

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
26 February 2026	
DATE	SIGNATURE

Case Number: 2022-019696

010696 LT

In the matter between:

UNIVERSITY OF JOHANNESBURG

First Applicant

PROFESSOR TSHILIDZI MARWALA

Second Applicant

and

LYNESS MATIZIROFA

First Respondent

MOTLATJO ELDRIDGE MACHABA

Second Respondent

TAVAZIVA MACGREGOR KUFA

Third Respondent

This Judgment is handed down electronically by circulation to the Applicant's Legal Representatives and the Respondents by email, publication on Court Online. The date for the handing down is deemed 26 February 2026.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MUDAU ADJP:

Introduction

[1] This is an application for leave to appeal against the whole of the judgment and order handed down by this Court on 17 August 2022, with full reasons provided on 26 August 2022. The application is brought by the respondents in the main application, namely Ms Lyness Matizirofa ("the first respondent"), Mr Motlatjo Eldridge Machaba ("the second respondent"), and Adv Tavaziva Macgregor Kufa ("the third respondent").

[2] In the main application, this Court granted a final interdict restraining the respondents from distributing, disclosing, publishing, or in any manner disseminating any defamatory matter concerning the applicants, the University of Johannesburg ("the University"), and its Vice-Chancellor, Professor Tshilidzi Marwala. The Court also dismissed the respondents' counter-application and ordered the respondents to pay costs on the scale as between attorney and client, jointly and severally.

[3] The respondents now seek leave to appeal to the Full Bench of this Division, alternatively to the Supreme Court of Appeal. The application is opposed by the applicants.

Background

[4] The factual matrix of this matter is extensively traversed in the main judgment and need only be summarised here for this application.

[5] The University previously employed the first respondent as a statistics lecturer. Following an internal disciplinary enquiry, she was dismissed. She referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The second respondent is an attorney who represents the first respondent in that labour matter. The third respondent is an advocate who appears as counsel for the first respondent in the same matter.

[6] On 26 and 27 July 2022, the respondents caused certain communications to be sent in which they made serious allegations against the applicants. These included allegations that the applicants had acted unlawfully, that they were xenophobic, and that they discriminated against persons with disabilities. The respondents also threatened to report Professor Marwala to his new employer, the United Nations University ("UNU"), with the stated aim of persuading the UNU to reconsider his appointment.

[7] The applicants demanded a retraction and an undertaking to desist from such conduct. The respondents refused, and in a letter dated 28 July 2022, the second respondent stated that the first respondent would "attend to sharing the pleadings in the unlawful dismissal complaint with the United Nations University (UNU)". The third respondent also stated at the CCMA arbitration proceedings on 29 July 2022 that Professor Marwala would be reported to his new employer "whether you like it or not".

[8] The applicants launched an urgent application on 3 August 2022. After hearing the argument on 16 August 2022, this Court granted the final interdict on 17 August 2022, with reasons to follow. Full reasons were handed down on 26 August 2022.

[9] On 2 September 2022, the respondents filed their application for leave to appeal. On 12 October 2022, they filed a supplementary application for leave to appeal.

The Grounds of Appeal

[10] The respondents' grounds of appeal are extensive and may be summarised as follows:

- 10.1. The Court erred in finding that the matter was urgent;
- 10.2. The Court erred in finding that the applicants had established a clear right;
- 10.3. The Court erred in finding that the applicants had established irreparable harm and the absence of an alternative remedy;

- 10.4. The Court erred in failing to uphold the points in limine relating to misjoinder and non-joinder;
- 10.5. The Court erred in failing to uphold the defence of *lis alibi pendens*;
- 10.6. The Court erred in finding that the respondents' statements were defamatory and that no defence was available to them;
- 10.7. The Court erred in its application of constitutional principles, including the rights to freedom of expression, access to courts, and a fair trial;
- 10.8. The Court erred in failing to find that the application constituted a SLAPP suit;
- 10.9. The Court erred in awarding costs on a punitive scale;
- 10.10. The Court erred in making use of "non-existent facts" in its judgment.

[11] In their supplementary application, the respondents specifically contend that the Court relied on "non-existent facts", including:

- 11.1. The finding that the second and third respondents acted in their personal capacities;
- 11.2. The finding that the letter of 28 July 2022 stated that the defamatory statements were deliberately intended to impugn the integrity of the applicants; and
- 11.3. The finding that the third respondent used the words "or words to that effect" in relation to the threat made at the CCMA.

The Legal Framework

[12] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be granted where the judge or judges concerned are of the opinion that:

- (i) the appeal would have a reasonable prospect of success; or

- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[13] In *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* (LCC, unreported, case no LCC 14/2012, 3 November 2014), Bertelsmann J held:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion... The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[14] This approach has been approved by the Supreme Court of Appeal in *Notshokovu v S* [2016] ZASCA 112 and *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176.

[15] The respondents must therefore satisfy this Court that there is a reasonable prospect that another court would come to a different conclusion, or that there are compelling reasons why the appeal should be heard.

Evaluation

Urgency

[16] The respondents contend that the matter was not urgent because the complaints arose as early as March 2020, and the applicants only launched proceedings in August 2022. This submission is without merit.

[17] The defamatory statements that formed the basis of the urgent application were made on 26 and 27 July 2022. On 28 July 2022, the respondents refused to retract and indicated their intention to continue publishing the allegations, specifically to the UNU. The applicants launched the application on 3 August 2022, a mere six days after the refusal. In the circumstances, the matter was manifestly urgent.

[18] The respondents' reliance on earlier communications from 2020 is misplaced. Those communications related to a complaint made to the CCMA about the conduct of the independent chairperson of the disciplinary enquiry. They did not contain the xenophobia and disability discrimination allegations against the applicants that formed the subject matter of this application.

[19] The court has a wide discretion to decide whether to entertain a matter on an urgent basis. That discretion can only be challenged on the basis that it was exercised capriciously or on a wrong principle. The respondents have made out no case for interfering with the exercise of that discretion.

Clear Right

[20] The respondents contend that the applicants did not have a clear right because the allegations against them are true and await determination in other forums. This submission is fundamentally flawed.

[21] The CCMA, after conducting its own investigation, found that the independent chairperson, Ms. Masege, was guilty only of negligence in using a CCMA template to communicate her award. No finding of fraud was made against the applicants. No finding of xenophobia or discrimination against persons with disabilities was made. Indeed, the first respondent herself recorded in a pre-arbitration minute that her dispute "is not one concerning an automatically unfair dismissal and/or discrimination."

[22] In the absence of any factual foundation for the allegations, the respondents had no reasonable grounds for believing their offending statements to be true. As this Court held in the main judgment:

"The failure to establish that the finding is substantially true, or put differently, that Masege committed fraud, is fatal to the defence of the respondents. The facts relied upon by the respondents in this regard are, therefore, entirely without basis and incorrect. The outcome of the CCMA investigation is accordingly misrepresented by the respondents."

[23] The applicants have a clear right to protect their good names and reputations. The respondents have no right to defame them.

Irreparable Harm and Alternative Remedy

[24] The respondents contend that the applicants failed to establish irreparable harm and that an alternative remedy existed in the form of a damages claim. This submission ignores the nature of defamation and the threats made by the respondents.

[25] The respondents expressly threatened to report Professor Marwala to the UNU with the stated aim of persuading the UNU to reconsider his appointment. Such harm, if it occurred, would be immediate and potentially irreversible. Damages would not provide an adequate remedy for the harm that might ensue, and the quantum would be very difficult to determine.

[26] As this Court noted in the main judgment, the import of such false disclosures would have "far-reaching and possibly unquantifiable consequences". The applicants were not compelled to wait for the damage to occur and then sue for compensation; they were entitled to approach the Court to prevent the damage from being done.

Misjoinder and Non-Joinder

[27] The respondents contend that the second and third respondents were misjoined as they acted only in their capacities as legal representatives. This submission ignores the evidence of their personal conduct.

[28] The second respondent personally authored and sent defamatory letters directly to the applicants and third parties. The third respondent personally made threats at the CCMA arbitration proceedings. Both went beyond the bounds of their professional roles.

[29] As this Court held in the main judgment:

"In this instance, the lines seem to be blurred, personal association with their client's interest by the legal practitioners, as opposed to professional interest. Qualified privilege cannot be elevated nor is it a licence to say falsehoods."

[30] The qualified privilege afforded to legal representatives is forfeited where statements are made with knowledge of their untruthfulness or are actuated by malice.

The evidence supported a finding of malice, and the second and third respondents were properly joined.

Lis Alibi Pendens

[31] The respondents contend that the application should have been stayed pending the determination of other proceedings, including the CCMA arbitration, the Labour Court matter, and a criminal complaint. This submission is without merit.

[32] The final interdict has nothing to do with the subject matter of those proceedings. The urgent application is not based on the same cause of action, nor does it relate to the same subject matter. The applicants do not seek to stop the first respondent from pursuing her labour disputes. They seek only to prevent the respondents from defaming them. The defence of *lis alibi pendens* has no application.

Defamation and Available Defences

[33] The respondents contend that their statements were true and that the defences of truth and public interest, fair comment, and absence of *animus iniurandi* were available to them. This submission is devoid of merit.

[34] As this Court found, there was no factual basis for the allegations of xenophobia and discrimination against persons with disabilities. The CCMA investigation found no fraud against the applicants. The allegations were manufactured and are not supported by any reasonable grounds.

[35] The onus was upon the respondents to establish a defence to rebut either wrongfulness or intention. They failed to do so. There was no material dispute of fact as to whether the published statements were true and in the public interest.

Constitutional Grounds

[36] The respondents raise numerous constitutional grounds, contending that the order restricts their rights to freedom of expression, access to courts, and a fair trial. These submissions are without substance.

[37] The right to freedom of expression is not absolute. It must yield to an individual's right not to be unlawfully defamed. As Corbett CJ stated in *Argus Printing and*

"I agree and I firmly believe that the freedom of expression of the press is a potent and indispensable instrument for the creation and maintenance of a democratic society but it is trite that such freedom is not and cannot be permitted to be totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons including the press must yield to an individual's right which is just as important not to be unlawfully defamed."

[38] The order does not restrict the first respondent's right to access the court. She retains her right to pursue her labour disputes. She is simply interdicted from defaming the applicants. The order does not interfere with the functioning of other courts or tribunals.

SLAPP Suit

[39] The respondents contend that the application constitutes a Strategic Litigation Against Public Participation ("SLAPP suit"). This submission is without foundation.

[40] A SLAPP suit is typically brought by powerful entities to intimidate and silence critics on matters of public interest. This application was brought to restrain defamatory conduct, not to silence legitimate criticism. The allegations of xenophobia and discrimination were baseless and made with knowledge of their falsity. The respondents are not being silenced; they are being held accountable for unlawful conduct.

Non-Existent Facts

[41] The respondents' most serious allegation is that the Court relied on "non-existent facts" in its judgment. This allegation is itself baseless and reflects a fundamental misunderstanding of the record.

[42] The respondents contend that the Court erred in finding that the second and third respondents acted in their personal capacities. The Court's finding was based on their conduct: the second respondent personally authored and sent defamatory letters;

the third respondent personally made threats at the CCMA. The finding was properly grounded in the evidence.

[43] The respondents contend that the Court erred in stating that the letter of 28 July 2022 conveyed that the defamatory statements were deliberately intended to impugn the integrity of the applicants. The letter itself stated that the respondents "have not bothered to reply to your allegations of defamation as they are ill-considered and naive". This, together with the express threat to report Professor Marwala to the UNU, amply supports the inference that the statements were intended to cause harm.

[44] The respondents contend that the Court erred in using the phrase "or words to that effect" in relation to the third respondent's threat at the CCMA. The third respondent did not dispute that he made such a threat. The confirmatory affidavit of Ms Froneman, which was not challenged, set out the words used. The Court's formulation was entirely appropriate.

[45] The allegation that the Court relied on "non-existent facts" is unfounded and, in the case of the second and third respondents, who are legal practitioners, borders on improper conduct.

Prospects of Success

[46] The respondents have failed to demonstrate that another court would come to a different conclusion. The applicants clearly established the requirements for a final interdict: a clear right to protect their good names and reputations; an injury actually committed and reasonably apprehended; and the lack of an adequate alternative remedy.

[47] The respondents' defences were properly considered and correctly rejected. The allegations of xenophobia and discrimination were baseless. The respondents' conduct, particularly that of the second and third respondents, went beyond the bounds of professional representation and was actuated by malice.

[48] There are no reasonable prospects of success on appeal. The threshold under section 17(1)(a)(i) of the Superior Courts Act has not been met.

Compelling Reasons

[49] The respondents have also failed to identify any compelling reason why the appeal should be heard. There are no conflicting judgments on the matters under consideration. The issues raised are factual and specific to this case. The suggestion that constitutional rights have been infringed is without substance.

Costs

[50] The respondents have persisted with an unmeritorious application for leave to appeal. The second and third respondents, as legal practitioners, ought to have known that the application had no reasonable prospects of success. Their conduct in making unfounded allegations against the Court, including the serious charge of relying on "non-existent facts", is improper and warrants a punitive costs order.

[51] In the circumstances, the applicants are entitled to their costs on the scale as between attorney and client.

Order

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

1. The application for leave to appeal is dismissed.
2. The respondents are ordered to pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved, which includes the employment of two counsel on scale C.



TP MUDAU
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

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Machaba Attorneys

Date of Hearing:

25 February 2026

Date of Judgment:

26 February 2026