IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 10061/08

In the matter between:

WINSTON P NAGAN Applicant

and

THE HONOURABLE JUDGE PRESIDENT

JOHN HLOPHE Respondent

JUDGMENT DELIVERED: 19 MARCH 2009

MAJIEDT, J:

[1] The Applicant, a law professor at the University of Florida, United States of America, seeks leave to sue the Respondent, the Judge President of this Division, for damages in the amount of six million rand. Mr. Albertus SC appeared for the Applicant and Mr. Pincus SC, assisted by Mr. Van Reenen, for the Respondent.

[2] Leave to sue is sought in accordance with sec 25 (1) of the Supreme Court Act 59 of 1959 ("the Act"). That provision reads as follows:

> ***"25 No process to be issued against Judge except with consent of court.***
>
> *(1) Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the provincial division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof".*

[3] The prospective damages claim is for alleged defamation which arises from an incident which occurred while the Applicant was acting as a Judge in this Division at the end of 2006. The Respondent has adopted the stance that he does not oppose the relief and will abide the decision of this Court. He has, however,

deposed to a comprehensive answering affidavit "in order to place evidence before this Court which may be of assistance to (it) in deciding this matter", as the Respondent puts it. In the end, Mr. Pincus did not make any submissions on the question of leave to sue. He restricted his argument to costs only. In the premises, this judgment will only briefly deal with the merits of the application.

[4] Most of the background facts are common cause and they can be concisely summarised as follows:

4.1 During the aforementioned acting stint, the Applicant sat with the Respondent in a criminal appeal on 17 November 2006. Judgment therein was reserved. The parties are now *ad idem* that the Applicant was to write the judgment.

4.2 The Applicant's acting stint terminated on 7 December 2006 and he returned to the United States during January 2007.

4.3 In the course of delivering judgment in the said, criminal appeal on 2 March 2007, the Respondent made the following remarks therein:

"After argument in Court judgment was reserved on the clear understanding that Nagan AJ was going to write the judgment, which is in accordance with the practice in this Division. It will be remembered that I gave judgment in the other appeal when we sat with Nagan AJ. Nagan AJ has subsequently left this country for Florida, I think, in the United States. Clearly this Court owes judgment to the parties. Attempts to get hold of Nagan AJ have been unsuccessful. In fact, there were other matters in respect of which he did not write judgments. Other colleagues have had to write judgments for him".

4.4 These remarks received publicity in, *inter alia*, the Cape Times of 19 March 2007 under the caption "Judge leaves for US, judgments unwritten". The Respondent denies that he had supplied the information for this story to the Cape Times.

[5] There is a measure of disagreement between the parties on some of the less salient facts. This divergence has no impact at all in reaching a decision in this application. Where the parties are poles apart, is on the law. With regard to the merits of the prospective damages claim for defamation, I need only make a

very limited finding on the legal issues at this juncture. In the event that I should grant the application, it will be for the trial court to adjudicate fully all the legal issues ventilated by the parties.

[6] What needs to be decided at this stage of the proceedings is simply whether good cause exists to sue the Respondent;

See: **Soller v President of the RSA** 2005 (3) SA 567 (T) at par. [9], 572 B-C. This will depend on the facts and circumstances of each particular case:

Soller, *ibid.*

[7] The procedure normally adopted in these types of applications has been outlined by Ngoepe JP in **N v Lukoto** 2007 (3) SA 569 (T) at par. [4], 572 B-E. The circumstances of this case is of course somewhat unique, inasmuch as the Respondent, who would ordinarily have considered such applications in Chambers (in terms of the procedure outlined by Ngoepe JP in **N v Lukoto**, supra), is the defendant in the prospective damages action.

[8] Our courts have, understandably, been loath to define "good cause".

See, *inter alia*:

Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 G.

In **Stocks & Stocks Properties (Pty) Ltd v City of Cape Town** 2003 (5) SA 140 (C) at 143 G-I, Van Reenen J adopted a similar reluctance, but added that:

> *"The question whether 'good cause'...has been shown to exist is dependent on the exercise by the Court of a judicial discretion on the basis of all the circumstances of a particular case so as to achieve fairness between the parties".*

In **Brown v Chapman** 1938 TPD 320 at 325 a Full Bench held that 'good cause' in the context where an appellant sought to reopen a case where default judgment had been granted against him, amounted to no more than a *prima facie* case to be made out by such appellant.

[9] Judicial officers enjoy a measure of qualified privilege when executing legal functions. Thus a judicial officer enjoys a certain degree of immunity when uttering defamatory remarks in the course of a judgment. This protection is, however, not absolute – so, for example, malicious or irrelevant or unfounded defamatory

remarks may well expose a Judge/Magistrate to liability for defamation;

See: **May v Udwin** 1981 (1) SA 1 (A) at 19 C-F;

Soller v President of the RSA, supra at par. [9] and [10], 572 B-F.

[10] An important consideration in deciding whether to grant permission to sue a Judge would, in my view, be the interests of justice and the constitutional founding values of openness and transparency. Generally speaking, litigants ought to be able to enforce unreservedly their constitutional rights to, for example, dignity, access to courts and of equality before the law. These rights should be enforceable even against judicial officers performing judicial functions, **provided that there is at least an arguable case made out by such litigants against the judicial officer concerned**. To hold otherwise would be to undermine the spirit and ethos of our Constitution. The constitutional rights enunciated above are all potentially at stake here insofar as the Applicant is concerned. Conversely and most certainly no less importantly, Judges too enjoy the protection which the Constitution affords them in section 165 (2), namely to "apply the law impartially, without **fear**, favour or prejudice" (emphasis supplied).

[11] In the present matter the Respondent is sought to be held liable for remarks uttered in the course and scope of his judicial functions. The Applicant avers malice on the part of the Respondent on the grounds that:

(a) the matter raised was not germane to the merits of the criminal appeal on which judgment was delivered; and

(b) there was no reasonable foundation at all for the said remarks.

[12] In his papers Respondent denies that the said remarks are defamatory and, if found to be defamatory, the Respondent further denies that they were made maliciously or that they had not been germane to the judgment. He also issued an apology if the remarks were found to be defamatory.

[13] As I have stated, Mr. Pincus did not address me at all on the merits of the application, electing to leave that for me to decide. He restricted himself to arguing the costs aspect only. His contention is that the Respondent had been compelled to come to Court (notwithstanding his stance not to oppose and to abide) since the Applicant had, in his replying affidavit, asked for a costs order against the Respondent.

[14] Originally, in his Notice of Motion, the Applicant asked for costs, **only in the event of opposition**. As it turned out, the Respondent did in fact file a notice of opposition and filed an answering affidavit as alluded to in par. [3] above. Mr. Albertus has laid much emphasis on this notice of opposition and on the Respondent's comprehensive elaboration on the merits of the prospective damages claim in his answering affidavit. Mr. Albertus has referred to the Respondent's stance as "ambivalent" and has also pointed out that the Respondent has sought (spuriously so, according to Mr. Albertus) to ask for security for costs from the Applicant. These factors, together with the Respondent's response to the initial letters of demand, signify recalcitrance on the part of the Respondent, so Mr. Albertus contends.

[15] I need to say something briefly about the prelude to this application:

15.1 A letter of demand was issued to the Respondent on 31 August 2007. In the letter, an application to court for permission to sue was foreshadowed in the event that the demand for payment (for damages for defamation) was not met.

15.2 No response was forthcoming on this demand and a further letter was issued by the Applicant's attorneys on 3 January 2008, seeking leave from the Respondent to institute action against him. A draft consent for signature by the Respondent was appended to this letter.

15.3 On 6 March 2008 the Respondents' attorneys responded by denying all Applicant's allegations and by threatening to seek security for costs from the Plaintiff since they claimed that he was a peregrinus embarking on vexatious litigation against the Respondent.

15.4 The Applicant's attorneys then gave formal notice of their intention to proceed with this application, by letter dated 24 June 2008.

[16] It is most regrettable that this matter could not have been disposed of in Chambers, as they traditionally are. I say this not in order to remove the matter from public scrutiny, but because there is so little in dispute in the end. Having said that, both Counsel argued vigorously for costs to be awarded to their respective clients and a decision must therefore be made.

[17] It is trite that costs is a discretionary matter which entails acting fairly towards the parties. Of cardinal importance is to determine the reasonableness of the conduct of the parties. Was the Respondent entitled to come to Court to resist a claim for a costs order against him as foreshadowed in the Applicant's replying affidavit? Did the Applicant act reasonably in replying to all the averments regarding the merits of his proposed damages claim as set forth in the Respondent's answering affidavit?

[18] In essence the conundrum really arises from the Respondent's answering affidavit and what Mr. Albertus, correctly in my view, describes as the Respondent's "ambivalent stance". While stating that he does not oppose the application and that he would abide the decision of this Court, the Respondent proceeds to deal extensively with the merits of the proposed action, thereby taking issue with the Applicant on many of the legal aspects. Mr. Albertus submitted that, as it were, the Respondent was attempting to straddle two chairs and that the Applicant could not leave these materially relevant allegations unanswered. Mr. Pincus, on the other hand, has referred to these matters (and to the notice of opposition) as "red herrings". In his submission no adverse consequences would have ensued had Applicant elected

to merely persist in the averments contained in his founding affidavit by way of a letter or short replying affidavit. I am not sure that Mr. Pincus is right on this score. One can well imagine a scenario where the Applicant will be questioned on such a stratagem at the trial. Be that as it may and in any event, what is the reasonable litigant to make of a notice of opposition, followed by an answering affidavit which challenges many of the important legal submissions made by Applicant and which is, according to the Applicant, at variance on the facts, some of which may well be important? I do not view the Applicant's conduct as unreasonable at all. Surely to sit back and do nothing is to run the risk of being exposed to cross-examination later at the trial concerning his inaction.

[19] In **Cape Coast Exploration Ltd v Scholtz & Another** 1933 AD 56, the matter concerned the validity of a cancelled discoverer's certificate under sec 82 of Act 11 of 1899 (Cape). This central issue was really only between the Plaintiff company (the Appellant in the appeal) and the First Defendant (First Respondent on appeal). The Second Defendant/Respondent was the government (through the Minister of Mines), which was merely cited due to the fact that it had restored the cancelled discoverer's

certificate which was in issue. Thus the government had no direct interest in the issue to be decided. The Court (per Wessels CJ) ordered the Second Respondent to pay its own costs in the trial court and on appeal and in this regard it set aside the costs order of the Court *a quo*. The court's *ratio* was that the Second Respondent, despite indicating at first that it had no interest in the subject – matter of the dispute and that it would abide the Court's judgment, had actively taken sides in the dispute. Wessels CJ stated (at 81) that:

> *"The Second Defendant, instead of allowing the Plaintiff and the First Defendant to settle this issue between themselves took upon himself the burden of showing that the Plaintiff's contention was wrong".*

[20] There is considerable merit in the Applicant's contentions that the Respondent, while ostensibly submitting to this Court's judgment, has in effect opposed the application by advancing contrary legal and, to some extent, factual averments on the merits. Nevertheless I am inclined, *ex abundante cautela*, to defer a decision on the costs of this application to the trial court. I do so mindful of the fact that the trial Judge may well be in a better

position, *ex post facto,* to assess and make a finding on the reasonableness or otherwise of the parties' respective conduct in this application.

[21] In summary therefore:

21.1 I am satisfied that the Applicant has made out a *prima facie* case inasmuch as there are sufficient averments which, if established at the trial, would entitle him to the relief sought;

See: **Brown v Chapman**, supra at 325.

It is not necessary for the Applicant to prove his *bona fides*, since the allegation that he is acting vexatiously, made in the Respondent's attorneys' letter of 6 March 2008, was not repeated in the Respondent's answering affidavit. The Applicant therefore merely has to prove good cause at this stage.

21. 2 In the exercise of my discretion, I have decided to have the costs of this application stand over for determination at the trial.

[22] I issue the following order:

22.1 The Applicant is granted leave in terms of sec 25 (1) of the Supreme Court Act, 59 of 1959, to issue summons against the Respondent for damages in the sum of R6 000 000-00 (six million rand) including interest *a tempore morae*, arising out of certain allegedly defamatory remarks made by the Respondent, on or about 2 March 2007.

22.2 Costs of this application will stand over for determination at the trial.

S A MAJIEDT

JUDGE