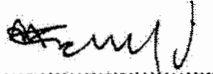


IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/58019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
15 March 2022	
DATE	SIGNATURE

In the matter between:

OOSTHUIZEN, MARYKA

First Applicant

ASA, JOSHUA

Second Applicant

**OUTSOURCED RISK AND COMPLIANCE ASSESSMENT
(PTY) LTD**

Third Applicant

and

DR DEENADAYALEN (LEN) KONAR

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This opposed application came before me in the urgent court on 23 December 2021. I heard the parties on the urgency of the application as well as the substantive relief claimed by the applicants.

[2] The latter sought urgent interdictory relief against the respondent, interdicting him personally and on behalf of any third party, either directly or indirectly, from:

- 2.1 Distributing copies of a charge sheet dated 25 October 2021 issued by the Association of Certified Fraud Examiners ('ACFE') against the first and second applicants, to the clients and potential clients of the third applicant and any third parties;
- 2.2 Disseminating copies of any complaints made by the respondent or any party acting on the respondent's behalf to any of the third applicant's clients, potential clients and any third parties;
- 2.3 Defaming and making untrue statements in respect of the applicants to any of the third applicant's clients, potential clients and any third parties;
- 2.4 Communicating in any way, be it verbally or in writing, the contents of ACFE's charges and complaints dated 25 October 2021 against the first and second applicants, to any of the third applicant's clients, potential clients and any third parties; and
- 2.5 Costs of the application.

[3] The applicants claimed final interdictory relief in their founding papers and interim relief in the alternative, in their reply. The applicants did not justify an order for final interdictory relief in the urgent court and I considered the alternative for interim relief only.

[4] The first applicant, Maryka Oosthuizen, ('Oosthuizen'), was a director and internal auditor of the third applicant, Outsourced Risk Compliance and Assessment (Pty) Ltd ('ORCA'). ORCA provided risk advisory and management services to its clients.

[5] The second applicant was Joshua Asa ('Asa'), a director of ORCA and employed as ORCA's IT auditor.

[6] The third current director of ORCA, one Mulaudzi, was not a party to the application.

[7] The respondent was Dr Deenadayalen (Len) Konar ('Konar'), a businessman and former director of ORCA. Konar resigned his directorship on 2 August 2018 and allegedly transferred his shareholding in ORCA during 2018.

[8] ORCA's bouquet of services included internal audit, IT audit, forensics, corporate governance and risk management services, all aimed at ensuring sound internal audit controls in Orca's clients.

[9] Oosthuizen and Asa were both members of the Association of Certified Fraud Examiner ('ACFE'), a body representing and governing fraud examination professionals in South Africa.

[10] Oosthuizen alleged that Konar's involvement with ORCA ceased from late 2020 and that Konar established a new company, LKA, that competed directly with ORCA.

[11] Konar denied that the applicants were entitled to the relief claimed and that the matter was urgent. Konar sought the dismissal of the application with punitive costs against the applicants. Furthermore, Konar denied that his conduct was unlawful and contended that no justifiable grounds existed for the interdict.

[12] The issues that I was required to determine comprised whether or not Konar's conduct complained of by the applicants amounted to defamation and if so, whether Konar acquitted himself of his onus to furnish a defence that served to exclude the elements of wrongfulness and / or intention on his part. Furthermore, whether the applicants met the requirements of the interdictory relief sought by them, which Konar denied.

[13] Turning to the applicants' claims of defamation, the applicants relied upon various allegedly defamatory statements made in respect of Oosthuizen and Asa and Konar's communication of the contents of the ACFE charge sheet, to the Takeover Regulation Panel ('TRP'), a client of ORCA.

[14] Oosthuizen alleged that the ACFE charges arose from two baseless allegations of misconduct levied by Konar against Oosthuizen and Asa with ACFE, resulting in the latter raising a charge sheet on 25 October 2021. Oosthuizen contended that the charges were devoid of merit.

[15] ACFE's hearing on the misconduct charges was not finalised yet, the applicants were yet to present their evidence and no determination on the merits or the veracity of the respondent's allegations had been made.

[16] On 9 December 2020 the applicants' attorney requested Konar to furnish an undertaking that he would desist from contacting ORCA's clients. Konar declined to

provide the requested undertaking. Notwithstanding, Konar tended an undertaking in terms similar to those sought by the applicants on 15 December 2021, which tender came to nought.

[17] Accordingly, Oosthuizen alleged that Konar was intent on defaming her and Asa's reputations, destroying ORCA's business and procuring ORCA's clients for LKA's benefit and to the detriment of ORCA.

[18] Thus, the applicants contended that absent an order of this Court, the respondent would continue with his unlawful and intentional misconduct in publishing the charges pending against the first and second applicants, causing irreparable harm and prejudice to the applicants.

[19] I could not determine the veracity or otherwise of the two additional incidents of Konar's allegedly questionable conduct raised by the applicants given that these were motion court proceedings.

[20] The applicants alleged that there was no alternate satisfactory remedy available to them and that the institution of a claim for damages would not bring an end to the respondent's unlawful conduct.

[21] The elements of defamation were reiterated by the Constitutional Court in *Le Roux v Dey*¹, namely; the wrongful and intentional publication of a defamatory statement(s) of and concerning a complainant.

[22] Furthermore, at the outset, a complainant must prove only the publication of defamatory matter concerning the complainant. Thereafter, wrongfulness and intention

¹ *Le Roux v Dey* 2011 (3) SA 274 (CC) ('*Le Roux*') para 84.

on the part of the wrongdoer are presumed, and, it is for the wrongdoer, wishing to avoid liability, to raise a defence that excludes either wrongfulness or intention.

[23] It is settled law that it is the respondent who carries the onus to rebut either or both of the presumptions and that this onus is a full onus to be discharged on a balance of probabilities, not a duty to adduce evidence. A bare denial of the averments by the respondent will not suffice. Facts must be pleaded and proved by way of evidence sufficient to establish the defence/s raised by the respondent.²

[24] A statement is defamatory if it 'tends' to reduce the status, good name or reputation of the complainant.³

[25] The test is objective – the meaning the words conveyed to the reasonable recipient of the words.⁴

[26] The respondent relied on the test in *Hix Networking Technologies v System Publishers (Pty) Ltd & Another*,⁵ referred to in *Midi Television*,⁶ to the effect that a party seeking such a restraint must show that the proposed ban is necessary, (meaning that the objective cannot be achieved by a reasonably available and effective alternate measure); that it is as limited in scope, time and content as possible; and, is proportional as between the salutary and deleterious effects of the ban.

² *Id* para 85.

³ *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 8.

⁴ *Id* para 15.

⁵ *Hix Networking Technologies v System Publishers (Pty) Ltd & Another* 1997 (1) SA 391 (SCA) at 402 ('Hix').

⁶ *Midi Television (PTY) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) (*Midi Television*).

[27] The respondent argued that the relief claimed by the applicants failed on all three of the grounds of the test in *Hix*.

[28] Furthermore, the respondent raised a plethora of factual disputes between the applicants and himself and relied upon various constitutional issues. The latter are not for the urgent court.

[29] The factual disputes alleged by the respondent related to extraneous issues outside of the relief claimed and did not impact the applicants' claims directly.

[30] Oosthuizen alleged that TRP, to which ORCA rendered services for the five-year period prior to the hearing, advised Oosthuizen through its officials on 8 December 2021, that it had decided not to renew its contract with ORCA upon termination thereof at the end of March 2022. That was despite TRP renewing its contract with ORCA in previous years.

[31] Oosthuizen alleged that Konar's allegations of misconduct by Oosthuizen and Asa, relayed by him to TRP on 6 December 2021, caused TRP's decision not to renew its contract with Orca.

[32] Konar admitted meeting with TRP's officials, denied handing the ACFE charge(s) sheets to them, denied that he contributed to TRP's decision not to renew Orca's services and denied any wrongdoing on his part. Konar relied upon a dispute of fact in respect of TRP's reason for its decision not to renew its contract with ORCA.

[33] The typed transcript of the conversation between Oosthuizen and Asa of ORCA with TRP's representatives on 8 December 2021, reflected that Konar showed TRP's representatives the ACFE charge sheet alleging VAT fraud and/or misconduct and/or

misrepresentation, allegations laid by Konar himself against Oosthuizen and Asa with ACFE. TRP's Risk Management team adopted the stance that further dealings with ORCA exposed TRP to reputational risk.

[34] Hence, Konar's denial that he 'handed over' the ACFE charge sheet to TRP was disingenuous as Konar informed TRP of the charges by showing them the charge sheet, albeit not making a copy of the charge sheet available to TRP's representatives.

[35] Considering the nature and content of the charges laid by Konar against Oosthuizen and Asa in the context of the environment in which ORCA conducted business and the nature of the services offered by ORCA, it followed that TRP's representatives were concerned that any future engagement by TRP with the applicants might bring reputational risk to TRP.

[36] Konar relied on a duty to disclose the pending charges that he allegedly believed to be true. The fact that Konar levied the charges with ACFE and thereafter utilised the circumstances of the pending charges for his own gainful ends reflected Konar's *mala fides*.

[37] However, Konar's alleged 'duty' did not extend to besmirching the applicants' good names and reputations, especially in circumstances where the applicants had not yet been heard by ACFE and the hearings finalised by ACFE.

[38] The applicants explained the facts underlying their contention that the charges were without merit and nothing more than 'mere allegations'. I am not inclined to foreshadow the outcome of the ACFE hearings by dealing in this judgment with the merits or otherwise of the charges or the applicants' defences to them.

[39] Accordingly, Oosthuizen and Asa demonstrated a *prima facie* right to limited protection of their reputations, and ORCA, Asa and Oosthuizen to the interim protection of ORCA's business interests.

[40] In so far as the applicants contended that Konar's dealings with ORCA terminated in approximately November 2020, Konar could not have knowledge of ORCA's potential or future clients. Thus, the applicants should be entitled to relief in respect of existing clients only and not future clients of ORCA.

[41] As regards the apprehension of harm, the applicants contended that Konar would continue with his defamatory and prejudicial conduct in the event that the order sought was not granted,

[42] Konar emphasised that he showed ACFE's charges to TRP only and not to any other party. Accordingly, Konar contended that the single publication to TRP served to exclude the applicants' claim for an interim interdict.

[43] The loss of TRP as a client to ORCA together with the resultant income stream is, in all probability, irreparable to ORCA given that TRP's renewed contract would have endured for a five-year period. Furthermore, the potential loss of any additional client/s to ORCA and / or damage to Oosthuizen and ASA's reputations would be, in all probability, similarly irrecoverable to the applicants justifying interim relief of a limited nature.

[44] The balance of convenience of interim relief, pending finalisation of ACFE's charges against Oosthuizen and Asa and limited to OCAR's current clients, favours the applicants. This is because such an order would serve to protect the applicants interests

for as short a period as possible, being the period pending finalisation of the charges raised by ACFE and finalisation of this application.

[45] The urgency in the application arose from the applicants being made aware on 8 December 2021, that Konar informed TRP's representatives of the content of the charge sheet.

[46] Thereafter, on 9 December 2021, TRP's representatives advised Oosthuizen and Asa that TRP would not renew its contract with ORCA, the reason being potential reputational risk to TRP. That alleged potential risk could only have arisen pursuant to Konar exhibiting the content of the charge sheet to TRP's representatives.

[47] In the circumstances, the applicants are entitled to interim relief and I propose granting an order in such terms.

[48] The costs of this application will be reserved for determination by the court seized with finalisation of this application.

[49] By reason of the abovementioned, I grant the following order:

[50] Pending final determination of:

50.1.1 This application in the ordinary course; and

50.1.2 The charges raised by ACFE against the first and second applicants:

50.2 The respondent is interdicted, both on his own behalf and / or on behalf of any other person or party, (be they natural or juristic), directly or indirectly, from:

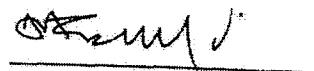
50.2.1 distributing or disseminating copies of the charge sheet dated 25 October 2021 issued by the Association of Certified Fraud Examiners ("ACFE") against the first and second applicants, to any of the third applicant's clients or any third parties;

50.2.2 distributing or disseminating copies of any complaints made by the respondent or any person or party, (natural or juristic), acting on the respondent's behalf, to any of the third applicant's clients or any third parties;

50.2.3 Defaming and/or making untrue statements in respect of any one or more of the applicants to any of the third applicant's clients or any third parties; and

50.2.4 Communicating the contents of ACFE's charges and / or complaints dated 25 October 2021 against the first and second applicants, in any manner, verbally or in writing, to any of the third applicant's clients or any third parties.

[51] The costs of this application are reserved for determination by the court seized with finalisation of this application.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

**GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 15 March 2022.

COUNSEL FOR THE APPLICANT: Ms E R Venter.

INSTRUCTED BY: Stan Fanaroff & Associates.

COUNSEL FOR THE RESPONDENT: Mr C Snoyman.

INSTRUCTED BY: Ebrahim Asvat Attorneys.

DATE OF THE HEARING: 23 December 2021.

DATE OF JUDGMENT: 15 March 2022.