THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 504/2023

In the matter between:

IRD GLOBAL LIMITED **APPELLANT**

and

THE GLOBAL FUND TO FIGHT AIDS,
TUBERCULOSIS AND MALARIA **RESPONDENT**

Neutral citation: *IRD Global Limited v The Global Fund to fight AIDS, Tuberculosis and Malaria* (504/2023) [2024] ZASCA 109 (04 July 2024)

Coram: MOCUMIE and SCHIPPERS JJA and KOEN, DAWOOD and BAARTMAN AJJA

Heard: 15 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 4 July 2024.

Summary: Civil procedure – interim interdictory relief – jurisdiction – alleged defamatory statement published on the Internet accessed in South Africa - whether the appellant was entitled to interim interdictory relief as sought in the high court – whether the high court correctly found that it lacked jurisdiction – whether it was appropriate to order additional security for costs – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van Nieuwenhuizen AJ, sitting as a court of first instance):

The appeal is dismissed with costs including the costs of two counsel, where so employed.

JUDGMENT

Baartman AJA (Mocumie and Schippers JJA, and Koen and Dawood AJJA concurring):

[1] The dispute in this appeal is whether the Gauteng Division of the High Court, Johannesburg, per Van Niewenhuizen AJ, (the high court) was correct in holding that it did not have jurisdiction to entertain an application for interim relief (the main judgment) and whether that court correctly exercised its discretion when it granted the respondent's application for additional security for its costs (the security judgment). The appeal is with the leave of the high court.

[2] The appellant, a global health delivery and research organisation, was founded in Pakistan in 2004. It is registered in Singapore and is alleged to have an established project profile in 17 countries and affiliates in nine countries, including in South Africa. The appellant works with governments and community organisations in the public health sector 'to address the global health delivery gaps by marginalised communities' lack of access to healthcare'. The respondent, an international organisation established in Switzerland, is involved in the fight against Aids, Tuberculosis and Malaria as 'donor and implementor of Global Fund-supported programs'. Both parties are *peregrini* of the high court and own no immoveable property in South Africa.

[3] On 1 April 2021, the respondent published a report on its website, compiled by its investigating unit, known as the Office of the Inspector General (OIG), titled 'global fund Grant in Pakistan-Prohibited practices compromised procurement in tuberculosis program'. The report resulted from an investigation into the respondent's tuberculosis grant in Pakistan to Indus Hospital (Indus) in which the appellant had acted as technical assistance provider implementing various tuberculosis-related health projects. The report, which is globally available on the respondent's website, contains numerous allegations that the appellant considers defamatory. The position was aggravated as the report was accompanied by a letter of endorsement from the respondent's executive director confirming allegations, such as conflict of interest, collusive and anti-competitive practices, data inflation and overcharging, that were levelled against the appellant and Indus in administering the tuberculosis grant.

[4] However, on 15 July 2019, prior to the publication, the respondent had informed the appellant that OIG would be conducting the investigation and on 18 June 2020, the OIG made its preliminary and confidential findings available to the appellant and other interested parties. Those preliminary findings included the following:

'39.4.1 Finding 1 – The appointment of the [appellant] breached the Global Fund's policies and involved multiple unmitigated conflicts of interest;

39.4.2 Finding 2 – Indus fraudulently steered the Projects to [the appellant];

39.4.3 Finding 3 – Multiple irregularities in the implementation of the projects by [the appellant], including data fraud;

39.4.4 Finding 4 – Conflicts of interest and irregularities in the awarding of an IT contract to Interactive Health Solutions.'

[5] On 16 July 2020, the appellant submitted a comprehensive response in which it dealt with the findings and gave an exculpatory account. On 15 January 2021, the initial draft report was leaked and published in Arab News. Despite, the appellant's comprehensive response, the respondent persisted with its version and made the report available on its website, substantially confirming the allegations in the leaked draft report.

[6] The appellant's South African attorney, acting on instructions, accessed the respondent's website and downloaded the report in Johannesburg. The appellant, on

the basis that the report was accessed in Johannesburg, intends to pursue a defamation action in the high court against the respondent. In May 2021, the appellant launched an urgent application in the high court seeking interim relief. The following prayers are relevant to this judgment:

'…

2. Pending the final determination of an action or application to be instituted by the applicant within 30 days of the Order for defamation against the respondent:

2.1 the report on the respondent's website, titled Global Fund Grant in Pakistan – … are within 1 (one) day of this Order, to be retracted and removed by the respondent from its website;

2.2 the respondent, within 5 (five) days of this Order, is to publish the following statement on its website:

"The High Court in South Africa has granted an interim order against [the respondent] …pending the final determination of an application or action to be instituted by [the appellant] to obtain a permanent interdict against [the respondent] in respect of the Report on the basis that the statements contained therein are defamatory and untruthful as against [the respondent]."

2.3 interdicting the respondent and its officials from making any further statements of a defamatory nature and effect against the applicant, including but not limited to repeating the contents of the Published Report and the Published Letter;

2.4 restraining the respondent and its officials from sharing, distributing or disseminating the Published Report or any other iteration of a report prepared pursuant to the OIG's investigation, with any person, entity or the public at large;

2.5 interdicting the respondent from making any recommendation or imposing any sanctions in respect of [the respondent] pursuant to the *Sanctions Panel Procedures Relating to the Code of Conduct for Suppliers*, [annexure FA60 to the founding affidavit], or any other basis;…'

[7] The respondent took the following preliminary points, instead of dealing with the merits of the application, but indicated that it would seek a postponement to do so. These points are:

(a) The high court lacked jurisdiction to entertain the application;

(b) The relief sought was not competent;

(c) The requisites for interim relief were not satisfied;

(d) The application should be brought in either Pakistan or Switzerland.

[8] As both parties are *peregrini* of the court, the respondent sought security for its costs. Reluctantly, without admitting that same was due, the appellant put up security for costs. Thereafter, the application was enrolled in the urgent court where Fisher J struck it from the roll for lack of urgency and directed the appellant to pay the costs of the application. The security that had been put up was used to settle the costs order leaving a balance of R91 000. In September 2021, Tsautse AJ heard the opposed application, although judgment remained outstanding for an inordinate period. The deputy judge president unsuccessfully attempted to persuade Tsautse AJ to deliver the judgment and as a last resort, directed a new hearing before a different judge.

[9] At that hearing on 12 September 2022, the respondent, without conceding the court's jurisdiction, sought an increase in the security for its costs alleging that the R91 000 balance from the original security was insufficient to cover the new situation. The main application and the request for additional security were heard together. While the hearing was in progress, Tsautse AJ 'uploaded' the outstanding judgment. After a short adjournment, having considered the uploaded judgment, both parties requested the court to proceed with the rehearing.

[10] The learned judge found in favour of the respondent in respect of its claim for additional security and directed the appellant to pay such additional security as the Taxing Master may determine. The main judgment held that there was 'no actual publication to a third party' as the appellant's attorney had accessed the publication to assess its impact and advise his client. The circumstances in which the publication was downloaded persuaded the court that '[the respondent] did not publish anything in South Africa'.

[11] The high court further held that the matter was distinguishable from *Akani Retirement Fund Administrators (Pty) Ltd v NBC Holdings (Pty) Ltd and Another*[1] as 'the terms of use limit the user's rights' in respect of the publication relevant to this matter. The learned judge was not persuaded that the reputational harm the appellant had suffered had arisen from publication in South Africa as the harm had been caused

[1] *Akani Retirement Fund Administrators (Pty) Ltd v NBC Holdings (Pty) Ltd and Another* [2020] ZAGPJHC 174.

when Arab News had published the initial leaked draft report. In addition, the report relates to alleged conduct in Pakistan in relation to a project that the respondent funded and in which the appellant partook. Cumulatively, these factors led the high court to hold that it did not have jurisdiction to entertain the application and that South Africa was not a forum of convenience. Therefore, the application was dismissed with costs.

[12] In this Court, the appellant persisted in its stance that the high court had jurisdiction to entertain the application and that it should not have been ordered to provide additional security. Among others, the respondent submitted that the relief sought was incompetent and therefore the appeal should fail. I deal with both judgments below.

The main judgment

[13] A basic principle in our law of jurisdiction is that of effectiveness.[2] A court must be able to give effect to its judgment so that, 'in the case of a judgment sounding in money, the judgment can be satisfied by attaching and selling in execution assets belonging to the judgment debtor if the judgment is not paid'.[3] Where a judgment debtor has immovable property in South Africa, a court can order its attachment and so give effect to its judgment. Jurisdiction is also exercised where litigants submit to the court's jurisdiction. The respondent in this matter has not submitted to the court's jurisdiction.

[14] In *Bid Industrial Holdings (Pty) Ltd v John Francis Roderick Strang and Others*[4] (*Strang*) this Court held as follows:

'In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case.

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[2] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* [1969] 2 All SA 338 (A); 1969 (2) SA 295 (A) at 346.
[3] 23(2) *Lawsa* 3 ed para 6.
[4] *Bid Industrial Holdings (Pty) Ltd v John Francis Roderick Strang and Others* [2007] ZASCA 144; [2007] SCA 144 (RSA); [2008] 2 All SA 373 (SCA); 2008 (3) SA 355 (SCA) para 56.

Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.'

[15] The appellant sought to overcome the jurisdiction issue on the basis that it has an affiliate in South Africa; the report was accessed in Johannesburg; the respondent has immunity in Switzerland; and the respondent has an office and funds in South Africa. It turns out that the respondent has neither an office nor funds in this country. Instead, funds are sent directly by donors to grant recipients in South Africa.

[16] In *King v Lewis*[5] the court said the following:

'We do not suggest, nor did Mr Browne, that Gutnik is a gateway for the introduction of a new rule in the law of England relating to Internet publications. It established no new rule in Australia. But the court's rejection of sweeping submissions that would have done away with Duke of Brunswick in favour of the "single publication rule" known in many States of the USA, alongside the dicta in Gutnick which emphasise the internet publisher's very choice of a ubiquitous medium, at least suggests a robust approach to the question of forum: *a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant. We by no means propose a free-for-all for claimants libelled on the Internet. The court must still ascertain the most appropriate forum; the parties' connections with this or that jurisdiction will have to be considered; there will be cases (like the present) where only two jurisdictions are really in contention. We apprehend this third strand in the learning demonstrates no more than this, that in an Internet case the court's discretion will tend to be more-textured than otherwise; for that is the means by which the court may give effect to the publisher's choice of a global medium. But as always, every case will depend upon its own circumstance.*

….

…The relative importance of all factors which must be examined – place of the tort, the parties' connection with this or that jurisdiction, the publisher's choice to go on the Internet- are not legal rules. They are matters which will inform the judge who must decide where the balance of convenience lies.' (Emphasis added).

[17] Applying the above principles to the facts of this matter, it is obvious that neither party, both *peregrini*, has any real connection to South Africa. The process was not served in South Africa and the respondent does not have a place of business locally.

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[5] *King v Lewis* [2004] EWCA Civ 1329 paras 31 and 36.

Although, the respondent actively seeks South African donors, such funds are donated to grant recipients, therefore the respondent does not have access to the funds in South Africa. The appellant's local affiliate has not joined in the litigation and there is no indication that the publication has had any effect on it.

[18] There is further no connection between the high court's jurisdiction and the dispute. As indicated above, the cause of action arose in Pakistan where the appellant and Indus are alleged to have compromised the tuberculosis grant. Therefore, the background facts, convenience and the law governing the relevant transaction, are outside the court's area of jurisdiction.[6] The only connection to the high court's jurisdiction is that the attorney accessed the report in its jurisdiction; that is insufficient as is apparent from the *Strang* judgment. Internet publication, with its global reach, for practical purposes must be contained otherwise multiple actions may follow in jurisdictions with no real connection to the parties or the issue in dispute other than publication. Self-evidently such a situation is untenable and may cause grave inconvenience to the court, witnesses and litigants. In the circumstances of this matter, adequate connecting factors for jurisdiction are absent and the court would be unable to give effect to its judgment. Although the jurisdiction issue is dispositive of the matter, I deem it necessary to deal briefly with the requirements for an interim interdict and the relief claimed.

[19] The respondent contends that the appellant did not make out a case for interim relief. The appellant sought interim relief pending the finalisation of the defamation action it intends to institute. As indicated above, the respondent did not file an answering affidavit dealing with the merits of this matter due to time constraints. However, the report, the history leading to its creation and the appellant's exculpatory response prior to publication are part of the papers. The respondent at an early stage indicated that it stands by the allegation, asserts the truth thereof and relies on truth and public interest for the publication. This was after the respondent had undertaken an elaborate investigation over many months and had given the appellant an opportunity to comment on its initial findings. Therefore, the allegations cannot be

[6] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GPN); 2014 (3) SA 265 (GP).

approached on the basis that they were spurious and defamatory as the respondent has indicated after considering the appellant's exculpatory reply that it stands by the truth of the allegations contained in the report.

[20] As indicated above, on 15 January 2021, Arab News published a leaked copy of the initial draft report and on 1 April 2021, the respondent published the report on its website. Yet the appellant only approached the court in May 2021 for interim relief and three years later, in 2024, issued summons. There was arguably a basis for interim relief three years ago. The appellant has not made out a case for an interdict to restrain future defamatory publications and there is no evidence that the harm is ongoing. The right the appellant seeks to protect is not under threat of irreparable harm as the harm occurred three years earlier.

[21] An interdict is not competent relief where the respondent has put up a valid defence to the defamation charge. It follows that the appellant has not established a *prima facie* right, even one open to some doubt, which needs to be protected by an interdict. Therefore, there is no need to enquire into irreparable harm, the balance of convenience or a satisfactory alternative remedy.

[22] The appellant further seeks a retraction and an apology on motion. Although, styled as interim, the relief is in fact final in effect. This Court in *Tau v Mashaba and Others,*[7] criticised that process as follows:

'…An order to retract the initial statements, to issue an unconditional apology for them and to ensure publication of the retraction and apology, presupposes a finding that the initial statements were defamatory of the respondent. That would involve a final determination of the rights of the parties, which has to be made in the defamation action. Further, if such an order were to be executed, it could not be undone: the notion of an interim retraction or apology is untenable.'

[23] Wallis JA expressed similar sentiments in *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd*[8] *(NBC Holdings)* as follows:

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[7] *Tau v Mashaba and Others* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) para 17.
[8] *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators* [2021] ZASCA 136; [2021] 4 All SA 652 (SCA) para 10.

'A good deal of the complexity of this case arose because Akani sought relief by way of urgent motion proceedings and not by way of action. In order to do this, it tied its claim for the publication of a retraction to a vague and general interdict. Furthermore, it said that it reserved its right 'to pursue other aspects and relief flowing from NBC's …. misconduct at a later date'. justifying this on the basis that only urgent matter could be traversed in these proceedings. The judge rightly rejected the claim for an interdict, thereby exposing the true nature of the proceedings as being for final relief to remedy the damage that Akani claimed it had suffered as a result of the publication of the letter…'

[24] It is now settled law that an apology or a retraction may serve the same purpose as an award of damages in a defamation action or may be ordered in conjunction with an award of damages.[9] However, that relief requires the institution of an action. It follows that the appellant is not entitled to the relief it sought on motion and that the application must fail on this basis too.

[25] Contrary, to the above established principles, the court in *Ramos v Independent Media (Pty) Ltd and Others,*[10]*(Ramos)* on motion proceedings found that the publication that formed the subject of those proceedings was defamatory, false and untrue. It interdicted the respondent from republishing the article or any false statement implying that the applicant had 'participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand'. It ordered a retraction and directed the respondent to publish an apology. The court reasoned that it could make the orders on motion as the applicant did not ask for damages. However, as indicated above, damages may now consist of a retraction, an apology, a monetary amount or any combination thereof.

[26] I therefore respectfully disagree with the court in *Ramos* and hold that motion proceedings remain unsuited to deal with defamation allegations. A trial is necessary to determine the veracity of the alleged defamatory statements and thereafter an award can be made consisting of an apology, a monetary amount, a retraction or a combination of same. Recently, in *Malema v Rawula*,[11] this Court confirmed that awards of damages may not be claimed in motion proceedings.

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[9] *NBC Holdings* para 15.
[10] *Ramos v Independent Media (Pty) Ltd and Others* [2021] ZAGPJHC 60 para 126.
[11] *Malema v Rawula* [2021] ZASCA 88 para 26.

The security judgment

[27] In directing that additional security be provided, the trial court exercised a discretion in the strict sense.[12] There is no *numerus clausus* of factors to which a court may have regard in arriving at a decision it considers just in any given case. In the exercise of its discretion, the court considered that the respondent had sought security at an early stage in the proceedings, which was provided, albeit under protest. That security was for an urgent application in which jurisdiction was challenged. The further developments, such as the long outstanding judgment resulting in a rehearing, were considered unusual. Both parties are *peregrini* of the South African courts and the respondent, if successful, might be put to the inconvenience of pursuing its costs in a foreign jurisdiction. Because the trial court exercised a discretion in the strict sense; therefore, it is not open to a court on appeal to interfere with the exercise of the discretion unless it has not been exercised judicially or has been exercised on a wrong principle of law or a wrong appreciation of the facts.[13] The factors considered included the factual situation; there is no indication that the court overemphasised any factor or exercised its discretion incorrectly. I am unable to find a ground for interference. It follows the appeal against the security judgment must fail.

Order

[28] The following order is granted:

The appeal is dismissed with costs including the costs of two counsel, where so employed.

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E BAARTMAN

ACTING JUDGE OF APPEAL

[12] *See Magida v Minister of Police* 1987 (1) SA 1 (A); [1987] 1 All SA 218 (A). *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H.

[13] *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) para 21.

Appearances

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For the respondent:	A Franklin SC and N Qwabe
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