

**IN THE HIGH COURT OF
GAUTENG DIVISION,**



**SOUTH AFRICA
JOHANNESBURG**

CASE NO: 2021/29113

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
17 October 2023

In the matter between:

ASHLEY RAPHALA

APPLICANT

and

NHLAMULO BALOYI

RESPONDENT

JUDGMENT

WRIGHT J

1. On 1 July 2021, the present applicant, Mr Raphala a well-known DJ issued summons against the present respondent as defendant. Damages were

claimed arising out of an alleged defamation, on 17 May 2021 and via social media, by the defendant of the plaintiff.

2. The respondent, Mr Baloyi is well known in the music industry and has a wide social media following.
3. A plea was filed denying the defamatory nature of the allegations and raising as defences truth in the public interest, fair comment and "*public media privilege*."
4. The nature of the defamatory statements in the trial action is similar to that set out below.
5. On 17 June 2021, the applicant issued the present application. What is sought, in the notice of motion as presently framed, is a declarator that the 17 May 2021 statements are defamatory, an interdict, a retraction and an apology.
6. On 12 August 2022, Mooki AJ awarded the plaintiff R200 000 as damages. Interest and costs were awarded. This followed a trial in which the plaintiff and defendant testified. Mooki AJ rejected the defences raised.
7. The applicant deposed to a supplementary affidavit in the present application, on 29 April 2023 alleging further defamation on, among other dates, 19 and 28 March 2023 and 5 April 2023. The defamatory statements here include allegations by the respondent that the applicant is corrupt and that the applicant allows President Ramaphosa to "*rawdog*", that is have unprotected sex with the applicant's girlfriend, Ms Athi Geleba, the Head of Digital Communications in the Presidency. The applicant is accused of bribing judges "*with CR17 campaign money*."

8. The applicant seeks the admission into evidence of this supplementary affidavit and he seeks modified relief in a to be amended notice of motion to keep pace with the ongoing defamations.
9. The answering affidavit was deposed to on 13 August 2021. The respondent says that Ms Geleba organized a cookout event and that her boyfriend, the applicant played at the event and was paid with public money in circumstances where there had been no proper tender procedure. Hence, according to the respondent, the statements are not defamatory and are protected by "*public interest, truth and fair comment*". The respondent refers to numerous statements by members of the public on social media questioning the alleged lack of correct tender process and the applicant's and Ms Geleba's role therein. He says that he relies on a television programme which went into the matter.
10. The respondent relies on the defence of *lis pendens*. This argument is mistaken. The defamations before Mooki AJ in the action were the 17 May 2021 defamations. These are presently before me as are the later March and April 2023 defamations. But the relief sought in the action was damages. The relief sought now does not include damages.
11. The respondent says that he enjoys the right to freedom of speech under s16 of the Constitution.
12. It is beyond doubt that, objectively considered the statements lower the applicant in the esteem of the reasonable person.

13. The respondent has not begun to prove that the defamatory statements are true and in the public interest. These are motion proceedings rather than a trial but the answering affidavit does not raise real disputes of fact.
14. Regarding the defence of fair comment, the respondent needs to prove that the statements are opinion or comment, which are fair, true and relate to a matter of public interest. The respondent does not establish truth and to the extent that he is entitled to comment on the broad issue of corruption he exceeded by far what is permissible.
15. It is not clear from the respondents answering affidavits that he relies on privilege of any kind. In the trial, he raised a defence of "*public media privilege*". Mooki AJ held that our law does not recognise such a defence. If the respondent relies on reasonable publication he needs to show that he published as media, that the publication was not wrongful, that he reasonably believed in its truth and that it was in the public interest that it be published. See *EFF v Manuel*, a judgment of the SCA on 17 December 2020 at paragraph 40. I am not all sure that the respondent falls within the media just because he is well known and is on social media. I do not decide the question. The published statements are mere invective which, on the facts of the present case could not possibly give rise to an actual belief in their truth, reasonable or otherwise.
16. The statements in question, including the newer statements of March and April 2023 go far beyond what is legitimate to protect the right of freedom of speech under section 16 of the Constitution. The respondent's right to engage in robust public debate about matters of public concern like the question of

corruption is well protected without recourse to the baseless and crude statements made.

17. When the matter was called, neither the respondent nor any lawyer for him appeared.

18. Counsel for the applicant handed up two draft orders which cover the relief claimed and provide for punitive costs. The excessive, vituperative and continual defamations call for such costs.

ORDER

X -

Y -

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 17 October 2023

DELIVERED : 17 October 2023

APPEARANCES :

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RESPONDENT No appearance

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