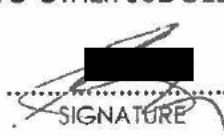


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/28121

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
12 November 2024 DATE	 SIGNATURE

In the matter between:

KS

Plaintiff

And

AM

First Defendant

SHM

Second Defendant

JUDGMENT

MIA J:

[1] The plaintiff seeks general and special damages against the first and second defendants. The matter comes before me as an application for default judgment. The first and second defendant's defences were struck out by an order of this court on 23 July 2023.

I was satisfied to proceed, notwithstanding the defendants' defence being struck out, as the application for default judgment was served on the attorney of record, and an attempt was made to serve the application on the first defendant personally, who refused to accept the service.¹ The notice of set down was left with the defendant.

[2] The plaintiff's claims arise from the creation of an imposter social media profile of the plaintiff, the recording of intimate images of the plaintiff, the non-consensual publication and distribution of intimate depictions of the plaintiff on a fake Facebook account of the plaintiff created by the defendants; as well as communications by the second defendant with various colleagues of the plaintiff and a senior colleague at the company where the plaintiff was employed. It is appropriate to provide background and context to the claim.

[3] The plaintiff and the first defendant were in a romantic relationship from approximately August 2014 to January 2015. The first defendant led the plaintiff to believe he was unmarried and proposed to her, and she accepted the proposal in December 2014. In January 2015, the second defendant approached her and informed her that she was the first defendant's wife. The plaintiff immediately ended the relationship. The first defendant refused to stop seeing the plaintiff and arrived at her place of employment in the mornings. She sent an attorney's letter requesting that he stop communicating with her.

[4] The first defendant continued sending WhatsApp messages to the plaintiff after receipt of the letter requesting that he desist communicating with her. He then threatened to send videos he described as "porno videos" to the plaintiff's attorney. He threatened that he would take three steps for each step she took. This was followed with a threat to send a video he recorded of her engaged in sex with him, to her family and friends. He directed her to a

¹ Record, Confirmatory affidavit Caselines 030-40

Facebook profile that had been created and said he would invite everyone they knew and post the video he had recorded. He sent a clip of a video to her WhatsApp to ensure she saw what the content was. She was not aware that the first defendant had been recording intimate images and recordings of them whilst they were together.

[5] The fake Facebook profile was created on 13 August 2015. The plaintiff's friends, family, and professional colleagues were invited to join this profile. The images and videos were posted on this fake Facebook profile. On 15 August 2015, the first defendant threatened that he had published the explicit videos and would send them to everyone if the plaintiff did not sleep with him.

[6] The plaintiff was contacted by friends and family who had seen the content. It also came to the attention of persons unknown to the plaintiff during the period the content was available on the active fake Facebook account until the account was deactivated. The plaintiff deactivated the account when the posts came to her attention.

[7] The plaintiff averred that the harm occurred within the jurisdiction of this court in Ekurhuleni, Germiston, as she resides there, and the infringement came to her attention in this jurisdiction. The defendants' conduct infringed on her personality, privacy, and reputation personally and professionally primarily in this court's jurisdiction. Notwithstanding that the infringement occurred online the plaintiff's colleagues and seniors were based within this court's jurisdiction and received the communication whilst in this court's jurisdiction.

[8] The first claim, A, is for the creation and activation of the false Facebook profile with the plaintiff's details and picture, which the defendants operated until the administrators deactivated it. The plaintiff avers that this constituted an infringement of her dignity and privacy by the defendants, who operated this account, which came to the attention of her friends and family. This claim is for R250 000.00.

[9] The second claim, claim B, is for the operation of the false Facebook account where the defendants posted two videos depicting the plaintiff in a state of undress and engaging in sexual conduct. The first defendant created the videos without her consent. The defendants intended this to come to the plaintiff's attention and to humiliate her, and she was severely traumatised as a result. She has experienced pain and suffering and has undergone medical treatment and will require treatment in the future due to the emotional trauma she has experienced. This claim is for R2 500 000.00 for general damages. The treatment is estimated to be in the amount of R 250 000. The total claim for medical costs, is thus R300 000, is made up of R50 000.00 for past and R250 000.00 for future medical expenses.

[10] The third claim, claim C, is for specific words published on the fake Facebook platform for the attention of the plaintiff's family, friends, and social acquaintances who had access to it. The words are alleged to be defamatory of the plaintiff and calculated to impute an immoral picture of the plaintiff to bring shame to her family and her professional life. The content describes the plaintiff as the person in the video who engaged in sexual conduct and describes how the plaintiff and the defendant met. Namely, the first defendant requested the plaintiff's number when they met at a filling station, and despite there being a baby on board sign the plaintiff commenced a relationship. The second defendant comments, *"it's sad that educated... from good homes can stoop to that level and not respect other women's marriages or homes. Homewrecker?? You be the judge. all we have at the end of the day are our morals n our character not our money or our professions or title" [sic]... to all who believe she is an honest n moral human being ...here is a wakeup call" [sic]*. The plaintiff alleges the words are *per se* defamatory and calculated to defame her and depict her as a dishonest, immoral, promiscuous and adulterous person who is a disgrace to her family and profession. As a result, the plaintiff seeks damages of R500 000.00.

[11] The fourth claim, D, is for communication by the second defendant to a colleague of the plaintiff of words that infringed the plaintiff's privacy and were

intended to harm her dignity and professional reputation. The second defendant communicated, *"ur friend started an affair with a married man in.. with 2kids while his wife is expecting their second child..... where are her morals and brains to ruin a home...no use being educated with a degree when your morals and values are so low. How does she face herself.* This was intended to attribute a defamatory meaning that the plaintiff is cruel, dishonest, immoral, promiscuous, adulterous and a disgrace to her profession. The plaintiff seeks damages in the amount of R250,000.00 for this instance.

[12] The fifth claim, claim E, is for the second defendant's communication with the receptionist at the plaintiff's previous employment. The second defendant stated to the receptionist words to the effect that that the plaintiff was having an affair with the second defendant's husband, she should tell the plaintiff to stop having an affair with the first defendant and the company should not employ women like the plaintiff. This communication the plaintiff avers was understood to impute a defamatory meaning, specifically that the plaintiff was immoral, adulterous and a disgrace to her employer. The second defendant intended the statements to come to the attention of the plaintiff and her superior, which occurred on the same day as the receptionist communicated this, and it did come to the attention of the plaintiff's senior, and she was embarrassed and humiliated. The plaintiff claims R 250 000.00 as a result of this infringement. Claim F was for an email sent to the plaintiff's superiors, which is summarised and referred to the plaintiff as a homewrecker and intimating that she was not an asset to the company if she slept with married men. This claim was for R250 000.00.

[13] The evidence before this court comprised the plaintiff's testimony regarding the humiliation she experienced as a result of the first and second defendants' conduct, as well as its impact on her. She was unable to continue working at the same company. She was embarrassed and humiliated when her family and friends discovered the videos. She was so emotionally distressed she considered suicide. She suffered from and has been treated for alopecia caused by the stress and anxiety she experiences. She does not go out and

fears for her family when they go out. She obtained a protection order against the first defendant. As a result of the trauma and distress she experienced, she sought the professional assistance of a psychologist. She will continue seeing this health professional for some time. It is envisaged that this will be for at least the next three years. Her evidence indicated that she had received medical treatment for the emotional trauma at a total cost of R 50,000.00. The plaintiff indicated that she would continue seeing this psychologist for some time. The expert report also addresses how this supports ongoing treatment.

[14] The report of a psychologist, which was independent of the treatment psychologist, offered insight into the plaintiff's trauma. The psychologist's report is detailed and indicates the assessment comprised the application of standardised tests and an interview with the plaintiff before the report was compiled. For this matter, I have considered the full report and noted the portions that support the plaintiff's evidence and are relevant to the matter.

[15] The psychologist indicates the plaintiff resigned from her employment due to the humiliation the defendants' conduct occasioned. This resulted in substantial financial losses for the plaintiff. On a social level, the plaintiff withdrew due to embarrassment and psychological dysfunction. She began to live in fear for her family and her own safety due to information disclosed to her by the first defendant about what he had done to other persons.

[16] The plaintiff had a stable upbringing and is educationally advanced, having progressed in doctoral-level LLD/PhD studies and successfully completing her board examinations. Before her resignation, she worked on major coal-fired power-producing plant projects. Her financial history was also stable. After she terminated their relationship, he threatened to expose the recorded videos if she did not remain in the relationship. The plaintiff started seeing a psychologist to deal with the emotional state occasioned by the fallout and threats and was diagnosed with post-traumatic stress disorder(PTSD). Medication was prescribed for PTSD; the medication affected her as it

worsened a pre-existing heart condition she had and also impacted her kidneys. The stress has also resulted in significant hair loss.

[17] The psychologist indicates that her distrust is significant and makes it difficult to enter and establish meaningful relationships. This indicates that the infringement has impacted her physical, emotional and mental health so that she has suffered physically, she is unable to continue working, and she does not trust easily. Her inability to trust impacts her relationships, which is a core aspect of being human, and her ability to function normally and ably in social and work settings. It impacts her ability to thrive.

[18] The determination to be made is the award of damages in the matter. There are six different claims for general and or special damages for the recordings of the plaintiff, the creation of the false Facebook profile, the posting of the recordings and comments to friends and colleagues of the plaintiff on the Facebook profile intended to harm her and cast her in her negative light. The communication about the plaintiff was created via the false Facebook account on different occasions and the email communication with her seniors.

[19] The claims are novel in that the defamation and posting of images and recordings of a person online is a relatively new occurrence. Legislation has been enacted to protect persons against such occurrences and prevent harm. Counsel for the plaintiff pointed out in his heads of argument that there is an acceptance that the damage may not be calculated with mathematical precision. By their very nature, the claims involve determining a just and reasonable amount. I thank counsel for the heads of argument that were helpful and also the case referred to *FGX v Gaunt*² which it was submitted was similar to the present.

[20] Justice Thornton DBE in *FGX v Gaunt*³ refers to the term revenge porn as the term commonly used to describe the first defendant's conduct. This is

² 2023 EWHC 419 KB

³ 2023 EWHC 419 KB

the publication of non-consensual intimate images, recording or depictions. It is recognised as a violation against persons. The United Nations Special Rapporteur has recognised that posting intimate images without consent violates the rights to privacy and dignity and to live a life free of violence.⁴ In the matter before Justice Thornton, the court considered a claim for damages arising from the publication of naked images on a website. The court took into account the emotional impact on the plaintiff, that she suffered from PTSD which led to an enduring personality change. It was also relevant that and that the defendant was paid for the images. The court awarded general damages of 60 000 pounds and special damages of 37 041.67 pounds which included costs for removing the images from the internet, past medical costs, estimated future medical costs, the cost of prescribed medication for the remainder of her life and the cost of a wasted holiday and her unplanned departure from the defendant's home including furniture she left behind.

[21] The publication of non-consensual intimate images is a recognised form of violence as provided in the Criminal Law Amendment Act 32 of 2007.⁵ I

⁴ The United Nations Special Rapporteur on Violence Against Women observed that the "publication or posting online without the consent of intimate photographs or photoshopped images that are sexualised" violates the subject's rights to privacy, to dignity, and to live a life free from violence. See UNHRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective' (2018).

⁵ See section 11A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 pertaining to the non-consensual disclosure of content of an explicit or sexual nature provides: 11A. Harmful disclosure of pornography.—(1) A person ('A') who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person ('B') appears or is described and such disclosure—

- (a) takes place without the consent of B; and
- (b) causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,

is guilty of the offence of harmful disclosure of pornography.

(2) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1) and such threat causes, or such disclosure could reasonably be expected to cause, any harm referred to in subsection (1) (b), is guilty of the offence of threatening to disclose pornography that will cause harm.

(3) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1), for the purposes of obtaining

was referred to the decision of this court in *KS v AM*, which is an appeal relating to a protection order arising from the same set of facts as the present matter. Briefly, the court *a quo* confirmed the interim protection order that had been granted. The appeal before this court was against the court *a quo*'s refusal to grant additional orders which sought to protect the appellant namely by directing the first defendant to hand over the device with the recordings and depictions of the plaintiff to enable her to remove them. The court on appeal ordered that any device with a photograph, depiction, video or audio related to the applicant [plaintiff] be handed over. The court also noted the preamble of the Act⁶ that the purpose seeks "to afford a victim of domestic violence maximum protection from domestic abuse that the law can provide".

[22] The preamble⁷ recognises that domestic violence takes many forms and that it can be committed in a wide range of domestic relationships. In committing to its obligation to end violence against women and children, specifically, the preamble references the Constitution and its international obligations, which include the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the Rights of the Child.⁸

[23] It is in this context that this claim is considered. Counsel for the plaintiff also drew to this court's attention that the extent of the breach of privacy is evident when regard is had to section 11 of the Cybercrimes Act⁹ which criminalises the disclosure of data messages of intimate images where the intimate image violates or offends the sexual integrity or dignity of the person or amounts to sexual exploitation. It was submitted that the first defendant and second defendant violated the plaintiff's dignity when they published the images

any advantage from B or any member of the family of B or any other person in a close relationship to B, is guilty of the offence of harmful disclosure of pornography related extortion.

⁶ Preamble, Domestic Violence Act 116 of 1998 (since amended)

⁷ Preamble Domestic Violence Act 116 of 1998 (since amended)

⁸ Preamble Domestic Violence Act 116 of 1998 (since amended)

⁹ Act 19 of 2020

and recording on the fake Facebook profile. This is an aggravated offence. Section 16 of the Cybercrimes Act also provides:

16. Disclosure of data message of intimate image.—(1) Any person (“A”) who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person (“B”), without the consent of B, is guilty of an offence.

(2) For purposes of subsection (1)—

(a) “B” means—

- (i) the person who can be identified as being displayed in the data message;
- (ii) any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or
- (iii) any person who can be identified from other information as being displayed in the data message; and

(b) “intimate image” means a depiction of a person—

- (i) real or simulated, and made by any means in which—
 - (aa) B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or
 - (bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed; and
 - (iii) in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that—
 - (aa) violates or offends the sexual integrity or dignity of B; or
 - (bb) amounts to sexual exploitation.

[24] Counsel also referred to section 24E of Films and Publications Amendment Act 11 of 2019, which provides penalties for knowingly distributing private sexual photographs and films in any medium, including the Internet and social media, without the prior consent of the individual.

[25] I note that Facebook has its own terms of service and user policy requiring that a user not access an account belonging to another person. Moreover, a user will not intimidate, bully or harass another. The creation of the fake Facebook profile appears to be a breach of such policy. The terms of

service also indicate that when intellectual property is deleted, it does so in a manner similar to emptying the recycle bin on a computer. Whilst the content is removed, backup copies may remain for a period. Where the content was published using a public setting, the content would have been available to everyone, including people off Facebook, to access and use the information and to associate it with the name and profile picture.¹⁰ The infringement is apparent, the extent of the harm depends on whether it was possible to download the images and video during the period it was online or if it was possible to screen-record the video depending on the device on which a viewer accessed the content.

[26] I have had regard to the various legislation referred to by counsel and note that the legislation refers to offences are criminal in nature. The current matter is a civil matter requiring a different standard of proof. I have considered that the legislation criminalising the conduct is reflective of the seriousness of the infringement. This reflects the extent to which the State has acted to ensure the protection of the right to privacy and dignity of persons and is in keeping with their international obligations to do so.

[27] In the prepared heads of argument, counsel referred to cases to assist in determining an appropriate award of damages. I was referred to cases where awards were made but noted that they were a guide as stated by the court "*an award for damages cannot be made with mathematical precision. No two matters are the same.*"¹¹ Moreover, as in the present case, "*claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors.*"¹² As is evident in the different legislation referred to above, publishing intimate videos of a person without that person's consent constitutes a recognised form of violence. This intersects with

¹⁰ <https://www.facebook.com/legal/terms/previous>

¹¹ *M.R v Mokgethi N.O and Another* (393/2015) [2024] ZANWHC 37 at para 45.

¹² *EFF and Others v Manuel* (711/2019) [2020] ZASCA 172

the infringement of the plaintiff's privacy and dignity and the defamation occasioned by the publication.

[28] This matter comes before me for general and special damages. In assessing the damages, I have had regard to the circumstances of the relationship between the plaintiff and the first defendant. The first defendant cultivated a relationship of trust. He led the plaintiff to believe he was unmarried and courted her devotedly before he proposed to her. When the plaintiff was confronted with the reality that the first defendant was married, she terminated the relationship and contact with the first defendant. The first defendant threatened her, necessitating a protection order.

[29] As submitted before me, no two cases are the same. There can be no mathematical precision when harm is occasioned. The amounts awarded are a mere solatium and served to reimburse the plaintiff for costs incurred or that she will incur.¹³ It is of consequence that the plaintiff had not consented to being recorded in a state of undress or whilst engaged in sexual activity by the first defendant or anyone else and had not been aware of this recording. She terminated the relationship when she learned that the first defendant was married. The conduct of the first defendant in capturing the recording is unconscionable. The plaintiff should be safe from such invasive behaviour.

[30] The further conduct of both the first and second defendants in creating the fake Facebook account and posting videos and other content exacerbates the plaintiff's right to be free from violence and to have her dignity intact. The video content was viewed widely. There is no way of knowing whether these videos were downloaded. The first defendant's recording of the video is serious enough to breach the plaintiff's integrity. The video uploaded online is an aggravation of the plaintiff's privacy and integrity breach. The plaintiff's evidence was that the first defendant refused to hand over the devices with the recordings, necessitating an appeal in the Magistrates Court. Despite the confirmation of the protection order, there was a refusal to hand over the

13

devices that contained the recordings, as the first defendant claimed he was the owner of such device and content.

[31] The impact of the abusive conduct is that the plaintiff has become reclusive, is not able to leave her home, and suffers from PTSD because of the breach of her privacy and integrity. She is depressed and continues to receive treatment. The impact of the first and second defendant's conduct on the plaintiff's life is far-reaching.

[32] The first claim regarding activating the Facebook profile was an invasion of her privacy. She was and is entitled to the protection of her privacy and dignity. The first defendant breached her privacy, and I am satisfied that the plaintiff is entitled to the relief of R 250 000.00 for general damages.

[33] The second claim is for operating the Facebook account where the two videos were posted. The first defendant threatened the plaintiff that he would post the videos and sent them to her Whatsapp number. He then directed her to the Facebook account. She testified, and there was a psychologist report relating to her mental state. Concerning this claim, the amount of R 2 500 000.00 is for general damages, and R300 00.00 is for special damages related to medical expenses. The R50 000.00 was for past medical expenses which is a reasonable amount for the treatment received as testified by the plaintiff. The amount of R 250 000.00 for future treatment reasonable is the treatment calculated at a conservative rate of approximately R 1000- R1500 per session over three to five years. The third, fourth and fifth claims related to utterances made on the Facebook profile by the second defendant and to the plaintiff's colleague the second defendant. They were made to cause harm to the plaintiff, to harm her image among her friends, family and her professional image. These were made on different instances and thus they are different awards. The plaintiff is entitled to damages for each of these instances of infringement calculated to cause her harm. The amounts claimed for damages under claims C, D and E are appropriate as sought in the plaintiff's particulars of claims. The final claim, F, was related to an email communication with the

plaintiff's superiors. In this communication, the tenor was to cause harm to the plaintiff's professional image as in the previous conduct. The plaintiff is entitled again to the maximum protection of the law and I have no difficulty in granting the amount claimed by the plaintiff.

[34] I turn now to the costs herein. The plaintiff seeks an order for attorney and client costs. In view of the nature of the relief sought and the relief I intend granting the costs order is appropriate.

ORDER

[35] For the reasons above I grant the following order:

1. The application for default judgment is granted.
2. The Defendants shall, jointly and severally, within 60 days of service of this order, pay the Plaintiff R3,550,000, made up as follows:
 - 2.1. In relation to Claim A, R250,000 in general damages;
 - 2.2. In relation to Claim B:
 - 2.2.1. R2,500,000 in general damages;
 - 2.2.2. R300,000 in special damages, plus interest at the prescribed rate from the date on which each past medical cost was incurred;
 - 2.3. In relation Claim C, R500,000 in general damages.
3. The Second Defendant shall, within 60 days of service of this order, pay the Plaintiff R750,000, made up as follows:

3.1. In relation to Claim D, R250,000 in general damages;

3.2. In relation to Claim E, R250,000 in general damages;

3.3. In relation to Claim F, R250,000 in general damages;

4. The Defendants shall, jointly and severally, pay the Plaintiff's costs in this action, including this application for default judgment, and including expert's fees, on the attorney-client scale.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 12 November 2024*

Appearances:

On behalf of the applicant	: Adv B Winks
Instructed by	: Power Singh Attorneys
On behalf of the defendants	: No appearance
Date of hearing	: 13 June 2024
Date of judgment	: 12 November 2024