Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 1452/2010

Before:

The Hon Mr Justice Binns-Ward

In the matter between:

KURT MARITZ	First Applicant
JT MARITZ ELECTRICAL CC t/a	
MARITZ ELECTRICAL	Second Applicant
and	
DEREK NEVILLE PAULSE	Respondent

JUDGMENT DELIVERED ON 26 APRIL 2011

BINNS-WARD J:

[1] The first applicant is the sole member of the second applicant, which is a close corporation that carries on business as an electrical contractor. Approximately eighty per cent of the second applicant's business is transacted with the municipality of the City of Cape Town. The respondent is an electrical contractor, who also

undertakes work for the City. Contract work awarded by the City of Cape Town is subject to the competitive, fair, open and transparent processes mandated in terms of s 217 of the Constitution and those prescribed in terms of the applicable legislation contemplated therein, such as the Local Government: Municipal Finance Management Act 56 of 2003 and the supply chain management policies and regulations made under that Act. The respondent has certain concerns about the propriety of aspects of the participation of the applicants in the City's procurement processes. The articulation of those concerns has given rise to the current proceedings, in which the applicants seek an order finally 'interdicting the respondent from unlawfully spreading false information about the first and second applicant, the state of the of the second applicant's business or nature of work it performs'. The founding affidavit and the argument addressed to the court by the applicant's counsel characterised the alleged wrong at which the prohibitory interdict that is sought is intended to be directed as the defaming of the applicants by the respondent.

[2] In order to obtain a final interdict, the applicants must satisfy the following requirements: 'a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy'; (*Setlogelo v Setlogelo* 1914 AD 221 at 227).

[3] As the applicants seek a final interdict in motion proceedings, the evidence falls to be approached applying the rule stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C; viz. on the facts stated by the respondent together with the facts stated by the first applicant which are admitted by the respondent, or not denied by him in a manner that raises a real, genuine or *bona fide* dispute of fact. The *Plascon-Evans* rule operates in the

manner described irrespective of the incidence of the onus; see *Nqumba en 'n Ander v Staatspresident en Andere; Damons en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A).

[4] Everyone, including a trading corporation, has a right to protect their reputation and nothing therefore requires discussion concerning the establishment by the applicants of the first requirement for a final interdict.

[5] In respect of the second requirement, the applicants rely on certain past events and seek on the basis thereof, and a refusal by the respondent to furnish an undertaking in respect of future conduct sought in a letter addressed to him by the applicant's attorney, to establish an injury actually committed as well as a reasonable apprehension of its future continuance. In the latter respect it bears reiteration that interdictory relief is directed at the prevention of current or future harm and is therefore not an appropriate remedy to address past wrongs; see e.g. *Philip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another* 1991 (2) SA 720 (A) at 735B and *Payen Components SA Ltd v Bovic CC and Others* 1995 (4) SA 441 (A) at 451F – G.

[6] I shall deal in turn with the past events on which the applicants rely.

[7] The first event occurred in March 2010 and revolved around an electrical installation at the Royal Road sports field in Maitland, Cape Town. The respondent had been commissioned by the City of Cape Town to undertake some emergency work at the sports field. After completing the work he discovered that the circuit breaker in the meter box was too large for the wiring it fed and that a smaller circuit breaker had to be fitted before he could safely reconnect the electrical supply. He drew this situation to the attention of the relevant City functionary, who attended a meeting on site to consider the issue. At that meeting, the respondent, who had no

knowledge of the identity of the contractor responsible for the situation he had discovered, stated that he considered that the previous contractor should be responsible for bearing the costs of the required rectifying work. At the meeting with the City official at which he pointed out the problem described above the respondent also pointed out to her that the materials used in the work differed from those which the local authority had indicated should be used in the installation. He knew this because he had attended a site meeting in respect of the tender of the contract in terms of which the installation had been undertaken.

[8] As a consequence of these intimations by the respondent, the City official arranged a meeting at the site about a month later so that he could point out the problem with the installation to the first applicant. It is not apparent from the answering affidavit exactly when it was that the respondent first learned that the first or second applicant had been responsible for the installation. (The installation had been done in terms of a contract awarded to the second applicant and M.I.B. Electrical Services as joint venturers.)

[9] There is a dispute on the papers as to what the respondent is alleged to have reported to the City official in respect of the installation. On the applicants' case, the respondent is alleged to have reported that (i) in executing the contract the second applicant had used sub-standard circuit breakers; (ii) the electrical feed to the various parts of the distribution board was not balanced and (iii) the meter box supplied by the second applicant was not galvanised. The respondent is also alleged by the applicants to have stated, during an argument at the site as to what precisely the content of the respondent's report to the City official had been, that the first applicant and the City official were 'smokkeling'; an expression that the applicants seem to suggest denotes an allegation of collusion.

[10] The first applicant denies that the installation work in question was in any manner non-compliant with the requirements of the relevant contract, but averred that the second applicant 'nonetheless, as a gesture of good faith, repaired the complaint at no cost to its valued complaint'.

[11] The respondent has denied that he defamed the applicants as alleged. He maintains that he had no knowledge, when he made the initial report, who the responsible installation contractor had been. He stated that he had a duty to report the situation that he had found to be evident to the responsible City official. He admitted telling the official that the materials used, in particular the meter box, were not those that had been specified; but he denied having said that they were sub-standard, or that the meter box was not galvanised. He also denied ever having, on this or any other occasion, said that the first applicant and the City's official were 'smokkeling'. He admitted having queried why the first applicant and the City's official had come to the meeting at the site together, the City's official having travelled there as a passenger in the first applicant's motor vehicle.

[12] The elements of the delict of defamation are the wrongful and intentional publication of a defamatory statement concerning the plaintiff or applicant, as the case might be. It is relevant in the context of some of the broadly based allegations in the applicants' founding papers described later in this judgment to emphasise that a claimant seeking a remedy for defamation must allege and prove the terms of the statement on which the claim is founded and may not content him or herself with a description of their general effect. The publication of a defamatory statement gives rise to a presumption that its publication was wrongful and intentional. The publisher of the statement is burdened with the onus of rebutting the presumption. The presumption of wrongfulness is rebutted if it is established that the statements in

issue were published in the discharge of a duty or the exercise of a right; see Joubert (ed) *The Law of South Africa* 2ed vol. 7 sv *Defamation* at para 250.

[13] On the evidence concerning the first event, assessed on *Plascon-Evans* principles, I cannot find that the applicants have proven that the respondent defamed them. If I am incorrect in that conclusion in any respect, and the statements the respondents admits having made were in fact defamatory, I consider that in any event the statements which the respondent admits having made were made in a privileged context in which he had a duty on the basis of the facts alleged by him to make the report and the City official a corresponding duty to receive it. In what appears from the evidence to have been the somewhat confrontational atmosphere of the onsite meeting at the Royal Road sports field, I consider that the respondent was entirely within his rights to have queried the arrival there of the City official in the first applicant's car. I do not consider that the query was defamatory. In the context, it would have been reasonably understood as questioning the official's impartiality, rather than, as alleged by the applicants, suggesting collusion in respect of the award of contract work.

[14] The second event relied upon by the applicants relates to an exchange alleged to have occurred 'about a year' before the application was instituted – therefore some time in mid-2009. The defamatory content of that alleged exchange between the respondent and one van der Ross was the statement by the respondent that the first applicant 'smokkeled' to secure the City's business for the second applicant. As already mentioned, the respondent denies ever having uttered such a statement. The respondent does recall a conversation with van der Ross, during which the amount of work being given by the City to the second applicant was discussed, but describes its content and context in a manner wholly contradictory of

the allegations made by the first applicant and van der Ross. Applying the *Plascons-Evans* rule, the respondent's version falls to be accepted; with the result that the applicants have failed to establish the alleged defamation.

[15] The events at a site meeting at Tafelsig about two months before the institution of the application – that is in about May 2010 – in which the respondent is alleged to have stated to the aforementioned van der Ross that he had asked someone in the City's procurement department to investigate the applicants for fraud are baldly stated in the founding papers and wholly disputed in the answering papers. They therefore do not afford material on which it can be found that the respondent defamed the applicants, as alleged.

[16] It was further alleged that at a site meeting at the Strandfontein Pavilion beach resort, during March 2010, the respondent had requested that 'a number of electrical contractors', including van der Ross, 'furnish him with letters setting out their respective grievances in respect of Second Applicant. According to the first applicant, whose evidence was substantiated by a confirmatory affidavit by van der Ross, the respondent had indicated that upon receipt of said letters, he would send them to his contact within the City of Cape Town. Even were these allegations - which I have quoted virtually *ipsissimis verbis* from para 31 of the first applicant's founding affidavit - admitted by the respondent, they would not, without more, establish the publication of defamatory matter by the respondent.

[17] As it was, however, the respondent did not admit the allegation, nor the further allegation that he had repeated the same request to van der Ross on a second occasion at the Stephen Regan Sports Field in Mitchell's Plain. In respect of the allegations concerning the Strandfontein Pavilion meeting, the respondent averred that he had been approached by a number of contractors after the meeting.

These persons had expressed certain complaints and concerns about the perception they had about the applicants' preferential treatment by officials of the City and about the perceived unfairness of the operation of the City's relevant procurement procedures. The respondent testified that he believed that he had been approached in this manner because he was regarded by these other contractors as a senior colleague who might represent them. The respondent averred that he had told these contractors to stop 'nagging' him if they were not prepared to put their complaints in writing. He told them that if they reduced their complaints to writing he would take them to the City. The respondent admitted that contractors discussed issues of common interest and concern between themselves, and that in that regard issues concerning the tendering for and award of work by the City were talked about. He suggested that this happened as a matter of course. He stated, however, (at para 73 of his answering affidavit) that '(t)he impression that the Applicants attempt to create that I'm "behind" all these feelings and suspicions about them is wrong. I have never actively solicited other contractors to provide me with their written complaints. I have never actively petitioned to convince other contractors, or to convey to other contractors, that the Applicants were dishonourable or incompetent in any respect'. In the circumstances, the commission by the respondent of any actionable wrong against the applicants at the Strand Pavilion or the Stephen Regan Sports Field events has not been established.

[18] Finally, it remains to consider the effect of the exchange of correspondence between the applicants' attorney and the respondent mentioned earlier.[1] The attorney's letter alleged that during the period February 2010 to April 2010 the respondent had made the following defamatory statements about the second

[1] In para [5].

applicant: (i) that the quality of work performed by it was sub-standard or poor; (ii) that it uses inferior products in executing its contracts and (iii) that it colludes with officials employed by the City of Cape Town to secure work. The context in which the aforementioned statements were uttered was not identified in the letter. It was stated, however, that they had been made 'to officials employed by the City of Cape Town, other electrical contractors and staff employed by [the second applicant]'.

[19] The only statements allegedly made to officials of the City of the Cape Town that have been identified in the applicants' evidence with any degree of particularity are those related to the Royal Road sports field matter described earlier. The only statements made to other electrical contractors identified with any degree of particularity are those mentioned earlier with reference to the Stephen Regan Sports Field and Strandfontein Pavilion matters. There is no particularity whatsoever in the evidence concerning defamatory statements allegedly made by the respondent to the second applicant's staff – unless by the word 'staff', the attorney meant to refer to the second applicant's sole member. It was evident from the respondent's reply to the applicants' attorney's letter that he considered that the allegations made against him related to the Royal Road sports field matter. That much follows from the manner in which the respondent dealt in his reply with the three allegations listed in the immediately preceding paragraph of this judgment. He answered in respect of the aforementioned allegations (i) to (iii) as follows:

> Your item 3.1 Re: sub-standard work by Kurt [i.e. the first applicant] Royal Road Sports field Maitland
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> My response He has subsequently repaired the potential (sic) hazardous electrical installation that I had pointed out to the City representative, and he informed me thereof. Yes I had written to the representative informing her of my findings.
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> Your item 3.2 Re: inferior products used
>
> My response When the representative myself and Kurt met on site so that I could point out the work that subsequently his company had done I pointed out to him and the

representative of the City that the materials used was (*sic*) not the materials that had been specified at the site meeting, her response to me was that the City never specifies types of materials to be used, if I am stupid to use a better product and Kurt choices (*sic*) a cheaper product that's his choice – [if you can believe this]

Your item 3.3 Re: Colludes with officials

My response At this meeting I questioned Kurt and the representative as to why he arrived at the site with the representative as his passenger in his vehicle, does this not seem odd.

[20] I have treated with the facts of the Royal Road sports field matter above.[2] The subsequent correspondence about it between the applicants' attorney and the respondent gives no reason to add to, or qualify my findings in that connection.

[21] As for the remainder of the respondent's reply to the applicant's attorney's letter, it went as follows:

> Please be informed that I, Derek Neville Paulse and various contractors has (*sic*) proceeded in exposing what we feel is unfair practise (*sic*) conducted by [the first applicant] over the past years allowing him to have an unfair advantage over the other contractors in securing work.
>
> A brief summary
>
> The first time that I met with [the first applicant] was at a site meeting in Melck Street Ndaben (*sic*) Electrical depot and later other site meetings were (sic) he was the one conducting the site meeting, at this stage I thought he was the representative of City (*sic*) while the representative of City (*sic*) stood one side (*sic*). The next meeting at Heideveld Sports field it was asked who wrote the specification and the response by the representative was that [the first applicant] wrote the said specification, we informed the representative that this practise (*sic*) was illegal whereby his response was that he was not an electrician so [the first applicant] was being used. I then received a call from [the first applicant] to meet with him at his offices which I did and he informed me that because I was aware of him writing specifications I should capitalise on this to help me secure work, When I refused he then offered me one of his contracts which I also refused.
>
> I have a lot more information which I can prove, so please feel free to summons me as I have only the interest of getting to the bottom of this matters (*sic*) and creating a free and transparent tender process for all.

[22] In his answering affidavit the respondent confirms his concerns about the propriety of the second applicant tendering in respect of contract work for which the

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[2] At para [7] -[13].

first applicant had written the work specifications. Thus, at para 81 of his answering affidavit, the respondent averred 'I state specifically that any unfair advantage that the Applicants seem to enjoy, from the perspective of many other electrical contractors in the industry, in the context of this matter, relates to unfair advantages in that the Applicants are, for example, allowed to write the specifications and quote on the same projects.'

[23] The respondent expanded on the issue of the first applicant writing the specifications of contract work for which the second applicant tendered as follows at para 97 -104 of his answering affidavit:

> 97. There is also evidence, apparent from these Supporting Affidavits [i.e. supporting answering affidavits made by certain other electrical contractors], indicating that there is a fair and reasonable impression in the industry that the First Applicant wrote the specifications on projects and the quoted on the same projects.
>
> 98. At a site meeting at the Royal Road Sports Field, about three years ago, I noticed a mistake in the tender document. The scope stated that the new supply cable should run from the meter box to the pavement sidewalk, and should then be left there for the Supply Authority to join it up with their new supply cable. In my experience this was not the method employed by the Supply Authority for bringing supply to premises.
>
> 99. I notified the project manager of this, and he looked at the First Applicant for assistance. The First Applicant informed all of us there at that meeting that he obtained the information from the Main's Department in Wynberg and that he would call on them to verify the information.
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> 100. I then indicated to the First Applicant that he should not quote on the project since he had written the specifications. The First Applicant told me that I should "capitalise on my knowledge".
>
> 101. At a meeting held at the Heideveld Sports Field I noticed a similar pattern in the written specifications than in the specifications on the other site meetings that I have attended.
>
> 102. I asked the project manger who the person was that wrote the specifications and he pointed to the First Applicant. I indicated to the project manager that it is not ethical or legal for the First Applicant to quote for projects if he also wrote the specifications for it, since this gave him an unfair advantage over the other participants in the tendering process.

103. The project manager became hostile and indicated to me that there was nothing wrong with the First Applicant writing the specifications, and that he would use any contractor to write the technical specifications for him because he was not a skilled electrician. He stated further that hi department did not have any skilled electricians that could draft a specifications document.

104. Many contractors present at this meeting heard this exchange. These contractors approached me after this meeting and were concerned and felt we should report this matter to the City. I indicated that they should let me know what they decide to do, and give me a call if they want to meet to discuss this issue. Some of these contractors have deposed to supporting affidavits attached to this Answering Affidavit.

[24] The first applicant denies that he wrote the specifications for any contract on which the second applicant submitted tenders. On the application of the *Plascon-Evans* rule, however, the facts alleged by the respondent fall to be accepted for present purposes. The examples given in the passage of the respondent's evidence quoted above were put in evidence by the respondent in the context of explaining his admission that he has been party to discussions with other contractors, including the aforementioned van der Ross, in which it has been alleged that the applicants have enjoyed an unfair advantage in obtaining work from the City. It is clear from what the respondent has said in this respect that he admits in this connection having made statements to the effect that the applicants' practice of tendering for work in respect of which the first applicant has written the specifications of the work put out to tender is unethical.

[25] Now it will be apparent from the description of the three events described above that were specifically relied upon by the applicants in their founding papers that the averments in para 97-104 of the answering affidavit quoted above do not relate directly to any of them. It needs explaining that they were made rather in response to an expatiation in the first applicant's founding affidavit of the allegation by the applicants' attorney in the letter mentioned earlier that the respondent had

made statements that the second applicant colluded with officials employed by the City of Cape Town to obtain work. I do not consider that the letter sufficiently identified the statements relied upon for the purposes of making out a claim premised on defamation. But insofar as the respondent's answer makes it clear that he has been party to statements suggesting that the applicants have been involved in unethical practice in respect of tendering for contracts with the City, it seems to me that the admitted statements would be covered by the defence of 'fair comment', or 'protected comment' as Cameron J recently remarked it might more appropriately be labelled; see *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11 (8 April 2011) at para 84. One of the reasons for preferring the term 'protected comment' is that, with reference to the protection that comment on matters of public interest enjoys under the guarantee of freedom of expression in s 16 of the Constitution, it illuminates, in the modern context, the constitutional source and extent of the protection.[3]

[26] The defence of fair comment or protected comment is available to a person who publishes a defamatory statement so long as the statement expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true.[4] If it is true - as in the circumstances I must accept for present purposes that it is – that the first applicant writes the specifications for City of Cape Town contracts in respect of which the second applicant submits tenders, then I consider that the respondent is entitled to express the opinion that this gives rise to unethical conduct. Whatever one thinks of the matter, the fact that the person who responsible for

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[3] *The Citizen 1978 (Pty) Ltd and Others v McBride* loc cit.

4 See e.g. *Crawford v Albu* 1917 AD 102; *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A); *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at para 13; *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 26 and *The Citizen 1978 (Pty) Ltd and Others v McBride* supra, at para 80.

specifying the requirements of a contract with an organ of state should also be qualified to tender for it is, in my view, undoubtedly a matter of public interest.

[27] In the result the applicants have not made out a case for final interdictory relief. Because of the effect of the *Plascon-Evans* rule they might have been better advised in the circumstances to have applied for an interim interdict pending the determination of an action to be instituted for a final interdict. It would only have been in the context of an application for interim interdictory relief that the factors in the judgment of Howes J in *Cleghorn & Harris Ltd v National Union of Distributive Workers* 1940 CPD 409 at 418-419, on which the applicant's counsel placed strong reliance, would arise for consideration. The applicant's counsel did not ask for interim relief as alternative relief in the circumstances. Having regard to the thinness of the applicants' case, apparent from the discussion above, I would in any event not have been inclined to grant it.

[28] The application is dismissed with costs.

A G. BINNS-WARD
Judge of the High Court