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

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

[redacted]

SIGNATURE DATE: 14 October 2024

Case No. 14102/2020

In the matter between:

JASON MKHWANE Plaintiff

and

ANDILE PHILIP DYAKALA Defendant

JUDGMENT

WILSON J:

1 On 15 July 2024, I dismissed the plaintiff's defamation claim. My reasons for doing so are set out in a written judgment I handed down on that date. On 10 September 2024, I delivered a judgment *ex tempore* refusing the plaintiff leave to appeal. My registrar immediately asked for the transcript of my *ex tempore* judgment so that it could be signed and made available to the parties. It was not until 10 October 2024 that I was informed that the transcript could not be

provided, because the recording machine in the courtroom in which I heard the application for leave to appeal had failed.

2 In this written judgment, I briefly record my reasons for refusing leave to appeal.

3 Mr. Ramogale appeared for the plaintiff, Mr. Mkhwane. Mr. Ramogale's principal submission was that I had mistakenly held that Mr. Mkhwane had failed to deny a critical piece of the evidence given by the defendant, Mr. Dyakala, and upon which I founded much of my trial judgment. That evidence was that Mr. Mkhwane had taken Mr. Dyakala aside and explained that he had a political mandate to ensure that only businesses favoured by the ruling party would be appointed as service providers to the Emfuleni Municipality, where both men worked.

4 However, my trial judgment does not conclude that Mr. Mkhwane failed to deny this conversation. Rather, the gravamen of my judgment is that the quality of Mr. Mkhwane's evidence in response to Mr. Dyakala's version on this point was so poor as to warrant my rejection of Mr. Mkhwane's denial. My trial judgment accepts Mr. Dyakala's account of how Mr. Mkhwane explained his political mandate. On that basis, I concluded that Mr. Dyakala's later description of Mr. Mkhwane as corrupt was substantially true. Given the nature of Mr Mkhwane's description of his political mandate, it was also in the public interest that Mr. Mkhwane's corruption be called out.

5 A trial court's factual findings may only be interfered with on appeal if they are clearly wrong. Properly construed, my factual finding on the point in issue was

faithful to the evidence I heard. There is no prospect of it being interfered with on appeal.

6 It was next suggested that I was wrong to find that Mr. Dyakala's imputation of corruption to Mr. Mkhwane was in the public interest, because I lacked any positive evidence supporting the proposition that it is in the public interest to make a true allegation of corruption.

7 This approach is misconceived. Once the truth of a defamatory allegation has been established, it is the duty of a court to consider whether the statement was made in the public interest on the particular facts of the case before it (see *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA), paragraph 24). There is no need for separate evidence on the point of whether the type of true statement made is generally consistent with the public interest.

8 At paragraph 40 of my trial judgment, I found that there was "no account of constitutionally informed public policy that is compatible with telling a senior municipal finance manager that he cannot, consistently with the public interest, call out what he honestly believes to be corruption in his own department, even if he chooses to do it on a departmental WhatsApp group on Christmas Eve". This plainly constituted an evidence-based assessment of whether, in this case, it was in the public interest for Mr. Dyakala to have said what he said in the manner and at the time he said it. This is what the applicable case law requires. There is no prospect of a court of appeal finding otherwise.

9 It was finally contended that I was wrong to uphold the unpleaded defence of fair comment relied upon in argument by Mr. Dyakala's counsel. I have little to

add to my trial judgment on this point. Mr. Ramogale submitted that my acceptance of the unpleaded defence caused Mr. Mkhwane prejudice. But he could not identify what that prejudice was. Nor could he say where, on the record, any such prejudice had been claimed or identified at trial. Mr. Ramogale's case was that I was debarred from considering, much less upholding, the unpleaded defence because Mr. Mkhwane's counsel had asserted in their heads of argument that my considering the unpleaded defence would cause prejudice to Mr. Mkhwane in some general sense. I do not think that was enough to meet the requirement to establish prejudice flowing from the consideration of an unpleaded issue. Nor would a court of appeal.

10 For these reasons, there is, in my view, no prospect of success on appeal, which is why I dismissed the application for leave to appeal in my *ex tempore* judgment of 10 September 2024.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14 October 2024.

HEARD ON:	10 September 2024
DECIDED ON:	10 September 2024
REASONS:	14 October 2024

For the Plaintiff:	T Ramogale Instructed by TTS Attorneys
For the Defendant:	BT Moeletsi Instructed by Ntosane Attorneys