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

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

[redacted]

SIGNATURE DATE: 19 September 2023

Case No. 21/25599

In the matter between:

MBUYISENI QUINTIN NDLOZI Applicant

and

MEDIA 24 T/A DAILY SUN First Respondent

MAPULA NKOSI Second Respondent

AMOS MANAYETSO Third Respondent

Summary
Practice – defamation claims – whether declaratory and interdictory relief can be sought on motion with a prayer to refer a claim for damages to oral evidence in the event that declaratory relief is granted – such a hybrid procedure available in principle in exceptional cases – exceptional cases are those where there are no disputes of fact underlying the primary defamation claim and where there is no prejudice to the respondent in adopting the hybrid procedure.

Defamation – defences – truth and public benefit – public benefit analysis requires the evaluation of any confidentiality interests that may be affected by the publication of a true fact – a rape complainant's interest in confidentiality will generally weigh against reporting the fact of the complaint and the identity of the suspect at a very early stage of the investigation.

JUDGMENT

WILSON J:

1 On 11 April 2021, the third respondent, Mr. Manayetso, a journalist, received a tip-off from a confidential source within the South African Police Service ("SAPS"). The tip-off was that the applicant, Dr. Ndlozi, had been named in a rape complaint made to SAPS on 9 April 2021. The source told Mr. Manayetso that, in the complaint, a woman had said that Dr. Ndlozi raped her. SAPS had opened a case of rape, and the confidential source supplied Mr. Manayetso with the case number allocated to the complaint. The source also supplied Mr. Manayetso with a number of further details, culled from the woman's statement, that appeared in a story published in the Daily Sun later that day under Mr. Manayetso's by-line. The Daily Sun is a newspaper controlled by the first respondent, Media 24. The second respondent, Ms. Nkosi, was the editor of the Daily Sun at the time.

2 Before publishing his article, Mr. Manayetso sought to confirm what the confidential source had told him with Dr. Ndlozi, and with the SAPS spokesperson for the Gauteng Province, a Captain Makhubele.

3 Mr. Manayetso telephoned Dr. Ndlozi at around 10h13 on 11 April 2021. Dr. Ndlozi did not answer, but the two men agreed to communicate by text. In a text message sent later that day, Mr. Manayetso outlined the tip-off he had received. He disclosed the identity of the complainant and the location and details of the assault she alleged. He asked Dr. Ndlozi for comment. The gist of Dr. Ndlozi's response was that he had not been contacted by the police, that he did not know about the complaint, but that, on the details of the complaint Mr. Manayetso relayed to him, there was no possibility that he could

have been the perpetrator. Dr. Ndlozi provided an account of his movements over the period apparently covered in the complaint. He adverted to eyewitnesses and CCTV footage that, he said, would demonstrate that he could not have been the complainant's assailant. He expressed solidarity with the complainant, and said that he hoped that her true assailant was apprehended and punished.

4 Mr. Manayetso first contacted Captain Makhubele at 12h21 on 11 April 2021. No substantive response was forthcoming from the SAPS for the period of just under 8 hours between the first contact Mr. Manayetso had with Captain Makhubele, and the point at which Mr. Manayetso's article was published online at around 20h00 on 11 April 2023. Just before 17h00, Captain Makhubele did refer Mr. Manayetso to an individual Captain Makhubele identified as "Peters", but "Peters" did not respond before the Daily Sun published the article.

5 At 11h33 on 12 April 2021, a Brigadier Peters, who was probably the "Peters" to whom Captain Makhubela had originally referred, issued a statement to the media, in which he confirmed that the complaint reported in the Daily Sun online the night before had been made, but that Dr. Ndlozi was not a suspect in the police investigation of it. The statement goes on to criticise Mr. Manayetso and, by implication, the Daily Sun and Ms. Nkosi, for publishing the story without seeking comment from SAPS, and for basing the story substantially on the complainant's statement, which Brigadier Peters said, could "only have been obtained through unlawful and unethical means".

6 In his first criticism, it appears that Brigadier Peters was misguided. On the papers before me, Mr. Manayetso plainly sought comment from SAPS before the Daily Sun published his story. Brigadier Peters' second criticism, however, appears to have been well-founded. On a conspectus of all the facts, the Daily Sun published its story solely on the basis of what the confidential source had relayed to Mr. Manayetso over the telephone. There has never been any suggestion that the confidential source had the right – whether legal or ethical – to disclose the information that they did.

7 Be that is it may, the issues in this case do not turn on the morality of the confidential source's conduct, or that of Mr. Manayetso and the Daily Sun in choosing to write about and publish what they were told.

8 What is at issue in this case is whether three statements the Daily Sun published on the basis of the confidential source's tip-off were defamatory, and whether, if they were defamatory, the statements were nonetheless lawful because they were true, and it was for the public benefit that they be published. A subsidiary issue is whether either of these questions may appropriately be decided on motion.

9 In what follows I first set out, and identify the sting of, the three statements of which Dr. Ndlozi complains. I then draw the following conclusions: first, that the lawfulness of publishing the statements is an issue that can properly be decided on motion; second, that two out of three of the statements defamed Dr. Ndlozi; and third, that the two defamatory statements were substantially true, but that their publication, on the facts of this case, was not for the public benefit. These conclusions compel me to find that the respondents have

unlawfully defamed Dr. Ndlozi, and that he is entitled to a declaration that this is so. He is also entitled to an order that the two defamatory statements be removed from Media 24's online media platforms. Any further relief to which he may be entitled is a matter that should either be agreed between the parties, or on which oral evidence should be led. I will make an order setting out how that oral evidence, if it is necessary, should be taken.

The statements

10 In his founding papers, Dr. Ndlozi sets out three statements that he contends are defamatory. The first is a billboard, under the Daily Sun banner, which reads "'MBUYISENI NDLOZI RAPED ME!'". The billboard was published in hardcopy, and attached to lampposts in Johannesburg, one of which Dr. Ndlozi saw on Jan Smuts Avenue on 12 April 2023. It was also published electronically on the Daily Sun's social media accounts. It was published separately from the article to which it adverts. The billboard is plainly a "teaser", which is meant to stimulate curiosity and lead those who see it to read the article.

11 The Daily Sun published a tweet containing the billboard hours before the article first appeared online. It follows from all of this that the statement must be evaluated separately from the text of the article to which it refers. This is because an ordinary, reasonable reader cannot be presumed to have access to the article, and to be able to evaluate the billboard in the context the article supplies. It also follows from this that a decision to publish must have been taken by about 15h00 on 12 April 2021, which is around three-and-a-half hours after comment was first sought from the police. While it is true that the

publication of the story was delayed to allow the police to revert, the intention was clearly to publish with or without police comment.

12 The gist or "sting" of the statement is that someone has accused Dr. Ndlozi of rape. The manner in which the statement is presented has the unfortunate and misleading implication that someone has approached the Daily Sun directly to tell the newspaper that Dr. Ndlozi raped them. But we know that did not happen. What happened is that Mr. Manayetso noted down what the confidential source told him. It was accepted before me that the Daily Sun never came into possession of the written complaint in which Dr. Ndlozi was named. A notice under Rule 35 (12) was issued on Dr. Ndlozi's behalf demanding that the respondents produce the complaint. The notice went unanswered. The only reasonable inference to be drawn in the context of this case is that the respondents never had the complaint, and when they purported to quote from it, they were in fact quoting their confidential source.

13 The second statement of which Dr. Ndlozi complains is Mr. Manayetso's article itself. The article was published online on the evening of 11 April 2021, and in the Daily Sun's printed edition on 12 April 2021. The article sets out the portions of the complainant's statement to SAPS as relayed to Mr. Manayetso by the confidential source. Again, the unfortunate impression is created that the article is quoting directly from the statement. The article also replicates Dr. Ndlozi's vehement denial of any involvement, his characterisation of the complaint as a "terrible instance of mistaken identity" and his pledge to co-operate with any investigation. It specifically records that Dr. Ndlozi says he was not present at the place the complainant said she was raped and that he

did not know her. The article does not contain any of the facts Dr. Ndlozi offered to exculpate himself. Nor, in its original form, did it contain SAPS' confirmation that Dr. Ndlozi was not a suspect in its investigations. That was added later.

14 The gist of the article is that a complaint of rape has been made against Dr. Ndlozi and that Dr. Ndlozi denies any involvement in the attack alleged against him. In its original form, the article conveys the sense that there is an ongoing investigation into Dr. Ndlozi's conduct. In its revised version, the article makes clear that Dr. Ndlozi is no longer being investigated.

15 The third statement is an article the Daily Sun published on 13 April 2021. It appears under the headline "We stand by our story!". It is a short response to Brigadier Peters' media release. It repudiates the allegation that comment was not sought from SAPS before Mr. Manayetso's article was published. It notes that Dr. Ndlozi is not a suspect in the complaint (SAPS' confirmation of this is the subject of a longer piece on the same page) and it chooses not to address Brigadier Peters' imputation of unlawful and unethical conduct.

16 The gist of the third statement is not directly concerned with Dr. Ndlozi. The third statement takes aim at one part of the SAPS statement on the original story: that SAPS' comment was not sought prior to publication.

17 It is these three statements that Dr. Ndlozi says defamed him. But before addressing the question of whether, and to what extent Dr. Ndlozi was defamed, it is necessary for me to consider the question of whether and to what extent Dr. Ndlozi's claim of defamation can be decided on motion.

Can this case be decided on motion?

18 In his notice of motion, Dr. Ndlozi seeks a declaration that each of the three impugned statements was unlawful and defamatory. He also asks for an order directing the respondents to remove the impugned statements from all of its electronic media platforms; an order that the respondents print a retraction and an apology; and an order that damages be paid in the sum of R120 000, or that the respondents be declared liable for damages and that quantification of damages be referred for the hearing of oral evidence.

19 Mr. Kairinos, who appeared together with Ms. Mathe for the respondents, argued that none of this relief can be granted on motion, because the Supreme Court of Appeal has said as much in *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA) ("*Manuel*"). Before exploring the decision in that case, I think that it is important to set out some basic principles about when relief can be claimed on motion, and how those principles apply, on their face, to the relief Dr. Ndlozi seeks.

20 The general rule is that motion proceedings are all about deciding questions of law on undisputed facts (*NDPP v Zuma* 2009 (2) SA 277 (SCA), paragraph 26). The affidavits setting out those facts are both the statement of the parties' respective cases and the evidence for the truth of the propositions stated in the affidavits. Unless the court can decide the application on the undisputed or common cause facts, it must dismiss the application or refer any material dispute of fact to trial.

21 It follows that, where there is unlikely to be a dispute about a material fact, a litigant may approach a court on motion, by filing a notice setting out the relief

they seek (a “notice of motion”), together with an affidavit setting out the facts on which they say they are entitled to that relief (a “founding affidavit”). They may also attach to the founding affidavit any documentary evidence or supporting affidavits on which they rely. There are cases where the law requires a party to proceed on motion, whether or not a dispute of fact will foreseeably arise, but they need not concern me here.

22 Conversely, where there is a foreseeable dispute of fact, a litigant must ask the court to hold a trial of the facts before any of the ultimate legal questions they wish to raise can be decided. A trial of fact generally involves oral evidence from the parties to the case or other witnesses who will testify in support of their claims. Each party is entitled to cross-examine the other party’s witness, and it is through cross-examination that the truth of a witness’ account is tested, and any disputes of fact between the parties are resolved.

23 In the High Court, a trial action commences when a plaintiff issues a combined summons, comprising a notice summoning a defendant to appear, and the written particulars of the claim the defendant will have to answer. Neither of those documents is evidence of the claims made in them. The plaintiff’s particulars of claim merely embody a statement of the facts the plaintiff intends to prove by the presentation of evidence at the trial.

24 A litigant who institutes a claim on motion but who ought to have known that a dispute of fact would arise runs the risk that their application will be dismissed, and that they will have to start their case again by issuing a combined summons. Where a dispute of fact arises, but was not foreseeable, a court may decide to refer the case to the hearing of oral evidence on that fact.

25 It is generally understood that certain types of case are brought on motion, and others are brought as trial actions. But the overriding consideration, no matter what type of claim is being considered, is always whether the facts alleged in support of the claim are likely to be disputed. Some cases – for example where the parties' relationship is governed by documents the authenticity and meaning of which are largely common cause – are unlikely to require a trial. Other cases – for example those which require a court to consider what someone saw at a particular place or at a particular time, or to inquire into a person's state of mind – are very likely to require a trial.

26 It follows that, unless Parliament had made one, there is no rule that requires a particular type of claim to be brought using either the motion procedure or the trial procedure. What matters is the facts that have to be proved and whether they are likely to be disputed.

27 In this case, it is agreed that the impugned statements were made. The content of those statements is likewise agreed. The meaning of the statements – especially the sense in which the statements can be said to be "true" – is disputed, but only on a point of interpretation: whether the statements assert the fact that Dr. Ndlozi raped the complainant, or merely that he was reported to the police as having done so. The factual background against which the statements require interpretation is common cause. If the publications are found to be defamatory, they may nevertheless be lawful if the respondents can establish that they did not intend to injure Dr. Ndlozi, or if they can establish that the statements were not made wrongfully.

28 In this case, the respondents do not ask me to decide whether the statements were made with the intent to injure. The defences set out in their answering affidavit address only the question of whether the impugned statements were wrongful. In particular, they raise the questions of whether, if the statements turn out to be true, they were made for the public benefit, and, if the statements turn out to be false, they were published reasonably. These are primarily questions of legal policy, which do not normally entail the resolution of factual disputes.

29 Given all this, on the ordinary principles I have set out, it seems to me that the primary question of whether Dr. Ndlozi was in fact unlawfully defamed can easily be decided on the papers before me. It follows that, at the very least, the question of whether Dr. Ndlozi is entitled to a declaration that he was unlawfully defamed and a mandatory interdict ordering the removal of the impugned statements from Media 24's platform can be considered on motion. This sort of relief has been considered without controversy on motion in a number of other cases in this Division (see, for example, *Ramos v Independent Media (Pty) Ltd* [2021] ZAGPJHC 60 (28 May 2021) and *Van Deventer and Van Deventer Inc v Mdakane* [2023] ZAGPJHC 529 (22 May 2023)). The question of whether someone is likely to be defamed is also regularly decided on motion when interdicts in prior restraint of defamation are sought (see for example *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) and *Quandomanzi Investments (Pty) Ltd t/a SM Structures v Govender* [2023] ZAGPJHC 516 (19 May 2023)).

30 The question becomes trickier when other forms of relief are sought. Classically, questions of damages for harm to a person's reputation are extremely difficult, if not impossible, to decide on motion. Where the quantum of damages is linked to the nature and likely effect of an apology, oral evidence of the reach and impact of the defamatory statements must generally be placed alongside the likely ameliorative effect of the apology. Not only are these issues likely to be disputed, but they can also only really be properly ascertained and identified once legal disputes about the nature and extent of the defamation have been resolved.

31 It is this difficulty that animated the Supreme Court of Appeal's decision in *Manuel*, in which the court set aside an award of damages and a court-ordered apology which was made after this Division had found, on motion, that the EFF had defamed Mr. Manuel. The Supreme Court of Appeal then made some remarks about whether, given that the declaratory and interdictory relief the High Court granted was correctly decided on motion (and confirmed on appeal), but the apology and damages relief was not, it is generally permissible to approach a court on motion for a declaration that a person has been defamed and for an interdict in restraint of that defamation, while also seeking an order that damages be assessed by way of oral evidence at a later stage.

32 It is fair to say that the Supreme Court of Appeal's attitude to this hybrid approach was at best tepid. However, given that there was no procedural objection or allegation of prejudice raised by the EFF in that case, the court did not have to finally decide whether the procedure adopted was generally

appropriate or permissible. The court contented itself with the statement that its judgment should not "be seen as endorsing as a general practice in defamation cases an application for some immediate relief, together with an application for the issue of the quantum of damages to be referred to oral evidence. For the reasons we have given, the ordinary procedure in claims for unliquidated damages should be by way of action". The court also implied that the hybrid procedure adopted in the case before it was permissible because the case was exceptional (*Manuel*, paragraph 127).

33 None of this means that the Supreme Court of Appeal has laid down a rule which disallows the approach taken in *Manuel*, or which has been taken by Dr. Ndlozi here. Even if the court's remarks can be read as blanket disapproval of such a procedure (they cannot), they are plainly *obiter*. In any event, it seems to me that the considerations the court did identify as justifying the hybrid approach in *Manuel* – whether the case has exceptional features, whether the procedure is objected to and whether there is any appreciable prejudice to either party in its adoption – can, at least notionally, justify a similar procedure being adopted in other "exceptional" cases that can be decided without prejudice to the parties' procedural rights.

34 To decide otherwise would impede access to justice and over-complicate legal procedure to no valuable end. I see no reason why, if a case can be fairly decided using the hybrid procedure Dr. Ndlozi engages here, it should not be so decided. I also see no reason in principle why, if a litigant is entitled to final declaratory or interdictory relief in restraint of defamation on the undisputed

facts, they should have to await the outcome of a contested trial on their unliquidated damages before they are able to obtain it.

35 In *Manuel*, the Supreme Court of Appeal was plainly alive to the fundamental issue: whether, in a particular case, the hybrid procedure is prejudicial to the parties, or to the administration of justice. Although they object to the procedure, the respondents' objection in this case is purely technical. They have not identified any prejudice caused by the procedure Dr. Ndlozi has adopted. It is hard to see what prejudice the respondents could suffer, given that the principal issues before me must be resolved on the facts that the respondents have alleged or which they do not dispute.

36 Even if the respondents are correct in their interpretation of the decision in *Manuel*, that would mean no more than that Dr. Ndlozi's prayers for damages and an apology would have to be dismissed rather than postponed. It would not prevent me from entering into the issue of whether the impugned statements were defamatory and unlawful. But, for the reasons I have given, there is no warrant in this case to dismiss Dr. Ndlozi's prayer for an apology and damages when it can be postponed and dealt with by way of the hearing of oral evidence.

37 The respondents also relied on the decision of the Supreme Court of Appeal in *Malema v Rawula* [2021] ZASCA 88 (23 June 2021) ("*Malema*"), but that decision takes the issue no further. In *Malema*, the Supreme Court of Appeal reiterated that an interdict in restraint of unlawful defamation may be granted on motion (see *Malema*, paragraph 26). It also reiterated that damages for unlawful defamation may not be sought on motion (see *Malema*, paragraph

27). The court had nothing to say about whether the hybrid procedure adopted here and in *Manuel* is permissible, whether generally or exceptionally.

38 It follows from all this that I can decide Dr. Ndlozi's prayer for a declaration that he has been unlawfully defamed, and his prayer that the defamatory material be removed from Media 24's media platform on the papers before me. His prayer for damages and an apology must, though, stand over for later determination once oral evidence has been led.

Were the impugned statements defamatory?

39 A publication is defamatory if it tends to lower the person defamed "in the estimation of the ordinary intelligent or right-thinking members of society" (*Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A), 403G-H). The test is objective. What matters is not what the publisher intends, but "what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied" (*Le Roux v Dey* 2011 (3) SA 274 (CC), para 89).

40 Mr. Premhid, who appeared together with Ms. Mahomed and Mr. Mohammed for Dr. Ndlozi, argued that all three statements defamed Dr. Ndlozi because they reported the rape allegations made against him as if they were true. But that argument was plainly misconceived. By using quotation marks and reported speech, the first statement clearly adverted to an accusation of rape by someone else. It did not endorse the allegation. The second statement told a story of two sides. It set out what the complainant had reportedly told the

police, alongside what Dr. Ndlozi had to say in response. It endorsed neither story. It plainly did not report the rape allegations as the truth. The gist of the third statement had little to do with the truth or falsity of the rape allegations. It was rather concerned with whether the police had accurately conveyed the respondents' efforts to secure comment from them before going to press. For what it is worth, the third statement records that Dr. Ndlozi is not a suspect in the police investigation. It also opines that the justice system should "commit to finding out who the perpetrator is and help [the victim] find justice". None of this is compatible with the proposition that the rape allegations against Dr. Ndlozi were reported as the truth.

41 Mr. Premhid next argued that the mere fact that the rape allegation was reported as one side of a contested story does not save the respondents from the repetition rule. In other words, the mere repetition of a rape allegation is defamatory, even if the repetition was in the context of a report that the allegation had been made.

42 That repetition rule, which Nugent JA set out in the *Tsedu* case, is that "[a] newspaper that publishes a defamatory statement that was made by another is as much the publisher of the defamation as the originator is. Moreover, it will be no defence for the newspaper to say that what was published was merely repetition. For while the truth of the statement (if it is published for the public benefit) provides a defence to an action for defamation, the defence will succeed only if it is shown that the defamation itself is true, not merely that it is true that the statement was made" (*Tsedu v Lekota* 2009 (4) 372 (SCA), paragraph 5).

43 However, I think Mr. Premhid's submission entails a somewhat strained interpretation of the repetition rule. The rule addresses a situation akin to the repetition of an unverified rumour. If the rumour turns out to be false and defamatory, the mere fact that the publisher only repeated what they heard does not mean that they have not defamed the target of the rumour.

44 This case is different. The respondents did not report a rumour that Dr. Ndlozi had committed rape. They reported the fact that someone had made a complaint to the police that he had done so. The fact reported was not the rape, but the complaint of it. In other words, the respondents did not repeat the allegation of rape. They reported the fact that a complaint of rape had been made to the police.

45 Ultimately, both Mr. Kairinos and Mr. Premhid accepted that little turns on the application of the repetition rule. The publication in this case was defamatory because even the report that a complaint of rape has been made to the police lowers a person in the estimation of the ordinary intelligent or right-thinking members of society. This is true whether or not the report amounts to the "repetition" of the complaint. It matters not whether the complaint is true, or even if it is false but reasonably made (in other words that the conduct alleged in the complaint was all substantially true but turns out not to have met the legal requirements to sustain a case of rape). There can be little doubt that the publication of the fact that a person has been reported to the police for rape is defamatory, because it will clearly tend to lower the person accused of rape in public esteem.

46 I emphasise that this does not mean that a person who makes an allegation that they have been raped, or publicises the fact that they have made a complaint of rape to the police against a named individual, thereby defames the person they believe is their assailant. I am not called upon to decide that question. It is enough to say that a newspaper that publishes the fact of such a complaint plainly defames the subject of the complaint in the legal sense that they damage that person's reputation.

47 Accordingly, I am driven to conclude that the first and the second impugned statements are defamatory. The sting of both statements is the fact of the complaint against Dr. Ndlozi. However, the third impugned statement is not defamatory, since it had no such sting. Read as a whole, it is not primarily concerned with the fact of the complaint. Where it did address the complaint, it plainly acknowledged that Dr. Ndlozi was no longer the subject of it, and that it was necessary to find out "who the perpetrator is" in order for the complainant to "find justice".

Were the defamatory statements substantially true?

48 Once it has been established that a statement is defamatory, it is presumed that the statement was made wrongfully and with the intent to injure. The presumption of intent to injure can be rebutted by evidence that the publisher of the statements did not intend to defame. The presumption of wrongfulness can be rebutted if one of a number of known defences that exclude the wrongfulness of the publication are established.

49 The respondents have not adduced facts that would allow me to conclude that they did not intend to injure Dr. Ndlozi. They deny Dr. Ndlozi's assertion that

they acted maliciously by holding back comment from the police when they published the impugned statements, but that is something different. What is required is a positive factual case that rebuts the presumption of intent to injure (see *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) ("*Modiri*"), paragraph 12). There is no such case in the respondents' answering affidavit. It follows that the presumption of intent to injure has not been rebutted.

50 The respondents instead rely on two other defences. The first defence is known as "truth and public benefit". The second is the defence of "reasonable publication". These defences are mutually exclusive. As its name implies, the defence of truth and public benefit is engaged only where the published statement is substantially true. The defence of reasonable publication only arises if a statement turns out to have been false (see *National Media Limited v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212G-H). Given that Dr. Ndlozi's primary contention was that the respondents defamed him by repeating an untrue statement, it is easy to see why the respondents sought to make out a defence of reasonable publication.

51 But, on the facts, the defence is inapplicable, because the sting of the defamatory statements is not that Dr. Ndlozi raped someone, but that a complaint to the police was made that he had. This is plainly true: everybody accepts that Dr. Ndlozi was the subject of a complaint of rape made to the police.

52 I have given some thought to whether the misleading impression that the first and second statement contained quotes which falsely purport to have been taken directly from the complainant and her complaint substantially affects the

truth of either statement. However, as Mr. Kairinos argued, persuasively, the gist of the statements was the fact of the accusation, not the manner in which it was made. While I do not think that the respondents were entirely honest in their presentation of the story, the fundamental truth of the gist of both the defamatory statements cannot seriously be impugned.

Were the defamatory statements published for the public benefit?

53 Having established that the sting of the two defamatory statements is true, it remains to consider whether their publication was for the public benefit.

54 This is perhaps the most difficult part of the case. Truth has never been a complete defence to a claim of defamation. That entails accepting that it may sometimes be defamatory and unlawful to publish something that is perfectly accurate. That may sound counter-intuitive, because, while it may sometimes be rude, or unethical, to speak the truth, or unlawful to break a duty of confidentiality, it seems onerous to require a defendant, especially a media defendant, to demonstrate that the dissemination of a true fact was also for the public benefit. As a general proposition, the public benefits from knowing the truth. The media exist to disseminate the truth, and must be accorded an appropriate margin of appreciation in their work towards doing so. That is precisely why we do not generally hold the media liable for publishing a falsehood if the publisher reasonably believed the falsehood was true.

55 However, the law recognises that it is not always in the public interest to publish a fact merely because it is likely to be of interest to the public. Cases where a person has a reasonable expectation of privacy are a paradigmatic example. We might appropriately disapprove of the publication of the details

of someone's private life – their addictions and peccadillos for example – unless they are a public figure who has cultivated a reputation to which they are not really entitled because it is contradicted by their private conduct. But where a person avoids the limelight, and performs no public role, there is no public benefit to peering into their private lives, no matter how entertaining the consumers of media content would find it.

56 Even public figures have an expectation of privacy in relation to particularly intimate details of their private lives, such as their health or their children. For example, it will rarely be for the public benefit to report, without their consent, that a public figure or their child suffers from a particular disease, even if knowing that they do would give comfort and relief to others.

57 It is partly for these reasons that our courts have long held that whether the publication of a defamatory statement is for the public benefit depends critically on the content of the statement, and the time, manner and occasion of its publication (see, for example, *Modiri,* paragraphs 23 to 25 and the cases referred to there). The question, in other words, is whether there was an overall public benefit to the publication of the statement in the way it was published, when it was published. Even if there was some benefit to be had from the publication, that must be weighed against any harm to the public interest the publication caused.

58 Accordingly, the inquiry extends further than the harm done to the claimant's reputation. It is necessary to consider whether, overall, the publication did more good than harm to the public interest.

59 Mr. Kairinos contended that there is a clear public benefit in the reporting of cases of gender-based violence in South Africa. As a general proposition this is no doubt true. There is an epidemic of violence against women in this country. It is a national disgrace. The violence meted out to women daily on our streets and in our homes bespeaks a culture of male entitlement and oppressive patriarchy that must be highlighted, explored and exposed to opprobrium at every opportunity.

60 Mr. Kairinos was also on firm ground when he highlighted the position of high public esteem and trust that Dr. Ndlozi occupies. He is a senior leader of South Africa's third biggest political party. He is a Member of Parliament. As a public figure he must expect scrutiny. Where, as he has done, he speaks out against gender-based violence, that scrutiny may legitimately extend to his private treatment of women.

61 Against this, however, must be weighed the public interest in the confidentiality of police investigations at a very early stage. That confidentiality interest was recognised in *Independent Newspaper Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA). At paragraph 47 of that decision, Marais JA warned against "premature disclosure of the identity of a suspect" in a police investigation, especially where it is clear that the person "may never be charged or appear in court". Having regard to this confidentiality interest, Marais JA held that it is generally not "in the public interest or for the public benefit that the identity of a suspect be made known prematurely".

62 That notwithstanding, in *Modiri*, Brand JA made clear that *Suliman* did not lay down a rule that it is not for the public benefit to disclose the identity of a

person suspected of criminal behaviour. In that case, a publication alleged that Mr. Modiri had long been suspected of a pattern of organised criminal behaviour, but could not be charged or prosecuted because none of his low-level accomplices would give evidence against him. The publication of those facts was held to be for the public benefit. Brand JA cautioned, though, that the question of whether the public benefits from the publication of the fact that a person is a criminal suspect is highly context-sensitive. The confidentiality interest in concealing the identity of a suspect may, on the facts of a particular case, trump the public interest in reporting the identity of the suspect when an investigation is at a very early stage, especially where the facts are uncertain and there is no suggestion of a pattern of criminal behaviour (see *Modiri* paragraph 23).

63 As Brand JA held, the inquiry into whether a publication is for the public benefit is also generally the stage of deliberation at which a court will balance the right to freedom of expression, including media freedom, against the right to dignity of the person defamed (see *Modiri* paragraphs 23 and 24). In my view, that balancing act must take place against the backdrop of "the appropriate norms of the objective value system embodied in the Constitution" (see *Carmichele v Minister of Safety and Security* 2002 (1) SACR 79 (CC) paragraph 56). That value system embraces, I think, a confidentiality interest that does not just protect the suspect's right to dignity. It also protects the integrity of the police investigation.

64 Most importantly, in a case like this, it protects the dignity and privacy of the complainant. In *NM v Smith* 2007 (5) SA 250 (CC) ("*NM*"), the Constitutional

Court made clear that the right to privacy "seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life" (*NM*, paragraph 131). In *NM* that autonomy encompassed the right to choose whether, when and how to disclose intimate details about one's private life.

65 As is clear from the facts of this case, the complainant did not chose to make her complaint public. She did not approach the respondents with her story. As far as I can see, she did not co-operate at all with its publication. Moreover, the complainant had a right to expect that her complaint would be treated sensitively and that it would be kept private unless she decided otherwise. That confidentiality interest is all the more acute when the identification of a person's assailant turns out to have been mistaken, or where, for some other reason, the police cannot or do not pursue as a suspect the person originally identified by the complainant. Unless the complainant actively chooses to tell her story publicly, I see no public benefit in it being spirited into a newspaper by a confidential police source where an investigation is otherwise at a very early stage, and the police have chosen not to comment on it.

66 Even if there were some public benefit to reporting the complainant's statement in this case, it would only accrue because of the fact that the complaint was made against Dr. Ndlozi as a public figure, and that it is generally in the public interest to know the truth about the character and conduct of public figures. But it seems to me that this benefit would be more

than outweighed by the interest in protecting the integrity of the police investigation, and the dignity and privacy of the complainant at the very early stage the investigation had reached at the time the report in this case was published.

67 It seems to me to be potentially extremely damaging to the capacity of the police to investigate complaints of rape against public figures if the media do not have to exercise caution in the timing and manner of their reporting on an ongoing investigation. If a rape complainant cannot be confident that their statement will not be promptly leaked to, and published by, the media, just hours after it is made, they may well decide not to report their assault at all.

68 Although the focus of the public benefit inquiry is generally on whether there is a benefit to the published facts being known, I do not think that there is an uncomplicated line to be drawn between the publication of the facts, and the way in which the facts are gathered. There are of course cases in which the value of making a fact public far outweighs any impropriety – such as the breach of a duty of trust or confidentiality – that may have been involved in securing and disseminating the information. But this case is not one of those. It weighs with me that Mr. Manayetso (no doubt inadvertently) interfered with the police investigation by naming the complainant to Dr. Ndlozi and disclosing details of the complainant's statement to Dr. Ndlozi before the police had been able to contact Dr. Ndlozi themselves. The public does not benefit from a news story being prepared in this way. It seems to me that a journalist does not act in the public interest by putting the details of a complaint to a potential suspect before the police have been able to do so.

69 Ultimately, I am driven to the conclusion that, on the particular facts of this case, any public benefit derived from reporting the fact of the complaint against Dr. Ndlozi was outweighed by the public interest in keeping the complaint private at the very early stage of an investigation at which it was reported.

70 It follows that the respondents have failed to demonstrate that the first and second impugned statements were published for the public benefit. Accordingly, the publication of those statements was defamatory and unlawful.

Costs

71 Mr. Premhid asked for costs on the attorney and client scale in the event that I decided for Dr. Ndlozi. However, he could point to no facts that would justify such an order. The respondents have not misconducted themselves in this litigation. Their defence, while ultimately unsuccessful, was far from frivolous. Since it is plain that Ms. Nkosi and Mr. Manayetso have acted throughout as employees of Media 24, and with its full support, it is appropriate that Media 24 bear the costs of the application alone, which would probably have been the effect of a joint and several costs order in any event.

Order

72 For all these reasons –

72.1 The publications annexed to the applicant's notice of motion as "NOM1" and "NOM2" are declared to be unlawful and defamatory.

72.2 The first respondent is directed to remove these unlawful and defamatory statements from all its media platforms including its website, Twitter account, and Facebook account within one week of the date of this order.

72.3 The relief sought in paragraphs 3.2, 3.3. 3.4 and 4 of the applicant's notice of motion is to be determined by reference to oral evidence to be heard by Wilson J on a date and at a time be arranged with his registrar. The affidavits presently filed and their annexures will stand as the pleadings and discovery. Further discovery may be agreed between the parties or authorised by Wilson J on application brought by either party on reasonable notice to the other.

72.4 The first respondent will pay the costs of the application to date, including the costs of two counsel.

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 to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 September 2023.

HEARD ON:	8 August 2023
DECIDED ON:	19 September 2023
For the Applicant:	K Premhid F Mahomed S Mohammed (Pupil Advocate) Instructed by Ian Levitt Attorneys

For the Respondents:	G Kairinos SC S Mathe Instructed by Jurgens Bekker Attorneys