THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **15490/2020**

Before the Hon. Ms Justice Slingers

Hearing: **9 and 10 March 2021**
Judgment Delivered: **20 April 2021**

In the matter between:

MALIZOLE DANIEL MDLEKEZA Applicant

and

MEGAN GALLIE Respondent

JUDGMENT

SLINGERS J

[1] On 23 June 2020 the University of Cape Town **("UCT")** published an article on the applicant which was intended to promote his profile and views in respect of student development and to boost his consulting business. Secondly, the article was intended to help raise awareness and funds to establish a bursary fund for

black actuarial science students. On 24 June 2020 UCT posted the following tweet through its Twitter account:

'UCT's first black South African actuarial science lecturer, Malizole Mdlekeza, said formal and informal mentorship programmes play a crucial role in students' development.'

[2] Following this, the respondent published the following tweets about the applicant on her twitter account on 24 June 2020:

(i) *'Tsi, I got sexually assaulted by this guy in 2012. He locked me in his house in Plattekloof and tried to force himself on me. Thankfully I fought my out and ran to the neighbours and got them to call my mom and the police got fetch me. He refused to open when they arrived. Sies.'* (sic)

(ii) *'Lol, he offered me a lift home because we were going in the same direction and I had met him through mutual friends. He drove past my stop and straight to his house. Soze ndimlibale.'*

(iii) *'We2. Come what may from this. I really couldn't care less. I really have been quiet about this for way too long.'*

[3] The respondent tagged UCT and in her tweet.

[4] On 4 August 2020 the applicant caused correspondence to be sent to the respondent requesting a retraction of and an apology for the offending tweets. On 20 October 2020 a further letter was sent to the respondent requesting that she remove the tweets and apologise by close of business on 22 October 2020. Neither letter received a response from the respondent. On or about 23 October

2020 the applicant instituted application proceedings against the respondent wherein he sought an order:

(i) directing the respondent to delete the above statements from her twitter account within 24 hours;

(ii) directing the respondent to, within 24 hours publish and pin an apology pertaining to the applicant on her twitter account keeping it active at all times, allowing comments and retweets for at least 30 continuous days;

(iii) finding the respondent liable to pay the applicant's damages of R200 000.00, which the applicant, in turn, would pay to a charity of his choosing; alternatively for the question of liability and/or quantum to be referred to oral evidence; and

(iv) directing the respondent to pay the applicant's costs on an attorney client scale, including the cost of counsel.

[5] The respondent instituted a counterclaim against the applicant wherein she claimed an amount of R250 000.00 for pain and suffering in the form of severe shock, grief and suffering.

THE COUNTERCLAIM

[6] Although the respondent's tweets recorded her alleged sexual assault as having occurred in 2012, she conceded that it occurred in 2014. Her counterclaim was instituted on 23 November 2020, as part of her defence in response to the applicant's claim against her.

[7] Given that a period of six years had transpired between the alleged incident and the institution of the counterclaim, the applicant challenged that the respondent's claim had prescribed.

[8] Section 11 of the Prescription Act 68 of 1969 provides as follows:

> ***'Periods of prescription of debts***
> *The periods of prescription of debts shall be the following:*
> *(a)* *thirty years in respect of-*
> *(i)any debt secured by mortgage bond;*
> *(ii)any judgment debt;*
> *(iii)any debt in respect of any taxation imposed or levied by or under any law;*
> *(iv)any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;*
> *(b)fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);*
> (c)six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph *(a)* or *(b)*;
> (d)save where an Act of Parliament provides otherwise, three years in respect of any other debt.

[9] In *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), the Supreme Court of Appeal held that in respect of claims based on delict, prescription begins to run from when the creditor has knowledge, or is deemed to have knowledge, of the entire set of facts which he/she has to prove in order to succeed with his claim against the debtor. Based on the respondent's answering affidavit,[1] the

[1] Paragraph 8 of the answering affidavit, pg 100 of the record

respondent had knowledge of the entire set of facts required to prove her claim against the applicant in 2014. Therefore, prescription would have commenced running in 2014, with the claim expiring in 2017.

[10] The Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020 **("Act 15 of 2020")** that came into operation on 23 December 2020 amended section 12(4) of the Prescription Act to read as follows:

'Prescription shall not commence to run in respect of a debt that is based on the alleged commission of (a)any sexual offence in terms of the common law or a statute; and (b)offences as provided for in sections 4, 5, 6, 7 and 8(1) and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or intellectual disability, disorder or incapacity, or because of any other factor that the court may deem appropriate.'

[11] The rule of law dictates that the amendment effected by Act 15 of 2020 would only be applicable to future matters and would not apply retrospectively.[2] Therefore, as the respondent's counterclaim was instituted before the commencement of Act 15 of 2020, the amended section 12(4) of the Prescription Act would not be applicable thereto.

[12] However, even if the amended section 12(4) of the Prescription Act was applicable to the respondent's counterclaim, it would not have prevented the prescription thereof as the papers filed on record offer no explanation nor any reasons why the respondent's claim was instituted six years after the alleged incident giving rise thereto. The court is, therefore, left without any explanation

[2] *Kaknis v Absa Bank Ltd and Another* 2017 (4) SA 17 (SCA) at para 37

why the counterclaim was not pursued sooner and is left with the distinct impression that had the applicant not instituted his claim against the respondent, she would not have proceeded with her claim against him.

[13] Consequently, the applicant's challenge that the respondent's counter-claim had prescribed was upheld and the counterclaim was dismissed with costs on 9 March 2021.

THE DEFAMATION CLAIM

[14] On 25 November 2020 Hockey AJ granted an order directing the respondent to delete the impugned statements within 24 hours. However, the deletion was not to be construed as an admission of liability by the respondent. The remainder of the relief claimed was postponed to the semi-urgent roll on 1 February 2021. On 1 February 2021 the matter was postponed to 9 February 2021. On 9 February 2021, the matter was postponed to 9 March 2021 with the following issues being referred to oral evidence:

(i) in respect of the applicant, the question of the truth of the statements published about him by the respondent on Twitter on 24 June 2020;

(ii) in the event that the applicant's points *in limine* are not upheld and the respondent's counterclaim against the applicant is not dismissed, the effect of the applicant's conduct on the night in question on the respondent's emotional and psychological well-being; and

(iii) the quantum of the damages claimed. In respect of the respondent, this is conditional on the applicant's points *in limine* not being upheld and the court finding that she had a valid counterclaim against the applicant.

[15] The applicant provided oral evidence in respect of the truth of the statements published about him and the quantum claimed. Initially the respondent indicated that in addition to herself, she would be calling a further two witnesses to give evidence in respect to the truth of the statements published. However, it transpired that only the respondent testified in this regard.

THE LAW

[16] Before a statement or image can be considered defamatory, it must have caused probable impairment to the claimant's reputation.[3] In determining whether or not a publication is defamatory, and therefore *prima facie* wrongful, the court is required to undertake a two stage inquiry.[4] Firstly, the court has to determine the meaning of the publication. In so doing, an objective test is applied and the question is posed what would a reasonable person of ordinary intelligence understand by the publication, this would include what a reasonable person may imply from the publication. Secondly, the court has to determine whether or not the meaning is defamatory. In this regard consideration is given to the manner and circumstances of the publication in determining whether or not the publication was calculated to convey a libelas imputation[5].

[3] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC)
[4] *Ibid* at [48]
[5] *Ibid* [39-42]

[17] The message conveyed by the plain wording of the tweets is that the applicant was guilty of sexual assault. Secondly, it implies that he is sexual predator in that his attack on the respondent was premeditated. The appellant had offered the respondent a lift which he used to get her to his house where he deprived her of her freedom by preventing her from leaving the premises by locking the door in order to perpetrate a sexual assault on her.

[18] The respondent elected to publish the statements in the medium of social media and described the incident in such terms as to convey an exaggerated version of events.

[19] To be accused of sexual assault and to be identified as a sexual predator in such manner and circumstances can only be defamatory, especially since at the time of publishing this tweet the respondent had not pursued any criminal charges or any other steps against the applicant for a period of six years. The manner and circumstances in which the respondent elected to publish her tweets served to accuse and convict the applicant in the realm of social media without affording him an opportunity of defending himself or of challenging the allegations against him.

[20] It is trite that there 5 elements to defamation. These are the (i)wrongful (ii)intentional (iii)publication (iv)of a defamatory statement (v)concerning the applicant.[6]

[21] The applicant need only establish, at the outset, the publication of a defamatory matter concerning him. Once this is established, it is presumed that the

[6] *Ibid* [84]

statement was both wrongful and intentional. A respondent will then have to set up a defence excluding either wrongfulness or intent to escape liability.[7]

[22] The respondent testified that she thought about the content of the tweet and drafted it in such a manner that it could be accommodated within the limited characters offered by tweeting. Thereafter, she shared the draft with her friends in whose company she was and asked their advice in respect of whether or not she should post the tweet. This included a friend who was a lawyer, who informed her that there could be consequences following the publication of the tweet. After considering the matter, the respondent proceeded to post the tweets. Therefore, it is clear that the publication of the tweet was intentional.

[23] I turn now to examine whether or not the tweet was wrongful. In doing so I will examine the evidence given by the respondent.

[24] The respondent testified that she knew the applicant through mutual acquaintances and that she had met him once before encountering him at the bar *'Neighbourhood'* on the night in question. She was with her friends and he was with his. Her taxi was scheduled to leave at 21h30 and as she still had to walk to the taxi rank she intended to leave at 21h15. When she walked over to her friends to greet, her friend known as Siya suggested that the applicant lift her home as he would be going in the same direction. The applicant agreed to this proposal and as they were all leaving the bar, he suggested to her that they have one more drink at the bar. The respondent agreed to this proposal and the two of them proceeded to have 1, 2, 3 shots of tequila. On the way home the applicant missed the first turnoff to her home. When this was pointed out to him, he indicated that he would take the next one. However, he missed that turnoff as

[7] *Ibid* [85]

well. The applicant became insistent that the respondent have another drink at his house, whereafter he would take her home, notwithstanding her insistence that she wanted to be taken home. When they arrived at the applicant's residence he opened her car door and tugged her out and proceeded inside. He closed and locked the door behind him, however the locking of the door appeared to be part of the action of closing the door and not that he locked the door to prevent her from leaving. The applicant proceeded to the kitchen, grabbed a bottle of Jameson and proceeded to drink from the bottle. He then approached her and tried to forcefully kiss her and pull her closer to him. She managed to shrug him off her and managed to get to the door which she unlocked and then proceeded to run to the neighbour to ask him to call the police and her mother. The police arrived approximately ten to fifteen minutes later and retrieved her bag from the applicant through the window as he refused to open the door for them.

[25] Approximately a week after the incident she again encountered the applicant in a social setting. Although he approached her, she completely shut him down. Thereafter, on a second occasion she again encountered the applicant who waved to her. She refused to wave back to him.

[26] The version presented by the respondent in her tweets differs from her oral evidence and does not accurately reflect what transpired. The applicant readily conceded that the year reflected in her tweets incorrectly recorded the year as 2012 when it should have been 2014. Furthermore, it was not the applicant who offered to lift the respondent home, on the contrary the initiative for him to lift the respondent came from the respondent's friend and herself. The respondent elected to describe the incident in such terms to exaggerate and embellish the

events. A reasonable person of ordinary intelligence would understand the respondent's tweet to imply that the applicant had attempted to rape her and not that he had tried to kiss her from the contents thereof which include the allegations that she was sexually assaulted, that she had to fight her way out and that he had locked her in his house. Similarly, a reasonable person of ordinary intelligence would not understand that the respondent's tweet to state that she managed to shrug the applicant off. The wording and context of the tweet implies that there was a physical struggle put up by the respondent.

[27] Based on the respondent's oral evidence, it cannot be said that the contents of her tweets are truthful.

[28] The respondent justified her publication of the tweets on the basis that she did so because she wanted to achieve social justice, she wanted to make people aware that she was sexually assaulted and what the applicant was capable of and that she wanted an apology.

[29] The respondent was not clear how tweeting six years after the incident would achieve social justice, especially within the context that she had not taken any steps within this period to hold the applicant accountable for his actions. When questioned why the respondent elected to publish on a general social platform rather than to contact UCT directly with her complaint and concerns about the applicant in light of her evidence that she wanted to achieve social justice and to make people aware of what he was capable of- she was unable to provide an answer. The respondent could not rebut the applicant's evidence that he approached her after the incident to apologise (albeit for events that he recalled differently) but that she had ignored him. On the contrary, the respondent conceded that when the applicant approached her after the incident, she

completely ignored him. The respondent did not explain why she did not demand or engage the applicant in respect of an apology shortly after the incident when he approached her but that six years after the incident she was intent on obtaining an apology.

[30] When deciding whether or not the publication was lawful or not, the court has to balance the constitutionally protected right of dignity, including the right to reputation with the right of freedom of speech.[8] In this balancing act, it is well-established that the onus falls on the party who invites the court to perform this balancing act to establish his/her defence which in this case would be the respondent. It is evident from the papers filed on record and the respondent's oral evidence that she deemed the applicant to be a person lacking good character and as such she determined that he was not entitled to have his reputation and character protected. In her answering affidavit the respondent states the following:

'In deciding whether my tweets truly caused harm to the Applicant, the Court ought first to consider whether the Applicant has a character of an upstanding and honest man that is worthy of protection and at risk of being defamed bearing in mind the criminal sexual assault charges against him under number CAS 53/8/2020 at Maitland Police Station.'

[31] It bears mentioning that the criminal charge against the applicant was laid during August 2020, after the respondent's tweet was published, as is evident from the CAS number.

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[8] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at [123]

[32] After evaluating the papers and the oral evidence, I am of the view that the respondent failed to discharge her onus of establishing a defence rendering the publication lawful. In the circumstances, I am of the opinion that the tweets were wrongful, intentional and of a defamatory nature.

DAMAGES

[33] In determining the quantum of damages to be awarded to the applicant, I am seized with an inherently difficult task which requires me to make a value judgment. In this determination, the court is cognisant of the seriousness of the defamation, the nature and extent of the publication and the reputation, character and conduct of the applicant and the motives and conduct of the respondent.[9]

[34] As stated above, the respondent published that the applicant was guilty of sexual assault and implied that he was a sexual predator. At a time of increased awareness of gender based violence and when the general public is increasingly vigilant against it (rightfully so), the mere accusation of being guilty of sexual assault and of being a sexual predator can ruin a person. In the circumstances, it cannot be denied that the defamation was materially serious.

[35] The respondent elected to publish the defamatory tweets on the platform of social media. As a result hereof, the harm caused by the defamatory tweets are ongoing as they remain on the respondent's twitter feed and are continuously and repeatedly being published, read and commented on.

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[9] *Tsichlas v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W) at [120-121]; *Mogale and Others v Seima* (575/2004) [2005] ZASCA101; 2008 (5) SA 637 (SCA) (14 November 2005)

[36] As a direct result of the respondent's tweets, UCT removed its original posting promoting the applicant to the public. The applicant was also called in by UCT to discuss the matter. On 25 June 2020 UCT's communication and marketing department reported that the allegations had been reported to the Office for Inclusivity and Change and that UCT had made contact with the respondent to work with her and other relevant authorities. In fact, it was as a result hereof that the respondent laid a criminal charge against the applicant. It was not done on her own initiative. The applicant was informed that some members of the faculty found the allegations pertaining to him *'deeply troubling'* and an email was sent to all actuarial students offering them a range of counselling services as some students may find the allegations deeply distressing. Students also expressed the view that in light of the allegations against the applicant, they do not wish to be lectured by him nor do they want to take his class. The defamatory tweets also negatively impacted on the applicant's consulting business causing interest therein by business and media to cease. The story was also picked up by mainstream media and published in articles during June 2020, the nature and extent of the publication and the reputation, character and conduct of the applicant and the motives and conduct of the respondent.

[37] I have dealt with the respondent's reasons for publishing the tweet above. Furthermore, the blasé approach of the respondent to the consequences of her tweets which was evident from her oral evidence and her tweets itself cannot be ignored. It is clear from the respondent's evidence that she was advised by her friends that there would be consequences to her posting the tweet, she nevertheless proceeded to post same.

[38] After taking into account the seriousness of the defamation, the nature and extent of the publication and the reputation, character and conduct of the applicant and the motives and conduct of the respondent, I am of the view that a fair determination of damages would be an amount of R65 000.00.

COSTS

[39] This matter was originally set down for hearing on 25 November 2020. On that day the respondent's legal representative, Mr Sebogodi appeared with an instruction to only apply for a postponement and was not properly briefed in respect of the merit of the matter. Although the respondent sought a postponement, she did not tender the wasted costs occasioned thereby and the matter was postponed to 1 February 2021.

[40] On 28 January 2021 the respondent's legal representatives caused correspondence to be sent to the applicant's legal representatives wherein he advised that he had tested positive for Covid-19 on 7 January 2021 and that he had a sick certificate putting him off duty until 27 January 2021. As a result hereof, he was unable to prepare for the hearing nor was he able to file the respondent's heads of argument and was seeking a postponement of the matter. On the same day, the applicant's legal representative advised that he would not agree to a postponement and that a formal application for same would be required.

[41] On 1 February 2021 Mr Sebogadi again appeared for the respondent. He advised the court that he was merely a correspondent in the matter on behalf of Mr. K Kedijang and that he was again briefed to seek a postponement.

Notwithstanding the applicant's legal representatives' communication that he would not agree to a postponement and that a formal application for a postponement would be required, no such application was forthcoming. The matter was postponed to 9 February 2021 and the parties were directed to be ready to argue the issue of costs and to prepare a note thereon.

[42] In the note filed on behalf of the respondent the following is stated:

'The Respondent's legal representation is assisted by wise for Africa.org and an order of costs against her will prejudice, her and the interests of justice. The order of the costs being stayed will not prejudice either party and the Respondent is a student and cannot afford the legal fee.'

[43] When the matter was heard Mr Sebogodi was briefed to represent the respondent. The note filed on behalf of the respondent failed to disclose why no formal application for a postponement was brought nor any reasons why Mr Sebogodi could be briefed at an earlier stage to argue the matter. Furthermore, the submission, that the respondent was a student and could not afford the legal fees, was made without any factual basis and was contradicted by the respondent when she testified.

[44] It is trite that postponements are not merely for the taking[10]. They have to be properly motivated and substantiated. The respondent failed to grasp this.

[45] In the circumstances there is no reason why the respondent should not be liable for the wasted costs occasioned on 25 November 2020 when the matter was postponed to 1 February 2021. Furthermore, given the respondent's legal representative's approach evident in his deliberate failure to bring a formal

[10] *National Police Service Union v Minister of Safety and Security* [2000] ZACC15; 2000 (4) SA 1110 (CC)

application seeking a postponement when he knew as early as 7 January 2021 that he was unable to prepare for the hearing on 1 February 2021 and was also advised to do so, I deem that the wasted costs occasioned by the postponement on 1 February 2021 be costs *de bonis propriis* against Mr. K Kedijang.

[46] In the circumstances, I find that the respondent defamed the applicant and make the following orders:

(i) the respondent is directed to publish and pin the following apology on her twitter account keeping it active at all times (i.e. not deactivate the account or make it private), allowing comments and retweets, for at least 30 continuous days:

'On 24 June 2020, in response to an official @UCT_News article, I posted tweets about Mr. Mdlekeza. The contents of those tweets were not true.

My tweets were reported on by the mainstream media and they were widely read and retweeted.

I published these tweets with the knowledge that they would cause harm and it was wrong of me to do so.

I acknowledge that my tweets caused Mr. Mdlekeza harm, in both his professional and private life. Mr tweets have negatively affected his ability to teach and mentor at UCT and have negatively impacted on his professional standing as an actuary and as a leader in his professional field.

I apologize to Mr Mdlekeza for my actions and the harm I have caused him.'

(ii) the respondent is to pay the applicant an amount of R65 000.00 within 60 days after this order, which amount the applicant shall pay to a charity of his choosing;

(iii) save for the costs occasioned by the postponement of 1 February 2021, the respondent shall bear the costs of this application, which costs shall include the costs of postponements and the costs of counsel;

(iv) the costs occasioned by the postponent of 1 February 2021 shall be costs *de bonis propriis* against Mr. K Kedijang.

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H Slingers, J

20 April 2021