REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

NOT REPORTABLE

CASE NO: 37581/2014

In the matter between:

20/6/2014

SHAW SPENCER Applicant

and

POTT "HUFFY" WILLIAM Respondent

J U D G M E N T

MAKGOKA, J

[1] On 3 June 2014, I made an order interdicting the respondent from publishing any defamatory statements concerning the applicant, and undertook to furnish reasons later. The full terms of the order appear at the end of this judgment. These are the reasons for that order. The applicant sought, on an urgent basis, a final interdict against the respondent from publishing or uttering allegedly defamatory statements about him. What gave rise to the application is a failed business venture between the applicant and the respondent's son.

[2] The respondent opposed the application on the following bases: that the matter is not urgent; the respondent denies having any intention of defaming the applicant; that he has the right to freedom of expression; and that in any event, the applicant has an alternative remedy of claiming damages. I shall revert to these grounds later in the judgment. I pause here to mention that the respondent's son currently lives in France, and would only be returning to South Africa in August, hence he is not featured in this application as a party, nor is there a confirmatory affidavit by him.

[3] The applicant is a businessman in Johannesburg, and an *alumnus* of the prestigious Hilton College in KwaZulu-Natal, where he says that he was a prefect and played in first sports teams. He mentions that many Hilton old boys are captains of industry and their paths cross in their business dealings. They rely on each other's backgrounds as 'Hilton old boys' when they deal with each other in business. The applicant alleges that it is this select group of people to which the respondent intends publishing defamatory statements about him. He contends that such publication would harm his reputation and be detrimental to his business interests.

[4] The applicant states that he has been involved in various businesses since the age of 18 years. He was the proprietor of a chain of franchise restaurants which operated under the American franchise 'Hooters'. He ultimately sold his interest in that business to an American-based listed company. As a tribute to his entrepreneurial acumen, the applicant says that the franchise won a prestigious award in its first year of operation in South Africa (the Restaurant Association of South Africa Services Excellence Award). That earned the applicant a place in the *Mail and Guardian* newspaper's 'Top 200 Young South Africans' listing.

[5] During August 2012, the applicant invited the respondent's son, David, also a Hilton old boy, to invest in a business venture, which David invested for R650 000. It was not successful, and David did not recover his capital investment. The respondent alleges that the applicant deliberately misrepresented the facts to David, an allegation denied by the respondent, who says it was just an unfortunate venture which went awry, with no fault on his part. This is the basis of the dispute between the applicant and the respondent, although, I must hasten to add, the correctness or otherwise of those allegations is not relevant to the present application.

[6] It seems that towards the end of April 2014, the respondent telephonically contacted Mr. Alex Papadupolo, a friend and business associate of the applicant, and warned him of doing business with the applicant. Papadupolo says that the respondent accused the applicant of being a 'fraudster and a thief' who could not be trusted, as he had 'ripped David off' concerning the failed business venture referred to earlier. Papadupolo trades as a wholesaler of various electronic goods which is also a supplier of the applicant's business. The respondent also contacted the applicant's mother, and conveyed more or less the same things he had conveyed to Papadupolo, and that the applicant owed David approximately R700 000 from the failed business venture. He further implied that the applicant's mother should settle that amount, failing which, he (the respondent) would ruin the applicant's name and life. The respondent specifically told the applicant's mother that he was intending to make contact with the *alumni* of Hilton College in order to 'warn' them of doing business with the applicant.

[7] The respondent also contacted another erstwhile business acquaintance of the applicant, Mr. Garyth Ditchfield (Ditchfield). Apparently, Ditchfield also had a failed business venture with the applicant, which he similarly blamed on the applicant. He therefore made common cause with the respondent. Ditchfield

had also contacted the applicant during April 2014 and made some monetary demands upon the applicant, failing which he threatened to go public with his side of the story. It appears that initially the applicant was prepared to pay the Ditchfield a sum of money for his silence. It is not clear what became of that arrangement. Suffice it to say that eventually Ditchfield gave an undertaking acceptable to the applicant's attorneys, hence he has not been joined as a respondent in this application.

[8] On 20 May 2014 the respondent contacted the applicant's attorney directly, and 'warned' him to be careful in his dealings with the applicant, and that the applicant might never pay him (the attorney) his fees. The respondent repeated the statement that the applicant is a fraudster who owed a lot of money to many people. He also confirmed to the attorney that he had contacted a number of individuals who know the applicant (either personally or professionally) in order to 'collect evidence' against the applicant and to 'expose' the applicant as a fraud. The respondent further stated that he had contacted the applicant's former college, Hilton, where he requested particulars of former pupils, but denied that it was for the purpose of contacting them about the applicant. He said that it was for another 'project'.

[9] On 21 May 2014, the respondent phoned the applicant's attorney, and left a voice message, in which he retracted his earlier statement that his contacting Hilton College was for other purposes. He now made it clear that his purpose for doing so was to communicate with the *alumni* about the applicant. The applicant's attorney, in an endeavour to avoid this application, invited the respondent to furnish an undertaking not to publish any defamatory allegations against the applicant, by close of business that day, being 21 May 2014. The respondent refused to furnish such an undertaking, hence this application.

[10] The respondent contends that the matter is not urgent. He argues that the applicant, on his own version, became aware of the allegations in April, but only launched the application on 23 May 2014. This is an over simplification. From the analysis of the founding affidavit, it is clear that the applicant made efforts to have the matter resolved amicably. He says that he became aware of the allegations towards the end of April. He contacted the respondent's son, David on 30 April and on 9 May 2014, seeking David's intervention. His efforts were unsuccessful. From there, his attorneys made contact with the respondent and/or his attorneys. There were efforts to have an undertaking, which the respondent spurned. Significantly, such efforts were successful as far as Ditchfield is concerned.

[11] On 20 May 2014 the applicant's attorneys requested that an undertaking by the respondent to be given by close of business on 21 May 2014, that he will not utter defamatory statements about the applicant and, specifically, that he would not publish an email to the Hilton College *alumni* concerning the applicant and his business dealings. It was only on 22 May 2014 that the respondent's attorneys confirmed that the respondent would not provide an undertaking requested by the applicant. This application was launched on Friday, 23 May 2014. I am therefore satisfied that the applicant was not dilatory. The applicant is therefore urgent.

[12] With regard to the merits of the application, the respondent denies having any intention of defaming the application. He places reliance on section 16 of the Constitution – the right freedom of expression. Even if it be established that he has defamed the respondent, so is the respondent's case, the latter has an alternative remedy to claim damages

[13] His only concern is to expose the applicant's business ethics and *modus operandi*, which the respondent contends, are not above board. He further says that he has spoken to several people, including Ditchfield, who are also

disgruntled with the applicant's business dealings. As a result, all what he does is to investigate the applicant's business activities, with a view to procure evidence in support of possible legal action to be instituted against the applicant in the near future. The applicant, says the respondent, is not entitled to interdict him from conducting a legitimate investigation. Papadupolo, Ditchfield and the applicant's mother were all contacted as part of the evidence-gathering process and investigation.

[14] He is correct to rely on the protection afforded by the Constitution regarding the right to freedom of expression. On the other hand, the applicant has a right to dignity and not to be defamed. What the right to freedom of expression does *not* entail, is to defame the applicant. What I must first establish, is whether the statements uttered by the respondent are defamatory. I have, in the preceding paragraphs, set out in some detail, what the respondent has conveyed to various people. For example, Papadupolo says that the respondent has told him that the applicant is a fraudster and a thief.

[15] In his answering affidavit, the respondent denies that but admits that he told Papadupolo that the applicant 'cannot be trusted'. That is *prima facie* defamatory, alternatively the sting thereof, is. He repeated the essence of what he told Papadupolo, to the applicant's mother, and to the applicant's attorney. The respondent further admits that he has spoken to a 'number of other people' about the applicant's supposedly 'unethical modus operandi'. It is clear that he intends to continue in his tirade against the applicant. I therefore have no difficulty in concluding that the respondent's statements are defamatory of the applicant.

[16] Counsel for the respondent, Mr. *Botha*, placed reliance on the dictum in *Tsichlas and Another v Touchline Media (Pty) Ltd* 2004 (2) 112 at 129B–C where the following is stated:

'The fact that some of the statements may be defamatory is not, *per se*, sufficient for the applicant to obtain an order interdicting their further publication. The applicant, in order to interdict existing or past defamatory publications, must show not only a clear right but also that she has sustained injury or reasonably apprehends further injury, and that there is no other suitable remedy available to her. Insofar as any of these statements may already have caused her injury, applicant would be entitled to claim, by way of action, such damages as she might have suffered. Their 'continued publication' may, however, simply add to the *quantum* of the damages when ultimately assessed by the trial Court.

[17] The facts in that matter are succinctly summarized in the head-note, which reads:

'The (first) applicant was the club secretary of the second applicant football club and the respondent was the owner and publisher of a football magazine and Internet website. The 20 selected statements which formed the basis of the applicant's complaint had all appeared in the 'chat forum' of the respondent's website and had been contributed by various users of the website. The applicant contended that the statements were defamatory of her and sought to interdict the respondent from publishing on its website material which was defamatory of her (prayer 2), ordering the respondent to remove the 20 selected statements appearing on its website (prayer 3) and ordering the respondent to monitor its website and to remove any defamatory material which might, in the future, be placed on the website by participants in its chat forums (prayer 4). The applicant had not called upon the respondent to withdraw the statements remaining on its website chat forum pages prior to launching the application. Simultaneously with her application, she instituted an action for damages for defamation against the respondent (as second defendant) arising out of certain other material which had been published in its magazine.'

[18] In my view, *Tsichlas* is distinguishable from the present case in one major respect. In that case, publication of allegedly defamatory material had occurred, and the court found, at 129G-H, that the applicant had failed to establish 'ongoing or continuing intent' on the part of the respondent to defame or injure her, the evidence concerning the already-published defamatory material not having established that the respondent had such intent. In the present case, the respondent's conduct clearly shows his intention to proceed with publication of defamatory material concerning the applicant to a much wider audience in the form of Hilton *alumni*. In this regard, the court stated the following at 129I-130A-B:

'In my view, this evidence failed to establish that the continued publication of the allegedly defamatory material would cause applicant further injury. Insofar as any such statements which had been published may already have caused her injury, an interdict would merely have the effect of trying to 'close the stable door after the horse has bolted'. There is,

furthermore, no reason to believe that defamatory statements will necessarily continue to be published or that, if they are, applicant will be harmed any further then she may already have been harmed by the original publication of such statements'.

[19] Also, in *Tsichlas*, the applicant had not requested the respondent to remove the allegedly defamatory material from its website. In the present case, the applicant made concerted efforts to have the respondent undertaking to desist from publishing the defamatory material about the applicant. What is more, in *Tsichlas*, the applicant had, simultaneously with application, instituted an action for damages. It was therefore easier for the court to conclude that the applicant's remedy lied in nominal damages in that action. I therefore conclude that *Tsichlas*' case does not assist the respondent.

[20] What remains for me to consider is whether applicant has satisfied the requisites for a final interdict, which are trite[1]. The requisites, all of which must be present, are:

(a) a clear right on the part of the applicant;
(b) an injury actually committed or reasonably apprehended;
(c) the absence of any other satisfactory remedy.

[21] The applicant has a clear right not to be defamed. It is so that the respondent is entitled to whatever legitimate investigations into the applicant's business affairs. I did not understand the applicant to seek to stop him from doing that. What he is not entitled to do, is defame the applicant. Whatever the respondent's gripe about the applicant is, following the failed business transaction between the applicant and his son, he does not have the right to call him a fraud or a dishonest person or businessman. Only a proper forum such as a court of law, has the power to make such findings, should it be necessary to do so. That is the essence of the rule of law – that no one is permitted to take the

[1] *Setlogelo v Setlogelo* 1914 AD 221

law into their own hands, no matter how aggrieved they might be about another person.

[22] With regard to an injury, the respondent has already defamed the applicant, as pointed out already. It is very clear that he intends to continue in his conduct. It is quite conceivable that he would convey to the applicant's other business associates, what he has already told Papadupolo, the applicant's mother and the applicant's attorney, namely that the applicant is an untrustworthy businessman. He has declined to give an undertaking not to defame the applicant. That is a clear indication of his intention to continue with his defamatory allegations against the applicant. The other consideration is that there is no public interest involved here. The respondent is upset about a business deal which went awry between his son and the applicant. The applicant is not a public figure against whom it can be said to be in the public interest to publish defamatory statements about.

[23] As to alternative remedy, I agree with the submissions by the applicant's counsel, Ms *Milovanovic*, that that proving damages in defamation claims is a difficult exercise. One must also bear in mind that the applicant is a businessman, and it is that aspect of the applicant's life which is the target of the respondent's campaign. Even if the applicant is ultimately successful in establishing that the respondent had defamed him, no measure of damages can ever compensate for loss of reputation and the resultant loss of business. There would be no way of reversing the harm that would have been visited upon the applicant.

[24] The sum total of all the above is that I am satisfied that the applicant has made out a case for a final interdict. In the result I made the order referred to in para 1, the full particulars of which are the following:

1. The respondent is interdicted and restrained from contacting the applicants' family and the business or social acquaintances, including any *alumni* of the Hilton College, whether telephonically, in writing (including any manner of electronic correspondence); or verbally, with the purpose of uttering defamatory statements concerning the applicant;
2. The respondent is ordered to pay the costs of this application.

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : **29 MAY 2014**

ORDER GIVEN : **3 JUNE 2014**

JUDGMENT DELIVERED : **20 JUNE 2014**

FOR THE APPLICANT : **ADV A MILOVANOVIC**

INSTRUCTED BY : ***ADAMS ATTORNEYS*, JOHANNESBURG, AND *PRETORIUS LE ROUX ATTORNEYS*, PRETORIA**

FOR THE RESPONDENT : **ADV. W J BOTHA**

INSTRUCTED BY : ***HILLS INCORPORATED*, PRETORIA**