



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

30/10/2024
Date


Signature

CASE NO:2023-132251

In the matter between:

DYKES VAN HEEREN INCORPORATED

FIRST APPLICANT

REG NO: 2017/432748/21

HERBERT JAMES DAVID ROBERTSON

SECOND APPLICANT

JOHAN VAN HEERDEN N.O

THIRD APPLICANT

And

ADELE HIGGS

FIRST RESPONDENT

STATION COMMANDER OF THE

HONEYDEW POLICE STATION**SECOND RESPONDENT****MASTER OF THE HIGH COURT, JOHANNESBURG****THIRD RESPONDENT**

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and all be uploaded on Caselines. The date for hand down is deemed to be 30 October 2024

JUDGEMENT

SCHEEPERS AJ

1. This is an application in terms of which the applicants seek final relief in the form of an interdict dealing with various publications and or utterances by the first respondent regarding the applicants and their character(s) and / or reputation.
2. The applicant applicants believe the to be defamatory and entitled them to an interdict prohibiting the respondent from publicising the allegations.
3. The application had several twists and turns, and despite the Court initially being informed that the matter had become settled, and the necessary correspondence in that regard uploaded onto case lines, the first respondent seemingly repudiated the settlement and persisted in opposing the relief sought.
4. The first respondent then proceeded to remove from Caselines certain documents and uploaded other documents onto Caselines from the 21st to the

22nd of August 2024, only days prior to the Application's hearing date. This in turn caused the Applicants to have to prepare hardcopies of all the documents that had been previously uploaded onto Caselines, and to ensure that the Court had access to the documents, as it was, prior to the first respondent making changes to the online documents on Caselines.

5. The matter was allocated by me for hearing on Monday 19 August 2024, and the first respondent did not attend Court and indicated that she had taken ill, she produced a doctor's note indicating her inability to participate in the proceedings until 21 August 2024.
6. I stood the matter down and issued a directive in terms of which the first respondent was *inter alia* requested to participate in the proceedings, either by being physically present in Court, or by way of a virtual hearing, on 23 August 2024.
7. The respondent indicated her ability to participate by way of a virtual hearing and on 23 August 2024 appeared in person, *via* a virtual link.
8. The Court took time at the onset of the hearing to establish the exact nature of the factors that led to the initial settlement and the subsequent about-turn on the part of the first respondent.
9. In this regard, I went in detail through the relief sought by the Applicants with her prior to hearing Miss Fitzroy (on behalf of the applicants), in order to establish

what the remaining disputes between the parties were, and prior to having to make a make a decision on the issue whether there was in fact a settlement of the disputes between the parties.

10. During this process it quickly materialised that a compromise was in fact reached.

11. The stumbling block was the cost order included in the draft order prepared by the applicants.

12. I went through the relief that was sought prayer by prayer with the first respondent and, save for certain issues pertaining to the extent of the relief sought, the first respondent indicated that she really only opposes the prayer for costs.

13. After these issues were dealt with, and it appeared that the respondent indeed acknowledges the entitlement of the applicant to, at the very least some of the relief sought, I afforded Miss Fitzroy the opportunity to address me on behalf of the applicants, and in particular requested her to address me on the extent of the relief sought, as well as the potential narrowing to ensure an executable order, and relief that would not unreasonably restrict the right of the first respondent to take lawful steps to raise complaints and / or to seek relief in the appropriate forum.

14. I also provided her with the opportunity to address me on the issues of costs. Miss Fitzroy pointed me to the history of matter, the extent and gravity of the allegations levelled against the applicants. Ms Fitzroy emphasised the extent to

which the communications went, and the prejudice and harm that it caused and, is still likely to cause to the applicants, if it continues unabated.

15. Miss Fitzroy also undertook to provide me with an amendment to the proposed draft order, in line with some of the issues raised pertaining to enforceability and potential problems with the interpretation of the actions prohibited on the part of the first respondent. Ms Fitzroy uploaded the proposed draft order, and I considered its contents and the proposed exceptions to publication that may be made in future by first respondent in seeking redress of her concerns regarding the processes followed, decisions made, and investigations sought.

16. The concern of the Court was the enforcement of the relief to be granted, especially in the event of an alleged breach of the terms of the interdict and relief that may be sought as a result of the breach of the terms of the Court Order.

17. Miss Higgs there after proceeded to address me on the issue of costs as well as the issues pertaining to the formulation of the prayers and I considered her inputs in that regard, as well as the explanation that she provided for the allegations levelled against and pertaining to the applicants, together with the undertakings that she provided to refrain from doing so in the future.

18. Even disregarding the concessions made by the first respondent, and the settlement of the dispute, I am satisfied that the applicants have shown a clear

right, that was unlawfully infringed with the irreparable harm, and claimed that applicants had no viable alternative remedy available to them.

19. I considered the justification relied upon by the first respondent for the allegations made and publication thereof, and applied the principles set out by *Supreme Court of Appeal in Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 392 (A)*. In doing so, I considered the interim nature of the interdict in that case, compared to a final interdict in casu. I considered the first respondent's right to freedom of speech, and I am cautious not to undermine this this fundamental right in this application for a final interdict. I considered the seriousness of the allegations of dishonesty and alleged unethical behaviour, the explanation of the first respondent for making the allegations , and her explanation as to me who it was actually aimed at.

20. Part of the consideration was whether the relief is necessary and could not adequately be addressed by way of a damages claim. I am satisfied, having regard to the circumstances of this case that a claim for damages is not a viable alternative remedy for the Applicants.

21. On the evidence before me, the first respondent's allegations do not fall within the recognized grounds of justification. The evidence does show that the allegations, that are *prima facie* defamatory, were true and in the public interest. In this regard, having regard that the relief is for a final interdict , the version of the

first respondent was not evaluated as if she had an evidentiary burden or onus to prove justification.¹ I considered the dictum in *Modiri v Minister of Safety and Security and Others* 2011(6) SA 370 (SCA) and in particular paragraphs 22 to 23 thereof :

[22] As explained by the Constitutional Court in Le Roux v Dey 2011 (3) SA 274 (CC) para 122, common-law grounds of justification play a pivotal role within the framework of our Constitution. The reason is that it is primarily in the province of justification that the common law allows the courts to strike a proper balance between the often conflicting fundamental rights of freedom of expression, including freedom of the press, on the one hand, and the rights to freedom of privacy and dignity, including reputation, on the other. Under the rubric of truth and public benefit, the balancing act turns mainly on the element of public interest or benefit. If a defamatory statement is found to be substantially untrue, the law does not regard its publication as justified. Publication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story. But, the converse does not necessarily hold true. Our law does not regard publication of a defamatory statement as justified merely because it is true, precisely because the court may, in its performance of the balancing act, find that, in the particular circumstances of the case, the freedom of expression is outweighed by the victim's right to privacy or dignity.

[23] In the case of mere suspicion held by the police the court may well come to the conclusion, in a particular case, that the right to dignity of the suspected person outweighed the publisher's right to freedom of expression. This may happen in a case where, for example, it is found to be true that the police held the suspicion, but that the suspicion was based on no more than unfounded allegations by a meddlesome neighbour or antagonistic police informant. If in that case publication of the unfounded suspicion then wrecked the reputation of the suspected person or destroyed his or her career, the defence of truth and public benefit is most likely to

¹ See *Neetlingh v Du Preez and others* 1994(1) SA 709 (A) at 769 A-770C

fail. On the other hand a blanket ban against publication of police suspicion may very well impede the press in the performance of its vital function 'to ferret out corruption, dishonesty and graft whenever it may occur and to expose the perpetrators'. (See Khumalo v Holomisa 2002 (5) SA 401 (CC) para 23.)

22. I am accordingly satisfied that interdictory relief prohibiting the continued publication of the defamatory allegations ought to be granted.

23. The relief as sought has to be qualified. In as far as the first respondent wishes to pursue her remedies available in law, whether that be in seeking relief against the applicants in Court, referring complaints to regulatory bodies, designated by law to receive complaints or that conduct investigations. This in my view, should not be interdicted.

24. In as far as complaints have been lodged, the first respondent is entitled to exhaust the remedies provided. This should not be interpreted as granting the first respondent *carte blanche* to defame the applicants. To the contrary, if the publication of defamatory remarks continues in such processes, and are not true and in the public interest, or do not fall within qualified privilege the applicants have as their remedy a claim for damages.

25. Costs

26. In as far as costs are concerned, the general rule remains that a successful party is entitled to its costs. The Court however retains a discretion in as far as costs are concerned, but this discretion cannot be exercised, absent a rational basis to deviate from the general rule. In particular, the discretion cannot be exercised purely out of sympathy for a party.

27. Although I have sympathy for the personal hardship that the death of miss Higgs' father brought about, as well as her suspicions pertaining to the contents of her late father's will, the majority of the opposition seemed to be to attempt, no such relief has been properly instilled and is not before me. Relief pertaining to the administration of the estate of her late father. Although there is no obligation upon a litigant to engage the services of a legal practitioner, the invitation to do so by the applicants on numerous occasions were to my mind, fair advice and necessitated by the ongoing and increasing animosity from the first respondent towards the applicants

28. The fact that the applicants, as attorneys, have been subjected to criticism and allegations of acting in an untoward manner cannot be overlooked, specifically when I consider the nature of the relief sought and the steps that the applicants have taken prior to seeking relief in the form of the interdict.

29. Having regard to the extent to which the defamatory statements were made, and the fact that the allegations were sent conveyed to a client of the applicants, it could very well be appropriate circumstances to grant a punitive cost order against the first respondent as sought by the applicants.

30. I am therefore of the view in the exercise of my discretion that cost should follow the result, and that such costs should be paid on a scale as between party and party, including the cost of counsel as per Tariff B.,

31. The costs incurred by the changes made by the first respondent on Caselines and the resultant need to prepare printed copies of the indexed and paginated papers are to be paid by the first respondent on a punitive scale and it is ordered to be paid on a scale as between attorney and client.

The following order is made:

1. Save for where engaging in litigation and / or remedies and/or complaints and / or investigations available in law or prescribed by law, the first respondent interdicted and restrained from publishing any defamatory statements, posts, comments, to or on any platform, referring to the first and/or, second, and/or third applicant, or their services were in she publicises, infers or imputes that:

- a) the third applicant is not an admitted attorney, or that he has not been duly appointed as the executor of the deceased estate of the late Frederick Kristian Foley (the deceased).
- b) the second applicant is abusive, negligent, acts outside of the normal code of conduct of attorneys, is biased, unprofessional, negligent, is guilty of misconduct, acts in a threatening manner, is gender biased, is guilty of gender-based violence, is in violation of the respondents' constitutional rights, is a liar is a criminal);
- c) that the first, and/or, second, and/or third applicant fraudulently produced the last will and testament of the deceased;
- d) that the first, and/or second, and/or third applicant is guilty of criminal conduct in the administration and/or execution of the mandates in respect of the deceased's estate;
- e) that the first, and/or, second, and/or third applicants are dishonest, or deceives the public about the deceased's last will and testament and/or the execution thereof;

- f) that the second applicant committed fraud in the amount of 20 million Rand's

2. The first respondent is interdicted from directly or indirectly, inviting, enticing, or calling on the public to boycott the first applicant's business and/or services.
3. The first respondent is interdicted from harassing the applicants by engaging in electronic communication aimed at harassing, threatening, or intimidating, the applicants;
4. The first respondent is ordered to pay the cost of an application of the application on a scale as between party and party, including the cost of counsel on tariff B
5. The costs incurred as a result of the changes made by the first respondent on Caselines and the subsequent need for the applicants to prepare printed copies thereof for the Court is to be paid by the first respondent on a scale as between attorney and client.



G J SCEEPERS

**Acting Judge of the High Court
Gauteng Division; Pretoria**

Appearances:

For the Applicant:

Adv. K Fitzroy

Instructed by:

Dykes Van Heeren Incorporated

For the Respondent:

1st Respondent in person

Date Heard:

24 August 2024

Date Judgement delivered:

12 November 2024