MALEMA v RAMPEDI AND OTHERS 2011 (5) SA 631 (GSJ) E

Citation	2011 (5) SA 631 (GSJ)
Case No	25571/2011
Court	South Gauteng High Court, Johannesburg
Judge	Lamont J
Heard	July 23, 2011
Judgment	March 11, 2011
Counsel	*SV Notshe SC* for the applicant. *MF Welz* for the respondents.
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Defamation — Defences — Justification — Media defendants — Public figure — Interdict sought by applicant restraining newspaper from publishing certain allegations — Allegations contained in series of questions put to G applicant — Applicant being in position to answer questions yet not doing so — Evidence of newspaper's source as well as evidence of reliability of source — Sustainable foundation for averments — Aspects of public figure's private life being in public interest — Application for interdict dismissed.

Headnote : Kopnota

A newspaper posed a series of questions to the applicant, a public figure who was H the subject of an upcoming article. The applicant approached the court for an interdict preventing the publication of certain of the allegations raised in the questions.
Held, that whether the allegations were supported by fact involved a consideration of both the source and the response of the applicant to the questions. (At 636F – G.) I
Held, that the newspaper had corroborative evidence of the existence of the source, and there was also evidence of the reliability of that source. (At 636A/B – D.)
Held, that the applicant had been sufficiently apprised by the questions to be able to assess the data and to identify the facts to which the data related. He had been in a position to properly answer the questions, and to set forward facts J

A which would have cast a different light on the issue. He had not done so. (At 634I – 635B.)
Held, accordingly, that there was a sustainable foundation for the averments made by the respondents. (At 638B – C.)
Held, that the applicant was a public person and the aspects of his private life under consideration were in the public interest. The intrusion into his B public life would be warranted. (At 636J – 637B and 638F.) Application dismissed.

Cases Considered

Annotations:

Reported cases

*Argus Printing and Publishing Co Ltd and Others v Esselen's Estate*1994 (2) SA 1 (A) C ([1994] 2 All SA 160): dictum at 25B – D applied

*Hix Networking Technologies v System Publishers (Pty) Ltd and Another*1997 (1) SA 391 (A) ([1996] 4 All SA 675): dictum at 398A – B applied

*Lieberthal v Primedia Broadcasting (Pty) Ltd*2003 (5) SA 39 (W): dictum at 45A – C applied

Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) D 2007 (5) SA 540 (SCA) (2007 (9) BCLR 958; [2007] 3 All SA 318): dictum in paras [19] and [20] applied

*National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347): dictum at 1212G – H applied

*Tshabalala-Msimang and Another v Makhanya and Others*2008 (6) SA 102 (W): dictum at 118A – B applied.

Case Information

E Application for an interdict restraining the respondents from publishing certain allegations about the applicant, a public figure.

SV Notshe SC for the applicant.

MF Welz for the respondents.

Judgment

F **Lamont J:**

Due to the urgency of the matter it is impossible to prepare a fully reasoned judgment. I merely highlight the principal factors upon which I rely for coming to the conclusion which I have. This is an application brought by the applicant for the following relief:

> G '2. Interdicting and restraining the respondent from publishing the following about and concerning the applicant.
>
> 2.1 That a businessman deposited R200 000 into an Absa account under his control as a reward for having facilitated a tender for his company.
>
> 2.2 That the applicant sent the same businessman the Absa H account number on a Short Message Service (SMS) and gave him 24 hours to deposit the money.
>
> 2.3 That the applicant sent another SMS thanking him after receiving confirmation of payment.
>
> 2.4 That the applicant uses the money deposited into the account of the Ratanang Family Trust to fund his lifestyle.
>
> I 2.5 That the applicant receives cash payments worth thousands of Rands from contractors, individuals and politicians into the Trust, in exchange for securing them lucrative tenders, protecting them politically or pushing their political agendas.
>
> 2.6 That the applicant charges a fee of at least 45 percent of the total profit made from a tender that he secured for a J contractor.'

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In addition, the applicant sought the costs of the application. During the A course of the argument the applicant indicated that, to the extent that I was not prepared to grant final relief, the applicant would seek temporary relief pending the finalisation of the application on a later date.

The application arises out of correspondence between the respondents B and the applicant. On 21 July 2011 at approximately 15h30 Adriaan Basson, who describes himself as the assistant editor of *City Press*, sent an email to various persons directing a series of questions to which the *City Press* wished the applicant to respond. The questions concerned, in paras 1 – 6, related to the Ratanang Family Trust. There was no response by the applicant to these questions, and there is no relief sought in C relation to these questions.

In para 7 a question was asked in relation to statements which had previously been made by the applicant, that the State could look at 'my account' as proof that he was poor. The question asked pertinently by D *City Press* was whether or not the reference to 'my account' included a reference to the account of the Ratanang Family Trust, and, if not, to which other accounts the applicant had referred. There was similarly no response to this question, and there is similarly no relief sought in relation to this question.

A question, numbered 8, was made of the applicant, asking him whether E he had declared any moneys received by the trust to the South African Revenue Service. There was no response to that question, and, similarly, there is no relief sought in relation thereto.

The relief is sought in relation to questions 9 to 13, with which I shall F deal later.

There are four further questions, numbered 14 to 18, relating to a farm which had apparently been purchased by the Ratanang Family Trust, which was identified, and which is apparently bond-free. There were questions concerning the farm that were made of the applicant. G

The final question (question 18) referred to a payment made by the trust in respect of the Seshego Baptist Church, and the question was directed as to who was the donor of the funds paid into the Trust which were used to build the church. H

In respect of questions 14 to 18 there was no reaction by the applicant, and no relief is sought in relation thereto.

The relevant questions which formed the basis founding the application are the following:

> '9. *City Press* was told by a businessman that he deposited I R200 000 into the Absa account of the Trust as a reward for you having facilitated a tender for his company. Comment Query.
>
> 10. The same businessman says you personally sent him the Absa account number on SMS, gave him 24 hours to deposit the money and sent another SMS, thanking him after receiving confirmation of payment? J

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> A 11. What is your response to the allegation that you used money deposited into the account of the Ratanang Family Trust to fund your lifestyle?
>
> 12. What is your response to the allegation that you received cash payments worth thousands of Rands from contractors, individuals and politicians into the Trust in exchange for securing them B lucrative tenders, protecting them politically or pushing their political agendas?
>
> 13. What is your response to the claim that you charge a fee of at least 45% of the total profit made from a tender you secured for contractors?'

C During the course of argument it became apparent that the principal complaint of the applicant concerning the proposed publication of the facts set out supra was the linking of the *causa* for the deposit as having been the applicant's facilitation of a tender for his company.

It also became apparent that the principal complaint of the applicant D concerning the allegations made in para 10 did not relate to the facts that a businessman had been given an account number at Absa by SMS, and had received thanks after the moneys had been

deposited. The complaint related to the action of the applicant in relation thereto.

Insofar as question 11 is concerned, during argument it became apparent E that the complaint was linked to the applicant having formed the view that the use of the money deposited related to the R200 000 deposited, rather than to the general use of moneys in the trust, ie there was no complaint concerning the applicant's use of moneys from the trust, but rather to the allegation that the applicant had used the R200 000 from the trust to fund his lifestyle. The inference which the F applicant drew in this regard, that the query related to the R200 000, does not appear in my view to be warranted. During argument the complaint concerning paras 12 and 13 supra remained.

The submission was made that these were prima facie defamatory, and that publication of those allegations should not be made.

G The response of the applicant to the set of queries which were made in the email which he was sent on 21 July 2011 are contained within the letter of the attorneys Mpoyana Ledwaba Inc of 22 July 2011. The relevant portion of the letter is the following.

> 'Further to our earlier letter and subsequent further consultation our H final instructions are that we act for and behalf of Mr Malema our client. . . . Our client's response to the questions 9 to 13 of your questions is that the information you received in respect thereof is false. The publication thereof will defame our client. Our instructions are to demand from your client as we hereby do an undertaking that you will not publish such defamatory information . . . .'

I It is immediately apparent from the response of the applicant that he was sufficiently apprised of the factual data in the letter of 21 July 2011 to be able to assess the data and identify the facts to which the data related. There is no complaint that the information which he was given, and in respect of which he was to provide his comment, was so vaguely supplied J to him that he was unable to deal with the allegations which were being

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made. Hence, I find that he was in a position to properly answer the A letter and properly set forward facts which would cast a different light upon the issue, should he have wished to do so.

The position is that the applicant well knew what the questions related to, well was able to deal with them, and stated that they were false. B

This matter came before me as a matter of extreme urgency, and under severe time pressures. Affidavits were prepared both by the applicant and by the respondents. The respondents, when they filed the answering affidavit, simultaneously filed a counter-application in the following terms: C

> '1. That the applicant be ordered to disclose the interest that this Trust has (with reference to the Ratanang Family Trust) directly or indirectly in companies, corporations or properties and the income derived from these sources.
>
> 2. That the applicant in his capacity as the sole trustee of the Ratanang Family Trust furnish to the respondent all bank statements D relating to the said Trust from May 2008 to date hereof.
>
> 3. That the applicant be ordered to state on oath what the sources of income for the Ratanang Family Trust are.
>
> 5. Cost of suit.'

The applicant has not been afforded any opportunity to deal on affidavit E with the counter-application. The counter-application, however, highlights to the applicant an issue with which he could, had he wished to, have dealt, namely, the disclosure of further information concerning the issues forming the subject-matter of the proposed publication.

The applicant has declined to furnish any further information, and relies F on his right in due course to deal with the counter-application. The counter-application is not urgent. It

does, however, have a bearing upon the present application, in that it affords the applicant an opportunity to make further disclosure, should he wish to do so.

I propose in due course to make the appropriate order that the G application should be postponed, with the parties being placed on appropriate terms to file answering and replying affidavits, and in due course it can be heard.

The respondent, in its answering affidavit, relied upon the fact that it had obtained information underlying the questions which it had posed to the applicant and hence underlying the proposed publication (the H precise wording of which does not appear). However, it is anticipated by the applicant, legitimately so, because the respondents have undertaken their defence on the basis that the publication will publish the facts and matters relating to the questions which have been asked.

The respondents have relied upon sources whose identities are not I revealed, on the basis that they fear victimisation as the applicant is a powerful political figure, and, whether correctly or incorrectly, they fear retaliation.

The pertinent point of the affidavit filed by the respondents is that they have a source who has disclosed the information to them, which J

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A underlies the questions which were asked, and which will found the publication.

There is corroborative evidence of the existence of the source. I was given an attenuated transcript of the evidence, and I was informed by B counsel that there is a tape recording of the source's evidence. The respondents declined to produce except to me alone both the tape recording and the transcript. There is, however, and I accept counsel's word in this regard, the existence of such evidence. I saw the attenuated transcript, and superficially looked at it. Superficially, it appears to deal with the issues which are set out in paras 9 to 13 of the request.

C The further fact upon which the respondents rely is that the source is reliable. They tender as evidence for the reliability of the source the fact that various additional matters which are not contested by the applicant emanated from the source, and have proved to be correct. This matter included for example the existence of the trust, and the ownership by the D trust of the property. The respondents accordingly state that they have a proper and reasonable set of facts upon which the article can be founded.

The test which I should apply to the question of whether or not the publication should be allowed is set out in *National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347) at 1212G – H E where the following appears.

> '(T)he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.'

F The first question which I must answer is whether or not the allegations of fact, made by the respondents in the form of questions, are supported by fact. That involves a consideration of both the source and the response of the applicant to the questions which were made. As I have set out previously, the applicant dealt very superficially with fairly detailed allegations which were made, allegations which he could understand, G and with which he could have dealt in more detail, had he wished to.

There is no requirement upon him to have dealt with it in more detail, however, it is a factor which I take into account: that he failed to deal with the matter in more detail than he did.

H I weigh that fact against the fact that there is a witness who has provided detailed information, some of which to date has been proven to be correct.

While I do not find that the allegations are true, I approach the whole matter on the basis that there is some substance to the claims of the I respondents that the source is reliable.

The applicant has a right not to be defamed. I, however, must take into account also the right of the public to receive information. The applicant in the present matter is a high-profile public figure. He has made controversial statements at times. At present there is a discussion in the J press concerning whether or not his income justifies his expenses. The

question of the income of the applicant is topical, and is relevant to that A issue.

The public is entitled in general terms to have full disclosures concerning persons who stand in a public position, and who are high-profile personalities who invite comment about themselves. As was said in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* B 1994 (2) SA 1 (A) ([1994] 2 All SA 160) at 25B – D by Corbett CJ:

> 'I agree, and I firmly believe that the freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does C not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to an individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word unlawfully for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what others say about you, the law D has devised a number of defences. . . .'

The relevant defence is that which I have referred to supra, and which is set out in *Bogoshi* and subsequent decisions.

In the matter of *Lieberthal v Primedia Broadcasting (Pty) Ltd* E 2003 (5) SA 39 (W) at 45A – C Cachalia J stated (in a judgment which is convenient to cite, having regard to the short time available to me) that the law of defamation strikes an appropriate balance between the protection of freedom on the one hand, and the value of human dignity encompassing good name and reputation on the other.

The more recent statement on the question of the Constitution and the F principles is to be found in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*2007 (5) SA 540 (SCA) (2007 (9) BCLR 958; [2007] 3 All SA 318). At para 19 and following Nugent JA stated:

> '[19] In summary, a publication will be unlawful, and thus susceptible G to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of H information outweighs its advantage. In making that evaluation it is not only the interest of those who are associated with the publication that need to be brought to account but, more important, the interest of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from I occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.
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> [20] Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice whether by a ban on publication or J

> A otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.'

Thereafter the court referred to the well-known case of *Hix Networking Technologies v System Publishers (Pty) Ltd and Another*1997 (1) SA 391 (A) B ([1996] 4 All SA 675) where at 398A – B it was stated that the respondents should lay a sustainable foundation

for their averments, that is, the words which were accepted as being prima facie defamatory. There is a sustainable foundation for the averments made by the respondents.

C I must give consideration to the test which is to be applied where the person who seeks the restricting on the publication is a public figure. Professor McQuoid-Mason has been quoted by Jajbhay J in *Tshabalala-Msimang and Another v Makhanya and Others*2008 (6) SA 102 (W) at 118A – B as laying down the following test.

> D 'In short it is submitted that the test whether a person is a public figure should be: has he by his personality, status or conduct exposed himself to such a degree of publicity as to justify an intrusion into, or a public discourse on, certain aspects of his private life? However, non-actionable intrusions on his privacy should be limited to those that are in the public interest or for the public benefit, so that unjustified prying into E personal affairs, unrelated to the person's public life, may be prevented.'

Applying the test of McQuoid-Mason, as approved by Jajbhay J, it is apparent that the applicant is a public person, and that the intrusion into his private life would be warranted. The aspects of his private life under F consideration are in the public interest, in that they are topical and concern attempts to cast light upon claimed inconsistency in the applicant's lifestyle.

The only remaining question is whether, having regard to the facts which are before me, which I have set out fully supra, the test in *Bogoshi* has G been met.

In my view, sufficient factors have been set out to establish that there is a reliable source who has disclosed information. That information was not dealt with issuably. For that too, there is no obligation on the H applicant to have dealt with it otherwise than that he did, however, it leads to the inference being drawn that the enquiries which have been made by the respondents meet the test of reasonableness.

I In my view, accordingly, the application must fail.

During the course of the hearing I indicated that the proceedings should proceed in camera, and I excluded the press from the hearing. I did so as at that stage it was not clear to me whether or not the publication of the matter should be prohibited, and there would have been in my view no point in allowing the press to remain present, and to publish information which the applicant sought to be prohibited from being published by the J third respondent.

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When I formed the view that the publication should not be prohibited, A I invited the members of the public, including the press, who wished to return to court, to return, and then I delivered the judgment. The order which I made, that the hearing be in camera, was withdrawn prior to that. The documents forming the record are available as public record to whomsoever may wish to consult them.

There remains to be considered the question of the further conduct of B the counter-application, which was brought by the respondents. Before I make any orders, I feel it appropriate to raise the issue of timing with counsel, as to the future conduct of that issue.

I accordingly make the following order: C

1. Insofar as the application brought by the applicant, Mr Malema, against the respondents is concerned:

    1.1 That application is dismissed with costs.

2. Insofar as the counter-application brought by the respondents is concerned: D

    2.1 That application is postponed *sine die*.

2.2 The applicant in that application is granted leave within 10 days to supplement the affidavits and amend the notice of motion in whatsoever way it deems appropriate and is advised.

2.3 The costs of that application to date are reserved. E

Applicant's Attorneys: *Mpoyana Ledwaba Inc*.

Respondents' Attorneys: *Willem de Klerk Attorneys*.