IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2219/2022

In the matter between:

DEFENSOR ELECTRONIC SECURITY SYSTEMS (PTY) LTD
(Registration number: 2012/038337/07) First Applicant

GERT RENIER VAN ROOYEN Second Applicant

CLAUDIUS GERALD PETERSON Third Applicant

and

AFRICA COMMUNITY MEDIA (PTY) LTD First Respondent
(Registration number: 2014/187226/07)

MINISTER OF POLICE N.O. Second Respondent

HEARD ON: 02 JUNE 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 20 SEPTEMBER 2022. The date and time for hand-down is deemed to be 20 SEPTEMBER 2022 at 14H00.

Introduction and Parties

[1] This matter was enrolled as an urgent application on 17 May 2022 before Snellenburg AJ who granted an interim relief as agreed between the parties. On the return date the applicants seek a permanent interdict. Both the respondents are opposed to the confirmation of the rule *nisi*.

Facts

[2] The facts are common cause that at all relevant times hereto the second and third applicant are directors of the first applicant. This is a security company with vast commercial interests in the two provinces of the Free State and Northern Cape. On 9 May 2022, the second and third applicant appeared in the Magistrate's Court, Kimberley on the charges relating to the contravention of various provisions of the Pensions Act 24 of 1956.[1] The main allegation is that employees' contributions were deducted from their salaries and employer's portion were not paid over to the administrators of the pension scheme. The total amount owed by the first applicant as per the annexures to the charge sheet is the sum of R817,892.82.

[3] Following their first appearance in court, a print journalist to *wit* Molaote Montsho employed by Independent Online SA (Pty) Ltd, who also deposed to the opposing affidavit, published an article on the online platform of the first respondent. It was titled "*Security boss in court for R14m pension fund fraud*" and dated 9 May 2022. The second article with the same headline and a photograph of the second applicant was published on 10 May 2022. The second article was a report on the statement issued by the Directorate for Priority Crime Investigation ("Hawks"). The common thread between these two (2) articles is that they make no mention of the third applicant.

[4] The second respondent is a ministry under which all formations of the South African Police Service fall. The police received a complaint from a former employee of the first applicant about the outstanding contributions.

[1] Page 23 – 64 of the Indexed Papers.

Investigations revealed a *prima facie* case against the first and second respondent. An affidavit deposed to by Fatima Cassim on behalf of the pension administrators known as Salt Employee Benefits (Pty) Ltd of Midrand disclosed a much bigger deficit of contributions not paid over to them.

[5] On 9 May 2022, an employee of the Hawks published a media statement on several of its media platforms. It correctly identified the allegations as pertaining to the contravention of the provisions of the Pension Fund Act 24 of 1956. The amount was reported as a whopping R14-million.[2] The employee referred to, did so, after receiving information from a fellow employee associated with the investigations.

Issues

[6] The issue to be decided, according to the applicants is a narrow one, the quintessence of which concerns the publication of a report that was false. The opposition on behalf of the first respondent is that there is no justiciable dispute pertaining to the third applicant. Counsel next argued that the articles considered offensive by the applicants are not defamatory. In the alternative should I find them to be offensive, the first respondent has raised a valid defence. Lastly, the applicants have an alternative remedy.

[7] On the other hand the attack of the second respondent is a three (3) pronged approach. The second respondent maintains for different reasons that the relevant article is not defamatory. Secondly that there are no demonstrable well-grounded apprehensions of harm or a continuing harm. Thirdly that the applicants have an alternative remedy.

Preliminary Issues

[8] There is one point that was timidly raised by the applicants that touch on the proper commissioning of the affidavit annexed to the opposing affidavit filed by the second respondent. That is the affidavit deposed to by Fatima Cassim. The

[2] Page 16 of the Indexed Papers.

deponent signed at Midrand and the stamp of the Commissioner of Oaths refers to Pretoria. Counsel for the applicants argued that because of this apparent defect it should be struck out.

[9] This should not detain us for long because it is only there to corroborate the version of the witness of the second respondent. It is now trite that a deponent to an affidavit is a witness. In this matter it is only an annexure. Even without it, the case for the second respondent is properly placed before court in the opposing affidavit. There is no merit in this point.

Contentions

[10] Mr Greyling who appeared for the applicants primarily relied on the decision of the Supreme Court of Appeal in **Economic Freedom Fighters and Others v Manuel**.[3] In that matter the court held that in order to rely on the defences that the statement was true and in the public interest, the respondents must plead and prove that the statement is substantially true and in the public interest. Counsel submitted that the sting of the report was the reference to fraud and the amount in excess of R14-million. This publication was untrue and done with the sole purpose of defaming the applicants.

[11] The nub of the submission is that the respondents published the statements with reckless indifference whether it was true or false. He emphasised that although the first respondent simply republished a statement sourced from the second respondent, it mattered not in our law where the same originated from. Therefore, it's not enough for the first respondent to rely on the statement issued by the second respondent. The first respondent was duty bound to verify the information and on this occasion it failed or neglected to do so. The point argued is that it was information that could be easily verifiable.

[12] During the course of his argument, counsel pointed out that both respondents were required to adhere to the Code of Ethics and Conduct for South African Print and Online Media. This document puts emphasis on the role of the media

[3] 2021 (3) SA 425 (SCA) at para 37.

and places an onerous duty "to take care to report news truthfully, accurately and fairly".[4] He submitted that the respondents breached all the rules that regulated their profession.

[13] The main contention of Mr Myburgh who appeared on behalf the first respondent remained that the application should be dismissed entirely. He pointed out that the allegations of R14-million was the information sourced from the pension fund administrators.[5] Surprisingly, the applicants do not deal with these allegations in their opposing papers. There is no effort to proffer an explanation whatsoever to express a particular version on these aspects. The fact that he did not, then the statements must be seen as correct.

[14] Counsel next argued that in our constitutional dispensation, the role of the press is paramount as shown in decided cases like **National Media Ltd v Bogoshi**[6] and **Economic Freedom Fighters and Others v Manuel** *supra*. The cornerstone of his submission was that the media was not to be judged on strict liability because prompt and robust reporting was important for media freedom and free flow of information.

[15] Turning to the language used in the statement, he argued that the document must be read in its entirety. The language used is not suggestive that the second respondent is guilty of anything. It is plain factual and not defamatory. In the alternative, he added, that in the event that the statement was defamatory then such mistake was reasonable and excusable. He lamented what he perceived to be an attempt to muzzle the media from exercising its main duty *ie* to inform the public.

[16] The approach adopted by counsel for the second respondent concentrated on the relief sought by the applicants. The main purpose of the interdict sought was to retract the article already published and in order to succeed the applicants must satisfy the ordinary requirements set out in our law.

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[4] Chapter 1 of the Press Code of Ethics and Conduct for South African Print and Online Media.
[5] Page 104 of the Paginated Papers.
[6] [1998] 4 All SA 347 (A).

[17] Firstly he pointed out that the second respondent did not publish any article mentioned in prayer 2.1 of the notice of motion. The article attached to the founding affidavit are marked “RG 1”, “RG 2” and “RG 3” respectively. The essence of his argument is that the relief sought is not related to the article published by the second respondent. Secondly, as a result of the order referred to in paragraph 1 above, all the articles have been removed. Therefore, the relief sought has become moot.

[18] The next issue, counsel argued, that if the publication of the personal information was a criminal offence as contemplated in section 36B(6)(d) of the Criminal Procedure Act 51 of 1977, then that constitutes an alternative remedy. Arguing for the dismissal of prayer 2.3 of the notice of motion, he relied on the decision of **Herbal Zone v Inftech Technologies**.[7] In that matter the court held that the interdict directed at preventing the party from making statements in future impinges upon a constitutional right to free speech. Turning to the founding papers he argued that there were no reasons why such an interdict should be granted.

[19] He countered the assertion of the applicants that they will suffer irreparable harm because they will not be eligible for tenders. The simple point he advanced was that the evaluation and adjudication of tenders was in terms of the requirements set out in a myriad of relevant regulations and acts. At this stage the applicants are appearing on allegations and nothing else. He pointed out that the alleged conduct of the applicants, on its own, was a demoralizing factor to their employees not the publication of the article.

[20] He reiterated that the article was not defamatory. He beseeched me to look at it through the prism of a reasonable reader as described by the court in **Channing v South African Financial Gazette Ltd and Others**.[8]

[7] 2017 2 All SA 347 (SCA) at para 36.
[8] 1966 (3) SA 470 (W) at 474A-B.

Discussion

[21] It remains then to consider whether the applicants have made out a case entitling them the relief sought. The other determination concerns a number of grounds of objection raised by the respondents to the application. The court must look at the papers in totality and apply the Plascon-Evans Rule in motion proceedings ever so repeated before our courts. In **Agribee Beef Fund and Another v Makinana** the court gave comprehensible explanation of the test in the following terms: -

> "The court has to accept those facts averred by the Applicant that were not disputed by the Respondents, and Respondents' version insofar as it was plausible, tenable and credible".[9]

[22] At the outset, I agree with counsel for the first respondent that there is no justiciable dispute pertaining to the third applicant. The media statement and two (2) articles makes no reference to him. His name only appears on the charge sheet. He did not even depose to any affidavit. It stands to reason that the application, to the extent that it relates to him, must fail. The greater portion of this judgment will concern itself with the second applicant.

[23] The significance of the words used in the articles is both important and self-evident. The main question is whether the article is defamatory. In the process of making such determination, the two (2) stage enquiry emphasised in the **EFF v Manuel** case *supra* is applicable. Firstly, the meaning of the words must be established. Secondly, whether that meaning was defamatory in that it was likely to injure the good esteem in which the plaintiff was held by the reasonable or average reader. The widely accepted definition is found in the **Channing v South African Financial Gazette Ltd and Others** where the court said the following: -

> "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

[9] Case Number 867/2020 ECP, Grahamstown at para 35.

> 'super-critical' or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read".[10]

[24] The articles were read widely on the media platforms of the first respondent. It is a fact that the second and third applicant appeared in court as per the summons and annexures. Their case was for contravention of the pension fund act totalling R817,892.82 a much lesser amount than the R14-million mentioned in the articles.

[25] What is required is that the published information must be substantially true. In this matter, the article clearly states that at this stage of his appearance at court, only allegations have been levelled against him. The articles do not in any manner refer to him of having committed anything or convicted of any crime. That is the truth. There is nothing defamatory nor unlawful in the conduct of the first respondent. It may well be so that he is unhappy about the publication but in a country like ours, robust media reporting is crucial to strengthen the constitutional dispensation and contribute to our national discourse.

[26] The word theft and fraud denotes a wrongful conduct or deception intended to result in financial or personal gain for the perpetrator. The common denominator in them is the element of dishonesty. In our criminal law they are competitive verdicts. Therefore, the use of the one instead of the other may in the long run come to the same conclusion. The statutory offence on which the second and third applicants was summoned to appear in court may well turn out to be one or the other.

[27] The second issue relating to R14-million does not stand alone and must be read in context. Again, in the article this is mentioned as an allegation but not a fact. The issue of the first applicant owing the sum of R14-million is supported by evidence contained in the affidavit deposed to by officials of the pension fund administrators. The uncontested evidence is in the form of the opposing affidavit including the one by the investigating officer. This figure is clearly defined that it comprises both amounts not paid over and penalties. It was not simply plucked off from the sky. Applying the Plascon-Evans Rule referred to earlier, this

[10] *Supra* at 474A.

version is not far-fetched or implausible. The inescapable conclusion is that the complain of the applicants is without merit.

[28] The important part is that the article referred to as "RG 2" reported by the first respondent, is attributed to the second respondent. The second article is substantially like the first article. The words used plainly refers to the second applicant as an accused and that what he is facing are still allegations. These cannot be mistaken as a fact by the reasonable leader who is assumed to decipher the true meaning of the statement.

[29] The applicants are seeking a final order and in order for such relief to be granted, the applicants must satisfy the requirements. They are tabulated as a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

[30] A clear right is a matter of substantive law. In their papers the applicants averred that there is no other alternative remedy. However, in the heads of argument, counsel pointed out that the conduct of the respondents was in contravention of section 36B(6)(d) of the Criminal Procedure Act 51 of 1977.[11] On their papers, it stands uncontested that indeed there is a remedy. The aforementioned alternative remedy qualifies as such because it is adequate in the circumstances, ordinary and reasonable remedy which could give a similar protection to the applicants.

[31] As a security company the first applicant is doing its business with both private and public entities. The argument is that the publication of these articles will jeopardise future business ventures. That alone is not a sufficient basis for the

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[11] Section 36B(6)(d) reads as follows: -
"Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter-
(i) uses or allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or
(ii) tampers with or manipulates the process or the fingerprints, bodyprints or images in question; or
(iii) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,
is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years."

conclusion that it has a well-founded apprehension of irreparable harm if the order is not granted. The applicants also seek to interdict future conduct of the respondents. That is far reaching and the court should not grant such orders without caution. The are no reasons advanced why there is such a need and that the respondents are prone to publish any articles perceived to be defamatory by the applicant. This argument is not meritorious. Counsel for the second respondent pointed out that tenders are determined in accordance with procurement laws. This incident has no bearing to their future commercial endeavours. I agree with him and conclude that there is no merit in this submission.

[32] The second respondent raised an important point concerning whether the order sought by the applicants it's moot or not. I agree with the submission that the order that this court will ultimately make as prayed in the notice of motion will have no practical effect on the parties or others. The offending article has been removed from all media platforms. The court order dated 17 May 2022 provides as such. There is nothing for this court to order as an issue between them. Therefore, there is no existing or live controversy between the parties. The applicants have not shown any reasons that they are entitled to the relief sought.

[33] The following order is made: -

33.1. The application is dismissed.

33.2. The applicants are ordered to pay the costs of the two (2) respondents, jointly and severally, the one paying the others to be absolved.

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M.A. MATHEBULA, J

On behalf of the applicant:	Adv. P. Greyling
Instructed by:	Bredenkamp Attorneys BLOEMFONTEIN
On behalf of the first respondent:	Adv. P. Myburgh
Instructed by:	Abrahams Kiewitz Incorporated C/O Webbers Attorneys BLOEMFONTEIN
On behalf of the second respondent:	Adv. M.S. Mazibuko
Instructed by:	State Attorney BLOEMFONTEIN

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