



IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A2023-005228

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
27/12/2023	_____
DATE	SIGNATURE

In

the matter between:

MMATLOU HELLEN PHALENG-PODILE

Appellant

and

NORANNE DOVEY

Respondent

JUDGMENT

YACOOB J: (Fisher and Mdalana-Mayisela concurring)

INTRODUCTION

1. In March 2019, this country, and most of the world, were subjected to extreme restriction of movement and association, in response to a lethal global pandemic to which there was no effective scientific response for some months. These unusual and unnatural circumstances, both the disruption of ordinary lives and

the fear of the then rampant virus had an effect on peoples' livelihoods and wellbeing that still has consequences now, almost four years later.

2. On 27 March 2020, on the first day of the National State of Emergency, with the most stringent lockdown measures in effect, an exchange took place on a WhatsApp group of residents in a complex, of which both the applicant and respondent are members, which resulted in the applicant instituting an application for relief relating to an alleged defamation.
3. The application was dismissed, with no costs order, by Todd AJ on 6 September 2022, leave to appeal granted on 13 December 2022. The matter now comes before us on appeal.

FACTUAL BACKGROUND AND INSTITUTION OF PROCEEDINGS

4. Ms Phaleng-Podile, the applicant, was a trustee of the body corporate of Ambiance, the complex in which the parties live. She noticed two men walking for exercise around the complex. At the time this was forbidden by the regulations, which required everyone to remain in their homes. She posted a message on the WhatsApp group, which at the time had some 42 members, reminding people that they should "stay in their own yards or around their own sections". She noted that there were two men walking around and that it should be dealt with before floodgates open.
5. Ms Dovey, the respondent, responded in a manner which can be described as irascible. She stated that it was only those two men, and accused the applicant of wasting her time monitoring people through her window. The engagement continued, with Ms Phaleng-Podile making comments which cast a slur on the intelligence of Ms Dovey, while Ms Dovey continued to react angrily and

dismissively. Other members of the group intervened, attempting to calm things down and supporting Ms Phaleng-Podile's stance on the lockdown.

6. Eventually, Ms Phaleng-Podile repeated her opinion that Ms Dovey was less intelligent than the majority of owners in the complex, adding "[y]ou are a real joke shame (sic)". To this Ms Dovey responded "Nice- you racist". It is this comment which has given rise to these proceedings. Ms Phaleng-Podile contends that members of the WhatsApp group would read the comment and conclude that she was a racist, with serious consequences for her dignity and reputation.
7. The discussion continued with other members of the WhatsApp group asking that the discussion calm down and that people refrain from personal attacks, and supporting the call to adhere to the lockdown conditions.
8. Ms Phaleng-Podile pleads that calling her a racist means that she is disreputable and unfit for the various roles that she fulfils, and that it has the potential to cause her professional harm. She pleads she is hurt, her self-worth and dignity have been harmed, and she feels belittled and humiliated.
9. Ms Phaleng-Podile claims damages to assuage her wounded feeling, good name and reputation, in the amount of R500 000. She also seeks an apology from Ms Dovey, on the same platform, the deletion of the message, and an interdict to the effect that Ms Dovey not defame her again.
10. Ms Dovey in her papers took issue with the probity of the evidence, which was in the form of screenshots of parts of the WhatsApp conversation. She goes as far as disputing the admissibility of screenshots of what are alleged to be her own statements, and not confirming or denying whether she made those posts, and only acknowledging the contents quoted in the Founding Affidavit to the extent

that they are consonant with the screenshot. Despite this, she still alleges justifications for the posts. She also criticises Ms Phaleng-Podile's allegations of the National Lockdown as hearsay, despite the fact that it is something that is of public record.

11. This approach by Ms Dovey must be criticised. It is not an appropriate way in which to litigate. Where it is alleged that a defendant said or posted something, the defendant must admit or deny having posted it.

12. In her Answering Affidavit Ms Dovey raised the point that a claim for damages had to be founded in action proceedings, not motion proceedings, and submitted that the case for damages had not been made out because evidence had not been adduced. She also submitted that there was no evidence of malice on her part.

13. Ms Dovey denies that her comment was made with the intention to defame Ms Phaleng-Podile. She suggests that Ms Phaleng-Podile has also harmed her by calling her stupid, that she will institute action proceedings for satisfaction of this harm, and that Ms Phaleng-Podile is therefore equally indebted to her. There is no evidence that those proceedings have been instituted. She contends that the statement was one of opinion, not fact, but rather a fair comment, and that it would have been interpreted that way by those reading it.

14. According to Ms Dovey, her comment was fair because in a previous, in person, engagement with Ms Dovey, Ms Phaleng-Podile told her children not to play with Ms Dovey's children because they are white and do not go to the same church, and because Ms Phaleng-Podile took exception to a comment by a white member of the scheme that the only efficient trustee was one who happened to be the only white trustee.

15. Ms Dovey also contends that she has apologised through her attorneys to Ms Phaleng-Podile. Perusal of the apology shows that it is not an apology at all.
16. Ms Dovey points out that the WhatsApp group now no longer exists. Ms Phaleng-Podile accepts this, but still wants an apology on the platform. The implication is that a new WhatsApp group was created.
17. Ms Phaleng-Podile in reply states that the comment about Ms Dovey's children was manufactured. She alleges that there was an issue within the body corporate in which allusions were made to efficiency and that there was a racist undertone, and that raising the issue does not make her a racist. In any event, she submits that those allegations by Ms Dovey are irrelevant.

THE JUDGMENT OF THE COURT A QUO

18. Todd AJ found that, taking the context of the exchange into account, the comment not have served to lower the Ms Phaleng-Podile in the estimation of right-thinking members of society, although calling someone a racist does have "a meaning that is capable of defaming".
19. Todd AJ found that an *iniuria* could have been pleaded, but had not been, although on the papers there may have been sufficient evidence to establish that claim. However, it was never pleaded that a reasonable person would have been insulted by the conduct, and therefore the objective element of *iniuria* had not been pleaded. Todd AJ commented that any damages he may have awarded would have been much smaller than the R500 000 claimed by Ms Phaleng-Podile.

20. As far as the interdict and apology were concerned, Todd AJ found that these were founded on the defamation claim, and that, having found that there was no defamation, those would fall away.
21. The written argument submitted on Ms Dovey's behalf in the court *a quo* relied on the judgment of the Supreme Court of Appeal in *Economic Freedom Fighters v Manuel* ("EFF"),¹ in which the SCA held that an unliquidated claim for damages must be pursued in action proceedings, and that this included a person seeking compensation for a defamatory statement. It was submitted that Ms Dovey had a defence, the prospects of which had to be decided by the trial court, and therefore that the application should be dismissed because Ms Phaleng-Podile had elected to follow the wrong procedure.
22. At the hearing of the matter in the court *a quo*, the question of whether the correct procedure was followed was given some attention. The transcript of proceedings has been included in the record of appeal. Mr Shongwe, for Ms Phaleng-Podile, submitted that the question of damages could be referred to oral evidence, but that the court nevertheless could, and should, determine the question whether there is defamation. He relied for this on the *EFF* case.
23. The court appeared to be of the view that it was in a position to deal with defamation if it found that there were damages. In fact, the court stated in the hearing that what was being claimed was a *solatium*, rather than quantifiable damages on which evidence would be led.
24. Mr Mudimeli submitted for Ms Dovey that, rather than referring the question of damages to oral evidence, the application should be dismissed, because the applicant herself was an attorney and ought to have known that a claim for damages should be action proceedings, and because his client did not have the resources to litigate endlessly.

¹ 2021 (3) SA 425 SCA

25. Having found that the statement was not defamatory, Todd AJ dismissed the application. He did not deal with the question of the correct procedure at all, presumably on the basis that, having found there was no defamation, damages did not enter the equation and there was no need to consider the question.

26. Todd AJ granted leave to appeal his judgment on the basis that there was a reasonable prospect that another court might come to a different conclusion than he did regarding whether the statement was defamatory.

THE APPEAL

27. Ms Phaleng-Podile notes seven grounds of appeal, contending that the court *a quo* erred as set out below.

27.1. By finding that the parties were engaging in similar tone, by equating attacks on intelligence with calling someone a racist, and by ignoring that Ms Dovey's tone of engagement from the outset was aggressive.

27.2. In finding that Ms Dovey's comment was intended to insult and offend, and was not defamatory.

27.3. By commenting that it was more probable that Ms Phaleng-Podile's own insulting statements addressed to Ms Dovey would have lowered Ms Phaleng-Podile in the estimation of right-thinking members of society, and in fact by finding that Ms Phaleng-Podile's statements were insulting.

27.4. By only considering whether the members of the WhatsApp group would think less of Ms Phaleng-Podile as a result of Ms Dovey's statement, and ignoring "the effects the racist label would continue to have out there".

27.5. By ignoring the deeper meaning of calling someone a racist, that is that the person engages in immoral or dishonourable conduct, by discriminating

among people on the basis of race, and the effect this would have on Ms Phaleng-Podile's reputation.

27.6. By ignoring the reasons suggested by Ms Dovey as justification for her comment, which then would give the comment more defamatory value.

27.7. By finding that no case had been made out for interdictory relief, in particular that there was no evidence of continuing harm.

28. In the notice of appeal the relief that is sought is the setting aside of the court *a quo*'s order and the substitution of an order granting damages of R500 000, an apology, and an interdict.

29. Mr Shongwe in his written argument distils the issues before us into two points:

29.1. whether the court *a quo* correctly went "above and beyond" the test laid out in *Le Roux v Dey*,² and

29.2. whether the court *a quo* correctly found that in the context of the WhatsApp exchange, the use of the word "racist" had not been defamatory.

30. Mr Shongwe conflates the second point into whether Ms Dovey was justified in labelling Ms Phaleng-Podile a racist, but that is not the inquiry, nor did the court *a quo* make any such finding. It must be noted that a finding that a statement is not defamatory does not mean that the publication of that statement is justified or correct.

31. He also submitted that Todd AJ erred by not deciding the matter only in accordance with Ms Dovey's defence, because Ms Dovey has plainly not made out a case for fair comment. This submission is obviously misguided. Before

² *Le Roux and Others v Dey* 2011 (3) SA 274 (CC)

considering a defence, a court must decide whether the plaintiff has made out a case, and that is what Todd AJ has done.

32. Mr Shongwe then deals in detail with the question of the correct procedure, in particular with reference to the *EFF* case, and Rule 17(2) of the Uniform Rules of Court, which require a person claiming unliquidated damages to use a long form summons and file particulars of claim. He acknowledges that it is settled law that a defamation suit in which damages are claimed ought to be prosecuted by way of action. He acknowledges that Ms Phaleng-Podile, like Mr Manuel in the *EFF* case, did not provide sufficient detail in relation to the harm suffered. He therefore requests that the question of damages, together with the apology, be referred to oral evidence, as the SCA did in the *EFF* case.
33. Mr Shongwe then submitted that the appropriate relief is a declaratory order that the statement is defamatory, an interdict, and a referral to oral evidence of the questions of damages and an apology or retraction.
34. At the hearing of the appeal, the question of the appropriate procedure was the primary focus. The question was whether, having instituted application proceedings, knowing full well that action proceedings ought to have been instituted, and despite the problem having been pointed out in the answering affidavit, and despite failing to seek a referral to oral evidence or a separation of issues when the *EFF* judgment came out in 2020, the appellant now can take advantage of a change of approach, and seek a referral to oral evidence.
35. The primary submission relied on by Mr Shongwe in this regard was that it was acceptable to bring an application for relief based on defamation if there is no dispute of fact.

36. After the hearing of the appeal, Wilson J handed down judgment in the matter of *Ndlozi v Media 24 t/a Daily Sun and Others (Ndlozi)*.³ Mr Shongwe commendably, and without waiting for a request from the court, submitted additional written submissions dealing with this judgment.

37. In that case, Dr Ndlozi brought application proceedings on the basis of allegedly defamatory statements, and Wilson J found that, in the circumstances of that case, there was no reason why the question of whether the statements were defamatory and unlawful could not be dealt with, and the prayers for an apology and damages be postponed and referred to oral evidence. That is, in fact what Wilson J did.

38. Wilson J found that the *EFF* judgment did not prevent this, because although the SCA commented that it is not ordinarily acceptable to bring an application for “some immediate relief” with damages to be referred to oral evidence or determined at a later stage, it did in fact permit that in that case – the court upheld the finding that the statements were defamatory, and referred the damages and apology to oral evidence, because of the “exceptional circumstances” of that case – in particular because there was no objection or allegation of prejudice by the EFF.

39. Wilson J found that the procedure could be adopted in “exceptional” cases where there would be no prejudice to parties’ procedural rights. The exceptional nature of the *Ndlozi* case lay in there being no real dispute of fact, in the fact that the interdictory relief being sought should not have to await the determination of damages, and that the court in *Ndlozi* was not called upon to decide whether there was intention on the respondents’ part.

³ (21/25599) [2023] ZAGPJHC 1040 (19 September 2023).

40. Mr Shongwe submits that Ms Phaleng-Podile is in the same position as Mr Manuel and, specifically, Dr Ndlozi, and therefore should be entitled to the same benefit of a referral of the damages to oral evidence.

41. I disagree with Mr Shongwe's submission for the following reasons.

42. Firstly, Ms Dovey objected to the procedure adopted from the outset. This has been set out in detail above. It was also specifically submitted on her behalf at the hearing in the court *a quo* that she could not litigate endlessly and that a referral to oral evidence would be unfair.

43. Secondly, the question of a referral to oral evidence was something that Ms Phaleng-Podile and her team were aware of even before the replying affidavit was filed. Certainly they were aware well before the date of the hearing in the court *a quo*, Mr Mudimeli having referred to the *EFF* judgment in his written argument.

44. Thirdly, unlike in the case of *Ndlozi*, Ms Dovey's intention is very much part of what the court had to consider, and did consider. Ms Dovey's intention to defame is in fact pleaded in the Founding Affidavit. This is something that, in my view, could only be properly examined in oral evidence.

45. Fourthly, an examination of the notice of appeal and the main written argument on appeal reveals that there are some issues which, if they were to have been considered in the manner in which Mr Shongwe submits they ought to have been considered, should have been the subject of oral evidence.

46. Under the rubric of the fourth ground of appeal, the submission is made that the court, in finding that the members of the WhatsApp group were not inclined to

think less of Ms Phaleng-Podile as a result of Ms Dovey's comment, did not consider and underestimated the external negative effects of the statement, and the continuing effects "out there". There was no evidence at all in the papers of the effects "out there", and in fact that evidence, as well as what the inclination of members of the WhatsApp group were, is something that ought to have been placed before the court in oral evidence so that it could have been properly scrutinized and evaluated.

47. For these reasons, I find that Ms Phaleng-Podile should have instituted action proceedings at the outset, to deal not only with the damages and apology relief but also the merits of the defamation claim. This is not an exceptional matter in which a "hybrid" procedure may be followed.

48. Although I find against Ms Phaleng-Podile on a different basis than did Todd AJ, this means that the appeal must fail.

49. I make the following order:

“The appeal is dismissed.”

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

I concur.

MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

Counsel for the appellant: CM Shongwe
Instructed by: Phaleng-Podile Attorneys

For the respondent: No appearance
Date of hearing: 30 August 2023
Date of judgment: 27 December 2023