IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:22/16783

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

..... **.....**
SIGNATURE **DATE**

In the matter between:

THAPELO AMAD **First Appellant**

AL JAMA-AH **Second Appellant**

And

COMMISSIONER SHADRACK MONGO SIBIYA **Respondent**

JUDGEMENT

MATSEMELA AJ

INTRODUCTION

1. The appellants have launched an application for leave to appeal to the full bench of this Division in respect of the entirety of the judgement and order granted by this Court on 29 June 2022 and handed down on 30 June 2022 in terms of which

the appellants were, amongst others, interdicted from defaming the respondent with an order of punitive costs ("the judgement").[1]

SECTION 17 (1) OF ACT

2. Section 17(1) of the Act provides

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success ;or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;

(b) the decision sought on appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties,"

The test currently applied is more stringent than its predecessor, which allowed appeal on the basis that the appeal court may come to another conclusion. The bar has now been raised.[2]

3. This is emphasised in the ratio of *Mont Chevaux Trust v Tim Goosen and 18 Others,*[3] where the court held:

"It is clear that the threshold for granting leave to appeal against a judgement of the High Court has been raised in the new Act. The former test was whether leave to appeal should be granted if there was a reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cornwright and Others 1985 (2) SA 342 (T) at 342 H. The use of the word "would" in the new statutes

[1] Judgement, p 00000-1- p 00000-22; Application for Leave to Appeal, p 075-1.

[2] See Mont Chevaux Trsut v Tina Goosen & 18 Others [2014] JDR 2325 (LCC), at para 6 and Notshokovu v S [2016] ZASCA 112 at para 2 and S v Smith 2012 (1) SACR 567 (SCA) at para 7.

[3] 2014 JDR 2325 (LCC).

indicates a measure of certainty that another Court will differ from the Court whose judgement is sought to be appealed against."[4]

4. The wording of section 17(1) (a) raised the bar of the test that now **must be applied to the merits** of the proposed appeal before leave should be granted.[5]

PROSPECTS OF SUCCESS

5. The respondents, in order to succeed, must provide admissible evidence and argument to convince the Court on proper grounds that they have prospects of success on appeal and that the prospects are not remote, but have realistic chance of succeeding. It is not sufficient for the respondents to establish a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal.

6. The respondents are in essence in their leave to appeal application relying almost exclusively on an attack on my reasoning, in reaching the order pronounced. An appeal can only be noted against the order and not against the reasons for the judgement. The purpose of an appeal was pointed out by Leach JA:

"*An appeal lies against an order that is made by court and not against its reasons for making the order. It follows that on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court below. In this court, the respondent did not seek to support the order on any ground than that given by the court below, which was that the regulation under which it was made did not confirm with the authorizing*

[4] Mont Chevaux Trust v Tina Goosen & 18 Others [2014] JDR 2325 (LCC), at para 6.

[5] Pretoria Society of Advocates V Nthai 2020 (1) SA 267 (LP) at para 5.

statute and was thus invalid subject to one subsidiary issue that I will come to. This means that the principal issue on which the appeal turns is whether the full bench was correct in its conclusion on the invalidity for r 22(C) (1) for the reasons that it gave. If the respondent fails on that issue, and on the subsidiary issue that I referred to, then the order that it made falls to be set aside, and the challenge to the validity of the order falls to be dismissed. The remainder of the notice of motion did no more that foreshadow a review application that was yet to be brought and need not concern us'."[6]

THE GROUNDS FOR APPEAL

The application was not urgent

7. The basis for this contention is that "the application was not urgent because the impugned statement had been removed by the respondents at the time of the hearing of the urgent application**.**"[7] Be that as it may, the appellants' do not deal with:

7.1. Due to the media statement having been removed, the appellants' argue that this matter is therefor, distinguishable from *Manuel v Economic Freedom Fighters and others*.[8] That is not so, the application was premised on the appellants' ongoing and anticipated unlawful conduct, some of which were issued on the eve of the hearing of the urgent application.[9]

7.2. Even if the media statement was removed, the unlawful publications and statements made by the appellants' expanded far beyond that. The appellants made various defamatory statements to the press on 30 March

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[6] The South African Reserve Bank v M G Khumalo (2435/09) (2010) ZASCA (31 March 2010) at para 4

[7] Application for Leave to Appeal, p 075-3, para 1.1; para 075-5, para 3.

[8] [2019] 3 All SA 584.

[9] Judgement, p 00000-1, para 1.

2022, 14 April 2022, 20 April 202 and 21 April 2022, which statements were quoted verbatim and were disseminated nationally.

7.3. In addition, the appellants had refused to provide and undertaking as demanded in the respondent's letters dated 14 April 2022 and on 03 May 2022, respectively. [10]Notwithstanding the appellants' concession that they received these demands, they refused to provide the necessary undertaking and, instead, stated that they were entitled to disseminate these falsehoods.[11] This Court did find that,[12] as evidenced from the recent media statement, released on the eve of the hearing of the urgent application on 30 May 2022, contains further defamatory statements.

7.4. The respondents contended that "they are entitled to publish the statements". The appellants' conduct showcases an *"unrepentant attitude that clearly evidences that they do not intend to put an end to"* their conduct and the appellants' "*ongoing agenda is a direct and concerted campaign aimed to malign the applicant and in so doing causing him serve prejudice*".[13]

7.5. On the issue of the removal of the first statement issued by the appellants, this Court found that whilst it had been removed after the service of the urgent application, the appellants' "*remain unrepentant".*[14]

7.6. In light hereof and due to the severe inroads that had been made into the respondent's good name, reputation, standing and dignity as espoused in

[10] Judgement p 00000-14, para 31.
[11] Judgement, p 00000-14, para 32.
[12] Supra.
[13] Judgement, p 00000-15,paras 33.1-33.3.
[14] Judgement, p 00000-15, paras 33.4

section 10 of the Constitution, this Court found that the *dicta* in the *Manuel v Economic Freedom Fighters and Others*[15] was indeed relevant. This Court found, in line herewith, that the *manner in which dignity is engaged in this matter renders the matter urgent*" as "*false allegations can so quickly destroy the good reputation*" of the respondent.[16]

7.7. As a result, the respondent would "suffer irreparable harm if the relief sought by the applicant is not granted on urgency."[17]

Error in findings of fact

The Zebediela report

8. The appellants' contend that this Court erred in finding that Brink unlawfully commissioned Zebediela to conduct the report.[18] The basis for this argument is that the report is currently the subject matter of review proceedings.

9. It is trite that judgements must be read as a whole. As held in the matter of *Etan Boulevard (Ply) Ltd v Fnyn Investments (Pty) Ltd and Others* One cannot look at the words or findings in isolation, rather taken as a whole. One needs to determine what the relevant factual findings were.[19] To do so, it is necessary to examine this finding in the overall context:

9.1. As this Court has stated, the test to determine whether a statement is, in fact, defamatory is two-fold. First it has to be determined what the meaning of the publication is as a matter of interpretation and secondly,

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[15] [2019] 3 ALL SA 584; Judgement, p 00000-2, para.2

[16] Supra, para 67; Judgement, p 00000-15, para 34.

[17] Judgement, p 00000-15, para 35.

[18] Application for Leave to Appeal, p 075-3, para 1.6; p075-6, para 3.6.

[19] 2019 (3) SA 441 (SCA), para 16.

whether the meaning is defamatory as held in the matter of *Le Roux and Others v Dey*.[20]

9.2. This Court did find that the statements were defamatory, across the board. What was then incumbent on the appellants was to discharge this *onus*.[21] They failed to do so. What is of import is that the appellants' purposed to rely on the Zebediela report in support of their defamatory statements. The Zebediela report is the subject matter of a review. The statements made by the appellant, as mimicked in the Zebediela report, were incontrovertibly false and defamatory.

10. This finding did not (and cannot) hinge on the outcome of the review of the Zebediela report, rather it is pertinent to showcase that the appellants' abjectly failed to satisfy their reverse onus. As a result, this ground of appeal has no merit.

<u>The Public Protector's letter</u>

11. The appellants allege that this Court has failed to consider that the Public Protector had opened a criminal case against the respondent. They furthermore allege that the Public Protector had issued a letter to the City and that Brink had supposedly issued an "urgent application" to the Public Protector. The appellants contend that these issues have a direct impact on this appeal.

12. This Court has dealt with these matters and held that it was "*common cause that this portion of the Public Protector's report has not been challenged, reviewed or set aside*" and that the findings were "final and is not susceptible to amendment" as held in the matters of *President of the Republic of South Africa v Office of the*

[20] 2011 (3) SA 274 (CC), at para 85. Judgement, p 00000-5,para 14-15.
[21] Judgement, p 00000-6, para 15.

Public Protector and Another (Economic Freedom Fighters and others as intervening Parties)[22] *of member of the Executive Council for Health, Province of the Eastern Cape NO and another v Kirland Investments (Pty) Limited t/a Eye Laser institute*.[23]

13. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others***,** the following was said : [24]

"*In the seminal case of Oudekraal Estates (Pty) Ltd v City of Cape Town and others, the court reasoned that this principle is premised on inter alia the principle of legal certainty. It was held that until such a time as the report, as well as the consequences of the report, is set aside by a "court in proceedings for a judicial review it exists in facts and it has legal consequences that cannot simply be overlooked. A transgression of this principle would otherwise result in intolerable uncertainty if the Public Protector's reports could be reserved at any moment or if she could express doubts in relation to her own findings."*

14. There is no basis to contend that the Public Protector's report, as it stands, does not carry import the findings. In addition, the letter by the Public Protector and the supposed "urgent application" by Brink, however ill conceived, have no bearing on this finding, that is the Public Protector's office is *functus officio* and that the matter is *res judicata*.

The respondent's clearance certificate

15. The appellants' allege this Court erred in finding that it was common cause that the "*applicant had the requisite clearance certificate*"[25]. They contend that the security clearance certificate was only *"produced on a date years after his appointment and days before the hearing of this matter"*.[26] As a result, the

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[22] [2018] 1 All SA 576 (GP), para 43-44.

[23] Judgement, p 00000-4, para 10; 2014 (3) SA 219 (SCA), paras 15 and 103.

[24] 2004 (6) SA 222 (SCA); Judgement, p 00000-4, para 11.

[25] Application for Leave to Appeal, p 075-3, para 15.1.

[26] Application for Leave to Appeal, p 075-5, para 2.6; p975-6, para 3.5.

appellants' contend that the respondent did not meet the requirements of his employment.

16. This Court found, that it was "common cause that the applicant has the requisite clearance certificate."[27] It is as simple as that. That is to say, no meaning can be imputed to the timing the respondent received the requisite clearance certificate, nor would any court find otherwise.

The appellants' media release dated 30 May 2022 ("the media release")

17. The appellant allege that publications and statements which were published on the eve of the hearing of the urgent application"[28] were not defamatory. In addition, they stated, from the bar, that the statement was *"a statement informing the media of the application before this Honourable Court and did not contain any reference to the applicant"*. [29]

18. There is no basis for this contention, the media release clearly refers to the respondent as well as their earlier media release where the respondent was expressly mentioned. It then goes on to say that the respondent's appointment was:

(a) an *"illegal conversation"*;

(b) *"was concealed from council in 2017";*

(c) politically compromised by virtue of being *"deemed Herman Mashaba's Golden Project***";**

(d) mislead to council. [30]

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[27] Judgement, p 00000-3, para 7.

[28] Application for Leave to Appeal, p 075-3, para 1.5.1.

[29] Application for Leave to Appeal, p 075-5,p para 3.2.

[30] Judgement, p 00000-7, para 17.2(d).

19. This Court found these statements to be defamatory.[31]Having determined that the statements were defamatory, it then turned to consider whether the appellants' had met their reverse onus. They did not. The statements were neither true, nor in the public interest nor was it subject to the defence of rigorous public debate. This ground of appeal, therefore, carries no merit. The media release is per se defamatory and no evidence was tendered to gainsay this.

The appellants allege that there was dispute of fact which rendered the granting of final interdictory relief inappropriate

20. The appellants contend that there was a clear dispute of fact which required "**referral to evidence**".[32] This Court could not find any definitive disputes of fact.[33]

21. This notwithstanding, the appellants' contend, in line with the judgement **of** *Hix Networking Technologies v System Publishers (Pty) Ltd & other*[34] *and Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd & and Others*,[35] that "*where the impugned statements in a defamation case emanate from factual disputes and are the subject of ongoing litigation, an urgent court cannot grant a final interdict."*

22. This argument is devoid of any merit.

The Court ought not to have accepted the respondent's contentions regarding the appellants' media statement, launched on the eve of the hearing of the urgent application

23. This ground is premised on the appellants' argument that they did not have an opportunity to respond to the allegation.[36]

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[31] Judgement, p 00000-9, para 18-20.

[32] Application for Leave to Appeal, p 075-3, para 1.2; p 075-6, para 3.4.

[33] Judgement, p 00000-17, para 40- p 00000-18, para 43.

[34] 1997 (1) SA 391 (A)

[35] [2017] ZASCA 8.

[36] Application for Leave to Appeal, p 075-5, para 2.8.

23.1. First, regarding the timeframes of filling of the papers, it is apposite to note that these proceedings were launched on a semi-urgent basis and the appellants' were provided with ample time to file further affidavits, if they intended to. To this end, the replying affidavit was filed on 30 May 2022 and the matter was only heard on 02 June 2022.

23.2. The appellants' were at liberty to either file an irregular step or to file a further affidavit as envisioned in Uniform Rule 6(5)(e) They did not do so. Rather, when this Court enquired whether they had published the statement, their only answer to this query was that they had. No issue of prejudice was raised. As held in the often-quoted *dicta* in *James Brown and Hamer (Pty) Ltd v Simmons, NO:*[37]

"It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry."

23.3. In answer to these *dicta*, the reason for the introduction of the statement, at the time of the filling of the replying affidavit, was that the statement was made on the eve of the hearing. Its subject matter spoke directly to the issues in determination before this Court. That cannot be gainsaid. In any event, our courts do not favour an overly technical approach as held in the matter of *Trans-African Insurance Co Ltd v Maluleka:*[38]

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

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[37] 1963 (4) SA 656 (A), at 660D-H.

[38] [1956] 2 AII SA 382 (A), p 386. See also: Mynhardt v Mynhardt 1986 (1) SA 456 (T), p 203.

24. In the premises, this ground of appeal carries no merit.

There was a material non-joinder

25. The appellants' argue that there was a material non-joinder of the City of Johannesburg.[39] At the time of the hearing, there was no justification for the joinder of the City of Johannesburg.[40]

26. The respondent is clearly affiliated with the office of GFIS by virtue of the position that held as Executive Head. The statements were clearly aimed at the respondent. This was common cause and is irrefutable.[41] In the circumstances, there was no need to cite the City of Johannesburg, nor were they required to prove defamation. This ground of appeal must similarly fail.

The appellants' statements were not made maliciously but rather were an expression of an honestly held opinion on a matter of public interests.

27. The appellants contend that the statements were not made maliciously but were an honestly held opinion on a matter of public interest. Thy do not qualify what portions of appellants' various statements this refers to however appear to be a "blanket" defence.

28. This is a composite defence which requires the respondents to establish not only that the *per se* defamatory statement was true but also that their publication was in the public interest.[42]The appellants' failed on both scores. They did not provide any evidence as to the truth of the statement.[43]

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[39] Application for Leave to Appeal, p 075-5, para 2.5; p 075-7,paras 3.9-3.10.

[40] Judgement, p 00000-20,para 47.

[41] Judgement, p 00000-2, para 4.

[42] Judgement, p 00000-12, para 23; p 00000-13, para 26. See also: Ramos v Independent Media (Pty) Ltd 2021 JDR 1082 (GJ) at para 72.

[43] Judgement, p 00000-11, para 21.4.

29. On the contrary, this court found that the statements were "**entirely malicious and derogatory" and patently false**."[44] This Court also find that they are not benevolent statements made for the public's benefit or for the sake of their interests. However they are inappropriate, as well as exploitative and purely derogatory in nature."[45]

30. This ground of appeal, therefore, has no prospects of success.

No order for punitive costs ought to have been awarded

31. This ground is premised on the appellants understanding that the respondents' relief, as set out in the notice of motion, was only partially successful. That is not the test:

31.1. First and foremost, it is trite that cost orders are a discretionary matter as held in Ferreira v Levin NO & others; Vryenshoek & others v Powell & others.[46]

31.2. In addition, and as a general rule, costs follow the cause.[47] In this instance, an additional consideration came to play, namely the *mala fide* conduct of the appellants'. In line with the *dicta* of *Manuel v Economic Freedom Fighter and others*,[48] I found that, the respondents' *mala fide* conduct necessitates the granting of a punitive cost order".[49]

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[44] Judgement, p 00000-13, para 26-27.
[45] Judgement, p 00000-13, para 27.
[46] 1996 (2) SA 621 (CC), para 3.
[47] Griesse; NNO and others v De Kock and Another 2019 (5) SA 396 (SCA), at para 23.
[48] Supra, para 71.
[49] Judgement, p 00000-20, para 49.

32. As held in the matter of *Kungwini Local Municipality v Silver Lakes Home Owners Association and Another*,[50] interference with a cost order is only warranted if the Court failed to exercise its discretion judicially. That is not the case here.

33. Having said that I am of the view that the appellants have wholly failed to satisfy the requirements as set out in section 17(1) of the Act. As it stands, the application for leave to appeal has no legal merit and therefore make the following order.

Order

The application for leave to appeal is dismissed with costs including the costs of the two counsel.

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MOLEFE MATSEMELA

ACTING JUDGE OF THE SOUTH GAUTENG LOCAL DIVISION

Date of hearing: 07 SEPTEMBER 2022

Date of judgement: 03 OCTOBER 2022

For the appellant	M STUBBS
With him	C SHAHIM
Instructed by	Kern Armstrong and Du Plesis
For the respondent	RA SOLOMON

[50] 2008 (6) SA 187 (SCA), at para 39.

With him	DE GOOSEN
Instructed by	Ian Levitt