THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 139/2020

In the matter between:

JULIUS SELLO MALEMA **APPELLANT**

and

THEMBINKOSI RAWULA **RESPONDENT**

Neutral citation: *Malema v Rawula* (139/2020) [2021] ZASCA 88 (23 June 2021)

Coram: PETSE AP, DAMBUZA AND SCHIPPERS JJA AND LEDWABA AND ROGERS AJJA

Heard: 25 February 2021

Delivered: 23 June 2021

Summary: Civil Procedure – motion proceedings – application for declaratory order that published statements defamatory – defence of justification – truth and public interest – sustainable foundation in papers – declarator sought and interdict not justified – appeal dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Mullins AJ sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Schippers JA (Petse AP, Dambuza JA and Ledwaba AJA concurring):

[1] The appellant, Mr Julius Sello Malema, is the President of the Economic Freedom Fighters (EFF), the third largest political party in South Africa, and a Member of Parliament (MP). The Deputy President of the EFF is Mr Floyd Shivambu, also an MP. The respondent is a former member of the EFF who resigned from the party in April 2019. He served on its highest decision-making body, the Central Command Team (CCT), represented it in Parliament and was the National Chairperson of the EFF's National Disciplinary Committee (NDC).

[2] On 5 April 2019 the respondent posted a statement on his Facebook page entitled, 'EFF REMAINS A FINANCIAL FISHING NET FOR THE PAIR, AN ANTITHESIS OF EVERYTHING IT [PURPORTS TO BE]. I AM NOW UNLEASHED, WHO CARES?'. I shall refer to the statement as the Facebook post.

[3] On 18 April 2019 the appellant applied to the Eastern Cape Division of the High Court, Port Elizabeth (the high court), for an order declaring that the Facebook post was unlawful and defamatory; restraining the respondent from

publishing any further defamatory statements; and directing him to pay damages in the sum of R1 million. The high court dismissed the application. The appeal is with its leave.

[4] The respondent appeared in person at the hearing of the appeal, as he had done in the high court. He indicated that he did not wish to address this Court and would abide by its decision.

Facts

[5] Shortly before his resignation from the EFF on 10 April 2019, the respondent published the Facebook post. It reads:

'EFF REMAINS A FINANCIAL FISHING NET FOR THE PAIR, AN ANTITHESIS OF EVERYTHING IT PURPORT[S TO BE]. I AM NOW UNLEASHED WHO CARES?

"Since when [is] the individual interest . . . asserted above the interest of the collective and the organization?" Lenin once lamented in his death bed when he learnt that Stalin had taken decisions that undermined the organization but assert[ed] and affirm[ed] his grip over the organization.

When Jacob Zuma was facing his corruption charges, the liberation movement was confronted with a possibility of fracturing like a glass into pieces. The SACP, Cosatu and the faction of the liberation movement were up [in] arms against the leadership of Mbeki.

Mbeki equally like Lenin, lamented as well, since when [is] the individual . . . held above the organizational interest? Have we arrived to the time where [a] personality cult and individual interest has come to reign over the collective and organizational interest?

No one dared to listen to Mbeki sanity because many of us in the SACP and organized labour Cosatu were emotionally perturbed by the macro economic policies, position [on] HIV/ AIDS and the disorientation of the ANC led alliance on decision making processes in particular as it relates to the marginalization of SACP and Cosatu under the Mbeki leadership. Accordingly, the climate was emotiona[l] and denied many of us an opportunity to allow sanity to prevail.

History has a way of repeating itself, yes, we are angry with the current economic policy direction of the country which embraces NDP a graduation of gear, the macro economic policy. Yes we are angry that our economy is not growing and instead it is leading us to job shedding and failing

to create jobs. Indeed all this is taking place under the leadership of ANC and indeed the leadership of the ANC is guilty as charged when it comes to corruption.

Fellow fighters and comrades, whilst we are emotional about these objective realities, it gives no one a licence to climb on the band wagon in the name of left working-class politics to commit corruption and hide behind the slogans of Economic Freedom for dejected African masses of our people.

If we demand clean governance and corrupt free and accountable government from the ANC and the state apparatus in the name of our respect for the rule of law, supremacy of our Constitution, [s]urely we must lead the society in abiding with the rule of law as an advance movement of the working class, the Economic Freedom Fighters. We ought to demonstrate highest discipline in the management of the state and our organization fiscus.

In parliament, the Presidency and the executive remain accountable to the legislature for everything, policy direction and the management of the state funds and the fiscus in general. It is so because those who are elected to public office are accountable through the representatives of the people. The mechanism of the legislature is meant to hold the executive accountable on behalf of the people.

In our organizations, we go to National conferences or National Peoples Assemblies to elect leadership and the top 6 led by the Presidency is the executive and latter number of 35 or 90 remains the NEC/ CCT additional members. Whilst the executive is in charge for the direction and management of resources of the organization . . . it remains accountable to the full complement of the NEC/ CCT both for political direction and management of resources including money.

The point is that, no one must be a holy cow when it comes to accountability including the Economic Freedom Fighters.

The EFF receives levies from 61 MPs / MPLs and each pays not less than R6800 monthly x61. EFF has 852 Councillors comprising metros, district and local municipalities. On average these Councillors contribute R2000.00 monthly x852. Whilst on it, the EFF is recorded to have reached a million paid up membership, R10 x1 000 000.

EFF is receiving from parliament per quarter not less than R25 Million from National Assembly and Provincial Legislatures comprising of Party Funding, Constituency Funds and Caucus funds. The Constituency funds [are] suppose[d] to assist MPLs and MPs to assist them with logistical traveling arrangements such as accommodation and transport. The Caucus funds . . . [are]

suppose[d] to enable the Caucus in the legislature to plan their approach and direction in the Province.

All these [monies] are centralized in the EFF under the control, abuse and dictatorship of Julius Malema and Floyd Shivambu. [The] pair have made it clear, this is their organization and all of you have come to join us not the other way round. In the EFF there is . . . a Treasurer General called Leigh Ann Marthys, unfortunately she only administers petty cash of the EFF.

I have been a national leader, a Central Command Team member of the EFF since 2014 and we have never had a Financial Report and when occasionally we find courage to ask about it, we are chastised as spouses and treated with disdain and threatened to be removed from Parliament, so for the past 5 years we had to think with our stomachs rather than objectively engaging the executive, holding it accountable.

The Parliament money of the EFF cannot be cashed in terms of treasury rules, but the pair would use Training Providers who would inflate costs [by] 250% so that they can run away with 150% of the inflated cost, in the absence of financial reports from the pair, we would be forced to conclude as such. These service providers are in the form of alcohol party retailers, lawyers, security (Defenders of Revolution and Body and logistics service providers).[1] No report whatsoever.

On the VBS saga which has led to my sacrifice in the EFF list conference and ultimate endorsement on the list.

The political overview of Julius Malema in the most recent CCT meeting admitted to EFF taking VBS money to finance the revolution. In fact he said, "sometimes we are forced to kiss dogs or [the] devil to get funding". The VBS money was done under the full knowledge of the leadership.

The meeting was preceded by two important occasions. When the VBS saga broke out one of the EFF senior CCT members, Cmsr. Sam Matiase, wrote a letter to Julius Malema and pleaded for a special meeting which in short he denied and claimed to have everything under control as officials. The fellow was dismissed like that.

We are further aware, that there is a letter in which Dr Mbuyiseni Ndlozi wrote to the officials complaining about the lifestyle of Julius Malema and how he abuse[s] the EFF funds. It is reported that Ndlozi went to tell people closer to Julius Malema who reported him . . . . Ndlozi was summoned to officials where he was embarrassed and reduced into nothing to a point he was told that he joined the EFF through an interview. So he must not come here and be curious here.

[1] This is an unknown entity to the Court. Presumably it is a reference to the private security services hired by the EFF.

The contrast in between the above two letters, one was given audience and the other one was dismissed.

Back to VBS, when given the opportunity to raise our views on the political input. We had further learnt that prior to the CCT meeting there was a Caucus meeting of Chairperson's convened by the pair instructing them to defend the officials.

When I rose to raise my views, I argued that whilst we appreciate to be taken into confidence about the VBS by the leadership . . . it would have been better that we were taken into confidence prior to the acquisition of the VBS money, not after.

I further argue[d] that the people of Limpopo had lost hope [in] the ANC and SACP and EFF was providing the glimmer of hope, now EFF is mentioned in the same line with these organizations. It is my submission that the scandal of VBS has put the EFF cardinal pillar number 7 on trial in the Court of the public opinion. EFF will have a tough time to remedy itself to the poor grannies of Limpopo and the country as the whole.

I landed in the meeting by saying, the EFF has two options: to remove cardinal pillar number 7 which states that we will fight for a corrupt-free and accountable government. Accordingly, we have failed to pass the test of morality we have set for the society.

The other option is to simply close shop and renounce the position we have held and mobilize[d] the society under. If we fail to pass the test of corruption, how are you going to be trusted to nationalize mines and put under your regime state custodianship because instead of committing to equitable redistribution you will squander the funds.

How are you going to build state capacity when you are engaged in activities that weaken the state through engagement in corruption? How will people trust you with freeing this country from corruption?

Lastly I refused to take collective responsibility on VBS. I am poor, live like a church mouse despite the fact that I have been a member of Parliament for the past 4 years. The pair has milked every cent I worked for in Parliament but despite that, my integrity remains intact.

I will wait for those who demonstrate that they are fighters with zero revolutionary content, the populist who will do mudslinging to appease the pair.

I endured the past 4 years for convenience and the only leash they had on me was deployment to parliament. Now that I am not in the list, I am leashed away so let the ball roll.

We are made to believe that we were picked from the streets with no prospects of employment. When EFF called me for deployment to Parliament I was a professional public servant in the sphere of local government with post graduate qualifications. I left the ANC because amongst

the reason[s] was the dispensation of patronage and corruption, it is hypocritical to stand for it in the EFF.
In terms of the subjective and objective analysis, Rawula is emotional because he does not find expression on the deployment list and now is getting back at EFF leadership, sour grapes. Say for argument['s] sake, there is truth in that. None of the subjective factors can outweigh the objective reality.
You commit to an open and corrupt-free society and you instead you are found at the centre of corruption. In your analysis kindly JUXTAPOSE THE SUBJECTIVE REALITY OF EMOTIONALISM AND THE OBJECTIVE REALITY OF A PARTY ENGAGE[D] IN A CASH HEIST OF THE STATE MONEY.
Bring it on, insult me.
Bloody crooks.'

[6] The respondent's publication of the Facebook post led to extensive media coverage, and repetition and republication of the statements complained of. These included the following publications: an article published on News24, entitled 'Former EFF leader accuses Malema, Shivambu of taking VBS donation, party denies claims'; and two articles on the website of Eyewitness News, entitled 'SNUBBED EFF COMMITTEE MEMBER MAKES SERIOUS ALLEGATIONS AGAINST MALEMA' and 'SNUBBED EFF COMMITTEE MEMBER GIVES REASONS FOR SPEAKING OUT', respectively. A further article entitled, 'Malema, Shivambu accused of financial mismanagement' was published on the website of eNews Channel Africa (eNCA). An article was also published by Ms K Madisa on the Sowetan Live website entitled, 'EFF MP accuses Malema, Shivambu of using party millions to fund their lifestyles'.

[7] These publications, the repetition of the statements in the Facebook post during an interview with the respondent on eNCA on 5 April 2019 and a radio interview with Power FM the next day, led the appellant's attorneys to write to the respondent on 6 April 2019. The letter recorded that the following statements were

defamatory of the appellant. Monies received 'are centralised in the EFF under the control, abuse and dictatorship of Julius Malema and Floyd Shivambu'. They had used training providers who inflated costs to the EFF by 250% and in the absence of financial reports from them, the respondent would be forced to conclude that they '[ran] away with 150% of the inflated cost'. In a meeting of the CCT, the appellant had 'admitted to EFF taking VBS money to finance the revolution'.

[8] VBS Mutual Bank, which held the savings of many disadvantaged people and local municipalities, collapsed in 2018 with more than R2 billion in debt. The aged of Limpopo lost their lifetime savings. Investigations revealed that much of this money had been siphoned into private bank accounts and some spent on property or luxury cars. The Head of the National Prosecuting Authority has described the VBS scandal as 'probably the biggest bank robbery in this country'.[2] Officials of VBS have been arrested on charges of corruption, racketeering, money laundering, fraud and theft.[3]

[9] The letter of 6 April 2019 went on to state that the alleged defamatory statements were deliberately intended to impugn the appellant's integrity and good name by suggesting, alternatively implying, that he was corrupt; was stealing money; conducted himself in an unlawful and undemocratic manner; and was engaged in various unlawful activities, including irregularities in respect of VBS bank. In the letter it was also alleged that during the radio interview, the respondent had conceded that he had no evidence of these allegations. The letter ended with a demand that the respondent retract the offending statements in a public apology,

[2] Jason Burke 'South African police make arrests over notorious bank corruption scandal' 17 June 2020 *The Guardian*, available at https://www.theguardian.com/world/2020/jun/17/south-african-police-make-arrests-vbs-bank-scandal-notorious-corruption.

[3] NPA and Hawks media briefing on the VBS investigation, 17 June 2020 *Times Live*, available at https://www.timeslive.co.za/news/south-africa/2020-06-17-watch-live-npa-and-hawks-media-briefing-on-vbs-investigation/.

by way of a press statement to all the media houses which had interviewed him concerning the Facebook post.

[10] In reply to the letter of 6 April 2019, the respondent said that he would not retract the offending statements and that he had referred to the appellant and Mr Shivambu in the Facebook post because they were the most senior members of the EFF. He went on to say that his statement concerning the absence of evidence 'was a reference to hardcopy evidence only'. He also requested the EFF to provide audited statements, invoices showing payments to service providers, and minutes showing reports concerning the EFF's finances and documents proving financial accountability. He challenged the appellant to prove that he had never used EFF funds for his personal benefit or abused his power. The respondent made it clear that he had never said that the appellant had stolen money, and that the latter had admitted that the 'EFF did receive money from the VBS' in a meeting of the CCT.

[11] As already stated, the appellant launched an application in the high court for an order declaring that the statements contained in the Facebook post were defamatory and unlawful. He sought consequential relief in the form of an order: (a) directing the respondent to remove the Facebook post from all his social media accounts and his Facebook account in particular; (b) that the respondent publish an unconditional retraction and apology on all his social media accounts; (c) interdicting the respondent from publishing any further statement that says or implies that the appellant engages in conduct of the kind described in the Facebook post; and (d) that the respondent pay damages in the sum of R1 million.

[12] In the founding affidavit the appellant alleged that the respondent was 'motivated by political self-interest'; that he was 'deliberately engaging in acts of political sabotage' aimed at inflicting maximum damage on the appellant and the

EFF; and that the respondent had 'admitted that he has no evidence to support any of the claims he has made'. The specific statements alleged in the founding affidavit to be defamatory of the appellant and the EFF, were these:

'5.1 . . . All these [monies] are centralised in the EFF under the control, abuse and dictatorship of Julius Malema and Floyd Shivambu. [The] pair have made it clear, this is their organization and all of you have come to join us not the other way round.

5.2 . . . the pair would use Training Providers who would inflate costs by 250% so that they can run away with 150% of the inflated cost, in the absence of financial reports from the pair, we would be forced to conclude as such.

5.3 The political overview of Julius Malema in the most recent CCT meeting admitted to EFF taking VBS money to finance the revolution. In fact he said, "sometimes we are forced to kiss dogs or [the] devil to get funding". The VBS funding was done under the full knowledge of the leadership.'

These will be referred to as the offending statements.

[13] The offending statements, the appellant said, were made with the intention, alternatively, had the effect of being defamatory and were understood to mean or imply that he:

'66.1 is corrupt;

66.2 is stealing money;

66.3 conducts himself in an unlawful and undemocratic manner;

66.4 is of base moral character.'

[14] In his answering affidavit the respondent denied that he had failed to 'dislodge [the appellant] from the party leadership'. He said that there had been no elective conference or assembly at which the leadership of the EFF could be challenged, and that he had no ambition of becoming the leader of the EFF. He had already occupied a leadership position, namely, National Chairperson of the NDC, which, in his words, 'put me on [a] collision course with the [appellant] and other

officials of the organization in the efforts to assert the independence and the integrity of the National Disciplinary Committee'.

[15] As to his alleged disgruntlement, the respondent said that he was an elected leader of the EFF and was not at risk of losing that position at least until the National People's Assembly, which would have been convened in December 2019. In any event, his name had never been included in the list of candidates for Parliament in 2014, as he had been working in the South African Local Government Association.

[16] The respondent's detailed answers to the offending statements quoted in paragraph 12 above, are dealt with below. For now, it suffices to say that the Facebook post was not a random publication, but as the respondent put it, based on 'privileged information because [he] was sitting in the highest structure of the EFF'. The reason for publishing the Facebook post is summed up in the following statement in the answering affidavit:

'I have never had any personal business with the applicant, Mr Julius Malema and have no reason to tarnish his personal image, but have every right to expose his leadership in the interest of the public as the public figure and public representative and most importantly as the leader of the political party that has mobilised the public on an anti-corruption ticket.'

The high court's judgment

[17] The high court (Mullins AJ) dismissed the application and made no costs order. The document quoted in the judgment as being the Facebook post, is in fact not the Facebook post, but the respondent's letter of resignation from the EFF. Nothing however turns on this as the court's decision is based on the former. Its main conclusions were these. The appellant had established the first two requirements for the grant of a final interdict, namely a clear right to his good name and an injury: his good name had been besmirched by the Facebook post. The third

requirement – the absence of any other satisfactory remedy – was however not met. In this regard the judge said:

'As far as I have been able to ascertain, bringing a defamation claim by way of application for a final interdict and damages is a new phenomenon in our law (as opposed to an interim interdict pending an action for damages). In my view, it is inappropriate and undesirable. The reason I say this is the following: the person making the defamatory statement may have a very good reason for doing so but may not have the hard evidence to hand, which evidence may be in the possession of the person who claims to have been defamed and/or third parties; in an action a defendant will have the benefit of the pleadings in which the issues are narrowly defined, of the discovery process, of requesting particulars for trial, of a pre-trial conference and the subpoenaing of witnesses and documents *duces tecum*; he/she will be entitled to cross-examine the plaintiff and the witnesses called on behalf of the plaintiff in order to test their version and to give evidence and call his/her own witnesses; evidence of an expert nature might be necessary. An application deprives a respondent of all these extremely valuable and necessary litigation tools.'

[18] This, the judge said, was precisely what had happened in this case. The respondent had been a member of the CCT and had good grounds to believe that the EFF's financial and other records in its possession would prove the truth of his statements, were he to be given access to those documents. He also said that there were witnesses who would support his version. The respondent had laid a factual foundation in the evidence and had done enough to establish a triable issue in relation to the defences of truth and public benefit, privileged occasion and fair comment.

[19] The judge concluded as follows:

'Taking everything into account, I am of the view that bringing a defamation claim by way of application for a final interdict and damages was misguided and bad in law. The Applicant has a perfectly acceptable and appropriate alternative remedy, namely the institution of an action.'

[20] The judge then went on to consider whether there were material disputes of fact that could not be resolved on the papers. He ruled that there were none and for that reason declined to exercise a discretion to refer the matter to oral evidence in terms of rule 6(5)*(g)* of the Uniform Rules of Court.[4] He concluded that the respondent had not merely relied on his say-so, neither was his defence to the relief claimed a bare denial of the appellant's allegations. The respondent had demonstrated that he would be able to produce evidence to the contrary.[5]

[21] The judge also considered that the statements were made in the run-up to the general election of 8 May 2019, and the suppression of speech in an electoral context had severe negative consequences. Further, the EFF had refuted the respondent's allegations in the press. The application for an interdict was dismissed also on the ground that the Facebook post had been removed on 9 April 2019.

[22] The appropriateness of bringing a defamation claim by way of application for a final interdict and damages, in contradistinction to an interim interdict restraining the publication of defamatory material pending an action for damages, was a reason for granting leave to appeal. In this regard, the high court held that there were conflicting judgments as to whether the use of application proceedings in a case such as the present was appropriate, and that future litigants were entitled to clarity as to the proper procedure.

[23] It is necessary to deal with this issue before considering the appellant's contentions. The remedy of an interdict to restrain the imminent or continued

---

[4] Rule 6(5)*(g)* provides:
'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'
[5] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.

publication of a defamatory statement is not new.[6] In 1931 in *Heilbron v Blignaut*,[7] an application for an interdict to stop publication of a newspaper article allegedly defaming a boxing referee as being dishonest and unfair, Greenberg J said:

'If an injury which [would] give rise to [a] claim in law is apprehended, then I think it is clear law 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 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.'

[24] This dictum was cited with approval in *Hix Networking Technologies*,[8] in which it was held that the *Heilbron* case was not based on English law but on accepted principles in our law. As to how the phrase 'set up a defence' in Greenberg J's judgment was to be interpreted, Plewman JA said:

'As the detailed analysis . . . by Coetzee J shows, Greenberg J had not held (as was suggested by counsel in the *Buthelezi* case) that the mere *ipse dixit* of a deponent alleging a defence of justification should be accepted. It is, I think, implicit in this discussion and I think also in both judgments read as a whole, that no departure from the established rules was being proposed or indeed applied.'[9]

---

[6] See 14 *Lawsa* 3 ed at 164 para 136 and the authorities there cited.
[7] *Heilbron v Blignaut* 1931 WLD 167 at 168-169.
[8] *Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A).
[9] *Hix Networking Technologies* fn 8 at 399G. The *Buthelezi* case referred to is *Buthelezi v Poorter and Others* 1974 (4) SA 831 (W).

[25] Recently, the above analysis was explained by Wallis JA in *Herbal Zone v Infitech Technologies*[10] in this way:

'The clarification was to point out that Greenberg J did not hold that the mere *ipse dixit* of a respondent would 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. 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 therefor.'

[26] The high court was thus incorrect to hold that a claim for defamation by way of application for an interdict (as opposed to an action in which a defendant has the benefit of the issues defined in the pleadings, discovery, further particulars and cross-examination), is a new phenomenon in our law, and is inappropriate and undesirable. Most recently, in *EFF v Manuel*,[11] this Court affirmed the appropriateness of the remedy of an interdict as follows:

'There is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements proceeding by way of motion proceedings, on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they would obtain instant, though not necessarily complete, relief. There is precedent for this in the well-known case of *Buthelezi v Poorter*, where an interdict was granted urgently in relation to an egregious piece of character assassination. Notably, however, the question of damages was dealt with separately.'[12]

[27] Damages for defamation however, may not be claimed in motion proceedings. It appears that the appellant followed the approach in *EFF v Manuel*, in which the applicant, Mr Trevor Manuel, a former MP and Minister of Finance

[10] *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd and Others* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) para 38.
[11] *EFF and Others v Manuel* [2020] ZASCA 172; [2021] 1 All SA 623 (SCA); 2021 (3) SA 425 (SCA).
[12] *EFF v Manuel* fn 11 para 111, footnotes omitted.

of this country, obtained a declaratory order in the High Court, Johannesburg, that certain allegations published by the EFF concerning him were defamatory, together with an order that the EFF pay damages in the sum of R500 000. The High Court refused leave to appeal.

[28] This Court referred the EFF's application for leave to appeal to it for oral argument. At that hearing it dealt with all the issues on their merits, in the context of assessing the prospects of success. It refused leave against the order declaring that the allegations concerning Mr Manuel were defamatory and false, and that their publication was unlawful. However, it granted leave and simultaneously upheld with costs, an appeal against the orders directing the respondents to publish a retraction and apology, and to pay the applicant damages in an amount of R500 000. These issues were remitted for evidence in the High Court.

[29] This Court held that motion proceedings 'are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise'.[13] Its reasons, tersely stated, were these:

'In contested cases, following on the close of pleadings, evidence is led in an attempt to justify the amount claimed. The defendant is entitled to challenge that evidence and present countervailing evidence. How else would a court be able to determine an appropriate award? Relevant evidence has to be presented and fully explored. The factors to be considered by a trial court in determining an appropriate award include: the character and status of the plaintiff; the extent of the defamatory publication; its envisaged and actual impact on the plaintiff; and the subsequent conduct of the person who made the defamatory statement, including his or her efforts, if any, to make amends after the publication. This list is not exhaustive.'[14]

[13] *EFF v Manuel* fn 11 para 105. In fn 83 of the judgment this Court noted the approach of the high court quoted in paragraph 17 above.
[14] *EFF v Manuel* fn 11 para 96, footnotes omitted.

[30] The appellant did not persist in his claim for damages of R1 million and no more need be said about it. The appellant also abandoned his claims for a retraction and apology and an interdict against further publication.

Did the appellant make out a case for an interdict?

[31] The high court found that the appellant had demonstrated a clear right to his good name and reputation and that the Facebook post was defamatory, ie it was likely to injure the appellant's reputation by lowering him in the estimation of right-thinking members of society.[15] That being so, it is presumed that publication of the Facebook post was both wrongful and intentional.[16] The onus was thus upon the respondent to raise and establish a defence to rebut either wrongfulness or intention.[17]

[32] As stated earlier, the respondent opposed the application in person in the high court. This is how he described his defence:

'My prayer to the honourable High Court is that:

a. The court must declare that there is no ground or basis [for a] defamation order.

b. The published statement [should] not be declared defamatory as the respondent has made the remarks in the public interest and from [a] privileged position.'

[33] The publication of a defamatory statement which is true, provided that the publication is in the public interest, is not wrongful.[18] A defendant relying on this defence must plead and prove that the defamatory statement is substantially true and was published in the public interest.[19]

---

[15] *Lawsa* fn 6 at 134 para 111. *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae*) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 89.
[16] *Lawsa* ibid.
[17] *Borgin v De Villiers* [1980] 2 All SA 261 (A); 1980 (3) SA 556 (A) at 571F; *National Media Ltd v Bogoshi* [1998] 4 All SA 347 (SCA) at 364; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18.
[18] *Lawsa* fn 6 at 151 para 124; *Modiri v Minister of Safety and Security* [2011] ZASCA 153; 2011 (6) SA 370; [2012] 1 All SA 154 (SCA) para 20.
[19] *Lawsa* fn 18 para 124.

[34] Thus, the central question that the high court had to decide was whether the respondent had established a sustainable foundation by way of evidence that the defence of truth and public interest (or fair comment or the absence of *animus iniuriandi*), was available to be pursued.[20] Put simply, did the respondent produce evidence sufficient to establish a defence of truth and public interest, or that he acted without *animus injuriandi*?

[35] Counsel for the appellant submitted that the high court had ignored the prima facie burden that an applicant bears in defamation cases and 'imposed a false burden on the appellant to pre-emptively and conclusively disprove allegations that needed to be proved by the respondent'. The appellant, so it was contended, had presented 'strong and indisputable facts' whilst the respondent failed to establish a sufficient factual basis to overcome a defamation interdict. Simply stated, the respondent, like the appellants in *EFF v Manuel*, had not put up any facts to justify his defamatory statements. It was further contended that the high court had misdirected itself by having regard to the respondent's motives in raising the issues contained in the Facebook post; and in grounding the respondent's opposition to the application in freedom of speech.

[36] Two preliminary points are required to be made at the outset. The first is that inasmuch as the appellant sought an interdict declaring that the statements contained in the Facebook post were defamatory, a reasonable or right-thinking person would read the Facebook post in context and as a whole. In *Demmers v Wyllie*,[21] Muller JA stated the principle thus:

'From the above it is clear, I think, that the words "reasonable person" or "reasonable man" referred to in the decisions cited is a person who gives a reasonable meaning to the words used

[20] *Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others* fn 10 para 38; *Mohamed v Jassiem* 1996 (1) SA 673 (A) at 709H-I; *Le Roux v Dey* fn 15 para 85.
[21] *Demmers v Wyllie* [1980] 1 All SA 391 (A), 1980 (1) SA 835 (A) at 842H.

within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.'

[37] The second is that on its facts, this case is entirely distinguishable from *EFF v Manuel*. There, the EFF published a statement alleging that the process of selecting the Commissioner of the South African Revenue Service (the Commissioner), chaired by Mr Manuel was 'patently nepotistic, and corrupt'. Mr Manuel alleged that the sting of the statement was that he had conducted a corrupt, unlawful and clandestine process in the selection of the Commissioner, who was said to be a relative and close associate. These statements, he said, cast aspersions on his character, were false and could not be justified. The EFF's counsel accepted that the statement was defamatory.[22]

[38] The EFF's defence was that the statement that Mr Manuel was related to the Commissioner, which had been disclosed to it by a confidential source, was substantially true, was reasonable in the circumstances and was also fair comment. The defence of truth and public interest failed for the simple reason that the foundation for the defamatory statement – that Mr Manuel was related to the Commissioner and that they were business associates and companions – was untrue. The EFF had made no attempt to refute Mr Manuel's statements to the contrary.[23] The defence of fair comment that the appointment process was nepotistic and corrupt failed for the same reason: it was based on the allegation that the Commissioner was Mr Manuel's relative, business associate and companion.[24]

[39] By contrast, in this case the respondent laid a supportable foundation that the defence of truth and public interest was available to be pursued. To begin with,

[22] *EFF v Manuel* fn 11 para 35.
[23] *EFF v Manuel* fn 11 para 35.
[24] *EFF v Manuel* fn 11 para 39.

the statements in the Facebook post did not emanate from an unidentified source. When the post was published the respondent was a member of the EFF and served on the CCT – its highest decision-making body. As he put it:

'The Court will note that I have privileged information because I was sitting in the highest structure of the EFF and the information could not be manufactured but could be received as communicated by the applicant himself.'

[40] The statement that the EFF had received VBS funding with the full knowledge of its leadership illustrates the point. It is clear from the answering papers that the appellant had disclosed receipt of VBS funding at a meeting of the CCT. That disclosure and the respondent's reaction to it was described in the answering affidavit as follows:

'Furthermore, the irritation [of the appellant at the Facebook post] was further informed by my publication of the applicant's admission to have received the VBS money under the guise of financing of the revolution since there was no capital nor government that could finance the revolution and therefore called for collective responsibility, a request that I refused to give into. (RA 6 Cmsr. Xalisa affidavit).

I further commented that, whilst we appreciate that the CIC [Commander-in-Chief] is taking us into confidence, it would have been better that we could have been taken into confidence prior [to] the acquisition of the funds not after, the people of Limpopo had known that the ANC and its alliance partners as corrupt and have seen the EFF as the bearer [of] hope, but for the EFF to be mentioned in [a] corruption scandal involving the VBS which had carried the savings of poor people of Limpopo is unacceptable. As a result of that, our Cardinal pillar number 7 is now on trial in terms of the public opinion. (Annexure RA 16, applicant admitted in an interview with Scopa of Daily Maverick of having received donations from VBS & RA 6 Cmsr. Xalisa affidavit).

I further called for the EFF to consider two options, one to expunge Cardinal Pillar number 7 since we have failed to pass the moral test we have set for the society, or two, to close shop as we will lose relevance on the stance of corruption in particular to the people of Limpopo.'

[41] The appellant's counsel sought to make much of the fact that the appellant had informed journalists that neither he nor the EFF had benefited directly or indirectly from illicit VBS money. But that misses the point and ignores the evidence. First, could the respondent's version quoted above have been rejected on the papers as being patently implausible, far-fetched or clearly untenable?[25] I think not. It shows that (a) the appellant had disclosed his receipt of VBS funds at a meeting of the CCT; (b) when the disclosure was made, and before publication of the Facebook post, it was already known that VBS had corruptly misappropriated the funds of poor people in Limpopo; (c) the money was received 'under the guise of financing the revolution'; (d) the respondent refused to accept responsibility for that decision and had taken the view that the appellant should not have disclosed receipt of VBS funds only after the fact; and (e) the EFF had failed the moral test that it had set for itself and society.

[42] Second, the respondent's version was confirmed by Mr Zolile Rodger Xalisa, a member of the EFF and MP who also served on the CCT and the War Council (the body responsible for the execution of decisions of the CCT). In a handwritten affidavit he said:

'On the 05-06 February 2019 the CCT convened its ordinary meeting of the term. The President and the CIC of the EFF during the political overview made an admission that the EFF had received donations from VBS which is the Subject of Corruption. He said that no Capitalist or government is willing to support a revolutionary movement like EFF so VBS saw an opportunity that the EFF could be in government, it could assist to ensure that it thrives better.

Then . . . the President confirmed that they could not receive the donation with [the] EFF account of theirs (him and Floyd Shivambu) but had to devise other means, he said sometimes you must kiss dogs or [the] devil to get money. After this . . . CCT members were invited to speak on the

[25] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. The rule was crisply stated by Schutz JA in *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2002] ZASCA 141; [2001-2002] CPLR 13; [2003] 1 All SA 82 (SCA) para 10, as follows: '[T]he decision must be based on those facts averred by the applicant which are admitted by the respondent, together with the facts averred by the respondent.'

impact. All CCT members were present and some are MPCs, MPs and councillors could also attest [and were] given [an] opportunity.'

[43] Mr Xalisa's affidavit makes three things clear. First, the appellant, when he received funding from VBS, knew that VBS was 'the subject of corruption'. Otherwise viewed, there would have been no need 'to devise other means' to get the money, when according to Mr Xalisa the EFF had two bank accounts: one at First National Bank and the other at Standard Bank. Second, this is underscored by the appellant's utterance, which is not commonplace: 'sometimes you must kiss dogs or the devil to get money'. Third, the appellant apparently had no difficultly in accepting funds that were the subject of corruption as an opportunity for the EFF to be in government.

[44] Therefore, the conclusion in the minority judgment that the appellant's admission of the receipt of VBS funds was not made at a time when VBS was the subject of scandal or known to be fleecing its depositors, in my respectful opinion, is at odds with the evidence – *a fortiori* when the appellant denied that the meeting took place at all. On this issue he said that the respondent's version was 'based on hearsay evidence' and lacked specificity. Mr Xalisa's evidence (an affidavit sworn to at a police station) was brushed aside on the basis that it 'purports to be an affidavit'; and that 'in the absence of a confirmatory affidavit by the deponent', inexplicably, fell to be struck out. All of this, of course, was no answer to the facts set up by the respondent that formed the foundation of a defence of truth and public interest.

[45] What is more, statements that the EFF had in fact received VBS funding and that the appellant had personally benefited from those funds, were already in the public domain. It will be recalled that the Facebook post was published on 5 April 2019. The respondent annexed an email to the answering affidavit, which the

appellant had sent to the media on 19 November 2018 in response to questions by Scorpio, Daily Maverick. It reads inter alia:

'Questions to Mr Malema:

6. During the press conference of 16 October 2018, I asked very specifically if you or the EFF have ever benefited directly or indirectly and in any shape or form from the illicit VBS money. You denied the allegation. I have now proved that you lied. Your comment?

I don't lie Sesi, I stand by what I said in the press conference.

7. During the press conference of 16 October 2018 I asked whether you or the EFF ever received money from Sgameka or Mahuna.[26] At first you denied the allegation, and later backtracked by stating that you may have received "donations". I have now proved that you lied. Your comment?

I stand by what I said in the press conference, I don't lie Sesi.'

[46] Concerning this exchange, two observations are necessary. First, and tellingly, the appellant has not sought declaratory relief nor damages against the print or electronic media for any injury to his good name or reputation, arising from his or the EFF's receipt of funds from VBS bank. And this, when on 21 November 2018, the Daily Maverick published an article on its Scorpio website (also annexed to the answering affidavit) entitled, 'VBS bank heist: EFF's family ties and moneyed connections', after receiving the appellant's email of 19 November 2018. It reads in relevant part:

'EFF President Julius Malema and his "corruption busting" political party directly benefited from the VBS Mutual bank heist, a Scorpio investigation has found. Scorpio traced the flow of illicit VBS funds, earmarked for a property in the affluent Johannesburg suburb of Sandown, through three fronts that also dished out money to the EFF. Julius Malema stayed for years at the property which is now registered as an EFF asset. Over R1.8 million of the same illicit VBS funds were used to prop up the EFF, Scorpio has found. Stripped to its essence, a company officially owned by Floyd Shivambu's brother made questionable payments to a company owned by Malema's

[26] It has been reported that Mahuna Investments received significant funds from VBS (some R6 million) that the appellant allegedly used as a slush fund to pay personal expenses such as designer clothing and school expenses to maintain an affluent lifestyle. See Pauli van Wyk 'VBS Theft, Money Laundering & Life's Little Luxuries: Julius Malema's time of spending dangerously' 8 September 2019 *Daily Maverick Scorpio*, available at *https://www.dailymaverick.co.za/article/2019-09-08-vbs-theft-money-laundering-lifes-little-luxuries-julius malemas-time-of-spending-dangerously/*.

cousin. Both these companies operated like slush funds which dispersed money to where it was needed. This is a story of how the constituency Malema claims to fight for – the poor, the young and vulnerable – was robbed to feed the EFF leader's private and political interests.'

[47] The appellant did not deny the statements in this article in reply. He merely responded that the article 'falls to be struck out on account of the fact that it is irrelevant to these proceedings'. It was highly relevant – the appellant sought an interdict on the basis that his admission to taking VBS money in a meeting of the CCT, was defamatory.

[48] Second, the mere fact that the respondent had access to the email of 19 November 2018, reinforces his claim that he had access to 'privileged information' because he served on the CCT. There is nothing in the record to gainsay this. In this regard, I respectfully disagree with the statement in the minority judgment that the email of 19 November 2018 was a public document which the respondent attached to his affidavit. That was not the appellant's evidence. On the contrary, his statement: 'It is curious that the respondent has come into possession of this e-mail when he is not a recipient thereof', shows that the appellant was of the view that the respondent was not entitled to be in possession of it.

[49] That brings me to the statements in the Facebook post that the 'pair have made it clear, this is their organisation and all of you have come to join us not the other way round', and that costs had been inflated by the EFF's leadership. When these statements are considered in the context of the Facebook post as a whole, they are but examples of a recurring theme: a lack of accountability and abuse of funds on the part of the leadership of the EFF.

[50] The immediate context of these statements, as is evidenced by the Facebook post quoted in paragraph 5 above, can be summarised as follows. The EFF received

levies from 61 MPs of not less than R6800 each and 852 councillors contributed at least R2000 per month to the EFF. It had 1 million members who each paid R10. The EFF received not less than R25 million per quarter from the National Assembly and provincial legislatures. All these funds were centralised in the EFF 'under the control, abuse and dictatorship' of the appellant and Mr Shivambu, who had made it clear that the EFF was their organisation which members had joined, not the other way around. The Treasurer General of the EFF, the respondent said, 'only administers petty cash'. Since 2014 no financial report has been tabled before the CCT. When the respondent and others questioned this, they were chastised, treated with disdain and threatened with removal from Parliament. As a result, in the respondent's words, they had to 'think with [their] stomachs', rather than holding the executive of the EFF accountable.

[51] What then follows is the respondent's statement about the inflation of costs. The context speaks for itself:

'The Parliament money of the EFF cannot be cashed in terms of treasury rules, but the pair would use Training Providers who would inflate costs [by] 250% so that they can run away with 150% of the inflated cost, *in the absence of financial reports from the pair, we would be forced to conclude as such*.[27] These service providers are in the form of alcohol party retailers, lawyers, security (Defenders of Revolution and Body and logistics service providers).[28] No report whatsoever.'

[52] The answering affidavit states that the appellant refused to disclose the EFF's financial state of health to its leadership, or to be held accountable for the administration of EEF funds. The respondent said:

'The applicant has refused to disclose EFF's financial state of health from the 1st April 2014 to 31 March 2019. . . . The applicant is not honest when he says, he is ready to open the financial

[27] Emphasis added.
[28] This is an unknown entity to the Court. Presumably it is a reference to the private security services hired by the EFF.

books of the EFF to journalists when he has not been able to open the EFF financial books to EFF national leadership as provided by the constitution since 2014 to 2019/03/30.
As the Senior leader of the Economic Freedom Fighters serving in the national leadership and Member of Parliament, I have the privileged information in terms of the sources of funds of the Economic Freedom Fighters and [am] further alert [to] the constitutional obligation at least in the organisation in terms of democratic use of the finances of the organisation. It is my submission that the EFF funds are used in terms of the wisdom of the applicant and those closer to him to the exclusion of the collective of the national leadership as dictated by the Constitution. The provisions of the constitution are not complied with.'

[53] The respondent cited three instances in March 2017, May 2017 and November 2018 respectively, where officials of the EFF had appeared before its NDC on charges of lack of financial accountability. The respondent presided over those hearings and attached the findings of the NDC. The sanctions imposed were expulsion from the EFF and suspension of membership of the organisation for a period of at least three years. He went on to say:

'I am raising the above 3 incidents . . . to demonstrate the extent to which I am privileged to understand and know the information and the extent to which the EFF as the organisation is intolerant and strict [with regard] to . . . any conduct that is inconsistent with its policies in handling of the finances. . . . [T]he lack of financial accountability from the applicant and other officials should be deemed serious as it was deemed to the Northern Cape Provincial leaders that were expelled.'

[54] Then, under the heading 'PUBLIC INTEREST' in the answering affidavit, the respondent said this:

'The applicant is not an ordinary citizen but a President and the Commander-in-Chief of the third biggest political party in South Africa, a Member of Parliament and the leader of the opposition and a champion of anti-corruption. The applicant cannot demand accountability from the former State President of South Africa on the public funds mismanagement resulting in failure to be held accountable yet the applicant refuses to be held accountable for the organizational funds coming from the state. . . .

. . . [P]ublic representatives that are presiding over organizations that receive state funds have an obligation to remain accountable to the organisation they lead and the state equally. The public has the right to know that the applicant as the public representative does not account to the organization about the use of organizational funds and therefore is in violation of the EFF Constitution.'

[55] Again, the respondent's statements about the lack of accountability and abuse of funds by the leadership of the EFF were confirmed by Mr Xalisa. He said: 'I further wish to state under oath that the EFF is receiving money from Parliament and 9 legislatures, Party levies from 852 councillors, R6800 from 61 MPs and MPL's including R10 membership for an EFF member but has never given a financial report in the CCT since we were elected [in] 2014. . . The money that is used is not disbursed by the CCT but by President Julius and the Deputy President as Senior Authorities of the organisation.'

[56] The facts in the Facebook post referred to in paragraphs 49 to 51 and 54 above, and those relating to the appellant's admission of his receipt of VBS funds when it was the subject of corruption, would never have been known to outsiders. Therefore, the respondent's position as an insider serving on the CCT, and the evidence he presented to demonstrate that the defence of truth and public interest was available to him, cannot be over-emphasised.

[57] What remains is the allegation that in the absence of financial reports, the respondent would be forced to conclude that the leaders of the EFF had inflated the costs of training providers so that they could pocket the difference. When this statement is read in the context of the Facebook post as a whole, it means no more than this. In keeping with the 'control, abuse and dictatorship', and lack of accountability regarding the funds of the EFF by its leaders, and in the absence of financial reports from them, the inference is compelling that the costs of service providers, such as alcohol retailers, lawyers, security and logistics service providers, were inflated. Indeed, the Facebook post says so.

[58] In addition, the respondent put up sufficient facts to show that on this score also, the defence of truth and public interest, and fair comment,[29] could be mounted. He immediately went on to say:

'The recent function of the EFF, GALA dinner which was held in Pretoria after the Soshanguve Rally. The service provider of beverages, both alcohol and soft drinks, told us [in] no uncertain terms that a bottle of Tanqueray with a normal price of R200.00 was sold for R800.00. On enquiry we were told that it was [the appellant's] instruction that prices must be inflated, in the result we could not drink the bottle.'

[59] On the facts, the respondent demonstrated that there was a dinner in Pretoria after a rally of the EFF; that on enquiry he was told that the price of alcohol had been inflated; that he was not alone when the enquiry was made; that they could not buy the alcohol because of its exorbitant price; and that there are persons who would be able to verify his version. Even if the respondent's statement as to who gave the instruction that the price of alcohol should be inflated, that alone was not defamatory. His evidence of inflated prices at an EFF event was first hand. In these circumstances, it cannot be said that the respondent's version is far-fetched, clearly untenable or palpably implausible that it could be rejected as false merely on the papers,[30] which warranted the grant of a final interdict.

[60] Neither was the respondent's statement that the price of alcohol had been inflated, untrue: the very reason why the alcohol was not bought. The appellant's reply once more, was a bald denial. He said that the statement lacked specifics and was hearsay. This, when the facts show that the costs of service providers and the manner in which EFF funds are expended lie purely within the appellant's knowledge. Despite this, he did not produce a single document to show that those costs had not been inflated, or to rebut the allegation that there were no financial

[29] See in this regard *EFF v Manuel* fn 11 paras 38 and 39.
[30] *Plascon-Evans* fn 25.

reports tabled since 2014. Thus, the respondent's inability to cite further examples of the inflation of costs by service providers was potentially at least a product of the secrecy regarding the accounts of the EEF, which was not rebutted. In the circumstances, in my opinion, and apart from the facts stated in paragraphs 58 and 59 above, the inference drawn by the respondent that costs had been inflated was a readily apparent and plausible one.

[61] In addition, the respondent, in his capacity as a senior leader of the EFF and an MP, had personally raised all the issues which he had published in the Facebook post, with the appellant. This too, was denied and dismissed with an allegation that the appellant should have raised the issues within the structures of the EFF. The appellant's answer to the respondent's claim that he had not produced a financial report in the CCT since 2014, which was confirmed by Mr Xalisa, was also a bald denial.

[62] As to the hearsay statement by the service provider, it must be borne in mind that the respondent was an unrepresented litigant in person, who is not legally qualified. The claim he was called upon to answer was a not a simple legal matter, as *EFF v Manuel* and this case illustrates. In his affidavit, the respondent said:

'2. I am a 39 year old male currently employed and [a] student at Nelson Mandela University, I will be representing myself in this case.

3. I pray that the Honourable High Court bear with me.'

[63] This, of course, is not to say that the respondent was entitled to any better treatment than a represented party. That said, the advice to judges when dealing with litigants in person, referred to most recently by the UK Supreme Court in *Serafin v Malkiewicz*,[31] is instructive:

[31] *Serafin v Malkiewicz and others* [2020] UKSC 23 para 46. The extract is from the Equal Treatment Bench Book, issued by the Judicial College which provides training for judges in England and Wales.

'Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.'

[64] The defence of truth and public interest is founded on the recognition of a right to publish a defamatory statement which is true, where the publication is in the public interest.[32] The facts put up by the respondent demonstrated that the defence was available to be pursued. These facts comprise not only direct information placed before the court, but material showing other information not in his control but potentially available at a trial in due course, such as the EFF's financial records and documents relating to receipt of VBS funds. All these factors must be weighed up in order to decide whether there is a dispute of fact regarding the existence of a defence. Since *Heilbron*,[33] the position has been that a final interdict for defamation cannot be granted unless a respondent has no defence.

[65] Further, as this Court has affirmed in *Herbal Zone*,[34] and *Tau v Mashaba*,[35] an interdict is always directed at future conduct. If there is no risk of future re-publication by the respondent – as the appellant seems to have accepted – an interdict will not be granted, because there is nothing left to restrain and no risk of future injury. The high court rightly concluded that the appellant failed to make out a case for this relief.

[66] In the result the appeal is dismissed.

---

[32] See *Lawsa* fn 18.
[33] *Heilbron* fn 7.
[34] *Herbal Zone* fn 10 para 36.
[35] *Tau v Mashaba and Others* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) para 26.

A SCHIPPERS
JUDGE OF APPEAL

Rogers AJA:

[67] I have read the judgment of my colleague Schippers JA (the first judgment), which sets out the relevant factual background. I shall adopt the abbreviations used in the first judgment. I agree with what is said in the first judgment (paras 22-30) about bringing defamation claims on motion. I also agree with the first judgment's conclusion (paras 49-56) that the appellant failed on the papers to show that the respondent acted unlawfully by publishing statements that the appellant's conduct, as leader of the EFF, was undemocratic and unlawful (in the sense of behaviour inconsistent with the EFF's constitution). Contrary to the first judgment, however, I consider that the respondent acted unlawfully by publishing statements conveying that the appellant was corrupt, stole money and was of base moral character.

[68] At the hearing of the appeal, counsel for the appellant said that if the appeal succeeded he pressed only for the relief claimed in paras 1 and 2 of the notice of motion. In those paragraphs the appellant prayed for orders declaring that the statements made by the respondent in the Facebook post published on 5 April 2019 are defamatory and unlawful. Para 3 sought the removal of the offending statements from the respondent's social media accounts, but it is common cause that this has occurred. The appellant does not persist with his claims in para 4 for a retraction and apology; in para 5 for an interdict against further publication; or in para 6 for damages.

[69] The relief in paras 1 and 2 is directed at statements contained in the Facebook post. Although the appellant made allegations about later statements by the respondent (these include those quoted in para 12 of the first judgment), these were not the subject of the relief claimed, though they were relevant, at the time the

proceedings were launched, to the question of an apprehension of continuing unlawful conduct.

[70] In para 66 of the founding affidavit the appellant alleged that the defamatory statements were understood to mean and imply (a) that he is corrupt; (b) that he is stealing money; (c) that he conducts himself in an unlawful and undemocratic manner; and (d) that he is of base moral character. Meaning (d) is a conclusion from meanings (a) and (b). Since the appellant only sought relief in connection with statements contained in the Facebook post, I read para 66 to be his case as to the defamatory meaning of statements contained in the Facebook post. In this respect, I differ from the first judgment, which (in para 12) treats para 66 of the founding affidavit as referring to statements made by the respondent in a subsequent media interview, though perhaps not much turns on the distinction.

[71] The respondent did not deny that the Facebook post had the meanings alleged in para 66. Although the appellant should, in his founding affidavit, have identified the precise passages in the Facebook post which conveyed these meanings, no point was taken about inadequate pleading, either by the respondent or by the high court or in this Court. The Facebook post must be read as a whole. So read, the passages which would have been understood by the ordinary reader as meaning that the appellant is corrupt and steals money are readily identifiable:

(a) The post identified ‘the pair’ as the appellant and Mr Floyd Shivambu.

(b) The post’s heading was: ‘EFF remains a financial fishing net for the pair . . .’.

(c) In the post, the respondent, after stating that the ANC leadership was guilty of corruption, said that no one should have ‘a license to climb on the band wagon in the name of left working class politics to commit corruption and hide behind the slogans of Economic Freedom for dejected African masses of our people’.

(d) After identifying various sources of EFF funding, the respondent alleged that '[a]ll these moneys are centralized in the EFF under the control, abuse and dictatorship of Julius Malema and Floyd Shivambu'.

(e) Among the abuses alleged by the respondent was the following: 'The parliament money of the EFF cannot be cashed in terms of treasury rules, but the pair would use Training Providers who would inflate costs 250% so that they can run away with 150% of the inflated cost, in the absence of financial reports from the pair, we would be forced to conclude as such'. Such service providers were said to include 'alcohol party retailers, lawyers [and] security'.

(f) The respondent referred to a letter written by Dr Mbuyiseni Ndlozi to party officials 'complaining about the lifestyle of Julius Malema and how he abuse the EFF funds'.

(g) With reference to the 'VBS saga', the respondent claimed that the appellant had, at the most recent meeting of the party's CCT, 'admitted to EFF taking VBS money to finance the revolution'. The respondent stated that the party had 'failed to pass the test of morality we have set for the society': 'If we fail to pass the test of corruption, how are you going to be trusted to nationalize mines and put under your regime state custodianship because instead of committing to equitable redistribution you will squander the funds'. He followed this with another rhetorical question: 'How are you going to build state capacity when you are engaged into activities that weaken the state through engagement into corruption? How will people trust you with freeing this country from corruption?'.

(h) The respondent stated that he had refused to take collective responsibility on VBS. He remained poor, despite having been in parliament for four years: 'The pair has milked every cent I worked for in parliament . . .'.

(i) The respondent declared that among the reasons for which he left the ANC was 'the dispensation of patronage and corruption' and that it was 'hypocritical to stand for it in the EFF'.

(j) He concluded his post thus (capitalisation is the original):

'You commit to an open and corrupt free society and instead you are found at the centre of corruption. In your analysis kindly JUXTAPOSE THE SUBJECTIVE REALITY OF EMOTIONALISM AND THE OBJECTIVE REALITY OF A PARTY ENGAGED IN CASH HEIST OF THE STATE MONEY.

Bring it on, insult me.

Bloody crooks.'

[72] In defamation proceedings, the delictual element of fault is styled *animus iniuriandi*. Proof of *animus iniuriandi* is a necessary element of a claim for damages. Where, however, an injured party seeks an interdict, he does not need to prove fault, and this applies also to interdicts alleging defamation and injurious falsehood.[36] It is thus irrelevant whether or not the respondent honestly believed that he was entitled to publish the defamatory material. The same is true of the declaratory relief aimed at establishing that the statements in question were defamatory and that their publication was unlawful.

[73] We are also not dealing, in this case, with an anticipatory interdict in respect of defamatory material which has not yet been published (cf *Herbal Zone v Infitech Technologies*).[37] The Facebook post was published, and the question is whether it was lawfully published.

[74] Since the Facebook post was defamatory of the appellant, the onus rested on the respondent to neutralise the presumption of unlawfulness by establishing a defence going to lawfulness. The only one which need detain us is that the publication was true and in the public interest. Although the onus rested on the

---

[36] See *Hawker v Life Offices Association of South Africa and Another* 1987 (3) SA 777 (C) at 780I-J; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (1)* 1988 (2) SA 350 (W) at 353F-355I; *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC) para 52 (minority) and para 159 (majority); *Nativa (Pty) Limited v Austell Laboratories (Pty) Limited* [2020] ZASCA 11; 2020 (5) SA 452 (SCA) para 33.

[37] Fn 10 above, para 26.

respondent to raise some such defence, this did not alter the operation of the *Plascon-Evans* rule.[38] If there was a material dispute of fact as to whether or not the published statements were true and in the public interest, the dispute of fact had to be resolved in the respondent's favour, meaning that the appellant would not have been entitled to the declaratory relief he sought.

[75] In regard to interdicts against the publication of defamatory material, we were referred to the judgment of Greenberg J in *Heilbron v Blignaut.*[39] The learned judge said that there were no features peculiar to defamation. The law to be applied 'is the law which would apply to any apprehended injury'.[40] As this Court said in *Hix Networking Technologies*,[41] *Heilbron* did not signal any departure from established rules. *Hix Networking Technologies* was a case about an interim interdict. Particularly in the constitutional era, the elements of balance of convenience and discretion are where a court will factor in the right to freedom of speech.[42] Where one is dealing with a final interdict or declaratory relief, however, the focus is on whether the applicant has established his right and its unlawful invasion. Since we were not asked to develop the common law, defamation does not in this respect stand on a different footing from other allegedly unlawful conduct, though naturally the Constitution may affect the assessment of elements of conventional defences, such as, for example, whether publication of particular allegations was in the public interest.

[76] This Court's judgment in *Herbal Zone* cannot be read as altering, in relation to defamation, the ordinary law of interdicts. This Court emphasised, as had already been made clear in *Hix Networking Technologies*, that *Heilbron* was not authority

[38] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.
[39] Fn 7 above.
[40] At 169.
[41] Fn 8 above at 399B-H.
[42] *Hix Network Technologies* at 401D-402F.

for the proposition that in an application for an order to interdict the publication of defamatory material the respondent's mere *ipse dixit* suffices. Wallis JA explained:[43]

'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. 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 therefor.'

[77] In *Herbal Zone*, the appellant had, by admissible evidence, made out the case that its allegation of counterfeiting against the first respondent was true and in the public interest. Wallis JA said that it was unnecessary to determine whether the appellant's defence would succeed at trial; the appellant had raised 'a colourable defence' and laid a 'factual basis … for it that cannot be rejected out of hand'.[44] By using the expression 'colourable defence', Wallis JA was not signifying anything less than admissible evidence which, if true, made out the defence. His concluding words ('that cannot be rejected out of hand') shows that he had in mind evidence that passed the *Plascon-Evans* test. 'Colourable' here means 'appearing to be correct or justified'.

[78] Since truth and public benefit is obviously a good defence in law, the question for present purposes is whether the respondent laid a factual foundation for it by way of evidence. In the context of judicial proceedings, evidence means admissible evidence. While some leeway could properly be allowed to the respondent as a litigant in person, departure from accepted principles should not be allowed to prejudice the appellant. The rules of evidence exist to ensure fair play and reliable outcomes. While one can readily accept, as stated in the first judgment, that the respondent was an insider who might have had access to information not

[43] *Herbal Zone* para 38.
[44] Para 39.

available to the general public, the question remains whether, by virtue of his inside position, he had evidence to support the defamatory allegations and, if so, whether he adduced that evidence in the proceedings before the high court. One cannot assume that his defamatory statements are true just because he was an insider.

[79] What admissible evidence did the respondent put up in support of his allegation that the appellant was corrupt, stole money and was of base moral character? The respondent claimed in his answering affidavit to have been present at a meeting, held in early February 2019, where the appellant admitted to having received money from VBS to fund the revolution. In support of this allegation, he also filed an affidavit from Mr Zolile Xalisa who swore that he was present at the meeting and that the appellant, in the course of giving a political overview, admitted that the EFF had received donations from VBS. In context, the respondent's allegations convey that the appellant was instrumental in allowing the EFF to receive donations from VBS in order to finance its political activities. The respondent stated in his affidavit that on receiving this information he had observed that while he appreciated the fact that the appellant was taking them into his confidence, it would have been better for this to have happened before rather than after receipt of the money.

[80] Although these allegations were denied by the appellant in his replying affidavit, they cannot, on the *Plascon-Evans* approach, be rejected out of hand. If true, they support the respondent's complaint of the appellant's lack of financial accountability and a complaint that the VBS scandal tarnished the EFF by association. But they fall well short of making the case that the appellant is corrupt and steals money. Although VBS later became the subject of scandal, the respondent does not allege that the donations, the receipt of which the appellant allegedly admitted, were made at a time when VBS was known to be fleecing its

depositors or that the appellant admitted taking the money for himself rather than for the EFF.

[81] Publicly available information, including court judgments, reveal that in February 2018 VBS experienced a liquidity crisis as a result of withdrawals of deposits. This may have been precipitated by a circular which National Treasury sent to municipalities in August 2017 stating that they were not permitted by the Local Government: Municipal Finance Management Act 56 of 2003 to place deposits with mutual banks such as VBS. The liquidity crisis led to VBS being placed under curatorship on 11 March 2018 at the instance of the South African Reserve Bank. By late July 2018 its curator had formed the view that certain of VBS' officers had, as from 2017, embarked on a massive fraud which continued until the curatorship order.[45] On 5 October 2018 the South African Reserve Bank published a report by an advocate, Terry Motau SC, with the title 'The Great Bank Heist', which set out Mr Motau's findings of malfeasance at VBS.[46] With no prospect of being restored to well-being, VBS was placed in final liquidation on 13 November 2018.

[82] I mention this information not because it is admissible evidence in the present proceedings but to show that one needs to be cautious, in the absence of clear evidence, about inferring that an admission made by the appellant in February 2019 that the EFF had received donations from VBS meant that the appellant had taken donations from a bank at a time when he knew it to be engaged in looting. In fact, since VBS' curator and liquidator would not have caused the bank to make donations to the EFF or the appellant, any such donations must have predated 11

[45] Cf *VBS Mutual Bank (In Liquidation) v Ramavhunga and Others* [2018] ZAGPJHC 516 (3 August 2018) para 13. (The reference in the case title to VBS being in liquidation is an error – it was still under curatorship.)
[46] Some of the history in this regard is recorded in *Msiza v Motau NO and Another* [2020] ZAGPPHC 366; 2020 (6) SA 604 (GP).

March 2018, ie at a time, so it seems, that there was no public scandal surrounding VBS.

[83] In the first judgment it is stated, at para 41, to be beside the point that the respondent failed to allege or provide evidence that the appellant personally benefited from the VBS donations. In my respectful view, however, evidence to this effect, together with evidence that the donations were received at a time when VBS was known to be engaged in widespread theft from vulnerable depositors, was crucial if the respondent wished to establish the truth of statements conveying that the appellant was corrupt or a thief.

[84] In his answering affidavit the respondent claimed that the appellant had admitted to a Scorpio journalist, Ms Pauli van Wyk, that he (or the EFF) had received donations from VBS. The document he attached in support of this allegation (being questions posed to the EFF, the answers furnished by Messrs Malema and Shivambu and Dr Ndlozi, and the journalist's subsequent article) do not contain any such admission. (Scorpio is the investigative arm of *Daily Maverick*.) To the extent that my colleague considers that the passage he quotes in para 44 of the first judgment embodies such an admission, I respectfully disagree, though not much turns on this because there is other evidence (albeit disputed) that the appellant made such an admission at the CCT meeting of February 2019. I also disagree, in passing, with the statement in para 48 of the first judgment that the respondent's possession of these email exchanges is evidence of his access to inside information. Ms van Wyk's *Daily Maverick* article contained links to supporting documentation, one such link being the email exchanges between her and the three EFF functionaries. It was this linked document, ie a linked document available to the public at large, which the respondent attached to his affidavit.

[85] The respondent alleged in the answering affidavit that it was publicly known that the appellant had stayed in a house in Sandown, Johannesburg, for more than three years as from 2012 and that the house 'has been the subject of investigation due to the VBS financial illicit flows to the property'. He said that R430 000 had allegedly been 'pumped' into the property from VBS funds. The EFF had later bought the property (he attached a deed of transfer dated 21 June 2017). The acquisition of this property had not been reported to the CCT. The EFF's spokesperson, Dr Ndlozi, allegedly told the Scorpio journalist, when asked about the R430 000, that 'at least the money was not for the purposes of the [EFF], implying that the funds were pumped for the tenant of the house owned by EFF under the leadership of [the appellant]'. In this context, the respondent again referred to the questions posed by the Scorpio journalist and her article.

[86] The question which the journalist posed was: 'Is the above-mentioned EFF leadership – along with its national chair – aware that at least R430 000 in illicit VBS funds were pumped into the property?' The recorded response from Dr Ndlozi was: 'It is not true, at least not for EFF purposes.' In her article, the journalist remarked, 'It is unsure why Ndlozi felt the need to qualify his answer.' According to the journalist's article, the payments totalling R430 000 were made in the months after the EFF took transfer. Dr Ndlozi's answer, assuming it to be accurately recorded, does not show that the appellant is corrupt or a thief. Not even the journalist drew that conclusion.

[87] Once again, the appellant in his replying affidavit objected to the admissibility of the Scorpio article. I do not question the value of investigative journalism, but articles of this kind cannot simply be put up in court proceedings as evidence of the truth of what the journalist has written. Apart from the fact that Ms van Wyk did not make an affidavit (there is no evidence that she was asked),

self-evidently the content of the article is not within her personal knowledge. Understandably, she does not identify all her sources. The documents to which she refers would, if they were to constitute evidence in court, have to be produced and properly proved. Production of the article by the respondent constituted double or triple hearsay.

[88] The respondent alleged in his answering affidavit that the appellant appointed service providers without being accountable to the CCT and that these service providers inflated their costs. He claimed that at a recent gala dinner in Pretoria following a Soshanguve rally, the service provider of the beverages told them in no uncertain terms that a bottle of Tanqueray with a normal price of R200 was sold for R800 and that '[o]n enquiry we were told that it was your instructions that prices must be inflated, as the result we could not drink the bottle'. Later in his affidavit the respondent described his informant as the 'bar lady'.

[89] The occasion on which the respondent queried the Tanqueray price is the only incident he identified. No other examples of service providers (whether training providers, as alleged in the Facebook post, or otherwise) inflating their charges (whether by 250%, as alleged in the Facebook post, or otherwise) were given. And in relation to the Tanqueray incident, he does not state under oath that the bar lady told him that the price was inflated so that the appellant could pocket the difference. In his replying affidavit the appellant objected to the evidence about the Tanqueray incident. The respondent's evidence on this score was undoubtedly hearsay. The respondent did not identify his informant by name. He did not produce an affidavit by her or say that he had tried to get her evidence. It is not self-evident that a bar lady could speak reliably about the appellant's interactions with the service provider. In the circumstances, the respondent's allegations about this incident do not constitute admissible evidence that the appellant instructed the

supplier of beverages to inflate prices or that he did so in order to steal the difference.

[90] The respondent made allegations that the appellant is undemocratic and dictatorial in his running of the EFF, that he and Mr Shivambu are not accountable to the party's structures in their management of its money, and that he has failed to produce financial reports to the CCT. Although the appellant denied these allegations in reply, they must in terms of the *Plascon-Evans* rule be accepted for present purposes, but they do not show that the appellant is corrupt or a thief.

[91] The high court referred to the well-known passage from *Room Hire Co v Jeppe Street Mansions*[47] where Murray AJP identified the main ways in which disputes of fact arise. The first and clearest instance, he said, was when the respondent denies all the material allegations made by the applicant's deponents, and produces 'or will produce' positive evidence by deponents or witnesses to the contrary. With reference to the words I have placed in quotation marks, Murray AJP observed that the respondent 'may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed'. The high court in the present case considered that the respondent fell into this category: 'Due to his senior position in the EFF he has certain information and he says that the statements are true, and given the opportunity he will prove it. He does not rely on a bare denial or his *ipse dixit*'.

[92] I disagree. Save for the Tanqueray incident, there was no evidence, not even hearsay, of occasions when service providers inflated their prices so that the appellant could steal the difference from the EFF. As to the Tanqueray incident, the respondent did not say that he knew where the bar lady was or that he had asked

[47] Fn 5 above at 1163.

her for an affidavit or that he would be able or wished to obtain her evidence under subpoena at trial. In regard to the Scorpio article, the respondent did not express any intention of procuring admissible evidence of the matters stated therein.

[93] I should add that in my respectful view the high court's reasoning on this part of the case was also conceptually flawed. The high court considered that the appellant had made out the first two requirements for a final interdict, namely a clear right (the appellant's right to his good name) and injury (the besmirching of the appellant's good name). The high court treated the supposed dispute of fact as going to the question whether the appellant had another satisfactory remedy. That is incorrect. If the respondent raised a genuine dispute of fact, it was a dispute as to whether the defamatory material was true and its publication in the public interest, ie whether the publication was unlawful. Injury, in the delictual sense, means an unlawful invasion of the claimant's right.[48] If there was a genuine dispute of fact about whether the publication was true and in the public interest, the appellant failed to establish the element of injury. If an applicant for a final interdict does not establish the unlawfulness of the respondent's conduct, an interdict cannot be granted,[49] and the question of alternative remedies is irrelevant.

[94] Before concluding, I wish to make brief reference to this Court's recent judgment in *EFF v Manuel*,[50] since counsel for the appellant placed some reliance on passages in that case (paras 70 ff) in which this Court criticised the EFF for having relied on an undisclosed source without investigating the accuracy of the source's information. I agree with the first judgment that this case does not assist

[48] *Bredell v Pienaar* 1924 CPD 203 at 209; *Perlman v Zoutendyk* 1934 CPD 151 at 155. This is the essential meaning of the Roman Law term *iniuria*: J C van der Walt (ed J Labuschagne) *Principles of Delict* 4 ed paras 2, 8 and 72.
[49] See, eg, *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* [2014] ZASCA 169; [2015] 1 All SA 55 (SCA) paras 27-28; *Liberty Group Limited and Others v Mall Space Management CC t/a Mall Space Management* [2019] ZASCA 142; 2020 (1) SA 30 (SCA) para 35.
[50] Fn 11 above.

the appellant, though my reasons for that conclusion differ from those expressed in paras 37-39 of the first judgment.

[95] *Manuel*, in the passages upon which counsel for the appellant relied, was not dealing with the question whether the defamatory publication was justified. In that case the EFF did not seriously contend that its allegations about Mr Manuel were true. Although a defence of truth and public benefit was raised, this Court gave it short shrift (para 37). What thereafter engaged this Court's attention was whether the EFF had nevertheless acted reasonably in publishing the defamatory statement. This was treated as being relevant either to a defence of reasonable publication (if such a defence applied to parties other than the press, a question which this Court left open) or to a conventional defence by a non-press respondent of an absence of *animus iniuriandi*. (In *Manuel* the complainant was persisting with his claim for damages, so *animus iniuriandi* was an essential element of the cause of action.)

[96] The nature of evidence bearing on the question whether a respondent acted reasonably in publishing defamatory material, or whether the respondent honestly though mistakenly believed that the defamatory material was true and in the public interest, is qualitatively different from evidence bearing on the question whether the defamatory material was in fact true and in the public interest. Evidence of the sources of information known to a respondent at the time of publication might be inadmissible to prove the truth of the information but might be highly relevant to the question whether the respondent had a reasonable basis for publishing or an honest belief that the allegations were true. For the latter purposes, it would also be relevant to know whether the respondent took reasonable steps to verify his or her sources, and it is in these respects that this Court in *Manuel* criticised the EFF.

[97] In the present case, however, we are not concerned with reasonable publication or a defence of absence of *animus iniuriandi*. We are dealing with an objective enquiry: were the defamatory allegations true or not? The enquiries which the respondent made or should have made do not bear on that question. Either he has or has not adduced admissible evidence that the defamatory allegations are true. In the respects I have identified, the respondent did not produce such admissible evidence.

[98] In the circumstances, while the respondent put up a 'colourable defence, based on evidence' to justify saying that the appellant conducted himself in an unlawful and undemocratic way, he did not in my opinion do so in relation to the allegations that the appellant was corrupt, stole money and was of base moral character. It follows that I would have upheld the appeal in part. Since this is a minority judgment, there is little point in considering how his partial success would have affected costs in this Court and in the high court.

_____

O L ROGERS

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	T Ngcukaitobi SC
	K Premhid
Instructed by:	Ian Levitt Attorneys, Sandton
	Lovius Block Attorneys, Bloemfontein
For respondent:	In person