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

CASE NUMBER: 30437/17

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES	YES/~~NO~~
(3) REVISED	
20/11/2017	
DATE	SIGNATURE

In the matter between

MAGDALENA FRANCISZKA WIERZYCKA First Applicant

SYGNIA LIMITED Second Applicant

and

MZWANELE JIMMY MANYI Respondent

JUDGMENT

EF Dippenaar AJ

Introduction

[1] This is an urgent application which concerns a delicate balancing exercise of the right to freedom of expression on the one hand and on the other hand, the rights

to dignity and equality. These rights are enshrined in the Constitution, 1996 ("the Constitution").

[2] The respondent contends that he is merely exercising his right to freedom of expression in the course of robust political debate, whereas the applicants contend that the permissible parameters of such right have been exceeded.

[3] It would appear that the application has its roots in opposing political views held by the first applicant and the respondent. The case is, however, not about which of these views is preferable, but about how these views have been expressed.

[4] The application relates to certain tweets and/or statements ("the statements") concerning the applicants, published by the respondent on his social media accounts on Twitter and Facebook. The applicants contend that the statements constitute a campaign of harassment and hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act[1] ("PEPUDA"), defamation and an infringement on their constitutional rights. The respondent disputes this.

[5] The first applicant is a businesswoman and self-proclaimed activist against discrimination, corruption and state capture. She has on her version, called on South African businesses to take a stand against corruption and state capture. She is the CEO of the second applicant, a public company listed on the JSE, with substantial domestic and international clients, including corporate entities and individuals and some R174 billion under administration.

[6] The respondent is, in his own words, a transformation and social justice activist and ex senior public official. Presently he is the President of the Progressive Professionals Forum and has recently founded the Decolonisation Foundation to deal with issues of social justice and sustainable economic transformation. The respondent is on his own version a supporter of President Zuma and the leadership of the ruling party.

[7] At the hearing, the respondent sought to introduce further documents, being certain tweets emanating from the first applicant. No affidavit was presented in

[1] Act No 4 of 2000.

support of the admission of further evidence. As such, the documents do not constitute proper evidence and are disallowed.

Urgency

[8] The respondent disputes the urgency of the application. He contends that the first applicant's fears of harm are based on anxiety and the applicants have failed to illustrate why they would not be afforded substantial relief in the ordinary course[2]. He contends that as the papers have become voluminous and raise complex constitutional issues the matter should simply be struck from the roll with costs.

[9] Each case must be considered on its own merits and the prevailing circumstances. Whilst this application is voluminous and raises complex issues, these are not the only factors requiring consideration. The circumstances surrounding the hearing of the application must also be considered in the judicial exercise of the discretion afforded to this court. Considering the issues, the length of the argument (which endured in excess of a day) and the substantial delay which would have inevitably occurred were the matter to be heard in the normal course and pursuant to a special allocation, I am not satisfied that the applicants would be afforded substantial redress at a hearing in due course.

[10] Having regard to the relevant factors, including the interests of justice, the matter has sufficient urgency to warrant a consideration of the merits.

Relief sought

[11] In summary, the applicants seek the following relief in Part A of the application, which virtually mirrors the relief sought in Part B, save that the latter includes declaratory relief that the respondent is liable to the applicants in damages:

[11.1] A declaration that the statements made by the respondent are defamatory, constitute harassment against the applicants as contemplated in s 11 of PEPUDA and the common law and amount to hate speech under the Constitution and s 10 of PEPUDA;

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[2] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd* ZAGP JHC 196, para [9].

[11.2] A final interdict prohibiting the respondent from making, publishing or causing to be published any further defamatory statements or any hateful or harassing statements concerning the applicants;

[11.3] An order directing the respondent to remove the statements or other similar defamatory statements, including retweets, made from all social media accounts and platforms under his control;

[11.4] An order directing the respondent to publish a comprehensive statement apologising for his conduct and retracting the statements;

[11.5] In the alternative, an interim interdict and the removal of the offending statements from the media platforms is sought pending final determination of Part B of the application;

[11.6] Costs, including a punitive costs order.

[12] The respondent opposes the application on various grounds. He contends that:

[12.1] The applicants have failed to meet the requirements for an interdict, either on a final or interim basis;

[12.2] The applicants have failed to satisfy the requirements for the declaratory relief sought;

[12.3] The applicants have failed to illustrate that the statements comply with the elements of the delict of defamation or, if so, that his defences of truth and public interest, fair comment and/or privileged occasion should succeed;

[12.4] The applicants have failed to illustrate that the statements constitute hate speech or harassment as envisaged by s 10 and s 11 of PEPUDA;

[12.5] If the application is not struck from the roll for lack of urgency, it should be dismissed.

The offending statements

[13] The applicants' complaints are founded in a number of statements and re-tweets of the statements of other people made by respondent on his social media platforms on Twitter and/or Facebook[3] during the period 1 to 5 August 2017. The publication of these statements is admitted by the respondent.

[14] The background to the application originates in an interview on 13 April 2017 between the first applicant and Mr Bruce Whitfield on CNBC Africa. During this interview, the first applicant expressed the opinion that the increasingly dire economic situation in South Africa after 31 March 2017 was due to President Zuma's cabinet reshuffle, and particularly the sacking of the then Minister of Finance, Mr Gordhan.

[15] According to the first applicant, this opinion was expressed in the context of commenting on how best to rid South Africa of a President who she believes is not serving the best interests of South Africans.

[16] In answer to a question by Mr Whitfield in regard to South Africa's ability to boost investor confidence, she stated the following:

'I would offer [President Zuma] as much money as he wishes to have. I would offer him every immunity under the sun .... because I think the damage that can be done to this country and this economy in a very short period of time is so much greater than any amount of money he could possibly want to live out the rest of his years .... I think the conversations we should be having in South Africa are about poverty, inequality, social welfare, about job creation, economic growth, education, health care. There is so many policy conversations that we should be having. In the meanwhile we are talking about corruption, SAASSA contracts, people's love lives, emails, SMS'es, BEE deals. It's ridiculous ....'.

[17] The respondent avers that he became aware of this interview during mid July 2017, which spurred him to publish the statements forming the subject matter of this application.

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[3] See *Heroldt v Wills 2013 (2) SA 530 (GSJ) paras [9]-[23]* for a summary of the functioning of the various social media platforms.

[18] In his answering papers, the respondent by and large repeated the substance and central themes of the statements. He defends his position on various grounds.

[19] This judgment would be rendered unnecessarily prolix if each of the various statements is repeated. The statements follow various themes and only the main statements are repeated. The remaining statements are similar in vein.

The first theme: "Economic terrorism"

[20] On 1 August 2017, respondent posted a copy of the CNBC interview on Twitter, accompanied by the comment: '*This CEO should be investigated for Economic terrorism*'.

[20.1] Applicants object to the phrase '*economic terrorism*', contending that no such legal concept exists and that referring to the first applicant as a terrorist is defamatory. They further contend that first applicant did not commit any actions which constitute terrorism.

[20.2] The respondent defends his description of the first applicant as an economic terrorist and perpetrating terrorist activity and contends that the ambit of the definition of terrorist activity under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 is wide enough to include economic terrorism. The activity complained of is first applicant's call to businesses to allow staff to participate in mass action against a democratically elected government and alleged terrorism to want to remove a President, albeit by lawful means.

The second theme: Racism

[21] On 2 August 2017, the respondent tweeted: '*Infact this @magda_wierzycka woman is downright RACIST. She objectifies black people as things than can be bought*'.

[21.1] The applicants contend that there is nothing the first applicant stated in the CNBC interview which can classify her as racist.

[21.2] In defence of his statement, the respondent contends that the first applicant's expressed ideas objectify black people and constitute racial profiling.

The third theme: Heritage and association with Janus Walus

[22] On 2 August 2017, respondent tweeted: '*I wonder if the Polish@Magda-wierzycka is related to Janus Walu[ś]. Janus killed Chris Hani. Magda is willing to pay to get Prez Zuma OUT.*' As part of a debate with his one of his readers, he further tweeted: '*Do you know her maiden surname?*' and: '*I mentioned ONLY two polish people AND I mentioned their unwholesome deeds. You are the one generalising …*'.

[22.1] Applicants contend that the association with a murderer seeks to harass and delegitimise the first applicant and is defamatory. They further contend that the tweet was intended to mean that first applicant, like Mr Walus, another person of Polish background, was guilty of egregious crimes and propagates hate against her.

[23] On 3 August 2017 '*Proudly Khoi-Hoi @ proudlykhoikhoi*' responded to the respondent stating '*Where can we find this Magda? She needs to be stopped and eliminated*'.

[23.1] The applicants rely on the aforesaid tweet as illustrating the real risk of physical harm resulting from the respondent's statements.

[23.2] The respondent points out that he is not responsible for the latter tweet and disavows any responsibility therefor. He contends that his statement is warranted by the first applicant's conduct.

The fourth theme: Unconstitutional and corrupt call by "white monopoly capital" and call to public protest

[24] On 4 August 2017 respondent posted a screenshot of a You Tube interview with the first applicant with the heading: '*We should pay Zuma to quit: Sygnia CEO.*' He comments: '*An Unconstitutional and CORRUPT call by one of the faces of White Monopoly Capital @ Magda_Wierzycka*';

[25] In two related tweets respondent posted the same screenshot with the following comments: '*How money undermines democracy@Magda_Wierzycka #FaceOfWMC'* and '*Dear @PIC*[4] *are you perhaps entrusting public money with @ Magda_Wierzycka#FaceOfWMC for her to BUY OUT President Zuma? #FaceOFWMC*'.

[26] These concepts are reinforced with later tweets such as '*I put it to you @Magda-Wierzycka that your cash incentive to buy out Prez Zuma @presidency ZA is UNLAWFUL and unconstitutuobal #faceOfWMC*' and '*what exactly is democratic about the super rich White Monopoly Capitalist buying out a democratically elected President?*'

[27] On 4 August 2017, respondent posted an extract from an article in eNCA.com in which first applicant is quoted as calling upon businesses to encourage their staff to participate in marches and to give them time off for that purpose. Respondent commented: '*So @Magda_Wierzycka wants to make SA UNGOVERNABLE. She says employers must stop being productive and send employees to the street-marches'.*

[28] The respondent further tweeted: '*If you march against slave wage, it's No work no pay. If you march against Prz Zuma it's No work but FULL PAY as proposed by @Magda_Wierzycka'.*

[29] The respondent tweeted in similar vein: '*Financially empowered by the like of @Magda_Wierzycka the DA, EFF & UDM seek to remove Prez Zuma through back door and undermine ANC voters.'.*

[30] The applicants contend that these statements are defamatory, are not based on any facts and are made with the intention to harass the applicants and infringe their right to dignity.

[31] The respondent admits publication of the statements and contends that they are warranted, given the first applicant's conduct.

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[4] Public Investment Corporation.

The fifth theme: "Buying a president"

[32] On 5 August 2017, respondent retweeted a picture of a white woman posted by one *Nonang Ndlovu@bonang.ndlovu*. The drawing is of a blonde woman wearing a skimpy dress and high heels with one thigh revealed standing against a street pole, holdings wads of money and carrying a bulging bag of money. The picture has a bubble in which is written '*I can buy anyone. Be it President'.*

[33] The applicants contend that a reasonable reader would interpret the picture as being a picture of the first applicant depicted as a prostitute, aimed at harassing first applicant. They contend this is defamatory of the first applicant and intended to harass her and the second applicant. Similarly, they contend that the other statements referred to hereunder are defamatory and intended to harass the first applicant.

[34] The respondent disputes that the picture identifiably depicts the female as a prostitute. He contends that the imagery depicts precisely what the first applicant said in her April 2017 interview. He contends that the statements are warranted given the first applicant's actions.

[35] In furthering this theme, the respondent also tweeted statements such as:

[35.1] '*I put it to you @Magda-Wierzycka that your cash incentive to buy out Prez Zuma@PresidencyZA is UNLAWFUL and Unconstitutional. #Face OfWMC*'.

[35.2] '*One of the faces of the arrogant White Monopolly Capitalist ... @Magda_Wierzycka.*'

[35.3] '*What exactly is democratic about the super rich White Monopoly Capitalist buying out a democratically elected President.*'

[35.4] *'11 million people voted for a [President] Zuma led ANC. Then comes the monied White Monopoly Capitalist with bags of cash to buy out democracy.*'.

[35.5] *'How money undermines democracy. @Magda_Wierzycka #FaceOf WMC*".

[35.6] *'One of the faces of arrogant White Monopoly Capitalist ... @Magda_Wierzycka*".

[35.7] On Facebook: '*One of the arrogant faces of White Monopoly Capitalists*'.

Responses from respondents' followers

[36] The respondent's statements elicited various responses from his followers including what is stated hereunder. The applicants contend such responses increase the reasonable fear on the part of the first applicant that she will be harmed and which resulted in protection services being employed for her and her family:

[36.1] 3 August 2017: '*Proudly Khoi-Hoi@proudlykhoikhoi*' responded to Mr Manyi stating that '*Where can we find this Magda? She needs to be stopped and eliminated".*"

[36.2] 8 August 2017: Twitter user *"Makhaya@makhaya129" posted: "... You take your wealth and plunge us into a life of poverty, we will take your lives. Rest assured it is only a matter of time.'*

[37] The respondent disavows any responsibility for these tweets as he is not the author thereof.

Context: Opposing views

[38] The parties agree that the context and backdrop to the application is vital to determining whether the applicants are entitled to the relief sought. They however substantially disagree on the nuances of such context.

[39] The respondent admits making the statements and defends them on the basis of, *inter alia,* freedom of expression. He contends that the applicants are attempting to suppress fair comment on socio-economic issues which do not accord with first applicant's own views. His pervasive view is that he finds her opinions offensive and strongly resists her endeavours to have a democratically and constitutionally elected President bought off with money as that would subvert the will of 62% of the South African electorate. In his view, the first applicant's opinion that the President should

be offered money to step down, stereotypes black people as being for sale and is racial profiling which he cannot leave unchallenged.

[40] The respondent focusses on attacking the opinions of the first applicant by contending that she has no right, even on a *prima facie* basis, to propagate any subversion of the democratic process and has no right to instigate businesses' rebellion against constitutional laws such as BEE legislation. Respondent contends that first applicant has incited business to ignore BEE. It is argued that this is fatal to the granting of any interdictory relief as she has no *prima facie* right to any relief.

[41] First applicant contends the respondent is a public figure, a previous member of government with a considerable amount of public influence including some 89 500 Twitter followers and 5 000 Facebook friends, the number of which has grown substantially subsequent to the statements in issue. It is argued, that as such, the respondent bears a special responsibility to ensure that his public statements are well considered and do not cause harm or incite violence as his statements are more likely to be taken seriously or followed by the public.

[42] First applicant contends that the respondent has deliberately sought to pervert the context of the CNBC interview in an attempt to threaten, intimidate and silence her in the exercise of her constitutional rights and her fight against corruption and to defame and belittle her in the process. The respondent disputes these allegations and in turn accuses the first applicant of attempting to undermine his right to freedom of expression.

[43] The applicants contend that the statements in issue form part of a broader attempt to discredit and threaten those people and organisations who are attempting to rid South Africa of the scourge of corruption. Furthermore, the statements are published with a clear ulterior purpose, being a stifling of *bona fide* public debate and to divert attention away from investigations and focus on state capture and its devastating effects on the economy. The applicants further contend that, even without this context, the respondent's statements are unlawful.

[44] The respondent contends that the central nub of the matter is in fact '*a trenchant contest between two opposing political views, the dominant and oft-*

repeated view of the opposition on the one hand and the much-maligned view that supports the leadership of the ruling party on the other.'[5] The respondent further contends that this view of the opposition is "a political narrative" surrounding the President and the Gupta family.

[45] The respondent cautions on a disagreement on political views morphing into intolerance resulting in the suppression of views with which the first applicant does not agree. The respondent contends that he should be entitled to express his views, as much as they may be unpopular with the first applicant or even with the majority of South Africans.[6]

[46] The respondent further emphasises that the first applicant, having chosen to enter the public political arena, cannot complain if there are unfavourable responses to her expressed views within such space. A substantial portion of his answering papers is dedicated to illustrating why there is truth in the respondent's assertions or why his statements constitute fair comment. The first applicant did not refer to the respondent or attack him, yet it is clear that the respondent took her statements as a personal umbrage to his deeply held beliefs.

[47] It is thus clear that a properly nuanced consideration is required in order to determine especially the issues whether the statements constitute harassment and/or hate speech under PEPUDA. This impacts on a final determination of whether the statements are defamatory and whether the applicants are entitled to any of the declaratory relief sought.

Referral to oral evidence or trial

[48] After the hearing, additional submissions were requested from the parties regarding whether the matter should be resolved on the papers or whether any issue/s, specifically in relation to the declaratory relief sought, should be referred for the hearing of oral evidence or trial. These submissions were provided by the parties on 29 September 2017.

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[5] Respondent's heads of argument ("HOA") para 14.
[6] Respondent's HOA para 19.

[49] In their supplementary submissions, the applicants contend that there are no real or genuine disputes of fact on the papers and that the final relief sought in Part A of the application should be determined on the papers and granted. Only if there is a material dispute of fact should interim relief be granted pending the determination of the disputed issues in Part B. They point out that none of the parties sought a referral to trial or oral evidence at the hearing.

[50] The respondent on the other hand contends that the matter should be referred to trial and should not be determined on the papers. He contends that evidence is required on the issues whether the applicants have suffered any harm as a result of respondent's statements and whether there is any reasonable apprehension of such harm. He contends that the first applicant's security team and bodyguards should be subjected to cross-examination on the alleged threatened harm and the correlation between that and respondent's statements.

[51] A referral to evidence on such issues would, however, in this Court's view serve no real purpose insofar as they are relevant to the determination of the interdictory relief sought. This issue must be determined on the papers.

[52] The respondent further contends that the first applicant's evidence is required in respect of the declaratory relief sought in respect of hate speech, defamation and harassment.

[53] The respondent at no stage sought an opportunity to supplement his answering papers nor did he complain that he had an insufficient opportunity to fully present his response to the applicants' case. In responding to this court's enquiry as to what issues should be referred to the hearing of oral evidence, he did not contend that evidence was required regarding his defences to the applicants' defamation claim or their contentions regarding hate speech or harassment. Instead, he focussed on the applicants' case to contend that the first applicant should be subjected to cross-examination on various issues.

[54] The respondent contends that the evidence should be centred around which of the factors that describe harassment, the applicants rely on and in broad terms, on how the respondent's contentions can be construed to demonstrate an intention to

harm and constitute hate speech or defamation. The respondent contends that the meaning of the term '*economic terrorism*' as used by him must be tested in order to appreciate his defence of fair comment. His delineation of evidence required appears aimed at the cross-examination of the first applicant on her views.

[55] The respondent contends that his view that the first applicant is racist, the face of white monopoly capital and that she undermines South Africa's democracy, as stated in the offending statements and in his answering affidavit, constitute an integral part of his defence which needs to be tested; issues best determined by the Equality Court, rather than the Urgent Motion Court.

[56] It is not, in this Court's view, appropriate to refer any issue to oral evidence or trial at this juncture considering the jurisdictional issues which arise in relation to the relief sought.

Jurisdiction

[57] It is regrettable that the parties did not address this Court in any of their written or oral submissions on the respective jurisdictions of the High Court and the Equality Court and to what extent the High Court has jurisdiction to determine the application. In this Court's view, this issue is central to the ultimate determination of this application.

[58] Insofar as the application pertains to harassment and hate speech, applicants' primary reliance is on s 10 and s 11 of PEPUDA[7]. It is not for purposes of this judgment appropriate, nor necessary to attempt to delineate the parameters of the source of each category of relief sought as this would ultimately only result in a piecemeal determination of the issues, even if such a delineation is at all possible.

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[7] The prohibited grounds in s 1 are:
'(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status, or
(b) any other grounds where discrimination based on that other ground-
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal employment of a person's rights and freedom in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.

[59] There is merit in the respondent's supplementary submission that various of the issues which must be determined in this application, should best be determined by the Equality Court. The issue however goes further, as it must be considered whether the High Court any has jurisdiction to determine the relief sought in relation to harassment and hate speech under PEPUDA.

[60] PEPUDA[8] is national legislation as referred to in s 9(*3*) of the Constitution. The long tile of PEPUDA states, *inter alia*, that it is intended:

'*To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution…., so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech….*'.[9]

[61] S 16(1)(*a*) of PEPUDA provides, subject to s 31, that every High Court is an Equality Court for the area of its jurisdiction. S 16 however provides for specific requirements for the designation of presiding officers in the Equality Court. This Court as currently constituted is not a designated presiding officer of the Equality Court.

[62] More importantly, this application was not launched in the Equality Court in accordance with the provisions of s 20 of PEPUDA, but in the High Court as an urgent application.

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[8] As analysed by Moshidi J in *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and the Congress of South African Trade Unions* [2017] 3 All SA 1029 EqC ("Masuku").

[9] The objects of the Equality Act are significant. In addition to those objects related to s 9 of the Constitution, the objects include:

'(a) to enact legislation required by section 9 of the Constitution;
(b) to give effect to the letter and spirit of the Constitution, in particular –
(i) the equal enjoyment of all right and freedoms by every person;
(ii) the promotion of equality, the values of non-racialism and non-sexism contained in section 1 of the Constitution;
(iii) the prevention of unfair discrimination and protection of human dignity as contemplated in section 9 and 10 of the Constitution;
(iv) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
…
(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment.'

[63] It is necessary to establish whether this Court, notwithstanding what is stated in [61] above, sitting as a High Court has jurisdiction pertaining to the declaratory relief sought under s 10 and s 11 of PEPUDA.

[64] The Constitutional Court in *De Lange v Methodist Church and Another*[10] reaffirmed the position adopted in a trilogy of cases by the Supreme Court of Appeal[11] that the Equality Court is a special purpose vehicle and a creature of statute deriving its powers from PEPUDA, which exists separately and distinct from the High Court. The jurisdiction of the High Court and the Equality Court is thus distinct.

[65] The Equality Court has jurisdiction over issues relating to hate speech and harassment under PEPUDA. The High Court has jurisdiction over constitutional issues and issues which arise under the common law.

[66] The question which must be determined is whether the relief sought by the applicants falls within the purview of the Equality Court[12]. Considering the basis of the application and the relief sought, a substantial portion of the application does; as it relates to harassment and hate speech. The application relies cumulatively on the common law, the Constitution and PEPUDA as bases for the different categories of relief sought. The applicants' case further relies heavily on the underpinning contention that the respondent's statements constitutes a campaign of harassment under s 11[13] of PEPUDA.

[67] The powers and functions of the Equality Court are regulated by s 21 of PEPUDA. The relief sought by the applicants by and large falls within the ambit of

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[10] *De Lange v Methodist Church and Another 2016 (2) SA 1 CC at paras [55]-58].*

[11] *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (NO2) 2009 (6) SA 589 (SCA) paras 54 and 57; Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (NO1) 2009 (6) SA 574 (SCA) paras 30-31 and Minister of Environmental Affairs and Tourism v George and Others 2007 (3) SA 62 (SCA) paras 12-13.*

[12] As per Navsa JA *in Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (NO2) 2009 (6) SA 589 (SCA) para 71.*

[13] S 11 of PEPUDA prohibits harassment against any person. Harassment is defined to mean:
'unwanted conduct which is persistent or serious and demeans, humiliates or creates as hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-
(a) sex, gender or sexual orientation, or
a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.'

appropriate orders under s 21 (2). This includes the declaratory relief sought by the applicants in relation to the issues of harassment and hate speech and the apology and retraction relief sought.

[68] The problem of jurisdiction is further exacerbated by the fact that PEPUDA contains specific provisions which regulate important issues such as the institution, rules and regulation of the proceedings (s 9 and s 20), how the Act should be implemented (s 3)[14], guiding principles (s 4), and the burden of proof (s 13). These provisions are specifically drafted to deal with issues falling within the purview of PEPUDA and do not apply to matters falling within the jurisdiction of the High Court.

[69] The Supreme Court of Appeal, via Cameron JA in *Minister of Environmental Affairs and Tourism v George and Others*[15] stated the following:

'*The question of double jurisdiction this case raises is not unique, and is likely to arise in every case brought under the Unfair Discrimination Act [PEPUDA]; and…there is no reason why those who have interrelated remedies under the Unfair Discrimination Act and other legislation should not be entitled to pursue their remedies in parallel proceedings before the High Court, in its capacity as an Equality Court, and the High court in its ordinary capacity. Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same High Court Judge who, in his capacity as an Equality Court Judge, is presiding in that Court*'.

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[14] In interpreting PEPUDA the provisions of S 3 provide as follows:
'Any person applying this act must interpret its provisions to give effect to -
(a) the constitution, the provisions of which include the promotion of equality through legislative and other measures designed or protect or advance persons disadvantaged by past and present unfair discrimination;
(b) the Preamble the objects and guiding principles of this act thereby fulfilling the spirit purport and objects of this act;
(2) any person interpreting this act may be mindful of -
(a) any relevant law or code of practice in terms of a law;
(b) international law, particularly the international agreements referred to in section 2 and customary international law;
(c) comparable foreign law.
(3) Any person applying or interpreting this Act must take into account the context of the dispute and he purpose of this Act.'
[15] *supra, paras 17-18.*

[70] In *De Lange*, Deputy Chief Justice Moseneke cited with approval the judgment of Van Oosten J in *Qwelane v Minister of Justice and Constitutional Development and Others*[16], who invoked the provisions of s 173[17] of the Constitution to consolidate claims[18] falling within the distinct jurisdiction of the High Court and the Equality Court[19].

[71] Deputy Chief Justice Moseneke went further to state that *'In George it was held that the Equality Court proceedings and constitutional challenge proceedings may be consolidated for hearing before a single judge sitting as equality court and as high court. There is indeed much to be said for this approach of permitting consolidation of disparate claims before a high court. The consolidation will not only serve the procedural requirements of the Unfair Discrimination Act but will also avoid piecemeal litigation and costs.*'

[72] The issues which arise in relation to the present application are on a slightly different footing, although the same overriding principles apply. Although not instituted in separate proceedings, the claims of the applicant are distinct insofar as the relief sought is materially predicated upon issues which fall within the respective jurisdictions of the High Court and the Equality Court.

[73] Considering the intertwined nature of the interdictory, declaratory and other ancillary relief sought it would not be appropriate to attempt a piecemeal determination of applicants' entitlement to declaratory and ancillary relief. Rather, the matter should be adjudicated in a parallel process by a single judge sitting both as a an Equality Court and a High Court, with the necessary jurisdiction to determine all the issues in accordance with PEPUDA, the common law and the Constitution.

[74] It is thus clear that this Court does not have the necessary jurisdiction to determine the application as a whole or to consider the granting of any final relief.

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[16] *Qwelane v Minister of Justice and Constitutional Development and Others 2015 (2) SA 493 (GJ) para 5 and 8.*
[17] which vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effectively manner within its jurisdiction.
[18] *Qwelane* para [6].
[19] *De Lange supra* para [57].

[75] To administer justice in an orderly and efficient fashion, it is in this Court's view necessary to refer the application, including both the equality relief and the final relief for determination by a single judge sitting as an Equality Court and a High Court. This authority is vested in the judiciary in terms of s 173 of the Constitution.[20]

[76] Considering the fact that the applicants seek relief on other grounds, such as the common law and the Constitution, it does not mean that the High Court has no jurisdiction to entertain certain of the relief sought, specifically insofar as it pertains to the interim interdictory relief sought.

Interdictory relief

[77] The applicants seek final interdictory relief and in the alternative, only interim interdictory relief pending determination of Part B of the application. They seek both prohibitory and mandatory interdictory relief.

[78] As the application cannot be finally disposed of at this juncture, the applicants cannot obtain final relief. It must be determined whether the applicants are entitled to interim relief.

[79] The requirements for interim interdictory relief[21] are trite. They are:

[79.1] a clear right or a right *prima facie* established though open to some doubt;

[79.2] a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

[79.3] a balance of convenience in favour of the granting of the interim relief; and

[79.4] the absence of any other satisfactory relief.

[80] In the context of interim relief, a court is not typically called upon to determine the issues in dispute but asked to arrest future or continuing irreparable harm, often

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[20] *Qwelane*, para [6].
[21] *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-E; Setlogelo v Setlogelo 1914 AD 221 at 227 .*

based on partial evidence[22]. The proper approach is to take the facts set out by the applicants together with any facts set out by the respondent, which the applicants cannot dispute and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at trial.[23]

[81] Much of the debate has centred around whether the applicants have illustrated any *prima facie* right and irreparable harm. Save that the threshold test is the establishment of a *prima facie* right, although open to some doubt, the factors are not to be considered separately or in isolation but in conjunction with one another in the determination of whether a court should exercise its overriding discretion in favour of the grant of interim relief.[24]

[82] Although normally stated as a single requirement, the requirement for a *prima facie* establishment, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicants' case in order to see whether serious doubt is thrown on the applicants' case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed.[25]

***Prima facie* right**

[83] Respondent contends that the applicants have failed to disclose any right to the relief sought, whether on a clear or *prima facie* basis.

[84] The applicants rely on their right to dignity under s 10 of the Constitution and contend that the statements are defamatory.

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[22] *Zondo v Union & National & General Assurance Co of SA Ltd 1954 (3) SA 541 (W).*
[23] *Spur Steak Ranches Ltd and Others v Saddlers Steak Ranch Claremont and Another 1996 (3) SA 706 (C) 714B-H.*
[24] *Olympic Passenger Services (Pty) v Ramlagan 1957 (2) SA 382 (D); Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A); Beecham Group Ltd v B-M Motors Group* (Pty) Ltd 1977 (1) SA 50 (T).
[25] *Webster v Mitchell 1948 (1) SA 1186 (W) at 1189; Gool v Minister of Justice and Another 1955 (2) SA 682 (C)* at 688.

[85] The respondent raises no real factual dispute on the facts alleged by the applicants. Instead, he focusses on the views expressed by the first applicant and criticises them. Essentially, he repeats the same or similar views as expressed in the offending statements.

[86] He relies on his constitutional right of freedom of speech under s 16 of the Constitution to do so.

[87] The settled and trite approach of South African Courts in pronouncing on the provisions of s 16[26] of the Constitution has been that, although the right to freedom of expression is inseparable from a normal democracy, it is however, neither an absolute nor limitless right nor is it a pre-eminent right. In addition, our courts have also adopted a rather generous interpretation in holding that, *inter alia*, unless an expressive act is excluded by s 16(2) of the Constitution, it is a protected expression.[27]

[88] In *South African National Defence Union v Minister of Defence and Another*,[28] Justice O'Regan held that:

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters ... As Mokgoro J

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[26] S 16 of the Constitution provides for Freedom of expression:
'(1) Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to-
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[27] LAWSA 2ed, Vol 5, Part 4, paras [107]-[209].

[28] *South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at paras [107]-[209].*

observed in Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) … in para [27].'

[89] In defining the right to freedom of expression, the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*,[29] said:

'*South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as "one of the essential foundations of a democratic society; one of the basic conditions of its progress and for the development of every one of its members" … As such it is protected in almost every international human rights instrument. In Handyside v The United Kingdom the European Court of Human Rights pointed out that this approach to the right to freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb … Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democracy society"'.* [30]

[90] The right to freedom of expression is however not without limitation. As stated by Moshidi J in *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and the Congress of South African Trade Unions*[31]:

'[28] Indeed, the above approach and interpretation of the right to freedom of expression, not only show the importance and indispensability of the right, but also that it is not without any limitation. In fact, s 36 of the Constitution specifically limits the right in the following terms:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including –

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[29] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division 2002 (4) SA 294 (CC) para [28].*
[30] *Handyside v The United Kingdom 2004 (1) SA 406 (CC) para [48].*
[31] [2017] 3 All SA 1029 (EqC) ("Masuku") paras [28]-[29]; See also *National Media Ltd & Others v Bogoshi 1998 (4) SA 1196 (SCA).*

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[29] From the provisions of s 36 of the Constitution, the following is more than plain: the rights targeted therein, in particular the right to dignity, are more than critical in the evaluation of this matter, bearing in mind the interpretational instruction prescribed in s 39 of the Constitution; that the Equality Act is part of the national legislation anticipated in s 9(3) of the Constitution; and as referred to in s 2 (Objects of the Act) of the Equality Act, and finally, and most importantly, in the context of the matter, the provisions of s 10(1) as well as the related section of the Equality Act, must be interpreted in such a manner that is consciously and especially circumspect, to avoid simply exchanging one type of thought regulation for another – and in order to achieve an equitable balance between the contrasting rights. In doing so, I must conclude, as I do, ultimately below, that the limitation of freedom of expression imposed by s 10(1) and s 11 and related provisions of the Equality Act under discussion, are not unreasonable and not unjustifiable in an open and democratic society based on human dignity, equality and freedom, when regard is had to all the relevant circumstances. The same should apply to s 12, which in its proviso essentially and potentially targets speakers who do not act bona fide and whose utterances have the damaging effects listed in s 10.'

[91] The respondent's statements must thus ultimately be evaluated giving due consideration to the common law, the applicants' right to dignity and respondent's right to freedom of expression, subject to the limitations imposed thereon by the Constitution and PEPUDA. For present purposes, no final determination can be made in respect of these issues, which will in due course be dealt with by a court with competent jurisdiction.

[92] In considering interim interdictory relief, the issue to be determined at this stage is whether the offending statements are *prima facie* defamatory under the common law and the Constitution.

[93] It is trite that a corporation such as the second applicant can be defamed[32]. The same principles will thus apply to both applicants.

[94] There are three requirements for a successful defamation action, set out thus in *Le Roux v Dey*[33]:

'[84]...In Khumalo and Others v Holomisa ("Holomisa") *this court stated that the elements of defamation are "(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (3) concerning the plaintiff"*

[85] Yet the Plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defences.'[34]

[95] In *Holomisa*[35], the Constitutional Court held that the right to dignity, guaranteed in s 10[36] of the Constitution, has a wide meaning and encompasses a number of values. Amongst these are a person's right to reputation, his or her right to a sense of self-worth and his or her right to privacy. In arriving at this decision, the Court held that, while the common law draws a sharp distinction between a person's right to his or her reputation and a person's right to his or her dignity or self-worth, the Constitution does not. This is because the value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an

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[32] *See Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd 2011 (5) SA 329 (SCA) para [39].*
[33] *Le Roux v Dey ("Dey") 2011 (3) SA 274 (CC) at para 84.*
[34] *See also FDJ Brand LAWSA Volume 7 (Second edition) at 234.*
[35] *Khumalo v Holomisa 2002 (5) SA 401 (CC).*
[36] S 10: '*Human dignity*
Everyone has inherent dignity and the right to have their dignity respected and protected.'

affirmation of the worth of human beings in society. The Constitutional Court also held that the value of human dignity includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in the Constitution therefore encompasses both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.[37]

[96] In *Dey*, the test for whether a statement is defamatory is stated thus:[38] '*Where the plaintiff is content to rely on the propositions that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have regard not only to what is expressly stated but also to what is implied.*'

[97] Considering what meaning a reasonable reader of ordinary intelligence would attribute to the statements, the applicants contend they mean:-

[97.1] that the first applicant should be investigated for economic terrorism; and is, at least potentially, a terrorist;

[97.2] that the first applicant is racist or prejudiced or discriminates against other races;

[97.3] that the first applicant objectifies black people or treats them as things that can be bought;

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[37] The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.

[38] *Supra* para [89].

[97.4] that the applicants are corrupt and prepared to undermine South Africa's democracy;

[97.5] that the applicants use or wish to use public money (from PIC) to buy out the President Zuma, which carries the implication that they are corrupt.

[98] This accords with the meaning attributed to the statements by the respondent.

[99] In this Court's view, *prima facie* the statements are, especially in a South African context, defamatory considering their ordinary meaning when measured from the perspective of a reasonable reader of ordinary intelligence and tend to lower the applicants' reputation in the eyes of the public.

[100] The respondent relies on the defences of truth, alternatively fair comment to exclude the presumption of unlawfulness.

[101] The respondent does not in his answering papers identify in which instance he relies on truth and in which instance on fair comment, but refers to them as "and/or", thus collectively and in the alternative.

[102] In support of these defences, the respondent:

[102.1] contends that the financial incentive to get rid of a president is unlawful and *prima facie* constitutes economic terrorism which should be investigated;

[102.2] contends that the first applicant is racist and objectifies black people as commodities because of his interpretation of first applicant's statements in the CNBC interview. He further accuses first applicant of racial profiling;

[102.3] confirms his perception that the common thread between first applicant and Mr Walus is racism;

[102.4] contends that the first applicant undermines South Africa's Constitution by her offer of a financial incentive to remove a democratically elected president is corrupt and warrants her characterisation as "the face of white monopoly capital";

[102.5] justifies his allegation that first applicant is corrupt by maintaining that her offer to bribe the President to procure the vacation of his office is subversive of the Constitution, corrupt and constitutes terrorist activity. He also considers the rallying of business to aid and abet the disruption of the economy by encouraging staff to participate in protest action as terrorism.

[103] In his answering papers, the respondent puts up no facts supporting the truth of his averments and thus does not *prima facie* discharge his onus on the truth defence.

[104] The defence of fair comment, was distilled by Innes *CJ Crawford v Albu*[39] in the following terms:

'*Inasmuch as it is the expression of opinion only which is safeguarded, it follows that the operation of the doctrine must be confined to comment; it cannot protect mere allegations of fact. It is possible, however, for criticism to express itself in the form of an assertion of fact deducted from other clearly indicated facts. In such case it will still be regarded as comment for the purpose of this defence. The operation of the doctrine will not be ousted by the outward guise of the criticism (see O'Brien v Marquis of Salisbury, 6 Times L.R., at p. 137). Then the superstructure of comment must rest upon a firm foundation, and it must be clearly distinguishable from that foundation. It must relate to a matter of public interest, and it must be based upon facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true. And those to whom the criticism is addressed must be able to see where facts end and comment begins, so that they may be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact (see remarks of FLETCHER MOULTON, L.J., in Hunt v Star Co., 1908, 2 K.B. at p321). Further, the comment, even if clearly expressed as such, and*

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[39] *CJ Crawford v Albu* ("Crawford") *1917 AD 102* at 114. See also *Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC) at 99 ("DA v ANC").*

based upon true facts, must be "fair" in the sense that it does not exceed certain limits.'

[105] Although it is lawful to publish a defamatory statement which is fair comment on facts that are true and are matters of public interest, this immunity is provisional and the publication will be wrongful if the defendant acted with an improper motive[40].

[106] Moreover, as stated in *Farrar v Hay*[41], '*where the words complained of not only attack the plaintiff's actions as a public man, but also impugn his honour and private integrity*', a plea of fair comment will not avail as a defence.

[107] The onus is on respondent to establish that the facts on which his comments were based are fair comment. It is unclear from the answering papers whether respondent's aforesaid comments are presented as fair comment or as fact.

[108] In applying the aforesaid principles, this Court is not satisfied that the respondent has, on a *prima facie* basis discharged his onus on the fair comment defence.

[109] Although the first applicant did not refer to the respondent or attack him personally in expressing her opinions, the respondent saw fit to attack the applicants personally.

[110] Ultimately, a final determination regarding defamation can only be made once the PEPUDA issues of harassment and hate speech have also been considered in context, as set out above.

[111] For purposes of determining whether applicants have established a *prima facie* right and in applying the aforesaid principles, this Court is satisfied that the applicants have established a *prima facie* right to interdictory relief.

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[40] *Crawford* supra 113-114 and 136-138.
[41] *Farrar v Hay 1970 TS 194* at 201.

Risk of irreparable harm

[112] The respondent contends that applicants have shown no irreparable harm as its complaint is targeted at what has already taken place and not aimed at anticipated or ongoing harm[42]. Even if there is harm, it is argued that harm is not irreparable and, that the applicants' fears are based on anxiety.

[113] It is undisputed that respondent's twitter account is set to "public" and thus his statements can be viewed by the general public. The ambit for publication is thus not limited to respondent's Twitter followers or Facebook friends. Although the statements have already been published, a risk of harm exists in their further and continued publication.

[114] The respondent disavows any vicarious liability for any statements made by his followers and denies that by retweeting any particular statements he is endorsing the contents thereof. The unanswered question remains why the respondent retweeted the statements which he disavows and does not endorse.

[115] It is not disputed that the effect of the respondent's statements has been that numerous of his followers have reacted to them in terms that threaten physical harm to the first applicant.

[116] Further to the statements already referred to, responses to the statements include: (i) '"*her*" *citizenship should be revoked and [she] should be sent back to Poland; so this white chick thinks Zuma will Go? Please take your racist medicine and sit down'*; (ii) '*This overconfident WMC stooge needs to be taught a lesson for her loose talk, may lightening (sic) strike her one of these days'*; (iii) *'time's up for white monopoly capital n it will go down, n so will its stooges, just wait and watch (sic)'*; (iv) *'Magda Wierzycka had a proposal of paying @Presidency SA # wmcpuppet #wmcpaidmedia'*; (v) *'you take your wealth and plunge us into a life of poverty, we will take your lives. Rest assured it is only a matter of time.'*

[117] These responses are reasonably to be interpreted as threatening. The respondent's contention that the applicants' anxiety has no justification, lacks merit.

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[42] *Tswane City v Afriforum and Another 2016 (6) SA 279 (CC)* paras 35 and 39.

This Court is satisfied that the first applicant has sufficiently illustrated a reasonable risk of reputational and psychological if not physical harm, which is irreparable.

[118] Given the nature of the statements against the second applicant this Court is satisfied that there is a risk of reputational and/or financial harm to the second applicant in the face of the allegations relating to its alleged involvement in unlawful and corrupt activities.

[119] Considering the stance adopted by the respondent in his answering papers, by confirming and repeating the statements and denying the applicants' rights, there is at least a reasonable prospect that the respondent will continue with his statements, with a potential of harm to the applicants, if no relief is granted.

Balance of convenience

[120] Respondent contents that absent a *prima facie* right and irreparable harm, applicants have further not illustrated a favourable balance of convenience.

[121] Considering that applicants have established, *prima facie*, that respondent's statements are defamatory in considering the other requirements and in context of the parties' respective constitutional rights, this Court is satisfied that the balance of convenience favours the granting of interim relief.[43]

[122] The respondent will not be prohibited from expressing his political views in a lawful manner and with respect for the applicants' rights.

No alternative suitable remedy

[123] The applicants contend that a damages claim for defamation will not provide adequate redress and that they cannot be expected to wait for damage to occur[44].

[124] The respondent has not contended for any alternative suitable remedies at the applicants' disposal.

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[43] *Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) 383.*
[44] *VEA Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd 2006 (1) SA 252 (SCA).*

[125] Considering the nature of the harm contended for, it has not been disputed that there is no other suitable remedy available to the applicants.[45]

[126] In the circumstances I am satisfied that the requirements of an interim interdict have been satisfied.

Discretion

[127] The respondent contends that even if the requirements for interim relief are met, a court should not exercise any discretion[46] in favour of the applicants as it would stifle robust political debate.

[128] Regarding the robust nature of political discourse in public media in this country, the Constitutional Court in *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)*[47] stated:

'[99] ...Public debate in South Africa has always been robust. More than 50 years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, "(s)trong epithets are used and accusations come readily to the tongue". The court also found that allowance must be made "because the subject is a political one, which had aroused strong emotions and bitterness", of which readers were aware, and that they "would not be carried away by the violence of the language alone'.

[100] These words are still apt today. Public discussions of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech. Another is the legitimate protection afforded to every person's dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussions of public affairs.'

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[45] *Kenitex Africa (Pty) Ltd v Coverite (Pty) (Ltd) 1967 (3) SA 307 (W).*
[46] Considering the wide ambit thereof as considered in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H-I.
[47] *The Citizen 1978 (Pty Ltd and Others v McBride (Johnstone and Others, Amici Curiae) 2011 (4) SA 191 (CC).*

[129] The Constitutional Court thus expressly recognised the constitutional boundaries set to freedom of expression and robust political debate by the legitimate protection afforded to every person's dignity, including their reputation. The right to freedom of expression is thus not unbridled.

[130] The respondent contends that granting the applicants relief would '*have the chilling effect and unintended consequence of sending a message to South Africans that the political and socio economic view of the well heeled enjoy more protection of the law than the views of the less financially secure which are anchored in the constitution and democratic norms and standards*'.

[131] This view is predicated upon the misconception that any interdictory relief granted would prevent him from participating in any political debate. This is not correct. The respondent may freely exercise his right to freedom of expression within the recognised constitutional boundaries which protect the applicants' right to dignity. The contents of the political views expressed are not the relevant consideration, it is how they are expressed.

[132] A robust political debate reflecting opposing views can and should be conducted within the parameters of what is lawful without any need to exceed the parameters thereof if the fundamental constitutional values which underpin our societal norms are adhered to.

Conclusion

[133] In the circumstances, this Court is satisfied that the applicants are entitled to interim interdictory relief to prevent any further publication of the statements forming the subject matter of this application and the making and publication of further defamatory statements, pending the final determination of this application.

[134] The applicants seek an interdict in wide terms, including a prohibition on '*any further defamatory statements or any hateful or harassing statements concerning the applicants'*. For the reasons already stated, the issues pertaining to harassment and hate speech must be determined in due course by a court of competent jurisdiction.

[135] The relief is directed at restraining the respondent from making any further unlawful and defamatory statements concerning the applicants, including the same or similar statements as those forming the subject matter of this application. This would provide the applicants with adequate protection against the infractions, whilst not inhibiting the respondent from expressing his views in a lawful manner.

[136] The respondent is a sophisticated and astute person, well able to appreciate the risks involved in publishing new statements which do not pass legal muster. Undoubtedly his legal representatives will also advise him accordingly.

[137] I am further satisfied that the applicants are entitled to an order to remove the offending statements[48] on an interim basis, pending final determination of the application in order to avoid further harm to the applicants and that such relief is necessary in order to render the relief granted effective.

[138] For the reasons already stated regarding the jurisdiction issue, the remaining relief sought in Part A of the application, stands over and is to be determined with the relief sought in Part B.

[139] The parties are directed to approach the Deputy Judge President for a special allocation in terms of the relevant provisions of the practice manual.

Costs

[140] Considering the jurisdictional issues, it would be appropriate to reserve the costs so that an appropriate costs order can be made once all the issues have been determined by a court of competent jurisdiction.

Order

[141] This Court therefore makes the following order:

[141.1] The application is referred to a single judge sitting both as an Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 and as a High Court;

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[48] *Heroldt v Wills 2013 (2) SA 530 (GSJ).*

[141.2] Pending final determination of the application, the respondent is directed to remove or cause the removal, within 24 hours of this order, from his Twitter page: *@MzwaneleManyi*, his Facebook page: *MzwaneleManyi* and/or any other social media accounts under his control, the statements referred to in in this application, including any retweets thereof or responses received thereto;

[141.3] Pending final determination of the application, the respondent is interdicted from making, publishing, causing to be published, retweeting, commenting on Facebook or Twitter or disseminating any defamatory statements concerning the applicants, including the same or similar statements as those forming the subject matter of this application;

[141.4] The costs are reserved.

E F DIPPENAAR
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG

DATE OF HEARING	:	13 September 2017
DATE OF JUDGMENT	:	20 November 2017
FOR APPLICANTS	:	Adv DN Unterhalter SC Adv L Sisilana
	:	Webber Wentzel Attorneys
FOR RESPONDENT	:	Adv V Ngalwana SC Adv M Moropa
		KS Dinaka Attorneys