

REPUBLIC OF SOUTH AFRICA



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

Case No: 253/20

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27 /10/2022	
..... DATE SIGNATURE

In the matter between:

CASILLI, DIEGO

Applicant

and

FACEBOOK SOUTH AFRICA (PTY) LTD

First Respondent

ZAMBIAN WATCHDOG

Second Respondent

FACEBOOK, INC

Third Respondent

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant initially sought a final interdict ordering and directing the First Respondent ('Facebook SA') to remove offending and defamatory content posted by the Second Respondent, ('Zambian Watchdog') on the Facebook

Service Page as provided to users in South Africa by the Third Respondent ('Facebook Inc').

- [2] Following the filing and service of the main application and further pleadings including applications for an amendment and joinder of Facebook Inc, and the subsequent removal of the offending post, the main relief is no longer being pursued, and the sole issue to be determined is whether Facebook SA and Facebook, INC are liable for the applicant's costs. In this judgment, the two entities will be referred to as Facebook where the text requires.

Background:

- [3] The applicant is a businessman, a director and shareholder in various business entities which conduct business in both South Africa and Zambia.
- [4] The Facebook Group of companies comprises of a number of different, legally separate and distinct entities including Facebook INC, a well-known American online social network service that is part of the company Meta Platforms, with its headquarters in Menlo Park, California, USA. Facebook Global Holdings II LLC, is another entity and a subsidiary of Facebook INC, which is also incorporated in the USA.
- [5] Facebook SA is a subsidiary of Facebook Global Holdings II LLC. It is incorporated as a private company in South Africa, and is an indirect subsidiary of Facebook INC. It has its own, separate legal personality, and mainly provides sales support and marketing services in South Africa to Facebook, INC. The applicant however holds a different view in regards to the relationship between Facebook SA and Facebook INC, which he deems to be one entity, with Facebook SA being an extension of the latter, and effectively constituting its local office and representative with no distinction being drawn between the two separate legal *personas*. Facebook SA and Facebook INC will be referred to as 'Facebook' in this judgment, unless the text requires a distinction to be made.
- [6] The second respondent, *Zambian Watchdog* is an online website purportedly operating as a news site. Its Facebook Page was created in July 2013. The applicant contended that the full particulars and ownership of that publication are unknown, and it is essentially a ghost entity.

- [7] The applicant is not a user of Facebook's service, but had instituted the proceedings as a third party having been adversely affected and prejudiced by the offending posts placed on the Facebook service platform by *Zambian Watchdog* on 20 March 2018 and 20 July 2019. The applicant's complaint was that the contents thereof were false, wrongful and defamatory as he was painted as corrupt and inept, causing continuous damage to his business reputation. For the purposes of the sole issue to be determined, it is not necessary to repeat the contents of the posts in question.
- [8] Upon being aware of the posts, the applicant's attorneys of record had on 24 July 2019 sent a letter of demand to Facebook SA to remove the posts. The latter's response the following day was that it had no authority or power to remove the posts, and that the complaint should be addressed to Facebook, INC which had the power to remove the posts.
- [9] The applicants attorneys of record had then sent a letter of demand on 17 September 2019 to Facebook, INC. The response was that since the Facebook service was operated and hosted in the USA, the applicant should obtain and provide a URL (an acronym for the Uniform Resource Locator), which is essentially an address utilised on the Facebook Services by its users including *Zambian Watchdog* .
- [10] On 10 October 2019, the applicant provided Facebook INC with the URL. A subsequent response from Facebook INC on 16 October 2019 was it had investigated the complaint and established that the posts did not violate its '*Terms of Service, or its Community Standards*', which included prohibitions against the posting of unlawful content. Facebook INC further informed the applicant that it could not simply remove the post since it was a neutral intermediary and not in a position to determine whether the post contained unlawful defamatory statements in violation of its Terms. The applicant was accordingly informed that if he obtained a valid Court order addressed to Facebook, INC, the posts would be removed.
- [11] What followed on 8 January 2020 was the institution of proceedings by the applicant against Facebook SA and the *Zambian Watchdog*. The latter has not filed any opposition and thus took no part in these proceedings. Facebook contends that there appears to have been no service of the proceedings on *Zambian Watchdog*.

- [12] Subsequent to the filing of the answering affidavit by Facebook SA on 11 February 2020, the applicant filed and served a replying affidavit. On 4 May 2020, the applicant also instituted edictal citation application, and thereafter filed an application to join Facebook INC. The latter initially opposed the joinder but abandoned the opposition, and filed a notice to abide.
- [13] Facebook, INC having been joined then filed a Notice to Oppose on 10 February 2021. There is a dispute as to the extent and nature of that opposition, with the applicant contending that the opposition was in regards to the entire relief claimed, whilst Facebook INC's contention was that it had only opposed the costs sought against it.
- [14] Facebook's attorneys of record had then on 1 March 2021 informed the applicant's attorneys that the *Zambian Watchdog* posts complained of are no longer available at the URL's provided by the applicant. This was confirmed by the applicant's attorneys on 3 March 2021, who had then confirmed that the applicant would no longer be persisting with the first prayer of the notice of motion (which was the removal of the posts), but will be seeking costs against Facebook.
- [15] A Mr Ross Creighton, an eDiscovery analyst, had on or about 4 March 2021 performed checks and confirmed that the offending posts were permanently deleted at least 90 days prior to him performing those checks. He had made further checks and enquiries on 4 March 2021 with the business of Facebook and could not find any record that it was the latter that had deleted the offending posts in question. This was confirmed in his confirmatory affidavit.
- [16] On 5 March 2021, Facebook INC instituted an application for an extension of time to file an answering affidavit which the applicant had opposed. That application was subsequently withdrawn.
- [17] The applicant again on 9 March 2021 confirmed that he will no longer persist with the main claim on 9 March 2021, and reiterated that he would only be seeking costs against Facebook.
- [18] On 26 May 2021, the applicant instituted an application for costs in terms of Uniform Rule 41(1)(c) related to the withdrawn application for an extension.

Facebook INC had opposed the application on 24 June 2021, and the applicant's replying affidavit followed on 20 July 2021.

The arguments and evaluation:

[19] For the purposes of determining costs, the issues to be considered are whether Facebook, INC has as a matter of fact, agreed to the interdictory relief and only opposed the costs order; whether Facebook is liable for the costs of the main application; whether Facebook had a duty to remove the allegedly defamatory posts from its Service; whether Facebook SA was the correct party against whom the applicant should have sought interdictory relief; whether Facebook, INC is liable for the applicant's costs of the withdrawn application for an extension; and whether the applicant should be liable for the costs of the application.

[20] The applicant accepted that the offending posts have since been removed from the Facebook page. A concern was raised by Facebook that despite the offending posts having been posted by *Zambian Watchdog*, the applicant failed to pursue any action against it with any vigour. Even if it might be accepted that the applicant had made some search in establishing the identity or particulars of this publication, there is nothing to demonstrate that more was done other than simply providing Facebook with the ULR. Inexplicably, when Facebook INC advised the applicant to obtain a Court order against *Zambian Watchdog* before the post could be removed, the applicant instead launched the main application. Since Facebook had the ULR of the *Zambian Watchdog*, the issue remains whether the applicant was not obliged to do more to trace and unmask the owners of *Zambian Watchdog*, rather than simply giving up and only litigating against Facebook. As correctly pointed out on behalf of Facebook, nothing prevented the applicant from approaching the Court to grant him an order compelling Facebook to authorise it to unmask the identity of *Zambian Watchdog*, especially since its ULR had been obtained.

The liability of Facebook SA:

[21] To come back to the main issue, the applicant pursued costs against Facebook, on the basis that it was consistent in its refusal to remove the offending posts. It was submitted that it was this unlawful refusal that necessitated the main application. It was further argued that the determination

of who was liable for the costs of the main application centred around the question of whether or not the interdict would have been granted in the event that the offending posts were not removed, and the applicant holds the view that he would have been successful.

[22] Just to recap, the main application was initially brought against Facebook SA and the *Zambian Watchdog*. Facebook SA opposed all the relief sought against it on the basis that any such relief ought to be sought against Facebook, INC since it was the latter that hosted and operated the Facebook Service for its users. Facebook SA had thus indicated that it did not have the power or authority to remove the offending posts. This had been conveyed to the applicant prior to the application being launched. Subsequent to the application being launched, Facebook SA again reiterated its stance in the answering affidavit, resulting in Facebook, INC being joined.

[23] Upon being joined, Facebook INC indicated that it was prepared to remove the offending posts published by *Zambian Watchdog* on its Facebook Page, provided that the applicant obtained a properly served valid court order to this effect. This was on the basis that Facebook, INC, was not in a position as a neutral hosting provider, to determine with certainty whether the content was defamatory or not, and that a proper tribunal was to make such a determination. It is common cause that no such court order was obtained, and what followed was the main application.

[24] An issue that ought to be swiftly disposed of relates to whether it can be said from the responses of Facebook, the two entities had persistently refused to remove the offending posts. A determination of this issue ought to be considered within the context of the timeline of events since the offending posts were published by *Zambian Watchdog* on 20 March 2018 and 20 July 2019.

[25] It is accepted that the applicant had requested Facebook on at least three occasions between July 2019 at least until September 2019 to remove the offending posts, which had elicited immediate responses and explanation as to the reason why the posts could not be removed, and the applicant was advised as to what steps to take in order to have the posts removed. It is therefore incorrect for the applicant to suggest that Facebook had consistently refused to remove the posts. It is correct that the posts were not removed

when the demands were made, but reasons were proffered in that regard. The applicant was clearly not satisfied with the responses, but that did not imply that there was a steadfast or consistent blanket refusal. Whether the refusal at the time was unreasonable or unlawful under the circumstances is however a different issue.

[26] A further issue for determination was whether the interdictory relief ought to have been sought against Facebook SA. The latter's response when demands to remove the posts were made was that it did not provide the Facebook Service to any users, nor did it have the power to remove any content from any Pages and from the Facebook Service. It had consistently contended that only Facebook, INC had the power to remove the posts

[27] The applicant nonetheless insisted on pursuing relief against Facebook SA on the basis that its relationship with Facebook, INC was intimate to such an extent that the former forfeited its own identity, was usurped by Facebook, INC, and was treated as its agent and/or alter ego. It was conceded that the separate corporate identity of the two entities should not be ignored, but rather, what was required for the Court was to lift the veil to determine Facebook SA's real controllers.

[28] I fail to appreciate the reason why this Court should be asked to lift the corporate veil for the purposes of finding Facebook SA liable for costs. This is so in that I did not understand from the applicant's averments that any conduct on the part of either entity constituted abuse of their corporate personalities, was unconscionable, or that there was a fraudulent relationship between the two¹. The relationship between the two entities was set out in the answering affidavits of Brendon Webb of Facebook INC and Nunu Ntshingila, the Facebook SA's regional Director, who have consistently stated that the two entities were separate and distinct under the Facebook Group. It was reiterated that Facebook SA was therefore not responsible for the actions or omissions of Facebook INC, in the same way that any subsidiary company could be not sued as a proxy for the parent entity.

[29] At most, the applicant despite not being a user, had in his founding affidavit acknowledged that the Facebook site/service was owned and operated by

¹ *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others; and Steinhoff International Holdings NV and Another v AJVH Holdings (Pty) Ltd and Others* [2020] ZASCA 134 at para 45.

Facebook, INC. Once there was such acknowledgement, and since Facebook SA had insisted that for Facebook users in South Africa and Zambia, the services were operated, hosted, and controlled by Facebook, INC in California, and thus it had no control or power over any content posted on the Services, I fail to appreciate the reason the applicant would have persisted in pursuing any relief against Facebook SA let alone sought costs against it, on the further basis that it was an alter ego or agent of Facebook INC.

[30] A further difficulty pointed out to the applicant was that the relationship between Facebook SA and Facebook INC, entailed the former being a mere subsidiary with limited powers in regards to what is posted on the Facebook services. Its main focus was purely on providing sales support and marketing services in South Africa. There was therefore merit in Facebook SA's contentions that the relief sought against it, even if obtained, was incapable of enforcement. The relief would have been rendered ineffective in the absence of Facebook INC's involvement in the matter, and effectively, any order against Facebook SA would not have brought the matter to finality.

[31] Against the above conclusions therefore, and since there was no basis to pursue relief against Facebook SA, there is therefore no basis for any conclusion to be reached that had the relief against Facebook SA have been pursued, the outcome would have been favourable to the applicant. Furthermore, there is no basis for a conclusion to be reached that the refusal of Facebook SA to remove the post was unlawful or unreasonable. To reiterate, Facebook SA did not refuse to remove the posts. It had merely referred the applicant to Facebook, INC, and proffered reasons in that regard, which referral he had pursued. It therefore follows that Facebook SA was correct in opposing the application even if any order against it would have led to the difficulties of enforcement as already alluded to above. Since it was therefore an incorrect party against which the main relief ought to have been sought, clearly a costs order is not warranted against it, particularly since it was within its rights to oppose the relief sought against it. On the opposite end, it is Facebook that should be entitled to costs.

The liability of Facebook, INC:

[32] Even if the applicant doubted Facebook SA's version in regards to its constraints in removing the posts, he had nonetheless filed and obtained a

joinder application against Facebook INC. One can only surmise that he did so upon the realisation of the difficulties faced by his posture in persisting against Facebook SA.

[33] Amidst the exchange of pleadings, the applicant was informed that as at March 2021, the offending posts were since removed. The averments made on behalf of Facebook are that it does not know who had removed the posts and when. There is nothing from the applicant's contentions to gainsay that averment, other than a blanket submission that it was Facebook that had removed the posts. It is not known what the basis of that conclusion was, when Ross Creighton, an eDiscovery analyst, had on or 4 March 2021 performed checks and confirmed that the offending post was permanently deleted at least 90 days prior to him performing those checks (*i.e.* at least by January 2021), and that further checks with Facebook revealed that it was not the latter that had removed the posts. Had the applicant done a check, he would therefore have realised that the posts no longer existed as at January 2021. Worst still, the probabilities that *Zambian Watchdog* may have removed the posts appears to have been remote to the applicant, despite the absence of any other evidence pointing to Facebook as being responsible for removing the posts.

[34] Upon the accepted fact that the posts were removed, the applicant had however turned his attention to recouping his costs. This was based on his contention that Facebook, INC had opposed the main application, *i.e.*, the removal of the posts. Facebook INC however contends that its opposition was mainly in respect of the costs sought, and not in respect of the interdictory relief.

[35] Since the issue was that Facebook INC had opposed the primary relief, the court accepts on Creighton's version that as at January 2021, the post had been removed. Webb's answering affidavit having been filed and served in late March 2021, and with the knowledge that the posts had been removed, there could have been no basis for Facebook, INC to oppose the removal of the posts, other than oppose an order of costs. Furthermore, I fail to appreciate the reason Facebook INC would have opposed the relief in circumstances where the originator of the post, *Zambian Watchdog*, played no role in the dispute.

[36] For the sake of completeness, one need only to have regard to Brandon Webb's answering affidavit on behalf of Facebook INC, in which he had clearly indicated that the purpose of that affidavit was to oppose the costs as sought by the applicant in his amended notice of motion filed and served on 3 February 2021². There is no merit in the submissions made on behalf of the applicant that Webb was not specific in regards to what was being opposed.

[37] The reliance by the applicant on Facebook INC's Notice of Intention to oppose filed and served on 10 February 2021 does not in my view assist his case. A Notice of Intention does not constitute the entire pleadings of a litigant. It is from the substance of the averments made in an affidavit that a case is set out. Of course Webb had in the course of opposing the costs order, set out the context within which the costs order was opposed. This does not imply that the merits despite being elucidated were being opposed. There was justification for placing the context within which the costs order was opposed, and there is therefore no basis for a finding to be made that Facebook, INC had not merely opposed the costs order.

Alleged unlawful and unreasonable refusal to remove the posts:

[38] The question whether Facebook INC had unlawfully and unreasonably refused to remove the offending post ought to be determined within the context of its responses upon a demand having been made by the applicant. It has already been concluded that there was no consistent refusal by Facebook. The applicant upon a request by Facebook, provided Facebook, INC with a URL. He was in turn informed that the posts could not be removed since Facebook, INC was not the arbiter of the truth. The applicant was then advised or invited to obtain a court order compelling the removal of the post. The applicant nonetheless refused to do so in circumstances where he could easily have obtained such an order and served it on Facebook, INC. If such an order was obtained and Facebook had refused to comply (assuming that the posts still existed), then circumstances of liability would have been different.

[39] Whether the posts were defamatory or not was not for Facebook, INC to determine, especially where such a determination would have required it to go beyond its powers as contained in the guidelines of its *Terms of Service and*

² At para 5 and 7 of the Answering Affidavit; Caselines 009-3.

Community Standards. Facebook INC therefore acted correctly in directing the applicant to obtain a Court order in that regard.

[40] To the extent that it was Facebook's contentions that it had not opposed the primary relief, little turns on whether the posts in question were defamatory or not. The mere fact that Facebook had evinced an intention to remove the posts upon certain steps having been taken by the applicant, in my view renders the debate superfluous. The only issue in my view is whether the refusal and responses given by Facebook at the time prior to the removal, rendered its conduct unreasonable or unlawful.

[41] From the above, it is accepted that there was a publication by *Zambian Watchdog* on the Facebook Service. In circumstances where Facebook provided a service for its billions of users, to simply request it to remove particular posts on the basis that they are defamatory is a big ask, hence it had persistently disowned the title of the arbiter of the truth. In a case like this, where the publisher of the offending posts was not before the court, and where Facebook had advised the applicant prior to these proceedings as to what steps to take, I have difficulties in appreciating how it can be said that it should be liable for each and every defamatory post wrongfully, intentionally or otherwise, posted by any of its users, when it was constrained by the guidelines of its Terms of Service and Community Standards. To this end, I agree that Facebook's conduct in refusing to remove the post at the time that the applicant had demanded, was not unreasonable nor unlawful.

Costs in respect of interlocutory applications:

[42] The applicant seeks costs on attorney and client scale related to the institution and withdrawal of Facebook, INC's application for an extension for time in filing an answering affidavit.

[43] It is my view that since it is common cause between the parties that the application for an extension was superfluous in the light of the extension having been granted by the applicant, it was unnecessary for the applicant to have filed an answering affidavit in opposing what it had conceded to in any event. I am of the view that there is nothing to support the contention that the application for an extension was merely meant to frustrate the applicant. It is in fact the needless opposition to that application that would have further

prolonged the matter. To this end, I am of the view that there should be no award of costs to either party in respect of this aborted application.

[44] In the light of all the above conclusions, the following order is made;

Order:

1. The application for all costs against the First Respondent is dismissed, and each party to bear its own costs.
2. The application for costs against the Third Respondent is dismissed, with each party to bear its own costs.
3. The application for costs against the Third Respondent for the instituted and withdrawn application for an extension of time to deliver its answering affidavit is dismissed with no order as to costs.

Edwin Tlhotlhemaje

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 27 October 2022.

Heard on : 24 January 2022 (Via Microsoft Teams)

Delivered: 27 October 2022

Appearances:

For the Applicant:

C Acker SC with R Bhima,
instructed by Swanepoel van Zyl
Attorneys

For the Respondent:

G Kairinos SC with R Pottas & K
Reddy, instructed by Adams &
Adams