IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 16255/2024

In the matter between:

MOREBOYS MUNETSI Applicant

and

BETTER KUDAKWASHE MADHUYU First Respondent

KYLIE TONSANI Second Respondent

Coram: Acting Justice P Farlam

Heard: 31 July 2024

Delivered electronically: 6 August 2024

JUDGMENT

FARLAM AJ

[1] The applicant (Mr Munetsi) has approached this Court as a matter of urgency seeking interdictory relief, an apology and punitive costs in the light of the respondents' publication on social media platforms of the applicant's personal information and material which is alleged to be defamatory of him.

[2] The respondents, who are unrepresented, have opposed this matter and delivered virtually identical answering affidavits, in which they advanced

justifications for the publications and also sought to press their own claims against Mr Munetsi (seeking compensation of R1,000,000.00 for "trauma he has caused us from previous attacks as well as this recent attack", as well as an order that Mr Munetsi "never again in any form contact us directly or indirectly, never to mention our names in whatever setting and finally to issue an apology publicly to us on all his social media platforms").

[3] When this matter was first called in the urgent court on the morning of Wednesday, 31 July 2024 for the purposes of scheduling hearing times, I asked the first respondent (Mr Madhuyu), who also spoke on behalf of the second respondent (his wife), whether they were persisting with their opposition to the prayer for the removal of the video (published some two weeks before, on 17 July 2024) which had caused Mr Munetsi offence, and a prohibition on the respondents broadcasting the applicant's personal information. Mr Munetsi stated, without apparent hesitation, that he had no objection to removing the offending video, and thus, too, the screenshot from the video disclosing Mr Munetsi's phone number, from *Facebook*. However, when the application was called again later in the morning, Mr Madhuyu informed me that he and his wife had reconsidered and were no longer willing to remove the post and video of their own accord in the light of the impact that this would have on their business and their own complaints against Mr Munetsi. It accordingly became necessary after all to hear the application on its merits.

[4] The consideration of this matter was complicated by the defects in the cases sought to be presented by both sides. In this regard:

4.1. The annexure to the applicant's founding affidavit, which was said to show a picture of the applicant together with his cell phone number, was effectively unreadable, and despite my having alerted the parties to the defect after receipt of the papers, the applicant never remedied that problem – though, fortunately for him, the respondents came to his aid by annexing a legible copy of the screenshot to their answering affidavit. The video (showing a "live broadcast") of which

the applicant complained more generally was moreover in good part in Shona, and, even though I also drew the applicant's attention to this problem prior to the set-down date, I was only provided with what purported to be a translation by an unspecified person (based on what was stated to be a video of a video with less than clear text) in a supplementary practice note filed by the applicant's attorneys; and as that did not constitute admissible evidence, no reliance could be placed upon it.

4.2. The respondents' affidavits (which, as I have mentioned, were almost identical) did not, for their part, address the applicants' averments. The allegations made by the respondents in answer – which largely consisted of background information, apparently designed to demonstrate that the applicant had undermined their business and that they were therefore justified in taking retaliatory steps against him – furthermore did not, by and large, pertain to a recognised defence to a defamation claim or a claim for breach of privacy (albeit that they sometimes alluded to potentially relevant facts).

4.3. As mentioned in paragraph [2] above, the respondents also sought to advance their own claims against the applicant in their answering affidavit. However, as I advised the respondents, if they had wanted to claim relief against the applicant, they should have brought a counter-application, which the applicant could have answered. The respondents' claims were anyway either not susceptible to consideration in application proceedings, or capable of being sustained on the allegations made in the answering affidavit, insofar as they were competent at all. I shall therefore not address the respondents' own claims further, except to mention that should the respondents still want to seek relief against the applicant, they should bring separate proceedings, which, save in the event of urgency, would probably have to be brought by way of action, not

application, in the light of the kind of relief sought and the allegations on which the respondents would need to rely in support thereof.

[5] I now turn to consider the applicants' case, which, as mentioned, was effectively unaddressed in the respondents' affidavits.

[6] The first substantive prayer sought by the applicant (after a prayer seeking condonation for bringing the matter as one of urgency) was an order that "the Respondents be and are hereby interdicted from broadcasting the Applicant's personal information and to immediately remove the live broadcast published on 17 July 2024 from all their social media platforms". There are two components of this prayer, which require separate consideration: (1) whether the respondents should be interdicted from broadcasting the applicant's personal information (and more particularly his cell phone number); and (2) whether the respondents should be directed to remove from their social media platforms the "live broadcast" uploaded on 17 July 2024.

[7] The applicant's complaint about the publication of his cell phone number on the respondents' social media platforms, in the body of the video, involved an allegation that the respondents had breached the Protection of Personal Information Act, 4 of 2023 (**POPIA**), as well as the right to privacy (entrenched in s 14 of the Constitution), although both contentions were framed in general terms, and for example without reference to any particular provision of POPIA other than the definition of "*personal information*" in section 1 thereof (which, as the applicant's counsel pointed out, includes the "telephone number" of an "identifiable, living, natural person").

[8] I agree that the respondents have breached POPIA by publishing the applicant's telephone number on their social media platforms (and *Facebook*, in particular). That breach was moreover aggravated by the first respondent requesting the viewers of that post in their video to "ask [the applicant] what it is that [the applicant] wanted from [the respondents]", apparently resulting in a deluge of telephone calls to them. Section 11(1) of POPIA stipulates that personal information (as defined) may only be "processed" in certain specified

circumstances, none of which is applicable here. The term "*processing*" is defined in section 1 of POPIA as including, in relation to personal information, "dissemination by means of transmission, distribution or making available in any other form". By making the applicant's cell phone number publicly available on social media, the respondents thus breached section 11 of POPIA.

[9] Publishing someone else's personal cell phone number on social media platforms with a large viewership (the first respondent was stated to have advised the applicant that he had 67,000 followers on *Facebook* and 33,000 on *Tiktok*), and requesting that viewers call the person in question to promote the interests of the person who had published the cell phone number also involves a breach of the common-law right to privacy. Whether or not the applicant's phone number may already have been available on some other platform (as I understood the first respondent to contend) does not detract from this.

[10] The applicant is accordingly entitled to an order that the respondents remove any video or message containing the applicant's picture and cell phone number from their social media platforms and an interdict prohibiting them from publishing the applicant's personal information without his consent in the future. (The prayer sought by the applicant in this regard was simply to the effect that the respondents be "interdicted from broadcasting the Applicant's personal information", but the gist of what is sought appears to be better captured by the formulation in the first sentence of this paragraph, which could competently be granted under "further and or alternative relief".)

[11] The prayer for the immediate removal by the applicant of the video published (or uploaded) on 17 July 2024 was also sought on the basis that the video contained defamatory allegations about the applicant. As alluded to above, however, a problem that the applicant had in this regard was that the video was in good part in Shona and there was no admissible translation before the Court. The applicant was accordingly constrained to rely on general allegations in his founding affidavit as to what the video contained.

[12] As the answering affidavit did not take issue with the contents of the founding affidavit, the applicant's allegations in this regard were essentially uncontroverted. However, even on their own terms, the majority of the allegations failed to sustain a case for defamation against the respondents, as, while they may have upset the applicant, they were not defamatory, given that they could not reasonably be regarded as likely to undermine the applicant's good name or reputation. It was not for example defamatory to state that the applicant "did not like them or their content and would therefore never work with them"; nor that the respondents "had never approached [the applicant] to work with them, or to solicit [the applicant's] help"; nor that the applicant "had contacted the First Respondent while he was in Johannesburg having lunch with [the applicant's] client, Mr Nyathi, and proposed a business venture, additionally requesting the address of their hotel so that we could meet there". It was also not defamatory for the first respondent to have "claimed that [the respondents] had no issue with [the applicant's] client, Mr Nyathi, and that their contention was solely with [the applicant]".

[13] The high-water mark of the defamation claim was the allegation that the video broadcast had accused the applicant of being an "evil person and a liar", something which, I was informed, was particularly detrimental to someone like the applicant who had a business providing insurance and funeral services, including the repatriation of bodies. The respondents admitted that the second respondent had called the applicant "evil" in the video, but said that they had already apologised for that. The respondents also admitted that they had called the applicant a liar, but said that this was true, and thus justified on this basis (although the justification ground is not only truth, but a substantially true statement in the public interest, and the public interest in the slur was less clear).

[14] It is unnecessary to analyse whether it was warranted for the respondents to call the applicant a liar, as it is sufficient for the applicant's defamation complaint that it is common cause that the video ("live broadcast") published on 17 July 2024 on the respondents' social media platforms referred to the

applicant as “evil” – an unquestionably defamatory allegation, which the respondents did not attempt to justify.

[15] Given the extent of the respondents’ social media profile, and the number of viewers of their *Facebook* pages, there was moreover a sufficient apprehension of irreparable harm to the applicant’s reputation for him to seek the removal of the video by way of an interdict (even apart from his entitlement to seek the removal of the video as a result of it disclosing his cell phone number).[1] I also agree that there was no adequate alternative relief available to the applicant, as the possibility of a damages claim would be of little consolation.

[16] The applicant also contended that the balance of convenience was in his favour, as the harm that he was suffering as a result of the offending video far outweighed any inconvenience that the respondents might experience in the event of being ordered to remove it. I agree that, were the balance of convenience enquiry to be relevant, it would favour the applicant. (Indeed, it was difficult on the papers to understand what the respondents would lose at this point from removing the video (and thus, too, the screenshot disclosing the applicant’s personal information) from their social media platforms.) However, as the applicant is seeking a final interdict, not an interim one, balance of convenience considerations do not arise and so need not be addressed.

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[1] The Supreme Court of Appeal has confirmed in *EFF and Others v Manuel* 2021 (3) SA 425 (SCA) para [111] that an interdict (whether interim or final) can be sought in respect of the publication of defamatory statements.

[17] As noted at the start of this judgment, the applicant also sought a public apology. This apology was requested as a result of both "the defamatory statements and the unauthorized disclosure of public information".

[18] I am not aware of an apology being a competent remedy for a violation of privacy, or a breach of POPIA.[2] The recognised remedies for that unlawful conduct would be damages or an interdict. I also anyway regard the interdict which is sought, and will be granted, in relation to the unlawful publication of the applicant's personal information as sufficient to address that wrong.

[19] While an apology can be ordered in response to the publication of defamatory matter, it appears from *EFF v Manuel* that the question of whether "an order for an apology should be made is inextricably bound up with the question of damages",[3] and thus cannot be made in isolation of a damages claim. There is also authority in this Court expressly to that effect.[4] In any event, the only defamation that has been proved by the applicant was the second respondent's remark that he was "evil", and the respondents have already apologised for that, as this judgment mentions. In my view, that should suffice.

[20] Turning finally to costs:

20.1. The applicant has been substantially, though not entirely, successful. The interdictory relief sought in prayer 2 of the notice of motion was

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[2] The Constitutional Court has held that an apology can be an appropriate remedy for an injury to a person's dignity (*Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as amici curiae)* 2011 (3) SA 274 (CC) para [150, [202]-[203]). However, in this matter, no case has been made out on the affidavits for a violation of the applicant's dignity.

[3] *EFF v Manuel supra* para [128].

[4] *Hartland Lifestyle Estate (Pty) Ltd and Another v APC Marketing (Pty) Ltd and Another* (6831/2023) [2023] ZAWCHC (13 June 2023) para [101]. *Cf*, too, *Jacobson v Finch* (18830/2020) [2023] ZAWCHC 115 (22 May 2023) para [55], where it is recorded that the applicant sought damages coupled with an order directing the publication of the respondent's apologies on Facebook.

the most important relief, and the one on which almost all of the time was spent in argument. The applicant is accordingly entitled to his costs.

20.2. The applicant is not, however, in my view, entitled to the punitive, attorney and own client costs he has sought. Nor has the applicant made out an adequate case in his founding affidavit for any costs order other than a party and party one. The applicant's costs argument was essentially to the effect that he is entitled to costs as "vindication" for his constitutional rights and the respondents' unlawful conduct. The applicant has however essentially succeeded with claims founded in the common law and a breach of statute, rather than a constitutional claim (albeit that his common-law claims are infused by constitutional values and rights). In any event, a breach of a party's rights, whether constitutional or otherwise, does not justify an attorney and client (or attorney and own client) costs; something more has to be shown. The vindication that a successful applicant receives is also in the normal course in the obtaining of the substantive relief sought, together with party and party costs. In order to obtain an attorney and client (or attorney and own client) costs award, the applicant would have had to show that the respondents had acted vexatiously, or done something else which would warrant a show of special judicial disapproval. The applicant has not met that burden in this case.

20.3. The applicant's counsel did not attempt to make out a case for counsel's costs to be awarded on a scale other than Scale A, as contemplated in rules 67A and 69 of the Uniform Rules of Court. That scale anyway seems appropriate.

[21] **I accordingly make the following order:**

1. **Condonation is granted to the applicant for non-compliance with the ordinary rules relating to forms and timeframes, and the matter is enrolled as one of urgency.**

2. **The respondents are directed to remove the live broadcast published on 17 July 2024 from all their social media platforms, and also remove any video or message containing the applicant's picture and cell phone number from such platforms, as well as refrain from publishing the applicant's personal information without his consent.**

3. **The respondent is to pay the costs of the application on a party and party basis, with counsel's costs being taxed on Scale A.**

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ACTING JUDGE P FARLAM

For applicant: Adv Isiah Mureriwa

Instructed by: S E Kanyoka Attorneys (Pretoria) c/o PVW Inc. Attorneys, Observatory

For respondents: Mr Madhuyu (in person)