IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 15747/19

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

16/12/19
DATE

A. J. L.
SIGNATURE

In the matter between :

NICOLAAS JOHANNES WIECHERS	**FIRST APPLICANT**
BIRDSEYE PROPERTY MANAGEMENT (PTY) LTD	**SECOND APPLICANT**

and

SPRUITSIG PARK BODY CORPORATE	**RESPONDENT**

JUDGMENT

A.J. LOUW AJ

[1] The First and Second Applicants (hereafter "the Applicants") apply for two orders directing the Respondent to remove certain words from the draft minutes of the Respondent body corporate annual general meeting that was held on 20 June 2018. In the replying affidavit the Applicants seek leave, under further and/or alternative relief, for an order that the Respondent be ordered to have the words as set out in the first two prayers of the notice of motion struck out of the draft minutes. The third order applied for is an interdict prohibiting the trustees of the Respondent from making and publishing any further defamatory remarks towards the Applicants. Costs on attorney and client scale are also applied for.

[2] The application has its origin in a reconvened annual general meeting ("AGM") of the body corporate of Spruitsigpark. The Applicants allege that the trustees of the Respondent made a number of defamatory statements and allegations against the Applicants to an audience comprising of 92 owners of the body corporate present in person or via proxy. Neither the First Applicant personally nor the Second Applicant as represented by the First Applicant attended the AGM.

[3] The only deponent on behalf of the Applicants is the First Applicant. Not having attended the AGM, the allegations in the evidence of the First Applicant of "a litany of defamatory statements and allegations" orally made during the AGM against the Applicants to an audience comprising of 92 owners of the body corporate present in person or via proxy and through a powerpoint presentation that purportedly in so-called

"hyperlinks" (that were not placed before the Court) contained written statements of a defamatory nature directed at the Applicants are hearsay statements that, if disputed by the Respondent, cannot found any basis for relief in favour of the Applicants. Any relief that the Applicants might be entitled to will have to be based on the contents of the draft minutes of the AGM that does form part of the papers before me.

[4] As is to be expected in litigation of this nature, the evidence of the First Applicant is indeed disputed in material respects. There is no request to refer the matter to evidence or trial. There is also no request to cross-examine any witness.

[5] The relief sought is of a final nature. In the circumstances the factual disputes in this matter must be adjudicated upon the principles set forth in the matter of ***Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634E- 635C where Corbett JA (as he then was) formulated the applicable principles as follows: *"Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence.... It is correct that, where in proceedings on notice of motion disputes of fact have risen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justifies such an order. The power of the Court to give such final relief on the papers before it is,*

however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…If in such a case the respondent has not availed himself of the right to apply for the deponent concerned to be called for cross examination and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers…"

[6] I re-cap: The Applicants received the powerpoint presentation (without the hyperlinks) in documentary form and attaches same to the founding affidavit as an annexure. The Applicants complain that there were hyperlinks in the powerpoint presentation that were not provided. The simple fact is that the powerpoint presentation as such and as attached to the founding affidavit does not refer to the Applicants by name. The Applicants do not rely on the contents of the powerpoint presentation as attached to the founding affidavit to make out a case for purposes of the relief sought. The challenge indeed is that the defamatory statements (if any) contained in the hyperlinks were not made available to the Court. Therefore I cannot make any decision in favour of the Applicants based upon the contents of the powerpoint presentation as such or on the

purported hyperlinks which I have not had sight of. The deponent on behalf of the Respondent denies any such defamatory statements. Mr. Diamond, counsel for the Applicants confirmed that the application is indeed limited to the contents of the draft minute of the AGM. He submitted both in oral argument and in his heads of argument that the correctness of the contents of draft minute of the AGM is not in dispute. I will return to the correctness of this submission.

[7] The Applicants requested a copy of the minutes of the AGM from the portfolio manager of the Respondent. The minutes, actually the draft minutes as referred to above, were sent to the Applicants and accordingly are attached to the founding affidavit as an exhibit. It is not directly disputed by the Respondent that the Applicants obtained the draft minutes of the AGM from the portfolio manager. The portfolio manager is the agent of the Respondent and thus the draft minutes were lawfully obtained. At the time the First Applicant in any event was an owner and entitled to have sight of the draft minutes. Nothing turns on this in any event.

[8] The Applicants complain firstly of a statement in paragraph 5 of the draft minutes under a sub-paragraph headed "Units sold on Auction in December 2017". I quote the relevant contents of the draft minutes as a paraphrased version thereof is provided in the founding affidavit:

"Trustees were informed on the 4th of December about the units going on auction and the auction date was scheduled for the 5th December. Sam said the owner purchased the units for R2 000.

Sarela informed the meeting that Nico Wiechers a trustee from the previous board of trustees purchased the units on auction.

The purchaser still has to pay the arrear levies, legal fees, and arrear rates."

[9] The second complaint regarding the contents of the draft minutes is a statement under the same heading as referred to above and that reads as follows:

"*Sarela mentioned to the owners about unit 1341 Tambotie that was also purchased by Mr. Wiechers on a dishonest way on auction for a small amount."*

[10] The Applicants explain that the First Applicant did purchase that unit at a sheriff's auction on 8 November 2016 and also took transfer of that unit on 14 December 2017 as per the deed of transfer that is attached to the replying affidavit. The Applicants say that they did so neither dishonest nor for a small amount. The explanation shows that the purchase price as such was R5000.00 and that sheriff's commission and rear levies and legal fees and such like amounted to the additional sums resulting therein that the amount paid by the Applicants came to R168 619.65. Whilst the sum of R168 619.65 is not in issue on the papers the Respondent alleges that a substantial portion thereof represents levies that usually is written off. In reply the Applicants say R168 619.65 is the amount the First Applicant paid.

[11] The Applicants complain that the First Applicant did not purchase any units in Spruitsigpark during December 2017 as well as that this false allegation was designed specifically to paint the First Applicant in a bad light before the attendees of the AGM. The allegation indeed is that coupled with the second statement, the statements were especially defamatory and vexatious and untrue.

[12] The Respondent as represented by Sarela Bongani who resides at Spruitsigpark and who acts in his capacity as the chairperson of the trustees of the Respondent deposed to the answering affidavit. Three purported points *in limine* are taken that in my view are indeed not points *in limine* as normally understood.

[13] The Respondent to a significant extent answered the evidence in the founding affidavit by giving explanations without dealing with the particular paragraphs and without setting out which of the Applicants' allegations are admitted and which are denied and in some cases simply challenged the Applicants to prove its allegations. This last mentioned approach does not amount to a denial of the averments of the Applicants. See: ***Gemeenskapsontwikkelingsraad v Williams*** (2) 1977 (3) SA 955 (W) at 957 E-F where it is said: *"These are affidavits and not pleadings. A statement of lack of knowledge coupled with a challenge to the applicant to prove part of its case does not amount to a denial of the averments by the applicant."* Furthermore, in appropriate circumstances a bare denial of an applicant's material averments in the founding affidavit cannot be

regarded as sufficient to defeat such applicant's right to secure relief by motion proceedings. See: ***Plascon – supra*** and ***Room Hire Co v Jeppe Street Mansions*** 1949 (3) SA 1155 (T) at 1165.

[14] However, apart from the points *in limine* the Respondent in paragraph 5.1 of the answering affidavit denies that the Applicants have direct personal knowledge of the facts deposed to in the founding affidavit. He admits that a reconvened AGM took place on 20 June 2018 and that a powerpoint presentation was done. He expressly denies that any defamatory statement was made against the applicants during the presentation.

[15] In paragraph 5.6 of the answering affidavit he deals with paragraph 5.9 of the founding affidavit. Paragraph 5.9 of the founding affidavit consists of paragraphs 5.1 – 5.11 and whereof 5.9 consists of paragraphs 5.9.1 – 5.9.27.2. In addressing paragraph 5.9 the deponent on behalf of the Respondent admit that there was a discussion regarding the sale on auction of units in December 2017 but says that the discussion revolved "one other Nic and not the First Applicant". With regard unit 505, also known as unit 1341 his explanation was that the owner (actually unlawful occupant) claim that she was threatened of being evicted from her flat by other people who claim to have bought her flat on auction and requested intervention by the membership of the Respondent. He then testifies that a motion was carried that municipal services should be restored to the flat. He then also testifies that it appears from the management agent that unit 505/1341 indeed was sold. This is an admission of the fact that the First

Applicant purchased the said unit. He then ventures into an explanation regarding the purchase price in attempting to show that the First Applicant purchased the said unit for a purchase price of R 5000.00 and attempts to breakdown the evidence that the actual amount paid by the First Applicant did not amount to R 168 619.65. He further continues to raise an issue with regard to the agreement between the Respondent and the First Applicant regarding the purchase of the said unit on auction in October and November 2016. This all has as apparent purpose to make out a case that the First Applicant is not truthful with regard to the purchase and purchase price of the said unit.

[16] All the evidence of the First Applicant regarding how the purchase of units by owners or trustees of the Respondent assist the Respondent to stay financially afloat are not dealt with and thus must be regarded as admitted.

[17] The Applicants' evidence regarding the correspondence directed to the Respondent and the tarnishing effect of the purported defamatory statements on the reputation of the Applicants are not directly dealt with and must be regarded as admitted.

[18] From the above discussion it is clear that any defamatory statement is denied by the deponent on behalf of the Respondent. It is denied that the first statement attacked in the notice of motion refers to the First Applicant. Also the second statement referred to in the notice of motion namely the defamatory reference thereto that the First Applicant purchased unit 1341/505 "on a dishonest way on auction for a small amount" is denied.

The additional explanation attempts to justify the statement in the answering affidavit that the First Applicant does not give a truthful explanation regarding this sale and the amount paid by the First Applicant for this unit.

[19] In the heads of argument of the Applicants it is stated, as was also orally argued, that the correctness of the draft minutes is not disputed and can be taken is common cause. This is done with reference to paginated pages 95 and 96 at paragraph 5 of the answering affidavit. I have read pages 95 and 96 of the paginated papers and do not find that the correctness of the draft minutes is admitted at all. I referred to the evidence of the deponent on behalf of the Respondent in this regard here above in some detail in order to point out that I cannot find that the draft minutes are common cause.

[20] The question then arises whether the fact that the Applicants obtained the draft minutes of the AGM from the Respondent's management agent and therefore from the Respondent's agent with authority to make such document (i.e. the draft minutes) available to the Applicants, make the draft minutes admissible as a correct record of what was said at the AGM. Secondly the question arises whether the Respondent's denials of the material allegations of either injurious falsehood or defamation referred to above are false and intrinsically improbable and thus must be rejected.

[21] On the dictum in ***Plascon supra*** a court is entitled to reject allegations or denials that are so far-fetched or clearly untenable that a court is justified

in rejecting them merely on the papers. The approach in this regard has become more robust because in the absence thereof the busy motion courts in the country might cease functioning. *"But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."* See***: Fakie NO v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) at paragraphs 55 and 56.

[22] The First Applicant did not attend the AGM. He is the only deponent on behalf of the Applicants. He relies solely on the contents of the draft minutes of the AGM for the relief sought. The Applicants are correctly criticised that they do not support their evidence with an affidavit or affidavits of persons who attended the AGM, nor of the management agent or the person responsible for minuting down the draft minutes of the AGM. The Applicants therefore rely thereon that the draft minutes correctly record what was said at the AGM without themselves having been present and without the evidence under oath of any witness who confirms the correctness of the statements contained in the draft minutes that the Applicants complain about. I emphasize that I already found that the correctness of the draft minutes are not common cause.

[23] In motion proceedings the affidavits serve as not only the equivalent of pleadings but also the evidence required to prove the applicant or

respondent's case. The rules of evidence apply, also with regard to documents. See: ***Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*** 1999 (2) SA 279 (W) at 323G - H. In this case the Applicants rely on the draft minutes of the AGM in order to prove that the Respondent defamed the Applicants at the AGM. Accordingly the purported defamatory words must be proved by the Applicants. They thus must prove that the draft minutes correctly record what was said at the AGM.

[24] The law in relation to the proof of private documents is that the document must be identified by a witness who can be inter-alia the writer of signatory thereof or the person who found it in possession of the opposite party, amongst others. In this case the Applicants obtained the draft minutes from the portfolio manager of the Respondent. Thus this requirement of the law is complied with. However having in this fashion proved the authenticity of the draft minutes, is not sufficient. The contents must be proved as correct, i.e. that the statements on which the Applicants rely were indeed made at the AGM. A document (in this case the draft minutes) does not normally constitute evidence of the contents thereof. The existence of the document only proves the fact that it is, in this case, draft minutes of the AGM. Producing the document through a witness who can identify the document or obtaining a copy thereof from the Respondent (in this case from the portfolio manager as agent of the Respondent) does not prove the correctness of the contents thereof. The contents of the draft minutes are hearsay evidence and therefore inadmissible except if it is proved by a

witness or admitted by the Respondent. See: ***Knouwds v Administrateur Kaap*** 1981 (1) SA 544 (K) at 551H- 552B and ***Howard and Decker Witkoppen Agencies and Four Ways Estates (Pty) Ltd v De Sousa*** 1971 (3) SA 937 (T) at 940D – H and ***Weintraub v Oxford Brick Works (Pty) Ltd*** 1948 (1) SA 1090 (T) at 1093 – 4.

[25] There simply is no admissible evidence before me as to the veracity of the contents of the draft minutes of the AGM, namely on the question whether the words complained of were indeed conveyed to the attendees of the AGM. It is trite that the Applicants must prove the defamatory statement. I cannot simply disregard the denials of making the defamatory statements of and concerning the Applicants at the AGM in the absence of admissible evidence as to the correctness of the contents of the draft minutes in this regard. The purportedly defamatory statements are the fundamental starting point of the Applicants' case against the Respondent. I accordingly cannot apply the robust approach that would be required in order to find for the Applicants on the issues in this matter.

[26] I disagree with the Respondent that the draft minutes, in unsigned form cannot serve as evidence of what occurred at the AGM. Minutes of a meeting are at best prima face evidence of what occurred at a meeting and unsigned minutes of the Respondent's meetings would not mean that the resolutions taken at the meeting are not binding. See: LAWSA, Second Edition, volume 17 (2) at paragraph 200 and volume 24 at paragraph 448. Insofar as paragraph 448 appears to say that an unsigned minute is not

evidence in a court, I disagree with this statement. However, in this case the fundamental problem lies with the fact that there is no admissible evidence before me regarding the correctness of the contents of the draft minutes of the AGM.

[27] The above-mentioned finding probably makes it unnecessary to make any findings on the three points *in limine* but I will shortly state my views regarding these points.

[28] The first point is that the application is too late or should have been dealt with as an urgent application because the next annual general meeting would have passed long before the application was heard. It is clear that the draft minutes exist and may surface, as it did at the request of the Applicants, again. Assuming that the draft minutes indeed correctly reflect what was said of the Applicants, the said draft minutes could still in future damage their reputation. I would thus not have upheld this point.

[29] The second point *in limine* was that the AGM was cancelled after a number of hours and accordingly there cannot be minutes of a cancelled meeting. The very existence of the draft minutes proves the contrary and I would also have dismissed this point.

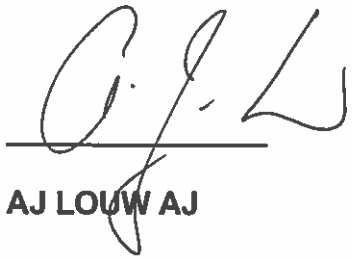
[30] The third point is that the purpose of the application has been rendered useless as the annual general meeting scheduled for 17 April 2019 took place and the draft minutes or minutes of the cancelled AGM were not tabled at the 17 April 2019 annual general meeting. The same reasoning

applies with regard to both the two previous points *in limine*. I would therefore have dismissed this point also.

[31] As regards the third prayer in the notice of motion, there is on the admissible evidence before me no case made out for the third prayer. The third prayer in any event is a restatement of the law namely that one may not defame another person. As it is formulated it is too vague to be made an order of court.

[32] The Applicants were not successful with the application and must accordingly bear the costs of the application.

[33] I make the following order: the application is dismissed with costs.



AJ LOUW AJ