

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-019518

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

14.3.2025

DATE

SIGNATURE

In the matter between:

WESLEY JACOBS

Applicant

and

AARON MATOELZI NKOMO

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL
FOR INFRASTRUCTURE DEVELOPMENT, GAUTENG**

Second Respondent

JUDGMENT

CORNELISSEN, AJ:

Introduction

- [1] The application emanates from several statements composed by the first respondent, Mr Aaron Matoelzi Nkomo, in which he made certain remarks about the applicant, Mr Wesley Jacobs.
- [2] The first respondent published these statements (in the form of email communications and correspondence) and disseminated them to various officials within the Department of Infrastructure Development, Gauteng (the Department)¹, and external third parties such as the South African Police Services, the Special Investigating Unit and the Offices of the Presidency and the Premier, Gauteng.
- [3] In these statements, the first respondent alleged, amongst others, that the applicant was involved in maladministration, malfeasance and corrupt activities within the Department. More particularly, that the applicant had been appointing his friends into senior positions within the Department, without following recruitment and selection processes.
- [4] The first respondent does not dispute that he had published these statements, only that they are defamatory and/or are intended to harm the applicant's reputation.
- [5] The applicant bears the onus of proving that the first respondent's statements are defamatory. If he succeeds in doing so, it is presumed that these statements

¹ At the time of deposing to the founding and answering affidavits, the applicant was the Acting Deputy Director General: Corporate Services within the Department and the first respondent, an Accounting Clerk.

were both wrongful and intentional. The onus then shifts to the first respondent to raise a defence which excludes either wrongfulness or intent.²

The statements

[6] The first respondent's discontent with the applicant appears rooted in an email exchange that occurred between them on 14 August 2020.

[7] In the initial email, the first respondent informed the applicant that an unknown individual had given him a brown envelope which contained information concerning apparent irregular appointments and tailor-made posts within the Department.

[8] The first respondent went on to remark that:

"DDG, I am currently studying and I am doing very well at school. I am not worrying about who does what and when, all I request from you and your team is to be considered in one of the Assistant Director positions which are advertised and I have applied in all of them.

You will decide which one am I suitable for."

[9] On the same day, the applicant responded as follows:

"...

I have taken note of your email, the attachments and the tone of the email.

I find this email to be trying to blackmail me, which I am informing you now, I will not take lightly at all."

² *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC) at para 85 (*Le Roux v Dey*).

- [10] In his response, the applicant asked an official from Risk Management to investigate the allegations and another from Labour Relations to follow the formal processes.
- [11] In reply, the first respondent copied officials from the Special Investigating Unit and asked that they too investigate the allegations.
- [12] It seems that following this exchange, the first respondent went on a digital tirade against the first respondent.
- [13] He wrote to Ms Malebo Siya, copying in officials from the Department, the South African Police Services and the Special Investigating Unit, alleging that the Department was being turned into a place where senior officials were giving each other positions to act, and some of the senior officials, including the applicant, were involved in corrupt activities.
- [14] The first respondent also claimed that he and other junior officials were being bullied, harassed, victimised and subject to a high level of maladministration and corrupt activities. He concluded his email by requesting that the Special Investigating Unit investigate the alleged maladministration and corruption within the Department.
- [15] Following on from this email to Ms Siya, the first respondent sent a further email to the "Office of the Chairperson of the Anti-Corruption Inter-Ministerial Committee" on 11 September 2020.
- [16] In this email, in which he included the President of the Republic and other institutions, the first respondent intimated that:

“ ...

I cannot hide my disappointment in the manner in which the Chief Director Human Resource Management (HRM) who is currently acting in the position of Deputy Director General (DDG) Corporate Services Mr. Wesley Jacobs, abuses his powers by appointing officials in positions without following recruitment and selection processes during the lockdown of COVID-19 period I feel very strongly that he took the advantage of the situation that the country is facing right now.

...

The appointment of Ms. Phindile Gule in an Administration Clerk Transport is actually a confirmation of what was said on the below email that Jacobs has been appointing his friends in positions without following the recruitment and selection processes.

...

The Tailor Made Posts which is also attached was designed for Jacobs's friends only, there are two Directors who were recently appointed and their names also appears on the Tailor Made Posts list."

[17] Following these allegations, the Department undertook an internal investigation and issued report, signed in March 2021 and titled "*Investigation Report into Allegations made by Mr Aaron Nkomo Regarding Irregular Appointments in the Department of Infrastructure Development*".

[18] Some of the objectives of the investigation was to probe whether there were tailor made positions and whether the applicant was appointing his friends into those positions without following recruitment and selection processes; and whether the first respondent and other junior officials were subject to bullying, harassment, victimisation, maladministration and corruption.

- [19] It is notable that though the first respondent was afforded the opportunity to provide supporting evidence and give information relating to his allegations, he elected not to participate in the investigation.
- [20] The report found that the allegation that the applicant had appointed his friends in positions without following the recruitment and selection processes was not supported by the evidence, and on a balance of probabilities, was unsubstantiated.
- [21] Similarly, the allegations of bullying, harassment, victimisation, maladministration and corruption were not supported by the evidence and were on a balance of probabilities, found to be unsubstantiated.
- [22] Predictably, the first respondent did not accept the finding of the report and continued with his attacks on the applicant.
- [23] For instance, using a NEWAHU letterhead, the first respondent wrote to the Head of the Department, Mr T Mdadane, on 7 September 2022, and repeated the allegation that the applicant was highly implicated in maladministration and corrupt practices. He attempted to lodge a formal complaint against the applicant and sought his removal from his acting position with immediate effect
- [24] No luck being had, on 17 November 2022, the first respondent wrote to the Deputy Director of Corporate Services Ms Masabata Mutlaneng, under the subject line "Irregular Appointments of Service Provider / Contractor", in which he claimed that one of the reasons for his non-appointment to the position of Senior Administrative Officer Finance Level 8 in Westhoven District Maintenance

Hub, was because there was a continuation of corrupt practices in the Department and nothing was being done about corrupt officials.³

[25] In addition, the first respondent repeated the claim that the applicant had created tailor made posts which benefited his "friends and favourites" and appointed an official without following recruitment and selection processes. According to the first respondent, he was being subjected to occupational detriment as a result of this, and he invoked the provisions of the Protected Disclosures Act.

[26] Still aggrieved, the first respondent wrote to the second respondent on 7 December 2022, with the subject line "Maladministration, Malfeasance and Corruption Practices".

[27] The first respondent complained to the second respondent that:

"Our minimum understanding was that the Department should deal and resolve administrative issues internally, but what should we do when we report issues of corruption practices with tangible evidence to the relevant office and/or unit (Risk Management) which reports directly to the HOD, but the very same unit does not have the decency to acknowledge or respond to what we have reported.

We have been consistently reporting cases of malfeasance, maladministration and corrupt practices to Risk Management, the unit which reports direct to the HOD, that unit failed dismally to investigate, instead those who reported have been subjected to victimisation which is a violation of the Whistleblower Protection Act (WPA) which was established to ensure that employees who engage in protected disclosures are free from fear of reprisal for their disclosures.

³ This email appears to have been forwarded to even more officials on Wednesday, 14 December 2022.

Therefore, I would like to escalate my issues to your urgent attention and action, and I further request the MEC to appoint an external unit to investigate the following officials as the department cannot investigate itself:

....

2. Chief Director Human Resource Management Mr. Wesley Jacobs (Jacobs), his name appears on the document of a private company as a contact person which was doing in business in Westhoven using the state resources being the private company, which followed by creating posts for his (Jacobs)'s friends and favourites including appointing officials in positions without following recruitment and selection processes.

Much as both Heads of State current and former President Ramaphosa and President Zuma are hold accountable for what is being suggested to be wrong, which correctly shows that no one is above the law, what about ordinary government officials? They must be investigated, charged and prosecuted for their wrongdoing."

[28] The same accusation i.e., that the applicant was highly implicated in malfeasance and corrupt practices, was repeated in an email to the Director of Labour Relations, Mr P Podile, on 9 December 2022 (after Mr Podile had informed the first respondent that his grievance relating to his non-appointment was finalised).

[29] The first respondent wrote to the second respondent once more on 14 December 2022, indicating that he would never apologise to the applicant (after he received a letter of demand from the applicant's attorneys) and,

"Mr Wesley Jacobs (Jacobs) ran to the attorneys after I reported him and Mr. Vincent Selemela (Selemela) for being highly implicated in malfeasance, maladministration and corrupt activities wherein I attached tangible evidence. It is a clear indication that

Jacobs knew all along that he (Jacobs) is involved in wrong doings of malfeasance, maladministration and corrupt activities hence he ran immediately to his attorneys for defending his corrupt activities and protection after I reported them to your attention.

Jacobs is continuing to victimise and intimidate me so that I cannot be able to report his involvement in corruption activities with Selemela, as part of victimisation they took away my duties and responsibilities that of Senior Administration Officer Finance level 8 from me which I am misappropriated and exploited, which I performed for the past nine (9) years, as a result I am currently redundant based on the fact that I reported their involvement in corruption practices, both (Jacobs and Selemela wanted to cover their tracks and continue with corrupt practices), I have been consistently reporting to the Department unfortunately it falls to deaf ears.

If Jacobs is innocent of any wrong doings, why did he run to the attorneys for defence what is it is that Jacobs is protecting or hiding by running to the attorneys? Why did Jacobs not wait for the HAWKS or SIU to be appointed and investigate the allegations, which are reported by a junior official to both of them Selemela and Jacobs? It is very clear that he felt guilty he knew what he did was wrong hence Jacobs ran to the attorneys.

Honourable MEC, both Mr. Wesley Jacobs and Vincent Selemela must be suspended with immediate effect and to be investigated so that they both do not interfere with investigations as well as ensuring that they do not intimidate the witnesses.

I have also copied other institutions including Chapter 9 institutions: the office of the Chief Justice Hon RMM Zondo of the Republic of South Africa, the office of the Deputy Chief Justice Hon MML Maya and the office of the National Prosecuting Authority, Advocate Shimila Batohi. Office of the Public Protector Advocate Kholeka Gcaleka, and others."

[30] Finally, on 17 February 2023 and under a PSA (Public Servants Association) letterhead, the first respondent addressed a letter to the Assistant Director of Labour Relations, Mr Victor Sebitlo, and repeated the same allegation i.e., that the applicant was highly implicated in mismanagement and maladministration.⁴

Are these statements defamatory?

[31] Defamation is the wrongful and intentional publication of a defamatory statement concerning the plaintiff (or applicant).⁵

[32] In *Le Roux and Others v Dey*, the Constitutional Court recognised that:

“Yet the Plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional.”⁶

[33] The applicant says that the words used by first respondent are clear in their meaning.⁷ In other words, that the statements are defamatory per se.

[34] Where a complainant is content to rely on the proposition that the published statements are defamatory per se, a two-fold enquiry is involved.⁸ The first is to establish the ordinary meaning of the statement(s), and the second is to determine whether that meaning is defamatory.

⁴ The Labour Relations Officer for Johannesburg, Mr Henry Hall, subsequently confirmed in an email dated 20 February 2023, that the first respondent was not an elected shop steward and had no right to engage on behalf of PSA nor to use the PSA letterhead or logo, and PSA distanced itself from the allegations / comments made by the first respondent.

⁵ *Khumalo and others v Holomisa* [2022] ZACC 12; 2002 5 SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 18 (*Khumalo*).

⁶ *Le Roux*, op .cit., fn 2, para 85.

⁷ See para 51 of the applicant's heads of argument.

⁸ *Le Roux v Dey*, op. cit., fn 2, para 89.

[35] In relation to the first enquiry:

“The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also what is implied.”⁹

[36] For the most part, there is a running theme in the first respondent’s allegations against the applicant. They can be summarised as follows:

- a. There were tailor-made posts which were designed for the applicant’s friends.
- b. The applicant abused his powers by appointing his friends into positions without following recruitment and selection processes.
- c. There is a high level of maladministration and corruption in the Department and the applicant is implicated in these corrupt activities and maladministration.
- d. The first respondent is being bullied, harassed and victimised (presumably by the applicant).

[37] In the simplest of terms, all of this amounts to the claim that the applicant is corrupt.

⁹ *Le Roux v Dey*, op.cit., fn 2, para 89.

[38] In *Manuel v Crawford-Browne*¹⁰, Le Grange J held that the allegation that someone is corrupt is defamatory because it is aimed at lowering the person in the estimation of right-thinking members of society.

[39] The applicant argues that the statements claiming that he is corrupt are damaging to him because they lower his esteem and affects how he is seen in the eyes of his peers, colleagues and the public. They are not only intended to undermine his credibility and reputation but also undermine his integrity and dignity in both his personal and professional capacities.

[40] In *EFF and others v Manuel*¹¹, the former Minister of Finance, Mr Trevor Manuel, was accused of being corrupt, nepotistic and conducting himself unlawfully. The Supreme Court of Appeal recognised that there could be no doubt that such statements would, in the eyes of the reasonable reader, diminish the esteem of any person about whom they were made.¹²

[41] Similarly, the allegation that the applicant is corrupt has the potential of damaging the esteem that he holds not only as a senior official within the Department (that is, amongst his peers and colleagues), but also the greater community who are served by the Department.

[42] In our country, where corruption is rife and continues to undermine the State's ability to deliver on its constitutional obligations, by substantially diminishing its

¹⁰ (2471/08) ZAWCHC 13; [2008] 3 All SA 468 (C) (6 March 2008).

¹¹ (711/2019) [2020] ZASCA 172 (17 December 2020); [2021] 1 All SA 623 (SCA); 2021 (3) SA 425 (SCA) (*EFF v Manuel*).

¹² *EFF v Manuel*, op.cit. fn 11, para 35.

limited resources, any person accused of being corrupt, particularly a senior official within Government, may face dire consequences.

[43] It is therefore not an accusation that is to be made lightly, and absent cogent evidence in support thereof, is per se defamatory.

Wrongfulness and intention

[44] The applicant has proven that the first respondent's statements are defamatory, and accordingly, they are presumed to be wrongful and intentional.

[45] In other words, they were published with the intention to injure.¹³

[46] In order to avoid liability, the first respondent must raise a defence which excludes either wrongfulness or intent. In doing so, the first respondent is to rebut one or the other presumption by discharging his onus on a preponderance of probabilities. Put differently:

“A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence.”¹⁴

[47] As indicated above, the first respondent does not deny that he published the statements, only that they are neither defamatory nor were they intended to harm the applicant.

Truth and public interest

[48] In his answering affidavit, the first respondent is adamant that there is truth to the allegations against the applicant. He believes that the applicant is involved in

¹³ *EFF v Manuel*, op. cit., fn 11, para 36; *Khumalo v Holomisa*, op cit, fn 5, para 18.

¹⁴ *Le Roux v Dey*, op cit, fn 2, para 85.

malfeasance, maladministration and corrupt practices. He also believes that he is a victim of these practices because he was not appointed to a position in which he had been acting for several years.

[49] The entire premise for the first respondent's allegations appear rooted in the tailor-made posts list, which he says he received from a confidential source.

[50] It is however striking to me that on the very same day of receiving the brown envelope i.e., 14 August 2020, the first respondent wrote to the applicant and said that he is not concerned with who is doing what and when.

[51] To my mind, that meant that the first respondent was not concerned with whether there was corruption the Department. He was willing to be complicit in that corruption, if it meant that he was to be considered for an Acting Director position.

[52] It is only when the applicant objected to the first respondent's tone and motive, and asked that the allegations be investigated by Risk Management, that the first respondent suddenly took tremendous issue with corruption and slandered the applicant to all and sundry. That is not a *bona fide* belief that the applicant is corrupt, but seems to me to be rather self-serving discontent.

[53] In any event, if the first respondent truly believed that the applicant was corrupt, he would not have sent him an email on 14 August 2020. Instead, he would immediately have approached more senior persons within the Department with the information and asked that it be investigated. By contrast, it was the applicant who asked for the initial investigation into the allegations.

[54] I turn to deal with the tailor-made post list, a list that is said to prove that the applicant was appointing persons, deemed his friends and favourites, in senior

positions within the Department, without following recruitment and selection processes. According to the first respondent, these persons would only act for five to six months before they were permanently employed, whereas he – who had acted in the same position for ten years – was not appointed. It is this purported unfairness, which lies at the heart of the first respondent's grievance against the applicant.

[55] The question is, is it true?

[56] The simple answer is no. The allegations were thoroughly investigated and were found not to have any substance.

[57] In any event, the tailor made posts list merely sets out when the acting posts of officials as well as their start and end date. I am informed by the applicant that this list is actually a photograph of a white board which was used by the Human Resource Department as a control mechanism to monitor the acting positions within the Department. This board is said to be found on the 12th floor, in an open space that is occupied by more than 50 human resource officials and is visible to anyone who comes into that space.

[58] The applicant accepts that some of the persons on the board who were acting, were eventually permanently employed, but notes that conversely, there were officials who were not appointed to posts in which they had acted.

[59] It is also apparent from the advertisement for the Senior Administrative Officer : Finance, Inventory and Store Services under the District Maintenance Hub, Westhoven, which is the position to which the first respondent applied - that a

National Diploma (NQF 7) qualification in Supply Chain Management / Economics / Accounting as recognised by SAQA was required.

[60] The first respondent attached a host of qualifications. They are Certificates in Sundry Payments Capturing, Microsoft Excel 2010 Basic, Competence Mentoring, Time Management and Organising and a CCMA Education, Training & Development. At the time of deposing to the answering affidavit, the first respondent was studying for a Higher Certificate at Regenesys School of Public Management.

[61] Though these qualifications are admirable, they do not amount to a National Diploma (NQF 7).

[62] The first respondent alleges that the Department, more particularly the applicant, was inconsistent with the requirements for positions within the Department because a higher position – that of Office Manager level 9 – required a minimum requirement of Grade 10, which is a lesser requirement than that which was required for the Senior Administrative Officer position, level 8.¹⁵ That is not so.

[63] All of which is to say that I cannot accept, based on the evidence produced by the first respondent, that the applicant was appointing his friends into senior

¹⁵ In support of this contention, the first respondent attached the job specifications for the Office Manager position. From the specification, the Office Manager position required a recognised 3 year degree / national diploma in office management coupled with a minimum of 3 years' experience in Administration or a Grade 12 or Grade 10 Certificate with more than 10 years' experience in Administration of which 2 years must be in rendering support functions to top management level. The advertisement clearly contemplated that a prospective candidate either have the qualification i.e., a degree or diploma with 3 years' of experience or the experience i.e. grade 10 or 12 certificate but with more than 10 years of experience. It is therefore not so, as the first respondent claims, that the minimum requirement was a grade 10 certificate. That was coupled with more than 10 years' of experience.

positions within the Department, without following recruitment and selection processes, nor am I convinced that the first respondent truly believed this to be the case.

[64] Rather, the first respondent manifested this situation because of his despair at not being elevated within the Department, whilst seeing others being promoted.

[65] It is also not so that the evidence on which the first respondent relies – which is the tailor-made posts list – proves that there is corruption within the Department. That is not so, nor is it so that the applicant is corrupt.

[66] The first respondent accordingly did not prove, on a balance of probabilities, that his defamatory statements are true. That is fatal to his defence and it falls to be rejected.

[67] Remedies

[68] The applicant seeks four different types of relief i.e., a declarator, an interdict, a retraction and an apology. I shall consider the declaratory and interdictory relief and thereafter the retraction and the apology.

Declaratory and interdictory relief

[69] The applicant seeks a declarator that the allegations made about him, concerning his employment and position within the Department, as Acting Deputy Director General: Corporate Services and his erstwhile position as Chief Director: Human Resource Management¹⁶, are defamatory and false. Further,

¹⁶ Contained in the emails and letters to various officials of the Office of the Premier of Gauteng, the Department and its members, the Office of the Chairperson of the Anti-Corruption Inter-

that the first respondent's publications and statements were and continue to be unlawful.

[70] This Court held in *Ramos v Independent Media (Pty) Ltd*¹⁷ that a declarator confirming the defamatory and false nature of the statements concerned, is not abstract relief for which a declaratory order is unsuited. Rather, it is relief which encapsulates the legal finding of defamation and leads to the interdictory relief that the applicant seeks.¹⁸

[71] Insofar as the interdictory relief is concerned, the applicant clearly has a right to his reputation and good name, and the first respondent's continuous onslaught on his reputation through the various defamatory statements infringes that right.

[72] The first respondent denies that the applicant has suffered any harm as a result of the statements and cites the fact that he remains in his position, as an example of the applicant remaining unharmed.

[73] But this Court held in *Ramos* that "*it was not necessary to show actual harm to her career in order to satisfy her onus in the defamation claim where she seeks interdictory relief.*"¹⁹

[74] As held earlier, the allegation of corruption is a serious charge with potentially dire consequences for the applicant. He illustrated in his founding affidavit that the first respondent has made severe inroads into his status, dignity, good name

Ministerial Committee, the South African Police Service, the Special Investigating Unit, the Office of the Presidency, the National Minister of Public Works, the Office of the Director General of the National Public Works and the Minister of Justice, found in annexures FA2, FA3, FA6, FA7, FA8, FA9, FA12, FA13 and FA14.

¹⁷ (01144/21) [2021] ZAGPJHC 60 at para 114.

¹⁸ *Ramos*, op.cit., fn 17, para 114.

¹⁹ *Ramos*, op.cit., fn 17, para 119.

and reputation, which are characteristics he relies on as a senior government official.

[75] I am accordingly satisfied that the applicant has shown that he has suffered harm.

[76] Finally, the first respondent continued to publish harmful allegations against the applicant, notwithstanding investigations having found that those allegations were unsubstantiated. I cannot see how, but for this Court's intervention, the first respondent will cease his conduct. There is accordingly no other remedy available to the applicant.

[77] I am persuaded that the applicant is entitled to the declaratory and interdictory relief that he seeks.

[78] In *EFF v Manuel*, the Supreme Court of Appeal held that where defamation is established and the defences to a claim for an interdict are shown on the papers to be without substance, the grant of a final interdict is permissible.²⁰

The retraction and apology

[79] The applicant seeks an order that the first respondent be directed, within 24 hours, to publish a notice to all persons to whom the unlawful publications and statements had been directed to, in which he unconditionally retracts and apologises for the unlawful publications and statements made about the applicant.

²⁰ See *EFF v Manuel*, op cit, fn 11, para 88. Further, at para 111 "[T]here is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements proceeding by way of motion proceedings, on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they would obtain instant, though not necessarily complete, relief."

[80] Whether I am permitted to grant this relief to the applicant, specifically on motion proceedings, is a little less clear.

[81] I say this because the Supreme Court of Appeal in *EFF v Manuel* questioned whether a court could order a retraction and an apology separately to an award of damages, and subsequently held that an apology is inextricably bound up with the question of damages.²¹

[82] Keightley J in *Ramos* considered that the inextricable link in *EFF v Manuel* should be read in its context and that it is only where both forms of relief i.e., damages and an apology, are sought, that the link is established, because the measure of damages will be affected by the additional award of an apology.

[83] Keightley J determined that:

“In my view, there is nothing in the relevant dicta of our higher courts that prevents a court ordering an apology along with the kind of relief that Ms Ramos is entitled to in this case. She has elected not to pursue a damages claim. The effect of an apology on the computation of damages in the future is not a relevant factor here. The respondents are members of the media. It is by no means unusual for the media to publish corrections and apologies without a court directing them to do so. I see no reason why, in circumstances where the respondent elect not to offer an apology, this Court should not order them to do so.”²²

²¹ *EFF v Manuel*, op. cit., fn 11, para 130.

²² *Ramos*, op cit, fn 17, para 134.

[84] Though I would ordinarily have been constrained to adopt the approach of Keightley J in *Ramos*, the Supreme Court of Appeal held later, in *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd* ²³:

“A claim for damages for defamation, whether general or special, was always unliquidated and the damages could only be determined in proceedings by way of action, or possibly in special circumstances after hearing oral evidence in application proceedings. The position has not changed as a result of courts now being empowered to grant other compensatory remedies, either in addition to, or to the exclusion of, a claim for damages. Relief such as an apology or the publication of a retraction remains compensatory relief and for that reason requires oral evidence in the same way as a claim for damages requires oral evidence.”

[85] I am also mindful of the *obiter* remarks made by the Supreme Court of Appeal in the more recent judgment of *IRD Global Limited v The Global Fund to fight AIDS, Tuberculosis and Malaria* ²⁴ that 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. However, that relief requires the institution of an action.”

[86] For these reasons, I cannot grant a retraction and an apology on motion. These forms of compensatory relief must be referred to either oral evidence or trial.

[87] In his supplementary written submissions, Mr Gross contended that if this Court was not inclined to grant the retraction and apology on motion, these issues should be referred to trial with costs to stand over for later determination. Mr

²³ (299/2020) 2021 ZASCA 136 (6 October 2021) at para 21 (*NBC Holdings*).

²⁴ (504/2023) [2024] ZASCA 109 (04 July 2024) at para 24 (*IRD Global*).

Gordon, for the first respondent, agreed that the issues of a retraction and an apology should be referred to trial.

[88] This Court has a discretion, under Rule 6(5)(g) of the Uniform Rules of Court:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[89] I do not agree that the issues of retraction and apology should be referred to trial.

In my view, these are specific issues which do not require a full trial. Rather, it would be more appropriate that they be referred to the hearing of oral evidence.

The first respondent's points in *limine*

[90] The first respondent raised two points in *limine*. I deal with it at this stage of the judgment because I do not find that either point has merit.

[91] In the first instance, the first respondent took issue with the applicant not citing all of his names in his founding affidavit, suggesting that he was hiding something.

[92] I am satisfied that the applicant has been properly identified and accordingly, the first point in *limine* is rejected.

[93] In the second instance, the first respondent contended that there are disputes of facts that warrant the referral to oral evidence. It is unclear what exactly the disputes of facts are as they have not been cogently identified in the answering affidavit.

[94] In any event, insofar as the first respondent relies on a defence of truth and public interest to discharge his onus on whether the statements were defamatory, they did not amount to material disputes of facts which could not be decided on paper. It is only the compensatory relief of a retraction and an apology which requires the hearing of oral evidence, as discussed above.

[95] The second point in limine also falls to be rejected.

Condonation for the late delivery of the answering affidavit

[96] The final issue for determination is whether first respondent should be granted condonation for the late delivery of his answering affidavit.

[97] The application was initially issued on an urgent basis for hearing on 7 March 2023. On that day, the first respondent appeared in person and informed the Court that he intended to oppose the application. The application was subsequently removed from the roll for lack of urgency.

[98] The first respondent did not deliver a notice of intention to oppose and the application was enrolled on the unopposed motion roll for hearing on 11 May 2023.

[99] On that day, the first respondent once more appeared in person and again informed the Court that he wished to oppose the application.

[100]The Presiding Judge granted the applicant limited interim relief and the first respondent was directed to deliver his answering affidavit within fifteen days from the grant of the order.²⁵ In other words, the answering affidavit would have been due by 1 June 2023.

[101]The first respondent did not deliver his answering affidavit by the aforementioned date. According to him, he had approached the Legal Practice Council, who appointed Mr Clifford Gordon of CL Gordon Attorneys on 19 June 2023.

[102]Mr Gordon filed a notice of intention to oppose on 24 July 2023, but did not immediately deliver an answering affidavit. Rather, the answering affidavit was only delivered some 4 months later on 13 November 2023.²⁶

[103]There was accordingly approximately a 5 month delay between the expiry of the fifteen day extension granted by Pretorius AJ and the delivery of the answering affidavit on 13 November 2023.

[104]Under Rule 27(3) of the Uniform Rules of Court, this Court may, on good cause shown, condone any non-compliance with the Uniform Rules of Court.

[105]However, as the Court cautioned in *Uitenhage Transitional Local Council v South African Revenue Service* ²⁷ :

“... condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable

²⁵ In terms of the interim interdict granted by Pretorius AJ, the first respondent was interdicted and restrained from directly or indirectly publishing words, in writing or in any other manner of communication, including electronic communication, wrongful and/or defamatory comments regarding the applicant, pending the final outcome of the application

²⁶ The delivery of the answering affidavit appears to have been prompted by the applicant having once more set the application down on the unopposed motion roll for hearing on 23 November 2023.

²⁷ [2003] ZASCA 76; 2004 (1) SA 292 (SCA) at para 6.

the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelt out."

[106] The first respondent's explanation for the delay in delivering his answering affidavit falls far short of what is required.

[107] Even after he had obtained the services of Mr Gordon, it would take another 4 months before the answering affidavit was filed.

[108] In argument before me, Mr Gordon took responsibility for the sparseness of the explanation of the delay and requested that the Court not prejudice the first respondent because of the way in which he had prepared the answering affidavit.

[109] Though I am not convinced that a satisfactory explanation for the delay has been provided, and thus, whether good cause has been shown, I am aware that I have a discretion, which I am to exercise judicially upon a consideration of all of the facts, and that I must be fair to both sides.

[110] That is apparent from *Melane v Santam Insurance Co Ltd*²⁸:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and importance of the case. Ordinarily these facts interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that

²⁸ [1962] All SA 442(A); 1962 (4) SA 531 (A).

all of the foregoing clearly emerge from the decisions of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases.”

[111] A full and proper explanation of the delay should have been placed before me, and it may well be so that the blame for the lack of explanation is to be cast on Mr Gordon.

[112] However, to my mind, this ought not to be the reason for shutting the door to the first respondent. It is more important that the principle of *audi alteram partem* be observed and the first respondent’s version be properly considered.

[113] For this reason, I shall grant the first respondent’s application for condonation for the late delivery of his answering affidavit.

Costs

[114] Though the applicant was partially successful in that he shall be granted the declaratory and interdictory relief that he seeks, his remaining relief is to be referred to oral evidence.

[115] The Court hearing the oral evidence will be best placed to determine an appropriate costs order when all of the relief claimed by the applicant has been dealt with.

[116] The applicant has in any event asked that costs be stood over for later determination, in the event that the retraction and apology relief are referred to oral evidence.

[117] In the result, I make the following order:

- a. The allegations concerning the applicant, as contained in the following publications and statements, are declared as defamatory and unlawful:
 - i. The emails and or letters to various officials of the office of the Premier of Gauteng, the second respondent and its members, the Office of the Chairperson of the Anti-Corruption Inter-Ministerial Committee, the South African Police Service, the Special Investigating Unit, the Office of the Presidency, the National Minister of Public Works, the Office of the Director General of the National Public Works and Minister of Justice, found in: -
 - 1. Email correspondence dated 11 September 2020, addressed by the first respondent to the Office of the Chairperson of the Anti-Corruption Inter-Ministerial Committee and others, as Annexure FA2.
 - 2. Email correspondence addressed by the first respondent to Ms Malebo Sibiya, and others as Annexure FA3.
 - 3. Letter dated 07 September 2022, addressed under the National Education Health & Allied Workers' Union's letterhead, and addressed by the first respondent to the attention of the Head of Department of Infrastructure Development and Property Management Mr Thulane Mdadane and others, as Annexure FA7.

4. Email correspondence dated 17 November 2022, addressed by the first respondent to Deputy Director General Corporate Services Ms Masabatha Mutlaneng and others, as Annexure FA8.
5. Letter dated 7 December 2022, addressed by the first Respondent to the Department of Infrastructure Development and to the attention of the MEC Honourable Lebohang Maile and others, as Annexure FA9.
6. Email dated 09 December 2022, addressed by the first respondent to Mr Podile Podile and others, as Annexure FA12.
7. Letter dated 14 December 2022, addressed by the first Respondent to the Department of Infrastructure Development and to the attention of the MEC Honourable Lebohang Maile and others, as Annexure FA13.
8. Letter dated 17 February 2023, addressed under the PSA Union letterhead and addressed by the first respondent to the attention of Assistant Director Labour Relations Mr Victor Sebitlo and others, as Annexure FA14 (the publications and statements).

- b. The first respondent is interdicted from publishing any statement which says or implies that the applicant:
 - i. is appointing or has appointed officials and/or friends in positions without following due and proper recruitment and selection processes at the Department;
 - ii. has created tailor-made posts designed for his friends at the Department;
 - iii. is involved in maladministration and corruption at the Department;
 - iv. is in violation of the acting policy at the Department;
 - v. has subjected the first respondent to acts of harassment, intimidation and victimisation, through the Labour Relations Unit of the Department;
 - vi. is implicated in cases of misappropriation and exploitation of employees at the Department; and
 - vii. is highly implicated in malfeasance and corruption practices at the Department.
- c. The relief sought by the applicant under paragraph 2.4 of the notice of motion is referred to oral evidence.
- d. Costs of the application are to stand over for later determination.



Z CORNELISSEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the applicant:

Mr GJA Gross
Kern Armstrong & Associates

For the first respondent:

Mr CL Gordon
CL Gordon Attorneys