

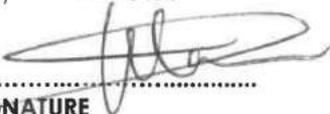
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13349/2019

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.


.....
SIGNATURE

..30 May 2019..
DATE

In the matter between:

TREVOR ANDREW MANUEL

Applicant

and

ECONOMIC FREEDOM FIGHTERS

First Respondent

MBUYISENI QUINTIN NDLOZI

Second Respondent

JULIUS SELLO MALEMA

Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is a semi-urgent application for final interdictory relief against the respondents relating to the publication of an alleged defamatory statement. The publication occurred in the form of a 'tweet' on the respondents micro blogging-service known as Twitter on 27 March 2019.

[2] Two conflicting values are at stake in this matter – on the one hand, is the freedom of expression and on the other, the right to dignity,¹ which includes reputation. While freedom of expression is a fundamental freedom protected by section 16² of the Constitution, human dignity is stated in section 1 of the Constitution to be a foundational value of our democratic state.³ The challenge for the courts has been to strike an appropriate balance between these rights in articulating the common law of defamation. In this case, the Court is asked to consider, once again, whether this balance requires further adjustment.

[3] The applicant, Mr Trevor Andrew Manuel, seeks a declaratory order to the effect that the impugned statement is defamatory, false and unlawful. He states that this order is necessary to vindicate his good name and reputation and to finally settle the dispute between him and the respondents about the lawfulness of the publication of the impugned statement.

[4] Second, the applicant seeks an order directing the respondents to remove the impugned statement from all their media platforms. This relief is contingent on the Court declaring that the ongoing publication of the impugned statement is unlawful.

[5] Third, the applicant seeks an order interdicting the Economic Freedom Fighters (the EFF), Dr Ndlozi and Mr Malema from publishing the same or similar

¹ Section 10 of the Constitution provides 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

² Section 16 of the Constitution provides

(1) Everyone has the right to freedom of expression, which includes—
 (a) Freedom of the press and other media;
 (b) Freedom to receive or impart information or ideas;
 (c) ...;
 (d)

³ On the relationship between the right to freedom of expression and dignity, O'Regan J in *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) stated at paragraph 25 that 'although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.'

defamatory allegations about him in the future. The applicant says that if there is no accompanying order interdicting any subsequent publication after the respondents have been ordered to remove the impugned statement from their media platforms, there is every likelihood that they will make substantially the same false allegations against him.

[6] Fourth, the applicant asks that the respondents be ordered to publish an unconditional public retraction and apology for the allegations made about him in the impugned statement, in order to set the record straight.

[7] Lastly, the applicant claims general damages as a *solatium* for the alleged injury to his reputation.

[8] The respondents deny that the impugned statement is defamatory, but if it is found to be defamatory, the respondents submit that they are protected from liability as the impugned statement is either substantially true; constitutes reasonable publication; is the result of fair comment; or is in the public interest.

The parties to the application

[9] The applicant, Mr Manuel, was appointed as South Africa's Minister of Finance in 1996. Before that, he served as the Minister of Trade and Industry from 1994 until 1996. Between 2009 and 2014, he served as a Minister in the Presidency for the National Planning Commission. He has held positions in numerous international bodies, including the World Bank, the International Monetary Fund and the African Development Bank. He retired from politics in 2014 and no longer served on the leadership structures of the African National Congress. Currently, he is the chairperson of Old Mutual Limited, a senior adviser to Rothschild South Africa (in addition to being its Deputy Chairperson) and he also serves as the trustee on the Alan Gray Orbis Endowment Trust.

[10] The first respondent, the EFF, is a political party widely represented in the national, provincial and local legislatures throughout South Africa. Dr Ndlozi, the second respondent, is the national spokesperson of the EFF, and Mr Malema, the third respondent, is the president of the EFF. Both Dr Ndlozi and Mr Malema are

members of Parliament and serve in the National Assembly as elected representatives of the EFF.

Preliminary Objections

[11] The respondents submit that the relief sought is overboard because Mr Manuel does not identify with any particularity which portions of the statement violate his rights. The first five paragraphs of the impugned statement (quoted below) accuse Mr Manuel of conducting a nepotistic, corrupt and clandestine process in the appointment of Mr Kieswetter as the Commissioner of the South African Revenue Service (SARS). The courts have previously found that allegations of corruption and nepotism are defamatory per se, and it is not necessary for Mr Manuel to point out that portion of the statement.

[12] In prayer 1.3 of his Notice of Motion, Mr Manuel seeks to have those allegations made about him in the statement declared defamatory and false. The respondents argue that the entire statement does not relate to Mr Manuel, and he therefore cannot request a retraction of the full statement. In this regard Mr Manuel states that he will not object to an order that the respondents remove only those specific aspects of the impugned statement that refer to him if the Court decides that it will be appropriate to do so. There is no merit to the respondents' submission, as the entire statement is coloured by the allegations made against Mr Manuel.

[13] The respondents also complained that Mr Manuel's prayer to have the statement removed is overboard in the sense that the statement refers not only to himself, but also to Mr Kieswetter and Treasury, and that Mr Manuel has no authority to represent them or bring proceedings on their behalf.

[14] Mr Manuel explains that he brings this application in his name to vindicate his reputation and dignity. He does not seek relief on behalf of Mr Kieswetter and Treasury. In terms of section 38⁴ of the Bill of Rights, anyone acting in the public

⁴ Section 38 of the Constitution provides as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

interest can approach a court to enforce rights. See *Ruta v Minister of Home Affairs*.⁵ It is in the public interest that any allegations that the appointment process of the new Commissioner of SARS was corrupt, should be exposed to assure the public that the Commissioner was appointed on merit and not because he was related to the applicant, or because he was his close business associate and companion.

[15] There is no doubt that the allegations in the impugned statement that the Commissioner of SARS is a dodgy character who was appointed unlawfully harm the integrity of SARS and the National Treasury, and contributes to the already compromised tax morality among the South African public being undermined.

Urgency

[16] The respondents dispute the urgency of the application. They contend that Mr Manuel's fears of harm are based on mere anxiety that his reputation may be harmed and that he has not provided any evidence of such harm. The respondents argue that this case is an abuse of legal process, as it was brought to be heard on the day before the national elections by Mr Manuel, who is their political rival, in order to cause maximum damage to the respondents.

[17] Mr Manuel is accused of grave allegations of corruption and nepotism. Allegations of dishonesty and immoral or dishonourable conduct are defamatory.⁶ There is no reason why Mr Manuel ought to submit himself to further indignities and assaults on his dignity before this matter can be determined. Dignity is not only a value fundamental to the Constitution, but it is also a justiciable and enforceable right that must be respected and protected.⁷

[18] There is nothing in the papers to suggest that Mr Manuel is the respondents' political rival. The appointment process, as will appear below, was designed to be

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- (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interests of its members.

⁵ 2019 (2) SA 329 (CC) at paragraphs 9-12

⁶ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae)* 2011 (3) SA 274 (CC) para 91(c).

⁷ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35.

apolitical, and members of the selection panel were chosen because they were people of impeccable reputation and probity, and not because of their political affiliation.

[19] In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*⁸ Corbett JA held that:

'...Naturally, it is for the Court to decide whether the matter is really one of urgency and whether the circumstances warrant a departure from the normal procedures. To hold otherwise would, in my view, make the Court the captive of the Rules. I prefer the view that the Rules exist for the Court, rather than the Court for the Rules.'

[20] The respondents have been afforded ten days to prepare their answering affidavits, all the papers have been filed, and the matter is ripe for hearing. The respondents have not complained that the time frames in the notice of motion prejudiced them. The manner in which dignity is engaged in this matter renders the matter urgent. Having regard to the relevant factors and, in particular, the fact that it is in the public interest to urgently determine whether National Treasury conducted a corrupt and nepotistic appointment process of the new Commissioner of SARS, I am satisfied that Mr Manuel was justified in bringing this matter on a semi-urgent basis.

Requirements for an interdict

[21] Mr Manuel has met the requirements of an interdict, contrary to the argument of the respondents. He has a clear right to protect his dignity and reputation, which he alleges the respondents have infringed. Secondly, he has suffered and continues to suffer harm to his reputation, both in his personal and professional capacity, through the widespread dissemination of the impugned statement. He has no alternative remedy to the persisting injury, as the respondents have refused to apologise or to take down the defamatory statement from their social media platforms. There is also ongoing harm to the well-being of the country as the public labours under the misapprehension that SARS is led by a person who was appointed for nepotistic and corrupt reasons.

⁸ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 675H.

[22] The threat to Mr Manuel's right to dignity and the compelling public interest in disabusing the public of the idea that the Treasury conducted a corrupt appointment process of the Commissioner renders this matter urgent.

The circumstances in which the impugned statement was published

[23] The relevant circumstances are in the public domain. The Nugent Commission of Inquiry into Tax Administration and Governance at SARS ('the Nugent Commission') recommended the removal of former SARS Commissioner Mr Tom Moyane (Mr Moyane) in November 2018.⁹ The Commission recommended that the President take steps, without delay, to appoint a new Commissioner of SARS to replace him.

[24] President Ramaphosa adopted the recommendation of the Commission and asked the Minister of Finance to oversee the appointment of a panel which would shortlist interviewees and submit a list recommending a suitable and competent candidate for appointment. The panel was required to publish its recommendations, together with its reasons, to enable the public to see whom the panel recommended and the basis of the recommendation.

[25] The President was not obliged to appoint a panel to recommend a suitable candidate to him because section 6 of the South African Revenue Services Act 34 of 1997 (the SARS Act) empowers the President to appoint the Commissioner of SARS in any manner he sees fit.

[26] To inspire confidence in the new SARS Commissioner, the Nugent Commission recommended that the Commissioner be appointed through an open, transparent and apolitical process. The Commission recommended that persons providing the input should be selected for their merit, including their impeccable reputation and probity, and on the basis of being a representative of any particular

⁹ Final Report of the Commission of Inquiry into Tax Administration and Governance by SARS dated 11 December 2018, accessible at <http://www.thepresidency.gov.za/content/commission-inquiry-tax-administration-and-governance-sars>.

organisation. The Commission recommended a specific process for the appointment of the next Commissioner of SARS¹⁰ and set out its recommendation as follows:

'In paragraph [39] it is recommended that the SARS Act be amended to provide for the appointment of the Commissioner of SARS by the President, after consultation with the Minister of Finance, in accordance with a transparent process, which it is recommended should be along the following lines:

16.3 In paragraph [39] it is recommended that the SARS Act be amended to provide for the appointment of the Commissioner of SARS by the President, after consultation with the Minister of Finance, in accordance with a transparent process, which it is recommended should be along the following lines:

16.3.1 The President should, of his own volition, or after a call for nominations, at his discretion, select one or more suitable candidates for appointment.

16.3.2 The candidate or candidates should

16.3.2.1 be, and be reputed to be, of unblemished integrity;

16.3.2.2 have proven experience of managing a large organization at a high level;

16.3.2.3 not be aligned to any constituency, and if so aligned, should renounce that alliance upon appointment.

16.3.3 The candidate or candidates for appointment should submit to a private interview by a panel of four or more members selected by the President. The function of the panel is to evaluate the candidate or candidates against the criteria above and make motivated non-prescriptive recommendations to the President.

16.3.4 Members of the panel should be apolitical and not answerable to any constituency and should be persons of high standing who are able to inspire confidence across the tax-paying spectrum.

16.3.5 The panel must, upon its evaluation, make motivated non-prescriptive recommendations to the President on the suitability or otherwise for the appointment of the candidate or candidates. If the recommendation is against the appointment of a particular candidate, it is the prerogative of the President to reject the recommendation and appoint the

¹⁰ Ibid, page 186, para 40 of the Final Report.

candidate nonetheless or to select an alternative candidate or candidates to repeat the process.

16.3.6 Upon appointment of a candidate, the recommendations of the panel, in whichever direction, should be made public.¹¹

[27] On 7 February 2009, the Minister of Finance announced the composition of the panel. The task of the panel was to interview candidates and to recommend to the President a shortlist of candidates for the position of SARS Commissioner. Participation in the panel was a non-remunerative public service. The advertisement for the position of SARS Commissioner was advertised by National Treasury in national newspapers on 16 December 2018 with a closing date of 18 January 2019. On 8 February 2019, the press reported on the candidates who were shortlisted for interview by the panel.

[28] On 13 February 2019, when retired Justice Nugent presented his Report to the Parliamentary Standing Committee on Finance, Mr Floyd Shivambu, the Deputy President of the EFF, addressed a letter to the Minister of Finance complaining that Retired Justice Nugent had recommended a '*secret interview process*' and addressed specific questions to the Minister in this regard. The EFF was advised to address its questions to the Minister through Parliament, and after that, the EFF addressed parliamentary questions to the Minister, to which he responded on 5 March 2019.

[29] Mr Manuel was appointed as the Chair of the panel, which comprised seven members, including himself. The other members were people of very high standing, including a senior High Court judge with tax expertise, a former director-general, an advocate, business people, and a senior member of National Treasury.

[30] Before the interviews were conducted, panel members were asked to disclose any relationships they had with candidates for the interviews. Mr Manuel recused himself, out of an abundance of caution, from the interview of Mr Kieswetter. This was because Mr Kieswetter had previously worked at SARS as head of the Large Business Centre, and subsequently as a Deputy Commissioner, while Mr Manuel was the Minister of Finance.

¹¹ Ibid, page 186-187 of the Final Report.

[31] Mr Kieswetter was anonymously recommended by the panel as being, by far, the most suitable and preferred candidate for the position. He was duly appointed by the President as the Commissioner of SARS.

The impugned statement

[32] It is not in dispute that on 27 March 2019, the EFF published a tweet on its official Twitter account. The statement in the tweet is indicated as being issued by the EFF and reads as follows:

THE EFF REJECTS SARS COMMISSIONER INTERVIEW PROCESS

Wednesday, 27 March 2019

The Economic Freedom Fighters objects to the patently nepotistic, and corrupt process of selecting the South African Revenue Services' Commissioner.

In February 2019, the EFF sent a letter, and Parliamentary questions to the outgoing President Mr Cyril Ramaphosa and Mr Tito Mboweni, to specifically ask why they are conducting the SARS selection process in secret. It is confirmed that a panel chaired by the former minister, Trevor Manuel, conducted secret interviews to select the SARS Commissioner, and this goes against the spirit of transparency and openness.

It has now emerged that the reason is that, one of the candidates who was interviewed and favoured by the panel, is a dodgy character called Edward Kieswetter, who is not just a relative of Trevor Manuel, but a close business associate and companion.

Kieswetter used to be a Deputy SARS Commissioner, unlawfully appointed to that position by Trevor Manuel when Pravin Gordhan was SARS Commissioner. Kieswetter was in SARS during the time of the illegal intelligence unit established by Pravin Gordhan, to hound off political opponents and commit corruption.

After SARS, Kieswetter joined Alexander Forbes and was subsequently removed from the company due to alleged corruption and unethical conduct. After Alexander Forbes, Kieswetter became a vice chancellor of an institution whose academic credentials are questionable. This is now a candidate whom Trevor Manuel and Tito Mboweni want to impose into SARS.

The EFF is profusely opposed to the imposition of a secretly assessed candidate by conflicted individuals, and we will do everything in our power to stop, and reverse the appointment of Kieswetter as SARS Commissioner. We will immediately write a legal letter to Mr Ramaphosa and Mr Mboweni, to demand the disclosure of all processes that were followed in the process of selecting a SARS Commissioner.

Furthermore, the EFF will explore legal options to invalidate the unlawful appointment of SARS Commissioner.

The EFF is particularly concerned about SARS because our Elections Manifesto states that, part of our immediate plans when we take over Government will be the capacitation of SARS so that it can maximally collect revenue. The EFF particularly advocates for a SARS that will decisively fight against illicit financial flows, base erosion and profit shifting. A secretly chosen SARS Commissioner with a clear connection to the white capitalist establishment will not maximally collect taxes.

The EFF, therefore, demands that the process to select SARS Commissioner should be restarted, and be opened to public scrutiny. This should be so because a Commissioner of the ultimate Revenue Collector in South Africa should be beyond reproach and must stand public scrutiny. SARS has over the years been involved in a lot of illegal and unlawful activities, and tax payers deserve to know who will be responsible for the institution.

We also caution Mr Ramaphosa and Mr Mboweni to not engage in activities that led to the downfall of Mr Jacob Zuma. If they become arrogant and ignore the EFF's logical demands, they must know that they too will fall very hard on their own sword.

[33] At the time of publication of the statement, the EFF had over 725 000 Twitter followers. The tweet was retweeted 237 times from the EFF Twitter account. Mr Malema also tweeted the statement from his personal Twitter account. He has over 2 million Twitter followers who also may have retweeted the statement. The tweet received wide coverage in the media and on online channels that draw high volumes of daily traffic.

What the parties contend the tweet meant

[34] Mr Manuel submits that the statement is highly defamatory of him, as well as Mr Kieswetter and other members of the panel, as the statement implies that he:

- (a) is corrupt,
- (b) is nepotistic,
- (c) conducted 'secret interviews' and participated in a secretive process to select the new SARS Commissioner;
- (d) conducted an unlawful appointment process, which led to the appointment of Mr Kieswetter as the SARS Commissioner, who was not deserving of the appointment;
- (e) made previous unlawful appointments to positions at SARS during his tenure as Minister of Finance;
- (f) is connected to a 'white capitalist establishment' that acts contrary to the best interests of SARS.

[35] Mr Manuel submits that the sting of the statement is that, in his capacity as Chair of the panel, he appointed his relative and close business associate and companion, Mr Kieswetter, as a Commissioner of SARS in a corrupt manner for nepotistic and corrupt reasons. His primary concern is the restoration of his good reputation in the eyes of the public.

[36] In their answering affidavit, the respondents put up no facts to support the truth of their averments, nor do they refute the sting of the defamation contained in the first five paragraphs of the impugned statement. Instead, the respondents contend that their actions were reasonable, because the EFF was given information by a confidential source (which it states that it had no reason to doubt), and that their only other option after exhausting parliamentary avenues was to disclose their concerns about the appointment of the SARS Commissioner 'more robustly' in the public domain.

[37] The respondents argue that the essence of the statement is the EFF's concern about the 'lawfulness' of the appointment process. They aver that the process was 'entirely executive-controlled and run' and occurred outside the public

arena in contravention of section 195 of the Constitution, which requires openness and transparency in the public administration.¹²

[38] The respondents concede that the appointment of the Commissioner was made pursuant to the recommendation of the Nugent Commission, and that in terms of s 6 of the SARS Act, the President was empowered to appoint a Commissioner of his choice. Their concern was that the appointment of such a strategically important constitutional office bearer could occur with no meaningful role being played by Parliament.

[39] Counsel for the respondents, Mr Ngalwana SC, sought to escape the sting of the statement by submitting that the averments in the impugned statement were not about Mr Manuel, but the secrecy surrounding the interview process of the SARS Commissioner. He argued that it is the transparency of the interview process that has been an issue for the respondents. He stated that, after receiving the information from the confidential source, the EFF wrote to Parliament to ask whether a potential conflict of interest by members of the panel and the interviewees were taken into account when the panel was constituted.

[40] The respondents submit that they are protected from liability as the impugned statement is either substantially true, a reasonable publication, the result of fair comment, or made in the public interest.

¹² **Basic values and principles governing public administration**

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development-oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
- (2) ...

[41] It will be necessary to return in more detail to the contentions of the parties. However, before doing that, it is necessary to set out the relevant law which I have to apply in resolving this dispute.

The respondents knew that the impugned statement was false

[42] The EFF members of parliament were present on 7 February 2019 when the President announced that he was implementing the recommendations of the Nugent Commission to appoint a new SARS Commissioner in his State of the Nation Address. They were also present on 13 February 2019 when retired Justice Nugent presented his Report to the Parliamentary Standing Committee on Finance. As detailed above, the EFF sent a parliamentary question to the Minister of Finance asking why Justice Nugent had recommended a 'secret interview process'.

[43] The respondents also knew that Mr Manuel played no role whatsoever in determining that the process would be conducted in accordance with the recommendations of the Nugent Commission. They knew that the appointment process was conducted in accordance with the recommendation of the Nugent Commission, the Terms of Reference and the SARS Act. There is there no basis for saying that the process was secretive. Even if the process was secretive, they had a legal remedy that they could have resorted to.

[44] The allegation that Mr Manuel unlawfully appointed Mr Kieswetter to the position of Deputy SARS Commissioner when he was Minister of Finance is also patently false. The President appointed Mr Kieswetter in terms of the SARS Act.

The definition of defamation

[45] An individual's reputation is central to his or her sense of self-worth and dignity. The importance of freedom of expression cannot, however, be overstated. Defamation consists of the wrongful and intentional publication of a defamatory statement concerning a person.¹³ The applicant must first prove that the publication of the defamatory matter concerned himself; a presumption of unlawfulness and

¹³ *Khumalo Holomisa* (note 3 above) para 17.

intent then arises, which can be rebutted by the respondent by raising a defence which rebuts either the requirement of wrongfulness or intention.¹⁴

[46] There is no dispute that the tweet refers to Mr Manuel, (because it refers to him by name) and that it has been publicised widely. The issue here is what the tweet means and whether it defames Mr Manuel. Whether a statement is defamatory depends on the natural or ordinary meaning of the words, considered in the context of the publication as a whole.

Is the impugned statement is defamatory?

[47] The legal principles to be applied where an applicant alleges that the statement, in itself, is defamatory were summarised by the Constitutional Court in *Le Roux and Others v Dey*¹⁵ as follows:

'Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test, the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.'

[48] The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate.¹⁶ It should not be so low as to stifle free expression

¹⁴ *Le Roux v Dey* (note 6 above) para 85.

¹⁵ *Ibid* para 89.

¹⁶ Colman J said the following about a reasonable man *Channing v South African Financial Gazette Ltd and Others* 1966 (3) SA 470 (W) at 474A-C:

'From these and other authorities it emerges that the ordinary reader is a "reasonable", "right thinking" person, of average education and normal intelligence; he is not a man of "morbid or suspicious mind", nor is he "super-critical" or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read. ... It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a somewhat higher standard of education and intelligence and a

unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation.

[49] It is important in this case to point out that the tweet was not a publication on a newspaper or broadcast. It was a publication on Twitter. The hypothetical ordinary reader must be taken to be a reasonable representative of users of Twitter who follow the EFF and Mr Malema and share his interest in politics and current affairs.

[50] In my view, a reasonable person of ordinary intelligence would understand the tweet to mean that Mr Manuel is corrupt, nepotistic, and has conducted the appointment process for a new SARS Commissioner secretly in a deliberate attempt to disguise his familial relationship with Mr Kieswetter, and that he is connected to a 'white capitalistic establishment' that acts contrary to the best interest of SARS.

[51] The second stage of the enquiry is the question whether the meaning conveyed by the impugned tweet genuinely tarnishes Mr Manuel's reputation and dignity. There is no doubt that the statement would generally tend to lower Mr Manuel's reputation in the estimation of right-thinking members of society, as the tweet implies that it was dishonest, unscrupulous and lacking in integrity.

[52] The respondents submit that by accepting the presidential appointment to chair the panel for the appointment of the head of an organ of state as contested as SARS, Mr Manuel had thrust himself firmly '*in the political eye*' and must consequently display a greater degree of tolerance to criticism than ordinary private individuals. There is no merit in this submission, as high profile public office bearers are also entitled to a right to dignity and to not having their reputations unlawfully harmed. The decision of the SCA in *Mthembu-Mahanyele v Mail & Guardian Ltd and Another*¹⁷ is instructive in this regard. Lewis JA at para 42 stated:

'The decision of the court below in denying to a cabinet minister *locus standi* to claim damages for defamation is, with respect, incorrect. It does not give sufficient weight to the

greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this inquiry, the training or the habits of mind of a lawyer.'

¹⁷ 2004 (6) SA 329 (SCA).

right to dignity and to not having one's reputation unlawfully harmed. It elevates freedom of expression above that of dignity when there is not, and there should not be, a hierarchy of rights. It denies to a class of people the ability to protect their reputations, save where defamatory statements are made with malice.'

[53] I find that the tweet, when reading it as a whole, is *per se* defamatory. Mr Manuel's reputation and dignity have been tarnished. It is common ground that the respondents published the defamatory statement in the tweet and that they refer to Mr Manuel. It is thus presumed that the publication of the statement is wrongful and intentional, and the respondents have the onus of demonstrating that the publication of the statements lacked wrongfulness or intention.

The defences raised by the respondents to rebut unlawfulness

Truth and public interest

[54] A complete defence to a defamation claim is that the statement is true and in the public interest. The meaning of the words must be substantially true in order for the defence to succeed. The 'sting of the charge' that Mr Manuel is corrupt and nepotistic must be proved by the respondents.¹⁸

[55] It is not true that the appointment process was 'secretive' as details of the appointment process were made publicly available from the outset. The process was open and transparent, even if the interviews themselves were not public. The respondents admit that they lacked proper facts because they were not provided with meaningful information.

[56] The respondents have failed to prove that the sting of the statement was true. Instead, in their defence, they only raised concerns about the lack of transparency in the appointment process, concerns about state capture, the dismissal of Mr Tom Moyane, the Nugent Commission's recommendations and the 'Rogue Intelligence

¹⁸ *Jonson v Rand Daily Mail* 1928 AD 190 at 205-207.

Unit'. All these are peripheral facts which are unrelated to the sting of the defamatory statement in respect of Mr Manuel.¹⁹

[57] The EFF argues that the fact that Mr Manuel recused himself from Mr Kieswetter's interview demonstrates that he was sufficiently related to him to justify an inference that he was nepotistic. As previously stated, Mr Manuel explained that he was never related to Mr Kieswetter in any way.

[58] If the respondents rely on these facts to infer that Mr Manuel was biased, they must show that "a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias." In other words, they must show a reasonable apprehension of bias to succeed.²⁰

[59] The mere fact that Mr Manuel once had an employment association with Mr Kieswetter many years ago will not, without anything more, form the basis for a reasonable apprehension of bias. In any event, Mr Manuel disclosed, in writing, his association with Mr Kieswetter and recused himself from the interview despite the panel not viewing his relationship with Mr Kieswetter as a conflict of interest.

[60] The EFF's claim that it published the words with an honest belief in the truth thereof, based on the reliable information provided by an anonymous source, does not absolve it from liability. Under the Repetition Rule, the person who repeats a defamatory allegation made by another is treated as if he had made the allegation himself, even if he attempts to distance himself from the allegation.²¹

Reasonable publication

[61] The respondents contend that their conduct was reasonable because it acted in a manner akin to a whistle-blower. They were given information by a confidential source, which they accepted to be true, and had no reason to doubt. The Protected Disclosures Act²² encourages people to report serious wrongdoing in their workplace

¹⁹ *Independent Newspapers Holdings Ltd and others v Suliman* [2004] 3 All SA 137 (SCA) para 36. In respect of peripheral facts the SCA stated, '...It is a peripheral fact which, even if it had been left out, or even if it had been corrected, would have made no difference whatever to the defamatory import of that part of the article which was true.'

²⁰ *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC) para 40, quoting the Court in *Bernert v ABSA Bank* 2011 (3) SA 92 (CC).

²¹ *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) para 5.

²² Act 26 of 2000.

by protecting employees who want to 'blow the whistle'. The Act lists prescribed ways of reporting wrongdoing and does not protect people who publish their unsubstantiated defamatory disclosures worldwide.

[62] The respondents contend that the EFF's statement must be seen in the light of the public disclosure role it was playing, that would ordinarily have been played by the media. They state that the media could not play that role because it was kept in the dark regarding the conduct of the President and the Minister of Finance in the appointment of the panel and the panel's subsequent activities. They seek to invoke the reasonableness of the publication, although containing false allegations, to rebut the unlawfulness of the publication.

[63] The defence of reasonable publication is available to the media to rebut the unlawfulness of the publication of defamatory material. This defence was introduced by the SCA in *National Media Ltd and Others v Bogoshi*, where²³ Hefer JA held that:

'... the publication in the press of false, defamatory allegations of fact will not be regarded as unlawful if, upon consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in a particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318 C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before the defamatory matter is published in a newspaper.¹

[64] The court in *Bogoshi* made it clear that there can be no justification for the publication of untruths, and members of the press may not lower standards of care which must be observed before a defamatory matter is published in a newspaper.

²³ *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212G-1213A.

[65] Because of social media platforms like Twitter, Facebook and others, ordinary members of society now have publishing capacities capable of reaching beyond that which the print and broadcast media can. Twitter users follow news in general on the service worldwide. They get their news either through scrolling their Twitter feeds or browsing the tweets of those they follow. When there is breaking news, they become even more participatory, commenting, posting their opinions and retweeting. Statements are debated and challenged, and people can make up their minds on the issue.

[66] The difference between an ordinary person communicating matters of public interest or concern to the general public on social media, and a journalist publishing the same statement in a newspaper, is that in the case of the former, the communication is capable of reaching millions more instantaneously than, for example, printed copies of newspapers.

[67] There is no justification as to why the press should enjoy the privilege of freedom of expression greater than that enjoyed by a private individual. The liberty of the press is no greater than the liberty of any individual. There is, therefore, no justification for limiting the defence of reasonableness as it pertains to both wrongfulness and fault to the media only. In my view, this limitation cannot be justified under section 36 of the Constitution.²⁴

[68] The defence of reasonable publication cannot assist the respondents in the present case, as they have failed to show that it was reasonable in the circumstances to publish the particular facts, in a particular way and at the particular time.²⁵

²⁴ Limitation of rights

36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) ...

²⁵ *National Media Ltd v Bogoshi* (note 23 above) at 1212F-H.

[61] The EFF alleged that Mr Manuel was related to Mr Kieswetter on the strength of an allegation in an undated SMS brought to their attention. They did not take reasonable steps to verify the defamatory allegations in the SMS before the publication of the statement in question. They did not allow Mr Manuel to respond before publication. It was only in response to a letter demanding a retraction from Mr Manuel's attorneys that the respondents, through their lawyer's letter of 5 April 2019, wanted to know from Mr Manuel how long he has had a relationship with Mr Kieswetter and whether he had discussions with him regarding, amongst other things, SARS, the findings of Nugent Commission and the allegations against (and the ultimate suspension and dismissal) of Mr Moyane, including any litigation related thereto.

[62] It follows that the defence of reasonable publication must fail.

Fair comment

[63] The respondents contend that they can rely on the defence of fair comment because it and the rest of South Africa were 'kept in the dark' regarding the constitution and the work of the panel. The respondents argue that Mr Manuel should have taken steps to make the process open to the public. They argue that the mandatory requirements of section 195 of the Constitution were not given effect to, which is a sufficient basis 'in terms of which the appointment of the new SARS Commissioner may be challenged'.

[64] The above allegations do not relate to the defence of fair comment or opinion that Mr Manuel is corrupt and nepotistic. To succeed with this defence, the respondents must show that the statement was based on true facts. In *The Citizen 1978 (Pty) Ltd and Others v McBride*²⁶ the Constitutional Court explained that:

'Protected comment need thus not be "fair or just at all" in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must "justify the facts; but he need not justify the comment".'

²⁶ *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, amici curiae)* 2011 (4) SA 191 (CC) para 83.

[65] The defence of protected comment, in this case, is defeated by the fact that the respondents have failed to demonstrate that the underlying facts upon which the statement is based are true.

[66] The conduct of the respondents both before and after the publication of the impugned statement shows that they were actuated by malice. They published the tweet with reckless indifference as to whether it was true or false. The statement remains published online despite it being subsequently shown to be false, and the respondents refuse to take it down. There can never be a justification for the ongoing publication of a defamatory statement which has been revealed to be untrue unless the principal purpose is to injure a person because of spite or animosity.

Public interest

The respondents state that the statement was made in the public interest, and for that reason, it is justifiable as it increased public scrutiny of SARS. The mere fact that the content of the statement relates to issues that are in the public interest is not determinative in itself. The defence of public interest applies only if other defamation defences are in the public interest, e.g. the defence of truth and fair comment. On its own, the public interest is not a defence to a defamation claim.

Remedy

[67] Mr Manuel's primary concern, in this case, is the restoration of his good reputation and dignity of the individual. False allegations can so very quickly and destroy a good reputation. Mr Manuel asks that the respondents be ordered to publish an unconditional public retraction and an apology for the allegations made about him in the statement. The court in *Le Roux v Dey* explained—

'...Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity, our aim to create a better society may come to nought. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the

fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.²⁷

[68] Mr Manuel has sought only general damages as a solatium for the injury to his reputation. In Hattingh J said in *Esselen v Argus Printing and Publishing Co Ltd and others*²⁸ Hatting J said:

‘In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways – as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant’s conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.’

[69] I have taken the following factors into account in determining the seriousness of the defamation, amongst other things, the nature of the defamatory statement, the nature and extent of the publication, and the reputation, character and conduct of the parties.

[70] The conduct of the EFF, Dr Ndlozi and Mr Malema has been egregious and hurtful. In response to a letter to the EFF by Mr Manuel, in which he refuted the claims in respect of Mr Kieswetter and where he requested the EFF to withdraw the allegations or face legal action, Mr Malema replied in a tweet to Annika Larsen of eNCA that Mr Manuel ‘*can go to hell, we are not scared of him*’.

[71] The motive and conduct of the respondents are relevant. They stubbornly refuse to retract, apologise or remove the impugned statement from their social media platforms, when it is evident that they should do so. These factors collectively establish the existence of actual malice and a desire to hurt Mr Manuel in his person, and professionally, through the widespread dissemination of the defamatory statement. Such conduct warrants a punitive costs order.

²⁷ *Le Roux v Dey* (note 6 above) para 202.

²⁸ 1992 (3) SA 764 (T) at 771F-I.

[72] Mr Manuel has indicated that should he be awarded damages, he will donate the entire amount to a charitable organisation.

[73] Having regard to the foregoing and the general trend of awards in recent times, I believe that an award of R500 000 in general damages is merited.

Interdictory relief

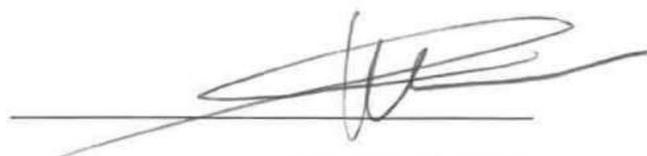
[71] Mr Manuel seeks a permanent interdict against the respondents to prevent future defamatory comments. Mr Manuel has a reasonable apprehension that in the absence of an interdict, the EFF, Dr Ndlozi and Mr Malema will commit further injuries of the same kind given that they have steadfastly refused to acknowledge their wrongdoing or to take down the defamatory statements.

[72] Mr Manuel has been injured in his dignity. He is entitled to the declaratory order that he seeks including an apology from the respondents. That apology should be ordered in addition to the sum of compensation that the respondents must pay to him. He is also entitled to the punitive costs he has asked for.

In the result, I make the following order:

1. The allegations made about the applicant, Trevor Andrew Manuel, in the statement titled 'The EFF Rejects SARS Commissioner Interview Process' dated 27 March 2019 are defamatory and false;
2. It is declared that the respondents' unlawful publication of the statement was, and continues to be, unlawful;
3. The respondents are ordered to remove the statement, within 24 hours, from all their media platforms, including the first and third respondents' Twitter accounts;
4. The respondents are ordered, within 24 hours, to publish a notice on all their media platforms, on which the statement had been published, in which they unconditionally retract and apologise for the allegations made about the applicant in the statement.

5. The respondents are interdicted from publishing any statement that says or implies that the applicant is engaged in corruption and nepotism in the selection of the Commissioner of the South African Revenue Service.
6. The respondents are ordered jointly and severally to pay damages of R500 000.00 to the applicant.
7. The respondents are ordered jointly and severally to pay the applicant's costs on an attorney and client scale.



K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 14 May 2019

Date of judgment: 30 May 2019

Appearances:

Counsel for the Applicant: Adv. C Steinberg
Adv. M Mbikiwa

Instructing Attorneys: Webber Wentzel Attorneys

Counsel for the Respondents: Adv. V Ngalwana SC
Adv. K Premhid
Adv. F Karachi

Instructing Attorneys: Ian Levitt Attorneys