

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 062312/2024

1. REPORTABLE: ~~YES~~/ NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED: YES

DATE: 22 May 2025

SIGNATURE OF JUDGE:

A handwritten signature in black ink, which appears to be "M. J. M.", is written over a black rectangular redaction box.

In the matter between:

**NEUNET PROPERTIES (PTY) LTD
t/a SUNSHINE HOSPITAL**

APPLICANT

and

ROAD ACCIDENT FUND

1ST RESPONDENT

MACINTOSH PULELLA

2ND RESPONDENT

JUDGMENT

HERSHENSOHN AJ

INTRODUCTION

[1] The current application before me is an application in terms of which the applicant seeks certain interdictory relief and more particularly in terms of an amended notice of motion, a declaration as to a certain statement to be found as defamatory.

[2] The matter comes as an opposed motion and was argued before me on 23 April 2025.

THE FACTUAL AVERMENTS

[3] As I understand the applicant's case and from a perusal of the papers, the applicant contends that as a hospital a statement made by the second respondent, Mr Pulella, acting in his capacity as the Head of Corporate Communications for the first respondent being the Road Accident Fund ("the RAF") made certain defamatory during an eNCA interview which took place on 15 March 2024 during which interview the second respondent accused the applicant of involvement in a "*corrupt scheme*" of transferring patients unlawfully and "*over-servicing and overcharging*" their patients.

[4] In this regard the offending statement as transcribed in the founding affidavit reads as follows:

"... They are a company called Sunshine and they are a company that was involved in a corrupt scheme of moving patients from anywhere around the country to the Sunshine Hospital in Benoni. As a result of that we felt that there was over servicing and there was overcharging and the matter is in court and so until such time as the matter is finished with in court we are going to face this all the time."

[5] The applicant contends that the statement was false and an outright lie and was furthermore not the first time that these statements were made. The applicant further contended that when considering a report which had been done by investigators in the employ of the RAF and as such was released. The said report found no evidence of wrongdoing and on the part of the applicant.

[6] As I have alluded to above the applicant seeks in effect:

- (a) a declaration that the statement made by the second respondent and more particularly on 15 March 2024 on the news channel eNCA and specifically that the applicant was involved in a corrupt scheme of moving patients from other hospitals across the country to itself and further that the applicant was involved in over servicing and overcharging are declared to be defamatory and false;
- (b) that the first respondent and all other persons under its authority and employed by it or under its control acting on its instructions together with the second respondent is interdicted and restrained from making any further statements that either state or imply that the applicant is involved in a corrupt scheme of moving patients from other hospitals across the country to itself and furthermore that the applicant was involved in over servicing and overcharging;
- (c) that the first and second respondents are to be declared to be jointly and severally liable for the applicant's damages as occasioned by the aforementioned defamatory conduct, that the determination of the quantum of the applicant's damages an apology and retraction of the statements are referred to the hearing of oral evidence;
- (d) that the first and second respondents pay the costs of the application on a party and party scale and more particularly on scale C thereof inclusive of costs of counsel, one of which is a senior counsel.

[7] The respondents on the other hand contend that the statements were truthful or based upon fair comment and which is premised upon the following:

- (a) investigations into Sunshine Hospital's allegations of alleged corruption and billing irregularities;

- (b) the fact that the RAF had made prior media statements about the same matter and more particularly that the applicant had done nothing in that regard;
- (c) that there were ongoing investigations by the special investigating units into corruption involving RAF officials and private entities;

[8] The respondents took issue with the manner in which the application was brought and more particularly that it was brought by motion proceedings and, and that by virtue of a foreseeable factual dispute that the matter ought to have been referred to trial and in particular with reference to the damages claim.

THE AMENDMENT

[9] From the relief quoted above it is apparent that the relief I have quoted in this judgment is in fact different to the original relief sought.

[10] This is simply because prior to the hearing of the matter the applicant launched an application in terms of the provisions of Rule 28 to amend the notice of motion and more particularly the relief sought to include not only the interdict, but a declaration that the statement itself as was made by the respondents was in fact defamatory.

[11] The rationale for this was obvious. This is an issue which was raised by the respondent in its answering affidavit as a key contention and quite rightly so. In the absence of a declaration of the fact that the statement was in fact defamatory, a case would not be made out and relief would not be competent when considering the ancillary relief sought.

[12] Consequent upon the amendment being filed, the matter was argued in front of me. In this regard the issue was raised prior to the arguing of the matter in its entirety, by both Mr Mokhare and Mr Arnoldi representing the various parties.

[13] I immediately asked Mr Mokhare if there was any objection to the proposed amendment. He recorded that the way the amendment found its way to court, was unfortunate particularly since this was an issue raised by the respondents in their answering affidavit, however he did not oppose the amendment.

[14] I am appreciative of Mr Mokhare in that to simply oppose the amendment would have inevitably drawn out the matter unnecessarily. As such, I have accepted the amendment as proposed by the applicant and the notice of motion was accordingly amended and in terms of the amended notice of motion filed.

ARGUMENT ON BEHALF OF PARTIES

[15] Mr Arnoldi acting on behalf of the applicant contended that the statement as published was clearly and patently defamatory.

[16] He furthermore contended that albeit that it was alleged by the respondents that these allegations had been previously made and that the applicant was only now prepared to object to them, was not correct. Importantly he argued, insofar as the previous statements were made, they were already challenged by the applicant, alternatively the applicant did not particularly consider them defamatory. In this regard Mr Arnoldi dealt with the previous statements and as follows:

- (a) insofar as the statement as per annexure "AA1" was concerned, the matter had been challenged and in terms of a fact which was not on the papers before me, reference was made to a finding by my brother Maumela AJ who granted an order on 29 March 2022 in terms of which the first respondent and its CEO were ordered to remove and retract the said media statement of 10 March 2022;
- (b) in this regard I was able to find a copy of the judgment dated 12 January 2023 and which judgment is currently the subject of a full bench appeal;
- (c) the outcome of the matter is in my mind not relevant to the matter at hand as I will deal with hereunder;

- (d) in terms of annexure “AA2”, it was argued by Mr Arnoldi to be so general that one could not necessarily read in a proper context that the statements made in the said article particularly related to the applicant;
- (e) in terms of annexure “AA3”, Mr Arnoldi contended that by using the word “*alleged*” this similarly did not constitute a defamatory statement and as such the applicant was loathe to challenge same, since, on a strict interpretation of the content of the said document, this in itself did not constitute a defamatory utterance;
- (f) in terms of annexure “AA4” and “AA5”, similarly, in his view did not demonstrate a clearly defamatory statement or the *animus injuriandi*.

[17] One of the debates which was had between myself and Mr Arnoldi related to the particular relief which was sought.

[18] Albeit that it may be the case that a case may have been made out on the papers justifying an interdict, the difficulty I had was whether or not I could make a finding on defamation and for purposes of damages and if this was not an issue which ought to be referred to trial.

[19] In this regard Mr Arnoldi referred me to a matter recently in front of the Supreme Court of Appeal and more particularly the matter of the **Economic Freedom Fighters and others v Manuel** 2021 (3) SA 425 (SCA) which he used in support of this contention. In fact Mr Arnoldi’s statement was specifically that whilst the court was hearing an application for an interdict the court is necessarily enjoined to make a finding on defamation and that in such circumstances that finding holds true for the damages to be argued later. More about this later.

THE RESPONDENT'S CASE

[20] The respondent's case was argued by Mr Mokhare. In short his argument was premised upon the following:

- (a) there is clearly a dispute of fact on the papers which cannot be resolved on the papers before the court and simply put the matter ought to be referred to trial in its entirety;
- (b) furthermore when one considers the statements, these statements have been previously made and previously the applicant had taken absolutely no steps to address these issues.
- (c) In Mr Mokhare's view annexures "AA1" to "AA5" speak to the same thing and do not create a new case when considered to the statement made on 15 March 2024.
- (d) Mr Mokhare further contended that should the applicant wish to persist with the matter, the matter in its entirety ought to be put before a trial court where evidence is led *vive voce* and in order to determine the issue at hand.

IS THERE A DISPUTE OF FACT?

[21] One of the respondents main contentions was that there is a material dispute of fact on the papers which cannot be resolved absent evidence *viva voce*.

[22] An application for an interdict remains a request for relief by means of motion proceedings.

[23] In this case, the relief sought is a final interdict and the principles applied in **Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635C are apposite.

[24] In this regard the basic premise is that the court has to accept the facts alleged by the respondent unless those facts are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[25] This principle has been stated further in **National Scrap Metal Cape Town (Pty) Ltd and another v Murray & Roberts Ltd and others** 2012 (5) SA 300 (SCA) at 307D para 21–23 as follows:

“As the High Court was called on to decide the matter without the benefit of oral evidence, it has to accept the facts alleged by the appellants (as respondents below), unless they were ‘so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers’.”

and further:

“An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the applicants (i.e. the respondents), is so far-fetched and improbable that it can be rejected without evidence.”

[26] So which version should I consider?

[27] I have considered the answering affidavit in some detail.

[28] In this regard it was my view that the answering affidavit is of very little help to the court. It simply records that the statements made during the interview were not simply made recklessly and without factual foundation. The respondents contend that the statements which were made, were supported by investigation reports which had been commissioned and presented to the first respondent. It contends further that there were facts substantiating the various contentions made.

[29] This unfortunately is as far as the affidavit goes. In my view, the first respondent ought to have taken matters further and detailed what the actual portions of these reports were, which they relied upon, what investigations the reports relied upon in

coming to these conclusions, and what the particular facts were that justified the conclusion that the applicant was “...involved in a corrupt scheme...” *inter alia*.

[30] Furthermore, if there were investigations and any findings made, these should have been referenced in detail in the answering affidavit to demonstrate that the contentions made were in fact true or at least amounted to fair comment.

[31] This the respondents did not do. As such and with the absence of any facts to support these contentions and more particularly the disputes raised in the answering affidavit, I would need more to sustain the argument that there is such a material dispute of fact that the matter cannot be resolved on the papers.

[32] Even when applying the **Plascon-Evans** test, and if there was indeed a dispute of fact so material, I am of the view that I must reject the contentions as made by the respondents out of hand in that they are so bald and vague as to not be taken seriously.

WAS THE STATEMENT DEFAMATORY

[33] A key question remains as to whether or not the statement which is relied upon by the applicant was in fact defamatory. This involves a two-fold inquiry.¹

[34] Firstly, one is required to establish the meaning of the words used. Secondly, one asks whether the meaning was defamatory and that it was likely to impugn the good esteem in which the plaintiff was held by the reasonable or average person to whom the statement was published.

[35] When one considers paragraph 26 which has an extract of the quotation which is contended to be defamatory, it is in my mind clear that the message that was conveyed, was clearly that:

- (a) the applicant was involved in a corrupt scheme of moving patients from anywhere the country and to the hospital in Benoni;

¹ **Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)** 2011 (3) SA 274 (CC) at para 89.

(b) that there was overservicing; and

(c) that there was overcharging.

[36] The wording used is clear and unequivocal and as such I believe that the statement as made is defamatory and that it was likely to injure the good esteem of the applicant and by the reasonable or average person who read and/or to whom the statement was made.

[37] The fact that the abovementioned statement was published on eNCA is common cause between the parties.

[38] Once publication of a defamatory statement has been proved, it is trite that it is presumed that the publication was wrongful and intentional, that is, published with the intention to injure (the *animus iniuriarum*).²

[39] Accordingly, a respondent who wishes to avoid liability must raise a defence that includes either wrongfulness or intention and as such, the publisher of the defamation bears the onus of rebutting either the wrongfulness or intention. They must also induce the necessary evidence to achieve that purpose.³

[40] In this regard the onus rested clearly upon the respondents to establish either that the publication was not wrongful or that it was not published with the requisite intent.

[41] It appears that the high watermark of the respondents, over and above taking the several technical points in the answering affidavit, and that the respondents rely upon, is to be found at paragraph 22.3 of the answering affidavit in which the second respondent records as follows:

2 **Khumalo v Holamisa** 2002 (5) SA 401 (CC) para 18.

3 **Le Roux v Dey** *supra* at para 85.

“The statement I made during the interview were not simply made recklessly and without factual foundation. These were statements which were supported by investigation reports which have been commissioned and presented to the RAF. The very reports that the applicant seeks to rely on, do not support the conclusion that is made by the applicant and that these reports have exonerated the applicant. I dispute that the reports have exonerated the applicant. In fact, the allegations pertaining to the irregularities and corruption are still ongoing including that the SIU, is investigating the very issue of corruption which may involve RAF officials, in their dealings with private sector entities such as the applicant.”

[42] In the following paragraph it appears that there is also an attempt to rely upon the defence of fair comment.

[43] Finally, it appears that the respondents rely upon the fact ,as I understood the argument, that by virtue of the fact that these statements had been made several times, and by or on behalf of the respondents and that the applicant had taken no action, that this further demonstrated that the applicant did not consider the statements as seriously injurious.

[44] According to LAWSA, truth and public interest, and fair comment, are two defences that have long been recognised as rebutting the presumption of wrongfulness. A respondent relying upon the truth in public interest, must plead and prove that the statement is substantially true and was published in the public interest.⁴

[45] It appears that the high watermark of the respondents’ contention in this regard is that they were relying upon several reports to demonstrate this.

[46] From my perusal of the answering affidavit and the various documents attached to the pleadings, I did not find any contentions which clearly and unequivocally supported the contention made in the statement complained of and particularly that:

- (a) the applicant was involved in a corrupt scheme;

4 LAWSA Vol 14(2) 3 Ed (2017) by Justice FDJ Brand, para 124.

[47] Similarly and as far as the defence of fair comment is concerned, this defence has four elements upon which the respondents ought to demonstrate and prove in his pleadings. These are that the defamatory statement:

- (a) must be a comment and not a statement of fact;
- (b) it must be fair, by which is meant only that it must be an honestly held opinion, not that it is balanced or temperate;
- (c) the facts on which it is based must be true and must be clearly stated or clearly indicated or matters of public knowledge; and
- (d) the comment must relate to a matter of public interest.⁵

[48] Already as far as the first requirements is concerned, this defence cannot be sustained. In this regard the words “... *They are a company called Sunshine and they are a company that was involved in a corrupt scheme. ...*” clearly denotes that the statement was made as a statement of fact.

[49] As I have said above, the answering affidavit is very thin on the facts upon which the statement was based, the high watermark being what I have alluded to above and that it was simply that the statements and comment thereon simply emanated from “*various reports*”. The one report attached (annexure FA6) was again of very little use in providing some support to this contention, and in fact concluded quite the opposite.

[50] In my mind, if the respondents were genuine in stating that this was fair comment, I would have expected them to go far further in dealing with these reports which very clearly would have demonstrated that the applicant was involved in “... *A corrupt scheme. ...*”

5 **The Citizen 1978 (Pty) Ltd and others v McBride** 2011 (4) SA 191 (CC) at para 80.

[51] Although much innuendo is made in the affidavits I find no clear and patent facts which cogently demonstrate this.

[52] Dealing finally with the last aspect and that these statements were made on previous occasions, I need go no further than to point out that as was conceded during the course of argument the applicant has already taken action before the courts contending that at last one of the previous statements was defamatory. In this regard, this court has already made a finding that that statement was defamatory albeit that this in itself is subject to an appeal before the full Court, the outcome of which is yet to be handed down.

[53] Insofar as the other occasions are concerned, I am satisfied with the explanation provided on behalf of the applicant above.

[54] In fact, I am of the view that the continued behaviour of the first respondent at the hands of various different persons, and the continued making of these statements actually exacerbates the problem faced by the applicant.

[55] It is furthermore, in my mind clear that this exhibits an intention on behalf of the respondents to continue making these statements regardless of the consequences and despite not having the evidence or facts to justify the statements.

[56] One would have thought that already having been found wanting on a previous occasion, again albeit that the order referred to in this regard is the subject of a pending appeal, the respondents would have been more circumspect with regards to their statements and regarding the applicant.

[57] This aspect also supports the necessity for the granting of an interdict. On the respondents own version, these statements have been made on several occasions, one of which has already faced this court.

[58] I am satisfied that the applicants have made out a case for an interdict. From the continued publication by the respondents of similar statements preceding the latest

statement of 15 March 2024, it is quite apparent that only an interdict will stop the respondents from continuing to make these statements in future.

THE REMEDY RELATING TO DAMAGES

[59] As has been dealt with above and prior to the hearing of the matter, the applicant filed an amended notice of motion seeking more enhanced relief which was clearly as a result of the issues raised by the respondents in their answering affidavit.

[60] My initial view was that I was not sure that such damages could be claimable in proceedings by way of an application.

[61] In this regard I was referred to by Mr Arnoldi to the matter of **EFF and others v Manuel** (711/2019) [2020] ZASCA 172 (17 December 2020) where the Supreme Court of Appeal and when faced with this very question found as follows:

“[111] There is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements preceding 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. There is precedent for this in the well-known case of Buthelezi v Poorter, where an interdict was granted urgently in relation to an egregious piece of character assassination. Notably, however, the question of damages was dealt with separately. In appropriate circumstances persons following this route might as pointed out earlier, be required to overcome the barriers to prior restraints and have to deal with the availability of alternative measures, as a potential bar, to achieving redress. However, seeking damages instantly, on application is problematic for the reasons provided above. Counsel for the amicus, like counsel for Mr Manuel did not provide a proper basis for departing from the established position of requiring evidence and did not propose how damages might otherwise, especially in opposed matters, be determined. In argument he indicated that if we held that a claim for damages could not be pursued on paper, we should nevertheless reiterate that an interdict retraction and apology could be ordered.”

[62] In that matter the Supreme Court of Appeal discussed at length the type of relief sought. It appears that the principal issue in this regard relates to the quantum of damages to be awarded and the necessity for the hearing of oral evidence and in these types matters.

[63] The Supreme Court of Appeal ultimately referred the determination of the quantum of damages suffered by the applicant to be referred to the hearing of oral evidence and further directed that the High Court would determine in conjunction with its determination of the quantum of damages, whether an order for the publication of a retraction and apology should be made.

[64] Considering the amended notice of motion, I am now asked to make a declaration that the defamatory statement is defamatory and false.

[65] In this regard an award for damages for defamation is compensation or an injury to dignity and reputation under the rubric of the *actio iniuriarum*.⁶ Put differently, an award of damages to compensate the applicant for wounded feelings and loss of reputation. Where in addition, patrimonial losses are sustained, the *aquillian* action is available to a litigant.⁷

[66] Once a finding that the statement has been made is defamatory, as I am required to do for purposes of the interdict sought, the issue of the quantum of damages remains, which as I have discussed above, is a matter which has to be referred to the hearing of oral evidence.

[67] As such, I believe that the matter as before me, indeed falls within that ambit of matters dealt with by the Supreme Court of Appeal in the matter of the **EFF v Manuel** *supra*, in order to justify such a finding.

ORDER

6 **Le Roux v Dey** *supra* at para 119.

7 **Caxton Ltd and others v Reeva Foreman (Pty) Ltd and another** 1990 (3) SA 547 (A) at 567G–567B.

I accordingly make the following order:

- (1) It is ordered that the allegations and statements made of and concerning the applicant on 15 March 2024 on the news channel eNCA, specifically that the applicant is involved in a corrupt scheme of moving patients from other hospitals across the country to itself and further that the applicant was involved in overservicing or overcharging are hereby declared to be defamatory and false.
- (2) The first respondent and all other persons under its authority, employed by it, under its control or acting on its instructions, together with the second respondent are interdicted and restrained from making any further statements that say or imply that the applicant is involved in a corrupt scheme of moving patients from other hospitals across the country to itself and further that the applicant was involved in overservicing and overcharging.
- (3) The first and second respondents are declared to be jointly and severally liable for the applicant's damages occasioned by the aforementioned defamatory conduct and that the determination of:
 - a. the quantum of the applicant's damages; and
 - b. an apology and a retraction of the statement,are hereby referred to the hearing of oral evidence.
- (4) The first and second respondent are jointly and severally directed to pay the costs of this application on a party and party scale, scale C inclusive of the costs of counsel one of which is senior counsel, and where so employed.


HERSHENSOHN AJ
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 22 day of May 2025.

Appearances

Counsel for the Applicant: instructed by	Adv. F Arnoldi SC Podebilski Mhlambi Incorporated c/o Kritzingers Attorneys
Counsel for the First Respondent: Instructed by	Adv. WR Mokhare SC Edward Sithole and Associates c/o Madiba & Co.
Date of Hearing:	23 April 2025
Date of Judgment:	22 May 2025