



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

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

SIGNATURE

DATE: 19 July 2024

Case No. 2024-039872

In the matter between:

SIPHO TJABADI

Applicant

and

ESKOM HOLDINGS SOC LTD

Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Mr. Tjabadi, applies for an order declaring that three sets of averments made on papers filed in legal proceedings to which he was not a party were defamatory. He also asks that I order the respondent, Eskom, on whose behalf the averments were made, to apologise publicly for having made them. Finally, he seeks an interdict restraining Eskom from publishing any similar material in future.

- 2 Though it is clearly aware of Mr. Tjabadi's complaint, and was properly served with Mr. Tjabadi's founding papers, Eskom did not oppose the application, which was enrolled in my unopposed court on 17 July 2024. After hearing from counsel, I dismissed the application. I indicated that my reasons for doing so would be issued in due course. These are my reasons.

Mr. Tjabadi's dismissal from Eskom

- 3 Mr. Tjabadi is a former employee of Eskom. In June 2015, he was disciplined and dismissed from his role. On 25 October 2019, the Commission for Conciliation Mediation and Arbitration (CCMA) confirmed Mr. Tjabadi's dismissal, finding it to have been both procedurally and substantively fair. Eskom disciplined Mr. Tjabadi on three charges. The first charge alleged the mishandling of contracts between Eskom and various of its service providers. The second charge alleged that Mr. Tjabadi had been negligent in assessing quotations provided to Eskom for services it wished to procure. The third charge alleged that Mr. Tjabadi had acted contrary to Eskom's interests in his role as its agent in the management of one of its contracts with a service provider.
- 4 It is hard to be more precise about the nature of the charges Mr. Tjabadi faced, because the only relevant evidence before me is the charge sheet proffered against Mr. Tjabadi at his disciplinary inquiry. I have not seen any of the evidence led at that inquiry, or any of the material placed before the CCMA.
- 5 Mr. Tjabadi is in the process of reviewing the CCMA award at the Labour Court. That review has not yet been heard.

The alleged defamatory matter

- 6 Whatever the facts underlying Mr. Tjabadi's dismissal, his conduct seems to have become relevant in three other sets of contentious legal proceedings involving Eskom.
- 7 In an affidavit made on Eskom's behalf in proceedings in the Supreme Court of Appeal, which was filed on 28 January 2016, a Ms. Leena Ramprasad alleged that Mr. Tjabadi had become "the subject of criminal fraud charges".
- 8 In a further affidavit, deposed to on Eskom's behalf in the Labour Court on 22 April 2016, a Ms. Winile Madonsela alleged that Mr. Tjabadi had engaged in "irresponsible and dishonest behaviour". The affidavit was filed in proceedings concerning another of Eskom's employees.
- 9 On 30 August 2021, while engaged in an arbitration with a joint venture it is not necessary to name, Eskom sought to amend its statement of defence to include an allegation that Mr. Tjabadi had "wrongfully" approved a "task order" in "collusion" with some other person. The gist of the allegation is that Mr. Tjabadi knew that he should not have approved the order, but did so anyway, apparently for some improper motive.
- 10 Mr. Tjabadi says that all of this is untrue and defamatory. He also says that Eskom's allegations go well beyond anything for which he was disciplined and dismissed. He is clearly aggrieved that allegations have been made about him in proceedings to which he is not a party. He wishes to protect his reputation against further attack.

- 11 On 5 December 2023, Mr. Tjabadi's attorney wrote to Eskom seeking the retraction of the allegations I have set out, a public apology for having made them, and an undertaking not to make them again. On 19 December 2023, Eskom replied. It asserted the truth of all the allegations. It stated that the evidentiary basis on which the allegations were made is set out in the record of the CCMA proceedings. It refused to accede to Mr. Tjabadi's demands.

Relief not available on the established facts

- 12 I shall assume in Mr. Tjabadi's favour that the material of which he complains is defamatory, and that Eskom was solely responsible for publishing the defamatory material, rather than the legal representatives who drafted the pleadings or the deponents to the affidavits in each case. That notwithstanding, the relief Mr. Tjabadi seeks is not available to him, because his own papers establish that the defamation of which he complains was probably lawful.
- 13 Mr. Tjabadi says that the allegations in Eskom's papers are false. Eskom says that they are true. The grounds on which Eskom asserts the truth of the allegations are not addressed in Mr. Tjabadi's affidavit. Mr. Tjabadi says no more than that the charge sheet in his disciplinary inquiry does not allege dishonest or criminal conduct. But that simply begs the question of what was established by the evidence proffered on those charges. Mr. Tjabadi does not produce the CCMA record. Nor does he seriously address Eskom's allegation that the record contains the evidence necessary to confirm the truth of the statements made on its behalf in the affidavits and the pleadings with which Mr Tjabadi takes issue. The record was plainly available to Mr. Tjabadi. His

failure to deal with it justifies the inference that Eskom was probably right in asserting that the CCMA record confirms the truth of its statements.

- 14 Moreover, the defamatory statements were each made in affidavits and pleadings tendered in legal proceedings. It is well-established that those who make statements on affidavit or in pleadings enjoy a qualified privilege against liability for defamation, so long as their statements are relevant to the issues in the proceedings, and are not made maliciously or recklessly (*Findlay v Knight* 1935 AD 58). There is no suggestion that Eskom's statements exceeded the bounds of the privilege that would normally attach to them.

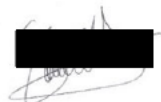
Onus

- 15 Counsel for Mr. Tjabadi approached the matter on the basis that Mr. Tjabadi merely had to establish that the statements were defamatory. Once he had done that, counsel submitted, Mr. Tjabadi was entitled to rely on the onus to justify a defamatory publication that usually rests on a defendant in defamation proceedings.
- 16 There are at least two problems with this approach. The first is that it has long been accepted that "[i]n motion proceedings the question of onus does not arise". The rule in motion proceedings is that final relief may only be granted on the undisputed facts "irrespective of where the legal or evidential onus lies" (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), paragraph 27).
- 17 Secondly, and assuming against the authority in *Zuma* that the onus counsel relied upon can meaningfully be applied in these motion proceedings, the facts

necessary to discharge the onus appear in Mr. Tjabadi's own papers. It is Mr. Tjabadi who discloses that the defamatory matter was probably published on a privileged occasion. It is Mr. Tjabadi who discloses Eskom's version that the truth of the defamatory allegations is apparent from the CCMA record, the contents of which he declines to address. And if the allegations are true, then it was plainly in the public interest that they were published at the time and in the manner they were.

18 I do not know why Eskom chose not file an affidavit formally placing Mr. Tjabadi's allegations in dispute, but in these circumstances I do not think that it matters. Mr. Tjabadi's own papers establish that Eskom's statements were probably justified.

19 For at least those reasons, no relief could be granted, and the application had to be dismissed.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 July 2024.

HEARD ON: 17 July 2024

DECIDED ON: 17 July 2024

REASONS: 19 July 2024

For the Applicant: C Liebenberg
Instructed by Cavanagh and Richards Attorneys