

REPUBLIC OF SOUTH AFRICA



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

Case Number: 58023/2021

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES/NO |

29 December 2023 _____

DATE

SIGNATURE

In the matter between:

**AKANI RETIREMENT FUND ADMINISTRATORS
PROPRIETARY LIMITED**

First Applicant/Respondent

ZAMANI ERNEST EPHRAIM LETJANE

Second Applicant/Respondent

and

**INDEPENDENT MEDIA
PROPRIETARY LIMITED**

First Respondent/Applicant

ANEEZ SALIE

Second Respondent/Applicant

AYANDA MDLULI

Third Respondent/Applicant

THABO MAKWAKWA

Fourth Respondent/Applicant

SUMMARY

Rule in *Hollington v Hewthorn* to be strictly applied – not applicable in circumstances of this case. Findings of another court relevant on the facts of this case because it has probative force in relation to issues in the main application.

JUDGMENT

FISHER, J

Introduction

- [1] This is an interlocutory application for the admission of further evidence in a main application.
- [2] The applicants (in the main application) seek relief relating to alleged defamatory statements made in articles published by the respondents (in the main application) at the end of 2021.
- [3] The parties are referred to as in the main application.
- [4] The respondents are members of the press.
- [5] The evidence sought to be admitted by the respondents takes the form of findings in certain passages in a recent judgment of the Full Bench of this division, *Moropa and 9 Others v Chemical Industries National Provident Fund & 22 Others* - Appeal Case Number: A5041/21 (*Moropa*) and a press release of the Financial Sector Conduct Authority (FSCA).
- [6] The handing down of the judgment and the publication of the press release came after the respondents had filed their answering affidavit in the main application and the applicants had replied.
- [7] Although the applicants purport to raise six objections to the admission of the evidence, in reality the objections can be distilled into two main arguments.

- [8] First, that there is a temporal problem in that the judgment and the press release post-date the articles and are thus irrelevant to the making of the statements.
- [9] Second, reliance on *Hollington v Hewthorn & Co Ltd*¹ on the basis that, properly construed, it provides that findings in judgments are inadmissible for being the irrelevant opinion evidence of another court. Related to this are the arguments that there is, furthermore, prejudice arising from the fact that (i) that the evidence sought to be admitted is not, in any event, properly defined and (ii) that the judgment is subject to appeal.
- [10] These objections, in their essence, are that the evidence is inadmissible for being irrelevant.
- [11] On the merits of the main application, the respondents dispute the defamatory nature of the statements on the basis that they were reporting on facts stated by others as opposed to themselves stating these facts.
- [12] The respondents also deny wrongfulness. More specifically they raise the truth of the statements and that the publication was for the benefit of the public. They also raise the so-called *Bogoshi* defence,² which accords to the media the privilege of reasonable publication.
- [13] A central basis for both the defences of truth and in the public interest and the *Bogoshi* defence is the assertion that Akani was under investigation for corruption by the FSCA relating to complaints by the CINPF against Akani and Mr Letjane involving improper relationships with FSCA officials. This is the sting or gist of the statements complained of.
- [14] It is in relation to the establishing of these defences or at least the raising of a dispute pertaining thereto that the evidence is sought to be admitted.

¹ 1943 All ER 35

² After *National Media Ltd v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA).

[15] These competing arguments in relation to relevance must be viewed against the factual and procedural background to the main application, to which I now turn.

Background

[16] The first article, titled “*Akani’s boss Zamani Letjane accused of ‘unsavoury’ relationship with the Financial Sector Conduct Authority*”, was published by the respondents on 30 November 2021. The second article, titled “*Akani Retirement Fund MD in hot water over claims of extortion and failing to hand over documents*” was published by respondents on 06 December 2021.

[17] There were subsequent tweets on the social network *Twitter* related to these articles but the argument centres on the articles themselves.

[18] In essence, the articles make reference to reports made by others about Akani and its CEO, Mr Letjane, the applicants in the main application.

[19] These reports pertain to alleged complaints made by the Chemical Industries National Provident Fund (CINPF) to the FSCA against Akani and Mr Letjane relating to improper relationships with FSCA officials, extortion and failure to hand over documents for forensic investigation.

[20] The procedure adopted by the applicants is pertinent to this application. The applicants opted to use a hybrid model which entails launching motion proceedings to pursue a declaration that the articles and tweets contained false and misleading allegations which are defamatory of the applicants and/or injurious to them, final interdictory relief and the publication of an apology or retraction. A declaration is then sought that the respondents are liable for damages in an amount to be determined in action proceedings.

[21] The approach is based on the assertion by the applicants that there is no dispute of fact in relation to the defamation and that the only disputed issues relate to the determination of the quantum of damages.

- [22] The respondents contend, *in limine*, in the main application that this hybrid procedure is incompetent. They argue that they are entitled to the dismissal of the application on that basis alone.
- [23] I need not make any comment on the correctness or otherwise of the procedure as this is for the court dealing with the main application.
- [24] Whether the evidence is admissible is, however, pertinent to whether a dispute of fact arises. This obviously affects the argument as to whether the application procedure is appropriate.
- [25] With this in mind, I turn to an examination of the relevancy objections raised in this application.

The temporal argument

- [26] The argument is that the evidence sought to be introduced arose after the making of the statements and is thus irrelevant to the issues surrounding their making.
- [27] This assertion ignores that the events forming the subject matter of the findings in *Moropa* pre-dated the publication of the defamatory matter forming the subject of the main application.
- [28] The passages in *Moropa* involve findings that an associated company of Akani which was run and controlled by Letjane, Neighbour Funeral Scheme (NFS) paid bribes to three trustees of CINPF in order to benefit Akani.
- [29] The events described in *Moropa* occurred in November and December 2019.
- [30] The respondents argue that these findings create context for their defences of lack of wrongfulness at the time the statements were made – i.e. at the end of 2021. They argue that the press release is relevant for the purposes of raising the required rebuttal or at least establishing a dispute of fact as to the truth of

the sting being that the applicants were involved in corrupt activities which were being investigated by the FSCA.

- [31] The applicants argue that the respondents must show that the investigation mentioned in the press release was pending at the time the articles in issue were written and that this was known of by the respondents at that time.
- [32] I disagree. The matter sought to be introduced, although it postdates the statements is relevant to the reasonableness or otherwise of the making of the statements at the time. *Bogoshi* provides that publication by the press of false defamatory allegations of fact will not be regarded as unlawful if it is found to have been reasonable in the circumstances of the case to publish the particular facts at the particular time of publication.³
- [33] The respondents raise also that the applicants have no reputation worthy of protection.
- [34] It is relevant that defendant 'need not justify immaterial details or mere expressions of abuse which do not add to its sting and would produce no different effect on the mind of the reader than that produced by the substantial part justified'.⁴
- [35] The underlying logic behind this approach appears from the judgment of Wessels JA in *Johnson*. The reason, he explained, why truth and public benefit is recognised as a defence, is because a plaintiff is not entitled to recover damages in respect of an injury to a reputation which he does not deserve.⁵
- [36] The question of whether the applicants have such a reputation is central evidence in the case. The applicant's place their reputation for honesty and integrity in the forefront of their case. A large portion of the founding papers is devoted to extolling this alleged reputation.

³ Id at 30-31.

⁴ *Johnson* at 205-206

⁵ See also *Modiri* op. cit. at para 13.

The rule in Hollington v Hewthorn

- [37] The rule in *Hollington* originated from English law, which forms the basis of the South African evidentiary process and is regarded as its common law. Domestic statutes regulate South Africa's procedures and where statutes are silent on certain issues, the English law of evidence which was in force on 30 May 1961 in South Africa takes precedence. This is provided for in various sections of the Criminal Procedure Act,⁶ as well as section 42 of the Civil Proceedings Evidence Act.⁷ The common law that must be followed includes English cases decided prior to 30 May 1961. It is on this basis that the rule in *Hollington* has been said to bind South African courts.
- [38] Because the *Hollington* rule has had its detractors and because its strict application often makes no sense our courts have tended to seek to limit its range whilst calling for its abolition
- [39] In *Institute for Accountability in Southern Africa v Public* 2020 (5) SA 179 (GP),⁸ Coppin J in an eloquent treatment of the rule found that the rule should be strictly construed and confined to the facts in *Hollington* and as such did not encompass a bar to admitting findings of civil courts in that *Hollington* related only to the admission of a criminal conviction.⁹ I am bound by this decision and like Coppin J and I cannot find that it is clearly wrong as the applicants 'argue that I should. I prefer the route of its strict containment or "extirpation" as applied by Coppin J.
- [40] Thus, I find that it has no application in this matter and does not operate in a blanket fashion to exclude the evidence of the passages in *Moropa*.
- [41] However, even if one were to engage in a less restrictive approach as to the ratio in *Hollington* being that it is essentially no more than a restatement of the rules against receiving opinion evidence and hearsay, the evidence is to my mind still admissible.

⁶ 51 of 1977.

⁷ 25 of 1965.

⁸ *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP)

⁹ *Ibid* at para 23 -25

- [42] The Constitutional Court held in *Helen Suzman Foundation v President of the Republic of South Africa (HSF)*,¹⁰ that any opinion, whether from a lay person or expert, which is expressed on an issue the court can decide without receiving such opinion is, in principle, inadmissible because of its irrelevance. But when an opinion has probative force, it can be considered admissible.
- [43] On the application of *Hollington* this exclusion applies also to the opinions of judges expressed in court cases.
- [44] Consequently, the evidence is receivable if it is capable of putting the court in a better position when deciding on the matter.
- [45] The court in *HSF* was dealing with an application to strike out but the pronouncements as to relevance have application here. The applications to strike out and the application to introduce further evidence are two sides of the same coin and the inquiry into relevance and prejudice is, to my mind, the the same in each instance.
- [46] Had the evidence which is sought to be introduced been available to the respondents earlier it would, no doubt, have been included in the answering affidavit. The remedy of the applicants would thus have been to apply to strike out the evidence if they felt it to be objectionable. The basis for such a strike out would have been that the evidence is irrelevant and prejudicial.
- [47] In *HSF* the position was explained in the judgment of Fronamen J (in which Cameron J concurred) as follows:

“In an application to strike out evidence on affidavit, neither the eventual veracity of the evidence nor the prospects of success of the main application are at issue. This is a trite proposition. The only question in a striking-out application is whether the evidence is admissible. The truth of the evidence plays no role at this stage; it is only determined at the end of the matter if the evidence is admitted.”¹¹

¹⁰ *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC).

¹¹ *HSF* at par 127

- [48] Therefore, whether an opinion carries any probative force will depend on the issues before the court and the purpose for which the evidence is sought to be used.
- [49] The court in the main application is asked to consider the question of wrongfulness. This consideration includes an inquiry related to the applicants' reputation.
- [50] These questions could, to my mind, be impacted upon by the fact of litigation involving the applicants in the context of the function of Akani in the pension fund industry and its activities. Seen from this perspective, the truth or otherwise of the findings is not necessarily the basis for the admission of the evidence. The fact that there have been allegations of corruption which have been a matter of public record and scrutiny at material times in relation to the publications in issue, to my mind, creates relevance in the context of the wrongfulness inquiry.
- [51] It is also important that this application comes at an interlocutory stage of the consideration of the main application.
- [52] The judgment in *Crypto Open Patent Alliance v Craig Steven Wright*,¹² in the UK is instructive. The claimant brought an action for a declaration that the defendant did not own certain copyright.
- [53] The defendant made an application at an interlocutory stage of action proceedings for a declaratory order that findings of fact made in litigation he was a party to in America were not admissible in the main action on the basis of the rule in *Hollington*. The court dealt with such argument thus:

“But, even in the narrower form of order, that the judicial findings from the US litigation be not admissible as evidence of the facts so found, I do not consider that I should make the order. The rule in *Hollington v Hewthorn* is clear, and it will be the duty of the trial judge to decide whether it applies to the particular evidence tendered. It would be unusual for another judge, long before the trial, and with less information than the trial judge will have, to bind the hands of the trial judge in this respect. If this limb of the order is made

¹² *Crypto Open Patent Alliance v Craig Steven Wright* [2021] EWHC 3440 (Ch).

now, what is to prevent other orders being sought at this stage to prevent admissibility of evidence at trial which infringes other of the rules of evidence? These are matters best left to the trial judge.” (Emphasis added).

- [54] The court explored the justification for the rule, finding that it lies in the requirements for a fair trial in that it is ultimately the trial judge’s responsibility to make an independent assessment of the evidence and therefore weight ought not to be attached to conclusions reached by another judge. This is in line with the approach taken by the Constitutional Court in *HSF*.
- [55] The hybrid approach taken by the applicants in the main application seeks to have the court determine liability in a vacuum which seals the inquiry off from context.
- [56] To my mind, the purpose of the objection to the evidence is not to protect the applicants from the prejudice attached to the receipt of opinion evidence of the court in *Moropa*; its purpose is to suppress evidence which has relevance to and creates context for the defences in respect of which the respondents bear the onus.
- [57] The respondents would to my mind be prejudiced by the exclusion of the evidence at an interlocutory stage, especially in light of the hybrid procedure chosen by the applicants.
- [58] The introduction of the evidence even for the purposes of context as opposed to truth arguably creates disputes of fact which would require an oral ventilation of the factual complex. This, ultimately, is for the consideration of the court hearing the main application. To my mind the existence of this evidence should not be excluded from the consideration as to whether the hybrid approach was apposite.

Conclusion

- [59] Thus, I find that the evidence is admissible for being relevant to a determination of wrongfulness in this matter.

[60] The respondents' argument that the receipt of this evidence creates or assists with the creation of a dispute of fact and thus has relevance to the process adopted by the applicants is also accepted.

[61] To the extent that these disputes are ultimately dealt with by way of oral ventilation of all the evidence, the applicants be entitled to their protections in due course.

Costs

[62] The respondents seek that the costs be in the cause. This is an appropriate order.

Order

[63] I thus make an order which reads as follows:

[1] The factual findings made by the High Court, Gauteng Division, Johannesburg in the matter between *Moropa & 9 Others v Chemical Industries National Provident Fund & 22 Others*, Appeal Case No. A5041/2021,(29 June 2022) in the following paragraphs are admitted into evidence:

[1.1] Paragraph 5;

[1.2] Paragraph 10;

[1.3] Paragraph 13;

[1.4] Paragraphs 15-16;

[1.5] Paragraphs 29-36;

[1.6] Paragraph 50; and

[1.7] Paragraphs 80-82.

[2] The press release of the Financial Sector Conduct Authority dated 14 July 2022, is admitted into evidence.

[3] The costs of this application are to be costs in the cause.

**D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 29 December 2023.

Heard: 19 October 2023.

Delivered: 29 December 2023.

APPEARANCES:

For the applicants: Adv H J De Waal SC.

Instructed by: Abrahams Kiewitz Inc.

For the respondents: Adv. JPV McNally SC, Adv. S Scoot.

Instructed by: Webber Wentzel.