Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no **5395/2022**

In the matter between:

JOHAN VAN GREUNEN 1st Applicant

VAN GREUNEN & ASSOCIATES INC 2nd Applicant

and

HILDA MC GOVERN Respondent
(ID. […])

JUDGMENT BY: JP DAFFUE J

HEARD ON: 26 JANUARY 2023

DELIVERED ON: 6 APRIL 2023

This judgment was handed down electronically by circulation to the applicants' representatives and the respondent personally by email, and release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 6 April 2023.

ORDER

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1. The respondent is interdicted and restrained from publishing any defamatory statements regarding or concerning the applicants.
2. The respondent shall pay 50% of the taxed party and party costs of the applicants in respect of this application.

JUDGMENT

INTRODUCTION

[1] An experienced legal practitioner with some impressive curriculum vitae is involved in a fierce battle with a disgruntled person. The trouble started in 2021. The one may be considered a warrior trying to play according to the rules of the game and the other a real street fighter who does not subvert herself to any rules. On 28 October 2022 the legal practitioner filed papers out of this court in order to obtain an interdict and accompanying relief against the disgruntled person.

[2] Having to read application papers in excess of 1 400 pages and numerous pages of heads of argument, the matter was eventually heard by me on 26 January 2023.

[3] First, an apology. I am accustomed to pronounce judgments expeditiously, but in this case it did not materialise. I was on circuit court for a full four weeks immediately after hearing the parties' submissions and on my return I was the duty judge for the week from 6 March until 10 March 2023. Consequently, the delivery of this judgment was delayed.

THE PARTIES

[4] The first applicant is Mr Johan van Greunen, a major male attorney practising as such as sole director under the name and style of Van Greunen & Associates Inc,

the second applicant, with business address situated in Centurion, Pretoria, Gauteng. The applicants were represented by Adv F Van Wyk of Pretoria.

[5] The respondent is Ms Hilda McGovern, a major female business person residing in Deneysville, Free State Province. Ms McGovern drafted her own papers, including the heads of argument, and personally presented oral submissions.

THE RELIEF CLAIMED

[6] The applicants claim the following in their notice of motion:

'1. The respondent is interdicted and restrained from publishing any defamatory statements regarding or concerning the applicants;

2. The respondent is ordered to publish a unequivocal and written apology, which apology shall;

2.1 be furnished by the respondent to the applicants within 24 hours of this order; and

2.2 be published by the respondent in the Government Gazette, The Beeld Newspaper and the Sunday Times Newspaper within two (2) weeks of this order.

3. The respondent is ordered to pay the costs of this application on a scale as between attorney and own client.'

ISSUES IN DISPUTE

[7] Notwithstanding the voluminous documents presented to the court in this opposed application and the factual disputes raised, not much is in dispute in respect of the issues to be adjudicated in the present application.

[8] It is in dispute whether:

a. the alleged defamatory remarks are true or false;

b. these remarks are in the public interest;

c. the respondent's right to freedom of expression and speech relied upon by her is sufficient to prevent this court from granting an interdict against her; and

d. the applicants are entitled to an apology in accordance with the draft suggested, or in any other form, bearing in mind the authorities to which I shall return.

COMMON CAUSE FACTS

[9] The following facts are not in dispute:

a. in his founding affidavit of 37 pages to which is attached the first applicant's curriculum vitae of 12 pages, he presented evidence of his extensive experience and attributes;

b. since October 2021 until October 2022 and just before this application was issued the respondent authored several emails and letters in which the first applicant in particular as well as others are inter alia referred to as fraudsters;

c. the respondent communicated her defamatory remarks to inter alia the Land Bank, including its Chief Executive Officer and senior officials as well as to courts, police and creditors of K2016128779 (South Africa) (Pty) Ltd t/a Deneys Swiss Diary (DSD) on several occasions, although it is denied by her that her statements were defamatory as these were the truth;[1]

d. the respondent also laid charges against the first applicant with the Specialised Commercial Crimes Unit in Johannesburg, the Legal Practice Council (the LPC) and the South African Restructuring and Insolvency Practitioners' Association (SARIPA), repeating defamatory remarks;

e. the respondent as director of DSD brought about the voluntary liquidation of this company on 22 July 2020;[2]

f. at the time of the liquidation of DSD it owed the Land Bank in excess of R16 million and the respondent stood surety for this debt;

g. on 4 February 2022 the respondent was finally sequestrated;[3]

h. the first applicant and his company acted on behalf of Land Bank in several civil matters since the voluntary liquidation of DSD;

i. the respondent has embarked on litigation to have the liquidation of her company set aside and the final sequestration order be rescinded;

j. the respondent did not deal at all with the following allegations of the applicants and these are therefore undisputed:

'107. The respondent's latest attack on the applicants is the proverbial last straw that broke the camel's back.

108. The applicants can simply not sit back idly and allow the respondent to indefinitely continue with her personal, unwarranted and unfounded attacks with possible far-reaching detrimental

[1] Answering affidavit paras 3 & 5.3, volume 3 pp 278 & 279.
[2] Annexure FA3, volume 1 p 54, read with para 31 of the founding affidavit p 14.
[3] Annexure FA11, volume 1 p 93, read with para 48 of the founding affidavit p 18.

consequences to myself, my professional career, as well as the second applicant's business interests.'[4]

k. the respondent's defence is based on the truthfulness of her admitted communication to various entities and persons; and

l. it is clear from the respondent's answering affidavit and her heads of argument that she will not stop the conduct alleged to be defamatory.

THE LAW PERTAINING TO INTERDICTS

[10] An interdict is not a remedy to deal with past unlawful action. In terms of this remedy an order is sought against another to refrain them from acting in a specific manner, or directing them to perform in a particular manner. Thereby, protection is sought against an ongoing unlawful interference, or the threatened interference of someone's rights.[5] In casu the applicants seek both a final prohibitory as well as a mandatory interdict as is evident from the notice of motion quoted above. The three requirements for the grant of a final interdict are (a) the applicant must have a clear right, (b) the applicant must prove that an injury has actually been committed or is reasonably apprehended and in this regard the injury must be a continuing one as the court will not grant an interdict in respect of an act already committed; and (c) there is no other remedy. The court has a limited discretion to refuse a final interdict.

[11] In *Economic Freedom Fighters and Others v Manuel (Manuel)* the Supreme Court of Appeal confirmed the well-known principle that persons may seek interdicts, interim or final, by way of motion proceedings against the publication of defamatory statements.[6] It agreed with the High Court that Mr Manuel had satisfied the requirements for final relief.[7] However, I shall deal hereunder with the court's approach to the court a quo's award of damages.

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[4] Founding affidavit, paras 107 & 108, volume 1 p 37.
[5] Van Loggerenberg et al, Erasmus Superior Court Practice RS 17, 2021, D6 - 1.
[6] 2021 (3) SA 425 (SCA) para 111.
[7] *Ibid*, 89.

[12] The approach in *Manuel* was again confirmed recently by the Supreme Court of Appeal in *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd (NBC Holdings).*[8] The court continued as follows:

'29……. However, the entitlement to proceed in that way is constrained by the fact that in motion proceedings, where the issue is whether the defendant has a defence to a claim based on defamation, it cannot be decided on motion if there is a dispute as to the applicant's right to that relief. As Greenberg J said:

'… if the injury which is sought to be restrained is defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence.'

In Hix Networking the court emphasised that this did not mean that the mere ipse dixit of the respondent would suffice to establish a defence. It must be based on evidence.

[30] A respondent wishing to resist an interdict against the future publication of defamatory material can do so by presenting evidence that provides a sustainable foundation for a defence recognised in law. This may be done not only by way of direct evidence, but also by making the case that at a trial further evidence could be procured and would be available to sustain the defence. A plausible claim by a respondent that, with the advantage of discovery and being able to subpoena witnesses and documents, they will be able at trial to produce evidence to sustain their defence, will ordinarily suffice to establish the requisite foundation for the defences raised. This is well-illustrated by the recent judgment of this court in Malema v Rawula where, after analysing the evidence, Schippers JA concluded that:

'These facts comprise not only direct information placed before the court, but material showing other information not in his control but potentially available at a trial in due course, such as the EFF's financial records and documents relating to receipt of VBS funds. All these factors must be weighed up in order to decide whether there is a dispute of fact regarding the existence of a defence.' (Emphasis added)

[13] *Tau v Mashaba and Others*[9] is yet another example of the approach of the Supreme Court of Appeal in respect of interdicts to restrain publication. In that case the applicant sought and obtained a retraction and apology from the respondent and an interdict to prevent him from repeating his initial defamatory statements. The appeal against the order of the High Court succeeded.

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[8] (299/2020) 2021 ZASCA 136 (6 October 2021) paras 29 & 30.
[9] 2020 (5) SA 135 (SCA) paras 20 & 28.

[14] In *Herbal Zone v Infitech Technologies*[10] *(Herbal Zone)* the Supreme Court of Appeal confirmed the principle that an interdict to prevent a party from making defamatory statements in the future is 'only infrequently granted' as 'it impinges upon that party's constitutionally protected right to freedom of speech.' The court recognised that in our constitutional era freedom of speech carries greater weight than it had in the past.[11]

DEFAMATION AND THE RIGHT TO AN APOLOGY

[15] In *Manuel* the Supreme Court of Appeal dealt extensively with defamation and the various defences available to a defendant.[12] It is not necessary for adjudication of the present dispute to deal with any of the aspects highlighted by the court, save to refer to the award of damages that was set aside, and particularly the approach to the request that an apology be tendered.

[16] The well-known principle that an unliquidated claim for damages must be pursued by way of action was confirmed in a detailed analysis.[13] Motion proceedings are not suited for prosecution and adjudication of claims for unliquidated damages. This obviously includes claims based on the *actio iniuriarum* for compensation, ie when an injury to dignity and reputation had been caused.

[17] The court proceeded to deal with an apology sought by an aggrieved litigant as follows:[14]

'The apology

[128] That leads us to the question whether the apology ordered by the court below was appropriate. While there might be reservations concerning the sincerity of a court-ordered apology, the Constitutional Court in *Le Roux v Dey* considered remedies provided for in Roman-Dutch law that had fallen into disuse. These allowed for the retraction of a defamatory statement and an apology. The court also had regard to customary law and tradition and concluded that respect for the dignity of

[10] (204/2016) [2017] ZASCA 8 (10 March 2017) para 36.
[11] *Ibid*, para 40.
[12] *Manuel loc cit*, paras 30 – 86,
[13] *Ibid*, paras 91 – 127.
[14] *Ibid*, paras 128 – 130.

others lies at the heart of the Constitution, and that reconciliation between opposing parties at different levels consists of recantation of past wrongs and apology for them. It considered that the plaintiff in that case was entitled to an apology. It must also be borne in mind that the apology in that case was ordered in conjunction with an award of damages, not separately from it.

[129] In *McBride* the Constitutional Court referred to its earlier decision in *Le Roux v Dey* and reiterated the importance of an apology in securing redress and 'in salving feelings'. It went on to have regard to the plaintiff's contention on appeal, that an apology in that case was inappropriate and took into account that a media defendant was involved and that there were law-reform initiatives afoot in other countries. Consequently, it was thought that ordering an apology in those circumstances was not warranted.

[130] Neither of these two judgments suggested that an order for publication of a retraction and apology on its own and not in conjunction with an award of damages would be an adequate remedy. The High Court's order for publication of a retraction and apology in this case was made in conjunction with its order for damages. We have held that the latter should not have been made without hearing evidence. The applicants had suggested in their challenge to the quantum of damages, that an apology would be sufficient redress, but that suggestion can only be considered in conjunction with the consideration of whether an award of damages should be made and the quantum of that award. An apology has always weighed heavily in determining the quantum of damages in defamation cases as occurred in *Le Roux v Dey.* In our view, whether an order for an apology should be made is inextricably bound up with the question of damages. As the latter award falls to be set aside and referred to oral evidence, so too must the order to publish a retraction and apology be set aside and referred to the High Court for determination after the hearing of oral evidence on damages.'

(Footnotes omitted and emphasis added.)

EVALUATION OF THE EVIDENCE AND LEGAL SUBMISSIONS

[18] Section 16 of the Constitution guarantees the right of freedom of expression and speech. Human dignity is also guaranteed as specifically provided in s 10 of the Constitution. Although the court stated in *Herbal Zone* that freedom of speech carries greater weight than in the past, this cannot be interpreted to mean that the right to dignity and reputation of another person should not be considered at al. In casu, the applicants are entitled to the protection of their dignity and reputation. In *O-Keeffe v Argus Printing and Publishing Company Co Ltd & Another*[15] Watermeyer AJ quoted De Villiers, the author of *Injuries,* with approval. Dignity is defined as a 'valued and serene condition' in a person's social or individual life which may be violated, either publicly or privately, by another through 'offensive and degrading treatment', or when

[15] 1954 (3) SA 244 (CPD) at 247.

the person 'is exposed to ill-will, ridicule, disesteem or contempt'. Currie and De Waal[16] are probably correct by referring to human dignity as 'perhaps the pre-eminent value.' This submission is in line with the Constitutional Court's approach in *Christian Education in South Africa v Minister of Education.*[17]

[19] In the event of conflict between two competing constitutional rights, a balancing act is to be exercised. No right is absolute and although the right to human dignity is seen as a central value and even a pre-eminent value, the facts and circumstances in each case need to be considered to established whether the right to dignity should not be limited. I accept that people serving the public such as lawyers and insolvency practitioners, as in casu, must accept that they may be fiercely criticised from time to time by others such as creditors, disgruntled debtors and even the courts. They are not immune to criticism. In the preparation of this judgment I take cognisance hereof.

[20] A disgruntled client or any other person who is possessed of evidence that a legal practitioner has acted unprofessionally, fraudulently or unethically will always be entitled to lay complaints with the professional body or bodies of which such a legal practitioner is a member and with the South African Police Service in the event of criminal offences. Such a right is in the public interest, but there is an obvious limit. Nobody shall be allowed to make unfounded accusations against such a legal practitioner.

[21] The respondent is of the view that she has a valid defence against the applicants' claim that she should be restrained from publishing any defamatory statements pertaining to them. It is her case that her communication, which is not denied, is the truth and in the public interest. I am not convinced that any of the serious remarks made by the respondent are the truth. I am mindful of the fact that the rule in *Plascon Evans* applies even in this case where the respondent has to prove the defences relied upon. She is obviously dissatisfied with the approach of all and sundry involved in the litigation against herself and DSD and the first applicant is her main target. She has communicated her dissatisfaction to the Landbank in

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[16] The Bill of Rights Handbook 5th e p 272.
[17] 2000 (4) SA 757 (CC) para 15.

October 2021 and if that was the end of the communication, an interdict could not be ordered. However, she just carries on and on regardless by repeating herself as the record shows. This has to stop. She has already laid complaints with the South African Police Service and the aforesaid professional bodies. She will not be ordered to withdraw those complaints. These entities will have to deal with the matters without interference by this court, but she shall be prohibited from carrying on making defamatory remarks.

[22] There can be no doubt that the admitted allegations are serious and defamatory in nature. It is inter alia alleged that the first applicant together with others 'have abandoned all forms of morality and integrity including their fiduciary duties as legal professionals…'[18] and that the first applicant 'has continued with fraud, assisting the liquidator to steal assets and many more criminal actions.'[19] Land Bank, who has been fed with the respondent's remarks pertaining to the first applicant, is one of his biggest clients.

[23] Before I continue, it is recorded as follows:

a. the notice of motion and annexures thereto comprise of 206 pages;
b. the answering affidavit and annexures thereto comprise of 1028 pages; and
c. the replying affidavit and annexures comprise of 107 pages.

The respondent attached 225 annexures to her answering affidavit, the last of which is the first page only of one of her answering affidavits in another matter, instead of the full affidavit as alleged.[20] She expected the court to trawl through these voluminous annexures without specifying the relevance pertaining to specific paragraphs in the various documents. It made adjudication of the application extremely difficult although I eventually have to agree with the applicants' view point that the vast majority of the documents presented by the respondent is irrelevant to the present application. Over and above the voluminous application papers, the respondent also attached several other documents to her heads of argument which she regarded to be in response to the replying affidavit. I did not consider this for the obvious reason that she did not have a right to act accordingly.

[18] Annexure FA14, volume 2 p 130.
[19] Annexure FA22, volume 3 p 263.
[20] Volume 12 p 1121.

[24] I agree with the applicants' observation in reply that it is clear from the respondent's version that 'she admits that the truth of her numerous statements have not yet been proved, despite their widespread publication to all and sundry, which baseless publications and the potential repercussions thereof on myself, my firm and its employees, form the crux of this application.'[21] A clear impression is created when considering the history of the litigation that every time legal steps had been taken against the respondent, she continued with her strategy of publishing defamatory statements. The record speaks for itself and I do not intend to quote each and every occurrence.

[25] It is unnecessary to deal with all the litigation, but there can be no doubt that the respondent is a disgruntled debtor who has embarked on a process to make life as difficult for the applicants as possible by especially making serious defamatory allegations against them and others. Notwithstanding the fact that DSD was placed in voluntary liquidation and that the debt owing to the Land Bank was admitted at that stage, the respondent has embarked upon litigation to rescind her final sequestration order as well as the voluntary liquidation of the company. Mr Van Wyk on behalf of the applicants submitted during oral evidence that particular emphasis should be given to annexures FA14 to FA16.[22]

[26] Contrary to Mr Van Wyk's oral submissions that the court should merely consider the defamatory remarks contained in annexures FA14 to FA16, it is apparent from the founding affidavit that the respondent did not stop defaming the applicants during October 2021. If those were the only remarks made by the respondent, there would be no entitlement to an interdict. On 31 August 2022 the respondent directed further correspondence to the Land Bank wherein she once again accused the first applicant personally of fraud and theft.[23] Further letters wherein the same averments were made followed in September and October 2022.[24] The respondent did not specifically deal with the contents of paragraphs 101 to 103 of the founding affidavit, but stated with reference to paragraph 104 thereof that all the statements are substantiated with proof and continued with the following

[21] Volume 12 para 9 p 1144 in response to the respondent's statement in para 3 of her answering affidavit.
[22] Volume 2 pp 130 – 179.
[23] Annexure FA22, volume 3 p 263 and para 101 p 35 of the founding affidavit.
[24] Annexure FA23 and FA24, volume 3 pp 264 & 267 respectively as well as paras 102 & 103 of the founding affidavit pp 35 & 36.

averment: 'The applicant must believe that if he ignores the proof it will somehow cease to exist.'[25]

[27] Insofar as the applicants indicated that they have complied with the requirements for a final interdict, the respondent made the following allegation:

'Ref paragraph 112: the respondent has freedom of speech. It was proven that the statements made by the respondent were not false. The applicant can not seek protection from this Honourable Court, to prevent the respondent from exposing the applicant for what he has done and who he is.'[26]

The respondent failed to present evidence to substantiate her allegations.

[28] The applicants' submission that the second requirement to obtain a final interdict, has been met is correct. Not only has an injury been committed already, but it is also reasonably apprehended to be repeated.[27] Clearly, the respondent has embarked upon a road of no return. She will not desist from defaming the applicants, unless restrained by a court order.

[29] I am mindful of the dicta in *NBC Holdings* and *Herbal Zone.* The respondent's defence of the truth is not based on any evidence and she has also failed to present evidence that provides a sustainable foundation for her defence. The applicants' do not have any other satisfactory remedy, than to approach the court for an interdict they have proven all three requirements in order to obtain a final interdict in paragraph 1 of the notice of motion. Therefore, I am satisfied that the applicants are entitled to an interdict restraining the respondent from publishing any defamatory statements regarding or concerning them.

[30] The applicants pointed out that the respondent is hopelessly insolvent and that even if successful in a claim for damages, they would not be able to recover any meaningful amount from her. Therefore, they seek an order directing her to publish an unequivocal and written apology in three newspapers. They provided the court with a draft apology which is extremely widely worded. In terms thereof the respondent should unreservedly withdraw every word in all communications to the various entities and admit that there was never any foundation for any of the charges

[25] Answering affidavit, volume 3 para 39 p 287.
[26] Answering affidavit, volume 3 para 43 p 288.
[27] Founding affidavit, volume 1 para 112.2.1 p 38.

which she had laid. She must also undertake to pay the costs of the application on a scale as between attorney and client.[28] Insofar as I am not in a position to consider directing an apology to be made in light of the case law quoted, it is not necessary to consider the contents of the apology any further.

[31] The authorities are clear. The applicants are not entitled to the relief claimed in motion proceedings for the reasons set out in the judgments which I do not intent to repeat. If the applicants want to claim damages based on defamation, they shall proceed by way of action procedure.

CONCLUSION

[32] The applicants have proven that they are entitled to an interdict as prayed for in paragraph 1 of the notice of motion. However, based on the authorities quoted above, they are not entitled to damages in the form of an apology as sought in paragraph 2 of the notice of motion. The applicants are partially successful and it may even be argued that they have obtained substantial success and are therefore entitled to the costs of the application. Having said this, the applicants should have appreciated that they could not in motion procedure obtain relief in the form of an apology. The first applicant has acted as a judge in the High Court in the past and he is an experienced senior attorney. He was represented by an experienced counsel. The judgments referred to above were delivered some time before this application was launched and they should have been well aware thereof. I also take into consideration that the first applicant has made use of his own firm of attorneys, to wit the second applicant, to represent him in the application, although they made use of local attorneys in Bloemfontein, to wit Badenhorst Attorneys, as their correspondents. In the exercise of my discretion I have decided not to adhere to the request for a punitive costs order and also not to allow the applicants all their costs on a party and party scale. In the circumstances the respondent shall be ordered to pay 50% of the taxed party and party costs of the applicants.

ORDER

[33] The following order is issued:

[28] Annexure FA1 to the founding affidavit, volume 1 p 41, read with paras 2 & 3 of the notice of motion.

1. The respondent is interdicted and restrained from publishing any defamatory statements regarding or concerning the applicants.
2. The respondent shall pay 50% of the taxed party and party costs of the applicants in respect of this application.

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J.P. DAFFUE J

On behalf of the applicants:	Adv F van Wyk Van Greunen & Associates Inc c/o Badenhorst Attorneys BLOEMFONTEIN
On behalf of the respondent:	Mrs H Mc Govern (In Person)