interpretive exercise, it is possible to resolve the merits on the pleadings. I am indebted to both Counsel for narrowing down the issues thus. After summarising the case for each litigant, I analyse the phrase 'known enemy agent' in isolation, then in the context of the entire tweet and finally in the light of the reference in it to the Commission. I preface my analysis of Mr Zuma's tweet with a brief description of the political context in which this litigation presents. I quote extensively so that the litigants 'speak' for themselves, and their 'voices' and the tone in which they choose to express themselves in their affidavits, are not diluted or misrepresented by my paraphrasing.

Mr Hanekom's case

[14] Mr Hanekom became a member of the NEC of the ANC in 1994. He served as Minister of Agriculture and Land Affairs from 1994 to 1999, as Deputy Minister of Science and Technology from April 2004 to October 2012, as Minister of Science and Technology from 4 October 2012 to 25 May 2014, and as Minister of Tourism from 26 May 2014 to 30 March 2017 and 27 February 2018 to 25 May 2019. Additionally, he was a member of Parliament from 1999 to 2004 and from 30 March 2017 to 27 February 2018. Then he resigned as a member of Parliament. He is currently the chairperson of the board of the Ahmed Kathrada Foundation, an organisation formed to continue the legacy of the anti-apartheid struggle stalwart. He is also a recipient of an award of merit from the German President in recognition of his contribution to cooperation between Germany and South Africa as Minister of Science and Technology. All this vests Mr Hanekom as a politician with a reputation that has considerable currency.

[15] Mr Hanekom submits that the tweet, expressly or by implication, characterises him as a 'known enemy agent'; and that he is an apartheid spy in the context of Mr Zuma's evidence at the Commission. As an enemy agent or apartheid spy it follows that he 'conducted himself in a manner which is contrary to the best interests of the ANC

and the country; that he 'lacks integrity'; that he is 'untrustworthy'; and that he lies and deceives his comrades. These statements presented as fact are 'entirely and demonstrably false'. Mr Hanekom claims he is not and has never been a spy for the apartheid government. Furthermore, not only is the tweet false, 'it is inconceivable that Mr Zuma could have genuinely believed it to be true.' Mr Zuma is fully aware of Mr Hanekom's history as an anti-apartheid activist and loyal member of the ANC.

[16] Publication of Mr Zuma's tweet is widespread in social and print media. That is the nature of the Internet. Mr Zuma knew that the communication via Twitter would be 'instantaneous, borderless and far-reaching.' A person conducting an Internet search of Mr Hanekom's name 'anywhere in the world will see the statement and will understand that [he] was or still [is] an apartheid spy, lacks integrity and trustworthiness and conducts himself in a manner contrary to the law and best interests of the country.' The tweet continues to circulate widely and with additional comments and innuendo, to cause immense harm and damage to Mr Hanekom's reputation for as long as it remains published without censure.

[17] Axiomatically, without his integrity, his colleagues and the public he serves perceive him as 'untrustworthy and suspicious'. Mr Zuma's tweet undermines Mr Hanekom's legitimacy and authority as a senior and previously well-respected politician, as well as his legacy as an anti-apartheid activist. Unless the court grants the interdict, his reputation and integrity will remain severely impugned and his integrity as a member of the ANC will remain in question.

[18] The interdict is urgent. The public should be 'disabused of the lies that Mr Zuma is perpetrating'. Because the matter is high profile, the abuse takes place in the public eye. Comments on social media call Mr Hanekom 'askari' and 'impimpi'. Historically, these words were reserved for those who were suspected of being disloyal to the liberation struggle. They were often assassinated or at the very least ostracised. It is exceptionally dangerous to be referred to in these terms. Nor is it in the best interests of the people of South Africa to lose faith in the integrity of those who serve at the highest

echelons of government. Furthermore, his fundamental right to dignity has been infringed.

Mr Zuma's case

[19] Mr Zuma is a member of the ANC 'for decades'. He was the President of the ANC and of South Africa for two terms following the general elections in 2009 until he resigned on 14 February 2018.

[20] Mr Zuma contends that it is not he, but Mr Hanekom who 'deliberately and mischievously adds 'apartheid spy' to his 'reference to him as an enemy agent.' He emphasises:

'I never referred to Hanekom as an apartheid spy. I have not expressed any view about his role and history in the ANC. It is instructive that he deems it appropriate to prevent me from future statements I may or may not wish to make about him. His anxiety in this regard is indeed telling.'

[21] Mr Zuma admits that he placed his tweet within the context of his evidence in the Commission. Following Mr Malema's disclosure of Mr Hanekom's role in supporting enemies of the ANC, he said that Hanekom was a known enemy agent in the following context:

'Hanekom, a member of the ANC had worked with the EFF, an avid opposition political party that had ceaselessly campaigned to discredit the ANC and its President. This conduct of Hanekom – working with the enemies of the ANC to weaken it politically and ultimately cause its removal from power fits well within the pillars of the intelligence plan that I spoke about at the Zondo Commission. More importantly, his conduct fits the definition of enemy agent.'

[22] His evidence at the Commission 'is what it is'. He has never testified there that Mr Hanekom was an enemy agent. He said that 'there is an intelligence plan that [he is] aware of, which was specifically created to ensure that the ANC is ultimately hijacked by a person who had worked for the intelligence organizations to fight against the ANC.'

The plan included ensuring that 'the ANC was weakened and controlled by the interests represented by those intelligence organizations. There are people who do their work purporting to advance a good agenda but in truth being part and parcel of the plan.' The Commission was his 'graveyard' in which his enemies intended to bury him with 'lies and character assassination.'

[23] Mr Zuma advances as 'true' that Mr Hanekom was amongst those who deliberately sought to assassinate Mr Zuma's character and discredit his political role both in the ANC and the country. Mr Hanekom also used his position in the ANC and its information to support its enemies and those of Mr Zuma. A 'clear example of his role' is his support for the EFF to bolster its political opposition of the ANC. Mr Zuma accepts 'that the statement is defamatory, but it is true and was a fair comment.'

[24] As for Mr Hanekom's role in the liberation struggle, it does not mean that he did not act 'against the interests of the ANC when he deliberately worked with its enemies to discredit its support and encourage its removal from power. When he worked against the political interests of the ANC by actively seeking the help of the enemies of the ANC to topple its democratically elected President, Hanekom earned his crown as enemy agent.'

[25] Mr Zuma maintains that Mr Hanekom did work 'with the political enemies of the ANC when it was convenient for him. It is clear that he could use his ANC membership to bolster the strategies of political enemies of the ANC against it. In other words, he could work against his own political party, to sure that it was weakened and finally removed from power. That, on the objective and uncontested facts, is disloyalty to the ANC. It places him in the camp of the enemy of the ANC while he continues to declare himself as its loyal member.'

[26] Mr Hanekom deliberately misconstrued his tweet 'to suit his grand plan to muzzle [Mr Zuma] into silence' in case he makes any further revelations in other ANC forums or Commissions. Mr Hanekom may not use Mr Zuma's evidence at the Commission 'to

fight' him in this court before he has concluded his evidence. An interdict would 'muzzle the truth,' unfairly limit his right to share his political opinions about the actions of persons in the ANC 'who betray its historical mission'. Furthermore, the matter is 'self-evidently not urgent.'

[27] Mr Zuma seeks costs on a punitive scale against Mr Hanekom because Mr Hanekom 'is actually lying under oath and misleading this court' whereas he, Mr Zuma has 'demonstrated' that his tweet is 'true'.

Context

[28] Although the dispute is framed as a claim for defamation, a larger conflict casts a longer shadow beyond the legal and into the political. The ANC, through its highest decision-making structure, its NEC, resolved to recall Mr Zuma as President. Mr Hanekom actively supported that decision. Notwithstanding their common political home, both litigants find themselves on opposite sides of each other, not only in this application but also within the ANC. In the following extract, Mr Zuma's identifies each faction as those opposed to the wishes and objectives of the ANC and those who deployed him as Head of State:

'As my tweet demonstrates, my removal as Head of State was part of the broader plan by those opposed to the wishes and objectives of the party that deployed me as Head of State.' By his own admission, part of which is attached to this affidavit, Hanekom in conflict with positions of the ANC deemed it fit to plot my removal with enemies and opponents of the ANC. (my underlining)

[29] This litigation is a proxy for the internal conflict within the ANC. Repeatedly, Mr Zuma claims that Mr Hanekom undermines the ANC:

'Hanekom by his own admission held various meetings with those who sought to undermine the ANC by removing its elected President as Head of State.'

'The statement that I made against Hanekom is justified and is a consequence of Mr Malema's claim that he plotted to undermine the ANC and its leadership.'

(my underlining)

[30] Repeatedly, Mr Zuma insinuates that Mr Hanekom is dishonest and untrustworthy:

‘Mr Hanekom’s allegations about his role in the ANC and the anti-apartheid struggle are entirely irrelevant for the court to determine the dispute in respect of his actual role.’

‘His duplicitous character has been confirmed by his own admission that he had no difficulty working with the enemies or opponents of the ANC to remove its President when it had not adopted such a resolution.’

‘Hanekom acted in an untrustworthy manner when he worked with the enemies of the ANC to topple it and undermine its leadership. He is rightly treated with suspicion for the role he played in toppling the ANC leadership and undermine the unity of the ANC.’

‘Hanekom is the last person to talk about lying. His entire life as a duplicitous two-faced person is an embarrassing lie. He seeks to reinvent history and perpetuate a lie in the face of evidence that he acted in collaboration with parties acting to undermine the ANC.’

(my underlining)

[31] Mr Zuma dismisses Mr Hanekom’s struggle credentials with:

‘It is true that I first met Hanekom in 1988 in his staged exile in Zimbabwe.’

(my underlining)

[32] Mr. Zuma takes ‘exception to Hanekom’s constant reference to him as ‘a liar’ in his founding affidavit. He counters that it is people like Mr Hanekom who seek ‘to suppress alternative views and facts by rubbishing those who may expose ... liars or enablers of State capture, when in fact it is they who seek to conceal the true nature of State capture they have perpetrated since South Africa’s political settlement in 1994.’

(my underlining)

[33] This litigation is a conflict aggravator.¹⁶ By launching this application, Mr Hanekom signals to Mr Zuma that invoking internal organisational remedies for dialogue is over. Nevertheless, on 29 July 2019, before launching this application, Mr Hanekom issued a demand for the relief he now claims in this application. Mr Zuma's attorneys acknowledged receipt of the demand on 30 July, indicating that they would revert when they had instructions. They did not. Once the deadline of 2 August passed, Mr Hanekom launched this application on 5 August. Still, Mr Zuma did not respond to clarify his tweet.

[34] Mr Zuma had a choice. He could have clarified his tweet to say, as he now does in his answering affidavit, that he was not suggesting that Mr Hanekom is an apartheid spy. Mr Zuma chose not to respond to the demand. It follows that Mr Zuma wanted his tweet to remain on his Twitter account. He too wants a litigated outcome. Neither litigant seems inclined to engage bilaterally or within the political structures of the ANC to find a negotiated solution. Pursuing dialogue through mediation is not even a remote possibility. Manifestly, mutual distrust has broken down the relationship irretrievably. The conflict is intractable. Both litigants are stoically positioned. Preferring the battlefield of litigation, both are prepared for lawfare.

[35] Lawfare is a consequence of the failure of dialogue and politics. As a shield, lawfare is used to protect the rule of law. As a weapon, lawfare is used to enforce rule by law. This duality 'can be a good and a bad thing.' It is good for litigation to factor in politics to advance constitutionalism; it is bad when litigation becomes the site of political contestation with politicians trying to usurp the judiciary to do their bidding.¹⁷ However, it will be far worse without an effective judiciary to take up the slack flowing from failed politics and social discord. Escalating lawfare reflective of institutional dysfunctionality, social discord and ailing politics will, over time, constrain the capacity of litigation to remedy disorder efficiently.

¹⁶ M Anstey 'Negotiating Conflict – Insights and Skills for Negotiators and Peacemakers' (1991) at 43.

¹⁷ Michelle le Roux and Dennis Davis 'Lawfare – Judging Politics in South Africa' (2019) p5, 20, 300.

[36] This litigation is a battle or skirmish in the overall war for dominance and control of the ANC by one or other faction. The conflict is intractable political contestation for which a legal resolution is sought. Interest in its outcome ramifies beyond the litigants and into the public domain. This is the context in which the defamation claim serves before the court. Mindfulness of this context facilitates the court's intervention with due regard for the three 'I's' – Independence, Impartiality and Integrity. One way or the other the courts will solve the dispute; but it would take much more to resolve the conflict.

The words in the phrase 'known enemy agent'

[37] Mr Zuma's stance is that 'enemy' refers to the EFF and other opposition parties and anyone who sought his removal as President of the country, including other members of the ANC. His tweet means that Mr Hanekom has 'connived and colluded with the enemies and opposition parties that sought to remove him as president of the Republic of South Africa.'

[38] By 'agents' he means those who 'by their very nature operate clandestinely'. It is precisely through 'seeming loyal' and committed that enables agents to be effective. Such persons, as agents of enemies, foes or adversaries of the ANC, are well known. Mr Zuma fortifies this interpretation when he adds in his supplementary affidavit, that as an enemy agent, Mr Hanekom was disloyal and undisciplined. He brought the ANC into disrepute, in violation of the constitution of the ANC. For this misconduct, Mr Hanekom falls to be disciplined. Thus far, Mr Hanekom has not been disciplined. That may still happen.

[39] As for 'known' Mr Zuma says:

'In the ANC it is known that a member that works with its enemies to weaken it, is an enemy agent. Whether or not it is harsh to do so it's a matter of perspective or choice of words. Nothing really turns on it.'

[40] Mr Sikhakhane argues that it 'would be a leap of logic' to equate 'known enemy agent' to mean an 'apartheid spy'; it is Mr Hanekom himself who makes this link. The

tweet is political speech that must be protected as such.

[41] Mr Hanekom's succinct response to Mr Zuma's use of 'enemy' to refer to opposition parties in a constitutional democracy is that it is 'indefensible'. The ordinary and natural meaning of the word 'agent' means acting on behalf of and in the interests of another or taking on the role of another. In the context it means that Mr Hanekom acted on behalf of the enemy, in their interests and against the interests of the ANC. He acts secretly, dishonestly and in violation of the constitution of the ANC. As a representative of the people on the ANC's NEC and in Parliament, this insinuation casts him as duplicitous and subversive. This alleged duplicity was allegedly known before he supported the removal of Mr Zuma as President. It was known to others besides Mr Zuma. It arises not from the recent or even single issue of discussing the removal of Mr Zuma as President. The phrase reaches into history. Historically, apartheid spies were generally referred to as enemy agents. This is false and defamatory. This implicates the reputation of Mr Hanekom.

[42] Unsurprisingly considering that both litigants gleaned their political culture and education within the ANC, there is little difference between their interpretations. As political actors they allow for some robustness in political speech. They agree that historically, apartheid spies were referred to as enemy agents. And it is the hurtful to be called an apartheid spy. This would render the tweet defamatory. But, says Mr Zuma, his tweet does not refer to apartheid spy and is therefore not defamatory.

[43] Notwithstanding his denial, Mr Zuma describes 'enemy agent' to be 'a member who works with its enemies to weaken it'. This description is known in the ANC. Historically, it referred to apartheid spies. 'Harsh' as Mr Zuma acknowledges it to be, he dismisses it as is 'a matter of perspective or choice of words.' In my view, to the reasonable reader, the historical connection to apartheid spies is the most obvious. This is the connection that Mr Zuma wants readers to make. Otherwise, he would have cured the innuendo or ambiguity when he received the demand.

[44] For justification, Mr Zuma has no evidence other than Mr Hanekom's admission. He says:

'The evidence that I have of Hanekom having worked with the political enemies of the ANC to discredit and weaken its support is his admitted contact.'

[45] Mr Hanekom's admission is that he met Mr Godrich Gardee, the Secretary-General of the EFF at the latter's request. He disclosed this meeting openly and publicly. He admits that he attended several meetings with other like-minded senior members of the ANC who also wanted Mr Zuma removed as head of State in the best interest of the ANC and South Africa. At two ANC NEC meetings held in 2016 and 2017, many ANC NEC members called on Mr Zuma to resign as President. Accordingly, he denies that he held various meetings with those who sought to undermine the ANC, that he met with other members of the EFF and that he 'connived and colluded with enemies and opposition parties'. He also denies 'in the strongest terms' that he ever received any financial reward or support for his role in removing Mr Zuma as President or for his support for President Cyril Ramaphosa's 2017 campaign.

[46] In my view, nothing from Mr Hanekom's admission lays a basis for Mr Zuma to label him as a 'known enemy agent' or apartheid spy. Dishonesty and duplicity embedded in the phrase makes it automatically defamatory. That Mr Zuma links his tweet to Mr Hanekom's admission and role in removing him as President is odd. The decision to remove Mr Zuma as President was that of the NEC. The practice of recalling a head of State is not new. Mr Zuma is well aware of this. Ironically, it is how he came to replace his predecessor, President Mbeki.

[47] Mr Zuma offers no evidence to support his tweet that Mr Hanekom is an agent of the EFF. The tone of Mr Malema's tweet and the innuendo that Mr Hanekom is fascist, is at odds with such a proposition. If Mr Hanekom is an agent of the EFF and acts in its interests, it would be foolhardy for Mr Malema to expose and disown a useful mole in the ANC. I find no evidence to support Mr Zuma's claim that Mr Hanekom is either an enemy of the ANC or an agent for the EFF or opposition parties.

[48] As indicated above, the litigants limited the dispute to the interpretation that a reasonable reader would give to Mr Zuma's tweet. They also agreed that if I find that a reasonable reader of the tweet would infer a reference to apartheid spy then that would settle the dispute. Before making conclusive findings in this regard, the phrase has to be interpreted in the context of Mr Zuma's tweet.

Phrase in the tweet.

[49] Undoubtedly the first sentence – 'I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom' – reminds Mr Zuma of his testimony at the Commission. However, it is the second sentence – 'It is part of the plan I mentioned at the Zondo Commission' – that invites the question: What was the plan that it causes him to link the Commission to Mr Hanekom?

[50] At the Commission, Mr Zuma testified that in his role in the ANC as intelligence chief he knew about the work of three foreign intelligence agencies and apartheid spies who had infiltrated the ANC. He named two senior members of the ANC as apartheid spies. He has not named Mr Hanekom – yet. About the plan, he testified at the Commission as follows:

'[T]here were three intelligence organisations that met ... to discuss me and had a plan to begin in 1990 a process of character assassination of Zuma. Two of these organizations came from two different big countries and one of them came from inside South Africa under – which was one of the structures under apartheid which was part of this conspiracy'.¹⁸

'Now Zuma has information about these [spies]. We do not know when will he use this information to stop that process that plan of theirs and therefore they took a decision that Zuma must be removed from decision making structures of the ANC and that is why the[ir] character assassination began.'¹⁹

'I am saying this because there has been a process and particularly against

¹⁸ Transcript p15.

¹⁹ Transcript p16.

Jacob Zuma a conspiracy. I am sitting there and I am told by other organisations that my organization as well as in the NEC there are people who are working for them whom they want to be in control of this country.’²⁰

And

‘We kept it as an intelligence issue but it is as important to say this because the character assassination that I faced over the years more than 20 years this is one of the clear sources that I know. There was a plan to deal with Zuma and Zuma has been dealt with all the time.

In other words foreign intelligence organisations and the local one of course under apartheid for a variety of reasons thought it was important to deal with this man.’²¹

‘So the issue of Zuma must resign, Zuma must leave the leadership started way back, as part of this plan.’²²

[51] Clearly and consciously, Mr Zuma links his evidence at the Commission to Mr Hanekom in his tweet. The plan which allegedly started more than 20 years ago persists today in the ANC and its NEC through Mr Hanekom. So, it is not as recent as the discussions in 2017 or 2018 to have Mr Zuma recalled. Reasonable readers would interpret the link in the tweet to the Commission to mean that Mr Hanekom is part of that plan in which apartheid spies and agents conspired with two big countries to ‘deal with Zuma’. In other words, Mr Hanekom’s plans to have him removed from leadership in the ANC, dovetails with the apartheid agents’ plans. This interpretation gains traction in further evidence from his answering affidavit.

Tweet in context of Mr Zuma’s Affidavits

[52] Mr Zuma testifies that the primary function of members of the ANC who played a dual role, was to serve the apartheid intelligence machinery. While Mr Zuma does not dispute Mr Hanekom’s membership, he disputes his loyalty to the ANC and its objectives. Like his evidence at the Commission, the following extracts from his affidavit

²⁰ Transcript p18.

²¹ Transcript p20.

locates the inferences flowing from his tweet to times before the attempts to recall Mr Zuma. They go way back into history, into the anti-apartheid struggle, to a time when the ANC was at war with the SADF.

‘Agents by their very nature operate clandestinely. It is precisely through seeming loyal and the appearance of commitment that enables agents to be effective. Accordingly, Hanekom’s allegations about his role or membership in the ANC and the anti-apartheid struggle are entirely irrelevant for the court to determine the dispute in respect of his actual role.’

And

‘I note that Hanekom’s affidavit is replete with his protestation and denial that he was ever an Apartheid spy during the anti-Apartheid struggle. His protestations though understandable are misplaced and premature as I have not yet mentioned him as an Apartheid spy.’

(my underlining)

[53] Mr Zuma denies that Mr Hanekom has been a loyal and disciplined member of the ANC for the most part of his adult life:

‘His entire life as a duplicitous two faced person is an embarrassing lie.’

‘His entire life and conduct are the anti-thesis of an activist and the new cadre that the ANC seeks to develop.’

‘Only Hanekom can attest to his true role within the SADF or the ANC. He knows which of the two he was deceiving. This is not for this court to determine at this stage.’

(my underlining)

[54] The insinuations, inuendo and ambiguity in the phrase, in Mr Zuma’s tweet and reinforced in his evidence at the Commission become explicit in the following paragraph 112 of his answering affidavit:

‘The statement that I posted about Hanekom say what it says. Hanekom worked with enemies of the ANC to advance their political goals against the ANC and to

topple it from government. The statement that I published was therefore truthful, fair comment of Hanekom's conduct and protected under section 16 of the Constitution. By assisting the political enemies with information to weaken the ANC and topple its leadership, Hanekom acted as an apartheid enemy agent.' (my underlining)

Mr Zuma expresses his claim that Mr Hanekom is an apartheid spy unambiguously in the above extract. He uses innuendo to project the same message in the phrase 'known enemy agent' in his tweet. I find that his tweet is defamatory and false.

Inconsistencies, misconceptions and distortions

[55] At the outset I acknowledged the caution that in lawfare, politicians may try to use court to do their bidding. These litigants make many accusations and counteraccusations against each other. Many are either irrelevant to the principal claim for defamation or incapable of resolution in application proceedings. So, they do not feature in this judgment. However, the public interest nature of this application requires some analysis of a few material inconsistencies, misconceptions and distortions. Left unchecked, they could be peddled as truths merely because they are in affidavits that are cloaked with the respectability of judicial proceedings. For some of these inaccuracies, reference to Constitutional Law and history will do. For others, the rules of evidence to determine probabilities will apply.

[56] Mr Zuma says that by 'enemy' he means the EFF and other opposition parties and anyone who sought his removal as President of the country, including other members of the ANC. He says that this is his belief. He repeats this belief several times. So emphatic is he that he goes further to deny that his tweet is 'false and that [he] could not have genuinely believed [it] to be true' in the context provided. He also denies that his tweet is either 'malicious or untruthful'. He seems unaware that these beliefs and denials undermine his defence that his tweet does not imply that Mr Hanekom is an apartheid spy. His beliefs may count in his capacity as a politician. However, it is not his beliefs that count in this defamation claim. The test is: Would reasonable right-thinking people also understand 'enemy' as Mr Zuma does, and would they limit it, as Mr Zuma

suggests, to exclude any reference to Mr Hanekom being an apartheid spy? The answers to these questions originate in our Constitution.

[57] South Africa's 'negotiated revolution' heralded our Constitution in which we pledge to '[h]eal the divisions of the past ... and [b]uild a united and democratic South Africa...'.²³ Section 1(d) of our Constitution lays the foundation for 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' As such, opposition parties are constitutive of our political landscape, enriching our democracy, diversity of discourse and culture, but simultaneously uniting us to take our 'rightful place as a sovereign state in the family of nations'.²⁴

[58] Ironically, it is in *UDM*²⁵ in which the dispute about the motion of no confidence in President Zuma was decided, that Mogoeng CJ scribing for a unanimous Constitutional Court (CC), extolled the values underpinning the Preamble to our Constitution:

'The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.'

²³ Preamble to the Constitution of the Republic of South Africa, 1996.

²⁴ Preamble to the Constitution of the Republic of South Africa, 1996.

²⁵ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 para 31.

[59] Founded on a negotiated political settlement, the Constitution anticipates that a culture and consciousness of co-operation and dialogue would evolve organically. Political representatives are entrusted to provide leadership to cultivate unity of purpose and action in our collective pursuit of egalitarian ends through dialogical, transformative constitutionalism.²⁶ To this end, coalitions and collaboration amongst political parties arise. Without common aims and reciprocity, 'nothing resembling a society can exist.'²⁷ That is not to say that dialogical constitutionalism jettisons conflict and contestation for political power. On the contrary, interparty and intraparty conflict is inevitable in complex societies confronting intractable problems. Dialogical constitutionalism anticipates meaningful engagement to be agonistic, not antagonistic, to sharpen debate for best outcomes, and not to subvert constructive discourse.²⁸ A critical legal approach to constitutional interpretation recognises, respects and accounts for these phenomena in public interest litigation such as this.

[60] In short, this is what it means to be participatory, dialogical, developmental and constitutional in a multi-party democracy. This is the constitutional culture that democracy-seekers collectively and consciously strive for to make our fledgling nation work. To link 'enemy' to opposition parties would be the antithesis of all that we stand for as a peace-loving, multi-party democracy, historically grounded in our heritage as negotiators of our revolutionary transformation.²⁹ The adoption of the Constitution symbolises not the end but the continuation of peaceful transformation through dialogue. To regard opposition parties as enemies of the ANC undermines dialogue. To refer to anyone with whom one does not agree, politically, intellectually, ideologically, or in any other way, as enemy, sows the seeds for internecine political violence that bedevil many nations. Against these constitutional imperatives, I find that no reasonable

²⁶ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) SAJHR at 150.

²⁷ L Fuller 'Forms and limits' at 357.

²⁸ C Mouffe: Agonistic Democracy and Radical Politics <http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/> (accessed 15 April 2018).

²⁹ P Langa 'Transformative constitutionalism' (2006) Stell LR 351 at 352; R Suttner in '25 years of democracy (Part1): ruptures and continuities' (11 February 2019) writes: 'The 'democratic breakthrough' of 1994 constituted a revolutionary rupture with the past, incomplete then and incomplete now.' <https://www.polity.org.za/article/25-years-of-democracy-ruptures-and-continuities-2019-02-11> (accessed date?).

reader of Mr Zuma's tweet would link 'enemy' to the EFF, opposition parties or opponents within the ANC.

[61] As a member of the ANC 'for decades', having 'different leadership responsibilities', including as President, Mr Zuma must know, support and actively advance dialogue and other bridge building practices to achieve the revolutionary aims of our Constitution. As a conciliator entrusted to lead a nation fractured by 'strife, conflict, untold suffering and injustice,'³⁰ Mr Zuma would not reasonably be understood to mean that members of opposition parties are enemies of the ANC. Reasonable, right-thinking people would not anticipate that Mr Zuma would bear such an adversarial disposition towards opposition parties, let alone encourage such antagonism. Mr Zuma's insistence that 'enemy' refers to opposition parties and his detractors is seriously at odds with our constitutional values. If his beliefs prevail, our democracy would unravel.

[62] As the chief of intelligence and an elder in the ANC, Mr Zuma's utterances are weightier than ordinary mortals. On matters of state security, his opinions count. More so than many social media activists. Consequently, when Mr Zuma refers to a political activist as 'a known enemy agent' reasonable readers of his tweet will understand that he is referring to an apartheid era spy.

[63] Mr Zuma began his defense by repeatedly denying that 'known enemy agent' implied 'apartheid spy'. His paragraph 112 unravels his defense altogether. However, this is not the only contradiction in his case.

[64] Mr Zuma's evidence in this application is internally inconsistent in multiple ways. He admits that to be called a 'known enemy agent' or an 'apartheid spy' is defamatory. However, he then denies that his tweet 'cast aspersions on the character and integrity of Hanekom'. He continues to say that Mr Hanekom displayed 'a shocking lack of

³⁰ E Mureinik 'Bridge To Where? Introducing The Interim Bill Of Rights' 10 S. Afr. J. on Hum. Rts. 31 1994.

political integrity and judgment' by 'using his political position, knowledge and experience in the ANC to join the political foes of the ANC with the sole purpose of toppling the ANC leadership and weakening its political power.' He emphasises that by defying 'the ANC to join forces intent on dismantling the ANC and toppling its democratically elected leadership,' Mr Hanekom showed that he 'has no integrity whatsoever. Even in politics, integrity means that you do not place your political party at the jeopardy of losing credibility and support by joining the opposition to topple the leadership of the party and weakening it.'

[65] Furthermore, the 'ANC NEC had specifically instructed all its members in Parliament to not vote with the EFF or any opposition political party in support of a motion to remove the President. Hanekom defied this resolution of the ANC NEC. This defiance does not define discipline and loyalty.

[66] Mr Hanekom counters that it was his loyalty to the ANC that urged him to seek Mr Zuma's removal as President. It is in fact Mr Zuma who damaged the reputation of the ANC as a result of the allegations of fraud and corruption levelled against him. Removing Mr Zuma as President was therefore consistent with the country's Constitution and in the interest of the ANC and the people of South Africa.

[67] In my view, Mr Zuma seems to have forgotten the CC's reminder in *UDM* below that the oath of office is allegiance to the Constitution, not to the political party to which the member belongs:

'Central to the freedom 'to follow the dictates of personal conscience' is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through

their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution. The requirement that their names be submitted to the Electoral Commission before the elections is crucial. The people vote for a particular party knowing in advance which candidates are on that party's list and whether they can trust them.'³¹

[68] The CC also encouraged the Speaker to put the people first in the following extract:³²

'Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions.' (footnotes omitted)

[69] Mr Zuma mistakenly assumes that loyalty to the ANC is synonymous with loyalty to him. His assumption is both factually and constitutionally untenable. Falsely or erroneously, Mr Zuma believes that his recall as President was against the wishes of the ANC. However, it was the ANC NEC itself that insisted on Mr Zuma resigning as President of South Africa. Furthermore, it is not only the wishes of the ANC that matter. Mr Zuma offers no evidence that the people of South Africa were opposed to his recall. The people have an interest in what goes on in the ANC not least because it is the majority governing party.

[70] Support for the removal of Mr Zuma as President of South Africa is not synonymous with undermining the ANC. It is not only Mr Hanekom who supported his removal. Many other members of the ANC who were of the view that Mr Zuma 'did not possess the characteristics befitting the office' of President of the country acted in the best interests of the ANC and the country when they mobilised and resolved to recall him as President. Notwithstanding the efforts within the NEC since 2016 to recall him,

³¹ United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21 para 79.

³² United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21 para 80.

Mr Zuma chose to resign only in February 2018. If the NEC decision was contaminated by the influence of apartheid spies, as Mr Zuma suggests, then the appropriate response for Mr Zuma was to challenge the NEC decision. Instead he resigned. By his resignation he acquiesced in the NEC decision. Whether he did so as a disciplined member of the ANC or because he acknowledged that the balance of forces within the ANC had shifted, is irrelevant for current purposes. Equally, his bald, unsupported assertions of apartheid spies in the NEC are insufficient to cast doubt on the authenticity of the NEC decision in these proceedings.

[71] By impugning Mr Hanekom's discipline and loyalty to the ANC, Mr Zuma opens himself to the same criticism. Mr Zuma is unmindful that his own resistance to being recalled and his criticism of the NEC resolution and characterisation of members of the ANC who supported it as apartheid spies, opens him to the same accusation that he levels against Mr Hanekom of undermining the ANC.

[72] About his underground activities, Mr Hanekom testifies that in 1979 he contacted the ANC in Botswana. One of his contacts was Roland Hunter, the personal assistant of Colonel Cornelius van Niekerk of the South African Defence Force, who headed 'Operation Mila' a covert programme of support for Renamo rebels, with the sole aim of destabilising the Frelimo government of Mozambique. This was apartheid's model project for similar destabilising programmes in Lesotho, Angola and Zimbabwe. Mr Hanekom facilitated contact with the ANC in Botswana and helped Mr Hunter convey information about Renamo to the ANC. By his involvement in this way, he deceived neither the SADF, of which he was a member only briefly to complete his compulsory conscription to the South African Army in 1971, nor the ANC for whom he gathered information from Mr Hunter.³³

[73] Mr Hanekom later learned that President Oliver Tambo of the ANC, had

³³ 'Released spy tells of stolen SA secrets' <https://mg.co.za/article/1987-11-27-ed-spy-tells-of-stolen-sa-secrets>; 'Treason trial in South Africa' CIIR Newsletter September 1984 http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG1977/AG1977-A11-6-8-001-jpeg.pdf (accessed 4 September 2019).

conveyed the information he had gathered to President Samora Machel of Mozambique which enabled Frelimo to respond rapidly to Renamo. His facilitation strengthened the hand of the President of Mozambique in the negotiations resulting in the Nkomati Accord. The search for the source of the information led to his arrest in 1983 for high treason. He faced the prospect of the death penalty.

[74] It is an undisputed objective fact that for conveying information from Mr Hunter, Mr Hanekom was convicted of high treason and imprisoned for 24 months until his release in September 1986. It is a historical fact, tested through evidence in his trial, that Mr Hanekom's activities as an underground operative facilitated contact between Mr Hunter and the ANC in Botswana to convey information about apartheid South Africa's destabilization of neighbouring states. Of the Nkomati Accord, Callinicos writes that it 'proved to be a positive turning point for the ANC. It pushed the movement back to its most fundamental 'rear base', to the people of South Africa, back home, thus escalating the struggle and hastening the demise of the apartheid regime.'³⁴

[75] In these circumstances, for Mr Zuma to dismiss Mr Hanekom's anti- apartheid activism, his loyalty to the ANC and his underground work as irrelevant to this application is not only offensive and inflammatory but also disingenuous. Mr Hanekom's anti-apartheid activities are building blocks constitutive of his reputation and his identity. Hence this claim for defamation. Despite being the head of intelligence and 'fully aware' of intelligence operations, Mr Zuma offers not a shred of evidence to support his claim that Mr Hanekom was an apartheid era spy. False narratives about Southern African history cannot be left unchecked.

[76] Mr Zuma acknowledges meeting Mr Hanekom in Zimbabwe, thanking him for his contribution to the liberation struggle and appointing him to Cabinet when he was President. However, he maintains that none of this suggests that he did not believe then that Mr Hanekom worked with political enemies of the ANC to achieve the political

³⁴ L Callinicos 'Oliver Tambo – Beyond the Engeli Mountains' (2004) at 519. This biography has a stamp of authority with the forward by President Thabo Mbeki.

agenda of those enemies against the ANC. This is another instance of inconsistency with his defence that 'known enemy agent' did not include a reference 'apartheid spy'.

[77] However, for Mr Zuma to testify in this application that Mr Hanekom 'staged' his exile without putting up any facts to support it, is impermissible. Saying so in this application requires him to substantiate it. That he has reserved his right to testify about apartheid spies at the Commission does not relieve him of his obligations to substantiate claims he makes in this application. If he cannot substantiate his claims, he should not make them. Having made them, he should withdraw them if he cannot put up the evidence.

[78] Mr Hanekom challenged Mr Zuma for appointing him to a Cabinet post as Minister while believing him to be an apartheid spy. Inappropriately, Mr Zuma points to President Mandela's appointment of Mr F.W de Klerk as Deputy President in 1994. That appointment was to forge a government of national unity as the outcome of a negotiated revolution. It does not explain why he, Mr Zuma, would knowingly appoint a person whom he believed to be an apartheid spy to senior positions within the ANC and the government. To add that such a person would never assume the position of President of the ANC is no explanation for enabling an apartheid spy to hold high political office in democratic South Africa.

[79] Mr Hanekom challenges Mr Zuma about allowing him to serve on the ANC's National Disciplinary Committee knowing him to be a known enemy of the ANC. About this appointment Mr Zuma's believes the following:

'Hanekom has been at the forefront of expelling other members of the ANC who committed the offences of a less serious nature, I suppose, at that point, he did this to pursue his very desire to have me removed at some stage. While pretending to act in the interests of the ANC and its leadership, I believe that he sought to prepare the ground for my removal. His was a stratagem to strip me of any future support that would jeopardize his grand plan to remove me.'

If Mr Hanekom did what Mr Zuma believes he did, then it is equally an indictment of Mr

Zuma's leadership as it is of Mr Hanekom's alleged duplicity. However, Mr Zuma's beliefs are not evidence. They cannot acquire the stamp of legitimacy merely because he articulates them under oath in court proceedings.

[80] Mr Zuma insinuates:

'It has become common place for people in Hanekom's place to suppress alternative views and facts by rubbing out those who may expose them as being liars or enablers of State capture, when in fact it is they who seek to conceal the true nature of State capture they have perpetrated since South Africa's political settlement in 1994.'

I find on objective evidence in this application that it is Mr Zuma who propagates a false narrative about Mr Hanekom and his underground activities for the ANC. Mr Zuma has no better evidence than Mr Hanekom's admission about his role in having Mr Zuma recalled. Yet, Mr Zuma exaggerates this role to conniving and colluding with opposition parties. He distorts objective historical facts about Mr Hanekom's underground work that led to the Nkomati Accord and his conviction for high treason. There is an NEC decision that binds Mr Zuma, but he seeks to undermine it in the way he conducts his defence in this application.

[81] The litigants finger each other as wedge-drivers. This calls for a value judgment best left to the political party to which they belong. As the ANC adopted the concept of wedge-drivers, it would know best how to apply it.

Remedy

[82] Turning to the three requirements for a final interdict – urgency, harm and alternative remedy³⁵ – Mr Zuma disputes that the matter is urgent. He testifies that:

'An interdict would muzzle the truth, unfairly limit my right to share my political opinions about the actions of persons in the ANC who betray its historical

³⁵ Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016) at para 29; Setlogelo v Setlogelo 1914 AD 221 at 227.

mission. An interdict is not a just and equitable remedy in these circumstances. In any event, an interdict as sought will undermine the constitutional right to expression and free speech under section 16 of the Constitution.'

He is yet to complete his testimony in the Commission. To issue this interdict will place unfair limitation on his ability to give evidence that will demonstrate the false views of people like Mr Hanekom on his role in government as President.

[83] The submission that the interdict would bar him from testifying about Mr Hanekom is unsustainable. This application is to interdict Mr Zuma from making false statements about Mr Hanekom. Mr Zuma has deposed to affidavits in these proceedings which oblige him to be truthful. Similarly, by testifying under oath at the Commission Mr Zuma is already barred from making false statements there. Nothing said or done in this application constrains his testimony at the Commission any more than his oath to be truthful.

[84] As for the harm, Counsel concedes that to refer to any person as an apartheid spy would be harmful. However, Mr Zuma contends that whatever harm Mr Hanekom claims to have suffered, is self-inflicted. He cannot see how his tweet, 'which is true, can cause any harm to Mr Hanekom or impugn his dignity.' Mr Hanekom is the 'author of his own misfortune for conniving with the political enemies of the ANC to undermine and topple the ANC and its leadership.' Turning to the remedy, Mr Zuma refuses to apologise to Mr Hanekom for what Mr Zuma regards as the truth and fair comment about Mr Hanekom because he 'sold the ANC'. On the issue of damages, Mr Zuma submits that Mr Hanekom should not be rewarded with damages for conduct that amounted to selling out on the ANC by collaborating with its political enemies.

[85] I find that a reasonable reader would infer that Mr Zuma's tweet implies that Mr Hanekom is an apartheid spy. Mr Zuma must apologise, remove the tweet and pay damages.

[86] Counsel for Mr Hanekom, Ms Steinberg contends that his public profile is

sufficient to determine quantum.³⁶ However, both Counsel acknowledge that it is inappropriate to determine malice as an element that affects quantification. There may be other aspects of quantum that deserve fuller ventilation. The nature and volume of media publications would be relevant for assessing quantum. Consequently, quantum is referred for oral evidence.

[87] Both litigants claim costs against each other on an attorney client scale. Ms Steinberg expatiated on the difficulties in effecting service on Mr Zuma and his disregard for the time limits set for delivering his answering affidavits. I agree with Mr Sikhakhane that taking instructions from Mr Zuma in Nxamalala Village, in Nkandla, KwaZulu Natal, in a fact sensitive matter such as this, takes time. Importantly, the time taken enabled the matter to be disposed of finally on the merits. Commendably, Mr Sikhakhane acceded to the merits being determined finally, without raising procedural and technical objections. He made appropriate concessions that helped to narrow down material issues. The issues ventilated in the public domain via social and other media are of a public interest. They call for judicial intervention when the litigants are unable to resolve their dispute amongst themselves. In the circumstances, a punitive costs order is unjustified.

Order

1. It is declared that the allegations made about the applicant, Derek Hanekom in the following statement posted as a tweet, are defamatory and false:
 'I'm not surprised by @Julius_S_Malema revelations regarding
 @Derek_Hanekom. It is part of the plan I mentioned at the Zondo
 Commission. @Derek_Hanekom is a known enemy agent.'
2. It is declared that the respondent, Jacob Gedleyihlekisa Zuma's publication of his tweet above was and continues to be unlawful.
3. The respondent is ordered to remove the tweet within 24 hours from all media platforms including by deleting it from his Twitter account.
4. The respondent is ordered, within 24 hours, to publish on Twitter from his Twitter

³⁶ Manuel v EFF and Others [2019] 3 All SA 584 (GJ).

account (@PresJGZuma) the following apology:

‘On 25 July 2019, I published a tweet which alleges that Derek Hanekom is a known enemy agent. I unconditionally withdraw this allegation and apologise for making it as it is false.’

5. The respondent is interdicted from publishing any statement that says or implies that the applicant is or was an enemy agent or an apartheid spy.
6. The interdict in the preceding paragraph does not bar the respondent from testifying truthfully, as he is required to, at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.
7. The applicant is awarded damages against the respondent, the quantum of which is yet to be determined.
8. The determination of the quantum of damages of R500 000 claimed by the applicant against the respondent is referred for oral evidence.
9. The respondent is ordered to pay the applicant’s costs, including the costs of two counsel.
10. The matter is adjourned sine die.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

APPEARANCES

Counsel for the applicant : Advocate C Steinberg, Advocate C Tabata

Instructed by : Weber Wentzel Attorneys

Ref: P Dela / D Milo/ L Pillay/ S Owen

Email: pooja.dela@webberwentzel.com; dario.milo@webberwentzel.com

Tel: (011) 530 5422

c/o Shepstone & Wylie

Email: shaista.singh@wylie.co.za

Tel: (031) 575 7000

Counsel for the respondent : Advocate M Sikhakhane SC,

Advocate T Masuku SC, M Sikhakhane

Instructed by : Lugisani Mantsha Incorporated

Ref: LMO313/19/JGZ

Email: info@lugisanimantshaattorneys.co.za

c/o Robinson Manzi Attorneys

Tel: (011) 781 0099

Date of Hearing : 23 August 2019

Date of Judgment : 6 September 2019