

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**Case no: 1247/2013
Date heard: 19.9.2013
Date delivered: 12.6.2014**

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION, NATIONAL PROVIDENT FUND**

Applicant

vs

AYANDA MTYHOPO

Respondent

JUDGMENT

TSHIKI J:

[1] In this matter applicant has filed an application for an interdict against the respondent in the following terms:

- “1.1 Interdicting the respondent from publishing or representing to any person (including a legal persona), or to the public media or to any statutory or other body:
 - 1.1.1 that there is any order which is binding on applicant issued by the Pension Funds Adjudicator relating to a complaint lodged by the respondent and other members of applicant relating to the applicant's refusal to allow them to transfer to another pension fund of their choice;
 - 1.1.2 that the applicant has failed to comply with any order issued by the Pension Funds Adjudicator or by any court or by other tribunal;
 - 1.1.3 that the applicant was or is embroiled or involved in any scandal relating to the theft or any other unlawful dealing with money;
 - 1.1.4 interdicting the respondent from publishing any defamatory matter about the applicant;

- 1.1.5 interdicting the respondent from causing whether directly or indirectly, or from allowing any publication or representation referred to in prayers 1 and 2 *supra* to take place by any other person or persons;
- 1.1.6 ordering the respondent to pay the costs of the application as on the scale between attorney and own client.”

[2] Applicant herein is a pension fund organization in terms of the Pensions Fund Act 24 of 1956 (hereinafter referred to as “the PFA”) which is duly registered in terms of section 4 of the PFA and consequently a body corporate with *locus standi* to sue and be sued.

[3] Respondent herein is employed by the Nelson Mandela Bay Metropolitan Municipality in Port Elizabeth and is a member of the applicant.

[4] The background of this application emanates from an application brought by the applicant herein to the South Gauteng High Court in terms of section 30P of the PFA in terms of which the applicant sought an order to set aside the determinations of the Pension Fund Adjudicator against the applicant. The application had been brought under case no 32233/2012 as “South African Municipal Workers Union Provident Fund v Moss TP and 65 others”. There were two applications lodged in the South Gauteng High Court in terms of section 30P of the PFA. The second application was filed under case no 36381/2012 as “South African Municipal Workers Union Provident Fund v Mtyopho and 2 others”.

[5] Both applications were heard by the South Gauteng High Court on the 15th November 2012 and were decided in favour of the applicant herein on an unopposed basis and the effect thereof was to have the Pension Fund Adjudicator’s

determinations set aside thus dismissing, *inter alia*, the underlying complaints by respondent and two others against the applicant.

[6] It is the contention of the applicant that during the course of the motion week in which these applications were heard, the respondent was in constant contact with the applicant's attorneys. In the process of such constant contact aforementioned, respondent was informed and therefore well aware that the applications were successful and that the determinations by the Pension Fund Adjudicator, including the one in which the respondent is a party and, in any event did not oppose, were set aside. Respondent herein was in fact one of the respondents in the first application.

[7] On the 18th February 2013, three months after the order of the South Gauteng High Court granting the orders in favour of the applicant, thus effectively setting aside the Pension Fund Adjudicator's determination, an article was published in the print version of the Eastern Cape, Port Elizabeth newspaper, *The Herald*. The article reads as follows:

"Spokesman for the group Ayanda Mtyhopo said they had spoken to Samwu, the SA Local Government Association (Salga) and the Bay Municipality about their grievances, begging them to intervene, but with no luck.

The group also took the matter to the Pension Funds Adjudicator – a body which investigates and resolves pension funds disputes – which ruled in their favour in June last year. This had not, however, influenced the bargaining council's decision.

[Despite] numerous discussions with representatives of Samwu National Provident Fund and letters of termination, we have not been successful and find ourselves disadvantaged in many ways..." Mtyhopo said.

Other grievances are that the Samwu National Provident Fund was embroiled in a scandal in which R800 000.00 was allegedly stolen.

Deputy Pension Funds Adjudicator Muvhango Antionette Lukhaimane ruled that the moratorium was “unenforceable” and that the members were “entitled to transfer their fund values to a local authority fund of their choice” provided the fund was an approved local government fund.

She ordered the Samwu provident fund to “take all necessary steps to effect the transfer of the [99 members’] benefits within eight weeks”. [Emphasis added]

[8] It was the respondent who published the above article. It is glaringly apparent from the above extract from the article that the respondent has, notwithstanding that the adjudicator’s determinations aforesaid were set aside by the Court on the 15th November 2012, typified them as if they were still valid and binding on the Fund notwithstanding that they were set aside.

[9] According to the applicant the clear implication from the context of the entire article is that the fund is deliberately infringing the rights of its members by refusing to comply with the Adjudicator’s determinations which to the respondent’s knowledge, were in fact set aside three months before the article in issue was published.

[10] In addition, the reference in the article to the “fund was embroiled in a scandal in which R800 000.00 was allegedly stolen” which also formed part of the complaints which were also dismissed together with the others on 15th November 2012, placed the fund and its board members in a negative light.

[11] From the contents of the e-mail sent to the respondent herein it appears that he was informed of the Court results on the 15th November 2012. Respondent throughout and at least since the 13th November 2012 has always been interested to know the outcome of the two Court cases. It does not appear to me that the respondent is denying receipt of those e-mail messages, his only explanation about them being that “while I am currently aware of the appeals and the High court orders setting aside the determination of the adjudicator, I deny that I was ‘well aware’ of them at the time I was interviewed for the article, for the reasons alluded to *supra*.”

[12] Respondent, having approached *The Herald* newspaper as gleaned from its contents, he did not inform them that the determinations relating to the fund transfers referred to *supra* were subsequently set aside by the South Gauteng High Court. This includes the issue of the Fund being “embroiled in which R800 000.00 was allegedly stolen”.

[13] In his response to the applicant’s allegations aforesaid, respondent contended that despite having sought the information about the outcome of the aforementioned Court cases from the applicant’s attorneys on several occasions, he was not furnished with such information.

[14] It is apparent from the respondent’s answer that he does not deny that the information contained in the Herald issue aforementioned was received from him and he also does not dispute that he failed to disclose to the reporter, when he was well aware of the true facts at the time, that the adjudicator’s determinations had been set aside.

[15] With respect to the “scandal” involving the misappropriation of R800 000.00 by one of the applicant’s trustees respondent’s answer is that this was but admitted by the Fund in its response to the Pension Funds Adjudicator.

[16] Relative to the court order, respondent contends that at the time of the publication of the article in issue he “did not have a copy of the Court order or judgment pertaining to the outcome of the appeals against the decision of the adjudicator”.

[17] With respect to the Fund’s argument for an interdict against him, respondent contends that he refused to give an undertaking to the Fund not to make certain statements about the Fund. This is so, according to the respondent, because the undertaking demanded from him by the Fund was unjustifiably onerous and therefore, he could not agree to it. He further contends, however, that the relief sought by the Fund in their notice of motion is much narrower than what they sought in the undertaking demanded by the Fund.

[18] Respondent however admits that he is the source of the statements to the writer of the article in issue. Save for one exception appearing in paragraphs 27.2 and 27.3 below he confirms that he was quoted correctly. He, however, denies that the statements were untrue or defamatory as alleged. In any event, respondent states that the words used by the applicant’s attorneys are simply English language which cannot be referred to as the jargon.

[19] Most importantly respondent confirms that he did not inform the journalist that the adjudicator’s determination had been set aside on appeal, his only reason for

saying so being that the actual Court order did not come to his attention until after the article was published. He in fact denies that he was fully aware that the appeals had been successful. He submitted that he only requested the Fund's attorneys to clarify the position and further he was not in constant contact with the Fund's attorneys. He says he only contacted them once a week. He claims not to have been aware of the date of the hearing of the matter by the South Gauteng High Court.

[20] In his argument *Mr Bishop* who appeared for the respondent submitted that the application is ill-founded. He develops his argument by submitting that the statements of which the applicant complains of are not defamatory. Therefore, from his own perspective applicant has failed to establish a reasonable apprehension of injury and that applicant's remedy in such circumstances would be an action for damages against either the respondent or *The Herald*. Consequently, he argues that the orders that applicant seeks are unconstitutionally overboard. For those reasons he requests that the application should be dismissed with costs.

[21] On the other hand, *Mr Van der Berg* for the applicant contends that the contents of the published material is false and this was known by the respondent because he was informed of the outcome of the application to the South Gauteng High Court that the applications herein were successful in that the determinations by the Pension Funds Adjudicator were set aside by reason of the successful applications against the Pension Funds Adjudicator's decision.

[22] In the first place what the respondent published in *The Herald* newspaper is not the truth. I say so because notwithstanding the fact that the respondent as one of the parties to the litigation which was in progress in the South Gauteng High Court on the 15th November 2012 he must have had a jealously guarded interest in the outcome of those proceedings. This interest is also exhibited by his enquiry by way of e-mail messages sent to the applicant's attorneys, his main interest particularly being the outcome of the two cases. This is shown by his constant enquiries as far back as the 24 and 26 October 2012 when he was making enquiries requesting an update. Another of his enquiries was sent by e-mail to applicant's attorneys on 13th November 2012 and this was two days before the Court date on which the applications were due to be heard. He did the same on the 14th November 2012 as well as on the date of the case being the 15th November 2012. On this date he was informed as follows:

"Kindly note that the Fund's appeal in both matters were today upheld which resulted in the complainants' complaints having been dismissed".

[23] Respondent does not deny having received this e-mail from his opponent's attorneys but claims that he did not understand the meaning thereof. It surprises me that he could not understand the meaning when in fact the response was in simply English language and not in what he refers to as the "complicated legal jargon". He was aware that the Pension Funds Adjudicator had earlier found in their favour and that finding was being challenged in the South Gauteng High Court by his opponents on the 15th November 2012. He now wants this Court to believe that when the Fund's appeal in both matters were upheld which resulted in the complaints having been dismissed he did not understand the meaning of those words. In my view, there is no confusion in the language used in the e-mail for him to suggest that the

language used therein is confusing and difficult to understand. This is more so for a person who has all along been following the proceedings from the beginning and especially a litigant in the proceedings. What the respondent says cannot be true.

[24] As someone who had been interested in the outcome of the proceedings it is somewhat strange that the respondent did not get the Court order himself if he did not understand the meaning of the e-mail sent to him by the applicant's attorneys. In any event, when he was informed of the outcome by the applicant's attorneys, he did not seek clarity from those attorneys. To me he only had a problem with the interpretation of the Court order after the application papers were served on him.

[25] Further, the respondent having been informed about the finalization of the application he would not have been expected to pretend to *The Herald* newspaper journalist that the proceedings in the South Gauteng High Court had not been finalised. This is so especially that he knew very well that the case was finalised on the 15th November 2012 and when he gave the information to *The Herald* newspaper journalist it was about three months after the Court proceedings were finalised yet he had not established what was meant by the contents of the e-mail of the 15th November 2012 which he pretends not to have understood. In my view, he was well aware of the status *quo* and of the correct outcome when he gave the information contained in the article of the 18th February 2013. When he told *The Herald* newspaper journalist about the Fund being embroiled in a scandal in which R800 000.00 was allegedly stolen he knew very well that the issue about R800 000.00 also formed part of the matters which were successfully challenged by the Fund on the 15th November 2012.

[26] The respondent herein is challenging the applicant's wisdom in proceeding with an interdict in the circumstances of this case. The requirements for a final interdict are as follows:

[26.1] A clear right;

[26.2] An injury actually committed or reasonably apprehended; and

[26.3] The absence of any other satisfactory remedy.

[27] According to Johan Meyer on *Interdicts and Related Orders 1993 edition* on page 8 the learned author stipulates the various forms of the order for interdictory relief as follows:

[27.1] prohibitory, ordering a person not to do a certain act;

[27.2] mandatory, ordering a person to do a certain act; or

[27.3] restitutionary, ordering a person to return property to an applicant or plaintiff or to preserve such property pending the outcome of an action. (***Jafta v Minister of Law and Order and Others*** 1991 (2) SA 286 (A) at 295B-C).

[28] It follows that the object of an interdict as the one in issue is mostly prohibitory and or preventive in nature. It is the most effective remedy for restraining a continuing publication of defamatory material. I must, however, caution herein that a remedial recourse to claim damages is no absolute bar to the aggrieved party from exercising the interdictory relief in appropriate circumstances. [***Tsichlas v Touch Line Media (Pty) Ltd*** 2004 (2) SA 112 (W); ***Lieberthat v Primedia Broadcasting (Pty) Ltd*** 2003 (5) SA 39 (W)]. However, not all interdicts are necessarily preventive. In the present case, applicant had approached the Court with a view to prevent the respondent from publishing false information against the applicant. In this regard,

the respondent contends that the applicant has failed to satisfy any of the requirements for an interdict, in particular the respondent argued that the applicant has failed to show that any of the statements of the respondent are unlawfully defamatory. Consequently, respondent contends that the applicant has failed to show a reasonable apprehension that the respondent will cause any harm in the future more so that it has numerous other remedies available to it to protect its interests.

[29] One of the respondent's contentions is that in relation to both the issue of the clear right, as well as the fact that the respondent was not aware that what he published was false, and therefore he did not publish the defamatory statement with intention to defame the applicant. The respondent contends further that the article of the 18th February 2013 simply does not mean what the applicant asserts it means. To the respondent the article does not explicitly state whether there is a binding order on the applicant or that it failed to comply with such order. In my view, the argument by the respondent fails to consider that the respondent had become aware of the applicant's success in its challenge to the Pension Funds Adjudicator's determinations as far back the 15th November 2013. Therefore, when respondent published the statements through *The Herald* newspaper, he knew very well that he was publishing something which was not true. Our law of defamation is based on the *actio injuriarum* a flexible remedy which evolved from Roman law. This remedy affords a right to claim damages to a person whose personality rights had been intentionally impaired by the unlawful act of another. (***Holomisa v Argus Newspapers Ltd*** 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W)) A defendant can only succeed if it successfully raised the two defences being the rebuttal of

unlawfulness and that the publication was true and in the public interest. The Constitution, however, guarantees the right to freedom of expression which is an important right constitutive of democracy and individual freedom. In ***National Media Ltd and Others v Bogoshi*** 1998 (4) SA 1196 (SCA) at 1212G-1213A Hefer JA held that:

“... the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper”. See also ***Khumalo and Others v Holomisa*** 2002 (8) BCLR 771 (CC).

[30] It is clear from the language used in both ***Bogoshi*** and ***Khumalo*** cases *supra* that the Courts do not encourage the deliberate publication of material which is known to be false by its publisher. In the present case, the respondent knew that the Court had already set aside the Pension Funds Adjudicator’s determinations and therefore he was aware of the true state of affairs yet he proceeded to publish a statement he knew to have been false. It is for that reason that all the cases cited on behalf of the respondent do not assist him due to the fact that they are distinguishable from the facts of the current case.

[31] In *Midi Television (Pty) Ltd t/a E-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para [19] Nugent JA held:

“In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.”

[32] The above principles hold good in circumstances where the publication might cause prejudice to the administration of justice, it should not be allowed to take place, however where, as is the case herein, the published information is false the Court should not allow the publication for the clear reason that it would not be in the interests of justice to allow the publication of such information. The only relevant question is whether, in the opinion of the reasonable man with normal intelligence and development, the reputation of the person concerned has been injured. This is an objective approach and if so the words or behaviour are defamatory to, and in principle wrongful against that person. In our case, the respondent has published information which he knew or at least ought to have known that it is not true and therefore, any conduct in attempting to or in continuing to deliberately publish false information should be discouraged at all costs as this conduct could not be in the interests of justice and good order. In my view, an interdict is the only effective

remedy available to the applicant to prevent such publication. It should be noted that once false information is published even though the applicant does have an alternative remedy, the respondent in this case may not be able to satisfy the applicant's damages occasioned by the publication of such false material. [***Hix Networking Technologies v System Publishers (Pty) Ltd and Another*** 1997 (1) SA 391 (A)].

[33] I must say though that the Courts are reluctant to prohibit the publication of speech and have held that the Courts should do so with extreme caution and great circumspection. In ***Hix Networking Technologies*** case *supra* at p 402 C-F Plewman JA held:

"To sum up, cases involving an attempt to restrain publication must be approached with caution. If s 15 adds anything to this proposition it would merely be to underline that, though circumstances may sometimes dictate otherwise, freedom of speech is a right not to be overridden lightly. The appropriate stage for this consideration would in most cases be the point at which the balance of convenience is determined. It is at that stage that consideration should be given to the fact that the person allegedly defamed (if this be the case) will, if the interdict is refused, nonetheless have a cause of action which will result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned. And in the exercise of its discretion in granting or refusing an interim interdict, regard should be had *inter alia* to the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving, in the limited time afforded to it in cases of urgency, the defence which it wishes to raise and the fact that the order may, in substance though not in form, amount to a permanent interdict. (See also ***Midi Television (Pty) Ltd t/a E-tv v Director of Public Prosecutions (Western Cape)***; *supra*).

[34] Respondent herein contends further that the applicant was embroiled in a scandal in which R800 000.00 was allegedly stolen. When the respondent made mention of the applicant's involvement in the R800 000.00 scandal this issue formed part of the complaints which had been dismissed by the South Gauteng High Court. When the respondent raised the issue with *The Herald* journalist, he was well aware that this issue had been dismissed by the Court about three months prior to him raising the issue with the journalist. In my view, if that issue was dismissed by the Court, the respondent having been a party in those Court proceedings he ought to have been aware that the allegations against the Fund relative to that issue, could not be published as if they were still an issue when they were finalised and in fact decided in favour of the applicant. It was, therefore, not correct for the respondent three months after the cases were finalised to pretend as if such issues were still alive for debate with the journalist of a newspaper. To raise such an issue in the manner the respondent has done amounts to deliberately portraying the applicant in a negative light.

[35] In my view, the respondent's conduct aforesaid is the worst kind of disregard of the applicant's rights. It is clear from the above conduct of the respondent above that he was not prepared to desist from his unlawful conduct in disregarding the applicant's rights. His conduct was not only unlawful but reprehensible in the extreme. In these circumstances, the applicant could not have waited for the opportunity to assert his rights by way of a damages claim in the circumstances. It was obliged to proceed by way of an interdict which at that stage was the only effective remedy in the circumstances.

[36] Before the present application was launched against the respondent, and on the 6th March 2013 he was approached by the applicant to give an undertaking that he would not publish the statements again. He refused to make such undertaking thus creating a legitimate expectation to the applicant that the respondent was likely to publish the same or similar statements which would continue to defame the applicant. It is not escapable that the respondent's defiant attitude exhibited in this judgment shows clearly that he published the statements with impunity and with a malicious motive.

[37] Lastly, the respondent has submitted that the applicant had an alternative remedy available to it other than to file an interdict, such remedy being a damages claim by which applicant should have proceeded by way of suing for damages. In response thereto applicant contended that the respondent would not be able to meet the award of damages sought to be claimed from him should the applicant proceed by way of damages. I also agree that it would not be unreasonable for the applicant to consider whether or not in the present case the respondent would be able to afford the amount of damages claimed by the applicant should the latter resorts to institute a claim of damages. If the respondent could not afford to pay those damages as the applicant contends, there would be no wisdom in proceeding with such claim and an interdict would turn out to be the only satisfactory remedy. [***Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others*** 1976 (4) SA 218 (T) at 22A]. Even though an injury may be capable of pecuniary evaluation and compensation, a Court will generally grant an interdict if the respondent is a man of straw or if damages would be difficult to access or if damages would not be the appropriate relief under the circumstances or would have been a poor substitute

especially in this case where there is continuing unlawful publication. (***Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another*** 1992 (1) SA 807 (W). See also ***The Performing Right Society Ltd v Berman and Another*** 1966 (2) SA 355 (R).

[38] In the result, I am satisfied that the respondent deliberately published the false information aforementioned against the applicant with full knowledge that it was false. This is a reprehensible conduct on the part of the respondent which deserve severe censure which it now receives. Applicant has requested this Court to award costs on an attorney and client scale. I agree, especially given the attitude displayed by the respondent, failing to show, *inter alia*, any form of remorse for his deliberate conduct aforementioned coupled with his refusal to make any undertakings that he would not in future publish the same against the applicant.

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

[39.1] The respondent is hereby interdicted and restrained from publishing any false and/or defamatory matter about the applicant.

[39.2] Respondent is hereby interdicted from causing, whether directly or indirectly, or from allowing any publication or representation about the applicant referred to in prayers 1 and 2 of the notice of motion to take place by any other person or persons.

[39.3] Respondent is hereby ordered to pay costs of the application on the scale as between attorney and own client.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

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