IN THE HIGH COURT OF SOUTH AFRICA,

KWA-ZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10175/2013

In the matter between:

R[…] K[…] M[…] **Applicant**

and

R[…] L[…] B[…] **Respondent**

JUDGMENT

Judgment delivered on: 19 September 2014

CHETTY, J:

[1] The applicant launched an urgent application on 9 September 2013 in which the following relief was sought:

1.1 That the respondent be ordered to remove all messages as contained in annexure 'D' to the applicant's founding affidavit, from her Facebook page;

1.2 That the respondent be ordered to refrain from posting any defamatory statements about the applicant on her Facebook page;

1.3 That the respondent be ordered to refrain from in any way making, publishing and/or distributing defamatory statements about the applicant.

[2] The matter was heard on an urgent basis on 10 September 2013 by my colleague Nkosi J in Chambers, when he granted the applicant interim relief in terms of prayers 1 to 3 of the Notice of Motion. The applicant comes before this Court seeking confirmation of the interim Order, together with costs of the application. The application is opposed.

[3] It is necessary to sketch the brief history of the matter, and particularly the facts giving rise to the launching of the application. The applicant and the respondent are the biological parents of a minor child, a daughter P born in July 2008. At the time of the launching of the application, the child was five years old. The respondent and the applicant were never married, and at the time of the institution of these proceedings, were no longer in a relationship. P lives with the respondent. In terms of an arrangement between the parties, the applicant has contact with his child every alternate weekend from Friday afternoon until Sunday afternoon. It is not disputed that in accordance with this agreement, the applicant picked up his daughter on the weekend commencing 30 August 2013 and returned her to the respondent on Sunday 1 September 2013.

[4] During the course of this particular weekend the applicant and his daughter visited the house of a friend, and ended up staying over. During the course of the evening, other friends gathered at the house eventually resulting in P sharing a bed with an adult female, who is a pre-primary school teacher, and someone known to her as she had babysat P on previous occasions. The applicant has categorically stated that he has never had a romantic relationship with the teacher concerned. P was safely returned to her mother on the Sunday.

[5] In the week that followed, the applicant received calls from several friends drawing his attention to a posting by the respondent on Facebook, under the heading “DEBATE”. The posting reads as follows:

> ‘DEBATE: your ex has your daughter (5) for the weekend and is sleeping at a mates house. They all (about six adults) go jolling and your ex’s drunk, 50 yr old girl “friend” ends up sleeping with your daughter cause he doesn’t want his girl “friend” sleeping in a single bed she can share the double bed with his/your daughter! How would you feel?’

[6] It is not in dispute that at the time of this posting the respondent had 592 “Facebook friends”. A number of the respondent’s ‘friends’ responded to her posting and were critical of the behaviour of the applicant. The respondent further contributed towards the debate by making subsequent postings to that set out above. These postings or messages appear as annexure ‘A’ to the applicant’s founding papers. The initial postings resulted in a further debate with the respondent’s brother Sheldon Braithwaite, who questioned the aspersions cast by the respondent on the applicant and the teacher with whom P shared a bed. These postings appear as annexure ‘B’ to the applicant’s founding papers.

[7] In light of the postings, which the applicant regarded as defamatory and detrimental to his business reputation, he engaged his attorneys who wrote to the respondent on 4 September 2013 clarifying that during the weekend in which the applicant had access to P, at no time therein was she placed in any danger, nor was her safety compromised in any way. His attorneys then called upon the respondent to remove the offending postings (annexures ‘A’ and ‘B ‘to the founding papers) from her Facebook page by the close of business on 4 September 2013, failing which they threatened litigation.

[8] According to the respondent, she removed the offending postings by 5 September 2013. Accordingly, at the time when the application came before my colleague Nkosi J, the respondent contended in her opposing affidavit that there was no need for the application as she had long since complied with the demand and

removed the postings. In support of the submission, the respondent attached an SMS received from the applicant on 5 September 2013 stating:

> 'And well done on removing your false Facebook posting – you've saved yourself from a lawsuit. Ensure no further defamatory posts are put up or you'll find yourself in Court!!'

[9] As is evident from the prayers sought in the Notice of Motion, notwithstanding the removal of postings in the form of annexures A and B, the applicant persisted in his application for urgent relief on the basis that the respondent had failed to take down the postings on what is referred to as her Facebook Wall, which the applicant contends "*retained a partisan version of the debate"*. The postings on the respondent Face Wall appeared as annexure D to the applicant's founding affidavit. The applicant contended that the contents of annexure 'D' defamed him, even though the respondent has deleted the earlier postings on her Facebook page. In order to understand the applicant's complaint, a perusal of the respondent's Facebook Wall reflects the contents of active debate taking place between the respondent and her friends. The subject of the debate continues to be the incident relating to the applicant's care (or neglect) of his daughter over the weekend at the end of August 2013. In particular, the opening message on the applicant's Facebook Wall is the following:

> 'This is my FB page which I can get opinions on matters close to my heart, if you don't like it then go read someone else's and defriend me!'

[10] This message was posted in response to earlier messages from the respondent's brother, S[…] B[…], who it would appear, did not take kindly to the insinuations of neglect aimed at the applicant.

[11] Earlier decisions by Satchwell J in *Dutch Reformed Church Vergesig & another v Sooknunan* 2012 (6) SA 201) (GSJ) and Willis J (as he then was) in *H v*

W [2013] 2 All SA 218 (GSJ) contain a comprehensive description of the various terms associated with social networking and Facebook. It is not necessary for me to repeat these here.

[12] It was submitted by Mr *Flemming*, who appeared on behalf of the applicant, that even though the respondent removed the postings, being annexures 'A' and 'B' to the applicants founding affidavit, the "remnants" of that debate lingered on the respondent's Facebook Wall at the time when the application for urgent relief was launched. It was for this reason that the applicant persisted in the relief sought on an urgent basis. This much is clear from the respondent's opposing affidavit to the interim relief sought, where she states:

> 'As to the items shown in Annexure D to the Applicant's founding affidavit, these remnants of the "debate" may have remained after I made the initial deletion.'

[13] The respondent's defence is that she did not consider the contents of annexure 'D' to be defamatory, but also that she that removed it prior to the application being heard. In this regard she says the following:

> 'They had in any event been posted prior to my receiving the Applicant's text message. I have since deleted them as well. As they have been deleted I am unable to ascertain when they were posted and when they were deleted.' (my underlining)

[14] The primary contention of the applicant in relation to the contents of annexure 'D' being defamatory stems from a reference or posting by the respondent where she says the following:

> ‘I have Every right to know who ends up looking after / sleeping with my daughter. Completely different situation Sheldon get real please. Looking after a child during school hours or afternoon is different to a night time, when alcohol and drugs are involved!!’

[15] In light of the above, and in particular the reference to the use of drugs, the applicant contended that he had a *prima facie* right to approach the Court to ensure that his reputation was not further harmed and that he should not be subjected to defamatory statements being posted by the respondent. He considered the postings to be harmful to him as a father, but also that it could have a detrimental impact on his business reputation and character.

[16] At the time of the interim application, the stance of the respondent was that she had taken down the postings, and that the application was unnecessary and that no urgency existed for it. She further contended (without making any concession) that if the applicant was defamed, then he had an alternative remedy for damages. On this basis alone, she contended that the interim order ought not to have been granted. As matters transpired, the Court was not persuaded by these arguments and was satisfied that the applicant had made out a *prima facie* case for the relief, and that the balance of convenience favoured him. Accordingly the Court granted a *rule nisi* in terms of prayers 1, 2 and 3 of the Notice of Motion.

[17] The applicant is now before the Court seeking confirmation of the rule and that he be granted costs of the application. The final relief sought by the applicant is opposed. It would be perhaps most expedient to deal with the matter on two legs: first, whether the order granted in prayer 1 – directing the respondent to remove all messages which appeared in annexure ‘D’ to the founding affidavit - should be made final. This relief is sought in the form of a mandatory interdict to remedy a wrongful state of affairs which the applicant contends has been brought about by the actions of the respondent. The relief sought by the applicant is not dissimilar to that sought in *Tsichlas & another v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W) where the

club secretary of a popular football club brought an application to restrain a football magazine's website from publication of defamatory matter on what, at the time, was referred to as a "Chat forum". I shall return to analyse this judgement as it is instructive in respect of the relief which I consider to be appropriate in this matter.

[18] Mr *Pretorius*, who appeared for the respondent, contended that as the respondent had removed the contents of annexure 'D' prior to the hearing of the urgent application, or at the latest, on the day the application was heard (10 September 2013), the Order should not have been granted. The respondent contends that the rule (prayer 1 specifically) should be discharged. In support of his argument, counsel correctly submitted that there is a dispute of fact on the papers as to when the content of annexure 'D' was removed. There has been no request for a referral to oral evidence from the applicant and in any event this dispute was capable of being resolved on the common cause facts. In terms of the *Plascon-Evans* rule where disputes of fact arise on the affidavits, a final order can be granted only if the facts as set out in the applicant's affidavit, which have been admitted by the respondent, together with the facts set out by the respondent, justify such an order. See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

[19] The question remains whether the applicant has satisfied the requisites for a final interdict. See *Setlogelo v Setlogelo* 1914 AD 221. 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; and (c) the absence of any other satisfactory remedy. In respect of the postings on her Facebook Wall, referred to as annexure 'D', on the respondent's own version she accepts that they may only have been taken down on the day when the interim Order was granted, or thereafter in compliance with the Order. The clearest evidence which could have resolved the issue would have been for either party to produce a copy of the respondent's Facebook Wall, which would indicate whether the alleged defamatory statements remained or not. The respondent clearly complied with the earlier request from the applicant's attorney to remove the postings referred to as annexures 'A' and 'B' to

the founding affidavit, despite her persistence that they were not defamatory. As Willis J pointed out in *H v W* (supra) para 27:

> 'In our law, it is not good enough, as a defence to or a ground of justification for a defamation, that the published words may be true: it must also be to the public benefit or in the public interest that they be published. A distinction must always be kept between what "is interesting to the public" as opposed to "what it is in the public interest to make known". The courts do not pander to prurience.'

[20] Other than a denial that the postings were defamatory, the respondent does not make out any argument of the public interest in respect of the statements attributed to the applicant. I am satisfied that the applicant was entitled to approach the Court on an urgent basis at the time that he did. I am accordingly satisfied that the applicant has made out a case for first part of the *rule nisi*, in terms of the relief sought in prayer 2.1 of the Notice of Motion, to be confirmed.

[21] I now turn to the second leg of the enquiry, that of the confirmation of prayers 2.2 and 2.3 of the *rule nisi*. Counsel for the applicant submitted that a proper case was made out for the granting of the relief that the respondent refrain from posting any further defamatory statements about the applicant on her Facebook page. The relief sought in 2.3 is wider than that in 2.2, and contemplates an order against the respondent from publishing or distributing any defamatory statements about the applicant. As I understood the argument, the relief foreshadowed in 2.3 extends beyond the social network platforms, and could extend to printed media or any other form of publication. In essence, the contention on behalf of the applicant is that the Court should have regard to the prior conduct of the respondent, and in light thereof, in order to protect his reputation into the future, the applicant is entitled to the orders in 2.2 and 2.3. Mr *Fleming* submitted that if the Court were disposed to granting this relief, in the event of future transgressions by the respondent, the applicant would be entitled to approach the Court on the basis of contempt as opposed to having to prove, on a *prima facie* basis, the right to an interim interdict to stop defamatory utterances or statements being made.

[22] An attempt was made by counsel for the applicant to draw on analogy between the orders sought herein and an interdict obtained under the Domestic Violence Act 116 of 1998, which provides that a person may acquire a protection order in order to prevent further incidences of domestic violence against a person with whom the complainant has been in a domestic relationship. A domestic relationship, for the purposes of that Act includes a relationship between a complainant and a respondent where they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time). In the event of the one partner to the relationship violating the existing order, the party in whose favour the interdict has been granted may secure the assistance of the police to have the other party summarily arrested. I am not convinced that there is a sufficient correlation between the harm that the Domestic Violence Act was intended to rein in by providing for an anticipatory or prospective interdict against a violent domestic partner, and a prohibitory interdict of the nature sought by the applicant.

[23] It was further submitted by Mr *Fleming* that if an interdict was granted against the respondent preventing her from making defamatory statements in the future about the applicant, it would be an easier task for the applicant to approach the Court on the basis of contempt rather than having to traverse the entire background or history of his relationship with the respondent. I am not persuaded by this argument, nor do I think that it would be in the interests of justice to make it “easier” for one party to seek relief against another in litigation that may possibly result at some time in the future. Moreover, the penalty for contempt is far more drastic than having to deal with an interim interdict.

[24] On the other hand, the respondent submitted that there is no basis at common law for a Court to curtail the respondent in respect of material which is not as yet known to the Court, nor has it been presented or published. As such the Court is asked to speculate on what could constitute a defamatory statement, uttered or

published by the respondent against the applicant. It was correctly submitted in my view that even if the statement in the future by the respondent is defamatory of the applicant, it is equally so that not every defamatory statement is *per se* actionable in that the respondent may have a good defence to its publication. For example, the respondent might be under a legal duty to furnish information about the applicant in connection with an investigation of a crime, or she could be a member of a public body which places on her a social duty to make defamatory statements about the applicant. To this extent, the respondent may make defamatory statements about the applicant in circumstances where they may be a qualified privilege. Obviously it would be necessary to ascertain the nature of the occasion in order to determine whether any privilege attaches to it. The difficulty in granting such an order is evident, albeit in the context of the publication of an article, from the judgement in *Roberts v The Critic Ltd & others* 1919 WLD 26 at 30-31 where the Court held:

> 'I think I have jurisdiction to make an order restraining the publication of a specific statement that is defamatory, but in the present case I am asked to restrain the publication of an article in so far as it is defamatory; if the applicant's contention is correct this will come to the same thing as restraining any continuation of the article at all, because that contention is that no continuation of the article can be written that is not defamatory. . . . There is the grave difficulty in the way of granting an interdict restraining the publication of an article which purports to deal with a matter of great public interest, and which I have not before me. It is impossible to say what it will contain, however grave one's suspicions may be. The respondents specifically state that the continuation will not be libellous, nor will it slander the petitioner; nor will it affect her good name and fair fame. It can only be determined upon the publication of the article if this statement be true. I think it is impossible for me to deal with it now. In the cases I have referred to the defendants insisted on the right to publish the statements complained of. The interdict must therefore be discharged.'

[25] At the same time it has also been held that it is lawful to publish a defamatory statement which is fair comment on facts that are true and in matters of public interest, as well as in circumstances where it is reasonably necessary for and relevant to the defence of one's character or reputation. Counsel relied on the judgement of Willis J in *H v W* (supra) para 40 in support of his submission that

Courts should not be eager to prohibit or restrict parties in respect of future conduct, of which one can only speculate in the present. The Court held that:

> 'Although judges learn to be adept at reading tealeaves, they are seldom good at gazing meaningfully into crystal balls. For this reason, I shall not go so far as "interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media". I have no way of knowing for certain that there will be no circumstances in the future that may justify publication about the applicant.'

[26] As indicated earlier, the relief that I consider proper in this matter is influenced in large measure by the reasoning of Kuny AJ in *Tsichlas & another v Touch Line Media* (supra) where the applicant sought to restrain the respondent from publishing defamatory material of her on its website. In arriving at his decision not to grant the relief sought by the applicant, the Kuny AJ noted, at 124C-D that the effect of the prayers sought, if granted, would constitute interdicts, and, indeed interdicts of a permanent and not merely of an interim nature.

[27] Although counsel did not pursue any argument based on freedom of expression, this Court has to consider whether it would be appropriate to interdict the respondent in advance of defamatory or derogatory statements by her in relation to the applicant. Section 16 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right of freedom of expression and the freedom to receive or impart information or ideas. Whilst the applicant has the right to the protection of his dignity and reputation, there is equally a right on the part of the respondent to freely express herself. Obviously, that right is not without limitation.

[28] In today's world, the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet. At the same time the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to the reputational integrity of

individuals. However, to grant an order sought in prayers to 2.2 and 2.3 would be a drastic limitation and restraint on the respondent's freedom of expression. A simplistic view of the relief sought, may be met with an argument that the applicant is not seeking to curtail the legitimate and lawful use of Facebook by the respondent. The applicant, it could be said, is merely seeking to restrain the respondent from making defamatory or derogatory statements concerning him. As set out earlier this argument must fail because it is clear that not every defamatory statement made by the respondent about the applicant would be actionable.

[29] Moreover, given the relationship between the parties and that they have a child together, the potential or risk for one party to abuse an Order which may be granted in terms of prayers 2.2 and 2.3 to settle personal vendetta's against each other, is great. The interest of the child that both parties have with each other, would be lost in the constant restraint and monitoring of statements that the respondent may make in relation to the applicant into the future. In my view, if the respondent were to repeat her conduct in the future and make derogatory or defamatory statements about the applicant, I have no doubt of his right to approach this Court for relief in the form of an interdict. Equally, he always has the remedy of suing the respondent for damages. In the circumstances, I am not inclined to grant the relief sought in prayers 2.2 and 2.3.

[30] In relation to costs, the applicant has been successful, albeit only in obtaining confirmation of the relief sought in prayer 2.1. The respondent has been successful in warding off an interdict to restrain her from making future comments about the applicant. This Court has a discretion in deciding the issue of costs, which discretion must be judicially exercised. The conduct of the respondent resulted in this litigation being instituted. Although she has been partially successful, I see no reason why she should not be liable for the costs of this application.

[31] In the result I make the following order:

1. The *rule nisi* issued on 10 September 2013 ordering the respondent to remove all messages contained in annexure ‘D’ to the applicant’s founding affidavit from her Facebook pages, is confirmed.

2. The respondent is to pay the costs of this application.

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M R CHETTY

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Adv. A G Flemming, Instructed by Hay & Scott Attorneys, Pietermaritzburg.
For the Defendant:	Adv. JP Pretorius, Instructed by W H A Compton Attorneys, Pietermaritzburg.
Date of hearing:	8 September 2014.
Date of judgment:	19 September 2014.