THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 335/2019

In the matter between:

PARKS TAU **APPELLANT**

and

HERMAN MASHABA **RESPONDENT**

AFRICAN NATIONAL CONGRESS WOMEN'S LEAGUE **SECOND RESPONDENT**

CONGRESS OF SOUTH AFRICAN TRADE UNIONS **THIRD RESPONDENT**

Neutral citation: *Tau v Mashaba and Others* (335/2019) [2020] ZASCA 26 (26 March 2019)

Coram: MAYA P, ZONDI, MOLEMELA AND SCHIPPERS JJA AND GORVEN AJA

Heard: 4 March 2020

Delivered: 26 March 2020

Summary: Civil Procedure – motion proceedings – parties to define and court to adjudicate dispute – court not empowered to grant relief not sought – interdict pending defamation action infrequently granted – defence of justification – sustainable foundation in papers – interdict not justified.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van der Linde J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:
'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Schippers JA (Maya P, Zondi and Molemela JJA and Gorven AJA concurring):

[1] It is often said that one has to be thick-skinned to survive as a politician. But harsh criticism does not include unlawful action. In this case it was alleged that the appellant, a member of the African National Congress (ANC) and the former Mayor of the City of Johannesburg Metropolitan Municipality (the Municipality), had acted unlawfully by making defamatory statements concerning Mr Herman Mashaba (the respondent), his political rival and a member of the Democratic Alliance (DA), who succeeded him as the Mayor of Johannesburg.

[2] In an address at the funeral of a fellow councillor on 28 August 2016, the appellant said the following concerning the respondent:

'The City of Johannesburg is today led by a man that believes that the women who are senior executives in the City of Johannesburg prostituted themselves to be in the jobs that they are in.

He says that in fact for them to earn the positions that they are in they had to sleep with the leadership … .
We have heard views from the Mayor Herman Mashaba who says that in fact if it were up to him he would not want to be black.' (The initial statements.)

[3] Pursuant to the publication of the initial statements, on 7 October 2016, the third respondent, the Congress of South African Trade Unions (COSATU), delivered a memorandum of grievances to the respondent's office in which it noted his 'ill-informed comments' which it said were 'sexist in regard to women leadership in our country and the City of Johannesburg in particular'. Contrary to the respondent's assertion, COSATU did not repeat the initial statements. COSATU urged the respondent to desist from making sexist comments that undermined women; and demanded that his administration treat women with dignity and respect, and that he issue a public apology for his sexist statements. On the same day the second respondent, the African National Congress Women's League (ANCWL), issued a media statement in which it repeated the initial statement to the effect that women had to sleep with the leadership in order to be appointed to their positions. The ANCWL called on political parties in the Municipality who valued women as equal citizens of this country, to pass a vote of no confidence in the then coalition government of the Municipality. The statement recorded that it would be embarrassing for political parties in the Municipality 'to allow the City to be led by a person who views women as nothing else but sex traders in exchange for positions'.

[4] Two months after the appellant had uttered the initial statements, on 1 November 2016, the respondent launched an application in the Gauteng Division of the High Court, Johannesburg, for the following relief:
'Pending the institution of an action for defamation and damages, which must be instituted against the first respondent within 60 days of the granting of the order herein:

1. Ordering the respondents:

1.1 forthwith to retract the offending remarks;

1.2 to refrain from repeating such and/or similar remarks concerning the applicant in future;

1.3 to issue an unconditional apology to the applicant framed along agreed terms; alternatively terms to be imposed by the court;

1.4 to ensure the widest possible publication of the retraction and/or apology envisaged in 1.1 and 1.2 above.'

[5] The respondent alleged that the initial statements were false and were intended to convey, inter alia, that he was sexist and a bigot; that he was racist, anti-black and viewed black people as inferior to others; and that he believed that female executives in the Municipality were prostitutes and otherwise not qualified to hold their positions. The respondent said that he did not protest against similar false statements at the time of the 2016 local government elections, because he 'accepted that as part of their campaign, parties make all sorts of outrageous statements to attract voters'.

[6] The appellant opposed the application. He said that he and the respondent often made statements and comments about each other's political stances because they were political opponents. The initial statements had to be viewed in that context. Prior to and after the 2016 local government elections, the respondent had publicly criticised the ANC's policies in government and in the Municipality. Importantly, the appellant alleged that the initial statements were a response to the following statement made by the respondent and published in the media on 10 August 2016:

'If I had a social worker running the police, there's no way I will accept that . . .

If the wrong people are in the wrong positions, they are going to be purged. I am not apologetic about that. The days when they allowed their girlfriends to run state institutions are over.' (The offending remark.)

[7] The appellant went on to say that the offending remark was a reference to the employment practices of the Municipality; and that he understood it to mean that women appointed to lead entities of the Municipality during his tenure as mayor, 'were appointed purely on the basis of their romantic or sexual relationships with male superiors', which was 'sexist, demeaning and disrespectful of women'. The appellant alleged that the initial statements 'were a fair representation of the objectionable views expressed by the [respondent]' in the offending remark; that they did not falsely represent that remark; and that they were not defamatory.

[8] The appellant presented evidence that members of the public and interest groups had also interpreted the offending remark as being sexist and demeaning of women. He referred to an extract from the electronic publication, 'Businesslive', which had reported that pursuant to the publication of the offending remark, a group of women, supported by various organisations, including the Black Management Forum, the Young Women for Business Network, the #SexismMustFall Women's Group and the ANCWL had marched to the respondent's office. They demanded that he apologise for and withdraw the offending remark, which allegedly referred to the ANC administration; and that he make a commitment to advance gender equality in Johannesburg. The #SexismMustFall Women's Group issued a statement that the offending remark was 'poisonous and threatened to taint the reputations of women'.

[9] The respondent did not deny that he had made the offending remark. In his capacity as the DA's mayoral candidate, prior to the formation of a coalition government in the Municipality, he had allegedly demanded documents concerning recent appointments to key positions in the Municipality. The respondent however alleged that the offending remark was not made with

reference to employment practices in the Municipality under the appellant's leadership, but that it was, in his words, 'a general reference using the example of South African Airways, where allegations of a politician's girlfriend running a state institution abound'.

[10] As regards the statement that if it were up to him the respondent would not want to be black, the appellant alleged that the respondent had made various public statements which caused him to comment that the respondent 'hates being Black'. These included an interview on Radio 702 in January 2016, shortly after his appointment as Mayor of the City of Johannesburg, in which the respondent said that if he had the power, he would do away with racial classification laws and policies 'yesterday'. Also, in January 2016, the respondent was quoted in the City Press newspaper as having said, 'I am really intrigued that in South Africa today, I am still regarded as a black person'. The appellant also referred to the respondent's statements concerning the government's policies of black economic empowerment and affirmative action, in an address to Solidarity's Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination in May 2015, in which he had said, 'The notion of empowering previously disadvantaged blacks is a noble ideal, noble but racist'. The respondent had also publicly stated that poor people could not be trusted. The respondent did not deny that he had made these public statements, but alleged that his views did not render him 'anti-black', a racist'; nor did they imply that he was 'in denial about [his] obvious blackness', as he had named his company 'Black Like Me'.

[11] The appellant also referred to the reaction of members of the public and social media commentators concerning the respondent's objections to being labelled as a black person. These included opinions that the respondent's thinking

allowed politicians 'to divide South Africans along tribal lines'; and that the racially based policies in government were intended to redress the injustices of the past.

[12] The application came before Van der Linde J who issued the following order:

'(a) It is declared that the statement made by the 1st respondent on the 28th August 2016 is defamatory of the applicant.

(b) The 1st respondent is interdicted and restrained from repeating the statement, or statements to the same effect.

(c) All other issues relating to relief arising in the present application are deferred for decision in the pending action instituted by the applicant against the 1st respondent for damages for defamation.

(d) The 1st respondent is directed to pay the costs of the application, including the costs of two counsel.'

[13] The judge said that he came to the conclusion that the initial statements were defamatory 'on the basis of such material as is relevant and admissible to found a final order'; and held that there was no scope for holding that the said conclusion was merely prima facie. Then the judge said:

'The relief claimed, final in nature, includes a retraction, apology, and publication of these. The trial action and the intended damages claim there are pending. Whether the applicant would in addition to damages be entitled to a retraction and an apology should be considered together, and should appropriately be resolved in that forum.

Therefore, acting in terms of rule 33(4), I separate from the issues that I will have decided, all further issues that arise in this application concerning the applicant's entitlement to relief and defer them for decision in the pending action.'[1]

[1] Rule 33(4) of the Uniform Rules of Court provides:
'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.'

[14] Subsequently, in the judgment granting leave to appeal to this court, the judge acknowledged that the separation and referral of the remaining issues for trial, purportedly in terms of rule 33(4) of the Uniform Rules of Court, was an error. He said:

'In separating the relief granted from the relief deferred, I purported to act under rule 33(4). That was an error as the definition of "action" in the uniform rules does not include "application". It may be that I had the power in any event to defer the other forms of relief claimed – retraction, apology – for determination in the pending action; in particular, the entitlement to such relief could conceivably simply have been referred for the hearing of oral evidence. But that was not the formal approach I adopted.'

[15] By reason of the conclusion to which I have come, it is unnecessary to decide whether the referral of the relief sought in paragraphs 1.1, 1.3 and 1.4 of the notice of motion for hearing in the defamation action, in terms of rule 33(4), was appropriate. On this score it suffices to say that Wallis JA, on behalf of the majority in *Theron*,[2] stated that it is undesirable to dispose of an application piecemeal:

'In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings, is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.'

[16] I turn now to the central issue in this appeal: whether the high court should have granted final relief in the form of a declaratory order that the initial statements were defamatory, and an order restraining the appellant from repeating them. The starting point for any analysis of this issue is the relief sought by the

[2] *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 26. Ponnan JA, after reviewing the relevant authorities, concluded that there was authority for the proposition that a high court, in the exercise of its inherent jurisdiction, may separate issues in application proceedings. However, the correctness of that proposition was left open. See also *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others* [2018] ZASCA 163; 2019 (3) SA 97 (SCA) paras 32-33.

respondent, as 'the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is'.[3]

[17] The respondent sought the interdicts in paragraphs 1.1 to 1.4 of the notice of motion quoted above, on the basis that the initial statements were false, defamatory and aimed at belittling and discrediting him, '[p]ending the institution of an action for defamation and damages'. Whether an interdict is interim or final depends on its effect on the issue, not on its form.[4] The relief sought in paragraphs 1.1, 1.3 and 1.4 of the notice of motion were final interdicts. An order to retract the initial statements, to issue an unconditional apology for them and to ensure publication of the retraction and apology, presupposes a finding that the initial statements were defamatory of the respondent. That would involve a final determination of the rights of the parties, which has to be made in the defamation action. Further, if such an order were to be executed, it could not be undone: the notion of an interim retraction or apology is untenable.

[18] The same cannot be said of the relief claimed in paragraph 1.2 of the notice of motion: an interim interdict to restrain the appellant from repeating the initial statements, pending finalisation of the action for damages. It is true that the notice of motion states that paragraph 1.2 is an interdict pending the 'institution' of the defamation action; and the notice does not contain a prayer that pending the finalisation of that action, paragraph 1.2 would operate as an interim interdict. However, it is clear from the papers that the respondent sought an interim interdict

[3] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC) para 75.

[4] See 11 *Lawsa* 2 ed at 418 para 401 and the authorities cited in footnote 2.

pending the outcome of a defamation action: to preserve his interests until the merits of that action were finally determined.[5]

[19] So, on this part of the case, what was before the high court was not an application for a declaratory order, much less a final interdict. The high court erred in disregarding the pleadings and evidence, and in issuing a declaratory order, mero motu, that the initial statements were defamatory of the respondent. In this regard, the pronouncement by this court on the nature of civil litigation in our adversarial system, bears repetition:

'[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'[6]

[20] The founding affidavit makes it clear that the dispute between the parties was whether the respondent was entitled to a retraction and apology; and an interdict to prevent the respondents from repeating the initial statements 'between the granting of the interim order and the finalisation of the action'. That is also how the appellant understood the case he was called upon to meet. Both parties had approached the application on the basis that the trial court would decide whether the appellant was liable for damages for defamation. The papers show

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[5] *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others* 1986 (2) SA 663 (A) at 681E*; Apleni v Minister of Law and Order and Others; Lamani v Minister of Law and Order and Others* 1989 (1) SA 195 (A) at 201B.

[6] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13, footnotes omitted.

that the appellant's defences were fair comment, truth and public benefit and 'political commentary'. The order declaring that the initial statements were defamatory of the respondent, effectively precludes the appellant from exercising his right to adduce evidence in defence of a claim for defamation. That, in turn, adversely impacts upon his fundamental right to have a dispute decided in a fair public hearing, enshrined in s 34 of the Constitution.[7]

[21] Had the high court determined the dispute before it as defined by the parties, it ought to have decided whether the respondent had met the requirements for the grant of an interim interdict. These are: a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy.[8] An interim interdict pending an action is an extraordinary remedy within the discretion of the court.[9]

[22] As to the proper approach to an application for an interdict to restrain the publication of defamatory material, Plewman JA in *Hix Networking*,[10] approved the following dictum by Greenberg J in *Heilbron*:[11]

'If an injury which would give rise to a claim in law is apprehended, then I think it is clear that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear and if there is a dispute as to whether what is about to be done is actionable, it cannot be decided on motion. The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the

[7] Section 34 of the Constitution provides:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[8] *Lawsa* fn 6 at 419 para 403; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691D.
[9] *Eriksen* fn 9 at 691C.
[10] *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A**)** at 399B-E.
[11] *Heilbron v Blignaut* 1931 WLD 167 at 169.

defendant has no defence. Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard the statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed.'

[23] This court also approved the analysis in *Buthelezi*,[12] that Greenberg J 'did not intend to lay down that a mere allegation, or a denial under oath, is sufficient "to set up" a defence which would be the case if a matter had to be decided on pleadings alone'.[13] Put simply, the mere say-so of a deponent who alleges a defence of justification should not be accepted at face value: the facts on which it is based must be analysed to determine its weight. A factual foundation for a defence of fair comment or truth and public benefit must be established in evidence.[14]

[24] Applying these principles to the facts and considering the evidence outlined above as a whole, I do not think that it can be said that the appellant has no defence, or that the facts put up in support of the defence of justification may be rejected out of hand. The nub of the appellant's defence was that the initial statements had to be considered in the context of the political rivalry between him and the respondent; and that they were a riposte to the offending remark that the appellant, and others, had interpreted as being demeaning and disrespectful of women. Likewise, the appellant's statement that the respondent did not want to be black, was made pursuant to the respondent's own public statements, which radio and social media commentators had weighed into. The appellant's stance

[12] *Buthelezi v Poorter and Others* 1974 (4) SA 831 (W) at 836A-F.

[13] *Hix Networking* fn 14 at 399F-G; *Buthelezi* fn 16 at 836C-F.

[14] *Herbal Zone (Pty) Limited v Infitech Technologies (Pty) Limited* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) para 38.

was that the respondent's views on affirmative action were inconsistent with nation building and the realisation of racial equality. And the appellant's comment that the respondent did not want to be black, was also a retort to the latter's public statement that poor people, or as the appellant put it, '[b]lack people who overwhelmingly comprise the poor', could not be trusted.

[25] This, obviously, is not to say that the appellant's defence of justification is likely to succeed in the defamation action, which is pending. That is an issue to be decided by the trial court. But where a factual foundation for a defence of justification has been set up in motion proceedings, a court cannot know whether defamation has been proved until the trial process has shown where the truth lies. And of course, if the defence of justification fails, the appellant will have to pay damages. The high court thus erred in holding that as a matter of law, the respondent had established that the appellant had defamed him.

[26] On the facts, the respondent also did not establish an apprehension of harm, in that there was no evidence the appellant had any intention of harming his good name and reputation in the future. On the contrary, the facts point the other way. The appellant, in terms, stated that any apprehension of impending harm was unreasonable; that he had not repeated the initial statements after 28 August 2016; and that there was no threat that he intended do so. These allegations went unchallenged. And some two and a half years had passed after the initial statements had been made, without incident or complaint, when the final interdict was granted on 8 February 2019. An interdict is not a remedy for the past invasion of rights: it is concerned with the present and the future.[15]

[15] *Lawsa* fn 6 at 412 para 390; *Philip Morris Inc v Marlboro Shirt Co SA* 1991 (2) SA 720 (A) at 735B-C, approving *Stauffer Chemicals Chemical Products Division of Cheeseborough-Ponds (Pty) Ltd v Monsanto Co* 1988 (1) SA 806 (T) at 809F-G.

[27] Regarding the absence of another satisfactory remedy, the respondent alleged that his reputation in politics and his reputation and good name could not await the outcome of the action, essentially because, as he put it, he had been 'associated with the twin demons of racism and sexism'. This allegation also, is insupportable on the facts. It appears that the members of the public and commentators had considered the respondent's stance on affirmative action as racist long before publication of the initial statements. The offending remark made on 10 August 2016, in the context of appointments in the Municipality, had also resulted in the public perception that he was sexist.

[28] There is no allegation in the founding affidavit why an award of damages for defamation would not vindicate the respondent's right to his good name and reputation. In my view, the following passage in *Herbal Zone*[16] provides a complete answer to the alleged absence of an adequate remedy:

'[A]n interdict to prevent the publication of defamatory matter … 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, the party claiming that they will be injured by such speech ordinarily being left to their remedy of a claim for damages in due course. Nugent JA said in this court:[17]

> "Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose." '.

[29] For these reasons the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

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[16] *Herbal Zone* fn 16 para 36.

[17] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 20.

‘The application is dismissed with costs, including the costs of two counsel where so employed.’

A Schippers

Judge of Appeal

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