REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No: 1204/2019

Date Heard: 10 October 2019

Date Delivered: 12 November 2019

In the matter between:

JULIUS SELLO MALEMA APPLICANT

and

THEMBINKOSI RAWULA RESPONDENT

JUDGMENT

MULLINS, AJ

[1] The Applicant, **JULIUS SELLO MALEMA**, is the president and commander in chief of the Economic Freedom Fighters ("the EFF"), a political party registered in accordance with the Electoral Act, 73 of 1998, and a member of parliament.

[2] The Respondent, **THEMBINKOSI RAWULA**, was until the events described hereunder, a member of the EFF, who served on its Central Command Team ("the CCT"), which is the EFF's most senior decision-making body, and prior to the last general election a member of parliament.

[3] At the hearing of this matter the Applicant was represented by Mr *Premhid* and the Respondent appeared in person.

[4] Alleging that a Facebook post written by the Respondent is defamatory of him, in an application launched in this Court on 21 May 2019, the Applicant seeks the following relief:

a) That the statements made by the Respondent, contained in annexure "FA1" to the founding affidavit ("the statements"), are declared to be defamatory of the Applicant;

b) That the Respondent's publication of the statements is unlawful;

c) That the Respondent be ordered to remove the statements from all his social media accounts, and his Facebook account in particular, within 24 hours of the granting of this Order;

d) That the Respondent is ordered to publish on his social media accounts, and his Facebook account in particular, a statement in which he unconditionally retracts and apologises for the statements made about the Applicant;

e) That the Respondent is interdicted from publishing any further statement that says or implies that the Applicant engaged in conduct as described in, or similar to, the conduct described in annexure "FA1" to the founding affidavit;

f) That the Respondent is ordered to pay damages of R1,000,000.00 (one million rand) to the Applicant;

g) That the Respondent is to pay the costs of this application on the attorney and client scale.

[5] The Respondent has opposed the application.

[6] At the commencement of the matter there were a number of interlocutory skirmishes. The Applicant objected to what it referred to as formal irregularities in the Respondent's answering affidavit, which rendered it *pro non scripto,* and submitted that I should have no regard thereto. The Applicant also objected to the fact that the Respondent's heads of argument were filed late. On his part the Respondent applied on notice for condonation for the defects to his affidavit, for the late filing of the heads and also, from the bar, applied to file two supplementary affidavits.

[7] So as not to burden this judgment I do not intend dealing with these preliminary issues at length because, ultimately, they do not have a bearing on the outcome. After hearing argument I delivered an *ex tempore* judgment and made the following orders:

(a) In my discretion and in the interests of justice I condoned the formal defects in the Respondent's answering affidavit;

(b) On the basis that there was no prejudice to the Applicant, and none was alleged, I condoned the late filing of the Respondent's heads of argument;

(c) I refused the Respondent's application to file the two supplementary affidavits (one of which is 264 pages long inclusive of annexures), which also consisted of two audio-visual discs, on the basis that a proper case had not been made out. In any event, on a cursory perusal of these affidavits they consist largely of repetitive, irrelevant and hearsay allegations. For example, the Respondent deals at length with the manner in which his membership of the EFF was terminated – did he resign or was he expelled – which is totally irrelevant to the dispute before me.

[8] The Respondent's answering affidavit also contains numerous irrelevant and hearsay allegations many which are repeated, *ad nauseam*. No regard will be had thereto.

[9] The background to the dispute is to be found to a large extent in the Applicant's founding affidavit, as supplemented by the relevant portions of the Respondent's answering affidavit, and is mostly common cause, or not in dispute, and may be summarised as follows:

(a) Prior to the 2019 general election the EFF elected its list of parliamentary candidates. The Respondent, who was a sitting member of parliament at the time, was not on the list. The reasons for his omission differ. According to the Applicant the Respondent did not make the cut. According to the Respondent he did, but his name was removed because the powers that be were unhappy with the uncomfortable questions he was asking about the VBS Bank scandal and the management of the EFF's finances in general;

(b) Whatever the reason, the Respondent was disgruntled by the snub and on 5 April 2019 he wrote a post on his Facebook page (attached to the founding affidavit as annexure "FA1") which read as follows:[1]

"*Dear Julius and your surrogates*

Re: Resignation from the Economic Freedom Fighters immediately

1. *You note I have joined EFF in 2013 when it started in North West Province, and along with many courageous men and women, we built EFF from the ground up.*
2. *I was elected in the CCT with a ticket of my province because of hard work and dedication to the mission and vision of the EFF at the time.*
3. *I served the EFF as the CCT member and the member of the War Council and in all these years, amongst many things I have suffered is your abuse of power, abuse of organisational resources and funds and intimidation of your fellow leaders.*
4. *I have taken time in comfort and in calmness and made few observations about the EFF I have joined in 2013 and the EFF we have now in 2019.*
5. *The EFF I have joined committed itself to a corrupt free society and as person of good morals, I joined EFF on the basis of the ticket of committing to a corrupt free society.*
6. *In committing to the mission of economic freedom and building a corrupt free society, I have dedicated my time and resources to ensure the fulfilment of the mission.*

[1] All passages quoted in this judgment are reproduced exactly as they appear in their original form, irrespective of grammatical and typographical errors.

7. *The organisation had no money or resources, but in our own small corners we made it possible to build EFF from next to nothing.*
8. *We did this because we believed in you as a leader also in the mission of the Economic Freedom fighters, despite the fact that, all of us were warned about you and your love for money.*
9. *Indeed we were often reminded about your Limpopo gates of scandals and how you looted it to the ground, we were reminded how you avoided legal compliance with the South African taxes and further how you managed to stretch a simple R 25 0000 salary of the ANCYL into millions to serve your lavish lifestyle and your Lousi Vittoni lifestyle.*
10. *Our commitment to the mission for economic freedom indeed blinded us and to a large extent forced us to give you a benefit of the doubt. Indeed you fooled us all.*
11. *Under your leadership, indeed we managed to get 6% of the 2014 elections, this is the power we could have used to engage black people led political parties for more productive gains but instead we have spent almost 5 years sharing your anger and hatred against Zuma and the leadership of the ANC, because you are not happy with the manner and the process that led your expulsion from the ANC.*
12. *With the 6% of the EFF, you managed to get 61 seats across the legislatures and extracted from your MPs/MPL's almost R 7000 without consulting them because you argued that they are in Parliament because of your popularity, a 7 000 which in to total gives you 427 000 monthly. Further to that, you are receiving not less than 20 million per quarter in a year from these legislatures.*

13. *This the money to make your MPs/MPL's to do their job as public representatives easier, using the constituent funds but you took that money and service yourself and those in your proximity. You have never taken your collective into confidence about your expenditure of the EFF funds, this is despite the Constitution demand for accountability from you as the Commander In Chief.*
14. *You use the EFF money in whatever way you deemed fit without consulting any of us, you threw parties whenever you feel after our meeting trying to appease your guilt of EFF money consumption by sharing the crumbs of it with EFF CCT members just to make them feel important around you, when you are just doing to appease your guilt.*
15. *The little we could have appreciated at least, if you are taking care of our deployment cost instead of guillotining with exorbitant costs of weekly deployment cost, such as car hire, accommodation cost, buying T-shirts for EFF fighters and providing food for fighters at our own cost. If that was not abuse and exploitation you will never know what is abuse and exploitation in the EFF.*
16. *In 2016 Local government elections, the EFF got an average of 10% votes and received 852 Councillors who on average pay the levy of almost R 2000 each which roughly equals to R1,704000. (1.7 Million). Monthly. Again you never reported about this money in the CCT and the War Council, you refuse to be held accountable nor account about these funds.*
17. *If you willing to go extra miles to escape accountability about organisational funds, what is your motives and what must we make about*

these motives should people of South Africa give you political power over state resources?

18. *It is more worrying when you circumvent the process of the election of a TREASURE GENERAL instead of complying with the constitution, you resort to tactics and appoint your favorable person to be the custodian of funds and further impose yourself as the signatory despite the fact that you are a major beneficiary on those funds, through allowances and credit card allocation to you.*
19. *I have come to a decision that I am resigning from the Economic Freedom Fighters, it is becoming clear that the EFF is your bedroom, kitchen, toilet and your yacht and I you will stop at nothing to demonstrate that. You intimidate people who dare question you, you threaten them of possible removal from Parliament and you scare them. You have turned good men and women into your surrogates and political zombies. Indeed you force people to think with their stomachs than their brains.*
20. *It is my decision that I can no longer associate with the Economic Freedom fighters in light of the above observations. Accordingly I have decided to escape your wrath, consider this letter as my resignation as of immediately.*

    Thank you."

(c) The Facebook post was seized upon by the media in general and was reproduced and expanded upon in one form or another by, *inter alia*, News 24, Eyewitness News, the Sunday Times, YouTube and various TV news broadcasts. The Respondent also gave an interview to the radio station Power

FM and gave two television interviews in which he apparently repeated many of the allegations;

(d) On 6 April 2019 the Applicant's attorney sent the Respondent a letter of demand calling upon him to retract the statements made about the Applicant, such retraction to be in the form of a public statement in which he apologises to the Applicant on account of the allegations being untrue and defamatory, such public statement to be posted on all the Respondent's social media accounts and distributed to all media houses with which he had conducted interviews. The letter of demand required the retraction to be given effect to by 8 April 2019, failing which further legal action would be instituted against him;

(e) On 7 April 2019 the Respondent replied to the Applicant's attorney in a lengthy letter (it is six typed pages long), *inter alia*, refusing to retract the allegations unless he is provided with certain documentary information, mostly relating to the EFF's financial affairs. *Inter alia*, he asked for: the production of various bank account statements for the past four years; credit card statements together with invoices corresponding to their use; invoices relating to payment to service providers since December 2014; agenda items and minutes that demonstrated that at each meeting of the EFF Central Meeting the treasurer general had reported on the organisation's finances; audited and verified statements and detailed reports on the use of EFF funds by the Applicant in his personal capacity and by his family; a resolution as to how parliamentary funds are utilized;

(f) Also on 7 April 2019 an EFF spokesperson responded to the Respondent's claims on YouTube denying his allegations and stating that he was disgruntled because he had been left off the EFF's election list. The denial was apparently also aired on the eNews TV Channel. His resignation as a member of the EFF was welcomed in colourful language;

(g) There followed a further Facebook post in which the Respondent stated that he was aware that he was in breach of the EFF's constitution, that he was aware that he was bringing the organisation into disrepute and that his actions were a betrayal of the organisation;

(h) During argument it emerged that the Facebook post has been removed by the Respondent on 9 April 2019, and that he had not written any further posts concerning the Applicant and/or the EFF. Mr *Premhid* could not dispute this because he conceded that he (presumably meaning his attorney) had not checked the Respondent's Facebook page prior to issuing the application papers. (Had the Applicant's legal advisers done so they would no doubt not have asked for the relief set out in paragraph [4](c) above).

[10] Given the above events, on 21 May 2019 the Applicant launched this application. In his founding affidavit the Applicant alleges that the Facebook post, and further statements, were defamatory of him in that they were made with the intention, alternatively had the effect, of being defamatory, and were understood to mean, alternatively implied, that the Applicant:

(a) Is corrupt;

(b) Is stealing money;

(c) Conducts himself in an unlawful and undemocratic manner;

(d) Is of base moral character;

(e) Is of questionable moral character and is engaged in unlawful activities.

[11] The Applicant alleges that the Respondent's conduct is injurious of him and that the statements:

(a) Damage his political persona; and

(b) Cast aspersions upon his character.

[12] In his answering affidavit the Respondent denies that the statements are defamatory of the Applicant and alleges that:

(a) His attack was not directed at the Applicant directly, but at him as the leader of the EFF and as its ultimate authority;

(b) He had raised the issues as a member of the EFF and member of parliament;

(c) As a public representative, political figure and leader of a political party that had mobilised the public on an "anti-corruption ticket" he (the Respondent) had every right to expose the Applicant's leadership in the interests of the public;

(d) The Applicant is not an ordinary citizen and as leader of the third biggest party in parliament, which party champions anti-corruption, the Applicant cannot demand accountability from others in respect of public funds, specific reference being made to former President Zuma, and at the same time refuse to be accountable himself;

(e) The public has a right to know how the Applicant, as a public representative, fails to account to the EFF as to the utilisation of public funds.

[13] In argument before me the Respondent also relied on sec 16(1) of the Constitution, and I quote paragraph 32 of his heads of argument:

> *"32. In terms of the South African Constitution in terms of Section 16(1) I enjoy a Freedom of expression to an extent, all matters been collated in my facebook post (annexure RA15 page 109-112)[2] are reasonable, justifiable in an open and democratic society based on human dignity, equality and freedom in consideration of my right to express the political opinion and views."*

[2] Annexure "FA1" to the founding affidavit.

[14] Essentially, the Respondent's defence is that his utterances are the truth and in the public interest and/or fair comment and/or privileged and/or protected by sec 16(1) of the Constitution.

[15] Not so argues the Applicant, relying on the tried and tested common law position that defamation consists of the wrongly and intentional publication of a statement concerning another person which has the effect of injuring that person's reputation in the eyes of the public. The test is objective.

[16] Once the aggrieved person establishes that there has been publication of a statement which, objectively viewed, is injurious of that person's reputation, the onus shifts to the person who uttered the statement to rebut the defamatory nature thereof by means of one of the recognised defences, none of which the Respondent had established on the papers. It was also submitted, in response to a question from me, that no dispute of fact had arisen, in that the Respondent's argument that his attack was aimed at the EFF and not the Respondent, was patently untenable.

[17] The Applicant argues that the mere fact that in response to his attorney's letter of demand the Respondent called for the production of various documents is proof enough that he (the Respondent) was unable, at the time at which he posted the message on Facebook, to establish the truth of the statements.

[18] The Applicant has approached this Court on notice of motion for a final interdict and damages. An interdict is the appropriate remedy where a person requires protection against an unlawful interference, or threatened interference, of his/her rights. **Godongwana v**

Mpisana 1982 (4) SA 814 (Tk) at 817 C – D. An interdict is not concerned with the past invasion of rights, but is concerned with present and/or future and/or on-going infringements thereof.

[19] In order to succeed the Applicant must satisfy the requirements for a final interdict, all of which must be established, namely:

(a) A clear right;

(b) An injury actually committed or reasonably apprehended;

(c) The absence of any other satisfactory remedy.

[20] In two recent matters the High Court has entertained defamation claims brought on notice of motion for a final interdict and damages, namely **Manuel v Economic Freedom Fighters and Others** 2019 (5) SA 210 (GJ)[3] and **Hanekom v Zuma** Case No D6316/2019 (KZN, Durban).[4]

[21] In **Manuel** the applicant, a prominent ANC politician, a former member of parliament and cabinet minister and current chairperson of a panel appointed to select a new Commissioner for SARS, had been accused on Twitter by the EFF and its president (ironically, the Applicant in the present matter) on the social media platform Twitter of nepotism and the unlawful appointment of a particular individual as the new Commissioner. Manuel brought an application on a semi-urgent basis for an order declaring the statements

[3] In this matter leave to appeal has been granted.
[4] In this matter leave to appeal has been refused.

defamatory, that the Respondent refrain from repeating the statements in the future, that the tweet be removed and that the respondents publish an unconditional retraction and apology. He also sought general damages as a *solatium* for the injury to his reputation. The Court granted the relief and awarded him R500,000.00 in damages (see para [84] of the judgment).

[22] The Learned Judge dealt with the requirements for a final interdict (at para [21]) as follows:

> *"[21] Mr Manuel has met the requirements for 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 the 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."* (My underlining).

[23] In **Hanekom** the applicant, a prominent ANC politician, a former member of parliament and cabinet minister, had been accused by the respondent (former President Zuma) on Twitter of being "*… a known enemy agent"*, the implication being that he (Hanekom) had been a spy for the Apartheid regime. He applied on an urgent basis for, and was granted almost identical relief to that which was granted in the **Manuel** matter, save that the issue of damages was referred to oral evidence.

[24] Although the learned judge makes a passing reference to the requirements for a final interdict (at para [82]), she does not actually deal with the requirements, and whether they had been met, at all. She also mistakenly lists urgency as one of the requirements.

[25] In the present matter I am satisfied that the Applicant has met the first requirement: he has a clear right to his good name. For present purposes I also accept that an injury, namely the besmirchment of the Applicant's good name, has occurred. It is the third requirement, the absence of any other satisfactory remedy, that requires further scrutiny.

[26] An application for a final interdict must allege and establish on a balance of probabilities that he/she has no alternative legal remedy. In **Chapmans Peak Hotel (Pty) Ltd and Another v Jab and Annalene Restaurants CC t/a O'Hagans** [2001] 4 All 415 (C) at 420d –f the test for an alternative remedy was expressed thus:

> *"It must be borne in mind in this regard that the alternative remedy postulated in this context must –*
>
> *(a) be adequate in the circumstances;*
>
> *(b) be ordinary and reasonable;*
>
> *(c) be a legal remedy; and*
>
> *(d) grant similar protection."*

[27] Defamation actions have traditionally been brought by way of action, although interim interdicts pending an action for damages, while rare, have been granted, but are limited to preventing a respondent from making defamatory statements in the future. **In Herbal Zone**

(Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others [2017] 2 All SA 347 (SCA) at 361d – 362a, Wallis JA stated:[5]

> *"[37] The contentions in regard to the onus of proof were also contrary to established authority, to which for some reason we were not referred. This Court dealt with the proper approach of a court to an application for an interdict to restrain the publication of defamatory matter in* Hix Networking.[6] *There it approved, with some clarification, the following passage from the judgment of Greenberg J in* Heilbron v Blignaut:[7]
>
> > *'If an injury which would give rise to a claim in law is apprehended, then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear, and if there is dispute as to whether what is about to be done is actionable, it cannot be decided on motion. Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if the statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed.'*

[5] Footnotes are excluded.
[6] Hix Networking Technologies v System Publishers (Pty Ltd) and Another 1997 (1) SA 391 (A)
[7] Heilbron v Blignaut 1931 WLD 167 at 169

[38] The clarification was to point out that Greenberg J did not hold that the mere ipse dixit *of the respondent would suffice to prevent a court from granting an interdict. <u>What is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent.</u> It is not sufficient simply to state that at the trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefore."* (My underlining).

[28] Referring to the case made out by the respondent in the **Herbal Zone** matter, Wallis JA goes on to say (at 362c):

"There is no need for us to determine whether that defence will succeed at trial. But it is a colourable defence and a factual basis has been laid for it that cannot be rejected out of hand."

[29] Dealing with a similar situation, Cachalia J (as he then was) stated in **Lieberthal v Primedia Broadcasting (Pty) Ltd** 2003 (5) SA 39 (WLD) at 43 G – 44 B:[8]

"Of course, before a court can be called upon to exercise its discretion it must first be persuaded that the allegations are defamatory. If there is serious doubt as to whether the allegations are defamatory no <u>interim</u> interdict will be granted. Once the applicant overcomes this hurdle he or she must demonstrate that the respondent threatens or

[8] Footnotes are excluded.

intends to publish or further publish the defamatory words or similar words. This is because the whole purpose of an interim interdict is to prevent prejudicial information concerning the applicant from being unlawfully published in the future. Its purpose is not to punish passing[9] infractions of the law.

A court must thereafter decide whether the publisher has a sustainable defence. (See Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A) at 398A). If it does have a sustainable defence, the publication will not be restrained no matter how damaging the allegations may be. However in assessing the sustainability of the defence offered by the respondent the court is not required at this stage to enter into a detailed consideration of the likely result should the matter ultimately proceed to trial. What the court is called upon to do in the exercise of its discretion of granting or refusing the interim interdict is to consider inter alia

> *'the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving in the limited time afforded to it in cases of urgency, the defence which it wishes to raise and the fact that the order may, in substance though not in form, amount to a permanent interdict'.*
>
> *(Per Plewman JA in Hix (supra) at 402E-F)."* (My underlining).

[30] The Applicant submits that he must succeed on the basis that, objectively viewed, the Respondent has uttered defamatory statements concerning him and that the Respondent, the onus having shifted to him, has not been able to prove that the statements are true and in the public interest, or that any other defence is available to him.

[9] I assume the learned judge meant "past".

[31] So, how does the Respondent deal with the Applicant's allegations? In his answering affidavit he states, *inter alia*, as follows:

> "*7. It is my submission that all the issues and allegations I have raised publicly against the applicant, were directed to the applicant as the leader of the EFF, President and Commander in Chief and also the Member of Parliament who is leading the third biggest political party in South Africa, not on his personal capacity.*
>
> *8. Equally myself I have raised these allegations against the applicant in my capacity as a member of the EFF, leader of the EFF and as Member of Parliament.*
>
> *9. I have never had any personal business with the applicant, Mr Julius Malema and have no reason to tarnish his personal image but have every right to expose his leadership in the interests of the public as the public figure and public representative and most importantly as the leader of the political party that has mobilised the public on an anti-corruption ticket.*
>
> *10. The applicant is Julius Malema, an adult male who is the President and the Cmdr in Chief of the Economic Freedom Fighters, in that capacity served as the leader and the authority of the EFF the applicant is the ultimate authority of the organisation, very powerful and direct the operations even do so against the EFF constitution. The applicant is also member of Parliament in South Africa and the leader of opposition, third largest organisation.*
>
> *…*

19. *Furthermore the applicant claims that I (respondent) have made defamatory and vicious attacks on himself, he is factually incorrect that are made defamatory attacks on him, rather I published the truth about the President and the CIC[10] of the Economic Freedom fighters who is the leader of the public organisation and the member of Parliament, to the extent that he is the President and CIC that preside over the financial expenditures of the EFF which have not been authorised by the CCT as the highest decision-making structure, use service providers which have not been approved or authorised and procured by the Central Command team who inflate the cost in a manner that is unaccountable by you and other officials. Further use the EFF money without the CCT authority to finance a property which he is allegedly to have been staying over three years and in that three years, the property has been subject to investigation given the alleged VBS money paid into the property. (Annexure 14, Edward Rubinstein property valued R5,250 million paid by the EFF).*

…

27(b). *It is my submission, none of the allegations have been made with the intention of defamation of both EFF and the Applicant, but with the intention to publish the truth about the manner in which EFF funds are used inconsistently with it constitution under President, CIC Julius Malema who is the applicant in this case.*

…

[10] Commander in chief.

54. *The applicant is not an ordinary citizen but a President and the Cmdr in Chief of the third biggest political party in South Africa, a Member of Parliament and the leader of the opposition and the champion of anti-corruption. The applicant cannot demand accountability from the former State President of South Africa on the public funds mismanagement resulting to failure to be held accountable yet the applicant refuses to be held accountable for the organisational funds coming from the state. (Annexure RA 11, Resignation letter of Xalisa) & (RA 6 Cmsr. Xalisa affidavit).*

55. *The applicant and myself as the respondent, we have taken oath as Public Representatives, to defend, advance and uphold the Constitution and applicable laws of the Republic of Africa. Whilst there has been an observation of refusal to be held accountable but the VBS cash heist was turning point for the EFF Commander in Chief to openly admit receipt of funds. It was a turning point because EFF had mobilised the society behind the banner and ticket of anti corruption (annexure RA 12 Member of Parliament statement of Oath).*

…

72. *On the 5th April, 2019 I published a document on social media exposing the applicant office as the President and Cmdr in Chief along with his Deputy President as they constitute the office of Presidency in the EFF. (Annexure RA 15 published document on facebook).*

73. *I published the document as the member and the leader of EFF with the intention to expose the hidden truth about the manner in which the EFF*

funds are managed without an ounce of accountability under the Presidency of Julius Malema and his Deputy President.

…

95(b). The published statement not to be declared defamatory as the respondent has made the remarks in the public interest and from privilege position."[11]

[32] Bearing in mind that the Respondent is a layperson, and some allowance must be made for the manner in which he has expressed himself, has he (to paraphrase **Heilbron** at p. 169) done enough to set up that he can prove truth and public benefit, or one of the other defences available to him? Or, (to paraphrase **Herbal Zone** at p. 362c) has he made out a colourable defence and has a factual basis been laid that cannot be rejected out of hand? To put it another way, is the Respondent relying on more than just his *ipse dixit*? I will return to this aspect below.

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

[11] The references in brackets at the end of some of the paragraphs are to annexures attached to the papers.

of the plaintiff in order to test their version and to give evidence and call his/her own witnesses; evidence of an expert nature might be necessary. An application deprives a respondent of all these extremely valuable and necessary litigation tools.

[34] That, in my view, is precisely what has happened in the present matter. The Respondent says that if he is given access to the EFF's financial and other records he can prove the truth of the statements. The Respondent does not rely on his *ipse dixit*. On the contrary, he says that he was a senior member of the EFF and part of the CCT, its most senior decision-making body. He says he raised his concerns often and has, or on good grounds believes there is, information in the form of financial and other documents which will prove the truth of the statements he has made, which documents are in the possession of the Applicant and/or the EFF and/or third parties (such as financial institutions). He also says that there are witnesses who will support him.

[35] In my view the Respondent has done enough to establish that there is a triable issue. Although inelegantly phrased, he has raised the defences of truth and public benefit and/or privileged occasion and/or fair comment. He also relies on his constitutional right to freedom of speech.

[36] It is also relevant that the statements were made in the run-up to the general election (which was held on 8 May 2019). In **Democratic Alliance v African National Congress and Another** 2015 (2) SA 232 (CC) (which was an application arising out of the run-up to the 2015 general election) the DA made certain statements concerning former President Zuma and the manner in which the up-grades to his Nkandla homestead had been financed. The ANC challenged the statements under the Electoral Act. Dealing with the penal provisions

provided for in the Act versus freedom of speech, the Constitutional Court stated (at p. 275 *et seq*) as follows:[12]

> *"[130] The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.*
>
> *[131] This court has endorsed this approach. And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common law presumption in favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution. And the interpretive injunction in the Bill of Rights itself requires us to interpret s 89(2) and item 9(1(b) to promote its spirit, purport the objects.*
>
> *[132] Conversely, suppressing speech in the electoral context will inevitably have severely negative consequences. It will inhibit valuable speech that contributes to public debate and to opinion-forming and holds public office bearers and candidates for public office accountable. Because those who speak may not know - indeed, often cannot know – in advance whether their speech will be held to be prohibited, they may choose not to speak at all.*
>
> *[133] To these propositions, which earlier we called obvious, we add a further observation. Political life in democratic South Africa has seldom been polite, orderly*

[12] Footnotes have been excluded.

and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.

[134] During an election this open and vigorous debate is given another, more immediate, dimension. Assertions, claims, statements and comments by one political party may be countered most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspaper. An election provides greater opportunity for intensive and immediate public debate to refute possible inaccuracies and misconceptions aired by one's political opponents.

[135] So freedom of expression to its fullest extent during elections enhances, and does not diminish, the right to free and fair elections. The right individuals enjoy to make political choices is made more meaningful by challenging, vigorous and fractious debate."

[37] It is relevant that the EFF also approached the press to vigorously refute the Respondent's allegations.

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

[39] Insofar as my approach differs from that which was adopted in **Manuel** and **Hanekom**, I make the following observations:

(a) In both of those matters at the time the applications were launched the offending statements were still extant. In the present matter the Facebook post was deleted on 9 April 2019, four days after it was posted and some seven weeks before the application was launched;

(b) In the **Manuel** matter the applicant appears to have dealt in his founding affidavit with the substance of the offending allegations and shown conclusively that they were false. In the present matter the Applicant has made no attempt to counter the statements made by the Respondent, relying on the shifting of the onus to make out his case;

(c) In the **Hanekom** matter the respondent's case is muddled, but he appears, ultimately, to rely on the submission that his offending statement was taken out of context, which the Court rejected.

[40] Although not necessary, in the light of my finding on the procedure adopted, I turn now to the Applicant's submission that there is no dispute of fact on the papers. As previously alluded to, it is the Applicant's argument that as the Respondent cannot prove the truth of the statements, and as the onus is on him to do so, the application must succeed. It is not that simple. In **Room Hire Co (Pty Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1163 the following was stated:

"It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence viva voce if subpoenaed. There are however other cases to consider…" (My underlining).

[41] In my view, broadly speaking, the Respondent's case falls into this category. Due to his senior position in the EFF he has certain information and he says the statements are true, and given the opportunity he will prove it. He does not rely on a bare denial or his *ipse dixit.* I accordingly do not agree with Mr *Premhid's* submission that there is no dispute of fact on the papers. Thus, even if I am wrong in regard to the interdict aspect, I find that there are material disputes of fact which cannot be resolved on the papers.

[42] Perhaps relying on the fact that in two recent matters the High Court has entertained defamation claims brought on application, the Applicant did not apply for the referral of the matter to oral evidence or to trial, which should in any event be done at the latest commencement of the hearing. See **Law Society, Northern Provinces v Mogami & Others** 2010 (1) SA 186 (SCA) at 195C. Indeed, Mr *Premhid* argued strenuously that this would not be necessary as there was patently no dispute of fact on the papers.

[43] I have also given consideration to whether I should exercise my discretion in accordance with Rule 6(5)(g) and refer the matter to trial. In order for me to do so I must be

satisfied that there are disputes of fact which are incapable of resolution on the papers which are too wide-ranging for resolution by way of referral to oral evidence, which is certainly the case in the present matter, notwithstanding Mr *Premhid's* submissions to the contrary. It has, however, been held that it is undesirable for a court to do so *mero motu*. See **Joh-Air (Pty) Ltd v Rudman** 1980 (2) SA 420 (TPD) at 428 H – 429 H**; Santino Publishers CC v Waylite Marketing CC** 2010 (2) SA 53 (GSJ) at 56 C – 57 D**.**

[44] In the light of the above authorities, I decline to exercise my discretion and *mero motu* refer the matter to trial.

[45] In conclusion, as the Facebook post had been removed on 9 April 2019, I am of the view that the Applicant would not even have succeeded with an interim interdict, let alone a final one, and intend to dismiss the application.

[46] The Applicant is at liberty to institute an action for damages in accordance with the *actio iniuriarum*, if so advised.

[47] As the Respondent appeared in person I intend to make no order as to costs.

[48] In the circumstances I make the following order:

(a) The application is dismissed;

(b) There will be no order as to costs.

_____

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant:	**Adv K. Premhid**
Instructed by:	**IAN LEVITT ATTORNEYS** c/o **BROWN BRAUDE & VLOK** 317 Cape Road Newton Park PORT ELIZABETH
Obo the Respondent:	**In person**