REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
CASE NO: 30069/12

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

....
DATE SIGNATURE

In the matter between:

MILENKOVIC BRANKO Plaintiff

And

QITHI MOFFAT First Defendant

BOXING SOUTH AFRICA Second Defendant

J U D G M E N T

VICTOR, J:

[1] The plaintiff who is a boxing promoter sues the first defendant, Mr Moffat Qithi who is the Chief Executive Officer of Boxing South Africa, the second defendant. Boxing South Africa is the umbrella body constituted by statute, the South African Boxing Act No.11 of 2001 ("the act") together with the regulations to control the sport of boxing in South Africa. The plaintiff is a licensee to Boxing South Africa in his capacity as promoter. Boxers are also licensed to Boxing South Africa for purposes of health protection and other positive features. There are more stringent tests and constraints for female boxers and medical issues are treated very seriously.

[2] Sadly the context of this dispute arises out of the failure by Ms Noni Tenge of South Africa to defend her world boxing title. She is the first International Boxing Federation (IBF) world champion woman boxer from South Africa and indeed the continent of Africa. It is against this background that the plaintiff claims that Mr Qithi gave interviews to the City Press and Daily Dispatch newspapers wherein he defamed the plaintiff for the failure by Ms Noni Tenge to defend her world title.

[3] On 22 July 2012 Mr Qithi made statements concerning the plaintiff to a journalist known as Mr Junior Motsei of the City Press newspaper.

[4] The plaintiff claims that the statements were made by Mr Qithi acting within the course and scope of his employment with Boxing South Africa.

[5] The statement is as follows:

"*Top promoter Branco 'Baby' Milenkovic is to blame for Noni Tenge being stripped of her International Boxing Federation 'IBF' welter weight crown … Qithi said that promoter should look in the mirror to see the man who caused Africa's most distinguished female pugilist her title … A promoter is responsible for digging deep in his pocket and putting up a world title fight without blaming anyone for the repercussions.*"

It was undisputed that the article was read by members of the boxing industry, by boxing promoters and boxers and the public at large.

[6] The second claim is that on 13 July 2012 Mr Qithi made the defamatory statement to one Mr Monwabisi Jimlonga, a journalist employed by the Daily Dispatch newspaper knowing that the article would be published by it.

"*It is clear in this case that there is a breach of contract as Noni has not fought since July last year.*"

It is also undisputed that Mr Qithi was acting within the course and scope of his duty as the Chief Executive Officer of Boxing in South Africa.

[7] The said articles were published in the City Press and Daily Dispatch which have a readership of hundreds of thousands of readers. The parties had agreed the extent of the publication.

[8] The plaintiff contends that the words were wrongful and defamatory of him *per se* and/or they imputed and were intended and were understood by readers of the statements to mean that the plaintiff had no concern for the interests of boxers promoted by him, is only concerned for his own interests, is unethical, is unprofessional and does not honour his contractual obligations. The statements were made with the intention of defaming the plaintiff and injuring his good name. Each claim is for R2 million.

[9] There were initially special pleas of non-joinder of the relevant newspapers and journalists but these were abandoned. The import of the plea is simply that the discussions were had. They were relevant to issues raised in the questions posed to Mr Qithi.

[10] In the plea Mr Quithi admits making statements to Mr Junior Motsei of City Press in respect of claim A and to Mr Monwabsisi Jimlongo of the Daily Dispatch in respect of claim B. The special plea of non joinder of the journalists and newspapers was not pursued before me. On the merits the

recognized defences were that the statements were factual in nature and the content was true and correct, relevant to the question posed, not inspired by malice, not intended to defame, were fair and reasonable, a matter of public interest, for the public benefit and were not wrongful or defamatory. The defendant also pleaded that the comments were permissible as a constitutionally entrenched right to freedom of expression.

Plaintiff's reputation in the sport of Boxing

[11] The plaintiff contends that his good name and reputation was impaired. He also testified how the articles had a devastating effect as he had dedicated his entire career to the promotion of boxing.

[12] The plaintiff testified that as a boxing promoter in the industry much turns on one's image and reputation. In particular negotiations and dealings are done verbally and many telephonically. Once there is a commitment that you are going to pay someone a certain amount of money you cannot change that. The boxing world is very small and reputation is everything. Word spreads very quickly and the world has become a global village. If a promoter breaches a contract or is dishonest or dishonourable one's image is tarnished as it gets around the world in a question of minutes.

[13] The plaintiff has been a boxing promoter for 15 years and has contributed significantly to the sport. He has won many accolades. He has promoted four legitimate World Championships with the IBF. He is the only promoter on the Continent of Africa who has had no less than five IBF world champions. He has put South Africa on the boxing map.

[14] The plaintiff referred to a chronology of his career as a boxing promoter. He took the court through the bundle of documents confirming all the accolades that he had received over the decades. All this was undisputed. Briefly the following accolades were bestowed on him: IBF promoter of the year at Carnival City in 2010 and 2011, the South African Government was honoured in 2011 by the IBF for its role in boxing. A photograph has a caption "South Africa honoured in Las Vegas, promoter of the year award."

[15] The plaintiff is placed at the same level as the famous Mr Don King in the boxing world. The plaintiff was a promoter of the South Africans who boxed at international level: Hawk Makupela, Vusi Malinga, Moruti Mthalane, Simpiwe Nongqayi, Jeffrey Mathebula, Isaac Hlatshwayo, Malcolm Klaasen, Evans Mabamba, Moruti Mthalane, Takalani Ndlovu, Zolani Tete and Vusi Malinga. The plaintiff's promotion company Branco Sports Productions was inducted into the International Hall of Fame in 2005. He has been recognised for his

role in South Africa. The Minister of Sport awarded him a Life Time Achievement Award. He was sought after by the boxing fraternity of Tanzania. He supports charities such as a home for children born with HIV on the West Rand. He is involved in the development and upgrading of boxing projects in Alexandra, Soweto and Ekurhuleni. The plaintiff has received an accolade from the Tanzania Professional Boxing Commission. He was described by them as the real son of Africa and there was a show of gratitude on behalf of the country about his achievements in Tanzania.

[16] It is abundantly clear to me that the plaintiff enjoyed an unblemished and positive reputation in the sport of boxing. Up until 2010 he had a very good relationship with Boxing South Africa and all this changed when Mr Qithi became the CEO. Quite clearly the repercussions have found themselves embedded in conflict within the boxing sport and the claims made by the plaintiff must therefore be assessed within the context of boxing nationally and internationally and also to the public at large.

Former IBF world champion boxer Ms Noni Tenge

[17] The plaintiff had promoted the world IBF title fight of Ms Noni Tenge of East London at his own expense at a cost of almost R1million. In South Africa a promoter does not get a percentage of the boxer's

purse. A promoter's income is derived from sources such TV coverage and the like. There is also an agreement in place between a boxer and promoter and in terms of clause 2 of the agreement the promoter undertakes to promote a minimum of two bouts and a maximum of four bouts per year.

[18] Ms Tenge did not get to do her second fight or defend herself by 11 March 2012 as required by the IBF. Much of the trial centred on this. No one would assist financially to promote the bout. In the past SABC had flighted the boxing fights and the promoters would derive their income from this source. Mr Qithi after becoming CEO would not allow SABC to flight the fight. He would no longer allow the promoters to deal directly with SABC and this meant that the plaintiff could not stage Ms Tenge's second fight. South Africa is the only country where a promoter does not get any percentage of the boxer's purse. The manager gets a percentage. In this case the plaintiff even had to pay her trainer/ manager's fee. The plaintiff lost close to R1 million in that first fight and could not put up the money for the second bout without SABC sponsorship. I find that Mr Qithi was instrumental in cutting off the SABC revenue stream to the plaintiff and he knew what the effect would be on the plaintiff and in particular the critical fight of Ms Noni Tenge.

[19] The most important feature in this case is that a boxer has to defend his/her IBF title within a certain time period and if that does not take place then the boxer is stripped of the World Title.

[20] Ms Noni Tenge also made very high demands as she wanted R250 000 and the plaintiff could not put up that amount.

[21] The plaintiff sought assistance from Boxing South Africa and received a cold shoulder from them. He also spoke to Mr Loyiso Mtya the Director of Operations at the second respondent and he was ignored. He also spoke to Mr Lennox Mpulampula to ensure that Noni Tenge did her second fight but no one was interested. He did get some sort of response from the Minister of Sport Mr Balfour. Whenever he put the budget forward he was kept on a string, he kept reducing it until finally it became evident that no one was prepared to spend one cent to promote the Noni Tenge fight.

[22] He received various correspondences from the IBF advising that she would be stripped of her title if the next fight did not take place. He sent copies of these to Mr Qithi and the response was cavalier. On the 9th of April 2012 the plaintiff received a letter from the office of the President of the IBF stating that Ms Tenge had beaten the former champion Ms Daniella Smith in a mandatory defence of the IBF Female Welter Weight Title on June 11, 2011 and that her mandatory defence was

due on or before 11 March 2012. The leading available contender was Ms Cindy Serano and that she had agreed to fight Ms Tenge for the IBF Female Welter Weight champion. It was made very clear in the letter that every effort was to be made to make sure that the mandatory defence fight took place. A further letter was received on the 2nd of May and the import of that letter was that the IBF ordered Ms Tenge and Ms Serrano to start negotiations for Tenge's mandatory defence which was due on 9 April 2012. It would appear that the plaintiff then speeded up his efforts to try and obtain the necessary financial support for the fight.

Mr Qithi's attitude towards the plaintiff

[23] In the light of the critical financial situation and no support from SABC the plaintiff wrote to Mr Qithi and Boxing South Africa and pointed out the dangers in Ms Tenge not being able to fight the mandatory defence fight and the consequences thereof.

[24] On 18 June 2012 the plaintiff wrote to the defendants wherein he attached the letter from the IBF.

> "Attached letter which speaks for himself (sic) itself. Noni's mandatory defence was due on or before the 11th of March 2012. We were unable to get any interest from TV and for this reason we will have no grounds to place a bid. This e-mail is to make you aware of the situation so there will be no accusations like in the case of Mzonke Fana who was stripped of his title. One will recall

> 11 June last year when Noni won the title; there were no TV or sponsors again. We have lost hundreds of thousands, but we were determined to make history in producing the only and first ever legitimate IBF Woman World Champion from the continent of Africa. It is sad that Noni's achievement, which was not only sporting but political importance as well, is still without the support from National Broadcaster or potential sponsors. Regards Branco"

[25] The simple answer was in my view one of disinterest. The response from the first defendant was 'thanxs Branco!!!' Boxing South Africa had gone a long way in order to make sure that boxing in South Africa reached good heights, but here was a female boxing champion having to fight her mandatory defence and the response from Mr Qithi and the controlling body was cavalier and one of disinterest. Mr Qithi's response was calculated to cause the maximum amount of divisiveness and spite towards the plaintiff. This showed a nonchalant attitude on the part of the controlling body to something which was very important in the female world of boxing.

[26] The consequence was that the relationship between the plaintiff and Mr Qithi broke down further and he formed the view that this was a breach of contract on the part of the plaintiff in that it was up to him to make sure that Ms Tenge attended to her fight which was required to defend her title. In cross examination he tried to avoid answering any question directly on his letter to the IBF after the loss of Ms Tenge's title in which he claimed that if he had been informed of the situation he would have stepped in to save the situation. This is a deliberate

untruth in the face of the proven requests by the plaintiff for him and Boxing South Africa to save the day. Mr Qithi's evidence demonstrated unequivocally that he regarded the plaintiff as having breached his contract with Ms Tenge, that the plaintiff had to fund at least two fights a year from his own pocket and that a boxer should be compensated if there are not two fights.

[27] There is a wide range of correspondence between the parties and in my view it was clear that the wording that appears in the newspapers in question did come from the attitude and approach adopted by the first and second defendants in their correspondence. I find that Mr Qithi's failure to try and facilitate this very important fight was motivated by malice. The plaintiff had done all he could to draw their attention to the deteriorating and critical situation regarding Ms Tenge.

[28] The words which appear in the newspaper therefore are consistent with the approach taken by Mr Qithi in the matter. In contradiction to his plea Mr Qithi in evidence claimed the journalist had quoted him out of context. This is yet another fabrication. Mr Qithi claims that if he had seen the second article he would have disputed the words used. Well he had not done so right up to the time of lodging the plea, at the pre trial conferences and did so for the first time during his own cross examination. If he had seen the article he would have told the

journalist it was not what he said. In particular one sees in the articles in question the words that the plaintiff is to blame for Ms Tenge being stripped of her IBF World Welter Weight crown and in addition in relation to claim B it is clear in this case that there is a breach of contract as Noni has not fought since June last year.

[29] The version particularly in relation to the breach of contract clearly emanates from the writing and the correspondence which I have referred to as being too numerous to list in this judgement and to me, it is clear that the approach as reflected in the newspaper is the approach of Mr Qithi in this matter.

[30] Both parties testified at great length, every single issue was traversed. I permitted an intensive ventilation of the issues that may not have been immediately and directly relevant in the hope that once the difficulties had been aired the parties would have found some rapprochement but that failed to materialise.

[31] In my view Mr Qithi deliberately set out to injure the reputation of the plaintiff. Mr Qithi was not justified in doing so having regard to all the facts in this case. The sting in the publications was untrue and calculated to defame the plaintiff. Mr Qithi's attempts to obfuscate the central issues by never answering any question directly dragged the

trial out. He could not explain why he had lied to the IBF in his letter after Ms Tenge was stripped of her title. He could not explain in any logical and credible way why he had formed his own promotions company (although it had not yet commenced trading) nor could he explain why he was party to a scheme where a private company was going to take over the promoter's work and pay over 20% to Boxing South Africa when promoter's only paid over 15%. He could not explain why he had not disclosed his previous criminal conviction when applying for the job of CEO of Boxing South Africa. No explanation was forthcoming about his dismissal from the Walter Sisulu University for misconduct from his employment. The first defendant testified and it was very difficult to find consistency in his version of events. No question was answered directly and in my view the defensive approach adopted by the first defendant lacked clarity, lacked frankness and no insight were shown into the importance of the role of the second defendant in trying to save that fight in question.

[32] The defence suggested that the statements were factual in nature, true and correct, relevant to the questions posed, not inspired by malice, not intended to defame, fair and reasonable are rejected. In my view the comments were not fair and reasonable in the circumstances. The statements in the way that they were made were

inspired by malice. Mr Qithi has not been able to demonstrate that the words published in the article were true and for the public benefit

[33] As to whether the words were defamatory it is necessary to consider the following elements in *Khumalo and Others v Holomisa* 2002 (5)SA 401 (CC) 3 this court stated that the elements of defamation are '(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff'. Once the element of wrongfulness has been established the statements are presumed wrongful and intentional. As stated Brand AJ in *Le Roux v Dey* 2011 (3) SA 274 (CC) it becomes necessary for the defendant to raise defences that excludes wrongfulness and intent

[34] In *Modiri v Minister of Safety and Security* 2011(6) SA 370 at para 12 Brand JA sets out a concise model to assess the truth and public benefit defence.

‘Though both the presumption of intent and that of wrongfulness arise from a single event, that is, the publication of a defamatory statement, the two presumptions are essentially different in character. The presumption of intent to injure relates to the defendant's subjective state of mind. By contrast, the presumption of wrongfulness relates to

a combination of objective fact, on the one hand, and considerations of public and legal policy, on the other (see eg *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 768I – 769A; *Le Roux v Dey* 2011 (3) SA 274 (CC) paras 121 – 125). By contrast, the objective nature of the enquiry into wrongfulness signifies that the subjective beliefs of the defendant are of no consequence.'

[35] In my view the defendants' defences on truth, fair comment and public benefit must fail. All the elements of delictual liability are present. The words were per se defamatory in the context of the article. Mr Qithi's subjective state of mind was intended to injure the plaintiff. The issue of wrongfulness can be gleaned from the objective facts. The evidence has amply demonstrated this.

[36] The defendant also relied on the constitutionally entrenched right to freedom of expression. There is a limitation. The manner in which Mr Qithi reported the situation was filled with fabrications and goes beyond what is permissible in terms of constitutionally entrenched right to freedom to expression. An objective evaluation of the published articles does have the effect of tarnishing the plaintiff's reputation as a promoter and that he has done something unethical in

destroying a young woman's potentially illustrious career.

[37] The determination on the question of damages is complex. In my view the plaintiff was a good witness; he was consistent in what he told the court. It is clear in my view that the accolades that he had received in the boxing world were not fabricated in any way and in cross-examination the dignity and acknowledgement that he enjoyed in the industry was clear in its terms.

[38] I am mindful of the relatively modest amounts awarded by our courts in matters of defamation and whether there should be an award at all and not the imposition of question of say an enforced apology. In this case the plaintiff's career as a promoter in the boxing industry depends on word of mouth, reputation and an unerring commitment to the boxer he promotes and honesty. His considerable role in the development of the industry in South Africa went unchallenged. His international career as a promoter was also undisputed. In the result this defamation did not amount to a prank but was intentionally calculated to harm the plaintiff as a promoter in the industry both nationally and internationally. In addition the defamation in this case is dissimilar to the reported cases of defamation relating to a litigant's past or a restatement of a litigant's past involving criminal activity or of him being charged for a criminal offence in respect of which he has

not been convicted. The conduct here was aimed at destroying the plaintiff in the market place and undermining the great emotional and financial sacrifice he had made of promoting boxing in general and in particular a women boxer to international champion at his own cost of a R1million.

[39] I have also been referred to a number of international authorities, they include a number of Canadian defamation verdicts for example *Fennimore v Sky Service Airlines et al* where a pilot had been blackballed by a tight knit flying community, the allegation being that he had consumed alcohol 7 hours before he was scheduled to fly. He was awarded $3million.

[40] In *Cairns v Modi* case no HQ 10D00267 Queens Bench Division London Mr Justice Bean awarded £75000 and added another £15000 in respect of aggravation where a false allegation of match fixing in cricket had been made.

[41] There are two separate sets of defamation. Mr Qithi conducted two separate interviews with two separate newspapers. Two separate claims are justified in the circumstances. Ultimately the effect on the plaintiff was equally devastating and merit the same amount awarded.

In the result I make the following order.

ORDER

1. The first and second defendants are ordered jointly and severally the one paying the other to be absolved, to pay the amount of R250,000 to the plaintiff in respect of Claim A.

2. In respect of Claim B, the first and second defendants are ordered to pay to the plaintiff the sum of R250,000 jointly and severally the one paying the other to be absolved.

3. The interest on the aforesaid amounts shall be payable at the rate of 15.5% per annum from today's date.

4. Costs of suit.

_____

M VICTOR
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF	ADV L HODES SC ADV L HOLLANDER
INSTRUCTED BY	PHILIP SILVER AND ASSOCIATES
COUNSEL FOR THE DEFENDANTS	MR HOPKINS

INSTRUCTED BY	MAJAVU INC
Date of hearing	11November 2013
Date of Judgement	10 June 2014