



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO: **A158/2020**

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

Date: 14 APRIL 2023

In the matter between:

**SPEICAL OPS 99 (PTY) LTD**

Appellant

and

**BEAGLE WATCH ARMED RESPONSE**

First Respondent

**PHUMLANI MKHIZE**

Second Respondent

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**JUDGMENT**

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**[1] DE VOS AJ (Van der Westhuizen and Phahlane JJ concurring)**

[1] The appellant and the first respondent are competitors in the private security industry. The second respondent is a security officer. The parties are in dispute about statements the respondents made about the appellant. The sting of the statements are that the applicant is operating unlawfully.

[2] The statements are based on the second respondent's knowledge of the appellant's business. The second respondent worked for the appellant and gained knowledge

from this employment. The first respondent came to learn, through the second respondent, that the appellant was not operating lawfully. The respondents used the statutory complaints mechanism of the Private Security Industry Regulation Act 56 of 2001 to request the Private Security Industry Regulatory Authority ("the Regulator") to investigate the lawfulness of the appellant's operations. In this context, the respondents obtained further information regarding the appellant's non-compliance. Based on this information plus an affidavit from the second respondent, the first respondent published two statements regarding the appellant. The first was a circular for publication to certain media houses and the second was a statement to the Bryanfern Residents Association. In these statements the first respondent said that the appellant was operating unlawfully and was being investigated by the Regulator.

[3] The appellant's case is that the complaint to the Regulator and the two statements are defamatory. The appellant seeks a final interdict to prohibit future publications on the ground of defamation. The respondents rely on the defence of truth and public interest to resist the interdict.

[4] In the court a quo, the appellant was unsuccessful in proving the requirements for a final interdict. The Court a quo held that the appellant had not proven a clear right or the absence of an alternative remedy. The appellant was however granted leave to appeal to this Full Bench. The sole issue for consideration is whether the appellant has satisfied the requirements for a final interdict.

[5] The first requirement to consider is whether the appellant has established a clear right. The appellant contends that the sting of the statements are that it is operating its business unlawfully. The circular contained allegations that the first respondent feels it "must advise residents of a serious risk" and that it believes that "the residents may be exposed to the risk of poorly trained officers" and that the first respondent is "deeply concerned for the safety of the clients and staff" of the appellant.

[6] The statement to the Bryanfern Residents Association is along the same line and reads:

"Having recently employed an ex-Special Ops 99 security armed response officer we are reliably informed that Special Ops 99 is and has been conducting business unlawfully in that:

Whilst Special Ops 99 is registered with the compulsory PSIRA provident fund, they have been flagged by the administrators of the fund as non-compliant. All employers and employees must according to the law, participate in the fund. Special Ops 99 is required to contribute to the provident fund and is required to participate in the fund. Special Ops 99 is

required to contribute to the provident fund and is required to deduct the same amount from its employee. Failure to do so, results in the employees and reaction officers not having any risk benefits, including death, permanent disability and funeral benefits.

The gravity of the above unlawful conduct is such that such violation attracts imprisonment of up to 10 years or a fine of up to R 10 million.

Significantly, we, in concurrency with the PSIRA Act and Regulations consider the unlawful and unjust treatment of employees of security service providers to constitute a risk to staff and customers ...

We draw your attention to the unlawful conduct of Special Ops 99 in the discharge of our duty to you and in compliance with the PSIRA Act and the PSIRA Code of Conduct.

We have drawn the PSIRA Authority's attention to the unlawful conduct of Special Ops 99 and the matter is currently under investigation. We also note that in your previous correspondence to Bryanfern Residents you indicated that your due diligence in response to Special Ops 99 was successful."

[7] The court a quo accepted that the statements were, prima facie, defamatory. This Court is willing to assume that the statements can diminish the good name of the appellant in the eyes of a reasonable person and are consequently defamatory.

[8] The respondents therefore attract the onus to prove that the sting of the statements are true and in the public interest. The defence requires that the respondents have to lay a "substantial foundation" for the statements. The Supreme Court of Appeal in *Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd*<sup>1</sup> held that the mere say so of a respondent would not suffice to prevent a court from granting an interdict. What is required is that a sustainable foundation be 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.<sup>2</sup> The Court held that it is not sufficient simply to state that at a trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis. The authority of *Herbal Zone* is appropriate as the case, similar to what is before us, relates to averments made against a competitor, with allegations containing overtones of criminality and in the context of final interdict relief being sought.

[9] The Court, in *Herbal Zone*, concluded that a sustainable foundation for the defence of truth and public interest had been laid. The Court held -

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<sup>1</sup> *Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others* (204/2016) [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) (10 March 2017) at para 38

<sup>2</sup> *Herbal Zone* (above) para 38

"There is no need for us to determine whether that defence will succeed at trial. But it is a colourable defence and a factual basis has been laid for it that cannot be rejected out of hand."<sup>3</sup>

- [10] This Court has to determine whether it has before it a colourable defence. Applying this test, the Court considers the evidence presented by the respondents. The respondents factual foundation consists, in the main, of several pillars. First, the respondents present an email from Mr Tony Botes, the National Administrator of the Security Association of South Africa (an employer's organisation) dated 12 November 2019. The email relies on a payslip from Special Ops 99 and states that "it is blatantly obvious" that the appellant is "grossly non-compliant with SD 6" in that it does not contain "overtime, Sunday time, no statutory provident fund deductions, no cleaning allowance and no special allowance".
- [11] Second, the respondents provide an email from Ms Wanda Ndabeni, a Legal Officer at the Provident Fund of 13 November 2019. Ms Ndabeni writes that the appellant's contributions are "not frequent and the last contribution was received on 31 October 2019 but without the submission of a schedule". The PSIRA Act requires contributions to the Provident Fund and the failure to contribute amounts to a criminal offence.
- [12] Third, a certificate from the Regulator which indicates that there is an amount of roughly R 50 000 in the form of interest for late payments still outstanding from the appellant. The appellant has not explained why there is interest levied for late payment or disputed the interest or that it is outstanding.
- [13] Fourth, the second respondent's payslip. The payslip shows that there is no deduction and no contribution to the Provident Fund. The failure to make the necessary deduction and contribution, is not disputed. The appellant laid the blame for this at the feet of the second respondent, claiming the second respondent did not provide certain information. However, during the course of the proceedings, the appellant did manage to register the second respondent and the deductions were made. The registration however predates the second respondent starting employment with the appellant and appears to have been possible without any indication that the outstanding information had been provided.
- [14] Fifth, the first respondent raises questions about the appellant's registration with the Regulator and Provident Fund. The appellant's version is that it was registered as a company in 2014 and registered with the Regulator in 2016. Section 20(1)(a) of

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<sup>3</sup> Herbal Zone (above) para 39

PSIRA provides that no person may render a security service for remuneration unless registered. The respondents contend that even on the appellant's version, it acted in contravention of section 20(1)(a) of PSIRA for two years. The first respondent contends that a contravention of this section attracts a penalty and constitutes a criminal offence.

[15] Sixth, the first respondent points to the date on which the appellant registered with the Provident Fund. On the appellant's version it was registered with the Provident Fund on 22 August 2012. The version is at odds with the appellant's contention it was registered as a company only in 2014. On the appellant's version it registered with the Fund before it was registered as a company.

[16] Seventh, the Regulator inspected the appellant and called for a host of outstanding information in order to determine whether the appellant was operating lawfully.

[17] The appellant disputes some of these and presents an updated report from the Regulator. Neither the Report nor the appellant's version provides a basis on which the Court can, out of hand, dismiss the respondents' defence. When the respondents' evidence is viewed cumulatively, as it must be viewed, the evidence stacks up to meet the threshold of a colourable defence that cannot be rejected out of hand. The evidence arises from different sources, an employer's organisation, the Regulator and the Provident Fund. The factual foundation is bolstered by objective evidence. The respondents have therefore laid a sustainable foundation for the defence of truth and the public interest. The appellant has failed to prove it has a clear right to the relief sought. The failure to meet the threshold of a clear right is sufficient to dismiss the appeal on its own. The Court however considers the remainder of the requirements for purposes of providing a full set of reasons.

[18] The next requirement the appellant has to satisfy is to show it has no alternative remedy. The possibility of an alternative remedy plays a weighty role in the context of the relief sought in this matter. The interdict sought is directed at preventing the party interdicted from making statements in the future. If granted it impinges upon that party's constitutionally protected right to freedom of speech. For that reason such an interdict is only "infrequently granted" and the courts are cautious in granting this relief.<sup>4</sup> Generally, a party injured by speech can ordinarily claim damages in due course and would have an alternative remedy available. Our courts have held that an award of damages is "usually capable of vindicating the right to

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<sup>4</sup> Herbal Zone (above) para 36

reputation" and an "anticipatory ban on publication will seldom be necessary for that purpose."<sup>5</sup>

[19] The appellant has to show why, on these facts, an anticipatory ban is necessary and explain to the Court why it will not be able to obtain relief through a damages claim. The appellant has provided only vague and generalised allegations. The allegations are that an action in due course would not cure the harm and that the "proverbial horse has already bolted". The factual foundation for this is not provided. No basis has been provided why damages would not be an effective remedy. The appellant has failed to indicate the absence of an alternative remedy. On this basis also, the appeal falls to be dismissed.

[20] The Court however, for purposes of fullness, considers the last requirement of an interdict, being a reasonable apprehension of harm. The Court finds itself in the same position as the Supreme Court of Appeal in *Herbal Zone* where the Court held -

"no attempt was made to show that Herbs Oils had suffered loss as a result of the publication of the advertisements and circular, much less that it would suffer irreparable harm in the future by further publications of such material. Nor did it allege that damages would not be an adequate remedy for any such publication. Indeed the third respondent's founding affidavit entirely lacked allegations in regard to those two elements of a claim for an interdict."<sup>6</sup>

[21] Similarly, in this case, the appellant has provided only vague and generalised allegation that the appellant has "already suffered reputational harm". There are no allegations that the appellant has lost any clients or any income. In fact there is no allegation of concrete loss suffered. There is no factual basis on which the appellant can reasonably apprehend any future harm.

[22] The Constitutional Court in *Oak Valley*<sup>7</sup> has reaffirmed that a reasonable apprehension of injury has been held to be one which a reasonable person might entertain on being faced with certain facts. The Court has to make this

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<sup>5</sup> *Midi Television t/a ETV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA); 2007 (2) SACR 493 (SCA); 2007 (9) BCLR 958 (SCA); [2007] 3 All SA 318 (SCA) para 20 quoted with approval in *Herbal Zone* para 36

<sup>6</sup> *Herbal Zone* para 36

<sup>7</sup> *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* (CCT 301/20) [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) (1 March 2022) para 19

determination "on the basis of the facts presented". No such facts were presented to this Court.

[23] The appellant has had ample opportunity to place concrete allegations regarding loss before this Court. Whilst the appellant can be excused for not raising such concrete allegations of loss in its founding affidavit in the context of urgent proceedings where this matter originated, the same cannot be said for its failure to raise such allegations in the replying affidavit, or the supplementary affidavit filed three months after the urgent application. In fact, by the time the appeal came before this Court the appellant had had more than three years to place such evidence before the court - yet none was forthcoming. The appellant has not pleaded any clear facts - despite several opportunities to do so - that it has suffered harm and the factual basis on which it apprehends harm in future.

[24] Lastly, the Court turns to costs. The appellant abandoned three quarters of the relief it sought, the day before the matter was heard in court. The respondents seek punitive costs for the late withdrawal of the relief sought. The appellant contends it had to prepare to defend on these grounds. The Court expresses its displeasure with the lateness of the withdrawal and acknowledges that it must have resulted in unnecessary costs incurred for the respondents. The appellant was provided an opportunity to respond to whether it would be appropriate to grant punitive costs in this matter. Its response was that it withdrew this relief as a result of a development in the case law. The development however, it conceded, was not recent and the appellant could not provide any explanation for the lateness of the the abandonment. The Court's displeasure results in a punitive costs order against the appellant.

#### Order

[25] In the result, I propose the following order:

- a) The appeal is dismissed.
- b) The appellant is to pay costs as between attorney and client.



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**I DE VOS**  
**ACTING JUDGE OF THE HIGH COURT**

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 14 April 2023.*



**APPEARANCES:**

Counsel for the appellant:

**Adv. J Roux SC**

**Adv. C Jacobs**

Instructed by:

Kyriacou Attorneys Inc

Counsel for the Respondent:

**Adv. A Swanepoel SC**

**Adv. L Friedman**

Instructed by:

Douglas Mccusker Attorneys

Date of the hearing:

25 January 2023

Date of judgment:

14 April 2023