

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION: DURBAN

CASE NO: D3159/2019

In the matter between:

Penguin Random House South Africa (Pty) Limited First Applicant

Pieter-Louis Myburgh Second Applicant

and

Nexor 312 (Pty) Limited First Respondent

Vikash Bharathlall Narsai Second Respondent

Judgment

Lopes J

[1] On the 16th April 2019 the respondents in this application, Nexor 312 (Pty) Limited and Vikash Bharathlall Narsai ('the plaintiffs') instituted action out of this court against the applicants, Penguin Random House South Africa (Pty) Limited ('Penguin') and Pieter-Louis Myburgh ('Mr Myburgh') ('the defendants').

[2] The plaintiffs' cause of action is that during March or April 2019 Penguin published a book written by Mr Myburgh. The book was published throughout the Republic of South Africa, and made available in electronic form, both nationally and internationally. In the defendants' plea they described the book

as ‘a work of investigative journalism primarily about the former Premier of the Free State Province and the current Secretary General of the African National Congress, Ace Magashule’, and the book exposes alleged impropriety, maladministration and corruption. The plaintiffs take exception to the contents of chapter 16 of the book which is entitled, ‘Zuma’s Vrede “Thank you-fee”’.

[3] The plaintiffs aver that various statements in chapter 16 allege corrupt and dishonest activities by them, in their involvement with government contracts. In their particulars of claim, they identify twelve specific portions of chapter 16, which they aver are defamatory of them, and were intended to convey that: they were participants in corrupt activities; they paid bribes to secure access to tender work; they unlawfully obtained work outside of lawful tender processes by way of corrupting government officials; and that they were participants in schemes to defraud the government, by siphoning-off funds intended for housing projects, for the benefit of corrupt government officials and themselves. They also allege that the allegations are false. In the result they claim that they have each suffered general damages in the sum of R5 million.

[4] On the 19th November 2020 the defendants applied on notice of motion in this court for an order in terms of rule 33(4) of the Uniform Rules of the High Court, for the following issues to be determined separately from the other issues in the trial:

- (a) whether the contents of chapter 16 are defamatory of the plaintiffs;
and
- (b) if so, in what respects the chapter and the statements outlined by the plaintiffs in their particulars of claim are defamatory of the plaintiffs.

The application is opposed.

[5] Sub-rules 33(4)-(6) provide:

‘(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.’

[6] As I understand the application of the rule to this matter, I am obliged to make such an order because it is sought by the defendants, unless I am of the view that the issues cannot conveniently be decided separately.

See: Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd 1995 (4) SA 128 (T) at 132 C-D.

When the rule refers to ‘unless it appears that the questions cannot conveniently be decided separately’ it refers to convenience, both to the court and to the parties. As set out by King J in *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at page 939Iff:

‘There are obvious advantages and disadvantages to the Court and to the parties. As far as concerns the Court, part-heard matters are at the very least a nuisance to the Judge concerned who may, for instance, find that the hearing of the quantum issue has been set down on a date when he is in the middle of hearing another matter. It also

adds to the burden of the Judge President (or his delegate) of arranging the roll and allocating Judges.

The plaintiff is clearly disadvantaged by reason of the fact that he is kept out of his money (assuming what the plaintiff is entitled to assume, namely that he will achieve eventual success in the action). This can involve a lengthy delay in the event that the plaintiff succeeds on the merits and the defendant takes the decision on appeal, which may be done prior to the hearing on quantum. See *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A). It may also be mentioned in this context that a suggestion made on plaintiff's behalf that defendant agree to pay interest on the award (assuming plaintiff's eventual success) from the date of judgment on the merits, did not find favour with defendant.

From defendant's point of view the obvious disadvantage is the incurrance of costs, which I accept will be considerable, involving as it will the evidence of experts of various disciplines, in a matter where plaintiff may well be non-suited.

"Convenient" connotes not only "facility or ease or expedience", but also "appropriateness": the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned. See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363D.'

[7] In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3, Nugent JA made the following remarks about separating issues:

'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a

whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the “merits” and the “*quantum*” is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience, it is only in the simplest of cases that the initial *consensus* survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, a trial Court should ensure that the issues are circumscribed with clarity and precision.’

[8] What I am required to consider then, is whether it will be convenient for the court hearing the action firstly to determine whether the contents of chapter 16 of the book are defamatory of the plaintiffs, and if so, in what respects the chapter and the statements alleged therein are defamatory of the plaintiffs.

[9] In the founding affidavit by the defendants’ attorney (Mr de Klerk), he states at paragraph 7:

‘The defendants contend that the Chapter concerned do not have defamatory meaning in respect of the plaintiffs. (sic). This defence is raised seriously and *bona fide* on the basis of well-established Constitutional Court and Supreme Court of Appeal precedents. In so far as this is necessary, this will be addressed at the hearing of the matter and it will be demonstrated that the defence has very real prospects of success.’

Mr de Klerk then refers to aspects of convenience in the interests of justice, and deals briefly with the objections by the plaintiffs.

[10] I do not intend to opine on whether the contents of chapter 16, or any of the individual averments therein, are in fact defamatory of the plaintiffs. That is

not my function. I am merely to decide whether it would be convenient to separate the issues.

[11] In the defendants' plea they deny that the portions identified by the plaintiffs, and, indeed, the whole of chapter 16 taken within the context of the book, are *per se* defamatory of the plaintiffs. The defendants also deny the allegations that the statements carry the additional sting which, in addition, may define the defamation.

[12] In addition to the blanket denials, the defendants maintain in the alternative that the statements constitute statements of facts which are true or substantially true, and that the publication of them is in the public interest. They also aver that insofar as the statements constitute comments or matters of opinion, those comments are protected because the comments or opinions were honestly expressed, fairly and in good faith, and on the basis that they are true or substantially true and are matters of public interest. There is a further defence that the statements were published without '*animus iniuriandi*', or negligently by reason of the public interest in the exposing of corruption on the part of senior and powerful politicians. They claim a constitutional entitlement to have published the statements.

[13] But would it be 'convenient' to determine the issues of whether the statements are defamatory, and if so, in what respects? A determination of whether a statement is defamatory, must surely encompass the defences to the defamation as well.

[14] If a court hearing the separated issues as sought in the notice of motion were to decide that any of the cited statements were not defamatory, that would

be the end of the matter as far as those statements were concerned. In that way, a separation could contribute to the ‘convenience’ of the trial, in the sense of contemplating what would be left to be established. As the defences raised by the defendants involve the issues of truth and public interest, a decision as to whether the statements are defamatory could not be made without a proper consideration of truth and public interest. That means it would be necessary to lead evidence on those issues.

[15] If the issues were to be separated, there is the possibility that the same witnesses who would give evidence regarding the defamation, would have to testify on the question of the quantum of the damages in any event. This may entail an assessment of the plaintiffs’ reputations, but much of that would surely be covered in the separated issue anyway. In those circumstances there would be little utility in separating the issues and having to hold separate hearings, with the presiding officer having to deal with the credibility of any witness more than once. That would clearly be undesirable.

[16] I accordingly asked Mr *du Plessis* SC, who appeared for the defendants together with Ms *Pudifin-Jones*, whether they wished to have to have a separated hearing on the issue whether the statements made were *prima facie* defamatory. Mr *du Plessis* did not answer my enquiry, but submitted that it would be convenient to separate the issues because:

- (a) the hearing of a great deal of evidence would be avoided;
- (b) the court would only have to decide on the ordinary meaning of the words used. As the test for whether language is defamatory is an objective one, no evidence could be led at the hearing of the separated issue to explain the meaning. In *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice*

Centre as amici curiae) 2011 (3) SA 274 (CC) para 90, Brand AJ stated:

‘The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.’ (Footnote omitted.)

- (c) even though the plaintiffs suggest that the words have a secondary meaning that is not what they have pleaded, having pleaded only that the words are *per se* defamatory or impliedly defamatory. The leading of evidence on any secondary meanings would be impermissible;
- (d) if there is to be no separated hearing, the defendants would have to lead evidence for ‘days and days’. This evidence would relate to the remaining issues which would arise after a court had decided whether the words used were defamatory – truth and public benefit, protected comment and reasonable publication;
- (e) if no separate hearing was held, discovery would result in many unnecessary documents being dealt with, including, possibly, the State Capture Report.

[17] Mr *du Plessis* also submitted that the practice of holding a separate hearing in defamation cases is confirmed in *Sindani v Van der Merwe and others* [2002] 1 All SA 311 (SCA), where the court *a quo* decided, as a first and separate issue, whether the article in question was defamatory. This approach was also adopted in *Netshandama v NEHAWU and another* (26096/2014) [2016] ZAGPJHC 330 (9 December 2016), a judgment of Van der Linde J.

Although the order was granted by consent, the learned judge heard the separated issues, and, I have no doubt, would not have agreed to the separation and later heard the argument, unless he considered it appropriate for him to do so.

[18] Reference was also made to *The Lord McAlpine v Sally Bercow* [2013] EWHC 981 (QB), at least as far as English Law is concerned. Mr *du Plessis* submitted that our law follows English procedural laws with regard to defamation. The dominant practice is to determine defamation as a primary issue. This involves an objective determination of the meaning of the words used, with no evidence being admissible with regard to the meaning thereof. The Supreme Court of Appeal in *Council for Medical Schemes v Selfmed* (561/2010) [2011] ZASCA 207 (25 November 2011) confirmed the contextual approach to the interpretation of allegedly defamatory words, and the wisdom of separating issues in this regard (Mr *du Plessis* submitted that separation it was ‘the dominant practice to determine defamation as a primary issue’. What Tugendhat J actually said was ‘The question of its meaning is being tried separately as a preliminary issue. That is not uncommon in libel actions nowadays, in cases where it is agreed that the trial will be by a judge sitting without a jury.’).

[19] Mr *du Plessis* pointed out that the plaintiffs had raised the issue of a sting in paragraph 16 of their particulars of claim, and they would have to adduce evidence to prove it. In *Le Roux*, Brand AJ had distinguished between primary and secondary meanings of statements – a primary meaning, which is the ordinary meaning given to a statement in its context by a reasonable person, and a secondary meaning, which is a meaning other than the ordinary meaning, also referred to as an innuendo, derived from special circumstances which can be

attributed to the statement only by a person who has knowledge of the special circumstances (para 87). An implied meaning is not a secondary meaning or innuendo, but is part of the ordinary meaning. The special circumstances must be pleaded.

In *Selfmed*, Van Heerden JA stated at para 60:

‘As no secondary meaning is relied upon by the respondents, the question is how a reasonable person of ordinary intelligence forming part of the abovementioned group would construe the statements complained of.’

The ‘abovementioned group’ referred to was the group of people who would have understood who was being referred to in the writing. In this matter, that would include every reader of the book.

[20] On the other hand, a ‘sting’ in a statement may be defamatory *per se*. This may be emphasised by paraphrasing the statement, which is referred to as a quasi-innuendo, which does not have to be pleaded, but by which meaning the plaintiff is bound (*Le Roux* para 88).

[21] Mr *Kissoon-Singh* SC, who appeared for the plaintiffs, together with Ms *T Palmer*, submitted that the defendants had not clarified what they sought in their notice of motion – the reference in the prayers to the notice of motion to ‘defamatory’ did not state ‘*per se*’ defamatory, (as I had enquired, and to which question I had received no reply), or whether the separated issue was to apply to whether the statements were defamatory in law – ie, after all defences had been exhausted. If one of the issues involves the leading of evidence, what is the effect of that on the time which will be used for deciding the separated issues.

[22] Mr *Kissoon-Singh* also submitted that:

- (a) there would be no point in separating any issue unless the decision of the court hearing the issue, disposed of the issues. This would not necessarily be the position in this matter, and two hearings may result in the same issue having different decisions by two different judges;
- (b) the background of the book, in which light the allegations must be viewed, deals with corruption, into which allegations the plaintiffs are drawn;
- (c) the dicta in *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province and another* 2020 (3) SA 391 (ECB) set out that the court hearing a separation application must have sufficient information before it to be in a position to determine ‘convenience’; that there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation; that there must be a reasonable prospect that the alleged advantages would occur; and that the issues to be heard separately are clearly circumscribed in the order;
- (d) a duplication of evidence should be avoided. In this application a duplication of evidence was entirely foreseeable. This is because the plaintiffs have pleaded multiple causes of action and there are several possible defences to each cause of action. Careful thought must be given to how the issues interrelate, and accordingly, whether separation is appropriate.

[23] In their particulars of claim, there are twelve statements alleged by the plaintiffs to be defamatory of them. They also allege that the chapter, read

within the context of the book as a whole, are defamatory of them. They allege that the twelve extracts, in particular, are defamatory of them because:

- (a) the statements suggest that the plaintiffs are guilty of corrupt and dishonest behaviour;
- (b) alternatively, the statements impute (expressly or impliedly) dishonest and corrupt activities by the plaintiffs; and
- (c) the chapter carries the additional sting that the plaintiffs are dishonest and corrupt.

[24] The plaintiffs do not plead that there are any circumstances which would have the effect of imputing a secondary meaning or innuendo to any of the statements. It is only in the plaintiffs' heads of argument that they record that evidence is necessary when a secondary meaning is pleaded. This submission relies on paragraph 11 of the plaintiffs' answering affidavit which states that 'it is self-evident that the plaintiffs rely not only on the ordinary meanings of the words used in the offending chapter but also on the secondary meanings thereof in the context of the chapter and of the book as a whole'. The problem is that the plaintiffs have not pleaded any secondary meanings in their particulars of claim. Where nothing is pleaded to indicate a secondary meaning or an innuendo, the interpretation of the allegedly defamatory statement will be of the ordinary meaning. However that the pleadings could be amended. Mr *Kissoon-Singh* also submitted that evidence could be led under the guise of the sting.

[25] If some of the twelve allegations of defamation are dealt with in a separated issues hearing, the separation will not have achieved the object of shortening the trial. If they are not all dealt with in favour of the defendants (as they appear to anticipate), it would seem that the effect will not be a

considerable narrowing of the issues, with a consequent saving of costs, particularly with regard to discovery, but rather the converse. That only some findings are determined, will not narrow the issues, time and effort spent on preparation, because the allegedly defamatory statements all arise out of the same chapter of the book, and deal with a single subject – the housing project. So, even if some of the statements are struck out, but others are not, I do not see that that would result in convenience. What will result is two hearings, instead of one. Those hearings could both be protracted because of the manner in which the defendants pose their defence. This must surely be so because of the fact that the defendants have pleaded numerous defences which they will seek to demonstrate should any of the statements be found to be defamatory. In my view, *Netshandama* and *Sindani* are distinguishable.

[26] In *Sindani* the learned judge a quo himself elected to separate the issues, in circumstances where very little evidence was led. Reliance was placed on the fact that the statement in question was *per se* defamatory, and the learned judge held it was not. The Supreme Court of Appeal tacitly accepted the wisdom of having separated the issues.

[27] In *Netshandama* the issue was separated by van der Linde J, as follows:

‘the order made in terms of rule 33(4) was to separate from the remainder of the issues that arise between the parties on the pleadings, the following issues:

- (a) Whether the letter dated 29 August 2013 annexed to the particulars of claim at page 14 of the pleadings bundle is *per se* defamatory of the plaintiff; and, if so
- (b) Whether the defence of qualified privilege as pleaded by the defendants at paragraphs 3 to 9 of their plea would, if proved, constitute a defence to the plaintiff’s claim.

The remainder of the issues that arise between the parties on the pleadings were postponed for later determination, if necessary.’

The defamatory matter concerned a letter, the publication of which was very limited. The issues concerned similar issues to this matter, but the scope seems to have been much narrower. In those circumstances, the separation of issues is easier to understand.

[28] In this matter, there seems no merit in determining at the outset, whether the twelve statements (and, indeed, any others, alleged to reflect the chapter within the context of the book) are defamatory.

[29] I accordingly grant the following order:

- (a) The application in terms of rule 33(4) of the Uniform Rules of this court is dismissed.
- (b) All questions of costs are reserved for decision by the court hearing the action.

Lopes J

Date of hearing: 26th January 2022.

Date of judgment: 28th February 2022.

For the applicants: M du Plessis SC, with S Pudifin-Jones (instructed by Willem de Klerk Attorneys).

For the respondents: AK Kissoon-Singh SC, with T Palmer (instructed by V Chetty Incorporated).