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

CASE NUMBER: 2021/2212

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

A. DE WET 07 SEPTMEBER 2021

In the matter between:

MATSHELA MOSES KOKO Applicant

and

BARBARA TANTON Respondent

JUDGMENT

DE WET AJ:

INTRODUCTION

1. The applicant, a former Chief Executive Officer of Eskom Holdings SOC Limited ("Eskom") brought an application against the respondent, a 72-year-old female principal of a preschool, for the following relief:

1.1 An order declaring that the statement/s or publications made and published by the respondent on Twitter are defamatory, demeaning, false and unlawful;

1.2 in the event that the court finds that the statement/s or publications are defamatory, demeaning, false and unlawful; the respondent is directed to remove them from the media platforms and to publish an unconditional public retraction and apology for the defamatory publications about the applicant;

1.3 the respondent be interdicted from publishing similar defamatory, demeaning, false and unlawful statement/s about the applicant in future;

1.4 the respondent to be liable for damages in the amount of R500 000,00 as solatium for the injury caused to the applicant; and the determination of the quantum to be postponed *sine die*.

FACTS

2. On 16 May 2017 the applicant was placed on special leave pending the outcome of an investigation into certain allegations of a breach of fiduciary duties which he owed to Eskom.

3. The applicant is a registered user on Twitter since July 2016. The respondent is also a registered user on Twitter.

4. On 25 October 2020, City Press, on Twitter, mentioned the applicant's name with reference to him "*refusing to sign off 27 contracts with independent power providers that had already been negotiated by the Government*". The applicant retweeted the City Press publication and endorsed his comment thereon, which read:

"*@Eskom_SA can generate a unit of electricity for R0,42. It is obliged to buy it from IPPS for R2.13 & it sells it to its customers at R0.93.*"

5. It is to this tweet that the respondent posted the tweet which precipitated this application, which read:

"*you stole so much I am so sick of your innocent ramblings.*"

6. The applicant, being aggrieved by such publication addressed a letter of demand to the respondent on 5 November 2020 in which he sought:

6.1 an unconditional public retraction of the publication and an apology for the unfounded allegations made about the applicant;

6.2 to desist from publishing similar defamatory statements about the applicant in future; and

6.3 to make payment of the amount of R500 000,00 as damages for defamation and damaging his reputation, which amount was to be paid within 10 days from the demand.

7. The respondent during early January 2021 removed her tweet and closed her Twitter account.

8. On 21 January 2021, the applicant launched this application against the respondent.

9. Emma Sadleir of the Digital Law Company, on behalf of the respondent, addressed a letter to the applicant on 3 February 2021, in which letter she proposed a settlement of the disputes between the applicant and the respondent. Whilst this letter was addressed without prejudice, the contents thereof have been disclosed as a consequence of the applicant not proceeding with any relief in the application save for an order for costs.

10. In the letter the respondent proposed that in full and final settlement of all claims between them:

10.1 The respondent shall, within one hour of the applicant withdrawing his application, reactivate her Twitter account for one week and publish a tweet retracting and apologising for her tweet;

10.2 that the respondent undertakes in writing not to publish any further statements concerning the applicant on any platform; and

10.3 that each party bears their own costs.

11. It is of no little importance that the respondent recorded in this letter that the application is destined to be dismissed with costs in light of the Supreme Court of Appeal's judgment in EFF & Others v Manuel (711/2019/[2020] ZASCA 172 (17 December 2020) in which the Supreme Court of Appeal held that application procedure is inappropriate for a claim for damages for defamation even if no material dispute of fact arises. Damages for defamation as well as the demand for an apology should be pursued through action proceedings. In addition, the respondent informed that there is a material dispute of fact between the parties in the present case.

12. The applicant did not accept the olive branch extended to him by the respondent and persisted with the application, which necessitated the respondent delivering her answering affidavit which is very extensive and includes a substantial amount of documents upon which she relies in her defence to the applicant's claim.

13. Save for delivering his replying affidavit, the applicant did not take any further steps to prosecute the relief sought in the application.

14. The respondent opposed the application and raised three points *in limine*, being that the application is an abuse of the court process and is nothing other than Strategic Litigation Against Public Participation ("SLAPP"), that motion proceedings cannot be used to claim general damages and that motion proceedings cannot be brought when material disputes of fact are foreseeable, as they were in this application.

15. The respondent raises five defences, which include that the respondent's tweet was not defamatory of the applicant, it was a fair comment, it was true and published in the public interest, was so trivial that it cannot be deemed wrongful and that the respondent had no *animus injuriandi*.

16. The applicant does not proceed with any relief save for an order that the respondent pay the costs of this application. He did not claim costs in the notice of motion and he has not delivered a notice to amend the relief claimed to include a prayer for cost.

17. The respondent delivered her heads of argument and practise note on 3 May 2021. The respondent brought an interlocutory application to compel the applicant to deliver his heads of argument and practice note failing which his

application be struck out. The applicant thereafter delivered his heads of argument and practise note on 5 July 2021. The application was set down by the respondent's attorneys of record.

18. In his heads of argument as well as at the hearing of the application, the applicant conceded that the court cannot determine the relief sought in regard the declaratory order on motion and that the amount of damages to be awarded can similarly not be determined in motion proceedings. Despite the foregoing he did not ask for a referral. He did not persist with his claim for an unconditional public retraction and apology for the defamatory publications about the applicant or his claim that the respondent be interdicted from publishing similar defamatory, demeaning, false and unlawful statement/s about the applicant in future. He explained that in light of the removal of the offending tweet he no longer sought or required the public apology by the respondent or the interdict restraining her from similar unlawful conduct in future.

19. The applicant sought an order striking out a substantial portion of the respondent's answering affidavit and numerous annexures on the grounds that it was scandalous, vexatious and irrelevant and that the applicant will be prejudiced if the application to strike is not granted.

20. On considering the numerous portions, phrases and annexures of the respondent's answering affidavit which the applicant seeks to strike, it is clear

that such material relates directly to the defences raised by the respondent. The applicant specifically relies on his good name and reputation for the relief sought against the respondent. The respondent is entitled to place facts and evidence before the court to rebut the applicant's contentions. I do not find the matter which the applicant seeks to have struck to be abusive or defamatory, that it has been included in the answering affidavit with an intention to harass or annoy the applicant and neither that such matter is irrelevant. It is *inter alia* on these facts that the respondent wishes to rely in opposing the applicant's claim, and upon which she may rely at a future hearing, should the applicant further pursue his claim/s against her.

21. Consequently, I am not persuaded that there is any merit in the applicant's application in terms of rule 6(15) of the Uniform Rules of Court read with rule 6(11) and the application is dismissed with costs.

22. Mr Moorcroft, assisted by Ms Reddy, submitted that the applicant was entitled to his costs as the respondent's tweet was directed at the applicant, intended to convey that he was a thief who misappropriated taxpayers' money, that such phrase is *per se* wrongful, defamatory and insulting. The argument of the applicant is further that the respondent bears the onus to prove the absence of *animus injuriandi*, which she failed to do in that she has not rebutted the

presumption of *animus injuriandi.* The respondent has similarly failed to rebut the onus that she bears in respect of her defence of truth and public interest.[1]

23. The applicant submitted that in removing the offending tweet the respondent conceded the second prayer in the notice of motion, which rendered the application moot. The applicant argued that the questions relating to the interplay between the constitution right of freedom of speech and opinion on the one hand and the constitution right to dignity on the other hand are the issues that arise in this application and submits that such issues cannot be determined by this court. He further contends that as the respondent removed the offending tweet he has been substantially successful herein.

24. This court is not required to determine the issues raised by the applicant in light of the findings hereunder. Accordingly, I refrain from doing so.

25. Mr Winks, for the respondent, submitted that the application should be dismissed with punitive costs.

26. The respondent contends that this application is an abuse of the process of court and is nothing other than a SLAPP. She maintains that the applicant's improper motive of the applicant's SLAPP against her was unmasked by the applicant during an interview with Cape Talk Radio that took place a mere two court days

[1] Joubert v Venter 1985 (1) SA 654 (A) 696-697; National Media Ltd v Bogoshi [1998] 4 ALL SA 347 (A).

after issuing the application. In this interview the applicant when asked why he instituted proceedings against the 72-year-old preschool principal, being the respondent, replied:

> "*She needs a big* klap *so that others can learn that the time for impunity is gone*".

27. The applicant went to great pains in the founding affidavit to demonstrate and expound on his not insignificant academic and professional achievements and success, the umbrage which he took against the appalling manner in which the respondent was vilifying him and sending a wrong message to her limited and his very extensive followers on Twitter and his exposure to extensive reputational damage and injury to his dignity. He expressed concern that his pool of clients, national and international, will be deterred from continuing to do business with him on a large scale as a consequence of fears that he is a dishonest man. He concludes that it leaves him in a precarious position, facing an uncertain future in respect of earning a livelihood.

28. It is against *inter alia* this evidence of the applicant that his conduct herein is inexplicable.

29. The applicant did not at the hearing of the application persist with his claim that the respondent publish an unconditional public retraction and apology for the

defamatory publications about him and he no longer seeks an interdict against the respondent from publishing similar defamatory, demeaning, false and unlawful statements about in in future.

30. In addition, it came to light that the applicant declined to accept the respondent's tender of 3 February 2021 and that he did not accept an offer that she, within an hour of him withdrawing the application, reactivate her Twitter account and publish a tweet retracing and apologising for the tweet and neither did he accept her undertaking in writing not to publish any further statements concerning him on any platform.

31. More telling, however, is the absence of vigorous pursuit of the relief and vindication initially sought in this application under circumstances where he contends that he finds himself most aggrieved by the conduct of the respondent.

32. The respondent was obliged to oppose the application and deliver very substantial opposing papers. In order to advance the application to finality the respondent filed her heads of argument on 3 May 2021. When the applicant failed to do so the respondent brought an application to compel the applicant to file heads of argument, which he did on 5 July 2021. It was indeed the respondent who enrolled the matter for hearing.

33. Mr Winks submitted that, the applicant having been the subject of numerous less than complimentary tweets over many years, carefully selected the respondent as a strategic target for a SLAPP, knowing that she does not possess equal means to meet and oppose the applicant in a court of law. Mr Winks further contends that upon the applicant having instituted motion proceedings for the relief sought herein against the respondent, he went on public radio to announce his proceedings and to warn other citizens that the same fate would await them if they were to similarly express themselves. Mr Winks submitted that the three-fold purpose of a SLAPP having been achieved, namely to silence the respondent, to punish her with exorbitant legal costs which she can ill afford and to deter other citizens, the applicant fails to pursue the relief sought in the proceedings which he had brought.

34. The respondent, in submitting that the application constitutes an abuse of the process of the above honourable court, relies on PWC v National Potato Co-Operative[2] where the Supreme Court of Appeal held:

"*It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process (see Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271; Corduroy v Union Government (Minister of Finance) 1918 AD 512 at 517; Hudson v Hudson & another 1927 AD 259 at 268; Beinash v Wixley 1997 (3) SA 721 (A) at 734B; Brummer v Gorfil Brothers*

[2] [2004] 3 All SA 20 SCA par 50.

Investment (Pty) Ltd en andere 1999 (3) SA 389 (SCA) at 412C-D), but no all embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process .... and it has been said that 'an attempt made to use for ulterior purpose machinery devised for the better administration of justice' would constitute an abuse of the process (Hudson v Hudson & another supra *at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true cause so as to serve extortion and oppression; or to exert pressure so as to achieve an improper end."*

35. The respondent further relied on Mineral Sands Resources (Pty) Ltd & Another v Redell & Others and two related cases 2021 (4) SA 268 (WCC) where the court held as follows:

"[40] The signature elements of SLAPP cases are the use of the legal system, usually disguised as an ordinary civil claim, but designed to discourage others from speaking out on issues of public importance, and exploiting the inequality of finances and human resources available to large corporations, as compared to their targets. These lawsuits are notoriously long, drawn-out, and extremely expensive, legal battles, which consume vast amount of time, energy, money and resources. In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, to

restrain public interest in advocacy and activism, and to convert matters of public interest into technical private-law disputes.

....

[43] *A SLAPP does not need to be successful in court to have its intended effect. Proceedings can be continued until the desired effect and impact are achieved. Prolonging and dragging out proceedings and shifting the debate out of the public domain to the courts can fulfil the intended objective. The mere threat of being sued is sometimes sufficient to engender fear and intimidate the target.*

...

[64] *Public dialogue and debate, with broad participation in matters of public interests, such as the environment, must be protected and encouraged. Any legal action aimed at stifling public discourse and impairing public debates should be discouraged."*

36. In her letter of 3 February 2021 the respondent informed the applicant that should he persist with his application she will oppose the relief sought and that material disputes of fact will be raised. She further informed the applicant that the proceedings instituted are inappropriate for the relief sought and, as was found in EFF v Manuel[3].

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[3] Economic Freedom Fighters & others v Manuel [2020] ZA SCA 172; 2021 (1) All SA 634 (SCA), par 122.

37. The applicant persisted with his claims until early July 2021 when he, in his heads of argument recorded that he would not proceed with his relief in respect of the declaratory order or the interdict. He conceded that the damages claim cannot be determined in motion proceedings. During argument he confirmed that he no longer requires the unconditional public retraction and apology from the respondent. He submitted that it was no longer required as the respondent had withdrawn the tweet. It is clear that the first part of prayer 2 may have been resolved upon the respondent withdrawing the tweet but by no means does it address the applicant's claim that she publish an unconditional public retraction and apology for the offending publication. On specific enquiry about this difficulty that the applicant now faces, Mr Moorcroft submitted that the applicant was satisfied with the withdrawing of the tweet and that he does not persist with the second part of the relief in prayer 2.

38. I cannot but conclude that the applicant was not only unwise to institute proceedings for the relief sought on motion but further to persist with these proceedings subsequent to the letter of the respondent dated 3 February 2021, particularly in light of the reasoning of the Supreme Court of Appeal in the EFF matter at paragraph 41:

"*It appears that the simplistic view was taken that if one were to provide victims of social media defamation with a quick and easy way of seeking and obtaining sizeable damages awards on motion, that would bring to a quick halt these kinds*

of transgressions. We do not agree that the problem can be resolved that easily. The search for a solution to the evils of the abuse of social media platforms should be carefully considered, without compromising constitutional rights, fundamental legal principles and due process. Careful thought should be given to the possible dangers of the envisaged simplistic solution. It might well incentivise the abuse of motion proceedings by undeserving, but well-resourced, plaintiffs and be used in terrorem. *It has the potential for stifling freedom of expression.*"

39. In light of the applicant's failure to accept the respondent's tender in the letter of 3 February 2021, his persistence with the application until the papers were filed and thereafter his failure to take any steps to advance the matter to hearing and finality, his election as recorded in the heads of argument and as was confirmed at the hearing to not proceed with the application save to seek costs against the applicant, all suggest that the applicant's conduct herein was not aimed at the reparation of his rights, constitutional and otherwise, and the restoration of his reputation or to assuage his injured feelings. I cannot but conclude that he wished to punish the respondent but also that he saw the opportunity to institute proceedings against the respondent which would have the effect as expressed by him during the talk show on Cape Radio, to teach others that the "*time for impunity is gone*" and in so doing prevent public comment on his conduct and/or matters of public importance in which he may have been directly or indirectly involved.

40. I accordingly find that this application constitutes an abuse of the process of court.

41. The respondent further submitted that the application should be dismissed as the applicant knew or ought to have known that his illiquid claim for damages cannot be determined on motion and that it should have been pursued by the institution of an action. It is telling that the applicant persisted with his application notwithstanding having received the letter of the respondent of 3 February 2021 in which she specifically brought the judgment of the Supreme Court of Appeal in EFF v Manuel *supra* to his attention. In the aforementioned case the applicant similarly sought a declarator that the offending statement was false and defamatory and that the publication thereof was unlawful, that the statement be removed from the Twitter accounts of the appellant, a retraction and an apology, an interdict of future publication of defamatory statements and damages in the amount of R500 000,00. After an analysis of the applicable principles pertaining to defamatory statements on social media and claims such as in this matter, the applicant sought final interdictory relief. The Supreme Court of Appeal held as follows:

> "*[91] .... An award of damages for defamation is compensation for an injury to dignity and reputation, under the rubric of the* actio iniuriarum. *Put differently an award of damages to compensate a plaintiff for wounded feelings and loss of reputation where, in addition, patrimonial loss is sustained, the aquilian action is available.*

[92] … it is necessary to consider the proper process for prosecuting such claims. An unliquidated claim for damages must be pursued by the institution of an action. No less so, when an aggrieved victim a defamatory statement seeks compensation. <u>That has always been the position and it is reflected in the Unform Rules of Court</u>. Uniform rule 17(2) compels a person claiming unliquidated damages to use a long-form summons and file particulars of claim, and uniform rule 18(10) obliges 'a plaintiff suing for damages [to] set them out in such manner as will enable the defendant reasonably to assess the quantum thereof' and plead thereto. …

[93] This is not a mere technicality. Claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors. That exercise cannot be undertaken in proceedings by way of application. As Harms DP said in Cadac : 'Motion proceedings are not geared to deal with factual disputes – they are principally for the resolution of legal issues – and illiquid claims by their very nature involve the resolution of factual issues'".

42. The applicant has elected to pursue the relief herein in motion proceedings which, it is trite, are the incorrect proceedings. He elected to proceed with his application

notwithstanding the letter dated 3 February 2021 in which he is cautioned to not proceed as a consequence of the numerous disputes of facts which will no doubt arise.

43. A further aspect of the applicant's conduct herein which should be considered in determining the issue of costs, is that his initial notice of motion did not include a prayer for costs. His claim for costs is first raised in his heads of argument, which he delivered consequent upon the order compelling him to do so. It was at this stage that he realised that the respondent was steadfast in her intention to oppose the relief sought and have his application dismissed with costs, on the attorney/client scale. Only then did he pursue costs in this application. Such conduct again suggests the punitive nature of these proceedings against the respondent.

44. Upon having considered the facts of the matter, the defences raised, the arguments and submissions of counsel on both sides, and the authorities relied upon I find that the proceedings instituted by the applicant are the incorrect process and it ought to have been instituted by action.

45. In light of the above, it is not necessary to consider the defences raised by the respondent.

46. This court has a discretion when determining the issue of costs of the application. The applicant seeks an order that the respondent pays his costs. The respondent seeks an order that the applicant pays her costs on an attorney / client scale. She relies on In re Alluvial Creek Ltd 1929 CPD 532 at 535 for the order sought.

47. The applicant herein persisted with the application notwithstanding the respondent's tender of 3 February 2021. It is common cause that the respondent generally has more resources than the respondent to sustain the litigation. The respondent, who can ill afford the costs of this application, was mulcted in very substantial costs in not only having to file opposing papers, but also having to prepare and deliver heads of argument on all the issues, compel the applicant to deliver his heads of argument and thereafter to enrol this application and attend to the hearing thereof.

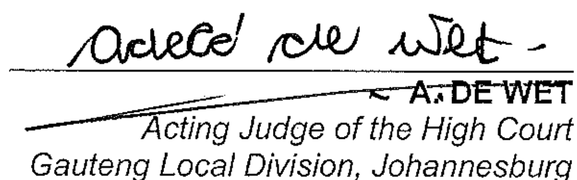
48. The applicant at a very late stage indicated that he has no intention to proceed in this application with the relief sought, save for an order for costs. At that late stage the applicant had already incurred the greater part of her costs and was still obliged to set the matter down for hearing to oppose the applicant's ill-considered quest that she pay his costs of the application. Had the applicant carefully considered the elected process, being motion proceedings, the nature of the relief sought, the tender of the respondent as well as heeded the caution contained in the letter of 3 February 2021, he would have been well advised to not proceed with the application. I find that his motive in pursuing the application under the

foresaid circumstances and his conduct in this litigation was not to redress the wrong that he contends the respondent did him, but rather to punish the respondent, even in the face of the substantial opposition by the respondent, in persisting that she pay his costs of the application. Such conduct of the applicant is vexatious.

49. As a consequence of the above, the following order is made:

49.1 The application to strike out is dismissed with costs.

49.2 The application is dismissed with costs, the costs until 3 February 2021 on a party-and-party scale and thereafter the costs on the attorney/client scale.



A. DE WET
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	18 August 2021
Judgment:	07 September 2021
Applicant's Counsel:	Adv. J. Moorcroft
Instructed by:	Ndou Inc.
Respondent's Counsel:	Adv. B. Winks
Instructed by:	Rupert Candy Attorneys Inc.