

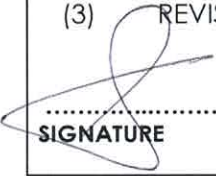
**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION PRETORIA**

CASE NO: 26427/2020

DOH: 24 NOVEMBER 2021

(1)	REPORTABLE: YES / <u>NO</u>	(1)
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
 ..... SIGNATURE		<u>4/4/2022</u> ..... DATE

**DR. RENOSI MOKATE**

**APPLICANT**

**and**

**THE UNITED DEMOCRATIC  
MOVEMENT**

**FIRST RESPONDENT**

**RETIRED GENERAL**

**BANTUBONKE HARRINGTON HOLOMISA**

**SECOND RESPONDENT**

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## JUDGEMENT

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THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 04 APRIL 2022

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### MALI J

1. This application has origins in the urgent court wherein it was struck off the roll due to lack of urgency. The applicant amongst others sought the following:

*"2. That the allegations in the statement titled 'DBSA: Looting of state resources by some of the same people involved in the Public Investment Corporation saga' ('the Assailed Statement') be declared defamatory, unlawful and false.*

*3. That it be declared that the Respondents' publication of the Assailed Statement is and continues to be unlawful.*

*4. That the Respondents be ordered to remove the Assailed Statement, within 24 hours, from all their medial platforms, including, but not limited to Twitter and the First Respondent's website.*

*5. That the Respondents be ordered, within 24 hours of this order, to publish a notice on all their medial platforms, in which they unconditionally retract and apologize for the allegations made in the Assailed Statement.*

*6. That it be directed and ordered that the Respondents are immediately interdicted from publishing any express statement or implication that the Applicant has been and is a director of Poseidon (Pty) Ltd, that the Applicant behaves like 'locusts that hop from one source of easy funding to the next', that the Applicant aims to enrich herself by illicit means, that the Applicant is unscrupulous, corrupt, a criminal and/ or guilty of misconduct or similar*

*sentiments and that the Applicant is unfit to be the Chairperson of the Government Employees Pension Fund (" the GEPF") or to hold similar positons of status.*

*7. The Respondents are ordered to make payment of R500,000 to the Applicant within 7 days of this order.*

*8. In the alternative to prayer 7, that the determination of quantum of damages be postponed sine die of an enquiry into damages.*

*9. The Respondents are ordered to pay the Applicant's costs as between attorney and own client, which costs include the costs of two counsel, one of which is senior counsel.*

*10 Further and/ or alternative relief."*

2. The applicant is a person of great importance, same applies to the second respondent. The applicant holds a PhD and MA from the University of Delaware, Newark, and a BA from Lincoln University, Pennsylvania. She is a former Executive Director and Chief Executive Officer of the Unisa Graduate School of Business. She is also a former Independent Consultant for the Ministry of Finance and National Treasury as well as a member of the Investigation Steering Committee of the Municipal Demarcation Board.
3. Amongst her many important roles she was a Deputy Governor of the South African Reserve Bank. She is a board member of the Bidvest Bank as well as Vukile Property Fund. At the time of hearing of this application she was the Chairperson of the Government Employees Pension Fund which was established in terms of the Government Employees Pension Law, Act 21 of 1996, as amended ("*the GEPF*"). The GEPF. The GEPF is a separate juristic entity and is Africa's Largest pension as well as a single investor in the Johannesburg Stock Exchange. It manages pensions and related benefits on behalf of approximately 450 000 pensioners in South Africa. For purposes of this application, most significantly is that, she is a Politically Exposed Person ("*PEP*").



4. The second respondent is the President of the first respondent political party and its elected representative in the National Assembly for more than 20 years, at the time of hearing of the application. He is also a retired Major General.

### **ASSAILED STATEMENT**

5. It is common cause that on 17 June 2020 the respondents published a statement on the first respondent's website, the second respondent's Twitter account. The statements were further contained in a letter addressed to the, (i) The President of the Republic of South Africa; (ii) Minister of Finance of South Africa; (iii) Chairperson of the Development Bank of Southern African; and (iv) Chairperson of the Public Investment Corporation.

6. The statements are as follows:

*"DBSA looting of state resources by some of the same people in the Public Investment Corporation saga"*

1. *I write to you with grave concern over the apparent looting of state resources by some of the very same individuals that were found to have had enhanced ability to secure easy accesses to Public Investment Corporation (PIC) funds. We seem to have the same style of legal corruption, but this time it is at the Development Bank of Southern Africa (DBSA). A curious feature, however, is the emergence of the involvement of the Chairperson (GEPP). Elitist people seem to behave like locust that hop from one source of easy funding to the next; voraciously consuming every opportunity they can generate through whatever means. Once they have depleted one source, they effortlessly jump to the next one with the same agenda-enriching themselves at any cost and patting themselves on the back for being such clever operators."*

*“Clearly there is enough motivation to have, at the very least, immediately suspended Harith’s management of any and all of PIC/GEPF funds and launched further investigation. Has government taken any action to protect the PIC/ GEPF from these self-enriching individuals? If not, why not?*

*4. To make matters worse, this recipe for plundering state resources is seemingly being replicated at the DBSA with the very same people involved. This time, at the face of it, with a new vehicle called Poseidon (Pty) Ltd, of which the shareholding is as follows:”*

*5. The DBSA has recently funded Poseidon to the tune of R50 million to conduct feasibility studies, for some kind of water project/s in South Africa and other Southern African countries. Another R300 million is apparently still to be disbursed for the implementation of Poseidon’s project.”*

*“The following persons are also Poseidon directors:*

*6.1 Dr. Renosi Mokate (GEPF Board Chairperson),*

*6.2 Ms. Lungile “Zee” Cele (Independent non- executive director of Harith General Partners and a former board member of Eskom Holdings SOC Ltd),*

*6.3 Mr. Roshan Morar (former PIC Deputy Chairperson, former Chairman of the South African National Roads Agency SOC Ltd, chairman of Ithala Development Finance Corporation (Ltd) and non-executive director of Harith General Partners) and*

*6.4 Ms. Motsea Alix- Mary Lugemwa (former Chairperson of the Gautrain Management Agency Board and non-executive director of PAIDF)*

*This list reads like a dream-team of politically exposed persons (PEPs) who seemingly have access to public funds. It is especially worrying to find the name of Dr. Renosi Mokate on this list; a scenario where a GEPF Chairperson has access to public funds using a private conduit, after having seen what happened at the PIC, is indefensible. She must be removed as GEPF Chairperson with immediate effect.”*

7. Determining whether a statement was defamatory involves a twofold enquiry. First, one establishes the meaning of the words used. Second, one asks whether that meaning was defamatory in that it was likely to injure the good esteem in which the plaintiff was held by the reasonable or average person to whom the statement was published. Where the injured party selects certain meanings in order to point the sting of the statement, they are bound by the selected meanings. The meaning of the statement is determined objectively by the legal construct of the reasonable reader and is not a matter on which evidence may be led.

8. Defamation, which forms part of the law of delict, can be defined as the unlawful publication of a defamatory statement concerning another person. In the case of *Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (SCA)*, Plewman JJA defined defamatory statements as follows:

*“...a defamatory statement is one which injures the person to whom it refers by lowering him in the estimation of the ordinary intelligent or right-thinking members of society...”.*

9. There are certain elements that must be present in order for a person to succeed in a claim for defamation. The elements consist of the

- (i) wrongful,
- (ii) intentional
- (iii) publication of a defamatory statement concerning a person.

The law requires that the three aforementioned elements be present to successfully prove that defamation has been suffered by a party.

10. The applicant's case as per the founding affidavit commences with the negative impact of the impugned statement to the GEPPF. The applicant



further avers that despite the Public Investment Commission of inquiry (*"Retired Justice Mpati Commission"*) doing an intensive investigation, there was absolutely no suggestion of any wrongdoing or any misconduct by herself. The GEPP refused to be joined, although it has supported the applicant's case. The GEPP stance has no legal basis. It is either the party is joined or not; in the least indicate to abide by the court's decision.

11. It is further submitted that the applicant is not a director of Poisedon and has no connection with that company. In fact, the entire application appears to be based on the assertion that she has no connection with Poseidon, the company whose suspicious deal with DBSA triggered the second respondent's utterances.
12. According to the respondents' brief outline of salient facts the following is of significance. In their public and political capacities and in line with their well-established corruption –busting pedigree, the respondents received information from a whistleblower regarding the funding bid made by a company called Poseidon to the Development Bank of South Africa (*"DBSA"*), an organ of state accountable to the Minister of Finance in terms of the Public Finance Management Act 1 of 1999.
13. It is the respondents' version that the information implicating Poisedon came in the form of a few copies of slides which seemingly formed part of a larger slide show evaluating the aforesaid funding, which are annexed in their answering affidavit. The applicant's gripe understandably so is that she is no a director of Poseidon, a fact admitted by the respondents. Nevertheless, the issue does not end there.
14. Paragraph 21 of the respondents' affidavit is of significance. Respondents aver that they are in the process of doing everything in their power to obtain the full information, without compromising the protection of the whistleblower. In this regard annexure *"BBH 2"*, a letter addressed to

DBSA by the respondents' attorneys. The essence of the correspondence is a clear request for information in terms of the Promotion to Access of Information Act, 2000. At paragraph 4 of the letter the following appears:

*"4 In summary, we hereby request that you provide us with the following documentation:*

*4.1 all information pertaining to the 26 March 2020 transaction which was approved by the DBSA Board.*

*4.2 the original document which applied for the funding; and*

*4.3 Any due diligence the DBSA had undertaken."*

15. At the time of hearing this application the respondents had not yet received a response to the above. At paragraph 5.1 of the applicant's replying affidavit the following is stated:

*"5.1 I specifically note that the Respondents made harmful allegations against me based on the above incomplete and secondhand "slides" and did "desktop research". The Respondents made no attempt to even contact me about the harmful allegations before widely distributing false and egregious allegations and irreparably damaging reputation".*

16. From the above it appears that the applicant has knowledge of the first hands slides which she also fails to produce, same as the respondents having failed to produce their research. Coming to the respondents' case they make invaluable allegation of a whistleblower information. Whistleblower information is regulated under Protected Disclosures Act 26 of 2000. The purpose of the Act reads:

*"To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers, to provide for matters connected therewith."*



17. It is not clear from the respondents' affidavit whether the whistleblower is an employee of DBSA, be that as it may the objects of the and application of Protected Disclosures Act are amongst others;

*"(a) to protect an employee, whether in private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;"*

18. Furthermore, paragraph 71 of the answering affidavit the following bears:

*"I admit that the applicant is not a director or shareholder of Poseidon. However, this is a peripheral issue."*

Applicant's reply is as follows:

*"In paragraph 71 the Respondents admit that they lied about me in the document."*

19. The applicant does not address that the untruth about her directorship is a peripheral issue or challenge the essence of the subject matter. In ordinary motion court proceedings, the primary purpose of a replying affidavit is **to put up facts that refute the respondents' case**. (own emphasis).

20. The last sentence of paragraph 72 of the answering affidavit reads; *"In any event, her name is specifically mentioned in the whistleblower information."* In her replying affidavit she does not attempt to address this thorny and or very curious mentioning of a whistleblower. I am not at all suggesting that I believe there is a whistleblower with information pertaining to the applicant's connection to Poseidon, until the matter is properly ventilated. With greatest respect to the applicant I do not imply she is corrupt by any means.

21. From the important issue of a whistleblower information alone I believe there are fundamental issues not addressed in the applicant's replying

affidavit. There is a glaring dispute of facts in this application In *Stellenbosch Famer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 where the court held that:

*"where there is a dispute as to the facts, a final interdict should be granted in motion proceedings only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such an order, or where it is clear that the facts, although not formally admitted, cannot be denied and must be regarded as admitted."*

22. In the present matter there is a dispute about the connection/ and or relationship of the applicant to the Poisedon. In the assailed statement the respondents make a fact that the applicant is a director of Poisedon, however under oath the respondents state that it is a fact that the applicant is **connected** (own emphasis) to Poisedon, and are prepared to back up the assertions with evidence. As indicated in paragraph 14 they are still yet to receive the information they wish to rely upon, from DBSA.
23. The importance raised by the assailed statement cannot be underestimated in a country where we are faced with large scale corruption. At the same time no one should be accused of such acrimonious conduct in vain resulting to harming anyone's reputation. Issues of this nature need proper ventilation. Another issue for consideration is the unsubstantiated amount of claim for damages, although the order is sought in the alternative it would anyway require enquiry in the form of oral evidence.
24. For the foregoing it is concluded that, the matter should be referred to trial. In the result the following order ensues:

## ORDER

1. The matter is referred to trial on a date to be allocated by the Registrar;
2. The affidavit/s of the applicant will stand as simple summons and the affidavit of the respondents will stand as pleadings.
3. Respondents are to subpoena witnesses in particular the whistleblower, within the confines of the Protected Disclosures Act 26 of 2000.
4. Both parties may amend their pleadings in accordance with Uniform Rules of the Court.
5. Parties are ordered to hold a pre-trial conference and or case management within 21 days of closing of the pleadings.
6. Costs of this Application are to be determined in the trial.




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**N P MALI**

**JUDGE OF THE HIGH COURT, PRETORIA**

## APPEARANCES:

For the Applicants-

Adv. CE Puckrin SC

Adv. K Kollapen

Instructed by Mncedisi Ndlovu & Sedumedi Attorneys

c/o Mpoyana Ledwaba Inc.

For the Respondents-

Adv. D Mpofu SC

Adv. K Pillay

Instructed by Mabuza Attorneys

c/o Nkome Inc. Attorneys