



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 13 NOVEMBER 2023

Case No. 2023-058876

In the matter between:

GAIL LE GRELLIER

First Applicant

JABULANE FRANCISCO KHOZA

Second Applicant

and

TONY KAMIONSKY

First Respondent

DYNAMIQUE COMMISSION OF INQUIRY

Second Respondent

Summary

Right to freedom of expression – prior restraints on expression rarely granted – such restraints should almost never be granted *ex parte* – *ex parte* applicant for prior restraint of defamation must exclude any possible defence that might be available to the respondent on the material facts.

JUDGMENT

WILSON J:

- 1 On 20 June 2023 the applicants, Ms. Le Grellier and Mr. Khoza, approached my brother Senyatsi J urgently and without notice to the respondents. Ms. Le

Grellier and Mr. Khoza asked for a wide-ranging order restraining the respondents from “publishing any communications” which allege any “impropriety” about them. Ms. Le Grellier and Mr. Khoza also sought interim orders restraining the respondents from making contact with their employers; from “publishing any communication” that “threatens, insults and/or seeks to undermine or harm” their “reputation or dignity”; from “attempting to have” them “banned from rendering services” within the financial services industry; and from “harassing, threatening, intimidating or verbally or physically abusing” them.

2 Ms. Le Grellier and Mr. Khoza also sought relief directing the first respondent, Mr. Kamionsky, to take down nine websites he operated which Ms. Le Grellier and Mr. Khoza alleged contain “defamatory [material] and/or allegations of alleged impropriety [sic]” about them. They finally sought relief directing Mr. Kamionsky to disclose the details of a meeting said to have taken place between him and members of various pension funds on 20 February 2023. Ms. Le Grellier and Mr. Khoza asked for an order compelling Mr. Kamionsky to disclose “when and where the meeting took place”; “the purpose and agenda of the meeting”; “the names of everyone that attended the meeting”; and “all minutes and notes taken from the meeting”.

3 This relief was to operate on an interim basis pending the outcome of an application for a final order on the same terms. The respondents were to be given notice of that application once the interim order had been granted. The application for final relief also encompasses an order declaring the second respondent, the “Dynamique Commission of Inquiry”, to be “void *ab initio*”

and an order directing the Commission's website to be taken down. Costs are sought on the scale as between attorney and client.

4 The "Dynamique Commission of Inquiry" has no legal personality and has been mis-joined to these proceedings. The real purpose of the interim relief sought from Senyatsi J was to place Mr. Kamionsky under severe restraint about what he can say about Ms. Le Grellier and Mr. Khoza until the application for final relief is determined.

5 On 20 June 2023, Senyatsi J granted the interim relief as prayed for. Mr. Kamionsky was served with the interim order shortly afterwards. On 29 June 2023, Mr. Kamionsky gave notice of his intention to oppose the application for final relief. On 26 July 2023, Mr. Kamionsky also gave notice of his intention to set the application for interim relief down for reconsideration under Rule 6 (12) (c).

6 It is the reconsideration of Senyatsi J's interim *ex parte* order that is now before me. Reconsideration under Rule 6 (12) (c) encompasses a full rehearing of the applicant's case with the benefit of the respondent's affidavits and legal submissions. A court sitting in reconsideration of an order granted in the respondent's absence must give the order that the court that heard the applicant *ex parte* would have given if it had heard from the respondent.

7 *Ex parte* orders are granted on the basis that the applicant's claim is so strong, and the prejudice to the applicant from giving notice to the respondent is likely to be so severe, that a court can safely dispense with the general necessity to hear from the person against whom the *ex parte* order

is to be granted. The test for granting such an order is strict and exacting. Those who seek *ex parte* relief must show that giving notice of their application to the person against whom they seek relief would defeat the purpose of that relief, and that without the relief being granted *ex parte*, the applicant would suffer irreparable harm (see *Shoba, Officer Commanding Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A), p 15H-I; *South African Airways SOC v BDFM Publishers* 2016 (2) SA 561 (GJ), paragraph 22; and *Mazetti Management Services (Pty) Ltd v Amabhungane Centre for Investigative Journalism NPC* 2023 JDR 2338 (GJ), paragraph 1).

8 A good example of that sort of situation is where an anti-dissipation order is sought, under which a person in possession of money to which they may not be entitled is prevented from spending or transferring it while their entitlement to it is investigated. Since it is generally very easy to move money, and the honesty and trustworthiness of people who have money they should not have can often fairly be called into question, a person who may be in possession of funds to which they have no right might well, depending on the facts, be subjected to appropriate restraints on their capacity to move it around, without being given notice of the application for that relief.

9 Nonetheless, applicants for orders *ex parte* have a very high bar to meet before a Judge will grant them even limited interim relief. Such applicants are under a duty of the utmost good faith, which includes an obligation to disclose every material fact that might be relevant to the decision to grant the relief (see *Schlesinger v Schlesinger* 1979 (3) SA 521 (W)). In case like this, where a prior restraint on the exercise of a person's rights to freedom of

expression, freedom of association and privacy is sought, an applicant *ex parte* must also, in my view, exclude any defence that the person they wish to place under restraint might fairly invoke on the material facts.

10 For the reasons that follow, I have concluded that Ms. Le Grellier's and Mr. Khoza's case before Senyatsi J fell far short of that standard. Furthermore, having had the benefit of Mr. Kamionsky's affidavits and submissions, it seems to me that there was and is no warrant in this case for placing Mr. Kamionsky under any restraint pending the determination of the final relief Ms. Le Grellier and Mr. Khosa seek. It follows that the order Senyatsi J granted must be set aside, and replaced with an order dismissing the application for interim relief.

11 In giving my reasons for reaching this conclusion, I shall first set out the long-running dispute that has arisen between the parties, before moving on to address what the law has to say about the very rare circumstances under which an *ex parte* restraint on the right to freedom of expression can be granted.

The dispute

12 Mr. Kamionsky is an actuary. He used to be the director of his own actuarial firm "Dynamique SA Consultants and Actuaries (Pty) Ltd". Between 2005 and 2008, this consultancy was the administrator of two pension funds and two provident funds. On 31 January 2008, the duty to administer these four funds passed to AON, a well-known insurance, management consulting and investment advice firm. When AON took over control of the funds, it raised concerns about the state of the funds' records.

- 13 Ms. Le Grellier was a trustee of the funds at that time. Together with the other trustees, she decided to implement what is referred to in the papers as a “rebuild” of the funds’ records. The cost of that “rebuild” was in the region of R20 million. That money had to come out of the funds themselves, obviously reducing the amount that was available for distribution to the funds’ members.
- 14 Ms. Le Grellier blames Mr. Kamionsky for the necessity of the rebuild. It was said that his consultancy’s poor record-keeping led to the need for it. Mr. Kamionsky hotly disputes this, and it is clear from the papers that he feels deeply aggrieved by the imputation of fault to him and his consultancy. He says that there was never any need to rebuild the funds’ records. The real problem, Mr. Kamionsky says, was with AON’s administration of the funds, and particularly with the number and quality of the staff it placed in charge of the funds.
- 15 This poor capacity, so Mr. Kamionsky says, led to inaccuracies in the calculation of unit prices within the funds. Pension and provident funds are divided into “units”, each of which is owned by a particular member. Units can be bought and sold between members. People who are not presently members of a fund can also buy-in to the fund by purchasing one or more “unit”. Returns from the fund to any particular member depend on how many units they own, and what those units are worth. The calculation of unit prices is accordingly a core function of a fund administrator.
- 16 Stripped to its essence, then, Mr. Kamionsky’s view is that the funds’ records relating to ownership and unit pricing while he was in charge were in order,

and that the rot only set in after AON was placed in control of the funds. His case on this score is supported by several affidavits of a broadly testimonial nature that were placed before me. I need not, however, resolve the question. It is enough to say that Mr. Kamionsky feels scapegoated for a problem that he says was never of his creation, and over which he had no control. That notwithstanding, he settled an action brought by the funds arising from what they said was his maladministration. He paid R1 million in full and final settlement of the funds' claims.

- 17 Mr. Kamionsky holds Ms. Le Grellier and her fellow trustees ultimately responsible for what he feels has been unwarranted criticism of his administration of the funds, and the implementation of what he says was the needless rebuilding of the funds' records. He also holds Mr. Khoza, who succeeded Ms. Le Grellier as a trustee, responsible for failing to hold Ms. Le Grellier accountable for what he says was inadequate oversight of the funds during her tenure.

The complaints to the pension fund adjudicator

- 18 In May 2011, some employers who had invested in the funds made a complaint to the pension fund adjudicator about the loss they said their employees had suffered as a result of the costs occasioned by the rebuild of the funds' records. The adjudicator found that the loss was the result of the failure of a number of trustees, including Ms. Le Grellier, to oversee the funds properly. On 3 July 2012, the trustees, including Ms. Le Grellier, were held personally liable for the repayment of the losses occasioned by the rebuild of the records. Those losses were to be computed in a manner set

out in the adjudicator's award, less the R1 million already paid over to the funds in settlement of their claims against Mr. Kamionsky.

19 The trustees appealed to this court against the adjudicator's determination. Mr. Kamionsky applied for leave to intervene in that appeal. For reasons that are not clear from the record, the appeal was not heard until 28 May 2018. By that time, none of the original complainants wished to press their complaints or to defend the adjudicator's decision. Kathree-Setiloane J upheld the appeal and set aside the adjudicator's decision, on the narrow basis that the original complaints were no longer persisted with.

20 Mr. Kamionsky then brought a second complaint before the pension fund adjudicator. That complaint was dismissed on the grounds that the dispute had already been determined by the first complaint and appeal process, and that two of the funds had by that time been liquidated. An application to the Financial Services Tribunal to reconsider the adjudicator's decision also failed.

21 The trail of litigation in relation to responsibility for the cost of the reconstruction of the funds' records ended there. But Mr. Kamionsky's sense of grievance did not. He subsequently instructed an advocate of this court to convene the commission of inquiry that has been mis-joined as the second respondent in these proceedings. Although the advocate involved appears to have done his best to investigate the matter thoroughly, and to seek input from Ms. Le Grellier, Mr. Khoza and the other trustees, his investigation was necessarily a one-sided affair. The predictable outcome of the inquiry was that Ms. Le Grellier and Mr. Khoza, together with various other trustees,

were said to be liable for the cost of the reconstruction of the funds' records, and the consequent financial loss.

22 The outcome of the commission was published on the commission's website, and on several other websites Mr. Kamionsky controls. Its function was purely symbolic, and its findings have no legal effect.

23 The upshot of all of this is that it is far from clear who was really responsible for the loss caused to the funds by the reconstruction of the funds' records. The most definitive official determination of the issue is the pension funds adjudicator's 2013 award. But, while it found Ms. Le Grellier and her fellow trustees liable for the loss, that award did not exonerate Mr. Kamionsky, and it had nothing to say about Mr. Khoza's responsibility. The pension fund adjudicator was in fact critical of the funds' decision to settle with Mr. Kamionsky for what the adjudicator thought was a very low amount.

Events leading to the *ex parte* application

24 Time marched on, but that did nothing to prevent Mr. Kamionsky nursing his sense of injustice. On 20 February 2023, Mr. Kamionsky wrote to Ms. Le Grellier's and Mr. Khoza's attorneys to inform them that he had been at a meeting of former members of the funds, and that he had seen a document setting out their addresses, identity numbers and mobile telephone numbers at the meeting. He said that he felt duty bound to pass that information on, as he "wouldn't want to see bad things happen to anyone".

25 In his affidavit in support of the reconsideration application, Mr. Kamionsky accepted that there was in fact no such meeting on 20 February 2023. He

had contrived the incident in order to “put pressure” on the parties to whom the email was addressed, including Ms. Le Grellier and Mr. Khoza. Mr. Kamionsky apologised for writing the email. He promised that conduct of that nature would not be repeated.

26 By April 2023, Ms. Le Grellier had moved to the United Kingdom, where she had taken up employment with Ross Trustees, which specialises in providing professional services connected with the management and administration of pension funds. Mr. Khoza had found work with Standard Bank.

27 On 17 April 2023, Mr. Kamionsky wrote to Ms. Le Grellier and to Mr. Khoza to inform them that he would soon contact their employers and draw their attention to what he considered to be their responsibility for the financial loss caused by the reconstruction of the funds’ records. He afforded them until 12 May 2023 to inspect the various websites on which he had published the commission of inquiry’s findings. Mr. Kamionsky invited Mr. Khoza and Ms. Le Grellier to draw attention to any factual inaccuracies on those websites, ostensibly to ensure that their employers would only be supplied with accurate information.

28 Ms. Le Grellier and Mr. Khoza did not respond to that invitation. Mr. Kamionsky nonetheless carried out his threat to contact Ms. Le Grellier’s employer. On 8 June 2023, Ms. Le Grellier was suspended from her employment pending an investigation of Mr. Kamionsky’s allegations. It appears, however, that the suspension has since been lifted, and that Ms. Le Grellier is still employed at Ross Trustees. In her replying affidavit in the reconsideration application, dated 6 August 2023, Ms. Le Grellier describes

herself as a “Senior Associate in a firm specialising in providing professional pensions trusteeship”. It is a fair inference that this firm is Ross Trustees, and that, if it was not, Ms. Le Grellier would have been keen to disclose that she had been dismissed as a result of Mr. Kamionsky’s contact with her employer.

29 On 10 June 2023, Mr. Kamionsky wrote again to Ms. Le Grellier’s and Mr. Khoza’s attorneys. He said that he planned to set up a further website on which his allegations against them would be ventilated. He gave them until 30 June 2023 to consider and comment on the information to be placed on that website.

30 It seems that it was Mr. Kamionsky’s contact with Ms. Le Grellier’s employer and the 10 June 2023 letter that triggered the urgent *ex parte* approach to Senyatsi J. I now turn to whether Ms. Le Grellier and Mr. Khoza were entitled to the relief they then obtained.

The law

31 Mr. Kamionsky strikes me on the papers as a haunted man, who has lost all perspective on his grievance against the funds’ trustees in general, and Ms. Le Grellier and Mr. Khoza in particular. Whatever the truth of the matter, and wherever fault lies, two of the funds have long since been liquidated, the complaints against the trustees have been dealt with, and it seems that everyone, except Mr. Kamionsky, has moved on with their lives.

32 However, there is no right in law to be protected from criticism, even from the criticism of those who may have fallen victim to an obsession. Section 16 of

the Constitution, 1996 enshrines the right to freedom of expression, which includes the right to receive or impart information or ideas. Only propaganda for war, incitement of imminent violence or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm” is excluded from its ambit.

33 The right to freedom of expression is limited by the common law of defamation. The Constitutional Court has long held that the limitation is a justifiable one (see *Khumalo v Holomisa* 2002 SA (5) 401 (CC) paragraphs 35 to 46). I also have little difficulty with accepting that there are some kinds of tortious interference with other people’s contractual relationships which may constitute unprotected expression, and many forms of injury to a person’s dignity which will not find shelter in section 16. In addition, to the extent that free expression takes the form of harassment or intimidation, it may be restrained in terms of the Protection from Harassment Act 17 of 2011, or the Intimidation Act 72 of 1982, or under the common law.

34 To the extent that Ms. Le Grellier and Mr. Khosa made out a case to restrain Mr. Kamionsky in their founding papers, they relied squarely on the law of defamation. A publication is defamatory if it tends to lower the person defamed “in the estimation of the ordinary intelligent or right-thinking members of society” (*Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) (“Hix”), 403G-H). The test is objective. What matters is not what the publisher intends, but “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 had regard not only to what is expressly stated but also to what is implied” (*Le Roux v Dey* 2011 (3) SA 274 (CC), para 89).

35 Once it has been established that a publication is defamatory, wrongfulness and intent to injure are presumed (*Le Roux*, para 85), but that presumption may be rebutted if any one of a number of known justifications is established. One of these justifications is that the defamatory publication constitutes “fair comment”. A publication is fair comment where it is an expression of opinion, where it is based on true facts and where it relates to a matter of public interest. The publication must also be fair in the sense that that it conveys an honestly-held opinion without malice. It need not, however, be “just, equitable, reasonable, level-headed and balanced” (*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC), paras 80 to 83). Another defence is that the defamatory material is true, and that it is in the public interest that it be disclosed (see *Ndlozi v Media 24 t/a Daily Sun* [2023] ZAGPJHC 1040 (19 September 2023), paragraphs 48 to 70).

36 I must accept that the allegations Mr. Kamionsky continues to publish about Ms. Le Grellier and Mr. Khoza are defamatory. They would clearly tend to lower Ms. Le Grellier and Mr. Khoza in the esteem of a reasonable reader. Ms. Le Grellier and Mr. Khoza say that the publication of the defamatory matter is unlawful, because Mr. Kamionsky’s complaints about their conduct have long since been settled by the pension funds adjudicator, the Financial Services Tribunal and this court. In their founding papers, Ms. Le Grellier

and Mr. Khoza seek to create the impression that they have been absolved of any wrongdoing.

37 On any interpretation of the facts, though, that is not true. While the complaints against the funds' trustees may fairly be described as having been adjudicated, I do not think that anyone has absolved Ms. Le Grellier and Mr. Khoza of the allegations that Mr. Kamionsky continues to level at them. It may be that, given the passage of time and the liquidation of the funds, wiser heads would have let matters rest, but that is not the same as saying that Mr. Kamionsky is peddling untruths or is acting with malice.

38 Mr. d'Oliviera, who appeared for Mr. Kamionsky before me, impressed upon me his client's sincere belief in the justice of his cause, and I am unable to see how Mr. Kamionsky can fairly be described as a liar, or as someone who is not, on the whole, acting in good faith. There was, of course, his childish attempt to suggest that someone was collecting the trustees' personal details for some malicious purpose, but that is, I think, best explained by stupidity or hubris rather than malevolence or the lack of a genuine belief that Ms. Le Grellier and Mr. Khoza should be held to account for what Mr. Kamionsky believes is their wrongdoing.

39 Our courts have long been reluctant to grant orders in prior restraint of defamation except in the clearest of cases. In *Hix*, it was held that applications for orders placing prior restraints on publication ought to be approached with caution (p 402C-D). Moreover, where "a sustainable foundation [is] laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent"

in any post-publication damages claim, a prior restraint will not generally be granted (*Herbal Zone (Pty) Ltd v Infitech Technologies* 2017 BIP 172 (SCA), paras 37 and 38). This is because, where such a defence has been set up, the applicant has no reasonable apprehension that it will be unlawfully defamed in the forthcoming publication.

40 It seems to me that, on the undisputed facts, Mr. Kamionsky has an arguable case that the publication of his allegations against Ms. Le Grellier and Mr. Khosa are true and that it is in the public interest that they be known. They may also be fair comment on the true facts. If Mr. Kamionsky had been given the opportunity to oppose the application for interim relief, I have no doubt that a "sustainable foundation" for these defences would have been laid. He may well also have been able to rebut the presumption of intent to injure that usually attaches to matter that is defamatory on its face.

41 The problem in this case is that Mr. Kamionsky was not given the opportunity to be heard before the interim interdict was granted. It has been said that the power to grant relief *ex parte* "should be exercised with great caution and only in exceptional circumstances" (*Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA), paragraph 80). It seems to me that, given the general reluctance to grant prior restraints on free expression, courts should almost never grant such restraints *ex parte*. In cases where such restraints are sought, the very least that would have to be shown to establish a *prima facie* right to interim relief, in addition to the satisfaction of the ordinary requirements for *ex parte* relief (including the likelihood of irreparable harm if notice is given, and

disclosure of every fact that might be material to the relief sought) is that the person sought to be placed under restraint cannot realistically make out any of the known defences to a claim of defamation on the material facts.

42 In this case, that was plainly not shown. Ms. Le Grellier and Mr. Khoza established only that the statements sought to be published were defamatory on their face. In the context of *ex parte* applications, that standard is woefully inadequate to afford the protection to freedom of expression that our Constitution requires. There must be a strong and convincing case made out that the expression sought to be restrained is not just *prima facie* defamatory, but that the defamation that is sought to be restrained would plainly be unlawful, in that it would not find protection in any of the known defences to a claim of defamation.

43 In addition, I do not think that Ms. Le Grellier and Mr. Khoza established that an *ex parte* approach was necessary to protect them from irreparable harm or to obtain effective relief. The allegations against them had been in the public domain for years. Ms. Le Grellier had already been suspended by her employer. The papers before Senyatsi J did not set out what further harm might befall Ms. Le Grellier and Mr. Khoza if Mr. Kamionsky was given notice of the application. The fact that Mr. Kamionsky gave them prior notice of the publication of his website is inconsistent with an inference of malice on his part. There is nothing to suggest that he would not have agreed to stay his hand pending the hearing of an application for interim relief on an opposed basis. Even if he did not so agree, there was no real evidence put up to support the suggestion that the further dissemination of Mr. Kamionsky's

allegations would have caused Ms. Le Grellier or Mr. Khoza any significant harm.

44 I have given some thought to whether I should not sustain a narrow interim interdict that prevents Mr. Kamionsky from harassing or intimidating Ms. Le Grellier and Mr. Khoza, and from interfering wrongfully with their relationships with third parties, such as their employers. However, there was no case made out in law for that relief, and I am unsure of the extent to which it could be justified on these facts. There is no obvious distinction, in my view, between what Ms. Le Grellier and Mr. Khoza call “harassment” and “intimidation” and the mere repetition of allegations about their alleged mismanagement of the funds which, at first blush, are not obviously untrue or unjustified on the facts.

45 In addition, Ms. Le Grellier and Mr. Khoza have elected not to try to make out a case of harassment, intimidation, or injury to dignity. They have chosen instead to ground their cause of action in the law of defamation. It is on that ground that their application must stand or fall. I do not think it would be appropriate for me to cut a new case for them out of whole cloth, not least because it might be seen as a consolation prize that vindicates their decision to bring a meritless *ex parte* application in the first place. I wish to do nothing that would encourage that inference, or that would encourage others to approach this court *ex parte* for very wide relief, on the assumption that at least some of it may later be sustained by a sympathetic Judge on reconsideration. Having decided to proceed as they have, on the cause of

action that they have chosen, Ms. Le Grellier and Mr. Khoza must be held to the consequences of their failure to make out a case for any relief.

Order

46 It follows that the interim order cannot stand. Mr. d'Oliveria asked that I reconsider the order and substitute it with an order dismissing the application for interim relief. He also asked that Ms. Le Grellier and Mr. Khoza pay the costs of the reconsideration application on the scale as between attorney and client. The punitive costs order was said to be justified by a number of material non-disclosures, and I agree that it is. I think the most egregious of the non-disclosures was Ms. Le Grellier's and Mr. Khosa's attempts to paint the legal proceedings in which they had been involved with Mr. Kamionsky as having exonerated them from any wrongdoing. That was plainly misleading. This is clearest from the transcript of the proceedings before Kathree-Setiloane J, which was annexed to Mr. Kamionsky's answering affidavit. From that transcript, it is clear that the first pension fund adjudicator's award, dated 3 July 2012, was not set aside because it was found to have been wrong, but because the relief it granted was no longer pursued. Ms. Le Grellier and Mr. Khoza ought to have been more candid about that than they were.

47 For all these reasons –

47.1 The order of Sentyatsi J dated 20 June 2023 is reconsidered and discharged under Uniform Rule 6 (12) (c). It is replaced with the following order –

“Part A of the application is dismissed.”

47.2 The applicants are to pay the costs of the reconsideration application on the scale as between attorney and client.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 13 November 2023.

HEARD ON: 12 October 2023

DECIDED ON: 13 November 2023

For the Applicants: L Peter
Instructed by Thyne Jacobs Incorporated

For the Respondents: A J d'Oliveira
Instructed by Fluxmans Incorporated