IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/37668

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

7 December 2018 .....

SIGNATURE

In the matter between:

STOBBS, JULIAN CHRISTOPHER First Applicant

CLARKE, KATHLEEN (MYRTLE) Second Applicant

And

MAYATHULA-KHOZA, NANDI First Respondent

GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT Second Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This is an application in which Mr Stobbs and Ms Clarke seek an order declaring that certain statements made on the Stephen Grootes *Midday Report* show on Talk Radio 702 (which was simultaneously aired on its sister station, Cape Talk) by the First

Respondent, who is the MEC of Social Development in Gauteng Province (*"the MEC"*), which were made in her official capacity on behalf of the Gauteng Department of Social Development, which is the Second Respondent, are defamatory of them.

They also seek an unqualified apology from, and retraction of the statement by, the MEC to be broadcast live on the *Midday Report* show alternatively that it be published prominently in the Sunday Times newspaper. The applicants also seek costs on an attorney-client scale.

2. The application was opposed on the merits, and on the technical ground that the applicants failed to comply with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (*"the Act"*).

DILATORY DEFENCE

3. I am satisfied that a defamation case can be brought on motion if no damages are sought and the underlying facts are common cause[1]. In the present case the relief sought is in the form of a declaratory order that an apology and a retraction be made.

4. It is common cause that the offending statements were made by the MEC acting in her official capacity. It is also common cause that the respondents are therefore organs of State as defined in s 1(1) (vii) of the Act.

5. In terms of s 3(1)(a) of the Act "*no legal proceedings for the recovery of a debt may be instituted against an Organ of State unless the creditor has given the Organ of State in question notice in writing of his or her or its intention to institute the legal proceedings in question*". Such notice must be given within six months of the date when the debt arose. In terms of s3 (1) (b) an Organ of State may consent in writing to the institution of proceedings against it. The applicants did not give notice and the respondents have not consented to the institution of the proceedings against them.

6. *Adv Brammer* for the applicants' submits that they are not seeking the recovery of a debt as defined in s1 of the Act.

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[11] Or that the *Plascon-Evans* exceptions apply. See below.

7. In terms of the definition section a *'debt'* means:

> *"any debt arising from any cause of action-*
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> *(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-*
>
> *(i) act performed under or in terms of any law; or*
>
> *(ii) omission to do anything which should have been done under or in terms of any law; and*
>
> *(b) for which an organ of state is liable for payment of damages*
>
> *…. "*

8. Although the present proceedings are founded in delict it is clear from the underscored words that the claim must be one sounding in money before the provisions of the Act are triggered. The Act is clear. If any authority is required then an application of *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) esp at para 92 is decisive.

9. The technical point is therefore dismissed.

THE OFFENDING WORDS

10. The applicants contend that the following utterance by the MEC is defamatory:

> *"… it is the Dagga Couple who really are interested on one thing only; on making millions of Rands to sell to our young people these drugs, to have an open-market in schools and communities, so that they can sell billons of Rands worth of dagga …"*

11. It is common cause that members of the public would understand that the term "*Dagga Couple*" refers to the applicants.

THE ISSUES

12. *Adv. Bokaba* on behalf of the respondents raised the following issues:

    a. The remarks are not defamatory;
    b. The remarks amounted to fair comment;

c. The remedy sought is inappropriate

13. In response the applicants dispute that the remarks were simply comment; they contend that the MEC asserted them as facts. Moreover they sought to rebut the defence of fair comment by raising malice.

14. There is a further issue which is based on the manner of pleading.

In advancing their defences to the claim the respondents' answering affidavit sought to contextualise the circumstances in which the remarks came to be made.

The applicants apply to strike out these passages on the ground that the factual background is irrelevant.

15. In order to determine the case the respondents were called on to meet it is necessary to first analyse the way in which the applicants pleaded the defamation.

THE CASE MADE OUT BY THE APPLICANTS

16. *"It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) it was stated at 469C--E that*

> *'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'*

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof."

This is the seminal statement of Joffe J in *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 323G-324A with which practitioners are familiar and which has been consistently applied.[2]

17. The case made out by the applicants in their founding affidavit is that the MEC knew, or should have known, that the statements were untrue, by reason of court proceeding brought in the Pretoria High Court in which the applicants, as first and second plaintiffs, have challenged the constitutionality of laws prohibiting the use and possession of cannabis. It would have been evident to the MEC from those proceedings that the applicants have never suggested that;

    a. they were interested in making money from selling dagga;

    b. they were desirous of selling drugs to young people, or anyone for that matter; or

    c. they desired an open-market in schools and communities.

18. The applicants accept that the respondents are not defendants in the Pretoria action but contend that they represent the Provincial branch of the National Department of Social Development, the Minister of which is a defendant in that action. The applicants also contend that the pleadings and documents are matters of public record.

19. The applicants furthermore refer to the contents of the pre-trial conference in the Pretoria case which show that they expressly contended that the use and possession of cannabis may be legitimately regulated by the State in a rational and constitutional manner.

20. The applicants therefore pleaded that the words used were *per se* defamatory. In view of the *ratio* in *Swissborough* it is self-evident that the respondents were not called on to

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[2] See most recently *Hunter v Financial Sector Conduct Authority and others* 2018 (6) SA 348 (CC) at para 71

meet a case based on innuendo or secondary meaning as it is sometimes called[3]. Nor can the court make out such a case for an applicant.

21. If the applicants pass the hurdle of demonstrating that the words were *per se* defamatory but the respondent succeeds in showing that the remarks were fair comment then the applicants contend that in the context of the interview the utterance was made maliciously when the MEC was caught on the back foot. It was argued that she launched this personal attack on the applicants in order to divert attention from embarrassing questions the interviewer was putting to her on what is claimed to be an unrelated matter.

THE RESPONDENTS' CASE

22. The respondents argue that the MEC's statements cannot be seen within the narrow compass of the Pretoria High Court action to which the applicants wish to confine them. The issue is much broader and one must have regard to the way in which the applicants promote themselves as the self-styled "*Dagga Couple*".

23. It is also submitted that the MEC was not referring to school children when she mentioned "*young people*". This aspect need not detain us: I am satisfied that in its context it included school children. The conclusion is reinforced by other comments the MEC made during the exchange with Grootes.

24. The respondents contend that the remarks would not be understood as statements of truth but as a hypothesis. They contend that it would be so understood by the listeners of the program, who would typically be sophisticated, have insight into domestic and current affairs and knowledgeable of our political and public discourses. It is contended that the reasonable listeners of the program would consider that the MEC was positing a hypothetical scenario and would not consider the remarks as defamatory.

25. Even if they are to be found incorrect on this point, the respondents contend that the applicants failed to identify how the remarks lowered their reputation and dignity in the minds of right-thinking people.

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[3] In *Le Roux v Dey* 2011(3) SA 274 (CC) at para 87 the court confirmed that a plaintiff must;" *plead special circumstances from which the statement derives its secondary meaning".*

26. Should the statements not be construed by the ordinary listeners as a hypothesis but based on an underlying factual base then the respondents rely on the defence of fair comment and public interest.[4]

27. In my view the utterance complained of is exaggerated but nonetheless is relevant to the facts on which it is based. The underlying factual underpinning relied upon by the respondents is that the applicants were arrested while allegedly in possession of 1.89kg of cannabis, the estimated value of which is half a million Rand. Moreover they portray themselves on social media as entrepreneurs who show interest in producing cannabis on a large scale. [5]

28. The conclusion drawn by the MEC was that the applicants intended to profit from what will self-evidently become, if legalised, the lucrative production and sale of cannabis. The MEC also claims that statistics show that cannabis is the most common illicit drug used in South Africa especially among the youth. The MEC relies on figures which allegedly reveal that 12.8% of learners in grades 8 to 10 have used cannabis of which 9.2% had used it the month before.

29. Other statistics relied on are that adults who have used cannabis since adolescence show reduced brain connectivity and that long-term use is hazardous to the white matter of the developing brain. These statistics are among those relied on by the respondents in their defence. The manner of assessing the respondent's contentions in the face of a denial by the applicants is considered next.

ASSESSMENT OF THE FACTS

30. The applicants seek final relief. They chose to go by way of motion proceedings which ensures a much speedier resolution of matters particularly while they are still fresh in the public's mind. It however comes at a price. An applicant must be able to show that there is no genuine dispute of fact or that the exceptions referred to in *Plascon-Evans* apply as

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[4] See *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) at 80-83

[5] There are photographs of the applicants at a large Canadian operation accompanied by comments attributed to them

to when a respondents averments can be rejected, failing which the respondent's version will be accepted by a court.[6]

31. It is evident that the issue of whether the sale of cannabis should be legalised is hotly debated and that one of the issues is whether there can be adequate safeguards put in place to protect school going children whether in particularly vulnerable areas or generally. The potential impact on children of legalising cannabis will naturally draw heated, robust and emotive debate.

32. The applicants elected to enter the fray and take a position. Moreover they have not shunned the limelight. They have engaged in robust debate and must accept the consequences provided it does not exceed defined limits and descend into a personal attack on the individual's value system which is untrue or humiliates and denigrates without justification.

    In short the applicants had to develop a thicker skin than most as they themselves have sought celebrity status on an emotionally charged platform which will continue to engage pro- and ante-lobbyists until resolved.

33. It is understandable that the applicants sought to restrict the respondents to the confines of the Pretoria High Court papers. The broadening of the scope of the enquiry in order to contextualise the respondents' position vis a vis the applicants, the applicants' alleged desire to become involved in the industry if it becomes lawful and their failure to suggest appropriate checks and balances in relation to senior year school children accessing or being exposed to cannabis brings to the fore the core issues that need addressing: They and the measures that might have to be introduced to either prohibit use or control access and abuse among children are integral elements of the debate.

34. On the allegations relied upon by the respondents, which must be accepted in the main as the applicants are unable to challenge them under *Plascon-Evans*, I am satisfied that the offending statements based on their primary meaning amount to fair comment and that the rebuttal based on malice cannot succeed. Even if the comments were made in order to turn defence into attack the issue itself is part and parcel of a genuine concern

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – I

on the part of the respondents requiring public engagement, and the listenership would understand it as such.

35. The case may have been different if the applicants had relied on an innuendo that the applicants were of such a character that they would be pushing drugs at schools if cannabis was legalised and succeeded in demonstrating that this is how it was understood. Presumably it would have been raised if they believed this to be the thrust of the remarks.

36. Even if I were to accept that there was a defamation on the case as pleaded, applying *Plascon-Evans* the defence of fair comment succeeds.

COSTS

37. This case flows from a position taken by the applicants challenging the constitutionality of prohibiting the sale of cannabis. On the facts there appears to be a sufficient link to treat this case as one where costs are determined as if it is a constitutional matter against an organ of State.

38. The question is whether the applicants have acted vexatiously or in a manner that justifies them forfeiting the immunity they would otherwise enjoy of not having to pay the successful party's costs.

39. While the application strikes me as having some of the attributes of seeking publicity or obtaining sympathy as a victim I cannot be certain. I therefore would not wish to unnecessarily penalise the applicants.

ORDER

40. I accordingly make the following order:

    1. *The application is dismissed*

2. *Each party is to pay its own costs*

SPILG, J

DATE OF HEARING:	15 October 2018
DATE OF JUDGMENT:	7 December 2018
FOR APPLICANTS:	Adv B Brammer (Heads of Argument drawn by Attorney P-MA Keichel Schindlers Attorneys
FOR RESPONDENTS:	Adv.TJB Bokaba SC Adv K van Heerden Adv T Scott The State Attorney