Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 2471/08

[Reportable]

In the matter between:

TREVOR ANDREW MANUEL
Applicant

and

TERRY CRAWFORD-BROWNE
Respondent

JUDGMENT: 6 MARCH 2008

Le Grange J:

[1] The decision of the South African Government to embark upon an arms procurement process *(the arms deal)* and the subsequent acquisition of arms and related equipment for the defence capability of the National Defence Force has been the subject matter of much debate in recent years.

[2] This application, on an urgent basis, is a direct result of this ongoing debate. The Applicant in this matter, who is also the Minister of Finance since 1996 and a senior member of Cabinet, gave effect to the

consequential financial arrangements which included the raising of loan capital. These loan agreements between various International Banks and the South African Government was signed by the Applicant in his capacity as Minister of Finance in 2001, in terms of the provisions of the Exchequer Act, no. 66 of 1975.

[3] The Respondent, a retired banker and member of Economists Allied for Arms Reduction (ECAAR), a non-governmental organization, opposed the arms deal. It is not in dispute, that ECAAR is opposed to military spending and military approaches to conflict resolution and took a stand against the arms deal. The Respondent himself, has written extensively on the subject matter and recently published a book "*Eye on the Money"* to express his views and criticism on the arms deal. It would not be incorrect to describe the Respondent as a fierce critic of the South African Government, including *inter alia* the Applicant, the State President, Mr Mbeki, and the Minister of Public Enterprises, Alec Erwin for the roles they played in the decision to proceed with the arms deal.

[4] The attack on the Applicant briefly stated, is that as Finance Minister, when he signed the foreign loan agreements, he violated the Public Finance Management Act, (PFMA) as these agreements have never been referred to Parliament for authority. Furthermore, the Applicant relinquished control over South Africa's future financial and economic policies to international banks, *inter alia* Barclays Bank and the Commerzbank and "prostituted himself for the sake of political perks and

power" and that the National Prosecuting Authority (NPA) should prosecute the Applicant with corruption and related criminal offences.

[5] The substratum of Applicant's complaint is that the Respondent in two publications dated 24 December 2007 and 3 January 2008, which he recently became aware of, defamed him by stating that he has committed the crime of corruption relating to the arms deal and should be prosecuted by the NPA, without providing any proof or evidence to support these defamatory remarks. The fact that the Respondent has repeatedly criticized the Applicant and widely published the alleged defamatory statements is not in dispute.

[6] The Respondent denies that the particular statements, that are the subject of this application, are defamatory. He argues that freedom of expression in political discourse is necessary in order for members of government to be accountable to the public and that he should not be prohibited from participating in a debate on a matter that is under scrutiny and of public importance.

[7] Mr. B Pincus, SC assisted by Ms S Cowen, who appeared on behalf of the Applicant, argued that the Respondent is properly entitled to question the role of the Applicant as Minister of Finance in the arms deal and to engage in robust political debate about it. The issue is whether the Respondent is entitled to publish articles and post it on his website, which states that the Applicant must be prosecuted with criminal conduct without providing any proof or foundation to the NPA to charge the Applicant.

[8] Mr P Hawthorne, counsel for the Respondent, argued that section 16 of the Constitution would be grossly curtailed if the relief sought by the

Applicant is granted. Furthermore, there is no basis at common law to grant such an order as sought by the Applicant. For this contention reliance was placed on the dictum in Tsichlas and Another v Touch Line Media (Pty) Ltd 2004 (2) SA 112 W at 129 B – C. Moreover, Mr Hawthorne argued that even if the statements complained of by the Applicant are defamatory, there can be no point in suppressing the publication of those statements on the respondent's website. The continued publication of the statements by the Respondent on the Independent Newspaper Website which is more widely read than the Respondent's, according to him, defeats any claim the Applicant might have had to a well grounded apprehension of irreparable harm if the relief sought is not granted.

[9] In this matter, two constitutional rights, freedom of expression and dignity, are at odds and have to be balanced against each other. That balancing process has to be undertaken in a constitutional context. Our Courts have consistently held that, though circumstances may sometimes dictate otherwise, freedom of speech is a right not to be overridden lightly and at the point which the balance of convenience is determined consideration should be given to the fact that the person allegedly defamed will, if the interdict is refused, nonetheless have a cause of action which will result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned. And in the exercise of the discretion in granting or refusing an interim interdict, regard should be had *inter alia* to the strength of the

applicant's case; the seriousness of the defamation, the difficulty a respondent has in proving a defence which it wishes to raise, within the limited time afforded to it in cases of urgency, and the fact that the order may, in substance though not in form, amount to a permanent interdict. (See Hix Networking Technologies , *supra* at 402 D –F).

[10] It is thus generally accepted that cases involving an attempt to restrain publication, must be approached with the necessary caution. Even where there is a risk to rights that are not capable of subsequent vindication, a narrow ban might be all that is required if any ban is called for at all. (See Midi Television t/a E-TV v Director of Public Prosecutions 2007 (5) SA 540 SCA at 548 G.)

[11] The legal principles applicable in the context of an Applicant seeking to prevent alleged defamatory matter being published, is the ordinary rules governing interim interdicts. These requisites are:

a) A prima facie right;

b) a well-grounded apprehension of irreparable harm if the relief is not granted;

c) that the balance of convenience favours the granting of an interim interdict; and

d) that the applicant has no other satisfactory remedy.

[12] In *casu*, it is not in dispute that in November 2001, the Respondent and ECAAR instituted legal proceedings to have the loan agreements, which Applicant as Minister of Finance was party to, set aside. The grounds upon which it was contended that the agreements were unlawful

included the allegations that the Applicant allegedly acted arbitrarily and irrationally and did not comply with the provisions of the Exchequer Act and the PFMA. It appears that the Respondent did not allege during these proceedings that the Applicant was corrupt or guilty of corruption.

[13] It needs to be mentioned that during the same proceedings, the Respondent was pertinently asked by the State's attorneys to specify which provisions of the PFMA and Exchequer Act, the Applicant had breached. The Respondent's attorneys replied in writing during January 2002, that the Respondent would not persist with the attack based on the Exchequer Act and the PFMA as he accepts that the PMFA was not applicable at the time that the loan agreements were concluded. The loan agreements were signed in January 2000 and the PFMA came into effect in April 2000.

[14] Judgment with costs was granted against the Respondent. An application for leave to appeal to the Supreme Court of Appeal by the Respondent was also dismissed with costs. In an effort to recover the two costs orders, an application was launched by the Minister of Finance to provisionally sequestrate the Respondent's estate. In that matter (5811/2005), the Sheriff in terms of the warrants of execution rendered firstly, a *nulla bona* return and secondly attached a vehicle valued at R 7000. Cleaver J, who presided, held that there was no *prima facie* prove that a provisional sequestration order will be to the financial advantage of creditors and dismissed the application. At paragraph [11] and [12] Cleaver J held that:-

> "[11] The respondent states on oath that he has no financial resources and explains how it came that he spent approximately R5 million. His affidavit, while containing much that is irrelevant and even vexatious, contains

additional information about the fruitless campaign which he embarked upon and which appears to have ruined him financially.

[12] As I have mentioned, the respondent's answers contained much that was irrelevant, as well as averments that were clearly vexatious. Not surprisingly, counsel for the applicant moved for the offending portions of the affidavit to be struck out. The paragraphs referred to by counsel are indeed irrelevant and/or vexatious and/or malicious and/or defamatory and will be struck out. The paragraphs in question are paragraphs 1.3 – 1.5, paragraph 2.1, paragraphs 3.1 – 3.6, and paragraphs 4.1 – 6.16."

[15] Applicant's founding affidavit at paragraph (21) states that, one such matter that was struck out, contains the accusations that he committed fraud, perjury and grievously abused the powers of his office.

[16] Freedom of expression is fundamental to our democratic society, however, it is not a paramount value. It must be construed in the context of the other values enshrined in the Constitution, in particular the value of human dignity. Under our new constitutional order the recognition and protection of human dignity is a foundational constitutional value.

[17] The Applicant, as Minister of Finance and member of Cabinet, has like any other person of civil society, a legitimate right to protect his reputation and good name against defamatory statements that injures his person and lowers him in the estimation of ordinary, intelligent or right-thinking members of society generally. (See Mohamed and Another v Jassiem 1996 (1) SA 673 (A) at 703 G- 704 D.)

[18] In the article dated 27 December 2007, the Respondent states as

fact that the Applicant, as Minister of Finance, signed the foreign loan agreements in violation of the PFMA, the agreements was never referred to Parliament as required, bribes were paid to secure certain contracts and the Applicant "*prostituted himself for the sake of political perks and power*" and that he should be charge with corruption. In the second publication dated 3 January 2008, the attack on the Applicant was of similar content. The Respondent stated that the Applicant acted in contravention of the PMFA, bribes were paid, he sold the country out to foreign banks and that he should be charged for corruption, fraud money laundering, racketeering and tax evasion plus for the deliberate and systematic obstruction of justice. Both articles were posted on the Respondent's website. The December-article was also published on the Independent Newspaper website which it appears has a much wider reading audience.

[19] As to the sting of these articles or in other words their defamatory nature, there is little doubt in my mind, it lies in the allegations that the Applicant has contravened the Public Finance Management Act, (PFMA) when signing the foreign loan agreements as these agreements have never been referred to Parliament for authority, bribes were paid by certain preferred contractors, the Applicant is corrupt and that he and other Cabinet Ministers, including the State President should be charged with corruption.

[20] In my view, to say a person, in particular a Minister of Finance, who is charged with the responsibility of the National Treasury and fiscal policy of a Country, is corrupt and should be prosecuted with corruption and similar offences, without providing a shred of evidence pointing to his/her involvement, is defamatory and aimed to lower such person in the estimation of right-thinking members of society.

[21] The repeated attack on the Applicant that he has contravened the Public Finance Management Act, (PFMA) when signing the foreign loan agreements, whilst the Respondent is well aware since February 2002, that the PFMA was not applicable, clearly demonstrates malice and not an

intention of boisterous political discourse associated with freedom of expression which is so vital in our democracy.

[22] The Respondent makes reference in his replying affidavit that the alleged defamatory statements were made within the context of an enormously complex arms deal process, which is still the subject of ongoing investigations and the full ramifications of which is yet to be determined. Moreover, within the limited time afforded to him, being 10 days to prepare, he could not brief his legal representatives fully and file comprehensive opposing affidavits and limited his opposition to two grounds. First, that the relief sought by Applicant is incompetent and secondly that a well-grounded apprehension of irreparable harm if the interim relief sought is not granted, has not been established in the Applicants founding papers.

[23] On the papers filed, the Respondent initially failed to seek a postponement of the hearing to afford him more time to prepare. Even when he did so, during the proceedings, he failed to tender therewith a satisfactorily undertaking. But more importantly the Respondent does not divulge or give any explanation for his assertions that the Applicant is corrupt and has committed the crime of corruption. I deem it not appropriate in the circumstances of this matter to grant the postponement as the Respondent failed to show *prima facie* that if granted the indulgence of a postponement it will place facts before the Court which will constitute a ground of opposition to the relief claimed. (see Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co and Others 1975 (2) SA 776 (C) at 777E.

[24] The proposition by Mr Hawthorne that the relief sought by the Applicant is incompetent, is without merit. His reliance on the dictum in Tsichalas and Another v Touch Line Media (Pty) Ltd 2004 (2) SA 112 WLD, is misconceived. First, the facts of the two matters differs significantly. Secondly the present relief sought by the Applicant is limited and different

from the Touch Line case. Thirdly, the Applicant is not seeking an award of damages against the Respondent in the main action. The head note of the Touch Line matter is instructive. It properly records the following facts:-

"*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.*"

[25] The contention by Mr Hawthorne that the Applicant has alternative remedies needs closer scrutiny. His principle proposition in this regard is that the Applicant can institute, in the main action, a claim for an apology and nominal damages.

[26] Mr Pincus, replied that the proposition in this regard is surprising as the Respondent failed to make any averment in his answering affidavit as regards to the alleged alternative remedies. Moreover, the Respondent is remarkably silent that he would apologise unreservedly, retract the statements and do so sincerely, in the event that he failed to justify what the Applicant alleges is malicious defamation.

[27] In Mineworkers Investments Co (Pty) Ltd v Modimane 2002 (6) SA 512 WLD at 525 E, on the question of an apology, Willis J held that the *amende honorable* was not abrogated by disuse but rather forgotten like a little treasure in a nook of our legal attic. In Dikoko v Mokhatlala 2006 (6) SA 235 CC at 265 E-F, the majority decision (*per* Moseneke DCJ) did not make a finding on this issue. Moreover, Mokgoro J (dissenting) held that whether or not the *amende honorable* technically still forms part of our

law, it is important that, once an apology is tendered as compensation or part thereof, it should be sincere and adequate in the context of each case. (at 260 F).

[28] Even if the 'little treasure' can be recovered from a 'nook in our legal attic' I do not believe that a public apology in this matter will be sincere and adequate in the context of this case. In my view freedom of expression does not include the right to falsely attack the integrity of a fellow citizen for selfish reasons or for reasons which have nothing to do with public benefit. The Respondent in his papers is remarkably silent that he would apologize unreservedly, retract the statements and do so sincerely, in the event that he failed to justify what the Applicant alleges is malicious defamation.

[29] On the available evidence, the statements made by the Respondent are in my view defamatory and part of an ongoing campaign to deliberately undermine the Applicant. I am satisfied that a strong *prima facie* right to the Court's protection has been established.

[30] The Applicant's reasonable believe that the Respondent will continue to make the unlawful defamatory remarks and may increase the intensity and frequency thereof unless he has protection of the Court is not unfounded. The Respondent, as mentioned in paragraph [21], persistently made false allegations against the Applicant. No undertaking was given that the Respondent will stop with the defamatory remarks pending the action. There seems to be a well-grounded apprehension of irreparable harm. In this case it is clear that the harm cannot be remedied by the payment of damages. The balance of convenience favours the Applicant.

[31] The limited restraint on free speech resulting from the order I make is not directed to stop the Respondent from participating in a debate of immense public importance. The restraint is directed at the manner in which the Respondent has chosen to participate in the debate and the methods he chose to employ.

[32] This application is a precursor to an action which the Applicant intends to institute. I do not propose making any costs order at this stage, as it is an issue best resolved by the Court which hears the action.

[33] In the result, the following order is made:-

a) Interdicting and restraining the Respondent from publishing any matter in which it is alleged that the Applicant is corrupt or committed the crime of corruption or any other criminal conduct in connection with the arms deal, pending an action;

b) that the Respondent remove from his website all allegations wherein the Respondent has accused the Applicant or suggested that the Applicant is guilty of the crime of corruption or other criminal conduct in connection with the arms deal, pending the action;

c) that Applicant be ordered to launch the action within 20 days of date hereof.

LE GRANGE, J