Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

Case Number: 61891/21

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

[redacted]

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E.M. KUBUSHI **DATE: 12 April 2024**

In the matter between:

MAHLODI SAMUEL MUOFHE APPLICANT

and

SETHLOMAMARU ISAAC DINTWE IN HIS CAPACITY AS INSPECTOR GENERAL OF INTELLIGENCE RESPONDENT

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 e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 12 April 2024.*

JUDGMENT

KUBUSHI, J

[1] The Applicant, Mahlodi Samuel Muofhe ("Mr Muofhe"), the former Director of State Security Agency of the Republic of South Africa, Domestic Branch (SSA), seeks, in this application, a declaratory order in terms of section 38 of the Constitution of the Republic of South Africa Act ("the Constitution"),[1] and an order of constitutional damages against the Respondent. The basis of Mr Muofhe's claim is that the Respondent, Sethlomamaru Isaac Dintwe ("Mr Dintwe"), the erstwhile Inspector General of Intelligence of the Republic of South Africa (the IGI), violated Mr Muofhe's constitutional rights to human dignity and privacy when he confirmed in a statement made during a television interview that he (Mr Dintwe) was investigating Mr Muofhe for an allegation of falsifying his qualifications. At the time when the statement complained of was made Mr Muofhe was the current Director of the SSA, and Mr Dintwe was the incumbent in the IGI position, having been duly appointed in that capacity in terms of section 7 of the Intelligence Services Oversight Act (as amended) ("the Act").[2]

[2] The genesis of Mr Muofhe's claim is an anonymous undated complaint received by the office of the IGI during August 2020 accusing Mr Muofhe of impropriety, and amongst other issues raising the question of the falsification of Mr Muofhe's academic qualifications and his admission as an advocate of the High Court of South Africa. Subsequent to receipt of this complaint, Mr Dintwe was on 10 November 2020 interviewed by the ENCA television station on the news bulletin which was headlined as 'SSA DOMESTIC DIRECTOR MAHLODI MUOFHE INVESTIGATED FOR FALSIFYING HIS QUALIFICATIONS'. In the said interview, Mr Dintwe was asked to confirm whether his office was investigating the said allegations of impropriety against Mr Muofhe – which he confirmed.

[3] The gravamen of Mr Muofhe's complaint is that Mr Dintwe, whose functions and duties are regulated in terms of the Act, breached some of his statutory duties, in particular, section 7(8)(b) of the Act, when he confirmed in the said television interview that his office was investigating Mr Muofhe for falsifying his academic qualifications and his admission as an advocate of the High Court of South Africa. According to Mr Muofhe, this conduct of Mr Dintwe, resulted in Mr Dintwe violating Mr Muofhe's fundamental rights contained in sections 10 and 14 of the Constitution that deals with

[1] Act 108 1996.
[2] Act 40 of 1994.

the rights to human dignity and privacy, respectively. It was argued on behalf of Mr Muofhe that to the extent that certain principles of the common law do not accommodate certain rights which may be peculiar to a constitutional state, our laws do allow for a remedy for a person like Mr Muofhe, in terms of section 38 of the Constitution, to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and a court may grant appropriate relief, including a declaration of rights.

[4] Section 7(8)(b) of the Act provides that the IGI may, if the intelligence or information received by him in terms of section 8(a) of the Act is subject to any restriction in terms of any law, disclose it only (a) after consultation with the President of the Republic of South Africa and the Minister responsible for the service in question; and (b) subject to appropriate restrictions placed on such intelligence or information if necessary; and (c) to the extent that such disclosure is not detrimental to the national interest.

[5] Mr Muofhe avers in his founding papers that Mr Dintwe never consulted with the President or the Minister before making the disclosure about him in the television interview. And, in disclosing the private information about him without informing the President or the Minister, Mr Dintwe gave no regard at all to whether the disclosure is detrimental or not to the national interest. According to Mr Muofhe, the disclosure made by Mr Dintwe turned out to be detrimental to the national interest and was in breach of section 7(8)(b) of the Act and, thus, a breach by Mr Dintwe's of his statutory obligations as encapsulated in the applicable legislation.

[6] The contention is further that in breaching his statutory obligations, Mr Dintwe violated Mr Muofhe's constitutional rights to dignity and privacy. The right to privacy is said to be breached in that in his capacity as an employee and member of the Intelligence Service, Mr Muofhe had every right to have information pertaining to him and his employment kept confidential. Furthermore, Mr Muofhe alleges that the mere announcement by Mr Dintwe that he was investigating Mr Muofhe for allegedly falsifying his qualifications when he (Mr Dintwe) had not even done the most basic fact of checking, was an assault on Mr Muofhe's dignity.

[7] Mr Dintwe is opposing the application and has in the main raised a preliminary defence and various ancillary defences. The preliminary defence is founded on the fact that Mr Muofhe seeks an order for the declaration of rights and appropriate relief in the form of constitutional damages *via* application proceedings. The remedies sought are final in nature. It is Mr Dintwe's submission that these remedies cannot possibly be granted in application proceedings. The prayers, according to Mr Dintwe, are impermissible in these proceedings as they raise dispute of facts, and, thus, fall to be dismissed. In reinforcement of the submission, Mr Dintwe relies on the seminal Supreme Court of Appeal decision in *EFF v Manuel,*[3] which was reaffirmed in that court's other judgment in *NBC Holdings,*[4] where it was held that compensatory remedies cannot be granted in application proceedings.

[8] The preliminary defence ought to be dealt with first as it might be dispositive of the application as a whole. Is there material dispute of facts, the effect of which being that the relief sought cannot be decided on the papers? That is the question that ought to be determined first in this matter.

[9] It was argued on behalf of Mr Dintwe that a claim for violation of the right to human dignity and privacy cannot be determined on papers without the benefit of oral evidence where there is a material dispute of facts, and that where compensatory damages are sought there is always a dispute of facts. Mr Dintwe has denied in his papers that any dignity or privacy of Mr Muofhe has been tarnished at all by his announcement that he (Mr Dintwe) was investigating the allegation that Mr Muofhe has falsified his qualifications. Mr Dintwe, thus, argues that there is a dispute of facts and for a court to determine the issues, it has to hear oral evidence.

[10] In resisting the preliminary defence, it was argued on behalf of Mr Muofhe during oral argument that the essence of the issues in this matter are not in dispute, and that in any event, the court has a discretion that to the extent that any issue may be a subject matter of a dispute, that such issue may be referred to oral evidence, and further that, in this instance, the submission is that, definitely, the issue of damages can be referred to oral evidence, but all the other issues can be decided on the papers.

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[3] Economic Freedom Fighters and Others v Manuel 2021 (3) SA 425 (SCA) (17 December 2020) para 130.

[4] NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (399/2020 [2021) ZASCA 136 (6 October 2021) paras 19-21.

[11] The Supreme Court of Appeal in *EFF v Manuel,* to which the court was referred, was, in fact, dealing with a defamation case. That court, nevertheless, held that

> 'Motion proceedings are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise.'[5]

The principle was reaffirmed in *NBC Holdings,* which, also, was a defamation matter, that

> 'A claim for damages for defamation, whether general or special, was always unliquidated and the damages could only be determined in proceedings by way of action, or possibly in special circumstances after hearing oral evidence in application proceedings. The position has not changed as a result of courts now being empowered to grant other compensatory remedies, either in addition to, or to the exclusion of, a claim for damages.'[6]

[12] The proper process for awarding unliquidated damages was discussed in *EFF v Manuel* as follows:

> 'An unliquidated claim for damages must be pursued by institution of an action. No less so, when an aggrieved victim of a defamatory statement seeks compensation. That has always been the position and it is reflected in the Uniform Rules of Court. Uniform Rule 17(2) compels a person claiming unliquidated damages to use a long form summons and file particulars of claim, and Uniform Rule 18(10) obliges '*a plaintiff suing for damages [to] set them out in such manner as will enable the defendant reasonably to assess the quantum thereof*' and plead thereto. In respect of damages claims for personal injury the rule requires even greater specificity. Summary judgment proceedings, regulated by Uniform Rule 32, are limited to claims based on a liquid document, a liquidated amount in money, the delivery of specified movable property, and ejectment. It is not a remedy available in respect of claims for unliquidated damages'.[7] *(footnotes excluded)*

[13] The principle enunciated in the aforementioned judgments does find application in a matter dealing with a claim for constitutional damages. A claim for constitutional damages is undoubtedly a claim for unliquidated damages and is in that regard unsuited for prosecution on motion proceedings. The court in *NBC Holdings* above, stated that the position has not changed as a result of courts now being empowered to grant other compensatory remedies, either in addition to, or to the exclusion of, a

[5] Para 105.
[6] Para 21.
[7] Para 92.

claim for damages.[8] This is the position in this matter where in terms of section 38 of the Constitution the court is empowered to grant appropriate relief including a declaratory order. This proposition is affirmed by the Constitutional Court in *Fose*,[9] where the following is stated:

> 'Notwithstanding these differences, it seems to me that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed. *(footnotes excluded)*
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> For the purposes of the present case I will assume that 'appropriate relief' in s 7(4)*(a)* [now section 38] includes an award of damages where such award is required to enforce or protect chap 3 rights. What has to be decided is whether on the allegations made in the pleadings the plaintiff would be entitled to the particular damages with which the exception is concerned.'[10]

[14] It is trite that claims for unliquidated damages by their very nature involve dispute of facts. As Harms DP said in *Cadac*,[11]

> ' … motion proceedings are not geared to deal with factual disputes – they are principally for the resolution of legal issues – and illiquid claims *by their very nature* involve the resolution of factual issues.

[15] The applicant's counsel, in this matter, without regard to the Uniform Rules and established practice, in relation to the necessity of proceeding by way of an action to claim unliquidated damages, proceeded instead, on motion proceedings, and opted to seek indulgence from the court for leave to refer the damages part of the claim to oral evidence by application from the bar, then, also, after having argued for the granting of the declaratory order sought in prayer 1 of the notice of motion.

[16] It is true that a court, in motion proceedings, in terms of Uniform Rule 6(5)*(g)*, has a discretion to direct that oral evidence be heard on specified issues with a view

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[8] Para 21.
[9] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC): 1997 (7) BCLR 851; [1997] ZACC 6 (5 June 1997).
[10] Paras 60 and 61.
[11] Cadac (Pty) Ltd v Weber-Stephen Products Company and Others [2010] ZASCA 105; 2011 (3) SA 570 (SCA) para 10.

to resolving a dispute of fact or, in appropriate circumstances, to order the matter to trial. Generally, however, a court will dismiss an application when, at the time that the application is launched, an applicant should have realised that a serious dispute of fact was bound to develop.[12] Moreover, bringing application proceedings claiming relief that is not appropriate to be sought in such proceedings, will ordinarily be an *a fortiori* case.[13]

[17] It is worth noting that the Supreme Court of Appeal in *Ngomane*,[14] awarded constitutional damages to the Appellants (27 homeless people) as appropriate relief for the violation of their constitutional right to property, human dignity and privacy on application proceedings. The Appellants, in that matter, had not in their application before the court below, claimed constitutional damages, *per se*. They had approached the court below invoking the *mandament van spolie* seeking the return of their personal belongings and shelter materials, alternatively to be provided with similar shelter material and personal belongings, which were confiscated and subsequently destructed, by officials of the Johannesburg Metropolitan Police Department ("JMPD"), acting under the instructions of the Respondent. The materials and possessions were removed from a road traffic island on which the Appellants lived pursuant to a clean-up operation conducted in terms of the Respondent's Public Health By-Laws. The Appellants had, in addition, claimed that the conduct of the JMPD breached several of their constitutional rights without seeking compensatory relief. The court below did not find in favour the Appellants and dismissed the claim on the basis that the property in issue was inadequately described and had, in any event, been destroyed and could therefore not be returned.

[18] However, on appeal, the Supreme Court of Appeal, found that the conduct of the JMPD violated the Appellants constitutional rights to property rights, the right to have their inherent dignity respected and protected and the right to privacy. The court found further that such conduct should be declared inconsistent with the Constitution and, therefore, unlawful, entitling the Appellants to appropriate relief in terms of section 38 of the Constitution in the form of constitutional damages. The Appellants were, as

[12] Adbro Investment Co Ltd v Minister of the Interior 1956 (3) SA 345 (A) at 350A-B.
[13] See EFF v Manuel ibid para 114.
[14] Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another [2019] ZASCA 57 (03 April 2019).

a result, awarded R1 500 each as compensation for the wrong they were found to have suffered. The award was made without the Appellants being required to prove their damages.

[19] Of importance in this matter is that the court granted the constitutional damages not as a norm, but simply because it reasoned that an action for damages was not an appropriate remedy as, instituting a damages claim, would involve the Appellants in a costly and time consuming civil litigation in respect of property that was of objectively trifling commercial value. The judgment, as such, is no authority that compensatory relief should be sought on application proceedings.

[20] In this matter, it is unescapable that the relief sought by Mr Muofhe cannot be granted when the facts concerning the alleged breach by Mr Dintwe of his statutory duties and the subsequent alleged violation of Mr Muofhe's rights to human dignity and privacy are vehemently disputed. This is so because, on the *Plascon Evans* rule,[15] Mr Dintwe's denial of the alleged breach of his statutory duties and the ensuing violation of Mr Muofhe's constitutional rights must stand on the papers, and, if not, the application for relief must fail.

[21] Counsel for Mr Muofhe argues that the material issues are not in dispute. This, however, is not the case. What is common cause, is that the office of the IGI received an anonymous complaint accusing Mr Muofhe of impropriety, which included an allegation that Mr Muofhe falsified his academic qualifications and his admission as an advocate of the High Court of South Africa, which the IGI was investigating. It is, also, not in dispute that subsequent to receipt of the complaint, Mr Dintwe was interviewed by the ENCA television station where, in answer to a question that was put to him, he confirmed that his office was investigating the said allegations of impropriety. These common cause issues are not material to the crux of the issue before court. The crux, as stated by Mr Muofhe, is that Mr Dintwe, by his conduct when he confirmed the investigation, breached his statutory duties which culminated in Mr Muofhe's constitutional rights to human dignity and privacy being violated.

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[15] See Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

[22] These allegations are disputed by Mr Dintwe, hence the contention that there is a dispute of facts that cannot be resolved on the papers. Mr Dintwe's contention is that there was no statutory breach of his duties, all that he did when he confirmed the investigation was to perform his functions in terms of section 195 of the Constitution by exercising a high standard of professional ethics and making sure that he fosters transparency by providing the public with timely, accurate and accessible information. Mr Dintwe denies also that he violated Mr Muofhe's constitutional rights to human dignity and privacy in that Mr Muofhe's allegations do not amount to impeachment of his rights of dignity and privacy. These are material dispute of facts which loom large in the papers, and in light of the principle in *Plascon - Evans*, Mr Muofhe's allegations of breach of Mr Dintwe's statutory duties and the ensuing allegation of the violation of Mr Muofhe's constitutional rights, cannot stand on the papers.

[23] The Supreme Court of Appeal in *NBC Holdings,*[16] was correct in stating that it is risky for an applicant to bring an application procedure in respect of these kind of claims because then the *Plascon-Evans* rule will apply against them. It is clear from the papers that Mr Dintwe is disputing the allegations made by Mr Muofhe in his founding papers that in making the statement in the interview Mr Dintwe violated Mr Muofhe's rights to dignity and privacy. Mr Dintwe's counsel during his oral argument in court, confirmed Mr Dintwe's denial that he in any way, violated any of Mr Muofhe's constitutional rights when he (counsel) stated that the statement made by Mr Dintwe, simply says that the investigations are ongoing, and Mr Muofhe, as a senior official, should understand that whilst investigations are ongoing, the person being investigated is presumed not guilty until a finding has been made by a proper forum.

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[16] "[22] I fully appreciate that in a trial action the plaintiff may rely solely on the defamatory nature of the publication and the presumption that everyone has a reputation that may be harmed by a defamatory utterance or publication, for the assessment of damages. The plaintiff may give no evidence, relying on the right to lead evidence of rebuttal to refute any evidence from the defendant directed at diminishing the effect of the defamatory publication. But, if the defendant then chooses not to give evidence, the plaintiff loses the opportunity to bolster the damages by giving evidence of the effect of the defamation on their reputation and standing. Where the proceedings start by way of application the evidence has already been led. If the matter proceeds on the papers and the damage to the applicant's reputation has been placed in issue, no relief can be granted, because there is a dispute of fact on the papers and the rules governing the resolution of disputes of fact on paper apply. For that reason, it was inappropriate for the high court to grant the order it made in this case. That is the first ground upon which the appeal must succeed." (own emphasis)

[24] In *EFF v Manuel*, the court referred the determination of the *quantum* of damages suffered by the applicant to oral evidence, in circumstances where the applicant had, in the notice of motion, clearly prayed, in the alternative, for a referral of 'the quantification of the damages to oral evidence'. It did so under circumstances where the court below, when granting the award of damages, dealt cursorily with the question of damages, and 'did not pause to consider whether it should dismiss the application on the basis that this dispute ought to have been foreseen, or on the basis that that issue ought to have been dealt with by way of action. It did not deem it necessary to consider referring the issue of quantum to oral evidence as sought, in the alternative by Mr Manuel'. What about a case, like in this matter, where no such relief was sought on the papers but merely sought in argument from the bar?

[25] When all is said and done, the request on behalf of Mr Muofhe for an indulgence that the damages part of the claim be referred to oral evidence, is a concession on his behalf that there is a material dispute of facts and that the issues cannot be determined without the hearing of oral evidence.

[26] In response to an answer to a question from the bench pertaining to the effect of the *Plascon - Evans* rule[17] in the event that the court had to resolve any dispute of facts that may arise, it was conceded on behalf of Mr Muofhe that the *Plascon - Evans* rule would help in resolving the disputes, but not finally determining them as the court still retains the discretion. Fundamentally, in the exercise of its discretion when deciding whether to refer the matter to oral evidence for the determination of quantum, it is this court's view, following on the decision in *EFF v Manuel*, that Mr Muofhe, or rather his legal representatives ought to have foreseen that a dispute of facts would arise. Where compensatory remedy is sought, like in this matter, a dispute of facts is likely to arise. A litigant, in such circumstances, must approach court on action proceedings, he or she fails to do so at his or her own peril. The application has, therefore to be dismissed.

[27] In respect of the question of costs, Mr Dintwe prays for costs in the event the matter in decided in his favour, which costs must include costs of two counsel. The

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[17] See Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

argument advanced on behalf of Mr Dintwe that the *Biowatch* principle[18] finds no application in the circumstances of this matter, is persuasive. The contention is that *Biowatch* should, clearly, not apply where Mr Muofhe should have followed the proper process when claiming compensatory remedy as guided by the Supreme Court of Appeal judgments in *EFF v Manuel* and *NBC Holdings*. The argument is that Mr Muofhe or his legal representatives ought to have foreseen that a dispute of facts will arise in respect of *quantum* and also in respect of a dispute about whether there has been breach of rights or not. It was argued, furthermore that *Biowatch* can only apply in a case of a non-governmental institution which is representing indigent people, and trying to advance their constitutional rights, and not in an instance where a highly sophisticated government official bringing an application with means to do so.

[28] The above factors are persuasive, an exception must be made, and costs should be granted as requested.

[29] In the premises the application is dismissed with costs, such costs to include the costs of two counsel, one senior one junior.

E M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 16 October 2023

Date of judgment: 12 April 2024

APPEARANCES:

For the Applicant:	Adv FJ Nalane SC instructed by Ntanga Nkuhlu Incorporated.
For the Respondent:	Adv M Mphaga SC instructed by State Attorney.

[18] See Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).