

Republic of South Africa
REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 2921/2001

In the matter of

ELIA HADJIDAKIS

First Applicant

GEORGE HADJIDAKIS

Second Applicant

SEVEN ELEVEN CORPORATION (PTY) LTD

Third Applicant

and

ANTHONY HALL

Respondent

JUDGMENT DELIVERED : 14 FEBRUARY 2002

MOOSA, J:

INTRODUCTION:

On 20 April 2001 applicants obtained an interim interdict, restraining respondent from publishing or disseminating certain defamatory allegations. These allegations were contained in a letter dated 14 April 2001 addressed by respondent to the head office of third applicant and for the attention of second applicant ("the letter").

DEFAMATORY ALLEGATIONS:

The gist of the allegations was to the effect that second applicant firstly, defeated the ends of justice by falsely prosecuting respondent on a charge of theft and secondly, interfered with the administration of justice by unlawfully influencing the authorities not to accept charges of assault allegedly perpetrated by first applicant on respondent.

More specifically, respondent alleged that:

- (1) applicants falsely prosecuted him for theft and this they could do because of the influence they exercised over certain members of the police force;
- (2) second applicant stole respondent's furniture and personal possessions, but

respondent could not institute proceedings against second applicant because he allegedly lied to the police;

(3) first applicant became upset and assaulted the respondent when the former discovered that the latter was having an affair with one Pedro, with whom first applicant was also having an affair. Respondent attempted to lay a charge of assault against first applicant, but it proved fruitless because of second applicant's influence with high ranking police officials;

(4) second applicant bribed the police with cash and gifts in return for favours.

DEFENCE:

Respondent admits publication of the letter and avers that the contents thereof are true and the publication thereof is in the public interest.

REMEDY:

Applicants obtained an **ex parte** interim interdict. Applicants are now moving for a final interdict. Respondent, who appears in person, opposes the final interdict. Respondent filed opposing papers but applicants elected not to file replying papers. The issues therefore are to be determined in terms of the facts deposed to in the founding and opposing papers. For applicants to succeed, they must establish that respondent is about to publish or to continue the publication and distribution of the defamatory statement; that respondent has no valid defence to the defamation proceedings and that applicants will suffer irreparable harm if an interdict is not granted. (LAWSA, Vol 7 para 268.)

It is common cause that respondent did in fact publish and distribute and further intended publishing and distributing the letter containing the defamatory allegations.

Two presumptions in law arise from such publication. Firstly, that the publication is **prima facie** unlawful and secondly that respondent acted **animo inuriandi**. The onus is on respondent to establish either some justification or excuse for the defamatory allegations or the absence of intent to defame. (See LAWSA, **supra** at para 245.) However, if the respondent in interdict proceedings puts up a defence of truth and public interest, the court is not entitled to disregard such defence. A claim for an interdict is based on an actionable wrong which is about to be committed. There can be no

actionable wrong if there is justification for the conduct that gave rise to such wrong.

(**HEILBRON v BLIGNAUT** 1931 WLD 167 at 169; **BUTHELEZI v POORTER & OTHERS** 1974 (4) SA 831 (W) at 834EH.)

THE APPROACH:

In my view, the proper procedure applicants had to adopt in this case, was to obtain a temporary interdict, pending the institution of action for defamation. Nothing, however, prevented the applicants from instituting notice of motion proceedings for a final interdict. However, they did so at their own risk, because they could be forced to accept the factual allegations of respondent if their allegations were disputed and they had applied for a final interdict. (See **PRINSLOO v SHAW** 1938 AD 570 at 576.)

The general rule is that when a real, genuine or **bona fide** dispute of fact arises in motion proceedings for a final relief, the matter can be determined on the papers if the court is satisfied that the allegations made by respondent together with the allegations of the applicant which were admitted by respondent, justify the relief claimed. Likewise, the contrary is also true, that is, where such allegations do not justify the relief sought, the applicant is not entitled to the relief sought. There are two exceptions to the general rule. The one is where a denial by respondent of a fact alleged by applicant may not amount to a real, genuine or **bona fide** dispute of fact. The other is where the allegations of and denials by respondent are so far fetched or clearly untenable or improbable, that the court is justified in rejecting them on the papers. (See **PLASCONEVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634H635C.)

The issue of **onus** in relation to factual disputes on paper was raised in the matter of **NGQUMBA & ANDERE v STAATSPRESIDENT & ANDERE** 1988 (4) SA 224 (A) at 258 **et in fin** 269. In this case the court at 261HJ to 262A referred to a minority judgment in the matter of **ASSOCIATED SOUTH AFRICAN BAKERIES (PTY) LTD v ORYX & VEREINIGTE BACKEREIEN (PTY) LTD & ANDERE** 1982 (3) SA 893 (A) and quoted with approval from 923G924B the following:

"As algemene uitgangspunt

kan 'n applikant in mosieverrigtinge op finale regshulp van die soort wat hier ter sprake is op die stukke en sonder die aanhoor van mondelinge getuienis aanspraak maak slegs as dit blyk dat hy op sodanige regshulp geregtig is op grondslag van die bewerings wat gemaak word deur die respondent en sodanige van die applikant se bewerings as wat

deur die respondent erken word. (Vgl **STELLENBOSCH FARMERS WINERY LTD v STELLENVALE WINERY (PTY) LTD** 1957 (4) SA 234 (K) te 235EG; **BURNKLOOF CATERERS (PTY) LTD v HORSESHOE CATERERS (GREENPOINT) (PTY) LTD** 1976 (2) SA 930 A te 938AC; **TAMARILLO (PTY) LTD v B N AITKEN (PTY) LTD** 1982 (1) SA 398 (A) te 430G431A.) Ek sal na hierdie posisie verwys as die algemene reël wat geld by mosieërrigtinge. Op die algemene reël is daar wel uitsonderings, soos bv waar die bewerings of ontkennings van die respondent so vergesog of klaarblyklik onhoudbaar is dat die verwerping daarvan bloot op die stukke geregverdig is. Vir my doeleindes is dit nie nodig om verder hierop uit te brei nie. Van belang is dat die algemene reël na my mening klaarblyklik ook van toepassing is op verweere wat respondent teen die applikant se eise opper in sy beantwoordende verklaring. As die respondent se bewering 'n verweer openbaar, dan kan die applikant op die stukke nie slaag nie, al sou hy sodanige bewerings in sy repliserende verklaring ontken en al sou die bewyslas ten opsigte van die verweer volgens die gewone toepaslike reëls by die respondent berus."

(My emphasis.)

The incidence of the burden of proof, i.e. **onus probandi**, is a matter of substantive law and not a question of evidence. (**TREGA & ANOTHER v GODART & ANOTHER** 1939 (AD) 16 at 32.) By "onus" here is meant the overall onus of proof which, according to substantive or adjective law, rests from the beginning of the proceedings, upon the one or the other of the parties to the litigation and such onus never shifts. (**MABASO v FELIX** 1981 (3) SA 865 (A) at 871H.) Excuse and justification are generally regarded as special defences in the sense of being a confession and avoidance of applicant's claim. (**MABASO v FELIX**, *supra* at 876AB.) It is now trite that when an applicant approaches a court, in an application for final relief, and respondent discloses a defence irrespective of the onus, the rule enunciated in the **PLASCONEVANS** case, *supra*, will still apply.

THE FACTS:

Respondent admits the authorship of the letter and the publication thereof. The contents of the letter are **per se** defamatory. His defence is one of lawful justification or excuse and the absence of **animus inuriandi**. He alleges that the allegations are true and the publication thereof is in the public interest. Applicants in their founding affidavit, fail to deal in detail with the allegations in the letter. At the time of drafting the founding affidavit, the applicants were in possession of such letter as it formed an annexure to their founding papers. Applicants also failed to reply to respondent's opposing affidavit. Applicants' response in the founding affidavit to the alleged defamatory allegations in the letter is basically a denial. First applicant states that the allegations are baseless. Second

applicant confirms the correctness of first applicant's affidavit and states that the allegations are unjustified. A great deal of the founding papers are taken up with marginal issues and not with the substance of the allegations. I will deal with the allegations **in seriatim**.

THE PROSECUTION:

Respondent alleges that applicants falsely prosecuted him for theft. He was accused of obtaining monies from franchisees of third applicant. He further alleges that first applicant and his brotherinlaw, Robert Goff, were informed by two police officers that it was a civil and not a criminal matter. Despite such advice, applicants proceeded with the prosecution because of their influence with the police. The respondent reluctantly sold his jewellery to repay third applicant the monies paid to him by the franchisees. The court accepted his version and he was acquitted of any charges.

THE FURNITURE:

Respondent alleges that second applicant stole his furniture and personal possessions to the value of R20 000. First applicant in his founding affidavit which is confirmed by the second applicant, states that the furniture and personal possessions were a bed, a cupboard and a chair. According to them these items were removed from the premises by respondent shortly after his dismissal from third respondent's employment. In his opposing affidavit, respondent states that he was denied the right to remove his furniture and personal possessions from the premises. He claims that he has witnesses to substantiate his allegation and alleges that first applicant is telling a blatant lie.

THE ASSAULT:

In the letter respondent claims that he was assaulted by first applicant in the presence of his brotherinlaw, because of his affair with Pedro. The police refused to accept charges because of the influence of second applicant with high ranking police officers. Respondent in his opposing affidavit states that first applicant is a womaniser and had an affair with Pedro. Because of respondent's affair with Pedro, first applicant assaulted respondent.

THE BRIBERY:

In the letter respondent claims that second applicant instructed respondent to pay the police, which he did, so that they could patrol the 711 stores. He also recalls delivering alcohol to all the local police stations at Christmas time. Second applicant further instructed him to load the superintendent's vehicle with alcohol, which he did. He can identify the police officers in question.

In his opposing affidavit, respondent repeats most of the allegations made by him in the letter. Respondent alleges that the alcohol was supplied to certain police stations and the Liquor Squad officers. He further alleges that it was a regular occurrence over the Christmas period to take them alcohol parcels. Respondent also claims to have given drinks to SAPS members to patrol and protect 711 stores. The assumption is that it was done at second applicant's instance. Respondent claims that he has witnesses to substantiate these allegations. Respondent alleges further that because of the tremendous power and influence second applicant wields over high ranking police officers, respondent was prosecuted falsely for theft and the police refused to accept charges of assault from respondent against first applicant.

THE RESPONSE:

The applicants do not deal adequately with the substance of these allegations in their founding papers, nor did they elect to file replying affidavits. Their response to the allegations was basically a denial and a general averment that they were unjustified. In my view therefore, no substantial and **bona fide** dispute of fact arises concerning these allegations.

THE JUSTIFICATION:

In the letter respondent states that he is writing the letter to set the record straight, and to clear his name that has been blackened by second applicant. In it he also requests a public apology. He claims that the allegations are true and the publication thereof is in the public interest. Applicants' attorneys addressed a letter to respondent, calling upon him to retrieve all the letters which have been disseminated, withdraw the allegations, apologise to all recipients of the letter and give an undertaking in writing to cease his defamatory and injurious conduct. The letter from the attorney does not deal with the substance of the allegation, nor with the public apology demanded by respondent in the

letter. It appears that respondent did not respond to the demands of applicants. Respondent also disputes the marginal issues raised in the founding papers of the applicants and more particularly the allegation that he is a “*man of straw*”. These issues have also gone unchallenged by applicants.

REFERRAL FOR TRIAL:

In his opposing affidavit respondent states that the matter can go to trial to determine the truth. He can bring witnesses to testify that everything he has said is true and correct. Applicants who are **dominus litis** have asked the court to determine the issues on the papers and not to refer the matter for hearing of oral evidence. I am empowered to refer issues raised in motion proceedings for hearing if there are substantial disputes of fact that cannot be resolved on the papers before me. However, the court will not **mero motu** refer the matter for oral evidence. In **MEYER v BRAND** 1927 TPD 392, **Greenberg, J** concluded:

“And as the applicant claims a decision on the matter and does not ask for evidence to be heard, I do not think I am justified in ordering the hearing of evidence.”

In my view the issues in this matter can be resolved on the papers and in the circumstances I see no reason why the matter should be referred for hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court. The remarks of **Miller, JA** in the case of **TAMARILLO (PTY) LTD v B N AITKEN (PTY) LTD** 1982 (1) SA 398 (A) at 430G431A is incisive:

“A litigant is entitled to seek relief by way of a notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.”

FINDING:

Mr **Donen** for applicants, submitted that the onus is upon respondent to establish that the allegations are true and the publication thereof is in the public interest. Respondent has failed to discharge such onus and it was accordingly not necessary for the applicants to file replying affidavits. This submission militates against the authorities to

which I have referred earlier and is not in accordance with the principles of our law. Respondent has throughout maintained that the allegations are true and its publication is in the public interest. The objective of its publication is in order to clear his name in the absence of a public apology. He has disclosed a defence. On this ground alone I could find in favour of respondent.

However, I have already found that there are no substantial and **bona fide** disputes of fact in respect of the prosecution, the assault and the bribery allegations. The court came to the conclusion on the basis of the exception to the general rule referred to above, namely that a denial of a fact (and in this case by applicants) may not amount to a real, genuine or **bona fide** dispute of fact. Applicants in their founding affidavit made a blanket denial of the allegations in the letter, without dealing with the substance of such allegations. Even if the court applied the general rule, namely, the allegations made by respondent together with the allegations of applicants admitted by respondent, I would also have come to the same conclusion.

ORDER:

In the premises, I am satisfied that applicants have not made a case for final relief. The rule **nisi** is accordingly discharged and the application is dismissed.

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